KC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Maria Ramos and Nicolas Olivares on behalf of themselves and others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 02 C 8266 Judge Mark Filip
Thomas Ridge, et al.,	)	
Defendants.	)	

PARTIES' AGREED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

The parties, through their respective attorneys, respectfully request this Court to preliminarily approve their Settlement Agreement, Exhibit 1, and to set a date for a fairness hearing whereby members of both Plaintiff Classes represented in this lawsuit will have the opportunity to raise any objections to the parties' Agreement. In support thereof, the parties submit the following:

I. Summary of the Litigation

The *Ramos* and *Olivares* Plaintiffs filed the instant class action on November 14, 2002, after their original action had been dismissed on February 2002, and amended this complaint on February 14, 2003, and January 26, 2004. On March 3, 2004, the case was reassigned by executive committee to the Honorable Judge Mark Filip.

Plaintiffs challenge the manner in which the Chicago District Office of the Immigration and Nationality Service (hereinafter "Chicago District Office") handled thousands of applications for adjustment of status for a four year period stretching from 1997 to 2001. Plaintiffs have alleged throughout this litigation that the Chicago District Office violated the Immigration and Nationality Act ("INA"), the applicable regulations, national policy, and the Constitution by processing applications that should have been rejected and returned, by granting work authorization documents that should not have been granted, by keeping fees that should have been refunded, and by starting investigations of a great number of the applicants,

many of whom were victims of notary fraud, which eventually led to placing those applicants in deportation proceedings.

Defendants have maintained they did not violate the INA, the implementing regulations, national policy, or the Constitutions through their actions, and deny they have any obligation to Ramos, Olivares, or any of the Class Members they represent. During the pendency of this suit, Defendants have filed at least two motions to dismiss the present action. They filed their first Motion to Dismiss for lack of jurisdiction and for failure to state a claim on January 24, 2003. On January 28, 2003, the Honorable David H. Coar ordered the parties to brief only the issues regarding the jurisdiction of the Court over the case. On September 29, 2003 Judge Coar denied Defendants' motion. Defendants then filed their motion to dismiss for failure to state a claim on November 19, 2003. Judge Coar issued an order on January 15, 2004 granting Defendants' motion with respect to Plaintiffs' Procedural and Substantive Due Process and Equal Protection claims, and denying the motion with respect to Plaintiffs' Administrative Procedures Act claim.

II. Terms of the Settlement Agreement

From May 11, 2004 through the present, the parties have engaged in intensive negotiations supervised by this Court. The process has included formal and informal communications between Plaintiffs' and Defendants' counsel, and the exchange of numerous drafts of the settlement agreement, and culminated in the proposed Settlement Agreement that is the subject of this motion.

The *Ramos* and *Olivares* Plaintiffs seek to enter into the instant Settlement Agreement with Defendants Thomas Ridge, Secretary of Department of Homeland Security, the U.S. Department of Homeland Security, the U.S. Citizenship and Immigration Services, the U.S. Immigration and Customs Enforcement, Eduardo Aguirre, Jr., Director of the U.S. Citizenship and Immigration and Customs Enforcement; Donald Monica, Director of the Chicago District Office of the U.S. Citizenship and Immigration Services; Michael Garcia, Assistant Secretary for U.S. Immigration and Customs Enforcement, and Deborah Achim, Acting Director of the Chicago Field Office, U.S. Immigration and Customs Enforcement. The basic terms of this Settlement Agreements are as follows:

1. The Plaintiffs, on behalf of themselves and the classes they represent, must dismiss their class action without prejudice. Plaintiffs also agree that Defendants will exercise prosecutorial discretion in the processes they will implement to review Plaintiffs' individual cases, and that any decisions made pursuant to those processes will be final and nonreviewable actions, and may not be raised in separate legal proceedings;

2. The parties stipulate to certification of the *Ramos* and Olivares Classes;

3. CIS will review the files of all Class members who have not received any notification of a deportation hearing against them (i.e. they have not received a Notice to Appear letter). This case review will be conducted using standards set forth in a memorandum by Doris Meissner, former Commissioner of the INS;

4. If the CIS decides to begin deportation proceedings against any of the Class members in the category described above, the CIS will notify those Class members of this decision and will give them thirty days to request CIS to reconsider their decision to begin deportation proceedings and to submit information and documentation in support of their request;

5. DHS agrees to conduct a review of their files using the same Meissner memorandum mentioned above for all Class members currently going through deportation hearings before the Immigration Courts or the Board of Immigration Appeals (BIA). However, any individual ordered removed before June 1, 2004 by the Immigration Judge or the Board of Immigration Appeals is not eligible to apply for this benefit. In order for Class members in this category to take advantage of this process, they must (a) notify the Chicago Chief Counsel for the U. S. Immigration and Customs Enforcement (ICE) that they are members of any of the two classes in this suit within six months from the date the Settlement is approved, and (b) request to have their case reviewed;

6. All Class members who have been deported from the United States and are eligible for a waiver of inadmissibility may also ask that the government consider their membership in this class when applying for that waiver;

7. All Class members, whether they are still in the United States or not, shall receive a credit for the fees they paid to the Chicago District Office for the filing of their application for permanent residency if they apply for a credit within one year from the date the Settlement is approved with the Chicago District Office of the U. S. Citizenship and Immigration Services (CIS). The credit should equal the amount paid at the time to file the application for permanent residence (Form I-485), and, if applicable, the amount paid as a penalty fee under section 245(i)(1) of the Immigration and Nationality Act ($1000 in most cases). The credit can be used only once and CIS will retain any remaining balance when the credit is used by the class member. If the amount of fees is owed by the class member is greater than the amount of the credit, the class member is responsible for the difference. The credit is non-transferable, is valid for ten years after being issued, and can be applied by the Class members to any application or petition fees charged by the CIS;

8. If Class members re-file their applications for permanent residency under Section 245(i) once their visa number becomes available, Defendants will not deny the application for the reason that the Class members had filed the same application before during the period between January 29, 1997 through April 30, 2001;

9. Class members who have been convicted of an aggravated felony, who are subject to administratively final orders of removal or deportation, or who are subject to the reinstatement of removal orders, are not eligible for relief pursuant to this Agreement;

10. Payment of $90,000 in fees and cost to the attorneys for the Plaintiffs; and

11. The Court will retain jurisdiction over this lawsuit for the purpose of enforcing compliance with the settlement agreement.

The terms of the parties' Agreement are fair, reasonable and adequate, especially when they are balanced against the strength of Plaintiffs' and Defendants' cases, and the complexity, length and expense of further litigation.

WHEREFORE, Parties pray for entry of an Order containing the following terms:

1. Finding that this action may be maintained as a class action, and certifying the Ramos and Olivares Classes for purposes of settlement;

2. Preliminary finding that this Agreement is fair, reasonable, and adequate to both Classes;

3. Schedule a fairness hearing;

4. Direct parties to issue a notice to class members through press release twenty-one (21) days after the entry of this Order;

5. Determination that notice given pursuant to the terms of the Agreement is the "best notice practicable under the circumstances" and that it satisfies the requirements of Federal Rule of Civil Procedure 23(e)(1)(B) and due process;

6. Determination that any class members who fail to object to the terms of this Agreement in the manner prescribed under its terms, shall be deemed to have waived their right to raise any objections to the Agreement and shall be forever foreclosed from raising their objections.

