

THE U.S. ALIEN LEGALIZATION PROGRAM

By David S. North and Anna Mary Portz

TransCentury Development Associates
1724 Kalorama Rd., N.W.
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EXECUTIVE SUMMARY

Background: The Immigration Reform and Control Act of 1986 created two major alien legalization programs (the subject of this report) and two lesser ones. The largest of the programs, under §245A, provided legal status for applicants who had been in illegal status in the U.S. since January 1, 1982; another program offered legal status to Special Agricultural Workers (SAWs) who had spent at least 90 days working in specific crops. SAWs secured more benefits, more easily, than 245A applicants.

To administer the program the Immigration and Naturalization Service (INS) opened a chain of 107 legalization offices and four centralized decision factories. 245A applicants could apply between May 5, 1987 and May 4, 1988; SAWs between June 1, 1987 and Nov. 30, 1988.

Operations: The program dealt with a complex statute, and was often the subject of controversy, particularly over who was eligible, and what documentation was needed; following an open but sometimes cantankerous dialogue on regulations the battles moved to the courtroom, where INS often lost. There were also disagreements over the role of immigrant-aiding private agencies and over an extension of the 245 program (rejected by Congress).

The SAW program, but not the 245A program, experienced substantial fraud; given the rules set by Congress, and further refined by the courts, it was difficult for INS to handle the fraud though some innovative techniques were launched.

Funding arrangements, particularly in the SAW program, were unusual. Applicants for both programs paid fees, usually \$185 each. The 245A fees were dedicated to the 245A program, but most of the SAW fees were used for other public purposes despite what the authors regarded as a need for additional field staff to cope with SAW fraud. SAW applicants, as a result, unwittingly made a more than \$100 million contribution to the U.S. Treasury.

Results: Despite these problems, the program has brought major benefits to a large number of disadvantaged, low-income, minority people. Probably more than 90% of the more than 3 million applicants will receive at least temporary legal status as a result of the first phase of the program. Among the most obvious and immediate benefits are: (1) the new and welcome ability of participants to cross borders legally (which has apparently resulted in a substantial drop in illegal entries at the U.S.-Mexico border); and (2) the unscrambling of close to 2 million Social Security accounts.

Phase Two of the program, leading to permanent legal status, remains for most of the applicants. Some critics say this has been under-publicized, and that all the needed English and civics classes may not be obtained for the 245A applicants; initial second phase participation statistics, however, are encouraging.

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GLOSSARY

245A applicant -- an illegal alien seeking legalization under §245A of the Immigration Reform and Control Act of 1986; one who claims residence in the U.S. since January 1, 1982.

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AILA - American Immigration Lawyers Association

EWI - entered without inspection; an alien who crossed the border without encountering an INS examiner

INA - Immigration and Nationality Act

INS - Immigration and Naturalization Service

IRCA - Immigration Reform and Control Act of 1986

LO - legalization office

PRA - permanent resident alien; (this is the formal status of a lawful resident alien with a green card; it is the status gained after successfully completing the second phase of the legalization program.)

QDE - qualified designated entity; term used in IRCA for INS-licensed organizations who helped 245A applicants and others apply for legalization under IRCA. Most, but not all QDEs are voluntary, non-profit organizations.

RAW - replenishment agricultural worker, a legal alien status created by IRCA.

RPF - regional processing facility, an INS organization.

SAW - special agricultural worker, a legal alien status created by IRCA.

S-9 Program - an INS program which allowed SAW applicants to apply either at U.S. consulates in Mexico, or at the U.S.-Mexico border

SLIAG - State Legalization Impact Assistance Grants; these federal funds are allocated to the states to help defray social services costs linked to the legalization program.

TREA - temporary resident alien (i.e. the status gained after successfully completing phase one of the legalization program).

INTRODUCTION

This report is designed to provide an overview of what happened in the alien legalization program in the two-and-a-half years following the signature of the Immigration Reform and Control Act of 1986 (IRCA).¹ It is written, however, with the knowledge that there is an extensive, if uneven, literature on the subject. In cases where a specific subject has been covered well by someone else, we will summarize those findings; in cases where the topic has been little explored, we will devote more attention to it.

Examples in the first category are: Meissner and Papademetriou's detailed report on, among other things, the open process through which IRCA's regulations were drafted; Kissam's useful examination of the demographic characteristics of the Special Agricultural Workers (SAWs); and the National Council of La Raza's careful analysis of the demand and supply for English/civics instruction to meet the needs of those in the second round of the legalization program.²

In the second category there are at least three subjects which we think deserve greater attention than they have received to date: the (almost totally positive) changes in human behavior among the newly-legalized, the apparently extensive fraud in the SAW program, and the strange financing of the legalization program.

1 Pub.L. 99-603.

2 Doris Meissner and Demetrios Papademetriou, The Legalization Countdown: a Third Quarter Assessment, The Carnegie Endowment for International Peace, Washington, DC, February, 1988; E. Kissam and J. Intili, Legalized Farmworkers and Their Families: Program and Policy Implications, California Human Development Corporation, Santa Rosa, CA, January, 1989; "The Missing Link: Community-based Organization Participation in ESL/Civics Classes," a memorandum distributed by The National Council of La Raza, Washington, DC, March, 1989.

The focus in this report is on the alien legalization program as a process; how was it organized, funded and managed? How well did the Immigration and Naturalization Service (INS) work with the other players? What happened to the program as time passed and as various pressures came to bear? What were the direct and indirect outcomes of the program?

This report is the third in a series written about the U.S. legalization program by TransCentury Development Associates (TDA). An earlier, broad-brush examination of the program (as of the late winter of 1988), written as the filing period for the principal alien legalization came to an end, recommended that the filing period be extended; this was Through The Maze: An Interim Report on the Alien Legalization Program. A narrower study of the INS' Regional Processing Facilities (RPFs) in the program, called Decision Factories: The Role of the Regional Processing Facilities in the Alien Legalization Programs was released by the Administrative Conference of the United States earlier this year.

The raw material for this report includes extensive literature on the subject,³ visits to more than twenty of the INS Legalization Offices (LOs) in eleven states,⁴ interviews with immigrant-helping agencies in as many areas, tours of each of the four INS RPFs, and countless conversations with advocates, lawyers, legalization applicants, and INS personnel.

While it would be impossible to thank each of our important

³ In addition to specific reports, regulations and newspaper articles cited throughout this volume, we relied on four ongoing sources of information: Interpreter Releases, Federal Publications, Washington, DC; Legalization Update, National Center for Immigrants' Rights, Los Angeles, CA; the periodic mailings of the National Immigration, Refugee and Citizenship Forum, Washington, DC, and "Legalization Statistics," published periodically by the Statistical Analysis Division of INS, Washington, DC.

⁴ California, Florida, Georgia, Illinois, Indiana, Massachusetts, New York, New Mexico, North Carolina, Texas and Virginia.

sources, we would be remiss if we did not mention those whom we called upon most frequently in the course of this work, such as Warren Leiden and Crystal Williams of the American Immigration Lawyers Association, Carol Wolchok of the American Bar Association, and Charles Kamasaki and his colleagues at National Council of La Raza.⁵ We are grateful to Aaron Bodin, E.B. Duarte, Mike Hoefer, Terry O'Reilly, and Bob Warren, as well as many others, of the INS Central Office for their assistance. We are, similarly thankful, in the INS Regions to Joe Thomas in the Western RPF, Jim Bailey, in the Northern Regional Legalization Office, Lewis DeAngelis in the Southern RPF and Edward Wildblood in the Eastern Region and to their respective staffs. We had a number of good conversations with others involved in the immigration policy business, such as Doris Meissner of the Carnegie Endowment for International Peace, Demetrios Papademetriou at the U.S. Department of Labor, Rick Swartz of the National Immigration, Refugee & Citizenship Forum, Professor Charles Keely at Georgetown University, Michael Fix and Frank Bean of the Urban Institute and Paul Hill of Rand Corporation's Washington Office. A special note of thanks goes to those INS and immigrant-serving agency staff members who spent time with us during those hectic days just before the application filing deadlines for both the regular and the SAW programs. Dona Coultice and William King of the INS Western Region and Darwin Weirich of the Fresno Legalization office are in this category as is Vanna Slaughter of the Dallas office of Catholic Immigration and Refugee Service.

⁵ While the advocates of the restrictionist position were extremely active during the debates about IRCA, they played a much smaller role in the implementation of the legalization program than the pro-immigrant advocates; thus virtually all of the external pressures on INS during the implementation of legalization came from the pro-immigrant side of the table. In the course of this study we did, however, talk with such restrictionists as Roger Conner, then with the Federation of Americans for Immigration Reform (FAIR), Patrick Burns of FAIR and David Simcox of the Center for Immigration Studies.

The generous support of the Ford Foundation made this study possible, and we are grateful to William Diaz, our program officer, and to his colleagues Mary McClymont and Paul Balaran, for their patience, encouragement and useful suggestions.

Whatever errors of fact or of judgment, or whatever omissions, are, despite all this assistance, the authors' alone.

I. BACKGROUND

A. Why a U.S. Legalization Program?

The alien legalization program had its roots in a long-growing concern about the size of the undocumented or illegal alien population in the United States and its impact on the nation.

While there are, and have been, illegal immigrants in the U.S. from all over the world, most of the dialogue on the subject over the years has focussed on the southern border, on Mexican Nationals, on the American southwest, and on the labor practices of the fruit and vegetable growers in that area. Hence, almost unconsciously, the emphasis during the pre-IRCA debate was on those who crossed the border by night (entered without inspection, EWI, is the INS term) and not on the large number of aliens who arrived with valid visas which they later violated (visa abusers). And, as we will see later, this focus on the southwest shaped the detailed regulations and policies which made it easier for some groups of illegal immigrants (notably Mexican Nationals) to become legal, and harder for others. How did this southwestern tilt to the debate come to pass?

In the first place, the most visible, and the most numerous of the illegal immigrants were, in fact, from Mexico, but there also is an element of dimly-remembered history.

There were two periods in U.S. history when strong efforts were made to do something about an illegal alien population. There was the forced repatriation of people of Mexican heritage, including many legal residents and some citizens, during the depression, and there was the para-military "Operation Wetback" during President Eisenhower's first term. While the depression activity involved both city and country dwellers, the 1950s action (run by one of Eisenhower's classmates at West Point, INS Commissioner Joseph Swing), dealt primarily with farmworkers. Neither of these actions were set in motion by Congress, and both left a series of unpleasant memories. No one wanted those pieces

of history repeated.⁶

Much of the growth of the illegal population during the last twenty-five years is usually linked to the end of the nation's own guestworker program, the bracero program which operated from World War II through the end of 1964.

That program, which brought Mexican men into the U.S. for agriculture work on a legal but controversial basis, served as a safety valve for Mexico's unemployed blue-collar workers. It gave Western growers a docile and inexpensive work force, which was sent home at the end of the season.

While the always influential growers liked the bracero program, as did (quietly) the Mexican Government, it came under increasingly powerful pressure from three allied groups in the United States: organized labor, the Catholic Church and the Mexican American community (then much less strong than it is now). This coalition argued that the braceros were exploited by their employers and as a result wages for farmwork were artificially low, and farm jobs were not available to U.S. residents.⁷ In the middle '60's, at the time of the civil rights movement, these arguments carried the day and Congress decided not to extend the program. It ended on the last day of 1964.

The western growers adjusted only partially to the loss of the braceros -- mechanical tomato and cotton harvesters filled the gaps in those harvests, but many of the growers preferred to hire the familiar Mexican Nationals, legal or illegal, rather

⁶ For more on these two forced emigrations, see Leo Grebler, Mexican Immigration to the United States: The Record and Its Implications, Mexican American Study Project: Advance Report No. 2, University of California at Los Angeles, 1966.

⁷ For more on the wage-reducing results of the bracero program see the late Ernesto Galarza's understated Merchants of Labor, Rosicrucian Press, San Jose, 1964.

than experimenting with new sources of legal labor.⁸ The flow of illegal aliens across the Southern Border increased each year. At first then INS Commissioner Raymond Farrell sought to downplay the increasing flows of illegal aliens but by the time of the Ford Administration, the Executive Branch decided that perhaps something needed to be done. The arguments for action were the two that have stayed with the dialogue over the years: some people, usually on the right, worried about too many immigrants--generally--and usually expressed this by noting the lack of law enforcement; while others, usually on the left, worried about too many powerless illegal immigrants in the labor markets.

The Ford Administration created a mid-level task force⁹ to look into the problem, and it decided that what the country needed was a two-tier approach. In order to discourage future illegal immigration, there would be a program to penalize employers who hired them, and in order to diminish the size of the illegal alien population, those who had been in the nation for a while would be given temporary legal status.¹⁰ While the Ford Administration created the Domestic Council task force, it waited until after the 1976 election to release its report.

The Carter Administration was not eager to tackle the problem either, and it accepted the Congressional decision to create a more serious ad hoc body, the Select Commission on

⁸ The senior author served as Assistant for Farm Labor to the U.S. Secretary of Labor during the termination of the bracero program; no one at the time predicted that the death of that program would be followed by an upsurge in illegal immigration though in retrospect it appears to have been inevitable, given, among other things, grower preferences and the INS policies and funding of the time.

⁹ See "Preliminary Report: Domestic Council Committee on Illegal Aliens," U.S. Department of Justice, Washington, December, 1976.

¹⁰ In a crude sense there was a precedent for such a legalization program; during "Operation Wetback" the Immigration Service, in the inelegant words of the day "dried out some of the wets" by converting them to bracero status.

Immigration and Refugee Policy. The Select Commission was no task force, it had five Senators and five Congressmen (including Senators Kennedy (D-MA) and Simpson (R-WY)) among its members. It held hearings all over the country, and then came to pretty much the same conclusion as the Ford task force -- the nation needed employer sanctions and a legalization program.

The Reagan Administration was more willing than previous administrations to tackle the subject. The 1980 presidential campaign took place right after the Mariel boatlift, an event which suggested that an Administration could be vulnerable to charges that it had mismanaged its immigration policy. It was the first Reagan Attorney General, William French Smith, who popularized the concept that "we have lost control of our borders." Further, the restrictionist lobby was newly active, and eventually Senator Simpson and his allies were able to pass the Immigration Reform and Control Act in the fall of 1986.

B. Other Nations' Legalization Programs

While U.S. decision-makers toyed with the possibility of legalization, and then debated it seriously, other nations moved ahead and implemented alien legalization programs of their own.¹¹

To some extent these programs were created because of situations much like that in the U.S.: an alien population was

¹¹ For a summary of these overseas experiences, see Doris Meissner, Demetrios Papademetriou and David North, Legalization of Undocumented Aliens: Lessons From Other Countries, A Report on a Consultation Held at the Carnegie Endowment for International Peace, Washington, D.C., December 10, 1986. See also North, Alien Legalization and Naturalization: What the United States Can Learn from Down Under, New TransCentury Foundation, Washington, D.C., 1984; The Virgin Islands Alien Legalization Program: Lessons for the Mainland, New TransCentury Foundation, Washington, D.C., 1983; and Amnesty: Conferring Legal Status on Illegal Immigrants, (a report on the Canadian and Western European experience), New TransCentury Foundation, Washington, D.C., 1980.

out of status, and the government did not want to expel them. In several of these situations, such as the British amnesty of 1974-77 and the Canadian program in 1973, the situation was quite similar to that of the U.S. in that the government had changed the rules for immigration, and wanted to make a one-time exception for those who had migrated under the old rules.

By the time IRCA had passed the following countries, and perhaps others as well, had experimented with alien legalization programs: Argentina, Australia, Belgium, Canada, France, New Zealand, The Netherlands, United Kingdom and Venezuela.

The programs in these countries tended to be quite different than IRCA's; they were generally relatively small in size (in terms of the absolute numbers of those eligible for them¹²), they were much more generous than that of the U.S. (in terms of the definition of who was eligible) and the benefits offered were better than those provided in this country (full legal immigrant status, not a temporary status, was the norm). There was only minimal mention of these overseas experiences in the IRCA debate about legalization.

C. What Congress Decided

"Ollee, ollee, all home free"

The amnesty call in hide and seek

Other nations' legalization programs were about as simple and direct as the words that the child who is "it" yells when he unilaterally ends or suspends the game.¹³

¹² The Canadian amnesty provided legal status for about 50,000 people -- and using the standard nine-to-one ratio when comparing demographic data in the two nations, that would suggest a 450,000 response in the U.S. Australia tried amnesties three times, getting about 300 the first time, 3,000 the second time and perhaps 10,000 the third time.

¹³ This is the call as remembered by one of us who grew up in upstate New York; other versions remembered by TDA staff and spouses include: "Ollee, ollee olson free (used in the Chicago suburbs fifty years ago), "Ollee, ollee, oxen,

Sometimes this happens because "it" gives up the search, sometimes when someone else beats "it" back to home base, and sometimes because an authority figure has announced it is time to return to the house. It is a clear invitation, even a command, to come out of the shadows; the terms of the offer are straight-forward and the benefits known to all.

The Congress of the United States, however, opted for a different approach, a less generous and much more complex one. Because a majority of the legislators would not support a sweeping legalization program (like most of those of other nations), a more restricted formula was adopted. And because there was the usual legislative horse-trading over the terms and conditions of the legalization program, a number of complications were built into the system. Finally, there was the aforementioned focus on the special problems of the southwest.

Congress finally settled on two major legalization programs, and a couple of lesser ones. The major programs were for aliens who had been in the nation illegally since January 1, 1982, and for aliens who had worked at least ninety days in certain kinds of farm work in the period ending May 1, 1986. The January 1, 1982 program is spelled out in Section 245A of the Immigration and Nationality Act (INA), hence the term 245A applicants. The farm provisions created a class of Special Agricultural Workers, hence SAWs.¹⁴

all in free" (District of Columbia), "Ollee, ollee, exction, all in free" (New Jersey), "Ollee, ollee, in come free" (Florida) and "Ollee, ollee in free" (Kansas and Wisconsin).

¹⁴ The other two programs were for: Cuban-Haitian Entrants, a population that had been identified by INS as illegally in the country by January 1, 1982, and for really long-term illegal immigrants, those in the country since January 1, 1972. Both programs produced applicants in the tens of thousands (as opposed to the more than three million applicants in the main programs). For more on these programs

There were both similarities and differences between these two programs. Both programs had these characteristics:

- o applicants had to show that they had been in the United States illegally for certain periods of time;
- o aliens seeking the benefits of legal status had to apply for the program in person and be interviewed;
- o there were limited time periods (windows) in which applications could be filed: May 5, 1987 to May 4, 1988 for the 245As, and June 1, 1987 through November 30, 1988 for the SAWs;
- o applicants had to go through a multi-step, expensive process, in which they filled out forms, sought documentation, went through a superficial medical examination, and paid fees to the Government (\$185 for an individual, and no more than \$420 for a nuclear family);
- o applicants had to show that they were not excludable under most of the provisions of the INA, which bars certain classes of criminals, diseased persons and welfare recipients;
- o most past immigration law violations, however, were not held against applicants; and
- o applicants, at the first stage, did not have to show any knowledge of English or civics.

There were substantial differences between the two major programs, however, as Exhibit One indicates. Some of these differences, such as the longer application window for the SAWs, were deliberate decisions of the Congress (which wanted SAWs to be able to apply during two harvest seasons). Other differences were more or less accidental and related to the unusual legislative history of the SAW program.

The SAW provisions were drafted outside the usual hearings process by three members of the House with different interests, two of whom happen to share a house on Capitol Hill. The trio of Democrats included Howard Berman, who

see North and Portz, Through the Maze, pp. 4-6.

Exhibit OneDifferences Between the SAW and the 245A Programs

<u>Policy or Procedure</u>	<u>245A</u>	<u>SAW</u>
Eligibility:		
Application deadline	May 4, 1988	Nov. 30, 1988
Minimum days presence in the U.S. on March 1, 1988 *	2,071	90
Maximum total absence from US since 1/1/82	180 days**	no limit
Maximum length of individual absence since 1/1/82	45 days**	no limit
Fee	\$185	\$185
Apply overseas?	no	yes
Apply at border?	no	yes
Where can one apply in the U.S.	only at specific LO	any LO in the U.S.
Medical examination as part of application	can be postponed only at end of program	may be postponed under several circumstances
Can "Employment Authorized" card be used at border	no	yes
Second Phase:		
Application for PRA	must apply	automatic
Need to study English	yes	no
Need to study civics	yes	no

* Assumes, for 245As an absence of 179 days since 1/1/82 and for SAWs, an application filed at either the border or overseas; most SAW applicants have resided in the U.S. for more than 90 days.

** waivers were potentially available for these time limits

spoke for the farmworkers, Leon Panetta, who spoke for the growers, both of California, and Charles Schumer of New York, who played the role of deal-maker. Once these three were able to put together a farmworker compromise acceptable to all the major agricultural interests, they were able to persuade the managers of the bill (Senator Simpson and Congressman Peter Rodino (D-NJ)) to accept their provision. Without the support of California agri-business the whole bill would have been defeated, or at least that was the calculation of the managers.¹⁵ As a by-product of these maneuvers, many of the benefits for SAWs were different from (and generally more generous than) those for the other legalization applicants.

After years of controversy and complex legislative activity¹⁶ on October 9, 1986 the House of Representatives, using a modified open rule, passed by a vote of 230-166, their carefully negotiated version of IRCA. The more enforcement-focused Senate bill had been hammered out in 1985. The next step toward passage was the Joint Senate-House Conference where 32 House conferees and 7 Senators, facing the impending conclusion of the 99th Congress, acted swiftly, meeting on October 10 and 11 and in a closed 5-hour caucus on October 14 before announcing that they had reached consensus on the key areas of controversy. The Conference Report then was sent to the two chambers, with the House passing it on October 15, and the Senate two days later, after voting down a threatened filibuster by Senator Gramm

¹⁵ The source of this account is a series of conversations with those who played roles in IRCA's legislative history.

¹⁶ Since IRCA was such a broad and intricate piece of legislation the House bill went through a multi-committee-consideration process called sequential referral; while the principal work on the bill was done by the House Committee on the Judiciary it was also reviewed by the Agriculture, Labor and Education, and Ways and Means Committees.

