

Immigration and Nationality Law

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As millions of refugees from war and political upheaval seek political asylum, and many others seek economic opportunity, the United States fears an influx of foreigners and seeks to protect its domestic labor markets. Nevertheless, in an increasingly global economy, U.S. companies seek talented foreign engineers, mathematicians, and other scientists, executives, managers, and persons with specialized knowledge and skills to work in the United States. Decisions regarding whom to admit to and whom to exclude from the United States are political. Immigration law has been much-discussed in the media and many Americans have strong opinions on the subject. The U.S. Congress, as it formulates new immigration laws, has sought to reconcile the tugs and pulls of competing interests.

This year has seen significant developments in U.S. immigration law. The Antiterrorism and Effective Death Penalty Act (AEDPA),¹ enacted on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (IIRIRA),² signed by President Clinton on September 30, 1996, represent some of the most significant procedural and substantive changes in U.S. immigration law since the early 1920s.

The new legislation is so important that the majority of this article will focus on it and the far-reaching effects it will have on almost all immigrants and nonimmigrants, whether in the United States legally or not. Certain areas of immigration law, however, are untouched by the new legislation and continue to evolve through administrative and judicial processes. The remainder of this article will discuss certain important developments in the courts and agencies during the past year and several recently reported court decisions.

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. (Enacted on April 24, 1996).

2. Defense Department Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is Division C of that Act.

I. Highlights of the IIRIRA

The IIRIRA purports to crack down on illegal immigration. It goes much further, however, and has been called "one of the most radical pieces of immigration legislation ever" that will bring about "barbaric cruelties."³ It reflects the anti-immigrant sentiment that has become increasingly prevalent in the United States. The following is an outline of the major provisions of the IIRIRA including: (1) greatly increased border enforcement; (2) new employer sanctions and penalties; (3) new initiatives against alien smuggling and document fraud; (4) new summary exclusion and removal proceedings; (5) new bars to admissibility; (6) new legal grounds for removal; and (7) denial of public benefits to noncitizens.

A. STRENGTHENING BORDER ENFORCEMENT

In response to the influx of illegal immigrants, the IIRIRA provides funding to facilitate efforts of the Immigration and Naturalization Service (INS) to strengthen enforcement of the immigration laws at U.S. borders. The IIRIRA increases the number of Border Patrol agents by a minimum of 1,000 in each of the next five years and mandates an increase of at least 300 additional support personnel during each of the next five years.⁴ The IIRIRA authorizes the installation of additional barriers including fences and highways on the southern border to deter entry into the United States⁵ and the acquisition of interdiction equipment including aircraft, helicopters and other vehicles, night vision goggles, scopes, and sensor units.⁶ By 1999, every foreign person entering the United States will be required to have a border crossing identification card equipped with a machine-readable biometric identifier.⁷ The IIRIRA increases civil and criminal penalties for persons attempting illegal entry and doubles penalties for repeat offenders.⁸ Any person who flees or evades a law enforcement checkpoint in excess of the legal speed limit is subject to five years' imprisonment and is deportable.⁹

In order to identify nonimmigrants who remain in the United States beyond their authorized stays, the IIRIRA requires the Attorney General to develop a system to record all alien departures.¹⁰ The IIRIRA also provides for nationwide fingerprinting of undocumented or criminal aliens and requires annual reports on the Attorney General's strategy to deter illegal aliens.¹¹

The greatest number of inadmissible aliens are suspected to enter at ten foreign airports. The IIRIRA requires the establishment of preinspection stations in at least five of them. It provides additional immigration officers to assist airlines in detecting fraudulent documents and permits INS to pay for training and technical assistance to commercial airline personnel so they may better detect fraudulent documents.

The IIRIRA increases by 300 in each of the next three years the number of INS personnel assigned to investigate alien smuggling and to enforce employer sanction violations.¹² The IIRIRA permits the Attorney General to enter into agreements with states and their subdivisions

3. Letter from Professor Stephen Legomsky of Washington University in St. Louis to President Bill Clinton (Sept. 25, 1996), *quoted in* Anthony Lewis, *Covering Up Cruelty* in the N.Y. TIMES, September 27, 1996, at 33.

4. IIRIRA § 101 (1996).

5. *Id.* § 102 (1996).

6. *Id.* § 103 (1996).

7. *Id.* § 104 (1996).