Respectfully submitted,

One of the Attorneys for Plaintiffs

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SETTLEMENT AGREEMENT
RESOLVING MATTERS BETWEEN PLAINTIFFS AND
DEFENDANTS IN
RAMOS, et al. V. MICHAEL CHERTOFF, et al.,
CASE NO. 02 C 8266
March 25, 2005

Plaintiffs, MARIA ROSA RAMOS, APOLINAR OCHOA, FERMIN GUTIERREZ, FERNANDO CARRANZA, GABRIEL TORRES, HECTOR DIAZ, JUAN RODRIGUEZ, NICOLAS OLIVARES and EFREN DE LA TORRE, (hereinafter the "Names Plaintiffs"), by their attorneys the Midwest Immigrant & Human Rights Center (MIHRC), the Mexican American Legal Defense and Educational Fund (MALDEF), and Steven Saltzman, and Defendants MICHAEL CHERTOFF, Secretary of Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; EDUARDO AGUIRRE, JR., Director, U. S. Citizenship and Immigration and Customs Enforcement; MICHAEL COMFORT, Director of the Chicago District Office of the U. S. Citizenship and Immigration Services; MICHAEL GARCIA, Assistant Secretary for U. S. Immigration and Customs Enforcement; DEBORAH ACHIM, Acting Director, Chicago Field Office, U. S. Immigration and Customs Enforcement, for their Settlement Agreement and Release (hereinafter the "Agreement"), state:

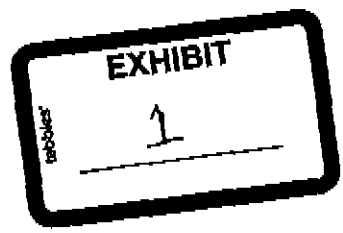
I. GENERAL TERMS

A. This Agreement, in its final form, shall be presented to the Honorable Mark Filip, and entered into the record in this case, *Ramos v. Chertoff, et al.,* Case No. 02 C 8266. Upon approval of the terms of this Agreement by Judge Filip after a fairness hearing, any and all claims against the Defendants shall be dismissed with prejudice.

B. The Classes covered by the Agreement are the following:

1. All persons who sought the benefits of 8 U.S.C. § 1255(i) and had Form I-485, Application to Register Permanent Residence or to Adjust Status, accepted for filing by the Chicago District Office of the INS between January 29, 1997, through April 30, 2001, where a colorable Form I-130, Petition for Alien Relative was also filed but a visa was not immediately available (hereinafter "the Ramos class").

2. All persons who sought the benefits of 8 U.S.C. § 1255(i) and had Form I-485, Application to Register Permanent Residence or to Adjust Status, accepted for filing by the Chicago District Office of the INS between January 29, 1997, through April 30, 2001, where no colorable Form I-130, Petition for Alien Relative was also filed (hereinafter "the Olivares Class").



3. For paragraph I(B)(1) above, a colorable Form I-130 means a visa petition that was approvable when filed. For paragraph I(B)(2) above, a non-colorable Form I-130 means a visa petition that was not approvable when filed.

C. The parties agree that this Agreement does not constitute and shall not be construed as an admission of the truth of any allegation contained in Plaintiffs' cause of action, or as an admission of Defendants' liability with respect to the claims made in the underlying lawsuit. Nothing in this Agreement is intended to impinge on the prosecutorial discretion of the defendants in making decisions on the initiation and continuation of removal proceedings against individuals who are unlawfully present in the United States. Nothing in this Agreement is intended as a concession on behalf of the United States that any of the plaintiffs were improperly placed into removal proceedings.

D. The parties enter into this Agreement for the sole purpose of compromising, settling and terminating all pending litigation among them. The parties further acknowledge that settlement of this lawsuit is made to avoid the uncertainty of the outcome of litigation, the expense in time and money of further litigation, and for the purpose of judicial economy. The parties shall not use this Agreement as notice or evidence of misconduct on the part of any party to this litigation or for any other purpose in any other litigation, and agree that any such use violates both the express terms and intent of this Agreement.

E. The terms of this Agreement shall be limited to only the members of both classes mentioned above who filed for adjustment of status in the Chicago District Office and nowhere else in the country.

II. APPROVAL AND CLASS NOTICE

A. The Parties agree to petition the Court for an order ("Preliminary Approval Order") containing the following terms:

1. Determining that this action may, for the purposes of settlement, be maintained as a class action, and certifying both the Ramos and Olivares classes;

2. Finding that the named plaintiffs, as class representatives, fairly and adequately represent the interest of the two classes in this action;

3. Finding, preliminarily, that this Agreement is fair, reasonable, and adequate to the Class;

4. Scheduling a hearing (the "Fairness Hearing") to:

   a. make a final determination as to the reasonableness, adequacy and fairness of the Agreement and whether it should be finally approved by the Court; and

   b. approve all agreed prospective relief, including an award of attorneys fees under the Equal Access to Justice Act ("EAJA");

5. Directing that within twenty-one (21) days of the entry of the Preliminary Approval Order, the Parties shall issue notice, *see* Notice attachments, to all class members of the provisions of this Agreement through a press release issued by the Chicago District Office of U. S. Citizenship and Immigration Services ("CIS") and U. S. Immigration and Customs Enforcement ("ICE") that will be posted on the internet sites maintained by the respective agencies. The press release will also be transmitted to:

   a. Community-based organizations;

   b. The Chicago Chapter of the American Immigration Lawyers Association (AILA);

   c. The Legal Assistance Foundation of Chicago (LAFC);

   d. posted at the Chicago Offices of CIS, ICE, EOIR and

   e. and at selected detention centers used by the ICE Chicago district office;

   f. The notice provided for in paragraph II(A)(5) will be maintained on the internet site and posted at CIS and ICE facilities for six months after the date that this Agreement is approved and entered by the Court.

6. Finding that notice given pursuant to the provisions of paragraph 2II(A)(5) hereof is "the best notice practicable under the circumstances" and that the notice satisfies the requirements of Federal Rule of Civil Procedure 23(e)(1)(B) and due process;

7. Providing that no person shall be entitled in any way to contest the approval of the terms and conditions of the Agreement or the judgment to be entered thereon except by filing written objections in accordance with the provisions of paragraphs II(B) and II(C) herein, and that any members of the Classes

who fail to object in the manner prescribed in paragraphs II(B) and II(C) herein, shall be deemed to have waived their right to raise any objections to the Agreement and shall be forever foreclosed from raising objections to the Agreement.

B. Any class member who wishes to object to the fairness, reasonableness or adequacy of this Agreement must file with the Court and serve all counsel of record any objections they may have in writing, at least fourteen (14) days before the Fairness Hearing. Any written objection must specifically identify the factual and legal basis of the class member's objection, as well as the class member's address and telephone number. A class member who submits a written objection may not raise at the Fairness Hearing any legal or factual arguments not raised in his written objection.

C. Any class member who files and serves a written objection, as described herein, may appear at the Fairness hearing for the entry of the Final Approval and Dismissal Order and object to the fairness, reasonableness, or adequacy of this Agreement or the Settlement. Subject to the Court's discretion, any class member who fails to comply with the provisions of paragraphs II(B) and II(C) shall waive and forfeit any and all rights the class member may have to appear separately and/or to object, and shall be bound by all the terms of the Agreement and by all proceedings, orders and judgment in the Litigation.

