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Immigration and Nationality

GABRIELLE M. BUCKLEY*

I. Introduction

The year 1997 has been momentous in the field of immigration law. Sweeping legislation enacted in 1996 was implemented, interpreted, and reinterpreted. The Immigration and Nationality Law Committee's comments regarding *International Legal Developments in Review: 1996* detailed the new legislation, including 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 (IIRAIRA).² Although the legislation was signed into law in 1996, many of the more important provisions became effective in 1997. Despite the extensive and confusing nature of this legislation, the Immigration and Naturalization Service (INS) has not yet issued final regulations. The INS and the U.S. Department of State (State Department) have issued interpreting memoranda and cables, many of which have contradicted one another, and courts have struggled to adjudicate issues arising from these new laws. This article summarizes the effect and interpretations of a number of the provisions in the 1996 legislation, in addition to other relevant changes in the immigration laws which occurred in 1997.

II. Expedited Removal

One of the harshest changes in the law in 1996 involves persons presenting themselves at the border of the United States. Effective April 1, 1997, an arriving alien seeking admission who is suspected of being inadmissible due to fraudulent or invalid documents is subject to expedited removal.³ Aliens not paroled or admitted, who cannot prove their continuous physical presence in the United States for the two years prior to the determination of their inadmissibility,

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996).

2. Illegal Immigration Reform and Immigrant Responsibilities Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). This Act enacted serious substantive and procedural changes in the U.S. immigration laws.

3. See INA § 235(b)(1)(A)(i), 8 U.S.C.A. § 1225(b)(1)(A)(i) (West Supp. 1998).

are also subject to expedited removal.⁴ Aliens subject to this process are detained until removed,⁵ and once removed, are barred from reentry for five years.⁶ The only classes excepted from expedited removal are Cubans arriving by plane, unaccompanied minors, and those paroled into the United States before April 1, 1997.

Secondary INS inspectors and their supervisors make these determinations. The arriving alien has no right to counsel and expedited removal orders are not subject to review by immigration or federal judges.⁷ An alien subject to expedited removal may voluntarily withdraw his application for admission, but only at the discretion of the inspecting INS officer.⁸ According to the INS Inspector's Field Manual, withdrawal should be allowed for innocent mistakes, ignorance and bad advice, or where the request is made prior to or during a credible fear interview in connection with an asylum application.

Advocates have noted several ways in which the process has been improperly enforced. Despite clear Congressional intent to apply expedited removal only to arriving aliens with no documents or obviously fraudulent documents, the INS has invoked the expedited removal process in other situations. For example, use of expedited removal has been based on suspicion that the alien intends to immigrate—despite the fact that this basis for inadmission is more properly characterized as an intent to enter for the purpose of working without proper authorization,⁹ a basis for exclusion not subject to expedited removal. In addition, some INS officers, suspecting that a visa was obtained through the use of false statements to the issuing consular, have considered a facially valid visa to be fraudulent and applied the expedited removal procedures. An alien subject to expedited removal is entitled to an opportunity to explain his or her actions, but real opportunities are seldom provided. Aliens have been denied the ability to telephone family, friends, or an attorney; denied access to people who may be waiting for them in the airport; and have been held, sometimes handcuffed or shackled to benches, for hours.

If an arriving individual claims to be a lawful permanent resident (LPR),¹⁰ an asylee, or a refugee, additional procedural safeguards apply.¹¹ For these classes of aliens, the inspecting officer must check the INS database system, send a manual request to the Records Division of the INS, and review any other documentation that the person may have to verify her claim.¹² If the claim is not verified through this process, the person must give a statement, under oath, regarding her status and the matter is then referred to an Immigration judge for a claimed status review.¹³ If the person refuses to give a sworn statement, she is subject to immediate removal. The Immigration judge's review is conducted within seven days. During the review process, there is no right to in-person interpretation services; however, the alien has a right to consult with an advocate. The judge may accept written or oral statements during the review,

4. See INA § 235(b)(1)(A)(iii)(II), 8 U.S.C.A. § 1225(b)(1)(A)(iii)(II) (West Supp. 1998).

5. See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV) (West Supp. 1998).

6. See INA § 212(a)(9)(A)(I), 8 U.S.C.A. § 1182(a)(9)(A)(I) (West Supp. 1998).

7. See INA § 242(a)(2)(A), 8 U.S.C.A. § 1252(a)(2)(A) (West Supp. 1998).

8. See INA § 235(a)(4), 8 U.S.C.A. § 1225(a)(4) (West Supp. 1998).

9. See INA § 212(a)(5), 8 U.S.C.A. § 1182(a)(5) (West Supp. 1998).

10. An LPR is considered to be "seeking admission" only if the person abandoned LPR status, left the U.S. for more than 180 continuous days, engaged in illegal activity since leaving the U.S., left the U.S. during removal process, committed certain crimes, or entered or attempted to enter the U.S. without being inspected by the INS.

11. See generally INA § 235(b)(1)(C), 8 U.S.C.A. § 1225(b)(1)(C) (West Supp. 1998).

12. See 8 C.F.R. § 235.3(b)(5)(I) (1997).

13. *Id.*

and the review must be recorded.¹⁴ Habeas corpus review is available, but is limited to the question of whether the person is subject to an expedited removal order and whether the person can prove her status as an LPR, asylee, or refugee.¹⁵

III. Asylum Rules & Procedures

The year 1997 has seen the beginning of enforcement of the new and more restrictive provisions regarding asylum. Upon the determination that an alien is inadmissible and subject to removal, the INS officer must determine if the alien has a credible fear of returning to her home country and therefore is allowed to seek asylum.¹⁶ Under the new rules, the inspecting INS officer must provide the alien with Form M-444 (available in thirteen languages, both in writing and on video) which explains the credible fear interview.¹⁷ The alien has a right to consult with someone and to have that person present during the credible fear interview. The advocate may make a statement at the end of the interview.¹⁸ The INS officer must inform her of these rights, as well as provide the alien with a list of attorneys and agencies that may offer assistance.