(R-TX) who objected, among other things, to the specter of document fraud. President Reagan signed the bill on November 6, 1986.

D. Program Operations

D.1 Planning. The Immigration and Naturalization Service had planned for the passage of IRCA. On several occasions in the 1980's an immigration bill seemed to be on the verge of passage, and INS devoted substantial resources to planning both a legalization and an employer sanctions program.¹⁷ A special legalization program for farmworkers, however, was not expected until fairly late in the process.

During these planning exercises, a number of important decisions were made.

- o Although the legalization program would have a separate identity, it would be managed through the normal INS Central Office-Region-District chain of command. The alternative of creating a whole new agency to run the program, a sort of subsidiary to INS, was rejected.

- o The legalization program, however, would not make use of INS' existing network of some 40 district and sub-district offices, which were regarded as both crowded and having too much of an enforcement atmosphere about them. A new set of single-purpose Legalization Offices (LOs) were to be rented and furnished for the program and no uniformed INS personnel would be allowed in LOs.

- o Decisions on individual legalization applications, following an interview at the LO and electronic checking with INS, FBI and other files, would be made at four regional processing facilities (RPFs); these offices were to be models of modern, computer-assisted decision-making.

- o Special arrangements would be made to offer unusually attractive, 18-month assignments to recently retired INS

¹⁷ The senior author participated, from time to time, in some of these exercises.

officials to serve as executives in the program.¹⁸

o Special efforts were to be made to enlist immigrant-serving agencies to help encourage applicants to come forward; organizations licensed to do this work by INS were termed Qualified Designated Entities (QDEs) by the legislative draftsmen.

o A major public relations program was to be launched to reach out to the applicants, a group of people who, by definition, had successfully avoided INS in the past.

As we will try to show in the balance of the report, INS handled some of these challenges better than others. It was best at institution-building: hiring and motivating employees, securing space and equipment, and managing the finances. It was remarkably open in its regulation-writing process. It handled the decision-making about 245A applications reasonably well (although there are some advocates who will disagree). However, it did not do as well in its relations with the QDEs, or in SAW decision-making, where it appeared overwhelmed by questionable applications. Further, according to observers whose judgment we trust, INS' public relations program was belated, underfunded and not as

¹⁸ The vast majority of the INS staff are career people, and many of them spend most of their working lives as INS employees. Since INS is, among other things, a law-enforcement agency (with a substantial uniformed force, the Border Patrol) many senior INS people are covered by the federal government's mandatory retirement age of 55 for law enforcement personnel. Those with more than 20 years of law-enforcement service can retire at 50. There was, as a result, at the time of IRCA's passage, a large pool of recently-retired, still relatively young executives. INS knew this and saw to it that special language was written into IRCA allowing the hiring of no more than 300 of these annuitants; they were, unlike other re-hired annuitants, allowed to keep their full federal pension as well as their pay for 18 months. Many of the re-hired annuitants earned more than the Commissioner during the legalization program, some had combined pensions and salaries well in excess of \$100,000 a year. Although § 201 (c)(2) of IRCA made this provision applicable to all retired military and civilian employees, it was largely used with recently retired INS personnel.

successful as one might hope in its outreach to applicants, particularly non-Mexican Nationals.¹⁹

INS, however, was not alone in the program-design process. Congress created an extremely complex law (IRCA covers 100 pages), and the Reagan Administration's budget officials were far from supportive (a subject covered later).

D.2. Institutional Arrangements. The legalization function in INS was placed under the Associate Commissioner for Examinations (while employer sanctions were placed under the Associate Commissioner for Enforcement). A new Assistant Commissionership for Legalization was created, as were two Deputy Assistant Commissioner slots, one for the 245A program and another for the SAW program. These four men provided the day-to-day staff leadership of the program at the Central Office.²⁰

The line structure of the Immigration Service is headed by the Commissioner. The four Regional Commissioners report to the Commissioner and the Deputy, with the Associate Commissioner for Examinations and his legalization subordinates working in a policy management relationship to the Regional Commissioners and their legalization staffs. Each Regional Commissioner established a regional legalization officer, with the responsibility of providing

¹⁹ For a useful description of these public information efforts, see Meissner and Papademetriou, *op cit*, pp. 10-21. The authors feel that TDA should not comment on this aspect of the legalization program because TDA was a member of a coalition, in the winter of 1986-1987, which lost the competition for the public education contract to the Justice Group of California.

²⁰ There was stability in the staffing of these four offices; the only turnover occurred in the office of Assistant Commissioner/Legalization, which had two incumbents during the period covered by this study (from the signing of the bill until April, 1989). All five are career government officials.

staff leadership for the program in the region. Similarly, each of the district directors of the program appointed district legalization officers. The legalization program, in short, was managed like all other INS examinations programs, through a network of four regions and thirty-one districts.

The INS field structure is different from all other federal agencies, most of which have ten regions. Since there are fewer regions than in other agencies, and since some of the INS regional commissioners are political appointees with their own power bases and networks, the role of the regional structures is an important one. Further, the distribution of legalization applicants was quite uneven, with the Western Region having about 56% of the applicants for both principal programs.²¹ Given these factors, and a particularly strong Western Regional Commissioner, that Region often operated somewhat independently from the rest of the agency and was often the first to suggest innovative approaches.

The units of INS most visible to the applicants were the 107 legalization offices which were spread from Portland, Maine on the east to Agana, Guam, on the west, and from Anchorage, Alaska, on the north to Santurce, Puerto Rico, on the south.²² Each of these LOs reported to district directors, and each handled both 245A and SAW applications, and related matters, but none were engaged in the routine work of the Immigration Service. This network of LOs was large enough and diverse enough, and the kind of outreach work being done was different enough from normal INS activities, so that some of the creativity which goes with decentralization came into play.

²¹ The Western Region of INS consists of Arizona, California, Guam, Hawaii and Nevada.

²² Coincidentally, these four far-flung LOs were not particularly busy; the activities in Guam, for example, were shifted into another INS facility partway through the program.

Applications filed in the LOs were sent to a central processing facility in London, Kentucky, and from there to the four RPFs, where decisions were made. Applicants rejected by the RPFs were (and are) able to appeal those decisions to the Legalization Appeals Unit (LAU), a branch of the INS Central Office in Washington. This then was the structure that handled the legalization programs.

D.3. Writing the Regulations. Although the Congress wrote a long, complicated law, it left a large number of matters to be defined in INS regulations. For example, IRCA speaks in terms of continuous illegal residence in the U.S. as being necessary for 245A eligibility, but says "an alien shall not be considered to have failed to [have] maintained continuous physical presence... by virtue of brief, casual and innocent absences from the United States."²³

So what is "continuous physical presence" and a "brief, casual and innocent absence"? Congress probably was thinking about Mexican Nationals returning home at Christmas time. This was just one of the many thorny definitional problems INS faced in the regulation-writing process, which brought INS both praise and criticism.

As part of the previously described planning process, INS had begun to work on draft regulations well before the IRCA was signed into law, and thus was able to circulate draft regulations fairly quickly after IRCA's passage; they were out on January 20, 1987, barely two and a half months after the November 6, 1986 signing.²⁴

²³ INA § 245A (a) (3) (B).

²⁴ The notice of availability of the draft regulations appeared in the Federal Register, Vol 52, No. 12, January 20, 1987, p. 2115; the text appeared, among other places, in Interpreter Releases, Vol. 64, No. 3, January 20, 1987, pp. 50-122. The draft regulations covered Employer Sanctions as well as the legalization programs.

It was in fact the early circulation of the draft first phase regulations in advance of the traditional publication (in the Federal Register) which gained considerable applause for INS. More than 6,800 copies of the preliminary draft were requested. The document ran 132 pages, including application forms in draft. INS received more than 4,000 written comments and hundreds of comments over the telephone.

The next stage in the process, the formal publication of the proposed regulations came on March, 19, 1987, a couple of weeks after INS had promised to deliver them.²⁵

Although INS got off to an early start, and used what appeared to be an open process, getting the regulations finalized before the opening day of the legalization program proved almost impossible. The final legalization regulations did not appear until May 1, three days before the LOs opened their doors.²⁶ There were some intra-agency strains in the process:

"INS' procedure provoked some criticism from sister agencies also charged with drafting regulations under IRCA and was not sanctioned by the Office of Management and Budget, the arbiter of rule-making matters within the executive branch. However, the procedure created an opportunity for all parties to get an early indication of the government's thinking and stimulated extensive comment and participation. ... Open exchange was critical and the regulations as ultimately published reflected an evolution in the government's thinking on a series of key points which might not otherwise have been possible.

"Although the process was, in the words of one long-time actor, 'exemplary,' it did not prevent strong policy disagreements between the parties. Antagonists during the years of debate over IRCA, immigrant-assistance groups and INS clashed repeatedly on key regulatory issues. INS made significant adjustments in its initial position, but when the final regulations

²⁵ Federal Register, Vol. 52, No. 53, March 19, 1987, pp. 8740-8795.

²⁶ Federal Register, Vol. 52, No. 84, May 1, 1987, pp. 16189-16228.

were published several important issues were still vigorously contested and disagreements over regulations continue to this date."²⁷

The general thrust of this process of publication and revision was toward expanding the legalization eligibility requirements. As Interpreter Releases summarized it, there was "one major change" (regarding continuous residence) and "a number of smaller liberalizations."²⁸

On November 17, 1987, INS compiled many of its mid-course corrections and issued Interim Final Regulations which were not formally published in the Federal Register until two months later (January 17, 1988).²⁹ The window of 245A eligibility had only a few weeks remaining when INS published another final regulation, this one substantially narrowing the definitions of "felony" and "misdemeanor" to allow some aliens with criminal records (notably for driving while intoxicated in Texas) to be eligible for the program.³⁰

Meanwhile, the regulation writers at INS had turned their attention to the second phase of the 245A program, with the following results:

- o working draft regulations were distributed informally on May 17, 1988 with a request for comments by June 20;

- o proposed regulations appeared on August 8, with additional opportunities for comment;

- o interim regulations were printed on October 31, to take effect on Nov 7, 1988 the first day of the second phase of the program. According to Interpreter Releases these regulations "though referred to as interim

27 Meissner and Papademitriou, op cit, pp. 22-23.

28 Vol. 64, No. 17, May 4, 1987, p. 517.

29 "INS Issues Interim Rule on Legalization", Interpreter Releases, Vol. 64, No. 45, November 23, 1987, pp. 1308-1310.

30 "INS Publishes Final Definitions of Felony, Misdemeanor for Legalization," Interpreter Releases, Vol. 65, No. 12, March 28, 1988, pp. 301-302.

rules... are final in form and will govern second stage legalization unless and until further amended."³¹

o amended regulations, with further modifications, once expected in April or May had not been issued by early June, 1989.

The process, in the second phase, resembled that in the first in that INS (1) again went through the unusual step of distributing its working draft, (2) did not reach final publication until just before the regulated activity was about to begin, and (3) liberalized the rules as it went along. As it was, many QDEs and service-providing agencies held up their own second phase planning and programs awaiting exact details of INS requirements.

Among the substantive changes made by INS in the October 31, 1988 rules was a decision that many of the aliens previously regarded as subject to the English and civics examination were excused from them (including people below 16 and over 64). Similarly, the public charge provisions (i.e. those barring adjustment to potential welfare recipients) were eased as a result of a court decision.

Returning to one of the first phase questions, what did INS do with the concept of "continuous residence?" Congress had started the process while using an understandable premise. If it was going to grant legal status to people who had been in the United States for a long time, they, in fact, should have spent a considerable amount of time inside the country. A standard was clearly needed. Let us see what happened to this standard in the course of the legalization program.

Regarding the breaking of continuous physical presence during the eligibility period (between Jan. 1, 1982 and enactment on Nov. 6, 1986) INS first proposed, in the draft regulations, that the standard should be an absence of no

³¹ "INS issues Final Rules for Legalization Second Stage," Vol. 65, No. 42, October 31, 1988, pp. 1128-1131.

more than 30 days per trip, and a total of no more than 150 days. There was to be some room for exceptions to be made for overstaying the 30 days, but not for the 150 days.

The commentators ganged up on INS on this issue; all 130 of them who responded in writing on this point said that INS was being too rigid in defining continuous physical presence. INS agreed, in the proposed regulations, to up to four 45-day absences with a total length of 180 days.³² The final regulations maintained this position.

Meanwhile, the immigrant advocates noted that while INS spoke of accepting absences in excess of 45 days, it had not created a formal waiver procedure. One had to apply, on an ad hoc basis, for an exception. The development of policy on this point then moved away from the regulation writers, as it did in many other matters, and into the courts and the Legalization Appeals Unit (LAU). A federal district court ruled that the Justice Department was within its powers when it refused to establish a waiver procedure for continuous residence cases.³³

The LAU proceeded to define "emergent" as meaning "coming unexpectedly into being," a broad enough definition to cover a number of situations, including a more-than-45-day absence caused by such things as the failure of Mexico's mail system to deliver a letter from the U.S. containing the needed money to make the return trip.³⁴ We also gather that INS is now accepting the effectiveness of the Border Patrol as an emergent reason for not returning to the U.S. promptly

³² "Simpson-Rodino Act Regulation Details Revealed," Interpreter Releases, Vol. 64, No. 9, summary on p. 244, and text of the proposed regulation on p. 254.

³³ "Challenge to Amnesty Continuous Residence Requirement Fails," Interpreter Releases, Vol. 65, No. 40, October 17, 1988, pp. 1065-1066.

³⁴ "LAU Defines Emergent Reasons," Interpreter Releases, Vol. 65, No. 22, June 6, 1988, pp. 595-596.

-- several applicants said that would have been back in the U.S. before the end of the 45-day-period but they kept being apprehended and escorted out of the country by La Migra.

The total length of time accepted by INS for being outside the country for emergent reasons has been stretched to as much as 305 days. Recently the LAU accepted the argument of a Mexican National woman that she had an emergent reason for staying a long time in Mexico with her sick mother, despite the presence of both her father and her siblings at the family home in Mexico. She argued that the siblings were too young to help her mother, and that her father was too old. The LAU accepted her emergent stay of 270 days.³⁵

While INS policy has liberalized on this and other legalization issues over the last two years, there are different views on the subject. The American Immigration Lawyers Association (AILA) is one of several groups saying that many applicants were turned down on what are now out-of-date interpretations of continuous physical presence, that many of those whose applications were rejected did not file appeals with the LAU, and that still others did not apply at all because of the early INS position on this issue. Senior INS officials reply that the agency did the right thing by liberalizing these eligibility rules, and that the Service should not be criticized for being flexible, and for doing what the advocates wanted done.

³⁵ "LAU Finds Emergent Reasons," Interpreter Releases, Vol. 66, No. 13, April 3, 1989, pp. 378-379. The National Council of La Raza has pointed out in this connection that: "...your example illustrates that exceptions are made only if the applicant can prove that others in the family could not care for the sick relative. We believe that the LAU definition unreasonably excludes many legitimate U.S. residents who left the country to fulfill family obligations." (Letter to the authors from Cecilia Munoz, Senior Immigration Policy Analyst, National Council of La Raza, May 24, 1989.)

Another criticism of the INS posture on this issue comes from the Asian Pacific American Legal Center of Southern California. This organization makes the point that the basic structure of the regulations do not relate to the situation of the undocumented aliens from Asia. The Center, in a report on how IRCA impacted that community, said it does not make sense to expect anyone to buy a trans-Pacific airline ticket and then spend less than 45 days visiting the homeland.³⁶ Further, under the best of circumstances a new nonimmigrant visa (which was often needed) can rarely be secured in 45 days.

In fact, it probably was the case that INS, as an institution, was much more familiar with the patterns of EWIs than those of visa abusers. (After all, it has apprehended ten times as many EWIs as visa abusers, year after year, decade after decade.) It probably did not even occur to INS regulation writers initially that significant numbers of nonimmigrant aliens, out of status but otherwise comfortable in the U.S., would abandon that status to fly home, and then successfully secure another visa, return to the States, and abuse the new visa. The 45-day limit would seem to point to such a mindset.

A third criticism is that the whole process of creating a standard of residence in the United States in connection with the legalization process has become much too complicated; at this writing there are, as shown in Exhibit Two, four different absence periods in the legalization process, each covered by a different set of rules.³⁷ The

³⁶ See that organization's "Asian Pacifics and U.S. Immigration Policy: IRCA Legalization, Phase I," Los Angeles, California, 1988, pp. 23-27.

³⁷ We are grateful to Crystal Williams, then with the American Immigration Lawyers Association, for her assistance in this complex area.

Exhibit Two

A Not-Very-Brief-and-Casual Description of Rules
Governing Applicant Absences from the U.S. in the 245A Program
(as of April, 1989)

Period	Summary of Applicable Rule
Absence Period # 1	Period: from 1/1/82 to 11/6/86 Concept: continuous residence Exception: brief and casual absences of not more than 45 days each, totalling no more than 180 days, except for emergent circumstances as defined by INS
Absence Period # 2	Period: from 11/6/86 to TRA application date Concept: continuous physical presence Exception: brief, casual and innocent absences, for which no time limits have been established. All decisions on exceptions are done on a case-by-case basis.
Absence Period # 3	Period: from TRA application to TRA grant Concept: advance parole is required, which routinely covers 30 days*
Absence Period # 4	Period: from TRA grant until PRA application Concept: continuous residence Exceptions: any period covered by advance parole, and any brief and casual absence of not more than 30-days each, totalling no more than 90 days, both extendable under emergent circumstances

* While TRA grants are made retroactive to the date of TRA application, there is, in fact, a gap between those two dates during the application process.

Sources:

Period #1: 8 CFR 245a.2 (h)(1)(i), and for definition of "emergent," Matter of C... Interim Decision 3087 (Comm'r, Nov. 15, 1988).

Period #2: INA § 245A(a)(3)(A) & (B); 8 CFR 245a.1 (f); and for the exception, Catholic Social Services v. Meese S-86-1343-LKK (E.D, Calif. 1988)

Period # 3: 8 CFR 245a.2 (m); but see Bamondi v. INS, No. 88-1410-KG (S.D. Calif. 1988)

"brief and casual" absences during the first of these periods are handled differently from the "brief, casual and innocent" absences in the second period.

The problem of course is that too many actors, in the Congress, the Service and the courts, each approached the absence question narrowly, dealing usually with only one of the four specific time periods. All this was done in the uniquely American setting in which the legislative branch writes extremely detailed statutes, and then the bureaucrats/regulation-writers and the judges further define them, so as to narrow the area in which decisions need to be made subsequently by the bureaucrats/adjudicators.

Getting back to the totally noncontroversial basic decision, that people offered legalization should be firmly attached to their homes in the United States, perhaps the standard should have been shaped by Congress and INS along the following lines: applicants are allowed to be, or to have been, out of the country for as much as 10%-15% of the time during any of the absence periods, or for 45 days, whichever was longer, unless emergent reasons caused the absence to be longer than the allowed period. Under those circumstances the applicant would bear the burden of proof that there were emergent reasons. In this way perhaps some of the problems about the length of single trips would be avoided and the same standard would be applied to all periods.

One of the many other issues addressed during the regulation-writing process was the definition of "public charge". (A prospective immigrant who seems destined for the welfare rolls can be excluded on the grounds that he is likely to become a "public charge.")³⁸ This was one of the instances when INS seemed to respond favorably to advocates' pressure. INS stated that the "spirit of the regulation

³⁸ These other areas of program evolution are discussed in greater detail in Meissner and Papademetriou, op cit, pp. 23-37.

relating to public cash assistance is that if persons have received public cash assistance for short periods of time, and if there is no meaningful departure from a history of employment, the person should not be considered a public charge."³⁹

By December 29, 1987, INS had issued three memoranda regarding the public charge ground of exclusion. The first confirmed that the test to determine financial responsibility should be a prospective evaluation based on the totality of the alien's circumstances (e.g. age, health, income, and vocation). A "special rule" is outlined for aliens who can show a history of employment evidencing self-support without receipt of public cash assistance. The second memo stated that Supplemental Security Income (SSI) will only be regarded as cash assistance for those who directly receive it, and the third dealt with foster care payments, suggesting a liberal approach on public charge excludability of foster children.⁴⁰

D.4. Operating the Program: The INS perspective. On May 4, 1987, just three days after the final phase one rule was issued and only a couple of weeks after the public information contract was signed, the 245A program began.

At this point INS had rented space for 107 LOs, no mean feat for a government agency, and had furnished them attractively -- they were much better than the typical INS office. Virtually all we visited were large, open, sunny and lacked the negative signs that often decorate government offices.

By opening day INS had hired most of those who were to work in the LOs. While virtually all the LO managers were

³⁹ Legalization Update, Vol. 1, No. 3, National Center for Immigrants' Rights, Los Angeles, June 29, 1987, pg. 2.

⁴⁰ Legalization Update, Vol 1., No. 9, December 29, 1987. pg. 1.

current or former INS career personnel, most of the rest of the staff had no immigration experience. Consequently, INS not only had to train its staff in the legalization program, but in immigration generally. The legalization office staff without immigration experience had typically worked in other government decision-making programs, such as in the Social Security Administration. INS did not demand of the temporary LO staff, as it does of its career officers, that they speak at least some Spanish. Many offices, however, had largely, and some (e.g. Harlingen, Texas) totally bi-lingual staffs.

By October 1, 1987, when the legalization program was at or near the peak of its staff, INS had 2,052 people on the program's payroll (in addition to many more employees of contractors). Of these, 210 were re-employed annuitants, 1,206 were newcomers to the Service, and 636 were INS career people on detail to the program. A large proportion of the third group was assigned to the RPFs.

Returning to the start-up of the program, fortunately for the agency, it began slowly. With only a handful of applications coming in each day, the LO managers could use the time as an additional training period. On June 1, 1987, the SAW program began; it, too, was off to a slow start. There were a number of reasons for the slowness in both programs, but the principal ones were that (1) eligible aliens were wary of this new program, and (2) once they became interested, they learned that applying would take substantial amounts of time and money.

