

# INTERPRETER RELEASES

Report and analysis of immigration and nationality law

Vol. 67, No. 6

February 5, 1990

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## RECENT DEVELOPMENTS

### 1. INS Reverses Family Fairness Policy

INS Commissioner Gene McNary has announced significant liberalizations to his agency's family fairness policy. Under the changes, most children and spouses of newly legalized aliens here before November 6, 1986 will be allowed to remain in the U.S. and work. The changes may prevent the deportation of up to 100,000 undocumented children and spouses of newly legalized aliens.<sup>1</sup>

Mr. McNary sent a memorandum to all four INS regional commissioners on February 2, 1990, outlining the changes in the Service's family fairness policy. A copy of that memo is reproduced in Appendix I. The changes take effect February 14.

1 See *Los Angeles Times*, Feb. 3, 1990, at A1, col. 4; *New York Times*, Feb. 3, 1990, at 28, col. 1; *Washington Post*, Feb. 3, 1990, at A1, col. 1.

What to do when some but not all members of an alien family qualify for legalization has been a controversial issue since the beginning of the amnesty program. Former INS Commissioner Alan C. Nelson instructed INS offices in late 1987 to automatically grant voluntary departure only for minor children living with their newly legalized parents. Ineligible spouses of legalized aliens had to show "compelling or humanitarian factors" beyond the marriage itself to warrant voluntary departure.<sup>2</sup>

Immigrants' rights advocates attacked that version of the family fairness policy, calling it "overly restrictive, non-responsive to the needs of immigrants and their families, and contrary to the American tradition of keeping families together."<sup>3</sup> They also alleged that local INS offices were inconsistently applying the policy, with some routinely granting voluntary departure to legalized aliens' family members, while other offices denied almost all such requests. At a recent meeting with several national immigrants' rights organizations, new Commissioner McNary agreed to look into the controversy.

At his February 2 press conference announcing the policy change, Mr. McNary acknowledged that the previous policy guidelines were "fairly nebulous," and that they had not been "evenly and uniformly applied" around the country. "I had to...set a uniform policy," he told reporters.

Under the new policy, INS district directors must grant voluntary departure to a legalized alien's spouse and unmarried children under 18, if the following conditions are met: (1) the beneficiaries must be living with the legalized alien; (2) they must establish they have been residing in the U.S. since before November 6, 1986; (3) they must be admissible as

2 See 64 *Interpreter Releases* 1191-92, 1200-04 (Oct. 26, 1987); 1368, 1380-81 (Dec. 14, 1987).

3 See 66 *Interpreter Releases* 562 (May 22, 1989).



### Federal Publications Inc.

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Washington, D.C. 20036-3406  
(202) 337-7000 (Editorial Office)  
(615) 377-3322 (Circulation Office)

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INTERPRETER RELEASES (ISSN 0020-9686) is published weekly (except the fourth week in February, the third week in June, the first week in July and the last week in November) by Federal Publications Inc., P.O. Box 41094, Nashville, TN 37204. Annual Subscription \$340. Second-class postage paid at Brentwood, TN. POSTMASTER: Send address changes to INTERPRETER RELEASES/Sunbelt Fulfillment Services, P.O. Box 41094, Nashville, TN 37204.

immigrants; (4) they must not have been convicted of a felony or three misdemeanors committed in the U.S.; and (5) they must not have assisted in persecuting others.

Voluntary departure and work authorization will be granted in one-year increments to the beneficiaries of this new policy, with annual reviews by the district directors to see if the aliens have committed crimes or become dependent on public assistance.

Commissioner McNary clarified two points at the press conference that were left ambiguous in his memo. First, the legalized alien and his or her spouse must have married before November 6, 1986 for the undocumented spouse to benefit from the new policy. Second, in response to a question, Mr. McNary said he "would think" that children over 18 won't be deported. They would continue to receive voluntary departure and work authorization "until they've waited their turn in the queue" to obtain an immigrant visa.

A February 2 telex sent from the INS Central Office to all field offices reiterated Commissioner McNary's policy memo. Paragraph 6 of the telex also added the following clarification:

All cases currently in deportation proceedings should be reviewed for family fairness eligibility before commencement of a hearing or removal. If the alien is found to be eligible, proceedings should be administratively closed to allow them the opportunity to request voluntary departure under this policy.

