

Chapter 1 - The Basic Scheme of Immigration

Introduction

There are many ways to immigrate to the United States. Many people come to this country every year as non-immigrants. That means people who are coming to the USA not to live here permanently but for a specific purpose. These may be students, temporary workers, or visitors for pleasure. They may also be people coming to conduct research in the US or for temporary agricultural or other unskilled labor. They may also be pilots or crewman on cruise ships. They may be diplomats or other government officials. They may be cultural exchange visitors, coming to share their native countries' culture, customs and experiences with the American population.

On the other hand, there are immigrants. Immigrants are people who are coming here legally to live and work permanently in the USA. We talk of these people as "green card" holders. Having a green card gives you the right to live and work permanently in the USA. However, to get a green card you must either have a qualifying family relationship with a US Citizen or permanent resident or have a job offer from a US employer. Also, some immigrants obtain their status through applications for asylum or other immigration relief through the immigration court. Some applicants may obtain their green cards as religious workers. Finally, some applicants may obtain their green cards through substantial investments and job creation in the USA. In 2003 following the collapse of the World Trade Center, the US Congress broke up the immigration service into three separate agencies. Those agencies work with one another to ensure the integrity and security of the United States. These agencies are:

- **USCIS** (United States Citizenship and Immigration Services): Generally provides benefits to aliens whether immigrant or non-immigrant;
- **USCBP** (United States Customs and Border Patrol): They are the "first line of defense" at the borders, airports and seaports to screen people who wish to enter the United States;
- **USICE** (United States Immigration and Customs Enforcement): As the name suggest, this is the enforcement arm of the Department of Homeland Security (DHS). They are responsible for apprehending and deporting criminal aliens or other aliens who have violated the terms of their status in the United States or have entered illegally to the United States.

In addition, immigration is a complex area and immigration rules are often impacted by other agencies such as the Social Security Administration, Department of Labor, Department of Health and Human Services, Housing and Urban Development, and Department of Transportation as well as the Transportation Security Administration.

Who Makes Immigration Law?

Federal authority over immigration law - Article I, Section 8, of the United States Constitution lists the powers granted to Congress, and includes the power "To establish a uniform Rule of Naturalization".

If only Congress (and not the states) can regulate naturalization, it stands to reason that Congress likewise has the power to regulate all of the processes which ultimately culminate in naturalization.

The Supreme Court held that the Federal Government had the power to regulate immigration in two cases arising out of the states' intent to impose taxes upon alien passengers. In the "Passenger Cases" (48 U.S. (7 How.) 283), the syllabus explained:

"Statutes of the states of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states declared to be contrary to the Constitution and laws of the United States, and therefore null and void.

Inasmuch as there was no opinion of the Court as a Court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States."

Interestingly, the cases reflect the public policy on the exclusion of aliens from the United States - in *Norris v. City of Boston*, one of the two companion cases included in the *Passenger* cases, the decision reported:

"And the jury further find, that the plaintiff in the above action is an inhabitant of St. John's, in the Province of New Brunswick and Kingdom of Great Britain; that he arrived in the port of Boston on or about the twenty-sixth day of June, A.D. 1837, in command of a certain schooner called the Union Jack, of and belonging to said port of St. John's; there was on board said schooner at the time of her arrival in said port of Boston nineteen persons who were passengers in said Union Jack, *aliens to each and every of the states of the United States, but none of them were lunatic, idiots, maimed, aged, or infirm.*"

In *The Chinese Exclusion Case*, 130 U.S. 581 (1889), the Supreme Court summarized decades of commentary, prior decisions, and the laws as pertaining to international treaties as follows:

"The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone."

We will examine the grounds for immigration in this chapter, and in other chapters we will explore the grounds for exclusion of aliens from the USA, as well as the numerous grounds for deportation (removal) of aliens.

Who enforces Immigration Law?

Before 9/11, that answer was very clear: the INS (Immigration and Naturalization Service) was the primary agency tasked to execute immigration laws and related regulations. To a lesser extent, the Department of labor and the US Department of State also had immigration-related functions. However, after 9/11, while the duties of the other Federal agencies reflected the overarching demands of national security in all their functions, the INS came under special attention for having not only admitted the 9/11 hijackers, but, ironically, post 9/11, issuing non-immigrant visa extensions to a couple of these hijackers. Congress felt that the INS was broken. As a result, the INS found itself directly in congress' cross hairs. As a result, the INS that practitioners had grown to love (and hate) was broken into three separate agencies and transferred to the newly created 'Department of Homeland Security' (DHS).

Of BICE and Men: Immigration Practice after the fall of the INS

(Note: this article was originally authored by Farhad Sethna and published in 2003 - several changes have been made to reflect present conditions)

On February 28, 2003, the INS we had grown to know and love ceased to exist. It seemed as though even before the ashes from the 9/11 attacks had cooled, the Federal government had replaced the INS with no less than three separate bureaus. All three Bureaus now fall within the jurisdiction of the then newly created "Department of Homeland Security."

The Bureau of Immigration and Customs Enforcement (BICE), is responsible for "interior enforcement." The Bureau of Customs and Border Protection (BCBP) is responsible for cross border traffic of people and goods, and ensuring a uniform immigration and customs policy. Finally, the Bureau of Citizenship and Immigration Services (BCIS) conducts the functions that most people associated with the former INS: approval of petitions for relatives and immigrant workers, asylum and refugee processing, and naturalization.

(Author's note: the "Bureau" designation was subsequently removed and the agencies are now called the United States Citizenship and Immigration Service (CIS) , United States Immigration and Customs Enforcement (ICE), and the United States Customs and Border Protection (CBP))

Even a cursory glance at the functions summarized above will illustrate that there exists a staggering amount of overlap between the three bureaus. How this overlap will eventually play out is yet to be seen. For now, the purpose of this article is to alert readers to the changing dynamics in increasingly complex process that profoundly affects real people each and every day.

The first problem is the lack of rules and infrastructure in certain areas. For instance, the three Bureaus do not yet have a coordinated system for sharing information. Thus, in recent experience, a client was asked the same set of questions at the CIS and then answered more of the same questions across the hall at the ICE. However, this is changing as the same databases can be accessed by various agencies.

The second problem is the location of the physical files on applications, removal (deportation) cases, and other types of benefit cases where there is going to be interaction between the three Bureaus and the DHS's immigration counsel. It is very likely that files will be lost, misplaced, in transit when they are needed, or simply not available to one Bureau because another Bureau has possession. File transfer between departments was already a problem when the INS was one agency; now multiply that problem times three, and add to that a liberal dose of mileage, since the Bureaus may not be in the same location. In fact, the typical CBP office will not generally be located proximally to the ICE or the CIS, since the CBP functions primarily for border security, and offices are consequently based at land borders, ports of entry such as airports and seaports.