On the first point, some of the more isolated eligibles simply did not believe it when the program was explained to them. "Why would the government do a thing like that?" they asked. Others suspected a trick, that they would be whisked out of the country if they admitted they had been in the nation illegally. The amount of effort, money and time lost from work needed to apply also caused some delays, and in some cases probably caused eligibles not to apply. The 245A

program demanded a plausible documentation of one's presence in the U.S. over a period of more than four years (from January 1, 1982, at the latest through May 4, 1987.) This demand was laid on a low-income population which had wanted, before IRCA, to be hidden from society's attention and its documents.

The program was an expensive one, certainly worth the price as a long-term investment, but expensive nevertheless. A typical 245A applicant who sought help with his application (as many did) would have had at least the following expenses:

application fee (paid to INS)	\$185	41
medical examination	\$25-\$125	42
assistance with application	\$75	and up ⁴³
photos, fingerprints	\$15-\$25	

all in addition to probably losing at least three days of work, one for the medical examination, one for filing the applications and a third for the interview. The \$75 quoted above for assistance with an application was the fee often established by the QDEs. Applicants going to a lawyer for

⁴¹ The fee, for both SAWs and 245As, was set at \$185 for adults, and \$50 for a child. The total fee for a nuclear family was capped at \$420. The cap, however, required that the fee be paid all at once, but the cheaper-by-the-dozen approach was of no use to families that could not come up with that much money at one time.

⁴² The wide-spread range in the cost of the mandatory medical examination had little to do with the differing thoroughness or difficulty of these examinations, and everything to do with old-fashioned, Adam Smith economics. Early in the program, and in places where few such examinations were needed, they were costly. In the cities where applicants clustered, particularly at the end of the program, there was vigorous competition and low prices. An alien entering a LO was likely to be handed several flyers, promoting various clinics, with the examination's price printed in large numbers.

⁴³ Probably 40 to 50% of the applicants had paid assistance; some 20% were assisted by QDEs, and the balance by lawyers and others.

assistance paid much more.

Between May, 1987 and November 1988, a total of more than 3.0 million applicants applied for the 245A and the SAW programs. This heavy volume did not arrive in a steady flow; three deadlines encouraged bursts of activity. These came on September 1, 1987, May 4, 1988, and November 30, 1988, with the first two directly effecting 245A applicants, and the third SAWs.

The first deadline was the least significant; during the first few months of the legalization program an undocumented alien could meet the Employer Sanctions documentation demands by simply self-certifying to his or her employer that the worker was an applicant for legalization. In the month before that system ended a total of 168,000 245A applicants filed.⁴⁴ Applications then dropped off, particularly around Christmas, as the trade-off between spending money on Christmas or on legalization apparently diminished LO activity. There were less than 50,000 applications recorded in January, 1988. Another factor probably at work in the winter of 1987-1988 was a "wait and see" attitude among many of the eligibles. We gather that applications filed in the first few months were largely those of persons who were quit confident of their eligibility and of their ability to manage the system. Their somewhat less confident neighbors watched to see what happened to those first applicants; when the TRA cards began arriving for the early applicants more of the eligibles began to apply.

The next burst of activity came in April and May, 1988, as the deadline approached for the 245A program. Some

⁴⁴ These totals, and those on Exhibit Three are from one of the INS statistical systems, LOSS, which recorded applications when they entered the system, rather than on the day that they were filed. Since this is the case, the peaks and valleys of applications, shown in the exhibit, are less dramatic than they would be if they recorded the month of filing, rather than the month the filing was noted.

221,000 filed in the month of April, and 323,000 were recorded in May. Close to 7% of the program's total flow of 245A applications were filed on the last day, which was in keeping with the annual rush of income tax filings on April 15, and with the Canadian amnesty experience. The Canadian program had been shorter (60 days) and more intense than the American program, and fully 10% of the applications were filed on its last day.

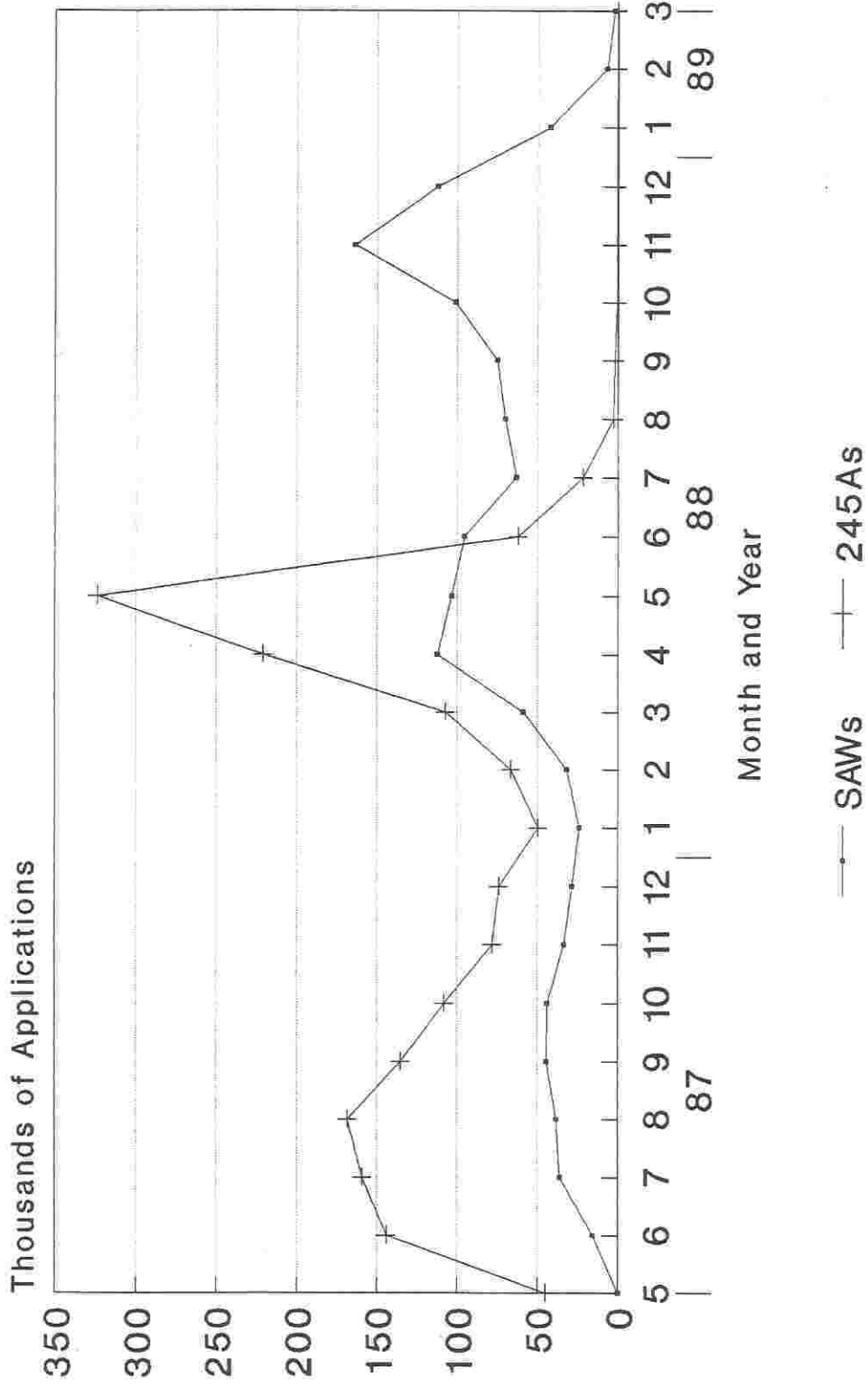
There was an upsurge in SAW applications in May as well, as farmworkers rushed to meet a deadline that did not apply to them. The final burst of activity came in late November when the SAW program ended. There were 164,000 applications filed that month. These surges are of interest for two reasons: (1) they presented substantial logistical problems for the Service, and (2) in the 245A program they set in motion follow-on surges that are sure to recur in the second phase of the program. Exhibit Three shows the rise and fall of applications, a set of gyrations which makes the variations in the Dow Jones in recent years look like a Kansas prairie.

INS knew that it would be facing surges in applications, and was largely prepared for them. There were two sets of arrangements which were designed to ease the last-minute pressures on INS, on other agencies, and on the applicants. These were: (1) a provision at the end of both the 245A and SAW programs for LOs to accept skeletal applications (a signed form and a money order, but no medical examination and no supporting documentation -- those could be furnished later); and (2) a provision allowing applicants to file an even more skeletal applications with QDEs on condition that these be completed within 60 days of the deadlines; an applicant who did not have \$185 for the INS fee could file with a QDE, and pay the \$185 later in the 60-day period.

There were some glitches, however. For example, although INS knew that there would be a last-minute rush,

Exhibit Three

Legalization Applications Filed By Month



Data are for the month the applications were logged into the INS/LOSS system

some LOs scheduled interviews on May 4, for those who had previously applied (and could be interviewed later), instead of freeing staff to handle the flood of applicants. Then, on November 30, when the SAW surge came, INS had again scheduled similar interviews for that day.

D.5. Operating the Program: The Applicants' Perspective.

To obtain a better appreciation of the alien legalization program in general it is useful to follow a couple of imaginary applicants through the decision-making process.⁴⁵

The Case of Agnes B. Agnes B., a woman in her thirties and a Mexican National, with one Mexico-born child and two younger U.S. citizen children, had lived in the U.S. for a number of years; she decided that she might be eligible for legalization and visited a QDE to inquire. She learned that she was, in fact, probably eligible for the 245A program but she would need to provide documentation.

On the next visit to the QDE she brought along a shoebox full of documents, some useful to her cause, some useless. The QDE case worker sorted through the box, and pulled out (for photocopying) a set which depicted Agnes' life in sufficient detail to support her application. There was her birth certificate from Mexico; the 10-year-old U.S. marriage license; her husband's old Texas driver's license (they had moved to Indianapolis a year earlier); an El Paso Independent School District report card for the oldest child, fortunately dated June 2, 1981; an INS document showing her one brush with the Border Patrol; birth certificates for the two U.S.-born children; several doctor's bills; some pay stubs and rent receipts; the insurance on the family car, dated July 1, 1983, and more. Agnes had the money she needed for her own application (\$185) and the \$50 for the oldest child. As was often the case, this was a

⁴⁵ This section is a modification of a passage in North and Portz, Decision Factories.

family with mixed immigration statuses; while mother and oldest son were undocumented, the father had a green card and the younger children were U.S. citizens.

The caseworker helped her fill out the I-687 application forms for herself and her son. Then Agnes carried that form, the checks, the photos and the medical examination to the nearest LO. Since she was living in Indianapolis at the time she was in luck -- there was a nice big office with few applicants and she had an immediate interview. Elsewhere she might have had to wait for months.

The INS adjudicator looked through her collection of documents, read the application carefully (there was no time pressure that day) and asked a few questions. She wanted to know how much time, since January 1, 1982, Agnes had spent outside the country, just a few weeks Agnes said. The LO officer was satisfied that Agnes and her documents and her application meshed with one another, and that she had been in the U.S. since before January 1, 1982. The adjudicator marked "approval recommended" on the worksheet (I-696), gave Agnes a receipt for her checks ("fee'd her in" to use the INS term), walked her and her son over to a Polaroid camera, took her picture, and sealed the photo into a driver's-license-sized work-authorization card.

Then Agnes and her application went their separate ways. Agnes and her son took their new cards, which came out of the sealer about the temperature of freshly-baked bread, and went home to wait for the next step.

Their files were sent to the national clearing center, in London, Kentucky, where a contracting firm key-punched the more important information from Agnes's application. The firm sent electronic messages to a series of U.S. government index systems to see if any of them had any records on Agnes. Among the systems queried in this, and every other case, are the FBI master file on criminal activities, the Government's lookout book file for people they want to stop at the ports of entry, and several, not-yet-totally connected INS data systems.

Once these activities had been set in motion, Agnes' file was boxed up with scores of others and sent overnight by Federal Express to another location not usually associated with immigrants, the basement of the federal building in Lincoln, Nebraska. Here Agnes' file was delivered to the RPF for the INS Northern Region.

The file was logged in and was placed on a shelf for several weeks. Meanwhile, the query from London, Kentucky, produced no responses from any of the electronic files consulted. The FBI knew nothing about Agnes. None of the INS files reflected her one apprehension by the Border Patrol (which is not unusual for a single, non-aggravated apprehension). In the words of the RPF, there were no hits on her case, and since this was true, and since there was a recommendation for approval from the LO, her file went into the automatic approval category.

A sample of 10% of these cases are reviewed at the RPF, but Agnes' was not, and a letter was ground out telling her to come back to the Indianapolis LO for another card, this one indicating that she had been approved for TRA status.

Agnes regarded the letter with mixed emotions; it was neither attractively printed nor immediately scrutable (see Exhibit Four). Worse, it was about her, and not about her and her son. Had she been approved, but her son denied? What had happened, as she would never learn, was that her son's file had been selected in the random quality review at the RPF; once the adjudicator saw the son's file he asked for the mother's already-approved file as well, and it took some days before he got back to the youngster's case, which was quickly approved once it got to the top of the pile. (INS, like virtually every other government agency except those administering Aid to Families with Dependent Children, works through cases individual by individual, as each single person must qualify or not qualify on his or her own.)

Since Agnes, and, later, her son, were approved for Temporary Resident Alien (TRA) status, she was effectively

EXHIBIT FOUR

This is INS' Blurred Message to
Legalization Grantees

F
R
O
M

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
REGIONAL PROCESSING FACILITY
P O BOX 569710
DALLAS TX 753569710

REORDER SCIM - 1

YOUR CLIENT:
FILE NUMBER:

FEE RECEIPT NUMBER:

DATE: 03/09/88

UPON CONSIDERATION, IT IS ORDERED THAT YOUR APPLICATION (I-687) FOR STATUS AS A TEMPORARY RESIDENT ALIEN UNDER SECTION 245A OF THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 BE APPROVED.

YOU MUST RETURN TO THE LEGALIZATION OFFICE WHERE YOU FILED YOUR APPLICATION IN ORDER TO RECEIVE YOUR NEW I-688, TEMPORARY RESIDENT CARD. WITH THIS NOTICE, YOUR I-688A CARD, AND YOUR SOCIAL SECURITY NUMBER NOTIFICATION WITH YOU.

ANY FURTHER QUESTIONS YOU MAY HAVE SHOULD BE DIRECTED TO YOUR LOCAL LEGALIZATION OFFICE.

T
O

DALLAS

TX

DIRECTOR

003350

I-692A (5-5-87)

Note: This is a photocopy of a photocopy of an actual notification. It does not, however, do much injustice to the quality of the graphics.

through phase one of the program, and would, later, as will the reader, face phase two.

The Case of Sam C. While Agnes B. was clearly eligible for section 245A TRA status, and was found to be eligible without difficulty by INS, the imaginary Sam C. presented a more troublesome case, for himself, and for the agency.

Sam is a 25-year-old single male from Belize. He now works in a store in Chicago which sells records and tapes, and rents videos, to a predominantly Jamaican clientele. He walks, talks and dresses like a city person. He says that when he first came to Chicago in 1985 he knew no one, and spent several months working for a Jamaican crewleader on the truck farms in Cook County south and east of Chicago. (Privately he is not sure that he worked as much as 90 days in the fields, but he is not sure that he did not; he does not share that information with anyone.)

When Sam heard about the alien legalization program he first learned of the 245A program, and knew that he was not eligible; after a while, he heard that there was a farmworker program as well, so he looked up the QDE which had an office in the Belizian neighborhood of Chicago. He went up the steps and found a little office run by the local Chinese Benevolent Association; it did not have many Chinese applicants for legalization, but it had a thriving practice among the people from Belize who lived in the neighborhood. (The last sentence is not imaginary.)

The Chinese gentleman in charge was a little dubious about Sam; he looked pretty urban for a farmworker, but he told Sam that he needed at least some evidence, other than his own word, that he had worked in agriculture. "Go find that crew leader, and have him fill out the verification form," he said. Sam took the form (I-705) and started to look for the crew leader.

Agricultural crew leaders (or labor contractors, the West Coast term) are rarely mistaken for the pillars of the community; Sam was sure that his crew leader, Jonas D., had cheated him in several ways, and did a little illegal selling of liquor and

pimping on the side. They had not parted friends. But Sam bit his lip, he looked up Jonas and asked him to sign the I-705.

Jonas had forgotten their quarrel, and may have forgotten Sam completely, but he was wise in the ways of the SAW program. He said that he thought Sam had worked for him, but would have to check his records; that would take a couple a days and it would cost Sam \$150 -- if Sam came back on Monday with the money, Jonas would see what he could do.

Sam did not like Jonas, he did not like paying \$150, but he felt he had no choice. He showed up with the money and Jonas signed the I-705 indicating that Sam had worked vegetables in the summer and early fall of 1985.

Sam went back to the Chinese QDE where the rest of the application was completed. He then visited the Blue Island legalization office where he was interviewed by an adjudicator with no immigration experience, but some street wisdom; she knew about Mexican and Puerto Rican and Southern Black farmworkers but a Belizian? With those clothes? With those soft hands? But, on the other hand, he did know the difference between a hoe and a shovel, knew at least the most obvious facts about radishes, carrots, tomatoes and spinach. And he was not flustered. He knew he had worked for Jonas, and seemed consistent in what he said.

The adjudicator decided to do something that happened frequently in the SAW program. She recommended that his application be denied on the worksheet, she checked that fraud was suspected, but at a low level (one point out of five), and then gave him the a work authorization card much like the one that Agnes had secured at the time of her interview. She did not ask him about absences from the country, as that provision does not relate to farmworkers.

Sam was relieved to get the card, was happy that the difficult interview was over, and had no clue that he had been recommended for denial.

Sam's file was also sent to London, Kentucky, but the

electronic queries received some responses. INS had a file on him for trying to push his way through the Brownsville, Texas, port of entry without being inspected. (This sometimes works during the rush hour.) He had been booked by the police after a tavern brawl, and his fingerprints were known to the FBI, but there was no conviction.

When Sam's file came up for adjudication in Lincoln, Nebraska, the INS staffer pricked up his ears. No single item was damning, but the combination meant he felt had to look further; there was the LO's recommendation of a denial, the police record, and the somewhat unusual citizenship (for a farmworker).

There also was just one piece of documentation on farmwork, and that was signed by Jonas. The RPF adjudicator asked the document fraud unit if they knew anything about Jonas. The answer was yes, he had been known to run a small-scale crew of farmworkers, but he had signed more than 60 I-705s, mostly for Pakistanis, and a couple of the latter had admitted to INS that they (a) had never worked for Jonas, and (b) they had paid \$300 for the documentation.⁴⁶ That did not mean that Sam had not worked in agriculture, but it looked suspicious. The RPF asked Sam to provide additional support for his farmwork experience, and placed the file in the continuing category where it still sits.

Sam's case is not unique. Some farmworkers with genuine agricultural work experience have had to pay for documentation; some crewleaders who have been active in SAW-eligible crops sell documents, directly or indirectly, to people who have never worked for them; as a matter of fact, most people signing SAWs documents are, in fact, in agriculture. Making decisions about people with files like Sam's is very, very difficult, which is why there are so many pending cases.

⁴⁶ Jonas charged more for false verifications than for accurate ones.

E. Controversies in the Program

Unlike the ongoing (and somewhat comparable) naturalization program of INS, which operates from year to year with minimal debate, the alien legalization program has been marked by a series of controversies, some of long duration, others that arose and died quickly, some of more importance than others. Perhaps this is inevitable in a totally new, short-term program designed to cause major changes in the lives of millions of people.

The most basic, and long-lived controversy is over the linked questions: who is eligible for the program and how is eligibility to be determined. This subject is covered later, in Chapter II.A of this report.

Another basic controversy was over the issue: what are the rights of ineligible resident aliens who are immediate relatives of eligible ones? The issue was important because there were a substantial number of families with both ineligible and eligible members and because an applicant was obliged to list family members on the INS application form.⁴⁷

The stated INS position was that it would deal with such matters on a case-by-case basis, granting non-deportation status automatically only to minor children whose parents were eligible. The advocacy groups said that this led to uncertainty (and unwillingness to file on the part of some eligibles). INS replied that it was bound by the law, and could not legalize a population which clearly did not meet IRCA standards. (It was also opposed to changing the law on this point.) The advocates called this the "family unity" issue, and INS replied with its own "family fairness" position.

We felt that the argument was overblown, that INS, in fact,

⁴⁷ Because immigration is sometimes a piece-meal process, some members of the family often arrive before others; a non-troublesome instance of a family with mixed immigration status was described in the case of Agnes B.

usually dealt gently with these family members, but the agency could never match the reality in the field with the kind of sweeping Central Office statements demanded by the advocates. This was an instance, we felt, in which each side put its worst foot forward.⁴⁸

Other significant controversies dealt with the appropriate role of the QDEs in the program and on the question of an extension for the 245A filing period. Lesser controversies were over: (a) the ability of would-be SAWs to file applications while in Mexico; (b) the appropriate list of agricultural activities which could convey SAW status; and (c) the question of AIDS testing.

E.1. The Role of the QDEs. Congress decided that it would be a good idea if Qualified Designated Entities played an honest broker role in the legalization program.⁴⁹ The idea was that an undocumented alien would be more likely to feel free to talk about his or her illegal status with a church or community-based agency (in the parish house or in a store-front) than with a government official sitting in a government office. Originally these QDEs were to be non-profit entities, but some lobbying from South Florida expanded the definition to include individuals and for-profit organizations.

Although the term "Qualified Designated Entity" was a new (and awkward) one, the principal organizations in mind had been doing roughly this kind of work for as much as 100 years, dating back to the days of Hull House and the other settlement houses. It was expected that the major church-related, immigrant-serving agencies (such as the Catholic Church's Migration and Refugee

⁴⁸ For a good summary of this issue, see Meissner and Papademetriou, op cit, pp. 33-39. Although the application period is over several of the immigrant advocacy organizations continue to monitor developments and are concerned with the way the program is being implemented.

⁴⁹ INA § 245A(c)(2).

Service (MRS)) would be joined in this work by the other voluntary agencies (volags) involved in refugee resettlement as well as a group of largely Hispanic community-based organizations.

As IRCA was passed the expectations were high in both INS and in the QDEs that these agencies would handle more than half of the legalization applications. The role envisioned by INS for the QDEs was that they would spread the word in the undocumented communities about the program, and that they would help the undocumented fill out the forms. The QDEs would provide INS with good applications, and this would allow INS to process large numbers of applications quickly.