8. *Id.* § 105 (1996) (to be codified at 8 C.F.R. § 275) (proposed December 30, 1996).

9. *Id.* § 108 (1996) (to be codified at 8 C.F.R. § 241) (proposed December 30, 1996).

10. The system must be developed by September 20, 1998. IIRIRA § 110 (1996).

11. IIRIRA § 112 (1996).

12. *Id.* § 131(a), (b) (1996).

so that local officers may perform the functions of immigration officers relating to the investigation, apprehension, and detention of aliens.¹³ The IIRIRA mandates that the INS provide at least ten full-time agents in each state to carry out immigration enforcement.¹⁴

B. NEW EMPLOYER SANCTIONS

The Immigration Reform and Control Act of 1986 (IRCA) required U.S. employers to verify that all employees have authorization to work in the United States and imposed penalties on those who knowingly hired persons without work authorization. The IRCA, however, has not prevented unauthorized employment, and the public perception is that foreign workers are taking jobs from U.S. workers. In response, the IIRIRA increases employer sanctions and introduces pilot programs to permit greater INS control of employment.

The IIRIRA requires the implementation of three employment eligibility pilot programs.¹⁵ The "basic," "citizen attestation," and "machine-readable" programs are to be implemented in at least five of the seven states with the highest estimated population of undocumented aliens.¹⁶ Employers may elect to participate and must participate only if they have been found guilty of violating employer sanctions provisions.¹⁷ By participating, an employer creates a rebuttable presumption that it has complied with the verification provisions.¹⁸

In the basic program, employers will be required to complete forms and to use an INS confirmation system to verify the information provided by employees.¹⁹ If the system is unable to confirm the information, the employee must do so. No employee may be terminated until nonconfirmation is final.²⁰ At that time, if the employer does not terminate the employee, it has knowingly hired an authorized alien and sanctions may be imposed.²¹ In the citizen attestation program, if an employee attests to being a U.S. citizen the employer is not required to seek documentation or confirmation of that status.²² For the machine readable program, an employer must inquire through the confirmation system by using machine-readable information.²³

The Attorney General must establish a confirmation system that will provide information to employers within three days through a toll-free telephonic or electronic communication.²⁴ The INS and the Social Security Administration are required to compare the information they have with inquiries from employers.²⁵ The information on the system may be used only for this purpose, and the IIRIRA explicitly does not authorize establishing a national identity card.²⁶

In an uncharacteristic amelioration of current law, the IIRIRA limits the liability of an employer for technical paperwork violations on employer sanctions forms if the employer has

13. IIRIRA § 133 (1996).

14. These agents were to be provided by December 31, 1996. IIRIRA § 134 (1996).

15. IIRIRA §§ 401-405 (1996).

16. *Id.* § 401 (1996).

17. Participation is also required for each executive department and members of the legislative branch of the federal government. IIRIRA § 402 (1996).

18. *Id.*

19. IIRIRA § 403 (1996).

20. *Id.*

21. *Id.*

22. IIRIRA § 403 (1996). Falsely attesting to U.S. citizenship is a new ground for removal. IIRIRA § 341 (1996). In addition, criminal penalties may be imposed. *Id.*

23. *Id.*

24. IIRIRA § 404 (1996).

25. *Id.*

26. *Id.*

made a "good faith" effort to comply, as long as the violations are corrected within ten days of notification by the INS or another enforcement agency.²⁷ To help protect employers who ask for more or different documents than required, the IIRIRA requires that discrimination claims are proper only against employers who intend to discriminate.²⁸

The IIRIRA restricts the award of government contracts to firms that engage in the practice of knowingly hiring aliens unauthorized to work.²⁹ The IIRIRA requires government agencies to report social security numbers issued to aliens not authorized to work who report their earnings and to report the fraudulent use of social security cards.³⁰

C. ALIEN SMUGGLING AND DOCUMENT FRAUD

The IIRIRA authorizes the INS to use wiretaps to investigate alien smuggling and document fraud offenses that, if conducted for profit, will violate the Racketeer Influenced Corrupt Organizations Act. The IIRIRA provides a ten-year term of imprisonment for a first or second offense involving smuggling, harboring, inducing, or transporting an illegal alien and a fifteen-year term for a third or subsequent conviction.³¹ The IIRIRA imposes a fine or a maximum five-year term of imprisonment, or both, on an employer who knowingly employs ten or more aliens unauthorized to work.³² To facilitate enforcement, at least twenty-five additional Assistant U.S. Attorneys will be hired and the INS will be allowed to operate undercover businesses.³³

