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Immigration Issues and Airlines: An Update

Constance O'Keefe

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IMMIGRATION ISSUES AND AIRLINES: AN UPDATE

Constance O'Keefe*

TABLE OF CONTENTS

I. INTRODUCTION .................................. 17
II. DETENTION ...................................... 18
III. FINES .............................................. 37
   A. LEGISLATIVE CHANGE ........................... 37
   B. DOCUMENT DESTROYING ASYLUM SEEKERS ...... 43
   C. TWOVs NOT PRESENTED ..................... 53
   D. I-193 WAIVERS .................................. 54
IV. CONCLUSION ..................................... 65

I. INTRODUCTION

This ARTICLE is an update on immigration issues that affect airlines. The original article appeared in the Winter 1993 issue of this Journal. This Article discusses the significant legislative, judicial, administrative case law, and policy developments that have occurred since that time. This Article also places special emphasis on the detention and fines issues that have buffeted the industry over the last few years.

Since the beginning of the 1990s, airlines have had prolonged battles with the U.S. Immigration and Naturalization Service (INS or “the Service”) over detention and fines matters. Both of these issues reached fever pitch in the U.S. with the onslaught of asylum seekers. Unfortunately, despite pleas by carriers that the INS work with them, the Service took extreme positions on both of these issues. And now, after years of struggle and expense to the carriers, the legal positions the INS has used to justify its

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policies on detention and carrier fines have been officially repudiated.

The common theme that unites all aspects of the recent history of these issues is the attitude of the Service. Rather than compromise or even address the concerns of the airlines, the Service has repeatedly chosen unremittingly harsh and extreme positions, which ultimately have failed. Many who examine these issues from the industry side remain mystified by the unchanging stance of the Service. Particularly troublesome is what the industry perceives as the INS's continued disinclination to engage in a constructive partnership with the airlines.

II. DETENTION

The most dramatic confrontation between the Service and the airlines was over the issue of detention of some asylum-seekers. The Service insisted that the carriers were required to keep stowaway and transit passengers who sought political asylum in the airlines' custody pending final disposition of their asylum claims. The dispute ultimately ended up in the courts. After four years of litigation, the courts agreed with the carriers that the Service's position was unjustified.

Before filing the lawsuits, industry representatives repeatedly asked INS officials to yield on the detention policy. The airlines backed up their requests with detailed arguments on the illegality of the INS position. When there was no response, the domestic airline industry as a whole filed suit in federal district court in Washington, D.C. in 1992. The industry lawsuit challenged the INS position on both stowaways and transit asylum.

The carriers believed that they had been relieved, generally, from the obligation to detain problem aliens with the passage of the 1986 user fee amendments to the Immigration and Nationality Act (the INA or the "Act"). These amendments were included in the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341 (1986). See O'Keefe, supra note 1, at 382. Because many of the decisions that have examined this issue refer to these amendments as the "User Fee Statute," that terminology is adopted in this Article. See infra notes 32-37 and accompanying text for a description of the discussion of these amendments by the Lan-Chile court.

4 At the time this controversy first arose, there was no legal definition of stowaways. The Service prepared a legal opinion in early 1991 defining stowaway, but did not acknowledge its existence until late the next year. See O'Keefe, supra note 1, at 368 n.31, for a discussion of the history of the definition of stowaway. The major immigration reform legislation of 1996 added a definition of stowaway to the Act that is in accord with the conclusions of the legal opinion on the INS. It is "evident" that ticketed passengers who board aircraft cannot be considered
seekers. Several individual airlines also challenged the INS policy of forcing airlines to keep certain asylum seekers in airline custody. Initially, these court cases resulted in judgments in favor of the Service. However, the industry won its first major victory against the INS in 1994, in Linea Area Nacional de Chile Airlines v. Sale (Lan-Chile).6

Lan-Chile first filed suit in the U.S. District Court for the Eastern District of New York, challenging the INS's detention policy on asylum-seeking TWOVs, and also seeking reimbursement of amounts it had expended. In its complaint Lan-Chile sought: (1) a declaration that the INS was responsible for paying all expenses incurred in detaining the asylum-seeking TWOVs because the INS's policy exceeded statutory authority and violated the Administrative Procedure Act (APA); (2) a declaration that the policy of the INS was arbitrary and capricious and in violation of the APA; and (3) an order requiring the INS to reimburse Lan-Chile for the amounts it had expended in detaining the asylum-seeking TWOVs.7 In September 1994, in a ruling on motions for summary judgment, the district court agreed with Lan-Chile and held that the INS's policy was insupportable. It ordered the Service to reimburse Lan-Chile $620,678.78 plus interest. At the time of the Lan-Chile decision several other courts

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5 INS regulations allow passengers to transit without visa (TWOV) through the United States as long as: (1) the passenger's travel documents establish his or her identity and ability to enter some country other than the United States; and (2) if the carrier is a signatory to a Transit Agreement with the INS. See 8 C.F.R. § 212.1(f) (1997). See also O'Keefe, supra note 1, at 372 n.42, for a description of the Form I-426 Transit Agreement. Passengers transiting the United States without visa must establish that they are otherwise admissible to the U.S., that they have “confirmed and onward reservations to at least the next country beyond the United States,” and that they will continue their journey on the same or a connecting transportation line within eight hours after arrival or on the first available transport. See 8 C.F.R. § 214.2(c)(1) (1997). There are restrictions on TWOV travel by some nationalities. There are also differences in the TWOV privilege accorded to passengers depending on the type of TWOV travel. Transit can be either on a direct flight on the same carrier or by means of an interline transfer from one carrier to another. See 8 C.F.R. § 212.1(f) (1997); 22 C.F.R. § 41.2(i) (1997).


7 Lan-Chile, 865 F. Supp. at 975-76.
had already addressed the issue of detention of asylum-seekers by carriers. Two of these decisions dealt with detention of stowaways.