D. On the date set by the Court for the Fairness Hearing, the Parties shall jointly request the Court to

1. review and consider any objections that have been timely and properly filed; and

2. enter a final judgment (the "Final Approval and Dismissal Order");

   a. approving, without material alterations, the Agreement;

   b. finding that the terms of the Agreement are fair, reasonable and adequate to the Classes;

   c. finding that the publication of the notice that shall have taken place pursuant to the provisions of paragraph 1E hereto of this Agreement is the only notice required and satisfies the requirements of the federal Code of Civil Procedure and the requirements fo due process;

   d. fixing the amount to be paid to Plaintiffs' attorneys in attorney's fees and expenses under EAJA;

e. dismissing all claims by the two classes against Defendants with prejudice, and entering final judgment thereon; and

E. Any order herein shall be deemed final:

1. thirty (30) days after entry of the order, if no appeal is taken during such thirty-day period; or

2. if, during the aforementioned thirty-day period, an appeal is taken from such judgment or order, the date upon which such appeal has been finally decided, or the date of the expiration of the time to initiate a further appeal.

III. DUTIES AND OBLIGATIONS

A. In consideration of the execution of this Agreement and the provisions set forth herein and upon advice of counsel, the Named Plaintiffs, on behalf of themselves, their assigns, heirs and representatives, hereby release and discharge the Defendants and their future current, or former trustees, officers, employees or agents, representatives or employees, of any and all claims, causes of action and demands that were raised in the underlying lawsuit.

B. In exchange for the releases and promises made, the Parties agree in good faith to the following with respect to the Ramos and Olivares Classes:

1. Stipulate to certification for both classes;

2. In order to ensure the consistent exercise of prosecutorial discretion pursuant to the terms of this Agreement, the Parties agree that CIS and ICE will follow the standards for prosecutorial discretions set forth in the November 17, 2000 memorandum written by Doris Meissner, former commissioner of the Immigration and Naturalization Service, *see* Exhibit A, pp. 7-8. In applying these standards, CIS and ICE will consider INS headquarters memoranda dated October 6, 1997, and January 26, 1998;

3. For all individuals whose Section 245(i) applications for adjustment of status, filed during the period of January 29, 1997 to April 30, 2001, were accepted for processing, but have not resulted in the issuance of a Notice to Appear ("NTA"), the Parties agree to have CIS conduct a review of these individuals' files and use the standards for prosecutorial discretion set forth by Doris Meissner's memorandum, *see* Exhibit A, pp. 7-8, to determine whether to favorably exercise prosecutorial discretion in declining to initiate removal proceedings against any of these individuals.

a. If CIS declines to favorably exercise its prosecutorial discretion and decides to issue a NTA to a class member covered by this paragraph, the NTA will be accompanied by a notice informing them of the decision and giving the class member 30 days to request reconsideration of the prosecutorial decision to issue an NTA and to submit additional information in support of the request to reconsider the issuance of the NTA; and

b. The procedure provided for in paragraph III(B)(3)(a) shall not apply to individuals who are removable on criminal or national security grounds or subject to the reinstatement of removal orders.

4. For those individuals currently in removal proceedings before the Immigration Court or the Board of Immigration Appeals (BIA), Defendants agree to:

a. Have the U. S. Immigration and Customs Enforcement (ICE) conduct a review of the case of any individual in this subgroup who gives notice (to Chicago ICE Chief Counsel) within six (6) months from the date of the entry of the Final Approval and Dismissal Order that he/she is a member of any of the two classes in this suit and requests to have his/her case reviewed, in accordance with the standards for prosecutorial discretion set forth by Doris Meissner's memorandum, *see* Exhibit A, pp. 7-8. In applying these standards, CIS and ICE will consider INS headquarters memoranda dated October 6, 1997, and January 26, 1998. In giving notice, individuals in this subgroup must include all relevant documents and make legal and factual arguments that could support the agency's favorable exercise of prosecutorial discretion.

b. If ICE chooses to favorably exercise its discretion pursuant to the procedure set forth in paragraph III(B)(4)(a), ICE will move to dismiss proceedings pursuant to 8 C.F.R. § 239.2(c).

5. Aliens convicted of an aggravated felony, individuals who are subject to administratively final orders of removal or deportation, or individuals subject to the reinstatement of removal orders, are not eligible for review pursuant to this Agreement. This bar shall not apply to cases that became administratively final as the result of BIA decisions issued between June 1, 2004, and three months following the date of the final approval of this agreement by the court.

6. Those class members who have been removed or deported from the United States and require a waiver of the bar imposed by § 212(a)(9)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(i), once a visa becomes immediately available to them, may raise their class membership as a factor in support of their waiver application. Plaintiffs acknowledge that this one factor does not automatically justify favorable action on their waiver application.

7. Defendants agree to:

   a. keep all fees paid to the Chicago District Office by these individuals; and

   b. give a credit for the filing fees individuals paid to the Chicago District Office to individuals who submit an application for a credit within one (1) year from the date of the entry of the Final approval and Dismissal Order. The credit will equal the amount paid at the time to file the application for permanent residence (Form I-485), and, if applicable, the amount paid as a penalty fee under section 245(i)(1) of the Immigration and Nationality Act ($1000 in most cases). The credit can be used only once and CIS will retain any remaining balance when the credit is used by the class member. If the amount of fees is owed by the class member is greater than the amount of the credit, the class member is responsible for the difference. The credit is non-transferable, expires ten years after being issued, and can be applied by the Class members to any application or petition fees charged by the CIS; and

   c. no credit of any kind will be issued for any fees filed in conjunction with an application for employment authorization.

   d. All applications for fee credits made pursuant to paragraph III (B)(7) must be made to the Chicago District Office of CIS and must be made pursuant to procedures developed by Chicago CIS.

   e. Defendant CIS agrees that section 245(i) applications of class members (as defined in section I.B.1 and 2 of this agreement) shall not be denied for the reason that the class member had previously filed a section 245(i) application during the period between January 29, 1997 through April 30, 2001.

   f. Aliens convicted of an aggravated felony are not eligible for a fee pursuant to this Agreement.

8. The Parties agree that Defendants' actions taken under their obligations in subparagraphs III(B)(2) through III(B)(7) are final and nonreviewable actions pursuant to 8 U.S.C. § 1252(g), and, may not be raised in a separate legal, administrative, equitable, or declaratory proceeding, or used as a basis to seek or obtain a writ of mandamus or habeas corpus. Plaintiffs acknowledge that defendants' decisions made pursuant to paragraphs III (B)(2) through III(B)(7) are solely within the prosecutorial discretion of the defendants and the outcome of the review conducted under this Agreement cannot be challenged in this or any other legal, administrative, equitable, or declaratory proceeding, or used as a basis to seek or obtain a writ of mandamus or habeas corpus.

9. During the pendency of this case, the Defendants will file a report with the court on an annual basis that states a summary of the number of cases that have been reviewed and the number in which the Defendants have favorably exercised their prosecutorial discretion.

IV. ENFORCEMENT

A. Subject to the limitations and requirements imposed in paragraph IV(B) below, the District Court shall retain exclusive jurisdiction over the subject matter of this Agreement and over the parties to this agreement. The District court shall have exclusive jurisdiction to decide any and all issues arising under this Agreement and to resolve any and all disputes growing out of the interpretation or application of this Agreement. The parties agree that this agreement creates no enforceable rights or obligations other than those provided herein.

B. Motions to enforce the terms of the agreement may be commenced by any of the parties to this Agreement by filing a motion with the District Court, but shall not include disagreements with actions taken by the Defendants pursuant to their obligations under subparagraphs 2 through 7 of section III(B) labeled Duties and Obligations included in this Agreement. The Parties agree that under no circumstance shall the Defendants' determinations pertaining to the exercise of prosecutorial discretion be subject to review by this or any other court or administrative body or tribunal. In no event shall a class member's enforcement action under the provisions of this agreement result in a stay of the Defendants' exercise of prosecutorial functions.