The third problem is that the INS reorganization simply puts old wine in new bottles. New bureaus may be created and new titles assigned, but the old culture still remains. It has been, and will continue to be, tedious and frustrating to obtain any meaningful assistance from the Bureaus. With the split, the problem becomes even more difficult: in place of one District Director with authority over all the INS departments, we now have three Bureau chiefs, with their own staff, their own turf, and their individual policies or biases. Multiply this by thirty-two, the number of INS districts, and you will quickly grasp the nature of the problem.

It is not the absence of the laws that weaken the immigration and national security process. Rather, it is the lack of adequate direction and clear policy from the top which placed the INS in its

unenviable position after 9-11. With three bureaus, with discrete and overlapping functions, it remains to be seen whether that fundamental managerial problem will be overcome or whether we will have three times the mess.

The fourth problem is the potential inability to obtain information to adequately represent one's clients. Freedom of Information Act requests used to be a time-honored method of obtaining information from the INS, especially on cases that were closed out years, or even a generation ago. However, the Homeland Security Act (which created the DHS), provides for criminal penalties if a government employee accidentally or intentionally discloses information that should not be disclosed in the interest of "national security". An attorney's ability to obtain a file may be severely truncated if the client presents any potential "national security" issues. In the wake of 9-11, the government has been using the constant chant of "national security" to curtail many freedoms. Access to counsel, or meaningful representation in the immigration context, is certainly one of the rights that has been curtailed.

On the brighter side, the immigration court (Executive Office for Immigration Review) remains within the purview of the Department of Justice, thus, potentially, insulating it even further from the CIS and ICE prosecutors that previously functioned within the same department. The BIA is the only appellate review available for many immigration cases and thus works under an immense, nationwide caseload. Consequently, the number of cases appealed from the BIA to the federal circuit Courts of Appeals has likewise increased exponentially.

So, what is an immigration practitioner to do? Now, more than ever, it is important to be constantly aware of changing rules and procedures. This is not the time to "dabble" in immigration law. The lives of people are at stake. Even minor mistakes, such as unauthorized employment, a DUI, or a petty theft, can have severe consequences for an alien. An alien's innocent failure to register a change of address with the DHS can be grounds for denial of immigration benefits and even deportation. The CIS and the ICE are fully conforming to the letter of the law, and then some. The Bureau's officers are applying their apply the law with the same "shock and awe" approach used on the battlefield.

It remains to be seen whether the INS reorganization truly helps to improve national security. Time will also tell whether the reorganization has improved services to aliens. In the meantime, tread carefully, look twice, and don't assume that procedures from three months ago will still apply.

As of the time of this writing, numerous changes in the USCIS have increased that agency's efficiency considerably; for example, most applications for family-based benefits or naturalization are processed in a matter of mere months. Other non-immigrant employment based-applications, such as for change of status, work visas, and other benefits, are likewise adjudicated promptly. Also helping to grease the bureaucratic wheels is the availability of "premium processing", where for an additional \$ 1,000 "premium process" fee, the USCIS will undertake to adjudicate certain types of applications within 15 calendar days of filing. The USCIS is mostly funded through "user fees", ie, fees charged to individuals and companies for applications processed by USCIS. Typically, the USCIS increases user fees every two years, often by 10-15% across the board or even more.

Immigration to the United States

In this chapter, we are going to look at the fundamental underpinnings of Immigration Law. How do people get to the United States? To analyze this issue, we will examine the Immigration & Nationality Act of 1952 (INA). Briefly, there are two main avenues that most individuals use to enter the United States. They may enter either as immigrants or non-immigrants. Immigrants, as the name implies come to the U.S. to live permanently or for a large portion of their lives. Non-immigrants, on the other hand may come to the United States temporarily, either for work, business or pleasure.

Immigrants may gain permanent residency (ie, the right to live and work permanently in the United States) through qualifying employment, qualifying family relationship, or as asylees, refugees, or beneficiaries of legalization programs. Over the last few years, many thousands of immigrants have benefitted from the "visa lottery".

Non-immigrants may enter for a variety of reasons. Many of you will be able to relate to the fact that your friends have "student visas". As you will see, students comprise a large portion of the non-immigrants entering the United States every year. Others enter the United States to conduct business. Tourists enter to seek the pleasures of Las Vegas and Disney World. Temporary workers enter to perform needed services for U.S. employers. The "alphabet list" of non-immigrant visas is long, and we will examine some of these categories in this chapter.

Congress also authorized and the INS (now USCIS) has also implemented the "visa lottery". This immigrant lottery is limited to the issuance of 55,000 immigrant visas per year. Visas will be issued through the lottery system to applicants from "under represented countries". Applicants must have a minimum of a high school education or equivalent.

1996 saw substantial changes in the immigration law. First was the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which criminalized many activities adding to the list of deportable offenses. Then came the "Welfare Law" (Personal Responsibility Act of 1996). This act barred many aliens, both legal and illegal, from receiving certain kinds of Federal or State support. Finally in 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Thus, immigration is a constantly evolving field which is very often subject to political pressure.

Following the 9/11 attacks, Congress passed the USA PATRIOT Act which imposed significant restrictions on immigration processing, judicial review, and due-process protections for aliens.

In 2005, Congress enacted the REAL ID law which also imposed substantial restrictions on judicial review of immigration decisions, heightened standards for asylum applicants, and various other restrictions.

Examples of the issues covered in both the USA PATRIOT and the REAL ID acts can be found in the appendices to this chapter.

The Law

Source: Immigration and Nationality Act (INA); 8 U.S.C. 1101, *et seq.*

Immigrant Visas

Sec. 201 Worldwide Level of Immigration
[8 U.S.C. 1151]

201(a) In general.--Exclusive of aliens described in subsection (b), aliens born in a foreign state or dependent area who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence are limited to--

201(a)(1) family-sponsored immigrants described in section 203(a) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(a)) in a number not to exceed in any fiscal year the number specified in subsection (c) for that year, and not to exceed in any of the first 3 quarters of any fiscal year 27 percent of the worldwide level under such subsection for all of such fiscal year;

201(a)(2) employment-based immigrants described in section 203(b) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(b)), in a number not to exceed in any fiscal year the number specified in subsection (d) for that year, and not to exceed in any of the first 3 quarters of any fiscal year 27 percent of the worldwide level under such subsection for all of such fiscal year; and

201(a)(3) for fiscal years beginning with fiscal year 1995, diversity immigrants described in section 203(c) (or who are admitted under section 211(a) on the basis of a prior issuance of a visa to their accompanying parent under section 203(c)) in a number not to exceed in any fiscal year the number specified in subsection (e) for that year, and not to exceed in any of the first 3 quarters of any fiscal year 27 percent of the worldwide level under such subsection for all of such fiscal year.

