

suspension of Respondent's registration. On August 14, 1996, Judge Bittner issued a Ruling denying Respondent's Motion for Reconsideration as lacking in merit. Neither party filed exceptions to her Opinion and Recommended Decision, and on August 26, 1996, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 C.F.R. 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Acting Deputy Administrator adopts in full the Opinion and Recommended Decision of the Administrative Law Judge.

DEA has consistently interpreted the Controlled Substances Act to preclude a practitioner from holding a DEA registration if the practitioner is without authority to handle controlled substances in the state in which he/she practices. See 21 U.S.C. 823(f) (authorizing the Attorney General to register a practitioner to dispense controlled substances only if the applicant is authorized to dispense controlled substances under the laws of the state in which he or she practices); and 21 U.S.C. 802(21) (defining a practitioner as one authorized by the United States or the state in which he or she practices to handle controlled substances in the course of professional practice or research). This prerequisite has been consistently upheld. See *Rita M. Coleman, M.D.*, 61 FR 35,816 (1996); *Dominick A. Ricci, M.D.*, 58 FR 51,104 (1993); *Roy E. Hardman, M.D.*, 57 FR 49,195 (1992); and *Bobby Watts, M.D.*, 53 FR 11,919 (1988).

The Acting Deputy Administrator finds that the controlling question is not whether a practitioner's license to practice medicine in the state is suspended or revoked; rather, it is whether the Respondent is currently authorized to handle controlled substances in the state. In the instant case, it is undisputed that Respondent is not currently authorized to handle controlled substances in the State of Louisiana. Therefore, as Judge Bittner notes, Respondent "is not currently entitled to a DEA registration."

The Acting Deputy Administrator concludes that Judge Bittner properly granted the Government's Motion for Summary Disposition. Here, the parties did not dispute the fact that Respondent was unauthorized to handle controlled substances in Louisiana. Therefore, it is well-settled that when no question of material fact is involved, a plenary, adversary administrative proceeding involving evidence and cross-

examination of witnesses is not obligatory. See *Philip E. Kirk, M.D.*, 48 FR 32,887 (1983), *aff'd sub nom. Kirk versus Mullen*, 749 F.2d 279 (6th Cir. 1984); *Alfred Tennyson Smurthwaite, M.D.*, 43 FR 11,873 (1978); see also *NLRB versus International Association of Bridge, Structural and Ornamental Ironworks, AFL-CIO*, 549 F.2d 634 (9th Cir. 1977); *United States versus Consolidated Mines & Smelting Co.*, 44 F.2d 432 (9th Cir. 1971).

In her Motion for Reconsideration, Respondent argued that the permanent revocation of a registration is a serious sanction and "should not be rendered without considering all of the evidence in a particular case." The Acting Deputy Administrator notes that the revocation of Respondent's registration is not permanent. Respondent may reapply for a new DEA registration when her state privileges to handle controlled substances are reinstated. Further, the Acting Deputy Administrator recognizes that he has the discretionary authority to either revoke or suspend a DEA registration. However, given the indefinite nature of the suspension of Respondent's state license to practice medicine, the Acting Deputy Administrator agrees with Judge Bittner that revocation is appropriate in this case.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824, and 28 C.F.R. 0.100(b) and 0.104, hereby orders that the DEA Certificate of Registration AT6512152, issued to Anne Lazar Thorn, M.D., be, and it hereby is, revoked, and that any pending applications for the renewal of such registration be, and they hereby are, denied. This order is effective April 17, 1997.

Dated: March 4, 1997.  
James S. Milford,  
*Acting Deputy Administrator.*  
[FR Doc. 97-6794 Filed 3-17-97; 8:45 am]  
BILLING CODE 4410-09-M

## Office of Justice Programs

[OJP(BJA)-1116]

RIN 1121-ZA62

## State Criminal Alien Assistance Program

**AGENCY:** Office of Justice Programs, Bureau of Justice Assistance (BJA), Justice.

**ACTION:** Notice of proposed guidelines.

**SUMMARY:** This notice is to request comment on the proposed guideline on

the application process for States and political subdivisions to obtain reimbursement for the incarceration of undocumented criminal aliens under the State Criminal Alien Assistance Program.

**DATES:** Comments on this proposed guideline must be received on or before April 22, 1997.

Final guidelines and application information will be published and issued within 30 days of the end of this comment period and applicants will be given at least 30 working days to make that application.

