



September 21, 2007

Department of Homeland Security
111 Massachusetts Avenue, NW, 3rd Floor
Washington, DC 20529

By email: rfs.regs@dhs.gov

RE: DHS Docket No. USCIS-2005-0056

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the proposal of the Department of Homeland Security (DHS) to terminate the validity of indefinite Forms I-551 (Permanent Resident Cards).

We appreciate the opportunity to comment on the proposed rule and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

AILA is opposed to termination of the validity of the indefinite Form I-551 or Permanent Resident Card. The existing card is compliant with current legal requirements. In addition, the notice procedures and the narrow 120-day application window outlined in the proposed rule are wholly inadequate and will not be effective in reaching the affected class of permanent residents, who by definition went through the application process 18-30 years ago, and have held lawful permanent resident status since that time.

The rule subjects these long-term permanent residents to substantial financial costs, an unpredictable and potentially lengthy security check process, no assurance that they will have a replacement card within a specific period of time, inconvenience in arranging for interim documentation of travel or work authorization and possible inability to travel during processing, and the risk of prosecution leading to fines and imprisonment if they do not comply with the refiling requirement within the application window. In addition, the rule provides insufficient notice to U.S. employers, and burdens employers with knowing about changes to employment verification rules that are not reflected in Form I-9 Employment Eligibility Verification instructions.

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Existing Cards Are Compliant

The USCIS acknowledges in the proposed rule that the existing indefinitely valid Permanent Resident Card is compliant with the requirements of the Enhanced Border Security and Visa Entry Reform Act of 2002 (BSA), in that it is machine-readable, contains tamper-resistant features, and has biometric identifiers.¹ However, the rule proposes to invalidate this BSA-compliant card because it does not contain “the same level” of tamper-resistant features and biometric identifiers as the current version. While minor technological improvements are laudable, they do not present a sufficient basis to invalidate, by USCIS’ own estimates, 750,000 to 1.9 million Permanent Resident Cards.²

The proposed rule indicates that one basis for invalidation of the indefinite Permanent Resident Cards is to “update cardholder information.” If so, the rule is overbroad in scope. Mandating that 750,000 to 1.9 million lawful permanent residents replace their currently valid Permanent Resident Cards on the basis that some of these cards no longer serve as reliable documentation of identification is arbitrary and unreasonable. Many types of identification contain out-of-date information. That is the nature of photo identification. There is no reason to decree mass cancellation of these particular cards.

The rule indicates that another basis for invalidation of indefinite I-551s is that requiring permanent residents to go through the security check process a second time enables USCIS to “electronically store applicants’ biometric information that can be used for biometric comparison and authentication purposes...”³ USCIS already has biometric data for these permanent residents, as well as the capability to convert that biometric data into electronic format. While national security is unquestionably a priority, this rationale indicates that the rule is proposed more as an administrative convenience, as well as a means of passing the cost of the technological upgrade to individuals who are not seeking any benefit.

As the indefinite Permanent Resident Card continues to be compliant with security and biometric requirements of current law, it should not be invalidated merely because USCIS believes that it has made incremental improvements to the card. Invalidation of the card does not merely burden long-term lawful permanent residents with inconvenience and expense, it subjects them to the risk of being considered in violation of registration requirements and subject to prosecution simply by virtue of keeping their current cards.

Criminalization of Lawful Permanent Residents

Invalidation of the indefinite green card, especially when combined with the inadequate notice provisions outlined in the proposed rule, would turn law-abiding

¹ 72 Fed. Reg. 42922 at 46924 (August 22, 2007).

² 72 Fed. Reg. 42922 at 46927 at fn. 4 (August 22, 2007).

³ 72 Fed. Reg. 42922 at 46922 (August 22, 2007).

permanent residents into a new class of criminal aliens. First, permanent residents with indefinite cards who do not register would be in violation of the registration requirements outlined at INA 264(e) and 266(a). By virtue of the proposed rule, at least 750,000 permanent residents potentially would become subject to prosecution and criminal sanctions simply by keeping a government-issued document that is valid on its face. While the proposed rule states that “USCIS does not anticipate that... criminal sanctions would be routinely used against aliens who fail to obtain new Forms I-551” and “[t]he far more common action, should USCIS discover that an alien’s Form I-551 has expired, will be to advise the alien to file a Form I-551 [sic] to obtain a new Form I-551,”⁴ this is hardly a comfort to the affected class of permanent residents.

USCIS points out that prosecution under INA 266(a), which provides for a penalty of up to \$1000 and six months imprisonment, requires a willful failure to register. However, there is no willfulness requirement under INA 264(e), which states, “[e]very alien... shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him... Any alien who fails to comply... shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both.” Thus, a long-term permanent resident can be imprisoned and fined as a criminal simply by not applying for a new card.