201(b) Aliens not subject to direct numerical limitations.--Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows:

201(b)(1)(A) Special immigrants described in subparagraph (A) or (B) of section 101(a)(27).

201(b)(1)(B) Aliens who are admitted under section 207 or whose status is adjusted under section 209.

201(b)(1)(C) Aliens whose status is adjusted to permanent residence under section 210, or 245A.

201(b)(1)(D) Aliens whose removal is canceled under section 240A(a).

201(b)(1)(E) Aliens provided permanent resident status under section 249.

201(b)(2)(A)(i) Immediate relatives.--For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 204(a)(1)(A)(ii) within 2 years after such date and only until the date the spouse remarries. For purposes of this clause, an alien who has filed a petition under clause (iii) or (iv) of section 204(a)(1)(A) of this Act remains an immediate relative in the event that the United States citizen spouse or parent loses United States citizenship on account of the abuse.

201(c) Worldwide level of family-sponsored immigrants.--

201(c)(1)(A) The worldwide level of family-sponsored immigrants under this subsection for a fiscal year is, subject to subparagraph (B), equal to--
201(c)(1)(A)(i) 480,000 ***

201(c)(1)(B)(ii) In no case shall the number computed under subparagraph (A) be less than 226,000

201(d) Worldwide level of employment-based immigrants.--

201(d)(1) The worldwide level of employment-based immigrants under this subsection for a fiscal year is equal to--
201(d)(1)(A) 140,000

201(e) Worldwide level of diversity immigrants.--The worldwide level of diversity immigrants is equal to 55,000 for each fiscal year.

Sec. 202 Numerical Limitations on Individual Foreign States

202(a) Per country level.--

202(a)(2) Per country levels for family-sponsored and employment-based immigrants.--Subject to paragraphs (3), (4), and (5) the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 203 in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

Sec. 203 Allocation of Immigrant Visas

203(a) Preference allocation for family-sponsored immigrants.

Aliens subject to the worldwide level specified in section 201(c) for family-sponsored immigrants shall be allotted visas as follows:

203(a)(1) Unmarried sons and daughters of citizens.--Qualified immigrants who are the unmarried sons or daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the class specified in paragraph (4).

203(a)(2) Spouses and unmarried sons and unmarried daughters of permanent resident aliens.

203(a)(2)(A) who are the spouses or children of an alien lawfully admitted for permanent

residence, or

203(a)(2)(B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).

203(a)(3) Married sons and married daughters of citizens.--Qualified immigrants who are the married sons or married daughters of citizens of the United States shall be allocated visas in a number not to exceed 23,400, plus any visas not required for the classes specified in paragraphs (1) and (2).

203(a)(4) Brothers and sisters of citizens.--Qualified immigrants who are the brothers or sisters of citizens of the United States, if such citizens are at least 21 years of age, shall be allocated visas in a number not to exceed 65,000, plus any visas not required for the classes specified in paragraphs (1) through (3).

203(b) Preference allocation for employment-based immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

203(b)(1) Priority workers.--Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (c):

203(b)(1)(A) Aliens with extraordinary ability.

203(b)(1)(B) Outstanding professors and researchers.

203(b)(1)(c) Certain multinational executives and managers.

203(b)(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

203(b)(2)(A) In general.--Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

203(b)(2)(B) Waiver of job offer.

203(b)(2)(B)(i) National interest waiver.--Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

203(b)(2)(B)(ii) Physicians working in shortage areas or veterans facilities.

203(b)(3) Skilled workers, professionals, and other workers.

203(b)(3)(A) In general.--Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

203(b)(3)(A)(i) Skilled workers.--Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

203(b)(3)(A)(ii) Professionals.--Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

203(b)(3)(A)(iii) Other workers.--Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

203(b)(3)(B) Limitation on other workers.--Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

203(b)(3)(C) Labor certification required.--An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A).

203(b)(4) Certain special immigrants.

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 101(a)(27)

203(b)(5) Employment creation.

203(b)(5)(A) In general.--Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise (including a limited partnership)--

203(b)(5)(A)(i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (c), and

203(b)(5)(A)(ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters). ***

203(b)(5)(C) Amount of capital required.--

203(b)(5)(C)(i) In general.--Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be \$1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

203(b)(5)(C)(ii) Adjustment for targeted employment areas.--The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

203(b)(6) Special rules for "K" special immigrants. (Service in US armed forces) -

(as defined in 101(a)(27)(K): an immigrant who has served honorably on active duty in the Armed Forces of the United States after October 15, 1978, and after original lawful enlistment outside the United States (under a treaty or agreement in effect on the date of the enactment of this subparagraph) for a period or periods.)

203(c) Diversity immigrants.

203(c)(2) Requirement of education or work experience.--An alien is not eligible for a visa under this subsection unless the alien

203(c)(2)(A) has at least a high school education or its equivalent, or

203(c)(2)(B) has, within 5 years of the date of application for a visa under this subsection, at least 2 years of work experience in an occupation which requires at least 2 years of training or experience.

203(d) Treatment of family members.--A spouse or child as defined in subparagraph (A), (B), (c), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

203(h) Rules for determining whether certain aliens are children.

(Child Status Protection Act) - INA §203(h)(1)-(3) was added by §3 of P.L. 107-208 (CSPA) (8/6/02), and, pursuant to CSPA §8, takes effect on 8/6/02 and applies to any alien who is a derivative beneficiary or any other beneficiary of "(1) a petition for classification under [INA §204] approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition; (2) a petition for classification under [INA §204] pending on or after such date; or (3) an application pending before the Department of Justice or the Department of State on or after such date."

203(h)(1) In general.--For purposes of subsections (a)(2)(A) and (d), a determination of whether an

alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using

203(h)(1)(A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by

203(h)(1)(B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.

In other words, reduce the alien's age by the length of time the immigrant visa petition was pending. If the age of the alien after such reduction is below 21, then the alien qualifies for immigration as a "child", even though the alien's actual age is over 21.

Non-immigrant Visas

8 C.F.R. § 214(a) Regulations.

214(a)(1) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond ***, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248, such alien will depart from the United States.***

214(b) Presumption of status; written waiver.

