Permanently Residing in the United States Under Color of Law: Guidelines for a More Precise Interpretation

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COMMENTS

"PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW:" GUIDELINES FOR A MORE PRECISE INTERPRETATION

I. INTRODUCTION

Establishing the precise meaning of "permanently residing in the United States under color of law" is critical; that determination prescribes which aliens are eligible to receive many federally-funded benefits such as unemployment compensation, medicaid and welfare assistance. For example, section 1264 of the California Unemployment Compensation Act states that benefits are payable to aliens who are "permanently residing in the United States under color of law" at the time the services are rendered. Despite the importance of that phrase, few courts have interpreted it. In fact, no California appellate court has construed that language. Because of the increasing public concern over uncontrolled immigration into the United States and alien rights, a precise definition of "permanently residing under color of law" is needed.

The term "permanently residing under color of law" can be traced to the Federal Unemployment Tax Act, section 3304(a)(14). That federal statute states that no alien may be paid unemployment benefits unless he is "permanently residing in the United States under color of law." The full language of the statute is:

Unemployment compensation benefits, extended duration benefits, and federal-state extended benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of Section 203(a)(7) of Section 212(d)(5) of the Immigration and Nationality Act.

Id.

Therefore, whether an alien is eligible for these unemployment benefits hinges on the exact meaning of "permanently residing in the United States under color of law."

The legislature has provided no clear statement of intent with respect to section 3304. For clues to the meaning of "permanently residing under color of law," therefore, one must turn to the few cases decided under section 3304 and under federal and state statutes with identical language. Holley v. Lavine is the landmark case which interprets "permanently residing under color of law." In the context of determining eligibility for welfare benefits, the court held that the plaintiff was residing "under color of law" because the Immigration and Naturalization Service (INS) knew of her presence in the United States, yet had decided not to deport her. Moreover, the plaintiff was "permanently residing in the United States" because: 1) her relationship with the United States was of a "continuing or lasting nature," and 2) she was allowed to remain in the United States until her children were no longer dependent upon her.

Although subsequent cases have followed the Holley rationale, many state agencies in charge of administering unemployment compensation programs do not adhere to the Holley interpretation. California's Employment Development Department (EDD) is a leading example. Through regulation number 1264-1, the EDD sought to condition alien eligibility for unemployment benefits on requirements imposed by neither Congress nor the state legislature. The EDD's action highlights the need for a more precise interpretation of "residing under color of law."

4. See infra text accompanying notes 26-28 for a discussion of legislative intent.
6. Id. at 851. See infra text accompanying notes 41-56.
7. Numerous claims have been filed against employment security agencies in California, Colorado, Texas, Utah and other states. The cases cited in this comment provide evidence of this phenomenon.
8. CAL. UNEMP. INS. CODE § 1264 raises a constitutional issue. Because aliens are protected by those federal constitutional provisions which refer to "persons," they receive protection under the fourteenth amendment's equal protection clause. The equal protection guarantee mandates that the government treat similarly situated persons in a similar manner. As a result, the question arises whether § 1264 should be invalidated as an arbitrary refusal to accord equal treatment to lawful residents who are not citizens. In distinguishing between citizens and aliens who are lawfully admitted or lawfully present, California may be denying aliens equal treatment in the disbursement of unemployment benefits. This inquiry requires an analysis of the U.S. Supreme Court's three standards of review for alienage cases. See Graham v. Richardson, 403 U. S. 365 (1971); In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Foley v. Connellie, 435 U.S. 291 (1978); Ambach v. Norwich,
UNDER COLOR OF LAW

This comment asserts that administrative abuse in the disbursement of unemployment benefits is the result of an imprecise definition of "permanently residing under color of law." Although Holley and subsequent cases clearly delineate factors which should be considered in determining alien eligibility for unemployment benefits, this is insufficient. Administrative agencies, as well as judges and attorneys, need guidelines for applying the standards of Holley and section 3304. Therefore, this comment proposes guidelines to clarify the meaning of "permanently residing in the United States under color of law." The proposed guidelines will bring clarity and precision to a vague phrase.

II. THE PRESENT DEFINITION OF "PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW"

A. Statutes

The phrase "permanently residing in the United States under color of law" appears in the Federal Unemployment Tax Act (FUTA) section 3304(a)(14)(A). In pertinent part the federal statute reads:

[C]ompensation shall not be payable on the basis of services performed by an alien unless such alien . . . was permanently residing in the United States under color of law at the time such services were performed . . . (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7)8 or section 212(d)(5)10


Recently, the Supreme Court extended the scope of the equal protection clause of the fourteenth amendment to include unlawful resident aliens. In Plyer v. Doe, 457 U.S. 202 (1982), the plaintiffs challenged a Texas statute which: 1) denied local school district funds for the education of undocumented school children, and 2) allowed school districts to deny free education to such children. The 5-4 majority struck down the statute as violative of equal protection. As a result, resident aliens who are in the United States unlawfully can secure constitutional protection from state or local laws which arbitrarily deny them benefits or impose burdens upon them. However, under this narrow ruling it is difficult to predict whether the equal protection guarantee will continue to expand. These constitutional issues will not be addressed in this comment.

9. 8 U.S.C. § 203(a)(7) was a conditional entry provision of the Immigration and Nationality Act of 1952 (codified at 8 U.S.C. § 1153(A)(7)). According to its terms, aliens who were fleeing communist persecution, fleeing the Middle East to escape persecution, or who were uprooted by catastrophic natural calamity were allowed conditional entry into the United States. Two years after their conditional entry, these aliens could petition to adjust their status to that of an alien lawfully admitted for permanent residence. A 1980 amendment, Pub. L. No. 96-212, 8 U.S.C. §§ 203(c)(1)-(6), eliminated this provision from the INA.

10. 8 U.S.C. § 212(d)(5) allows the Immigration and Naturalization Service discretion
of the Immigration and Nationality Act.\textsuperscript{11}

The phrase "permanently residing in the United States under color of law" does not appear in the Immigration and Nationality Act (INA),\textsuperscript{12} nor does it appear in the federal regulations relating to immigration.\textsuperscript{13} The Department of Labor (DOL), however, has added some clarity to this vague phrase.