The IIRIRA increases the term of imprisonment to a maximum of fifteen years for fraud or misuse of government-issued identification documents, longer if the offense facilitates drug-trafficking crime or international terrorism.³⁴ The IIRIRA creates new civil penalties for document fraud and new criminal penalties for failing to disclose a role in preparing false immigration documents, knowingly presenting documents that contain false statements, false claims to citizenship, and any offenses relating to the issuance or use of a passport or visa.³⁵

D. SUMMARY EXCLUSION AND REMOVAL PROCEEDINGS

To address the frustration with the numbers of foreigners illegally in the United States and the difficulties and delay associated with removing them, the IIRIRA provides that certain persons seeking to enter may be summarily removed and excluded at the port of entry without a hearing before an immigration judge and with no appeal or judicial review of an INS decision.³⁶ Persons subject to summary exclusion under the new legislation are those excludable under current law and, in addition, those seeking admission who have false or no travel or visa documents and those in the United States without authorization who cannot prove two years of residence here.³⁷

27. This limited liability will only be available to an employer who is not involved in a pattern and practice violation. IIRIRA § 411 (1996) (to be codified at 8 C.F.R. § 274A(b)(6)) (proposed December 30, 1996).

28. IIRIRA § 421 (1996) (to be codified at 8 C.F.R. § 274B(a)(6)) (proposed December 30, 1996).

29. IIRIRA § 412 (1996).

30. IIRIRA § 414 (1996) (to be codified at 8 C.F.R. § 290) (proposed December 30, 1996).

31. IIRIRA § 203(e) (1996) (to be codified at 8 C.F.R. § 274) (proposed December 30, 1996).

32. IIRIRA § 204 (1996).

33. IIRIRA §§ 204, 205 (1996) (to be codified at 8 C.F.R. § 294) (proposed December 30, 1996).

34. IIRIRA § 211 (1996).

35. IIRIRA §§ 212-217 (1996) (to be codified at 8 C.F.R. § 274C) (proposed December 30, 1996).

36. IIRIRA § 302 (1996) (to be codified at 8 C.F.R. § 235.3(b)(2)(ii)) (proposed December 30, 1996).

37. Those aliens who have entered without inspection will not be automatically subject to summary exclusion after April 1, 1997. The IIRIRA allows for the INS to have the option to apply summary exclusion to those aliens who entered the United States without inspection and have remained in the United States for less than two years. *Id.*

Persons seeking admission who have been continuously present in the United States for at least two years and asylum seekers with a "credible fear" of persecution are not, however, subject to summary exclusion.³⁸ The summary removal provisions are harsh and raise significant concerns regarding due process rights. It is anticipated that there will be much litigation in this area.

E. ASYLEES AND REFUGEES

The IIRIRA radically transforms the laws affecting political asylees, refugees, and parolees. The IIRIRA introduces harsh restrictions concerning eligibility, procedures, and judicial review of asylum claims that likely will reduce the number of claimants.

If another country, *i.e.*, one that is not the claimant's country of nationality or of last residence, will grant temporary protection or allow an asylum claim, a claimant may not apply for asylum in the United States unless that claim is determined to be in the U.S. public interest.³⁹ The IIRIRA mandates that applications for asylum be filed within one year of arrival in the United States, dramatically affecting the number of eligible persons.⁴⁰ The IIRIRA will affect especially those who are already in the United States on nonimmigrant visas, including students and temporary workers. Although they may have a credible fear of persecution if they return to their native country, they will be ineligible to apply for asylum in the United States because of the one-year requirement.

The IIRIRA includes among the definition of "refugee" any person who has been forced to abort a pregnancy or undergo voluntary sterilization, or who has been persecuted for resistance to coercive population control programs.⁴¹ No more than 1,000 refugees, however, may be admitted under this provision.⁴²

Although asylum seekers will not be subject to summary exclusion, they likely will be detained without bond.⁴³ If an asylum officer determines that the applicant likely cannot establish a claim, the applicant will be removed unless he or she requests review by an immigration judge. Asylum seekers awaiting judicial review will be subject to detention pending nonexpedited consideration and may consult with counsel prior to an asylum interview or review as long as it is not at government expense.⁴⁴

