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IN THIS ISSUE

LEGALIZATION IS ALIVE BUT HAS A JANUARY 31, 2010, DEADLINE IN UNDERPUBLICIZED "KNOWN TO THE GOVERNMENT" SETTLEMENT

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With the settlement of *Northwest Immigrant Rights Project (NWIRP) v. USCIS*, No. 88-379R (W.D. Wash. Sept. 9, 2008),[1] there is finally a remedy for those who were qualified yet turned away for legalization under the

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Immigration Reform and Control Act (IRCA)[2] of 1986—those whose claims were summarily dismissed by the INS because their illegal presence was alleged to have "not" been known to the government. The catch is that applicants now have only to January 31, 2010, to apply. The two basic requirements of legalization under the regular program were entry into the U.S. before January 1, 1982, and being illegal by that date. To the INS, the illegality had to be "known to the government" by that date. Many individuals qualified under the first score but had problems convincing the INS of the second.

One particular class of heartbreaking cases whose members claimed that their illegal status was "known to the government" held prima facie legal status. Most nonimmigrants with the exception of diplomats (A visas) and members of international organizations like the World Bank or the United Nations (G visas) were required to report their addresses on a quarterly and annual basis and, if they moved, their new locations to the government within 10 days. Many claimed that, because they did not, they were illegal and their illegal presence was constructively known by the INS. Students who stopped going to school but who were not reported as such by their designated school officials formed another group. They argued that the school officials had a duty to report their absences from school as they were the eyes and ears of the INS on campus. Thus, their violations of student status were constructively known to the government. Nonimmigrant H and L workers who left their employment were supposed to have had their violations reported to the INS by their petitioning organizations. They claimed that, assuming that their employers followed the law, their violations of status would have been known to the government. Other groups argued that their facially lawful statuses on or after January 1, 1982, were obtained by fraud or mistake and included situations of reinstatement to nonimmigrant status, change of nonimmigrant status, adjustment of status, or grant of some other immigration benefit interpreted to interrupt unlawful residence.

The INS originally rejected constructive knowledge, arguing that "known to the government" only meant "known to INS." In 1988, the D.C. District Court ruled in *Ayuda, Inc. v. Meese*, 687 F. Supp. 650 (D.D.C. 1988),[3] that "known to the government" should be more broadly interpreted as documentation existing in "one or more government agencies so that documentation taken as a whole would warrant the finding that the nonimmigrant's alien status in the U.S. was unlawful."

In *IAP v. INS*, 717 F. Supp. 1444 (W.D. Wash. 1989),[4] the court ruled that there was a rebuttable presumption that a violation of status, such as failure to submit an address report or dropping out of school while on a student visa, was reported to INS. Applicants had to make a prima facie showing that they had violated the terms of their visa statuses, and, once this was shown, the INS had the burden to come forward with evidence that unlawful status did not occur through the passage of time or that the unlawful status was not known to the government. However, In *Matter of H-*, 20 I. & N. Dec. 693 (Assoc. Comm. 1993), the Associate Commissioner ignored the *IAP* decision and ruled that it was "not reasonable to impute knowledge to the government based on the absence of a document," such as the absence of an address report or notification from a school. The Associate Commissioner reasoned that the absence of such a document did not necessarily indicate an unlawful status but might also imply that the alien had left the country. He concluded that, because of this possible ambiguity, unlawful status could not be "known to the government" by the absence of mandatory annual and quarterly registration reports in government files.

On March 3, 1999, the *IAP* district court in continuing class-action litigation entered an order which effectively reversed *Matter of H-*. The 1999 order required all pending legalization applications involving a "known to the government" class (including students who had violated their status and aliens who had failed to report their addresses) to be adjudicated according to the 1989 *IAP v. INS* decision. The 1999 order affirmed that there was a rebuttable presumption that violations of status were reported to the government. The 1999 order did not go into effect as the INS filed an appeal with the Ninth Circuit Court of Appeals. In 2002, the Ninth Circuit upheld the 1999 order, confirming the rebuttable presumption and remanding the case to the district court for further proceedings.

