

NATIONAL IMMIGRATION PROJECT

of the NATIONAL LAWYERS GUILD

PRACTICE ADVISORY
March 14, 2003¹

SPECIAL CALL IN REGISTRATION QUESTIONS AND ANSWERS: WHAT HAPPENS IF MY CLIENT REGISTERS LATE?

By Leila Laoudji, Defending Rights Post 9-11 Project

What does this Q&A cover?

In this Q&A, we will discuss possible civil and criminal penalties for failure to comply with Special Call In Registration, the possible penalties for registering late, and legal arguments that may help a client who has registered late. This Q&A does not cover basic information about what is special call in registration, who must comply with its provisions, and what are its deadlines. For information about those topics, please see the American Immigration Law Foundation's Q&A.²

What are possible removal penalties for failure to comply with Special Call In Registration?

The Special Call In Registration notices state that an individual who fails to comply with the registration requirements is deportable under INA § 237(a)(3)(A) unless he can prove that the failure was not willful or that it was reasonably excusable.³ The notices also state that an individual who fails to comply with Special Call In Registration is deportable under INA § 237(a)(1)(C)(i) because he failed to comply with the conditions of his status.⁴

Failing to comply with Special Call In Registration may have an effect on other immigration relief and benefits. We will address these issues in future Q&A's.

What must the government do to prove that my client failed to comply with Special Call In Registration?

¹ Copyright © 2003, National Immigration Project of the National Lawyers Guild

² American Immigration Law Foundation, *Special Registration Question and Answer*, <<http://www.aifl.org/lac/2002/SR121702b.pdf>> (Last updated Mar. 2, 2003).

³ "Any alien who has failed to comply with the provisions of section 265 is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful." INA § 237(a)(3)(A); 8 U.S.C. § 1227(a)(3)(A).

⁴ "Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 248, or to comply with the conditions of any such status, is deportable." INA § 237(a)(1)(C)(i); 8 U.S.C. § 1227(a)(1)(C)(i).

When the government issues a Notice to Appear (NTA) to your client, it is simply a charging document that states the allegations against your client. The government still bears the burden of proving in Immigration Court that your client's behavior constitutes a failure to comply with each element of the Special Call In Registration requirements.

The government must prove that your client was a nonimmigrant and that he was a citizen or national of a country designated by the Special Registration Notice. The government must also prove that your client's behavior constitutes a failure to register as described in the regulations. Under INA § 237(a)(3)(A) you have the opportunity to prove that your client's failure to register was not willful or that it was reasonably excusable.⁵

What are the criminal penalties for a conviction for willfully failing to comply with Special Call In Registration?

Section 266(a) of the Immigration and Nationality Act⁶ provides criminal penalties for a noncitizen who has an obligation to register but willfully fails or refuses to register. As with all criminal cases, the government must prove each element of the offense beyond a reasonable doubt that your client willfully failed or refused to register.⁷ If the government secures a conviction against your client for failure to register, he faces a fine of \$1000 or imprisonment for six months or both.

What can happen to my client if he registers late?

Neither the Special Call In Registration regulations nor the notices make any reference to the consequences of late registration. The INS has stated unofficially that: "Right now, a late registration that was willful, meaning it was a knowing late registration, is considered a violation of the regulations. An unwillful or reasonably excusable registration is one where they simply did not know, they had a medical problem, there was a family emergency, they had transportation difficulty, something like that. But knowing and being afraid to register late, right now is considered a violation of the regulations."⁸

The Department of Justice's (DOJ) statement regarding prosecutorial discretion⁹ announced in a February 14, 2003 press release extending the registration deadlines for

⁵ INA § 237(a)(3)(A).

⁶ "Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both." INA § 266 (a); 8 U.S.C. § 1306(a).

⁷ See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) (requiring government to prove each element of an offense beyond a reasonable doubt).

⁸ Janna Evans, Acting Director of Community Programs at the INS, Panel remarks, *INS Special Registration --What Does It Mean?* (American-Arab Anti-Discrimination Committee, Jan.7, 2003) (copy of transcript at <http://adc.org/PDF/INS_Special_Registration_Panel.pdf>).

⁹ "Prosecutorial discretion will be considered if a registrant has a currently-filed request or application for a benefit, appears to be immediately and prima facie eligible for the benefit sought, and if no adverse or disqualifying information is developed through indices checks or other sources." U.S. Department of

Groups 3 and 4 does not clarify whether or not late registrants will be charged with failure to register.