C. Prior to filing a motion with the Court, the complaining party must provide the other party or parties with notice that a dispute has arisen, describe with specificity the nature of the dispute and enter into good faith negotiations with that party or parties

in an effort to resolve the dispute. The parties will have thirty (30) days in which to attempt to resolve the dispute. If, after thirty (30) days, the dispute cannot be resolved, the complaining party may seek resolution by the Court.

D. If the Court determines that any of the parties to this Agreement failed to act in good faith to resolve the dispute prior to seeking judicial intervention, the Court may assess costs against that party.

E. Any action to enforce the terms of this Agreement on the part of the plaintiffs must be commenced within 48 months of the date that this Agreement is approved and entered by the court.

V. FEES

A. Plaintiffs' attorneys shall be entitled to reasonable attorney fees and cost, pursuant to the EAJA, 28 U.S.C. § 2412 *et seq*. The parties agree that Plaintiffs are entitled to attorney fees and costs in the amount of $90,000.00.

B. Plaintiffs' Counsel shall also be entitled to reasonable attorney fees and cost for any appearances and/or filings made with the Court in an effort to enforce this Agreement, but only after all reasonable attempts to resolve any dispute with any of the Defendants have failed and the Court determines that the defendants have failed to act in good faith.

MARIA RAMOS, et al. by

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Midwest Immigrant & Human Rights Center

STEVEN SALTZMAN

THOMAS RIDGE, DEPARTMENT OF HOMELAND SECURITY, et al., by

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Attorneys for the Plaintiffs

ALONZO RIVAS
JORGE SANCHEZ
Mexican American Legal Defense and
Educational Fund,
Attorneys for Defendants

APPROVED:

UNITED STATES DISTRICT JUDGE

Dated: _____

U.S. Department of Justice
Immigration and Naturalization Service

HQOPP 50/4

Office of the Commissioner

425 I Street NW
Washington, DC 20536

NOV 17 2000

MEMORANDUM TO REGIONAL DIRECTORS
DISTRICT DIRECTORS
CHIEF PATROL AGENTS
REGIONAL AND DISTRICT COUNSEL

FROM: Doris Meissner
Commissioner
Immigration and Naturalization Service

SUBJECT: Exercising Prosecutorial Discretion

Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion. This memorandum describes the principles with which INS exercises prosecutorial discretion and the process to be followed in making and monitoring discretionary decisions. Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process–from planning investigations to enforcing final orders–subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.

More specific guidance geared to exercising discretion in particular program areas already exists in some instances,[1] and other program-specific guidance will follow separately.

[1] For example, standards and procedures for placing an alien in deferred action status are provided in the Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing, and Removal (Standard Operating Procedures), Part X. This memorandum is intended to provide general principles, and does not replace any previous specific guidance provided about particular INS actions, such as "Supplemental Guidelines on the Use of Cooperating Individuals and Confidential Informants Following the Enactment of IIRIRA," dated December 29, 1997. This memorandum is not intended to address every situation in which the exercise of prosecutorial discretion may be appropriate. If INS personnel in the exercise of their duties recognize apparent conflict between any of their specific policy requirements and these general guidelines, they are encouraged to bring the matter to their supervisor's attention, and any conflict between policies should be raised through the appropriate chain of command for resolution.

EXHIBIT
A

However, INS officers should continue to exercise their prosecutorial discretion in appropriate cases during the period before more specific program guidance is issued.

A statement of principles concerning discretion serves a number of important purposes. As described in the "Principles of Federal Prosecution,"[2] part of the U.S. Attorneys' manual, such principles provide convenient reference points for the process of making prosecutorial decisions; facilitate the task of training new officers in the discharge of their duties; contribute to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices and between their activities and the INS' law enforcement priorities; make possible better coordination of investigative and prosecutorial activity by enhancing the understanding between the investigative and prosecutorial components; and inform the public of the careful process by which prosecutorial decisions are made.

Legal and Policy Background

"Prosecutorial discretion" is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone. The INS, like other law enforcement agencies, has prosecutorial discretion and exercises it every day. In the immigration context, the term applies not only to the decision to issue, serve, or file a Notice to Appear (NTA), but also to a broad range of other discretionary enforcement decisions, including among others: Focusing investigative resources on particular offenses or conduct; deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a proceeding; granting deferred action or staying a final order; agreeing to voluntary departure, withdrawal of an application for admission, or other action in lieu of removing the alien; pursuing an appeal; and executing a removal order.

The "favorable exercise of prosecutorial discretion" means a discretionary decision not to assert the full scope of the INS' enforcement authority as permitted under the law. Such decisions will take different forms, depending on the status of a particular matter, but include decisions such as not issuing an NTA (discussed in more detail below under "Initiating Proceedings"), not detaining an alien placed in proceedings (where discretion remains despite mandatory detention requirements), and approving deferred action.

[2] For this discussion, and much else in this memorandum, we have relied heavily upon the Principles of Federal Prosecution, chapter 9-27.000 in the U.S. Department of Justice's United States Attorneys' Manual (Oct. 1997). There are significant differences, of course, between the role of the U.S. Attorneys' offices in the criminal justice system, and INS responsibilities to enforce the immigration laws, but the general approach to prosecutorial discretion stated in this memorandum reflects that taken by the Principles of Federal Prosecution.

conduct, or one that while legal in other contexts, is not within the authority of the agency or officer taking it. Prosecutorial discretion to take an enforcement action does not modify or waive any legal requirements that apply to the action itself. For example, an enforcement decision to focus on certain types of immigration violators for arrest and removal does not mean that the INS may arrest any person without probable cause to do so for an offense within its jurisdiction. Service officers who are in doubt whether a particular action complies with applicable constitutional, statutory, or case law requirements should consult with their supervisor and obtain advice from the district or sector counsel or representative of the Office of General Counsel to the extent necessary.

Finally, exercising prosecutorial discretion does not lessen the INS' commitment to enforce the immigration laws to the best of our ability. It is not an invitation to violate or ignore the law. Rather, it is a means to use the resources we have in a way that best accomplishes our mission of administering and enforcing the immigration laws of the United States.

Principles of Prosecutorial Discretion

Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.

It is an appropriate exercise of prosecutorial discretion to give priority to investigating, charging, and prosecuting those immigration violations that will have the greatest impact on achieving these goals. The INS has used this principle in the design and execution of its border enforcement strategy, its refocus on criminal smuggling networks, and its concentration on fixing benefit-granting processes to prevent fraud. An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.

The Principles of Federal Prosecution governing the conduct of U.S. Attorneys use the concept of a "substantial Federal interest." A U.S. Attorney may properly decline a prosecution if "*no substantial Federal interest would be served by prosecution.*" This principle provides a useful frame of reference for the INS, although applying it presents challenges that differ from those facing a U.S. Attorney. In particular, as immigration is an exclusively Federal responsibility, the option of an adequate alternative remedy under state law is not available. In an immigration case, the interest at stake will always be Federal. Therefore, we must place particular emphasis on the element of substantiality. How important is the Federal interest in the case, as compared to other cases and priorities? That is the overriding question, and answering it requires examining a number of factors that may differ according to the stage of the case.