By virtue of the program outlined in USCIS’ proposed rule, long term permanent residents are essentially being placed in the same position as foreign nationals subject to the problem-ridden National Security Entry-Exit Registration System (NSEERS) program.⁵ They are subject to a reporting requirement that is poorly publicized and subjected to potentially drastic consequences, including criminalization, if they fail to comply.

Effects of IIRAIRA

The rule states that an independent reason for invalidation of the indefinite Form I-551 is to conduct background checks to confirm that permanent residents are “compliant with the laws of the United States and that they are not a threat to national security.”⁶ Compliance with all the laws of the United States is not a prerequisite to maintenance of permanent resident status. However, violation of certain laws of the United States can render a permanent resident inadmissible or removable from the United States.

In many cases, such violations occurred years ago, at a time when they had no immigration consequences. For example, prior to passage of the Illegal Immigration

⁴ 72 Fed. Reg. 46925 (August 22, 2007).

⁵ 67 Fed. Reg. 52584 (August 12, 2002).

⁶ 72 Fed. Reg. 42922 at 46924 (August 22, 2007).

Reform and Immigrant Responsibility Act of 1996⁷ (IIRAIRA), conviction of violation of a protective order had no immigration consequences. Subsequent to passage of IIRAIRA, conviction of violation of a protective order⁸ subjects the individual to removal from the United States. Due to the change in immigration laws, relatively minor violations, such as shoplifting, public drunkenness, or false reporting, can render a permanent resident inadmissible or removable from the United States.

After the enactment of IIRAIRA, a backlash emerged against some of its harsh consequences, particularly for long-term lawful permanent residents.⁹ In response, the then-INS issued a memorandum, outlining appropriate circumstances for exercise of prosecutorial discretion,¹⁰ which introduced a balance between the harsh effects of IIRAIRA and a reasonable approach of leaving in peace those long-term permanent residents who have been otherwise law-abiding for many years. However, that balance has disappeared since the formation of DHS, and the prosecutorial discretion memo is rarely followed anymore. Instead, DHS seems to feel compelled to remove anyone with a blip in their record who crosses the agency's path.

Without the reasonableness of a true prosecutorial discretion policy, requiring that long-term permanent residents apply for a replacement card essentially compels certain permanent residents to initiate the process of their own removal from the United States. While compliance with the laws of the United States is a legitimate law enforcement priority, compelling at least 750,000 long-term permanent residents to go through the process of reapplying for a document they already hold is not a legitimate means of enforcing these laws.

Burden of Proof

If DHS has grounds to believe that a foreign national, even a long-term permanent resident, is subject to removal, it may serve the foreign national with a notice to appear (NTA) before a U.S. Immigration Court. In immigration proceedings, DHS has the burden of proving that an individual is removable, "based upon reasonable, substantial, and probative evidence."¹¹ In cases involving criminal convictions, DHS has the burden of proving criminal conviction through appropriate documentation, such as an official record of judgment and conviction.

Permanent residents with a criminal record who file a Form I-90 Application to Replace Permanent Resident Card are likely to receive a Request for Evidence (RFE) demanding conviction documentation. In such cases, if the applicant does not respond to the RFE within the designated timeframe to provide the requested documentation,

⁷ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009.

⁸ Immigration and Nationality Act (INA) Sec. 237(a)(2)(E)(ii).

⁹ See, e.g., Anthony Lewis, "Abroad at Home; Rays of Hope" *NY Times* 2/10/01, describing a situation in which a woman was marked for removal due to having pulled another woman's hair in 1988.

¹⁰ INS memorandum, D. Meissner, "Exercising Prosecutorial Discretion," HQOPP 50/4 (Nov. 17, 2000).

¹¹ INA § 240(c)(3).

the Form I-90 application will be denied. The RFE essentially shifts the burden of proof from DHS to such permanent residents, and withholds issuance of a registration document in cases where applicants do not provide documentation that they are not required to provide in the context of removal proceedings. For DHS to demand documentation that it has the burden of producing in removal proceedings is inappropriate. The Form I-90 should be an application for evidence of the status that the foreign national already holds as a lawful permanent resident, rather than a means to gather information and documentation on an entire class of permanent residents, in order to potentially subject them to removal proceedings.

Background Check System

Prior to December 2002, while individuals submitting immigration applications underwent security checks, the Service was authorized to consider the lack of response an indication that no security check issue existed. Since December 2002, DHS determined that it would no longer process applications to completion until completion of all security checks.

The current security check system encompasses a series of checks including the FBI name check, a partially manual search of the FBI's Universal Index that consists of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. In some cases, the security check process has resulted in delays of many years due in large part to the FBI name check backlogs. Recent estimates are that the FBI name check process has resulted in a backlog of over 300,000 cases, and that more than 30,000 of these cases have been pending over 33 months.¹² The requirement that between 750,000 and 1.9 million permanent residents file applications for replacement cards within a 120-day window is unrealistic, and will only exacerbate existing security check delays.

