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Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?

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COMMENTS

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I. INTRODUCTION

As part of the Violent Crime Control and Law Enforcement Act of 1994,¹ Congress created the S-visa category.² This provision allows for the lawful admission and adjustment of status³ of criminal and noncriminal aliens who provide valuable testimony and information to law enforcement agencies.⁴ As a reward for his or her testimony, the recipi-

1. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130003, 108 Stat. 1796 (1994).

2. See *id.* If Congress does not renew the program, no additional S-visas will be allotted as of September of 1999. For reasons explained below, the expiration of the program, however, does not signal an end to its effects. Its repercussions will be felt by alien material witnesses for at least the following three years.

3. Adjustment of status permits an alien to become a legal permanent resident from within the United States, rather than from an embassy outside this country. See David L. Neal, *The Changing Dynamics of Adjustment of Status: Part 1*, 95 IMMIGR. BRIEFINGS May 1995, at 1.

4. See Adalsinda Lomangino, *Representing the Criminal Alien: Forms of Relief Available-Adjustment of Status, Asylum, "S" Nonimmigrant Status and Deferred Action in 2* ADVANCED PRAC. IMMIGR. & NAT'LITY LAW HANDBOOK 317, 333 (R. Patrick Murphy et al. eds., 1997).

ent of an S-visa, whom a court must determine to be a "material witness," may be awarded the status of lawful permanent resident if the Attorney General determines that any information supplied by the S-visa holder has contributed successfully to the investigation or prosecution of a criminal enterprise.⁵ Neither the Violent Crime Control and Law Enforcement Act that creates the S-visa category, nor the adjustment of status provision in 8 U.S.C. § 1255, contains a statutory minimum for the amount of time an S-visa holder must wait to apply for permanent residency.

Despite the absence of this requirement in any statute or administrative regulation, the Immigration and Naturalization Service (I.N.S.) adheres to the position that a three-year minimum wait is required before a material witness can apply to adjust his or her status. Such a policy adversely affects the federal government and the alien material witnesses whose services the government seeks.

This Comment challenges the assertion of the I.N.S. that the recipient of an S-visa must wait three years before applying for permanent residency. Before specifically examining the merits of the I.N.S.'s position, Part II of this Comment introduces three current cases involving S-visas that are pending or have been adjudicated by United States District Courts. Part III closely examines the material witness provisions as they apply to nonimmigrants. Part IV reviews the statutory and regulatory authorities that create the S-visa category and provide for adjustment of status. Part V describes the position of the I.N.S. and attempts to determine the origin of the three-year requirement. By comparing the S-visa provision to other statutes and focusing on the policy behind this unique crime enforcement mechanism, Part VI will show that the arbitrary policy followed by the I.N.S. amounts to an abuse of discretion. Finally, Part VII offers a more reasonable interpretation of the waiting period for adjustment of status under the statute. The proffered interpretation adheres to the policies behind and intended benefits of the S-visa category and the corresponding adjustment of status provision more closely than the three-year minimum waiting period that the I.N.S. currently requires.

II. ILLUSTRATIONS

The following is an examination of immigrant exploitation cases that have been prosecuted by the Justice Department. Taken together, these cases involve the exploitation of over 150 illegal immigrants.⁶ In

5. See 8 U.S.C. § 1255(j) (Supp. 1997).

6. See Frank Davies, *Feds Bust State Sex Slavery Ring*, MIAMI HERALD, Apr. 24, 1998, at 1A.

each of the following cases, immigrant victims of criminal enterprises accepted or were promised S-visa status in lieu of deportation and in return for their testimony against their aggressors. Not only were the immigrant witnesses lured into testifying by the possibility of becoming permanent United States residents, but they also were told by prosecutors that their family members would share in this legal status if they cooperated with the investigations.

The disappointing reality of these seemingly perfect deals has been that the alien material witnesses and their families eventually learned that they would have to wait three years before becoming legal residents. Although some may argue that there is nothing inherently wrong with such a requirement, this waiting period has dire adverse consequences for alien material witnesses who seek to adjust their status. The implications include travel restrictions, delays of benefits, and insecurity for the material witnesses and their families.

A. *A Sexual Slavery Ring in Florida*

Before arriving in the United States, SCH,⁷ a fifteen year-old Mexican girl, was told by natives of her village of Veracruz, Mexico, that she could obtain employment in the United States as a nanny for an American family.⁸ SCH agreed to pay \$2,000.00 to the men who promised to arrange for her travel to the United States, secure her employment, and complete her immigration paperwork.⁹ SCH believed she would be housed with the American family for whom she would be working.¹⁰

SCH realized how wrong she was as soon as she arrived at her new "home" in Florida. SCH had been brought to the United States to become a prostitute.¹¹ She learned this lesson when one of the individuals who had brought her to the United States stood over her as she was raped by a paying customer.¹²

SCH was one of at least twenty women of Veracruz, Mexico, who were lured to the United States by promises of jobs as domestic workers,

7. The names of these women are being withheld, as this case is pending in United States District Court for the Southern District of Florida.

8. Interview with Virginia Coto, Attorney and Director for LUCHA: A Women's Legal Project, A Program of the Florida Immigrant Advocacy Center (FIAC), in Miami, Fla. (Sept. 28, 1998). Along with Rosario Schrier, a Skadden Fellow at FIAC, Ms. Coto has been representing the material witnesses in the case of *United States v. Cadena*. See also *Man Pleads Guilty to Sex-Slave Operation*, MIAMI HERALD, Jan. 16, 1999, at 5B.

9. Coto, *supra* note 8.

10. *Id.*

11. *Id.*; see also Amy Driscoll, *A Case of Modern-Day Slavery*, MIAMI HERALD, July 11, 1999, at 1L.