An asylum officer,¹⁹ not the initial inspecting officer, now conducts the credible fear interview. Interpreters are provided; however, numerous problems have been reported regarding accuracy, the quality of telephonic interpretation services, and the ability of asylum seekers to speak openly due to the gender or tribal affiliations of the interpreters. Though detained during the pendency of the credible fear determination, the person seeking asylum may be subsequently released subject to the usual parole criteria.²⁰

An asylum officer's finding of no credible fear is subject to review by an Immigration judge.²¹ The review must take place within seven days and it may be conducted via telephone conference call without the consent of the alien.²² The alien has a right to consult with an advocate and the review must be recorded.²³ If an Immigration judge reverses the asylum officer and finds that the applicant has a credible fear, the asylum seeker is entitled to an asylum hearing pursuant to section 240 of the Immigration & Nationality Act (INA).

Between April 1, 1997, the effective date of the new asylum rules, and December 31, 1997, over 1,000 people have applied for asylum at the border. The INS has indicated that during the months of April, May, and June, twenty percent were subject to exclusion and eighty percent proceeded to a hearing before an Immigration judge.²⁴

IV. Sunsetting of 245(I) Adjustment of Status

Created in 1994, INA section 245(I) allowed aliens generally ineligible to adjust their status under section 245(a)²⁵ or 245(c) to adjust their status to LPR in the United States. Applicants

14. 8 C.F.R. § 235.6 (1997).

15. See INA § 242(e), 8 U.S.C.A. § 1252(e) (West Supp. 1998).

16. See INA § 235(b)(1)(A)(ii), 8 U.S.C.A. § 1225(b)(1)(A)(ii) (West Supp. 1998).

17. See INA § 235(b)(1)(B)(iv), 8 U.S.C.A. § 1225(b)(1)(B)(iv) (West Supp. 1998).

18. *Id.*

19. See INA § 235(b)(1)(E), 8 U.S.C.A. § 1225(b)(1)(E) (West Supp. 1998).

20. See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV) (West Supp. 1998).

21. See INA § 235(b)(1)(B)(iii)(III), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(III) (West Supp. 1998).

22. See *Id.*

23. See INA at § 235(b)(1)(B)(iii)(II), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(II) (West Supp. 1998).

24. See 16 AILA MONTHLY MAILING 1027 (Dec. 1997).

25. Section 245(a) allows adjustment of aliens inspected and admitted or paroled into the United States.

for adjustment under this provision, with a few exceptions, were required to pay a \$1,000 fee. This provision not only provided increased revenue to the INS, but permitted persons who had an approved immigrant visa petition to remain in the United States with their family and at their jobs while adjusting their status.

Since this provision expired on September 30, 1997, Congress temporarily extended it several times. However, on November 26, 1997, new legislation dissolved section 245(I).²⁶ In a memorandum issued on November 28, 1997, the INS Office of Programs explained that upon the expiration of section 245(I) on January 14, 1998, aliens ineligible to apply for an adjustment of status under section 245(a), but eligible for an immigrant visa not based on a petition to the Attorney General, may only seek that visa abroad.

The compromise law "grandfathered" in certain classes of people, rendering them eligible to seek an adjustment in status under the old section 245(I) provision. Those able to apply for an adjustment under section 245(I) are limited to family and employment-based immigrants, as well as their spouses and children, who filed immigrant visa petitions or applications for labor certification by January 14, 1998.

The new legislation also created INA section 245(k), allowing employment-based immigrants approved under INA section 203(b)(1)-(b)(4) to adjust their status under the usual adjustment provisions of section 245(a). The alien must have entered the United States legally, however, and cannot have been out of status for a total of more than 180 days.

V. Criminal Aliens

Although AEDPA and IIRAIRA were enacted in 1996, the effect of enforcement of many provisions was not felt until 1997. The press has reported widely the effects of the changes in the laws involving criminal acts, and the INS' stance as to retroactive effect. Immigration laws have long provided that aliens convicted of aggravated felonies are deportable, but AEDPA and IIRAIRA have given dramatically new meanings to some old terms. As a result, almost any felony may now be considered an aggravated felony. The following crimes have been added to the list of *per se* aggravated felonies: rape, sexual abuse of a minor, crimes relating to the management of a prostitution business, and involuntary servitude.²⁷

The minimum sentence necessary for a crime to be considered an aggravated felony has also been shortened. The minimum loss in connection with fraud, deceit, or tax evasion necessary to constitute an aggravated felony was lowered from \$200,000 to \$10,000;²⁸ and the loss due to money laundering was reduced from \$100,000 to \$10,000.²⁹ In addition, theft and violent crimes are now considered aggravated felonies where the sentence is one year or more—the prior law required at least a five year sentence.³⁰ Similarly, crimes related to bribery and forgery, obstruction of justice, perjury, and failure to appear in court are considered aggravated felonies.³¹ Finally, alien smuggling is considered an aggravated felony,³² but the existence of a minimum sentence requirement is in dispute.

26. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies and Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997).

27. See IIRAIRA § 321; 8 U.S.C.A. § 1101(a)(43) (West Supp. 1998).

28. See 8 U.S.C.A. § 1101(a)(43)(M) (West Supp. 1998).

29. See 8 U.S.C.A. § 1101(a)(43)(D) (West Supp. 1998).

30. See 8 U.S.C.A. §§ 1101(a)(43)(F), (G) (West Supp. 1998).

31. See 8 U.S.C.A. §§ 1101(a)(43)(Q)-(T) (West Supp. 1998).

32. See 8 U.S.C.A. § 1101(a)(43)(N) (West Supp. 1998).

A single conviction of a "crime involving moral turpitude" is also now a ground for removal.³³ In *Hamdan v. INS*,³⁴ however, the Fifth Circuit found that a conviction under a nondivisible statute addressing crimes that both do and do not involve moral turpitude, cannot serve as the basis for an alien's deportation. The following crimes now constitute crimes involving moral turpitude: high speed flight, domestic violence, stalking, violations of protective order, and crimes against children.³⁵

The definition of "conviction" has been reinvented so that an alien is deemed convicted where an adjudication of guilt was withheld, the alien plead guilty, plead no contest, or admitted facts that would support a guilty plea, and the judge ordered some restraint or punishment.³⁶ Many states with deferred adjudication statutes provide that the underlying behavior cannot be used against the defendant, and Immigration judges have split over the issue of whether deferred adjudication constitutes a conviction for immigration purposes. In *Matter of S-S*,³⁷ the Board of Immigration Appeals (BIA) indicated in dicta that all deferred adjudications would constitute a final conviction. Litigation has already been commenced over the potential due process and equal protection violations of the new definition of conviction.