**ADDRESSES:** Comments may be mailed to: Office of Justice Programs, Office of the General Counsel, 633 Indiana Avenue, NW, Room 1245, Washington, DC 20531.

**FOR FURTHER INFORMATION CONTACT:** Linda James McKay, SCAAP Coordinator, State and Local Assistance Division, Bureau of Justice Assistance, or the Department of Justice Response Center, 1-800-421-6770 or 202-307-1480.

**SUPPLEMENTARY INFORMATION:** The following supplementary information is provided: The State Criminal Alien Assistance Program (SCAAP) provides reimbursement for certain criminal aliens who are incarcerated in State and local correctional facilities. The program is administered by the Bureau of Justice Assistance (BJA), which is part of the Office of Justice Programs (OJP) in the Department of Justice. The program is authorized and governed by the provisions of the Immigration and Nationality Act of 1990, as amended, 8 U.S.C. 1251(i), originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322) at section 20301.

This section provides the authority, at the option of the Attorney General whenever an appropriation is made, to either reimburse States and localities for costs incurred in incarcerating qualifying criminal aliens or take such aliens into Federal custody. For Fiscal Year 1997 (FY 1997), the Attorney General has delegated the authority to implement the program to BJA. BJA is a criminal justice grant making and administrative agency within the Department of Justice and, thus, has no ability to take custody. Therefore, SCAAP will continue to be administered only as a reimbursement program. For FY 1997, \$500,000,000, less administrative costs, is available for reimbursement payments under SCAAP.

For FY 1997, records related to all foreign-born inmates with one felony or two misdemeanor convictions who are or have been incarcerated within a State

or local correctional facility during a specified one-year period should be included in an applicant's claim for an award. All State or local jurisdictions which have facilities housing such aliens for periods over 72 hours will be eligible. Applicants must provide inmate-specific information for comparison with records maintained by the Immigration and Naturalization Service (INS). Award amounts will depend on the number of reimbursable aliens verified by INS, on the lengths of stay of those aliens in the applicant's facilities, and on the applicant's costs of incarceration. Last year, reimbursement was approximately 60 percent of the amount claimed by applicants for verified, reimbursable aliens.

FY 1997 will be the third fiscal year in which funding for SCAAP has occurred. In each of these years, there have been changes to the authorization for SCAAP and modifications in data gathering and formal application procedures. Because of these changes, BJA is issuing its proposed model for distributing FY 1997 SCAAP funds to allow and encourage comment by potential applicants and other interested parties.

Comment is particularly requested about the methodology to be used to count inmates who fit within the criteria for reimbursement and the types of data elements about those inmates that must be provided for INS verification. The ability of eligible applicants to access necessary criminal history information and the completeness and accuracy of that information is also a critical area that should also be addressed, as it will be relevant to the provision of requested data (see subsection 2 below). Comment on any other aspect of this proposed distribution model is also welcome.

BJA is attempting to increase the body of information available about all incarcerated criminal aliens, to ensure that the data underlying its awards are complete and accurate, without establishing requirements for data submission that are overly burdensome for applicants. For these reasons, the model proposed expands the types of data required while streamlining the methodology for obtaining that data.

#### 1. Eligible Applicants

Eligible applicants are States and political subdivisions of States (hereafter, "localities" or "subdivisions") that exercise authority with respect to the incarceration of an undocumented criminal alien in a facility that provides secure, overnight custody of inmates for periods extending beyond 72 hours. Only one application may be submitted by each

locality; therefore, cost and inmate information from all facilities within a single subdivision must be consolidated into a single application.

The applicant may be either the chief executive officer (CEO) (e.g., governor, county executive, mayor) of the political subdivision itself or the head (e.g., director, commissioner, sheriff, etc.) of the correctional facility in that jurisdiction, pursuant to a delegation from the CEO. Such delegation must be in writing and be submitted to BJA by the CEO or correctional agency head applying on behalf of the jurisdiction. A copy of a valid delegation previously obtained and submitted to BJA for the purpose of SCAAP will be acceptable.

Awards will be made to the place of business of the signatory on the application, regardless of designation. That is, if the county board chair (or county manager, county auditor, etc.) will be signing the application, the formal applicant would be the county, at the address of the county office. If the county sheriff will be signing the application pursuant to delegation from the county board, the formal applicant would be the sheriff, and the award will go directly to the address of the sheriff (or county correctional facility).

For the purposes of the remainder of this guidance, "applicant" refers to the head of the correctional facility housing the alien inmates, as this facility is the source of both inmate and cost data required for the application.