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15), and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) except subclause (b1) of such section) shall be ***presumed to be an immigrant*** until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15).

101(a)(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens:

A: Ambassador / Diplomat

101(a)(15)(A)

101(a)(15)(A)(i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

101(a)(15)(A)(ii) ***upon a basis of reciprocity***, other officials and employees who have been

accredited by a foreign government recognized de jure by the United States, who are accepted by the Secretary of State, and the members of their immediate families; and

101(a)(15)(A)(iii) *upon a basis of reciprocity*, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

B: Business Visitor / Visitor for Pleasure

101(a)(15)(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

C: Transit Visa

101(a)(15)(c) an alien in immediate and continuous transit through the United States, or an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District and foreign countries, under the provisions of paragraphs (3), (4), and (5) of section 11 of the Headquarters Agreement with the United Nations (61 Stat. 758);

D: Crewman

101(a)(15)(D)

101(a)(15)(D)(i) an alien crewman...who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

101(a)(15)(D)(ii) an alien crewman serving in good faith as such in any capacity required for normal operations and service aboard a fishing vessel having its home port or an operating base in the United States ***

E: Treaty Trader / Investor:

101(a)(15)(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him:

101(a)(15)(E)(i) solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national;

101(a)(15)(E)(ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital; or

101(a)(15)(E)(iii) solely to perform services in a specialty occupation in the United States if the alien is a national of the Commonwealth of Australia; ***

F: Student

101(a)(15)(F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study consistent with section at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn,

101(a)(15)(F)(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

101(a)(15)(F)(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's qualifications for and actual course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

G: International Organization Representative

101(a)(15)(G) an alien who is

101(a)(15)(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669) 22 U.S.C. 288, note, accredited resident members of the staff of such representatives, and members of his or their immediate family;

H: Temporary professional / non-professional worker

101(a)(15)(H) an alien

101(a)(15)(H)(i)

101(a)(15)(H)(i)(a) [repealed]

101(a)(15)(H)(i)(b) subject to section 212(j)(2), who is coming temporarily to the United States to perform services *** in a specialty occupation *** or as a fashion model, ***, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)

101(a)(15)(H)(i)(c) who is coming temporarily to the United States to perform services as a registered nurse, who meets the qualifications described in section 212(m)(1), and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that an unexpired attestation is on file and in effect under section 212(m)(2) for the facility (as defined in section 212(m)(6)) for which the alien will perform the services; or

101(a)(15)(H)(ii)

101(a)(15)(H)(ii)(a) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, ***, or

101(a)(15)(H)(ii)(b) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or

101(a)(15)(H)(iii) having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

I: Information media representative

101(a)(15)(I) upon a basis of reciprocity, an alien who is a bona fide representative of foreign press, radio, film, or other foreign information media, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such a representative if accompanying or following to join him;

J: Exchange visitor

101(a)(15)(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j), and the alien spouse and minor children of any such alien if accompanying him or following to join him;

K: Fiancé / Fiancee / Spouse (K-2)

101(a)(15)(K) subject to subsections (d) and (p) of section 214, an alien who

101(a)(15)(K)(i) is the fiancée or fiancé of a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) and who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after admission;

101(a)(15)(K)(ii) has concluded a valid marriage with a citizen of the United States (other than a citizen described in section 204(a)(1)(A)(viii)(I)) who is the petitioner, is the beneficiary of a petition to accord a status under section 201(b)(2)(A)(i) that was filed under section 204 by the petitioner, and seeks to enter the United States to await the approval of such petition and the availability to the alien of an immigrant visa; or

101(a)(15)(K)(iii) is the minor child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

L: Intracompany transferee

101(a)(15)(L) subject to section 214(c)(2), an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

M: Vocational Students

101(a)(15)(M)

101(a)(15)(M)(i) an alien having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and

101(a)(15)(M)(ii) the alien spouse and minor children of any alien described in clause (i) if accompanying or following to join such an alien, and

101(a)(15)(M)(iii) an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the alien's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico;

N: Parent or child of special immigrant

101(a)(15)(N)

101(a)(15)(N)(i) the parent of an alien accorded the status of special immigrant under paragraph (27)(I)(i), (or under analogous authority under paragraph (27)(L)) but only if and while the alien is a child, or

101(a)(15)(N)(ii) a child of such parent or of an alien accorded the status of a special immigrant under clause (ii), (iii), or (iv) or paragraph (27)(I) (or under analogous authority under paragraph (27)(L));

O: Extraordinary Ability alien

101(a)(15)(O) an alien who--

101(a)(15)(O)(i) has extraordinary ability in the sciences, arts, education, business, or athletics which

has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or

101(a)(15)(O)(ii)

101(a)(15)(O)(ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events,

101(a)(15)(O)(ii)(II) is an integral part of such actual performance,

101(a)(15)(O)(ii)(III)

101(a)(15)(O)(ii)(III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or

101(a)(15)(O)(ii)(III)(b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and

101(a)(15)(O)(ii)(IV) has a foreign residence which the alien has no intention of abandoning; or

101(a)(15)(O)(iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

P: Performer

101(a)(15)(P) an alien having a foreign residence which the alien has no intention of abandoning who

101(a)(15)(P)(i)

101(a)(15)(P)(i)(a) is described in section 214(c)(4)(A) (relating to athletes), or

101(a)(15)(P)(i)(b) is described in section 214(c)(4)(B) (relating to entertainment groups);

101(a)(15)(P)(ii)

101(a)(15)(P)(ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

101(a)(15)(P)(ii)(II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the

temporary exchange of artists and entertainers, or groups of artists and entertainers;

101(a)(15)(P)(iii)

101(a)(15)(P)(iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and

101(a)(15)(P)(iii)(II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or

101(a)(15)(P)(iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

Q: Cultural Exchange visitor

101(a)(15)(Q)

101(a)(15)(Q)(i) an alien having a residence in a foreign country which he has no intention of abandoning who is coming temporarily (for a period not to exceed 15 months) to the United States as a participant in an international cultural exchange program approved by the Secretary of Homeland Security for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality and who will be employed under the same wages and working conditions as domestic workers; ***

101(a)(15)(Q)(ii)(II) the alien spouse and minor children of any such alien if accompanying the alien or following to join the alien;

R: Religious Worker

101(a)(15)® an alien, and the spouse and children of the alien if accompanying or following to join the alien, who

101(a)(15)(R)(i) for the 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States; and

101(a)(15)(R)(ii) seeks to enter the United States for a period not to exceed 5 years to perform the work described in subclause (I), (II), or (III) of paragraph (27)(C)(ii);