While the USCIS Question & Answer memorandum relating to the proposed rule states that "USCIS' intent is that each qualified permanent resident filing within the designated filing period is mailed a new card before we would terminate the older cards,"¹³ the fact is that overall processing time is not under USCIS control. Despite the fact that the FBI name check is a service for which FBI charges a fee to USCIS, the FBI does not have the will or resources to process name checks in a timely manner. Interestingly, the USCIS Ombudsman's 2007 Annual Report states that "the FBI name check process has limited value to public safety or national security, especially because in almost every case the applicant is in the United States during the name check process, living or working without restriction."¹⁴

¹² The USCIS Ombudsman's Annual Report 2007 indicates these figures as current as of May 2007, http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf at pgs 32, 37.

¹³ <http://www.uscis.gov/files/pressrelease/I551ReplacementQA082207.pdf>

¹⁴ The USCIS Ombudsman's Annual Report 2007, http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf at pg 40.

As a result of the security check delays, federal mandamus litigation demanding a decision on long-pending cases has increased. Until recently, USCIS policy in cases where mandamus litigation was filed was to pay for and request expedited processing from the FBI; however, USCIS has changed its policy and will no longer request such expedites.¹⁵ As a result, the backlog on obtaining security clearances on pending cases will continue to increase, unjustifiably preventing permanent residents from obtaining the required registration documentation of their status and clogging the federal courts with litigation. In the meantime, as discussed below, affected permanent residents will be unable to travel internationally or apply for new employment based on their pre-existing invalidated card.

By definition, the class of applicants created by the USCIS rule would be comprised of long-term permanent residents who have been living and working in the United States for at least the past 18 years. During this period of time, DHS could have initiated removal proceedings against any such permanent residents who presented a threat to national security. Given their uneventful and lengthy U.S. residence, as well as the fact that it took DHS two years to publish the proposed rule, DHS's sudden determination that these permanent residents may be a potential security risk is questionable.

Effect on Travel and Employment

Given that USCIS cannot guarantee any specific processing time due to its inability to control the amount of time that FBI takes to complete the name check process, and given that long-term permanent residents who apply for a replacement card will have their current indefinitely valid cards taken away from them when they appear for biometrics processing at an Application Support Center (ASC),¹⁶ the proposed rule could seriously hamper at least 750,000 permanent residents' ability to travel. The proposed rule provides no information on how USCIS plans to provide permanent residents who comply with the I-90 application requirement with interim travel authorization. USCIS has been phasing out prior interim evidence of registration, such as passport "ADIT" stamps, on security grounds. Even if USCIS were to allow for permanent residents to apply for ADIT stamps, this would involve the additional inconvenience of scheduling an InfoPass appointment to travel to a local USCIS field office, in addition to traveling to the ASC to provide biometrics.

All U.S. employers are required to verify an employee's identity and work authorization through the I-9 employment eligibility verification process. While permanent residents are employment authorized "incident to status," an expired Form I-551 or Permanent Resident Card is not specified as an acceptable document for

¹⁵ USCIS Update dated February 20, 2007, available on the USCIS website at <http://www.uscis.gov/files/pressrelease/ExpediteNameChk022007.pdf>

¹⁶ The instructions to the current Form I-90 Application to Replace Permanent Resident Card state that "If your card has already expired or will expire in the next six months, you will be required to submit your card when you appear in person at your local ASC." <http://www.uscis.gov/files/form/i-90instr.pdf>

initial I-9 verification.¹⁷ Thus, the proposed rule would invalidate the validity of the Permanent Resident Card as an employment eligibility verification document for at least 750,000 permanent residents. However, the rule does so merely by redefining “Form I-551” to mean a Form I-551 with an expiration date.

As discussed later in this comment, this subtle redefinition will be lost on U.S. employers, which are already challenged by an outdated Form I-9 and incomplete guidance in following employment eligibility laws. As permanent residents are a protected class with regard to immigration-related employment practices,¹⁸ the risks to employers for not understanding the changes due to the proposed rule are especially high.

Permanent residents who file a Form I-90 application and apply for employment with a new employer while the application is pending are employment authorized for a period of only up to 90 days based on the I-90 Receipt Notice,¹⁹ and are then subject to re-verification. As outlined above, USCIS processing time may well be longer than 90 days due to the requirement that security checks clear before USCIS will adjudicate an application. As a result, the proposed rule burdens not only long-term permanent residents but their employers as well. If USCIS promulgates a final rule, it should provide for continued validity of the indefinite Permanent Resident Card until the Form I-90 processing is completed, regardless of how long the process takes.