Proof of conviction may now be proved with docket entries, minutes of court proceedings, transcripts of court proceedings, abstracts of conviction records, and documents indicating conviction kept by state or federal prisons.³⁸ The phrase "term of imprisonment" has been redefined and now includes the entire sentence ordered by a judge without regard to that part of the sentence that the judge may have suspended.³⁹

Enforcement of the laws bearing on criminal aliens has been uneven. Few court decisions have limited the harshness of the laws, splits have developed between and among the Federal judges and Immigration judges over how to interpret the statute, and the BIA has adopted a rigid view of the new provisions.

For example, courts do not agree on the issue of whether drug possession constitutes an aggravated felony. The First Circuit has held that a state felony conviction for drug possession that would constitute a misdemeanor under federal law was an aggravated felony for immigration purposes.⁴⁰ However, the Second Circuit held that an alien's drug conviction, which was a felony under state law but not under federal law, could not be considered an aggravated felony for immigration purposes.⁴¹

In a case that at least one commentator described as an "abomination," the BIA held that, although the crime of accessory after the fact is neither an inchoate crime nor sufficiently related to the underlying drug crime to constitute a basis for deportation, it can be considered an obstruction of justice which is a ground for deportation.⁴² The BIA applied this rule retroactively

33. See 8 U.S.C.A. § 1251(a)(2)(A)(I); INA § 237(a)(2)(A)(I), 8 U.S.C.A. § 1227(a)(2)(A)(I) (West Supp. 1998).

34. 98 F.3d 183 (5th Cir. 1996).

35. See INA §§ 237(a)(2)(A)(iv), (E), 8 U.S.C.A. § 1227(a)(2)(A)(iv), (E) (West Supp. 1998).

36. See INA § 101(a)(48), 8 U.S.C.A. § 1101(a)(48) (West Supp. 1998).

37. 1997 WL 258946 (BIA May 6, 1997).

38. See INA § 240(c)(3)(B); 8 U.S.C.A. § 1229a(c)(3)(B) (West Supp. 1998).

39. See *United States v. Vasquez-Balandran*, 76 F.3d 648 (5th Cir. 1996).

40. See *United States v. Clase-Espinal*, 115 F.3d 1054 (1st Cir. 1997); *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996); accord *United States v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997).

41. See *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); see also *Coronado-Durazo v. INS*, 1997 WL 599395 (9th Cir. Sept. 30, 1997) (holding that a conviction for solicitation to possess drugs is not a deportable offense).

42. See *Matter of Batista-Hernandez*, 1997 WL 398681 (BIA July 15, 1997).

to a conviction for accessory after the fact which occurred several years before the passage of the 1996 Act.⁴³

VI. Limits on Waivers of Inadmissibility Owing to Crimes of Moral Turpitude

The IIRAIRA instituted new limits on INA section 212(h) waivers⁴⁴ and INA section 212(I) waivers,⁴⁵ and we have seen that since 1997 the INS has no intention of ameliorating the effect of this harsh penalty. A section 212(h) waiver is no longer available if an LPR committed an aggravated felony after admission or failed to reside lawfully and continuously in the United States for at least seven years prior to the commencement of the removal proceedings.⁴⁶ "Aggravated felony" includes all convictions entered after the alien acquired LPR status, although it has been debated whether a waiver would be available where the conviction occurred before the alien acquired LPR status.⁴⁷ This change does not affect the ability of a person to seek a waiver of inadmissibility in order to qualify for a temporary nonimmigrant visa.⁴⁸

The section 212(I) waiver may only be granted to aliens who have demonstrated that their removal would cause extreme hardship to their spouses or parents who are LPRs or citizens.⁴⁹ The extreme hardship showing is a new requirement, and may be limited to cases in which there is a long relationship between the alien and the spouse or parent in which the spouse or parent depends on the alien in some tangible way.⁵⁰ Significantly, the 1996 law eliminated the availability of a waiver based on hardship to the alien's child who is an LPR or citizen and a waiver based on the passage of ten years since the fraud or material misrepresentation occurred. There is no judicial review of a decision to deny a section 212(h) or 212(I) waiver.⁵¹

VII. Limits on Judicial Review

One of the most important changes in the law from a constitutional perspective occurred when the IIRAIRA erected several new bars to judicial review. In connection with expedited removal procedures, there is no review of (1) the individual expedited removal decisions, including the credible fear determination by an asylum officer, (2) the claims relating to the implementation of expedited removal orders, (3) the decision to invoke the expedited removal procedures, or (4) the procedures adopted to implement the new expedited removal process. The American Immigration Lawyers (AILA) has filed suit challenging the limits on judicial review of the validity of the expedited removal procedures.⁵² Judicial review of expedited removal is allowed, however, where the alien claims to be an LPR.⁵³

43. *See id.*

44. INA § 212(h) (provides a waiver of inadmissibility owing to a crime of moral turpitude or one-time possession of 30 grams or less of marijuana), 8 U.S.C.A. § 1182(h) (West Supp. 1998).

45. INA § 212(I) (provides a waiver of inadmissibility owing to fraud or material misrepresentation in obtaining documents for entry into U.S.), 8 U.S.C.A. § 1182(i) (West Supp. 1998).

46. 8 U.S.C.A. § 1182(h) (West Supp. 1998).

47. INA § 212(d) (provides waivers of inadmissibility for nonimmigrants, except where inadmissibility is due to security concerns), 8 U.S.C.A. § 1182(d) (West Supp. 1998).

48. *See* INA § 212(d)(3), 8 U.S.C.A. § 1182(d) (West Supp. 1998).

49. *See* 8 U.S.C.A. § 1182(i) (West Supp. 1998).

50. *See Matter of W*, 9 I&N 1, 4-5 (BIA 1960).

51. 8 U.S.C.A. §§ 1182(h), (i)(2) (West Supp. 1998).

52. *See* AILA v. Reno, No. 97-00597 (D.D.C., filed Mar. 27, 1997).

53. *See* 8 U.S.C.A. § 1252(a)(2)(A) (West Supp. 1998).

The IIRAIRA also restricts judicial review of denials of discretionary relief,⁵⁴ including decisions regarding several types of waivers of removal, voluntary removal, and adjustment of status under INA section 245. There is no review of removal orders of aliens based on criminal acts,⁵⁵ and limits have been placed on the availability of injunctive relief regarding the provisions on inspection, admission, expedited removal, apprehension, and detention of aliens.⁵⁶ The IIRAIRA eliminated an alien's ability to challenge a deportation order through a habeas corpus petition filed in federal court pursuant to the INA. Finally, the Act added INA section 242(g), a catchall provision, restricting all courts from hearing any claim by an alien relating to a decision or action by the Attorney General to commence an action, adjudicate a case or execute a removal order.⁵⁷

In addition to these jurisdictional bars, the IIRAIRA wrought several significant procedural changes to judicial review.⁵⁸ The most devastating change is the provision regarding the commencement of judicial review. Judicial review does not automatically stay an alien's removal and a court retains jurisdiction over the review even if the alien is removed.