1. \textit{Department of Labor Interpretation}

The unemployment benefits system is one aspect of the Social Security System.\textsuperscript{14} The provisions of the INA were incorporated into the Internal Revenue Code under the Federal Unemployment Tax Act (FUTA).\textsuperscript{15} FUTA required each state to pass its own legislation to provide unemployment programs.\textsuperscript{16} Although each state has been allowed to develop its own particular program, each must follow the FUTA general standards and guidelines. State employment security agencies (SESA's) administer the program in their respective territories. The DOL often uses Unemployment Insurance Program Letters (UIPL's) to inform the SESA's of its interpretation of federal statutory requirements.\textsuperscript{17}

The DOL has followed that procedure with regard to the restrictions on benefit payments to aliens appearing pursuant to section 3304.\textsuperscript{18} UIPL 15-78 contains the DOL's interpretation of individu-
als “permanently residing in the United States under color of law.” This interpretation states that aliens falling within this category are those residing in the United States “permanently” or “continuously for a long period of time,” and who entered the United States under conditions that appear to be lawful.\textsuperscript{19}

This language suggests that two factors determine whether an alien is “permanently residing in the United States under color of law.” In particular, the duration and continuity of the alien’s residence in the United States, as well as the nature of the alien’s entry should be examined. If a claimant was in the United States for a short period of time, and frequently visited outside the country, he has not resided “continuously for a long period of time”\textsuperscript{20} in the United States. Similarly, a claimant who was seized while illegally attempting to cross a United States border has not entered this country under “conditions that appear to be lawful.”\textsuperscript{21} Conversely, if an alien shows that he has resided in the United States continuously for a long time, and that he has entered the country under lawful conditions, this evidence should support his “color of law” claim. Therefore, any proof of these two factors should support an alien’s claim for unemployment compensation benefits.

An agency’s interpretation of the statutes that the agency is charged to enforce is a substantial factor to consider in construing a statute.\textsuperscript{22} Therefore, the two factors cited above—entry conditions and residency characteristics—deserve special attention in construing section 3304. At the same time, the degree of deference accorded to an administrative agency’s interpretation of a statute depends, in part, on its thoroughness.\textsuperscript{23} Although the DOL has discussed “per-

\textsuperscript{19} Unemployment Ins. Program Letter No. 15-78 (January 24, 1978).
\textsuperscript{20} Id.
\textsuperscript{21} Id. But see Antillon v. Department of Employment Security, discussed infra notes 90-93. Unlawful entry is not necessarily a bar to alien eligibility for unemployment benefits. In the Antillon case, the plaintiff did not make a lawful entry. Nonetheless, the court found him eligible for unemployment benefits.

The amount of deference due an administrative agency interpretation of a statute, however, “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

\textit{Id.}
manently residing under color of law” elsewhere,24 the DOL has not thoroughly interpreted section 3304.

Because the DOL’s interpretation is incomplete, other clues to the meaning of section 3304 must be found. Rules of statutory construction require that a statute be interpreted according to its plain language, unless a clear and contrary legislative intent is shown. Therefore, the legislative history of section 3304 will now be reviewed.

Prior to 1976, the federal statutes concerning unemployment insurance benefit programs25 did not cover alien eligibility for such benefits. However, under the Unemployment Compensation Amendments of 197626 aliens were specifically included. The amendments provided benefits only to aliens lawfully admitted for permanent residency, lawfully present for purposes of performing services, or permanently residing in the United States under color of law. Unfortunately, congressional discussion does not reveal the precise meaning of the statute.27

The phrase also appears in statutes which restrict alien eligibil-
ity for benefits under Social Security programs. No alien can receive social security benefits unless he has been lawfully admitted for permanent residence or is otherwise "permanently residing in the United States under color of law."28 However, no explanation of this Social Security Act language appears in the congressional records.29 Indeed, the legislative history of the Act provides limited information concerning the meaning of the phrase.

Congress intended to grant benefits to those aliens who were not lawfully admitted for permanent residence but who were allowed nonetheless to remain in the United States.30 However, this category of aliens remains undefined by the status. It is unclear exactly when an alien has been "allowed" to remain in the United States. Furthermore, it is unclear whether an alien who has been allowed to remain in the United States is automatically eligible for unemployment benefits. Because a clear legislative intention is not evident, one must turn to the common law interpretation of section 3304.

B. Holley and Its Progeny

Section 3304 refers to two sections of the Immigration and Nationality Act (INA). More specifically, section 3304 refers to INA provisions concerning refugees and parolees.31 Because of these two sections, section 3304 presumably concerns a claimant's immigration status. Therefore, an analysis of "permanently residing in the United States under color of law" under section 3304 should include at least some reference to the INA.32

According to the INA, "permanent" refers to a relationship which is not temporary, but rather of a "continuing or lasting nature."33 Moreover, the INA ambiguously describes "permanent" as a relationship which may be "dissolved eventually at the insistence ei-
ther of the United States or of the individual." In addition, the INA defines "residence" as the alien's place of "general abode," or "actual dwelling place."

The term "color of law" does not appear in the INA. But the term has been subject to interpretation in a variety of legal contexts. In 1899 the United States Supreme Court defined "color of law" for the first time: "'color of law' does not mean actual law. 'Color' as a modifier... means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.'" Similarly, Black's Law Dictionary defines "color of law" as the "appearance or semblance without the substance of legal right."

A purely linguistic analysis suggests that an alien is "permanently residing under color of law" if he makes his abode in the United States, and if he does so under an apparent claim of legal right. Furthermore, this analysis suggests how a claimant can use this definition to qualify for unemployment benefits. First, a claimant can show that his relationship with the United States is "permanent," or of a "continuing or lasting nature." Second, he can demonstrate that the United States is his principal, actual dwelling place. In other words, he can show that the United States is his "residence." Finally, the claimant can show that he has undertaken this "permanent residence" under an apparent claim of legal right. That is, he can show that he is residing here under apparently lawful circumstances.

These clues are informative. However, a thorough inquiry into the plain language of section 3304 must go beyond mere linguistic evaluation. One must also examine those cases decided under section 3304, as well as those few cases decided under identical language in

34. Id.
35. 8 U.S.C. § 1101(a)(33) (1964). "The term 'residence' means the place of general abode... principal, actual dwelling place in fact, without regard to intent." Id.
36. McCain v. City of Des Moines, 174 U.S. 168, 175 (1899). In that case, residents of Greenwood Park, Iowa sued the City of Des Moines for assessing taxes against their property. The city levied the taxes pursuant to an act which purported to extend the limits of Des Moines so as to include Greenwood Park. The U.S. Supreme Court agreed with the residents that the act was void. Nonetheless, it found that annexation of Greenwood Park by Des Moines was lawful because it was made under "color of law." In connection with this conclusion, the court stated "'Color of law' does not mean actual law. 'Color' as a modifier, in legal parlance, means 'appearance as distinguished from reality.' Color of law means 'mere semblance of legal right.'" Id.
38. See supra note 33 and accompanying text.
39. See supra note 35 and accompanying text.
40. See supra note 36 and accompanying text.
other federal and state statutes.