In the 1993 case *Dia Navigation Co. v. Reno*, the district court granted summary judgment in favor of the Service, holding that "the INA unambiguously provides that carriers, not the INS, are responsible for the detention and the costs of detention of stowaways." Like the *Argenbright* decision that would follow it a year later, the *Dia* court found that the case turned on the status of stowaways as "excluded" rather than "excludable" aliens. On appeal, the Third Circuit affirmed in part, reversed in part, and remanded. The Third Circuit issued a final opinion on September 13, 1994, just two days after the issuance of the *Lan-Chile* decision in the Eastern District of New York. The Third Circuit reversed on the basic legal issue, holding that the district court erred in not granting Dia's motion for declaratory judgment. The court noted that the provisions of the INA on which the Service relied to justify its policy "lack the requisite clarity." Therefore, according to the court, the INS policy should have been "promulgated pursuant to the notice and comment provisions" of the APA. The court decided that the availability of asylum changed the equation and revealed a fundamental tension in the statutory scheme, which "by its express terms only contemplates placing on carriers the cost of detaining stowaways who are subject to immediate deportation." According to the court, "in the face of what is at best statutory ambiguity, INS has adopted rules holding carriers liable for unlimited costs of detention and imposing custody with no guidelines, or subject only to standards as determined by an INS officer on the scene." The Third Circuit, however, concurred in the judgment of the district court on the question of reimbursement, holding that reimbursement would be "money damages" and therefore barred by the doctrine of sovereign

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9 831 F. Supp. at 373.
12 Id. at 1256.
13 Id.
14 Id. at 1259 (emphasis in original).
15 Id. at 1265.
immunity." According to the Third Circuit, the carrier had no statutory entitlement to the funds because the statute did not address the question of responsibility for costs of detention of stowaways who apply for asylum.

In *Argenbright Security v. Ceskoslovenske Aeroline*, the Service sought to force the Czech carrier, CSA, to keep a stowaway in custody pending resolution of his asylum claim. For approximately six weeks, the individual was in the physical custody of Argenbright, a security company hired by CSA. During that time, CSA continued to dispute the Service's right to force it to detain the individual or pay the detention charges, arguing that CSA was an airline, not a jailer. When six weeks had passed, CSA advised Argenbright that it would no longer assume responsibility for the custody or the cost of custody. When the security company sought to return the individual to CSA, CSA refused to accept custody and a tense three-way confrontation between the INS, the carrier, and the security company ensued. The confrontation ended with the INS taking the individual into its custody. Subsequently, Argenbright sued CSA, and in October 1992, the airline impleaded the Service. The district court dismissed the complaint on motions for summary judgment, and CSA appealed. While the appeal was pending, and in the wake of the *Lan-Chile* decision in the Eastern District of New York, the case was settled, on terms reportedly favorable to CSA (while nevertheless leaving the Southern District of New York decision on the books). The decision by the Southern District in *Argenbright* turned on the question of "excludable" versus "excluded" aliens, with the court holding that because stowaways were the latter, they were therefore not within the group for which the 1986 User Fee Statute shifted detention responsibility from the Service to the carriers.

The *Lan-Chile* decision included a thorough discussion of the issues involved in the controversy surrounding asylum-seeking TWOVs. The court first reviewed the statutory background of

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16 See id. at 1266-67.
17 See id. at 1267. See also O'Keefe, supra note 1, at 386 n.77.
19 See O'Keefe, supra note 1, at 384 n.69. The first decision in the industry lawsuit, a denial by the U.S. District Court for the District of Columbia of the industry's motion for summary judgment, and the then unpublished decision of the Claims Court in the *Aerolineas* case, had also been made shortly before the Eastern District of New York issued its decision in *Lan-Chile*. See infra notes 73-102 and accompanying text.
the dispute, noting that prior to the 1986 enactment of the User Fee Statute, section 233 of the INA\textsuperscript{20} required that carriers bear the financial responsibility for detaining aliens who were temporarily removed for examination and inspection prior to a final determination of their eligibility to enter the United States.\textsuperscript{21}


(a) Upon the arrival at a port of the United States of any vessel or aircraft bringing aliens (including alien crewmen) the immigration officers may order a temporary removal of such aliens for examination and inspection at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels or aircraft, the transportation lines, or the masters, commanding officers, agents, owner or consignees of the vessel or aircraft upon which such aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would, under the provisions of this chapter, bind such vessels or aircraft, transportation lines, masters, commanding officers, agents, owners, or consignees . . . .

(b) Whenever a temporary removal of aliens is made under this section, the vessels or aircraft or transportation lines which brought them, and the masters, commanding officers, owners, agents, and consignees of the vessel, aircraft, or transportation line upon which they arrived shall pay all expenses of such removal to a designated place for examination and inspection or other place of detention and all expenses arising during subsequent detention, pending a decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the transportation line or to the vessel or aircraft which brought them.

\textit{Id.}

\textsuperscript{21} The statute indicated that the expected course of events was one in which the Service would take custody of the aliens during the extended inspection process, but did include a "provided" provision at the end of subsection (a) of section 233 to cover circumstances in which the carrier assumed responsibility for the actual physical custody of the alien:

A temporary removal of aliens from such vessels of aircraft ordered pursuant to this subsection shall be made by an immigration officer at the expense of the vessels or aircraft or transportation lines, or the masters, commanding officers, agents, owners, or consignees of such vessels, aircraft or transportation lines, as provided in subsection (b) of this section and such vessels, aircraft, transportation lines, masters, commanding officers, agents, owners, or consignees, shall, so long as such removal lasts, be relieved of responsibility for the safekeeping of such aliens: \textit{Provided}, That such vessels, aircraft, transportation lines, masters, commanding officers, agents, owners, or consignees may with the approval of the Attorney General assume responsibility for the safekeeping of such aliens during their removal to a designated place for examination and inspection, in which event, such removal need not be made by an immigration officer.
Quoting *Argenbright*, the court noted that “[h]istorically, the maintenance expenses incident to the inspection, examination, and detention of aliens were borne, pursuant to section [233 of the INA], by the commercial carriers responsible for transporting such aliens into this country.”

The *Lan-Chile* court next reviewed the 1986 legislative changes to the traditional division of detention responsibility, including the passage of the User Fee Statute that year. The 1986 amendments, as the court noted, required that amounts from the user fee account be expended, *inter alia*, to reimburse the Attorney General for “providing detention and deportation services for excludable aliens arriving on commercial aircraft and vessels.”

According to the *Lan-Chile* decision:

> The thrust of the 1986 User Fee Statute is to reimburse the Attorney General for funds she expends in connection with the inspection and preinspection of aliens and the costs associated with their detention and deportation. In repealing section [233 of the INA], “one of the new statute's primary functions was to reverse the existing rule, requiring carriers to bear the expense of detaining aliens pending hearings on their immigration status.”