S: Law Enforcement Informant

101(a)(15)(S) subject to section 214(k), an alien

101(a)(15)(S)(i) who the Attorney General determines--

101(a)(15)(S)(i)(I) is in possession of critical reliable information concerning a criminal organization or enterprise;

101(a)(15)(S)(i)(II) is willing to supply or has supplied such information to Federal or State

law enforcement authorities or a Federal or State court; and

101(a)(15)(S)(i)(III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise; or

101(a)(15)(S)(ii) who the Secretary of State and the Attorney General jointly determine--

101(a)(15)(S)(ii)(I) is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation;

101(a)(15)(S)(ii)(II) is willing to supply or has supplied such information to Federal law enforcement authorities or a Federal court;

101(a)(15)(S)(ii)(III) will be or has been placed in danger as a result of providing such information; and

101(a)(15)(S)(ii)(IV) is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956,

and, if the Attorney General (or with respect to clause (ii), the Secretary of State and the Attorney General jointly) considers it to be appropriate, the spouse, married and unmarried sons and daughters, and parents of an alien described in clause (i) or (ii) if accompanying, or following to join, the alien;

T: Victim of Trafficking

101(a)(15)(T)

101(a)(15)(T)(i) subject to section 214(o), an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General, determines--

101(a)(15)(T)(i)(I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000;

101(a)(15)(T)(i)(II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;

101(a)(15)(T)(i)(III)

101(a)(15)(T)(i)(III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;

101(a)(15)(T)(i)(III)(bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or

101(a)(15)(T)(i)(III)(cc) has not attained 18 years of age; and

101(a)(15)(T)(i)(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal; and

101(a)(15)(T)(ii) if accompanying, or following to join, the alien described in clause (i) --

101(a)(15)(T)(ii)(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;

101(a)(15)(T)(ii)(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; or

101(a)(15)(T)(ii)(III) (III) any parent or unmarried sibling under 18 years of age of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

U: Victim of Crime

101(a)(15)(U)

101(a)(15)(U)(i) subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

101(a)(15)(U)(i)(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii);

101(a)(15)(U)(i)(II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) possesses information concerning criminal activity described in clause (iii);

101(a)(15)(U)(i)(III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii); and

101(a)(15)(U)(i)(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States;

101(a)(15)(U)(ii) if accompanying, or following to join, the alien described in clause (i) --

101(a)(15)(U)(ii)(I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien; or

101(a)(15)(U)(ii)(II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and

101(a)(15)(U)(iii) the criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes; or ***

V: LIFE Act beneficiary

101(a)(15)(V)

(Authors' note: I have left this out because it has become largely irrelevant with the passage of time)

Analysis of the Law

If you aren't cross eyed yet, then by now you will have realized there are two major categories for entering the United States, immigrants and non-immigrants. The above law touches upon the various immigrant categories - immediate relatives of U.S. Citizens, nuclear families of permanent residents, brothers and sisters of citizens.

In addition to family-based immigration, as you have also seen, immigration is possible through employment. As you will see in following chapters, it is possible for an alien to obtain a temporary work visa and then obtain "labor certification", leading ultimately to the issuance of a "green card". The employment-based preference categories list the various avenues for permanent immigration based on the employment or the skill of the alien. These are divided into five categories as follows:

1. Priority workers.
 - Aliens with extraordinary ability.
 - Outstanding professors and researchers.
 - Certain multinational executives and managers.
2. Aliens holding advanced degrees or aliens of exceptional ability.
3. Skilled workers, professionals and other workers.
4. Certain special immigrants (religious workers).
5. Employment creation (investor visas).

Application of the Child Status Protection Act: as you can see from the statute above, the age of the child who is over 21, and therefore becomes ineligible for derivative status or immigrant relative status is "reduced" or "credited" by the duration of time it takes (or took) for the underlying visa petition to be adjudicated. In other words, thanks to the CSPA, many children who would have otherwise "aged out" still remain eligible for immigrant visas in the more favorable category of children of citizens (immediate relatives) or LPR's

In the non-immigrant category, you have seen that there are various avenues available to non-immigrants to enter the United States depending on the purpose of their entry. B-1 visitors (INA §

101 [a][15][B]). business visitors enter the United States to conduct business. F-1 students enter, as the name implies, to study. H workers enter to perform temporary services. As you can see from the H category, it is further subdivided into four main areas. O and P aliens sometimes bring in their unique style of music, composition, art or dance or athletic performance to entertain their U.S. audiences. S non-immigrants enter the United States to provide assistance in law enforcement or national security matters. It is interesting to note that in the case of many of these non-immigrant categories, the principal beneficiary makes the spouse and dependent children eligible for “derivative” status so that they can similarly obtain non-immigrant visas to enter the USA.

Also note that many non-immigrant visa categories are issued for periods that correspond to equivalent visa categories granted by the respective countries that aliens seek entry from.

Cases

Matter of Hernandez-Puente
20 I & N Dec. 335

In Rescission Proceedings Under Section 246
of the Immigration and Nationality Act

A-22918876

Decided by Board June 20, 1991

(1) The Board of Immigration Appeals and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Immigration and Naturalization Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation.

(2) The Service has no authority to grant an application for adjustment of status nunc pro tunc under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (1988).

(3) As the Board has no jurisdiction, according to 8 C.F.R. § 245.2(a)(5) (1991), to review a district director's decision to deny adjustment of status, it follows that the Board also lacks jurisdiction to review or remedy a failure of the Service to act on the application.

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

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BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated February 12, 1988, an immigration judge rescinded the respondent's prior grant of adjustment of status to that of a lawful permanent resident. The respondent has appealed from that decision. The appeal will be dismissed.

The facts in this case are elicited from trial briefs submitted by the Immigration and Naturalization Service and the respondent in the record before the immigration judge in lieu of an evidentiary hearing. The immigration judge permitted this on the basis that the facts were not in dispute and the case only involved issues of law.

The respondent, a 30-year-old native and citizen of Mexico, entered the United States as a nonimmigrant visitor in September 1977 with his mother, on the basis of his mother's Nonresident Alien Mexican Border Crossing Card (Form I-186). On November 14, 1977, he acquired derivative fifth-preference classification as the unmarried child of a sister of a United States citizen after a visa petition was filed on his mother's behalf. See sections 203(a)(5), (8) of the Immigration and Nationality Act, 8 U.S.C. §§ 1153(a)(5), (8) (1976); 8 C.F.R. § 204.1(a) (1977). The visa petition was approved on December 6, 1977, and the respondent, his two brothers, and his mother filed applications for adjustment of status pursuant to section 245 of the Act, 8 U.S.C. § 1255 (1976), on April 24, 1978. They all appeared for personal interviews and were informed that their adjustment applications were approved and that each would receive an Alien Registration Receipt Card (Form I-551) in the mail. Subsequently, the respondent's mother and his two brothers received their cards, but the respondent did not. Reportedly, inquiries were made with the Service, and each time the respondent was assured that everything was in order and that his application had been granted. However, in fact, no action had been taken on the respondent's application.