1. Holley v. Lavine

The Second Circuit Court of Appeals in *Holley v. Lavine* interpreted the specific language in question. In that case, a Canadian citizen, who was in the United States unlawfully but whose six children were citizens, challenged a provision of the New York Social Services Law. Prior to August of 1974, the plaintiff had been receiving AFDC (Aid to Families with Dependent Children) benefits under the Social Security Act. However, the New York Social Services Law, enacted in August 1974, provides that aliens unlawfully residing in the United States are not eligible for AFDC. Pursuant to this law, the plaintiff continued to receive AFDC for her six children, but ceased receiving payments on her own account as a parent. The INS knew of the plaintiff’s unlawful presence in the United States; yet, deportation proceedings were not instituted. The INS issued a formal letter stating that, because of “humanitarian reasons,” it would not deport the plaintiff until her children were no longer dependent upon her.

Although the plaintiff was ineligible for benefits according to state law, the court addressed the issue of whether that law was consistent with the federal regulations concerning aliens’ rights to receive AFDC. Like section 3304, the federal AFDC regulation lim-

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45. *Holley*, 553 F.2d at 849.
46. *Id.* at 847; see generally 45 C.F.R. § 233.50 (1984).

Citizenship and Alienage: A state plan . . . of the Social Security Act shall provide that an otherwise eligible individual, dependent child, or a caretaker relative or any other persons whose needs are considered in determining the need of the child or relative claiming aid, must be either:

(a) A citizen, or

(b) An alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law, including certain aliens lawfully present in the United States as a result of the application of the following provisions of the Immigration and Nationality Act:

(1) Section 207(c) [refugees]

(2) Section 203(a)(7) [conditional entrant refugees]

(3) Section 208 [aliens granted political asylum]

(4) Section 212(d)(5) [aliens granted temporary parole status].

its benefits to those aliens who are "permanently residing in the United States under color of law." The court began by recognizing that "color of law" includes actions not covered by specific legal authorization:

It embraces not only situations within the body of law, but also others enfolded by a colorable imitation. "[U]nder color of law" means that which an official does by virtue of power, as well as what he does by virtue of right. The phrase encircles the law, its shadows, and its penumbra . . . under color of law" . . . [includes] cases that are, in strict terms, outside the law but are near the border.47

The opinion states that "color of law" includes cases in which an official uses his discretion not to enforce a statutory mandate. Because enforcement may inflict consequences beyond what lawmakers contemplated, an official may deliberately abstain from imposing penalties upon "known violators."48 The INS knew that the plaintiff was in the United States unlawfully. In fact, the plaintiff had fully disclosed her situation to the INS. Yet the INS chose not to deport her. In this case, those charged with the power of enforcement did not impose penalties upon a known violator. As a consequence, the plaintiff could be categorized as residing in the United States "under color of law."

In concluding that the plaintiff was "permanently" residing in the United States, the court referred to INA language. As previously mentioned,49 the INA defines "permanent" as a relationship of continuing or lasting nature which can be dissolved by either the United States or by the individual.50 The court accepted this definition of "permanent."51 Two other sections of the INA were also mentioned. More specifically, the court cited two statutory sections concerning refugees and parolees. These statutory sections appear in section 3304 and in the federal regulations that were examined in Holley.52 The opinion states that these sections describe instances in which an alien is permitted to stay in the United States "not necessarily forever, but only so long as he is in a particular condition."53 According to the court, the plaintiff's situation was another such "particular

47. Holley, 553 F.2d at 849-50.
48. Id. at 850.
49. See supra text accompanying notes 33 and 38.
50. See 8 U.S.C. § 1101(a)(31) (1982); see also supra note 34 and accompanying text.
51. Holley, 553 F.2d at 850-51.
52. See supra note 46 and text accompanying note 11.
53. Holley, 553 F.2d at 851.
condition.” The plaintiff, a Canadian citizen, was permitted to stay in the United States at least until all her children had grown to majority age. The “particular condition” was the children’s dependency upon their mother, the plaintiff. Moreover, because the plaintiff’s ties were so close to six United States citizens, the Department of Justice was not likely to deport the plaintiff to Canada.\(^54\)

Holley definitely clarifies the phrase “permanently residing under color of law.” According to Holley, a claimant is in the United States “under color of law” if the INS knows of his unlawful presence but chooses not to enforce sanctions against him.\(^55\) Of course, the INS cannot decide whether or not to deport an alien if it does not first know of his presence. Therefore, the INS knowledge of the claimant’s presence in the United States is of fundamental importance. If the claimant is able to show that the INS knew of his presence and the INS failed to deport him, then this information should buttress his assertion that he is residing in the United States “under color of law.” Before requiring any evidence from the INS, the claimant should provide evidence of INS knowledge of his presence. For example, he can submit a copy of his application for permanent resident status, receipt of which has been acknowledged by the INS. This is a relatively inexpensive and accessible source of proof for the claimant. Furthermore, this procedure will avoid placing an unnecessary burden on the INS. The INS need not affirmatively refute, in every case, the claimant’s contention that he has never been deported. Only after the claimant has made an initial showing of INS knowledge should the INS be burdened with such a task.

To further support his claim for benefits, the claimant should provide evidence confirming that he is “permanently residing” in the United States. Again, Holley offers some guidance. He should show that his relationship with the United States is of a “continuing or lasting nature.”\(^56\) Moreover, the claimant should offer evidence of “particular conditions” such as those presented in the Holley case.\(^57\) For instance, the claimant can show ties with United States citizens who depend on the claimant for their welfare. Marriage and birth certificates are one type of inexpensive proof which the claimant can offer.