The standard of judicial review has also been affected.⁵⁹ Current law limits a court to review of the administrative record; findings of fact are conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary." Decisions regarding the eligibility of an alien for admission are deemed conclusive "unless manifestly contrary to law" and asylum determinations are conclusive "unless manifestly contrary to law and an abuse of discretion."

Questions arose regarding the extent of the IIRAIRA's jurisdictional limitations. For example, both the First and Ninth Circuits held that jurisdiction was proper where a deportation decision, which was based on an aggravated felony conviction, was rendered by the Immigration Court and affirmed by the BIA before the effective date of the IIRAIRA.⁶⁰ A district court in Florida held the jurisdictional bar contained in section 242(g) only applies to actions by the Attorney General, not to decisions by lower government officials, and section 242(g) does not prohibit federal question jurisdiction over alleged constitutional infirmities in the INS's procedures.⁶¹

In regard to habeas corpus jurisdiction, courts are divided as to whether the IIRAIRA or the AEDPA limits a federal court's ability to consider habeas corpus petitions filed pursuant to 28 U.S.C. section 2241, the general habeas corpus provision.⁶² Other courts have found the question of whether the IIRAIRA eliminated section 2241 to be irrelevant, holding that section 2241 jurisdiction over deportation did not exist prior to the enactment of the IIRAIRA.⁶³

54. See 8 U.S.C.A. § 1252(a)(2)(B) (West Supp. 1998).

55. See 8 U.S.C.A. § 1252(a)(2)(C) (West Supp. 1998).

56. See 8 U.S.C.A. § 1252(e)-(f) (West Supp. 1998).

57. INA § 242(g), 8 U.S.C.A. § 1252(g) (West Supp. 1998).

58. See generally 8 U.S.C.A. § 1252(b), (d) (West Supp. 1998).

59. See INA § 242(b)(4), 8 U.S.C.A. § 1252(b)(4) (West Supp. 1998).

60. See *Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997).

61. See *Tefel v. Reno*, 972 F. Supp. 608 (S.D. Fla. 1997).

62. See *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) (finding that IIRAIRA abolished habeas review under § 2241) (dictum); *Moore v. District Director, INS*, 956 F. Supp. 878, 882 (D. Neb. 1997) ("Congress has repealed all statutory habeas jurisdiction"). But see *Mojica v. Reno*, 970 F. Supp. 130, 157 (E.D.N.Y. 1997) (finding that "the AEDPA and the IIRAIRA leave undisturbed the independent authority of federal district courts to entertain habeas petitions under section 2241 of Title 28").

63. See *Ozoanya v. Reno*, 979 F. Supp. 447, 450-51 (W.D. La. 1997); *Marriott v. Ingham*, 1998 WL 11942 (W.D.N.Y. Jan. 7, 1998).

VIII. Mandatory Detention During Deportation and Exclusion Processes

Since April 1, 1997, aliens arriving in the United States are subject to the new provisions relating to detention and release. All aliens suspected of being inadmissible "shall be detained" pending a removal proceeding.⁶⁴ The classes of arriving aliens subject to new detention rules include (1) asylum seekers; (2) those subject to expedited removal, including aliens claiming to be LPRs, refugees, or asylees; and (3) LPRs returning from brief absences and believed removable. Different detention rules apply to each class. Nevertheless, parole may be granted only on a case-by-case basis and the standard of review now requires proof of "urgent humanitarian reasons or significant public benefit."⁶⁵

Asylum seekers must be detained during the pendency of their application for asylum. Except for medical emergencies or law enforcement matters, detention is mandatory before the credible fear determination and after a finding of no credible fear.⁶⁶ If credible fear is established, the alien may be released pursuant to the usual parole procedures. Aliens subject to expedited removal are removed immediately and the new law affords virtually no judicial review of the removal order. Generally, detention and release from detention are nonissues. The additional process afforded aliens claiming LPR, refugee, or asylee status, however, takes time and in this context advocates should be aware that the new law requires mandatory detention of all aliens subject to expedited removal. An exception for allowing parole for medical emergencies or legitimate law enforcement purposes applies.⁶⁷

Returning LPRs, conditional residents, and temporary residents are eligible for parole pursuant to the Transitional Period Custody Rules (TPCR), despite the fact that the INS considers these aliens to be applicants for admission in the underlying removal proceeding.⁶⁸ A significant issue, however, is whether the mechanism for release is bond or parole. Bond determinations, but not parole determinations, are subject to review by an immigration judge.

The IIRAIRA also mandates detention of certain criminal aliens. Release may be granted only in limited circumstances. Since the INS has limited detention facilities, the Attorney General has invoked the TPCR provisions. Effective until October 10, 1998, the TPCR allows the Attorney General to release certain aliens otherwise subject to mandatory detention. For example, aliens lawfully admitted who do not pose a danger to the safety and property of others are eligible for release. The eligibility of aggravated felons for release has not been resolved, however.⁶⁹

IX. "Unlawful" Stay Vs. "Unauthorized" Stay and the Three & Ten Year Bars

The provisions of the IIRAIRA with the most widespread effect may be those creating new "3 and 10 year bars." The trigger date for these bars was April 1, 1997. The IIRAIRA created the concept that one is "unlawfully present" in the United States "after the expiration of the period of stay authorized by the Attorney General," or otherwise present without being admitted

64. See INA § 235(b)(2)(A), 8 U.S.C.A. § 1225(b)(2)(A) (West Supp. 1998).

65. See INA § 212(d)(5)(A), 8 U.S.C.A. § 1182(d)(5)(A) (West Supp. 1998).

66. See INA § 235(b)(1)(B)(iii)(IV), 8 U.S.C.A. § 1225(b)(1)(B)(iii)(IV) (West Supp. 1998).

67. 8 C.F.R. § 235.3(b)(2)(iii) (1998).