The government may or may not allow your client's late registration to constitute compliance with the Special Call In Registration.

If my client registers late and is charged with failure to register, what are some of the legal defenses?

This Q&A addresses three helpful arguments in the event that your client registers late and is charged with failure to register:

- A. Your client's late registration constitutes substantial compliance,
- B. The Special Call In Registration deadlines are subject to equitable tolling, and
- C. The Special Call In Registration notices and procedures are constitutionally inadequate.

Also, there are other constitutional challenges to the Special Call In Procedure as a whole.

A. Substantial Compliance

Substantial compliance is an argument that you can raise when a person's action or inaction has violated some but not all of the requirements of a law. You may argue that your client's compliance with most of the requirements of Special Call In Registration should constitute substantial compliance, and therefore, your client should not be deported.

In *Mashi v. INS*, 585 F.2d 1309, 1317 (5th Cir. 1978), the Fifth Circuit found that a student who failed to complete the required 12-credit course load to maintain status as an international student was not in violation of his status and should not be deported. In circumstances where there is no statutory or regulatory definition that notifies a noncitizen of which conduct would rise to the level of a status violation, the court of appeals urged for a case-by-case assessment of whether conduct violated a noncitizen's nonimmigrant status.¹⁰ The Fifth Circuit also invoked the canon of statutory construction that deportation statutes should be narrowly construed.¹¹

If your client is put into removal proceedings after registering late, you should consider raising the following arguments on behalf of your client:

Justice News Release, *Department of Justice Announces Extension of Registration Period under National Security Entry Exit Registration System* (Feb. 14, 2003)
<http://www.usdoj.gov/opa/pr/2003/February/03_ag_090.htm>.

¹⁰ *Mashi v. INS*, 585 F.2d 1309, 1317 (5th Cir. 1978). See also *Matter of Neely and Whaylie*, I&N Dec. 864, 865 (BIA 1966).

¹¹ *Mashi v. INS*, 585 F.2d 1309, 1316 (5th Cir. 1978).

- Your client’s late registration still constitutes compliance with Special Call In Registration since the regulations did not specify the penalties for not registering on time and the facts surrounding your client’s case (transportation difficulties, health problems, lack of notice or other) show that your client did not have the intention of violating the Special Call In Requirements.
- The character of his offense (registering late) and the consequences that INS is seeking to establish (deportation) are not balanced. In fact, your client would be penalized for attempting to comply with Special Call In Registration.
- The facts surrounding your client’s late registration all point to a lack of moral culpability where deportation would be an unjust Draconian sanction.¹²

B. Equitable Tolling

The doctrine of equitable tolling¹³ allows for a suspension of a statute of limitations or the extension of a deadline under certain circumstances. There is a presumption that a law that imposes time limitations is subject to equitable tolling.¹⁴ The government must rebut this presumption by proving that there is good reason to believe that the equitable tolling doctrine should not apply.¹⁵ In the Special Call In Registration context, equitable tolling would allow an individual to register late without penalties if the requirement is subject to tolling and he establishes that the equities in his individual case warrant that the time limitation be tolled.¹⁶

It is difficult to tell in advance whether a statute will be subject to equitable tolling.¹⁷ Nevertheless, where the criteria the government will use to adjudicate claims are not public, the doctrine should apply.¹⁸ The Supreme Court has recognized that the list of situations in which tolling is appropriate is not hard and fast.¹⁹

¹² See *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 458-9 (1987).

¹³ Equitable tolling is often confused with equitable estoppel. “Both equitable tolling and equitable estoppel can be used to ‘stop a limitations period from continuing to run after it has already begun to run’. But while tolling focuses on the plaintiff’s excusable ignorance of the limitations period and on a lack of prejudice to the defendant, ‘estoppel’ focuses on the actions of the defendant.” *Socop-Gonzalez v. INS*, 272 F.2d 1176, 1184 (9th Cir. 2001).

¹⁴ *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990).

¹⁵ *United States v. Beggerly*, 524 U.S. 38 (1998).

¹⁶ *Compare Zipes v. Trans World Airlines*, 455 U.S. 385 (1982) (holding that filing a timely charge of discrimination with the EEOC was not a jurisdictional prerequisite and that equities warranted tolling) with *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (determining that record in case of EEOC complainant did not warrant equitable tolling).