The respondent was married on January 11, 1980, and on April 29, 1982, he was paroled into the United States by the Service. However, upon reviewing his prior adjustment application, the Service terminated his parole status on August 19, 1982, concluding that he was no longer eligible for derivative preference classification through his mother, since he was over the age of 21 and married, and, thus, was no longer a "child." See sections 101(b)(1), 203(a)(8) of the Act, 8 U.S.C. §§ 1101(b)(1), 1153(a)(8) (1982); 8 C.F.R. § 204.1(a) (1982). The Service then informed the respondent in a letter dated June 21, 1985, that his application for adjustment of status was denied and gave him until July 21, 1985, to voluntarily depart from the United States. However, on September 9, 1985, the Service granted his application for adjustment of status *nunc pro tunc*, effective as of August 15, 1978. Apparently, the respondent subsequently lost the Alien Registration Receipt Card issued to him in conjunction with the grant of his application. When he applied for a replacement, these rescission proceedings were instituted when the district director, on March 6, 1987, issued a notice of intent to rescind the respondent's prior adjustment of status on the basis that there existed no authority to approve the application for adjustment of status *nunc pro tunc*. On March 18, 1987, the respondent requested a hearing before an immigration judge.

In his decision to rescind the adjustment of the respondent's status, the immigration judge concluded that there existed no authority to grant adjustment of status on a *nunc pro tunc* basis, and that the Service was not estopped from seeking rescission. Accordingly, the immigration judge ruled that rescission was warranted, given that at the time of the respondent's adjustment of status on September 9, 1985, he was ineligible for derivative status in view of his age and marriage.

Section 246(a) of the Act, 8 U.S.C. § 1256(a) (1988), provides in pertinent part:

If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

In rescission proceedings, the Government bears the burden of proving ineligibility for adjustment of status by clear, unequivocal, and convincing evidence. *Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Pereira*, 19 I&N Dec. 169 (BIA 1984).

On appeal, the respondent contends through counsel that in the absence of any statute or regulation prohibiting such action, the Service has the inherent power to grant adjustment of status nunc pro tunc. He further asserts that the action of the Service in separating his administrative file from those of his other family members amounts to affirmative misconduct, as a result of which it should be estopped from seeking to rescind the prior grant of adjustment of status.

The Service contends on appeal that it has no authority to grant applications for adjustment of status on a nunc pro tunc basis. In the Service's view, its actions in this case do not rise to the level of affirmative misconduct so as to establish a case for equitable estoppel.

Turning first to the Service's grant of adjustment of status on September 9, 1985, we agree that the Service had no authority to grant that relief on a retroactive or nunc pro tunc basis. Since a nonimmigrant alien is assimilated to the position of an applicant for entry when applying for adjustment of status, he must be eligible, at the time his application is acted on, for the preference category relied on when the application was filed. *Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir. 1981); *Yui Sing Tse v. INS*, 596 F.2d 831 (9th Cir. 1979); see also section 204(e) of the Act, 8 U.S.C. § 1154(e) (1988). Although discretion is given to the Attorney General to admit applicants, he has no authority to act retroactively on an application. *Dong Sik Kwon v. INS*, 646 F.2d 909 (5th Cir. 1981); *Matter of Talanoa*, 13 I&N Dec. 161 (BIA 1969), *aff'd*, 427 F.2d 1143 (9th Cir. 1970).

Given that the Service had no authority to grant the application for adjustment of status nunc pro tunc, we find that the grant was in error. The respondent was seeking immigrant status under section 203(a)(8) of the Act, which allows a "child," as defined by sections 101(b)(1)(A)-(E), if not otherwise entitled to an immigrant status and the immediate issuance of a visa, to be entitled to the same status as that afforded to his parent if accompanying or following to join that parent. See also 8 C.F.R. § 204.1(a)(5) (1991). Section 101(b)(1) defines a "child" to mean an unmarried person under 21 years of age. As noted above, at the time his application for derivative status was granted on September 9, 1985, the respondent was both married and over the age of 21. Therefore, the Service has demonstrated by clear, unequivocal, and convincing evidence that the respondent was ineligible for adjustment of status at the time it was granted.

The respondent seeks to estop the Service from rescinding his prior adjustment of status on the basis of its conduct in this case. In two nationality cases, *INS v. Hibi*, 414 U.S. 5 (1973), and *Montana v. Kennedy*, 366 U.S. 308 (1961), the United States Supreme Court opened the possibility that the doctrine of equitable estoppel might be applied against the Government in a case where it is established that its agents engaged in "affirmative misconduct." See also *INS v. Pangilinan*, 486 U.S. 875 (1988) (neither by application of estoppel doctrine, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship to Filipino nationals). However, the Supreme Court has not yet decided whether even "affirmative misconduct" is sufficient to estop the Government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. 14 (1982); see also *Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985); *Matter of M/V "Solemn Judge"*, 18 I&N Dec. 186 (BIA 1982). Some federal courts have found "affirmative misconduct" and applied estoppel against the Government. See, e.g., *Corniel-Rodriguez v. INS*, 532 F.2d 301 (2d Cir. 1976). By implication, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case falls, has found that the doctrine of equitable estoppel may be applied against the Service where affirmative misconduct is demonstrated. *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987). Acting on an appeal from a lower court's grant of summary judgment for the Service, the court found that the alien's claims against the Service were broad enough to encompass the type of conduct sufficient for

estoppel. In the court's view, there existed a material issue of fact precluding summary judgment, and it accordingly reversed and remanded. In that case, summary judgment would still have been proper notwithstanding the factual issue, if, as a matter of law, equitable estoppel was not available against the Service. As the court nevertheless found it necessary to reverse and remand the case, it would appear that the court has accepted the principle that estoppel is available upon a showing of affirmative misconduct.