68. See *INS Memorandum* dated Oct. 22, 1997 (visited May 23, 1998) <<http://www.AILA.org/info-net.htm>>.

69. See *Matter of Garvin-Noble*, 1997 WL 61453 (BIA Jan. 16, 1997).

or paroled.⁷⁰ The statute provides that aliens unlawfully present for more than 180 days⁷¹ and less than one year who voluntarily leave the United States are ineligible to reenter for three years.⁷² In a December 17, 1997 cable, the State Department advised that periods of unlawful presence are not counted in the aggregate. Unlawful presence for a period of time greater than one year renders the alien ineligible for admission for ten years.⁷³ These new limits on admissibility are referred to as the "3 and 10 year bars." A related provision, IIRAIRA section 632; INA section 222(g); 8 U.S.C. section 1202(g), makes any nonimmigrant visa void immediately upon the expiration of authorization and limits the ability to obtain a new nonimmigrant visa to consular posts in the alien's country of nationality. The visa overstay penalty is perpetual; it lasts as long as the alien is a nonimmigrant.

The scope of these new provisions was the subject of repeated, and sometimes contradictory, interpretation by the State Department and the INS. One of the most significant issues was whether status violations, e.g., unauthorized employment, constitute unlawful presence. After issuing various memoranda with differing interpretations, in a September 19, 1997 memorandum, the INS stated that, except where an Immigration judge determines that there has been a status violation, unlawful presence includes only periods of stay beyond the deadline on an alien's arrival/departure record (Form I-94). Thus, where an alien violates his status and applies for but is denied reinstatement, unlawful presence begins from the date of the Immigration judge's decision to deny reinstatement. In regard to overstays, the State Department limited the application of INA section 222(g) to temporal violations; the INA section 222(g) penalty does not apply to status violations.⁷⁴

X. "Admission" vs. "Entry"

The Supreme Court, in *Rosenberg v. Fleuti*,⁷⁵ found that an alien's return from a "brief, casual, and innocent" departure from the United States does not constitute entry and does not, therefore, require an assessment of his admissibility. The IIRAIRA amended INA section 101(a)(13), replacing the concept of "entry" with that of "admission."⁷⁶ In an en banc ruling, the BIA recently held that this amendment also eliminated the *Fleuti* doctrine.⁷⁷ The Board found that the new law created a stark dichotomy between aliens lawfully admitted and those seeking admission. The plain language of the statute requires, according to the Board, that if an alien committed one of the offenses listed in INA section 212(a)(2) and has not been granted relief under INA section 212(h) or INA section 240A(a), any attempt to reenter the United States after any kind of departure will be considered a request for admission. The purpose and circumstances of an alien's departure are no longer relevant; "any departure of a lawful permanent resident . . . will be a meaningful departure."⁷⁸

70. INA § 212(a)(9)(B), 8 U.S.C.A. § 1182(a)(9)(B) (West Supp. 1998).

71. See 75 INTERPRETER RELEASES 53 (Jan. 12, 1998).

72. See INA § 212(a)(9)(B)(i)(I), 8 U.S.C.A. § 1182(a)(9)(B)(i)(I) (West Supp. 1998).

73. See INA § 212(a)(9)(B)(i)(II), 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (West Supp. 1998).

74. See State Dep't Cable No. 96-State-232151 (Dec. 1996).

75. 374 U.S. 449 (1963).

76. See 8 U.S.C. § 1101(a)(13) (West Supp. 1998).

77. *Matter of Collado*, 1997 WL 805604 (BIA Dec. 18, 1997) (en banc).

78. *Id.*

XI. Law Addressing Central Americans

One of the few positive, humanitarian changes which occurred in 1997 relates to Central American and former Soviet/Warsaw Pact nationals. The President signed the Nicaraguan Adjustment and Central American Relief Act (NACARA) into law on November 19, 1997, making it easier for certain Central American nationals and former Soviet/Warsaw Pact nationals to adjust their status and relaxing the standards for suspension of deportation of certain alien classes.⁷⁹

The law granted amnesty to Nicaraguans and Cubans who are seeking an adjustment in status and who have been "physically present" in the United States since December 1, 1995. The amnesty also applies to their spouses, minor children, and adult unmarried children who are physically present in the United States at the time of filing, although any adult children must have entered the United States before December 1, 1995.⁸⁰ "Physical presence" is defined as fewer than 180 days of absence from the country.⁸¹ Applications for an adjustment must be made by April 1, 2000, and the alien must be admissible. Many of the grounds for inadmissibility do not apply, however. For example, ineligibility based on the likelihood of becoming a public charge, the intent to engage in unauthorized work, or an attempt to immigrate without valid documentation would not prevent people otherwise qualified under the NACARA from adjusting their status.⁸²

The Acting Chief Immigration judge issued a memorandum on November 24, 1997, to all Immigration judges describing the NACARA's implementation. According to this memorandum, the Act prohibits the issuance of a deportation or removal order until a final determination of an alien's application under the NACARA has been made. Immigration judges have been advised that until regulations implementing a procedure for applying for an adjustment in status are distributed, they may not enter deportation or removal orders against anyone who *appears* to qualify for an adjustment under the NACARA. Finally, the memorandum advised that an applicant need not file a motion to reopen and that an appeal of an administrative decision may be taken pursuant to INA section 245 and INA section 240.⁸³

By regulation, the Attorney General must stay any final removal orders pending against people who filed for an adjustment under this law and may issue employment authorization if an adjustment application has been pending for more than 180 days.⁸⁴ The Act does not provide for judicial review of rulings on adjustment applications.⁸⁵

XII. Employer Sanctions

The IIRAIRA amended 8 U.S.C. sections 1324(a), 1324(b), 1324(c), changing several provisions relating to employer sanctions.⁸⁶ The number of acceptable documents for I-9 verification will be reduced, employers must have a document verification system, multi-employer associations are subject to new rules, and penalties for violating the immigration labor laws have

79. See Nicaraguan Adjustment and Central American Relief Act (NACARA of 1997) Pub. L. No. 105-100, 111 Stat. 2193; Pub. L. No. 105-139, 111 Stat. 2644 (1997).