Inadequate Notice to LPRs

The proposed regulation fails to provide an adequate plan to give notice of the requirement to replace indefinite Permanent Resident Cards, and thereafter notice of the termination of the validity of such cards. The proposed rule indicates that USCIS plans to conduct an outreach program that would include press releases, postings on the USCIS web site, distribution of fliers at USCIS field offices and informational meetings with community-based organizations.²⁰

The notice provisions outlined in the rule are wholly inadequate. Permanent residents with indefinite validity cards have no reason to refer to USCIS information, unless they plan to apply for naturalization. Of those permanent residents, a substantial number will not ultimately receive actual notice (e.g., through travel) until after the 120-day window closes, when they no longer have current valid evidence of registration, and are subject to prosecution.

Historically, the Service has been unable to reach the affected immigrant communities, even in the case of programs that are remedial. For example, the LIFE Act²¹ was enacted by Congress on December 21, 2000, and temporarily restored

¹⁷ 8 C.F.R. 274a.2 (b)(1)(v)(A)(2).

¹⁸ INA 274(a)(3)(B).

¹⁹ 8 C.F.R. 274a.2(b)(1)(vi)(A).

²⁰ 72 Fed. Reg. 46922 at 46924 (August 22, 2007).

²¹ Legal Immigration and Family Equity Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (LIFE Act).

section 245(i) of the Immigration and Nationality Act to allow certain immigrants to apply for permanent residency without having to leave the country, and thus avoid certain penalties imposed by the immigration laws. However, information regarding the LIFE Act was untimely and insufficient, causing widespread confusion among undocumented immigrants regarding their eligibility for residency.²² If USCIS has problems publicizing a large-scale amendment to U.S. immigration laws, it will clearly have much greater problems publicizing a program which makes technical changes resulting in invalidation of an immigration document. It is patently unfair for USCIS to contemplate enforcement of the registration requirement at INA 264(e) and 266(a) against long-term permanent residents when its publicity campaign providing “notice” will fail in reaching these affected individuals.

It is probable that the Service has underestimated the number of potential applicants, which leaves its public outreach plan subject to even greater scrutiny. The proposed rule states that USCIS data “indicates that the number of Forms I-551 without an expiration date issued, minus the number of persons known to have held these cards before naturalizing is 1.9 million.”²³ USCIS states that it anticipates that a portion of these individuals will apply for naturalization, thus significantly reducing the overall number of permanent residents required to submit I-90 applications.²⁴ In fact, the Service issued approximately three million I-551 cards without expiration dates.²⁵ It is unclear how the Service determined that approximately 1.1 million people issued I-551 cards without expiration dates applied for naturalization. Similarly, there is no basis set forth for how USCIS has determined that only 750,000 of the 1.9 million permanent residents will not apply for naturalization following promulgation of the final rule, thereby reducing the overall number of I-90 applications.

The USCIS web site, in particular, is ineffective at advising the public regarding immigration policy and procedure. The CIS Ombudsman has stated that the web site is just part of a “hodgepodge” of ineffective methods to communicate requirements related to immigration.²⁶ Likewise, the Inspector General has stated that the IT system overall at the USCIS is extremely deficient and that the agency does not manage IT as a strategic resource.²⁷ Moreover, the web site often provides information that contradicts other USCIS publications, such as forms.²⁸

Moreover, the Service’s reliance on its web site to provide notice is out of touch with

²² See, e.g., New York State Assembly Task Force on New Americans, 2001 Annual Report, Resolution calling for a one-year extension of 245(i). (Available on the Internet at <http://assembly.state.ny.us/comm/NewAmer/20020128/> which states in relevant part, “[t]he small window of time allowed for filing the necessary papers, and the lack of information available to immigrants who were interested in exercising this option, caused widespread confusion.”)

²³ 72 Fed. Reg. 42922 at 46927 (August 22, 2007).

²⁴ *Id.*

²⁵ OIG Audit Report 97-06, (1/97).

²⁶ CIS Ombudsman Annual Report 2007 T p.8 (June 11, 2007).

²⁷ Department of Homeland Security, Office of the Inspector General, USCIS Faces Challenges in Modernizing Information Technology, OIG-05-41, September 2005.

²⁸ CIS Ombudsman Annual Report 2007, http://www.dhs.gov/xlibrary/assets/CISOMB_Annual_Report_2007.pdf at p. 10.

reality. Why would a person who obtained status as a lawful permanent resident more than 18 years ago log onto the USCIS web site at all? And if such a person did log onto the Service's web site, how would that person be notified of the requirement to replace a card with no expiration date? Typically, the Service lists the two or three most recent developments on its home page at www.uscis.gov. It is likely that future events will displace any home page notice that the I-551 replacement program initially may receive on the Service's website.²⁹

Likewise, why would a person who became a permanent resident more than 18 years ago travel to a USCIS office to obtain a flier regarding the I-551 replacement program? Moreover, the Service has actively discouraged visits to the field offices over the last two years following the introduction of the InfoPass appointment system. In most districts, visitors without an InfoPass appointment will be turned away, and there is no provision in the rule to provide additional InfoPass appointments for the 750,000 individuals, at a minimum, who must react to the new rule within 120 days of publication.