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54. Id.
55. Holley, 553 F.2d at 849-50.
56. See supra note 50 and accompanying text.
57. See supra notes 52-54 and accompanying text.
2. Subsequent Cases

Several courts since Holley have construed the language of section 3304. In Velasquez v. Secretary of the Department of Health and Human Services, a federal district court interpreted "permanently residing in the United States under color of law" under the Social Security Act. The plaintiff, a Mexican citizen, entered the United States in 1972 as a temporary non-immigrant visitor. After she overstayed her visa by nine years, the INS initiated deportation proceedings. On August 11, 1981, the plaintiff filed an application for suspension of deportation with the INS. The plaintiff was granted employment authorization for the duration of the deportation proceedings. For more than one year, the INS took no action in the deportation case. An administrative law judge evaluated the plaintiff's claim for social security benefits and decided that she had failed to prove that she was "permanently residing in the United States under color of law" as required by the Social Security Act. As a result, the Department of Health and Human Services denied her social security benefits.

In overruling the decision, the district court relied on Holley. However, it also distinguished the facts in Holley from those at bar. In Holley, an INS official issued a formal assurance that the INS did not contemplate deporting the alien because of "humanitarian reasons." In Velasquez, the plaintiff presented no such explicit evidence; she merely demonstrated a history of INS inaction. This was sufficient for the court to conclude that the Department of Health and Human Services had the burden of proving the INS's inten-

60. Velasquez, 581 F. Supp. at 17.

The term "aged, blind or disabled individual" means an individual who . . . is a resident of the United States, and is either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law . . . ."

Id.

The principal difference between FUTA and SSA is that § 1382 refers to eligibility for social security benefits, while § 3304 refers to unemployment compensation benefits.
64. Velasquez, 581 F. Supp. at 18.
65. See supra note 45 and accompanying text.
tions. At this point, however, the claimant was not ineligible for benefits.

_Papadopoulos v. Shang_, a New York appellate court case, involved alien eligibility for federally-funded benefits. In that case, subsequent to her entry as a visitor, the plaintiff filed an application for adjustment of status to lawful permanent resident. While her application was pending, the plaintiff suffered a stroke and incurred medical expenses for which she sought reimbursement through Medicaid. Like section 3304, Medicaid regulations provide for benefits only to aliens who are “permanently residing in the United States under color of law.”

According to INS Operating Instructions, an applicant for adjustment of status may not be deported if he is immediately eligible to receive an immigrant visa for permanent residence. In _Papadopoulos_, the plaintiff was immediately eligible to receive an immigrant visa; therefore, the INS could not deport her. The court found that the plaintiff qualified for medical benefits precisely because the INS could not deport her. As in _Holley_, eligibility for benefits depended, at least in part, on the failure of the INS to deport the plaintiff.

Another New York appellate court construed “permanently residing under color of the law” in _St. Francis Hospital v. D’Elia_. In that case, the plaintiff entered the United States using a valid non-immigrant visitor’s visa. Prior to the expiration of her non-immigrant visa, she applied for an immigrant visa. After the plaintiff’s non-immigrant visa had expired, the Department of State wrote to her at her residence in the United States. The Department of State explained that processing of her application would be delayed. The INS, however, took no action to deport the plaintiff. The plaintiff later applied for, and was denied medical assistance on the

68. Under the Immigration and Nationality Act, 8 U.S.C. § 1225, aliens may file applications to adjust their status to that of a permanent resident. Also, INS Operating Instruction 242.1(a)(25) provides that aliens filing such applications shall not have deportation proceedings initiated against them while the application for adjustment is pending.
70. Immigration and Naturalization Service Operating Instructions, OR 242(a)(25).
75. _St. Francis_, 71 A.D.2d at 119, 422 N.Y.S.2d at 109.
The appellate court in *St. Francis*, relying on *Papadopoulos* and *Holley*, found the plaintiff eligible for medical assistance. The court noted that, according to *Papadopoulos*, an alien is eligible for medical assistance if he is "permanently residing in the United States under color of law." The *St. Francis* court also quoted Holley's broad definition of "color of law." In making its determination, the court emphasized certain facts of the case before it. It restated the following facts: the plaintiff made a valid entry; she filed a timely application for an immigrant visa; she corresponded with the Department of State; and the INS failed to deport her. In the court's view, application of *Papadopoulos* and *Holley* to those facts compelled the conclusion that the plaintiff was eligible for medical benefits.

An Oregon state court reached a similar conclusion in *Rubio v. Employment Division*. The plaintiff in *Rubio* began working in 1979, while he was in the United States unlawfully. In 1980 he married a United States citizen who filed an application for permanent residence on his behalf. The INS notified the plaintiff's wife that it had approved her petition, and that it was being forwarded to the Department of State for processing. At the same time, the INS sent a form to the claimant granting him three months to voluntarily depart the country. The INS renewed this grant every three months until he eventually received permanent resident status. Prior to receiving permanent resident status, the claimant applied for unemployment benefits. The benefits were denied on the ground that he was not legally authorized to work in the United States.

The *Rubio* court cited *Holley* in holding that the claimant was eligible for unemployment benefits. According to the Oregon court,
the focus of inquiry was not whether the claimant was legally entitled to work, but rather, whether he was "permanently residing in the United States under color of law." Because of the Holley reasoning, the facts in Rubio supported the conclusion that the claimant was eligible to receive unemployment benefits. The claimant was "permanently residing" because he was married to a United States citizen, was working for a United States business, and was taking necessary steps to achieve status as a legal permanent resident.

Furthermore, the claimant's residence was "under color of law." To the extent that the INS sent a form granting voluntary departure to the claimant's address, the INS knew that the claimant was in the United States. Moreover, by its routine regular extensions of the claimant's voluntary departure, the INS actually acquiesced in his residence. The INS not only exercised its discretion not to enforce the law, but it had also "knowingly maintained the status quo" pending the outcome of the claimant's application for permanent resident status.

Rubio clearly indicates that a claimant who has been granted extensions on his voluntary departure should present evidence of such extensions in support of his claim for unemployment benefits. State agencies in turn should accept certified copies of these extensions. In this manner, the INS will not be burdened with unnecessary duplication of documents. Once the INS has issued a document to the claimant, the claimant can present a certified copy of this document to the state agency. The INS need not search for, copy, and distribute documents which have already been given to the claimant.