While the QDEs wanted to help large numbers of aliens, they did not see themselves as simply doing clerical work for INS. They saw themselves, in this program as in others, as advocates for the aliens as well. And since the program was to be fee-financed, the QDEs figured that they would receive adequate funding from INS to help pay for the work. INS and the volags had argued with each other for years about individual cases and fundamental policy. Now, suddenly, the two adversaries were to join in a mutual activity; the fiercely independent volags were about to become something like government contractors. In retrospect, collision was inevitable.

As the regulation-formation process began, the volags and INS found an increasingly long list of issues to fight about; while this was going on, the same small group of people in INS and in the volags were trying to work out a business deal with each other. The volags felt that their potential contribution was undervalued by INS, and INS, perhaps subconsciously, wished it were dealing with contractors who did what they were told, rather than advocating positions contrary to those of the agency.

Meanwhile, a more pleasant set of negotiations were going on in the field between the local INS leaders, and the local volag officials -- one of the reasons these relations were better than those in Washington was because the questions of regulations and

finances were not on the table.

Among the bread-and-butter issues between INS, on one hand, and the QDEs on the other, were the amount of upfront money to be supplied to the QDEs by INS, the size of the fee to be paid to the QDEs for each QDE-assisted application filed with INS, the extent to which INS would use its public information campaign to encourage applicants to work with the QDEs, and the extent to which the QDEs would participate in the development of the campaign.

The QDEs, particularly the Catholic MRS, felt it needed advance funding to pay for the expanded staff it had hired, and to pay for the software that it was acquiring to complete the legalization application on computers.⁵⁰ In short, it wanted funding for some institution building. INS, meanwhile, was hiring people, renting space and buying equipment; in effect, it had its own institution-building agenda. In this setting, the QDEs received far less than they wanted, less than one million dollars, as advance payments.

On the question of the unit payment, INS set the rate at \$15 per completed application, except that when the work was done by a local organization affiliated with a national one, the national one would receive an additional dollar. The QDEs felt that the \$15 or \$16 was too small a fraction of the \$185 being paid by the applicants.⁵¹ The extent to which the QDEs were included in INS publicity varied from place to place, but they had little prominence in centrally-produced material.

As the 245A application window opened, then, the QDEs and INS were not happy with each other.

The flow of applications, as noted earlier, began slowly and

⁵⁰ The Catholic agency is said to have sustained a substantial financial loss on the legalization program.

⁵¹ The QDEs were also allowed to set reasonable fees of their own for their services. Although the QDEs did collect fees they also were concerned about the total cost of the legalization program to the applicants, mostly a low-income group.

relatively few of the first applications came through the QDEs. INS management was worried about the unexpectedly slow flow of applications because it had borrowed money from other parts of the agency (notably the Border Patrol), and it looked for months as if the legalization program would not be able to repay its internal debts. In this setting INS-Washington complained that the QDEs were not moving rapidly enough; the QDEs replied that they had been denied needed resources by INS and that they felt it was important to do a careful job on each application, as each represented a major opportunity for an individual alien.

At one point in this quality vs. quantity argument, MRS stated that it felt that each of its applications had to be reviewed by an attorney, while INS said that it felt no need for a lawyer's review, except in unusually difficult cases.

As time passed, the percentage of legalization applications prepared by QDEs climbed slowly, and by the end of the 245A program it had passed 19.6%; the comparable figure for the SAWs program was 23.8%⁵² In addition to the applications the QDEs actually handled, they did a substantial, if unmeasurable, amount of outreach for the program, often providing information on legalization to people who filed directly with INS (rather than through the QDE).

Some of the most active QDEs were not the traditional volags at all but the network of grower-based organizations in California called ALFA (Alien Legalization For Agriculture). Labor unions, and would-be labor unions, were also active in the program, as were hundreds of other community-based groups, some as QDEs, and some operating in a different mode, without formal INS recognition.

The QDE-INS struggle in Washington was unfortunate; both sides went into the program with unrealistic expectations about what they could secure from the other party. INS expected more

⁵² Unpublished INS data from the Central Office's Statistical Analysis Division.

applications and less advocacy than it received, and the QDEs expected more money, more cooperation and a more openhanded program than they received.

E.2. Extending the 245A Program. By late March, 1988, a vigorous debate was underway about extending the 245A program. The QDEs, the immigration bar, the Hispanic organizations and many newspapers (e.g. New York Times, Washington Post) were urging an extension of the program. The line of argument, which we supported at some length in Through the Maze, was that the program was a complex, expensive one, that its public information campaign had gotten off to a slow start and that more time was needed to persuade eligibles to apply. We said that a smaller than anticipated number of people had applied, and there was some evidence that a large number of potential applicants had not applied by the end of March, 1988. We called for a six-month extension of the 245A program, and no more time for SAWS. One of the specific concerns was that some aspects of the program, such as the eligibility of persons known to be in illegal status by agencies other than INS, had developed too late in the program for many applicants to act on these developments. (We discuss the complications of the "known to the government issue" later in this report.)

Some immigrant advocates had wanted a year-long extension, to get the program past the Presidential election, so that perhaps a more expansive program could be set in motion by the new President, but the proposal as it came before the Congress was a six-month extension, with no changes in the other provisions.

INS, the Reagan Administration and Senator Simpson were opposed to an extension, saying that one year was long enough, and that there would be plenty of last-minute applications for the program, as there always are at the income tax filing deadline.

The House voted 213-201 in favor of extension, but the

Senate felt differently. An attempt to kill a filibuster secured only 40 of the 60 needed votes; the Senate then went into recess, ending any possibility of extension.⁵³ Fortunately, in a sense, the defeat came on April 28, meaning that during the last week of the program it was clear that there would be no congressional extension. If one wanted to file it was clear one had to do so by the May 4 deadline.

E.3. Other Controversies. Early in the SAW program, before it became apparent how many people would apply, there was a series of conflicts between California growers, on one hand, and INS, on the other, about (1) the ability of Mexican Nationals to apply for SAW status at the U.S.-Mexico border and (2) the level of documentation needed by all SAW applicants. The growers wanted to make it as easy as possible for experienced farm workers to secure legalization and INS wanted to discourage aliens from crossing the border illegally to seek SAW status. INS felt that farmworkers outside the U.S. who wanted SAW status should apply, as they could, at U.S. consulates in Mexico.

With these thoughts in mind, INS at first took the position that a SAW applicant had to have been within the U.S. at the date of IRCA's enactment to apply for the program in the U.S. Subsequently INS, under pressure from the growers,⁵⁴ extended that cut-off date twice, but always to dates that were prior to the date of the announcement. INS did not want to use a date in the future for fear of encouraging a rush of applicants over the

⁵³ "Senate Vote Dooms Amnesty Extension," Interpreter Releases, Vol. 66, No. 17, May 2, 1988, pp. 459-460.

⁵⁴ The growers claimed in the summer of 1987, that the imposition of IRCA had produced, or would produce, a shortage of harvest workers; most unbiased observers subsequently concluded that no shortage developed that fall, and that farm labor surpluses were common, at least in California, the following summer. See, for example "Predicted Shortage of Farm Labor Hasn't Materialized: Growers are Accused of Crying Wolf on Effects of the Immigration Law," Wall Street Journal, Sept. 22, 1987, p. 6.

border as EWIs.

INS also created the transition program by which SAW applicants could apply for SAW status at the Calexico (California) port of entry and at the U.S. consulates at Hermosillo and Monterrey. Later the ports of entry at Otay Mesa, near San Diego, and Laredo, Texas, accepted such applications as well. This, the S-9 program, was initially scheduled to operate from July through September, 1987. The program allowed those claiming SAW status to enter by filing an application and paying the fee. They were then given 90 days to secure documentation to complete their claim. By the end of the program it was apparent that about one quarter of the S-9 applicants had simply used the work authorization card to get through the border, and to work in the U.S., but never followed up with a complete SAW application.⁵⁵

Meanwhile, Congressman Vic Fazio (D-CA) who represents the Sacramento area, introduced an amendment to IRCA which was designed to postpone the cut-off date to November 30, 1988, to continue the S-9 program to that date, and to lower the then-existing INS standard for adjudicating SAW applications. INS was willing to accept a SAW application at the ports of entry without documentation (on the grounds it is difficult to secure such proof of employment when outside the nation) but wanted documentation from SAWs applying within the nation. Fazio wanted the S-9 standard applied to all SAWs.

The Congressman and the agency reached a compromise in which the cut-off date and the S-9 program were extended to November 30, 1988, and the INS position on the need for a documented SAW

⁵⁵ One might assume that an S-9 applicant, who applied at the border on November 30, 1988, for the 90-day work period in the U.S., would have to have filed his completed application by the end of February, 1989; INS however, as of April, 1989, was still accepting completed applications within the U.S. from aliens in the S-9 category -- another indication of the differential treatment accorded to SAWs as opposed to 245A applicants.

application was upheld. Further, INS prevailed on the question of its authority to expel an apprehended alien who claimed SAW status but who had failed to file what INS defined as a non-frivolous application (i.e. one that had at least some documentary support). Fazio's amendment was incorporated into the omnibus appropriations bills enacted on Dec. 22, 1987.⁵⁶

These border and overseas-application procedures were both beneficial to farm workers (and growers), and, in a pattern noted before, were unavailable to 245A applicants. Some 15,000 SAWs filed applications at consulates in Mexico. Another 103,000 filed applied for the S-9 program at the border.⁵⁷

While the growers had to press INS hard to extend the period for the S-9 applications, their relations with the Department of Agriculture were far easier. The Department's task was to define the crops that met IRCA's term "fruits and vegetables of every kind and other perishable commodities." The growers wanted, with one major exception, as long and comprehensive a list as possible. They got what they wanted to such a point that the Department was ridiculed for padding its list with such marginal items as the shaping of Christmas trees and the harvest of reeds used in clarinets. Generally agriculture was happy with the Department's positions, though the hay and sod growers sought to be added to the list. The former lost, and the latter's case is still pending.

The two crops of interest that were not on the list were cotton (hardly perishable and clearly not a fruit or otherwise edible) and sugar cane (clearly both perishable and edible.)

The cotton growers and the cotton workers jointly sued the

⁵⁶ For more on this see "President Signs Spending Bills with Immigration Provisions," Interpreter Releases, January 4, 1988, Vol. 65, No. 1, pp 1-3.

⁵⁷ A handful of applicants, perhaps a dozen, applied for SAW status at consulates outside of Mexico, including one far-flung farmworker in London. Application Statistics are from unpublished INS data from the Office of the Assistant Commissioner for Legalization.

Department to add cotton to the list, and won in the courts.⁵⁸

The sugar cane situation was different. Most sugar cane is cut mechanically in the U.S. and there is little use of alien labor. The Florida sugar cane crop is an exception, and annually about 10,000 Jamaican and Barbadian non-immigrants (in the H-2 category) come to Florida to cut the cane. The wording of IRCA is such that were sugar cane to be regarded as a perishable crop, then the H-2s could apply for TRA status. Had that occurred, the growers would have been faced with an experienced cane cutter work force that could not be deported if they sought higher wages; this is, in fact, the unenviable status of the current H-2 work force. The sugar cane growers, facing the uncertainties of a free, resident labor force, urged the Department to save them from this prospect by defining sugar cane off the list of IRCA crops. Agriculture obliged, and an effort on the part of the sugar cane workers to overturn this ruling failed in court.⁵⁹

At one point, in the fall of 1987, there was an INS ruling that showed signs of creating another, but narrow controversy. This was the stipulation, effective Dec. 1, 1987, that all

⁵⁸ "USDA Rules that Cotton is a "Fruit" for SAW Purposes," Interpreter Releases, Vol. 65, No. 32, August 22, 1988, p. 842.

⁵⁹ For the final report on this subject, see "SAW Program Sours for Sugar Cane Workers," Interpreter Releases, Vol. 66, No. 9, March 6, 1989. The sugar cane workers case had been merged earlier with another legal attack on the Department of Agriculture's list of crops; that was an effort by the restrictionists to narrow the Department's list of crops, that faction's only participation in legalization litigation. The judge hearing the case eventually said, in effect, a pox on both your houses, simultaneously denying the sugar cane cutters' efforts to expand the list of certified crops while denying the restrictionists efforts to narrow the list. The Federation of Americans for Immigration Reform, the restrictionist organization, is critical of the courts' position on who has standing in immigration cases generally. It says that any alien, or any employer of an alien, has standing to dispute a government decision on the grounds that the plaintiff's rights are threatened, but that no citizens group, seeking review of a decision from a public policy point of view, has similar standing.

applicants for TRA status had to take, in addition to other medical tests, a test for AIDS, or more precisely for human immunodeficiency virus (HIV).⁶⁰ The AIDS test, when administered in small batches is expensive and it is not terribly reliable (often giving false positive indications). The authors thought that there would be at least a mild rush to obtain a medical examination before the deadline.

There was no such rush, and the AIDS test did not seem to deter many people (except, we gather a few who knew they were AIDS victims) from applying for legalization. There is, we are told, a sense in most groups of the undocumented that AIDS is not a problem for them, that it is confined to gay white males.⁶¹ Further, there was little publicity on this point, and finally, the AIDS test was an invisible added component in an already existing blood test, so one could go through the physical without knowing that he was being tested for AIDS.

We gather from the RPFs that only a handful of applicants with HIV positive results have shown up in the legalization process, and that, in at least a couple of cases, waivers of inadmissibility were obtained from INS. On the other hand the INS District Director in Miami has not only threatened to deny Cuban-Haitian legalization status to those testing HIV positive, he has said he would deport them as well. (There is no privacy confidentiality provision in the Cuban-Haitian program.)⁶²

Apparently, too, both the immigrant advocates and the gay rights movement had more important battles to fight, and neither

⁶⁰ For a more detailed discussion of the proposed test, see "Update on AIDS Testing and Legalization," a memorandum to interested persons from Charles Kamasaki, National Council of La Raza, Washington, D.C., January 11, 1988.

⁶¹ This is not necessarily a correct impression, given the growing number of Black and Hispanic AIDS victims in the larger cities, but that is another issue.

⁶² Letter to the authors from Ms. Williams of AILA, May 9, 1989.

paid much attention to this instances of compulsory testing for AIDS, something that the gay organizations fight in other circumstances.

F. The Results of the Program

The principal result of the legalization program is that more than two million, and probably close to three million, people will become legal residents of the United States.

As Exhibit Five shows, INS has received more than 3,067,000 applications for legal status, and has approved more than 1,733,000 of them. There have been about 1,767,000 245A applications and about 1,300,000 SAW applications.

Up until now, the rate of denials has been very low. Of the finally-decided 245A cases, 97.6% of them have been approved. The ratio is lower, as one would expect, in the SAW program, 93.5%.

Looming over these statistics are perhaps three-quarters of a million cases (exact numbers are not available) which have been recommended for denial at the LO and are not yet decided by the RPFs. Will the program end with a flood of denials, particularly of SAW cases? We sense that this will not happen, although the denial rate will certainly climb as the most difficult of the cases are reviewed. (Generally it is felt that the incidence of ineligible applicants was higher late in the program than early in it. That makes sense; one would not hesitate to file a good application, but one might well hesitate to file a bad or dubious one.) This prospect of a last-minute rush of denials is worrisome to advocates, not only because of the decisions per se but because such an event would overwhelm the network of pro bono lawyers which have been organized and trained to handle legalization appeals.

Whether or not there will be a burst of denials, there clearly are serious backlogs in the program, as the exhibit shows. On March 24, 1989, after both programs had been closed for months, there were still 338,000 pending cases at the LO

Exhibit FiveDisposition of Alien Legalization Applications
(as of March 24, 1989)

Activity	SAWs	245As	Totals
Legalization Office Data			
Applications Received	1,300,249	1,767,566	3,067,815
Recommended Approvals			1,846,810
Recommended Denials			882,637
Pending *			338,368
Of which interviews had not taken place	58,510	1,647	60,124
Regional Processing Facility Data			
Applications Received			2,729,447
Final Approvals	358,346	1,375,114	1,733,460
Final Denials	25,036	34,984	60,020
Pending*			935,967
Decisions reversed at RPFs **			32,651
Central Office Data			
Appeals Received			46,226
Decisions Reversed at Legalization Appeals Unit ***			11,497

Source: unpublished INS workload data from the Office of the Assistant Commissioner for Legalization

* TDA calculations based on INS data

** Most of these reversals were denials changed to grants

*** All of these reversals, by definition, were denials changed to grants

level, including 60,000 needing interviews. The number of pending cases at the RPFs was, understandably higher, there being almost one million of them.

A total of 46,226 cases had arrived at the Legalization Appeals Unit in Washington; most of these had not yet been decided either.⁶³

How do these numbers compare to pre-program expectations? What do we know about the characteristics of those who have applied? We have better data on the second question than the first.

F.1. Applications vs. Expectations. Generally many more SAWs applied than expected, while somewhat fewer 245As applied; but these expectations were based on what everyone agrees were the roughest of estimates.

INS used several estimates in the course of its planning, and, appropriately, used the largest estimates for its budgeting purposes. (An agency does not want to under-prepare for the volume of anticipated business.) INS estimates of the size of the 245A eligible population varied from 2.0 to 3.9 million.

In Through the Maze,⁶⁴ we suggested 2.0 million as the minimal estimate of the number of 245A eligibles, and subtracted from that figure an allowance of 100,000 (for people who though 245A-eligible applied through other programs; these were Cuban-Haitian Entrant, SAW and registry date cases). That formula produces a total of 1,867,000 245A or neo-245A applications which is below, but not far below, 2.0 million.

Meissner and Papademetriou used a much more detailed analysis and came up with a range of 1.8 to 2.6 million 245A

⁶³ For more on the operations of the appeals system, see Francesco Isgro, "Administrative and Judicial Review of Denials of Temporary Resident Status," Georgetown Immigration Law Journal, Vol. 2, No. 3, Fall, 1988, pp. 473-490. Also see Through the Maze, pp. 64-66, and Decision Factories, 58-62.

⁶⁴ op cit, p 47.

eligibles -- again the number of 245A applicants is close to the lowest of their estimates.⁶⁵

The SAWs population was much harder to estimate than the 245A population, since each SAW (in contrast to each 245A applicant), needed only a cameo role in the U.S. to qualify. The U.S. Department of Agriculture estimated that there were between 300,000 and 500,000 illegal aliens doing farmwork, and from that estimate INS calculated that there were probably about 400,000 eligible for the SAW program. Expecting both an enthusiastic response to the program and some fraud, INS then, for planning purposes, figured that there would be 800,000 applicants, 600,000 in the U.S. and 200,000 overseas. These expectation can be compared with the final tallies of about 1,200,000 SAW applicants inside the U.S. and about 100,000 outside it.

A couple of reasons why there were both more SAWs and fewer 245As than expected could have been the apparently greater incidence of fraud in the SAW program, and decisions made by those eligible for both programs to file for SAW status, two matters discussed subsequently.

F.2. Who Came Forward? It is well known that most of the applicants for both legalization programs were from Mexico, and that most applicants filed in California. What has not been pointed out, to our knowledge, is that with one exception, the demographic profiles of the two groups are remarkably close to each other, as Exhibit Six shows.

Both groups are largely from Mexico, are overwhelmingly in the prime labor market years of 15-44, a minority are married, and just about 54% of them applied in California. One of the major differences between the two populations is the much larger role of men in the SAW program, 82% compared to 57% in the 245A

⁶⁵ In addition to the INS total of applications filed by 245As, as shown in Exhibit Five, there are also thousands of applications filed in connection with the Ayuda case discussed below, which have not yet entered the INS statistical system.

Exhibit Six

Demographic Characteristics of 245A and SAW Applicants

Variable	245As	SAWs
Average age	30 years	28 years
% between 15 & 44	81%	91%
Married	41%	41%
Males	57%	82%
Citizenship*		
Mexico	69.9%	81.3%
El Salvador	8.1	2.1
Guatemala	3.0	1.5
Colombia	1.5	0.6
Philippines	1.1	0.8
Dominican Rep.	1.0	0.7
Haiti	0.9	3.6
India	0.2	1.5
Pakistan	0.3	1.4
State of Residence*		
California	54.3	53.7
Texas	17.9	10.2
New York	6.9	3.6
Illinois	6.9	2.5
Florida	2.8	9.2
New Jersey	1.4	1.6
Arizona	1.6	3.9
New Mexico	1.0	1.0
Oregon	0.2	2.1
Washington	0.5	2.0
N. Carolina	0.1	1.3
Georgia	0.4	1.4

* all jurisdictions with 1.0% or more of the applicants for either program are listed.

Source: "Provisional Legalization Application Statistics" May 9, 1989; INS Statistical Analysis Division, Washington, 1989, summary sheets and table 2.

program. Another difference is in the much greater incidence of people from Pakistan and India in the SAW program, as compared to the other program.

Why the high percentage of applicants from Mexico? The primary reason, of course, is that the great majority of eligibles for the two programs were probably Mexican Nationals. We have noted earlier in this report some of the conscious and unconscious southwestern tilt to the writing of the laws and regulations, and, in Through the Maze, we discussed why it was easier to promote the program in one language (Spanish) than many, and how effective the Hispanic organizations were in promoting legalization.⁶⁶

Finally, the large number of Mexican Nationals in the program ran counter to much of the West-Coast-produced literature on migration from Mexico. The illegal alien from Mexico was not necessarily a seasonal, or temporary phenomenon; many had developed substantial ties to the U.S. over substantial periods of time.

If Mexican Nationals were fully represented in the program, Asians were under-represented because the mirror image of the factors favorable to Mexican National participation adversely impacted the Asians: as we suggested earlier, the program was not written against a detailed knowledge of the mechanics of illegal immigration from Asia; Asians speak a variety of languages; and, we gather that the Asian ethnic organizations did not rally around the legalization cause with the vigor than the Hispanic ones did.

One study of legalization within this population concluded: "Even using the Census Bureau's conservative figures, that 5 per cent of the undocumented aliens in the United States are of Asian

⁶⁶ op cit, pp. 21-31. One of the variables discussed is what we call the "fudge factor" that sometimes helped Mexican Nationals on the issue of the duration of absences from the country. An alien traveling through airports has his passport stamped on the exact day of arrival; that is never done for an EWI.