The *Lan-Chile* court concluded that asylum-seeking TWOVs are classified among the excludable aliens referred to in the User Fee Statute, noting that the INS had conceded this point, and quoting the 1994 Claims Court *Aerolineas* decision: “A TWOV who violates the TWOV requirements is excludable.” The *Lan-Chile* court also drew careful distinctions between asylum-seeking TWOVs and stowaways who seek political asylum, in order to distinguish its holdings from the district courts in the *Dia Navigation* and *Argenbright* cases, which had both decided that

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23 *Id.*

24 *Id.* This quoted section taken from the *Dia Navigation* decision also features an extensive review of the legislative history of the 1986 User Fee Statute. See also O'Keefe, *supra* note 1, at 384 (“The legislative history supports the carrier position that all detention is now the responsibility of the Service,” which quotes the same House Report, H.R. CONF. REP. No. 99-1005, at 421 (1986) (emphasis added)).

25 See *Lan-Chile*, 865 F. Supp. at 979.

26 *Id.* According to the *Lan-Chile* court, a TWOV “becomes an excludable alien when he constructively abandons . . . [his legitimate documents that make him eligible for transiting the United States] and hence his status as a TWOV, when he refuses to continue on his journey and applies for political asylum instead.” *Id.* at 979-80.
stowaways were “excluded” rather than “excludable” and “hence . . . [did] not fall under the umbrella of the 1986 User Fee Statute.”  

The Lan-Chile court returned to this key point several times in the course of its decision:

[I]t is undisputed that TWOVs who arrive pursuant to the contract signed by the Service are not immediately “excluded” as are stowaways who do not request political asylum; they are in the country pursuant to a legitimate program endorsed by the government but are “excludable” because by seeking [political] asylum they have abandoned their status as TWOVs and have no authorization to remain.

The Lan-Chile court was careful to distinguish TWOVs who abandon their status (and thus become excludable) from TWOVs who remain in transit. The Lan-Chile court underscored that carrier obligations under the Transit Agreements remain applicable to the latter. The court noted that although it had determined that the INS was required to “bear the physical and financial responsibility of detaining TWOVs who have discontinued their journey and are therefore no longer aliens in transit while their applications for political asylum are being processed,” it was not invalidating the Transit Agreements. The court also noted that “[t]o the extent that the Transit Agreements require the private carriers to detain TWOVs qua TWOVs during their lay-over in the United States prior to their departure for the final leg of their journey, they retain their validity.”

The court further concluded that the Service’s own position supported this conclusion, noting that according to the Service, “the TWOV program is not applicable if the alien applies for an adjustment of status or for an extension of his right to remain temporarily in the country.”

As part of its examination of the statutory background of the detention dispute, the Lan-Chile court conducted its own review of the legislative history of the 1986 User Fee Statute, quoting from both Senate and House Appropriations Reports for 1985.

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27 Id. at 980. See supra notes 8-19 and accompanying text.
28 Id. at 986. “TWOVs . . . abandon their status as such by seeking asylum.” Id. at 991.
29 Id. at 989.
30 Id. “[O]nce a TWOV requests political asylum, he is no longer an alien transiting through the United States.” Id. at 990.
31 Id. at 990. See also O’Keefe, supra note 1, at 383-86.
32 The Senate Appropriations Committee expressed concern
and from the 1986 Report of the House Appropriations Committee on the User Fee Statute, and concluding that "[t]he legislative reports . . . unambiguously demonstrate Congress's intent to shift the financial and physical responsibility of excludable aliens to the Service, even if they do not specifically address the unique situation of TWOVs who seek political asylum, or, for that matter, stowaways who seek political asylum." The court commented that the legislative history certainly made it clear that Congress was concerned about "compelling corporations to become private jailers." The court also stated that it is "illogical to suggest," as the Service did, "that Congress had a particular evil in mind (i.e., transforming corporations into jailers)" and then passed a statute, the effect of which "allows the evil to

about the policy of the Immigration and Naturalization Service which requires scheduled passenger airlines to assume custody and financial responsibility for aliens who arrive by plane in the United States without proper documentation. The Committee believes this policy raises significant questions about the equity and legal propriety of requiring private entities to assume the financial burdens of maintaining and, at the same time exercising physical custody over, excludable aliens for extended periods of time. Specifically, the Committee is concerned about the possible ramifications of detention of aliens by airline personnel or their agents who are not, of course, law enforcement officials.


33 As the Lan-Chile court noted, the 1986 report of the House Appropriations Committee "was even more expansive":

Last year the Committee expressed concern about the policy of the INS, which requires scheduled passenger airlines to assume custody and financial responsibility for aliens who arrive by plane in the United States without proper documentation. Specifically, the Committee expressed concerns about the possible ramifications of requiring air carriers, who are not, of course, law enforcement officers, to detain such aliens in hotels and motels. The Committee wishes to reiterate concern over this policy and notes its strong support for a change in policy which would require INS to assume, in all cases, all custodial responsibility when the transporting air carriers have demonstrated a good faith effort to detect inadmissibility prior to boarding the aircraft.


34 Lan-Chile, 865 F. Supp. at 982.

35 Id. at 988.
continue (i.e., allowing the Service to parole aliens into the custody of the carriers and reimbursing them at a later date)."36

The court next examined the regulations published by the Service after passage of the User Fee Statute, which the Service relied on to justify its policy.37 After a careful review of all of the regulations, the court stated that their scope "could not be clearer."38

Read and construed in their entirety, the regulations and the statutes form a mosaic which compels the conclusion that the transportation line was intended to be responsible for the custody of a TWOV only so long as necessary "to insure such immediate and continuous transit through, and departure from, the United States . . . ."39

In reviewing Lan-Chile's claims under the APA, the court devoted most of its analysis to Lan-Chile's first APA claim that the INS policy was in excess of statutory authority. First, the court noted that because the User Fee Statute did not "unambiguously" make the INS liable for detaining these asylum-seeking TWOVs and because the legislative history did not indicate a clear intent by Congress regarding the specific case of the cost of detaining asylum-seeking TWOVs,40 it would have to examine the INS's interpretation of the 1986 User Fee Statute, the regulations promulgated thereunder, and the Transit Agreement to decide if the INS interpretation was reasonable or violative of the APA.41 During the course of this review, the court noted that the Service freely conceded that "the repeal of section 233 of the Act and the passage of the 1986 User Fee Statute shifted

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36 Id. at 991. The court also reviewed the 1993 amendment to the User Fee Statute in the 1993 Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, which addressed the stowaway detention issue directly. According to the court,

The import of this amendment is clear: If there was any doubt before October 27, 1993, as to the scope of the 1986 User Fee Statute vis-a-vis stowaways the doubt can now be put to rest . . . . The Act also makes clear that the Attorney General must be reimbursed for fees expended in providing detention and deportation services for excludable aliens . . . .

Id. at 984.