¹⁷ *Compare Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) (treating deadline as jurisdictional even though Department of Labor regulation interpreting black-lung benefits for coal miners was unlawful) with *Bowen v. City of New York* 476 U.S. 467 (1986) (tolling administrative and judicial review deadlines where government used unstated criteria to adjudicate cases).

¹⁸ See, e.g., *Bowen v. City of New York* 476 U.S. 467 (1986).

¹⁹ *Young v. United States*, 535 U.S. 43 (2002).

The government often presents the argument that the time limitations are not statutes of limitations, rather that they are jurisdictional requirements.²⁰ Circuit courts have not necessarily accepted those argument unless the statutory language does not support a reading that it contains unstated exceptions²¹ or if the statutory or regulatory time limitations emphasize the time limitations.²²

However, several circuits have held that the statutory limitation²³ imposing a 180-day deadline on filing a motion to rescind an in absentia removal order for exceptional circumstances could be tolled because it did not impose a jurisdictional requirement.²⁴ The government then bears the burden of proving the Special Call In Registration regulation is not subject to equitable tolling. If he succeeds in his claim and the government fails to prove that equitable tolling should not apply to this regulation, the government will not consider his late registration to be a failure to register, and none of the civil and criminal penalties will apply.

The following facts would strengthen the argument that the regulation is subject to equitable tolling.

- The government itself has extended the deadlines for Special Call In Registration, which is inconsistent with the notion that deadlines are strictly jurisdictional.
- Section 265 of the INA does not mention any timelines for complying with registration requirements.
- The Special Call In Regulation and Notices do not emphasize the time limitations for compliance.
- Neither Section 265 of the INA nor the Special Call In Regulations and Notices have public criteria that the government will use to adjudicate late registration claims.

What are some of the factors that will help me to determine whether my client's particular case is eligible for equitable tolling if the statute is found to be subject to tolling?

To determine whether an individual's circumstances call for equitable tolling, the First Circuit identified five factors.²⁵ In order to prevail in the Special Call In Registration context, your client would have to prove that:

²⁰ *INS v. Pangilinan et al.*, 486 U.S. 875 (1988) (treating filing deadline as jurisdictional); *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

²¹ *Socop-Gonzalez v. INS*, 272 F.2d 1176,1189 (9th Cir. 2001) (quoting *United States v. Brockam*, 519 U.S. 347, 350 (1997)); see also *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (recognizing tolling of 180-day period to reopen an in absentia order); *Jobe v. INS*, 238 F.3d 96 (1st Cir. 2000) (same) *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (same). *But see Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999) (holding that counsel's failure to inform client of deportation hearing did not toll the 180 day period).

²² *Socop-Gonzalez v. INS*, 272 F. 2d 1176, 1184 (9th Cir. 2001).

²³ INA § 242B(c)(3)(A), 8 U.S.C. § 1252b(c)(3)(A).

²⁴ *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (recognizing tolling of 180-day period to reopen an in absentia order); *Jobe v. INS*, 238 F.3d 96 (1st Cir. 2000) (same) *Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (same). *But see Anin v. Reno*, 188 F.3d 1273, 1278-79 (11th Cir. 1999) (holding that counsel's failure to inform client of deportation hearing did not toll the 180-day period).

1. He did not get notice of the Special Call In Registration deadline

- He did not hear or read about the Special Registration requirement on the radio, television, or the Internet
- He does not have access or does not know how to operate the Internet
- He has poor English reading skills

2. He did not get constructive notice of the Special Call In Registration deadline

- He lives in an isolated community or a community with few immigrants
- His school/ attorney/ employer did not inform him of this requirement
- No one in his circle of family and friends had to register or told him about the registration requirement

3. He diligently pursued his rights

The fundamental principle is that equitable tolling should apply if the factors outside a party's control caused him to miss a deadline.²⁶ If a person is not diligent in pursuing a remedy, a court will not toll the deadline.²⁷

In the Special Call In Registration context, you can show due diligence by stating that when your client found out about it and its application to him, he attempted to comply with the special registration requirement as soon as possible or within a reasonable amount of time. It is important to show that the delay was not due to a lack of diligence, rather to factors outside of your client's control.