12. Coto, *supra* note 8.

landscapers, or table servers.¹³ When SCH and the other women from Mexico arrived in Florida, they actually became the sexual slaves of the Cadena family.¹⁴ From 1996 until early 1998, the Cadena family and ten other workers ran houses of prostitution that catered to Hispanic migrant workers.¹⁵ The brothels usually were housed in trailers that were scattered throughout Okeechobee, Lake Worth, Boynton Beach, Avon Park, West Palm Beach, Homestead, and Fort Pierce, Florida.¹⁶

The Superseding Indictment of the Cadena prosecution describes several of the overt acts committed by the members of the conspiracy.¹⁷ Rogerio Cadena, the leader of the conspiracy, is mentioned repeatedly in the Indictment.¹⁸ He stands accused of beating GCP, a forty-one year-old Mexican woman, for her refusal to perform acts of prostitution.¹⁹ He also is charged with having kicked SDV, a twenty-six year-old Mexican woman, in the abdomen, an action that resulted in the miscarriage of SDV's fetus.²⁰ Abel and Rafael Alberto Cadena-Sosa are accused of threatening physical violence to the brother of KFP, a seventeen year-old Mexican girl, if she attempted to escape from the Cadena family.²¹ Patricio Sosa is accused of having hit SDV, the woman mentioned above, for trying to prevent the rape of fifteen year-old SCH.²² This is only a sampling of the numerous acts of violence mentioned in the Indictment filed by the United States Attorney's Office against the members of the Cadena conspiracy.²³

For over two years, the government was unaware of the Cadena family's criminal enterprise. It was not until November of 1997, when two Mexican teenagers escaped from a West Palm Beach brothel, that the Mexican consulate in Miami learned of women's enslavement.²⁴ Since the breakup of the Cadena conspiracy, the Mexican women have

13. See Davies, *supra* note 6, at 1A.

14. See Driscoll, *supra* note 11, at 2L; John Pacenti, *Alleged Sex Slave Ring Broken*, MIAMI HERALD, Feb. 23, 1998, at B5.

15. See Pacenti, *supra* note 14.

16. See *id.*

17. Superseding Indictment, United States v. Cadena, No. 98-14015-CR-RYSKAMP (S.D. Fla. 1998).

18. See *id.*

19. See *id.* at 6.

20. See *id.* at 9.

21. See *id.* at 6.

22. See *id.* at 9.

23. The Indictment also states that these same threats and similar acts of violence were threatened against other women who were victims of the Cadena conspiracy. For example, some minors were beaten for refusing to perform acts of prostitution, and one young girl was confined to a closet for fifteen days for refusing to comply with the commands of her captors. See *id.* at 8. Additionally, one young woman was compelled to undergo an abortion. See *id.* at 8.

24. See Davies, *supra* note 6, at 23A.

been housed in women's shelters in South Florida.²⁵ Because the women have been determined to be material witnesses, they have been allowed to remain in this country and are expected to testify at the trials and sentencing of the members of the Cadena enterprise.²⁶ These women's requests for S-visas have not yet been approved by the I.N.S., but the women have agreed to continue cooperating with prosecutors in the hope that they eventually will be granted permanent resident status.²⁷

B. *Trinkets for Sale in New York City Subways*

In July of 1997, an officer in a police station in Elmhurst, Queens, was handed a note by four deaf Mexican immigrants.²⁸ This note led to an eleven-month investigation, which resulted in the prosecution of a \$1 million-a-year peddling enterprise that had been victimizing forty-nine deaf-mute Mexican immigrants for several years.²⁹ Like the victims of the Cadena sexual slavery conspiracy, the forty-nine victims of the New York criminal enterprise became involuntary servants upon their arrival to the United States.³⁰ Twenty bosses forced the deaf men and women to sell trinkets for one dollar in the New York City subways.³¹ The men and women worked for twenty hours each day and were compelled to turn over their earnings to their bosses.³² If the immigrants' bosses were not satisfied with the daily earnings, they would beat, starve, and electroshock their captives, who were housed in two tiny Queens apartments that had only floors as their residents' beds.³³

When the New York criminal enterprise was uncovered, the fate of the Mexicans was unclear. The federal government was deciding between immediate deportation of some or all of the immigrants and temporary housing in a Pennsylvania county jail.³⁴ Public concern for the fate of the Mexicans convinced the government to allow them to remain.³⁵ The immigrants and their children were detained for eleven months in a Westway Motor Inn in Astoria, Queens, under the custody

25. See Driscoll, *supra* note 11 Interview with Virginia Coto, Attorney for LUCHA: A Women's Legal Project, in Miami, Fla. (Oct. 26, 1998).

26. See *id.*

27. See Driscoll, *supra* note 11; Interview with Virginia Coto, Attorney for LUCHA: A Women's Legal Project, in Miami, Fla. (Jan. 14, 1999).

28. See Mirta Ojito, *U.S. Permits Deaf Mexicans, Forced to Peddle, to Remain*, N.Y. TIMES, June 20, 1998, at A1.

29. See Ray Sanchez, *Workers in Deaf Ring Win Release*, N.Y. TIMES, June 21, 1998, at A30.

30. See Mirta Ojito, *Deaf Mexican to Remain as Witnesses*, N.Y. TIMES, Aug. 3, 1997, §1, at 29.

31. See Ojito, *supra* note 28.

32. See *id.*

33. See *id.*

34. See Ojito, *supra* note 30.

35. See *id.*

of I.N.S., on the grounds that they had entered the country illegally and were material witnesses in a federal prosecution.³⁶ After their release from I.N.S. custody, however, those who wished to remain in the United States were allowed to apply for S-visas.³⁷

C. *Domestic Slavery in Miami*

Francisca Ekka had left her rural Indian village of twenty-one mud and straw houses to become a domestic servant in Bombay.³⁸ While working for a family there, she was approached by a visitor to the family home who asked her if she would like to work for her brother's family in the United States.³⁹ Francisca agreed, and she arrived in Miami on July 15, 1995.⁴⁰ After she handed her passport to her traveling companion, who had been sent by her new employers to accompany her, Francisca never saw her passport again.⁴¹

For seven months, Francisca worked grueling hours in the home of the Mahtani family.⁴² She would labor from 5:30 a.m. until 1:30 a.m. with only one fifteen minute break each day.⁴³ Her captors physically and emotionally abused her.⁴⁴ When Kishin Kumar Mahtani and Shashi Gobindram, Mahtani's wife, were not satisfied with Francisca's work, they would beat her or lock her outside in the cold night with only a T-shirt to wear.⁴⁵ Once, when Francisca did not clean the laundry quickly enough, Gobindram burned her hand with a hot iron.⁴⁶ Because the first burn did not leave a mark, Gobindram burned Francisca a second time, making sure the skin crackled and swelled.⁴⁷