It seems more likely that, in the absence of a much more robust publicity campaign than set forth in the proposed rule, a person who became a permanent resident 18 or more years ago has decided not to pursue any further immigration benefits. It is therefore more likely than not that the class of persons targeted by the proposed rule will not visit the USCIS web site or obtain an InfoPass appointment to obtain information regarding the invalidation of the indefinite Permanent Resident Card and re-registration requirement.

Given the possibility that noncompliance could result in criminal charges, it is incumbent upon the Service to conduct a widespread campaign of public service announcements in both ethnic and mainstream media and, where possible, to notify the affected class of permanent residents individually. The Service has addresses for many permanent residents on file; due to the recent re-invigoration of the change of address reporting obligation, the address information will be current in many cases. In addition, USCIS should publicize the change through other government offices, such as U.S. Postal Service offices.

The rule fails to set forth a comprehensive and strategic approach to identify and notify affected individuals, yet it seeks to penalize individuals who fail to comply. In light of the Service's prior determination that the I-551 cards without expiration dates are compliant with the BSA, and the lawful permanent residents' reasonable reliance on previous statements that they would not have to replace their cards, the Service must take many more steps than those set forth in the proposed rule to notify affected individuals.

²⁹ Notably, a basic search on the USCIS website at www.uscis.gov on September 17, 2004 under the term "greencard" did not result in any information regarding the indefinite Permanent Resident Card replacement program, although the USCIS issued a Question & Answer memorandum and a Fact Sheet on this development on August 22, 2007.

Inadequate Notice to Employers

All U.S. employers are required to verify an employee's identity and work authorization through the I-9 verification process. The proposed rule would invalidate a Service-issued document which appears indefinitely valid on its face. Further, the rule invalidates the Form I-551, which exists both as an indefinite version, as well as in a version which has a ten-year validity period. As stated above, the USCIS's proposal burdens U.S. employers with knowing that a Form I-551 with no expiration date is technically not a valid Form I-551. It is unreasonable for USCIS to expect that employers will be informed of and understand this change without both an extensive publicity campaign, and an update of the Form I-9 and instructions, as well as related employer bulletins.

Inadequate Filing Window

The proposed rule provides a 120-day period for affected individuals to submit I-90 applications, yet the Service fails to set forth a reasonable justification for such a short filing window. For lawful permanent residents who have no reason to expect a change in rules which invalidate their facially valid Permanent Resident Cards, the rule simply does not provide sufficient time for applicants to obtain notice, understand the process, retain counsel, if necessary, and gather the now significantly higher filing fee.

The proposed rule is silent regarding justification for such a short filing period, and provides a single, conclusory statement regarding the filing period: "USCIS believes that an application period of 120 days will be sufficient for affected permanent residents to learn of the new requirement and to complete the required Form I-90."³⁰ What other similar program has the Service conducted that leads the Service to this conclusion?

Notably, a class action was filed against the Service in response to the last invalidation of the indefinite card (Form I-151),³¹ and the overall period of rulemaking subsequent to the settlement of the class action extended over *three years*, not 120 days.³² In its last publication in a series of five notices in the Federal Register, the Service stated that "[t]he delay in the effective dates were needed to minimize the possibility that lawful permanent residents who apply for a replacement Form I-551, Alien Registration Receipt Card, or for naturalization have their applications adjudicated before expiration of the Form I-151 on March 20, 1996."³³ Similarly, if a

³⁰ 72 Fed. Reg. 42922 at 46924 (August 22, 2007).

³¹ U.S. vs. Espindola, S 92-1871 (E.D. Ca. 1994) (unpublished).

³² 58 Fed. Reg. 31000-31003 (May 28, 1993) (notice of proposed rulemaking); 58 Fed. Reg. 48775-48780 (September 20, 1993) (terminating validity of Form I-151 effective September 20, 1994, providing procedures for applying for a replacement card effective on October 20, 1993.); 59 Fed. Reg. 47063 (September 14, 1994) (delaying effective date of validity termination to March 20, 1995); 60 Fed. Reg. 14353 (March 17, 1995) (delaying effective date until March 20, 1996).

³³ 20 Fed. Reg. 32472 at 32473-32474 (June 22, 1995).

final rule is promulgated, the Service should provide for a compliance period of years, not days.

In addition to this guidance provided by the Service's previous program to invalidate a prior edition of the Permanent Resident Card (Form I-151), the Service itself has confirmed that a lengthier process is appropriate. In response to suggestions to replace I-551 cards without expiration dates, Doris Meissner, former Commissioner of the INS, proposed a phased invalidation of cards with no expiration dates.³⁴ At the time, the Service suggested that a one-time replacement of the I-551 cards without expiration dates would inundate the agency and create more backlogs and demands for interim documents.³⁵ The Service acknowledged that a single one-time replacement program would disrupt ongoing workloads. Then, as now, a phased approach over a two or three year period would be more likely to result in streamlined processing and provide ample notice to affected permanent residents than a one-time program with a 120-day filing period.