As a general matter, INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial.[3] Except as may be provided specifically in other policy statements or directives, the responsibility for exercising prosecutorial discretion in this manner rests with the District Director (DD) or Chief Patrol Agent (CPA) based on his or her common sense and sound judgment.[4] The DD or CPA should obtain legal advice from the District or Sector Counsel to the extent that such advice may be necessary and appropriate to ensure the sound and lawful exercise of discretion, particularly with respect to cases pending before the Executive Office for Immigration Review (EOIR).[5] The DD's or CPA's authority may be delegated to the extent necessary and proper, except that decisions not to place a removable alien in removal proceedings, or decisions to move to terminate a proceeding which in the opinion of the District or Sector Counsel is legally sufficient, may not be delegated to an officer who is not authorized under 8 C.F.R. § 239.1 to issue an NTA. A DD's or CPA's exercise of prosecutorial discretion will not normally be reviewed by Regional or Headquarters authority. However, DDs and CPAs remain subject to their chains of command and may be supervised as necessary in their exercise of prosecutorial discretion.

Investigations

Priorities for deploying investigative resources are discussed in other documents, such as the interior enforcement strategy, and will not be discussed in detail in this memorandum. These previously identified priorities include identifying and removing criminal and terrorist aliens, deterring and dismantling alien smuggling, minimizing benefit fraud and document abuse, responding to community complaints about illegal immigration and building partnerships to solve local problems, and blocking and removing employers' access to undocumented workers. Even within these broad priority areas, however, the Service must make decisions about how best to expend its resources.

Managers should plan and design operations to maximize the likelihood that serious offenders will be identified. Supervisors should ensure that front-line investigators understand that it is not mandatory to issue an NTA in every case where they have reason to believe that an alien is removable, and agents should be encouraged to bring questionable cases to a supervisor's attention. Operational planning for investigations should include consideration of appropriate procedures for supervisory and legal review of individual NTA issuing decisions.

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[3] In some cases even a substantial immigration enforcement interest in prosecuting a case could be outweighed by other interests, such as the foreign policy of the United States. Decisions that require weighing such other interests should be made at the level of responsibility within the INS or the Department of Justice that is appropriate in light of the circumstances and interests involved.

[4] This general reference to DDs and CPAs is not intended to exclude from coverage by this memorandum other INS personnel, such as Service Center directors, who may be called upon to exercise prosecutorial discretion and do not report to DDs or CPAs, or to change any INS chains of command.

[5] Exercising prosecutorial discretion with respect to cases pending before EOIR involves procedures set forth at 8 CFR 239.2 and 8 CFR Part 3, such as obtaining the court's approval of a motion to terminate proceedings.

Careful design of enforcement operations is a key element in the INS' exercise of prosecutorial discretion. Managers should consider not simply whether a particular effort is legally supportable, but whether it best advances the INS' goals, compared with other possible uses of those resources. As a general matter, investigations that are specifically focused to identify aliens who represent a high priority for removal should be favored over investigations which, by their nature, will identify a broader variety of removable aliens. Even an operation that is designed based on high-priority criteria, however, may still identify individual aliens who warrant a favorable exercise of prosecutorial discretion.[6]

Initiating and Pursuing Proceedings

Aliens who are subject to removal may come to the Service's attention in a variety of ways. For example, some aliens are identified as a result of INS investigations, while others are identified when they apply for immigration benefits or seek admission at a port-of-entry. While the context in which the INS encounters an alien may, as a practical matter, affect the Service's options, it does not change the underlying principle that the INS has discretion and should exercise that discretion appropriately given the circumstances of the case.

Even when an immigration officer has reason to believe that an alien is removable and that there is sufficient evidence to obtain a final order of removal, it may be appropriate to decline to proceed with that case. This is true even when an alien is removable based on his or her criminal history and when the alien–if served with an NTA–would be subject to mandatory detention. The INS may exercise its discretion throughout the enforcement process. Thus, the INS can choose whether to issue an NTA, whether to cancel an NTA prior to filing with the immigration court or move for dismissal in immigration court (under 8 CFR 239.2), whether to detain (for those aliens not subject to mandatory detention), whether to offer an alternative to removal such as voluntary departure or withdrawal of an application for admission, and whether to stay an order of deportation.

The decision to exercise any of these options or other alternatives in a particular case requires an individualized determination, based on the facts and the law. As a general matter, it is better to exercise favorable discretion as early in the process as possible, once the relevant facts have been determined, in order to conserve the Service's resources and in recognition of the alien's interest in avoiding unnecessary legal proceedings. However, there is often a conflict

[6] For example, operations in county jails are designed to identify and remove criminal aliens, a high priority for the Service. Nonetheless, an investigator working at a county jail and his or her supervisor should still consider whether the exercise of prosecutorial discretion would be appropriate in individual cases.

between making decisions as soon as possible, and making them based on evaluating as many relevant, credible facts as possible. Developing an extensive factual record prior to making a charging decision may itself consume INS resources in a way that negates any saving from forgoing a removal proceeding.

Generally, adjudicators may have a better opportunity to develop a credible factual record at an earlier stage than investigative or other enforcement personnel. It is simply not practicable to require officers at the arrest stage to develop a full investigative record on the equities of each case (particularly since the alien file may not yet be available to the charging office), and this memorandum does not require such an analysis. Rather, what is needed is knowledge that the INS is not legally required to institute proceedings in every case, openness to that possibility in appropriate cases, development of facts relevant to the factors discussed below to the extent that it is reasonably possible to do so under the circumstances and in the timeframe that decisions must be made, and implementation of any decision to exercise prosecutorial discretion.

There is no precise formula for identifying which cases warrant a favorable exercise of discretion. Factors that should be taken into account in deciding whether to exercise prosecutorial discretion include, but are not limited to, the following:

- Immigration status: Lawful permanent residents generally warrant greater consideration. However, other removable aliens may also warrant the favorable exercise of discretion, depending on all the relevant circumstances.
- Length of residence in the United States: The longer an alien has lived in the United States, particularly in legal status, the more this factor may be considered a positive equity.
- Criminal history: Officers should take into account the nature and severity of any criminal conduct, as well as the time elapsed since the offense occurred and evidence of rehabilitation. It is appropriate to take into account the actual sentence or fine that was imposed, as an indicator of the seriousness attributed to the conduct by the court. Other factors relevant to assessing criminal history include the alien's age at the time the crime was committed and whether or not he or she is a repeat offender.
- Humanitarian concerns: Relevant humanitarian concerns include, but are not limited to, family ties in the United States; medical conditions affecting the alien or the alien's family; the fact that an alien entered the United States at a very young age; ties to one's home country (e.g., whether the alien speaks the language or has relatives in the home country); extreme youth or advanced age; and home country conditions.
- Immigration history: Aliens without a past history of violating the immigration laws (particularly violations such as reentering after removal, failing to appear at hearing, or resisting arrest that show heightened disregard for the legal process) warrant favorable consideration to a greater extent than those with such a history. The seriousness of any such violations should also be taken into account.