Pacific origin, the fact that only 3.63 per cent of the legalization applications filed are Asian Pacific is distressing."⁶⁷

Similarly, the variegated undocumented populations of the east coast probably were under-represented among legalization applicants for the same set of reasons.⁶⁸

At some point in the future, when the INS-funded survey of the 245A population is completed by Westat, the research firm, there will be helpful demographic information on the characteristics of that population. In the meantime, a more sharply-focussed (and currently available) study gives us some data on Northern California SAWs, and by extension, all California SAWs.⁶⁹

The Kissam study covers both SAWs and some 245A applicants who had farmwork experience. The Kissam SAW population looks very much like the SAW applicant population reported by INS, and shown in Exhibit Six; it is 90% male, 28.8 years of age, and has a 48% incidence of marriage. The study group is 98% Mexico-born, a higher percentage than the national SAW population.

Kissam's SAWs are distinctly the working poor. They reported a mean wage of \$4.45 per hour. When annual incomes are worked out against family size, the mean per capita income was

⁶⁷ Asian Pacifics and U.S. Immigration Policy: IRCA Legalization, Phase I, Asian Pacific American Legal Center of Southern California, Los Angeles, 1988, p. 12.

⁶⁸ For more on the experience in New York City, see Arthur C. Helton, "The Alien Legalization Program in New York: A Review," Georgetown Immigration Law Journal, Vol 2, No. 3, Fall, 1988, Washington, pp. 447-4601, and Josh DeWind and Bess B. Rosenthal, "The Legalization of Undocumented Immigrants in New York City: The Second Stage," Immigration Research Program, Center for the Social Studies, Columbia University, New York, 1988.

⁶⁹ Edward Kissam and Jo An Intili, "Preliminary Results: CHDC Survey of Legalization Applicants," California Human Development Corp., Santa Rosa, CA, November, 1988.

\$4,378 and the median was \$3,583, which suggests that half of the families with children are below the poverty level. On average the SAWs reported 3.5 months of unemployment in the year before the interview.

Two separate findings are important in this study. One is that 40% of the applicants plan to stay with the kind of farmwork they are doing now, while some others would like more skilled jobs in agriculture. In all probability much of this population, which has only the most limited education (5.4 years) and ability with English, will have to remain in agriculture whether they want to or not. Given this degree of attachment to agriculture, and the very large numbers of SAW applicants (both legitimate and fraudulent) one wonders whether there is, in fact, a need for yet another round of foreign-born farmworkers that is being sought by the West Coast Growers. (See the final chapter for our comments on the Replenishment Agricultural Worker (RAW) program.)

The other intriguing finding is Kissam's four-way division of the SAWs along the following lines:

o Male heads of U.S.-resident families	10%
o Lone males	48%
o Male heads of Mexico-based families	32%
o Women	10%

Thus close to one-third of this group of SAWs is likely to commute seasonally from the Mexico to California each year; they certainly have done so in the past, and will have the legal right to do so in the future.

This pattern of commuting has many implications as to the integration of these workers in the future. We would speculate that these workers, as compared to non-commuting TRAs, will be less likely to become involved in the broader U.S. society, will have more limited prospects in the American labor market, and will be more likely to continue sending remittances to their relatives in Mexico. Presumably the commuters' rate of acquisition of English will be lower as well, particularly since

SAWs have none of the 245As' obligations to meet the English and civics requirements.

II. LOOKING BACK: SOME OBSERVATIONS

A. A Rapidly Evolving Program

Some government programs remain relatively stable over the years, such as the one encouraging prospectors to file claims for minerals on public lands, which is still operating along 19th Century guidelines; closer to home is the naturalization program, which has changed little over the decades.

The legalization programs changed rapidly during their brief lives. Given the short time-frame set by Congress, all mid-course corrections had to be done swiftly to give affected applicants a chance to apply before the deadlines. The constant pressures of time created greater tensions on all the players than those experienced in more slowly evolving programs.

The legalization programs not only evolved more quickly than most comparable activities, they also evolved in a somewhat unusual policy environment. Usually government works out its policies in a setting where there are competing interest groups - those who want higher and lower wages, or those who do, or do not, advocate U.S. support for the Contras in Nicaragua. Often, all three branches of Government, Executive, Legislative and Judicial play roles in the process. The legalization programs presented exceptions to both rules.

Although the restrictionists, people worried about too many people in the U.S., played a major role in the passage of IRCA, where they had not been supportive of a sweeping legalization program, they were almost totally silent regarding the administration of legalization. As mentioned earlier, FAIR filed a single lawsuit, against the Department of Agriculture's wide choice of SAW-related crops, and lost that one. The immigrant advocates, however, were extremely active throughout legalization, first pressing INS on its regulations, and later bringing legal actions against the Service on literally dozens of issues. In short, there were no built-in checks and balances within the flow of policy pressures, all the pressures on INS

were from one side of the issue.

Secondly, unless there is much hidden from view, INS received relatively little policy input from either the White House or the Congress as the legalization program evolved.

The Reagan White House was quite capable of providing policy guidance in some areas, such as tax reduction or support of the Contras. But it showed little or no visible interest in legalization implementation. Similarly, during much of the program, Attorney-General Edwin Meese was too busy defending himself to pay much attention to legalization.

Congress seems to have exhausted itself bringing birth to IRCA, and to have paid relatively little attention to legalization administration. As mentioned earlier, there was the failed effort to extend the 245A program, Congressman Fazio's successful bid to extend the S-9 program, and a few oversight hearings, but the Congress did not press INS very hard.⁷⁰

There were many controversies over this rapidly developing program, however. Once the regulations were written, these controversies were virtually all handled in the courts, with immigrant advocates bringing suits against INS, and INS fighting back, often losing. Interestingly, the traditional rule of the courts, that an applicant must exhaust his administrative remedies before appearing before a judge, did not play a role in these battles. Virtually none of the advocates waited until their client had lost at both the RPF and the LAU levels; they filed individual or class action suits against INS seeking to change various INS positions. They knew that the changes needed to be made quickly, if other aliens were to benefit from the

⁷⁰ Congressman Hamilton Fish (R-NY), ranking Republican on the House Judiciary Committee, as well as several of the senior Democrats on the Committee, criticized INS, at one of these oversight hearings, for being too restrictive on its interpretation of "continuous physical presence" and for its stand on the family unity question. See "IRCA Implementation Plans Discussed at House Oversight Hearing," Interpreter Releases, Vol. 64, No.14, April 13, 1987, pp. 438-439.

decisions, and the courts usually accepted this approach.

The general result of the legalization litigation was to make it possible for various, sometimes overlapping, groups of aliens to become eligible for the programs despite earlier INS decisions to the contrary. Although there is room for differing definitions of who won individual cases (which often covered a number of different issues), the AILA calculations are of interest. At one point the organization stated that 34 court cases had been filed against INS, that 28 of them were class actions, that 18 of the class actions had been decided or settled, and that the immigration bar had won 16 of them, and INS had won two. It is impossible to calculate how many aliens were covered by these rulings, or how many of them took advantage of them, but clearly the courts made a difference, and many people were granted TRA status, or will be, as a result of these actions.

While a comprehensive account of these courtroom battles would be a good subject for a study of at least this size, it is appropriate here to summarize some of the major court actions. Capsule summaries of the cases mentioned below, and other significant ones, can be found in the appendix to this report, and at greater length in various AILA reports and in Interpreter Releases. Perhaps the five most important cases are these:

A.I. Ayuda, Inc. v. Meese. This case dealt with a large class of visa abusers who claimed to have been in illegal status by January 1, 1982, but who were not regarded by INS as having been known to INS as being in illegal status on that date. The question was: were these aliens "known to the Government" to be illegally present, and thus eligible for legalization? The case had been brought initially against the INS Eastern Region, and was later broadened by INS to cover similarly situated people nationwide.

This case covered a variety of issues. The central one dealt with aliens, usually students or tourists working without INS

permission, who had filed income tax returns, or whose employers paid social security taxes before January 1, 1982. The advocates argued that the presence of these aliens was clearly known to a unit of the government. INS argued in vain that while the Social Security Administration might know that Mr. X was in the country, only INS could know if he were illegally present.⁷¹

The first of a group of Ayuda decisions came a few weeks before the May 4, 1988 deadline for 245A applications; it held that parts of the government other than Justice could "know" that an alien was illegally present. The lateness of the decision in the application window was one of the reasons advanced on Capitol Hill (and by us) for extending the application period.

The Ayuda decision covered about 5,000 cases which had already been filed, and had been, or were in the process of being denied. The court ordered the RPFs to re-open these cases. These applications, apparently, are being granted with no further controversy. The Ayuda judge also appointed a Special Master, and made arrangements for persons who could claim that they had not filed for legalization because they had been previously misled by INS as to their eligibility. The Special Master received some 6,000 cases before the extended window shut on Nov. 15, 1988; 2,000 of these were not "known to the government" cases but most would have been eligible for legalization had they filed before the May 4 deadline, we have been told. Another 4,000 cases apparently fit the Ayuda guidelines, and INS and the

⁷¹ A somewhat more contrived claim in the same case was that an alien who was present in the country on a once-valid visa could be regarded as being known to the government as illegally present if the alien failed to file either the quarterly or the annual alien registration cards required before the end of 1981. While we admire the creativity of those who brought the suit, it struck us that it was stretching to suggest that an agency known to lose so many files should be regarded as constructively knowing a fact based on the absence of a document. Further, the quarterly reports were a very obscure requirement of the law. The judge narrowed the impact in this field by saying that an applicant would have to show that he deliberately failed to file such a report in order to claim illegal status.

advocates continue to struggle over the fate of this group.

A.2. Haitian Refugee Center. Whereas the beneficiaries of Ayuda are largely from Europe, from Iran and from elsewhere in Asia, and are, by-in-large an urban, middleclass population, the beneficiaries of the Haitian Refugee Center decision were among the poorest and least literate of the legalization applicants.

The question in this case was about documentation standards and case-handling procedures used with this population, mostly SAW applicants. Essentially the court told INS that it had placed too much burden of proof on the applicants, that it had failed to give denied applicants enough information about their appeal rights and that it owed denied applicants an opportunity to know more about why their cases had been denied, so that they could rebut the INS position. This decision made it easier for SAWs to apply and more difficult for INS to deny cases where fraud was suspected (as discussed later in the section on SAW fraud).

The advocates in this case also argued that INS should provide translators for the Creole-speaking applicants; the district court agreed, but the 11th Circuit granted a stay of that part of the decision pending appeal.

A.3. Loe v. Thornburgh. This is a case about the documentation needed by 245A applicants. Loe is a John Doe- type name, further down the alphabet, and Thornburgh is the Attorney-General.

INS had taken the position, at least in the Eastern Region where this case originated, that a 245A application would not be approved if the only evidence presented were after-the-fact affidavits. INS wanted contemporary documentation, such as rent receipts, pays stubs, medical or school records. INS stipulated that it would change this practice, agreeing to reopen 245A cases in which the only documentation consisted of affidavits.

A.4. Catholic Social Services v. Meese. This case was important for several reasons: (1) it was the first of many nationwide, class actions against the Service's legalization policies; (2) it was a forceful reminder of the previously-discussed complex relationship between the QDEs and INS; and (3) it made a number of previously-ineligible 245A applicants eligible for the program.

The principal issue here was the definition of the previously-discussed concept of "brief, casual and innocent" departures from the United States. INS had held that one needed an INS-issued advance parole if one had left the country after the enactment of IRCA. Many Mexican Nationals went home for Christmas of 1987, without knowing that later INS would require advance parole, a procedure described subsequently. The court held that INS was unreasonable in demanding advance parole, and should determine, on a case-by-case basis if such absences were "brief, casual and innocent."

The advocates also sought an extension of the filing deadline (until 180 days after the 9th Circuit affirms the order) for those applicants who failed to apply on time because they thought they were ineligible. The district court so ruled, but INS has appealed on this point. INS has often accepted adverse rulings on substantive grounds but has routinely appealed all attempts to extend filing deadlines. On this point the agency relied heavily on a recent U.S. Supreme Court case about Filipino war veterans' eligibility for U.S. citizenship which was handed down in mid 1988; in its decision the Court ruled that a lower court had been incorrect when it extended a filing deadline laid down by Congress. ⁷²

A.5. Immigrant Assistance Project. This Seattle-based case was another multiple attack on INS practices in 245A cases. The

⁷² INS v Pangilon (Nos. 86-1992, 86-2019) and "Supreme Court Activity" Interpreter Releases, Vol 65, No. 39, October 7, 1988.

district court judge ruled that nonimmigrants who left the country and then returned with apparently valid visas did not break their "unrelinquished illegal residence" because of the possession of these visas.

She also ruled in favor of former students who claimed that INS should have known of their illegal status because one can make a rebuttable assumption that their schools reported to INS, prior to January 1, 1982, that they had dropped their courses, and thus their legal status. This may be a sweeping statement regarding how carefully foreign student advisers report INA violations to INS, but it also reflects the reality that the Service destroys such reports three years after they are received, as do many schools.

Because of these decisions, and many others, the pool of eligible applicants grew by fits and starts throughout the 245A and SAW application periods. Some applicants, particularly those who used attorneys or QDEs, had denials turned to approvals by these decisions. Others found out about the new rules in time to file applications which probably have been, or will be approved. Still others discovered their probable eligibility too late.

One of the continuing problems in this area was the matter of communication. There were many court decisions, and most of them covered highly detailed subjects; it was hard enough to convey this information to the professionals (both in and out of INS) and it was harder to get it to the concerned eligibles. Sometimes the advocates' communication system would run ahead of that of INS, and QDEs would tell applicants that there was a new decision that rendered them eligible; some applicants would then find that the LO had not yet received that piece of news.

B. New Rights for Three Million People

The advocates of legalization, throughout the decade-long debate, predicted that the arrival of legal status would change the behavior of the individuals involved. The aliens would "come

out of the shadows," take their money out of the mattress and put it in a bank, feel freer about seeking health care, and be more assertive about their rights, generally. People as diverse as labor union organizers and law enforcement officials shared this happy view.

To what extent has this occurred? Asking the question in Washington is not a very useful exercise; most people working in national organizations (private and public) in or near the immigration field have little to say on the subject with two important exceptions. When talking with people in the field, however, there is a small accumulation of indications that legal status has started to make a difference in the behavior of some aliens in a number of diverse areas.

Two themes stand out from the national data: the remarkable increase in legal, international travel by formerly illegal aliens and the wholesale corrections of previously jumbled or fraudulent social security numbers.

B.1. More Legal International Travel. Often a discussion of unintended consequences of public policies revolves around unanticipated disasters. The boom in legal international travel, was, on the other hand, a happy, if unexpected, development that grew directly out of IRCA.

The work authorization card granted to SAW applicants following their interview (and before a final determination is made on their application) can, from the moment it is issued, be used to regain entry into the United States. So can the TRA card issued to 245A applicants.

That SAWs immediately secured a travel document, and 245As had to wait, was part of the broader, previously-mentioned pattern of more benefits for SAWs than for 245As.⁷³ The latter,

⁷³ The motivation was not to create boons for hard-working tillers of the soil, always the last to be covered by social programs, but to expand the legal work force for western fruit and vegetable growers.

however, could leave the country and return to it on a one-shot basis if they so desired; this could be arranged through one of those awkwardly-named INS activities, in this case the "advance parole."⁷⁴ This document, which was usually, but not always, granted to applicants, was a sheet of paper bearing the alien's picture. He was to surrender it to the inspector upon his return to the country.

How much more legal travel was there? There are two ways of measuring that: (1) indications of additional legal travel by the previously illegal, and (2) indications of fewer illegal crossings of the southern border.

On the positive side there are media reports on the subject. The headline on one New York Times story was: "Legalized Migrants Flock Home for Holidays."⁷⁵ In that report Dr. Jorge Bustamante, the migration scholar/advocate, was quoted:

"It is possible that a million and a half migratory workers have returned to the interior of Mexico to rejoin their families during this holiday season...those are figures without precedent and also constitute a family reunion happening worthy of a Christmas fable..."

The Times also wrote of waits of up to a week to secure train, bus or plane passage from northern Mexico into the interior. Similarly, in TDA's work in Haiti a little earlier in the legalization program we encountered U.S.-to-Haiti planes filled to capacity with Haitians, many of them newly-legalized.

Data are not collected on the numbers of the newly-

⁷⁴ Other terms of this ilk include "voluntary departure", which sounds benign but usually means that you have to leave the country; "indefinite voluntary departure" on the other hand, is good news, it means that you can stay; equally cheerful, in fact, is the double-negative "suspension of deportation"; and LAPS and LOSS are the names of two quite useful statistical systems used in the legalization program.

⁷⁵ The story, written by Larry Rohter, appeared on January 1, 1989.

legalized aliens entering this country, but INS does note the number of aliens, generally, admitted to the nation through the ports of entry at the southern border. We have alien admissions for the last three months of most of the calendar years 1983 through 1988:

Year	Alien Admissions	Notes
1983	26,917,000	pre-IRCA
1984	data missing	pre-IRCA
1985	29,172,000	pre-IRCA
1986	28,808,000	IRCA signed
1987	31,329,000	legalization window open
1988	38,850,000 ⁷⁶	legalization program ends

Too much should not be made of these numbers, as there are many other factors at work on alien admissions, in addition to the arrival of the legalization program. The sharp increase in admissions at the border between 1986 and 1988, however, certainly is consistent with the notion that legalization has permitted more legal international travel, particularly with Mexico, home nation to most legalization applicants. These data suggest an increase in admissions through the southern border's ports of entry at the rate of 2,000,000 per month -- clearly an amount of travel that can not be caused only by the new travel rights of roughly two and a half million newly legalized aliens from Mexico and Central America.

There is another, negative, way of measuring the increase in legal traffic at the southern border, and that is by noting the apparent decrease in illegal entries. We have argued, over the years, that a rough-and-ready proxy for measuring the extent of illegal immigration over the southern border is the ratio of

⁷⁶ These data are for admissions in the months of October, November and December for the calendar years listed. Data are from an unpublished tabulation produced by the INS Statistical Analysis Division; while 99% of the admissions are through land ports of entry at the U.S.-Mexico border, a handful of seaport admissions for places like Wilmington, N.C., and Port Everglades, Florida, are included in these totals as well.

Border Patrol apprehensions right at the border (Line Watch) to the number of agents on duty in this function.⁷⁷ When there are many illicit entries, we have argued, the number of apprehensions per agent shift is high; when the flow is down, so are the number of apprehensions per shift.

This is a more complicated but we feel more accurate measure than the one usually used by INS, the raw number of Border Patrol apprehensions. By using only Line Watch, just one of the Border Patrol's enforcement activities, one eliminates the variable of INS tactics. By using the number of apprehensions divided by the number of agent shifts, one eliminates the variable of INS personnel resources. What one measures then is a proxy of the illegal traffic at the border. (This measure, however, does not help one estimate the stock of illegal aliens in the U.S..)

Exhibit Seven shows the number of officer hours, the number of apprehensions, and the ratio (i.e. average apprehensions per a ten-hour work shift) for the year before IRCA's passage, and for the two years since. On average, the number of apprehensions per shift was 3.96 in the last 12 months pre-IRCA, with the ratio dropping to 2.84 in the first 12 months of IRCA, and then up slightly to 3.02 in the following 12 months. Data for the three months following the period covered in the Exhibit suggest still further decreases in the illegal traffic. In fact, we project, based on the November, 1988-January, 1989 data, that the estimated number of illegal entries will be about 40% below the pre-IRCA level in the third post-IRCA 12-month period.

When we first examined these figures we noted that after IRCA was passed the number of officers assigned to Line Watch decreased; given the rhetoric of borders out of control one might have expected the number of agents at the line to have increased, or at least remained constant. The thin green line at the border grew thinner as agents were detailed to drug control and employer

⁷⁷ See David North, Analyzing the Apprehension Statistics of the Immigration and Naturalization Service, New TransCentury Foundation, Washington, 1979.

Exhibit Seven

A USEFUL, IF ROUGH, PROXY MEASURE OF ATTEMPTED ILLEGAL ENTRIES AT THE SOUTHERN BORDER:

THE NUMBER OF APPREHENSIONS PER BORDER PATROL OFFICER-SHIFT AT LINEWATCH

Month	1985-1986 (Pre-IRCA)		Apprehensions per Shift		Month	1986-1987 (Post-IRCA)		Apprehensions per Shift		Month	1987-1988 (Post-IRCA)		Apprehensions per Shift	
	Apprehensions	Officer Hours	Officer Hours	Apprehensions		Officer Hours	Officer Hours	Apprehensions	Officer Hours		Officer Hours	Apprehensions	Officer Hours	Officer Hours
November	53,679	181,864	2.95	51,217	November	216,425	2.37	36,966	November	182,299	2.03	36,966	182,299	2.03
December	46,160	187,663	2.46	39,572	December	218,161	1.81	33,884	December	179,835	1.88	33,884	179,835	1.88
January	80,479	198,605	4.05	69,579	January	236,063	2.95	66,534	January	182,158	3.65	66,534	182,158	3.65
February	81,006	190,384	4.25	63,562	February	215,537	2.95	70,524	February	164,262	4.29	70,524	164,262	4.29
March	94,092	208,598	4.51	67,479	March	233,617	2.89	70,315	March	176,600	3.98	70,315	176,600	3.98
April	97,005	211,002	4.60	56,899	April	210,703	2.61	56,743	April	154,806	3.79	56,743	154,806	3.79
May	100,028	228,671	4.37	50,313	May	217,628	2.31	47,971	May	173,737	2.76	47,971	173,737	2.76
June	78,068	203,416	3.84	66,531	June	206,343	3.22	42,966	June	161,155	2.63	42,966	161,155	2.63
July	90,463	213,335	4.24	84,388	July	197,752	4.27	48,468	July	160,206	3.03	48,468	160,206	3.03
August	86,347	195,744	4.41	76,772	August	200,893	3.82	49,224	August	162,543	3.03	49,224	162,543	3.03
September	78,970	198,031	3.99	53,792	September	198,003	2.72	43,270	September	154,673	2.80	43,270	154,673	2.80
October	77,089	215,273	3.58	45,657	October	197,377	2.31	39,174	October	158,492	2.47	39,174	158,492	2.47
Totals	963,386	2,432,586	3.96	723,761	Totals	2,548,502	2.84	607,459	Totals	2,010,766	3.02	607,459	2,010,766	3.02

Source: Unpublished INS data from its management information system, (G-23 series);
 Calculations by: TransCentury Development Associates, Washington, D.C.

sanctions activities. But the reduction in officer hours does not effect our statement that apprehensions per officer shift were down, for the reasons stated earlier.