While the proposed rule limits the application period to 120 days, it does not establish a maximum processing time for the Service to process the I-90 applications. In addition, the proposed rule states that the validity termination date will be determined in the discretion of the Service. The proposed rule fails to indicate how long after the 120-filing window such a termination date will come into effect. In addition, the Service fails to provide any indication of the significance of that termination date or the means or methods that it will use to communicate the termination date.

Finally, AILA is extremely concerned that permanent residents will fail to understand the distinction between lawful permanent resident status and validity of the Permanent Resident Card. We fear that the proposed rule will create needless concern, and perhaps panic, in the immigrant community, which is increasingly disenfranchised from a broken system. The rule echoes the enforcement-only approach proposed by some anti-immigrant groups that fails to address the real problems with the implementation of today's law.

Naturalization Exemption

USCIS should provide an exemption for compliance with the proposed rule for those lawful permanent residents (LPRs) who apply for naturalization within 24 months of the effective date of the rule. A clear exemption would be more predictable and understandable to the affected permanent residents than USCIS' current proposal.

The proposed rule sets forth a rather vague idea of what might happen to permanent residents who apply for naturalization during the 120-day filing window, stating that "[f]or those LPRs who have applied for, but do not receive, a grant of naturalization

³⁴ Memorandum from Office of Programs to Commissioner Doris Meissner, "Response to OIG Draft Audit Report: INS Replacement of Resident Alien Identity Cards," Sept. 27, 1996 (attached as Appendix I to OIG Audit Report 97-06 (1/97)).

³⁵ *Id.*

by the time USCIS sets the termination date, USCIS may issue interim evidence of registration.”³⁶ This statement leaves naturalization applicants without a clear understanding of their options with respect to the 120-day filing window. Moreover, this statement leaves permanent residents wondering what might happen if they choose to file for naturalization and not file an application for a replacement card, especially when it is not known when or whether USCIS will establish a termination date.

In light of the likelihood that a vast majority of the estimated 750,000 permanent residents affected by the proposed rule might be eligible to apply for naturalization, an exemption from the proposed rule for naturalization applicants would be a more rational and fair approach to the Service’s stated goal of reducing the number of Permanent Resident Cards that supposedly are less secure or have outdated information. This exemption would achieve several purposes:

1. The Service would realize the efficiency of processing a single application instead of two – one for a new I-551 card and another for naturalization;
 - a. This exemption would reduce the work load of the Service Centers and Application Support Centers;
 - b. This exemption would reduce the deluge of I-90 applications during the proposed 120-day filing window and would enable the Application Support Centers to maintain service to applicants for other benefits. Currently, it is unclear how the Service proposes to schedule appointments at the ASCs for a multitude of I-90 applications without disrupting other applications requiring submission of biometrics, such as adjustment of status applications;
 - c. This exemption would involve a single background check instead of undergoing a duplicative background check process for both the I-551 replacement and the naturalization application. This is a significant advantage because it will place less demand on the FBI name check process, which delays processing on a substantial percentage of applications, and which is not structured to meet the sudden, increased demand in security clearance requests inherent in the proposal to invalidate at least 750,000 Permanent Resident Cards;
2. USCIS would realize one of its important missions: to increase the number of naturalization applications and to welcome as many new citizens as possible;

³⁶ 72 Fed. Reg. 42922 at 46925 (August 22, 2007).

3. USCIS would demonstrate its commitment against taking punitive action for failure to comply with the re-registration requirement of the proposed rule. By reducing the number of individuals who need new Permanent Resident Cards and thus reducing the extent of this new enforcement program, USCIS would be able to dedicate its enforcement resources to more substantive and worthy violations of the immigration laws;
4. The incentive for permanent residents to apply for naturalization will produce cost savings to USCIS and other federal agencies. In fact, the proposed rule itself acknowledges these benefits, and states that “a portion of these applicants will apply for naturalization rather than replace their Permanent Resident Cards and thus significantly reduce the overall cost of this rule.”³⁷ The problem with this statement is that the proposed rule does not exempt applicants for naturalization from compliance with the 120-day filing window to replace their Permanent Resident Cards. Since all of the permanent residents who are subject to the proposed rule attained permanent resident status much more than five years ago, presumably a majority of these individuals are eligible to apply for naturalization. In order for USCIS’ cost-savings rationale to be given full effect, USCIS should adopt an exemption from the Permanent Resident Card replacement requirement for permanent residents who apply for naturalization. Instead of relying on a presumption that permanent residents will apply for naturalization, the Service should provide an incentive to apply for citizenship through an exemption, thereby reducing the overall cost of the proposed rule.