Another case arising in the context of unemployment benefits is Antillon v. Department of Employment Security. In 1980, Antillon filed an application for permanent resident status. After personally visiting the INS in January 1981, Antillon was placed under INS docket and given one month to leave the country voluntarily. He did not leave the country, and the INS took no further action. In January of 1981, Antillon also applied for unemployment benefits in

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84. Rubio, 66 Or. App. 525, 674 P.2d at 1203. See also Antillon, infra text accompanying note 94. The court in Antillon held that the issue is whether the plaintiff was in the United States under color of law, not whether he was authorized to work in the United States.
85. 66 Or. App. 525, 674 P.2d at 1202-03.
86. Rubio, 66 Or. App. 525, 674 P.2d at 1202-03.
87. Id.
88. See supra note 48 and accompanying text.
89. Rubio, 66 Or. App. 525, 674 P.2d at 1203.
90. 688 P.2d 455 (Utah 1984).
91. See supra note 82.
Utah. At the time Antillon applied for these benefits, he was already under INS docket control. Antillon applied for suspension of deportation in September 1981. The INS took no further action until a year later. At that time, an order to show cause why Antillon should not be deported was sent to his home address in the United States. The order stated that Antillon was required to appear before a judge at a date to be determined. However, no hearing date was ever set and no hearing was held. The INS never acted on Antillon’s application for suspension of deportation, nor did it act on his application for permanent resident status. When Antillon applied for unemployment benefits, his claim was denied on the grounds that he was in the United States unlawfully and without a work permit. It should be noted that Utah’s state unemployment law regarding alien eligibility is identical to section 3304 of the federal statute.

As in Rubio, the Utah Supreme Court in Antillon emphasized that the issue was not whether Antillon initially entered the United States illegally or whether he was legally entitled to work. Rather, the question was whether he was in the United States under “color of law” at the time he applied for unemployment benefits. The court reviewed how the Rubio court had adopted the reasoning in Holley. Applying Rubio and Holley to the facts presented, the court found that Antillon did indeed qualify for unemployment benefits. Antillon had applied for permanent resident status, and when he applied for unemployment benefits, the INS knew he was in the United States; in fact, he was under INS docket control. Furthermore, the INS knew where he was living; forms and notices had been sent to Antillon’s home address. Finally, the INS took no action to deport Antillon or to act on his application for permanent resident status. These facts convinced the Utah Supreme Court that Antillon was “permanently residing under color of law” because: 1) the INS knew of Antillon’s presence in the United States, and 2) the INS acquiesced to his presence by exercising its discretion not to enforce the laws. Clearly, INS knowledge of the claimant’s presence and INS inaction were the determinative facts in the case.

93. The Utah statute, UTAH CODE ANN. § 1-35-4-5K (Supp. 1984), states that an alien is ineligible for benefits unless he was “permanently residing under color of law at the time services were rendered.” As such, it is identical to 26 U.S.C. § 3304(a)(14)(A).
94. See supra text accompanying notes 84-89.
95. Antillon, 688 P.2d at 458.
96. Id. at 459.
Finally, in *Sudomir v. McMahon*,97 the Ninth Circuit clarified the meaning of "permanently residing." This case involved claimants who were denied welfare benefits. Their sole claim to these benefits rested on their filing applications for political asylum. The court cited the *Holley* case and stated that "permanently" does not mean "forever."98 This term, however, does not embrace "transitory, inchoate or temporary relationships."99 A residence is temporary when the alien's continued presence is solely dependent upon the favorable outcome of his application for asylum. In other words, asylum applicants are deemed to be residing temporarily when they "merely participate in a process that gives rise to the possibility of official authorization to remain indefinitely."100

*Sudomir* is directly applicable in cases involving claimants who have filed applications for political asylum or other applications for a change in immigration status. Under *Sudomir*, filing an application for political asylum is insufficient to entitle one to receive unemployment benefits. Other facts must be present before the claimant will be considered to be "permanently residing."

Other language in the *Sudomir* opinion, however, can be used by a claimant seeking to establish that he is "permanently residing." According to the court, "permanent" does not embrace "transitory, inchoate or temporary relationships."101 Therefore, claimants seeking unemployment benefits should present evidence negating the existence of a transitory, inchoate or temporary relationship with the United States.

*Holley* was the first case to interpret the language of section 3304. Furthermore, subsequent cases have followed the *Holley* court's reasoning. In certain respects, these cases simply affirm the conclusions in *Holley*. For instance, *Papadopoulos, St. Francis*, and *Antillon* each support the *Holley* conclusion that INS failure to deport is critical to a finding of "permanently residing under color of law."102 Yet in other respects, the opinions expand the *Holley* decision. *Rubio* and *Antillon* do not simply state that INS knowledge and inaction support a finding that the claimant qualifies for benefits. Instead, these cases reach beyond *Holley* in concluding that INS knowledge and inaction amount to an acquiescence to the alien's

97. *Sudomir*, 767 F.2d 1456 (9th Cir. 1985).
98. *Holley*, 553 F.2d at 851.
100. *Id.*
101. *Id.*
102. *See supra* notes 71-79 and accompanying text.
presence in the United States.\textsuperscript{103}

\textit{Sudomir} also adds to the decision in \textit{Holley}. As stated in the \textit{Holley} case, "permanent" does not mean "forever." In addition, \textit{Sudomir} asserted that the term does not include "transitory, inchoate or temporary relationships."\textsuperscript{104} At any rate, \textit{Holley} and its progeny clarify what is meant by "permanently residing under color of law." Indeed, all the determinative facts cited in these cases are useful to indicate when a claimant should be considered eligible to receive unemployment benefits. Nonetheless, the principles of \textit{Holley} and subsequent cases construing the language of section 3304 have not been strictly followed. California serves as a prime example of this practice.

\section{III. California: A Classic Case of Misinterpretation}

\subsection{A. The State's Unemployment Insurance Program}

Section 1264 of the California Unemployment Insurance Code\textsuperscript{105} recites the federal statute section 3304 verbatim. According to both laws, unemployment benefits are payable to aliens who were "permanently residing in the United States under color of law" at the time services were rendered.\textsuperscript{106} As a result, an alien cannot receive unemployment benefits unless he qualifies under Unemployment Insurance Code section 1264. In California, the Employment Development Department (EDD) administers the state's unemployment insurance program.\textsuperscript{107} Consequently, the EDD is responsible for ensuring that aliens are not paid benefits if they do not meet Code requirements.