F. BARS TO ADMISSIBILITY

Particularly wide-reaching and troublesome are the new IIRIRA bars to admissibility. After April 1, 1997, persons "unlawfully present" for more than 180 days but less than one year, even if they voluntarily departed from the United States without proceedings having been commenced,⁴⁵ will be barred from entering for three years. If unlawfully present for one year or longer,⁴⁶ the bar is ten years. The IIRIRA contains exceptions only for minors, asylees,

38. The U.S. Congress mandates that it will be within the discretion of the Attorney General to decide whether summary exclusion should be imposed upon persons seeking entry at a land border of a territory contiguous to the United States. The INS has not yet issued proposed regulations concerning this issue. See the IIRIRA § 302 (1996) (to be codified at 8 C.F.R. § 235.3(b)(4)) (proposed December 30, 1996).

39. IIRIRA § 604(a)(2)(A) (1996) (to be codified at 8 C.F.R. § 208.13(d)) (proposed December 30, 1996).

40. IIRIRA § 604(a)(2)(B) (1996) (to be codified at 8 C.F.R. § 208.4) (proposed December 30, 1996).

41. IIRIRA § 601 (1996) (to be codified at 8 C.F.R. § 101(a)(42)) (proposed December 30, 1996).

42. *Id.*

43. IIRIRA § 302 (1996) (to be codified at 8 C.F.R. § 235.3(b)(4)) (proposed December 30, 1996).

44. *Id.*

45. IIRIRA § 301 (1996) (to be codified at 8 C.F.R. § 212(a)(9)(B)(1)(i)(I)) (proposed December 30, 1996).

46. *Id.* § 301 (1996) (to be codified at 8 C.F.R. § 212(a)(9)(B)(1)(i)(II)) (proposed December 30, 1996).

family unity beneficiaries, battered spouses and children, and in other limited circumstances.⁴⁷ These bars will create significant hardship on family members waiting with relatives in the United States for visa numbers to become available.

Aggravated felons will be permanently barred⁴⁸ as will persons "removed" who have unlawfully entered or attempted to enter without permission.⁴⁹ The IIRIRA significantly amends the definition of aggravated felony to include any crime for which the term of imprisonment exceeds one year.⁵⁰ In addition, any alien convicted of smuggling or document fraud will be considered an aggravated felon, except that a criminal conviction involving alien smuggling or a first offense of certain counterfeiting and document fraud will not be considered an aggravated felony if the offense was committed to assist the smuggler's spouse, child, or parent.⁵¹ Virtually all aggravated felons released from criminal custody will be detained.

The IIRIRA merges deportation and exclusion proceedings into a single "removal" proceeding.⁵² Removal must be effected within ninety days of a final removal order or release from criminal custody.⁵³ Detention is mandatory during the removal period. Individuals may not be removed until released from criminal sentences and a person previously ordered removed will be inadmissible for five years from the date of removal or for twenty years if it is a second or subsequent removal.⁵⁴

The IIRIRA imposes new restrictions on voluntary departure and changes the requirements for relief from deportation.⁵⁵ Any alien who fails to appear for a hearing is ineligible for a maximum of ten years to apply for relief including voluntary departure, cancellation of removal, adjustment of status, change of nonimmigrant classification, or registry.⁵⁶

Importantly, the IIRIRA severely limits judicial review.⁵⁷ No court may review discretionary decisions or actions of the Attorney General including cancellation of removal, voluntary departure, or adjustment of status.⁵⁸ Only asylum decisions are reviewable. Orders of removal in individual cases are reviewable only in habeas corpus proceedings.⁵⁹ Judicial review is precluded for almost all cases involving criminal aliens and is limited for release on bond.

G. NEW LEGAL GROUNDS FOR REMOVAL FROM THE UNITED STATES

The IIRIRA increases the former grounds of exclusion (now removal) to include: lacking vaccination against certain diseases; inciting terrorist activity;⁶⁰ falsely representing oneself as

47. IIRIRA § 301 (1996).

48. AEDPA § 440(a) (1996).

49. IIRIRA § 324 (1996).

50. An "aggravated felony" now includes certain crimes of violence, theft, burglary, racketeering, gambling offenses, counterfeiting, document fraud, commercial bribery, forgery or trafficking in vehicles with altered identification numbers, obstruction of justice, perjury, and bribery of a witness. Also included are crimes involving rape and sexual abuse of a minor and violations of laws relating to protecting the identity of an undercover agent. See IIRIRA § 321 (1996) (to be codified at 8 C.F.R. § 101(a)(43)) (proposed December 30, 1996).