Francisca endured the abuse until the day that Gobindram warned her, "This is the last day of your life."⁴⁸ On this day, Francisca feared that her employer would kill her. She dialed 9-1-1 and was rescued by local detectives.⁴⁹ In exchange for her testimony against her employers, Francisca was granted an S-visa.⁵⁰

36. See Ojito, *supra* note 28, at A1.

37. See Sanchez, *supra* note 29, at A30.

38. See Lisa Shroder, *The Servant's Tale*, SUN SENTINEL, Nov. 17, 1998, 1E.

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. *Id.*

49. See *id.*

50. See *id.*

III. MATERIAL WITNESSES AND FEDERAL PROSECUTIONS

The Attorney General has long admitted alien material witnesses who testify in criminal cases to the United States.⁵¹ The S-visa category created by the Violent Crime Control and Law Enforcement Act of 1994 essentially extends the existing federal material witness statute to situations involving illegal immigrants who are deemed to possess information that is critical to a criminal prosecution.⁵² In each case mentioned above, the immigrant victims were granted S-visas only after they were found to be "material witnesses."

A material witness is defined as an individual who has "knowledge of facts closely connected to the crime, or to the accused" that is relevant and highly probative in a criminal proceeding.⁵³ The federal material witness statute sets forth procedures that can be used to secure detention of such a witness in federal court.⁵⁴ According to the statute, a party seeking to secure the presence of the material witness in a criminal proceeding must file an affidavit asserting that the testimony of the witness is "material."⁵⁵ If the party demonstrates that the witness cannot be secured by subpoena, a judicial officer has authority to order the arrest of the witness.⁵⁶

Although this practice may appear to violate the due process rights of the material witness, the United States Supreme Court has affirmed the government's power to arrest and detain material witnesses.⁵⁷ In *Stein v. New York*, Justice Jackson stated for the United States Supreme

51. See MATTHEW BENDER, *IMMIGR. LAW AND PROC.*, § 27-01 (1998).

52. The material witness statute is 18 U.S.C. § 3144. For a general history of the development of federal material witness law in the U.S. see Lisa Chanow Dykstra, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 600-07 (1991).

53. Ronald L. Sluyter, Comment, *Witnesses-Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503, 505 (1961).

54. 18 U.S.C. § 3144 provides:

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impractical to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

55. *Id.*

56. *See id.*

57. *Stein v. New York*, 346 U.S. 156 (1953); *see also* *Hurtado v. U.S.*, 410 U.S. 578, 588-89 (1973) (holding that pretrial detention of material witnesses did not constitute a taking within the meaning of due process).

Court, "The duty to disclose knowledge of crime . . . is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness."⁵⁸

After a material witness is apprehended, he or she is entitled to appear before the court where the case to which he or she is a witness is pending.⁵⁹ At this time, the witness may be released without conditions, released with conditions, or detained temporarily or indefinitely.⁶⁰ Bail and recognizance commonly are imposed as conditions of a material witness' release.⁶¹

Until September of 1999, the expiration date of the S-visa statute, there was an additional alternative to the government's list of methods for securing the witness' presence. If the material witness was an immigrant who had entered the United States illegally, and he or she was deemed indispensable to a criminal prosecution, the government could issue a temporary immigrant visa that allowed the witness to stay in the United States for up to three years.⁶²

There are several policies behind material witness detention. Material witness statutes arose in the English legal system as a way to enforce a public duty owed to the king.⁶³ In the United States, this public duty was extended to the courts, fellow citizens, and the criminal justice system.⁶⁴ The original purpose behind such proceedings also may have been to protect the safety of the witness during a pending trial.⁶⁵ Where safety is not an issue, compelling a witness to post a bond is an obvious way to ensure his or her presence at trial,⁶⁶ thereby securing the right of the criminal defendant to confront his or her accusers.⁶⁷ Each of these policies is inherent in the enactment of the S-visa statute, which is concerned primarily with securing the presence of a material witness in a criminal proceeding.

IV. THE S-VISA AND ADJUSTMENT OF STATUS STATUTES

Chapter 8, section 1101(a)(15)(S) of the United States Code creates

58. *Stein*, 346 U.S. at 184.

59. *See* 18 U.S.C. § 3142, as referred to by 18 U.S.C. § 3144 (1994).

60. *See id.*

61. *See* Sluyter, *supra* note 53, at 509.

62. *See* 8 U.S.C. § 1101(a)(15)(S)(1994). This provision will be explained in more detail in the next section. *See also* 8 U.S.C. § 1184(k)(3)(1994) (providing for three year maximum stay).

63. *See* Blair v. U.S., 250 U.S. 273, 279-81 (1919); Wilson v. U.S., 221 U.S. 361, 372 (1911).

64. *See Blair*, 250 U.S. at 281.

65. *See* Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied*, 40 WAYNE L. REV. 1533, 1544 (1994).

66. *See id.* at 1543.

67. *See* Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 702 (1969).

the S-visa category.⁶⁸ This is also known as the “snitch” visa.⁶⁹ This provision was passed as part of the Violent Crime Control and Law Enforcement Act on September 13, 1994.⁷⁰ The S-visa category is part of a legislative scheme intended to curb violent crime by encouraging the use of community policing.⁷¹

For an alien to qualify for an S-visa, the Attorney General must determine that the alien:

1. possesses critical reliable information concerning a criminal organization or enterprise;
2. is willing to supply or has supplied such information to federal or state law enforcement agencies or courts;
3. must be present in the United States in order for the criminal investigation or prosecution of the criminal organization or enterprise to succeed.⁷²

As previously mentioned, the Attorney General may not extend the S-visa beyond three years.⁷³ It is interesting to note that the S-visa statute was enacted with a five-year sunset provision.⁷⁴ Thus, no more S-visas will be issued by the government after September 13, 1999.⁷⁵

Although an S-visa expires three years after it is issued, its recipients may be eligible for an adjustment of status to that of permanent resident.⁷⁶ The three-year waiting period extends the effects of the S-visa statute for at least three years longer than the sunset period because an individual on S-visa status will want to adjust to permanent resident status after September 13, 1999. Close relatives of the S-visa holder also may be eligible to adjust their status after this date.⁷⁷ This Comment explores whether the adjustment of the alien’s status may occur prior to the expiration of the S-visas.