\subsubsection{1. Regulation 1264-1: The EDD's Proposal}

In determining alien eligibility for unemployment insurance benefits, the EDD uses a departmental document known as the "Citizenship Guide Card" (CGC).\textsuperscript{108} The EDD does not require an

\begin{itemize}
  \item \textsuperscript{103} See supra notes 87-96 and accompanying text.
  \item \textsuperscript{104} See supra notes 97-99 and accompanying text.
  \item \textsuperscript{105} CAL. UNEMP. INS. CODE §1264(a) (1978).
  \item \textsuperscript{106} Both CAL. UNEMP INS. CODE § 1264(a) and FUTA § 3304 (a)(14)(A) state that benefits are not payable on the basis of services performed by an alien "unless such alien . . . was permanently residing in the United States under color of law at the time such services were performed."
  \item \textsuperscript{107} See supra note 16 and accompanying text.
  \item \textsuperscript{108} Under, the CGC, once a claimant indicates noncitizenship status, he is asked a series of questions used to determine his eligibility for unemployment benefits. Documentary proof of immigration status is required only when the claimant does not respond affirmatively
\end{itemize}
alien to provide documentary proof of immigration status in order to qualify for unemployment benefits. As a result, under the CGC, claimants need not wait for the INS to verify any information provided. The EDD has used the CGC since 1978. In 1984, however, the EDD decided that the CGC did not provide adequate information about an alien’s eligibility for unemployment benefits.

Consequently, in August 1984, the EDD proposed a new regulation, 1264-1. In pertinent part, 1264-1 reads:

To be eligible for benefits an alien must present documentary proof that he/she was . . . permanently residing in the United States under color of law at the time of performing the services on which his/her claim is based. These aliens are . . . [a]liens who have documentary evidence from the INS which states the INS has made an affirmative decision that the alien may remain in the United States indefinitely.

The provisions of this regulation would change the procedure used to determine alien eligibility for unemployment benefits. More importantly, these provisions would render 1264 invalid.

2. Problems with Regulation 1264-1

At least three problems exist with 1264-1. First, by conditioning compensation upon documentary evidence, 1264-1 conflicts with the federal statute, section 3304. The states do have broad flexibility to any of the questions posed. The questions asked under the CGC are:

1. Are you a U.S. citizen?
2. Are you now and were you when you earned the wages upon which you are basing your claim lawfully admitted to the U.S. for permanent residence?
3. Are you now and were you when you earned the wages upon which you are basing your claim both permanently residing in the U.S. and either (a) the spouse or child of a U.S. citizen, or (b) the parent of a U.S. citizen who is at least 21 years of age?
4. Are you now and were you when you earned the wages upon which you are basing your claim legally entitled to enter the U.S. to seek and accept work?
5. Are you now and were you when you earned the wages upon which you are basing your claim either a conditional entrant, or paroled, into the U.S. with authorization to work?


109. See supra note 108. The claimant is required to provide documentary proof of immigration status only if he is unable to respond affirmatively to any of the CGC questions.


112. Id. (emphasis added).
with respect to the type of unemployment programs they establish, but Congress has ranked certain elements of the unemployment benefits program as fundamental. In this respect, states cannot deviate from standards established by Congress without clear evidence of congressional authorization. In establishing their individual unemployment compensation schemes, the state cannot work against the section 3304 fundamental standards. Indeed, the federal courts have repeatedly invalidated state statutes and policies that interpret eligibility for benefits more narrowly than the provisions of section 3304. Nowhere in section 3304 does Congress state that an alien is "permanently residing under color of law," and thereby eligible for unemployment benefits only if he produces documentary evidence of his immigration status. By requiring INS documentation, 1264-1 excludes from eligibility aliens which Congress did not intend to exclude. Therefore, California Unemployment Insurance Code Section 1264-1 conflicts with section 3304 and is invalid.

Second, 1264-1 is inconsistent with the statute it was designed to implement, California Unemployment Insurance Code section 1264. It is a fundamental rule of administrative law that a regulation is valid only if it is consistent with the statute it implements.

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114. See, e.g., Townsend v. Swank, 404 U.S. 282 (1971). Here the plaintiff challenged a statute and regulation denying AFDC to children between the ages of 18-20 who attended college. The court ruled that the Social Security Act's definition of "dependent child" was intended to include such children. Because the statute and regulation conflicted with the Social Security Act's standards, the court struck them down under the Supremacy Clause. See also Steward Mach. Co. v. Davis, 301 U.S. 548, 593-94 (1937); Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 364 (1939).


116. See supra text accompanying note 11.


118. See supra text accompanying note 112.

119. CAL. GOV'T. CODE § 11342.1 (West 1979). "Each regulation adopted, to be effective, must be within the scope of authority conferred and in accordance with standards pre-
Section 1264 does not require that an alien produce documentary evidence of his immigration status in order to receive unemployment benefits. This added requirement of documentary evidence renders 1264-1 inconsistent with section 1264 and, therefore, 1264-1 is invalid. Regulation 1264-1 is invalid for yet another reason.

Administrative agencies often adopt regulations which serve as interpretations of statutes. However, the courts function as the final interpreters of statutes Regulation 1264-1 states that, in order to be “permanently residing under color of law,” an alien must present documentary evidence from the INS. This evidence must state that the INS has made an affirmative decision to permit the alien to remain in the United States. However, the courts have already interpreted this phrase. More specifically, Holley, Velasquez, Papadopoulos, St. Francis, and Antillon have each held that INS inaction or failure to deport will render an alien “permanently residing under color of law.” Regulation 1264-1 misinterprets this phrase. The EDD has therefore disregarded legal precedent and ignored the court’s authority as final arbiter of the law.

IV. ADDING PRECISION TO A VAGUE DEFINITION

Adding precision to the present definition of “permanently residing under color of law,” will reduce abuse of the meaning of the term by the EDD and other state agencies. A series of guidelines framed to the specific features of state unemployment programs will clarify the meaning of this phrase. The following guidelines address how a claimant can establish that he is “permanently residing under color of law” for purposes of qualifying for unemployment compensation.

A. INS Inaction and Knowledge of Presence

The first guideline concerns INS awareness of the claimant’s
presence in the United States. The lawfulness of an alien’s presence in the United States is determined by the deportation statutes and regulations.\textsuperscript{129} Only those persons who, according to the terms of the deportation statute are deportable, are unlawfully within the United States. Until the INS determines that a person is deportable, the person has a \textit{right} to remain in the United States and has violated no law.