51. IIRIRA § 321 (1996).

52. *Id.* § 304 (1996) (to be codified at 8 C.F.R. § 240) (proposed December 30, 1996).

53. *Id.* § 305 (1996).

54. *Id.* § 301 (1996).

55. *Id.* § 304 (1996) (to be codified at 8 C.F.R. §§ 240.25-26) (proposed December 30, 1996).

56. *Id.* § 304 (1996).

57. *Id.* § 306 (1996).

58. *Id.*

59. *Id.*

60. IIRIRA §§ 341-342 (1996).

a U.S. citizen; and committing civil document fraud.⁶¹ In addition, a nonimmigrant student in a private elementary or secondary school who violates any term or condition of that status is inadmissible for five years.⁶² Foreign health care workers are inadmissible if they have sought admission for employment purposes without presenting credentials verifying their training, licensing, and experience.⁶³ Significantly, a former U.S. citizen who has renounced citizenship for tax reasons is also inadmissible.⁶⁴

The IIRIRA allocates \$150 million for costs associated with the removal of inadmissible or removable aliens, including detention and investigation costs.⁶⁵ The IIRIRA also mandates the creation of at least 9,000 beds in detention facilities throughout the United States.⁶⁶

H. RESTRICTIONS ON PUBLIC BENEFITS

The Personal Responsibility and Work Opportunity Act of 1996 (the Welfare Law) makes unavailable public benefits to any person who is not a U.S. citizen.⁶⁷ The IIRIRA requires proof of U.S. citizenship when applying for public benefits.⁶⁸ An alien unlawfully present in the United States is precluded from collecting social security benefits.⁶⁹ In addition, states may test pilot programs regarding the viability, advisability, and cost-effectiveness of denying driver's licenses to persons not lawfully present in the United States.⁷⁰ The IIRIRA gives states authority to determine the eligibility of aliens for benefits.⁷¹ Similarly, the Welfare Law permits states to limit or prohibit eligibility for state-funded cash assistance programs.⁷²

A state may not provide a post-secondary education benefit after July 1, 1998, to an alien not lawfully present in the United States unless the same benefit would be provided to an out-of-state citizen.⁷³ States must report to Congress the extent to which such benefits are given.⁷⁴ In addition, states and higher education authorities must transmit to the INS copies of documents received from persons verifying citizenship or alienage status.⁷⁵

The IIRIRA requires an intending immigrant to submit a legally binding affidavit of support from a U.S. citizen or permanent resident family member sponsor.⁷⁶ The affidavit of support must be legally binding on the sponsor and must be enforceable by the alien, the federal government, or any state or subdivision until the applicant either becomes a citizen or has

61. Falsely representing U.S. citizenship and committing civil document fraud were included to strengthen the new employer sanctions. See IIRIRA §§ 344-345 (1996).

62. *Id.* § 346 (1996).

63. *Id.* § 343 (1996).

64. *Id.* § 352 (1996).

65. *Id.* § 385 (1996).

66. *Id.* § 386 (1996).

67. An exception to this harsh provision has been established for certain victims of domestic violence who petition for immigration benefits (*i.e.*, cancellation of removal/suspension of deportation and adjustment of status). To qualify, the victim must not be living in the same household as the battering spouse, and there must be a substantial connection between the violence and the need for benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter Welfare Act), Pub. L. No. 104-193, 110 Stat. 2105, § 402(a)(1), (3) (August 22, 1996), as amended by IIRIRA § 501 (1996).

68. IIRIRA § 504 (1996).

69. *Id.* § 503 (1996).

70. *Id.*

71. IIRIRA § 553 (1996).

72. *Id.*

73. IIRIRA § 505 (1996).

74. *Id.* § 506 (1996).