37 See O'Keefe, supra note 1, at 389 n.87 for a discussion of these regulations.

38 Lan-Chile, 865 F. Supp. at 983.

39 Id.

40 See id. at 985.

41 See id. In the course of its APA review, the court reviewed and relied on Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), and Osorio v. I.N.S., 18 F.3d 1017 (2d Cir. 1994).
the burden of detaining "excludable aliens" from the carriers to the INS." The court also concluded that the Service had likewise conceded that asylum-seeking TWOVs are excludable. 42

Stating that it was guided by the well-settled principle that an agency's interpretation of a statute "need only be reasonable," 43 the court concluded that the INS's interpretation was unreasonable:

Given the fact that the Act was designed to relieve carriers of the physical and financial responsibility of detaining aliens . . . it follows that an INS policy (or an INS interpretation of the Act or its regulations) which results in imposing upon the carriers custodial responsibility for these excludable aliens is in clear contravention of the plain meaning of the Act and is in violation of Congressional intent, and hence is unreasonable. 44

The court indicated that its conclusion was influenced, at least in part, by the dogmatic absolutism of the position of the Service. "[I]f the agency's interpretations are accepted, the private carriers are obliged to maintain custody of [asylum-seeking] TWOVs indefinitely and with absolutely no guidelines as to the custodial conditions they must provide for their detainees, irrespective of the passage of the 1986 Act." 45 When it had com-

42 See *Lan-Chile*, 865 F. Supp. at 986.
43 *Id.* at 985.
44 *Id.* at 986.
45 *Id.* at 987. The *Lan-Chile* court quoted the *Dia Navigation* decision, which includes a lengthy quotation from colloquy during oral argument before the U.S. District Court for the District of New Jersey. Because it is such telling evidence of the extreme position adopted by the Service, those quotations are also reproduced here. According to the *Lan-Chile* court:

At oral argument, the Government attorney, Alexander Shapiro, . . . took the implausible position that, whatever the conditions or duration of detention imposed by the INA, a carrier cannot challenge those conditions as unreasonable . . . . For instance, the 23 July 1993 [transcript] reads, in part:

COURT: Suppose the [e asylum] [sic] hearing doesn't occur for two years. By definition, that's reasonable?

SHAPIRO: Yes, your Honor . . . .

COURT: Ten years, would that be reasonable?

SHAPIRO: If necessary to hold the alien that long, yes . . . .

COURT: Suppose the hearing just didn't occur for 60 days, but could have occurred within 10 days, are those additional 50 days unreasonable?

SHAPIRO: No . . . .

COURT: I'm asking you whether [carriers] have the right to challenge what the INS does. You say no. The INS can do literally
pleted its review of the Service’s position on the applicable statute and regulations on the legislative history, the court stated that “[t]he Service’s approach in interpreting the 1986 User Fee Statute has been to start with the conclusion that the term ‘excludable aliens’ does not include the aliens at issue in this challenge and then work backwards.”

The court completed its examination of the first APA claim with a review of the legal arguments made by both Lan-Chile and the Service with respect to the I-426 Transit Agreement, focusing on paragraph 4 of the Agreement. Lan-Chile’s position was that detaining TWOVs is only the obligation of the carriers “during the course of the aliens’s ‘immediate and continuous’ anything, take as much time as it wants, impose as many conditions as it wants and then the INS can say, this is reasonable and they’re at a dead end. Is that what you’re saying?

SHAPIRO: Essentially, yes, your Honor . . . .

COURT: That just doesn’t sound fair. You can have [an INS inspector] who has a bad day and says, I want two guards on this guy 24 hours a day, I want him put in the Plaza, I want him given gourmet meals and you’re telling me that that vessel owner can’t say a thing about that, right?

SHAPIRO: Yes.

Id. at 987-88 (quoting Dia Navigation, 831 F. Supp. at 377 n.36).

According to the Lan-Chile court,

[t]his exchange between the Service and the court highlights the fact that the agency’s interpretation of the 1986 User Fee Statute and its regulations is seriously flawed because, notwithstanding the passage of the 1986 Act, the agency continues to believe that the Service can hold private carriers responsible for jailing these aliens indefinitely and pursuant to any conditions the agency deems appropriate. The mere statement of that position bespeaks its unsoundness.

Id. at 988.

46 Id. at 989.

47 See supra note 5. Under this paragraph, the Service and the airline agree [t]hat all alien passengers brought to the United States under the terms of this agreement shall be detained in quarters provided or arranged for by the line, in the custody of immigration officers of the United States or such other custody as the Commissioner may approve: Provided, that the line shall reimburse the United States for salaries and expenses of immigration officers of the United States during such times as they are actually employed in maintaining custody of such alien passengers. The line shall maintain supervision of all such passengers at all times while they are in the United States and not in the actual custody of immigration officers or other custody approved by the Commissioner.

Lan-Chile, 865 F. Supp. at 992. See also infra note 82.
transit through the United States to a foreign country." The court concluded that the "documents indicate beyond cavil" that Lan-Chile's reading was correct. The court went on to state that:

It defies credulity to interpret [the Transit Agreement] as standing for the proposition that there was a meeting of the minds between the carriers and the government in which the carriers agreed that should the TWOVs decide to abandon or surrender their travel documents and seek asylum, the carriers would take responsibility for their indefinite medical, detention, and other needs pending disposition of their political asylum applications.

The court concluded that "[i]t belabors the obvious to reiterate that this contract only places on the carriers the responsibility of detaining TWOVs while they await the next flight in their trip 'through' the United States." Employing standard contract interpretation principles, the court construed the I-426 Transit Agreement against its draftsmen, and again noted that individuals in protracted asylum procedures were not the "passengers" whose temporary custody during passage through the United States in immediate and continuous transit was defined by the Agreement. The conclusion of the court was that "[t]he Service's interpretation of the Act and its regulations is . . . unreasonable and the policy resulting therefrom, assigning responsibility to Lan-Chile for the detention of asylum seeking TWOV aliens pending the processing of their political asylum applications, exceeds the Service's statutory authority and is in violation of the APA."