The public will be mindful that the rule was proposed just after the effective date of the new filing fee regulation, despite the fact that it had been on the agency’s regulatory agenda for at least two years preceding the fee increase. As a result, USCIS should take appropriate action, such as waiver of the requirements of the proposed rule for naturalization applicants, to reduce the burden on affected permanent residents.

Filing Fees and Other Costs

AILA is opposed to the imposition of the filing and biometrics fees for the processing of Forms I-90, which are filed solely to comply with the provisions of this regulation. Such filings will be made by long-term lawful permanent residents only because they are mandated to do so under threat of prosecution. These permanent residents are not seeking this replacement card because they wish to have an updated card, and this process is providing absolutely no benefit to them. The proposed rule itself states that “[t]he primary benefit to the government resulting from this rule is enhanced national security.”³⁸ We note the absence of any stated benefit to the long-term permanent

³⁷ 72 Fed. Reg. 42922 at 46928 (August 22, 2007).

³⁸ 72 Fed. Reg. 42922 at 46927 (August 22, 2007).

residents who must expend resources, time and money to comply with this requirement. The immigrants affected have long held permanent resident status, and many years ago paid all the requisite fees to acquire that status, including receiving a Permanent Resident Card that was issued on a permanent, indefinite basis.

Blanket Fee Waiver

The fees associated with the Form I-90 application are now \$370 (\$290 for the Form I-90 and \$80 for the biometric fee), and were recently increased from \$190 and \$70 respectively, effective July 30, 2007.³⁹ For many long term lawful permanent residents who would be affected by this regulation, the filing fees imposed can be a substantial sum of money. In addition to the financial burden, the affected class of permanent residents would be subject to other costs and inconvenience, such as arranging for transportation to and from an ASC, and taking time off work.

Notably, the initial notice relating to this rule published in 2005 states that DHS “has for some time collected photographs, signature specimens and fingerprints of applicants for various immigration benefits. Such information, commonly referred to as biometric information, has usually been collected and stored manually. Technological improvements have now made it possible to reliably and efficiently collect, store, retrieve and compare such data electronically... This regulation... calls for the replacement of those permanent residence cards still in circulation which have no expiration date, and which were issued to persons whose biometric data, other than fingerprints, may not be of record.”⁴⁰ The biometric data collected in the I-90 application process consists of fingerprints, a photograph, and a signature. Applicants for adjustment of status to permanent resident would have submitted photographs and signatures with their applications, thus such photographs were in the Service’s files at some point. If the proposed rule is being issued due to the fact that USCIS has misplaced biometric data such as photographs and signatures, affected permanent residents should not be penalized by the imposition of filing fees.

In view of the above, we submit that any I-90 applications submitted pursuant to the requirements of this proposed rule should be granted a blanket fee waiver. The affected population would be greatly inconvenienced and would receive no benefit. In order to encourage compliance, and in the interest of justness and fairness, we suggest that USCIS waive all fees associated with the process. Furthermore, providing a blanket fee waiver may provide the public with faith that USCIS is mandating this program for legitimate government interests, rather than as a revenue raising vehicle timed to take advantage of virtually doubled processing fees.

Undoubtedly, if USCIS does not issue a blanket fee waiver, many applicants will submit applications for individual fee waivers. This is a burdensome application process which requires applicant provision and USCIS review of financial documentation such as tax returns, bank statements, public benefits statements,

³⁹ 72 Fed. Reg. 29851 (May 30, 2007).

⁴⁰ 70 Fed. Reg. 64630, 64652 (October 31, 2005).

documentation of expenses, etc. If USCIS' focus is on updating its database and issuing the most technologically advanced cards rather than generation of fees, issuance of a blanket fee waiver would not only demonstrate good faith, but would also have the advantage of administrative efficiency for the USCIS.

If this is not possible, AILA requests that filing fee waivers requested in accordance with the regulations⁴¹ be adjudicated expeditiously and liberally by the USCIS, thereby ensuring fairness to long-term permanent residents, many of whom may be elderly and in various economic circumstances. Currently, USCIS does not grant waivers of the biometric fees associated with the filing of a Form I-90.⁴² However, we believe USCIS should grant waivers of the biometric filing fee as well.

Reduced Filing Fees

Should USCIS be unwilling or unable to issue a blanket fee waiver, then we would request that filing fees for I-90 applications submitted pursuant to this regulation be reduced to the filing fee schedule which was in effect prior to July 30, 2007.

AILA queries why, given all the time that passed, it is only now, when the fees have just been virtually doubled, that USCIS has decided to mandate this program. According to the Office of Management and Budget (OMB) website, the proposed rule was submitted to OMB on November 3, 2006, and cleared by OMB on February 1, 2007. However, the proposed rule was held by USCIS until after the higher filing fees went into effect on July 30, 2007, and was not published until August 22, 2007, more than six months after it was returned to USCIS for publication.⁴³ Given the delay in publishing the rule, the affected class of permanent residents should not be required to pay the higher filing fees.