For an alien material witness, the prospect of becoming a permanent United States resident is often the reward that entices him or her to testify against his or her aggressors. This is because the Attorney Gen-

68. 8 U.S.C. §1101(a)(15)(S)(i) (1994). This section is directed at aliens who possess critical information regarding a criminal organization. In contrast, section 1101(a)(15)(S)(ii) is concerned with aliens who possess critical information regarding terrorist organizations. Although alien material witnesses possessing either type of information may qualify for an S-visa, this Comment deals only with the first category.

69. Lomangino, *supra* note 4, at 333.

70. See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

71. H.R. REP. No. 103-324, at 6 (1994), reprinted in 1994 U.S.C.C.A.N. 1802, 1803.

72. 8 U.S.C. § 1101(a)(15)(S)(i).

73. 8 U.S.C. § 1184(k)(3) (1994).

74. 8 U.S.C. § 1184(k)(2).

75. *Id.* At the expiration of this time, the S-visa statute will have been revised by Congress.

76. See 8 U.S.C. § 1255(j) (Supp. 1997).

77. See 8 U.S.C. § 1255(j)(i).

eral may adjust an alien's status to that of permanent resident only if the alien is admitted into the United States under an S-visa, and he or she has provided information that has "substantially contributed to the success of an authorized criminal investigation" or prosecution of a criminal organization or enterprise.⁷⁸

The Code of Federal Regulations provides more specific guidelines for the adjustment of status of aliens in the S-visa category.⁷⁹ Only the law enforcement authority that originally requested S-visa classification may apply for an adjustment of status on behalf of the witness and/or his family members with the Assistant Attorney General.⁸⁰ As provided in 8 U.S.C. § 1255, the Assistant Attorney General then determines whether to certify the request for adjustment, but the final decision-making authority rests with the Commissioner of the I.N.S.⁸¹

Although an adjustment of status application under 8 U.S.C. § 1255(j) may be *filed* regardless of the availability of immigrant visa numbers, the adjustment of status may not be granted until a visa number is available for the alien under the worldwide allocation for employment-based immigrants.⁸² The worldwide allocation is governed by 8 U.S.C. § 1153. Adopted in 1990, this system creates preference categories for family-sponsored, employment-based, and diversity immigrants.⁸³

Each employment-based preference has an annual allocation for approximately 40,000 individuals, and the remaining preferences allow 10,000 for each preference, not to exceed 140,000 individuals annually.⁸⁴ The preference categories are for (1) priority workers, which are aliens with extraordinary ability, outstanding professors, and multinational executives; (2) professionals with advanced degrees or aliens with exceptional ability in the sciences, arts, or business; (3) skilled workers, unskilled workers, or professionals with baccalaureate degrees; (4) other special immigrants, a group comprised primarily of religious workers; and (5) entrepreneurs investing a certain amount of capital to start up a new business.⁸⁵ Because holders of S-visas who seek permanent resident

78. *Id.* Section 1255(j)(2) of this statute applies to an alien material witness who has assisted in the investigation or prosecution of a terrorist organization. This Comment does not address the latter provision.

79. 8 C.F.R. § 245.11 (1999).

80. *See* 8 C.F.R. § 245.11(a).

81. *See* 8 C.F.R. § 245.11(a)(2)-(4).

82. *See* 8 C.F.R. § 245.11(f); *see also* 3B AM. JUR. 2d *Aliens* § 2199 (1998).

83. *See id.*; *see also* BENDER, *supra* note 51, at § 37.02[2].

84. BENDER, *supra* note 51, at § 37.04[3]; Myron Kramer, et al. *Immigration Selection System and Governing Agencies Involving Immigration*, SC38 A.L.I.-A.B.A. CONTINUING LEGAL EDUCATION 1, 5 (1998).

85. 8 U.S.C. § 1153(b).

status are primarily unskilled workers, these individuals typically will belong to the third preference group.

V. THE POSITION OF THE I.N.S.

A. *From Where Does the Three-Year Requirement Arise?*

The greatest mystery for an attorney representing individuals on an S-visa who want to adjust to permanent residency status is how to determine the legal source of the three-year waiting period.⁸⁶ Neither the statutes nor the regulations that govern these cases contain a time requirement.

1. THE STATUTES

Section 1101(a)(15)(S) of chapter 8 of the United States Code creates the S-visa category. This section grants an S-visa to an individual who meets the following requirements.

(S) subject to section 214(k) of this section, an alien—

(i) who the Attorney General determines:

(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

(II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and

(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; . . . and if the Attorney General . . . considers it to be appropriate, the spouse, married and unmarried sons or daughters, and parents of an alien described in clause (i). . . if accompanying, or following to join, the alien.⁸⁷

Section 1255 (j) of Chapter 8 of the United States Code provides for the adjustment of status of S-visa recipients. Its text is as follows:

(1) If, in the opinion of the Attorney General

(A) a nonimmigrant admitted into the United States under section 1101(a)(15)(S)(i) of this title has supplied information described in subclause (I) of such section; and

(B) the provision of such information has substantially contributed to the success an authorized criminal investigation or the prosecution of an individual described in subclause (III) of that section, the Attorney General may adjust the status of the alien (and spouse, married and unmarried sons and daughters, and parents of the alien if admitted under that section) to that of an alien lawfully admitted for

86. Coto, *supra* note 8.

87. See 8 U.S.C. § 1101(a)(15)(S)(i) (1994).

permanent residence if the alien is not described in section 1182(a)(3)(E) of this title.⁸⁸

2. THE CODE OF FEDERAL REGULATIONS

As demonstrated by the above excerpts, the statutory provisions that govern the S-visa category and the adjustment of that status are devoid of any requirement that an alien material witness hold an S-visa for three years before applying for permanent residency. Similarly, the corresponding regulation, 8 C.F.R. § 245.11, does not contain such a prerequisite. In order to be eligible for an adjustment of status, Section 245.11(a)(4)(ii) of the Code only requires the holder of the S-visa to:

- (A) Meet the requirements of paragraph (b) of this section, if requesting adjustment as a qualified family member of the certified principal S nonimmigrant witness or informant;
- (B) Be admissible to the United States as an immigrant, unless the ground of inadmissibility has been waived;
- (C) Establish eligibility for adjustment of status under all provisions of section 245 of the Act, unless the basis of ineligibility has been waived; and
- (D) Properly file with his or her Form I-485, Application to Register Permanent Residence or Adjust Status, the approved Form I-485.⁸⁹

These requirements do not contain for a three-year waiting period. Also absent is mention of such a time period in sections 245.11(d)-(g), which provide for supporting documentation, priority dates, visa number limitations, and filing requirements for holders of S-visas who seek to adjust their status. The *Federal Register*, which published the rule for adjustment of status prior to its codification in the Code of Federal Regulations, also is devoid of such a time requirement.⁹⁰ Presumably, if the I.N.S. had intended to impose such a rule, it would have published it at this time.