#### 2. Reimbursable Inmates and Length of Stay Calculation

Applicants will be expected to submit records on all inmates in their custody who have a foreign country of birth and who have been convicted of a felony or two misdemeanors. Applicants should not screen out aliens known or believed to be nonreimbursable. The methodology for determining reimbursability of unmatched inmates (as discussed in subsection 4 below) will not depend on the ratio of reimbursable to nonreimbursable inmates, as was the case in prior years. This change means that applicants will not be required to make any judgments about the potential reimbursability of their incarcerated aliens.

Not all foreign born inmates whose records are submitted will be determined to be reimbursable aliens under the law. To be reimbursable, an inmate must:

- *Have a foreign country of birth.* The record submitted must contain the name of that foreign country. See the discussion under subparagraph 4 below for proposed rules for submitting and verifying suspected foreign-born

inmates who do not self-report a foreign country of birth.

- *Have been in the applicant's custody at some point between July 1, 1996, and June 30, 1997.* Only the number of days in custody during this time period may be counted toward the length of stay for that inmate. Thus, a cap of 365 days will be imposed on the number of days which an applicant may claim for a single inmate.

- *Have been in the applicant's custody for a period exceeding 72 hours.* Police "lockups" and similar holding facilities are excluded, and the applicant would not be expected to submit records for persons held pending arraignment on new charges who are then released and not again incarcerated. However, once the facility has exercised custody over an inmate beyond 72 hours, all time in custody may be included in the length of stay reported for an otherwise qualified inmate, as defined in this section.

- *Have one felony conviction or two misdemeanor convictions.* Qualifying conviction(s) can occur prior to entry into the applicant's custody or be the result of charges that led to that incarceration. In the case of aliens who entered with previous qualifying convictions, all time in custody during the specified one-year period may be counted, regardless of the disposition of the charges which led to the current incarceration. In the case of aliens who did not have the qualifying conviction(s) before entering into applicant's custody, only the time spent during the one-year period in applicant's custody after the qualifying conviction occurs may be counted, unless the inmate is also sentenced during the specified year period to some sentence (e.g., "time served") which converts the pretrial custody period into part of the final disposition for purposes of fulfilling the sentence. In this situation, all time in custody can be counted.

Please note that, in either case, the applicant must be able to determine and document that the qualifying convictions have taken place. Thus, particularly for those inmates for whom the qualifying conviction(s) occurred prior to entry into applicant's custody, the applicant must have ready access to accurate and complete criminal history information.

For the purposes of this determination, the applicant should follow its own State law as to what constitutes a felony or misdemeanor and what actions constitute a valid conviction. If a State has no set definition of "felony," a felony should be considered any offense for which the

potential sentence that could be imposed upon conviction is more than one year.

- *Fall within one of three categories specified in the statute:*

- *Entered the United States without inspection* or at any time or place other than as designated by the Attorney General;

- *Was the subject of exclusion or deportation proceedings at the time he or she was taken into custody* by the State or a political subdivision of the State; or,

- *Was admitted as a nonimmigrant and at the time he or she was taken into custody* by the State, or a political subdivision of the State has failed to maintain the nonimmigrant status in which the alien was admitted (or to which it was changed) or to comply with the conditions of any such status.

In determining who is the "subject of" proceedings under the second category, an alien would be considered eligible to be counted for reimbursement if the charging document had been issued by INS prior to that alien's entry into the applicant's custody. The charging document need not be served against the alien nor filed with the immigration court. Alien inmates with final orders of deportation or exclusion will also be considered the "subject of" proceedings. Cubans who entered the United States as part of the 1980 Marielito boatlift ("Mariel Cubans") are not separately eligible and will not automatically be included for reimbursement; rather, Cuban inmates, as all other inmates, will be reimbursable only to the extent they fall under one of the categories listed above.

### 3. Specification for Inmate Records

The applicant will have two options for providing information about inmates: (1) Applicants may use their own data system to produce a properly formatted data file, or (2) applicants may reenter data into a database shell on a diskette to be provided by BJA. For applicants choosing the first option, all inmate data submitted must be in ASCII format, in fixed length fields. Further, unless a specific exception is noted below, all data fields must be completed. Failure to provide the requested data in the proper format will result in exclusion of the record from the verification process. Exact information on the order and length of data fields will be provided in the final instructions.

*The following data will be requested:*

- *Alien ("A") number.* An "A" number is an 7-, 8-, or 9-digit number which may or may not have been assigned to an inmate by INS and be

known to the applicant. If no A number is available, the applicant may leave this field blank.