Finally, the court turned to Lan-Chile's second APA argument that the Service's policy was arbitrary and capricious. In a much more abbreviated analysis, the court again agreed with Lan-Chile, despite the substantial deference traditionally owed to an agency's interpretation of its own regulations. The court characterized the policy as "irrational and hence arbitrary and capricious because the practical result of the policy is to turn corporations, which are ill-equipped to handle the task, into private jailers . . . ." In reaching this conclusion, the court noted

48 Lan-Chile, 865 F. Supp. at 992.
49 Id.
50 Id. at 992-93.
51 Id. at 993.
52 Id.
53 Id. at 994.
one of the features of the INS's position that the industry had long-regarded as the most irrational: the airlines were required to keep asylum seeking TWOVs in detention, while "excludable aliens such as those who are without appropriate documentation are paroled on a daily basis" by the Service.\textsuperscript{54} The court based its conclusion on two independent grounds:

(1) the carriers assumed the responsibility for detaining TWOVs who were in transit through and from the United States, but not the risk or responsibility for detaining, indefinitely, excludable aliens, and (2) the passage of the 1986 User Fee Statute shifted the responsibility of detaining "excludable aliens" to the Government, and therefore it is a risk which Congress has determined the carriers should not take.\textsuperscript{55}

The \textit{Lan-Chile} court also ordered the INS to reimburse the carrier, with interest, for the cost of detention. Because both the district courts in \textit{Argenbright} and in \textit{Dia Navigation} concluded, in the stowaway context, that the carriers were \textit{not} eligible for reimbursement, the \textit{Lan-Chile} court engaged in extensive analysis of this issue. Those courts had relied on the analyses of \textit{Bowen v. Massachusetts},\textsuperscript{56} and \textit{Beverly Hospital v. Bowen},\textsuperscript{57} to reach the conclusion that the APA did not waive sovereign immunity with respect to claims for monetary damages and that the INA did not authorize either such damages or the payment of any funds to a carrier. The \textit{Lan-Chile} court disagreed, adopting the argument of the airline that, although the carrier was requesting

\textsuperscript{54} Id.

\textsuperscript{55} Id. At the time the \textit{Lan-Chile} decision was announced, the \textit{Dia Navigation} and \textit{Argenbright} decisions had reached opposite conclusions. However, both of those cases involved stowaways rather than TWOVs, and the court easily distinguished the two situations:

The differentiation between stowaways and TWOVs as recognized by the district courts in \textit{Dia Navigation} and \textit{Argenbright}, and the implication of that differentiation for assigning responsibility for the expense of detention between the carrier and the INS, should be as obvious as it is logical. It is reasonable to place responsibility upon the carrier for the careful inspection of all of the spaces of its vessel or aircraft to assure that those spaces are not occupied by persons who have not been cleared for boarding. It is not reasonable to place responsibility upon the carrier for the state of mind of a person properly cleared to occupy its spaces.

\textit{Id.} at 994-95. \textit{See also supra} notes 8-19 and accompanying text for further discussion of the \textit{Dia Navigation} and \textit{Argenbright} decisions.

\textsuperscript{56} 487 U.S. 879 (1988).

\textsuperscript{57} 872 F.2d 483 (D.C. Cir. 1989).
relief in the form of a money payment, the complaint itself was one seeking equitable relief.

In reaching this conclusion the court relied upon the fact that, in its view, the 1986 User Fee Statute created an "entitlement" to the funds the carrier had expended in detaining the TWOVs as they awaited processing of their asylum claims. In this respect, the User Fee Statute was very specific with respect to TWOVs, who were "excludable aliens," as opposed to stowaways, who were not "excludable aliens" for the purposes of the INA. The Lan-Chile court noted that the type of relief the plaintiff was seeking was declaratory judgment and an order requiring reimbursement for monies it had expended, "which should have been paid in the first instance by the defendant."\textsuperscript{58} Following the reasoning of Bowen, the court stated that "[w]hat the plaintiff is seeking is equitable relief and though, if successful, would require the federal government to pay a sum of money the relief it seeks is not money damages."\textsuperscript{59} The Lan-Chile court noted that Bowen had cited with approval the decision of Judge Bork in Maryland Department of Human Resources v. Department of Health and Human Services: "[d]amages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'"\textsuperscript{60} In the words of the Lan-Chile court, the airline was requesting "that the government reimburse it for that which the government should have paid all along. It asks not for a substitute for the expenditures it was compelled to make but for the return of those expenditures to which they claim an entitlement."\textsuperscript{61} The Lan-Chile court also relied on Katz v. Cisneros,\textsuperscript{62} which examined the same sort of question. The Lan-Chile court concluded that as in Katz, the carrier was "challeng[ing] the Service's interpretation of a statute which requires the carrier to make substantial expenditures; had the statute been honored, those expenditures would not have been made."\textsuperscript{63} The court's holding on reimbursement was succinct.

\textsuperscript{58} Lan-Chile, 865 F. Supp. at 997.
\textsuperscript{59} Id.
\textsuperscript{60} Id. (noted in D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 135 (1973) and quoting Maryland Dep't of Human Resources v. Department of Health and Human Servs., 763 F.2d 1441, 1446 (D.C. Cir. 1985)).
\textsuperscript{61} Lan-Chile, 865 F. Supp. at 997.
\textsuperscript{62} 16 F.3d 1204 (Fed. Cir. 1994).
\textsuperscript{63} Lan-Chile, 865 F. Supp. at 998.
Even though the 1986 User Fee Statute does not direct payment directly to private carriers for expenses incurred in detaining asylum-seeking TWOVs, reimbursement merely requires the Service to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it followed the directive of the 1986 User Fee Statute.\textsuperscript{64}

On appeal by the INS, the U.S. Court of Appeals for the Second Circuit affirmed the \textit{Lan-Chile} decision of the Eastern District, holding that the burden of providing detention for excludable aliens, including TWOVs, falls on the Service. The court ordered the Service to reimburse Lan-Chile for the detention expenses it had incurred.\textsuperscript{65}

In a decision issued one year after that of the District Court, the Second Circuit agreed with the Eastern District that “TWOVs who repudiate their onward tickets have gained entry to this country by willful misrepresentation of their intention to depart on their scheduled flights.”\textsuperscript{66} The Second Circuit noted that the “INS’s own regulations suggest that TWOV status is rescinded when a TWOV seeks asylum,”\textsuperscript{67} and concluded that “those TWOV passengers who disavow their intention to promptly depart the country are excludable aliens . . . and they may no longer be defined as TWOVs by INS regulation.”\textsuperscript{68} The Second Circuit also examined the 1986 User Fee Statute and its legislative history. It concluded that “Congress manifestly intended to place upon INS the burden of detaining excludable aliens; INS’s policy of excepting TWOVs who seek asylum is wholly without foundation and contradictory to the mandate of the INA.”\textsuperscript{69}

The Second Circuit also agreed that Lan-Chile was entitled to reimbursement, relying as did the district court, on \textit{Bowen, Maryland Department}, and \textit{Katz}, and also on \textit{Zellous v. Broadhead Associates}.\textsuperscript{70} “Having concluded that Congress intended that INS bear the burden of detaining and paying for the related expenses of all excludable aliens, including former TWOVs, we also find that