3. THE INTERNAL I.N.S. POLICY

Despite the lack of an explicit minimum time requirement in the statutes or regulations that govern S-visas, the I.N.S. will not consider an application for adjustment of status until the S-visa expires, three years after it is issued.⁹¹ In each of the cases mentioned in the introduction of this Comment, the I.N.S. has postponed the alien material witnesses' applications for adjustment of status. For example, Virginia Coto, the attorney for the female victims of the Cadena sexual slavery conspiracy,

88. See 8 U.S.C. § 1255(j) (Supp. 1997).

89. See 8 C.F.R. § 245.11(a)(4)(ii) (1999).

90. 60 Fed. Reg. 44,260 (1995).

91. *Id.* at 44,262.

will not be able to submit applications for permanent residency on behalf of her clients once they testify in the Cadena case until three years have passed since the issuance of their S-visas.⁹²

The only apparent source for the three-year waiting period is public statements that have been made by the I.N.S. during press conferences. In regard to the case of the Mexican deaf-mutes peddling trinkets in the New York subways, Russell A. Bergeron, Jr., a spokesperson for the I.N.S., has stated that the witnesses can apply for legal residency three years after the receipt of their S-visas.⁹³ When asked by the author of this Comment to give a basis for the three-year waiting period, Mr. Bergeron stated that he could find no basis for his statement; he just said that was the "rule."⁹⁴ That is, he did not know whether the requirement arose from an internal policy, departmental memoranda, or agency rumor.

Brian J. Jordan, another I.N.S. spokesperson, similarly stated that the deaf-mute Mexicans would not be able to apply to adjust their status until their S-visas expired, three years from their issuance.⁹⁵ Francisca Ekka, the Indian worker who was enslaved in a Miami home, also has been told that she cannot apply for residency status until three years have passed from the time she received her S-visa.⁹⁶

B. *A Possible Source for the Three-Year Waiting Period*

Because no statute or administrative rule requires the holder of an S-visa to wait three years before he or she applies for an adjustment of status, and no documentation of such a rule appears to exist within the I.N.S., the three-year requirement may be the I.N.S.'s unofficial interpretation of the corresponding statutes and rules. In essence, the I.N.S. deliberately may be requiring the legal status of holders of S-visas to expire before permitting them to apply for adjustment of status. Such a reading has been proposed by Louis DeBaca, an attorney with the Department of Justice who has been assigned to the case of the Mexican deaf-mutes in New York and the Mexican slavery case in Miami.⁹⁷ When the attorneys for the material witnesses in the Mexican slavery

92. Coto, *supra* note 8.

93. *See Ojito, supra* note 28, at A1.

94. Interview with Russell Bergeron, Jr., Director of Media Relations of I.N.S., in Washington, D.C. (Mar. 1, 1999). It is also interesting to note that no other I.N.S. agent contacted by the author of this Comment was able to find the source of the three year waiting period.

95. *See Ojito, supra* note 30, at 1E; *see also Enslaved Mexicans Granted U.S. Visas*, UPI, Aug. 3, 1997, available in LEXIS, Nexis Library, UPI File.

96. *See Shroder, supra* note 38, at 1E.

97. Interview with Virginia Coto and Rosario Schrier, Attorneys with LUCHA, in Miami, Fla. (Mar. 1, 1999).

case asked Mr. DeBaca why the I.N.S. would make them wait three years before applying for adjustment of status on behalf of their clients, Mr. DeBaca responded that the I.N.S. apparently has converted the three-year maximum stay provision for S-visa holders into a three-year waiting period for adjustment of status.⁹⁸

Section 245 of the Code of Federal Regulations, when read in its entirety, may support the position of the I.N.S. Section 245.2 of chapter 8 of the Code of Federal Regulations governs the application process for those individuals who seek to adjust their status to that of permanent residents. Because adjustment of status for S-visa holders is included in part 245 of the Regulations, the I.N.S. may argue that section 245.2 of the Regulations applies to holders of S-visas.

Section 245.2 provides, "After an alien, other than an arriving alien, is in deportation or removal proceedings, his or her application for adjustment of status under section 245 of the Act or section 1 of the Act of November 2, 1966 shall be made and considered only in those proceedings."⁹⁹ In cases involving S-visas, the holders of the visas would be in deportation or removal proceedings after three years, the maximum duration of their S-visa status.¹⁰⁰ If the Regulation is interpreted to mean that adjustment of status under section 245 can be granted only when an alien is in deportation or removal proceedings, S-visa recipients would have to wait until their legal status under the S-visa expires in order to apply for permanent residency.¹⁰¹

VI. THE PROBLEM WITH THE I.N.S.'S INTERPRETATION

The I.N.S.'s position inevitably leads to the conclusion that an alien material witness who possesses an S-visa must wait to become illegal before applying for legal resident status. Applying the three-year requirement to holders of S-visas would mean that they would be potentially deportable at the time their visa expires.

As demonstrated in the previous section, support for the position of the I.N.S. in regards to the adjustment of status of S-visa recipients is weak. At best, the three-year waiting period is an irrational interpretation of statutory and regulatory provisions that governs a different topic—the duration of the S-visa. At worst, the rule is the result of an

98. *Id.*

99. 8 C.F.R. § 245.11(a)(1).

100. *See* 8 U.S.C. § 1184(k).