80. See NACARA § 202(d).

81. See NACARA § 202(b)(1).

82. See NACARA § 202(a)(1)(B).

83. See also NACARA § 202(e).

84. See NACARA § 202(c).

85. NACARA § 202(f).

86. IIRAIRA § 412.

been increased.⁸⁷ The Labor Department has not provided guidance regarding the appropriate verification documents,⁸⁸ but interim rules issued September 30, 1997, state that, except where an employer has constructive knowledge that the person is unauthorized, the employer must accept a receipt in lieu of work authorization documents for terms of employment lasting three business days or more.⁸⁹ The 1996 Act also made it a crime for an employer to knowingly hire ten or more people unauthorized to work; to knowingly or with reckless disregard prepare, file or assist another in preparing or filing false documents; and to knowingly and willfully fail to disclose one's role as a preparer of false documents.⁹⁰

To the relief of many employers, the law established a safe harbor for technical violations of the verification requirements where the employer made a good faith effort to comply, as well as added an intent requirement to the elements of a citizenship discrimination claim.⁹¹ Detailed regulations about the safe harbor provisions have not been issued, but in a memorandum released on March 6, 1997, to INS enforcement officers, the Commissioner of Programs offered some guidance in distinguishing between substantive and technical or procedural noncompliance.⁹² The memorandum offered the following examples of technical errors: missing maiden name, missing birthdate, missing dates, missing information regarding the preparer/translator, missing work title, missing business address, missing title of the authorization document, and illegible copy of the authorization document.⁹³

XIII. Limits on Public Benefits

In 1996, Congress imposed harsh limits on the availability of public benefits to aliens, eliminating almost all Supplemental Security Income benefits (SSI) and food stamp grants to eligible aliens, as well as granting states the ability to bar aliens from receiving non-emergency Medicaid, Temporary Assistance for Needy Families⁹⁴ (TANF) and Title XX services.⁹⁵ This past year, all LPRs and parolees have been subject to the new law.⁹⁶

State governments differ widely in their responses to the elimination of federal benefits. So far, Alabama barred TANF to aliens who were receiving benefits on August 22, 1997; Wyoming and Louisiana barred Medicaid benefits to those aliens who were receiving benefits on August 22, 1997; and Wyoming, Louisiana and Virginia barred Medicaid benefits after the five year ban expires on qualified aliens who enter the United States after August 22, 1997. The Welfare Act also barred LPRs and parolees entering the United States after August 22, 1996, from receiving benefits from any "federal means-tested programs"⁹⁷ for five years.⁹⁸ At the end of

87. See generally INA §§ 274(A), 274(B), 274(C), 8 U.S.C. §§ 1324(a), 1324(b), 1324(c) (West Supp. 1998).

88. Interim rules published on September 30, 1997 identified acceptable documents for verifying authorization to work, but the rules largely maintained the status quo pending the creation of more comprehensive regulations and forms.

89. See 74 INTERPRETER RELEASES 1519 (Oct. 6, 1997).

90. INA § 274C(e), 8 U.S.C. § 1324c(e) (West Supp. 1998).

91. INA § 274A(b)(6), 8 U.S.C. § 1324a(b)(6) (West Supp. 1998).

92. 16 AILA MONTHLY MAILING 509 (June 1997).

93. *Id.*

94. TANF is the federal need-based assistance program that recently replaced the Aid to Families with Dependent Children (AFDC) program.

95. See Charles Wheeler, *Immigrant Sponsorship and Public Benefits*, in PRACTICE UNDER IIRAIRA: ONE YEAR LATER 270, 276 (AILA ed., 1997).

96. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act), Pub. L. No. 104-193, 110 Stat 2105 (1996) (to be codified in scattered sections of 8 U.S.C. and 42 U.S.C.).

97. See 62 Fed. Reg. 45,256 (1997) (defining "federal means-tested programs").

98. Welfare Act § 403.

the five year period, the income of the alien's sponsor will be deemed available to the alien until the sponsor's obligation ends.⁹⁹ Certain battered women and children are exempt from the deeming rules and the statute also contains an indigence exception that applies when the sponsor fails to provide sufficient assistance for the alien's basic food or shelter needs.¹⁰⁰

The law banned nonqualified aliens from receiving any other "federal public benefit."¹⁰¹ Regulations have not yet defined "federal public benefits," but by statute, the term excludes emergency Medicaid services, certain immunizations, certain non-cash emergency disaster relief, and would seem to exclude Title II Social Security benefits.¹⁰² The Attorney General released a provisional list of community benefits, e.g., police and sanitation services, that the Welfare Act does not preclude aliens from receiving.¹⁰³

In August 1997, Congress restored SSI eligibility to qualified aliens lawfully residing and receiving benefits on August 22, 1996.¹⁰⁴ "Qualified" was defined to include LPRs, refugees, asylees, aliens granted withholding of removal, aliens paroled for at least one year, battered spouses and children, Cubans, and Haitians. Non-qualified aliens receiving SSI benefits on August 22, 1996, may continue receiving benefits until September 30, 1998. Eligibility was also restored to those lawfully residing on August 22, 1996, and who later become eligible for SSI due to disability. All aliens receiving SSI benefits as of July 1996 based on applications filed before January 1, 1979, may continue to collect benefits, but any benefits will terminate on January 1, 1998, if convincing evidence shows that an alien is unqualified. Refugees, Cubans, Haitians, Amerasians, asylees, and aliens granted withholding of removal who become eligible for benefits after August 22, 1996, may collect benefits for seven years from the time of entry. SSI was fully restored to active duty military or veterans and their families, American Indians born in Canada, and LPRs who have worked for forty quarters.

In the 1997 legislation, Congress also restored food stamps to some classes of aliens. Refugees, asylees, and aliens granted withholding of removal may collect food stamps, but only for five years from the time of entry. Benefits were restored to all eligible aliens who are active duty military or veterans, their spouses and unmarried dependent children under twenty-one, as well as LPRs who have worked for forty quarters.¹⁰⁵ Families in which the head of household is a citizen or eligible alien, but which also contain ineligible aliens, may no longer receive a full subsidy.¹⁰⁶ In addition, the Act reduced the deferral of housing benefits termination from three years to eighteen months, although it provided for indefinite deferral in the case of a refugee or asylee.¹⁰⁷ The Act allows local public housing authorities to opt out of these restrictions.¹⁰⁸ The limits on qualified aliens applying for federal housing benefits implemented by the IIRAIRA, however, remained in place.¹⁰⁹

Finally, the Welfare Act imposed new restrictions on parents in arrears for child support payments,¹¹⁰ and the State Department has issued an interim final rule implementing these

99. See Welfare Act § 421.

100. See *id.*

101. See Welfare Act § 401.

102. See 61 Fed. Reg. 45,985 (1996).

103. See *id.*

104. See Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-5308, 111 Stat. 251 (1997).

105. IIRAIRA § 573.

106. See 42 U.S.C.A. § 1436a (West Supp. 1998).

107. See *id.*

108. See *id.*

109. The eligibility of existing tenants was unaffected.

110. Welfare Act § 370, 42 U.S.C.A. § 652(K) (West Supp. 1998).

new directives.¹¹¹ The new rule would create 22 C.F.R. section 51.7(a)(8) to require the State Department to deny passports to individuals who are \$5,000 or more in arrears in child support payments and authorize the revocation or imposition of other limits and restrictions on previously issued passports. No grievance would lie with the State Department; remedies would only be had with the state agency that initially determined the arrears.