\textsuperscript{64} Id. at 998.
\textsuperscript{65} See \textit{Lan-Chile}, 65 F.3d at 1034.
\textsuperscript{66} Id. at 1039-40.
\textsuperscript{67} Id. at 1040.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1042.
\textsuperscript{70} 906 F.2d 94 (3d Cir. 1990).
Congress waived sovereign immunity to allow vindication of what would otherwise be a hollow victory.”\textsuperscript{71}

Approximately one year after \textit{Lan-Chile} had completed its journey through the district court and the court of appeals, the other lawsuits on similar issues were finally decided by the U.S. circuit courts to which they had been appealed.\textsuperscript{72} The decision by the United States Court of Appeals for the Federal Circuit in \textit{Aerolineas Argentinas v. United States},\textsuperscript{73} preceded by just one month the D.C. Circuit’s decision in the industry lawsuit, \textit{Air Transport Association v. Reno}.	extsuperscript{74} On appeal from a 1994 decision by the U.S. Court of Federal Claims, the Court of Appeals for the Federal Circuit vacated the Claims Court’s dismissal of \textit{Aerolineas} for lack of jurisdiction and failure to state a claim on which relief could be granted.\textsuperscript{75}

The subject individuals in \textit{Aerolineas} were originally TWOV passengers and passengers whom the court concluded had destroyed their documents en route.\textsuperscript{76} The airlines\textsuperscript{77} were ordered to keep them in their custody. The Court of Claims had held that there was no Tucker Act basis for justification for two reasons. First, the airlines paid no monies to the government. Second, the User Fee Statute directs payment of user fee receipts only to the Attorney General in connection with payment of detention cost of aliens.\textsuperscript{78} The Federal Circuit, however, like the Second Circuit before it, viewed the language of the User Fee Statute as “unambiguously relie[ving] [the] airlines of custodial and financial responsibility for these aliens,”\textsuperscript{79} and considered

\textsuperscript{71} \textit{Lan-Chile}, 65 F.3d at 1044.

\textsuperscript{72} See supra notes 8-19 and accompanying text.

\textsuperscript{73} 77 F.3d 1564 (Fed. Cir. 1996).

\textsuperscript{74} 80 F.3d 477 (D.C. Cir. 1996). See infra notes 90-102 and accompanying text.

\textsuperscript{75} The decision of the Court of Federal Claims is reported as \textit{Aerolineas Argentinas v. United States}, 31 Fed. Cl. 25 (1994). The original order of the court was filed on December 22, 1993. The government requested publication of the decision, and the court released the written opinion on March 24, 1994. See also O’Keefe, supra note 1, at 384 n.69.

\textsuperscript{76} The arrival of the document destroyers at issue in this case predated the INS’s 1991 legal opinion that document destroyers cannot be classified as stowaways. The \textit{Aerolineas} case was first filed in mid-1992, and at issue were passenger arrivals in 1988, 1989, 1990 and 1991. At that time, the INS was treating document destroyers as stowaways. See O’Keefe, supra note 1, at 383. See also supra note 4.

\textsuperscript{77} Cases brought separately by \textit{Aerolineas Argentinas} and by \textit{Pakistan International Airlines} in 1992 were consolidated by the court.

\textsuperscript{78} See \textit{Aerolineas}, 31 Fed. Cl. at 31-32.

\textsuperscript{79} \textit{Aerolineas}, 77 F.3d at 1571.
the “legislative intention to [so] relieve the airlines . . . clearly stated.” The court noted that the deference it should normally show to agency interpretations of statutes:

does not permit abdication of the judicial responsibility to determine whether the challenged regulation is contrary to statute or devoid of administrative authority. In this case the Service is not simply interpreting a regulation as it applies to specific facts, but has construed a regulation as replacing and continuing a repealed statute.

The court applied the same reasoning to INS arguments that the I-426 Transit Agreement provided justification for carrier detention of asylum seeking TWOVs. “We discern no support for the position that the Form I-426 agreements can now substitute for the repealed INA § 233, or even that Form I-426 was intended to govern custody of aliens who claim political asylum.”

In vacating the decision of Claims Court, the Federal Circuit also concluded that the airlines had stated a claim within the Tucker Act, and that they were entitled to recover because the payments they had been forced to make were illegal exactions. Relying on Eastport S.S. Corp. v. United States, the Federal Circuit held that “Tucker Act claims may be made for recovery of monies that the government has required to be paid contrary to law . . . [and that it] provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on

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80 Id.
81 Id. at 1574. The regulation the court was considering was the version of 8 C.F.R. § 235.3(d) then in effect (this subsection was subsequently revised in March 1997), upon which the Service relied to support its position that carriers were required to keep asylum seeking TWOVs in their custody. See O'Keefe, supra note 1, at 388-89 nn. 86-87. The court held that the regulation should properly be read, as the carriers suggested, as creating a carrier responsibility for detention only until departure of the continuation flights of the TWOV passengers, see Aerolineas, 77 F.3d at 1575, and concluded that to the extent the Service adopted any other position, “the regulations were either misinterpreted, or are invalid as interpreted.” Id. at 1578.
82 The I-426 Transit Agreements are authorized by § 233(c) of the INA, 8 U.S.C.A. § 1223(c) (West 1970 & Supp. 1997) (formerly § 238(a) of the INA). The Service also traditionally cites 8 C.F.R. § 238.3(a) in connection with the I-426 Immediate and Continuous Transit Agreements. These agreements were last revised in 1965. See O'Keefe, supra note 1, at 372 n.42. See also supra notes 5 and 47.
83 Aerolineas, 77 F.3d at 1576.
84 See id. at 1564.
85 372 F.2d 1002, 1007 (Ct. Cl. 1967).
an asserted statutory power.” The validity of the claim is not affected and “[t]he amount exacted and paid may be recovered whether the money was paid directly to the government or was paid to others at the direction of the government, or was paid to others at the direction of the government to meet a governmental obligation.” The facts of the detention controversy, in the view of the Federal Circuit, yield this rule:

If [the airlines] made payments that by law the Service was obliged to make, the government has “in its pocket” money corresponding to the payments that were the government’s statutory obligation. Suit can be maintained under the Tucker Act for recovery of the money illegally required to be paid on behalf of the government.

The Federal Circuit remanded the case “to the Court of Federal Claims for determination of the sums exacted and for award thereof.”