101. This reading of 8 C.F.R. § 245.11(a)(1) is not very plausible. The more likely interpretation is that this provision was meant to apply in addition to the normal application process. That is, an alien may apply directly to the director for an adjustment of status, or, if deportation or removal proceedings have begun, he or she may apply only to the officer running the proceedings.

uninformed agency rumor that began in response to the question, "When can they apply to adjust?"

The three-year waiting period for adjustment of status is an internal policy of the I.N.S. that should be abolished. The most obvious authority for this proposition is the fact that neither the S-visa provisions nor the adjustment status provisions contain such a requirement.¹⁰² The rule of statutory interpretation, "expressio unius exclusio alterius," dictates that if one or more specific items are listed, and other similar items are excluded, the excluded items were not meant to be included in the provision.¹⁰³ A rule of reason that applies with equal force is that if something is left out of a statute or regulation, Congress did not authorize its inclusion. Taking these two premises together would mean that, where Congress listed the requirements in section 1255(j) for adjustment of status and did not include a three-year waiting period within these requirements, Congress did not intend for such a limitation to exist.

Support for the proposition that the statutory requirements of 8 U.S.C. § 1255(j) are the only requirements for adjustment can be found in the language of the statute and in Violent Crime Control Act from which it was adopted. Both of these label the adjustment of status provisions, "Exclusive Means of Adjustment."¹⁰⁴ Practice manuals characterize the conditions imposed by Congress as "restrictive."¹⁰⁵ Most importantly, the I.N.S. itself has recognized in its official rulemaking procedures that the only conditions that have been imposed for the adjustment of status of S-visa holders have been set by Congress, not the I.N.S.¹⁰⁶ The creation of additional requirements by the I.N.S. contravenes Congress' attempt to establish "restrictive" and "exclusive" requirements for adjustment.

In other situations involving adjustment of status, where Congress has sought to impose a waiting period for the submission of applications, it has provided minimum time limits explicitly. For example, the Attorney General may adjust the status of any alien who is a native or citizen of Cuba to that of a permanent resident.¹⁰⁷ Congress has

102. See 8 U.S.C. §§ 1101(a)(15)(S), 1255(j); 8 C.F.R. § 245.11. Additionally, none of the practice manuals that were consulted in drafting this comment contain a three-year requirement. See, e.g., MATTHEW BENDER, IMMIGR. LAW AND PROC. (1998); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK (5th ed. 1995).

103. Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853-54 (1964).

104. 8 U.S.C. § 1255(j); Pub. L. No. 103-322, § 130,003 (1994).

105. BENDER, *supra* note 51, at § 204[13][b][iii].

106. Entry of Aliens Needed as Witnesses and Informants, 60 Fed. Reg. 44,260, 44,263 (1995) ("The provisions for 'Exclusive Means of Adjustment' for S nonimmigrants provide clearly that these statutory terms and conditions are to be the exclusive means of adjustment. . . .").

107. See Cuban Refugees-Status, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

imposed the requirements for such an adjustment: the alien must have been admitted to the United States after January 1, 1959 and must have been physically present in the United States for at least two years.¹⁰⁸

It is particularly interesting to note that Congress has created explicit time requirements for the adjustment of status of other immigrant categories within 8 U.S.C. § 1255, the very same section that governs the adjustment of status of S-visa holders. For example, Polish and Hungarian parolees who wish to adjust their status to that of permanent residents are required by statute to be present in the United States for at least one year.¹⁰⁹ Similarly, Congress has required refugees from Indochina to be physically present in the United States for at least two years.¹¹⁰ If Congress had intended for a waiting period to apply to holders of S-visas before they could submit their adjustment of status requests, it would have stated that intent explicitly in the same statute, as it did for Poles, Hungarians, and Indochinese.

Physical presence requirements for inspections of aliens admitted under 8 U.S.C. § 1159, the statute governing adjustment of status for refugees, are also explicit.¹¹¹ An alien who has been physically present in the United States "for at least one year" and has not yet acquired permanent resident status must be inspected by the I.N.S. at the end of each yearly period for a determination as to admission or adjustment of status.¹¹² The same statute provides for adjustment of status for aliens who have been granted asylum and, among other requirements, have been physically present in the United States "for at least one year after being granted asylum."¹¹³

Examples of detailed time requirements that have been set by Congress can be found in other statutes and executive orders. In order for alien nurses who were on H1 nonimmigrant status on September 1, 1989, to be eligible to apply for adjustment of status, the applicant must have been employed in the United States as a registered nurse "for an aggregate of three years prior to the date of application for adjustment of status."¹¹⁴ Although it does not contain an explicit yearly requirement of physical presence for adjustment of status to occur, the Nicaraguan

108. *See id.*

109. Adjustment of Status for Certain Polish and Hungarian Parolees, Pub. L. No. 104-208, § 646 (1994) (codified in 8 U.S.C. § 1255).

110. Adjustment of Status of Indochina Refugees, Pub. L. No. 95-145 (1977) (codified in 8 U.S.C. § 1255).

111. *See* 8 U.S.C. § 1159(a). Section 1159 provides the criteria for the adjustment of status of refugees admitted under 8 U.S.C. § 1157. The latter statute admits aliens into the United States on the basis of humanitarian concerns.

112. 8 U.S.C. § 1159(a)(1)(B).

113. 8 U.S.C. § 1159(b)(2).

114. *See* 8 C.F.R. § 245.1(e)(2)(i)(B).

Adjustment and Central American Relief Act¹¹⁵ provides that certain Nicaraguans and Cubans may have their status adjusted to that of permanent resident if they have been “physically present in the United States for a continuous period, beginning not later than December 1, 1995 and ending not earlier than the date the application for adjustment under such subsection is filed.”¹¹⁶ Executive Order 12711, which addresses policy implementation with respect to aliens from the People’s Republic of China, contains a similar time requirement for physical presence.¹¹⁷ It provides protection of the lawful status for Chinese nationals who have been in lawful status from at least June 5, 1989 until April 11, 1990, the date of the Executive Order.¹¹⁸

In each of these examples, Congress, the President, or the I.N.S. has stated the time requirements explicitly in the statute, order, or rule. If a three-year minimum requirement had been deemed essential to the statutory scheme for the adjustment of status of S-visa recipients, then Congress would have included such a limit in 8 U.S.C. § 1255. Similarly, the I.N.S. would have included it in the corresponding regulatory provision for adjustment of status, 8 C.F.R. § 245.11.

