By Facsimile (613) 946-2566
and by E-mail

April 10, 2002

Ms. Nicole Girard
A/Director of Implementation
Legislative Review Section
Enforcement Branch CIC
219 Laurier Avenue, 2nd Floor
Ottawa, ON
K1A 1L1

Dear Ms. Girard:

Re: E-mail dated March 28th respecting proposed amendments to Regulations

This is in response to your e-mail of March 28th, respecting proposed amendments to the tranche 1 and 2 IRPR regulations.

You have asked for responses by April 8th and this does not allow sufficient time for a full response. Your e-mail has been circulated to executive members of the section, including the Provincial Chairs, for responses. This letter identifies notable concerns. It cannot be said that all of the proposed amendments have been fully considered, and any failure to make reference to proposed amendments should not be construed as implying approval.

We attach hereto your draft of your proposed changes, with our comments annotated in red. This letter serves to underscore our main concerns.

Regulation 17(5) Valid and Invalid Visas

There is unanimous strong rejection of the proposal to regulate that visas obtained through misrepresentation are "not valid", or any other circumstance deeming a visa to be "invalid".

1. The proposed regulation is **not** consistent with existing jurisprudence.

2. Implementing this regulation would lead to officers circumventing the role of the Immigration Division by issuing removal orders on grounds that an individual does not hold a valid visa, rather than referring to the Tribunal for determination of misrepresentation.

3. Deeming a visa to be "invalid" would arguably negate the right of appeal provided per s. 63(2) of the Act.

The introduction of the valid/invalid complexity is wholly inappropriate and the proposal should be scrapped in its entirety. It is an objectionable rewriting of the Act through the regulation that is entirely improper.

There are numerous problems associated with introducing the concept of "invalid" visas through misrepresentation. The misrepresentation provision is extremely broad and would encompass minor and major misrepresentations and not solely be limited to misrepresentations of essential facts supporting the visa issuance. In some cases it would be appropriate that the individual lose status, in other cases not. That is a matter that is best left to the Appeal Division exercising its legal and equitable jurisdictions. At the very least, an independent tribunal hearing is the preferable venue for determining the factual allegation of misrepresentation and the scope of misrepresentation.

Secondly, the IRPA does not distinguish between valid and invalid visas, particularly with respect to appeal rights granted under s. 63(2) and it is inappropriate for the regulations to try to force a distinction that does not exist under the Act.

Thirdly, the Federal Court ruling in *Seneca* has been extended to port of entry cases by the Federal Court. I refer to *Oloroso IMM 3976-99*. In *Seneca*, the FCA held that "the status of a person seeking to appeal an adjudicator's removal order cannot be invoked to deny the appeal right conferred by paragraph 70(1)(a) where ... any necessary conclusion with respect to the appellant's status is necessarily a consequence of a finding of fact or law made by the adjudicator. The suggestion that the person concerned has no status because he or she was not lawfully admitted in the first place can not take away the right of appeal on that very question." As noted by the court in *Oloroso*, the same logic applies with respect to port of entry applications for landing by a visa holder.

This is not to say that there should not be consequences to an immigrant who has engaged in misrepresentation in acquisition of a visa. The determination of misrepresentation in the Adjudication Division will lead to a removal order. Review of that removal order by the Appeal Division, as per the IRPA, may well lead to a confirmation that the removal order is valid and that there are no circumstances justifying relief from the removal order. Different results will flow from different facts of misrepresentation and different circumstances of the persons involved, and that is the way it should be.

<u>Regulation 41 Withdrawal of Applications for Entry</u>

We agree that ss. 41(1)(ii), (iii), and (vii) could be deleted to allow greater flexibility per withdrawals. We also recommend amendment of paragraph (iii), by referring to a warrant in Canada for their arrest, (iv) regarding being a fugitive from justice in a foreign jurisdiction. Without amendment or deletion as noted, these provisions are simply too broad. In the alternative, we would recommend deleting regulation 41 altogether and the development of appropriate guidelines that encourage a good level of flexibility in allowing withdrawal of application without constraining the officer unnecessarily.

<u>Regulation 223(2) Deemed Rehabilitation</u>

The clear reading of the IRPA provisions respecting criminal inadmissibility and the existing tranche 1 regulations provide that deemed rehabilitation removes inadmissibility upon the conditions being met, without requirement for any further determination. We are very unclear

and wary as to why regulation 223 would be amended to provide that the rehabilitation provisions "apply at the time of examination". Does this suggest that there is no deemed rehabilitation until an examination as been held? Your clarification is appreciated.

Regulation 224 Cross Border Offences

We agree with excluding clearly summary offences under the prescribed acts. However, we have continuing concern that this ground of inadmissibility has no rehabilitation provision and no means of being alleviated through a pardon. There must either be an appropriate rehabilitation provision provided, one that would utilize a lesser time frame than five years, or a deemed rehabilitation provision, or perhaps best - the consequence of an exclusion order rather than a deportation order for this kind of criminal inadmissibility.

Regulation 223(2) Included Family Members

We do not agree with the authority of officers to issue removal orders for inadmissibility per s.42. This should only be done through the Adjudication Division, consistent with the current Act. This ensures that appropriate notice and participation or rights are in fact provided before issuance of such a removal order.

Seizure Provision (tranche 2)

We have significant concerns with the language of the seizure provisions and these are being addressed in a separate response to the tranche 2 regulations. We will provide this response shortly.

Other Matters

The attached word document provides our comments with respect to all of the proposed regulatory changes in your e-mail of March 28th. Your response is appreciated.

What is Missing

We note two areas not addressed in tranche 2 or in the proposed amendments.

1. Regulations governing the conduct of examinations (s.15) on applications (other than port of entry or medical). Given the powers of arrest, offences, compelled examination and disclosure, and consequent authorities of officers to make determinations of loss of status and removal, it is imperative that the regulations provide for adequate notice to an individual respecting the time and place of an examination, the right to counsel and consequences of non-compliance. It is unacceptable that neither tranche of regulations provides these provisions.

2. Treatment of s.64 permanent residents (serious criminality). Both the Senate and Parliamentary Committees in their reports from 2001 and March 2002 have expressed their dissatisfaction with s.64 and the need for regulations to cover the obligation of officers to examine all the circumstances of a s.64 permanent resident (as per the *Ribic* factors) before proceeding with enforcement action. The Senate suggested three possible amendments, including the imposition of a five year domicile rule. The Parliamentary Committee requested that the regulations require officers to consider the *Ribic* factors. We do not accept the Department's reluctance based on prospects of litigation. The objective is justice,

fairness and defensible decision making, not expediency. We recommend adoption of the recommendation made by the Parliamentary Committee, for a statutory obligation to consider the *Ribic* factors in cases involving s.64 permanent residents.

We look forward to your reply.

Yours very truly,

GORDON H. MAYNARD

GHM/mb

Attachment