In the first seven months after IRCA, the reduction in illegal crossings was related only to fear of employer sanctions -- very few cards allowing newly-legalized aliens were issued before the middle of the summer of 1987. By the summer of 1988, more than a million previously illegal Mexican Nationals either had, or could get, U.S. travel documents, and by the time the January 27, 1989 legalization statistics were published, that number had risen to 2,287,000 Mexican Nationals plus several hundreds of thousands of Central Americans. Thus, in the second post-IRCA year, some to much of the decrease in illegal entries must be happening because once undocumented aliens now had a document they can use at the ports of entry.⁷⁸

How many attempted illegal entries did not occur because of IRCA? If we compare the roughly 960,000 Line Watch apprehensions in the last 12 months before IRCA with the average of roughly 665,000 in the next two 12-month periods, then there was a reduction of 590,000 apprehensions in the two-year period. If, using the Border Patrol's estimate that they stop one out of every two or three attempted entries, then in the two years after IRCA there were, on the two-to-one basis, 1,180,000 illegal entries that did not occur. Or there were 1,770,000 non-entries, if the three-to-one ratio were used.

Attempting to enter the U.S. without inspection is expensive and dangerous to the traveler, it is an illegal act, and seeking to control it is expensive to the United States. It is clearly a useful development that this illegal traffic has been reduced, as seems to be the case. This is good news regardless of whether its primary cause is fear of employer sanctions, or utilization

⁷⁸ Not all newly-documented aliens know the value of their new cards. The Border Patrol routinely stops Mexican Nationals who are both carrying valid travel documents and seeking to enter without inspection.

of the legalization program.

Another of the behavior-changing by-products of IRCA is more a deliberate one; it is the anticipated dramatic expansion of a legal, bi-national work force, with one foot in Mexico and the other in the U.S. Traditionally there has been a small group of green-card holders living in Mexico and commuting legally to jobs in the United States -- there were perhaps 75,000 of them when we looked into the matter twenty years ago⁷⁹. The commuters were nominally in danger of losing their green card if they were out of work in the States for a period of more than six months. The green-card commuters could also move to the U.S. whenever they wanted to do so.

Given the desire of the Congress to expand the legal agricultural labor force among the foreign-born, and the award of TRA status to SAWs who had worked 90 days in certain crops, INS decided to lengthen the period that a TRA or a greencard holder could retain commuter status without working in the United States to nine months (from the previous six-months period).⁸⁰ As noted earlier about a third of the SAWs are in bi-national families. This would suggest that as many as a quarter of a million of the SAWs might take advantage of their new right to work three to six months a year in the States, and spend the balance of the year in Mexico. These commuter TRAs also have the choice of living permanently in the U.S.

B.2. Fewer Scrambled Social Security Accounts. The other obvious, positive by-product of the legalization program is the straightening out of nearly 2,000,000 social security numbers

⁷⁹ North, "Border Crossers," reprinted in Hearings Before The Subcommittee on Migratory Labor of the Committee on Labor and Public Welfare, United States Senate, 91st Congress, on Border Commuter Labor Problems, May 21, 1969, U.S. Senate, Washington, D.C., 1970.

⁸⁰ "INS Publishes Final Rule on Alien Commuters," Interpreter Releases, Vol. 66, No. 9, March 6, 1989, pp. 255-256.

(SSNs).

Every applicant for legalization had an opportunity, without charge and without any threat of penalty, to untangle his or her previous social security card. By the end of February, 1989, the Social Security Administration had received 2.3 million applications in this connection. Of these, 83%, or about 1.9 million, were from persons who had not previously had a card issued to them under their correct name. The remaining 17% had cards that were legitimately issued to them under the correct name.⁸¹

The 1.9 million people, most of whom were of working age, had either no SSN or had secured a bad SSN in one of several ways. The most common practice was to use a SSN that had been issued to someone else, usually a relative; others had "bought" numbers from shady operators, and a few had invented numbers that had not yet been issued. All 1.9 million now have their own, correct legal SSN for recording future earnings, but many have tangled past records which will have to be sorted out over the next forty years. (Usually these efforts do not take place except at the request of the worker, and those requests rarely take place before retirement.)

The some .4 million with good numbers had secured them in one of three ways: (1) some had acquired them a few years back before the Social Security Administration was forced by Congress to deny SSNs to those illegally in the nation; (2) some had secured SSNs while in the U.S. as legal, nonimmigrant workers or students, who subsequently became illegal aliens; (3) and a few others had "no-work-authorization" SSNs which now can be used to record wages.

Our sense of watching the SSN part of the legalization process in LOs across the nation was that most applicants had no idea that seeking a correct SSN was a voluntary act. The whole

⁸¹ These are unpublished Social Security Administration workload data secured over the telephone.

legalization business was a very complex process, and filling out the social security form was just another part of it -- or so it must have appeared to many. We are not sure that it was designed this way, but it appears to have worked very well. (Social Security received corrected-SSN applications from more than three quarters of the legalization applicants, and thousands more, maybe tens of thousands, are probably still in various pipelines.)

Thus both the most prominent behavior-changing by-products of the legalization program were quite closely associated with the mechanics of the program. The newly-legalized person did not have to change his point of view, or alter his style of life, to get the documents he needed to travel legally over the border, or to improve his relationship with the national pension system.

B.3. Other IRCA-Related Changes in Behavior. In a series of conversations we picked up a few indications that the legalization program had probably caused some other changes in behavior. The dominant note was set by one Los Angeles union official who said that there were some changes, but they were generally subtle ones. Among the specifics:

- o substantial interest has been shown in the English/civics classes needed for the second phase of the 245A program, including some indications that some of the TRAs are finding their first encounter with adult education rewarding, and that they will go well beyond the basic course (sources: various Los Angeles observers and the Washington Post⁸²);

- o some lobbying in Sacramento by, and on behalf of the newly-legalized, to secure more English/civics classes (source: Los Angeles Times⁸³);

- o increased willingness to use health facilities (various sources);

⁸² Jay Mathews, "Amnesty's Second Hurdle: Aliens Fill English, Civics Class Around Clock," Washington Post, June 1, 1988, p. 1.

⁸³ Douglas Shuit, "Immigrants Take Plea for Education Funds to State Capital," Los Angeles Times, March 17, 1989, p.3.

o increased willingness of the newly-legalized to complain about substandard housing conditions (Los Angeles Herald-Examiner⁸⁴);

o one labor union organizing victory, at a poultry processing plant where the lack of legal status of the workers had been allegedly used by management in the past to discourage union participation (Fresno);

o some indications that the newly-legalized are leaving the very worst jobs in the New York garment district, and that their former employers are having trouble filling the jobs at the old wages (New York union official); and,

o some indications that the still undocumented workers who have been grandfathered into their pre-IRCA jobs (i.e. they need not show documents and their employers can not be penalized under Employer Sanctions for hiring them) behave more cautiously vis-a-vis their employers than do newly-legalized workers (Los Angeles union official).

These fragments of information, usually gleaned from activists looking for such indications, may (or may not) suggest a trend along the lines predicted before the passage of IRCA; it may also be, as several people suggested, a little early to look for such signs. If there are significant changes as aliens move out of the shadows they can not be enumerated as easily as can the fact that millions of people have newly-legal travel documents and/or correct social security numbers.

C. Fraud in the Saw Program

Both before and after IRCA passed there was wide-spread speculation that there would be extensive fraud in the 245A program -- that entrepreneurs were busily assembling kits for ineligible applicants, with full sets of rent receipts, utility

⁸⁴ "...the number of complaints by Spanish-speaking tenants shot up because, officials said, illegal immigrants who obtained federal amnesty were now willing to file reports..." Ruben Castaneda and Kim Kowsky, "For aliens who don't qualify, amnesty means exploitation," Los Angeles Herald Examiner, May 4, 1988, p. 1.

bills, drivers' licenses and other indicia of living in the U.S. since January 1, 1982. Very little of this surfaced, and both INS and the immigrant-serving agencies sensed relatively little fraud in that program.

The SAW program was not so blessed. It is clear from a number of bits and pieces of evidence, drawn from inside and outside INS, that a significant number of fraudulent applications were filed for the farmwork program. There were three different kinds of fraudulent SAW applications:

1. fraudulent applications filed wittingly by non-eligibles;
2. fraudulent applications filed wittingly by eligible applicants who could not secure legitimate documentation, given the frequently casual arrangements in farm employment;
3. fraudulent applications filed unwittingly by some illiterates (largely Haitians in Florida). They had sought documents, such as Haitian birth certificates, through middlemen who provides them with birth certificates issued in other names.⁸⁵

What was the extent of that fraud, and what are the evidences of it? It is doubtful that we will ever know the true extent of the fraud in the SAW program, but there are three threads of evidence that suggest it was substantial (i.e. probably relating to more than 20% of the applications filed); these are:

- o internal statistics and other INS data;
- o indirect, or hearsay evidence; and
- o the contrast between the number of claimed farmworkers in the SAW program and other estimates of the size of the total farmworker population (SAWs plus others).

⁸⁵ In all likelihood, these three types are listed in the order of incidence; for more on fraudulent application techniques encountered in the program see North and Portz, Through the Maze, pp. 66-69, and for the RPFs' defenses against them, see North and Portz, Decision Factories, pp. 51-58.

C.1. INS and SAW-fraud Prevention Efforts. Before exploring this mixed bag of evidence, it is useful to summarize briefly what INS sought to do about SAW fraud, and to recall two central elements of the SAW program, the question of Congressionally-mandated burden of proof, and the location of the final decision-maker on SAW applications. Both of these factors help explain the large gap between the INS suspicions of massive-scale fraud, on one hand, and the relatively minimal number of denials in the SAW program on the other.

Congress knew that it would be hard for farmworkers to document their jobs in the United States, and, as discussed earlier, the burden of proof on SAW applicants was less demanding than it was on 245A applicants. As a result, Congress gave INS an almost impossible job, setting very loose standards for the program.

Secondly, INS created a system where the final decision on granting or denying an application was to be made at one of the four RPFs, by an adjudicator working from a paper file -- one not face-to-face with the applicant.

INS has extensive experience with determining the credibility of applicants, such as in the parallel interviews conducted of couples believed to be engaged in marriage fraud.⁸⁶ But in these cases the decision is made on the spot. Separating the test of the applicant's credibility from the ultimate decision, given both time constraints on the initial interviewer and the location of the burden of proof in the SAW program, led to many reports of fraudulent applicants and relatively few denials. The reasons why LO adjudicators had so little time to examine applications filed by would-be SAWs is discussed in the

⁸⁶ At its most sophisticated the two people are separately and simultaneously asked the same set of questions about their married life, with the interviews taped on television cameras; if significant differences emerge from the interviews the couple is confronted with the evidence on tape and under those circumstances the petition for a green card for the alien spouse is usually withdrawn.

next section of this report.

What the Immigration Service sought to do in the SAW program was to change its basic strategy on prevention and detection of fraud. Instead of relying on its past approach, the use of a tough interview to break fraud cases one-by-one during a face-to-face session, it tried to rely on the use of computers and other mass-decision-making techniques to detect wholesale, organized fraud.

Organized SAW fraud generally took one of three forms: in some cases the labor contractor or grower both signed the fraudulent documents and sold them to alleged workers; in other cases the signer of the documents did not sell the documents directly, in effect, he signed blanks for so much an autograph, and a facilitator (or vendor) then sold them for a substantial markup;⁸⁷ in the third form, the labor contractor or the grower was innocent -- someone had forged his name.⁸⁸

The RPFs brought their computers to bear on the matter, by entering data on several crucial variables for each SAW application, including the citizenship of the applicant, the names of the growers, labor contractors, and where pertinent, notaries public. If a given notary's name, for example, starts showing up quite frequently among the SAW applications, all the forms he signed can be reviewed to see if there is fraud. If a given affiant (a labor contractor or a grower) seems to have a lot of ex-workers applying, the number of such workers, and their

⁸⁷ This modus operandi often involves two ethnic groups, which sometimes suggests unusual (and suspicious patterns). In one of the first fraud cases prosecuted in the courts, the signers of the documents were several Hispanic crew leaders, while the alleged workers were all East Indians with urban addresses. Once the pattern was identified it raised questions -- why would that group of workers work for those crew leaders? See U.S. Attorney, Eastern District of California Press Release, "Amnesty Fraud Prosecution," Office of the U.S. Attorney, Fresno, California, 1/14/88, or Through the Maze, pp. 67-68.

⁸⁸ For more on this subject, see North and Portz, Decision Factories, pp. 51-58, on which this is based.

nationality can be ascertained.

Similarly, we know that both the Western and Northern regions have created files on legitimate growers and crew leaders. The Western Region has a thick collection of 270 3-or-4-page descriptions of these operations, what they grow, and when they grew it, how many acres they have, and who is empowered to sign documents. When people claiming to have worked on these farms or for these crew leaders are interviewed at the LO, or their files are reviewed at the RPF, these descriptions could cast light on the validity of the applications.

Sometimes, in these files, there are copies of valid, and sometimes of both valid and forged signatures. In many instances growers, finding that someone had forged their names to phoney documents, brought the subject to the attention of INS, and volunteered the information about their real farm activities.

But what does a sophisticated system do when a real farmworker (as in the case of our mythical Sam C.) has a real document signed by a real labor contractor, who has also sold his signature a hundred times? As noted earlier, INS asks for other documentation, sometimes a very difficult burden for the applicant, and yet another SAW file goes into the pending category.

C.2. INS Statistics on SAW Fraud. Returning to the question of the extent of SAW fraud, the levels of suspicion reported at the LO level were as follows:

suspected fraudulent 245A cases	42,786
suspected fraudulent SAW cases	<u>340,181</u>
total	382,967 ⁸⁹

The percentage of suspected fraudulent applications to all applications is 2.4% in the 245A program and 26.2% in the SAW

⁸⁹ Unpublished INS data provided by the INS Office of Public Liaison, April, 1989.

program. Note, also, that the incidence of suspected fraud is only half as high as the number of cases with recommended denials, which was shown as 882,637 in Exhibit Five. A little over half those with recommended denials were simply regarded as not eligible, and a little less than half of these cases were regarded as both ineligible and fraud-tainted.

While LO adjudicators suspect fraud in more than a third of a million SAW cases, INS, by March 27, 1989 (20 months after the opening of the application window and four months after its closure), had denied only 25,036 SAW cases. Many were in pending status, and many of those will be denied subsequently, but the prevailing pattern in the RPFs is to overturn what those entities regard as "unsustainable denials." These are usually cases in which the first-line adjudicator suspected fraud, recommended denial, but did not provide a convincing rationale, in writing, for the recommended denial.

INS approaches the question of applicant fraud on two fronts: it seeks to identify fraudulent individual claims, and to deny them (which is what we have been discussing) and it also pursues and seeks criminal convictions of those persons who sell and help sell fraudulent documents. INS rarely presses criminal charges against individuals filing fraudulent claims.

Nationwide, as of April, 1989, the Service reported the following levels of criminal fraud activities:

Process	FY'87	FY '88	First half FY '89
arrests	15	298	317
persons indicted	7	286	268
convictions	8	75	164

This appears to be a lot of activity, and has gained in momentum in recent months. In the largest of these categories, there had been 630 arrests from the start of the SAW program through March 30, 1989.

While the numbers above are precise counts of actions taken against individuals, INS has only estimates for the number of

applications involved in these investigations, and the estimate is only for those open at a particular moment in time. At the end of FY '88, INS estimated that there were 38,758 SAW cases in this category, compared to 1,638 245A cases.⁹⁰ INS has clearly focussed, as one would imagine, on the biggest of the fraud operators -- using the numbers above, one can calculate that there were 61 applications under examination, at the end of FY'88, for every arrest recorded in the three fiscal years.

C.3. Hearsay about SAW Fraud. The universal reaction of people, on all sides, who worked with the day-to-day reality of the SAW program was that it was full of ineligible applicants. The same people would say in the same breath, that the 245A program had been remarkably clean.

These judgments were made by Anglos and Hispanics, staff members of INS and immigrant-serving agencies, lawyers and lay people, journalists and academicians; sometimes the statements were made with more vehemence and sometimes with less, but the tone of these conversations were in keeping with the INS suspicions, at the LO level, that there were more than a third of a million fraudulent SAW cases.

Without repeating the grim humor of those applicants who said that they had picked strawberries from ladders or had harvested purple cotton, it may be useful to recall one of our many conversations on the point (this in Central California).

We were finishing an interview with a Hispanic woman who managed a small QDE which specialized in farmworkers, when the following exchange took place:

Question: "In your work with this agency, have you ever encountered any applicants who you thought might not be eligible?"

Reply: "Most of the applicants I have seen in the last six

⁹⁰ These data are unpublished statistics provided by the Office of the INS Assistant Commissioner/Investigations.

months probably are not eligible for the program."

Question: "What gives you the first clue?"

Reply: "Well, there's the whiteout on the applications..."

But the hearsay was more than a series of impressions of individual fraudulent applications, there were remarkable patterns picked up by observers (in addition to the patterns detected by the RPF computers). Among them were these:

- o unlikely working patterns; people contending that they had worked 90 days in harvests which last half that long;
- o unlikely combinations of employers and employees (one usually does not encounter East Indians working for Hispanic crew leaders; or Pakistanis growing peanuts in Georgia, and hiring other Pakistanis to do field work);
- o unlikely educational and class backgrounds of SAW applicants (Ph.Ds, the son of a Saudi diplomat, etc.);
- o unlikely locations for SAW applications (there were 28,889 applications filed in New York City).
- o and then there were all those applicants who had an unlikely lack of knowledge of the kind of work that they claimed to have done.

There was a thought that was not expressed that was at least as impressive as all that was said. Though we had been in the thick of the debate on extending the 245A program, and though we were in the Central Valley of California in the last days of the SAW application window, we never heard a single voice suggesting that the SAW program be extended.

C.4. Comparing SAWs With Other Measures of the Farm Labor Force. In order to qualify for SAW status, one must successfully claim three months of work with perishable crops in a 12-month period ending May 1, 1986. Fortunately, for our purposes, there are various independent measures of the size of the farm labor force. Perhaps the best of these rough measures are those made continuously by the state agencies working with the U.S.

Employment Service, such as California's Employment Development Department (EDD).

EDD, and the sister agencies, play a broker role in the fast changing agricultural labor market. They find jobs for workers, and workers for jobs, usually working at the crew level, and working most intensely in the harvest periods. They need to have knowledge of the changing state of the agricultural labor market -- worker surpluses here and shortages there -- to fill job orders when they arrive. (Most agricultural, like most non-agricultural job placements are made privately, and not through EDD, but the latter has a considerable network of offices and staff members throughout the state.)

EDD's data is not collected by ethnicity or civil status, but the agency does break out its data along these lines:

- o farmers and unpaid family workers,
- o regular hired workers, and
- o seasonal hired workers.

Those in the first category are typically farm owners, and their immediate families, usually U.S. citizens. Those in the second category include a wide range of people, from highly-paid managers and professionals (such as accountants) to people who work year-around in dairy barns. Many of these workers are citizens, some are greencard holders and others must be undocumented aliens.

It is the third category, seasonal farm workers, that caught the eye of the Congress. These individuals work in a variety of short-term activities, planting, weeding, irrigating and, above all, harvesting crops. Some are migrants from elsewhere (primarily the interior of Mexico or the Lower Rio Grande Valley of Texas), but many are local residents. A large percentage of these workers in 1986 were Mexican Nationals, both greencarders and undocumented aliens. SAW applicants must, by definition, claim that they have been seasonal farmworkers.

EDD is interested in figuring out how many workers are

needed, and how many are available. Since its primary customer is California agri-business, it thinks in agri-business terms, not in demographic terms. EDD then measures the number of person weeks needed in a crop, and the number of person weeks used in a given harvest -- it does not routinely count the number of individual people flowing in and out of the highly mobile farm labor force.

When we compare the counts of the individual SAW applicants, in the state of California (691,500)⁹¹ and the number of person-years of work done in California agriculture, we find we have two different measures, but not incompatible ones. If people work part time, or more to the point in farmwork, move in and out of the work force, then more than one worker will be used to complete an average year's work; if one works 90 days in agriculture that is one quarter of a person year.

We have displayed some of these comparisons in Exhibit Eight which shows that if all the California SAW applicants worked fulltime in California agriculture they would have provided two and a half times as many man years of work as California used in 1987 -- even if no one except SAW applicants were employed in the roles of farmer, unpaid farm family worker, year-around farmworker and seasonal farmworker. (This is a comparison of lines 1 and 2 in the exhibit.)

Another comparison -- if all SAW applicants in California worked only 90 days in seasonal jobs they would provide 40% more weeks of seasonal farm work than used to meet the State's current

⁹¹ The total number of legalization applicants in California who identified themselves as farmworkers is even higher. To the 691,500 SAW applicants, who, by definition claim to have been farmworkers, we should add the 36,000 or so 245A applicants in California who gave their current occupation as farmwork when they applied; the total is 721,500.