However, although the Fifth Circuit may have accepted the availability of estoppel against the Service, the Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. Equitable estoppel is a judicially devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party's part, from asserting a claim or a defense, regardless of its substantive validity. *M.D. Phelps v. Fed. Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986). Estoppel is an equitable form of action and only equitable rights are recognized. *Keado v. United States*, 853 F.2d 1209 (5th Cir. 1988). By contrast, this Board, in considering and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. § 3.1(d)(1) (1991). Our jurisdiction is defined by the regulations and we have no jurisdiction unless it is affirmatively granted by the regulations. *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985); *Matter of Zaidan*, 19 I&N Dec. 297 (BIA 1985).

Of course, this Board is empowered to find that a violation of the statutes or regulations has infringed upon an alien's procedural rights, which may in turn affect determinations regarding deportability, exclusion, relief from deportation or exclusion, or other benefits under the immigration laws. However, this authority exists only to the extent that it is encompassed by our appellate jurisdiction, as delineated by 8 C.F.R. § 3.1(b) (1991). As we have no jurisdiction to review a district director's decision to deny adjustment of status according to 8 C.F.R. § 245.2(a)(5) (1991), it follows that we have no jurisdiction to review or remedy a failure to act on the application. As in this case, we do review the decision of the immigration judge in rescission proceedings, but the matter before us over which we have jurisdiction is whether the Service has met its burden of proving that the alien was ineligible at the time adjustment of status was granted, and not whether the failure to previously grant adjustment of status and the circumstances surrounding that failure constitute affirmative misconduct so as to justify granting adjustment of status as an equitable remedy in the face of the alien's clear ineligibility.

It is well settled that it is not within the province of this Board to pass on the validity of the statutes and regulations we administer. *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Valdovinos*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); *Matter of Chavarri-Alva*, 14 I&N Dec. 298 (BIA 1973). It follows that if the Service, pursuant to those statutes and regulations, properly seeks to rescind a prior grant of adjustment of status and establishes by clear, unequivocal, and convincing evidence that the alien was ineligible when adjustment of status was granted, the rescission must be upheld by the Board.

Accordingly, the appeal will be dismissed.

Order

The appeal is dismissed.

Cases - Discussion

In matter of Hernandez - Puente, above consider the following issues:

1. If the BIA cannot rule on questions involving equitable interests, who will?
2. Analyze the flow of the application/litigation. Where do you think would be the next step that the alien could have gone for relief?

Derivative Beneficiaries: Under the immigration law, Congress has attempted to maintain "family unity". Therefore, if a parent obtains permanent residency, the spouse and minor children of the beneficiary can also immigrate with the parent. These additional immigrants are called "Derivative Beneficiaries" since they derive their immigration status from the primary beneficiary. In order to be derivative beneficiaries however, the derivative beneficiary must be unmarried and under the age of 21 at the time the immigrant visa is granted.

Death of a USC Spouse

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 09a0139p.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NELLY SUPANGAN LOCKHART,
Petitioner-Appellee,

v.

JANET NAPOLITANO, Secretary, Department
of Homeland Security, et al.,
Respondents-Appellants.

No. 08-3321

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

No. 07-00823—Kathleen McDonald O'Malley, District Judge.

Argued: January 20, 2009

Decided and Filed: April 8, 2009

Before: COLE and GIBBONS, Circuit Judges; BELL, District Judge.*

No. 08-3321 *Lockhart v. Napolitano, et al.* Page 2

OPINION

COLE, Circuit Judge. The United States Citizen and Immigration Services ("USCIS") denied Petitioner Nelly Supangan Lockhart's ("Lockhart" or "Mrs. Lockhart") application for an adjustment of status to that of permanent United States resident on the ground that she was statutorily ineligible for such adjustment because she

was no longer an “immediate relative” under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., upon the death of her husband. Lockhart filed a lawsuit in the United States District Court for the Northern District of Ohio, seeking injunctive, declaratory, and mandamus relief to compel Respondent Janet Napolitano, Secretary of the Department of Homeland Security (“Secretary” of “DHS”), to find, as a matter of law, that she is an “immediate relative” under INA, § 204(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), and to reopen and readjudicate her application for adjustment of status. The sole issue before us is a question of law, which requires us to interpret language of the INA to resolve a matter of first impression in this Circuit. The question is whether an alien-spouse, whose citizen-spouse filed the necessary “immediate relative” petition form under 8 U.S.C. §§ 1187, 1255(c)(4), but died within two years of the qualifying marriage, qualifies as a spouse under the “immediate relative” provision of the INA. For the reasons set forth below, we conclude that a “surviving alien-spouse” is a “spouse” within the meaning of the “immediate relative” provision of the INA. Accordingly, we **AFFIRM** the district court’s grant of summary judgment for Lockhart.

Federal Authority over Immigration

It is a well established point of law that the federal government has the sole jurisdiction to enact and enforce any laws concerning immigration. This is generally why states have a problem when they attempt to sue the Attorney General or any other Federal official or agency for payment incurred as a result of services or expenses on aliens within that state's jurisdiction. Likewise, states cannot pass laws eliminating the rights of aliens to live and work within their boundaries.

Federal-Local Cooperation

Over the last few years, the USICE has used INA § 287(g) to establish agreements with local law enforcement to enforce immigration law, in effect deputizing local police officers to execute immigration functions. This has given rise to its own unique set of issues and debate on whether law enforcement peace officers, whose primary purpose is to prevent crime is appropriately suited to become immigration agents. The Police Foundation (www.policefoundation.org) issued a detailed report in April 2009 examining the use local police for immigration enforcement: “The Role of Local Police: Striking A Balance between Immigration Enforcement and Civil Liberties.”

Priority Dates

As you have seen from the law, there is a definite limitation on the number of immigrant visas allocated each year. In some categories, due to the large number of applicants, there is a waiting list. This waiting period can be as long as ten or twelve or even twenty years in some cases. Take a look at the "visa bulletin". Try to work through the priority dates of the various immigrant categories, both family and employment and the respective "availability" dates.

Problems

Consider the following individuals who would like to permanently immigrate to the United States. What do you think is the best course of action for each of these intended immigrants? Is there an immigrant option available for them? What is that immigrant option? What if there is no immigrant option? Is there possibly also a non-immigrant option available to them? If so, what would you advise?

A. Martha's parents immigrated to the U.S.A. after she turned 21. Martha is still single but wants to join her parents in the United States. What can Martha do?

B. Samantha goes off with the U.S. army to do a tour of duty in Germany. There she meets Kurt and they fall in love. How can Samantha and Kurt return to the United States together and keep the flame of love burning bright?

C. Sheila is the adult married daughter of a U.S. citizen. Sheila's U.S. citizen father wants her to immigrate to the United States. What are the best avenues for Sheila to immigrate? Consider this twist: halfway through the application process, Sheila gets divorced.