- *First, middle, and last names of the inmate, including all aliases.* A separate record will be required for each alias.

- *Unique identifying number for each inmate.* This number will allow INS to check separate alias records, but avoid duplicate counting of the same inmate. The number will be assigned to that inmate by the applicant and will generally be used by the applicant for other identification purposes.

- *Date of birth.* If more than one date of birth is provided, a separate record should be used for each date, as in the case of different names.

- *Foreign country of birth.* Applicants should supply the actual name of the foreign country (at least the first 10 letters of the name will be required) or use a coding system. If a coding system is used, applicants must submit documentation of the codes as part of their applications.

- *Date upon which the alien entered into the applicant's custody.* This date will be a required field for all inmates, not just those potentially qualifying under the "subject of proceedings" category.

- *Type and level of crime of the qualifying conviction(s).* Applicants will be expected to code the qualifying felony or misdemeanor convictions utilizing the Federal Bureau of Investigation's (FBI's) National Criminal Information Center (NCIC) coding scheme. Both of the qualifying misdemeanors will need to be coded. More specific directions for accessing and utilizing these codes will appear in the final guidance for application. These instructions will also address the issue of which among possible qualifying convictions should be coded.

Because this will be the first year in which the qualifying offenses will need to be submitted, and because of the specificity and reliability that would result from use of NCIC codes for all offenses, BJA particularly solicits comment by potential applicants on their ability to provide this data in the form requested.

- *Actual length of stay in the applicant's custody between July 1, 1996 and June 30, 1997 that is "qualifying" under the criteria set forth in subsection 2 above.* Applicants will be expected to specify the exact number of days of incarceration for each inmate. Unlike last year, no predetermined, standard lengths of stay will be allowed. Both State and local facilities will be expected to comply with this requirement.

- *Earliest possible release date for the inmate, if that inmate is currently serving a sentence in applicant's custody.* This field may be left blank if the inmate is in pretrial status (but has the qualifying prior felony or two misdemeanor convictions) or has been convicted but not yet sentenced for the charge(s) which brought the inmate into applicant's custody, or if the determination will be made by a State facility after transfer of a sentenced inmate from a local to a State facility.

- *FBI number.* This information will not be a required but is data that will increase the probability of a positive match between applicant and existing INS records.

In addition, each applicant will be preassigned a jurisdictional identification number that must appear on the diskette label and as part of every record submitted. This number must also appear on the formal application document. Other data that might be useful in making positive identifications of inmates may be requested, but will not be required.

Applicants that cannot provide data on lengths of stay for all inmates incarcerated during the one-year period will be allowed to do a one-day count at any point during the application period. However, they may only claim the lengths of stay for the inmates who were incarcerated on the day of that count. This option should only be used if it is impossible to provide full-year data, because it is very likely to result in a lower level of reimbursement than would use of the preferred method.

### 4. Verification of Inmate Data

INS will verify applicants' inmate records by matching those records to records in INS databases. The matching process will result in three groups of inmates: Positively identified reimbursable inmates, positively identified nonreimbursable inmates, and inmates not matched.

A reimbursement rate will be applied to inmates whose eligibility cannot be determined through a positive match. Unlike in prior years, this rate will not be based on the ratio of matched reimbursable to nonreimbursable inmates whose records are submitted by the applicant, but rather will be based on a separate process. The INS is currently working to gather data that will produce an estimate of the proportion of unmatched inmates who are likely to be eligible for reimbursement. The estimate will likely be based on the information about the immigration status of criminal aliens interviewed during the last year who previously did not have files in INS

databases. Depending on the results of this study, a single, nationwide rate will probably be developed, although it is possible that regional or state-specific rates will be necessary. This new procedure is expected to allow more uniformity among applicant submissions while being equitable to all applicants.

Applicants who have a reasonable basis to believe that an inmate has falsely claimed to have been born in the United States or its territories and possessions (e.g., Guam, Northern Mariana Islands, the Virgin Islands, Puerto Rico) may include those inmates in their data submissions. Similarly, applicants may include in their submissions inmates for whom they have no known country of birth. If INS is able to match these inmate records, they will be retained as part of the applicants' submissions. However, if INS is unable to match the inmates with no foreign country of birth provided, those inmate records will be deleted from the applicants' submissions. Aliens whose records are deleted from a submission will not be included in the pool of unmatched inmates to which the special reimbursement rate is applied.