The industry lawsuit was finally decided in March 1996, more than four years after the Air Transport Association (ATA) first went to court in January of 1992 to challenge the detention policy of the Service with respect to both stowaways and TWOV asylum seekers. In Reno, the U.S. Court of Appeals for the District of Columbia joined the Second Circuit and the Federal Circuit in holding that the INS policy was unfounded. As in the Aerolíneas case, the victory for the industry in the court of appeals reversed defeat at the district court level. The district court had taken the position that the Service’s interpretation of the statute was to be accorded deference. The D.C. Circuit, in reviewing the decision of the district court, stated unequivocally that it disagreed with its finding that the TWOV and stowaway policies were “authorized by current law.” In the words of the circuit court,

The statutory authority for the INS’s TWOV policy—section 233 of the INA—was repealed in 1986, and since that time the INS has had no legal authority to require the carriers to pay dete-

86 Aerolíneas, 77 F.3d at 1572-73.
87 Id. at 1573.
88 Id. at 1573-74.
89 Id. at 1578.
90 ATA, the Air Transport Association, is the association of domestic air carriers.
tion expenses. Moreover, the statute that the INS cites in support of its stowaway detention policy—section 237 of the INA—only authorizes the INS to require carriers to transport back to their country of origin those stowaways who are excluded and subject to immediate deportation, but does not impose upon airlines any detention responsibility with respect to those stowaways who claim asylum.  

The D.C. Circuit noted that, on the question of TWOV detention, its decision was in accord “with two of our sister circuits,” i.e., the Second Circuit in *Lan-Chile* and the Federal Circuit in *Aerolineas*, and that its decision was made “[i]n light of the well-reasoned discussions of identical issues in these recent opinions . . . .” With respect to stowaways, the D.C. Circuit declined to rely on a “snippet of legislative history from 1952” that suggested that “[s] towaways are excluded absolutely,” as requiring that the INS’s assertion of an “excluded” status be honored, and stated that “the fact that stowaways have been disfavored does not transform them into ‘excluded’ aliens.” The D.C. Circuit, agreeing with the Federal Circuit, concluded that “after the Refugee Act of 1980 provided that stowaways may apply for political asylum, they were properly considered ‘excludable’ rather than ‘excluded.’”  

On the question of damages, the D.C. Circuit held that while the INS should reimburse the carriers, the ATA lacked standing to prosecute a claim for reimbursement, which “would require detailed, individualized proof of [each carrier’s] damages.” The court declined to grant the “exceedingly broad remedy” requested by the Association in seeking “an order requiring the INS to reimburse its members for detention expenses they have unnecessarily incurred since 1986.” In reaching this conclusion, the court noted that “a judicial declaration that the INS’s policies are invalid would not end the matter,” and that “[t]he determination of how much money the airlines paid, for what kinds of detention services, and for which types of aliens, would

92 *Reno*, 80 F.3d at 478.
93 *Id.* at 481.
94 *Id.*
95 *Id.* at 482 (alteration in original).
96 *Id.* (quoting *Aerolineas*, 77 F.3d at 1577).
97 *Id.* at 478.
98 *Id.* at 483.
be no simple administrative matter, but would instead require
detailed individualized proof from each airline.”

Finally, in ordering the judgment of the district court re-
versed and remanding to that court for entry of summary judg-
ment, the D.C. Circuit, quoting Brandt v. Hickel, stated that 
“[t]he INS’s policies of requiring carriers to bear the detention 
costs of TWOVs and stowaways who seek asylum not only lack a 
basis in law, but reflect a position ‘hardly worthy of our great 
government.’” It was with this ringing condemnation of the 
Service’s policy that judicial review of the detention controversy 
between the airlines and the INS finally came to a conclusion, 
five years after the industry first approached the INS seeking co-
operation rather than confrontation and controversy.

III. FINES

A. LEGISLATIVE CHANGE

The Immigration and Nationality Act provides, at section 
273, for the fining of carriers who bring to the United States 
aliens not eligible for or properly documented for the status in 
which they seek admission into the United States. Fines against 
carriers have been included in the immigration laws for more

99 Id. at 484. In response to this portion of the decision and to the holding in Lan-Chile, the INS and various carriers, which are each presenting the Service individualized proof of the expenses incurred in the detention of asylum seekers, have been engaged in settlement discussions.

100 427 F.2d 53, 57 (9th Cir. 1970).

101 Reno, 80 F.3d at 485.

102 See O’Keefe, supra note 1, at 383 n.67 (quoting an Aviation Daily article that reported on the “months of efforts by ATA to convince INS to change the policy voluntarily.”).

103 Codified at 8 U.S.C.A. § 1323 (West 1970 & Supp. 1997). This statutory prohibition against transport of improperly documented aliens was renumbered as subsection (a)(1) with the addition of subsection (a)(2) to section 273 of the INA by section 308(c)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009. This 1996 Act made significant changes in the INA. For example, former section 238 of the INA, discussed in this Article in the context of the I-426 Transit Agreement, see, e.g., supra notes 5 and 47, was redesignated section 233 (the previous version of which had been repealed by the 1986 User Fee Statute). While many of the 1996 changes to the INA are likely ultimately to affect the airlines (especially the changes that added the new section 241 on detention and removal of aliens ordered removed), their impact is not yet clear. This Article discusses primarily the changes to the INA effectuated by the 1994 Technical Corrections Act to the INA, which did bring about a major change in INS fines against airlines.
than a century. 104 Section 273(a)(1) of the Act provides that "[i]t shall be unlawful for any person, including any transportation company . . . to bring to the United States from any place outside thereof . . . any alien who does not have a valid passport and an unexpired visa, if a visa was required . . . ." 105 Section 273 goes on, in subsection (b), to allow imposition of a $3,000 fine on carriers for violations of the proscription of subsection (a)(1). 106 Subsection (c) directs that any fines so imposed can be remitted or refunded if the transportation company "prior to the departure of the . . . aircraft from the last port outside the United States, did not know, and could not have ascertained, by the exercise of reasonable diligence, that the individual transported was an alien and that a valid passport or visa was required." 107

On October 25, 1994, with the adoption of the Immigration and Nationality Technical Corrections Act of 1994, Congress amended section 273 by adding a new subsection (e). 108 Potentially, this is a very significant amendment, but its impact cannot yet be assessed, because the INS has not yet applied it. This new subsection provides for the first time for mitigation of section 273 fines. 109

A fine under this section may be reduced, refunded, or waived under such regulations as the Attorney General shall prescribe in cases in which—