XIV. Affidavits of Support

Persons seeking to sponsor immediate relatives for admission to the United States as immigrants have long been required to prepare and file an "affidavit of support" on behalf of the alien. Prior to 1997, these affidavits were rarely, if ever, enforced, and certain new immigrants became public charges. The IIRAIRA promulgated new affidavit of support provisions that will seriously impact the efforts of a number of LPRs and U.S. citizens seeking to sponsor immediate relatives for permanent admission to the United States. Pursuant to the new law, a family- or employment-based immigrant is inadmissible as likely to become a public charge unless an affidavit of support is filed on their behalf.¹¹² The affidavit is required only where the immigrant seeks admission on the basis of a visa filed by an immediate relative, or on the basis of employment where a relative is the employer or has at least a five percent ownership interest in the petitioning employer, and certain exceptions exist.¹¹³ These new affidavits are legally enforceable contracts between the sponsor, the alien, and the government.¹¹⁴ An interim rule and Department of State update cable (no. 30) regarding the affidavit appeared in the Federal Register on October 20, 1997, and the National Visa Center is now distributing relevant forms to all diplomatic and consular posts.¹¹⁵

This new requirement applies to applicants for permanent residency filed on or after December 19, 1997, regardless of the date of the interview and to applicants denied admission pursuant to section 221(g) pending presentation of additional documentation. Applications filed with consuls abroad are considered filed on the date of the interview.

Eligible sponsors are limited to the spouses, parents, and children of the petitioning alien who are U.S. citizens or permanent residents, over eighteen years of age, domiciled in the United States and who possess an income level of 125 percent of the federal poverty line for both their own families and the sponsored alien.¹¹⁶ The affidavit legally obligates the sponsor to reimburse any private or public agency that supplies means-tested public benefits to the alien. The obligation does not cease until the sponsored immigrant has been naturalized, has worked for forty qualifying quarters under the Social Security Act, ceases to be a LPR and leaves the United States, or dies.

XV. Oversubscription of H-1B Visas

Nonimmigrant visas issued for the temporary employment of professional workers in the H-1B category were oversubscribed for the first time in 1997. To qualify for an H-1B visa, an American employer must demonstrate both that the employer will meet certain require-

111. See 62 Fed. Reg. 62,694 (1997).

112. See INA § 213A, 8 U.S.C. § 1183a (West Supp. 1998).

113. See INA § 213A(g), 8 U.S.C. § 1183a(f) (West Supp. 1998).

114. See INA § 213A(a), 8 U.S.C. § 1183a(a) (West Supp. 1998).

115. For more information see their web site at <<http://travel.state.gov/visa-services.html>>.

116. If a potential sponsor cannot meet this requirement, a joint sponsor may be used.

ments¹¹⁷ and that the alien qualifies for the position.¹¹⁸ In 1990, Congress first implemented an annual cap of 65,000 on H-1B visas, making professional workers the only nonimmigrant group subject to an annual cap. The congressional debate at the time indicated that the number was randomly chosen without regard to American businesses' need for or actual use of these visas. The booming economy, low unemployment, and a shortage of skilled workers in recent years led to an increased demand for foreign workers and, for the first time, the cap was reached before the end of the fiscal year. The cap is predicted to be reached earlier in 1998, and legislation is expected to be introduced early in 1998 to address this issue. The H-1B visa category permits companies to hire professional employees who may not be eligible for any other nonimmigrant visa category. The high tech industry has become increasingly reliant upon hiring foreign workers, many of whom are graduates of U.S. colleges and universities. Industry groups in the high tech field assert that they are facing severe and widespread shortages of skilled information technology professionals. However, labor groups are equally adamant in claiming that there are many skilled American workers available who could be readily trained for the unfilled positions. Each group has its own set of statistics to support its argument, and Congress will ultimately have to decide which set of figures to believe and whether U.S. businesses require an increase in the H-1B ceiling to remain competitive in a global economy.¹¹⁹

XVI. GAL 2-98 and Changes in the Labor Department Certification Process

On October 1, 1996, the Labor Department General Administration Letter (GAL 1-97) set forth major changes in the process by which labor certification applications were adjudicated, as described in last year's "Review." The regional offices of the Labor Department have implemented these provisions quite unevenly, resulting in forum shopping by labor certification applicants and long backlogs at most offices. A second General Administration Letter, GAL 2-98, provided for further changes, largely relating to prevailing wage data. Effective January 1, 1998, the Bureau of Labor Statistics (BLS) will provide Occupational Employment Statistics (OES) wages to state employment security agencies (SESAs), which will then provide specific data to employers regarding prevailing wages.¹²⁰ The BLS expects that this new system will speed responses to employer requests, lead to the use of a consistent methodology in all states, and increase the accuracy of determinations.

Initially, the SESAs must determine, pursuant to 20 C.F.R. section 656.40, if the wage is controlled by a prevailing wage under the Davis Bacon Act, the Service Contract Act, or a controlling collective bargaining agreement. If not, the SESAs may use the wage survey information in the OES. Employers should be aware, however, that the OES Dictionary of Occupational Titles contains 650-700 entries, as compared with the 14,000 codes that had been previously used. The office then determines the geographic area of intended employment.¹²¹

117. This requires an employer to show that (1) the foreign worker will be paid at or above the rate for similar work by American workers; (2) the foreign worker will not adversely affect conditions for American workers; (3) American workers will be notified; and (4) there is no strike or lockout at the workplace.

118. An employer must generally show that the position is professional in nature and that the intended employee has the necessary educational and experiential qualifications.