However, a final settlement did not come about until September 2008. By that time, Northwest Immigrant Rights Project (NWIRP) had replaced the Immigrant Assistance Project (IAP) as the lead plaintiff in the case, and the case was called *NWIRP v. USCIS*. Under the terms of the settlement, if a person establishes that he or she failed to file the required address reports before January 1, 1982, then the burden shifts to USCIS to prove that the person did file the required address reports. If USCIS does not produce the address reports, then it must be concluded that the person was in an unlawful status that was "known to the government." Similarly, if an applicant shows that he or she was a student who dropped out of school or transferred without authorization from the INS, then the burden shifts to USCIS to prove that the

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school did not notify the INS of the violation of status. If USCIS does not meet its burden of proof, then it must be concluded that the applicant was in an unlawful status that was "known to the government."

Currently class members who did not file an application for legalization during the legalization application period (May 5, 1987, to May 4, 1988) can submit legalization applications anytime between February 1, 2009, and January 31, 2010. Class members who filed an application for legalization during the legalization application period and who were denied for "known to the government" reasons can file a motion to reopen to have their legalization applications reopened and readjudicated in accordance with the presumptions described above.

To qualify as a "class member," an individual must have entered the U.S. in a nonimmigrant status prior to January 1, 1982, and:

(A) between May 5, 1987, and May 4, 1988, attempted to file a complete application for legalization under INA § 245A [8 USCA § 1255a] and fees to an INS officer or agent acting on behalf of the INS, including a qualified designated entity (QDE) and had his or her application rejected for filing;

(B) between May 5, 1987, and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under INA § 245A, but was advised that he or she was ineligible for legalization, or was refused legalization application forms, where, for the individual, such information, or inability to obtain the required application forms, was a substantial cause of his or her failure to file or complete a timely written application; or

(C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and (i) his or her application has not been finally adjudicated or his or her temporary resident status has been proposed for termination or (ii) his or her application was denied or his or her temporary resident status was terminated where the INS or USCIS action or inaction was because INS or USCIS believed that the applicant had failed to meet the "known to the government" requirement, or the requirement that he or she demonstrate that his or her unlawful residence was continuous.

In addition, a class member must fall into one of the following categories:

(1) persons who violated the terms of their nonimmigrant status prior to January 1, 1982, in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in a unlawful status prior to January 1, 1982, in a manner known to the government.

(2) persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file and who are unable to meet the requirements of 8 CFR §§ 245a.1(d) and 245a.2(d) without such records.

(3) persons whose facially valid "lawful status" on or after January 1, 1982, was obtained by fraud or mistake, whether such "lawful status" was the result of:

(a) reinstatement to nonimmigrant status;

(b) change of nonimmigrant status pursuant to INA § 248 [8 USCA § 1258];

(c) adjustment of status pursuant to INA § 245 [8 USCA § 1255]; or

(d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A [8 USCA § 1255a].

Although this opportunity for amnesty is wonderful for the many who fall under its terms and although USCIS was obligated to publicize the settlement, very few appear to know about it. Information about the case has not been widely publicized. Information about the case is available on the USCIS website and the website for Gibbs Houston Pauw. In addition, USCIS has sent out notices to some class members saying that they may be eligible for legalization under the settlement. However, the notice is clearly inadequate in that it does not reach those who were "front-desked" (turned away at the front desk) by the INS or a QDE. There would be no record of these applicants, and USCIS has no obligation under the *NWIRP* settlement to attempt to contact them. Also, for the individuals who managed to file applications in the 1980s, most of the addresses are no longer valid for contact, and any forwarding of mail would have expired

long ago. However, that should only be expected as USCIS opposed the "known to the government" class of cases claiming constructive government knowledge for two decades before being forced into this settlement. Hopefully more attention can be focused upon the *NWIRP* settlement as there are probably still many thousands of affected individuals who could benefit before the deadline of January 31, 2010. Although the prospects are not bright, USCIS should give consideration to extending the deadline in light of its lack of publicity to the settlement.

Notes

[1] For prior coverage of this national class action and the settlement, see 85 Interpreter Releases 3009 (Nov. 10, 2008); 85 Interpreter Releases 1803 (June 23, 2008); 85 Interpreter Releases 1656 (June 9, 2008); 76 Interpreter Releases 480 (Mar. 29, 1999); and 75 Interpreter Releases 733 (May 22, 1998). See also Gibbs, "It Ain't Over 'Til It's Over: Amnesty Issues Persist a Decade After IRCA," 73 Interpreter Releases 1493 (Oct. 28, 1996).

[2] Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

[3] *Ayuda* is discussed in 65 Interpreter Releases 345 (April 4, 1988).

[4] See 66 Interpreter Releases 285 (Mar. 13, 1989). ■