- Likelihood of ultimately removing the alien: Whether a removal proceeding would have a reasonable likelihood of ultimately achieving its intended effect, in light of the case circumstances such as the alien's nationality, is a factor that should be considered.
- Likelihood of achieving enforcement goal by other means: In many cases, the alien's departure from the United States may be achieved more expeditiously and economically by means other than removal, such as voluntary return, withdrawal of an application for admission, or voluntary departure.
- Whether the alien is eligible or is likely to become eligible for other relief: Although not determinative on its own, it is relevant to consider whether there is a legal avenue for the alien to regularize his or her status if not removed from the United States. The fact that the Service cannot confer complete or permanent relief, however, does not mean that discretion should not be exercised favorably if warranted by other factors.
- Effect of action on future admissibility: The effect an action such as removal may have on an alien can vary–for example, a time-limited as opposed to an indefinite bar to future admissibility–and these effects may be considered.
- Current or past cooperation with law enforcement authorities: Current or past cooperation with the INS or other law enforcement authorities, such as the U.S. Attorneys, the Department of Labor, or National Labor Relations Board, among others, weighs in favor of discretion.
- Honorable U.S. military service: Military service with an honorable discharge should be considered as a favorable factor. See Standard Operating Procedures Part V.D.8 (issuing an NTA against current or former member of armed forces requires advance approval of Regional Director).
- Community attention: Expressions of opinion, in favor of or in opposition to removal, may be considered, particularly for relevant facts or perspectives on the case that may not have been known to or considered by the INS. Public opinion or publicity (including media or congressional attention) should not, however, be used to justify a decision that cannot be supported on other grounds. Public and professional responsibility will sometimes require the choice of an unpopular course.
- Resources available to the INS: As in planning operations, the resources available to the INS to take enforcement action in the case, compared with other uses of the resources to fulfill national or regional priorities, are an appropriate factor to consider, but it should not be determinative. For example, when prosecutorial discretion should be favorably exercised under these factors in a particular case, that decision should prevail even if there is detention space available.

Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case. There may be other factors, not on the list above, that are appropriate to consider. The decision should be based on the totality of the circumstances, not on any one factor considered in isolation. General guidance such as this cannot provide a "bright line" test that may easily be applied to determine the "right" answer in every case. In many cases, minds reasonably can differ, different factors may point in different directions, and there is no clearly "right" answer. Choosing a course of action in difficult

cases must be an exercise of judgment by the responsible officer based on his or her experience, good sense, and consideration of the relevant factors to the best of his or her ability.

There are factors that may not be considered. Impermissible factors include:

- An individual's race, religion, sex, national origin, or political association, activities or beliefs;[7]
- The officer's own personal feelings regarding the individual; or
- The possible effect of the decision on the officer's own professional or personal circumstances.

In many cases, the procedural posture of the case, and the state of the factual record, will affect the ability of the INS to use prosecutorial discretion. For example, since the INS cannot admit an inadmissible alien to the United States unless a waiver is available, in many cases the INS' options are more limited in the admission context at a port-of-entry than in the deportation context.

Similarly, the INS may consider the range of options and information likely to be available at a later time. For example, an officer called upon to make a charging decision may reasonably determine that he or she does not have a sufficient, credible factual record upon which to base a favorable exercise of prosecutorial discretion not to put the alien in proceedings, that the record cannot be developed in the timeframe in which the decision must be made, that a more informed prosecutorial decision likely could be made at a later time during the course of proceedings, and that if the alien is not served with an NTA now, it will be difficult or impossible to do so later.

Such decisions must be made, however, with due regard for the principles of these guidelines, and in light of the other factors discussed here. For example, if there is no relief available to the alien in a removal proceeding and the alien is subject to mandatory detention if

[7] This general guidance on factors that should not be relied upon in making a decision whether to enforce the law against an individual is not intended to prohibit their consideration to the extent they are directly relevant to an alien's status under the immigration laws or eligibility for a benefit. For example, religion and political beliefs are often directly relevant in asylum cases and need to be assessed as part of a prosecutorial determination regarding the strength of the case, but it would be improper for an INS officer to treat aliens differently based on his personal opinion about a religion or belief. Political activities may be relevant to a ground of removal on national security or terrorism grounds. An alien's nationality often directly affects his or her eligibility for adjustment or other relief, the likelihood that he or she can be removed, or the availability of prosecutorial options such as voluntary return, and may be considered to the extent these concerns are pertinent.

placed in proceedings, that situation suggests that the exercise of prosecutorial discretion, if appropriate, would be more useful to the INS if done sooner rather than later. It would be improper for an officer to assume that someone else at some later time will always be able to make a more informed decision, and therefore never to consider exercising discretion.

Factors relevant to exercising prosecutorial discretion may come to the Service's attention in various ways. For example, aliens may make requests to the INS to exercise prosecutorial discretion by declining to pursue removal proceedings. Alternatively, there may be cases in which an alien asks to be put in proceedings (for example, to pursue a remedy such as cancellation of removal that may only be available in that forum). In either case, the INS may consider the request, but the fact that it is made should not determine the outcome, and the prosecutorial decision should be based upon the facts and circumstances of the case. Similarly, the fact that an alien has not requested prosecutorial discretion should not influence the analysis of the case. Whether, and to what extent, any request should be considered is also a matter of discretion. Although INS officers should be open to new facts and arguments, attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that have been thoroughly considered and decided, or for other improper tactical reasons should be rejected. There is no legal right to the exercise of prosecutorial discretion, and (as stated at the close of this memorandum) this memorandum creates no right or obligation enforceable at law by any alien or any other party.

Process for Decisions

Identification of Suitable Cases

No single process of exercising discretion will fit the multiple contexts in which the need to exercise discretion may arise. Although this guidance is designed to promote consistency in the application of the immigration laws, it is not intended to produce rigid uniformity among INS officers in all areas of the country at the expense of the fair administration of the law. Different offices face different conditions and have different requirements. Service managers and supervisors, including DDs and CPAs, and Regional, District, and Sector Counsel must develop mechanisms appropriate to the various contexts and priorities, keeping in mind that it is better to exercise discretion as early in process as possible once the factual record has been identified.[8] In particular, in cases where it is clear that no statutory relief will be available at the immigration hearing and where detention will be mandatory, it best conserves the Service's resources to make a decision early.

Enforcement and benefits personnel at all levels should understand that prosecutorial discretion exists and that it is appropriate and expected that the INS will exercise this authority in appropriate cases. DDs, CPAs, and other supervisory officials (such as District and

[8] DDs, CPAs, and other INS personnel should also be open, however, to possible reconsideration of decisions (either for or against the exercise of discretion) based upon further development of the facts.

Sector Counsels) should encourage their personnel to bring potentially suitable cases for the favorable exercise of discretion to their attention for appropriate resolution. To assist in exercising their authority, DDs and CPAs may wish to convene a group to provide advice on difficult cases that have been identified as potential candidates for prosecutorial discretion.

It is also appropriate for DDs and CPAs to develop a list of "triggers" to help their personnel identify cases at an early stage that may be suitable for the exercise of prosecutorial discretion. These cases should then be reviewed at a supervisory level where a decision can be made as to whether to proceed in the ordinary course of business, to develop additional facts, or to recommend a favorable exercise of discretion. Such triggers could include the following facts (whether proven or alleged):

Lawful permanent residents;
Aliens with a serious health condition;
Juveniles;
Elderly aliens;
Adopted children of U.S. citizens;
U.S. military veterans;
Aliens with lengthy presence in United States (i.e., 10 years or more); or
Aliens present in the United States since childhood.

Since workloads and the type of removable aliens encountered may vary significantly both within and between INS offices, this list of possible trigger factors for supervisory review is intended neither to be comprehensive nor mandatory in all situations. Nor is it intended to suggest that the presence or absence of "trigger" facts should itself determine whether prosecutorial discretion should be exercised, as compared to review of all the relevant factors as discussed elsewhere in these guidelines. Rather, development of trigger criteria is intended solely as a suggested means of facilitating identification of potential cases that may be suitable for prosecutorial review as early as possible in the process.