Once the INS knows of a deportable claimant’s presence in the United States, it has the power and information necessary to enforce his departure from the United States. Many alien claimants come to the United States seeking to establish “permanent residence” status. A petition for permanent resident status may be filed on the basis of a relationship to a United States citizen who is a parent, spouse or child.\textsuperscript{127} Alternatively, the alien claimant may base his petition on a less direct relationship with a United States citizen or another permanent resident alien.\textsuperscript{128} At any rate, once this petition—or any application—is filed with the INS, the INS knows of the alien claimant’s presence in the United States and can make a determination as to whether the claimant is deportable. Thus, once the claimant makes his presence in the United States known to the INS and the INS fails to enforce any sanctions, he is residing in the United States “under color of law.” At that point, the INS has failed to enforce sanctions upon a known violator.\textsuperscript{129} According to Holley,\textsuperscript{130} “color of law” means an authority’s decision \textit{not} to enforce penalties or other sanctions upon a known violator.\textsuperscript{131} That discussion compels the conclusion that a claimant should be permitted to present evidence of INS knowledge and inaction in support of his claim. For instance, copies of INS applications, extensions of voluntary departure, and correspondence, should be submitted. As stated above, the plaintiff in Velasquez\textsuperscript{129} did not have official assurance that the INS would not deport him. Nonetheless, the plaintiff was “permanently residing under color of law.” Therefore, a claimant may simply trace the INS’s history of inaction to support his claim. Official INS assurance that deportation is not contemplated is not necessary to show INS

\begin{itemize}
\item \textsuperscript{126} Holley, 553 F.2d at 850.
\item \textsuperscript{127} See supra note 126.
\item \textsuperscript{128} 8 U.S.C. \textsection 1151(b) (Supp. 1964); 1 C. Gordon \& H. Rosenfield, Immigration Law \& Procedure \textsection 2.18 (1984).
\item \textsuperscript{129} See supra note 48 and accompanying text.
\item \textsuperscript{130} 553 F.2d 845 (2d Cir. 1977); see also supra note 126 and accompanying text.
\item \textsuperscript{131} See supra text accompanying notes 126-31.
\item \textsuperscript{132} 581 F. Supp. 16 (E.D.N.Y. 1984); see also supra note 64 and accompanying text.
\end{itemize}
B. Evidence of "Permanent Residence"

The next category of guidelines concerns evidence tending to support or negate a finding of "permanent residence."

1. Nature of Residence

First of all, the claimant should offer proof concerning his residence in the United States. According to the INA, one's "residence" is his principal, actual dwelling place. Moreover, the DOL states that "permanently residing" hinges on whether a claimant has been residing "continuously for a long time." As a result, the claimant should offer proof that he has resided continuously and for a long time in his actual dwelling place. More specifically, the claimant should prove continuous ownership of his home. Foreign nationals often acquire real property in the United States without residing here for an extended period of time. However, these persons usually acquire property in connection with vacation homes and investment ventures. These foreign nationals are rarely found waiting in line for unemployment insurance benefits. Of course, evidence that the claimant owns real property outside the United States would weaken a claim for unemployment compensation benefits based on "color of law." Often the claimant may not own his actual dwelling place. If the claimant rents his abode, then proof of residence in the United States continuously and for an extended period of time can still be produced. Money order stubs, utility bills and postmarked envelopes can verify that the claimant has resided in the United States continuously for a long time. The claimant can produce that evidence at a minimal expense and without burdening the INS.

2. Claimant's Relationship with the United States

Secondly, the claimant may present evidence that his relationship with the United States is of a "continuous and lasting nature." The INA states that such a continuing relationship is "permanent." By extension, Holley held that this definition of "permanent" indicates what is meant by "permanently residing." There-

133. See supra note 35.
134. See supra text accompanying note 19.
135. See supra text accompanying note 33.
136. See supra note 51 and accompanying text.
fore, the claimant should demonstrate a continuing and lasting relationship with the United States. For instance, the claimant can prove that he has consistently filed federal income tax returns. By complying with this requirement, the claimant shows that he has established a relationship with the United States government. Also, by consistently filing the returns, he demonstrates an adherence to the INS definition of "permanent;" a relationship of continuing or lasting nature can then be distinguished from a temporary one. Finally, this evidence will tend to negate the existence of a "transitory, inchoate or temporary relationship" as discussed in *Sudomir.*

3. *Holley's "Particular Conditions"

Finally, the claimant should present evidence of "particular conditions," such as those which existed in the *Holley* case. The *Holley* court held that the plaintiff was "permanently residing" because she was allowed to remain in the United States until her children were no longer dependent upon her. The INS decided not to deport the plaintiff precisely because of this "particular condition." Similarly, the claimant may show that his family members—who are United States citizens—are dependent upon him.

C. Claimant's "Colorful" Attributes

In holding that a claimant is "permanently residing under color of law," many unemployment compensation cases have emphasized certain attributes of the claimant. Indeed, most administrative law judges rely almost exclusively on these factors in determining whether an alien has been "permanently residing under color of law." These attributes have not been codified as factors to consider in determining "color of law" cases. Nonetheless, these attributes deserve formal recognition.

1. *Family Members*

An alien may acquire "permanent resident" status under the Immigration and Nationality Act on the basis of a relationship to a parent, spouse or child who is a United States citizen or permanent

137. See supra notes 97-100 and accompanying text.
138. See supra notes 53-54 and accompanying text.
139. Id.
resident.\textsuperscript{141} In recognition of this fact, administrative law judges invariably emphasize a claimant's family members and their immigration status to support their decisions.\textsuperscript{142} They realize that the claimant will eventually secure permanent resident status\textsuperscript{143} on the basis of existing family relationships. Yet, the administrative law judges simply fail to isolate immigration status of family members as a determinative consideration. At any rate, a claimant enhances his ability to qualify for unemployment benefits if he offers proof of family relationships with United States citizens or permanent residents.

2. \textit{Employment Authorization}

Employment authorization issued by the INS is another factor to consider in determining eligibility under "color of law."\textsuperscript{144} The Legislature did not intend to limit "color of law" to those cases where the INS accords employment authorization. No such condition precedent is explicitly found in section 3304(a)(14).\textsuperscript{145} However, if a claimant does have employment authorization from the INS, this is strong evidence that the INS knows of the claimant's presence in the United States. Moreover, in authorizing the claimant to earn wages in the United States, the INS is in effect sanctioning the claimant's presence. If the INS grants employment authorization and makes no effort to deport the claimant, there is INS inaction in addition to knowledge of the claimant's presence. Therefore, according to Holley,\textsuperscript{146} the claimant is residing in the United States "under color of law."