Additionally, in none of these examples can section 245 of Chapter 8 of the Code of Federal Regulations be read to require removal of the alien before he or she applies for adjustment. That is, the temporary status of these individuals must not expire prior to application for adjustment as it does in the case of the holder of an S-visa, who is required to wait until his or her S-visa runs before applying for adjustment. This observation supports the notion that the three-year waiting period imposed by the I.N.S. an unreasonable and arbitrary.

VII. WHY ELIMINATE THE THREE-YEAR WAITING PERIOD?

Some may argue that there is nothing inherently wrong with imposing a three-year waiting period before holders of S-visas may apply for an adjustment of status. As pointed out in the previous section, most visa categories and refugee statuses require a waiting period. Some visa categories do not even permit an adjustment of status. Holders of these visas simply are sent back to their home countries upon expiration of the term. Furthermore, some may argue that holders of S-visas should not complain about the imposition of a waiting period because they would have been deported immediately upon their apprehension otherwise.

115. Pub. L. No. 105-100, § 201, 111 Stat. 2193 (1997).

116. *Id.* at § 204(b)(1).

117. Exec. Order No. 12,711, *reprinted in* 8 U.S.C. § 1157 (1990).

118. *See id.* at § 3(b).

While these arguments have some merit, they are outweighed by the fact that the S-visa and the corresponding provision for adjustment of status were created by Congress with particular benefits in mind. The time limit imposed by the I.N.S. significantly interferes with the realization of some of these benefits, particularly those that are to be conferred upon alien material witnesses in criminal prosecutions.

A. *Government Benefits*

S-visas confer many benefits upon the government and their recipients.¹¹⁹ Particularly, the government has recognized their importance as law enforcement tools.¹²⁰ S-visas give prosecutors access to key witnesses, who otherwise may face deportation and be unavailable for trial and grand jury hearings.¹²¹ S-visas also add moral force to the government's case by permitting jurors to hear the horrid tales directly from the victims who were exploited by criminal conspiracies.

The government may not be able to reap these benefits if alien material witnesses choose to return to their home countries rather than accepting the reward of permanent status in exchange for their testimony. This often happens because the witnesses cannot wait three years to become permanent residents because they generally need to return to their countries before this time. Visa status will not allow them to travel freely between the United States and their native countries. For example, in the New York case of the Mexican deaf-mutes, one of the alien witnesses chose to return to Mexico to visit her ailing parents. She opted out of S-visa status because it would take too long for her to acquire permanent status, which would allow her to travel to and from the United States.¹²²

Although the federal government has many other witnesses to choose from in cases involving alien material witnesses, this is not always the situation. There are instances, such as in the case of Fransisca

119. Congress has expressed this recognition indirectly by doubling the number of S-visas that are available. It has recognized that an increasing number of immigrants are being victimized, yet these victims are willing to aid in investigations. *See* FEDERAL NEWS SERVICE, March 13, 1996, available in LEXIS, Nexis Library, FEDERAL NEWS SERVICE File.

120. Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, 61 Fed. Reg. 1837, 1838 (1996). In 1996, Congress implicitly expressed its continued approval of S-visas as crime-fighting measures by increasing the number of visas issued annually under 8 U.S.C. § 1101(a)(15)(S)(i) from 125 to 200. *See* Omnibus Appropriations Act, Pub. L. No. 104-208, § 621 (1997) (codified as 8 U.S.C. § 1184(k)(1)(1997)). Congress recognized that the additional visas were necessary because the testimony of alien material witnesses was indispensable to criminal prosecutions. *See* *Hearing of Senate Judiciary Committee*, FEDERAL NEWS SERVICE, Mar. 13, 1996, available in LEXIS FEDERAL NEWS SERVICE File.

121. *See* Constance Emerson Crooker, *The "S" Stands for Snitch*, CHAMPION, Nov. 1997, at 29.

122. Coto, *supra* note 97.

Ekka, the enslaved Indian woman, where only one witness exists. If that witness decides to depart to his or her native country, then the government may be left with no alternative but to dismiss the case for lack of evidence.

Eliminating the three-year requirement would serve additional interests of the federal government. The more quickly material witnesses achieve permanent resident status, the more quickly they can achieve economic and psychological independence from the government. Like the Mexican deaf-mute workers who were held in the custody of the federal government in New York, Coto's clients have become wards of the federal government in South Florida. Whether they have received their S-visas or are waiting for I.N.S. approval, alien material witnesses remain in the custody of the federal government. Their movement often is restricted.¹²³ The F.B.I., I.N.S., and Justice Department must know where they are at all times because the S-visa essentially acts as a witness protection program. Additionally, the government and the community share the burden of paying for all of the witnesses' basic needs, such as housing and food, while the witnesses remain in custody. If these witnesses were to be granted an adjustment of status earlier, they would be able to find work and move more freely in their communities. The federal government, in turn, would be able to ease the economic burden that is imposed by caring for these individuals.

B. *Alien Material Witness Benefits*

Conceptually, adjustment of status is designed to save the applicant the costs and time of traveling abroad to complete the necessary procedures to become a permanent United States resident.¹²⁴ This process was created to prevent the interruption of personal and family life that typically occurs when a nonimmigrant is required to interview at an overseas embassy.¹²⁵ Adjustment of status also is designed to permit the applicant to continue living and working in the United States while applying for residency.¹²⁶ These overall goals are circumvented by the three-year waiting period for the reasons discussed below.

Because holders of S-visas are able to avoid deportation, at least temporarily, they can escape repercussions from their assailants' families in their native countries.¹²⁷ In fact, safety was one of the greatest

123. See 8 U.S.C. § 1184(k)(4) (Supp. 1997).

124. See Davies, *supra* note 6, at 5.

125. See *id.*

126. See *id.*

127. 61 Fed. Reg. 1837 (1996).

benefits envisioned for witnesses by Congress when it passed the adjustment of status provision. At the signing of the Violent Crime Control Bill, Senator Hatch asked, “[W]hat about the victims-and future victims-of these crimes? When is it time to stop focusing on the offender and start protecting the public?”¹²⁸ The I.N.S. Inspector Field Manual makes it clear that law enforcement agencies should be concerned with safeguarding testifying aliens and their identities.¹²⁹ Additionally, I.N.S. press conferences have conveyed the message that the agency is concerned with the “well-being” of the witnesses.¹³⁰ For alien witnesses who cannot wait to adjust their status because they must attend to personal matters in their home countries, the loss of the ability to readjust places them in danger of their aggressor’s revenge. This, in fact, is the case with some of the victims of the crimes discussed above.