Documenting Decisions

When a DD or CPA decides to exercise prosecutorial discretion favorably, that decision should be clearly documented in the alien file, including the specific decision taken and its factual and legal basis. DDs and CPAs may also document decisions based on a specific set of facts not to exercise prosecutorial discretion favorably, but this is not required by this guidance.

The alien should also be informed in writing of a decision to exercise prosecutorial discretion favorably, such as not placing him or her in removal proceedings or not pursuing a case. This normally should be done by letter to the alien and/or his or her attorney of record, briefly stating the decision made and its consequences. It is not necessary to recite the facts of the case or the INS' evaluation of the facts in such letters. Although the specifics of the letter

will vary depending on the circumstances of the case and the action taken, it must make it clear to the alien that exercising prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole), immunity from future removal proceedings, or any enforceable right or benefit upon the alien. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), it is appropriate to identify it.

The obligation to notify an individual is limited to situations in which a specific, identifiable decision to refrain from action is taken in a situation in which the alien normally would expect enforcement action to proceed. For example, it is not necessary to notify aliens that the INS has refrained from focusing investigative resources on them, but a specific decision not to proceed with removal proceedings against an alien who has come into INS custody should be communicated to the alien in writing. This guideline is not intended to replace existing standard procedures or forms for deferred action, voluntary return, voluntary departure, or other currently existing and standardized processes involving prosecutorial discretion.

Future Impact

An issue of particular complexity is the future effect of prosecutorial discretion decisions in later encounters with the alien. Unlike the criminal context, in which statutes of limitation and venue requirements often preclude one U.S. Attorney's office from prosecuting an offense that another office has declined, immigration violations are continuing offenses that, as a general principle of immigration law, continue to make an alien legally removable regardless of a decision not to pursue removal on a previous occasion. An alien may come to the attention of the INS in the future through seeking admission or in other ways. An INS office should abide by a favorable prosecutorial decision taken by another office as a matter of INS policy, absent new facts or changed circumstances. However, if a removal proceeding is transferred from one INS district to another, the district assuming responsibility for the case is not bound by the charging district's decision to proceed with an NTA, if the facts and circumstances at a later stage suggest that a favorable exercise of prosecutorial discretion is appropriate.

Service offices should review alien files for information on previous exercises of prosecutorial discretion at the earliest opportunity that is practicable and reasonable and take any such information into account. In particular, the office encountering the alien must carefully assess to what extent the relevant facts and circumstances are the same or have changed either procedurally or substantively (either with respect to later developments, or more detailed knowledge of past circumstances) from the basis for the original exercise of discretion. A decision by an INS office to take enforcement action against the subject of a previous documented exercise of favorable prosecutorial discretion should be memorialized with a memorandum to the file explaining the basis for the decision, unless the charging documents on their face show a material difference in facts and circumstances (such as a different ground of deportability).

Legal Liability and Enforceability

The question of liability may arise in the implementation of this memorandum. Some INS personnel have expressed concerns that, if they exercise prosecutorial discretion favorably, they may become subject to suit and personal liability for the possible consequences of that decision. We cannot promise INS officers that they will never be sued. However, we can assure our employees that Federal law shields INS employees who act in reasonable reliance upon properly promulgated agency guidance within the agency's legal authority – such as this memorandum–from personal legal liability for those actions.

The principles set forth in this memorandum, and internal office procedures adopted hereto, are intended solely for the guidance of INS personnel in performing their duties. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Training and Implementation

Training on the implementation of this memorandum for DDs, CPAs, and Regional, District, and Sector Counsel will be conducted at the regional level. This training will include discussion of accountability and periodic feedback on implementation issues. In addition, following these regional sessions, separate training on prosecutorial discretion will be conducted at the district level for other staff, to be designated. The regions will report to the Office of Field Operations when this training has been completed.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Maria Ramos and Nicolas Olivares, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 02 C 8266 Judge Filip
Thomas Ridge, et al.,	)	
Defendants.	)	

NOTICE OF PENDENCY OF CLASS ACTION AND SETTLEMENT

PLEASE READ THIS NOTICE; THE INFORMATION CONTAINED BELOW MAY BE OF BENEFIT TO YOU.

TO: If you applied for lawful permanent residence (a green card) between January 29, 1997 and April 30, 2001 under Section 245 (i) and if the Chicago District Office of the then Immigration & Naturalization Service (Chicago District Office) accepted your application for permanent residence (i.e. application was not rejected and returned to you), you may be able to benefit from this settlement. Please read below to see if you are a member of one of the two following groups:

Class 1	You had a valid I-130 visa petition filed on your behalf by a family member on or before April 30, 2001.
Class 2	You did not have a valid visa petition filed on your behalf by a family member on or before April 30, 2001, but still applied for permanent residence (a green card) under Section 245(i) between January 29, 1997 and April 30, 2001.

I. WHY IS THIS NOTICE PUBLISHED?

This notice is published to inform individuals who belong to either of the two groups described above (called Class 1 and 2 in this document for legal purposes), that they may benefit from a settlement (i.e. be eligible to receive benefits) in a case entitled Ramos, et al. v. Ridge, et al. This case, number 02 C 8266, in the United States District Court for the Northern District of Illinois, Eastern Division, is a class action lawsuit that is currently pending.

II. INTRODUCTION

The U.S. Congress enacted Section 245(i) of the Immigration and Naturalization Act (INA) in August 1994 to allow people who were in the country illegally to apply for a green card at their local Immigration and Naturalization Service (INS) office, now the U.S. Citizenship and Immigration Services (CIS). According to this law, these individuals could apply in the United States without leaving their families. These individuals must have a spouse, parent, child, or sibling, who is a U.S. citizen or permanent resident, in order to apply for this benefit. Before Section 245(i) was enacted, undocumented individuals related to a U.S. citizen or permanent resident had to leave the U.S. and return to their countries of origin to apply for permanent residency at the U.S. embassies or consulates there.

Under Section 245(i), a two-step process had to be followed to obtain permanent residency (a green card) through a family member. The first step required that a U.S. citizen or permanent resident relative request a visa for an undocumented relative by filing a petition (known as a Form I-130) by April 30, 2001. If the relative could prove that he or she was a U.S. citizen or permanent resident, and that he or she was related to the undocumented relative in a way recognized by the INS, the visa petition would be considered "valid" and would be approved.

Under section 245(i), the only way an individual would not have to leave his or her family in the U.S. was to have a visa petition that was filed by April 30, 2001. This was what gave the undocumented relative the right to apply for permanent residence at a future date, when the visa number became "available." Section 245(i), however, did not protect the undocumented relative from getting deported if the INS discovered through other means that he or she was not legally present in the U.S during the time he or she was waiting for a visa number to become "immediately available".

Completing step two of this process was and still is done according to a priority system. This priority system grants visas based on the relationship that the immigrant has to the citizen or resident of the United States. This is how the priority system works: Once the visa petition is approved, the immigrant relative has to wait until a visa number becomes "available" before he or she can take the second step in the process, which is to apply for permanent residence (submitting Form I-485). The time at which a visa number becomes available, and the time at which an application for permanent residence is to be filed, varies depending on the relationship between the undocumented individual and his or her U.S. citizen or permanent resident relative. For instance, for spouses, parents, and children of U.S. citizens who are unmarried and under 21 years old (called "immediate relatives"), a visa number becomes available immediately when the relationship is proven and recognized by the INS. In these cases, an application for permanent residence can be filed immediately. For other familial relationships, such as siblings of U.S. citizens or spouses and children of lawful permanent residents, it takes much more time to complete the second step in this process because it often takes many years for a visa to become available, and the application for permanent residence may not be filed until that happens.

