IRCA from the SAW program under section 210 of the Act. The Family Unity Program eligibility date for relatives of aliens legalized under the SAW program is now December 1, 1988, to correspond to the filing deadline for that program. This amendment is reflected in this final rule.

Children Born After May 5, 1988

The Service recognizes that the situation may arise where a child may be born abroad to an alien granted voluntary departure status and advance authorization to travel under the Family Unity Program. Although there is no provision in the statute to provide status to the child, it is also true that the intent of the statute was to enable specific family members to reside together in the United States.

Therefore, although the child cannot qualify for benefits under the Family Unity Program, the Service will provide for the granting of voluntary departure under 8 CFR 242.5, to a child of a legalized alien residing in the United States, who was born during an authorized absence of the mother who is currently either a legalized alien or a beneficiary of the Family Unity Program. This provision will also include children born to aliens residing in the United States, who were denied status in the Family Unity Program and granted voluntary departure status under 8 CFR 242.5, where the other parent is a legalized alien residing in the United States.

Waivers

Several commenters sought clarification regarding the availability of existing waivers of deportability for applicants for the Family Unity Program. The interim regulation reflects the statute in making aliens who are deportable under certain grounds ineligible for the Family Unity Program benefits. However, an alien who has been granted any available waiver is not deportable and is not ineligible for the Family Unity Program. The final rule is modified to clarify that existing waivers are applicable to applicants for the Family Unity Program.

Response to Notice of Intent To Deny

One commenter suggested that the Service should allow an applicant for Family Unity Program benefits to submit a good faith request for an extension of time to submit a response to a notice of intent to deny.

An applicant may request more time to respond to a notice to deny. However, the Service's decision whether or not to grant the request is discretionary. To ensure consistency with application procedures in other Service programs, the provisions in this rule are consistent with the general requirements and procedures for applications and petitions in 8 CFR part 103.

Denied Cases

The Service initially proposed an administrative appeal procedure. However, upon further review, this procedure was eliminated in the interim rule. One commenter believed that the Service should not have eliminated the administrative appeal process.

The Service set forth its reasons for eliminating the proposed administrative appeal process in the Supplementary Information to the interim rule published at 57 FR 6459–6460. The Service adheres to that reasoning and will not adopt an administrative appeal procedure.

Issuance of Orders To Show Cause (OSC)

A commenter was concerned that the Service would issue an OSC (Form I–221) while a Family Unity Program application is pending. The Service will not issue an OSC during the pending adjudication of an Application for Voluntary Departure Under the Family Unity Program (Form I–817), unless the OSC is based on a paragraph in section 241(a) of the Act which would render the applicant ineligible for the Family Unity Program.

Several commenters believed that having applicants placed in deportation proceedings as a result of a failure to meet basic eligibility requirements, such as residence by the required date, is a severely disproportionate consequence and a waste of Service resources, as the denied applicants are likely to be eligible for a second preference visa petition and will eventually be allowed to immigrate to the United States. The commenters recommended that the Service continue the policy under the administrative Family Fairness policy of not issuing OSCs in denied cases, except in egregious cases such as a serious criminal conviction.

However, as was discussed in the Supplementary Information to the interim rule, the Service must fulfill its enforcement responsibility under the Act. Therefore, this provision will remain as it is in the interim rule.

Several commenters proposed that the issuance of an OSC be delayed for 90 days after a second denial. They pointed out that the only way an alien may appeal a denial of Family Unity Program benefits would be to file a complaint against the Service in district court alleging abuse of discretion. Further, the commenters allege that the Service is making it difficult for the alien to bring these charges when it will only delay issuance of the OSC for the first denial. The commenters conclude that, in order to balance the removal of the proposed administrative appeals process, the Service should allow applicants more time after a second denial to seek judicial review.

The Service believes that granting a 90-day grace period after every denial before issuing an OSC might simply encourage a person to file repeated applications with the sole intent to protract the adjudication process and delay the issuance of an OSC. The Service believes that ample safeguards exist in the current procedure to enable an applicant to perfect an application and/or appeal a denial of benefits. Denied applicants will have at least 90 days from the first denial to refile a second application before the Service will issue an OSC. If the application is denied again, the applicant may still seek judicial review before the district court. Therefore, the final rule will not be amended to allow for a delayed issuance of an OSC after a second denial.

Release From Detention/Administrative Closure/Automatic Stay of Deportation

Several commenters suggested that the regulations provide that a demonstration of *prima facie* eligibility for Family Unity Program benefits should result in:

(1) The alien's release from detention on his or her own recognizance;

(2) Administrative closure of the deportation proceedings, provided a final administrative order of deportation has not been issued; and

(3) An automatic stay of deportation for a person with a final deportation order.

These commenters asserted that this would promote an efficient use of the budgets of the Service and the Executive Office for Immigration Review (EOIR) to be faithful to Congress' intent and would promote uniformity in national enforcement practice.

The Service may currently consider the requests of release from detention and stays of deportation on a case-by-case basis for Family Unity Program applicants under sections 242 and 243 of the Act. The Service is without authority to consider a request for administrative closure of a deportation proceeding.

Concurrent Jurisdiction of EOIR

Several commenters believe it would be helpful to have a provision stating that EOIR has concurrent jurisdiction with the Service in cases where an