It appears that USCIS has considered but rejected the possibility of providing for a lower filing fee. The proposed rule states that "Another alternative is to expire pre-1989 cards, but lower the fees for replacing the cards. However under this alternative the agency would fail to meet its general obligation to ensure that the fees for such services are established at rates that allow the agency to recoup its costs and would unfairly transfer the costs of this program to all other applicants for benefits and services from USCIS."⁴⁴

As stated previously in this comment, USCIS concurs that the existing cards are compliant with the current biometric requirements of the BSA. Further, USCIS already has biometric data for the affected class of permanent residents, as well as the capability to convert and technologically upgrade that biometric data into electronic format. The program has been initiated for the administrative convenience of the USCIS, and effectively shifts the cost of the technological upgrade to the affected

⁴¹ 8 CFR 103.7(c).

⁴² 69 FR 20528, 20529 (April 15, 2004).

⁴³ <http://www.reginfo.gov/public/do/eoHistReviewSearch>

⁴⁴ 72 Fed. Reg. 42922 at 46927 (August 22, 2007).

class of permanent residents. They are “applicants for benefits and services from USCIS” only by virtue of the fact that USCIS is depriving them of the validity of their existing Permanent Resident Cards. In light of these circumstances, these applicants for “benefits and services” are not in the same position as other applicants.

This scenario brings to the fore the continuing debate of the role of appropriated funds versus user fee funds for funding immigration related services. AILA’s comments over the years have repeatedly stated our position that, given the important role of immigration to the nation as a whole, it is imperative that proper and adequate appropriations are made to fund the work of the agencies providing immigration-related services. However, the argument in this scenario is far strengthened by the fact that, here, the applicants are not affirmatively seeking any benefit from the government. On the contrary, they are being required to request replacement Permanent Resident Cards or face the consequences, which include the imposition of fines and jail time, for breaking the law.

Fee is Excessive

The proposed rule states that “[t]he application form itself is not complicated and takes an estimated average time of 55 minutes to complete” and that “[f]inally USCIS implemented a new, highly automated filing procedure in May 2005 where applicants file their Forms I-90 with a U.S. Treasury-designated and operated lockbox provider that allows USCIS to process the applications and associated fees more expeditiously.”⁴⁵ Given the government’s assurances of the simplicity involved in completing and processing the form, it is not appropriate to impose the new filing fee of \$370 on the affected group of permanent residents, who have no basis for needing to file replacement applications other than invalidation of their current Permanent Resident Cards.

In light of the stated simplicity of the application process and USCIS’ enhanced ability to produce the card quickly and easily, it would appear that the filing fee is excessive. USCIS provides no evidence to establish that a lower fee would result in the government’s inability to recoup its costs. Secondly, while the proposed rule indicates USCIS’ unwillingness to shift the burden to other applicants for benefits and services, it appears that USCIS does not have any issues with placing the entire burden for this program on the shoulders of the affected permanent residents.

In addition to the financial burden and lack of any discernible benefit other than avoiding prosecution, this program requires affected permanent residents to find out about the refiling requirement in detail and in a timely manner, obtain, complete and submit the required form, take off time from work or otherwise interrupt their daily routine to appear at an Application Support Center in a locale which may range from slightly to extremely inconvenient, and endure issues with documentation of work and travel authorization while USCIS and other agencies process their applications.

⁴⁵ 72 Fed. Reg. 42922 at 46924 (August 22, 2007).

The proper party to shoulder the costs of this government-directed program is the government.

Conclusion

In conclusion, AILA is opposed to promulgation of a final rule invalidating the indefinite Permanent Resident Card or Form I-551. USCIS concedes that the existing card is compliant with current legal requirements. The notice procedures and the narrow 120-day application window outlined in the proposed rule are wholly inadequate and will not be effective in reaching the affected class of permanent residents or their employers. The rule subjects these long-term permanent residents to substantial financial costs, an unpredictable and potentially lengthy security check process, problems with documenting travel authorization, and the risk of prosecution leading to fines and imprisonment if they do not comply.

If USCIS does promulgate a final rule, it should provide for a filing window of several years based on prior experience, as well as for a maximum USCIS processing time, continued validity of the existing indefinite Permanent Resident Card during the entire period that a replacement card or naturalization application is pending, and an exemption from the refiling requirement for those who apply for naturalization.

Regarding notice, USCIS should mount an extensive publicity campaign as well as provide individual notice by mail to affected permanent residents. USCIS should provide for a blanket filing fee waiver given the lack of benefit to affected permanent residents, or for a lower filing fee given its delay in publishing the rule. USCIS should neither demand criminal conviction documents as a condition for processing of Form I-551 replacement applications, apply newer, harsher immigration laws to long-term permanent residents, nor criminalize the entire class of up to 1.9 million permanent residents simply for failure to apply for a new card.

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that our feedback will inform USCIS' decisions on this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION