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Major Issues in Immigration Law

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MAJOR ISSUES IN IMMIGRATION LAW

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I. INTRODUCTION

The immigration policy of the United States reflects a deep-seated national ambivalence. On the one hand, we pride ourselves on our heritage as a nation of immigrants, as a refuge for "huddled masses yearning to breathe free."[1] On the other hand, our laws have often manifested other, less generous themes—occasionally even outright hostility—in the nation's response to migration. Indeed, the laws had begun to do so well before Emma Lazarus penned those famous words for the Statue of Liberty. In 1875 Congress enacted the first enduring federal controls on the migration of aliens, beginning with attention to special categories that were seen to pose various kinds of dangers. Prostitutes, criminals, paupers, and Chinese laborers were among the earliest groups forbidden to enter. Anarchists joined the list around the turn of the century. Extensive additional controls were enacted in succeeding years, especially in an act adopted in 1917, in the midst of World War I.

In the 1920s, Congress added to these qualitative requirements a system of numerical ceilings, adopting the view that limits on the nation's absorptive capacity required some control on the large numbers of aliens who had immigrated in the early years of the century. (The peak year was 1907, when 1,285,000 immigrants gained entry.) Certainly such a perception was based in part on legitimate concerns—concerns that have grown in force as the planet has become more crowded and more volatile. But Congress's imposition of ceilings some sixty-five years ago also reflected other, more disturbing agendas. These were not simple ceilings, applied on a first-come, first-served basis. Instead, acting in part on the basis of explicit eugenic theories now readily seen as racist, Congress imposed a system of quotas based on the national origins of the would-be immigrants. The quota laws reserved the largest allocations for what Congress considered the more desirable nationalities of Northern Europe.

The national-origins system was perpetuated, with slight modifications, when Congress enacted a new, comprehensive codification

1. E. Lazarus, *The New Colossus,* reprinted in J. Higham, Send These to Me: Jews and Other Immigrants in Urban America 78 (1975).

of immigration and citizenship laws in the Immigration and Nationality Act of 1952 (INA).[2] Indeed, the national-origins scheme survived until the landmark amendments of 1965, which established a more neutral quota system based largely on family ties and employment skills.[3] The 1965 system remains in effect today, with only slight modifications. Even during the earlier era, however, the more generous theme in the American response to immigration found frequent expression, not only in the relatively large numbers of immigrants admitted throughout the period (compared with other countries' efforts at the time) but also in sizable refugee programs that began after World War II.

This tension between humanitarian impulse and concern over the numbers and character of immigrants has left us with a complex code of immigration and nationality laws.[4] Administrative forums, particularly in the Department of Justice and the Department of State, provide the principal venue for resolving the dilemmas, interpreting the statute, and deciding on individual controversies. With great regularity, however, that tension also results in litigation. Courts are asked to construe unclear provisions of the statute or regulations, or to declare invalid an exercise of the discretion explicitly and frequently granted by the INA to administrative agencies—a particularly striking feature of that statute. (This discretion to deny a benefit exists in addition to the ordinary authority to apply the statutory prerequisites, which themselves may be quite demanding.) Less often, for reasons to be explored later, litigation raises claims founded on constitutional law.

Court cases often present another, more immediate dilemma. On the one hand, the alien present in the courtroom may be motivated by understandable, even appealing and noble, plans and desires that simply happen to run afoul of the immigration laws. On the other side stand the equally important—but almost always less gripping—needs for bureaucratic regularity, effective enforcement,

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2. Act of June 27, 1952, Pub. L. No. 82-414, 66 Stat. 163. Although it has been frequently amended since 1952, the INA remains the major compilation of statutory law in the immigration field. It is codified in title 8 of the U.S. Code, using a numbering scheme that corresponds erratically to the numbering of the INA. Because practitioners and writers in the field often use INA section numbers, rather than the U.S. Code scheme, and because the regulations and INS Operations Instructions (an internal manual) are also numbered to correspond to INA numbers, this work provides citations both to the INA, as currently amended, and to 8 U.S.C.

3. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912-13.

4. One court found that the INA bears a "striking resemblance" to "King Minos' labyrinth in ancient Crete." Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977). Another voiced a more despairing sentiment: "We are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say." Yuen Sang Low v. Attorney Gen., 479 F.2d 820, 821 (9th Cir. 1973).

consistency, and clear line drawing that must characterize a system coping with millions of applications, covering a wide variety of benefits, each year.[5]

This monograph offers a somewhat selective introduction to the immigration laws of the United States.[6] It describes the major features of the relevant substantive and procedural law and highlights several areas in which controversies persist, particularly those controversies that judges are most likely to encounter. The monograph goes to press shortly after enactment of the landmark Immigration Reform and Control Act of 1986 (IRCA),[7] a long-debated measure designed primarily to master the problem of illegal migration to the United States. The act's major features are described in chapter 9: new sanctions applied to employers of undocumented aliens, a limited antidiscrimination provision, an amnesty meant to legalize the status of aliens who have been here unlawfully since January 1, 1982, and special arrangements for agricultural workers. A few other provisions of the IRCA are noted at the appropriate places in chapters 2 through 7. In addition, two other statutes containing significant amendments to the INA also passed during the waning hours of the Ninety-ninth Congress, although with much

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5. *See generally* Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985).

6. This monograph does not discuss U.S. citizenship law. It may be helpful in evaluating some provisions of the immigration laws, however, to recount three basic provisions. With extremely limited exceptions, anyone born in the territorial United States is a U.S. citizen by birth even if the parents are aliens temporarily or illegally present. *See* C. Gordon & H. Rosenfield, Immigration Law and Procedure §§ 12.4b, 12.5, 12.6 (rev. ed. 1987); U.S. Const. amend. XIV, § 1. In addition, under current law, children born abroad to an American citizen gain U.S. citizenship from birth, unless the citizen parent failed to satisfy certain minimal requirements of residence in the United States prior to the birth. *See* INA § 301(c)–(e), (g); 8 U.S.C.A. § 1401(c)–(e), (g) (1970 & Supp. 1987); C. Gordon & H. Rosenfield, *supra,* at § 13.1d. Naturalization is also available to lawful permanent resident aliens, on a fairly routine basis, after five years of residence in this country (three years for spouses of U.S. citizens). *See* C. Gordon & H. Rosenfield, *supra,* at § 15.5.

7. Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA of 1986]. Various versions of this legislation, often known as the Simpson–Mazzoli bill or the Simpson–Rodino bill, have been debated in Congress for at least six years. Earlier versions dealt with a much wider array of issues than the 1986 legislation (including proposals for changes in legal immigration quotas and categories, political asylum, and adjudication mechanisms), but all failed to pass. The successful 1986 legislation concentrated almost exclusively on illegal migration in order to minimize the controversy that had blocked earlier enactment. The relevant congressional committees, however, have vowed renewed efforts in 1987 to deal with many of the other issues not resolved in the 1986 legislation.

less fanfare.[8] The most important such changes are also noted in the chapters that follow.[9]

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8. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 [hereinafter IMFA of 1986]; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655 [hereinafter INA Amendments of 1986].

9. The changes enacted in the three 1986 laws usually take the form of amendments to the INA. The new or amended provisions therefore are usually cited here by INA section number, with a parallel citation to 8 U.S.C.A. (Supp. 1987), often supplemented by a citation to the appropriate 1986 statute, using the abbreviations appearing in the preceding footnotes. It should also be noted that descriptions of these provisions are offered without benefit of the implementing regulations and administrative interpretations, which may have considerable bearing on the ultimate effect and effectiveness of the new legislation, particularly of the IRCA.

II. BASIC PROCESS AND ADMINISTRATIVE STRUCTURE

Process and Players

Aliens may come to the United States as immigrants or nonimmigrants. Immigrants are admitted for permanent residence, and most become eligible for U.S. citizenship after five years of residence. They need not naturalize, however; they may maintain lawful permanent resident status indefinitely. Nonimmigrants come for a particular purpose (e.g., as students, tourists, diplomats, or temporary workers) and are generally admitted only for specified time periods.[10] It is usually possible to extend those time periods, and under certain limited circumstances nonimmigrants may "adjust status" to that of an immigrant, thereby gaining the right of permanent residence.

Consuls and the Visa Process

Virtually all aliens must obtain a visa before coming to the United States.[11] A visa does not guarantee entry; it represents only a kind of advance permission to come to the United States and apply for admission at the border. The immigration inspector at the port of entry is empowered to decide that an alien is inadmissible despite his or her possession of a valid visa, although this rarely happens. Transportation companies are subject to fines and other expenses if they bring an alien to this country without the proper documents[12]—ordinarily, a valid passport issued by the country of nationality and a visa issued by a U.S. consul.

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10. The basic provisions for nonimmigrant admission appear in INA §§ 101(a)(15), 214; 8 U.S.C.A. §§ 1101(a)(15), 1184 (1970 & Supp. 1987). Reference is often made to nonimmigrant visa categories and equivalent admission categories based on the lettered subparagraphs of INA § 101(a)(15). For example, tourists receive B-2 visas, students F-1 visas, and fiancés and fiancées K visas. Immigrant categories are covered in greater detail in chapter 4.

11. *See* INA §§ 211(a), 212(a)(20), (26); 8 U.S.C.A. §§ 1181(a), 1182(a)(20), (26) (1970 & Supp. 1987). The 1986 IRCA also authorized a visa waiver pilot program for tourists from a maximum of eight countries with low visa abuse rates. INA § 217, 8 U.S.C.A. § 1187 (Supp. 1987).

12. INA §§ 233, 273; 8 U.S.C. §§ 1223, 1323 (1982).

Consuls are officials of the Department of State. Stationed only in foreign countries, consular officers not only issue visas to aliens who want to come to the United States as immigrants or nonimmigrants but also provide assistance of various kinds to American citizens in the country to which they are posted.

For most nonimmigrant admission categories, the applicant simply applies to the consul for a visa and demonstrates his or her qualifications. For a few nonimmigrant categories and nearly all immigrant categories, however, the consul will not consider the case until the applicant has gained preliminary approval by means of a petitioning process carried out in the United States. Such "visa petitions" are usually filed by a U.S. citizen or lawful permanent resident, *not* by the alien who hopes ultimately to receive the visa (the "beneficiary" in immigration parlance). The petitioner takes the initiative to demonstrate to the attorney general's representatives in this country that certain qualifications are met—for example, that he or she has the family relationship to the petitioner necessary for certain immigrant categories, or that there is an insufficient supply of American workers for the job the beneficiary would fill.[13]

Adjustment of Status

Adjustment of status is a procedure whereby some aliens already in the United States can become lawful permanent residents without having to travel abroad in order to receive an immigrant visa from a consul.[14] It is employed most commonly by nonimmigrants who marry U.S. citizens during their time in this country. The Justice Department official adjudicating the application must determine that the usual requirements for approval of a visa petition are met and also must make the determinations ordinarily made by a consular officer (primarily, that the alien is not disqualified under one of the exclusion grounds set forth in INA § 212(a)).[15] As in consular determinations, the burden is on the alien to demonstrate that he or she is not excludable.[16]

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13. For most employment-based immigration, the process begins with the filing of a request for "labor certification," which is ultimately adjudicated by the Department of Labor's Employment and Training Administration. *See* INA § 212(a)(14); 8 U.S.C. § 1182(a)(14) (1982); 20 C.F.R. §§ 656.20–.21 (1985).

14. Adjustment is authorized by INA § 245; 8 U.S.C.A. § 1255 (1970 & Supp. 1987), which imposes several additional requirements. Adjustment is considered further in chapters 4 and 6.

15. 8 U.S.C.A. § 1182(a) (1970 & Supp. 1987). *See* Yui Sing Tse v. INS, 596 F.2d 831, 834 (9th Cir. 1979).

16. Ahwazi v. INS, 751 F.2d 1120, 1122 n.1 (9th Cir. 1985).

Immigration and Naturalization Service

Other than the responsibility for issuing visas, nearly all of the authority to administer and enforce the immigration laws is vested in the attorney general, who in turn delegates most of his or her responsibilities to other officials in the Department of Justice. The most important unit in the department is the Immigration and Naturalization Service (INS), headed by the commissioner of immigration and naturalization. The INS maintains a central office in Washington, D.C., as well as four regional offices and thirty-four district offices throughout the United States. The district office, headed by a district director, is the basic working unit of the INS. Most aliens—as well as citizens petitioning to bring in aliens as immigrants or nonimmigrants—come into contact only with a district office. Immigration examiners in the district office rule on a wide variety of matters, including visa petitions, requests for extensions of stay filed by nonimmigrants, requests for permission to work filed by nonimmigrants in those categories to which such permission may be granted, and applications for adjustment of status.[17] In addition, INS inspectors examine persons arriving at more than two hundred designated ports of entry. Each district office also has an investigatory staff that carries out enforcement of the immigration laws in the interior of the country. The Border Patrol, a separate enforcement arm of the INS, is charged with the duty to police our extensive national boundaries and apprehend people attempting clandestine entries.

Immigration Judges and the Board of Immigration Appeals

The second important administrative unit in the Department of Justice is the Executive Office of Immigration Review (EOIR), which consists of two subunits, the immigration judges and the Board of Immigration Appeals (BIA).[18] Immigration judges are referred to as "special inquiry officers" in the INA. The "immigration judge" label entered into usage in the early 1970s and now appears in the regulations; the terms are synonymous. Apparently seen as a more prestigious title than special inquiry officer, immi-

17. For the past few years, the INS has also been using a system of four Regional Adjudication Centers (RACs) for centralized high-volume processing of a few categories of applications that do not require a personal interview. *See* 62 Interpreter Releases 531, 542 (1985) [hereinafter "Interp. Rel."]; 8 C.F.R. § 103.1(s) (1986). Recently the official title was changed to "Regional Service Center," 51 Fed. Reg. 34,439 (1986), but the nickname "RAC" seems likely to survive.

18. 8 C.F.R. §§ 3.0, 3.1 (1986). Although the functions are somewhat similar, immigration judges are not administrative law judges within the meaning of 5 U.S.C. §§ 3105, 7521 (1982).

gration judge may also reflect more accurately the growing independence and "judicialization" of these officials over the three decades since the INA was adopted. Until 1983, immigration judges were formally part of the INS, although even there they had gradually achieved enhanced professionalism and greater insulation from enforcement functions.[19] A 1983 reorganization separated the corps of immigration judges from the INS altogether and made them accountable to the attorney general through the EOIR. Most immigration judges, however, still maintain their courtrooms in the same buildings occupied by INS district offices. The primary business of immigration judges is to hear exclusion and deportation cases brought by the INS, although they also have jurisdiction over a narrow range of other matters.[20] There are currently approximately sixty immigration judges throughout the country.

The BIA is a five-member appellate body, appointed by the attorney general and located in metropolitan Washington, D.C. Unlike the position of special inquiry officer, the BIA is not established by statute. Throughout its lengthy history the board has been solely a creature of regulation. Many judicial opinions have mistakenly considered it part of the INS, but the BIA has always been maintained as a separate and independent entity, directly accountable to the attorney general.[21]

The BIA's most important jurisdiction consists of appeals from immigration judges in exclusion and deportation cases.[22] Both the alien and the INS may appeal adverse decisions.[23] The BIA also has significant appellate authority over a variety of other decisions of the district directors, on matters that never go before an immigration judge.[24] For example, if a newly wed U.S. citizen files a visa petition seeking to bring in her alien husband as an immigrant, and the district office denies the petition on the ground that the marriage is a sham, the petitioner may appeal directly to the BIA.

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19. Some commentators, however, question the extent of this evolution. *See, e.g.,* Note, *Developments in the Law: Immigration Policy and the Rights of Aliens,* 96 Harv. L. Rev. 1286, 1363–66 (1983).

20. *See* 8 C.F.R. § 3.10 (1986).

21. Occasionally, the BIA's decisions are subject to further administrative review by the attorney general personally, under a process known as "referral." 8 C.F.R. § 3.1(h) (1986).

22. *See id.* § 3.1(b).

23. *See generally* Borden v. Meese, 803 F.2d 1530 (11th Cir. 1986).

24. *See* 8 C.F.R. § 3.1(b)(3), (5), (6) (1986).

Other Appeals

The BIA's appellate authority does not extend over the full range of decisions made by immigration examiners in the district office, however. Some of these decisions (e.g., denial of a transfer from one nonimmigrant category to another) are simply not appealable administratively.[25] Others (e.g., a district office's denial of a visa petition based not on family relations but on proposed employment) are appealable to the associate commissioner for examinations in the INS central office, rather than the BIA. Such appeals are actually considered by the Administrative Appeals Unit (AAU), which is part of the central office and is staffed by a half-dozen nonattorney examiners.[26] The division of administrative appellate jurisdiction between the BIA and the AAU is complex,[27] and the Administrative Conference of the United States has recently issued recommendations for improved allocation of such jurisdiction.[28] A mere handful of the thousands of administrative decisions issued each year are published as "precedent decisions." Most are from the BIA; others are decisions by the associate commissioner, the commissioner, other INS officials, and occasionally the attorney general.

Terminology: Exclusion Versus Deportation

It is important to understand the difference between *exclusion* and *deportation* of aliens in immigration parlance. The application of many statutory provisions turns on the distinction, and the degree of constitutional protection afforded to an alien may also be affected by whether that individual is in exclusion or deportation proceedings.[29] Aliens *seeking to enter* the United States have their

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25. *Id.* § 248.3(g).

26. *Id.* § 103.1(f). *See* Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1308 (1986).

27. The proper avenue for review of a particular issue can usually be determined by consulting 8 C.F.R. § 3.1(b) (1986) (appellate jurisdiction of the BIA) and *id.* § 103.1(f) (appellate jurisdiction of the associate commissioner), and occasionally the part of 8 C.F.R. containing the substantive regulations governing the particular immigration benefit at issue. The details of these regulations may also have an important bearing on whether judicial review of the matter must be sought in the district court or the court of appeals. A chart showing the major patterns for administrative and judicial review of decisions under the immigration laws appears as figure 1 in chapter 8, which deals generally with judicial review.

28. 1 C.F.R. § 305.85-4 (1986).

29. *See, e.g.*, Mansoor v. Montgomery, 620 F. Supp. 708 (E.D. Mich. 1985) (relief under INA § 244 available only to deportable, not excludable, aliens even though excludable alien had been present in the country for more than seven years as a "parolee"); Matter of Torres, Interim Dec. No. 3010 (BIA 1986) (same). Some deci-

admissibility determined in exclusion proceedings, should the border inspector challenge their qualifications. Aliens *who have entered* and whom the government seeks to expel are placed in deportation proceedings, where the procedures and the burden of proof are somewhat more favorable to the alien.[30]

The distinction between exclusion and deportation rests on a certain obvious logic, for our laws often differentiate between those first applying for a benefit and those whose previously awarded benefits the government seeks to take away. Unfortunately, the evident logic does not always carry through in drawing the line between exclusion and deportation, for three reasons. First, the distinction turns largely on whether the alien has entered the country, and the concept of *entry* is highly technical.[31] An alien's mere physical presence in U.S. territory is not enough to demonstrate that he or she has entered; otherwise, persons in line to meet the immigration inspector in the airport arrival area would have accomplished an entry. Instead, entry has occurred only when the alien either has been inspected and admitted or has successfully evaded inspection. Some cases require extremely difficult line drawing to determine whether an alien adequately evaded inspection.[32] Paradoxically, the doctrine places a clandestine entrant in a better position, for some purposes, than an alien who complies with the law and applies for admission at the inspection station: Once the INS catches a clandestine entrant, it will have to process him or her for removal through deportation proceedings, whereas an alien at the border is subjected to the somewhat less protective exclusion procedure.

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sions, however, have found ways to make the broader array of deportation-type protections available to paroled aliens who are technically excludable. *See, e.g.,* Patel v. Landon, 739 F.2d 1455 (9th Cir. 1984); Joshi v. District Director, 720 F.2d 799 (4th Cir. 1983).

30. The terms *deportation* and *exclusion* are somewhat slippery. In the statute *deportation* sometimes refers merely to the physical removal of an alien; thus, INA § 236(a); 8 U.S.C. § 1226(a) (1982), for example, grants special inquiry officers the power to decide that an alien seeking admission "shall be excluded and deported." This monograph attempts to avoid that usage; unless otherwise indicated, *deportation* refers solely to the expulsion of aliens who had already made an entry (under INA §§ 241-242; 8 U.S.C. §§ 1251-1252 (1982)), in contrast to the exclusion of aliens at the border or its legal equivalent (under INA §§ 235-237; 8 U.S.C. §§ 1225-1227 (1982)).

31. *Entry* is defined in INA § 101(a)(13); 8 U.S.C. § 1101(a)(13) (1982). The BIA's complex test for determining whether an entry has occurred is set forth in Matter of Pierre, 14 Administrative Decisions Under Immigration and Nationality Laws 467 (BIA 1973) [hereinafter "I. & N. Dec."].

32. *See, e.g.,* Pierre v. Rivkind, 643 F. Supp. 669, 671 (S.D. Fla. 1986); *In re* Application of Phelisna, 551 F. Supp. 960 (E.D.N.Y. 1982); Matter of Lin, 18 I. & N. Dec. 219 (BIA 1982).

Second, some aliens who have been at liberty inside the country for months or years remain subject to exclusion proceedings, should the INS seek their removal, because they are considered "parolees." Beginning early in this century, immigration authorities found it expedient to permit the physical presence of certain aliens—for example, for urgent medical care or to appear as witnesses in criminal prosecutions—despite some unwaivable ground of inadmissibility. Thus began the practice of "paroling" aliens into the United States. Parolees remain constructively at the border throughout their stay, no matter where they travel. Officially, they have not made an entry and so are considered excludable aliens rather than deportable aliens.[33] The 1952 INA endorsed the practice and codified the standards, although in highly general terms.[34] Parole also came to be used extensively for the release from detention of arriving aliens awaiting an exclusion hearing before an immigration judge, although the INS has curtailed such releases in recent years.[35]

Third, for most purposes, resident aliens who leave for a trip abroad and then seek reentry will be treated the same as first-time applicants for admission.[36] As a result of this so-called reentry doctrine, virtually all of the statutory grounds for exclusion are applicable afresh each time a resident alien reenters, and a contested admission will be tried in exclusion, rather than deportation, proceedings. There is a possible exception to this treatment, however, established by the Supreme Court's decision in *Rosenberg v. Fleuti.*[37] The Court held that a permanent resident alien's trip to Mexico lasting "about a couple hours" might not have resulted in a technical entry upon his return. The case was remanded for the lower court to determine whether the trip was "innocent, casual, and brief," and therefore not "meaningfully interruptive" of the alien's permanent residence. Application of this rather ill-defined exception remains a fruitful source of litigation.[38]

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33. *See* Leng May Ma v. Barber, 357 U.S. 185 (1958); Kaplan v. Tod, 267 U.S. 228 (1925).

34. INA § 212(d)(5); 8 U.S.C. § 1182(d)(5) (1982). From 1956 until 1980, parole was also used to bring in large groups of refugees—principally from Hungary, Cuba, and Indochina—largely because no adequate alternative for their admission existed. (The regular refugee provisions were subject to ceilings that proved unrealistic in some years.) When Congress improved the ordinary refugee provisions in 1980, it forbade further use of the parole power in this manner. *See* INA § 212(d)(5)(B); 8 U.S.C. § 1182(d)(5)(B) (1982), added by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

35. For a more complete account of the parole power, see T. Aleinikoff & D. Martin, Immigration: Process and Policy 232-36 (1985).

36. *See* United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933).

37. 374 U.S. 449 (1963).

38. *See, e.g.,* Dabone v. Karn, 763 F.2d 593, 595-97 (3d Cir. 1985); C. Gordon & H. Rosenfield, *supra* note 6, at §§ 2.3e, 4.6c, 7.9d. The BIA considers the *Fleuti* excep-

Key Documents

Two documents that the INS provides to arriving aliens deserve special mention. Those admitted as nonimmigrants or parolees usually receive an Arrival–Departure Record (form I-94). Stapled into the passport, this form contains important information, including the nonimmigrant category in which the alien is admitted and the length of stay allowed. If employment is authorized (most nonimmigrants will not receive such permission), INS will endorse the I-94 to this effect. If the alien receives an extension of stay or a transfer to another nonimmigrant category (e.g., from student to tourist), the changes in the terms and conditions of admission will be reflected on the I-94. To secure such changes after entry, the alien need apply only to the INS, not to a consular officer. Unless he or she plans a trip abroad and will then reenter the country after expiration of the original visa, the alien need not apply for a new visa.[39]

Persons admitted as immigrants receive (after a processing delay) a plastic laminated card (form I-551). Officially called the Alien Registration Receipt Card, it is more widely known as the "green card."[40] Technically it serves to signify compliance with the alien registration requirements of the INA.[41] But because only lawful permanent resident aliens legally receive the card, and because all such aliens are given virtually unlimited access to the U.S. employment market, it is often thought of as a kind of work

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tion available only to persons once admitted as immigrants, and not to nonimmigrants, owing to the language of INA § 101(a)(13); 8 U.S.C. § 1101(a)(13) (1982), on which *Fleuti* was based. *See, e.g.,* Matter of Legaspi, 11 I. & N. Dec. 819 (BIA 1966). The 1986 IRCA employs terminology and concepts similar to those derived from *Fleuti* at several points, as applied to many different categories of aliens, and the INS is expected to adopt regulations that should help clarify when departures are "meaningfully interruptive" and when they are instead "innocent, casual, and brief." *See, e.g.,* INA §§ 244(b)(3), 245A(a)(3); 8 U.S.C.A. §§ 1254(b)(3), 1255A(a)(3) (Supp. 1987) (relating to "continuous physical presence" in the United States). *Cf.* INA § 245A(b)(3)(A), (g)(1), (g)(2); 8 U.S.C.A. § 1255A(b)(3)(A), (g)(1), (g)(2) (Supp. 1987) (relating to "continuous residence").

39. Because the INS, not the consular officer, determines the ultimate admission category and length of stay, the category and end date shown on the I-94 are usually more important, after entry, than the equivalent information shown on the visa. For these reasons, it is slightly inaccurate—but extremely common—to speak of a nonimmigrant as being in the country "on a tourist visa" or "on a student visa."

40. Earlier versions of the card, principally form I-151, are also still in use.

41. INA §§ 261–266; 8 U.S.C.A. §§ 1301–1306 (1970 & Supp. 1987).

permit. The I-551 may also be used, in most cases, as a reentry document.[42]

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42. 8 C.F.R. § 211.1(b) (1986).

III. CONSTITUTIONAL FRAMEWORK

Federal and State Powers

The Constitution contains no express grant to Congress or the president of a power to control the entry of foreigners. The provisions most closely relevant give Congress authority to regulate foreign commerce[43] and to adopt a uniform rule of naturalization,[44] but neither provision straightforwardly embraces a power over immigration. Some early cases suggested that the states might have the primary authority to regulate and control the immigration of undesirable aliens.[45] But by 1875, the Supreme Court came to see immigration control as an implicit federal power—a proposition that is now deeply entrenched. The Court based this conclusion, at least in part, on the simple fact of national sovereignty.[46]

The extensive exercise of federal power in this field has been held, under the supremacy clause,[47] to preempt nearly all state efforts touching on similar subjects. For example, in *Hines v. Davidowitz,*[48] the Supreme Court struck down a state scheme for the registration of aliens, on the ground that it had been preempted by the federal registration provisions. Only one Supreme Court case in the modern era has permitted an exception to this wide-ranging federal preemption. In *DeCanas v. Bica,*[49] the Court sustained a California law penalizing employers who knowingly employed aliens not authorized to work in the United States. Although it held that the power to regulate immigration is "unquestionably exclusively a federal power,"[50] the Court decided that the

43. U.S. Const. art. I, § 8, cl. 3.
44. *Id.* cl. 4.
45. *See, e.g.,* The Passenger Cases, 48 U.S. (7 How.) 283, 467 (1849) (Taney, C. J., dissenting); Mayor of N.Y. v. Miln, 36 U.S. (11 Pet.) 102 (1837).
46. *See, e.g.,* The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889); Chy Lung v. Freeman, 92 U.S. 275 (1875). Although most controls are imposed pursuant to federal statute, the Court has ruled that authority over immigration is also an inherent executive power. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).
47. U.S. Const. art. VI, cl. 2.
48. 312 U.S. 52 (1941).
49. 424 U.S. 351 (1976).
50. *Id.* at 354.

challenged statute was primarily a regulation of the employment relationship. It found in the federal immigration laws of that time "no indication that Congress intended to preclude state law in the area of employment regulation."[51] *DeCanas* has not received wide application. Moreover, in 1986, Congress expressly preempted state and local laws of this type in connection with its own comprehensive scheme of federal sanctions for employers of unauthorized aliens.[52]

Over the last fifteen years, the Supreme Court has also acted to strike down, on equal protection grounds, several other state laws regulating or limiting aliens. In the pathbreaking case of *Graham v. Richardson*[53] the Court held unconstitutional a state law that made welfare benefits available only to U.S. citizens and another that limited such benefits to citizens and aliens who had been residents for fifteen years. In so holding, the Court ruled that alienage is a "suspect classification" and that the state had not demonstrated a sufficient justification for the classification to satisfy the "close judicial scrutiny" required.[54] Although this doctrine was applied frequently in the years following *Graham* to strike down state laws disadvantaging aliens,[55] later cases have retreated somewhat. Alienage classifications that restrict access to "political functions of government" need not survive strict scrutiny. If tailored with reasonable care, such state-law classifications will be subjected only to "rational basis" review.[56]

Not long after *Graham*, the Court held that equal protection doctrine does not similarly constrain the federal government. In *Matthews v. Diaz*,[57] the Court approved a federal classification quite similar to the state-law distinctions struck down in *Graham:* a five-year waiting period imposed by federal law upon aliens before they could participate in a federally funded public assistance program. Because establishing various kinds of classifications affecting aliens is "a routine and normally legitimate part" of federal, but not

51. *Id.* at 362.

52. INA § 274A(h)(2); 8 U.S.C.A. § 1324a(h)(2) (Supp. 1987), added by IRCA of 1986, § 101.

53. 403 U.S. 365 (1971).

54. *Id.* at 371–72. Preemption doctrine provided an alternative ground for the holding.

55. *See, e.g.,* Nyquist v. Mauclet, 432 U.S. 1 (1977) (state financial assistance for higher education); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (civil engineering positions); *In re* Griffiths, 413 U.S. 717 (1973) (bar admissions); Sugarman v. Dougall, 413 U.S. 634 (1973) (state civil service jobs).

56. *See, e.g.,* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (deputy probation officers); Ambach v. Norwick, 441 U.S. 68 (1979) (public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (police force).

57. 426 U.S. 67 (1976).

state, business, the Court held that only a rational basis was required to justify a federally imposed distinction.[58] Federal line drawing based on alienage, in short, will not be considered a "suspect classification." In some settings, however, the due process clause of the Fifth Amendment may require that such federal distinctions be expressly drawn either by Congress or by properly empowered high-level officials in the executive branch.[59]

Several commentators have noted that modern equal protection doctrine applied to aliens follows curious lines, sometimes demanding strict scrutiny, sometimes tolerating distinctions based on slender justifications. Many have called for a change of the conceptual framework so that the results of earlier cases are understood as applications of federal preemption doctrine.[60] In *Toll v. Moreno,*[61] the Supreme Court hinted that it might favor some such recasting of the analysis, which in fact would account readily for the results of the Court's earlier cases.[62] Nevertheless, the Court has not acted further on the hint, and the equal protection doctrine of *Graham* continues to be used, on occasion, to invalidate state classifications.[63]

Individual Rights

Substantive Provisions of the Immigration Laws

Not long after the enactment of the first federal immigration laws, the Supreme Court entertained challenges by individuals who claimed that certain provisions infringed on their rights. The petitioner in the first major case was a Chinese laborer and a longtime resident of the United States who had left for a yearlong visit to his family in China, bearing a certificate of identity that ostensibly

58. *Id.* at 82–85.

59. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

60. *See, e.g.,* Perry, *Modern Equal Protection: A Conceptualization and Appraisal,* 79 Colum. L. Rev. 1023, 1060–65 (1979); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?,* 31 Stan. L. Rev. 1069 (1979); Note, *State Burdens on Resident Aliens: A New Preemption Analysis,* 89 Yale L.J. 940 (1980).

61. 458 U.S. 1 (1982).

62. *Id.* at 11 n.16.

63. *See* Bernal v. Fainter, 467 U.S. 216 (1984) (state may not require notaries public to be U.S. citizens). Mention should also be made of Plyler v. Doe, 457 U.S. 202 (1982), which struck down a Texas law barring undocumented alien children from public schools unless they paid tuition. *Plyler* probably turns primarily on the nature of the benefit involved (education) and the fact that the disadvantaged class consisted of innocent children not responsible for their illegal status. The Court carefully stated that undocumented alien status is not a "constitutional irrelevancy" and suggested that states may use such a classification in distributing other sorts of benefits.

assured him of the right to return. While he was gone, Congress, in a measure that formed part of a long series of anti-Chinese enactments, nullified the effect of the certification and blocked all future entries or reentries by Chinese laborers, thereby violating treaty obligations owed to China. In the landmark *Chinese Exclusion Case,*[64] the Court sustained the statute, giving a sweeping endorsement of broad immigration powers in the federal government, largely as an inherent incident of national sovereignty rather than a power traceable to specific constitutional provisions. The Court went so far as to say that the determinations of the political branches "are necessarily conclusive upon all its departments and officers," because the powers touch on "protection and security" of the nation.[65]

Four years later, a similar issue arose in the context of deportation proceedings. In *Fong Yue Ting v. United States,*[66] the government sought to expel three longtime resident Chinese laborers because of their failure to obtain papers required under an 1892 statute. Although the three dissenters in the Supreme Court saw a vast difference between the exclusion of aliens at the border and the expulsion of aliens domiciled with government consent, the majority disagreed. Emphasizing the close links between decisions regarding the continued residence of aliens and international relations, the Court concluded that the right to expel foreigners "rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[67]

This "plenary power doctrine" has often been invoked by the Supreme Court, despite frequent academic criticism.[68] The Court has even stated that " 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[69] For example, a 1952 case, *Harisiades v. Shaughnessy,*[70] upheld a statute providing for the deportation of longtime residents based on former membership in the Communist Party—membership that had been lawful at the time—against challenges founded on the First Amendment, the ex post facto clause, and the due

64. (Chae Chan Ping v. United States), 130 U.S. 581 (1889).
65. *Id.* at 603-06. *See also* Nishimura Ekiu v. United States, 142 U.S. 651 (1892).
66. 149 U.S. 698 (1893).
67. *Id.* at 707.
68. *See, e.g.,* Nafziger, *The General Admission of Aliens Under International Law,* 77 Am. J. Int'l L. 804 (1983); Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* 1984 Sup. Ct. Rev. 255; Heese, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien* (pts. 1 & 2), 68 Yale L.J. 1578, 69 Yale L.J. 262 (1959).
69. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
70. 342 U.S. 580 (1952).

process clause. The Court acknowledged the potential harshness of such legislative actions, but declined to fashion a judicial remedy.[71]

The net effect of *Harisiades* and similar decisions is to shield substantive grounds for admission, exclusion, and deportation from virtually any judicial control exercised by way of constitutional review. The shaping of such substantive provisions apparently remains within the exclusive authority of the political branches.[72] Almost as if to compensate for this constitutional deference, however, the Supreme Court has fashioned a more interventionist rule of construction for the application of the substantive provisions. That rule calls for giving the most lenient interpretation to ambiguous statutes or regulations, particularly in deportation cases, in light of the high stakes involved for the alien.[73]

Only two Supreme Court decisions of the last fifteen years have considered constitutional challenges to the substantive provisions of federal immigration statutes. Both sustained the provisions against significant objections, and both generally supported the plenary power doctrine. Nevertheless, they may presage a slightly more active role for the judicial branch in considering future constitutional challenges, at least in extreme instances.

In *Kleindienst v. Mandel,*[74] the plaintiffs had challenged, on First Amendment grounds, the denial of a nonimmigrant visa to

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71. *See also* Galvan v. Press, 347 U.S. 522 (1954). Deportation is not considered punishment in the technical sense that would trigger the application to immigration cases of the ex post facto clause or the other constitutional provisions governing criminal procedure, such as the Sixth Amendment. *See Harisiades,* 342 U.S. at 594; Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

72. As the Supreme Court stated in Galvan v. Press, 347 U.S. 522, 531 (1954):

> Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. [Citations omitted.] But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.

73. *See, e.g.,* Woodby v. INS, 385 U.S. 276, 285–86 (1966); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948). The *Fong Haw Tan* Court adopted this rule "because deportation is a drastic measure and at times the equivalent of banishment or exile." 333 U.S. at 10. The rule has sometimes been applied, however, in questionable settings—for example, to benefit an alien who had spent but a few days in this country. *See, e.g.,* Squires v. INS, 689 F.2d 1276 (6th Cir. 1982). *Cf.* Woodby, 385 U.S. at 286 n.19 (applying its lenient construction requiring the government to prove deportability by "clear, unequivocal and convincing evidence" to all deportation cases, not just those involving longtime residents).

74. 408 U.S. 753 (1972).

Ernest Mandel, an author from Belgium who was held excludable because of his Marxist writings. The government argued that the denial did not interfere with expression, but only blocked the physical movement of Mandel to this country. The Court disagreed, ruling that a First Amendment issue was presented. When it reached the merits, however, it applied a test far more deferential to the government than the usual First Amendment standard: "We hold that when the executive exercises this [exclusion] power negatively on the basis of a *facially legitimate and bona fide reason,* the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[75] Because the government had offered a reason held to meet that standard, the visa denial was sustained.

In the second case, *Fiallo v. Bell,*[76] the Court upheld a provision of the INA that granted certain immigration benefits to an illegitimate child based on the child's relationship to the natural mother but denied benefits based on the relationship to the natural father. (The distinction was essentially eliminated by the 1986 IRCA.[77]) To assess the equal protection and due process claims of the plaintiffs, the Court applied the *Mandel* test.[78] But dictum in one footnote has been seen by some[79] as an effort to claim a slightly more active judicial role than obtained in earlier eras: "[O]ur cases reflect acceptance of *a limited judicial responsibility under the Constitution* even with respect to the power of the Congress to regulate the admission and exclusion of aliens."[80]

Whether this limited responsibility will evolve to provide somewhat more searching Supreme Court scrutiny of substantive immigration law remains to be seen. But it is already clear that the "facially legitimate and bona fide reason" test is increasingly being used in deciding constitutional and statutory challenges.[81] Further-

75. *Id.* at 770 (emphasis added).

76. 430 U.S. 787 (1977).

77. INA § 101(b)(1)(D); 8 U.S.C.A. § 1101(b)(1)(D) (Supp. 1987), as amended by IRCA of 1986, § 315(a).

78. *Fiallo,* 430 U.S. at 794–95.

79. *See, e.g.,* C. Gordon & H. Rosenfield, *supra* note 6, at § 2.2a (Supp. 1986); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability,* 52 N.Y.U. L. Rev. 1137, 1148–49 (1977).

80. *Fiallo,* 430 U.S. at 793 n.5 (emphasis added).

81. *See, e.g.,* Garcia-Mir v. Smith, 766 F.2d 1478, 1485 (11th Cir. 1985), *cert. denied sub nom.* Marquez-Medina v. Meese, 106 S. Ct. 1213 (1986) (parole decisions; court emphasizes that this standard is more deferential to the administrators than the usual "abuse of discretion" standard); Bertrand v. Sava, 684 F.2d 204, 212–13 (2d Cir. 1982) (parole decisions); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982) (denial of nonimmigrant admission).

more, some district courts have found in the *Mandel* test the basis for requiring at least additional explanations and justifications by the executive branch.[82]

Applicability of Procedural Due Process Review

Background. The first Supreme Court decisions to consider federal immigration laws appeared as willing to defer completely to Congress and the executive with respect to procedural matters as they were with respect to substantive grounds for exclusion or deportation. But in an important decision in 1903, the Court firmly asserted an independent judicial role in examining the constitutional sufficiency of the procedures used to remove an alien.[83] The Court exercised this power over the next several decades, hearing numerous challenges to the proceedings in both exclusion and deportation cases, although the standards for procedural adequacy often were not very demanding.[84]

Knauff and **Mezei.** In 1950, however, the Court reverted to the hands-off rule of the earliest cases as applied to *exclusion* proceedings, seeming to ignore the intervening half-century's decisions.[85] In *United States ex rel. Knauff v. Shaughnessy,*[86] the Court considered the application of Ellen Knauff, the alien wife of a U.S. serviceman, who had come to the United States expecting to be admitted under the War Brides Act. Instead, she was detained at Ellis Island and refused admission, based solely on confidential information. The government claimed that the information related to national security, and it refused to reveal the contents, even to a court in camera. Knauff petitioned for habeas corpus, claiming the right to know and contest the adverse information—a due process claim in its most elemental form. The Supreme Court ruled against her: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[87]

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82. *See, e.g.,* Allende v. Schultz, 605 F. Supp. 1220 (D. Mass. 1985); El-Werfalli v. Smith, 547 F. Supp. 152 (S.D.N.Y. 1982). On at least one occasion a district court has found that INS action implementing a statutory provision failed the *Mandel* test. Lesbian/Gay Freedom Day Comm., Inc. v. INS, 541 F. Supp. 569, 586 (N.D. Cal. 1982). The court of appeals affirmed the judgment on other grounds, however, without reaching the constitutional question, *sub nom.* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983). *See also* Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 531 (D. Mass. 1986) (issuing preliminary injunction against travel restrictions imposed on PLO official, in part because secretary of state's reasons therefor were not "facially legitimate").

83. The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903).

84. *See, e.g.,* Zakonaite v. Wolf, 226 U.S. 272 (1912); Chin Yow v. United States, 208 U.S. 8 (1908).

85. *See* Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1391-92 (1953).

86. 338 U.S. 537 (1950).

87. *Id.* at 544.

The Court compounded the potential harshness of this doctrine three years later in *Shaughnessy v. United States ex rel. Mezei.*[88] Mezei, the habeas petitioner, had lived in Buffalo, New York, for twenty-five years before traveling to Eastern Europe in order, he claimed, to visit his dying mother. When he sought to reenter the United States nineteen months later, he was detained at Ellis Island and ruled excludable after the same type of secret proceedings that had been used in the *Knauff* case. But Mezei's difficulties were more severe than Knauff's. Although the government tried to send him to several other countries, none would accept him. As a result, he faced indefinite confinement at Ellis Island.

The court of appeals, acting on Mezei's habeas corpus petition, ordered his provisional release so that he might rejoin his family in Buffalo. The Supreme Court reversed, reaffirming the *Knauff* doctrine even in this aggravated setting. To the Court it made no difference that exclusion based on secret information (never revealed to the alien or even to the court in camera) would result in the alien's indefinite confinement. The Court stated, "An alien in respondent's position is no more ours than theirs."[89] Although the Court acknowledged that more vigorous independent judicial scrutiny of procedures is usually required for "continually present alien residents," it found that Mezei's former domicile in the United States made no difference. "He is an entering alien just the same," and entitled to no more constitutional protection than first-time arrivals.[90]

Deportation cases. The *Knauff-Mezei* doctrine has generally been applied to require fairly full procedural due process review under the Constitution in deportation cases but to deny it altogether in exclusion cases.[91] Nevertheless, the Supreme Court has held that due process does not apply to some issues open for consideration in deportation proceedings. Specifically, in the 1956 case of *Jay v. Boyd,*[92] the Supreme Court decided that the adjudicators could act adversely on the alien's case on the basis of confidential information that the alien was unable to see or contest, when the issue was not deportability but instead the application of a *discretionary* provision for relief from deportation.[93] In one recent depor-

88. 345 U.S. 206 (1953).
89. *Id.* at 216.
90. *Id.* at 213-16. See the discussion of the reentry doctrine in text at note 36 *supra.*
91. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 3.18.
92. 351 U.S. 345 (1956).
93. *Id.* at 357 n.21.

tation case where a similar issue arose, the court of appeals expressed some doubt about the logic or fairness of such a result, but considered itself bound by *Jay*.[94]

Whether *Jay* is consistent with the Supreme Court's more recent due process case law is a difficult question. Modern decisions do place some government decisions beyond the reach of constitutional due process scrutiny: If the relevant provisions of statute and regulations leave essentially standardless discretion with the administrative authorities, the claim at issue is considered to implicate no deprivation of "liberty" or "property" within the contemplation of the due process clause.[95] But if regulations or other authoritative standards indicate "specific substantive predicates" for grant or denial of the benefit, procedural due process review comes into play.[96]

The *statutory* provisions in the INA for discretionary relief from deportation do vest express discretion in the attorney general and his or her delegates. *Jay* considered this "unfettered discretion" dispensed entirely as "a matter of grace."[97] But the judicial, legislative, and administrative treatment of these relief provisions has evolved considerably since that 1956 case. A leading decision, written in 1966 by Judge Henry Friendly and widely followed thereafter, held that Congress did not vest the attorney general with "ad hoc discretion" to be exercised at the whim of the decision maker. Instead, the agency's discretion is "subject to the restraint of the obligation of reasoned decision and hence of reasoned elaboration of a fabric of doctrine governing successive decisions."[98] Numerous precedent decisions by the BIA since 1956 also have spelled out guidelines that help channel the exercise of such discretion. Although Judge Friendly's decision was not addressed to the due process issue, that ruling, combined with the development of the internal administrative standards,[99] may undermine the premises of *Jay v. Boyd,* particularly in light of intervening changes in the Supreme Court's general approach to procedural due process claims.[100]

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94. Suciu v. INS, 755 F.2d 127, 128 (8th Cir. 1985).

95. *See, e.g.,* Olim v. Wakinekona, 461 U.S. 238, 249–50 (1983); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466 (1981).

96. Hewitt v. Helms, 459 U.S. 460, 472 (1983). *See also* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979); Garcia-Mir v. Meese, 788 F.2d 1446, 1449–53 (11th Cir.), *cert. denied sub nom.* Ferrer-Mazorra v. Meese, 107 S. Ct. 289 (1986).

97. 351 U.S. at 354.

98. Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (quoting H. Hart & A. Sacks, The Legal Process 172, 175–77 (tent. ed. 1958)).

99. These developments are reviewed in more detail in chapter 6.

100. For example, *Jay* relied significantly on an analogy between discretionary relief and what the Court saw as unfettered discretion in the decision to release con-

Exclusion cases. Even in exclusion cases, there are signs that the severity of the *Knauff-Mezei* doctrine may be abating. In *Landon v. Plasencia,*[101] the Court considered a due process complaint filed by a returning lawful permanent resident. After a two-day sojourn in Mexico, Plasencia had been caught at the border, apparently in the process of smuggling in other, undocumented aliens. Although the Court ruled that she could properly be placed in exclusion, rather than deportation, proceedings, it held that she was entitled to the full measure of process due any other lawful permanent resident alien who had been continuously residing in this country. The proceedings, in other words, could be labeled exclusion proceedings, but they would have to meet fairly exacting procedural due process scrutiny because of the alien's significant ties to the community. The Court remanded the case to the district court in order to determine, under the general framework established by *Mathews v. Eldridge,*[102] whether the procedures employed met constitutional requirements.[103]

Mezei was not overruled. Instead, it was distinguished on the ground of Mezei's lengthy absence (nineteen months). The Court's basic rationale suggests, however, that future cases involving lengthy absences will not depend routinely on the length of time away, but on an assessment of whether the alien maintained significant ties during the absence. After *Plasencia,* due process protection no longer turns entirely on the distinction between exclusion cases and deportation cases—that is, on whether the alien is at the border or in the interior of the country. In some settings, at least, the courts may undertake a more sensitive inquiry into the alien's community ties in assessing procedural requirements under the Constitution.[104]

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victed criminals on parole. 351 U.S. at 354. More recently, however, the Court has ruled that even parole release decisions may be subject to procedural due process scrutiny, particularly when specific guidelines for the decision have been authoritatively established. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979).

101. 459 U.S. 21 (1982).

102. 424 U.S. 319 (1976).

103. *Plasencia,* 459 U.S. at 34-37. The Court was careful to distinguish this case, however, from those like *Knauff:* "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application." *Id.* at 32.

104. *See generally* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond,* 44 U. Pitt. L. Rev. 165 (1983); Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin,* 44 U. Pitt. L. Rev. 237 (1983); Note, *Developments in the Law—Immigration Policy and the Rights of Aliens,* 96 Harv. L. Rev. 1286, 1324-34 (1983).

In camera review of confidential information. Another aspect of the *Knauff-Mezei* doctrine has also eroded, but more as a matter of practice than because of a change in constitutional doctrine. Today, the government rarely seeks to exclude aliens based on secret information not shared with the individual and thus not subject to direct challenge. But when it seeks to do so,[105] the government no longer resists sharing that information with the reviewing court. In *El-Werfalli v. Smith,*[106] for example, the court expressed strong doubts about whether information the government had placed on the public record would sustain the exclusion at issue under the *Mandel* test. Only after reviewing the in camera submissions, which were never seen by the alien or his attorney, did the court uphold the government's action.[107] In camera review, although it falls short of full adversarial testing, is of course a more familiar practice now than it was in the 1950s. Congress has expressly mandated such review in several settings to provide a check against executive abuses or mistakes.[108] Whether this procedure adequately safeguards the relevant interests in immigration cases, however, is still a matter of controversy.[109]

Standards for Procedural Due Process Review

Subconstitutional rulings. Broad challenges to the fundamental design of notice and hearing in immigration cases are relatively rare, because the INA itself, as amplified by the regulations, provides for fairly complete procedural protection in deportation and exclusion cases.[110] When such challenges arise, courts often dis-

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105. Such a procedure is now authorized by INA § 235(c); 8 U.S.C. § 1225(c) (1982).

106. 547 F. Supp. 152 (S.D.N.Y. 1982) (denial of readmission to Libyan student).

107. *Id.* at 154. *See also* Azzouka v. Sava, 777 F.2d 68, 76 (2d Cir. 1985) (expressing general approval of procedures and standards used in *El-Werfalli*); Suciu v. INS, 755 F.2d 127 (8th Cir. 1985) (permitting use of secret information in deportation case, but only with respect to denial of discretionary relief; court reviewed national-security information in camera).

108. *See, e.g.,* Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) (discussing in camera review procedures under the Freedom of Information Act); United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (similar procedures under the Foreign Intelligence Surveillance Act). *See also* Molerio v. FBI, 749 F.2d 815 (D.C. Cir. 1984) (summary judgment proper, based on in camera review of documents protected by state-secrets exception).

109. *See, e.g.,* Abourezk v. Reagan, 785 F.2d 1043, 1060 (D.C. Cir.), *cert. granted,* 107 S. Ct. 666 (1986) (remanding and expressing "grave concern" over district court's reliance on in camera submissions); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985) (rejecting use of in camera information to sustain visa denial).

110. *See* INA §§ 235–236; 8 U.S.C. §§ 1225–1226 (1982) (exclusion), INA § 242; 8 U.S.C. § 1252 (1982) (deportation), and the corresponding regulations in 8 C.F.R. pts. 235, 236, and 242 (1986).

pose of them on subconstitutional grounds, construing applicable statutes to require certain procedural protections, thereby avoiding potential due process problems that might arise if the statutes were interpreted otherwise.

Two Supreme Court cases exemplify this approach. In 1950, in *Wong Yang Sung v. McGrath,*[111] the Court invalidated the traditional practice whereby immigration inspectors regularly served as deportation hearing officers. Two objections to this practice predominated. First, such a rule mixed prosecutive and adjudicative functions because the hearing officer retained broad authority to subpoena and question witnesses or otherwise to develop the record. Second, immigration inspectors might one day serve as investigators and another day as adjudicators (although, by regulation, they could not adjudicate cases they had personally investigated), further risking bias. In an opinion filled with reflections on the constitutional requirement for fair hearings in deportation cases, the Court held that future deportation hearings would have to conform to the separation-of-functions requirements of another statute, the Administrative Procedure Act (APA).[112]

Similarly, in the 1966 case of *Woodby v. INS,*[113] the Court ruled that the government must carry the burden of proof in a deportation case and must establish deportability by "clear, unequivocal, and convincing evidence."[114] The majority opinion discussed due process concerns, and it rested the holding in part on "the drastic deprivations that may follow" the deportation of a resident alien. But the ruling, strictly viewed, amounted solely to an exercise in statutory construction. In a vigorous dissent, Justice Clark charged that the majority was engaging in disingenuous interpretation, be-

111. 339 U.S. 33 (1950).

112. *Id.* at 45–51.

113. 385 U.S. 276 (1966).

114. *Id.* at 276. The impact of such a holding is less significant than one might expect, however, for two reasons. First, in a majority of deportation cases, the alien concedes deportability, and most of the hearing is devoted to his or her application for various forms of relief from deportation. *See infra* ch. 6. The alien bears the burden of establishing eligibility for such relief and, if the relief is discretionary (most such provisions are), of persuading the decision maker that he or she merits a favorable exercise of discretion. 8 C.F.R. § 242.17(e) (1986); *see* Kimm v. Rosenberg, 363 U.S. 405, 408 (1960). Second, even when deportability is contested, INA § 291; 8 U.S.C. § 1361 (1982) contains a special burden-of-proof provision for what may be a crucial issue in a deportation proceeding, especially when the charge is entry without inspection. That section requires the alien to show "the time, place and manner of his entry into the United States." If this burden is not sustained, the alien "shall be presumed to be in the United States in violation of law." Before the section 291 presumption can take effect, however, the government must establish that the deportation respondent is an alien. For examples of how the section 291 presumption works in practice, see Paointhara v. INS, 708 F.2d 472 (9th Cir. 1983); Corona-Palomera v. INS, 661 F.2d 814 (9th Cir. 1981).

cause Congress had already clearly determined, in his view, that the government's burden was to be the more usual "preponderance of the evidence."

The majority's approach has the merit of avoiding unnecessary constitutional rulings, but sometimes the day of reckoning cannot be long avoided. In fact, Congress reacted to *Wong Yang Sung* almost immediately, enacting new provisions to exempt deportation hearings from some of the strict requirements of the APA. The Supreme Court thus returned to the separation-of-functions controversy in 1955, and found the new provisions constitutional with surprising ease.[115] Whether the *Woodby* rule would meet the same fate is unknown, of course. Bills to reduce the government's burden of proof to the "preponderance of the evidence" standard have on occasion come close to enactment, but none have become law.[116]

Constitutional review. The more common due process cases in the immigration field involve case-specific challenges to administrative implementation of the basic provisions—claims of constitutional unfairness in light of the particular circumstances of the case. For example, in *Landon v. Plasencia,*[117] the alien contended that a mere eleven hours' notice before exclusion proceedings began was constitutionally insufficient in light of the potentially complex factual issues involved in her case. As mentioned earlier, the majority in the Supreme Court first decided that, as a permanent resident alien, she could claim the full measure of due process protection even though she was in exclusion proceedings. It then remanded the case for further development of the parties' claims under the due process test set forth in *Mathews v. Eldridge.*[118]

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115. Marcello v. Bonds, 349 U.S. 302 (1955). The new section at issue in *Marcello* contained its own separation-of-functions provisions. These provisions were less stringent than those of the APA, but they were considered constitutionally adequate. Today the INA still allows for the commingling of prosecutive and adjudicative functions, but administrative practice has moved far beyond such arrangements. Current deportation proceedings generally conform to the usual model of trial-type hearings, and they are conducted by an immigration judge who is no longer an INS official and never serves as an investigator or enforcement officer. The government's side is ordinarily represented by an INS trial attorney. *See generally* T. Aleinikoff & D. Martin, *supra* note 35, at 87–91.

116. Although early versions of the Simpson–Mazzoli bill contained such a change, the IRCA, enacted in 1986, does not address the subject. The new marriage fraud provisions, however, do establish a preponderance standard for a limited set of issues affecting deportability. INA § 216(b)(2), (c)(3)(D); 8 U.S.C.A. § 1186a(b)(2), (c)(3)(D) (Supp. 1987), as added by IMFA of 1986, § 2(a).

117. 459 U.S. 21 (1982).

118. 424 U.S. 319 (1976). *Eldridge* requires an assessment of three factors: the individual interest at stake, the government's interest, and the gain to accurate decision making that can be expected from requiring the procedural protection at issue. The *Eldridge* framework is widely used to decide what process is due with respect to a broad range of administrative practices, and immigration cases increasingly

Justice Marshall dissented from the remand, finding the record already sufficient to hold that the constitutional requirements were not met.

Rights to counsel. Claimed rights to counsel frequently pose due process questions in immigration cases. Because the INA expressly permits the alien to be represented by counsel of his or her choice,[119] such controversies do not arise in their strongest form; that is, immigration judges lack authority to bar counsel from participating in exclusion and deportation proceedings. But because the statute expressly states that such representation shall be "at no expense to the Government," indigent aliens sometimes argue that due process requires appointed counsel, despite the statutory provision to the contrary.[120]

Some courts dismiss such a claim as "particularly dubious."[121] Other courts appear more open to such a possibility, if on the facts of the case "fundamental fairness" would require appointment.[122] But apparently no court has actually ordered the provision of counsel at government expense for immigration proceedings to be held on remand.[123] Statements suggesting that such a requirement might be appropriate in some settings have all been *obiter dictum.* They have usually appeared in cases where the court found that the alien was not prejudiced by the lack of counsel, under the particular circumstances of the case.[124] In any event, the INS has pro-

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employ this analysis. *See, e.g.,* Polovchak v. Meese, 774 F.2d 731, 735 (7th Cir. 1985); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1040 (5th Cir. 1982); Perez-Funez v. District Director, 619 F. Supp. 656, 659 (C.D. Cal. 1985).

119. INA §§ 242(b)(2), 292; 8 U.S.C. §§ 1252(b)(2), 1362 (1982).

120. Such claims arise under the Fifth Amendment's due process clause. Because deportation does not constitute punishment in the constitutional sense (*see supra* note 71), the Sixth Amendment's guarantee of counsel in criminal proceedings is inapplicable. *See* Magallanes-Damian v. INS, 783 F.2d 931, 933 (9th Cir. 1986) (finding no ineffective assistance of counsel based on the tactical decisions complained of); Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir. 1985) (holding two-day continuance to find counsel insufficient).

121. *See, e.g.,* Argiz v. United States Immigration, 704 F.2d 384, 388 (7th Cir. 1983).

122. *See, e.g.,* Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir.), *cert. denied,* 423 U.S. 1050 (1976); Escobar Ruiz v. INS, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986). "Fundamental fairness" is also the test for evaluating claims of ineffective assistance of counsel in immigration proceedings. *See, e.g.,* Ramirez-Durazo v. INS, 794 F.2d 491, 500 (9th Cir. 1986).

123. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 1.23a (comprehensively collecting cases).

124. The BIA has expressly required a showing of prejudice before it will reverse a deportation order because of a claim of lack of counsel or of insufficient time for counsel to prepare. Matter of Santos, Interim Dec. No. 2969 (BIA 1984). This decision includes a thorough discussion of many related issues, with abundant case citations.

mulgated regulations that attempt to ameliorate the difficulties faced by indigent aliens. The regulations now require that all such aliens held for exclusion or deportation proceedings be given a list of free legal services available in the district.[125]

Even though direct appointment of counsel has not been judicially mandated to date, deportation orders have sometimes been ruled invalid on due process grounds related to the absence of counsel or to administrative actions regarded as undercutting counsel's availability or effectiveness. Examples include denial of continuances to permit the alien to find counsel willing to take the case,[126] improper scheduling of masses of cases so as to overload the limited numbers of lawyers willing to represent aliens on a pro bono basis,[127] transfer of aliens to distant detention facilities where legal support would be more difficult to secure,[128] and insufficiently informed or untimely waiver of counsel where facts and law relating to deportability were particularly complex.[129] Such rulings, however, are highly dependent on the precise facts of the individual cases.

Other protections. Because deportation is not considered criminal punishment, several constitutional provisions that specify procedural requirements for criminal trials do not apply directly to immigration proceedings.[130] Courts and agencies sometimes provide equivalent safeguards in the latter setting, however, under the due process rubric of "fundamental fairness." Such an approach provides a check against severe administrative errors or abuses, but usually affords less in the way of clear, bright-line protection for the individual. For example, the Supreme Court ruled in *INS v. Lopez-Mendoza*[131] that the Constitution does not require blanket

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125. *See, e.g.*, 8 C.F.R. §§ 235.6(a), 242.1(c), 242.16(a), pt. 292a (1985). It has been held that, in some circumstances, an alien may eventually win reimbursement of attorneys' fees as a "prevailing party" under the Equal Access to Justice Act (EAJA), 28 U.S.C.A. § 2412(d) (Supp. 1987). Escobar Ruiz v. INS, 787 F.2d 1294 (9th Cir. 1986). *See also* Haitian Refugee Center v. Meese, 791 F.2d 1489 (11th Cir. 1986). The INS contends, however, that the EAJA is inapplicable to administrative proceedings under the INA. 59 Interp. Rel. 88 (1982).

126. Rios-Berrios v. INS, 776 F.2d 859 (9th Cir. 1985).

127. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

128. Louis v. Meissner, 530 F. Supp. 924 (S.D. Fla. 1981). *But see* Ledesma-Valdes v. Sava, 604 F. Supp. 675, 682–83 (S.D.N.Y. 1985) (aliens not protected against custodial transfer to distant district simply because they have retained local counsel). *See also* Roshan v. Smith, 615 F. Supp. 901 (D.D.C. 1985) (challenge to opening of new detention facility in rural Louisiana, based in part on the interference with existing and potential lawyer-client relationships that large-scale custodial transfers there would cause, dismissed as, at best, premature).

129. Partible v. INS, 600 F.2d 1094 (5th Cir. 1979). *But see* Cobourne v. INS, 779 F.2d 1564 (11th Cir. 1986) (counsel not required when facts and law are clear); Villanueva-Jurado v. INS, 482 F.2d 886 (5th Cir. 1973) (same).

130. *See supra* notes 71, 120.

131. 468 U.S. 1032 (1984).

exclusion from deportation proceedings of evidence seized in violation of the Fourth Amendment. Nevertheless, the Court noted with approval the BIA's practice, under the due process clause, of suppressing evidence obtained through INS misbehavior that results in especially unwarranted invasions of individual rights.[132] Similarly, *Miranda* warnings are not constitutionally required in connection with custody for purposes of deportation.[133] But the BIA and the courts will occasionally exclude statements of the alien, under the due process clause, when it is held that an official's coercive behavior rendered the statements involuntary.[134] Furthermore, hearsay is generally admissible in deportation proceedings, and the alien has no Sixth Amendment right of confrontation and cross-examination. But one court vacated a deportation order when, under the circumstances, the use of an affidavit instead of live testimony was deemed "fundamentally unfair."[135]

Detention

Perhaps the harshest feature of *Mezei*[136] was its approval of seemingly unlimited governmental authority to detain excludable aliens indefinitely if no other country agreed to take them. Before 1980, apparently no cases arose to test the limits or continued vitality of that portion of the *Mezei* ruling. But the 1980 boat lift from the Cuban port of Mariel provided many new opportunities. Over a few months in 1980, some 125,000 undocumented Cubans came to the shores of the United States. Several thousand of them, it

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132. *Id.* at 1051 n.5, citing Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980). *See also* Arguelles-Vasquez v. INS, 786 F.2d 1433 (9th Cir. 1986) (stop based solely on alien's Hispanic appearance would be an egregious Fourth Amendment violation requiring suppression of resulting statements); Matter of Garcia, 17 I. & N. Dec. 319, 321 (BIA 1980) (due process requires termination of deportation proceedings when key evidence consisted of admissions held to be coerced and involuntary). Courts have also occasionally issued injunctions imposing obligations on the INS that are meant to preclude future Fourth Amendment violations. *See, e.g.,* International Molders & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986); Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985). *See also* INS v. Delgado, 466 U.S. 210 (1984) (holding that INS factory sweeps did not amount to seizures of the workers and thus did not violate the Fourth Amendment); Martinez v. Nygaard, 644 F. Supp. 715 (D. Or. 1986) (finding no past INS violations and thus denying damages and injunctive relief).

133. *See, e.g.,* Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975). The regulations do provide for somewhat similar warnings, however, at specified points in the process of detention or hearing. *See* 8 C.F.R. §§ 242.1(c), 242.2(a), 287.3 (1986); T. Aleinikoff & D. Martin, *supra* note 35, at 431–34.

134. *See, e.g.,* Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Matter of Garcia, 17 I. & N. Dec. 319 (BIA 1980).

135. Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983).

136. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *See supra* text at note 88.

turned out, had criminal records in Cuba. Although the government paroled most of the arrivals, it sought to detain those who seemed most dangerous. In the intervening years, it also resumed custody of many of those convicted of crimes in this country, after they completed their regular sentences. Most such detainees have been ruled excludable (in a majority of cases, claims to political asylum were rejected), but Cuba has not agreed to their return. The U.S. government apparently now plans to continue their confinement until return to Cuba becomes possible. Under a strict application of *Mezei,* court challenges to continued detention would all be subject to prompt rejection.

Nevertheless, several courts have scrutinized the government's practices carefully. In the first Cuban detention case, *Rodriguez-Fernandez v. Wilkinson,*[137] the Tenth Circuit distinguished *Mezei* and suggested that there might be constitutional problems with lengthy incarceration. Its holding rested, however, on the view that the government has no statutory authority to detain such aliens beyond an initial period sufficient to inquire about the possibility of sending them on to other countries. The court ordered the release of the petitioner. In a later decision more favorable to the government, *Palma v. Verdeyen,*[138] the Fourth Circuit sustained the detention of a Cuban who had a record of misbehavior here in addition to crimes committed in Cuba. But even in that case, the court examined the government's position carefully in order to determine whether the attorney general had acted arbitrarily or abused his discretion—a standard the court drew from the governing statute rather than the Constitution.

A complicated series of recent cases involved several hundred Cubans incarcerated in the federal penitentiary in Atlanta, which has become the major detention center of "Marielitos" with criminal records. In one important decision in the series, *Fernandez-Roque v. Smith,*[139] the federal district court recognized the legitimacy of government detention of excludable aliens with dangerous criminal records in some circumstances. It went on, however, to find that the due process clause imposes strict procedural and substantive requirements that must be met if incarceration is to con-

137. 654 F.2d 1382 (10th Cir. 1981). *Rodriguez-Fernandez* was followed, in slightly different contexts, in Medina v. O'Neill, 589 F. Supp. 1028 (S.D. Tex. 1984); and Diaz v. Haig, 594 F. Supp. 1 (D. Wyo. 1981). *See also* Paulis v. Sava, 544 F. Supp. 819, 821 (S.D.N.Y. 1982) ("the Constitution imposes some outer limit on the length of time [the alien] can be detained while the government processes his case").

138. 676 F.2d 100 (4th Cir. 1982). *See also* Bertrand v. Sava, 684 F.2d 204, 212–13 (2d Cir. 1982) (emphasizing the narrow scope of judicial review of the district director's parole decisions).

139. 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd,* 734 F.2d 576 (11th Cir. 1984).

tinue past an initial period during which other countries are asked to accept the individuals. These requirements included elaborate hearings in which the government would bear the burden of proof and provision of appointed counsel for indigent detainees. The court of appeals ultimately reversed, however, based on its earlier holding in *Jean v. Nelson*[140] that excludable aliens may not assert constitutional rights.[141]

Jean likewise presented a challenge to detention of excludable aliens, but in a setting different in one important respect from that of *Mezei* and *Fernandez-Roque.* The *Jean* petitioners, Haitian asylum applicants, were not being held indefinitely; their detention would end upon final adjudication of their asylum claims, although that process could require months or even years. If the claims were accepted, the petitioners would be released in the United States; if not, Haiti was willing to accept their return. The petitioners claimed that they were being detained pending final asylum decisions while other asylum claimants were being released on parole. They asserted that the government was thus unconstitutionally discriminating against them on the basis of race and national origin. The government contested this claim on the facts, but the court of appeals, sitting en banc, chose to rest its decision for the government on the broad legal ground that such constitutional claims cannot be made by excludable aliens. The decision by the Eleventh Circuit was striking for its reaffirmation of a severe reading of *Mezei.* Its holding apparently would deny all independent constitutional checks on the treatment of excludable aliens.[142]

The *Jean* petitioners sought review in the Supreme Court, and certiorari was granted.[143] Some observers hoped that the case would provide an occasion for the Supreme Court to clarify the continued vitality of *Knauff* and *Mezei* and to announce a new framework for applying the Fifth Amendment in alien cases, a framework more in line with the more protective due process juris-

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140. 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd as modified,* 105 S. Ct. 2992 (1985).

141. *Fernandez-Roque,* 734 F.2d 576 (11th Cir. 1984). The district court later found other, nonconstitutional grounds for finding a cognizable "liberty" interest and imposing the same procedural requirements, 622 F. Supp. 887 (N.D. Ga. 1985), but the court of appeals reversed once again, Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom.* Ferrer-Mazorra v. Meese, 107 S. Ct. 289 (1986). The latter decision also recounts the lengthy history of the cases involving the Cubans detained in Atlanta. *See also* Perez-Perez v. Hanberry, 781 F.2d 1477 (11th Cir. 1986) (no right under Criminal Justice Act to appointed counsel for these detainees).

142. Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), *aff'd as modified,* 105 S. Ct. 2992 (1985). *See also* Garcia-Mir v. Meese, 788 F.2d 1446, 1450–53 (11th Cir.), *cert. denied sub nom.* Ferrer-Mazorra v. Meese, 107 S. Ct. 289 (1986).

143. 105 S. Ct. 2992 (1985).

prudence that followed *Goldberg v. Kelly.*[144] But the Supreme Court avoided the constitutional questions in *Jean* and held that the court of appeals should have done likewise. It determined that the petitioners were fully protected by the statute and governing regulations, as construed in the Supreme Court's decision, against racial discrimination in the detention decision. The Court therefore vacated the constitutional holdings of the court of appeals and remanded the case for the district court to determine whether lower-level immigration officials had complied with the nondiscrimination norm of the statute and regulations.[145] Justice Marshall, joined by Justice Brennan, wrote a lengthy dissent arguing that the *Mezei* doctrine should be read quite narrowly—with the result that significant constitutional protection would attach to excludable aliens.[146] Further clarification of the *Knauff-Mezei* doctrine by the Supreme Court must therefore await another case.

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144. 397 U.S. 254 (1970) (requiring full prior hearings, including rights of confrontation and cross-examination, before welfare benefits could be terminated). See generally the commentary cited in note 104 *supra.*

145. *Jean,* 105 S. Ct. at 2998–99. The decision by the court of appeals in *Jean* remains the authoritative statement in the Eleventh Circuit, however, regarding the extremely limited constitutional rights enjoyed by excludable aliens. Garcia-Mir v. Smith, 766 F.2d 1478, 1483–85 (11th Cir. 1985), *cert. denied sub nom.* Marquez-Medina v. Meese, 106 S. Ct. 1213 (1986).

146. *Jean,* 105 S. Ct. at 3005–12.

IV. ADMISSION CATEGORIES

The American immigration system allows for the admission of two broad classes of aliens, immigrants and nonimmigrants. An alien in either group must show initially that he or she is eligible for admission by meeting the requirements of one of the qualifying categories and then must also show that he or she is not disqualified by one of the grounds for exclusion appearing in section 212(a) of the INA.[147] This chapter reviews the qualifying categories; the exclusion grounds are discussed more fully in chapter 5.

Nonimmigrant Categories

An alien who wishes to come to the United States as a nonimmigrant must fit into one of numerous qualifying categories,[148] such as tourists, who are generally granted an entry period not to exceed six months; students and those in various business-related categories, who may be allowed entry for longer periods; and diplomats and employees of international organizations, whose stay may be extended indefinitely. Most nonimmigrant categories require that the alien intend the stay to be temporary. The provisions governing several categories specifically mandate a determination that the alien "has a residence in a foreign country which he has no intention of abandoning" before a visa can issue.[149] Consular officers

147. 8 U.S.C.A. § 1182(a) (1970 & Supp. 1987).

148. The categories are based, in general, on the lettered subparagraphs of INA § 101(a)(15); 8 U.S.C.A. § 1101(a)(15) (1970 & Supp. 1987). For a complete listing of these categories, followed by a thorough description of the requirements for each, see C. Gordon & H. Rosenfield, *supra* note 6, at §§ 2.6–2.16.

149. INA §§ 101(a)(15)(B) (visitors), (F) (students), (H) (temporary workers), (J) (exchange visitors), (M) (vocational students); 8 U.S.C.A. §§ 1101 (a)(15)(B), (F), (H), (J), (M) (1970 & Supp. 1987). Under the "dual intent" doctrine, however, it is sometimes possible to find that an alien has such an intent with regard to the foreign residence even when an application for an immigrant visa is under way, on the theory that the alien contemplates a permanent stay in the United States only if the law allows it and the immigrant visa application proves successful. *See* Matter of H__ R__, 7 I. & N. Dec. 651, 654 (Reg. Comm'r 1958); Brownell v. Carija, 254 F.2d 78, 80 (D.C. Cir. 1957).

tend to be particularly careful in reviewing this qualification in countries known for a high incidence of visa abuse, because a significant percentage of the illegal immigrant population currently in this country consists of those who were admitted as nonimmigrants but then overstayed the admission period.

The law places no numerical limits on nonimmigrant admissions. Control is maintained through the qualitative requirements reflected in the categorical provisions of INA § 101(a)(15)[150] and most significantly by application of the grounds for exclusion appearing in section 212(a).[151] In fiscal year 1982, the last year for which such statistics are available, INS recorded 11,779,359 nonimmigrant admissions; 79.4 percent of these were in the B-2 category ("temporary visitors for pleasure," the official category for tourists), and 10.4 percent were in the B-1 category ("temporary visitors for business").[152]

Immigrant Categories

Not surprisingly, the law imposes more demanding requirements, both substantively and procedurally, on persons who seek to come to the United States as immigrants—that is, for permanent residence.[153] In addition, since 1921, the immigration statutes have placed annual numerical limits on most such immigration. The character of those limits changed considerably in 1965, however, when Congress abolished the national-origins quota system in favor of a more neutral preference system. Currently, the basic preference provisions of the law allow the immigration of 270,000 persons annually,[154] with the numbers allocated among six basic preference categories.[155] Most of these admission numbers, some 80 per-

150. 8 U.S.C.A. § 1101(a)(15) (1970 & Supp. 1987).

151. 8 U.S.C.A. § 1182(a) (1970 & Supp. 1987).

152. U.S. Dep't of Justice, 1982 Statistical Yearbook of the Immigration and Naturalization Service, at table NIM 1.

153. Any alien who wishes to come to the United States is presumed to be an immigrant and therefore subject to the more stringent limitations, unless he or she carries the burden of demonstrating entitlement to classification in one of the nonimmigrant categories. INA § 214(b); 8 U.S.C. § 1184(b) (1982). *See also* INA § 203(d); 8 U.S.C. § 1153(d) (1982) (presumption that immigrants are nonpreference immigrants—the least favored category).

154. INA § 201(a); 8 U.S.C. § 1151(a) (1982). In addition, no single country may claim more than 20,000 of these 270,000 admission spaces in a single year. Special allocation rules apply to the countries affected by this limitation. (There are now about a half-dozen so limited.) *See* INA § 202; 8 U.S.C.A. § 1152 (1970 & Supp. 1987).

155. INA § 203(a); 8 U.S.C. § 1153(a) (1982).

cent, are reserved for family reunification, based on a variety of types and degrees of family relationships. The balance of the numbers are granted to persons with occupational skills or abilities needed in the United States. If aliens in the preference categories do not use all of the 270,000 available spaces, theoretically the remaining spaces are open for "nonpreference" admissions. But because many preference categories have built up a considerable backlog, nonpreference admission has not been available since 1978, and there is no realistic prospect that numbers will become available for nonpreference immigration in the future.

The preference categories are as follows:[156]

First preference: Unmarried sons or daughters[157] of U.S. citizens (20 percent of numerically limited immigration).

Second preference: Spouses or unmarried sons or daughters of lawful permanent resident aliens (26 percent, plus unused numbers from the first preference category).

Third preference: "[Q]ualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences or arts are sought by an employer in the United States" (10 percent).

Fourth preference: Married sons or daughters of U.S. citizens (10 percent), plus unused numbers from the first three preference categories).

Fifth preference: Brothers or sisters of U.S. citizens (24 percent, plus unused numbers from the first four preference categories).

Sixth preference: "[Q]ualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States" (10 percent).

In addition to these 270,000 admission spaces reserved for preference immigrants, the law allows for the admission, unconstrained by numerical limits, of "immediate relatives."[158] That term embraces spouses, parents, and children of U.S. citizens.[159] (The citi-

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156. *Id.*

157. According to the INA, a *child* is a person who is under age twenty-one and unmarried. INA § 101(b); 8 U.S.C.A. § 1101(b) (1970 & Supp. 1987). The act therefore uses the phrase *sons or daughters* when Congress wished to refer to people with the same basic family relationship, but who may be married or age twenty-one or older. *See infra* text at note 175.

158. INA § 201; 8 U.S.C. § 1151 (1982).

159. INA § 201(b); 8 U.S.C. § 1151(b) (1982). Note that the immediate-relative category includes only children (i.e., under twenty-one and unmarried), not all sons and daughters. *See supra* note 157.

zen must be at least twenty-one years old in order to petition for a parent's admission.) In fiscal year 1985, admissions of immediate relatives exceeded 200,000 for the first time. The law also provides for admissions, free of numerical ceilings, of persons in a handful of small, specialized categories labeled "special immigrants."[160] These admissions do not exceed a few thousand each year.

As a further addition to the 270,000 ceiling, the statute permits the admission of refugees screened and selected abroad.[161] Unlike immediate relatives, however, this category is not entirely free of numerical constraints. Although the statute does not set a uniform quota to be observed each year, it does spell out a careful procedure whereby the president, in consultation with Congress, establishes a firm ceiling at the beginning of each fiscal year, based on the best available judgment about refugee needs over the coming twelve months.[162] The law also allows the president to provide additional admission spaces later, following further consultation with Congress, in a genuine emergency.[163] These refugee provisions were adopted in the Refugee Act of 1980[164] to replace a haphazard assortment of earlier arrangements for the resettlement of refugees (including frequent use of the parole power).[165] Since 1980, authorized annual refugee admission ceilings have ranged between 67,000 and 232,000. Actual admissions have been lower, sometimes by a large percentage. Some of the grounds of exclusion are waived for refugees, and the attorney general has discretion to waive most of the others in individual cases.[166]

Initiating the Admission Process

Refugees are screened and selected at U.S. missions overseas designated as refugee processing posts.[167] The individual refugee usu-

160. INA §§ 101(a)(27)(B)–(I), 201(a); 8 U.S.C.A. §§ 1101(a)(27)(B)–(I), 1151(a) (1970 & Supp. 1987). The law also treats as special immigrants resident aliens returning from a trip abroad, so that such persons will not be counted more than once against the numerical quotas. INA § 101(a)(27)(A); 8 U.S.C. § 1101(a)(27)(A) (1982).

161. INA §§ 101(a)(42), 201(a), 207; 8 U.S.C. §§ 1101(a)(42), 1151(a), 1157 (1982).

162. INA § 207(a), (d), (e); 8 U.S.C. § 1157(a), (d), (e) (1982).

163. INA § 207(b); 8 U.S.C. § 1157(b) (1982).

164. Pub. L. No. 96-212, 94 Stat. 109 (1980).

165. *See generally* Martin, *The Refugee Act of 1980: Its Past and Future,* in *Transnational Legal Problems of Refugees,* 1982 Mich. Y.B. Int'l L. Stud. 91; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9 (1981).

166. INA § 207(c); 8 U.S.C. § 1157(c) (1982).

167. This feature stands in sharp contrast to the provisions for asylum, which are applicable only to people who reach the United States on their own and then claim protection against return based on a fear of persecution in the home country. In

ally initiates the process of applying for admission, although the government ensures careful coordination with sponsoring organizations in the United States before the alien actually moves to this country. The Refugee Act also established a framework for providing federal assistance to refugees during the first three years after their admission.[168]

For nearly all aliens who are not refugees, the immigration process is initiated officially not by the alien in a foreign country but by a person in the United States—a relative or intended employer—who files a petition with the INS or the Labor Department to demonstrate the requisite family relationship or employment need.[169] Such a petition, filed by a qualified petitioner, is indispensable. Merely having a brother who is a U.S. citizen, for example, will not qualify an alien for a fifth-preference visa if the citizen brother refuses to file a visa petition. Once the INS approves, it sends the endorsed petition to the consular post in the country where the alien will apply for the visa, and the consul carries out further processing there before an immigrant visa is issued. The consular process may require extensive documentation (police certificates, health clearances, and the like) to demonstrate that the alien is not disqualified under the grounds of exclusion set forth in section 212(a) of the INA.[170] In addition, as indicated in chapter 2, nonimmigrants already in this country may sometimes adjust status to that of an immigrant without returning home to receive a visa from a U.S. consul. In that case, INS officers make all the determinations ordinarily made by the consul.[171]

Family Reunification

Note that most of the family reunification provisions are designed for the benefit of U.S. citizens. The immediate-relative category, like the first, fourth, and fifth preferences, authorizes only

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such a setting, advance screening is of course inapplicable. Although the concepts of refugee status and political asylum are linked in important ways, the statutory and administrative provisions for overseas refugee programs, governed by INA §§ 207 and 209(a); 8 U.S.C. §§ 1157 and 1159(a) (1982), differ greatly from those for the asylum-related arrangements, governed by INA §§ 208, 209(b), and 243(h); 8 U.S.C. §§ 1158, 1159(b), and 1253(h) (1982). Little litigation addresses the overseas refugee provisions, but a large number of cases deal with political asylum. *See infra* ch. 7.

168. INA §§ 411–414; 8 U.S.C.A. §§ 1521–1524 (1970 & Supp. 1987). *See generally* Chu Drua Cha v. Noot, 696 F.2d 594 (8th Cir. 1982).

169. *See* INA § 204; 8 U.S.C.A. § 1154 (1970 & Supp. 1987).

170. 8 U.S.C.A. § 1182(a) (1970 & Supp. 1987). For the provisions governing visa issuance, see INA §§ 221, 222; 8 U.S.C.A. §§ 1201, 1202 (1970 & Supp. 1987).

171. INA § 245; 8 U.S.C.A. § 1255 (1970 & Supp. 1987). *See supra* text at note 14.

citizens to petition for a visa for the specified relatives. Only the second preference envisions permanent resident aliens as petitioners, and they may petition to bring in spouses and unmarried sons and daughters only (not parents, siblings, or married offspring). Moreover, because this provision appears among the preference categories, such admissions are subject to an annual quota (70,200, plus any numbers not used by first-preference immigrants). Second-preference admissions are badly backlogged, and applicants currently face a delay of at least fifteen months[172] before they will be able to immigrate—a lengthy separation to be endured by members of a nuclear family.[173]

Spouses, children, and parents of citizens, in contrast, enter the country as "immediate relatives." Since immediate relatives are not subject to a quota, these applicants encounter no waiting period—only the delay necessary to process the paperwork. Note also that none of the preference categories apply to parents. Parents can be admitted only as immediate relatives, and therefore only the parents of citizens gain entry. Hence, a new immigrant must ordinarily wait at least five years and become a naturalized citizen before qualifying to bring his or her parents into the country. Moreover, the law grants this power only to petitioning citizens who are at least twenty-one years of age.

Offspring

Much of the reported litigation involving the family reunification categories derives from the complicated statutory definition of *child,* appearing in INA § 101(b)(1).[174] Note, to begin with, that a person can qualify as a child only if he or she is both under age twenty-one and unmarried. Some of the preference categories refer to *sons or daughters* precisely in order to avoid one of these two constraints. For example, offspring age twenty-two or fifty-five or one hundred may be considered sons or daughters, but not chil-

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172. Delays in this category are even worse in badly backlogged countries that regularly reach the per-country ceiling of 20,000 annual admissions. For example, the wait in the second-preference category is now six years for the Philippines and nine years for Mexico.

173. Such a separation applies, however, only to "after-acquired" spouses and children—that is, when the family relationship came into existence sometime after the admission of the principal alien. If the relationship existed before admission, the new applicant may immigrate far more expeditiously under INA § 203(a)(8); 8 U.S.C. § 1153(a)(8) (1982), as a spouse or child "accompanying, or following to join" the principal alien. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 2.27i.

174. 8 U.S.C.A. § 1101(b)(1) (1970 & Supp. 1987). Other family relationships are also determined by reference to this statutory definition. *See, e.g.,* INA § 101(b)(2); 8 U.S.C. § 1101(b)(2) (parents); Matter of Mourillon, 18 I. & N. Dec. 122 (BIA 1981) (siblings).

dren. Similarly, according to the provisions, a married eighteen-year-old is not a child, but does qualify as a son or daughter.[175]

The statute recognizes as children persons in the following categories: legitimate children, stepchildren,[176] legitimated children, certain illegitimate children, adopted children, and certain special categories of adoptive children who fit the provisions for "orphans." In order to count for immigration purposes, some of these relationship must have been established before the child reached a specified age: sixteen in the case of adopted children and orphans, eighteen in the case of stepchildren and legitimated children.

Until recently, the statute recognized illegitimate offspring as children only when a benefit was sought based on the relationship to the natural mother, not the father.[177] In many cases, therefore, a decision has had to be made, on the request of a father whose child arguably was born out of wedlock, whether the child was nonetheless "legitimate"[178] or "legitimated."[179] As with many other family relationship questions, this issue usually turns initially on the law of the state or country of domicile at the relevant time.[180] Were the parents validly married, under a recognizable provision of local law or custom, at the time of the birth? Even if they were not, does the country regard an out-of-wedlock child as the legitimate offspring of the father? If not, have the parents acted so as to "legitimate" the child? The decision process frequently requires the BIA to decide difficult questions of foreign law or U.S. state law.[181] (In deciding on questions of foreign law, immigration authorities often receive assistance from the staff of the Library of Congress.[182]) Such dependence on local law also means

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175. A "son" or "daughter" must once have qualified as a "child" under section 101(b). Lau v. Kiley, 563 F.2d 543, 545 (2d Cir. 1977). *See* Nazareno v. Attorney Gen., 512 F.2d 936 (D.C. Cir.), *cert. denied,* 423 U.S. 832 (1975) (persons adopted at age thirty-two do not qualify as sons or daughters).

176. For an account of the clashing judicial and administrative decisions that have shaped the current interpretation of the stepchild provision, see Annot., 54 A.L.R. Fed. 182 (1981); Matter of McMillan, 17 I. & N. Dec. 605 (BIA 1981) (reluctant BIA acquiescence in judicial interpretation, which requires no showing of preexisting family unit or "active parental interest" on the part of the putative stepparent).

177. INA § 101(b)(1)(D); 8 U.S.C. § 1101(b)(1)(D) (1982). *See* Fiallo v. Bell, 430 U.S. 787 (1977) (sustaining this distinction against an equal protection challenge). For the 1986 amendment, see *infra* note 187.

178. INA § 101(b)(1)(A); 8 U.S.C. § 1101(b)(1)(A) (1982).

179. INA § 101(b)(1)(C); 8 U.S.C. § 1101(b)(1)(C) (1982).

180. *See* Lau v. Kiley, 410 F. Supp. 221, 223 (S.D.N.Y. 1976), *aff'd on other grounds,* 563 F.2d 543 (2d Cir. 1977); Matter of Kwan, 13 I. & N. Dec. 302, 305 (BIA 1969).

181. *See, e.g.,* Kaliski v. District Director, 620 F.2d 214 (9th Cir. 1980) (determination of legitimation under California law).

182. *See, e.g.,* Matter of Lee, 16 I. & N. Dec. 305 (BIA 1977); Matter of Hassan, 16 I. & N. Dec. 16 (BIA 1976).

that results can differ widely depending on the child's place of birth. For example, all children born in the People's Republic of China, Haiti, Guatemala, and several other countries are considered legitimate, as those countries recognize full rights in such children, regardless of the marital status of their natural parents.[183]

Nevertheless, local law is not always dispositive. For example, some procedures considered to be legitimation under local practice do not qualify as such for purposes of the federal immigration laws. The BIA has interpreted the term *legitimated* in the INA to refer only to those children born out of wedlock who have been accorded legal rights (e.g., rights to family support or to inheritance upon the death of the parents) that are identical to those enjoyed by legitimate children.[184] Some courts have cast doubt on the validity of such a stringent requirement when the differences between the rights of legitimate children and those of children the country of domicile considers legitimated are slight.[185] The recent trend, however, is to defer to the agency's construction of the statute, owing to possible risks of fraud if a more relaxed rule is applied and also to the administrative benefits of a consistent bright-line rule that can be applied worldwide.[186]

The Immigration Reform and Control Act of 1986 should sharply reduce the number of cases in which the BIA and the courts need to make a difficult determination of legitimacy or legitimation, for it amended INA § 101(b)(1)(D) to recognize illegitimate children as children of the natural father as well as the natural mother. But the 1986 amendment will not eliminate such litigation altogether, for it contains a potentially important proviso: Such a person is a statutorily recognizable child of the father only "if the father has or had a bona fide parent-child relationship with the person."[187]

Marriages

A second major area of contention centers on immigration based on marriage. Sham marriages that lead to immigration benefits appear to be on the increase, as more and more aliens apparently view marriage to an American citizen or lawful resident alien as

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183. *See* Lau v. Kiley, 563 F.2d 543 (2d Cir. 1977) (China); Matter of Richard, 18 I. & N. Dec. 208 (BIA) (1982) (Haiti); Matter of Hernandez, 17 I. & N. Dec. 7 (BIA 1979) (Guatemala).

184. Matter of Reyes, 17 I. & N. Dec. 512 (BIA 1980); Matter of Remy, 14 I. & N. Dec. 183 (BIA 1972). *See generally* Annot., 63 A.L.R. Fed. 520 (1983).

185. *See* Reyes v. INS, 478 F. Supp. 63, 66 (E.D.N.Y. 1979); Delgado v. INS, 473 F. Supp. 1343, 1348 (S.D.N.Y. 1979).

186. *See* De Los Santos v. INS, 690 F.2d 56, 60 (2d Cir. 1982).

187. 8 U.S.C.A. § 1101(b)(1)(D) (Supp. 1987), as amended by IRCA of 1986, § 315(a).

the most advantageous route to permanent residence for themselves.[188] This increase has challenged the government to develop more effective enforcement, so as to identify and punish fraudulent behavior, and Congress recently enacted a new law, the Immigration Marriage Fraud Amendments of 1986 (IMFA), to facilitate such enforcement.[189] (Its provisions are reviewed shortly.) But the increase in questionable marriages also sharpens an underlying substantive question of some complexity. What makes a marriage a sham? Or put differently, what sorts of marriages must be recognized for immigration purposes?

Mere validity of the marriage under the laws of the jurisdiction where the marriage took place is not sufficient to make it a valid marriage for immigration purposes, although this is a necessary prerequisite.[190] For example, early decisions held that the administrative agencies have the authority to refuse recognition of a polygamous marriage in granting immigration benefits, even if the marriage was entirely lawful in the alien's home country.[191]

Using this basic authority to respond to questionable marriages, the immigration agencies at one time sought to deny immigration benefits in two distinct situations: (1) when the underlying marriage was fraudulent, that is, when the parties "did not intend to establish a life together at the time they were married,"[192] and (2) when the underlying marriage was nonviable or "factually dead" at the time the immigration benefit was sought.[193] The courts proved quite unreceptive to the second test, believing that it invited overly intrusive inquiries by immigration officers, who otherwise had no particular expertise in evaluating the ongoing health of a marriage.[194] The BIA eventually agreed and has dropped the

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188. *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary,* 99th Cong., 1st Sess. 57–62 (1985) (testimony of David North), *passim. See generally* Roberts, *Marital Status and the Alien,* 62 Interp. Rel. 64 (1985).

189. Pub. L. No. 99-639, 100 Stat. 3537.

190. *See* United States v. Sacco, 428 F.2d 264, 268 (9th Cir.), *cert. denied,* 400 U.S. 903 (1970) (validity of marriage ordinarily judged by the law of the place where it is celebrated); Matter of Annang, 14 I. & N. Dec. 502 (BIA 1973).

191. *See, e.g.,* Mason v. Tillinghast, 26 F.2d 588 (1st Cir. 1928); Hi v. Weedin, 21 F.2d 801 (9th Cir. 1927); Matter of Darwish, 14 I. & N. Dec. 307 (BIA 1973). *See also* Adams v. Howerton, 673 F.2d 1036 (9th Cir.), *cert. denied,* 458 U.S. 1111 (1982) (finds congressional intent to disallow benefits to aliens based on homosexual marriage).

192. This language, taken from Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975), has become the standard formulation of the test for sham marriages. *See also* Lutwak v. United States, 344 U.S. 604, 611–12 (1953) (sustaining conspiracy convictions based on fraudulent scheme under the War Brides Act and finding it unnecessary to determine whether the marriages were valid under French law).

193. *See, e.g.,* Matter of Kitsalis, 11 I. & N. Dec. 613 (BIA 1966).

194. *See, e.g.,* Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979); Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978). These deci-

"nonviability" test.[195] The first test remains in full force, however. The crucial determination now focuses solely on the parties' intentions at the time the marriage was celebrated. A later falling out will not disable them from obtaining immigration benefits—up to the point when a formal divorce or written separation agreement takes place.[196]

In 1986, Congress dramatically altered the INA provisions governing immigration based on marriage, in order better to deter and detect fraudulent marriages. Under the most important amendment, all persons who obtain lawful permanent resident status based on a marriage that is less than two years old at the time (whether under the second preference or as an immediate relative) will receive such status "on a conditional basis."[197] The conditional period lasts for two years.[198] Within the final ninety days of that two-year period, both spouses must return to the INS to petition to have the conditional status "removed," and a successful removal petition results in full-fledged permanent resident status for the alien. The legislation thus requires the alien to take the initiative to contact the INS and provide certain information that may help in judging the original authenticity of the marriage. Under the earlier system, in contrast, even if the INS received information showing that a marriage was fraudulent from its inception, it often had difficulty locating the alien involved—and all the while the alien retained a green card of permanent validity. "Conditional basis" papers will automatically expire at the end of two years.

The petition for removal, filed toward the end of the two-year period, must provide certain specified information.[199] Congress de-

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sions cast no doubt on the first test, however—even though intrusive INS questioning is (understandably) employed at times in determining whether the parties intended at the time of marriage to establish a life together. *See* Horta-Ruiz v. INS, 635 F. Supp. 1039, 1040 (S.D.N.Y. 1986); Trillin, *Making Adjustments,* New Yorker, May 28, 1984, at 50 (a perceptive account of immigration practice in Houston).

195. Matter of McKee, 17 I. & N. Dec. 332 (BIA 1980). The BIA stressed, however, that later separation may in some circumstances provide evidence of the parties' sham intent at the time of marriage.

196. *See* Matter of Lenning, 17 I. & N. Dec. 476 (BIA 1980) (written separation agreement); Matter of Boromand, 17 I. & N. Dec. 450, 453-54 (BIA 1980) (legal termination of marriage).

197. INA § 216; 8 U.S.C.A. § 1186a (Supp. 1987), added by IMFA of 1986, § 2. Congress passed this legislation during the final week of the Ninety-ninth Congress and failed to notice that the IRCA of 1986, likewise passed that week, also added a new section 216 to the INA (8 U.S.C.A. § 1186). Congress is expected to correct the numbering early in 1987. Children of a spouse covered by the IMFA's section 216, and whose qualification for permanent resident status is based on the same recent marriage, will likewise receive such status on a conditional basis. INA § 216(g)(2); 8 U.S.C.A. § 1186a(g)(2) (Supp. 1987).

198. Note that the conditional period counts fully toward the necessary period of residence for naturalization. INA § 216(e); 8 U.S.C.A. § 1186a(e) (Supp. 1987).

199. INA § 216(c)(1), (d)(1); 8 U.S.C.A. § 1186a(c)(1), (d)(1) (Supp. 1987).

cided not to authorize the INS to determine the "viability" of the marriage at the two-year mark. If the marriage has been judicially annulled or terminated during the conditional period, however, the conditional status of the alien will also be terminated, and he or she will thenceforth be deportable.[200] Moreover, because both spouses must ordinarily join in the petition, the alien spouse may have trouble gaining the more secure status if the spouses have become seriously estranged. These disqualifying conditions—judicial termination of the marriage or failure of both parties to file—may be waived, however, if the immigration authorities find that "extreme hardship" would result from deporting the alien spouse, or if they determine that the marriage was entered into in good faith by the alien spouse and was terminated for good cause. The disqualifications are similarly relaxed if the originally petitioning spouse has died during the two-year period.[201]

If the petition for removal of the conditional status is denied, or if the parties fail to file before the two-year period ends (again, subject to limited waiver), the alien's permanent resident status terminates and he or she becomes deportable. The relevant determinations are administratively reviewable in deportation proceedings, and judicial review then becomes available as part of the review of any order of deportation.[202]

Congress also stiffened a few other provisions, in order to prevent and punish marriage fraud. For example, the IMFA of 1986 tightens the requirements for the nonimmigrant category for fiancées and fiancés (the K category);[203] strengthens the restrictions on future immigration of persons who have previously been involved in marriage fraud;[204] establishes criminal sanctions for involvement in marriage fraud of up to five years' imprisonment and a maximum fine of $250,000;[205] makes it more difficult for a person who immigrated on the basis of one marriage to bring in a spouse from a subsequent marriage;[206] forbids adjustment of status

200. A divorce after the two-year period will not cause loss of permanent resident status, unless it somehow reveals that the marriage was a sham from the beginning, and the INS chooses—and has the resources—to pursue deportation.

201. INA § 216(c)(1), (c)(4); 8 U.S.C.A. § 1186a(c)(1), (c)(4) (Supp. 1987).

202. INA § 216(c)(2), (c)(3); 8 U.S.C.A. § 1186a(c)(2), (c)(3) (Supp. 1987).

203. INA §§ 214(d), 245(d); 8 U.S.C.A. §§ 1184(d), 1255(d) (Supp. 1987), as amended by IMFA of 1986, § 3.

204. INA §§ 204(c), 212(a)(19); 8 U.S.C.A. §§ 1154(c), 1182(a)(19) (Supp. 1987), as amended by IMFA of 1986, §§ 4, 6.

205. INA § 275(b); 8 U.S.C.A. § 1325(b) (Supp. 1987), added by IMFA of 1986, § 2(d).

206. INA § 204(a)(2); 8 U.S.C.A. § 1154(a)(2) (Supp. 1987), added by IMFA of 1986, § 2(c).

based on a marriage entered into while the alien's deportation or exclusion proceedings were pending; and similarly bars any future immigration by an alien on the basis of such an eleventh-hour marriage until he or she has lived outside the United States for two years.[207]

Labor Certification

Aliens who intend to immigrate under the occupational preference categories (the third and sixth) must obtain labor certification.[208] Certification represents a determination by the Department of Labor (1) that there is an insufficient supply of willing and qualified American workers at the time and place of the alien's expected employment and (2) that the employment "will not adversely affect the wages and working conditions" of American workers.[209] For a few occupations judged to be in chronically short supply (including, e.g., physical therapist, professional nurse, and certain managerial or executive positions), blanket certification is provided under the Labor Department's Schedule A.[210] A longer list of occupations appears on the department's Schedule B; for these occupations, the department considers that an adequate supply of American workers is available throughout the country.

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207. INA §§ 204(h), 245(e); 8 U.S.C.A. §§ 1154(h), 1255(e) (Supp. 1987), added by IMFA of 1986, § 5. These provisions, which apply only to marriages entered into after the effective date of the act (Nov. 10, 1986), render obsolete some recent case law that had disapproved BIA decisions refusing, in the exercise of discretion, to reopen deportation proceedings to consider adjustment-of-status petitions filed on the basis of eleventh-hour marriages. *See, e.g.*, Fazelihokmabad v. INS, 794 F.2d 1470 (9th Cir. 1986); Israel v. INS, 785 F.2d 738 (9th Cir. 1986). The IMFA removes any discretion and flatly forbids adjustment in these circumstances.

The new arrangements for conditional permanent residence also probably render insignificant INA § 241(c)(1); 8 U.S.C. § 1251(c)(1) (1982), which, in most cases, created a rebuttable presumption that a marriage was fraudulent if divorce occurred within two years of the alien's entry. This provision was not repealed by the new act, however. *See* IMFA of 1986, § 5(d).

208. Certification is also required for immigrants seeking nonpreference admission, but as mentioned earlier, backlogs in the preference categories have caused such admissions to disappear. Certification is not required for immediate relatives or immigrants under the family-based preference categories, even if they intend to work.

209. INA § 212(a)(14); 8 U.S.C. § 1182(a)(14) (1982). Similar certification, governed by a special timetable, is required for temporary agricultural workers under the new H-2A provisions added by the IRCA of 1986, § 301. INA §§ 214(c), 216(a); 8 U.S.C.A. §§ 1184(c), 1186(a) (Supp. 1987). (Note that two section 216s currently appear in the INA, as explained in note 197 *supra*.) The Department of Labor also provides advisory labor certification with respect to other temporary workers in the traditional H-2 category. *See* 8 C.F.R. § 214.2(h)(3) (1986); 20 C.F.R. pt. 655 (1986).

210. 20 C.F.R. §§ 656.10, 656.22 (1985).

Absent a waiver, no labor certification will be issued for jobs on Schedule B, and waivers are difficult to obtain.[211]

If an occupation does not appear on either Schedule A or Schedule B, the employer must initiate a process for obtaining individual labor certification.[212] The regulations contain detailed requirements for the employer to advertise the job, recruit through the local job service office or otherwise, and offer terms and conditions of employment that match or exceed those prevailing in the relevant job market.[213] If a qualified American worker responds to the advertisement, certification will be denied, although the employer incurs no obligation to hire that applicant.

This feature of the certification system obviously gives an employer whose major aim is to maximize the chances of bringing in a particular alien a significant incentive to draft the job description so that it fits the alien and virtually no other likely applicant. The Labor Department attempts to guard against such manipulation by requiring employers to prove "business necessity" for any requirements more restrictive than those appearing in its comprehensive *Dictionary of Occupational Titles.*[214] Denial of certification often leads to litigation, particularly when the department finds that the employer's stated job requirements are too strict and hence represent only a "personal preference" rather than a bona fide occupational requirement. Some courts have been quite deferential to the Labor Department on such determinations, in light of its expertise on such matters;[215] others have been more willing to defer to the employer, who is believed to be the best judge of what the job requires.[216]

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211. *Id.* §§ 656.11, 656.23.

212. *Id.* §§ 656.20, 656.21.

213. *See, e.g.,* Industrial Holographics, Inc. v. Donovan, 722 F.2d 1362 (7th Cir. 1983); Production Tool Corp. v. Employment & Training Admin., 688 F.2d 1161 (7th Cir. 1982). For analysis of the standards for determining the "prevailing wage," see, e.g., *Industrial Holographics,* 722 F.2d at 1365–68; Golabek v. Regional Manpower Admin., 329 F. Supp. 892 (E.D. Pa. 1971).

214. 20 C.F.R. § 656.21(b)(2) (1985). *See* Kwan v. Donovan, 777 F.2d 479 (9th Cir. 1985); Oriental Rug Importers v. Employment & Training Admin., 696 F.2d 47 (6th Cir. 1982); Bodin, *Developments at the U.S. Department of Labor,* 60 Interp. Rel. 809 (1983).

215. *See, e.g.,* Acupuncture Center of Wash. v. Dunlop, 543 F.2d 852 (D.C. Cir), *cert. denied,* 429 U.S. 818 (1976); Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), *cert. denied,* 419 U.S. 1038 (1974).

216. *See, e.g.,* Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974). *Cf.* Ross v. Marshall, 651 F.2d 846, 851–52 (2d Cir. 1981).

V. GROUNDS FOR EXCLUSION AND DEPORTATION

The Immigration and Nationality Act contains thirty-two separate grounds for the exclusion of aliens[217] and nineteen separate grounds for deportation.[218] Although they cover many characteristics understandably seen as undesirable, these multifarious grounds for exclusion and deportation betray no unifying logic, obey no overarching theory. They have accumulated by a process of gradual accretion over the last one hundred years, as successive Congresses have responded to perceived abuses or problems by adding to the two lists. Only rarely has there been a corresponding erosion; old grounds have been repealed infrequently, even when the societal view of the underlying behavior may have evolved considerably.[219] When erosion does occur, it ordinarily takes the form of a congressional decision to give the attorney general the discretionary power to waive a certain ground for an alien or otherwise provide him or her with relief from exclusion or deportation, if the alien satisfies certain precise prerequisites.

This chapter provides a brief summary of exclusion grounds and deportation grounds and a selective treatment of the waiver provisions. The most important grounds for relief from deportation are discussed in a separate chapter, chapter 6. They receive more extended treatment both because they range widely, not being directly tied to particular grounds for deportation, and because they lead to a surprisingly high proportion of the litigation that reaches the federal courts. Indeed, the majority of contested deportation cases involve disputes not over deportability itself but over the provisions for relief from deportation.

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217. INA § 212(a); 8 U.S.C.A. § 1182(a) (1970 & Supp. 1987).

218. INA § 241(a); 8 U.S.C.A. § 1251(a) (1970 & Supp. 1987).

219. For example, the medical and, to some extent at least, societal response to homosexuality has changed considerably since Congress passed the 1952 INA. Nevertheless, "sexual deviation" remains among the exclusion grounds, INA § 212(a)(4); 8 U.S.C. § 1182(a)(4) (1982), prompting a split among the circuits as to its application and current enforceability, as well as a variety of shifting and agonized responses by the agencies involved in enforcement. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 216–32.

Grounds for Exclusion

The grounds for exclusion appearing in INA § 212(a) have been called "a magic mirror, reflecting the fears and concerns of past Congresses."[220] Primary authority for applying the exclusion grounds rests with U.S. consular officers in foreign countries. Because virtually every alien needs to obtain a visa from a U.S. consul before traveling to this country, the consular process screens out most ineligible individuals, and few aliens are ruled excludable at the border. Border inspectors have full authority, however, to consider anew the application of all the grounds for exclusion to any alien applying for admission, even if he or she bears a visa duly issued by a consul.[221]

Moreover, all the grounds for exclusion, unless waived, apply afresh every time an alien enters the United States. Because the act defines "entry" to mean "*any coming* of an alien into the United States, from a foreign port or place or from an outlying possession,"[222] even longtime permanent resident aliens are subject to all these grounds each time they travel abroad and return. To illustrate the operation of this "reentry doctrine," consider the case of an alien who becomes mentally ill twelve years after entry. He is not deportable on that basis.[223] If he recovers and then takes a two-week trip to Europe, however, he could be excluded at the border upon his return as an alien who has had "attacks of insanity,"[224] even though he had experienced no such problems before his initial admission for permanent residence. (Had he become a naturalized citizen, of course, he would not be subject to exclusion.) Fortunately, waivers are more readily available to longtime permanent residents returning to an unrelinquished domicile than they are to other aliens, but such waivers remain discretionary.[225]

The grounds for exclusion may be loosely grouped as shown in the following subsections.[226] The listing after each heading is illustrative rather than exhaustive.

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220. Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975).

221. *See* INA § 221(h); 8 U.S.C. § 1201(h) (1982).

222. INA § 101(a)(13); 8 U.S.C. § 1101(a)(13) (1982) (emphasis added).

223. *See* INA § 241(a)(3); 8 U.S.C. § 1251(a)(3) (1982).

224. INA § 212(a)(3); 8 U.S.C. § 1182(a)(3) (1982).

225. INA § 212(c); 8 U.S.C. § 1182(c) (1982).

226. All the exclusion grounds and most waiver provisions appear in INA § 212; 8 U.S.C.A. § 1182 (1970 & Supp. 1987). Parallel citations to this section of the U.S. Code are not separately provided in the subsections that follow.

Health Grounds

Section 212(a) begins with a series of exclusion grounds addressing physical and mental health or other conditions Congress associated with medical considerations. For example, people with dangerous contagious diseases are excluded,[227] as are those who are "mentally retarded"[228] or are found to be "narcotic drug addicts or chronic alcoholics."[229]

Economic Grounds

The law excludes aliens who "are paupers, professional beggars, or vagrants,"[230] as well as persons who, in the opinion of consular or immigration officials, "are likely at any time to become public charges."[231] The latter ground for exclusion is the one most frequently used to disqualify otherwise eligible applicants for permanent immigration.[232] In implementing the provision concerning public charges, consular officers often require the applicant to submit information about prearranged employment, personal financial resources, promised family assistance, and the like.[233] Also excludable are certain intending immigrants who lack labor certification[234] and certain graduates of foreign medical schools.[235]

Criminal Grounds

Section 212(a)(9) renders excludable any alien who has committed a "crime involving moral turpitude," but includes certain exceptions for minor offenses and crimes committed by juveniles.[236] *Moral turpitude* is not defined in the immigration laws.[237] Aliens

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227. INA § 212(a)(6).
228. *Id.* § 212(a)(1).
229. *Id.* § 212(a)(5).
230. *Id.* § 212(a)(8).
231. *Id.* § 212(a)(15).
232. *See* Study, *Consular Discretion in the Visa-Issuing Process,* 16 San Diego L. Rev. 87, 113-14 (1978).
233. 9 Department of State, Foreign Affairs Manual pt. 3, § 42.91(a)(15) nn.2-5 (1985). *See also* Matter of Kohama, 17 I. & N. Dec. 257 (Assoc. Comm'r 1978) (affidavits of support filed by family members may be probative, even if not legally binding).
234. INA § 212(a)(14).
235. *Id.* § 212(a)(32).
236. *Id.* § 212(a)(9).
237. *Good moral character* is partially defined in INA § 101(f); 8 U.S.C. § 1101(f) (1982), but this is a separate concept. For example, an alien convicted of two gambling offenses cannot be considered to have good moral character, but gambling offenses have been held *not* to constitute crimes involving moral turpitude. *See, e.g.,* Matter of S—, 9 I. & N. Dec. 688 (BIA 1962).

charged under the parallel deportation ground, because of crimes committed in this country, challenged Congress's use of the phrase, claiming that "moral turpitude" constituted an unconstitutionally vague formulation and invited arbitrary and unpredictable application. In 1951 a divided Supreme Court upheld the statute. The Court ruled both that the provision was sufficiently precise to pass constitutional muster and that it reached beyond the category of violent crimes to include those that involve fraudulent conduct.[238]

However problematic the vagueness ruling may have been at the time,[239] case-law developments since 1951 have relieved some of the concerns about arbitrary application. Treatises now contain authoritative lists of offenses that involve moral turpitude and those that do not.[240] Moreover, in applying the provisions to particular cases or offenses, courts and immigration authorities have taken a rather abstract approach that may further minimize the risk of arbitrary or biased application. Rather than retaining authority to decide whether the *individual* alien's behavior was so reprehensible as to involve moral turpitude, the adjudicator must examine in the abstract the criminal statute that was violated. Only if all possible convictions thereunder "inherently" involve moral turpitude will the exclusion or deportation ground be found applicable.[241] Convictions under certain statutes punishing involuntary manslaughter, prison escape, the carrying of a concealed weapon, and fornication, for example, have been held not to involve moral turpitude.[242]

In addition to this general criminal provision, the law contains a specific exclusion ground for those convicted of violating laws relating to "the illicit possession of or traffic in narcotic drugs or marihuana."[243] Waivers of exclusion are more difficult to obtain for drug offenses than for ordinary crimes involving moral turpitude.[244]

Quasi-Criminal and Moral Grounds

The INA also excludes aliens based on other disapproved behavior or conditions, whether or not the behavior resulted in a convic-

238. Jordan v. DeGeorge, 341 U.S. 223 (1951).

239. For a sardonic commentary on the difficulties in applying the concept, see Schmidt v. United States, 177 F.2d 450, 451-52 (2d Cir. 1949) (L. Hand, C.J.).

240. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 4.14; Annot., 23 A.L.R. Fed. 480-594 (1975).

241. *See, e.g.*, McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962); Matter of R—, 6 I. & N. Dec. 444 (BIA 1954).

242. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 391-98.

243. INA § 212(a)(23).

244. *See, e.g., id.* § 212(h).

tion or even violated the law of the country where it occurred. Persons excludable under this category include polygamists,[245] prostitutes and procurers,[246] illiterates,[247] and persons "coming to the United States to engage in any immoral sexual act."[248]

Grounds Related to Immigration Processing

Several exclusion grounds reinforce the basic system of immigration processing. For example, an alien is excludable if he or she does not carry a passport and a visa duly issued by a U.S. consular official, with a few narrow exceptions.[249] Stowaways are excluded.[250] Aliens excluded at the border (under a formal exclusion order) are barred from reentry for one year thereafter, unless they receive special permission from the attorney general.[251] Similarly, aliens who have been deported are barred for a period of five years, also subject to special permission from the attorney general allowing a new application for admission.[252] Those who have sought to procure a visa or other immigration documentation by fraud or misrepresentation are excluded,[253] as are persons who have participated in alien smuggling for gain.[254]

National-Security Grounds

The longest paragraph of section 212(a) excludes anarchists, Communists, and a variety of individuals who advocate Marxism, anarchism, violent overthrow of the government, or other subversive doctrines, or who are affiliated with organizations that do so.[255]

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245. *Id.* § 212(a)(11).

246. *Id.* § 212(a)(12).

247. *Id.* § 212(a)(25).

248. *Id.* § 212(a)(13).

249. INA § 212(a)(20), (21), (26). *See also id.* § 211(a); 8 U.S.C. § 1181(a). Historically, the only significant exception to the visa requirement applied to Canadian nonimmigrants. 8 C.F.R. § 212.1(a) (1986). *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 2.31c. Section 313 of the 1986 IRCA, however, added a new section 217 to the INA, 8 U.S.C.A. § 1187 (Supp. 1987), authorizing a pilot program that will waive visas for tourists from up to eight countries with low visa-abuse rates.

250. INA § 212(a)(18).

251. *Id.* § 212(a)(16).

252. *Id.* § 212(a)(17).

253. *Id.* § 212(a)(19). This ground was reworded in 1986 to render aliens excludable for a wider array of immigration-related frauds. 8 U.S.C.A. § 1182(a)(19) (Supp. 1987), amended by IMFA of 1986, § 6.

254. INA § 212(a)(31).

255. *Id.* § 212(a)(28). The provision was upheld against a First Amendment challenge in Kleindienst v. Mandel, 408 U.S. 753 (1972).

This particular exclusion ground is waivable for nonimmigrants,[256] and the 1977 "McGovern Amendment" established a presumption in favor of waiver for certain affected groups, subject to special decision-making and reporting procedures.[257] Other security-related grounds are more broadly worded and are not waivable. Section 212(a)(27) excludes people who are believed to be seeking to enter "solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." Section 212(a)(29) excludes aliens if there is "reasonable ground to believe [they] probably would" engage in subversive activities such as espionage, sabotage, or public disorder. The interrelation among these various waivable and nonwaivable security-related grounds has been the source of much recent litigation.[258]

Waivers of Excludability

The waiver provisions that fill out section 212(b)-(k) form an intricate pattern, and no attempt is made here to cover all of them. But a few generalizations are worthwhile. Some waiver provisions render certain of the exclusion grounds totally inapplicable to narrowly defined classes. The attorney general has no discretion; such aliens must not be considered excludable. For example, section 212(d)(1) renders the exclusion grounds based on polygamy and illiteracy inapplicable to nonimmigrants. Section 212(b) renders the illiteracy ground completely inapplicable to aspiring immigrants who have close relatives in the United States or are fleeing religious persecution.

Most of the waiver grounds appearing in section 212, however, including those most widely invoked, are discretionary. Therefore, merely meeting the statutory prerequisites—which are often quite demanding in themselves—will not necessarily result in admissibility. The appropriate official of the Department of Justice or the Department of State must decide explicitly to exercise discretion favorably before the waiver will apply.[259]

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256. INA § 212(d)(3).

257. 22 U.S.C. § 2691 (1982 & Supp. II 1984).

258. *See, e.g.,* Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir.), *cert. granted,* 107 S. Ct. 666 (1986); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985). *See generally Exclusion Under Section 212(a)(27) and (a)(28): The Abourezk Decision,* 5 Imm. L. Rep. 57 (1986).

259. *See generally* Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws,* 13 San Diego L. Rev. 144 (1975).

The most important discretionary waiver provisions can be summarized. Section 212(d)(3) provides the attorney general with discretionary power to waive nearly all the exclusion grounds for those who intend to enter the United States as nonimmigrants. The only other waiver provision that approaches section 212(d)(3) in breadth applies only to long-resident immigrants: Section 212(c) grants the attorney general discretion to waive nearly all exclusion grounds for lawful permanent residents who are returning to an unrelinquished domicile of at least seven consecutive years.[260] For unexplained reasons, the handful of nonwaivable exclusion grounds are not quite the same under section 212(c) as under section 212(d)(3).

Arriving aliens who are neither nonimmigrants nor longtime returning residents have far fewer opportunities to obtain waivers. Those who have a spouse, child, or parent who is a U.S. citizen or lawful permanent resident retain the best chances. Such aliens may qualify for discretionary waiver of the exclusion grounds based on criminal behavior,[261] certain health-related conditions,[262] or prior visa fraud.[263] Each such waiver provision differs slightly, and each also contains its own precise set of eligibility standards. For example, to gain a waiver of exclusion based on prior commission of a crime involving moral turpitude, the intending immigrant must show the requisite family relationship, demonstrate that extreme hardship will come to a family member who is a U.S. citizen or lawful permanent resident if entry is disallowed, and prove that admission "would not be contrary to the national welfare, safety, or security of the United States." In addition to all these showings, the alien must also gain a favorable exercise of discretion from the attorney general's delegate.[264]

Grounds for Deportation

The INA's nineteen grounds for deportation[265] cover much of the same conduct as the exclusion grounds do, but by no means do

260. Because section 212(c) has been ruled applicable in deportation proceedings, it is discussed further in chapter 6.

261. INA § 212(h).

262. *Id.* § 212(g).

263. *Id.* § 212(i). *Cf. id.* § 241(f); 8 U.S.C. § 1251(f) (1982), providing similar relief from deportation based on visa fraud. *See generally* Hernandez-Robledo v. INS, 777 F.2d 536, 539–41 (9th Cir. 1985).

264. INA § 212(h).

265. All these grounds are set forth in INA § 241(a); 8 U.S.C.A. § 1251(a) (1970 & Supp. 1987). Parallel citations to this section of the U.S. Code are not provided in the discussion that follows.

they track the exclusion grounds exactly. For example, as indicated earlier, mental illness is a ground for exclusion.[266] Mental illness that develops after entry, however, is not a ground for deportation.[267] Nor is the contracting of a dangerous contagious disease, although such illness would lead to exclusion.[268] Similarly, conviction of a crime involving moral turpitude makes an alien excludable, even if many years have passed since the completion of the sentence.[269] Such a conviction provides ground for deportation, however, only if the crime is committed within five years of entry.[270] This limitation evidently reflects a congressional judgment that the hardships entailed in deporting a longtime resident at some point outweigh the undesirable qualities manifested in such criminal behavior.[271]

Unlike earlier immigration acts, the 1952 Immigration and Nationality Act contains no statute of limitations applicable to deportation.[272] Whatever the ground, the alien may be expelled even if the underlying conduct or quality goes undetected for twenty or thirty years, during which time the alien is a model member of the community. The policy of repose underlying statutes of limitation may still be served in the deportation setting, but only through application of one of the discretionary provisions for relief from deportation discussed in the next chapter. Because they are discretionary, however, those relief provisions are obviously far less predictable in operation than a statute of limitations would be.

Grounds Based on Preentry Characteristics

The deportation grounds most frequently used are those that protect the integrity of the basic system for the screening and initial admission of aliens. These provisions permit a kind of "delayed exclusion" of those who should not have gained entry to begin with.[273] Deportation of such individuals takes place under section

266. INA § 212(a)(2)–(4); 8 U.S.C. § 1182(a)(2)–(4) (1982).

267. An alien who is institutionalized because of mental illness within five years of entry, however, may be deported, unless he or she shows that the condition did not exist prior to admission. INA § 241(a)(3).

268. *Id.* § 212(a)(6); 8 U.S.C. § 1182(a)(6) (1982).

269. INA § 212(a)(9); 8 U.S.C.A. § 1182(a)(9) (1970 & Supp. 1987).

270. INA § 241(a)(4).

271. The five-year time line applies to a few other deportation grounds as well. *See, e.g.,* INA § 241(a)(3) (institutionalization for mental illness), (8) (public charge), (13) (alien smuggling), (15) (violation of certain alien registration laws). This humane congressional policy can be undercut by application of the reentry doctrine: If the nondeportable alien takes a trip abroad, he or she may be excluded at the border. *See* United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); T. Aleinikoff & D. Martin, *supra* note 35, at 326–27.

272. For a summary of such provisions in earlier immigration laws, see T. Aleinikoff & D. Martin, *supra* note 35, at 371 n.22.

273. C. Gordon & H. Rosenfield, *supra* note 6, at § 4.7a.

241(a)(1), which applies to aliens who were excludable at the time of entry, and the first clause of section 241(a)(2), which applies to those who entered without inspection. Entry without inspection has been held to include those who passed through a border post by displaying false documents, since the fraud is deemed to vitiate any ostensible inspection.[274]

Grounds Based on Postentry Behavior

Virtually all the other deportation grounds apply to misbehavior after admission.[275] The most prominent are provisions related to the immigration process itself. For example, the second clause of section 241(a)(2), which ranks second among deportation grounds in frequency of use, renders deportable those aliens who are in the United States in violation of the INA or any other law. It is primarily employed to remove nonimmigrants whose initial admission was proper, but who overstayed or otherwise violated the terms of their admission—for example, by working without authorization.[276] Also deportable are those who fail to comply with the alien registration and reporting requirements of INA § 265,[277] or who assist in alien smuggling for gain.[278]

Next in importance are the provisions that make aliens deportable for violation of the criminal laws. The general criminal ground, section 241(a)(4), calls for the deportation of an alien who is convicted of a crime involving moral turpitude within five years of entry, if the alien is sentenced to one year or more in prison, or who receives two such convictions "not arising out of a single scheme of criminal misconduct" at any time after entry, regardless of sentence. This ground is subject to an important waiver provision. Section 241(b)(2) allows the sentencing judge in the criminal proceedings to enter a recommendation against any deportation based on that conviction. Although labeled a "recommendation,"

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274. Reid v. INS, 420 U.S. 619, 624 (1975); Goon Mee Heung v. INS, 380 F.2d 236, 237 (1st Cir.), *cert. denied,* 389 U.S. 975 (1967).

275. A deportation ground added in 1978 clearly applies to preentry behavior, however. Section 241(a)(19) renders deportable those aliens who participated in Nazi persecution from 1933 to 1945.

276. Most such aliens could also be deported under INA § 241(a)(9)(A), which applies to whose who fail to maintain the nonimmigrant status in which they were admitted or to comply with the conditions of such status. *See* Olaniyan v. District Director, 796 F.2d 373, 375 (10th Cir. 1986). The IMFA of 1986, § 2(b), also added a subparagraph (B) rendering deportable those aliens who receive permanent resident status on a conditional basis (because of the recency of the marriage which led to that status) and who have such status terminated. INA § 241(a)(9)(B); 8 U.S.C.A. § 1251(a)(9)(B) (Supp. 1987).

277. INA § 241(a)(5).

278. *Id.* § 241(a)(13) (within five years of entry).

such a judicial determination is, in fact, binding. The INS thereafter will not take the conviction into account for purposes of deportation or exclusion.[279] The statute provides no further guidance to the sentencing judge in his or her decision whether to recommend against deportation, but a rare reported case, recently published, provides a helpful discussion of factors that might be relevant.[280] The recommendation may be entered only at the time of judgment or sentence, or within thirty days thereafter, and only after due notice is given to the attorney general. Some lawyers overlook the possible deportation consequences of a client's conviction until this time has elapsed. Nevertheless, in most circumstances, an alien's unawareness of these consequences does not provide a basis for withdrawal of a guilty plea.[281] A few state courts have ruled, however, that a failure to warn of the deportation risk amounts to ineffective assistance of counsel, ordinarily voiding the judgment of conviction.[282] A new judgment then starts the clock running anew for purposes of a possible recommendation against deportation under section 241(b).[283] Other states have modified their criminal procedure statutes to afford the alien routine notice of the deportation risk before the court accepts his or her guilty plea.[284]

Other deportation grounds specify particular criminal convictions that may lead to deportation, including violations of the espionage statutes, selective service laws, firearms laws, and certain

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279. C. Gordon & H. Rosenfield, *supra* note 6, at §§ 1.15e, 4.15b. *See also* Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976) (if the judge issues a recommendation against deportation, the attorney general also may not consider the conviction as a negative factor in exercising his or her discretion). *Contra* Delgado-Chavez v. INS, 765 F.2d 868 (9th Cir. 1985).

280. United States v. DeParias, 631 F. Supp. 1530 (S.D.N.Y. 1986).

281. *See, e.g.,* United States v. Campbell, 778 F.2d 764 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975); Government of V.I. v. Pamphile, 604 F. Supp. 753 (D.V.I. 1985); Tafoya v. State, 500 P.2d 247 (Alaska 1972), *cert. denied,* 410 U.S. 945 (1973).

282. *See, e.g.,* People v. Correa, 108 Ill. 2d 541, 485 N.E.2d 307 (1985) (counsel's affirmative misrepresentation of deportation risk); Commonwealth v. Wellington, 305 Pa. Super. 24, 451 A.2d 223 (1982); Edwards v. State, 393 So. 2d 597 (Fla. Dist. Ct. App.), *review denied,* 402 So. 2d 613 (Fla. 1981). *See also* Janvier v. United States, 793 F.2d 449 (2d Cir. 1986) (remanding for hearing on ineffective assistance claim where counsel failed to warn of deportation consequences and failed to seek a section 241(b) recommendation; court reviews legislative history of this provision); Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985) (remanding for evidentiary hearing on ineffective assistance claim where counsel had allegedly assured client that guilty plea would not lead to deportation).

283. *Janvier,* 793 F.2d at 455–56.

284. *See, e.g.,* Cal. Penal Code § 1016.5 (West 1985); Conn. Gen. Stat. Ann. § 54-1j (West 1985); Mass. Gen. Laws Ann. ch. 278, § 29D (West 1985); Or. Rev. Stat. § 135.385 (1984); Tex. Code Crim. Proc. Ann. art. 26.13 (Vernon 1966 & Supp. 1986); Wash. Rev. Code Ann. § 10.40.200 (Supp. 1986).

laws relating to immigration fraud.[285] Another provision singles out drug offenses as a deportation ground.[286] None of the convictions covered by the provisions discussed in this paragraph is subject to the procedure for a binding judicial determination against deportation. This omission may have severe consequences in cases involving rather minor drug offenses. In response to that possibility, Congress adopted a new waiver provision in 1981, but it makes only minor inroads. Under section 241(f)(2), the attorney general now has discretion to waive deportation of a drug offender with close relatives in the United States if his or her only offense was simple possession of thirty grams or less of marijuana and if certain other showings are made.

The balance of section 241(a) consists of deportation grounds based on national security (tracking closely the equivalent exclusion grounds)[287] or on immoral conduct or undesirable traits.[288]

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285. *See* INA § 241(a)(5), (14)–(18).

286. *Id.* § 241(a)(11).

287. *Id.* § 241(a)(6), (7).

288. *Id.* § 241(a)(3) (institutionalization for mental disease), (8) (public charge within five years of entry), (11) (drug addiction), (12) (prostitution).

VI. RELIEF FROM DEPORTATION

Immigration officials may grant relief from deportation under a variety of provisions of the Immigration and Nationality Act. Some such actions result only in a temporary reprieve or merely permit the deportable alien to escape the stigma and consequences of formal deportation, while still leading to his or her removal from the United States. Others are more potent and durable. They provide the possibility of permanent relief and eventual attainment of lawful resident alien status, despite the alien's initial deportability.

This chapter catalogs the most important relief provisions and briefly describes their operation. It begins, however, with a more detailed analysis of one, suspension of deportation under section 244 of the INA.[289] In recent years suspension has probably been the most frequently litigated relief provision. Moreover, it illustrates well several issues that commonly arise in connection with nearly every such provision: issues relating to (1) administrative discretion to deny relief and (2) motions to reopen the deportation proceedings.

Suspension of Deportation

Suspension of deportation under section 244 may be granted only by an immigration judge in a deportation hearing, subject to appeal to the BIA.[290] It comes in two forms, depending on the underlying ground of deportability. Section 244(a)(1) applies unless deportation is based on the more serious grounds relating to criminal behavior and national security that are listed in section 244(a)(2). To qualify under section 244(a)(1), the deportable alien must show seven years of continuous physical presence in the United States, prove good moral character during the period, and demonstrate that deportation would result in "extreme hardship" to the alien or to his or her spouse, parent, or child who is a citizen or lawful permanent resident. If section 244(a)(2) applies, each requirement is stiffened. The alien must show continuous physical presence for ten

289. 8 U.S.C.A. § 1254 (1970 & Supp. 1987).
290. 8 C.F.R. §§ 3.1(b)(2), 244.1 (1986).

years *following the deportable act,* good moral character throughout that period, and "exceptional and extremely unusual hardship" to himself or herself or to the listed family members. Under either subsection, meeting these eligibility requirements constitutes only the first step. The alien must also secure a favorable exercise of the discretion that the INA explicitly vests in the attorney general in deciding whether to grant suspension.[291]

If suspension is granted, the attorney general makes a report to Congress and waits until the expiration of the next succeeding session of Congress before the suspension can ripen into a complete cancellation of deportation.[292] At that point, the alien may be recorded as a lawful permanent resident.[293] According to the statute, Congress may disapprove a section 244(a)(1) suspension by means of a one-house legislative veto resolution, and—again according to the INA—no deportation can be cancelled under section 244(a)(2) without express approval of both houses via a concurrent resolution. The legislative veto provision affecting section 244(a)(1) was declared unconstitutional in the landmark decision of *INS v. Chadha.*[294] The Supreme Court left the rest of the requirements regarding congressional procedure intact, however, so that they now function as a form of "report and wait" provision.[295] Possibly, Congress could now attempt to disapprove a suspension during the waiting period by means of regular legislation, but *Chadha* left open the question whether such an enactment would amount to an unconstitutional bill of attainder.[296] The effect of *Chadha* on section 244(a)(2) suspensions is less clear. Conceivably, they will now require approving legislation rather than simply a concurrent resolution.

Each element of the provisions for suspension of deportation has resulted in considerable litigation. Those elements are examined here using section 244(a)(1), the more lenient and far more frequently invoked provision.

Statutory Eligibility

Before 1984, a few cases had held that the requirement of seven years' continuous presence could be satisfied despite an alien's brief departures from the United States if those absences were not

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291. The statute eases the requirements for certain veterans of the U.S. armed forces, but bars suspension for alien crew members and certain exchange visitors. INA § 244(b), (f); 8 U.S.C.A. § 1254(b), (f) (1970 & Supp. 1987).

292. INA § 244(c); 8 U.S.C. § 1254(c) (1982).

293. INA § 244(d); 8 U.S.C. § 1254(d) (1982).

294. 462 U.S. 919 (1983).

295. *Id.* at 931-35 & n.9; Lewis v. Sava, 602 F. Supp. 571 (S.D.N.Y. 1984).

296. *Chadha,* 462 U.S. at 935 n.8; *see id.* at 962 (Powell, J., concurring).

"meaningfully interruptive" of the alien's continuing residence.[297] The BIA eventually accepted this construction, although it sometimes applied the doctrine more restrictively than the courts did.[298] The Supreme Court's decision in *INS v. Phinpathya,* however, disapproved these holdings. The Court ruled that Congress meant its seven-year stipulation to be interpreted literally, requiring absolutely uninterrupted continuous physical presence.[299] A provision of the 1986 reform legislation, in turn, effectively overruled the Supreme Court's decision by providing that continuous physical presence is not defeated by absences that were "brief, casual and innocent and did not meaningfully interrupt the continuous physical presence."[300]

The second statutory requirement, "good moral character," is defined in a negative fashion in section 101(f) of the INA.[301] That section provides that a person cannot be found to have good moral character if, for example, he or she is a "habitual drunkard" or a convicted murderer, was confined for 180 days or more because of a criminal conviction, or fits other specific disqualifying stipulations. The statute goes on to provide, however, that the alien need not fit one of the enumerated classes to be found lacking in good moral character—an invitation to the decision makers to elaborate further standards.[302]

The "extreme hardship" requirement presents the greatest challenge and has become the most frequently contested of the statutory prerequisites for suspension. Because almost any deportation of a long-present alien imposes significant hardship, the BIA and the courts have struggled for a way to interpret this requirement and divine Congress's intent. It is well accepted that economic detriment by itself does not constitute extreme hardship, although it is a factor for consideration.[303] Beyond this, the immigration judge and the BIA must consider, case by case, a variety of other factors, such as length of residence in the United States, family ties here, age, medical needs of the alien and his or her dependents, family ties in the country of nationality, and economic and educational opportunities there.[304] In a significant number of cases, the courts

297. *See* Kamheangpatiyooth v. INS, 597 F.2d 1253, 1259 (9th Cir. 1979); Wadman v. INS, 329 F.2d 812, 816 (9th Cir 1964) (using language drawn from Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963), which was not a suspension case). *See also* McLeod v. Peterson, 283 F.2d 180, 186 (3d Cir. 1960).

298. *See, e.g.,* Matter of Wong, 12 I. & N. Dec. 271 (BIA 1967).

299. INS v. Phinpathya, 464 U.S. 183 (1984).

300. INA § 244(b)(3); 8 U.S.C.A. § 1254(b)(3) (Supp. 1987), added by IRCA of 1986, § 315(b).

301. 8 U.S.C. § 1101(f) (1982).

302. *See generally* Hibbert v. INS, 554 F.2d 17, 21 (2d Cir. 1977).

303. *See* Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982).

304. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 7.9d(5).

had demonstrated a more generous approach to extreme-hardship determinations than had the BIA.[305] A 1981 Supreme Court decision, *INS v. Wang,*[306] was evidently intended to restrict that judicial practice. The Court stated:

> The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.[307]

In essence, the Supreme Court has insisted upon strong deference to the BIA's substantive interpretation and application of the extreme-hardship standard. Nevertheless, following *Wang,* in a surprising number of cases, decisions have been reversed and remanded on extreme-hardship grounds. Rather than being framed as a substantive disagreement with the BIA, however, these post-*Wang* decisions are stated in terms that ring more of procedure.[308] They find, for example, that the BIA failed to consider all the evidence tendered by the alien, or failed to consider all such evidence cumulatively, or failed to give adequate reasons for its conclusions.[309] Of course, many post-*Wang* decisions have also sustained the BIA.[310]

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305. *See, e.g.,* Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc); Bastidas v. INS, 609 F.2d 101 (3d Cir. 1979).

306. 450 U.S. 139 (1981) (per curiam).

307. *Id.* at 144. *See also* INS v. Hector, 107 S. Ct. 379 (1986) (per curiam) (insisting, contrary to a few recent court of appeals decisions, that only the family members expressly listed in the statute may be taken into account in determining extreme hardship).

308. *See* Hernandez-Cordero v. INS, 783 F.2d 1266, 1269 (5th Cir.), *vacated pending rehearing en banc,* 793 F.2d 701 (5th Cir. 1986).

309. *See, e.g.,* Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984); Luna v. INS, 709 F.2d 126 (1st Cir. 1983); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981); Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981).

310. *See, e.g.,* Sanchez v. INS, 755 F.2d 1158 (5th Cir. 1985); Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982); Ahn v. INS, 651 F.2d 1285 (9th Cir. 1981). One court implicitly criticized others imposing strict "procedural" review (e.g., requiring clear showings of cumulative BIA consideration of all factors) with these words: "The Board 'has no duty to write an exegesis on every contention. [It must merely] announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.' " Luciano-Vincente v. INS, 786 F.2d 706, 708–09 (5th Cir. 1986) (quoting Osuchukwu v. INS, 744 F.2d 1136, 1142–43 (5th Cir. 1984)). *See also* Villanueva-Franco v. INS, 802 F.2d 327, 330 (9th Cir. 1986).

Discretion

If the eligibility standards are met, the immigration judge still must decide whether to grant suspension in the exercise of discretion.[311] As with numerous other forms of relief, the exercise of discretion requires weighing favorable factors, or "equities," against adverse factors in the case. The Justice Department has been urged many times to clarify what the relevant factors are.[312] In 1979, the INS even proposed regulations to this end, but eventually abandoned the project based on a judgment that such a listing of factors would interfere with case-by-case weighing of all relevant considerations.[313] Nevertheless, the main factors emerge with some clarity from the decided cases. In the suspension context, many overlap with the factors that go into the extreme-hardship determination. The favorable factors include lengthy stay in the United States, family members here, and a strong record of self-support or community activities. The adverse factors include a history of immigration law abuses, a series of promises to leave voluntarily that were not kept, false statements, receipt of welfare, or lack of significant community ties.[314]

The immigration judge's exercise of discretion is subject to full review by the BIA, which can reexamine the facts and reach its own judgment on the balance of positive and negative factors.[315] Subsequent review takes place in the courts of appeals as part of the judicial review of the deportation order.[316] Reviewing administrative discretion of this type has posed a genuine challenge for the courts, however, as neither statute nor regulation sets express standards that could be used to measure the administrative decision.[317] At one time, it might even have been possible to consider

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311. The immigration judge need not, however, make findings as to statutory eligibility if it is clear that relief will be denied, in any event, in the exercise of discretion. INS v. Bagamasbad, 429 U.S. 24 (1976) (per curiam).

312. *See, e.g.*, Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966); Roberts, *The Exercise of Administrative Discretion under the Immigration Laws*, 13 San Diego L. Rev. 144, 164–65 (1975); Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65, 92–97 (1983).

313. 44 Fed. Reg. 36,187–36,193 (1979) (proposing regulations); 46 Fed. Reg. 9,119 (1981) (withdrawing them).

314. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 7.9e.

315. *Id.* at § 1.10e(2). *See* Parcham v. INS, 769 F.2d 1001, 1004–05 & n.3 (4th Cir. 1985).

316. Foti v. INS, 375 U.S. 217 (1963).

317. *See* Achacoso-Sanchez v. INS, 779 F.2d 1260, 1264–65 (7th Cir. 1985) (describing the difficulties a court faces in reviewing the BIA's exercise of discretion, in this case a discretionary denial of a motion to reopen).

such explicitly discretionary decisions unreviewable,[318] under the provision of the Administrative Procedure Act (APA) that excepts from judicial review matters "committed to agency discretion by law."[319] That exception, however, has been construed narrowly.[320] In the immigration field, courts now generally follow the lead of *Wong Wing Hang v. INS,*[321] which ruled the APA review exception inapplicable to the discretion vested in the attorney general under section 244. The decision held that another APA provision applied instead, rendering the suspension decision subject to judicial review for "abuse of discretion."[322]

But as Judge Friendly noted, writing for the court in *Wong Wing Hang,* there is a further question as to just what such review entails. After a careful consideration of the possibilities, he concluded:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or . . . on other "considerations that Congress could not have intended to make relevant."[323]

This decision has been widely followed. Virtually all discretionary decisions under the INA are now considered reviewable,[324] and

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318. *See generally* Jay v. Boyd, 351 U.S. 345, 354 (1956) (rejecting due process challenge to denial of suspension based on secret information not disclosed in hearing; Court emphasized that suspension was left to attorney general's "unfettered discretion"), discussed in chapter 3.

319. 5 U.S.C. § 701(a)(2) (1982). *See generally* Heckler v. Chaney, 105 S. Ct. 1649, 1654-56 (1985).

320. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

321. 360 F.2d 715 (2d Cir. 1966).

322. 5 U.S.C. § 706(2)(A) (1982).

323. 360 F.2d at 719 (quoting United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950)). *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983) (using similar language to explain scope of review under the "arbitrary and capricious" standard). Courts have often been reluctant, however, to grant extensive discovery of the INS when sought by aliens who are attempting to establish that denial of suspension for them amounted to a departure from established policies. *See* Munoz-Santana v. INS, 742 F.2d 561 (9th Cir. 1984).

324. For one of the rare exceptions, see Abdelhamid v. Ilchert, 774 F.2d 1447 (9th Cir. 1985) (U.S. Information Agency recommendations regarding waivers of two-year foreign residency requirement for exchange visitors are not judicially reviewable because they are within APA exception for actions "committed to agency discretion by law"). *Accord* Dina v. Attorney Gen., 793 F.2d 473 (2d Cir. 1986). Consular visa denials are also often considered immune to judicial review, for different reasons. *See infra* ch. 8.

with great regularity the quoted language from *Wong Wing Hang* establishes the framework for "abuse of discretion" review—in suspension cases and in many other settings.[325] Although judicial review is thus available, the framework is plainly meant to be deferential to the administrators, and in recent years the Supreme Court has taken pains to reinforce this message.[326] When reversal of a discretionary determination occurs, it most often rests on some inadequacy in the BIA's explanation; that is, the court finds a procedure-like deficiency—for example, inadequate consideration of the alien's evidence, failure to consider all evidence cumulatively, or insufficient statement of reasons for the denial.[327] In this respect, judicial review of the exercise of administrative discretion operates quite similarly to review of the ostensibly factual determination of extreme hardship.

Motions to Reopen

Aliens frequently file motions to reopen previously concluded deportation proceedings in order to seek relief from deportation.[328] Such motions are particularly common in seeking suspension of deportation, because often the seven years of physical presence accrues only after an initial decision in the case, but by no means are they limited to this setting. Motions to reopen have generated considerable controversy, beginning with questions about the legitimacy of the reopening procedure itself. Some court opinions have even suggested—although none have held—that such motions constitute an improper administrative invention because the statute

325. *See, e.g.*, Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985); Williams v. INS, 773 F.2d 8, 9 (1st Cir. 1985); Balani v. INS, 669 F.2d 1157, 1161 (6th Cir. 1982); Wing Ding Chan v. INS, 631 F.2d 978, 983–84 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

326. INS v. Rios-Pineda, 105 S. Ct. 2098, 2103 (1985) ("In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."); INS v. Wang, 450 U.S. 139 (1981) (per curiam).

327. *See, e.g.*, Israel v. INS, 785 F.2d 738, 740 (9th Cir. 1986) (reversing discretionary denial of motion to reopen deportation proceedings for adjustment of status); Sang Seup Shin v. INS, 750 F.2d 122, 125–27 (D.C. Cir. 1984); De La Luz v. INS, 713 F.2d 545 (9th Cir. 1983); Caporali v. Whelan, 582 F. Supp. 217 (D. Mass. 1984) (remand of discretionary denial of bail pending appeal of deportation order, because of inadequate record failing to show "reasoned determination" of release issue). Courts also review discretionary determinations to ensure that discretion was in fact exercised. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Parcham v. INS, 769 F.2d 1001, 1003 (4th Cir. 1985).

328. Such motions are provided for in 8 C.F.R. §§ 3.2, 3.8, 103.5, 242.22 (1986), and are filed with whichever decision maker—the BIA or an immigration judge—last considered the matter. On this procedure and the closely related motion to reconsider, see Hurwitz, *Motion Practice Before the Board of Immigration Appeals*, 20 San Diego L. Rev. 79 (1982).

does not provide for them and because they are sometimes used for manipulation and delay.[329] This suggestion seems unnecessarily severe; and in any event, the Supreme Court has frequently considered motions to reopen without in any way casting doubt on their statutory validity.[330] The regulations establishing this procedure merely recognize the frequent reality of changed circumstances that might legitimately call for a second look at an alien's situation before deportation is implemented, such as birth of a child or serious medical emergency. Indeed, on occasion, courts have insisted on the use of the motion-to-reopen procedure, in order to conserve judicial resources and make sure that new matters are initially raised and considered in the administrative forum.[331]

To be sure, the existence of the procedure does open up one avenue for potentially abusive delay. The regulations, however, attempt to minimize the potential for abuse by making reopening discretionary[332] and by requiring that the alien show that the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing."[333] The regulations further require that motions to reopen "state the new facts to be proved at the reopened hearing and . . . be supported by affidavits or other evidentiary material."[334] Moreover, a motion to reopen does not automatically stay the execution of any outstanding deportation order.[335]

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329. Sang Seup Shin v. INS, 750 F.2d 122, 130 (D.C. Cir. 1984) (Starr, J., dissenting). *See generally* Conti v. INS, 780 F.2d 698, 700–01 (7th Cir. 1985) (quoting Achacoso-Sanchez v. INS, 779 F.2d 1260, 1264 (7th Cir. 1985)); Bonilla v. INS, 711 F.2d 43, 44 (5th Cir. 1983). *See also* 62 Interp. Rel. 559 (1985) (INS general counsel suggests that motions to reopen should be abolished).

330. *See, e.g.*, INS v. Rios-Pineda, 105 S. Ct. 2098, 2100 (1985); INS v. Wang, 450 U.S. 139, 140–41 (1981) (per curiam).

331. *See, e.g.*, Roque-Carranza v. INS, 778 F.2d 1373 (9th Cir. 1985); Ramirez-Gonzalez v. INS, 695 F.2d 1208 (9th Cir. 1983); Martinez de Mendoza v. INS, 567 F.2d 1222 (3d Cir. 1977) (per curiam). The latter two cases found the administrative motion procedure superior to reopening for new evidence ordered by the court of appeals under 28 U.S.C. § 2347(c) (1982), which had been used in Coriolan v. INS, 559 F.2d 993, 1003–04 (5th Cir. 1977). *See* 63 Interp. Rel. 13–14 (1986) (editor's comment discussing the slightly varying standards for the two procedures).

332. *See* INS v. Phinpathya, 464 U.S. 183, 188 n.6 (1984); Matter of Barocio, Interim Dec. No. 2992 (BIA 1985). Some courts have suggested, however, that reopening is not discretionary when the alien establishes a prima facie case for relief that is not itself discretionary; withholding of deportation under INA § 243(h); 8 U.S.C. § 1253(h) (1982) is the only important relief provision that fits this description. *See* Aviles-Torres v. INS, 790 F.2d 1433, 1436 (9th Cir. 1986); Hernandez-Ortiz v. INS, 777 F.2d 509, 517–19 (9th Cir. 1985); Ananeh-Firempong v. INS, 766 F.2d 621, 624–25, 629 (1st Cir. 1985). *See also infra* note 341.

333. 8 C.F.R. § 3.2 (1986).

334. *Id.* § 3.8(a).

335. *Id.* §§ 3.6(b), 3.8(a); Brown v. INS, 775 F.2d 383, 386 (D.C. Cir. 1985).

When some courts announced rules that would have been quite generous to aliens seeking reopening of deportation proceedings, the Supreme Court stepped in to insist upon both judicial deference to the BIA's discretion in deciding whether to reopen and the alien's strict compliance with the requirement that motions be supported with affidavits or other evidentiary material.[336] In the most recent such case, *INS v. Rios-Pineda,*[337] the Court emphasized that the BIA may deny the motion to reopen when it is prepared to deny the relief sought on discretionary grounds, even if the applicant has established a prima facie case of statutory eligibility.[338]

Even after *Rios-Pineda,* however, courts have often reversed BIA denials of motions to reopen. A recent Ninth Circuit decision, for example, held that the BIA must reopen deportation proceedings if the alien presents a prima facie showing of statutory eligibility, unless the BIA provides "a non-arbitrary reasoned explanation" of why relief would be denied anyway in the exercise of discretion. Furthermore, in deciding whether to reopen, the BIA must accept the truth of the alien's evidentiary submissions unless they are inherently incredible.[339] Several other cases, however, including several in the Ninth Circuit after *Rios-Pineda,* have appeared much more inclined to sustain the BIA's denials of motions to reopen.[340] Judicial review of such denials ordinarily proceeds under the "abuse of discretion" standard, and the court considers the administrative decision denying reopening under the deferential tests summarized in the preceding section.[341]

Other Provisions Leading to Permanent Relief

Adjustment of Status

Adjustment of status, made available under section 245 of the INA,[342] was mentioned briefly in chapters 2 and 4. In essence, ad-

336. INS v. Wang, 450 U.S. 139, 143-44 (1981) (per curiam). *See also* Nocon v. INS, 789 F.2d 1028, 1033 (3d Cir. 1986).

337. 105 S. Ct. 2098, 2102 (1985).

338. *See also* Guevara Flores v. INS, 786 F.2d 1242, 1247 (5th Cir. 1986).

339. Mattis v. INS, 774 F.2d 965, 968 (9th Cir. 1985). *See also* Haftlang v. INS, 790 F.2d 140, 143 (D.C. Cir. 1986); Maroufi v. INS, 772 F.2d 597, 601 (9th Cir. 1985).

340. *See, e.g.,* Williams v. INS, 773 F.2d 8, 9 (1st Cir. 1985); Yahkpua v. INS, 770 F.2d 1317, 1320 (5th Cir. 1985); Vasquez v. INS, 767 F.2d 598, 601 (9th Cir. 1985).

341. *See, e.g.,* Williams v. INS, 773 F.2d 8, 9 (1st Cir. 1985); Balani v. INS, 669 F.2d 1157, 1161 (6th Cir. 1982). But if the BIA denies the motion to reopen on the ground that the applicant has failed to establish a prima facie case, the Ninth Circuit apparently applies a more demanding standard of review to that determination. Abudu v. INS, 802 F.2d 1096, 1100-01 (9th Cir. 1986) (extensive discussion of standards for reviewing denials of motions to reopen).

342. 8 U.S.C.A. § 1255 (1970 & Supp. 1987).

justment constitutes a domestic replacement for the usual overseas visa-issuing process for immigrants. Using the adjustment procedure, a nonimmigrant in the United States can gain lawful permanent resident status without having to travel abroad. If the alien takes the initiative to apply for adjustment while still in compliance with the terms of his or her nonimmigrant admission, an immigration examiner in the district office will decide on the application.[343] But in many cases, the alien does not seek adjustment until deportation proceedings have commenced. At that point, the district director lacks jurisdiction over the application, and the appropriate papers must be filed directly with the immigration judge.[344] The judge will consider adjustment in the course of regular deportation proceedings, treating the application for adjustment as a request for relief equivalent, for example, to an application for suspension. The applicant for adjustment must show that he or she is fully qualified for a visa and that a visa would be immediately available (e.g., because the alien is applying for a nonquota immediate-relative visa or is an applicant in one of the preference categories whose priority date has already been reached on the waiting list).[345] In addition, the alien must gain a favorable exercise of the attorney general's discretion.[346] Adjustment is statutorily unavailable to those who entered without inspection and to a few other classes of aliens.[347] Historically, it has been claimed in deportation proceedings almost exclusively by those who overstayed a nonimmigrant admission.[348]

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343. 8 C.F.R. § 245.2(a) (1986).

344. *Id.*

345. INA § 245(a); 8 U.S.C.A. § 1255(a) (1970 & Supp. 1987).

346. *See, e.g.,* INS v. Bagamasbad, 429 U.S. 24 (1976) (per curiam); Ahwazi v. INS, 751 F.2d 1120 (9th Cir. 1985); Sang Seup Shin v. INS, 750 F.2d 122 (D.C. Cir. 1984); Matter of Blas, 15 I. & N. Dec. 626 (BIA 1974, Att'y Gen. 1976). Denial of adjustment based solely on an unfavorable exercise of discretion does not preclude the alien's later immigration using the usual procedure for issuance of an immigrant visa by a consul in a foreign country. *See generally* Achacoso-Sanchez v. INS, 779 F.2d 1260, 1266 (7th Cir. 1985).

347. *See* INA § 245(a) (adjustment limited to aliens who were "inspected and admitted or paroled") and INA § 245(c); 8 U.S.C.A. § 1255(a), (c) (1970 & Supp. 1987). Most important, INA § 245(c)(2) bars adjustment for those aliens who have worked without authorization, unless they are immediate relatives of U.S. citizens.

348. Amendments made in 1986 further restrict the availability of adjustment of status. The IRCA of 1986, § 117, added a clause to INA § 245(c)(2); 8 U.S.C.A. § 1255(c)(2) (Supp. 1987) that is potentially quite significant. It makes adjustment unavailable to aliens who have not maintained a legal immigration status up to the date of the filing of an application for adjustment, unless they are immediate relatives of U.S. citizens or fit other, narrow exceptions. The IMFA of 1986, §§ 2(e), 3(b), and 5(a), added subsections (d) and (e) to INA § 245; 8 U.S.C.A. § 1255(d), (e) (Supp. 1987) to discourage marriage fraud.

Registry

Section 249 of the INA gives the attorney general the discretion to record the lawful permanent resident status of aliens who entered the United States before January 1, 1972, under a procedure known as "registry."[349] Such aliens must demonstrate good moral character and must have been continually resident since their entry—a less stringent requirement than the continuous physical presence test applicable to suspension.[350]

Section 212(c)

Section 212(c) gives the attorney general discretion to waive all but six of the thirty-two exclusion grounds for aliens "lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years."[351] By its terms, this section permits waiver of excludability, not relief from deportation. But owing to a complicated combination of administrative expansions and judicial holdings, this section now is uniformly held to offer relief from deportation to that rather limited class of deportable aliens who meet its stipulations.[352] Section 212(c) provides relief, however, only when deportation is based on a deportation ground for which a comparable exclusion ground exists[353]—most often, deportation for crimes involving moral turpitude or for certain drug offenses.

Waiver is in the discretion of the attorney general, but there is no express requirement that the alien demonstrate extreme hardship or good moral character. Moreover, brief departures during the seven-year period cause little difficulty because the statute requires only unrelinquished domicile, not continuous physical presence.[354] In these respects, section 212(c) is less strict than the suspension provision, but in other respects it is more limited. Section 212(c) relief is available only to aliens who have been lawfully admitted for permanent residence, whereas suspension is often

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349. 8 U.S.C.A. § 1259 (1970 & Supp. 1987). Until Congress passed the IRCA of 1986, § 203, the registry date had stood for many years at June 30, 1948.

350. *See generally* Lum Wan v. Esperdy, 321 F.2d 123 (2d Cir. 1963); Chan Wing Cheung v. Hamilton, 298 F.2d 459 (1st Cir. 1962).

351. INA § 212(c); 8 U.S.C. § 1182(c) (1982).

352. *See* Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (equal protection is violated by BIA policy of denying section 212(c) relief to certain deportable aliens while granting it to other deportable aliens). For a more complete account of the background to *Francis*, see T. Aleinikoff & D. Martin, *supra* note 35, at 537–47.

353. *See* Matter of Wadud, Interim Dec. No. 2980 (BIA 1984); Matter of Salmon, 16 I. & N. Dec. 734 (BIA 1978).

354. *See* Matter of Sanchez, 17 I. & N. Dec. 218, 221 (BIA 1980).

claimed by surreptitious entrants and those who have overstayed a nonimmigrant visa. Courts are split, however, over the appropriate test for determining when lawful domicile ends for purposes of this section. One court has held that lawful domicile terminates when deportation proceedings begin.[355] Another has found that it terminates only when the deportation order becomes administratively final.[356] Other courts have noted other possible tests without finding it necessary, under the facts of those cases, to resolve the issue.[357]

The next chapter discusses at length asylum and related provisions, which are increasingly important provisions for relief from deportation (and also from exclusion).

Other Relief from Deportation

The relief provisions mentioned in the preceding section usually result in lawful permanent resident status for the alien involved. The remaining provisions are not that potent, but they still serve important functions in the American immigration system.

Voluntary Departure

Voluntary departure is something of a misnomer. The term denotes a procedure whereby deportable aliens discovered by the INS may leave without a formal deportation order, frequently at their own expense. The departure is often not truly voluntary, however; most such aliens would probably prefer to stay. The procedure is widely used. In fiscal year 1982, the INS counted more than 823,000 aliens unwillingly removed from the country. Only 14,153 of these aliens were formally deported.[358]

Voluntary departure, in its usual form, constitutes a rough immigration equivalent of a guilty plea.[359] This procedure has advan-

355. Marti-Xiques v. INS, 741 F.2d 350, 355 (11th Cir. 1984).

356. Lok v. INS, 681 F.2d 107, 110 (2d Cir. 1982). *See also* Dabone v. Karn, 763 F.2d 593 (3d Cir. 1985) (reaching similar result in exclusion context).

357. *See, e.g.*, Avila-Murrieta v. INS, 762 F.2d 733, 735-36 (9th Cir. 1985) (apparently modifying Wall v. INS, 722 F.2d 1442 (9th Cir. 1984)); Reid v. INS, 756 F.2d 7, 9-10 (3d Cir. 1985). *See also* Rivera v. INS, 791 F.2d 1202 (5th Cir. 1986) (lawful residence period ends only under very limited circumstances), discussed in 63 Interp. Rel. 634 (1986).

358. U.S. Dep't of Justice, 1982 Statistical Yearbook of the Immigration and Naturalization Service, at table ENF 1.1.

359. *See generally* Perez-Funez v. District Director, 619 F. Supp. 656, 658-59 (C.D. Cal. 1985) (describing processing; court later finds procedures inadequate under due process clause as applied to unaccompanied minors).

tages for both the Department of Justice and the alien. The department avoids the expense, delay, and difficulties of a deportation proceeding and possible subsequent appeals. The alien often gains somewhat greater flexibility to arrange his or her departure time. (For example, the INS may be more willing under this procedure to set a deadline for voluntary departure that allows completion of the current semester in school.) The alien also gains certain legal advantages, in addition to avoiding any possible stigma that may come with a formal deportation order. An alien removed under a deportation order is barred from reentry for five years unless he or she receives special permission from the attorney general.[360] If the alien reenters the country despite this bar, he or she will be subject to summary removal and to prosecution for having committed a felony.[361] Neither of these consequences befalls an alien who departs voluntarily.

Certain specified officials in the district offices play the major role in granting voluntary departure.[362] They act under INA § 242(b), which authorizes voluntary departure in the discretion of the attorney general, in lieu of initiating deportation proceedings.[363] After such proceedings have begun, however, the immigration judge may also grant voluntary departure under discretionary authority provided by section 244(e).[364] Such a grant of voluntary departure usually comes in the form of an "alternate order of deportation."[365] Using this procedure, the immigration judge completes the proceedings, finds the alien deportable, and grants a stated period for voluntary departure, but at the same time orders formal deportation if the alien has not left by the deadline date. Thus, the INS may seize and deport a noncomplying alien without having to initiate further proceedings before the immigration judge. But if the alien leaves in timely fashion, he or she is not considered to have departed under a deportation order.[366] Aliens

360. INA § 212(a)(17); 8 U.S.C. § 1182(a)(17) (1982).

361. INA §§ 242(f), 276; 8 U.S.C. §§ 1252(f), 1326 (1982). The circuits have split over whether, or under what circumstances, an alien in the subsequent proceedings may collaterally attack the validity of the earlier deportation order. *See* C. Gordon & H. Rosenfield, *supra* note 6, at §§ 4.7h, 9.25. The Supreme Court will apparently resolve some of these questions, in the context of a criminal prosecution under INA § 276, in reviewing United States v. Mendoza-Lopez, 781 F.2d 111 (8th Cir. 1985), *cert. granted,* 107 S. Ct. 59 (1986).

362. 8 C.F.R. § 242.5(a) (1986).

363. 8 U.S.C. § 1252(b) (1982).

364. *Id.* § 1254(e). *See* 8 C.F.R. §§ 242.17(b), 244.1 (1986). Section 244(e), unlike section 242(b), requires a further finding that the alien is "of good moral character." *See* Hibbert v. INS, 554 F.2d 17 (2d Cir. 1977).

365. *See* 8 C.F.R. § 242.18(b).

366. *Id.* § 243.5. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 7.2b(2). Contreras-Aragon v. INS, 789 F.2d 777 (9th Cir. 1986), held that the reviewing court

denied voluntary departure occasionally challenge the denial in court. Judicial review proceeds under the usual "abuse of discretion" standard.[367]

The INS also occasionally employs voluntary departure where it has actually decided *not* to require the removal of the alien for an indefinite period, usually for humanitarian reasons. The INS may do so on individual grounds (e.g., because the alien has a sick child who needs professional attention in this country)[368] or on grounds affecting entire classes (e.g., because of civil war in the alien's home country).[369] In the latter case, the INS typically acts on the basis of a recommendation by the State Department and issues instructions to all offices to provide blanket "extended voluntary departure" (EVD) to all aliens in the identified group. Such relief is somewhat similar to political asylum, but is applied where the danger to the alien upon return does not meet the strict requirements for asylum or related relief.[370]

Indefinite or extended voluntary departure is functionally equivalent to parole. Under the INA, however, parole is limited to aliens who have not made an entry. This technical limitation forced the INS to use a different framework when it wanted to exercise a similar humanitarian dispensing power for aliens who had entered the country (deportable aliens), and voluntary departure afforded the most easily adaptable rubric. Here the term *voluntary departure* may be even more misleading than in its ordinary use, however, because the INS clearly contemplates indefinite nondeparture, at least until the underlying humanitarian ground for this action disappears.

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has no authority to reinstate a voluntary departure period, originally ordered by the BIA, after an unsuccessful petition for review. Because voluntary departure periods are almost always shorter than the time needed to complete judicial review, this ruling, were it to be applied to all such alternate orders, could possibly chill the exercise of wholly legitimate appeal rights. *See generally* Ballenilla-Gonzalez v. INS, 546 F.2d 515, 521 (2d Cir. 1976). The *Contreras-Aragon* decision has been criticized, 63 Interp. Rel. 525 (1986), on the ground that the automatic stay that occurs during judicial review, as provided by INA § 106(a)(3); 8 U.S.C. § 1105a(a)(3) (1982), fully suspends the execution of the deportation order, including any voluntary departure period—at least if the petition for review was filed before the expiration of the original voluntary departure period.

367. *See, e.g.*, Ahwazi v. INS, 751 F.2d 1120, 1123 (9th Cir. 1985); Strantzalis v. INS, 465 F.2d 1016, 1017 (3d Cir. 1972).

368. *See* 8 C.F.R. § 242.5(a)(2)(viii) (1986).

369. *See* 61 Interp. Rel. 103 (1984) (INS policy memorandum explaining the differences between blanket voluntary departure for threatened classes or nationalities and other uses of voluntary departure).

370. *See generally* Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502 (D.D.C. 1984) (declining to review denial of EVD to Salvadorans), *appeal pending*, 808 F.2d 847 (D.C. Cir. 1987) (granting rehearing en banc and vacating panel opinion); T. Aleinikoff & D. Martin, *supra* note 35, at 468-69, 726-35.

Prosecutorial Discretion

Immigration authorities share in the general power of the attorney general to withhold or target enforcement action—a power that is generally called "prosecutorial discretion."[371] Courts have occasionally expressed a willingness to consider claims of invidiously selective prosecution of deportation actions,[372] but apparently no court has invalidated a deportation order on these grounds. Most of the time, this prosecutorial discretion is exercised quite informally; the INS simply does not have the staff to pursue all deportable aliens on whom it has information. But it does attempt to target its enforcement resources in accordance with enforcement priorities set more systematically than they have been in the past.[373] The beneficiaries—if that is the appropriate term—of these resource limitations obviously receive no documentation as such.

Other exercises of prosecutorial discretion, however, are more formal and may result in some type of documentation for the alien. For example, indefinite voluntary departure as described in the preceding section might be characterized as an example of prosecutorial discretion. Aliens granted such voluntary departure typically receive some form of notification from the INS, often accompanied by work authorization.[374] Furthermore, the INS's Operations Instructions (a manual of internal guidelines and directives) establish a "deferred action" category for certain sympathetic cases.[375] A district director must personally recommend deferred action, based on the factors detailed in the Operations Instructions, and a regional commissioner must approve. Aliens have frequently sought judicial review of the INS's denial of deferred action. Courts in some early cases were amenable to hearing such complaints,[376] but

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371. *See* Heckler v. Chaney, 105 S. Ct. 1649, 1656-57 (1985); Johns v. Department of Justice, 653 F.2d 884, 889 (5th Cir. 1981).

372. *See* Lennon v. INS, 527 F.2d 187, 195 (2d Cir. 1975). *See generally* Wayte v. United States, 105 S. Ct. 1524, 1531-32 (1985) (standards for judging selective prosecution claim in criminal law enforcement context).

373. *See generally* INS Operations Instructions § 103.1a(3) (1984); U.S. General Accounting Office, Criminal Aliens: INS's Investigative Efforts in the New York City Area 10-19 app. (1986).

374. *See* Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), *cert. denied sub nom.* Shang v. Holley, 435 U.S. 947 (1978) (certain public assistance available to alien granted indefinite voluntary departure); 62 Interp. Rel. 256-58 (1985) (sample letter given to certain "EVD eligibles").

375. INS Operations Instructions § 242.1a(22) (1984). Other sections of these instructions similarly preclude enforcement action for certain categories of violators, absent special approvals. *See, e.g., id.* § 242.1a(26) (generally prohibiting deportation action based on a drug offense, if offense involved less than one hundred grams of marijuana).

376. *See, e.g.,* Nicholas v. INS, 590 F.2d 802 (9th Cir. 1979) (countenancing review but denying relief).

more recently, and particularly after an amendment of the governing instruction, courts have been more deferential to the INS on such matters.[377]

Stay of Deportation

Even an alien under a final order of deportation may gain a type of reprieve in the form of a stay of deportation.[378] The district director has broad authority to stay deportation "for such time and under such conditions as he may deem appropriate."[379] The district director usually uses this power to give the alien time to wind up affairs here before being deported, or to grant an extension to allow, for example, for medical or family needs. The district director may also use the power, however, to permit the alien to remain pending consideration of a motion to reopen or reconsider filed with an immigration judge or the BIA.[380] (The judges and the BIA also have authority to grant stays in connection with such motions.[381]) Such a stay may be indispensable to the alien, because the motion to reopen or reconsider will be deemed withdrawn if the alien leaves the country, for any reason, before it is resolved.[382] Nevertheless, if stays are issued too readily upon the mere filing of a motion to reopen, the possibility for abuse is considerably magnified.[383] The authorities tend to require a strong prima facie showing that the relief is likely to be granted before they will issue such a stay. Denial of a stay is subject to judicial review. The courts usually use the "abuse of discretion" standard, but in doing so are sometimes even more deferential to the administrative agencies than they are in ruling on denials of other forms of discretionary relief.[384]

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377. *See, e.g.,* Velasco-Gutierrez v. Crossland, 732 F.2d 792 (10th Cir. 1984); Pasquini v. Morris, 700 F.2d 658 (11th Cir. 1983).

378. *See* 8 C.F.R. §§ 3.6, 3.8(a), 103.5(a), 242.22, 243.4, (1986); *cf. id.* § 244.2 (district director has authority to extend time for voluntary departure initially established by the immigration judge or the BIA).

379. *Id.* § 243.4.

380. *Id.* §§ 103.5(a), 243.4.

381. *See id.* § 243.4; Turcios-Galan v. Ilchert, 633 F. Supp. 247 (N.D. Cal. 1986).

382. 8 C.F.R. §§ 3.2, 3.4. *See* Dill v. INS, 773 F.2d 25, 30-31 (3d Cir. 1985).

383. *See* Bonilla v. INS, 711 F.2d 43, 44 (5th Cir. 1983) (per curiam).

384. *See, e.g.,* Bothyo v. Moyer, 772 F.2d 353, 355 (7th Cir. 1985) (standard is "extremely narrow"; abuse of discretion may be found only if there is "no evidence to support the decision or if the decision is based on an improper understanding of the law"). *But cf.* Bazrafshan v. Pomeroy, 587 F. Supp. 498 (D.N.J. 1984) (administrative discretion to deny stay is narrower if alien's life may be at stake).

VII. POLITICAL ASYLUM

The Refugee Act of 1980[385] made important changes in the INA's provisions governing both the overseas refugee resettlement system and the granting of political asylum. Because both of these programs deal with refugees—persons who are threatened with persecution in their home countries—the potential exists for some confusion among the various provisions. Despite the overlapping terminology, however, it is helpful to treat overseas refugee resettlement and political asylum as crisply distinct programs that respond to different policy opportunities and constraints and also operate through dissimilar administrative structures.[386]

The overseas refugee program, authorized by INA § 207,[387] allows for the resettlement of refugees screened and selected outside the United States, usually while still in a refugee camp. The numerical ceilings and selection criteria are established each year through a careful deliberative process, which is described briefly in chapter 4. In contrast, the political asylum program, authorized by INA §§ 208 and 243(h),[388] deals with people who reach this coun-

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385. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 and 22 U.S.C.).

386. For a more complete description of the policy differences, see Martin, *The Refugee Act of 1980: Its Past and Future,* in *Transnational Legal Problems of Refugees,* 1982 Mich. Y.B. Int'l L. Stud. 91, 101, 111-14. The term *asylum* also bears many shades of meaning. Sometimes it is limited, in U.S. practice, to a technical reference to INA § 208; 8 U.S.C. § 1158 (1982), which authorizes the grant of a special immigration status ("asylum" or "asylee" status) to qualified aliens. Although this limited and technical usage has become more common in the wake of the Supreme Court's 1984 *Stevic* decision, described later, most people who speak of asylum use the term more broadly to refer to all the normal elements of protection extended to people allowed to remain here because they are threatened with harm if they return to their home countries. This protection includes the firm guarantee against return now mandated by INA § 243(h); 8 U.S.C. § 1253(h) (1982), sometimes referred to as the "withholding" or "nonrefoulement" provision. Unless the context indicates otherwise, asylum is used here in the broader sense encompassing the protections of both sections. *See generally* T. Aleinikoff & D. Martin, *supra* note 35, at 649.

387. 8 U.S.C. § 1157 (1982).

388. 8 U.S.C. §§ 1158, 1253(h) (1982). These are the crucial statutory sections relevant to the question of political asylum. They will be cited henceforth in this chapter without further parallel citation to 8 U.S.C.

try on their own and apply within the United States or at the border for permission to stay. The applicable legal standards, under both treaty and statutory law, leave little room for selectivity and ceilings if the asylum seeker demonstrates the requisite degree of threat at home. This inability to confine political asylum within deliberately selected numerical limits creates obvious pressures for restrictive application of the governing standards, and at the very least it sharpens the dilemmas that political asylum poses for both the administrators and the courts involved in implementing these provisions.[389]

Since 1980, the United States has been receiving applications for political asylum at the hitherto unheard-of rate of roughly 20,000 per year. Although more than 20 percent of the applications have been granted, administrative denials run high, and unsuccessful applicants often take their cases to court. The last few years have witnessed a cascade of asylum litigation, resulting in a vast body of new case law. Different circuits—or panels within circuits—often take strikingly diverse positions on the many issues posed by this unique form of relief from deportation or exclusion. This chapter considers the basic arrangements for political asylum and reviews the highlights of the case law. It does not touch on all issues or describe all possible shadings of alternative approaches to the issues that are discussed.

Background

Political asylum has been provided in various forms since the start of federal immigration controls, most of the time simply as a product of administrative grace. One provision in the 1952 version of the INA, however, served as a partial statutory authorization for this practice. Section 243(h), as originally enacted, authorized the attorney general, in his or her discretion, to "withhold deportation" of aliens who would be subject to persecution in their homelands.[390] Those whose deportation was withheld, however, received no clearly defined immigration status, and Congress provided no routine mechanism for eventual adjustment to permanent resident status.

In 1968, the United States became a party to an important international treaty affecting political asylum, the 1967 U.N. Protocol

389. *See generally* Martin, *supra* note 386, at 111-14; Teitelbaum, *Political Asylum in Theory and Practice,* 76 Pub. Interest 74 (1984).

390. Act of June 27, 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214.

Relating to the Status of Refugees.[391] In so doing, this country became derivatively bound by all the significant provisions of the 1951 U.N. Convention on the same subject.[392] These treaties mandate certain protections for refugees, although the extent of protection depends on whether the refugee's status has been regularized within the sheltering country.[393] The most important protection, however, is not linked to regularized status: Article 33 of the U.N. Convention, the "nonrefoulement" provision, forbids state parties "to expel or return (*refouler*) a refugee" to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."[394]

When the U.N. Protocol was ratified, Congress made no changes in the governing statutes, relying instead on the attorney general to exercise discretion under section 243(h) consistently with the treaty. Not until 1980 did Congress act to improve the statutory provisions for political asylum. Even then, the changes made were little more than an afterthought added to the Refugee Act—a bill meant primarily to modify the INA's overseas refugee provisions, which were then under the enormous strains imposed by the Indochinese refugee crisis.

Statutory Provisions

The Refugee Act contained three major provisions relating to political asylum. First, Congress added a new section 208 to the INA. This section, which was the first to use the word "asylum" in the history of U.S. immigration statutes, created a new and secure immigration status for its beneficiaries, a status called "asylee" in the regulations.[395] This immigration status helps clarify the alien's

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391. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

392. Convention Relating to the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter Convention].

393. Many provisions apply only to those refugees "lawfully in" the country of refuge, and mere recognition of refugee status does not render the person's presence lawful. In American practice, however, the distinction has been of minimal importance. Nearly everyone who proves refugee status has been given a regularized immigration status. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 648-49. This practice may well change, however, in the wake of the Supreme Court's 1987 decision in INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313 (U.S. Mar. 9, 1987), described later in this chapter.

394. Convention, *supra* note 392, art. 33(1). The second paragraph of the article excepts certain dangerous individuals from this protection. *See infra* note 400.

395. *See, e.g.*, 8 C.F.R. § 208.8(e)(1) (1986).

entitlement to work authorization and to public assistance. A second, closely related provision created a routine procedure for an asylee's eventual adjustment of status to lawful permanent resident, after a minimum waiting period of one year.[396] The terms and conditions of asylee status are similar, but not identical, to the refugee status given to beneficiaries of the overseas refugee resettlement programs under section 207. The principal differences are two: Asylees may have their status withdrawn if conditions improve in the home country, and the adjustment provisions for asylees are somewhat less generous.[397]

An alien establishes statutory eligibility for asylum under section 208 by showing that he or she meets the definition of *refugee* set forth in INA § 101(a)(42)(A),[398] which is itself drawn from the definition appearing in the U.N. treaties. Under that section of the INA, a refugee is a person outside his or her homeland

> who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Meeting this definition is only the first step, however. The granting of asylee status remains at the discretion of the attorney general.

At the urging of the Office of the U.N. High Commissioner for Refugees (UNHCR), the international agency charged with implementing the international refugee treaties, the drafters of the Refugee Act made the third important statutory modification. Recognizing that the treaty imposes a peremptory nonrefoulement obligation, Congress changed section 243(h) (the "withholding" section) from a discretionary provision to a mandatory one. It also expanded that section to apply explicitly in exclusion proceedings as well as deportation proceedings.[399] Finally, Congress modified the

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396. INA § 209(b); 8 U.S.C. § 1159(b) (1982). The attorney general has the discretion to adjust the status of no more than five thousand asylees per year. (Note that this is a ceiling on adjustments, not initial grants of asylum.) Although all five thousand adjustments have been made available each year since the Refugee Act took effect, in recent years asylum grants have run ahead of that figure. A backlog is building, necessitating waits of greater than one year at the present time.

397. *Compare* INA § 209(a) (adjustment provisions for refugees admitted under overseas programs) *with id.* § 209(b) (adjustment provisions for asylees); 8 U.S.C. § 1159(a), (b) (1982). *See generally* Martin, *supra* note 386, at 110.

398. 8 U.S.C. § 1101(a)(42)(A) (1982).

399. The earlier version of INA § 243(h) had been held inapplicable to aliens in exclusion proceedings. Leng May Ma v. Barber, 357 U.S. 185 (1958). But the INS had found ways to extend equivalent protection in exclusion cases, through use of the parole power.

wording so that the section closely parallels article 33, the Convention's nonrefoulement provision. Section 243(h)(1) now reads as follows:

> The Attorney General shall not deport or return any alien . . . to any country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[400]

This language is obviously quite similar to the refugee definition—the threshold requirement for asylum under section 208—especially in its stipulation that the threat in the home country be based on one of the same five factors. Why then have two asylum-type provisions in the law? The main reason derives from a subtle difference in the scope of protection afforded by sections 208 and 243(h), a difference that mirrors the distinction between asylum and nonrefoulement in international law. Nonrefoulement, governed by section 243(h), is country-specific—that is, it protects only against return to the threatening country. It does not preclude deportation to a nonthreatening third country.[401] Nor does it necessarily entail other benefits, such as work authorization, public assistance, eventual permanent residence rights, or even freedom of movement within the sheltering country. Section 208, the "greater form of relief,"[402] entails a regularized immigration status and the other benefits mentioned earlier. Congress made this latter provision discretionary primarily to foster the removal of aliens who do have a possibility of resettling in a third country.[403] In practice,

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400. INA § 243(h)(2) excepts four categories of aliens from this mandatory protection—principally dangerous criminals and persons who have participated in persecuting others. Similarly worded regulations apply the same exceptions to grants of asylum under section 208. 8 C.F.R. § 208.8(f)(1)(iii)-(vi) (1986). The statute also excludes former persecutors from the definition of *refugee.* INA § 101(a)(42) (second sentence); 8 U.S.C. § 1101(a)(42) (1982). The legislative history specifies that these exceptions are to be construed consistently with similar exceptions to the U.N. Convention's protections. *See generally* McMullen v. INS, 788 F.2d 591 (9th Cir. 1986) (ineligible because of involvement in violent acts of Provisional Irish Republican Army); Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986) (ineligible because of possession of cocaine for sale); Matter of Rodriguez-Coto, Interim Dec. No. 2985 (BIA 1985) (rejecting balancing test that would weigh seriousness of the crime against seriousness of persecution awaiting applicant in the home country); Matter of Frentescu, 18 I. & N. Dec. 244 (BIA 1982) (the fact that the crime involved moral turpitude is not dispositive in deciding whether it disqualifies the alien from section 243(h) protection; seriousness of the crime must be decided case by case).

401. *See* Matter of Salim, 18 I. & N. Dec. 311, 315 (BIA 1982).

402. *Id. See also* Matter of Lam, 18 I. & N. Dec. 15, 18-19 (BIA 1981).

403. *See generally* 8 C.F.R. § 208.8(f)(2) (1986). A related doctrine blocks asylum for refugees who have been "firmly resettled" in a third country before seeking asylum here. *Id.* §§ 208.8(f)(1)(ii), 208.14. *See* Rosenberg v. Yee Chien Woo, 402 U.S. 49, 55-56 (1971); Matter of Portales, 18 I. & N. Dec. 239, 242 (BIA 1982). Passage through a

however, third countries rarely agree to accept nonnationals from the United States under these circumstances. Moreover, the drafters of the Refugee Act evidently contemplated that nearly all who were held to qualify for nonrefoulement under section 243(h) would also receive asylum status under section 208. And the vast majority of successful applicants for withholding of deportation under section 243(h) do in fact receive asylum as well.[404]

Nevertheless, the practice of discretionary denial of asylum to people who are mandatorily protected by section 243(h) appears to be growing. The BIA began in 1982 to expand the grounds for discretionary denials beyond what would be suggested by the relevant INS regulations.[405] Those grounds, it ruled, include the usual unfavorable factors leading to a negative exercise of discretion under the ordinary relief provisions of the immigration laws. The major basis for discretionary denial thus has become, not opportunities for resettlement in a third country, but fraud or other misuse of the immigration laws.[406]

This is a severe approach, because most asylum seekers, by the very nature of the relief they are seeking, will not be in compliance with the usual provisions of the immigration laws. Denying asylum while granting section 243(h) relief leaves the applicant in a kind of limbo if no other country will receive him or her.[407] A 1985 decision, *Hernandez-Ortiz v. INS*,[408] casts doubt on the BIA's approach and apparently seeks to tie discretionary denials more closely to the limited list of negative factors appearing in the asylum regulations. The court held that the BIA may deny asylum in the exercise of discretion only when it can identify an alternative country

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third country, however, ordinarily should not be taken as a fact undercutting the claim of threatened persecution at home, whatever effect it might have on the discretionary decision to deny asylum status. *See* Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986).

404. For other countries, like Austria, with a well-established tradition of serving primarily as a country of transit—a tradition accepted by other countries that receive the transiting refugees, including the United States—the difference between nonrefoulement and asylum assumes greater importance. Large numbers of people there might be protected by the former but denied the latter, pending fairly swift resettlement elsewhere.

405. *See* 8 C.F.R. § 208.8(f)(1), (2) (1986).

406. *See* Matter of Shirdel, Interim Dec. No. 2958 (BIA 1984); Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982).

407. Administrative practice has alleviated this situation somewhat. Under guidelines adopted in 1983, *see* 60 Interp. Rel. 536–37 (1983), the INS considers for release from detention, on a case-by-case basis, excludable aliens protected by section 243(h) but not accepted by any third country. Those released often receive work authorization, but have few other benefits or entitlements. *See* Singh v. Nelson, 623 F. Supp. 545 (S.D.N.Y. 1985); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999, 1009 (1985).

408. 777 F.2d 509 (9th Cir. 1985).

of refuge or other "genuine compelling factors" justifying such a step.[409] Moreover, the BIA itself has begun to emphasize that an alien's prior misuse of the immigration laws should not lead automatically to a discretionary denial of asylum; the immigration judges should also weigh carefully any countervailing equities.[410]

Procedures

If exclusion or deportation proceedings have not already commenced, the alien may apply to the district director for asylum under section 208, using form I-589.[411] If the district director denies the application, no administrative appeal is available. The alien may renew the application, however, in exclusion or deportation proceedings, and the immigration judge will consider the matter de novo.[412] Aliens who do not file an application for asylum until proceedings have already begun may have the asylum issue considered only by the immigration judge, not by the district director. An asylum application is also treated by the immigration judge as an application for nonrefoulement benefits (withholding of deportation) under section 243(h).[413] The burden is on the alien to establish entitlement to relief.[414] The district director or the immigration judge will also seek the views of the State Department on each application—a practice that has raised some due process concerns.[415] Finally, if the alien decides to apply for asylum after an

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409. *Id.* at 519. *See also* Sakhavat v. INS, 796 F.2d 1201, 1203 (9th Cir. 1986) (discretionary denial of asylum must rest on "negative factors . . . that are based on valid immigration-law concerns"). The BIA appeared to reach a similar conclusion several years ago about the limited grounds for discretionary denial of this type of relief, Matter of Dunar, 14 I. & N. Dec. 310, 322-23 (BIA 1973), but recent BIA decisions clearly have departed from this approach.

The Supreme Court's decision in INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313 (U.S. Mar. 9, 1987) (discussed later), however, suggests a far wider scope for the application of the attorney general's discretion than would be possible under *Hernandez-Ortiz.* Exactly how the competing considerations will be reconciled remains to be seen.

410. Matter of Gharadaghi, Interim Dec. No. 3001, at 5 (BIA 1985).

411. 8 C.F.R. § 208.3(a) (1986).

412. *Id.* §§ 208.8(c), 208.9.

413. *Id.* § 208.3(b).

414. *Id.* §§ 208.5, 242.17(c). *See* Saballo-Cortez v. INS, 761 F.2d 1259, 1262-65 & n.4 (9th Cir. 1985); Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Matter of Acosta, Interim Dec. No. 2986, at 7 (BIA 1985).

415. 8 C.F.R. § 208.7 (1986). *Compare, e.g.,* Zamora v. INS, 534 F.2d 1055, 1059-63 (2d Cir. 1976) (State Department opinions advising on individual cases raise significant due process problems), *with* Hotel & Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 513-14 (D.D.C. 1984) (approving the practice), *appeal pending,* 808 F.2d 847 (D.C. Cir. 1987) (granting rehearing en banc and vacating panel opinion). *See also* Matter of Exilus, 18 I. & N. Dec. 276, 278-80 (1982) (describing

exclusion or deportation order has been entered, he or she must proceed by filing a motion to reopen and must "reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding."[416]

Courts ordinarily review a denial of asylum under section 208 or of withholding of deportation under section 243(h) as part of the review of the exclusion or deportation order. One court has held that all such denials are to be reviewed under the deferential "abuse of discretion" standard.[417] Most courts, however, consider that denials of section 243(h) relief should be reviewed to ensure that the order is supported by "substantial evidence," a somewhat more demanding review standard.[418] They base this approach on the fact that section 243(h) relief is mandatory for aliens who prove that they meet the statutory standards. Most courts also consider that section 208 denials are subject to two-tier review. Eligibility findings (i.e., whether the applicant meets the refugee definition) are reviewed for substantial evidence, whereas denial of asylum based on the attorney general's discretion is reviewed for abuse of discretion.[419]

Standards

Evidence

Adjudication of asylum applications presents two special challenges. First, in many cases, the only useful and direct evidence comes from the applicant. Interruptions for translation often hamper effective testimony—and also effective cross-examination. Simply establishing past facts (e.g., claimed mistreatment by the government before departure or alleged harm to family members still in the home country) therefore becomes more difficult than usual. Much turns on the credibility of the asylum seeker.[420]

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purposes of State Department advice letters and severely limiting discovery of letter's author); Edmond v. Nelson, 575 F. Supp. 532, 536-37 (E.D. La. 1983) (generally approving *Exilus* approach).

416. 8 C.F.R. § 208.11 (1986). *See* Abudu v. INS, 802 F.2d 1096, 1100-02 (9th Cir. 1986); Bahramnia v. INS, 782 F.2d 1243 (5th Cir. 1986); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985).

417. Sankar v. INS, 757 F.2d 532, 533 (3d Cir. 1985); Marroquin-Manriquez v. INS, 699 F.2d 129, 133 n.5 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

418. *See, e.g.*, Chavarria v. Department of Justice, 722 F.2d 666, 670 (11th Cir. 1984); McMullen v. INS, 658 F.2d 1312, 1316-17 (9th Cir. 1981).

419. *See, e.g.*, Cruz-Lopez v. INS, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); Vides-Vides v. INS, 783 F.2d 1463, 1466 (9th Cir. 1986); Carvajal-Munoz v. INS, 743 F.2d 562, 567-68 (7th Cir. 1984).

420. *See* Canjura-Flores v. INS, 784 F.2d 885, 888-89 (9th Cir. 1985) (helpful discussion of the importance of, and standards for, credibility determinations). Courts vary

Second, even when the adjudicator is satisfied as to past events or the existence of specific past threats, he or she has the difficult task of deciding how serious a risk these events or threats would represent if the applicant were to return home.[421]

Some court decisions have taken a dim view of the alien's own uncorroborated statements as the sole basis for an asylum claim;[422] a few have appeared ready to dismiss these statements as "self-serving."[423] The BIA has cautioned against such unalloyed skepticism, however.[424] Several decisions have soundly recognized that even the bona fide stories of people truly threatened or actually subjected to past persecution would appear self-serving. Moreover, the circumstances of escape often preclude the gathering of corroborating material. Even genuine refugees may have no detailed evidence to offer other than their own testimony; hence, corroboration is not indispensable, especially if the applicant's testimony is reasonably detailed.[425]

Nevertheless, there remains a legitimate need to guard against mala fide applications or embroidered accounts, especially because the INS, too, usually will be unable to produce other witnesses to the key events claimed by the applicant.[426] Although corroborative

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considerably in the degree to which they will probe the credibility findings of the immigration judges and the BIA. *Compare, e.g.,* Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (negative credibility finding rejected for lack of "legitimate, articulable basis to question [the applicant's] credibility"), *and* Zavala-Bonilla v. INS, 730 F.2d 562, 566 (9th Cir. 1984) (negative credibility finding rejected after close examination of BIA's reasons therefor), *with* Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) (courts must defer to immigration judge's "express and implied determination concerning credibility" even if the INS offered no testimony that rebutted applicant's statements), *and* Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) (immigration judge, who alone is in a position to observe tone and demeanor, is "uniquely qualified to decide whether an alien's testimony has about it the ring of truth").

421. *See* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984); Matter of Acosta, Interim Dec. No. 2986, at 22-23 (BIA 1985).

422. *See, e.g.,* Shoaee v. INS, 704 F.2d 1079, 1084 (9th Cir. 1983); Rejaie v. INS, 691 F.2d 139, 146-47 (3d Cir. 1982); Kashani v. INS, 547 F.2d 376, 379-80 (7th Cir. 1977).

423. *See, e.g.,* Nasser v. INS, 744 F.2d 542, 544 (6th Cir. 1984); Dally v. INS, 744 F.2d 1191, 1195 (6th Cir. 1984). More recently, the Sixth Circuit appears to have disapproved these decisions. Dawood-Haio v. INS, 800 F.2d 90, 96-97 (6th Cir. 1986) (containing useful discussion of credibility determinations in asylum cases).

424. Matter of Acosta, Interim Dec. No. 2986, at 10 (BIA 1985).

425. *See, e.g.,* Ananeh-Firempong v. INS, 766 F.2d 621, 628 (1st Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984); Nasser v. INS, 744 F.2d 542, 545 (6th Cir. 1984) (Edwards, J., dissenting); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); Matter of Sihasale, 11 I. & N. Dec. 531, 532-33 (BIA 1966).

426. *See generally* Haftlang v. INS, 790 F.2d 140, 143-44 (D.C. Cir. 1986); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285-86 (9th Cir. 1984).

evidence is therefore not essential, its absence may be a factor for consideration.[427] The best safeguard against false applications may lie in a requirement that the testimony (whether that of the applicant or of others) contain reasonably detailed and specific information on the source and nature of the threat affecting the individual or a group of which the individual is a member.[428] "Conclusory" statements are insufficient, but courts display much variety in deciding whether particular statements fall into this category.[429]

General evidence of human rights abuses in the home country—for example, in the form of State Department human rights reports, newspaper accounts, or Amnesty International information—is usually not sufficient, by itself, to carry the asylum seeker's burden of proof.[430] But if the applicant has introduced credible evidence, even in the form of his or her own statement, of specific threats or past persecution to which he or she has fallen victim, the general evidence of home-country conditions may be relevant and useful.[431] It will help the adjudicator decide on the degree of actual risk in the home country—whether any voiced threats should be taken seriously, for example, or perhaps whether there are other parts of the home country where the applicant would be safe.[432]

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427. Canjura-Flores v. INS, 784 F.2d 885, 889 (9th Cir. 1985).

428. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 55 U.S.L.W. 4313 (U.S. Mar. 9, 1987); Del Valle v. INS, 776 F.2d 1407, 1411 (9th Cir. 1985); Ananeh-Firempong v. INS, 766 F.2d 621, 627 (1st Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284–86 (9th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984).

429. *Compare, e.g.*, Haftlang v. INS, 790 F.2d 140, 143–44 (D.C. Cir. 1986), *and* Maroufi v. INS, 772 F.2d 597, 599 (9th Cir. 1985) (affidavits too conclusory, speculative, or vague for certain relief sought), *with* Hernandez-Ortiz v. INS, 777 F.2d 509, 515 (9th Cir. 1985) (information sufficient and should not have been dismissed as "conclusory").

430. *See* Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1392 (9th Cir. 1985); Fleurinor v. INS, 585 F.2d 129, 133 (5th Cir. 1978). *See also* Carvajal-Munoz v. INS, 743 F.2d 562, 574, 577 (7th Cir. 1984) (applicant must show "good reason to fear that he or she will be *singled out* for persecution").

431. *See* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285–86 (9th Cir. 1984); Zavala-Bonilla v. INS, 730 F.2d 562, 564 (9th Cir. 1984); Matter of Exame, 18 I. & N. Dec. 303, 304–05 (BIA 1982).

432. *See* Hernandez-Ortiz v. INS, 777 F.2d 509, 515 (9th Cir. 1985); Diaz-Escobar v. INS, 782 F.2d 1488, 1493 (9th Cir. 1986); Matter of Acosta, Interim Dec. No. 2986, at 33 (BIA 1985). *But cf.* Matter of Paniagua, 62 Interp. Rel. 227 (BIA 1985) (nonprecedent decision) (immigration judge wrong to deny asylum in this case on the theory that the applicant could go elsewhere than her hometown; El Salvador is a small country, and it may be difficult to find hiding places from forces seeking her out).

Basis of the Threat

Not all threatened harm in the home country, even if the proof shows that it is extremely likely to occur, will justify asylum or withholding of deportation under U.S. law. To qualify, the threat must be based on one of the five factors enumerated in the U.N. Convention and in both section 101(a)(42) and section 243(h): race, religion, nationality, membership in a particular social group, or political opinion.[433] A few decisions have properly rested denial of asylum and withholding on this ground.[434]

But in some cases, the BIA has gone further and applied this doctrine in an unduly narrow manner. In *Acosta,* for example, it ruled that threatened persecution—persecution that was definitely based on the political motivation of the persecutor—would not meet the statutory standards because the applicant himself had not clearly enough manifested a political opinion that the persecutor was attempting to overcome.[435] Courts have generally been hostile to this narrow approach. If a serious threat of politically motivated persecution is shown, one should regard that oppression as being "on account of" political opinion, however inarticulate the potential victim may have been, and even if he or she was attempting to remain neutral rather than take sides in a political dispute.[436]

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433. Most cases allege likely persecution based on political opinion—typically an individualized issue. But group affiliation may also validly support an asylum claim, for example, when the home government systematically persecutes a racial, religious, or ethnic minority. The claimant in such cases should not be held to too rigid a standard of proving individual threats. Proof of membership in the group, plus adequate proof of government oppression of that group, should suffice. For a helpful discussion, see Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980,* 23 San Diego L. Rev. 327, 353-56, 370-73 (1986). Asylum claims based on the more open-ended "membership in a particular social group" have sometimes posed more difficult legal issues. *See, e.g.,* Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985); Matter of Acosta, Interim Dec. No. 2986, at 31 (BIA 1985); Matter of Sanchez & Escobar, Interim Dec. No. 2996, at 13-14 (BIA 1985). The most thorough discussion of the "particular social group" concept appears in Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (affirming the BIA's result in *Sanchez & Escobar*).

434. *See, e.g.,* Zayas-Marini v. INS, 785 F.2d 801, 806 (9th Cir. 1986) (death threats that resulted from private dispute and "personal animosity" do not meet requirements of sections 208 and 243(h)).

435. Matter of Acosta, Interim Dec. No. 2986, at 32-33.

436. *See* Argueta v. INS, 759 F.2d 1395, 1397 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286-88 (9th Cir. 1984). In a recent case on this issue, the Ninth Circuit held that the persecutor's motivation is of greatest importance: "[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the [persecuting] government believes that he does." Hernandez-Ortiz v. INS, 777 F.2d 509, 517 (9th Cir. 1985). The court also suggested that government sanctions against an individual or group should be presumed to be politically motivated when there is no reason to believe the target guilty of criminal activity. *Id.* at 516-17.

Degree of Threat

The key part of the refugee definition requires a finding that the applicant has a "well-founded fear of persecution" in the home country. Section 243(h) similarly requires a showing that the applicant's "life or freedom would be threatened." Translating these general notions into useful operative guidance for adjudication, however, has presented one of the chief difficulties in implementing these asylum provisions.

On the one hand, any person leaving a country whose government has been known to persecute can, in a sense, claim a well-founded fear of persecution. The fear is based in reality; it is not fanciful. On the other hand, the U.N. treaties and the Refugee Act were not meant to declare a general right of relocation for all citizens of a nation whenever its government abuses human rights. These instruments were meant to protect people who are seriously at risk, people who are in some way targeted for persecution.[437] The difficulty lies in identifying just how much of a risk must be shown and how closely the threat must be focused on the alien or a group to which he or she belongs. The decisions agree, however, that neither section 208 nor section 243(h) is satisfied by allegations of widespread violence, anarchy, or civil strife affecting all residents of the country.[438] They also find insufficient those claims based on discrimination or general economic, social, or political disadvantage.[439]

Apart from these generalizations, there has been little agreement. For many years, the BIA demanded that applicants for asylum-type benefits demonstrate a "clear probability of persecution" if they returned to their home countries. Initially implemented when section 243(h) was a purely discretionary provision, this administrative requirement survived the United States's ratification of the U.N. Protocol.[440] But litigants began increasingly to

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437. *See* Ananeh-Firempong v. INS, 766 F.2d 621, 627 (1st Cir. 1985).

438. Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985); Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984); Martinez-Romero v. INS, 692 F.2d 595 (9th Cir. 1982). Violent home-country conditions, however, might provide a sound reason for deferring forced return to the home country, under a policy of blanket extended voluntary departure, described in chapter 6.

439. *See* Minwalla v. INS, 706 F.2d 831, 834-35 (8th Cir. 1983); Shoaee v. INS, 704 F.2d 1079, 1084 (9th Cir. 1983); Raass v. INS, 692 F.2d 596 (9th Cir. 1982). Some cases, however, apply a lower threshold for deciding when economic discrimination rises to the level of persecution. *See, e.g.*, Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969) ("deliberate imposition of substantial economic disadvantage for reasons of race, religion or political opinion" would suffice for asylum).

440. *See* Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Matter of Dunar, 14 I. & N. Dec. 310, 318-23 (BIA 1973).

challenge this formulation after 1980, asserting that the Refugee Act meant to introduce a less demanding standard variously described as a "well-founded fear of persecution," a "reasonable likelihood of persecution," or "good reason" to fear persecution. Some courts agreed; others supported the BIA's approach. When the Supreme Court granted certiorari in *INS v. Stevic*[441] to resolve the conflict, many hoped that the decision would clarify the legal standard and perhaps answer other evaluative questions that had cropped up in the adjudication process.[442]

The Supreme Court's ultimate decision in *Stevic* came as something of a surprise and a disappointment. The Court affirmed the use of the "clear probability of persecution" standard, but only for evaluating applications under section 243(h), the nonrefoulement provision, as this was the only form of relief Stevic had sought.[443] The Court construed this BIA standard, however, to require only that the alien show that persecution upon return is more likely than not. The word *clear* was held to be surplusage. Dicta in the case suggested more generous formulations of the standard that might apply in determining eligibility for the ultimately discretionary grant of asylum under section 208, but the Court carefully avoided any holding on that question.[444]

The *Stevic* decision therefore drove a wedge between the eligibility standard for asylum and that for withholding of deportation under section 243(h). This was surprising because the lower courts theretofore had treated the standards as unitary, and administrative practice before *Stevic* had never hinted at any such disparity.[445] Taking scant notice of this accumulated practice, the Court placed an unexpected emphasis on the sheer difference in wording between the refugee definition ("well-founded fear of persecution") and section 243(h) ("life or freedom would be threatened").[446]

Predictably, after *Stevic,* the federal courts became embroiled in disputes over the issue *Stevic* left open, the proper formulation of the standard for section 208 relief. The Third Circuit adhered to a unitary standard: An applicant must show a "clear probability of

441. 467 U.S. 407 (1984).
442. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 650–56.
443. 467 U.S. at 430.
444. *Id.* at 423–24 & n.19.
445. *See* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282–83 n.10 (9th Cir. 1984) (citing BIA and court cases that assumed a unitary standard).
446. This "plain meaning" approach was not as obvious as the Court suggested, because the two phrases can readily be read to describe the same potential risk level. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 664–68. Nevertheless, the Court reaffirmed this analysis in INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313, 4315–16 (U.S. Mar. 9, 1987).

persecution" to qualify for section 208.[447] The Ninth Circuit, however, took the lead in ruling that the "well-founded fear" standard under section 208 is "more generous" to the alien.[448] The other circuits that spoke on the issue all found some difference in the standards governing the two sections, viewing the section 208 threshold as less demanding, but some downplayed the magnitude of the difference.[449]

Before the Supreme Court granted certiorari in *INS v. Cardoza-Fonseca* to resolve this split among the circuits, the BIA offered its own views on this question. In *Matter of Acosta,*[450] the BIA wrote a lengthy and thorough opinion obviously meant to be a major statement of BIA standards in asylum and withholding cases. Although portions of the holding are qualified by the Supreme Court's decision in *Cardoza-Fonseca,* the BIA opinion is still well

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447. Sankar v. INS, 757 F.2d 532, 533 (3d Cir. 1985); Sotto v. INS, 748 F.2d 832, 836 (3d Cir. 1984).

448. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1451–54 (9th Cir. 1985), *aff'd,* 55 U.S.L.W. 4313 (U.S. Mar. 9, 1987); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1282–83 & n.11 (9th Cir. 1984) ("well-founded fear" test is partially subjective and "includes consideration of applicant's state of mind"). In at least one case the Ninth Circuit has held that the applicant satisfied the "well-founded fear" test but failed to qualify for relief under section 243(h). Garcia-Ramos v. INS, 775 F.2d 1370 (9th Cir. 1985).

Although many cases taking this approach stress that the "well-founded fear" test includes subjective elements, no case has been found in which the subjective showing (evidence of the psychological genuineness of the alien's claimed fear) has been determinative. *See* Vides-Vides v. INS, 783 F.2d 1463, 1469 (9th Cir. 1986); T. Aleinikoff & D. Martin, *supra* note 35, at 653. In any event, all cases agree that section 208 is not purely subjective; some reasonable, objective basis for the asserted fear must be shown. *See generally* INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313, 4315–16 (U.S. Mar. 9, 1987).

Some court decisions, however, have apparently confused the discussion of subjective elements in the *test* (referring to the applicant's state of mind) with discussions of subjective versus objective *evidence. See* T. Aleinikoff & D. Martin, *supra* note 35, at 653. Evidence is subjective, and apparently of almost no value in the view of these decisions, if it comes only from the alien's own statements. This disfavored testimony contrasts with objective evidence, meaning wholly independent corroboration of the specific threats the alien asserts. *See, e.g.,* Dally v. INS, 744 F.2d 1191, 1193 (6th Cir. 1984); Kashani v. INS, 547 F.2d 376, 379 (7th Cir. 1977); Matter of Sibrun, 18 I. & N. Dec. 354, 358–59 (BIA 1983). The value judgment implicit in this distinction is deeply problematic in this context and has been rejected by several courts, and even by, on some occasions, the BIA. *See supra* notes 424 and 425. Subjective evidence—the alien's own statements—certainly should be deemed relevant and sometimes dispositive, for purposes of both sections 208 and 243(h), if it is sufficiently detailed and specific. *See Cardoza-Fonseca,* 767 F.2d at 1453 ("That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective").

449. *See* Guevara Flores v. INS, 786 F.2d 1242, 1249–50 (5th Cir. 1986); Youkhanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 574–75 (7th Cir. 1984).

450. Interim Dec. No. 2986 (BIA 1985).

worth consulting to understand the decision process required to adjudicate asylum claims. The BIA wrote:

> One might conclude that "a well-founded fear of persecution," which requires a showing that persecution is likely to occur, refers to a standard that is different from "a clear probability of persecution," which requires a showing that persecution is "more likely than not" to occur. As a practical matter, however, the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made. Our inquiry in these cases, after all, is not quantitative, *i.e.,* we do not examine a variety of statistics to discern to some theoretical degree the likelihood of persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution. In this context, we find no meaningful distinction between a standard requiring a showing that persecution is likely to occur and a standard requiring a showing that persecution is more likely than not to occur. As we construe them, both the well-founded-fear standard for asylum and the clear-probability standard for withholding of deportation require an alien's facts to show that the alien possesses a characteristic a persecutor seeks to overcome by punishing the individuals who possess it, that a persecutor is aware or could easily become aware the alien possesses this characteristic, that a persecutor has the capability of punishing the alien, and that a persecutor has the inclination to punish the alien. Accordingly, we conclude that the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge.[451]

The Supreme Court was unpersuaded by the BIA's approach. In *Cardoza-Fonseca,* the six-justice majority held that Congress intended a more generous standard for asylum under section 208 than the "clear probability" standard that governs section 243(h). Discussing the lower threshold for asylum eligibility, the Court stated:

> There is simply no room in the United Nations' definition [of *refugee,* essentially the same as the INA definition] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, he or she has no "well-founded fear" of the event happening. . . . As we pointed out in *Stevic,* a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation

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451. *Id.* at 25. It is likely that the four factors listed in the second-to-last sentence of this passage will continue to frame the inquiry in asylum cases even after the Supreme Court's ruling in *Cardoza-Fonseca,* although under a somewhat less demanding standard of proof. *See generally* INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313, 4323-26 (U.S. Mar. 9, 1987) (Powell, J., dissenting).

> will probably result in persecution, but it is enough that persecution is a reasonable possibility."[452]

But in a later portion of the opinion, the Court disavowed any intent to provide detailed guidance on ultimate implementation of the asylum standard:

> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process . . . the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. . . . We do not attempt to set forth a detailed description of how the well-founded fear test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[453]

The Court also added a few words about the wider implications of its holding. Acknowledging some concern that a more generous standard would open up too wide a loophole in the immigration laws, the Court stressed that those who meet that standard are not

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452. INS v. Cardoza-Fonseca, 55 U.S.L.W. 4313, 4318 (U.S. Mar. 9, 1987). The Court evidently derived this numerical figure from a scholarly treatise's hypothetical, discussed earlier in the opinion, positing a government that had decided to kill or imprison every tenth adult male. *Id.* at 4316. It is unclear whether the 10 percent threshold has any wider significance. Justice Powell, in dissent, sharply criticized the numerical approach and argued for a qualitative analysis like that employed by the BIA in *Matter of Acosta:*

> [T]his hypothetical is irrelevant; it addresses a mathematically demanding interpretation of "well-founded" that has no relation to the BIA's actual treatment of asylum applications nor does it address the validity of the BIA's judgment that evidence presenting this distinction will be encountered infrequently, if ever.
>
> Common sense and human experience support the BIA's conclusion. Governments rarely persecute people by the numbers.

Id. at 4324 (Powell, J., dissenting). For a more complete discussion of the need for a somewhat higher threshold in asylum cases, in light of the demographic and political realities, see Martin, *supra* note 386, at 112-13. Some asylum seekers with a real claim on America's sympathy and support (e.g., because the home country is known for its human rights abuses) regrettably, but necessarily, will not be able to receive asylum. *See* Martin, *Human Rights and the Movement of Persons,* 1984 Proceedings, Am. Soc'y Int'l L. 346, 349-51.

453. 55 U.S.L.W. at 4320-21 (footnotes omitted). Two of the six justices in the majority also wrote separately to emphasize that the Court's opinion was not meant "to give substance to the term 'well-founded fear' " and that the "final contours" of the standard must be "shaped by the application of the standard to the facts of specific cases." *Id.* at 4321 (Blackmun, J., concurring). *See also id.* at 4322 (Scalia, J., concurring in the judgment).

guaranteed resettlement in the United States. Instead, they are "simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it."[454] The Court then discussed, with seeming approval, two cases in which the BIA took an expansive view of the grounds on which asylum may be denied in the exercise of discretion. Later in its opinion, the Court again emphasized the "flexibility" its holding gives to the attorney general in responding to the plight of dissidents throughout the world, and concluded: "Whether or not a 'refugee' is eventually granted asylum is a matter which Congress has left for the Attorney General to decide."[455] This grant of discretion under section 208, the Court emphasized, contrasts with section 243(h), which provides a firm guarantee (not of settlement, but of nonrefoulement to the threatening country) to the smaller class of individuals who meet its more demanding standard.

Although *Cardoza-Fonseca* thus brings to a close certain battles over the threat standards that have raged for years, it nonetheless promises considerable future litigation. First, thousands of unsuccessful asylum applicants can be expected to move to reopen their asylum cases to take advantage of the more generous standard. Second, the attorney general might choose to respond to the decision by making wider use of his or her discretionary authority to deny asylum, perhaps even doing so by regulation excluding whole categories from favorable action. Such an action, seemingly invited by the *Cardoza-Fonseca* majority, raises substantial questions in its own right. Courts are only beginning to develop adequate standards for judging discretionary denials in the asylum context.[456]

And finally, the exact contours of the "well-founded fear" standard remain for further detailed resolution. *Stevic* and its progeny may well have drawn undue attention to the "magic words"[457]

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454. *Id.* at 4319 (emphasis in original).

455. *Id.* at 4321. The two BIA cases are Matter of Salim, 18 I.&N. Dec. 311 (BIA 1982), and Matter of Shirdel, Interim Dec. No. 2958 (BIA 1984).

456. *See supra* note 409, citing cases suggesting that discretion under section 208 must hew to more narrow limits. For a discussion of poignant anomalies—most unlikely to be what Congress intended—that may result from the disparity between the standards for section 208 and section 243(h), especially if the attorney general frequently denies ayslum on discretionary grounds, see T. Aleinikoff & D. Martin, *supra* note 35, at 664–65. *And compare, e.g.,* National Center for Immigrants' Rights v. INS, 64 F. Supp. 5, 10–11 (C.D. Cal. 1985) (suggesting that the attorney general's discretion to set bond conditions under INA § 242(a) cannot be exercised under a blanket rule; INS instead must consider factors pertinent to each individual as an individual), *aff'd,* 791 F.2d 1351 (9th Cir. 1986), *petition for cert. filed,* 55 U.S.L.W. 3609 (U.S. Jan. 20, 1987), *with* Fook Hong Mak v. INS, 435 F.2d 728 (2d Cir. 1970) (rejecting claim that discretion granted to the attorney general by INA § 245 must always be exercised case by case; broad regulations excluding whole classes from favorable exercise of discretion are permissible).

457. Vides-Vides v. INS, 783 F.2d 1463, 1468 (9th Cir. 1986).

used to state the governing formulation—whether that be reasonable likelihood, good reason, well-founded fear, or clear probability of persecution. As the *Cardoza-Fonseca* Court acknowledged, a difficult adjudicative task remains even with the verbal formula firmly established. Asylum adjudication, now as always, requires careful case-by-case assessment of individual applications, followed by judicial review that can help refine the elusive legal standards and guard against mistakes or excessive narrowness, while still showing proper deference to administrative expertise.

VIII. JUDICIAL REVIEW

Previous chapters have touched on some of the standards and procedures for judicial review of immigration decisions. A special review provision, INA § 106,[458] adopted in 1961, presents certain complexities unique to immigration law and therefore warrants a separate chapter on the general topic. A brief review of the history of judicial review of immigration decisions will help clarify that section's intent and operation.

Background

Since the beginning of federal immigration controls, immigration statutes have regularly provided for administrative, rather than judicial, determination of nearly all significant issues, including the issuance of orders for exclusion or deportation. The statutes have also regularly provided that the administrative decisions in exclusion or deportation proceedings shall be "final."[459] Read literally, this stipulation would preclude any judicial role. Nevertheless, since at least the beginning of this century, federal courts have readily entertained actions seeking review. Their reason for doing so is not hard to find. The officer executing an order for exclusion or deportation must at some point take the alien into custody, and custody is the foundation for court jurisdiction in habeas corpus. The general statutory and common-law rules governing the writ of habeas corpus have therefore traditionally governed judicial review of exclusion or deportation orders.[460] During much of this century, the standard of review usually demanded little of the administrative agencies, but the mere existence of aliens' access to a court doubtless helped check abuses or serious errors.[461]

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458. 8 U.S.C. § 1105a (1982).

459. *See* Heikkila v. Barber, 345 U.S. 229, 233-35 (1953). The INA still contains such provisions. INA §§ 236(c), 242(b); 8 U.S.C. §§ 1226(c), 1252(b) (1982).

460. The best summary of these developments appears in Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1389-96 (1953).

461. *See, e.g.,* Gegiow v. Uhl, 239 U.S. 3, 9 (1915); Chin Yow v. United States, 208 U.S. 8, 12 (1908); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 100-02 (1903).

Habeas corpus, however, posed certain disadvantages for the alien, including its unavailability until he or she was actually taken into custody. As a result, litigants continually sought new and more flexible ways to secure review of decisions under the immigration laws.[462] When the Administrative Procedure Act (APA) was adopted in 1946, its liberal judicial review provisions appeared to open up significant new access to the courts, by means of an action for declaratory or injunctive relief.[463] After some initial uncertainty over the application of these APA provisions to immigration disputes, the Supreme Court had held, by 1957, that these procedures could be used to test the validity of orders of exclusion or deportation.[464] Congress, however, became concerned that these new review mechanisms might lend themselves to manipulation and delay. It therefore adopted a special provision, INA § 106, in 1961—the first express statutory provision for judicial review of immigration decisions—to clarify and channel judicial review of exclusion and deportation orders.[465]

Section 106 lays out sharply different paths for review of the two types of proceedings. For exclusion orders, Congress reverted to review "by habeas corpus proceedings and not otherwise."[466] An excludable alien thus applies initially to the district court, where review proceeds according to the usual standards for habeas corpus.[467] For deportation orders, Congress established what, for immigration law, was a wholly new approach. A deportable alien, whether in custody or not, petitions for review directly in the court of appeals, which considers the claim solely on the basis of the administrative record.[468]

Review in Accordance with the Administrative Procedure Act

Before examining section 106 further, it may be useful to clarify what that section did *not* change. Although it carefully channels

462. *See* T. Aleinikoff & D. Martin, *supra* note 35, at 563-64.

463. 5 U.S.C. §§ 701-706 (1982). The APA was enacted as Pub. L. No. 404, 60 Stat. 237 (1946).

464. Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) (deportation); Brownell v. Tom We Shung, 352 U.S. 180 (1956) (exclusion).

465. 8 U.S.C. § 1105a (1982), added to the INA by the Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651-53.

466. INA § 106(b); 8 U.S.C. § 1105a(b) (1982).

467. *See generally* 28 U.S.C. §§ 2241-2255 (1982); C. Gordon & H. Rosenfield, *supra* note 6, at § 8.7.

468. INA § 106(a); 8 U.S.C. § 1105a(a) (1982). This section applies to deportation orders the provisions of the Hobbs Act, now codified at 28 U.S.C. ch. 158 (1982).

judicial involvement in the most dramatic of immigration actions—those involving exclusion and deportation orders—it does not cover all possible disputes that may arise under the immigration laws. If the matter does not directly implicate an exclusion or deportation order, review still may be obtained in the district court, usually by means of a complaint for declaratory or injunctive relief, in accordance with the broad review provisions of the APA.[469] A wide variety of immigration decisions—for example, denial of a visa petition by a district director, refusal of an application to change from one nonimmigrant status to another, and denial of a labor certification by the Labor Department—have been held reviewable in the district court on this basis.[470] The decisions take different positions, however, as to who has standing to invoke such review. Some decisions have denied standing, for example, to alien litigants who were outside the country.[471] But often this denial of standing does not render the decision unreviewable, since a U.S. resident (e.g., the person who petitioned for the labor certification or filed the visa petition) is also directly affected and has standing to challenge the administrative decision.[472] Jurisdiction for this type of district court review is ordinarily founded on the general federal-question provision of title 28,[473] or on INA § 279, which is a broad grant to the district courts of jurisdiction over "all causes, civil and criminal, arising under any of the provisions" of title II of the INA.[474]

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469. 5 U.S.C. §§ 701–706 (1982).

470. *See* C. Gordon & H. Rosenfield, *supra* note 6, at § 8.23 (comprehensively collecting cases).

471. *See, e.g.*, Chinese American Civic Council v. Attorney Gen., 396 F. Supp. 1250, 1251 (D.D.C. 1975), *aff'd on other grounds*, 566 F.2d 321 (D.C. Cir. 1977) (denial of standing to aliens who have never been in the country is based on "the policy reasons against affording a federal forum for a person anywhere in the world challenging denial of entry or immigration status"). *See also* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 152 (D.D.C. 1976) (identifying a "general rule that nonresident aliens have no standing to sue in United States courts," with certain exceptions). Although the discussion is cryptic, a portion of the Supreme Court's decision in Kleindienst v. Mandel, 408 U.S. 753, 762 (1972), can be interpreted as denying standing to the "unadmitted and nonresident alien" whose visa denial was at issue. *See* Ben-Issa v. Reagan, 645 F. Supp. 1556, 1559 (W.D. Mich. 1986).

472. *See, e.g.*, Pesikoff v. Secretary of Labor, 501 F.2d 757, 759–61 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974) (petitioning employer has standing to challenge denial of labor certification); Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973) (same). For a more expansive approach to standing, see Taneja v. Smith, 795 F.2d 355 (4th Cir. 1986), and Sanchez-Trujillo v. INS, 620 F. Supp. 1361 (W.D.N.C. 1985) (recognizing standing in persons who would have been the beneficiaries of the rejected visa petitions, even though the visa petitioners did not join suit). The administrative bodies usually take a narrower view, however, denying standing to putative beneficiaries if the petitioner does not join in the appeal. *See* 63 Interp. Rel. 821 (1986) (editor's comment, collecting citations).

473. 28 U.S.C. § 1331 (1982).

474. 8 U.S.C. § 1329 (1982). The restriction to causes arising under title II is curious and occasionally causes difficulties. *See* Chen Chaun-Fa v. Kiley, 459 F. Supp.

Petitions for Review of Deportation Orders

Procedure

As indicated earlier, INA § 106(a) created a new review procedure for deportation orders. After the order becomes administratively final, the alien may file a petition for review in the court of appeals having jurisdiction over the place where the alien resides or where the immigration judge conducted proceedings.[475] The alien must file the petition within six months of the final order, and service of the petition on the INS automatically stays deportation.[476] (No stay takes effect until service of the petition; the INS is free to execute a deportation order even during the initial six-month period, unless the alien takes the initiative to claim judicial review.[477]) The court must consider the petition solely on the basis of the administrative record.[478]

Section 106(a), by its terms, provides the "sole and exclusive procedure"[479] for judicial review of "all final orders of deportation

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762 (S.D.N.Y. 1978) (this restriction prevents review, under both INA § 279 and 28 U.S.C. § 1331, of action taken (asylum denial) under general regulations adopted pursuant to title I of the INA); Yim Tong Chung v. Smith, 640 F. Supp. 1065, 1069 n.11 (S.D.N.Y. 1986) (same holding with respect to work authorization). Fortunately, however, most litigated disputes implicate title II, which contains the bulk of substantive immigration law. *See, e.g.,* Karmali v. INS, 707 F.2d 408 (9th Cir. 1983) (approving district court jurisdiction under section 279 to review denial of nonimmigrant visa petition under INA § 101(a)(15)(L), which is part of title I, because denial also implicated section 214(c), which appears in title II).

These complications, combined with the general overlap with the provisions of 28 U.S.C. § 1331, have prompted calls for repeal of INA § 279. *See* Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 Iowa L. Rev. 1297, 1384-86 (1986).

475. INA § 106(a)(2); 8 U.S.C. § 1105a(a)(2) (1982).

476. INA § 106(a)(1), (3); 8 U.S.C. § 1105a(a)(1), (3) (1982). The stay may be lifted by the court on application by the government. *See also* 63 Interp. Rel. 702 (1986) (reprinting memorandum from Justice Department's Civil Division reminding INS district office that, in its view, the automatic stay also applies when the alien petitions for review of a denial of a motion to reopen).

477. INA § 106(a)(7); 8 U.S.C. § 1105a(a)(7) (1982). *See* Umanzor v. Lambert, 782 F.2d 1299, 1303 (5th Cir. 1986).

478. INA § 106(a)(4); 8 U.S.C. § 1105a(a)(4) (1982). The statute provides an exception, however, when the petitioner makes a nonfrivolous claim to U.S. nationality. INA § 106(a)(5); 8 U.S.C. § 1105a(a)(5) (1982). In that situation, the case may be transferred to the district court for de novo judicial fact-finding, as required under the holding in Ng Fung Ho v. White, 259 U.S. 276 (1922). *See* Agosto v. INS, 436 U.S. 748 (1978).

479. By way of exception, however, INA § 106(a)(9); 8 U.S.C. § 1105a(a)(9) (1982) provides that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." With the expansion of the notion of "custody" for habeas purposes in recent years to include virtually any restriction resulting from a criminal conviction or similar ruling, *see, e.g.,* Hensley v. Municipal Court, 411 U.S. 345 (1973), this exception could turn into a rather large loophole, allowing multiple review proceedings. Courts therefore have struggled to

heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under § 242(b) of this Act." (Section 242(b) provides for deportation hearings before immigration judges.[480]) But this phrasing leaves many questions unanswered. Just what is reviewable in the court of appeals? All adverse decisions by immigration authorities leading up to deportation? The finding of deportability only? Rulings on relief from deportation for which the alien has applied? As earlier chapters have described, the statute authorizes various types of discretionary relief that may bear upon deportability itself or upon the execution of a deportation order. Some of these determinations may be made only by an immigration judge in the section 242(b) proceedings, while others may be made by district directors before, during, or after those proceedings—but outside the section 242(b) framework.[481] Which of these rulings may be considered by the court of appeals when the alien petitions for review under section 106(a)?

In three important decisions construing section 106(a),[482] the Supreme Court took neither the most restrictive nor the most expansive approach toward answering these questions. It ruled that the court of appeals may consider "those determinations made during a proceeding conducted under § 242(b), including those determinations made incident to a motion to reopen such proceedings."[483]

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narrow this provision, but have used sharply different approaches. *Compare, e.g.,* Umanzor v. Lambert, 782 F.2d 1299, 1302 (5th Cir. 1986) (jurisdiction under section 106(a)(9) requires "actual physical custody in a place of detention"), *with* Daneshvar v. Chauvin, 644 F.2d 1248, 1250-51 (8th Cir. 1981) (accepting expanded notion of "custody" but limiting section 106(a)(9) review to "denial of discretionary relief where deportability itself is not an issue"). *See also* Salehi v. District Director, 796 F.2d 1286, 1289-91 (10th Cir. 1986) (district court had jurisdiction under INA §§ 106(a)(9) and 279 when alien petitioners, who had been arrested, sought relief the court considered "independent" from and "collateral" to the deportation order); Williams v. INS, 795 F.2d 739, 743-45 (9th Cir. 1986) (accepting expanded notion of custody, apparently without the *Daneshvar* limitation on the issues that can be raised by a habeas petition).

In any event, section 106(a)(9) most often serves as a source of jurisdiction when a deportable alien challenges a denial of a stay of deportation (usually a stay the alien has sought in connection with a motion to reopen filed with the immigration judge or the BIA). *See, e.g.,* Lopez-Alegria v. Ilchert, 632 F. Supp. 932, 935 (N.D. Cal. 1986). Some courts of appeals have been especially insistent that stay denials be reviewed in the district court, based on a concern that use of the ordinary petition-for-review procedure in the court of appeals would only foster abuse, owing to the automatic stay provided by section 106(a)(3) once the petition is served on the INS. Habeas corpus review entails no such automatic protection. *See* Bothyo v. INS, 783 F.2d 74, 76 (7th Cir. 1986); Reid v. INS, 766 F.2d 113, 116 (3d Cir. 1985); Bonilla v. INS, 711 F.2d 43, 44 (5th Cir. 1983) (per curiam).

480. 8 U.S.C. § 1252(b) (1982).

481. *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 Colum. L. Rev. 1, 31-36 (1975).

482. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Giova v. Rosenberg, 379 U.S. 18 (1964) (per curiam); Foti v. INS, 375 U.S. 217 (1963).

483. Cheng Fan Kwok v. INS, 392 U.S. at 216.

The reviewing court may therefore hear challenges not only to the underlying finding of deportability but also to the denial of relief from deportation, assuming that such relief is of a type that could be sought from the immigration judge. (Most relief today fits this description, including suspension of deportation, adjustment of status, and political asylum.) The court of appeals may not review matters decided outside the section 242(b) proceedings, either before or after the deportation hearing, even though these issues may have an important bearing on the ultimate deportation.[484] It does have jurisdiction, however, to review denials of motions to reopen deportation proceedings.

For example, in *Cheng Fan Kwok v. INS,*[485] the Supreme Court considered the case of an alien whose deportation order was already final. It held that the court of appeals lacked jurisdiction under section 106(a) to review the district director's decision not to grant a stay of deportation while the alien prepared an application for political asylum.[486] This holding by no means precludes all judicial review of a decision by the district director handed down either before or after the deportation order. It simply requires that the alien seek such review by means of a separate action, in the district court, for declaratory, injunctive, or habeas corpus relief.[487]

A typical scenario will illustrate the operation of this complex and technical review scheme. It will also demonstrate the risk of piecemeal review, delay, and confusion resulting from the *Cheng Fan Kwok* interpretation of section 106(a). Consider a student, admitted in the F-1 nonimmigrant category, who wishes, after several years of study, to extend his stay for one year. Assume that the district director denies his application, but happens to rule after the student's original admission period has expired. The district office

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484. *See, e.g.,* Kavasji v. INS, 675 F.2d 236 (7th Cir. 1982) (per curiam) (court of appeals does not have jurisdiction to review district director's denial, before initiation of deportation proceedings, of alien student's application for transfer of schools and extension of stay); Reyes v. INS, 571 F.2d 505 (9th Cir. 1978) (court of appeals does not have jurisdiction to review denial of a stay pending consideration of a motion to reopen, although court may have ancillary jurisdiction over this matter once the BIA has ruled on the motion itself).

485. 392 U.S. 206 (1968).

486. The Court emphasized that the district director's order "was issued more than three months after the entry of the final order of deportation, in proceedings entirely distinct from those conducted under § 242(b), by an officer other than the special inquiry officer." *Id.* at 212-13. The last factor—that the decision was made by an officer other than the one involved in the section 242(b) proceedings—is not essential, however. *See* Reyes v. INS, 571 F.2d 505 (9th Cir. 1978) (court of appeals lacks jurisdiction to review the *BIA*'s denial of a stay pending the *BIA*'s consideration of a motion to reopen).

487. *See Cheng Fan Kwok,* 392 U.S. at 210.

therefore promptly initiates deportation proceedings, claiming that the alien is now deportable for overstaying.[488]

The student may believe that he has two significant arguments in his favor, either of which would defeat deportation: first, that the denial of extension was an abuse of the district director's discretion, and second, that he now qualifies for suspension of deportation under INA section 244.[489] If successful on the first claim, he would not be deportable, for he would never have been out of compliance with conditions validly imposed on his nonimmigrant admission. The second claim accepts deportability but seeks relief therefrom.

Under the regulations, however, neither the immigration judge nor the BIA has authority to review the first issue, the district director's denial of the extension; such denials simply are not administratively appealable or otherwise open for consideration in those forums.[490] Therefore, the judge and the BIA will inevitably find the alien deportable. But the immigration judge does have authority to consider the application for suspension as part of the section 242(b) proceeding.[491]

Assume that the judge rejects the suspension application and the BIA affirms that decision. The student may then seek judicial review of the deportation order in the court of appeals under section 106(a). That court may consider the denial of suspension, but it lacks jurisdiction to consider what appears to be the more significant issue: the district director's allegedly erroneous denial of the extension. After all, if the district director had decided the other way, the alien would not have lapsed into deportable status and probably would not have sought suspension. Nevertheless, because the regulations prevent the immigration judge and the BIA from considering the extension denial in the course of the deportation proceedings conducted pursuant to section 242(b), the court of appeals likewise may not reach that issue.[492] Instead, the alien must

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488. INA § 241(a)(2), (9); 8 U.S.C. § 1251(a)(2), (9) (1982).

489. 8 U.S.C.A. § 1254 (1970 & Supp. 1987).

490. 8 C.F.R. § 214.1(c)(4) (1986). For a description of the authority of immigration judges, the BIA, and district directors, see Johns v. Department of Justice, 653 F.2d 884, 889-92 (5th Cir. 1981).

491. 8 C.F.R. § 244.1 (1986).

492. The only clearly established exception to this lack of jurisdiction when the matter cannot be considered in the section 242(b) hearing occurs when the alien raises a constitutional challenge to the statute underlying the administrative action. Although the immigration judge and the BIA, like other administrative agencies, will not entertain such challenges, *see* Hernandez-Rivera v. INS, 630 F.2d 1352, 1355 (9th Cir. 1980), the Supreme Court has held that the court of appeals may consider the constitutional issue under section 106(a). INS v. Chadha, 462 U.S. 919, 937-39 (1983). It appeared at first that the Court's reasoning in *Chadha* might open up a great many other issues previously unreachable by the court of appeals, but later

seek (or perhaps already should have sought) judicial review of that crucial issue in the district court, in a separate action. Numerous cases depict unsuspecting aliens who made the mistake of seeking judicial review of this kind of issue in the courts of appeals.[493]

Note that the jurisdictional reach of the court of appeals is largely dependent on Justice Department regulations.[494] If those regulations were rewritten, for example, to make the extension denial an issue before the immigration judge and the BIA in a section 242(b) proceeding, the court of appeals could then also consider that issue. The Justice Department generally has not picked up on this possibility for avoiding piecemeal judicial review.[495] In any event, it is evident that patterns for administrative and judicial review are linked. Figure 1 on page 104 displays, in a simplified fashion, the most common patterns for administrative and judicial review of decisions under the immigration laws.

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decisions have resisted such expansion. *See generally* T. Aleinikoff & D. Martin, *supra* note 35, at 580-85.

493. *See, e.g.,* Olaniyan v. District Director, 796 F.2d 373 (10th Cir. 1986) (denial of work authorization to nonimmigrant student); Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984) (denial of school transfer); Ghaelian v. INS, 717 F.2d 950 (6th Cir. 1983) (challenging denial of extension of stay and also special reporting requirements); Kavasji v. INS, 675 F.2d 236 (7th Cir. 1982) (per curiam) (denial of school transfer and extension).

494. *See* Cheng Fan Kwok v. INS, 392 U.S. 206, 216-17 (1968); Foti v. INS, 375 U.S. 217, 229-30 (1963).

495. In a few settings, however, matters first raised before the district director can be aired in the section 242(b) hearing, although in a distinctive fashion. For example, under some circumstances, applications for adjustment of status or political asylum are first considered by the district director. If unsuccessful, the alien may then renew the application in the deportation proceeding before the immigration judge. 8 C.F.R. §§ 208.3, 208.9 (1986) (asylum); *id.* § 245.2(a)(1), (4) (adjustment of status). This is not an appeal to the immigration judge—apparently because the Justice Department does not want to suggest that the immigration judge somehow sits above the district director. The immigration judge considers the matter de novo, and the BIA reviews the immigration judge's decision on it as part of the regular administrative appeal. The court of appeals may then consider, under section 106(a), whether denial of adjustment or asylum was proper. But strictly speaking, the court is reviewing only the BIA's denial, not the district director's. *See, e.g.,* Carvajal-Munoz v. INS, 743 F.2d 562, 566-67 (7th Cir. 1984) (asylum); Jain v. INS, 612 F.2d 683 (2d Cir. 1979), *cert. denied,* 446 U.S. 937 (1980) (adjustment). *And compare* Nasan v. INS, 449 F. Supp. 244 (N.D. Ill. 1978) (district court has jurisdiction to review district director's denial of adjustment, at least where deportation proceedings have not begun), *with* Yim Tong Chung v. Smith, 640 F. Supp. 1065, 1068-70 (S.D.N.Y. 1986) (district court may not review district director's denial of asylum; denial was not a "final administrative action" because application for asylum could be renewed before an immigration judge in deportation proceedings then under way).

Pendent Jurisdiction

Perhaps recognizing the risk that review might become seriously fragmented, the Supreme Court hinted in *Cheng Fan Kwok* that a court of appeals on some occasions may have pendent jurisdiction to review determinations made outside the section 242(b) hearing.[496] Several courts of appeals have considered pendent jurisdiction along these lines, but most have taken a highly restrictive approach.[497] They have usually justified their reluctance on the basis of concern about the lack of an adequate administrative record, pointing out that the relevant decision that the alien wants the court to review (like the extension denial in the student example above) was made by the district director, and not by the immigration judge in the more familiar, quasi-judicial setting of a deportation hearing.[498] This concern may be exaggerated, however. District directors maintain copies of the papers filed in connection with most applications for immigration benefits or other relief, and they ordinarily give reasons, in writing, when denying such applications.[499] Moreover, it is not farfetched to expect that the administrative records generated by these more informal proceedings would improve if it were clear that such a change might facilitate unitary review of cases in the courts of appeals. Further, the reviewing court—either the district court or the court of appeals—would normally remand to the agency for further fact-finding or clarification in any case where it found the record inadequate.[500]

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496. 392 U.S. at 216 n.16.

497. *See, e.g.,* Wall v. INS, 722 F.2d 1442, 1443-44 (9th Cir. 1984); Ghorbani v. INS, 686 F.2d 784, 788-91 (9th Cir. 1982); Shoja v. INS, 679 F.2d 447, 451 (5th Cir. 1982); Lad v. INS, 539 F.2d 808, 809 (1st Cir. 1976).

Apparently the only case clearly exercising pendent jurisdiction of this type is Bachelier v. INS, 625 F.2d 902 (9th Cir. 1980) (reviewing rescission of adjustment of status under INA § 246; 8 U.S.C. § 1256 (1982)). *See also* Martinez de Mendoza v. INS, 567 F.2d 1222, 1224-25 & n.5 (3d Cir. 1977) (dictum favorable to pendent jurisdiction as alternative source of appeals court's competence to consider matter at issue).

498. *See, e.g.,* Mohammadi-Motlagh v. INS, 727 F.2d 1450, 1452 (9th Cir. 1984); Tooloee v. INS, 722 F.2d 1434, 1437 (9th Cir. 1983); Ghorbani v. INS, 686 F.2d 784, 789-91 (9th Cir. 1982).

499. *See, e.g.,* 8 C.F.R. § 214.1(c)(4) (1986) (extension of stay); *id.* § 248.3(g) (change from one nonimmigrant category to another); Bitar v. Department of Justice, 582 F. Supp. 417 (D. Colo. 1983) (describing administrative record underlying denial of change of nonimmigrant category and emphasizing that district court review is to be based strictly on that record).

500. *See* Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1607 (1985) (rejecting "inadequate agency record" rationale as a basis for finding exception that would give the district court power to review certain issues on which the Nuclear Regulatory Commission held no hearing; review is nonetheless to be sought in the court of appeals under the Hobbs Act, and if the administrative record is inadequate, the court should ordinarily remand).

FIGURE 1
Major Patterns of Administrative and Judicial Review Under the Immigration Laws

Pattern	Administrative Decision and Administrative Review (if any)	Type of Action	Initial Forum for Judicial Review

Issues Not Directly Associated with Exclusion or Deportation Orders

A — DD → APA[1] → DC

Examples: Denial of extension of nonimmigrant stay or of change of nonimmigrant status

B — DD → AAU → APA → DC

Examples: Denial of visa petition based on occupational preference; decision finding breach of bond conditions

C — DD → BIA → APA → DC

Examples: Denial of visa petition based on family preference; decision imposing administrative fine

D — Dept. of Labor: Certifying officer → ALJ → APA → DC

Issue: Denial of labor certification

E — Consul - - - APA - - - DC[2]

Issue: Denial of visa

Exclusion

F — IJ → BIA → Habeas (INA § 106(b)) → DC

Issues: Excludability and certain waivers or other forms of relief open to excludable aliens

Deportation

Basic pattern

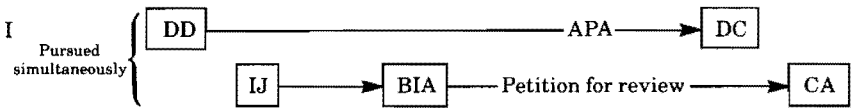
G — IJ → BIA → Petition for review (INA § 106(a)) → CA

Issues: Deportability and most forms of relief from deportation (e.g., suspension, relief under § 212(c), withholding under § 243(h))

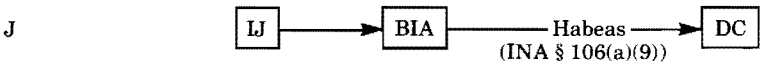
Variations

H[3] — [DD[4]] → IJ → BIA → Petition for review → CA

Examples: Adjustment of status; asylum

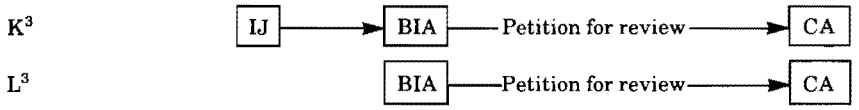


Example: Denial of extension of nonimmigrant status by DD, followed by initiation of deportation proceedings upon expiration of initial admission period

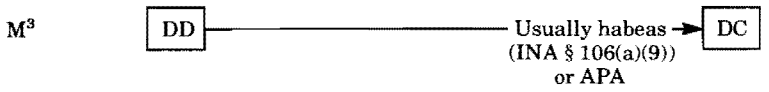


Issues: Courts differ substantially over the range of issues that may be litigated by the district court under § 106(a)(9) and over whether the alien must be in actual physical custody to secure such review. See ch. 8, note 479.

Motion to Reopen Deportation Proceedings
(to be filed with decision maker who last heard the case)



Stay of Deportation[5]



ABBREVIATIONS: DD = District director of the Immigration and Naturalization Service (INS) (includes certain high-volume adjudications now performed by regional service centers); IJ = immigration judge; AAU = Administrative Appeals Unit (exercising authority officially vested in INS associate commissioner for examinations); BIA = Board of Immigration Appeals; ALJ = administrative law judge; DC = U.S. district court; CA = U.S. court of appeals.

[1]Action for declaratory or injunctive relief in accordance with the Administrative Procedure Act (APA); jurisdiction is usually based on Immigration and Naturalization Act (INA) § 279 or 28 U.S.C. § 1331 (1982).

[2]Authority is divided as to permissibility of judicial review.

[3]A similar pattern is possible, but less common, in exclusion cases, in which case the initial forum for judicial review is clearly the district court.

[4]If the benefit has been sought before the DD, the application is renewable before the IJ, who will consider it de novo. But there is ordinarily no requirement that the alien apply to the DD first; in fact, application to the DD may be barred if exclusion or deportation proceedings have already begun. If application is made only to the IJ, consideration of the issue conforms to pattern G.

[5]When a stay is sought in connection with a motion to reopen, application may also be made to the IJ or the BIA. Jurisdiction to review the BIA's denial of a stay (or reversal of an IJ's grant of such a stay) is ordinarily held to lie in the district court, as in pattern M.

NOTE: For a comprehensive description of the review process, including less common patterns not depicted here, and for citations to relevant statutes and regulations, see Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1303-12 (1986).

In short, courts might be well advised to show greater concern for the cost and delay that result from piecemeal review and begin making more frequent use of pendent jurisdiction.[501]

Exhaustion of Remedies

A general principle of administrative law requires a litigant to exhaust administrative remedies before invoking judicial review. The exhaustion rule

> is based on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention.[502]

This general principle is often applied in the judicial review of immigration law decisions that do not involve exclusion or deportation orders.[503] But when such orders are contested, section 106 sets forth a specific statutory requirement: The alien must exhaust "the administrative remedies available to him as of right under the immigration laws and regulations."[504] Some courts have held that this is a jurisdictional requirement and cannot be waived.[505] A few, however, consider that they have some discretion in the matter and have found limited exceptions to the exhaustion requirement.[506]

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501. For a more complete account, which likewise advocates wider use of pendent jurisdiction in this context, see Legomsky, *supra* note 474, at 1328, 1367–68.

502. Schlesinger v. Councilman, 420 U.S. 738, 756–57 (1975).

503. *See, e.g.*, Wong v. Department of State, 789 F.2d 1380 (9th Cir. 1986) (review of revocation of nonimmigrant visas by consular officer; exhaustion principle applies, but petitioners had satisfied it); Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 765 (S.D.N.Y. 1978) (alternative ground for dismissal of action seeking review of district director's asylum denial).

504. INA § 106(c); 8 U.S.C. § 1105a(c) (1982). *See* Bak v. INS, 682 F.2d 441 (3d Cir. 1982) (per curiam).

505. *See* Townsend v. INS, 799 F.2d 179, 181 (5th Cir. 1986); Gallanosa v. United States, 785 F.2d 116, 119 (4th Cir. 1986); Bothyo v. INS, 783 F.2d 74, 76–77 (7th Cir. 1986); Garcia-Mir v. Smith, 766 F.2d 1478, 1488–89 (11th Cir. 1985), *cert. denied sub nom.* Marquez-Medina v. Meese, 106 S. Ct. 1213 (1986). In *Townsend*, the court found that the petitioner had failed to exhaust administrative remedies even though he had filed a formal appeal to the BIA, because he neither filed a brief there nor otherwise detailed the precise reasons for his appeal. *Cf.* Matter of Valencia, Interim Dec. No. 3006 (BIA 1986) (BIA will dismiss appeal unless appellant provides such details).

506. *See, e.g.*, Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033–35 (5th Cir. 1982) (exhaustion not required when wholesale agency program to violate constitu-

Departure While Review Is Pending

Section 106(c) also precludes judicial review of an exclusion or deportation order if the alien involved "has departed from the United States after issuance of the order."[507] (The regulations similarly deem motions to reopen or reconsider to be withdrawn when the alien leaves the country for any reason.[508]) In 1977, the Ninth Circuit held in *Mendez v. INS*[509] that the statute's preclusion of review does not apply when departure was effected through a governmental violation of procedural due process.[510] The INS had deported the alien without the advance notification to counsel required by its own regulations. *Mendez* has occasionally been applied in other cases,[511] but a recent decision by the Fifth Circuit expressed "serious reservations" about the *Mendez* exception, fearing that it would become a "sinkhole" that would swallow the rule of section 106(c).[512]

Judicial Review of Visa Denials

Despite the broad presumption of reviewability of administrative action established by the APA, one important pocket of immigration decisions is often considered beyond the reach of the courts: consular decisions not to issue a visa.[513] A few cases from early in this century held that the courts lacked jurisdiction to consider challenges to visa denials, particularly when filed by aliens outside the United States.[514] Several modern cases have reaffirmed this

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tional rights was alleged); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960) (exhaustion not needed when "fundamental errors" are shown). *See also* Bagues-Valles v. INS, 779 F.2d 483 (9th Cir. 1985) (exhaustion not required for certain constitutional claims, as agency cannot consider them); Beltre v. Kiley, 470 F. Supp. 87, 89 (S.D.N.Y. 1979) (exhaustion not required when it would be "futile as a matter of law").

507. 8 U.S.C. § 1105a(c). *See* Newton v. INS, 622 F.2d 1193 (3d Cir. 1980).

508. *See* 8 C.F.R. §§ 3.2, 103.5, 242.22 (1986).

509. 563 F.2d 956 (9th Cir. 1977).

510. *Id.* at 958–59.

511. *See, e.g.,* Zepeda-Melendez v. INS, 741 F.2d 285, 287, 289 (9th Cir. 1984); Juarez v. INS, 732 F.2d 58, 59–60 (6th Cir. 1984).

512. Umanzor v. Lambert, 782 F.2d 1299, 1303 & n.5 (5th Cir. 1986).

513. *See, e.g.,* Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 971 (9th Cir. 1986) ("long-recognized judicial nonreviewability of a consul's decision to grant or deny a visa"); Kummer v. Shultz, 578 F. Supp. 341 (N.D. Tex. 1984) (same).

514. *See, e.g.,* United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir), *cert. denied,* 279 U.S. 868 (1929).

doctrine, even while acknowledging that the APA renders such nonreviewability anomalous.[515] Most such cases cite the Supreme Court's 1971 decision in *Kleindienst v. Mandel*[516] in support of their rulings. But *Mandel,* carefully read, did not hold the denial of a visa (to a Belgian Marxist author and lecturer) to be unreviewable. Rather, the Court reviewed the denial, at the behest of American plaintiffs who wished to speak with Mandel and alleged that the visa denial violated their First Amendment rights.[517] To be sure, the Court did sustain the administrative decision, employing a standard that was remarkably deferential to the administrators: They had only to show a "facially legitimate and bona fide reason" for the denial.[518] Nevertheless, the decision amounted to a ruling on the merits.

In any event, the alleged consular nonreviewability doctrine has been evaded on a number of occasions by courts employing various rationales to distinguish contrary cases.[519] More recently, at least one court examined the question afresh, applying ordinary APA doctrine. The court readily concluded that it had jurisdiction to review the visa denial, again based on the suit of U.S. resident plaintiffs who wished to speak with the excluded alien.[520]

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515. *See* Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976). *See also* Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir.), *cert. denied,* 429 U.S. 897 (1976).

516. 408 U.S. 753 (1972).

517. *See* Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 529 (D. Mass. 1986). The Supreme Court's emphasis in *Mandel* on the American plaintiffs suggests that standing doctrine might in any event block review if sought only by the unadmitted alien. *See supra* note 471.

518. *Mandel,* 408 U.S. at 770.

519. *See, e.g.,* Friedberger v. Schultz, 616 F. Supp. 1315 (E.D. Pa. 1985) (court has jurisdiction to consider claim that State Department regulation was invalid); Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979) (court has jurisdiction to consider constitutional challenge to statute under which the consul acted).

520. Abourezk v. Reagan, 785 F.2d 1043, 1050–51 (D.C. Cir.), *cert. granted,* 107 S. Ct. 666 (1986). The court took a similar approach in Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 529–30 (D. Mass. 1986), and in Allende v. Shultz, 605 F. Supp. 1220, 1223 (D. Mass. 1985). *Cf.* Knoetze v. United States, 634 F.2d 207, 209 (5th Cir.), *cert. denied,* 454 U.S. 823 (1981) (court has jurisdiction, under ordinary APA standards, to review visa revocation; action brought by the affected alien while in this country).

IX. ILLEGAL IMMIGRATION AND THE 1986 REFORMS

For many years congressional attention has focused on the problem of illegal migration to the United States, and since 1972 one or the other house of Congress on several occasions has passed a bill meant to deal more effectively with the situation. Until 1986, however, the two chambers had never reached agreement on final legislation; each bill had been defeated in the confusing political crosscurrents created by the unusual coalitions the issue seems to evoke. In the waning days of the Ninety-ninth Congress, and long after immigration reform legislation appeared dead for the year, this pattern was abruptly broken. Informal negotiations achieved a compromise solution, both chambers passed the resulting measure, and President Reagan signed the Immigration Reform and Control Act of 1986 into law on November 6, 1986.[521] He called the act "the product of one of the longest and most difficult legislative undertakings of recent memory."[522]

Overview

Although the IRCA contains a few other amendments to the INA of some significance in their own right,[523] the major provisions of the new law all relate to the long-standing problem of illegal migration.[524] The IRCA's most important impact will be felt by em-

521. Pub. L. No. 99-603, __ Stat. __ (amending scattered sections of 7, 8, 18, 20, 29, and 42 U.S.C.). The act is also known as the Simpson–Rodino Act after its principal sponsors, Sen. Alan Simpson (R-Wyo.) and Rep. Peter Rodino (D-N.J.).

522. Statement by the President, reprinted in 63 Interp. Rel. 1036 (1986).

523. The most important of those amendments are noted at the appropriate places in earlier chapters.

524. The principal sections added to the INA by the IRCA (in the order in which they are treated in this chapter) are employer sanctions, INA § 274A; 8 U.S.C.A. § 1324a (Supp. 1987), as added by IRCA § 101; antidiscrimination, INA § 274B; 8 U.S.C.A. § 1324b (Supp. 1987), as added by IRCA § 102; legalization, INA § 245A; 8 U.S.C.A. § 1255a (Supp. 1987), as added by IRCA § 201; temporary agricultural workers (H-2A nonimmigrants), INA § 216; 8 U.S.C.A. § 1186 (Supp. 1987), as added by IRCA § 301; special agricultural workers, INA § 210; 8 U.S.C.A. § 1160 (Supp. 1987), as added by IRCA § 302; replenishment agricultural workers, INA § 210A; 8 U.S.C.A. § 1161 (Supp. 1987), as added by IRCA § 303. Parallel citations to the U.S. Code for these sections are not provided in later footnotes.

ployers and new job applicants. The INA has always forbidden aliens to engage in unauthorized work in the United States, but before 1986 it did not penalize employers, even if they intentionally hired undocumented aliens. Indeed, under a clause widely known as the Texas Proviso, employers were expressly sheltered from prosecution under the criminal provisions proscribing the "harboring" of illegal migrants.[525] This situation has now changed dramatically. Employer sanctions constitute the centerpiece of the IRCA, for Congress decided that the most effective deterrent to illegal migration would come from shrinking the job opportunities that draw most illegal migrants.[526] Therefore, for the first time, federal law imposes penalties on those who knowingly hire, recruit, or refer for employment aliens not authorized to work in this country.[527] In addition, all employers must comply with certain record-keeping requirements that will memorialize their compliance, whenever they hire, with careful procedures for verifying a job applicant's identity and work authorization.

Congress also took steps to reduce the risk that employer sanctions might induce discrimination against recent immigrants or particular ethnic groups. The IRCA creates in the Department of Justice a new post of "Special Counsel for Immigration-Related Unfair Employment Practices," who is to receive complaints and initiate remedies against certain kinds of alienage or national-origin discrimination. In addition, the record-keeping and verification procedures are crafted to help minimize discrimination. Employers must adhere to these procedures in all cases, no matter how certain they may be that a particular job applicant is a U.S. citizen. Because good-faith compliance with the procedures constitutes a defense in an employer sanctions enforcement proceeding, risk-averse employers need not try to protect themselves by shunning those who "look foreign."

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525. INA § 274(a); 8 U.S.C. § 1324(a) (1982). This section has now been changed by IRCA § 112.

526. Congress also considered enhanced border enforcement to be important, and the IRCA authorizes a 50 percent increase in Border Patrol personnel. IRCA § 111(c). Actual implementation of that increase, however, depends on later appropriations. The IRCA also urges better enforcement of wages and hours legislation, so as to "remove the economic incentive for employers to exploit and use" unauthorized aliens. *Id.* § 111(d).

527. By 1986 at least thirteen states had their own employer sanctions legislation forbidding the hiring of undocumented aliens. The Supreme Court had expressly held that such legislation did not unconstitutionally intrude on the federal sphere, DeCanas v. Bica, 424 U.S. 351 (1976), but such laws were underenforced and were generally considered ineffective. The IRCA expressly preempts such state measures. INA § 274A(h)(2).

Other provisions deal with related problems that might become more acute once employer sanctions are effectively implemented. First, rather than encourage massive deportations of longtime illegal residents, Congress decided to "legalize" the status of those who were in the United States illegally before January 1, 1982, and have resided here continuously since then. Qualifying aliens will not receive permanent resident status immediately, but will instead receive a new temporary resident status that can ripen into permanent status after eighteen months.

Second, Congress responded to the concerns of agricultural growers, believing that that industry might be the one most adversely affected by the other changes in the law. Initially, the IRCA streamlines the provisions for hiring aliens as temporary agricultural workers by creating a new nonimmigrant class known as "H-2A." More sweepingly, the act creates a novel provision for legalization of "special agricultural workers"—persons who worked in U.S. agriculture for a total of ninety days during the twelve-month period ending May 1, 1986—which will eventually lead to permanent residence rights. The IRCA also allows for admission of additional, "replenishment" agricultural workers in fiscal years 1990 through 1993, if a new shortage of agricultural labor is found.

Each of these measures was highly controversial, and each envisions the creation of complicated administrative mechanisms for implementation. Hence frequent court challenges can be expected.[528] In addition, the precise effect and effectiveness of many of the provisions will depend on the implementing regulations, which are not yet available. Subject to that limitation, the remainder of this chapter describes the major provisions of the IRCA in somewhat greater detail.

Employer Sanctions

Coverage

The employer sanctions provisions, as set forth in a new INA § 274A, penalize those who knowingly hire, recruit, or refer for a

528. Other potentially significant changes, which might easily figure in future litigation, should be noted, although they are not treated further in this chapter: amendments to the criminal provisions punishing fraud and misuse of documents or unlawful transportation and harboring of aliens, IRCA §§ 103, 112; restrictions on warrantless entry by INS officers on agricultural property, IRCA § 116; provisions requiring agencies administering a variety of federally funded public assistance programs to verify the legal immigration status of beneficiaries (the so-called SAVE program), IRCA § 121; and certain limited eligibility of H-2A workers for legal assistance, IRCA § 305.

fee any unauthorized alien.[529] They also penalize the employer for continuing employment, knowing that an alien is or has become unauthorized.[530] These provisions cast a wide net. Whereas some earlier versions of the bill exempted small enterprises, the final legislation applies to all employers. Moreover, it is not limited to full-time employees. The legislative history, however, speaks of a vague exemption for "casual hires (i.e., those that do not involve the existence of an employer/employee relationship)."[531] Also, to close a loophole that has reduced the effectiveness of similar schemes in some European countries, the IRCA expressly makes general contractors equally liable with subcontractors for the knowing employment of unauthorized aliens.[532] And it forbids indemnification agreements purporting to make an employee pay an employer's fine for an illegal hiring.[533]

Verification

To ensure that prospective employees are authorized to work, the IRCA requires employers to adhere to certain verification procedures.[534] These requirements apply to all job applicants "who are being seriously considered for employment."[535] Even a father hiring his U.S.-born daughter to work in the family business, for example, must conform, although he would plainly have no doubt that she is authorized to work in this country. Congress chose this sweeping coverage primarily to reduce the chances of discriminatory implementation by employers.

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529. Unauthorized aliens are those not lawfully admitted for permanent residence or otherwise authorized by the attorney general to undertake the particular employment at issue. INA § 274A(h)(3).

530. Under an important grandfather clause, however, an employer may continue, without being subject to the IRCA's sanctions, to employ unauthorized aliens who were hired by that particular employer before the IRCA's date of enactment (Nov. 6, 1986). IRCA § 101(a)(4).

531. H.R. Rep. No. 682, pt. I, 99th Cong., 2d Sess. 57 (1986) [hereinafter House Report]. One noted commentary reads the "casual hire" language as probably excepting from penalties those "hiring an unauthorized alien as a babysitter or a carpenter for one job, or for failing to verify the citizenship status of such an individual." *The Simpson-Rodino Act Analyzed*, 63 Interp. Rel. 991, 992 (1986) [hereinafter Analysis]. *See also* H.R. Rep. No. 1000, 99th Cong., 2d Sess. 86 (1986) (Conf. Rep.), stating an expectation that the INS will "target its enforcement resources on repeat offenders and that the size of the employer shall be a factor in the allocation of such resources."

532. INA § 274A(a)(4).

533. INA § 274A(g).

534. INA § 274A(a)(1)(B).

535. House Report, *supra* note 531, at 61. There is a limited exception, however, in those instances where a state employment agency refers the applicant and the agency certifies to the employer that it has already performed the verification. INA § 274A(a)(5). States are not expected, at present, to make wide use of this provision; hence most employers will have to perform their own verification.

Each employer must sign a form attesting, under penalty of perjury, that he or she has examined specified types of documents as a way of checking the applicant's true identity and verifying his or her authorization to work in this country. The applicant also signs the form, attesting, under penalty of perjury, that he or she is a U.S. citizen, a lawful permanent resident alien, or an alien otherwise authorized for U.S. employment. The forms must be kept on file for a minimum of three years. They are subject to inspection by INS and Labor Department officials, but—because of privacy concerns—the information collected may not be used for other governmental or law enforcement purposes.[536] An employer's good-faith compliance with these verification and paperwork requirements constitutes an affirmative defense against a charge of knowing employment of an unauthorized alien.[537]

Documents

Certain documents establish both identity and authorization to work: for example, a U.S. passport, a certificate of citizenship or naturalization, a resident alien card containing a photograph, or a foreign passport bearing an endorsement showing the attorney general's permission to work.[538] When those are unavailable, the applicant must display a combination of one identity document (e.g., a driver's license or similar state-issued document bearing a photo) and one work authorization document (such as a U.S. birth certificate or certain Social Security cards).[539]

An inherent tension is reflected in these legislative provisions. Congress wanted the identification system to be effective, and there remains genuine concern about counterfeit documentation. On the other hand, it did not want to authorize employers to exact too much from prospective employees, again largely because of the perceived risk of discriminatory application.[540] Hence employers are directed to accept the documentation if it "reasonably appears on its face to be genuine."[541]

The attorney general may add to the list of acceptable documents by regulation.[542] Moreover, the IRCA contains elaborate provisions

536. INA § 274A(b).
537. INA § 274A(a)(3).
538. INA § 274A(b)(1)(B).
539. INA § 274A(b)(1)(C), (D).
540. *See* House Report, *supra* note 531, at 60–62.
541. INA § 274A(b)(1)(A).
542. INA § 274A(b)(1)(C)(iii), (D)(ii).

for monitoring this system and for studying and eventually implementing various improvements.[543] Possible improvements listed in the act include the institution of a telephone verification system similar to those used by credit card companies. Major changes in the verification requirements, however, can be implemented only after congressional approval. The act also specifically provides that it is not to be construed to authorize national identification cards.[544]

Enforcement and Penalties

A system of civil fines constitutes the central enforcement mechanism for the employer sanctions provisions. First-time offenders of the laws against employment of unauthorized aliens are subject to fines of $250 to $2,000 per unauthorized alien. For second offenses the range is $2,000 to $5,000, and for third and subsequent offenses, $3,000 to $10,000. Offenders are also subject to cease-and-desist orders and may be subject to other remedial orders.[545] Criminal penalties are available against employers who engage in a "pattern or practice" of unauthorized employment, and the Justice Department may also obtain injunctive relief.[546] The verification and paperwork requirements carry their own separate enforcement remedies, which do not include criminal sanctions. The civil penalties for nonadherence to these requirements range from $100 to $1,000 per job applicant, and they are to be applied even if the unverified applicant proves to be a U.S. citizen or an alien fully authorized to work in this country.[547]

The IRCA calls for creation of a new unit within the INS to receive complaints, investigate them, and prosecute alleged violations of the employer sanctions provisions. There is no private right of action, however, if the INS chooses not to pursue a claimed offense. Before penalties are imposed, the person charged has thirty days to seek a hearing before an administrative law judge, followed by administrative appellate review.[548] Because immigration judges are not administrative law judges, the IRCA clearly envisions the creation within the Justice Department of a new system of hearing officers, separate from the immigration judges, for this enforcement regime. Moreover, the act expressly provides that the body

543. INA § 274A(d), (j)–(n); IRCA § 101(d)–(f).
544. INA § 274A(c).
545. INA § 274A(e)(4).
546. INA § 274A(f).
547. INA § 274A(e)(5).
548. INA § 274A(e). The INS bears the burden of proving a violation by a preponderance of the evidence in such an enforcement proceeding. In criminal proceedings, of course, the burden is "beyond a reasonable doubt."

charged with administrative appellate review cannot be an "entity which has review authority over immigration-related matters,"[549] thus excluding the BIA and AAU from such a role.

Judicial Review

A person adversely affected by an administrative order implementing the employer sanctions may petition for review in the appropriate federal court of appeals within forty-five days after the order becomes administratively final. The attorney general may enforce compliance with a final order by filing suit in a federal district court. That court may not review the validity or appropriateness of the administrative order itself in the course of the enforcement proceeding.[550]

Transition

These provisions map out very ambitious changes in ordinary American hiring practices, although it is expected that the verification and paperwork requirements will one day become routine. For this reason, the IRCA includes a number of measures to ease the transition. To begin with, it contains a grandfather clause making the sanctions inapplicable to all current employees as of the date of the IRCA's enactment (November 6, 1986), even if the employer continues the employment relationship with full knowledge of the alien's unauthorized status.[551] Moreover, the other sanctions are to be phased in gradually. The IRCA provides initially for a six-month period of education, during which federal agencies are to distribute forms and information about the system. For the next twelve months, first-time violators are to receive only a citation and are not subject to other sanctions. Thereafter, beginning in May 1988, the employer sanctions provisions become fully effective.[552]

Antidiscrimination

Some organizations vehemently opposed employer sanctions because they feared that such measures would lead to employment discrimination against Hispanic-Americans or members of other

549. INA § 274A(e)(6).
550. INA § 274A(e)(7), (8).
551. IRCA § 101(a)(3).
552. INA § 274A(i). Under INA § 274A(i)(3), however, certain agricultural employers enjoy a longer transition period. They are shielded from sanctions until December 1, 1988, the end of the application period for "special agricultural workers" under new INA § 210.

minority groups. They also worried that at least some such discrimination would not be covered by already existing fair employment laws. In particular, it is clear that title VII of the Civil Rights Act of 1964[553] has certain limits in this respect. For one, it applies only to those who employ fifteen or more employees, and certain part-time or seasonal employees do not count toward this total.[554] Moreover, the Supreme Court held in *Espinoza v. Farah Manufacturing Co.*[555] that title VII does not bar discrimination based solely on alienage.

As a result, Congress adopted what has become known as the Frank Amendment, after its primary congressional sponsor, Representative Barney Frank (D-Mass.). A new section 274B, added to the INA, creates an office of "Special Counsel for Immigration-Related Unfair Employment Practices" in the Department of Justice. This official is to investigate and pursue charges of the kind of employment discrimination covered by the amendment: discrimination on the basis of "national origin" or "citizenship status."[556]

Coverage

It is important to recognize that the amendment does not cover all possible forms of alienage discrimination. It protects only U.S. nationals and "intending citizens." To fit the latter category, an alien must meet three requirements: He or she must (1) be a lawful permanent resident alien, a newly legalized alien, a refugee, or an asylee; (2) demonstrate intent to become a citizen by filing form N-300, currently a little-used declaration of intent to become a citizen; and (3) within six months of eligibility for naturalization (or of the effective date of the act), actually initiate the full naturalization process, and then secure naturalization within two years thereafter.[557] Nonimmigrants (even those authorized to work), parolees, and certain other aliens therefore are not covered. Moreover, because a great many permanent resident aliens have historically remained in the country without naturalizing for many years after eligibility first accrues, the Frank Amendment will either work significant changes in naturalization patterns or else leave a large proportion of aliens uncovered.

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553. 42 U.S.C. § 2000e-2 (1982).

554. *Id.* § 2000e(b).

555. 414 U.S. 86 (1973). An ostensible refusal to hire aliens would violate title VII, however, if such a policy were merely a pretext covering national-origin discrimination.

556. INA § 274B(a)(1).

557. INA § 274B(a)(3). A complaining alien will not be disqualified for failing to meet these latter timetables if the delays are attributable to slow government processing.

Certain other exceptions also apply. Small employers—those having fewer than four employees—are not reached. Moreover, national-origin discrimination may not be prosecuted under INA § 274B if it could be prosecuted under title VII. That is, the IRCA covers national-origin discrimination only if it is carried out by an employer whose operations are too small to reach the title VII threshold but large enough (at least four employees) to be covered by the IRCA. In addition, the IRCA permits discrimination based on citizenship status when lawfully required under federal, state, or local governmental authority. And the so-called Lungren Amendment permits an employer to hire a U.S. citizen in preference to an alien if the two are "equally qualified."[558]

Finally, a sharp dispute over what kinds of actions the new section 274B covers surfaced on the first day of the IRCA's existence. Title VII of the 1964 Civil Rights Act is violated by actions motivated by discriminatory intent *or* by practices having a disparate impact on different groups.[559] When President Reagan signed the IRCA, he carefully included in his signing statement his interpretation that the act reaches only discriminatory intent, not actions having a disparate impact.[560] Representative Frank promptly denounced this reading as "mean-spirited" and incorrect.[561] This dispute may well figure in early litigation under the antidiscrimination provision.

Procedures

Aggrieved individuals may file charges with the special counsel's office, within 180 days of the allegedly discriminatory action.[562] INS officers may also file charges, and the special counsel may conduct investigations on his or her own initiative.[563] The counsel has 120 days to decide whether to bring a formal complaint before an administrative law judge based on a privately initiated charge.[564] If he or she chooses not to proceed, the individual may file a private action directly with an administrative law judge, but only if the charge alleges "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity."[565] Although

558. INA § 274B(a)(2), (4).
559. *See, e.g.,* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
560. Statement by the President, reprinted in 63 Interp. Rel. 1036, 1037 (1986).
561. N.Y. Times, Nov. 7, 1986, at A12, col. 1.
562. INA § 274B(b), (d)(3).
563. INA § 274B(b)(1), (d)(1).
564. INA § 274B(d)(1).
565. INA § 274B(d)(2). President Reagan cited this language as support for his construction that the act reaches only intentionally discriminatory behavior, *see supra* note 560, but the limiting language could also be read as applying only to pri-

somewhat limited, this possible private remedy contrasts with the general employer sanctions provisions, which give no private right of action to a disappointed individual whose allegations are not deemed worthy by the prosecuting authorities.