Exhibit Eight**The Number of SAW Applicants in California as Compared With Other Measures of the Size of the California Farm Work Force**

Category	Total
1. SAW applicants in California, 1/27/89	691,500
.....	
Other measures of the California Farm Work Force	
2. Average agricultural employment in California (man years worked) 1987	
Farmers and unpaid family workers	59,100
Regular hired workers	89,900
Seasonal hired workers	124,700
Total	273,700
3. Highest mid-month average in weeks worked in last two years, same measure as above (Sept. 1986)	
Farmers and unpaid family workers	68,700
Regular hired workers	102,600
Seasonal hired workers	172,700
Total	344,000
4. Highest mid-month utilization of seasonal hired workers, as above, <u>times two</u> (also, Sept. 1986)	345,400
5. Individual workers who earned \$2700-\$12,500 in SAW-qualifying crops in 1986	188,000
6. Individual workers who worked in SAW-qualifying crops 18-40 weeks in California, 1986	115,000

Sources: 1: Provisional Legalization Statistics, INS Statistics Division, Washington, D.C.; 2,3 and 4: California Employment Development Department, Report 881-M, Agricultural Employment Estimates, February, 1988, Sacramento, CA; 5 and 6: EDD data, based on unemployment insurance tax payments data secured by Professor Philip Martin, University of California/Davis.

labor-use practices⁹² -- again, even if no citizen or greencarder clipped a single lemon or cut a single head of lettuce.

Still other comparisons -- these of individual workers recorded as being employed in SAW-qualifying crops in California in 1986 (lines 5 and 6 of the exhibit) show that the number of such workers recorded in the unemployment tax system in California is a small fraction of those SAW claimants who said that they had worked in such crops.

There are, of course, some difficulties with these comparisons. First, some of the SAWs filing in California probably did some of their farm work in other states (though the reverse may be true as well). Secondly, the unemployment tax data understates the true number of people working in SAW-qualifying crops because some employers are too small to be covered by unemployment insurance, and others fail to pay their taxes. (California, however, has one of the more all-encompassing unemployment tax systems for farmworkers.) Thirdly, as is well known in the business, securing data on a transient and powerless labor force, such as seasonal farm workers, is difficult and the estimating process is underfunded.

Despite all this, the number of SAW applicants in California is much, much larger than one would suspect from all other measures of the agricultural labor force.

C.5. Why Different Levels of Fraud? Why does there appear to be so much more fraud in the SAW program than in the 245A program?

⁹² Professor Philip Martin of University of California/Davis has argued for years that many farm labor practices are traditional and not necessarily financially rewarding to growers -- such as growers insisting on the picking of the last fruit on the tree; were there to be a tightness in the labor supply, such practices would be eliminated with no harm to consumers. The end of the bracero program eliminated some of the traditional excessively-neat weeding of sugar beets, again with no harm to consumers, given the persistent world-wide surplus of sugar.

One obvious answer, but not the only one, is that it is easier to document (either honestly or dishonestly) that one was working in agriculture for 90 days than it is to prove that one was residing in the U.S. for five or six years.

In addition there were other interactions between the two legalization programs, which tended to steer fraudulent cases out of the 245A program and into the SAW program.

All applicants for the two legalization programs, by definition, can be divided into four mutually-exclusive categories. Each applicant was either (A) eligible for both programs, or (B) eligible for SAW but not 245A status, or (C) eligible for 245A but not SAW status, or (D) not eligible for either program. Most fraudulent applicants belong to class D, and for many the choice was simple, to apply for the SAW program which had the easier of the two sets of requirements. (That the SAW program had many more benefits than the 245A program, such as no civics or English tests in the second phase, and a card which could be used immediately to cross the border, probably played a minor role in these decision-making processes.)

Other important factors, in the location of most of the fraud in the SAW program, related to the interactions of the two programs. People close to the legalization process sensed that a majority of the applicants who had a choice of a program in which to file (i.e. those with eligibility in both or in neither) opted for the SAW program.

Further, there were dimensions of both time and space which pushed the fraud into the SAW program. Between May 5 and November 30, 1988, a period of close to six months during which 63% of the SAW applications were filed, it was the only game in town -- one could not seek legalization in any other way. By the end of this period it was even more clear than it had been in May, 1988, that it was perfectly safe for an alien to file for legalization, even if one had a bad case; INS was not rounding up applicants in the LOs (as some had feared) and deporting them.

Finally, if one were outside the nation at any time during

the SAW application window and wanted to apply for legalization, one had to file for the SAW program; all 245A applications were filed in the U.S. There were some 118,000 applications filed outside the U.S., all but a handful in Mexico.

There were, as one would expect in a large and complex program, some anomalies. Some misguided aliens, apparently eligible for the SAW program, but not for 245A, had filed for the latter.⁹³ The Western RPF encountered an unknown number of such applications. There presumably was a larger number of people -- those eligible for 245A who did not file by the May 5 deadline, who subsequently, despite the lack of needed farm work, filed for the SAW program.

D. The Strange Financing of These Programs

What follows will seem bizarre to officials of other nations' immigration services. Most legalization programs of other nations, to our knowledge, were funded with tax funds; only one levied fees.⁹⁴ The Treasuries and the taxpayers of those nations paid for those legalization programs.

The American programs worked differently. In general terms, 245A applicants paid fees which funded that program, and those fees were largely used within that program.

As far as we can determine, less than one quarter of the \$240,000,000 collected from the SAWs were spent on the SAW

⁹³ The INS Central Office, at this writing, is trying to determine what to do with such cases and others in which: an applicant filed a timely petition for legalization, was eligible for one of the programs, but filed for the wrong one. Given the existence of the four IRCA-related programs, updated registry, Cuban-Haitian Entrant, 245A, and SAW, the potential combinations are numerous. One group of Central Office staff members argue that such applications should be regarded as having been "constructively filed" with the appropriate program.

⁹⁴ The Philippines is the exception. It has created a legalization-cum-fund-raising program which charges U.S.\$2,500 to legalize the presence of previously illegal aliens, most of whom have Chinese ancestry.

program. The rest of the funds were used for other governmental purposes. More specifically, the SAW applicants who filed before Sept. 30, 1988, made a net \$107,000,000 contribution to the U.S. Treasury; while those who filed after that date made a \$50,000,000 dollar contribution to the Immigration Service's computerization program. The processes by which these two decisions were made were quite different from each other.

IRCA was passed late in the Reagan Administration, at a time when government spending was under heavy pressure from a White House that preferred lowering taxes to spending moneys on domestic programs. Given the fiscal environment, and the fact that the legalization program would benefit a previously illegal population, Congress decided that the 245A program would be funded by fees. Some of the immigration specialists in the Congress, however, wanted a mixed funding for the program: some tax money and some fees.

INS did some rough estimates of the number of people who would apply and the anticipated costs of the program, and figured that the appropriate fee would be \$185 per adult and \$50 for those under 18 years of age. This fee structure was applied to both the 245A program and the SAW program.

The costs of the 245A program, and the fees received, seem to be working out pretty equitably, at this writing. These were the estimated fees received and anticipated, and the costs incurred and anticipated, for that program:

Fiscal year	Fees in	Expenditures
1987	\$104,000,000	\$96,000,000
1988	\$189,000,000	\$128,000,000
1989	\$72,000,000 }	
1990	\$120,000,000 }	\$55,000,000
1991	\$39,000,000 }	
Totals	\$413,000,000	\$390,000,000 ⁹⁵

⁹⁵ While the rest of the data were secured over the telephone from INS officials, the \$120,000,000 estimate for second round 245A applications is TDA's estimate, based on a \$80 fee to be paid by an estimated 1.5 million second phase

The Office of Management and Budget (OMB) was not very helpful to INS as the 245A program began; as mentioned earlier, OMB told INS to borrow funds from the third and fourth quarter allotments to other parts of INS to start up the legalization program, and then hope that enough fees would come to the agency to pay off those internal debts.

By the time that the 245A application period ended, INS had taken in enough money so that it appears that the agency will break even or a little better as the program winds down. Costs will continue, as the backlog of applications are processed, and as the second phase of the program gets under way. The receipts from the second phase will be based on a \$80 fee for second phase processing.

The financing of the SAW program was more complex. In fiscal years (FYs) '87 and '88, tax funds were appropriated, through the normal channels, to fund the program, and the fees collected were to be deposited in the Treasury. This practice of levying fees for the Treasury, and using appropriated funds to provide services, was the traditional approach, used by INS and other agencies for decades. The 245A approach was the new one.

What happened, however, was that SAW receipts were heavier than anticipated, and much greater than the funds spent on the program. These were the receipts and expenditures in the first two fiscal years of the program:

Fiscal year	Fees in	Expenditures
1987	\$23,973,000	\$6,240,000
1988	\$113,118,000	\$23,260,000
Totals	\$137,091,000	\$29,600,000
Apparent short-term profit to the Treasury:		\$107,491,000

During these two fiscal years the undocumented farmworkers, as a group, made a net contribution to the Treasury that exceeded

applicants.

what the following Fortune 500 firms, paid in corporate income taxes in 1987:

- o Coors (\$28 million in corporate income taxes) and Coca Cola (\$50 million), or
- o J.P. Morgan (\$73 million) and Chase Manhattan (\$10 million), or
- o Xerox (\$33 million) and Johnson & Johnson (\$40 million).⁹⁶

Meanwhile INS had been negotiating with the Congress to secure a larger part of its annual funding from user fees. In a different but somewhat parallel situation, INS inspections at the airports have been funded by a \$5 fee levied on arriving travelers. INS likes user-fee funding; it finds it easier to predict the fluctuations in the level of international airline travel or fees received for adjudications than it is to predict OMB decisions. In this context, INS persuaded the Congressional Appropriations Committees to adopt the following arrangement: INS would receive \$54,000,000 in appropriated funds in FY'89 for examinations functions, it would send the Treasury the first \$50,000,000 in fees, and it would be able to use, but only for examinations functions⁹⁷, all fees collected above \$50,000,000.

The Appropriations Committees liked the arrangement because it made the examinations function virtually self-supporting; INS was happy because it figured that it could secure more funding for its programs without asking for tax moneys. This arrangement created the Examinations Reimbursement Account and it was enacted

⁹⁶ The SAWs however, were unable to balance the outflow of Treasury moneys to IBM, which secured \$123 million in corporate income tax rebates in 1987. All tax data are for 1987 and are from The Corporate Tax Comeback, Citizens for Tax Justice, Washington, DC, 1988, pp. 42-46.

⁹⁷ Examinations functions include, in addition to legalization, the adjudication of various petitions submitted to INS (such as by persons seeking immigrant visas for their relatives), and the naturalization of aliens.

in the State-Justice-Commerce Appropriations Bill for FY'89.

At about that time, the SAW program was coming to a roaring close. Although the program had only two months to go on October 1, 1988, INS took in \$72,000,000 in SAW fees as the program ended. With other examinations fees coming in at about the same rate as the year before, INS suddenly had a burst of cash, that it could use for the "enhancement of its examinations programs" a phrase broad enough to allow INS a certain leeway in its internal budgeting. The FY '89 financial picture, for funding INS examinations activities other than the 245A program, will be about as follows:⁹⁸

Receipts:	SAW fees	\$72,000,000
	other fees	\$60,000,000
	appropriations	\$54,000,000
	total receipts	\$186,000,000
Payment to Treasury		\$50,000,000
Available to INS		\$136,000,000
Est. FY '89 expenditures		\$111,000,000
Surplus for later use ⁹⁹		\$25,000,000

More narrowly, dealing with the SAW program only, these are the estimated receipts and expenditures for the SAW program for this fiscal year:

Fees in	Expenditures
\$72,000,000	\$15,000,000 from fees
	\$5,700,000 in appropriated funds
total	\$20,700,000

Apparent excess fees for other INS examinations functions	\$57,000,000
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The INS Assistant Commissioner for Adjudications told

⁹⁸ Financial data were secured in interviews with various INS officials.

⁹⁹ Such as, but not confined to, "out-year" expenditures on the second phase of the SAW program, and for the Replacement Agricultural Worker (RAW) program.

Interpreter Releases that the Service was going to use \$50,000,000 in unspent SAW funds to purchase a new generation of computers to "take INS from the 19th to the 21st Century" in its handling of adjudications.¹⁰⁰ Meanwhile, it is well known within INS that SAW funds are being used for a variety of other purposes that may seem distant from determining the validity of farm workers' claims to legal status, such as the funding of 21 positions in INS' overseas offices.

We have several thoughts about these financial arrangements. First, on a narrow, INS-focus, we note a couple of other pressing needs. While INS clearly needs to expand its computer capacity, why not use some of those unspent funds to conduct more careful adjudications of those 340,000 suspect SAW applications? A more comprehensive suggested approach to reducing SAW fraud, outlined by the Central Office in a legalization wire on September 14, 1988, was simply not implemented in the field because no funds were dispatched to support the suggested activities.¹⁰¹ Similarly, why not use some of those funds to provide a public information program for the under-publicized second phase of the 245A program? (This subject is covered subsequently.)

Secondly, on the social equity level, we have an interesting situation. Legitimate SAW applicants, who are among the poorest of the working poor, as Kissam's data revealed, find that about 80% of their user fees are being spent on other Government activities. Stated another way, they were overcharged by at least \$100 a head. (INS, of course, was taken by surprise at the number of applicants; had the agency anticipated 1.3 million applicants it probably would have lowered the fee.)

Finally, there are two other calculations. Non-legitimate SAW applicants, who receive TRA status despite their lack of

¹⁰⁰ "INS Adjudications: from the 19th to the 21st Century," Interpreter Releases, Vol. 66, No. 9, March 6, 1989, p. 249.

¹⁰¹ "INS Advises on SAW Fraud," Interpreter Releases, Vol. 65, No. 37, September 28, 1988, p. 983.

eligibility, have secured legal status in the United States for a mere \$185 (plus associated other costs). That is clearly a bargain for those individuals but it is a strange offering for a government agency dedicated to, among other things, law enforcement. From the point of view of INS it might be called a Faustian bargain, in effect, starving one program seeking to detect fraud in order to buy machines to make such determinations more accurately in the future.

These comments, in a draft version of this report, set off more objections from several INS managers that anything else we wrote. They made the following points:

- o INS did not expect as many SAW applicants as it experienced, and thus the fee was higher than it might have been. Agreed.¹⁰²

- o The decision to appropriate less money for the SAW program than fees received by that program in FYs '87 and '88, were not INS decisions, being OMB-Congressional decisions. Agreed.

- o INS badly needed to upgrade its computer operations and its adjudication systems, and the SAW funds gave it an opportunity to do so. We are in total agreement about the Service's needs in this connection, but we would prefer the use of tax funds for this purpose.

- o INS allocations of funds from the Examinations Reimbursement Account were legitimate policy decisions, and within the bounds of Congressional intent. Agreed.

- o Should the SAW program need additional funds in the future they can, and will, be drawn from the Examinations Reimbursement Account. Agreed.

- o The SAW program was adequately funded. On that central point we disagree. We also think that additional funds can and should be spent on publicizing the second phase of the 245A program.

In defense of the size of the SAW budget it was argued that given the looseness of the statute, the location of the burden of

¹⁰² Further, although this point was not made to us, it made good sense to set the 245A and SAW fees at the same level.

proof (on INS), and a series of court decisions making it harder for INS to deny SAW applications, why throw more money into what appeared to be a losing cause?

E. The Impact of Legalization on INS

The legalization programs, generally, have been good to the Immigration Service. The agency is stronger for having faced this challenge, and has benefitted in at least four different ways.

E.1. A stimulating experience. Just as the New Deal was a challenge to the Department of Agriculture in the '30s, the war was to the Pentagon in the '40s, and the Model Cities Program was to the Department of Housing and Urban Development in the '60s, so legalization was to INS in the '80s.

The Service as a whole, and many people in it, suddenly had to do something quite different; while everything did not work, and INS clearly operated within tight statutory and budgetary binds, the agency's juices began to flow and, to use the tennis term, INS largely played over its head -- and enjoyed the experience.

This was even more true for many individuals in the program. There was a real sense of joy in many INS offices as people who had led fairly limited work lives were suddenly given new and challenging responsibilities. Not only were a number of middle-grade people suddenly placed in command positions, they found the tenor of their work had reversed itself. People who had spent most of their careers in law enforcement or in D&D (detention and deportation) found themselves managing a program to grant benefits to the people they were jailing the previous year.

Further, there was a new and complex program to design and operate, new media attention, and new kinds of inter-agency relationships to manage. LO managers, who had previously

experienced television only passively, were in demand for on-the-spot interviews, complete with the current version of Klieg lights. INS staff found themselves arranging parades, radio hot lines, booths at fairs and other atypical Service activities as they sought to publicize the program. The agency found itself reaching out to the medical and educational communities in new ways, as it sought to facilitate the medical examinations and civics and English classes built into the program.

Finally, there was something that did not happen in the program, or if it did, we have not heard about it. Although there were 3,000,000 applications filed, and thus countless opportunities to suborn LO adjudicators, we heard of no internal INS corruption.

In short, the agency and its people were stretched and strengthened by the experience.

E.2. Institutional Changes. The legalization program hurried along a couple of developments which were already under way within INS: the creation of remote decision-making entities for handling many INS adjudications, and the related move towards computer-based, as opposed to file-based, decisions.

On balance, as we wrote in Decision Factories, we feel that the centralized, automated Regional Processing Facilities, were an important step forward towards rational and more uniform decision-making.

A somewhat similar, if less sharply-defined element, relates to the agency's progressively stronger role in the making of policy, not just its implementation. INS played a spectator's role when the last great change in the immigration law was enacted. This was the long-overdue elimination of country-of-origin quota systems which took place in 1964. The agency played a more active role in the creation of IRCA (and had lots of practice over the years, as the bill was in gestation for longer than seven successive baby elephants.)

Even before the end of the legalization application windows,

the Central Office had taken, for INS, the remarkable step of devising its own proposed reform of the allocation of immigration visas. We suspect that some of the troubles that INS had with legalization, a largely Capitol Hill-designed program, encouraged INS to do some program designing of its own.

E.3 Money and Equipment. INS emerged from the legalization experience stronger in material ways as well. There were 107 offices full of new furniture, much of which will be moved to district offices where it is badly needed. There are the new generation of computers purchased with SAW and other fees. There are much better systems in place for handling operating statistics. Further, INS purchasing agents have had their own set of eye-opening experiences, as they bought new, and for INS exotic, items such as public information programs (including bilingual comic books), and research contracts.¹⁰³

E. 4 Local level contacts. At the LO, district and regional levels, INS made a number of new, and generally mutually-useful contacts with immigrant-serving agencies in the course of the legalization program. (The extent and utility of these relationships varied, of course, with the predilections of the individuals involved being a major variable.)

The same statement can not be made at the national level, given the previously described wrangling with the QDEs, and the continuing disputes with the immigration bar. While critics often say that government regulators, in fields such as railroads, pollution, and savings and loan associations, are often too close to the people they regulate, INS rarely hears that criticism.

¹⁰³ Related to IRCA, but not the legalization program, is a similar revolution in the acquisition of law enforcement hardware. INS used to get helicopters by rehabilitating surplus Defense Department planes; last year it conducted a "fly-off" competition among several manufacturers, including a French one, before making its helicopter purchases.

F. Utility of the Overseas Experience to INS

INS paid a considerable amount of attention to the overseas experience in legalization programs (sending the Commissioner and much of the senior staff to an all-day meeting on the subject arranged by several non-profit entities¹⁰⁴), and made substantial use of the overseas experience.

The principal lessons from other nations were to keep the programs simple in design, to publicize them extensively, and to try to build maximum confidence in the target populations and the organizations that relate to them. Unfortunately Congress devised a complex and not very generous program, and OMB refused to permit the use of sufficient funds (even though they were supplied by the aliens) to publicize the program. The agency, thus began its activities with serious handicaps that did not beset the overseas programs.

INS did seek, largely successfully, to build confidence in the target population by its fundamental decision to keep the legalization program physically separate from the district offices; further, the agency felt that the heavy direct flow of cases to LOs (rather than through the QDEs) suggested confidence in INS on the part of much of the applicant population. Finally, there was a useful message from the Canadian agency which INS apparently heeded; that was: convince your own staff to buy into the program, believe in it and convey that attitude to the public.

¹⁰⁴ See Meissner-Papademetriou-North report cited in footnote #11.

III. LOOKING FORWARD: WHAT HAPPENS NEXT?

A. Wrapping up the First Phase

As Exhibit Five indicated, there were, on March 24, 1989, more than 1.2 million SAW and 245A cases pending in the LOs and in the RPFs. Tens of thousands of more difficult cases were in the hands of the LAU or the courts. Each needs to be decided.

In some instance an LAU or a court decision may cause other previously closed cases to be re-opened, adding still more cases to the group to be decided.

That there would be, months after the application windows closed, a large number of cases to be decided was, of course, expected. It was also anticipated that easier cases would be handled first, and more difficult ones later. What worries the advocates is the prospect that INS will suddenly begin to deny large numbers of cases, and that the aliens involved will overwhelm the appeals-assistance systems which have been created by the American Bar Association and other groups.

Looking at the situation from another point of view -- that of litigant rather than that of applicant -- there are a substantial number of law suits still before the courts. We gather that all of the class-action cases remain alive, one way or the other, though some of the individual cases have been settled. Given attorneys' obligations to individual clients, or groups of them, and given the posture of the Government lawyers that theirs are the correct views on the matters under dispute, there presumably is no way to proceed except on a one-suit-at-a-time basis.

One can not help think about the analogy of international diplomacy. If their General Secretary and our President can work out major questions such as how many nuclear bombs each nation can own, why not at least think about a major negotiation between the immigration bar on one hand, and the INS Commissioner on the other? But the Law usually does not work that way.

B. The Second Phase

B.1. New Hurdles for the Newly-Legalized. The principal problems of the second phase of the legalization program are that it exists, and that some of the applicants do not know that it exists. As with many other aspects of IRCA, this is a problem for the 245As, but not for the SAWS who will get their permanent resident alien cards automatically.

Those who have been through the first phase of the 245A program become eligible for PRA status starting on the 19th month after they filed their original TRA application. Twelve months later their window of opportunity closes, and they would, according to IRCA, revert to undocumented status. Thus applicants who applied when the program began on May 5, 1987, became eligible to apply for the green card showing PRA status on November 7, 1988. They will drop out of legal status on November 6, 1989, if they have not applied by then.

The TRAs do not simply file an application for PRA status, they must also:

- o pay another fee, this time \$80, or no more than \$240 for a nuclear family;
- o secure another blood test if they had not undergone the AIDS test in the first round; and,
- o satisfy the Government that they either can pass an INS-approved English and civics test or can demonstrate that they are satisfactorily pursuing a course of study in those fields.