75. Welfare Act § 404(b), as amended by IIRIRA § 507 (1996).

76. Welfare Act § 423, as amended by IIRIRA § 551 (1996).

been credited for forty qualifying quarters of work.⁷⁷ Sponsors must be at least eighteen years of age, be domiciled in the United States, and agree and be able to support their own and the immigrants' families at an income level of at least 125 percent of the federal poverty guidelines.⁷⁸ The IIRIRA provides for a three-year pilot program in five INS district offices to require posting of a bond in an amount sufficient to cover the cost of benefits provided to the alien and dependents in addition to the affidavit of support.⁷⁹

The IIRIRA accelerates the transition out of public housing for ineligible aliens and removes certain due process rights for persons who have difficulty proving eligible immigration status.⁸⁰ The IIRIRA also requires that no individual or family may receive financial assistance until at least one family member establishes eligibility.⁸¹

Because of the haste with which the IIRIRA was passed, Congress may not have been fully aware of its far-reaching consequences. When its draconian effects become known, Congress should amend the legislation.

I. CONCLUSION

Final INS regulations implementing the IIRIRA are likely not to be promulgated until March 1997 and are expected to be enacted within six months of the April 1, 1997, effective date of the majority of its provisions. The proposed interim regulations, however, are evidence that the INS is adopting the harshest interpretation that the law allows. These drastic new provisions appear to mark the beginning of a new trend that will radically change the way we once embraced migration to this country.

II. Recent Developments in Business-Related Immigration

Employers and employees alike should be aware of the employer sanction provisions of the IIRIRA described above and should know also that the U.S. Department of Labor (DOL) has taken actions this year that impact significantly on the labor certification requirements for permanent residence. In addition, the courts have ruled on the DOL's proposed regulations concerning the H-1B nonimmigrant category.

A. DOL CHANGES TO LABOR CERTIFICATION

The majority of foreign workers seeking permanent residence based on an offer of employment from a U.S. company must obtain certification from the DOL that no qualified U.S. citizen or permanent resident is available for the job. The process of obtaining labor certification is complicated and time-consuming, often requiring one to two years. Efforts of the DOL to reengineer the process by streamlining the procedures, saving resources, assuring greater consistency and accuracy in prevailing wage determinations, and providing better service to the business community have been sidetracked by budgetary restraints. In the meantime, the DOL has issued a General Administrative Letter dated October 1 that provides guidance to state employment security agencies (hereafter referred to as the SESAs) and DOL regional offices as to the changes in the prevailing wage process.

77. *Id.*

78. *Id.*

79. IIRIRA § 564 (1996).

80. *Id.* § 571 (1996).

81. *Id.* § 576 (1996).

The GAL guidelines will, in practice, make it more difficult to obtain labor certification approval for a job offer that lists special requirements or educational or experience requirements that are above those considered normal for the position. On the other hand, it should lead to speedier approvals for cases the DOL considers "problem-free."⁸² In view of these changes, it is necessary to draft the job requirement more carefully. And employers should try to file their applications as soon as the job offer is made.

B. LITIGATION CONCERNING DOL PROPOSED REGULATIONS REGARDING THE H-1B CATEGORY

Recent litigation concerning the H-1B visa category will affect H-1B professional and other highly skilled workers and their employers.⁸³ The Immigration Act of 1990 (IMMACT 90) introduced the DOL into the H-1B process by creating a new step requiring employers to obtain DOL certification of a Labor Condition Application (LCA) prior to filing an H-1B petition with the INS.⁸⁴ The LCA requires an employer to attest to numerous conditions, including that it will pay the foreign employee the higher of the prevailing or actual wage for the job and will post the LCA in a conspicuous place on the job site.⁸⁵

The DOL did not publish final regulations to implement this legislation until 1993, three years after passage of the IMMACT 90.⁸⁶ These regulations further complicated the H-1B process and were harsh on business interests. The National Association of Manufacturers filed suit alleging that the DOL violated the Administrative Procedure Act by failing to provide for proper notice and comment periods and that it exceeded its authority and acted in an arbitrary and capricious manner.⁸⁷ The U.S. District Court invalidated the LCA regulations and enjoined the DOL from enforcing them.⁸⁸

III. Recent Litigation

The AEDPA, enacted on April 24, 1996, among its other provisions, provided an expanded definition of an "aggravated felony."⁸⁹ In addition, the AEDPA eliminated certain forms of relief available under prior law. This change resulted in the detention of many aliens, including lawful permanent residents who previously were eligible for waivers of relief from deportation, release on bond from custody, and judicial review.⁹⁰ However, the AEDPA eliminated this form of relief for lawful permanent residents. Because the AEDPA was silent on the effective date of several of its provisions, and its consequences were so severe, there have been constitutional challenges to its temporal reach.