Complaints, whether filed privately or by the special counsel, are to be heard by administrative law judges within the Department of Justice.[566] Again, the act evidently contemplates that these be different officials from the immigration judges who hear exclusion and deportation cases.[567] If the complainant proves a violative act by a preponderance of the evidence, the administrative law judge must enter a cease-and-desist order. The order may also require the hiring or rehiring of the victim of discrimination, with or without back pay (to a maximum of two years). In addition, it may impose a civil fine of up to $1,000 per individual, $2,000 in the case of repeat offenders.[568] The courts of appeals have jurisdiction to review findings and orders by administrative law judges; review must be sought within sixty days (fifteen days longer than the period allowed for review of employer sanctions orders).[569] Attorneys' fees may be awarded to the "prevailing party" (other than the United States)—either complainant or employer—if the losing party's position was "without reasonable foundation in law and fact."[570]

Legalization

The employer sanctions provided for by the IRCA are meant to reduce sharply all future illegal migration to this country. Congress also had to deal with the question of what to do with those who had already come to this country illegally under the earlier regime of ineffective controls. Because such people may have developed substantial ties to this nation, and because any large-scale deportation program would be difficult to achieve, Congress chose to provide for "legalization" of longtime illegal residents. These amnesty provisions, meant to be a one-time-only project, are designed to give a new, more secure status to the beneficiaries, thereby bringing them out of the shadows and ending any exploitation they may have suffered or any unfair competition they may have provided to American workers.

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vate complaints and not necessarily to all complaints that might be brought under section 274B.

566. INA § 274B(e), (f).
567. INA § 274B(e)(2).
568. INA § 274B(g).
569. INA § 274B(i).
570. INA § 274B(h).

Scope

Over the years, different versions of immigration reform legislation put forth a variety of cutoff dates and legalization schemes. The program finally adopted, in the form of a new INA § 245A added by the IRCA, is available to those aliens in the United States illegally as of January 1, 1982, who have maintained "continuous residence" thereafter.[571] Such aliens must also establish "continuous physical presence" since the date of the IRCA's enactment—a more demanding requirement than continuous residence—but the act provides that such presence shall not be broken by "brief, casual, and innocent absences."[572] Unlike nearly all of the ordinary provisions for relief from deportation (see chapter 6), this unique legalization program does not create discretionary benefits. The IRCA states that the attorney general "shall" accord legalization to those aliens who meet the program's criteria.[573]

Persons who entered the United States without inspection before January 1, 1982, and have remained thereafter, will clearly fit the act's timetable. In contrast, those who entered as nonimmigrants have to jump through a few more hoops to qualify, for the specified continuous residence must have been residence "in an unlawful status." Thus a nonimmigrant's admission period must have expired before January 1, 1982, or, if the claim of illegal presence rests on some other occurrence, such as violation of the terms of admission (e.g., by unauthorized employment), the unlawful status must have been "known to the Government as of such date."[574]

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571. INA § 245A(a)(2).

572. INA § 245A(a)(3). This language undoubtedly derives from the Supreme Court's decision in Rosenberg v. Fleuti, 374 U.S. 449 (1963). *See supra* ch. 2. Similar, but not identical, language, sometimes adorned with a variety of other concepts such as "emergency or extenuating circumstances" or "family obligations," is used at other places in the section to describe absences that may be deemed not to break a period of "continuous residence." *See* INA § 245A(b)(3)(A), (g)(1)(A), (g)(2)(A), (g)(2)(C). One may hope that INS regulations will give more precise content, regarding both continuous residence and continuous physical presence, to standards that have been elusive on this issue ever since *Fleuti*. Indeed, it would have been helpful if Congress had followed up on various executive branch suggestions and specified exact standards in the INA itself.

Moreover, early statements by the INS seem to interpret the IRCA as providing that continuous physical presence, which is required from the date of enactment until temporary resident status is granted, will be broken by an absence unless the alien leaves with the prior permission of the INS, under "advance parole." *See* INA § 245A(a)(3)(C), (g)(2)(B)(ii) (provisions that do suggest some linkage to advance parole). *Cf.* INA § 245A(f)(3)(A) (allowing judicial review of legalization denial only as part of review of a deportation order, not an exclusion order). At the very least, any departure, not approved in advance, between November 6, 1986, and the actual approval of a legalization application certainly jeopardizes an alien's legalization entitlement, no matter how clearly qualified he or she might be according to all the other requirements of section 245A.

573. INA § 245A(a).

574. INA § 245A(a)(2)(B).

Several of the ordinary exclusion grounds are waived for purposes of the legalization program. The act also grants the attorney general the discretion to waive most of the other exclusion grounds.[575] Conviction of any felony or three misdemeanors committed in the United States, however, expressly renders an alien ineligible.[576] No numerical limits constrain the legalization program, and legalized aliens are not charged to any other quotas.[577] Because several million people are believed eligible, the legalization program poses formidable challenges to the administering agencies. Skilled and sensitive implementation will be necessary if the program is to walk the fine line necessary to achieve the contradictory aims Congress set for it: (1) sufficient openness and flexibility to encourage qualified aliens to step forward and to ensure that they will in fact receive a legalized status, thus saving future enforcement resources,[578] but (2) sufficient care to avoid legalization of those with fraudulent claims and to reward only those longtime residents Congress deemed worthy of this amnesty.[579]

Benefits

The IRCA provides for an initial public information and preparation period of no longer than 180 days. Thereafter, the attorney general must allow for a twelve-month application period, during which persons may apply for legalization;[580] that period is expected to start on May 5, 1987. During the roughly eighteen-month stretch from the IRCA's enactment to the end of the application period, any apprehended alien who makes out a prima facie case of eligibility for legalization may not be deported and must be given employment authorization. Naturally such an individual must then seasonably apply for legalization. The ban on deportation and the permission to work last until the application is definitively denied. The same benefits are accorded to aliens who apply for legalization during the application period, assuming they establish a prima facie case.[581]

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575. INA § 245A(d)(2).

576. INA § 245A(a)(4). This paragraph specifies a few other disqualifying characteristics as well.

577. INA § 245A(d)(1).

578. The House Judiciary Committee's report called for implementation of legalization "in a liberal and generous fashion," so as to "ensure true resolution of the problem and to ensure that the program will be a one-time-only program." House Report, *supra* note 531, at 72.

579. The act specifies criminal penalties, including a maximum of five years' imprisonment, for false statements in the application process. INA § 245A(c)(6).

580. INA § 245A(a)(1)(A), (i).

581. INA § 245A(e).

Once their applications are approved, these aliens receive a new status as aliens "lawfully admitted for temporary residence."[582] After eighteen months in this status, they may apply for adjustment to permanent resident status.[583] Indeed, legalized aliens then have only about twelve months during which they must pursue such an adjustment application or once again become deportable; the temporary resident status may last no longer than thirty-one months.[584] To qualify for lawful permanent residence, applicants must show that they have been continuously resident in the United States throughout the period of temporary status and that they have not been convicted of any felony or three or more misdemeanors. At this stage, applicants must also prove that they have acquired a minimal understanding of the English language and a knowledge and understanding of the history and government of this country, or that they are satisfactorily pursuing a course of study to this end. Applicants over age sixty-five may be excused from these "basic citizenship skills" requirements.[585]

All legalized aliens receive employment authorization throughout the period of temporary and permanent resident status.[586] But the IRCA renders them ineligible for most forms of federally funded public assistance for a period of five years from the time they acquire temporary resident status. This means that the disqualification for such aid continues even after they become lawful permanent residents.[587]

Figure 2 on page 122 sets forth in graphic form the various timetables that apply to the legalization provisions of the IRCA.

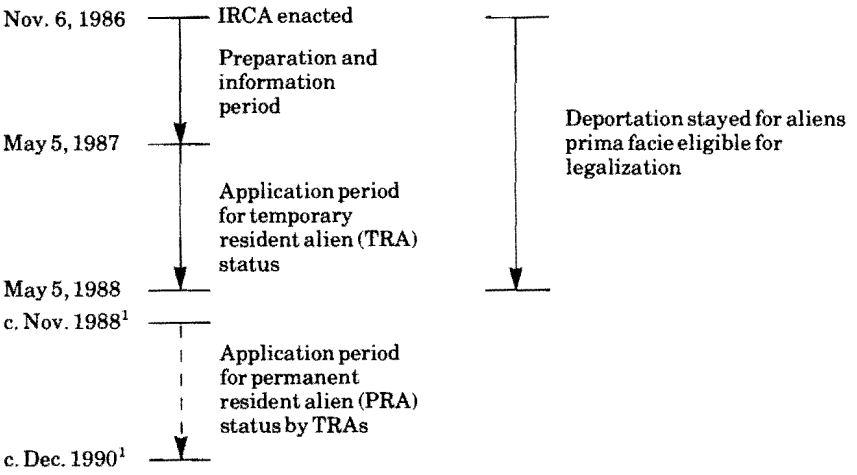
Procedures

Congress designed the application procedures for legalization in such a way as to encourage eligible aliens to participate despite the suspicion many of them may feel toward the INS. Applicants may initially file their papers with "qualified designated entities"—that

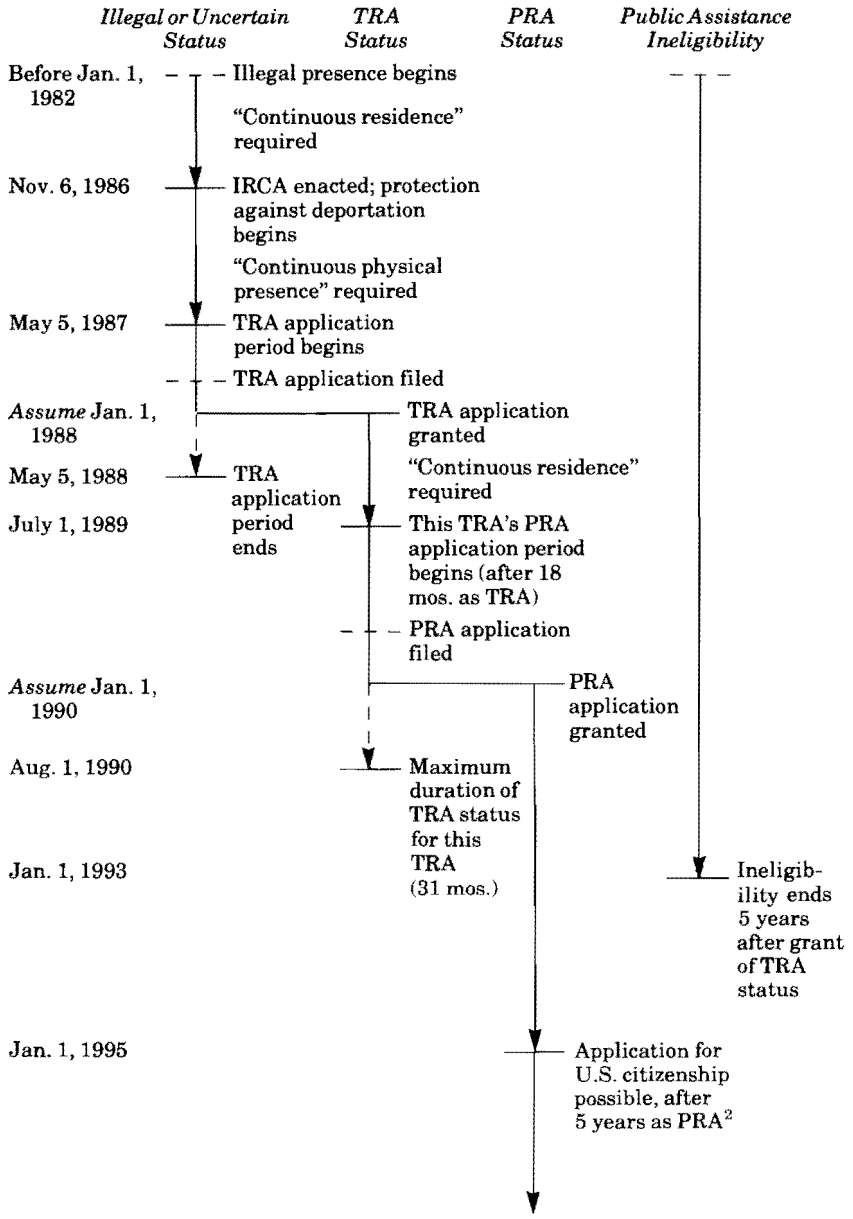
582. INA § 245A(a).
583. INA § 245A(b)(1)(A).
584. INA § 245A(b)(2)(C). Temporary residence may be prolonged, however, if the alien has duly applied for permanent residence and is simply waiting for a ruling on the latter application.
585. INA § 245A(b)(1).
586. INA § 245A(b)(3).
587. INA § 245A(h); IRCA § 201(b). Despite these provisions, Congress anticipated a significant financial burden on states with large populations of legalized aliens. Therefore, IRCA § 204 provides four billion dollars over four years for "legalization impact assistance grants" to state governments.

FIGURE 2
Legalization Under the Immigration Reform and Control Act (IRCA)

Government Schedule



Typical Individual Schedule



[1]The period from Nov. 1988 to Dec. 1990 is only a rough approximation because it is tied to the date individuals are actually granted TRA status. TRAs may file for PRA status 18 months after the grant of TRA status. TRA status ends 31 months after it is granted, unless an application for PRA status has been filed and processing delays require an extension.

[2]An application for U.S. citizenship is not required; PRA status may last indefinitely.

is, voluntary agencies or community groups designated by the attorney general as qualified to help with this program.[588] It is expected that a large number of organizations traditionally active in assisting aliens will assume this role. These agencies will provide an initial review of an alien's case and presumably will advise unqualified aliens that they should proceed no further. In any event, they may forward application papers to the INS only with an applicant's approval, and the IRCA specifically guards the confidentiality of the agencies' files.[589] Indeed, even information that reaches the Department of Justice in connection with a legalization application may be used only for purposes of evaluating that application or prosecuting for false statements therein.[590] The House Report explains that these confidentiality provisions are "meant to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by INS."[591]

Applications may also be filed directly with the INS, which expects to set up about one hundred special offices to receive such papers. Wherever the papers are first filed, all applications ultimately will be adjudicated by governmental officers who are delegates of the attorney general's authority under INA § 245A.[592] The act requires that continuous residence and continuous physical presence for the required periods be "established through documents, together with independent corroboration of the information contained in such documents." It also establishes a preference for employment-related documents where such are available.[593] These stipulations may be difficult for some otherwise qualified aliens to satisfy, given their previous incentives to avoid the creation of a paper trail. Much of the outcome of the legalization program will depend, therefore, on the strictness or flexibility of the evidentiary standards included in the implementing regulations.

In contrast to the sections dealing with employer sanctions and antidiscrimination, section 245A says very little about just who within the Justice Department should perform the adjudications. The act does specify that there shall be "a single level of administrative appellate review" of the applications for adjustment of status provided for in section 245A, and presumably either the BIA or the AAU could perform this function. The IRCA also specifies

588. INA § 245A(c)(2).
589. INA § 245A(c)(3), (4).
590. INA § 245A(c)(5).
591. House Report, *supra* note 531, at 73.
592. *See* INA § 245A(c)(3), (5).
593. INA § 245A(g)(2)(D).

that court review of application denials shall be available exclusively by means of the judicial review of an order of deportation under section 106 of the INA.[594] And the act contains its own unique standard for judicial review of a denial of legalization: "[T]he findings of fact and determinations contained in [the administrative] record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole."[595]

Cuban-Haitian Entrants

Section 202 of the IRCA[596] establishes special adjustment provisions for certain nationals of Cuba or Haiti who entered the United States before January 1, 1982. Most of this group consists of people already documented as "Cuban-Haitian entrants," and most of those so designated are persons who arrived during the 1980 boat lift from the Cuban port of Mariel. Although all these Cuban-Haitian entrants would also qualify for the general legalization provisions, adjustment under IRCA § 202 is clearly preferable. Those qualifying under that section become permanent residents immediately, and that status is recorded retroactively to 1982, thus speeding their eligibility for citizenship. They also escape the disqualification for federal benefits under the general legalization provisions.

Agricultural Workers

Controversies over alien agricultural workers contributed overwhelmingly to the failure of immigration reform legislation in earlier years. They almost torpedoed the Simpson-Rodino bill in 1986 as well. Negotiating efforts spearheaded by Representative Charles Schumer (D-N.Y.), however, ultimately achieved a compromise that satisfied all interested parties; the resulting provisions are often known as the Schumer Amendment. If they seem remarkably generous to certain farmworkers and to the growers who will employ them, one must keep in mind that this generosity was the price that had to be paid to resolve the impasse and achieve passage of any kind of immigration reform legislation. The agricultural worker provisions finally enacted are in any event more limited

594. INA § 245A(f).
595. INA § 245A(f)(3)(B).
596. 8 U.S.C.A. § 1255a note (Supp. 1987).

than certain other versions accepted by the House or Senate at various times. Moreover, by the end of the legislative process, they had become extremely complex. Only a general outline of the provisions is sketched here, with fewer details than have been given for the other portions of the IRCA.

H-2A Nonimmigrants

The preexisting provisions for temporary foreign workers (under the H-2 nonimmigrant category) were rarely used for agricultural workers, particularly in the southwestern region of the country. Growers of perishable crops argued that the administrative arrangements were too time-consuming and unpredictable to meet the needs of their industry. Many growers feared that the new employer sanctions provisions, if effectively enforced so as to cut off the availability of future undocumented workers, would only aggravate the difficulties. The IRCA therefore creates a new H-2A category for temporary agricultural workers and, in a new INA § 216, spells out in detail the streamlined procedures that prospective employers now must follow in order to bring in temporary agricultural labor.[597] The new section retains the basic philosophy of the original temporary worker provisions, however. The employer must still make an effort to recruit domestic workers first and cannot receive certification unless it is determined that the regional labor supply is insufficient and that the employment of foreign workers will not "adversely affect" the wages and working conditions of domestic workers.[598]

Simplified access to nonimmigrant workers was not deemed adequate by itself, however, to satisfy the perceived needs of the growers. Two other new provisions—each contemplating permanent admissions—therefore round out the IRCA's arrangements for agricultural labor.

Special Agricultural Workers

A new INA § 210 creates a novel legalization program for "special agricultural workers" (SAWs). To qualify, an alien must have resided in the United States[599] and must show that he or she

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597. INA § 216, added by IRCA § 301(c). As explained in chapter 4, both the IRCA and the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, added to the INA new sections designated with the number 216. (Both were passed in some haste in the closing days of the Ninety-ninth Congress.) The IRCA's addition will be codified as 8 U.S.C. § 1186, and the IMFA's as § 1186a. Presumably the next Congress will sort out the numbering problem.

598. INA § 216(a), (b).

599. This is a considerably less demanding residence requirement than that which obtains under the main legalization provisions. *See* Analysis, *supra* note 531, at 1131–34.

worked at least ninety "man-days" in "seasonal agricultural services" during the twelve-month period ending May 1, 1986.[600] The latter term is defined as "the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture."[601]

Qualified aliens may apply for legalization under section 210 any time between June 1, 1987, and December 1, 1988.[602] Whereas applicants for ordinary legalization must apply inside this country (and may lose their eligibility if they depart without advance permission, even briefly, after the IRCA's date of enactment[603]), putative SAWs may apply at U.S. consular posts abroad.[604] Within the United States, they may apply directly to the Justice Department or via other entities designated by the attorney general to receive applications (for SAWs, these may include various farmworker or agricultural organizations).[605]

Consistent with a general statutory pattern of far greater liberality toward SAWs than toward the beneficiaries of the main legalization program, the statutory standards for proving the necessary residence and labor are not as strict under INA § 210 as under INA § 245A.[606] The temporary resident status that is granted to SAWs is also more favorable. Temporarily resident SAWs, for example, apparently will enjoy greater opportunities to travel outside this country.[607] They also qualify for a wider array of federally funded public assistance, but not quite so wide an array as that open to ordinary immigrants.[608] Admitted SAWs incur no continuing obligations to remain active in agricultural labor, but the Schumer Amendment's proponents clearly expected that a high proportion of them would do so anyway.

The standards for adjustment to permanent resident status are also considerably less demanding for SAWs than for the main legalization program. For example, SAWs need not meet the "basic citizenship skills" requirement. So-called Group 1 SAWs (those who compiled a minimum of ninety man-days of agricultural work *each* of the three years preceding May 1, 1986) have a chance to obtain permanent residence one year sooner than other SAWs.[609]

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600. INA § 210(a)(1).
601. INA § 210(h).
602. INA § 210(a)(1)(A).
603. *See supra* note 572.
604. INA § 210(b)(1).
605. INA § 210(b)(2).
606. INA § 210(b)(3), (c).
607. *See* INA § 210(a)(4), (g).
608. INA § 210(f).
609. INA § 210(a)(2).

The statutory provisions for administrative and judicial review of adverse determinations essentially follow the pattern of the main legalization program.[610] But whether consular decisions on SAW applications will be subject to the same kinds of review is unclear. (The ordinary legalization provisions do not permit consular determinations; the SAW provisions clearly do.)

Replenishment Agricultural Workers

Although the growers' worries about an adequate supply of agricultural labor were somewhat allayed by the combined SAW and H-2A provisions, some agricultural interests remained concerned about possible future shortages. The act therefore sets forth, in a new INA § 210A, complicated provisions for the admission, in fiscal years 1990 through 1993 only, of "replenishment" agricultural workers. (Yes, the conference committee report does refer to them by the wonderful acronym RAWs.) Such workers are to be admitted only if the secretaries of agriculture and labor jointly determine, according to an extremely complex formula, that there exists a shortage of available agricultural workers.[611] The IRCA limits replenishment admissions to a ceiling computed on the basis of the number of SAWs admitted under INA § 210.[612]

Once the shortage number is determined, the attorney general is to provide for the admission of RAWs to meet the need. The statute provides remarkably little further guidance on how to select the aliens who will be admitted as RAWs.[613] It does not require that they have previously worked in U.S. agriculture, although nothing prevents the agencies from imposing such a requirement by regulation. RAWs will receive temporary resident status, with essentially the same five-year restriction on eligibility for public assistance as that imposed on the beneficiaries of the main legalization program.[614] RAWs are subject to more onerous requirements than SAWs if they wish to retain temporary resident status and ultimately qualify for permanent residence. They will have to work at least ninety man-days in agriculture during each of the three years following admission. If they do not meet this three-year labor obligation, they become deportable, but if they do, they can then apply for adjustment to permanent resident status.[615] Even then, how-

610. INA § 210(e).
611. INA § 210A(a).
612. INA § 210A(b).
613. *See* INA § 210A(c), (e).
614. INA § 210A(d)(6).
615. INA § 210A(d)(5)(A).

ever, RAWs will have to perform another two years of equivalent agricultural labor before they can qualify for naturalization.[616] Although RAWs are thus obligated to a significant extent to work in a particular industry, they differ from H-2A workers in that their work is not tied to any particular employer or region.

* * *

The Immigration Reform and Control Act of 1986 promises fundamental changes affecting life throughout the United States. For employers and job applicants, from mid-1987 on, it demands major alterations in hiring practices. To longtime illegal residents, it offers a chance to emerge from the underground in order to claim a more secure future. To those contemplating future illegal migration, it poses new obstacles: both stronger border enforcement and tighter controls on eventual access to jobs and public benefits.

To the nation as a whole, the IRCA ultimately promises an opportunity to remove, humanely but firmly, the long-standing ill effects of years of ineffective controls on illegal migration. Whether this hopeful prospect can be realized, however, depends critically on the skill and sensitivity of the administering agencies, as well as on the willing cooperation of most of the citizenry. There are reasons to hope for a favorable response, but the jury is still out on these crucial questions.

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616. INA § 210A(d)(5)(B).

ANNOTATED BIBLIOGRAPHY

General Works

Treatises

C. Gordon & H. Rosenfield, Immigration Law and Procedure (Matthew Bender rev. ed. 1986). For many years the leading treatise on immigration and nationality law, this work is now a ten-volume set in loose-leaf form, regularly updated. The treatment of all relevant materials—statutory, regulatory, and judicial—is comprehensive and reliable. Volumes 1, 1A, and 2 deal with immigration; volume 3 treats nationality law and practice. The next four volumes constitute an extremely valuable collection of relevant governmental materials, some of which are not readily available elsewhere. Volume 4 contains the Immigration and Naturalization Service (INS) Operations Instructions and the INS Examinations Handbook. Volume 5 reprints the Immigration and Nationality Act (INA) and other selected statutes; INS, Labor Department, and State Department regulations; various presidential documents; United Nations materials; and the Labor Department's Technical Assistance Guide, which sets forth extensive information about labor certification. Volume 6 and the first portion of volume 6A contain those sections of the State Department's Foreign Affairs Manual dealing with visa processing. The balance of volume 6A consists of an index and various reference tables. Two new volumes, numbered 7 and 8, were added in 1986 to cover "Procedure and Strategy." Designed for the practicing immigration attorney, these two volumes nonetheless provide a helpful picture of the real day-to-day operation of the administrative scheme.

Immigration Law Service (Lawyers Co-operative Publishing 1985). This six-volume loose-leaf work, a recent addition to the literature, was evidently intended to rival the preceding book by Gordon and Rosenfield. It is well designed and thorough, and it reproduces many of the primary source materials, including a fully annotated version of the INA with relevant case headnotes and citations.

The following treatises are less ambitious in scope than the first two.

Fragomen, Del Rey & Bernsen, Immigration Law and Business (Clark Boardman rev. ed. 1985). This two-volume loose-leaf work is designed mainly for immigration lawyers who have business clients; nevertheless, it covers in at least summary fashion the full range of issues under the immigration and nationality laws. It places special emphasis on applications filed with the district directors or consular officers,

rather than on exclusion and deportation cases, and is especially useful as a source of detailed information on nonimmigrant categories.

B. Hing, Handling Immigration Cases (Wiley Law Publications 1985). A clear and thorough treatment of the range of immigration issues a practitioner is likely to confront, this book also contains a useful compilation of INS forms. It will apparently be supplemented with pocket parts.

Immigration Project of the National Lawyers Guild, Immigration Law and Defense (2d ed. rev. 1986). This loose-leaf volume is directed mainly toward the practitioner, with major emphasis on the defense of deportation and exclusion cases.

R. Steel, Steel on Immigration Law (Lawyers Co-operative Publishing 1985). This single-volume work, supplemented with pocket parts, is directed primarily toward the practitioner. Each chapter begins with cross-references to other material available within the Lawyers Co-operative System, such as A.L.R. Fed. annotations.

Casebooks

T. Aleinikoff & D. Martin, Immigration: Process and Policy (West 1985). Designed primarily for classroom use, this work should also be of assistance to judges and practitioners. Cases are usually presented with other materials that set forth the background and context of particular issues, and the subsequent notes often suggest new avenues for legal development—either by way of new judicial approaches or through amendments to the INA or regulations.

A. Leibowitz, Immigration Law and Refugee Policy (Matthew Bender 1983). This casebook presents excerpted cases as well as edited materials from congressional hearings and the reports and studies of the Select Commission on Immigration and Refugee Policy.

Loose-leaf Services

Federal Immigration Law Reporter (Washington Service Bureau (1983-). This service provides a weekly newsletter and slip opinions from courts and various administrative agencies (the opinions are not limited to those decisions designated as administrative precedents). Case summaries are then reprinted following the relevant statutory or regulatory provisions, which are set forth in full text in the main volumes. The service's format groups a single provision of a statute with the corresponding regulations and related provisions from other regulatory materials, such as the INS Operations Instructions, followed by the case summaries. Unfortunately, this format is sometimes rather confusing.

Immigration Law and Procedure Reporter (Matthew Bender 1985-). Cross-referenced to the Gordon and Rosenfield treatise, this service reports both precedent rulings and selected nonprecedent rulings by the Board of Immigration Appeals (BIA), the Administrative Appeals Unit (AAU), and other decision makers of the Department of Justice, as

well as selected rulings from the Labor Department and the federal courts. Sample forms and practice pointers are also included.

Periodicals

Interpreter Releases (Federal Publications, Inc. 1924–). Easily the most useful and reliable of the weekly or monthly periodical reporting services, this modest-looking newsletter is a gold mine of information on recent developments in the field. Published weekly, it reports current administrative news, including visa availability dates, personnel changes within the relevant agencies, proposed and final rules, and less formal policy developments; administrative decisions, both precedent and selected nonprecedent; developments in Congress, including not only those measures that are enacted but also hearings, significant proposed legislation, and the like; and an occasional survey article. It also provides summaries of a rich variety of other information and sometimes includes reports on immigration developments in other countries. The summaries of administrative and judicial cases are especially useful if an editor's comment is appended. The editor is Maurice Roberts, a perceptive former chairman of the BIA, and his comments often help place the decision in context, identifying its significance (or occasionally its aberrant character) and often providing trenchant criticism or suggestions for future development of the law.

Georgetown Immigration Law Journal (1985–). The successor to several earlier Georgetown journals dealing in one way or another with immigration, this publication is to appear three times a year. It contains lead articles, notes and case comments, and a survey of current immigration-related developments in the three branches of government as well as internationally.

Immigration and Nationality Law Review (Clark Boardman 1976–). This hardbound annual volume reprints what its editors regard as the best law review articles and notes on immigration subjects published in the preceding year. It also occasionally contains one or two original articles, and Clark Boardman, the new publisher, apparently intends to begin each volume with an introductory survey of major judicial, legislative, and administrative developments.

Immigration Law Report (Clark Boardman 1981–). This monthly publication, prepared by the law firm of Fragomen, Del Rey & Bernsen, provides a reliable and comprehensive treatment. Each month's issue is devoted to a single special topic (such as the labor certification process or newly proposed rules of procedure before the immigration judges).

San Diego Law Review (1975–). Since 1975, the first issue of each annual volume of this periodical has been devoted to a symposium on immigration law. Like the Georgetown journal, each such issue contains articles and notes on specific immigration topics. Each issue also contains a lengthy synopsis of developments in the preceding year,

which is often useful for identifying the context and setting of particular immigration disputes.

Government Publications

Administrative Decisions Under Immigration and Nationality Laws (U.S. Department of Justice 1940–) [cited as "I. & N. Dec."]. These bound volumes, eighteen to date, contain all decisions that have been designated as precedents, decided by the various agencies of the Justice Department (principally the BIA, but also regional and associate commissioners, the INS commissioner, and occasionally the attorney general). Later precedent decisions appear in slip opinion form as sequentially numbered "Interim Decisions."

U.S. Department of Justice, Statistical Yearbook of the Immigration and Naturalization Service (1978–). The major source for immigration statistics, this series is now complete through fiscal year 1984.

Other important government materials, such as the INS's Operations Instructions and the Labor Department's Technical Assistance Guide, are most easily accessible in the primary source materials volumes of the Gordon and Rosenfield treatise or similar publications. Nonprecedent administrative decisions may also be found in the looseleaf services mentioned above.

Historical Background

J. Higham, Strangers in the Land: Patterns of American Nativism 1860–1925 (Atheneum 2d ed. 1985). This is a highly acclaimed historical study.

M. Jones, American Immigration (University of Chicago Press 1960). This book is a thorough and comprehensive account beginning with the seventeenth century.

Schuck, *The Transformation of Immigration Law,* 84 Colum. L. Rev. 1 (1984). This article is a thoughtful effort to survey the historical development of immigration law—both statutory and judge-made—and to relate the trends to broader currents in American intellectual and political history.

Legislative History

E. Hutchinson, Legislative History of American Immigration Policy, 1798–1965 (University of Pennsylvania Press 1981). This helpful and comprehensive review is divided into two parts. The first presents a chronological discussion of the immigration legislation that was considered in each Congress, whether or not it passed. The second provides a topical breakdown, indicating policy development related to particular issues.

O. Trelles & J. Bailey, eds., Immigration and Nationality Acts: Legislative Histories and Related Documents (Hein 1979). This fifteen-volume set contains the major congressional documents (hearings, committee re-

ports, etc.) and executive branch materials relating to all immigration and naturalization statutes passed from 1952 to 1978, along with helpful indexes.

Immigration Reform

Of a vast recent literature, the two following works may be especially useful.

Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest (1981). The Select Commission was chartered by statute in 1978 to review proposals for immigration reform, principally in connection with the issue of undocumented aliens, and to come up with its own proposals for legislation. The commission, made up of cabinet officers, members of Congress, and four public members including the chairman, Father Theodore Hesburgh of Notre Dame, compiled an extensive body of useful research and offered its own comprehensive set of suggestions, which have by and large shaped the succeeding debate. The materials include one volume containing the final report and recommendations of the commission itself; a separate, lengthier volume containing the staff report; and nine appendix volumes reprinting the results of commission hearings or specially chartered studies.

Eig & Vialet, *Comprehensive Immigration Reform: History and Current Status,* 1 Geo. Immigration L.J. 27 (1985). This useful summary of legislative activity from the time the Select Commission reported through 1985 ends, unfortunately, well before passage of reform legislation in October 1986.

Bibliographies

Pagel, *Research Guide to Immigration, Aliens, and the Law,* 77 Law Libr. J. 465 (1985), reprinted in 1986 Immigration & Nationality L. Rev. 487. A thorough, reliable, and well-organized guide to the literature in the field, this bibliography sets forth the major primary sources, governmental sources, and secondary sources. Someone seeking a law review article on a particular issue might profitably begin here.

Prepon, *Immigration Reform and Control: A Selected Bibliography,* 17 N.Y.U. J. Int'l L. & Pol. 1051 (1985). More oriented toward policy questions, this bibliography is somewhat less useful to the lawyer or judge than the Pagel article *supra.*

Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature,* 14 N.Y.U. J. Int'l L. & Pol. 209, 487 (1981–1982). International human rights law is increasingly invoked in immigration cases. Although this bibliography ranges widely beyond materials directly relevant in the immigration context, it might be usefully consulted for works helpful in evaluating a particular international law claim. The bibliography appears in two parts; the second concentrates on the international protection of refugees.

Constitutional Issues

Out of an extensive literature, the following may be particularly useful.

Developments in the Law—Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286 (1983). A comprehensive review of alien's rights issues, with a decided viewpoint.

Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362 (1953). This is a classic of the legal literature, with an important section devoted to due process rights in immigration cases.

Symposium, Strangers to the Constitution: Immigrants in American Law, 44 U. Pitt. L. Rev. 163 (1983). This symposium presents an important collection of useful essays, with particular emphasis on recurring issues under the due process and equal protection clauses.

Political Asylum and Refugees

International Law

G. Goodwin-Gill, The Refugee in International Law (Clarendon Press 1983). This is a scholarly, thorough, and more recent treatment of international law issues, prepared by a member of the legal staff of the Office of the United Nations High Commissioner for Refugees.

A. Grahl-Madsen, The Status of Refugees in International Law (Sijthoff, 2 vols., 1966, 1972). This pioneering work on the international law relating to refugees is unfortunately now somewhat dated.

Michigan Yearbook of International Legal Studies: Transnational Legal Problems of Refugees (Clark Boardman 1982). A helpful collection of essays on a wide variety of topics relating to refugees, this work also reprints the most important refugee treaties, presents a summary of the legislative history of various U.S. refugee laws, summarizes the refugee-related laws of other selected countries, and provides a comprehensive bibliography.

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979). Although the introduction states that this work should not be considered "a treatise on refugee law," it has often been cited as an authoritative statement of the views of the high commissioner's office in construing the definition of *refugee* that appears in the U.N. treaties and on which the U.S. definition is based.

U.S. Law and Practice

Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9 (1981). This article offers a thorough description of the legislative history of the Refugee Act.

Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980,* 23 San Diego L. Rev. 327 (1986). A highly useful and reliable discussion of the major litigated issues of the past several years, this article focuses on the Ninth Circuit, where nearly half of all asylum litigation takes place; it also refers to major decisions from other courts of appeals.

A. Helton, Manual on Representing Asylum Applicants (Lawyers Committee for International Human Rights 1984). Primarily for practitioners, this volume contains useful information on the law and procedure of political asylum.

Martin, *The Refugee Act of 1980: Its Past and Future,* 1982 Mich. Y.B. Int'l Legal Stud. 91. This article presents a review of the legislative history of the Refugee Act of 1980 and a thorough description of the way the various provisions were meant to operate in practice, often sorting out confusing intricacies of the statutory language.

Administrative Procedure and Judicial Review

Hurwitz, *Motions Practice Before the Board of Immigration Appeals,* 20 San Diego L. Rev. 79 (1982). Prepared by a member of the legal staff of the BIA, this article sorts out the various motions that may be filed before the BIA, describes the relevant procedures and standards, and sketches the appropriate avenues for judicial review.

Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 Iowa L. Rev. 1297 (1986). Based on a study for the Administrative Conference of the United States, this article includes a comprehensive description of current avenues for administrative and judicial review, as well as helpful proposals for regulatory or statutory reform.

Roberts, *The Board of Immigration Appeals: A Critical Appraisal,* 15 San Diego L. Rev. 29 (1977). This useful description of the BIA was prepared by a recently retired chairman of the BIA.

Verkuil, *A Study of Immigration Procedures,* 31 U.C.L.A. L. Rev. 1141 (1984). Based on a report for the Administrative Conference, this article suggests a framework for evaluating the procedural ingredients of immigration proceedings, with special attention to initial adjudications.

TABLE OF CASES

U.S. GPO: 1988-201-734/93052

THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

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