The English and civics requirement is new and different; no where else in the INA are there any demands that any class of aliens meet such standards. What is traditional in the U.S. and in many other nations of immigration is that a would-be citizen must know something about the country and, usually, its language. The English and civics requirement was inserted into IRCA during

the deliberations in the House of Representatives, with Speaker James Wright (D-TX) playing a leading role in the decision.

INS has done its best to minimize the impact of the English and civics requirement on the second phase of the legalization process. It has made three important groups of decisions in this connection:

1. It has substantially reduced the number of people who have to meet the requirement, eliminating those over 64 and under 16, those who have been in the nation for 20 years who are over the age of 50, people with U.S. high school diploma or a year of college, people without the ability to see or speak or hear, etc.
2. It has created a variety of tests, and made it possible for repeated taking of some of these tests.
3. It has defined "satisfactorily pursuing" to mean having completed 40 hours of a 60-hour program of instruction.¹⁰⁵

It is expected that most PRA applicants will not take the tests, but will enroll in the classes.

The most significant challenges in the second phase of the legalization program are to inform the applicants that they must complete the second round requirements, and to make sure that there is an adequate number of seats in classrooms to provide the needed training programs.

INS has decided, unfortunately we think, to conduct only a modest public information program in the second phase. This will be, primarily a series of mailings to those who applied during the first phase. INS opted neither to increase the application fee by say \$5 which would raise about \$7-\$8 million for a public relations campaign, nor to make use of excess SAW fees. One of the difficulties with such a direct mail approach is that the population is a mobile one, and that many of the applicants

¹⁰⁵ "English/Civics Test" Legalization Update, Vol. 1, Issue 1, January 30, 1989, p. 1

(including the scores of thousands of non-Hispanics) can not read either English or Spanish.¹⁰⁶

The INS position on this issue is that the level of funding is adequate, and the response level in the early stages of the second phase is heartening. INS, which spent \$11 million on publicizing the first phase of legalization, is spending about \$3.5 million on the second phase. The latter figure does not include the costs (handled otherwise) for the several direct mailings to those in TRA status; these mailings include messages in both English and Spanish as well as copies of the applications forms.

The early returns are truly encouraging. As of May 21, these were the filings for the first three cohorts (by months) of TRAs eligible for PRA status:

cohort	no. eligible	no. filed	percent filing
May 87	44,314	31,691	72%
June 87	127,137	80,082	63%
July 87	135,639	73,225	54%

At the point when the data were collected the members of these cohorts had several more months in their eligibility windows. As of May 9, 1989, there had been 341,656 second phase applications; 150,526 approvals had been issued, and only 43 denials, most of whom were found excludable on criminal grounds. To date INS had issued no denials on the English-civics grounds.

The need for classes for those seeking PRA status has created enormous pressures on the educational system, particularly in southern California, with, as noted earlier, classes being offered on a round-the-clock basis. The questions, well addressed by others, is will there be enough classes, in the

¹⁰⁶ For more comments on this subject see Legalization White Paper a commentary on the second phase of the legalization program sponsored by eight interested organizations and distributed by National Association of Latino Elected and Appointed Officials, Los Angeles, 1989.

right places, at the right time, to meet the demand?¹⁰⁷ INS, particularly its Western Region, has been canvassing the educational establishment in an effort to secure sufficient seats in classrooms.

But will all of these efforts suffice to move the legalization population through the second phase of the program? What about the individuals who filed on the last few days of the first round? Won't they act similarly in the second round?

It appears almost inevitable that there will be an unmet demand for English and civics classes in the summer and fall of 1990, when the May 1988 245A applicants will begin to enroll in large numbers.

INS has adopted several procedural rules to ease some of these pressures. For example, TRAs must apply within the statutory timetable but can postpone, on request, their interviews (and the need to show that they are satisfactorily pursuing their courses) for a period of six months to a year. Similarly, the window now closes for applying for PRA status 30 months after the date that the TRA decision was made, not the date that the application had been submitted, the earlier rule. An even more fundamental approach to the PRA deadline is simply to eliminate it by changing the law. Congressman Bruce Morrison (D - CT), the new chair of the House immigration subcommittee, is said to be considering such a move. Given the advantages of PRA status over TRA status most of the legalized would file for the former, but at their own pace. Not a bad idea.

B.2. Related Policy Questions: RAWs and SLIAG. Congress, worried that an insufficient number of farmworkers would apply for SAW status and/or that those who did apply would quickly leave farm work, set up a complex program for Replenishment Agricultural Workers (RAWs).

¹⁰⁷ See the very useful National Council of La Raza memorandum on this subject cited in footnote #2.

Now that more than three times as many SAWs as the Department of Agriculture expected have applied for the program, one might think that there would be no need for a RAWs program. One might think that there is a more than ample supply of experienced foreign-born farmworkers and the introduction of more of them would unreasonably loosen the agricultural labor market, placing a downward pressure on wages and working conditions.

One would be wrong. The eight pages of IRCA that spell out how this program will work are still in place, and the strong likelihood is that the U.S. government will decide to admit some scores of thousands of RAWs for work in the 1990 season. (The numerical limits of the RAW program will be announced on October 1, 1989; those close to the process think that some 50,000 workers will be admitted.)

The process by which the number of RAWs to be admitted is determined is complex and beyond the scope of this study. Suffice to say that three different government agencies (Department of Labor, Department of Agriculture and the Bureau of the Census) using different statistical inputs for labor supply and demand, will construct an equation as prescribed by IRCA to come up with the final figure. That is a process that bears watching; the growers' interests usually prevail in such matters.

Another interesting process will be the selection of the RAWs. Immigrant advocates, and some forces within INS, would like to see these seasonal work visas granted to people who have ties to legal residents of the U.S., such as members of TRA families who can not secure legal status. Moving in that direction would help to defuse the family unity-family fairness issue. The growers, however, prefer experienced farmworkers¹⁰⁸.

¹⁰⁸ Watching this whole process with a truly jaundiced eye are the labor contractors who sold phoney SAW work verifications. RAWs will need documentation showing that they used their RAW cards to work in agriculture; some of the labor contractors are looking forward to selling their autographs again, this time to RAWs who have worked in cities and will tell INS they worked on farms.

Congress set aside \$4 billion to cope with the anticipated costs created by the legalization populations on social programs at the federal and state level. These funds, to be spent at the rate of \$1 billion a year for four years were called State Legalization Impact Assistance Grants (SLIAG). It is, in effect, a specialized block grant program, administered by the Department of Health and Human Services; funds are paid to federal programs like Food Stamps, and then the remaining money is apportioned among the states according to their level of need. Given the high percentage of legalization applicants living there, the program is potentially of most significance to California.

What has happened to SLIAG funds? They are handled in such a way, we gather, that only the most narrowly defined uses of the money are permitted, and as a result a substantial amount of the funds have not been spent, and, as a further result, other fates are being contemplated for these funds. The Bush Administration has proposed slashing the funds by \$300 million a year in FY'90 and FY'91, Senator Kennedy proposes to use \$200 million to fund the admission of more Soviet refugees, and Congressman Berman (of the Berman-Panetta-Schumer trio) proposes to borrow \$100 million from SLIAG in FY'89 (for Soviet refugees) to be repaid to SLIAG in FY'91. SLIAG funds, in short, are in danger of being diverted away from legalization programs, just as SAW fees were.

Congressman Berman's bill gives an indication of the narrowness of the current usage patterns of SLIAG funds. He proposes to do a variety of things not now possible under DHHS guidelines, such as providing outreach to TRAs about the second phase of the legalization program, and the funding of vocational training programs and classes in preparation for naturalization examinations.¹⁰⁹

There are problems at the state level as well; we understand that there is a tug-of-war going on between California's Governor

¹⁰⁹ "Congress Considers Proposals to Increase Soviet Emigre Flow" Interpreter Releases, Vol 66, No.1 14, April 10, 1989, pp. 397-401.

(a Republican) and the State Superintendent of Education (a Democrat in an elective post) over SLIAG money. The state has created relatively easy techniques for allocating SLIAG funds to health programs (favored by the Governor) but more intricate ones for funding education programs.

C. Conclusions

The legalization programs we have described relate to a finite population -- much of this report has dealt with the definition of that population. It was perfectly clear from the legislative history undergirding this program, as well as the words of the statute, that legalization was designed to be a one-time effort, and that it was not designed to cover all the undocumented aliens in the country. That may be an inappropriate approach, but that is the route that the Congress took.

Other aspects of IRCA, notably Employer Sanctions, were to encourage non-legalization-eligible undocumented aliens to leave the country, and to discourage new ones from entering the country. We have not been following this subject closely, and can not measure how successful these efforts have been. We sense, however, some impact of Sanctions, and certainly a pronounced drop in the illegal traffic at the southern border.

What we do know is that there remains a substantial illegal immigrant population in the U.S. It is clearly smaller than it used to be -- but it is still here, and to some extent its members probably have a rougher time in this country than they did before IRCA. Getting a job is not as easy as it used to be.

But democracies do not solve problems the way physicists do, they make changes, usually at the margins, usually in the direction preferred by most of the citizens. There never was any realistic expectation that IRCA would solve the problems of, and caused by, illegal aliens, it would simply limit the size of those problems.

We think it has done that; when it is all over IRCA will probably lead to the legalization of more than 2.5 million

previously illegal aliens. (This is equal to four years of immigrant acceptance at our usual 600,000-a-year level; this is a lot of people.)

Legalization may not have happened with all the grace that one might have wanted; clearly some eligible people were left out, and moneys were diverted to other public purposes, but the program will make a major difference for a powerless, disadvantaged, minority population. It will help millions of the working poor. How often can America make such statements?

APPENDIX

Summary of Selected Court Actions

This information is organized under key topics. The impact of these cases is analyzed in the text of this report, particularly Chapter II. A. Since our earliest look at these cases, we have been grateful to AILA's Litigation Alerts on which these summaries are based. Status data is accurate to our knowledge through April 20, 1989, but a number of these cases had not come to a conclusion at that time.

ADVERSE INFORMATION REBUTTAL/BURDEN OF PROOF

Haitian Refugee Center v. Nelson, No. 694 F.Supp. 864 (S.D.Fla. 1988) is a class action challenging a number of INS practices and policies in the SAW program. (It is limited to the 11th Circuit, i.e. Florida, Georgia and Alabama.)

STATUS: INS was ordered by the District Court to: 1) stop imposing what it termed an improper burden of proof on applicants; 2) stop issuing denial notices giving incorrect information regarding appeal procedures or inadequate information as to the basis of the denials; 3) stop conducting interviews without competent translators; and 4) stop denying cases on the basis of adverse information not supplied by the applicant without first providing the information to the applicant and providing an opportunity to rebut. (On the last point INS had argued, in vain, that it had no need to tell an applicant who presented a bad document that it was a forgery or a counterfeit.) INS was also ordered to reopen and readjudicate those cases that did not conform to these standards. INS is appealing the ruling on translators (part #3).

A similar class action, Ramirez-Fernandez v. Guigni, No. EP-88-CA-389 (W.D.Tex. 1988), sought the same provisions for SAW applicants in Texas and New Mexico.

STATUS: The Ramirez suit was dismissed on the grounds that INS agreed to follow the Haitian Refugee Center standards throughout the Southern Region. The court also found, in connection of a subject raised in this suit, but not in Haitian Refugee Center, that neither IRCA nor the Constitution requires transcripts of interviews as the plaintiffs had argued.

In United Farmworkers v. INS, No. 87-1064LKK (E.D.Calif.) a nationwide class action challenged: 1) the INS requirement of more than a worker's own affidavit to

establish a nonfrivolous SAW application; 2) what was termed INS' failure to publicize deferral of sanctions for agricultural employers; and 3) INS' failure to issue regulations to establish a method for compelling employers to produce records to support SAW applications.

STATUS: The case has been tentatively settled on one of these points. INS agreed to rely on an applicant's credible testimony as to the number of days worked if the applicant produces independent evidence of the fact of qualifying (including affidavits provided by applicants of a third party. Further, INS promulgated interim regulations on employer's records on July 20, 1988. Additional applicant parties (from the Northern and Western Regions) have joined in this case and raised many of the issues from Haitian Refugee Center. They also are challenging the 30-day period for appealing SAW denials as too brief.

APPLICATION PERIOD

Doe & Roe v. Nelson, No. 88-C-6987 (N.D.Ill. 1988) is a nationwide class action which seeks a judgment invalidating INS rules which deny legalization to persons who were apprehended after November 6, 1986 and did not apply for legalization within 30 days of the beginning of the application period. This action also seeks additional time to apply for those who never submitted applications because they believed that this rule made them ineligible.

STATUS: INS ultimately dropped the June 3, 1987 filing deadline for this class of applicants and agreed to reopen and reconsider cases denied on that basis. See 8 CFR 245a.2(a)(2)(i).

A similar action Guzman v. Nelson, No. 87-12060 (S.D.Fla. 1989) has been filed on behalf of SAWs to have INS reopen and reconsider previous denials on this basis. This action remains pending.

See also DOCUMENTATION - LULAC v. INS.

BRIEF, CASUAL & INNOCENT/CONTINUOUS PHYSICAL PRESENCE

Catholic Social Services v. Meese, No. S-86-1343-LKK (E.D.Calif., 9th Cir. 1987, 1988) is a nationwide class action brought by an agency of the largest QDE. The suit challenges INS on a number of Legalization and SAW regulations and policies. Currently at issue is the INS rule that, in order for an absence after May 1, 1987 not to have broken the continuous presence requirement, the

applicant must have received advance parole from INS. This of course was not possible for an otherwise brief and innocent absence which began shortly before that date and according to INS renders the alien ineligible if he did not reenter the U.S. until after that date.

The district court struck down this requirement, holding that such absences must be reviewed on a case-by-case basis to determine whether they were brief, casual and innocent (the standard for which derives from a line of cases in the suspension-of-deportation context). The court also ordered INS to accept legalization applications from persons who failed to apply on time because they believed themselves ineligible on this basis. The INS is required not to deport or remove any alien without first inquiring as to his/her eligibility for this class. If such an alien is eligible, s/he is to be released and granted work authorization and a stay of deportation.

STATUS: INS has appealed the late application order, as it has all similar judgments, but withdrawn its appeal of the order striking down the advance parole requirement. INS' appeal of the order requiring them to ask apprehended aliens whether they are in this category was denied.

This action overlaps Romero-Romero v. Meese, No. 87-407 (D.Ariz. 1988) encompassing aliens in Arizona and Nevada which challenged the alleged failure of INS to advise apprehended aliens of their rights under IRCA.

In a related individual action, Gutierrez v. Ilchert, No. C-88-0585 (N.D.Calif. 1988), an alien sought release from detention where he had been placed when he attempted to reenter the U.S. after a three-week visit to his seriously ill mother in Mexico in May, 1987. INS had excluded him as "plainly ineligible" for legalization because his absence after May 1, 1987 was without advance parole. INS contended that the absence was not "brief, casual and innocent" and therefore interrupted the alien's continuous physical presence. The district court rejected INS's position, finding that the absence was brief, casual and innocent using the standards cited above.

DOCUMENTATION

LULAC v. INS, No. 87-4757-WDK (C.D.Calif. 1988) is a nationwide class action which challenged the now-changed INS policy denying legalization to those who used a fraudulently-obtained visa or other document to reenter the U.S. after January 1, 1982, to resume an unlawful residence. After INS changed that rule to allow such persons to obtain

legalization, provided they obtain a waiver for the fraud, the suit was amended to challenge the waiver requirement for some aliens and to request additional time to apply for people who failed to apply by May 4, 1988, because they believed themselves ineligible.

STATUS: The court upheld the INS waiver requirement but found that those who did not apply on time should now be given the opportunity. INS has appealed the latter point but LOs accepted skeletal applications with fees from class members, and granted 6-month work authorizations and stays of deportation.

In Loe v. Thornburgh, No. 88 Civ. 7363 (PKL) (S.D.N.Y. 1989), a class action on behalf of aliens in the Eastern Region challenges: 1) INS' alleged failure to give proper weight to affidavit evidence; 2) INS' refusal to contact affiants to verify their statements; and 3) the failure to provide a hearing at which live testimony could be given and the witnesses' credibility weighed.

STATUS: While the case is pending, INS agreed to stop issuing denials where the evidence consists solely of affidavits, and to reopen such cases previously denied.

KNOWN TO THE GOVERNMENT

Ayuda, Inc. v. Meese, No. 687 F.Supp. 650 (D.D.C.1988), probably the most known legalization litigation, is a nationwide class action challenging the IRCA requirement that a nonimmigrant's unlawful presence must have been known to INS prior to January 1, 1982. The district court ruled that any federal agency (e.g. IRS or SSA) could have in its records the "knowledge by the Government" required in the statute. The court also held that willful failure to file quarterly and annual address forms required by INS through 1981 constituted an unlawful status known to INS. The most controversial decision in this matter was that aliens in these categories who did not apply by May 4, 1988 because they believed they were ineligible could file through the court or more directly through a court-appointed Special Master until November 15, 1988.

STATUS: INS has appealed the ruling on the address form applicants, but accepted the court's broader definition of the Government. It is readjudicating cases in the latter category. INS tried unsuccessfully to vacate the late filings and Special Master orders.

Immigration Assistance Project v. INS, No. C88-379 (W.D.Wash. 1988) and CIPRA v. Meese, No.99-1088 (D.D.C.

January 3, 1989) also deal with this issue. The CIPRA suit class was students on F visas. After the action was initiated INS reversed itself and granted the legalization applications of all known class members.

In the Immigration Assistance Project matter, the court ordered INS to use the rebuttable presumption proposed by the plaintiffs in deciding "known to the Government" cases. The presumption was that a school or employer that was supposed to report immigration law violations did so; the underlying notion was that both INS and private sector documentation of such reports were highly likely to have been discarded by the time the legalization program began.

An individual habeas corpus action Farzad v. Chandler, 670 F. Supp. 690 (N.D.Tex. 1988), in response to a deportation order, was an earlier challenge of INS on the same grounds. INS appealed this decision, then capitulated because of the above actions.

PUBLIC CHARGE

Perales v. Meese, (S.D.N.Y. 1988) is a class action on behalf of alien families residing in New York State who have received public assistance. The advocates demanded that INS make public its rules relating to what it considers grounds for a public charge exclusion, and sought a 12 month period after such publication in which this class could apply. (While INS regulations were restrictive, most LOs were in fact operating from a General Counsel memorandum which was more liberal.) A late filing order was issued at the district court level but was vacated on appeal.

STATUS: This case is now before the district court on another motion. While it is pending, INS is not deporting class members and is granting work authorizations even to those who filed after May 4, 1988.

In Zambrano v. Meese, NO. S-88-455 EJG-M (E.D.Calif. 1988), a 9th Circuit class action, the court rejected INS' proof of financial responsibility requirements. INS was ordered to reopen cases denied on public charge grounds.

STATUS: The court left open the question of a filing extension which is still pending.

The City of New York v. Meese, No. 88 Civ. 1570 (S.D.N.Y. 1988) is a class action which was suspended after INS issued a memorandum changing a related public assistance definition. The advocates had demanded that INS not consider foster care as public cash assistance rendering

children in this situation ineligible for legalization.

QUALIFYING CROPS

These actions were initiated against the Department of Agriculture which compiled the SAW eligible crop list and thus the defendant in these matters was Secretary Lyng. Morales v. Lyng, No. 87-C-20522 (N.D.Ill. 1988) was filed on behalf of sod workers. The district court ordered INS to accept skeletal SAW applications without fees, and to grant work authorization and stays of deportation. INS is holding these applications in abeyance.

Cottonworkers and growers filed parallel suits and were successful. In National Cotton Council v. Lyng, No. 5-877-0200-C (N.D.Tex. 1988), the court ordered USDA to stop excluding cottonworkers from the SAW program and the government did not appeal so the order is final. This rendered moot the cottonworkers' Valdez-Valencia v. Lyng, No. 87-630 (D.Ariz. 1988).

Hay producers and their employees lost their challenge in Texas Farm Bureau v. Lyng, 697 F.Supp. 935 (E.D.Tex. 1988). The court ruled that USDA was reasonable in its exclusion of hay from the perishable commodities and vegetables list.

Northwest Forest Workers v. Lyng, 688 F.Supp. 1 (D.D.C. 1988), No. 87-1487 (D.D.C. Feb. 28, 1989) resulted in another USDA vindication. The case was originated by FAIR to limit the SAW eligible crops. The sugarcane workers' suit for SAW eligibility (against the growers' wishes) was merged into the proceedings.

STATUS: The district court ruled in favor of the USDA's list of crops rejecting both the FAIR and the sugarcane workers' positions.

WAIVERS

The Western Region class action, Hernandez v. Meese, No. S-88-385LKK (E.D.Calif. 1988), challenged INS' alleged failure to make known the availability of waivers for single absences of more than 45 days or aggregate absences of more than 180 days. It also sought an extension to the application period.

STATUS: The court dismissed the challenge but left open the possibility of relief for those who did not apply on time or failed to appeal because they believed their absences made them ineligible.

See also DOCUMENTATION - LULAC v. INS.

WORK AUTHORIZATION (SAWs)

Prior to the start of the SAW program, Garza v. INS, No. H-87-0148 (S.D. Tex. 1987) sought work authorization for aliens in the Houston district who were apprehended by INS. The court ordered INS to issue the same to those apprehended after November 6, 1986 if they appeared otherwise eligible.

Arizona Farmworkers v. INS, No. 87-3475 (D.D.C. 1988) challenges the INS policy of denying SAW work authorization to anyone currently under an H-2A contract.

STATUS: This is pending.

Lopez v. Ezell, No. 88-1825 JLI (S.D. Calif. 1988) is a nationwide class action on behalf of SAW applicants who travelled abroad (usually to Mexico) on their work authorization cards (I-688As) and, who, on their return, had their cards seized by INS (on the grounds that they were not, in fact, eligible for the SAW program). INS responded to the suit's allegations by issuing a cable indicating that personnel should cease confiscation of I-688As. INS also agreed that affected SAWs should be issued new cards but they did not take the initiative to contact these individuals.

STATUS: The case has been settled. INS agreed to contact the 500-600 SAWs whose cards were confiscated and issue them new cards.

See also ADVERSE INFORMATION REBUTTAL/BURDEN OF PROOF - Ramirez-Fernandez v. Guigni.