#### 5. Cost of Inmate Custody

Only routine operating expenditures will be allowed as part of the calculation of annual inmate costs; capital expenditures and nonroutine costs will not be allowed. Cost calculations should be based on routinely maintained cost figures for all qualifying facilities administered by the political subdivision making application, not on costs directly associated with alien inmates claimed. The costs should be calculated based on the average number of bed spaces filled in all facilities under the applicant's control over the course of the year, not on an average of the costs of running each separate component facility.

In making calculations, all payments, including Federal payments, to the applicant from other jurisdictions to cover costs of housing inmates for those other jurisdictions must be deducted from the overall prisoners' upkeep costs. Payments made by the jurisdiction to other jurisdictions to house their inmates can be added to the cost figures. Similarly, services provided within facilities but not charged to the budget of the correctional agency (e.g., vocational training funded through the State's department of education) should not be included. Nor should applicants use inmate cost rates negotiated with Federal or State or other jurisdictions as their basis of claim. Rather, calculations

should be based on their own actual costs of inmate custody for the current or the immediately prior fiscal year.

BJA will review and compare inmate cost figures submitted. If requested to do so by BJA, the Department of Justice, or any other authorized auditor, applicants must be able to provide the detailed information that went into their claimed costs calculation.

#### 6. Formal Application and Deadline for Application

Application kits with final instructions will be mailed directly to correctional facilities (unless BJA has been notified by an eligible jurisdiction to provide the kit to another office) and will consist of a formal application form, required Federal assurances and certifications, and a diskette for provision of inmate data (at the applicant's option; see subsection 3 above). An original, signed delegation from the CEO of the jurisdiction will also be required if the applicant is not the CEO. If both the CEO and the designated signatory for the jurisdiction are the same as reflected in prior applications under this program in FY 1995 or FY 1996, a copy of the previously submitted delegation will be acceptable.

As was the case last year, BJA anticipates requesting a mix of electronic and hardcopy documentation as part of the application package. All inmate data must be submitted in electronic form (on diskette). A scannable, hardcopy application form will be used to obtain basic information on the applicant (e.g., address, contact person, etc.). Separate, hardcopy certifications and assurance forms may be used, or the scannable application form may contain the necessary standard certifications. In any event, the applicant will be required to provide all inmate and cost information necessary for BJA to make the award, as is described in this announcement.

In a change from last year, the deadline for submission of both inmate data and the other application documents will be on the same date. This date will be a firm deadline (evidenced by postmark); no extensions of this deadline will be given and late submissions of inmate diskettes will not be allowed. Applicants will be given at least 30 working days to complete the required application. During the application period, BJA staff will provide technical assistance to potential applicants preparing the inmate data diskettes and will be available to answer any questions that applicants may have about filling in the formal application

documents. After applicants have met the deadline, BJA reserves the right to ask for additional information to clarify or correct minor errors in the application.

#### 7. Award Calculation and Funding Availability

The FY 1997 amount available for distribution is \$492,038,000. As in past years, the formula for award calculation will, first, establish the final dollar claim of each applicant, based on the verification of its inmate and cost data. This calculation will involve multiplying the number of reimbursable inmates (including a percentage of inmates not matched) by the lengths of stay for these inmates by the applicant's actual annual cost per day per inmate. The final claims for all applicants will then be totaled and divided into the available appropriation to determine the percentage payoff on the dollar of each claim. Finally, the award amount for each applicant will be calculated based on that payoff percentage.

Applicants cannot be assured of receiving an award, however, because it is possible that, following INS verification of inmate data, there will be no reimbursable inmates upon which to base an award. Similarly, past reimbursements should not be used to predict future reimbursements because the number of applicants may vary and the eligibility criteria have changed in each of the three years of this program's operation.

#### 8. Award and Post-Award Processing

BJA will continue to utilize grants as its reimbursement mechanism. The conditions governing general award eligibility, drawdown, and use of funds after drawdown, and the processes used for these events will remain the same as in the past year. In particular, all payments to applicants will be made electronically. New applicants will be expected to provide information to allow electronic transfer of funds as part of their award acceptance. Grant closeout will be automatic. Award funds, once properly distributed to eligible applicants, may be used by these jurisdictions for any lawful purposes and need not be applied towards reimbursement of correctional costs.

Nancy E. Gist,

*Director, Bureau of Justice Assistance.*

[FR Doc. 97-6740 Filed 3-17-97; 8:45 am]

BILLING CODE 4410-18-P