119. See Vol. 17, No. 6 IMMIGR. L. REP. (Mar. 15, 1998).

120. See 16 AILA MONTHLY MAILING 996 (Dec. 1997).

121. See 20 C.F.R. § 656.3 (1998).

As an alternative to this SESA determination process, an employer may offer a substituted wage based on an industry survey.¹²² The recent survey information presented by the employer must meet certain criteria, including dates of collection, and must be a cross-industry survey, provide an arithmetic mean, be random and with representative sampling, account for experience level, relate to the geographic area of the prevailing wage request, and the methodology must be reasonable and consistent with recognized standards and principles.

Administrative difficulties have hampered the Department of Labor's efforts to implement these changes. In order to divert funding to the creation of the OES wage system, over seventy positions in the Department are unfunded in fiscal year 1998. As a result, the regions with the largest backlogs of certifications are experiencing the longest delays.

XVII. E-Visa Regulations

New E visa regulations were finally issued by the State Department and INS in 1997.¹²³ The proposed rules were first published in 1991, and although not issued in final form, have been effectively implemented since that time in guidance to consular officers through the *Foreign Affairs Manual*. The most important change in the new rules provides for a two year period admission for E visa holders each time they apply for admission at the U.S. port of entry. Under the old rules, a one year period of admission was granted at the port of entry, with extensions of stay granted in two year increments through the INS Service Centers.

In the final new rules, the INS adapted the existing DOS criteria relating to "essential skills" personnel. The availability of U.S. workers, transferability of skills, and uniqueness of skills will be relevant factors in determining whether to admit "essential skills" personnel. The *Foreign Affairs Manual* includes a sliding scale to be used in determining whether an investment meets the "substantiality" test for treaty investor purposes. Although the sliding scale was removed from the final rules, it remains in the *Foreign Affairs Manual*, and consular officers are expected to continue to use it as a tool with which to measure the substantiality of the investment. In order to constitute a "substantial" investment, the investment may not be "marginal". Under the new rules, the capacity to employ U.S. workers must be established within five years of the principal investor's admission to the United States. Business plans regarding the investment submitted with the visa application must reflect that U.S. workers are currently employed by the enterprise or will be employed within five years.

XVIII. Miscellaneous Provisions

A. NEW FINGERPRINTING PROVISIONS

Due in part to the well-publicized problems with the INS' "Citizenship USA" program under which many additional individuals have naturalized over the past two years, the INS procedures for obtaining fingerprints have been changed. About 180,000 individuals were naturalized without the proper background checks, resulting in the naturalization of about 16,000 persons who had at least one felony arrest. The INS is now seeking to revoke the naturalization of about 5,000 individuals.¹²⁴ Seeking to ensure better quality control and effi-

122. See 20 C.F.R. § 656.40 (1998).

123. See 62 Fed. Reg. 48,138 (1997).

124. See 74 INTERPRETER RELEASES 744 (May 5, 1997); 598 (Apr. 14, 1997).

ciency relating to the fingerprinting of aliens, the INS has cancelled the Designated Fingerprint Service (DFS) program and created Application Support Centers (ASCs) to take its place.¹²⁵ Instead of requiring fingerprints to be submitted concurrently with a naturalization application, the INS will direct a naturalization applicant to have his or her fingerprints taken at an ASC after it has received the application. This change is not expected to increase an applicant's waiting time because the background check can be performed during the wait for an interview.

The centers are to be located near immigrant communities, although a number of other accessibility issues will help determine locations. Mobile units will also be employed to reach homebound individuals. The staff will be hired and trained by the INS, cleared by the FBI, and overseen by INS. Applicants for immigration benefits may continue to use law enforcement agencies (LEA), however, to obtain fingerprints. Over the next several months, the INS plans to open eighty ASCs nationwide. In anticipation of the number of people in need of fingerprinting while ASCs are being established, the INS has registered 250 additional LEAs.

B. VACCINATION REQUIREMENTS

The IIRAIRA provided that all applicants for immigrant visas and adjustment of status would be inadmissible if they do not present documentation showing that they have been vaccinated against a variety of vaccine-preventable diseases.¹²⁶ The State Department published an interim rule incorporating the substance of the new inadmissibility grounds and its regulations at 22 C.F.R. Part 40.62 Reg. 67564 (December 29, 1997). Although many immigrant visa applicants would be considered inadmissible pursuant to this provision, they may be eligible for waivers either because they initially did not have a required vaccination but subsequently obtained it, or because a panel physician certified that a particular vaccination was not medically appropriate. The INS delegated to consul officers the authority to grant waivers at inadmissibility under INA sections 212(g)(2)(A) and (B). However, the INS did not delegate to consulate officers the authority to grant waivers pursuant to INA sections 212(g)(2)(C) for religious or moral reasons. An Application must be filed with the INS in order to receive this form of relief.¹²⁷

C. RETHINKING THE INS

In 1997, the U.S. Commission on Immigration Reform¹²⁸ issued its long awaited final report to Congress entitled "Becoming An American: Immigration and Immigrant Policy." One of the Commission's most controversial recommendations is the dismantling of the INS and spinning off core functions to other agencies. The Commission recommended that immigration enforcement be handled by a new Bureau for Immigration Enforcement at the Justice Department, that adjudication of all applications for immigrant-related services be placed under an Undersecretary of State; that enforcement of immigration-related standards for employers be consolidated in the Department of Labor, and that administrative review of all immigration related decisions be considered by a newly created independent Agency for Immigration Review. This 232-page report made recommendations on overhauling the management structure of the immigration system, reordering priorities for deportation and removal of undocumented aliens,

125. See 16 AILA MONTHLY MAILING 1029 (Dec. 1997).

126. See INA § 212(a)(1)(A).

127. Vol. 17, No. 4 IMMIGR. L. REP. (Feb. 15, 1998).

128. Members of the commission include Shirley M. Hufstedler, (chair), Lawrence H. Fuchs, Michael S. Teitelbaum, Richard Estrada, Harold Ezell, Robert Charles Hill, Warren R. Leiden, Nelson Merced and Bruce A. Morrison.

and simplifying the immigrant and non-immigrant selection system. The Commission also recommended a twenty-five percent reduction in legal immigration from current levels, and that employment based immigration be reduced by almost thirty percent.

XIX. Conclusion

Political, humanitarian, and labor related issues drive the interpretation and implementation of U.S. immigration laws, and contributed to the major changes enacted in 1996 and 1997. The recommendations expressed in the Commission's Report and the varied reactions to its proposals are indicative of the current state of U.S. immigration law. These issues still exist, and will continue to have a major effect upon the law and its interpretation in 1998 and beyond.