S-visas are attractive to their recipients because they eventually allow those individuals who entered the United States illegally to become legal residents.¹³¹ This benefit can be offset easily by the practical implications of the I.N.S. three-year requirement.

Requiring alien material witnesses to wait three years before applying for permanent residency imposes significant personal hardships on those aliens and their relatives. When faced with the choice of having to live with alien status in the United States for three years or returning home, many holders of S-visas may choose the latter option. Otherwise, they are isolated from their extended families who remain in their native countries. Although S-visas allow alien witnesses to work during the time they are in the United States, witnesses’ travel within the United States is very limited.¹³² They must report at least every four months to the Attorney General, who has a right to ask them about their personal whereabouts and activities.¹³³ Because the witnesses constantly are being debriefed and prepared to testify, they cannot leave the jurisdiction where they are residing. This means that a witness who is testifying in Miami, for example, will not be able to visit California to find a job. Additionally, the witnesses most often are housed in government-controlled safespaces during their temporary status.¹³⁴ In essence, they remain in government custody throughout their S-visa status.

128. 40 CONG. REC. S12,799 (daily ed. Sept. 13, 1994) (statement of Sen. Hatch).

129. BENDER, *supra* note 51, at 15-43.

130. *Holds News Conference on Status of Fifty-Seven Deaf Mute Mexicans*, FDCH POLITICAL TRANSCRIPTS July 21, 1997, available in LEXIS, FDCH POLITICAL TRANSCRIPTS File.

131. 60 Fed. Reg. 44,260 (1995) (“may eventually be granted lawful permanent resident . . . status because of their cooperation”).

132. *See* 8 U.S.C. § 1184(k)(4); 60 Fed. Reg. 44,260, 44,262.

133. *See id.*; BENDER, *supra* note 51, at § 27.01.

134. Coto, *supra* note 27.

Consider what would happen to an alien material witness who needs to return home for personal reasons. For example, what if one of Virginia Coto's clients needs to travel to Mexico to care for a terminally-ill aunt or friend? What if her family's home was being repossessed by the Mexican government? If this woman did not have to wait three years, she could apply for an adjustment of status immediately and travel to Mexico to take care of her personal situations. Instead, the three-year waiting period forces her to choose between forfeiting her home or losing a loved one while waiting in the United States for the time limit to expire or returning home and not testifying at the trial against her captors.

Once this witness returns to Mexico, the benefits envisioned by the S-visa and adjustment of status provisions will be gone. The threat of retribution from her captors and their families once again will become a possibility, for she already will have assisted the government in its investigation. Coto's client also will have lost an opportunity to become a United States resident.

VIII. AN ALTERNATIVE PROPOSAL FOR A WAITING PERIOD

The benefit that is intended to be conferred upon the government by the S-visa (the assurance of material witness testimony for criminal prosecutions) sometimes can go against the interests of the material witness in securing adjustment of status. That is, without any kind of waiting period, a witness who is conferred permanent resident status automatically will not have an incentive to testify on behalf of the government. For this reason, the status of alien material witnesses in possession of S-visas should not be adjusted before they testify.

Such an interpretation of the statute's implied waiting period is consistent with the provisions in sections 1255(j)(1)(A) and (B) of Chapter 8 of the United States Code. These sections grant the Attorney General discretion to adjust the witness' status if the witness "has supplied information" and "the provision of such information has substantially contributed to the success of an authorized criminal investigation."¹³⁵ A reasonable interpretation of this statute would be, for example, that Coto's clients could submit their applications for adjustment of status only after they have testified in the Cadena case in the Southern District of Florida or supplied information that has assisted the government substantially in the apprehension of the members of the Cadena conspiracy. Additionally, Coto's clients would not be allowed to apply if the Attorney General determines that the information supplied by the individuals

135. See 8 U.S.C. § 1255(i)(1)(A)-(B).

has been trivial; that is, the information supplied by these individuals must have been proven to be significant.

This proposal substantially differs from the current policy of the I.N.S., which requires a three-year waiting period in *all* situations. If the I.N.S.'s interpretation is adhered to, a witness who is granted an S-visa today and testifies the following month would be required to wait two years and eleven months to submit the application for adjustment of status, even though he or she complied with the terms of the S-visa agreement almost immediately upon receipt of the visa. If this person desires to naturalize to citizenship status, an additional waiting period of at least five years would follow before the naturalization process can occur.¹³⁶

IX. CONCLUSION

Although the sun set on the S-visa statute on September 13, 1999, alien material witnesses who have been granted S-visas since 1996 will be seeking to adjust their status after the expiration date of the statute. Will they be told that they must wait three-years to apply for permanent residency, or will they be granted their reward after testifying on behalf of the government?

As long as the I.N.S. continues to adhere to its arbitrary three-year policy, adjustment of status for holders of S-visas will continue to occur three years too late. As a result of this threat, the government will lose potential witnesses and spend a significant amount of tax dollars supporting those witnesses who seek to maintain on S-visa status. In turn, many of these victim-witnesses of international criminal enterprises will forego the opportunity of becoming United States residents or citizens. Until the I.N.S. changes its current policy, Congress' intent behind the adjustment of status provision for S-visa holders will not be implemented fully.

CHRISTINA M. CEBALLOS*

136. NANCY-JO MERRIT, *UNDERSTANDING IMMIGRATION LAW: HOW ENTER AND LIVE IN THE UNITED STATES* (1993). Only an alien who has been admitted as a permanent resident may apply for naturalization. Among the requirements such an individual must meet is that of residing in the United States for five years. *See* 8 C.F.R. § 316.2 (1997). If the current I.N.S. waiting period of three years for adjustment of status is kept in place, this translates into a waiting period for S-visa holders of at least eight years. This period does not include the time it takes to process the paperwork, a task that often takes several additional years.

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