PHILIPPINE EXPRESS
September 27, 1999

LEGAL NOTES

Ruben S. Seguritan

Final rule on affidavit of support

On Sept. 20, the Department of State (DOS) published its final rule requiring a new enforceable affidavit of support from aliens applying for immigrant visa in the immediate relative, family-based and certain employment visa categories. The affidavit of support is intended to assure the U.S. government that the immigrating alien will not become a public charge.

The requirement was first issued as an interim regulation on Dec. 29, 1997 pursuant to the Illegal Immigration Reform and Responsibility Act of 1996. The sponsor must demonstrate that his income and assets equal at least 125% of the current minimum Federal Poverty Guideline.

There has been a lot of confusion and concern on the part of the public about the new requirement and what constitutes "public charge." In many cases, noncitizens and their families chose not to apply for public health benefits for which they were eligible because they feared the negative immigration consequences.

In an effort to relieve some of the public's concerns, the Clinton Administration has issued guidelines which we reproduce in part below:

1) An Affidavit of Support (AOS) is a legally binding promise that the sponsor will provide support and assistance to the immigrant if necessary. Sponsors must be able to demonstrate that they are able to maintain the sponsored alien(s) at an annual income of not less than 125 percent of the federal poverty level. If the family member who filed the visa petition does not have enough money to support the alien(s), then another person can sign an AOS as a "joint sponsor," indicating that he or she is willing to support the immigrant in the future if needed. The sponsor's obligations under AOS lasts until the immigrant is naturalized, has worked or can be credited with 40 quarters of work, leaves the U.S. permanently, or dies. The sponsor and joint sponsor (if any) must also agree to repay the government if the immigrant uses certain benefits during that time and if the government ask the sponsor for repayment.

2) If lawful permanent residents want to sponsor a relative to come to the U.S. it will not hurt their chances if they are receiving or have received public benefits in the past. Sponsors are not subject to public charge screening under the immigration laws; the question is whether the alien being sponsored is likely to become a public charge.

3) In deciding whether an alien is likely to become a public charge, the law requires that the INS (in the U.S.) or State (overseas) take certain factors into account, including the alien's age, health, family status, assets, resources, financial status, education and skills. The government official examines all of these factors, looking at the "totality of the circumstances" concerning the alien, to make a forward-looking decision. No single factor — other than the lack of an Affidavit of Support, if required — will be used as the sole basis for finding that someone is likely to become a public charge, that is, likely to become primarily dependent on the government for subsistence. Non-cash benefits and certain special-purpose cash benefits will not be taken into account under the totality of circumstances test.

4) Acceptance of cash assistance for income maintenance such as Supplemental Security Income (SSI), cash assistance from the Temporary Assistance for Needy Families (TANF) program and State or local cash assistance programs for income maintenance, often called "General Assistance" programs could make a noncitizen a public charge, if all other criteria are met as described above in item 3.

In addition, public assistance, including Medicaid, that is used for supporting aliens who reside in an institution for long-term care — such as a nursing home or mental health institution — will also be considered by INS and DOS officials as part of the public charge analysis. Short-term institutionalization for rehabilitation is not subject to public charge consideration.

5) Non-cash benefits and special purpose cash benefits that are not intended for income maintenance are not subject to public charge consideration. Such benefits that are not intended for income maintenance are not subject to public charge consideration. Such benefits include: Medicaid, Children's Health Insurance Program (CHIP), Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), immunizations, prenatal care, testing and treatment of communicable diseases, emergency medical assistance, energy assistance, child care services, foster care and adoption assistance, transportation vouchers, educational assistance, job training programs, and non-cash benefits funded under the TANF program.

6) The INS can deport an alien on public charge grounds only if the alien has failed to meet the benefit-granting agency's demand for repayment of a cash benefit for income maintenance or for the costs of institutionalization for long-term care. INS may initiate removal proceedings only if the benefit-granting agency has the legal authority to demand repayment and has chosen to seek repayment within five years of the alien's entry into the United States; obtained a final judgment; taken all steps to collect on that judgment; and been unsuccessful in those attempts.

Even if these conditions are met, the alien is not deportable on public charge grounds if the alien can show that he or she received public cash benefits for income maintenance or was institutionalized for long-term care for causes that arose after entry into the United States.

7) There is no public charge test for naturalization, so the receipt of benefits is not relevant, as long as they were legally received. Nor is there a requirement to repay benefits received in the past in order to qualify for citizenship.

8) Benefits received by one member of a family are not attributed to other family members for public charge purposes, unless the cash benefits amount to the sole support of the family.