III. WHAT IS THIS LAWSUIT ABOUT?

In their lawsuit, Plaintiffs Maria Rosa Ramos and Nicolas Olivares (two individuals who started this lawsuit), say that the Chicago District Office of the then INS did not follow the law, INS's own regulations, nor INS's memos interpreting those regulations, because the INS accepted applications for permanent residence that were filed prematurely (i.e. accepted even though the visa numbers were not yet available for the applicants) between January 29, 1997 and April 30, 2001. Many of the people who filed these applications ended up filing prematurely, applying for a benefit for which they were not yet entitled under Section 245(i), following the advice of fraudulent notary publics or "notarios".

The Plaintiffs also challenge the legality of the Chicago District Office's actions in keeping the significant filing fees that accompanied the applications for permanent residency even when the application was filed in error. They further question the legality of using the information contained in the applications to start investigating and deporting applicants. The law, Plaintiffs claim, required the Chicago District Office to: (1) reject and return the applications for permanent residence that were filed prematurely; (2) refund the fees that accompanied those applications; (3) deny any work authorization petitions filed with the premature applications for permanent residence; and (4) not use the information provided in the premature applications for permanent residence to begin investigations against the applicants.

Defendants (representatives of the U.S. Government) deny they violated any law through their actions, and deny they have any obligation to Ramos, Olivares, or any of the Class Members they represent.

IV TERMS OF THE SETTLEMEMENT- WHAT MEMBERS OF CLASSES 1 AND 2 WILL BE AWARDED IF THE COURT APPROVES THE SETTLEMENT

Under the Settlement, all members of Classes 1 and 2 will benefit as follows:

1. CIS will review the files of all Class members who have not received any notification of a deportation hearing against them (i.e. they have not received a Notice to Appear letter). This case review will be conducted using standards set forth in a memorandum dated November 17, 2000, and issued by Doris Meissner, then Commissioner of the INS. This memorandum includes standards that are to be applied in making decisions on when removal proceedings are to be initiated. Attorneys for the Plaintiffs believe that applying these guidelines is likely to result in a decision by the INS (now the (CIS)) not to start deportation proceedings against many of the Class members in this category. Plaintiffs believe that there are approximately 3000 people in this category;

2. If the CIS decides to begin deportation proceedings against any of the Class members in the category described above, the CIS will notify those Class members of this decision and will give them thirty days to request CIS to

reconsider their decision to begin deportation proceedings and to submit information and documentation in support of their request;

3. For all Class members currently going through deportation hearings before the Immigration Courts or the Board of Immigration Appeals (BIA), DHS agrees to conduct a review of their files using the same Meissner memorandum mentioned above. However, any individual ordered removed before June 1, 2004 by the Immigration Judge or the Board of Immigration Appeals is not eligible to apply for this benefit. In order for Class members in this category to take advantage of this process, they must (a) notify the Chicago Chief Counsel for the U. S. Immigration and Customs Enforcement (ICE) that they are members of any of the two classes in this suit within six months from the date the Settlement is approved, and (b) request to have their case reviewed. Plaintiffs' attorneys believe that this review may result in the termination of deportation hearings against some of these Class members. Attorneys for the Plaintiffs believe there are approximately 200 people who fall within this category;

4. All members of Class 1 or 2 who have been deported from the United States and are eligible for a waiver of inadmissibility may also ask that the government consider their membership in this class when applying for that waiver. Attorneys for the Plaintiffs believe there are approximately 400 people who fall within this category;

5. All Class members, whether they are still in the United States or not, shall receive a credit for the fees they paid to the Chicago District Office for the filing of their application for permanent residency if they **apply for a credit within one year** from the date the Settlement is approved with the Chicago District Office of the U. S. Citizenship and Immigration Services (CIS). The credit should equal the amount paid at the time to file the application for permanent residence (Form I-485), and, if applicable, the amount paid as a penalty fee under section 245(i)(1) of the Immigration and Nationality Act ($1000 in most cases). The credit can be used only once and CIS will retain any remaining balance when the credit is used by the class member. If the amount of fees is owed by the class member is greater than the amount of the credit, the class member is responsible for the difference. The credit is non-transferable, is valid for ten years after being issued, and can be applied by the Class members to any application or petition fees charged by the CIS; and

6. If Class members re-file their applications for permanent residency under Section 245(i) once their visa number becomes available, Defendants will not deny the application for the reason that the Class members had filed the same application before during the period between January 29, 1997 through April 30, 2001.

Even if the CIS or the ICE decide not to begin deportation proceedings or if they chose to terminate deportation proceedings that are currently pending against Class members, this does not mean that CIS or ICE will be forbidden in the future from beginning deportation proceedings against those same Class members if they find through means other than those mentioned in this lawsuit that the Class members are present in the United States illegally. Plaintiffs agree that decisions relating to the commencement or termination of removal proceedings under this Agreement are solely within the prosecutorial discretion of the Defendants and the outcome of the review conducted under this Agreement cannot be challenged in this or any other legal, administrative, equitable or declaratory proceeding, or used as a basis to seek or obtain a writ of mandamus or habeas corpus. Aliens convicted of an aggravated felony, individuals who are subject to administratively final orders of removal or deportation, or individuals subject to the reinstatement of removal orders, are not eligible for relief pursuant to this Agreement.

The Settlement also provides for a payment of $90,000 in fees and cost to the attorneys representing the Plaintiffs (Class Counsel). This payment is a substantial reduction from the actual fees and costs incurred during the case, which totaled $147,986.21 for time spent to date and $2,446 in costs incurred. This total was calculated by using the Equal Access to Justice Act (EAJA) fee rate schedule, under which Class Counsel would have been entitled to hourly rates of $145.87, $148.43, and $148.75 for years 2002, 2003 and 2004, respectively. The total hours spent by the attorneys each year are 326.5 for 2003, 334.7 for 2003 and 347.7 for 2004.

V. WHO REPRESENTS THE CLASS?

The following attorneys represent Maria Ramos and Nicolas Olivares and are Class Counsel:

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1) If you believe you are a member of either Class 1 or 2, Class Counsel represents your interests in this lawsuit. 2) You will not be charged for their services. 3) You may, however, hire your own attorney at your own expense to advise you on the terms of the Settlement Agreement.

VI. WHAT DO I NEED TO DO?

If you believe you are a member of either Class 1 or 2, you do not need to do anything until this settlement is finally approved by the Court. You should not contact immigration authorities, including CIS. However, if you have any questions about this case or settlement, you may consult Class Counsel by calling _____.

You are encouraged to see the complete file, including a copy of the Settlement Agreement. You may do so by visiting the Office of the Clerk, United States District Court for the Northern District of Illinois, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604. The Clerk will make the files relating to this lawsuit available to you for inspection and copying at your own expense. **DO NOT ADDRESS ANY QUESTIONS ABOUT THE CASE TO THE CLERK OF THE COURT OR THE JUDGE, OR THE IMMIGRATION AUTHORITIES.**

VII. FAIRNESS HEARING.

A hearing will be held on the fairness of this proposed settlement on [date], before the Honorable Mark Filip, District Judge for the Northern District of Illinois, in Courtroom 1725 of the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604. At the hearing, the Court will hear any objections and arguments from parties that filed written objections by [date] concerning the fairness of the proposed settlement, including the fees awarded to Class Counsel. **YOU DO NOT NEED TO APPEAR AT THIS HEARING UNLESS YOU OBJECT TO THE SETTLEMENT.**

BY ORDER OF THE COURT.