In *DeMelo v. Cobb*,⁹¹ the petitioner was arrested by the INS for having been convicted of

82. For an excellent discussion, see *Practical Implications of the Department of Labor's Recent General Administrative Letters*, IMMIGR. L. REPORT, November 1, 1996.

83. For a detailed discussion, see Michael D. Patrick, *Recent Developments in the H-1B Category*, NEW YORK L.J. (1996).

84. 8 C.F.R. § 214.2(h)(4)(1)(B)(1).

85. 20 C.F.R. §§ 655.715, 655.730(h)(1)(ii).

86. 59 Fed. Reg. 65,646 (1994).

87. *National Association of Manufacturers v. United States Department of Labor*, 1996 WL 420868 (July 22, 1996, D.D.C.).

88. 72 Interpreter Release 559 (April 1995). See also Michael D. Patrick, *Recent Developments in the H-1B Category*, NEW YORK L.J. 35, n.23 (September 23, 1996).

89. See AEDPA, § 440 (1996).

90. For instance, AEDPA generated controversy by mandating that the Immigration and Naturalization Service could detain any aggravated felon released from criminal custody. AEDPA, § 440(d) (1996).

91. *DeMelo v. Cobb*, 936 F. Supp. 30 (D. Mass. 1966).

an aggravated felony pursuant to the amended provisions of the AEDPA. His conviction and release from criminal custody both occurred prior to the AEDPA's April 24, 1996, enactment date. The petitioner argued that the AEDPA's provision denying bond and release from custody for aggravated felons could not be applied retroactively to an individual who was released from criminal custody before the enactment date of the AEDPA. The Court held that although the provision could apply retroactively to convictions issued prior to April 24, 1996, a narrow interpretation of the law would not permit retroactive application of the provision to an individual released from criminal custody prior to the effective date of the Act.⁹²

The AEDPA also introduced a bar to judicial review for those found deportable based upon their previous criminal convictions.⁹³ Many immigration practitioners were challenged in trying to find other means to obtain judicial review of these deportation orders. In *Qasguargis v. INS*, the petitioner sought relief from deportation by way of a writ of habeas corpus. Review of the petitioner's writ was denied because the Court found that he had no statutory right to judicial review of a petition made after the amendments of the AEDPA had taken effect.⁹⁴ The Court concluded that a statute is not considered to have a retroactive effect "merely because it draws upon antecedent facts for its operation."⁹⁵

In *Duldulao v. INS*, the petitioner challenged the retroactive application of a provision of the AEDPA that prohibited judicial review of deportation orders issued to aliens convicted of firearm offenses.⁹⁶ The petitioner argued that a newly enacted statute that acts to impair the substantive rights that a party possessed before the statute was enacted cannot be retroactively applied.⁹⁷ The Court held that the AEDPA's statutory bar of judicial review could be retroactively applied because it merely withdrew a court's jurisdiction to review deportation orders and did not act to impair the substantive rights previously possessed by the petitioner.⁹⁸ The Court concluded that only Congress has the power to define lower federal court jurisdiction and formulate policies for the expulsion or exclusion of aliens.⁹⁹

The effective and applicability dates of certain sections of the IIRIRA are open to interpretation. Presently before the Board of Immigration Appeals (BIA) is the issue of whether the IIRIRA's new system, "cancellation of removal," which replaces current exclusion and deportation proceedings, will take effect on the enactment date of September 30, 1996, or on the effective date of April 1, 1997. The BIA is reviewing this issue in several cases of applications for suspension of deportation that have been pretermitted by application of this transitional rule.

Importantly, the IIRIRA provides a general bar to judicial review that will likely invoke litigation involving constitutional issues of due process. The IIRIRA provides that no court shall have jurisdiction to hear any claim by an alien concerning a decision or action by the Attorney General except claims for which the IIRIRA specifically provides for judicial review.¹⁰⁰ This catch-all provision in the IIRIRA effectively prevents affected individuals from obtaining judicial review.

92. *Id.* at 35.

93. AEDPA, § 440(a) (1996).

94. *Qasguargis v. INS*, 91 F.3d 788 (6th Cir. 1996).

95. *Id.* at 789.

96. *Duldulao v. INS*, 90 F.3d 396, 397 (9th Cir. 1996).

97. *Id.* at 398.

98. *Id.*

99. *Id.* at 399.

100. IIRIRA § 306(a)(2) (1996).