4. There is no prejudice to the government

The United States is seeking to keep track of nonimmigrants through Special Call In Registration. A nonimmigrant's late compliance does not prejudice the government since it arguably is getting the information it is seeking. As a result, it arguably would not prejudice the government to accept voluntary registrations that were not filed by the deadlines.

5. He was reasonable in remaining ignorant of the filing requirements

- He was not negligent in finding out immigration information that applied to him
- He did not ignore any notices about Special Call In Registration
- Notice of Special Call In Registration was so defective that the government extended the deadlines for all four groups yet did not improve publicity

²⁵ *Jobe v. INS*, 238 F. 3d 96, 100 (1st Cir. 2001). (quoting *Benitez-Ponz v. Commonwealth of Puerto Rico*, 136 F.3d 54, 61 (1st Cir. 1998)).

²⁶ *Salois v. Dime Savings Bank*, 128 F. 3d 20, 25 (1st Cir. 1997).

²⁷ *Benitez-Ponz v. Commonwealth of Puerto Rico*, 136 F.3d 54, 61 (1st Cir. 1998).

C. Constitutional Inadequacy of Special Call In Registration Notice and Procedures

In *Walters v. Reno*²⁸, the Ninth Circuit found that the forms and procedures that the INS was using to deport noncitizens for document fraud were so confusing and misleading that the INS violated the due process rights of the noncitizens. As a result, the INS allowed those already deported to reopen their cases, and the INS had to refrain from deporting persons under this unconstitutional procedure, to revise the misleading forms, and to initiate a publicity campaign to reach those affected. Many of the arguments presented in the *Walters* decision are relevant to the Special Call In Registration context.

The *Walters* Court in applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine whether the INS procedures and forms satisfied procedural due process:

1. The interest at stake for the individual

Deportation is the interest at stake for the individual in both the *Walters v. Reno* document fraud context and the Special Call In Registration context.

1. The risk of an erroneous deprivation of the interest through the procedures used

The Court in *Walters* discussed at length the many reasons that the forms and procedures used were deficient and considered constitutionally inadequate notice to the individual. The Ninth Circuit's reasoning in *Walters* arguably applies with equal force to the notice extended to Special Call In registrants.

First, the forms in *Walters* did not mention the consequences that would flow automatically from not asking for a hearing.²⁹ Similarly, the Special Call In Registration notices do not explain or mention the severe consequences of registering late.

Second, the INS used a complicated rights waiver form in *Walters*.³⁰ Like the problem the Ninth Circuit identified in *Walters*, the Special Registration notices were issued in four separate notices to four registrant groups with four different deadlines for compliance. Four additional notices announced extensions of the deadline. The Special Call In Registration notices themselves are confusing documents with many subsets and exceptions to determine who should register. Many people who did not have to register, such as refugees and asylum seekers, tried to register because the notice confused them. Many individuals were confused between the Special Call In Registration procedures and the Special Registration occurring at airports.

²⁸ *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998).

²⁹ *Id.*

³⁰ *Id.*

- Third, the forms in Walters did not provide a noncitizen with a form to request a hearing.³¹ Again, the Special Call In Registration notices did not provide a form a nonimmigrant could use to explain why he could not register on time.

Finally, the Ninth Circuit in Walters was concerned about the INS' selective translation of certain forms. The government translated "Fact Sheets on Special Call In Registration" into Arabic. Advocacy groups widely distributed the government's materials. However, the government's Group 2 Fact Sheet had a serious mistranslation that incorrectly stated that persons who arrived after September 30, 2002 should register, instead of those who arrived before September 30, 2002. The mistake was eventually corrected, but many persons relied on the erroneous fact sheet information.

2. The interest of the government in using the current procedures rather than additional or different procedures

The government's interest is to gather accurate information of the whereabouts and status of nonimmigrants currently in the United States. Allowing for persons to register late without penalties will not hinder that goal. Conversely, deporting persons who want to comply with Special Call In Registration will deter countless others in similar situations from complying with Special Call In Registration.

Conclusion

While it is unclear how the government will ultimately treat late registrants, this Q & A provides possible arguments to defend against government prosecution for failing to register in a timely manner. The three arguments presented center around the premise that your client failed to comply with the Special Call In Registration requirements despite exercising reasonable due diligence. We urge you to consider these arguments when representing a late registrant.

³¹ *Id.*