3. \textit{Claimant Belief}

A plaintiff's belief is an element of many causes of action. A claim for unemployment benefits should be no exception. Indeed, administrative law judges often support a finding of "color of law" with the claimant's belief that he has a legal right to reside in the United States.

According to Holley, "color of law" covers situations which are, in strict terms, outside the law but near its border.\textsuperscript{147} Therefore,

\textsuperscript{141} See supra notes 128-29.
\textsuperscript{142} See, e.g., Cal. Unemp. Ins. Appeals Bd., Case Nos. SJ-18718, SJ-18542, SJ-18380. The assertion presented in the text is based on a review of over 25 Cal. ALJ decisions.
\textsuperscript{143} 8 U.S.C. § 1101(20) (1964).
\textsuperscript{144} See supra note 62.
\textsuperscript{145} See supra note 11 and accompanying text.
\textsuperscript{146} See supra note 48 and accompanying text.
\textsuperscript{147} See supra note 47 and accompanying text.
some semblance of a legal right is sufficient to substantiate a finding of "color of law." The claimant may be waiting for the INS to process his application for permanent resident status. He is not unlawfully within the United States at that point because the INS has not deported him; he has a right to remain in the United States until the INS determines that he is deportable. He is, in fact, here under some semblance of a legal right, or "under color of law." As a result, the claimant's subjective belief that he has a legal right to be in the United States is not unfounded. In support of his claim for unemployment benefits, the claimant should be allowed to present a sworn statement to his state agency. The claimant can assert that he has a legal right to reside in the United States. Whether the INS contemplates deporting a claimant is often considered in deciding "color of law" cases. INS intentions are not ignored. Similarly, the claimant's subjective belief should not be overlooked. His intentions also deserve consideration.

The claimant should be allowed to offer evidence of the factors included under each guideline. Ideally, the claimant can satisfy all three guidelines: INS inaction and knowledge of his presence, his "permanent residence," and his "colorful" attributes. In such a case, the claimant should automatically qualify for unemployment benefits. However, this combination may not always be possible. If no evidence exists to support any of the above guidelines, the presumption should be that the claimant is not "permanently residing under color of law."

On the other hand, the claimant may offer evidence of only some of the factors included in the guidelines. In this case, INS inaction and knowledge of claimant's presence are of primary importance. This guideline is the focus of Holley and subsequent cases which have adhered to the Holley ruling. A showing of INS inaction and knowledge should be combined with one other factor in either the "permanent residence" or "colorful" attributes" categories to find a color of law residency. For instance, the claimant may show that he has corresponded with the INS (INS knowledge of claimant's presence), and that he has not been deported (INS inaction). Addi-

149. See supra note 48 and accompanying text.
149. See supra text accompanying notes 48, 65, 78, 86-89 & 96.
150. See supra text accompanying note 65. In Velasquez, 561 F. Supp. 16 (E.D.N.Y. 1984), the court stated that once the plaintiff demonstrates INS inaction, the state agency must be responsible to demonstrate INS intentions. Therefore, INS intentions have been respected in deciding "color of law" cases. The claimant deserves the same opportunity to show his subjective belief.
tionally, by submitting a marriage certificate, he can show that he has a spouse who is a United States citizen. This documentary evidence should be accepted by the state agency or adjudicator in support of the claimant’s request for unemployment benefits.

Although judges will find these guidelines useful, legislators should also recognize these items. Legislative provisions based on these guidelines would improve the efficiency of unemployment compensation programs across the country. Once the claimant is allowed to provide his own proof of real property ownership, family relationships, and tax returns the process of distributing unemployment benefits can be expedited. Reliance on information from outside agencies such as the INS inevitably leads to administrative “red tape” and delayed receipt of benefits. On the other hand, self certification such as the Guide Card used in California has led to inaccurate information and unauthorized disbursements.\textsuperscript{181} As a middle ground, state employment security agencies should be required to accept certified proof of the factors mentioned above.

V. CONCLUSION

In 1977, Holley v. Lavine construed the language “permanently residing under color of law.”\textsuperscript{189} The Second Circuit held that an alien is “permanently residing in the United States” if: 1) his relationship with the United States is of a continuing or lasting nature,\textsuperscript{183} and 2) he is allowed to remain in the United States until “particular conditions” change.\textsuperscript{184} Moreover, an alien is residing in the United States “under color of law” if the INS knows of his presence and takes no action to deport him.\textsuperscript{186} However, widespread abuse in the disbursement of unemployment benefits is painful proof of the inadequacy of the common law definition of the term. Many persons who are “permanently residing under color of law” in California and elsewhere have been wrongfully denied unemployment benefits.

In an effort to remedy this problem, this comment has proposed three guidelines for determining alien eligibility for unemployment benefits. These guidelines clarify the meaning of “permanently residing in the United States under color of law.” Moreover, adherence to

\begin{footnotes}
\item[151.] See supra note 108 and accompanying text.
\item[152.] See supra text accompanying note 41.
\item[153.] See supra note 50 and accompanying text.
\item[154.] See supra note 54 and accompanying text.
\item[155.] See supra note 48.
\end{footnotes}
these guidelines will improve the efficiency of unemployment compensation programs. If the claimant is allowed to present proof without resorting to outside agencies, he will receive benefits without undue delay. Finally, these guidelines acknowledge the financial and language barriers of most alien unemployment claimants. If a claimant must provide proof from the INS or other agencies prior to receiving benefits, he will undoubtedly incur expenses connected with travel, long-distance calls and administrative fees. Claimants who are not proficient in English face the additional hardship of procuring assistance in writing letters, making calls and understanding administrative procedures. Under the proposed guidelines, however, communication with outside agencies is minimized. As a result, financial and language barriers should not interfere with the receipt of benefits.

Legislators, judges, and the legal community in general, must act to halt the unjustified denial of unemployment benefits. The proposed guidelines are but one contribution in this respect. Only through a systematic approach can legal decisionmakers put an end to the confusion and abuse behind the various interpretations of “permanently residing under color of law.” This comment has emphasized the need to respect legislative mandate and judicial precedent in order to properly interpret and apply this phrase. Whatever specific legislative and judicial action is taken, those involved must be careful to conform to principles found in statutory provisions and in the common law.

Blanca Zarazúa