Asked whether the new policy might encourage other undocumented aliens to seek entry into the U.S., Mr. McNary replied that he would do everything possible within the INS budget to enhance enforcement along the U.S.-Mexico border, including increasing detentions. "It is vital that we enforce the law against illegal entry," he said. "However, we can enforce the law humanely. To split families encourages further violations of the law as they reunite." Mr. McNary also noted that the new INS policy was consistent with provisions in legal immigration reform legislation pending in Congress.<sup>1</sup>

## 2. Courts Uphold INS L-1 Regulations

Two federal courts have recently upheld the INS' regulations defining managers and executives for L-1 intracompany transferee visa purposes. A federal district court in New York upheld the INS' denial of a sixth preference immigrant visa petition filed on behalf of a president of a Taiwanese company's U.S. subsidiary. The court held that although the INS considered the subsidiary's size, it did not place "undue emphasis" on this factor. *Fedin Brothers Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Similarly, the Fifth Circuit upheld the Service's denial of a sixth preference petition, finding that the INS' definition of "managerial capacity," which requires that an employee "primarily" direct operations, is not inconsistent with the INA. *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989).

The company in the first case, Fedin Brothers Co., Ltd., filed a sixth preference immigrant visa petition on behalf of Huy-Yin Chen, a citizen of Taiwan. Fedin, a plastic parts manufacturer, is incorporated in Taiwan and has a New York subsidiary. Mr. Chen, Fedin New York's president, holds a nonimmigrant L-1 visa valid until November 1990. The visa petition asserted that Mr. Chen qualified for Schedule A, Group IV blanket labor certification as an L-1 executive and manager under 20 CFR § 656.22(f)(1). Mr. Chen submitted affidavits stating that he performed and will continue to perform executive and managerial duties for Fedin New York.

The INS denied the petition, finding that Mr. Chen did not perform in an executive or managerial capacity. Mr. Chen, the Service said, is primarily providing all the subsidiary's services, not supervising managers. The INS' Administrative Appeals Unit (AAU) dismissed Fedin's appeal on the same ground. Fedin then filed a complaint in federal court. The INS filed a motion for summary judgment.

U.S. District Judge Leonard D. Wexler first noted that in general a reviewing court defers to the construction accorded a statute by the relevant agency. Courts have been especially deferential to INS decisions, he said, given the "respect for the Service's expertise in interpreting and administering the [INA]."

Judge Wexler then turned to the facts before him. The court pointed out that the Service's denial of Fedin's petition accords with congressional intent (724 F. Supp. at 1106 (citations omitted)):

<sup>1</sup> See, e.g., S. 358, § 108, discussed in 66 *Interpreter Releases* 837 (July 31, 1989).

## Appendix I

## Memorandum



C-1588-P

Subject: Family Fairness: Guidelines For Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens	Date  FEB 2 1990
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To

From

Regional Commissioners  
 Eastern  
 Northern  
 Southern  
 Western

Office of the  
 Commissioner

On November 13, 1987, the Service implemented guidelines on granting voluntary departure to the ineligible spouses and children of legalized aliens, the so-called "family fairness" policy.

The Service is likely to face the issue of family fairness for several more years, because of the length of time needed for newly legalized aliens to acquire lawful permanent resident status and then to wait for a visa preference number to become available for family members. Accordingly, the Service is clarifying its family fairness policy, to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens.

Effective February 14, 1990, the following policy is to be implemented by all district directors in determining the eligibility for voluntary departure of ineligible spouses and children of legalized aliens.

1. Voluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien, who can establish that they have been residing in the United States since on or before November 6, 1986, if
  - the alien is admissible as an immigrant, except for documentary requirements;
  - the alien has not been convicted of a felony or three misdemeanors committed in the United States;
  - the alien has not assisted in the persecution of any person or persons on account of race, religion,

## Appendix I, continued

nationality, membership in a particular social group or political opinion.

2. Voluntary departure will be granted for a one-year period to aliens who meet these requirements. Cases will be reviewed on an annual basis thereafter by district directors to determine whether extensions of voluntary departure should be issued.
  - A grant of voluntary departure based on family fairness will be terminated if the legalized family member loses his or her status.
  - A grant of voluntary departure based on family fairness will be terminated if the alien fails to maintain the requirements outlined in Paragraph 1.
  - A grant of voluntary departure issued pursuant to this policy shall not be terminated for the sole reasons that the legalized family member has become a lawful permanent resident.
3. Documentary evidence must be submitted to establish
  - the family relationship, through marriage certificates for spouses and birth or baptismal certificates for children and
  - residence with the legalized alien, through a sworn affidavit, under penalty of perjury, by the legalized alien.
4. Work authorization will be granted to aliens who qualify for voluntary departure under Paragraph One and as provided in Paragraph Two.
5. In the case of a child born after November 6, 1986, no deportation proceedings shall be instituted as long as a parent maintains his or her status as a legalized alien.

The Legalization and Special Agricultural Worker Programs will eventually bring permanent lawful immigration status to nearly 3 million aliens. It is critical that the Service continue to respond to the needs of these aliens and their immediate family members in a consistent and humanitarian manner.

  
GENE MCNARY  
Commissioner