D. Juan is a brilliant physicist who has won numerous national awards and recognition. He wants to reside permanently in the United States to further his research due to the facilities in this country. What options does he have?

E. Nadine is a Russian foreign student studying computer science in the United States. What can she do?

F. Jan is a talented soccer player from the People's Republic of Korea. He visits the USA for a exhibition match and during the tour, he slips away from his team. What options does he have?

G. Tom, Dick, and Harry are three lawyers with a practice in Germany. They want to form a law firm in the USA to assist investors who want to set up operations in the US.

H. Abbey Road is a musical group that has been invited to perform at the prestigious annual Grammy awards this year. Seeing that the USA is a better market for their kind of music, they want to immigrate to the USA. What visa type would you advise?

I. A student in India wants to continue with higher studies in the USA. What options does she have?

J. Joe Shmoe meets the love of his life on a trip to Thailand. Joe comes to you for advice since he wants to bring his girlfriend to the USA as soon as possible.

K. What options are available for a person who has to obtain medical treatment in the USA?

L. Tony Hok is a martial arts exponent who has been invited to showcase his skills at various martial arts venues throughout the USA.

M. David, a US Citizen, meets Gloria from Greece on her business trip to the USA. David wants to spend more time with Gloria and get to know her better. At some time during their relationship, while Gloria is still in the USA, David proposes to her.

N. Miguel has been kidnaped from his family in Guatemala and brought across the US border to work in the USA. He escapes from his captors and is apprehended by US law enforcement.

O. Tomas was brought to the USA at the age of 2 by his migrant farm worker parents who entered the USA without inspection. He is now 18, has graduated from high school, shows great promise in science and math, and wants to go to college. What options does he have?

P. Rooshtam and Shire Duck, two brothers, want to bring their chain of high-end restaurants, “The Peeking Duck”, to the USA.

Q. Puppy Queen, a top dog breeder, wants to travel to the USA to explore the market for her puppies in the US market.

R. Successful gaming magnate, Goombah Tron wants to attract talent from the top US firms to lure them to China to start a software development firm there. While in the USA he also wants to take a few courses on anti-piracy and intellectual property law at a top-rated law school, Akron Law.

S. Faisal Khan, from Pakistan, wants to come to the USA to learn to fly at a local flight school and get his commercial pilot’s license.

T. Teresa, from El Salvador, has great fear of returning to her native country on account of gang violence and violence against women.

U. A spouse of a H-1b worker is seriously assaulted by the H-1b spouse. The victim complains to law enforcement and the spouse is convicted. The victim knows that there is no support available in the couple’s home country and has to take care of the couple’s two children.

V. Victor is a talented car designer for the Italian automobile firm Pininfarina. He wants to visit the USA to participate in a design contest. While here, he is wooed by a US auto design firm and wants to accept their offer.

W. Ronaldo and his friends from Brazil enter the USA via air through Miami with valid visas. About three months into their stay, they decide not to return to Brazil since there are better job opportunities in the USA. However, they do not want to remain illegally in the USA. What options do they have?

X. Movie Director Diego X. wants to make a documentary about street children in the USA. He wants to bring his production team with him to the USA for the shoot, estimated to take 3-4 months.

Y. Dr. No is a dedicated pediatrician. She wants to come to the USA to gain experience at a pediatric hospital to improve her skills.

Z. It is the end of the line for Zorro. He entered the USA illegally over 25 years ago and had two US-citizen children. Now ICE has caught up with him and he has been placed in deportation proceedings. Are there any immigrant visa options available to him?

Family

	All	P.R.CHINA	INDIA	MEXICO	PHILIPPINES
1st	08NOV02	08NOV02	08NOV02	08OCT92	01SEP93
2A	15DEC04	15DEC04	15DEC04	15MAY02	15DEC04
2B	01FEB01	01FEB01	01FEB01	01MAY92	01APR98
3rd	08OCT00	08OCT00	08OCT00	22OCT92	01JUL91
4th	15AUG98	15AUG98	15AUG98	22MAY95	01AUG86

*NOTE: For June, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 15MAY02. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 15MAY02 and earlier than 15DEC04. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

Employment

	All	P.R.CHINA	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	15FEB05	01JAN00	C	C
3rd	U	U	U	U	U
Other Workers	U	U	U	U	U
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C

Visa Bulletin for June 2004 - Source: www.state.gov

Priority Dates for Family Based Immigrant Visas

	All	INDIA	MEXICO	PHILIPPINES
1 st	22OCT00	22OCT00	15OCT94	15JUL90
2A*	08DEC99	08DEC99	01JUN97	08DEC99
2B	15JUN95	15JUN95	15JAN92	15JUN95
3 rd	15OCT97	15OCT97	08MAR95	01MAR90
4 th	08JUL92	15MAY91	08JUL92	22MAR82

*NOTE : For June, 2A numbers EXEMPT from per-country limit are available to applicants from all countries with priority dates earlier than 01JUN97. 2A numbers SUBJECT to per-country limit are available to applicants chargeable to all countries EXCEPT MEXICO with priority dates beginning 01JUN97 and earlier than 08DEC99. (All 2A numbers provided for MEXICO are exempt from the per-country limit; there are no 2A numbers for MEXICO subject to per-country limit.)

Priority Dates for Employment-Based Immigrant Visas

	All	INDIA	MEXICO	PHILIPPINES
1 st	C	C	C	C
2 nd	C	C	C	C
3 rd	C	C	C	C
Other Workers	C	C	C	C
4 th	C	C	C	C
Certain Religious Workers	C	C	C	C
5 th	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C

A (Very Short) Glossary of a few selected terms

AAU: Administrative Appeals Unit

AG: Attorney General

BALCA: Board of Alien Labor Certification Appeals

BIA: Board of Alien Labor Certification Appeals

DHS: Department of Homeland Security

DOJ: Department of Justice

DOL: Department of Labor

DOS: Department of State

EOIR: Executive Office for Immigration Review

EWI: Entry Without Inspection

IIRIRA: Illegal Immigration Reform and Immigrant Responsibility Act of 1996

IJ: Immigration Judge

Immigrant: One who intends to reside permanently in the USA

INA: Immigration and Nationality Act

INS: Immigration and Naturalization Service

IRCA: Immigration Reform and Control Act of 1986

Non-immigrant: One who comes to the USA for a temporary, defined purpose

NTA: Notice to Appear

OSC: Office of Special Counsel

USCBP: United States Customs and Border Patrol

USCIS: United States Citizenship and Immigration Service

USICE: United States Immigration and Customs Enforcement