104 The first law to impose limitations on immigration, in 1875, also provided for carrier sanctions. Section 273 itself has been on the books since the passage of the McCarran-Walter Act in 1952. See O'Keefe, supra note 1, at 363 n.18.
106 See id. § 1323(b).
107 Id. § 1323(c). A significant and distinctive feature of subsection (c) is that, while remission or refund are contemplated, there is no provision for mitigation. See O'Keefe, supra note 1, at 363.
109 Other sections of the INA that also provide for fines allow for mitigation. See, e.g., Section 271 (8 U.S.C. § 1921)—fines for "unauthorized landing of aliens" and Section 254 (8 U.S.C. § 1284 (a))—fines for failure to control alien crewmen. Thus, before the 1994 amendment of the INA, the section 273 fines were an all-or-nothing-at-all proposition, and it was that, plus the steadfast refusal of the Service to cancel any fines involving document destroying asylum seekers (other than those whose documents the carriers had photocopied before boarding them), that caused the high level of carrier frustration during the onslaught of opportunistic asylum seekers. See O'Keefe, supra note 1, at 362-67.
(1) the carrier demonstrates that it had screened all passengers on the vessel or aircraft in accordance with procedures prescribed by the Attorney General, or

(2) circumstances exist that the Attorney General determines would justify such reduction, refund, or waiver.110

The mandatory regulations are also a key feature of this amendment. Because the INS has yet to put into effect the regulations, any case involving a fine against a carrier, in which the carrier has requested mitigation as provided for in section 273(e), remains pending at the National Fines Office (NFO).111

After passage of the 1994 Technical Corrections Act, the Service convened two informal meetings of carrier organizations to continue the "open exchange of information between carrier organizations and the INS [that] will to be beneficial to all,"112 and to consider the approach for implementing the regulations prescribed in the new subsection of section 273. The Service ultimately decided to combine the rulemaking with the carrier compliance initiative it had begun to work on with carriers the year before the 1994 amendments were enacted.113 Ultimately, the INS published a Notice of Proposed Rulemaking (NPRM) on June 10, 1996.114 From the carrier point of view, the NPRM set forth a scheme that combined the worst features of the Service's overly literal interpretation of section 273(a) and (c)115 and the very limited and unsatisfactory levels of mitigation it had

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111 See O'Keefe, supra note 1, at 366 n.24, for a description of the National Fines Office and the procedures in administering and adjudicating fines against carriers. As this Article went to press, industry estimates put the total of cases pending before the National Fines Office at more than 5,000. Notwithstanding the new mitigation provision in section 273, some airlines have chosen not to request mitigation and continue to pay INS fines in full, often without filing any defense or request for remission.

112 Facsimile Cover Sheet from Bob Hutnick, Chief Inspector, INS, to Mark Hawes, IATA Director of Traffic Support (March 21, 1995) (on file with Journal of Air Law and Commerce). The Service's idea of continued open exchange, however, went no further than calling meetings on one week's notice that required the attendance in Washington of carrier representatives from all around the world.

113 The Service, when it began the process of discussing an initiative with the carriers, announced that it was able to consider such an initiative as a function of its "prosecutorial discretion." See O'Keefe, supra note 1, at 380-81.


115 See infra notes 131-155 and accompanying text on document destroyer cases.
proposed in its meetings with carriers to discuss a carrier compliance initiative.

The rule proposed in the NPRM included both general standards for case-by-case mitigation of the $3,000 fines and reference to a proposed Memorandum of Understanding (MOU) (the text of which appeared as an Appendix to the NPRM) under which carriers could apply for automatic (but limited) mitigation of fines. Both the case-by-case approach and the MOU approach are based on INS determinations of carrier performance. The keystone of the proposal is INS assessment of each carrier’s record in avoiding fines by avoiding transportation of inadmissible passengers. According to the commentary section of the proposed rule, INS views a “performance” standard as “of primary importance.”

In the proposed rule, the INS describes the method it has worked out to evaluate carrier performance. INS establishes an Acceptable Performance Level (APL) by figuring the performance level, or number of problem arrivals, for each carrier, and then averaging the totals to arrive at the basic “APL.” The Service also establishes an “APL2,” or Above Average Acceptable Performance Level. This level is determined by averaging the totals for the carriers whose performance is above average or above the APL. Those in the top half of the APL group are moved into the APL2 group.

Carriers generally viewed the NPRM with concern, taking the position that the most significant negative features were (1) that mitigation was not available for all carriers, and (2) that in any case, mitigation would always be limited. The NPRM indicated

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116 The MOU, as proposed in the NPRM, is discretionary on the part of the INS. The Service makes it clear that no carrier is entitled to join the MOU. “Carriers may apply to enter into a Memorandum of Understanding (MOU) with the Service . . . .” 61 Fed. Reg. at 29,325 (to be codified at 8 C.F.R. § 278.6(a)) (emphasis added).

117 In the view of the INS, results are more important than the procedures carriers employ. INS officials have stated that they believe there is no other objective basis for evaluation.

118 61 Fed. Reg. at 29,323.

119 See id. INS has given the carriers a break by including only “nonimmigrant” offenses in its calculations (i.e., it has omitted problems with the arrival of “immigrants” or green card holders).

120 See id. at 29,323-24. At the time the NPRM was issued, the INS had prepared (but has not officially released) APL rankings based on its FY94 data. Performance levels ranged from 0% to 5.2% offense rates, with most carriers falling well below the 1% rate. The average, however, which the INS used to determine the APL, is 0.2%. This data is on file with the Journal of Air Law and Commerce.
that the INS had determined to grant basic mitigation (i.e., a twenty-five percent mitigation of the $3,000 fine amount) to no more than half of the carriers, and its maximum (but still partial) mitigation of fifty percent to no more than one-quarter of the carriers. Thus, every fine imposed would lead to INS collecting from the carrier—and the minimum amount collected would be $1,500. The INS approach could actually serve as an absolute guarantee that the INS will collect no less from fines than it did before the 1990 legislation that increased section 273 fines from $1,000 to $3,000. Moreover, using the averaging method to set the APL cutoff does not give carriers much incentive for improvement.

In the fines scheme the INS proposed in the NPRM, carriers, even those choosing to sign the MOU, could continue to apply for mitigation case-by-case, as they now apply for remission. Theoretically, in the case of an individual application for mitigation, and under the standards arrived at by means of the INS averaging process described above, carriers in the APL group would be eligible for a twenty-five percent reduction in fines and those in the APL2 group would be eligible for a fifty percent reduction in fines. However, the proposed rule sets out procedures the carriers must have in place before this eligibility can be acted upon, and additional factors beyond performance that the Service proposes to consider in mitigating fines.

As a condition precedent for any fine reduction, refund, or waiver, carriers would have to adopt the following “voluntary procedures” at ports of embarkation: screening passengers and documents and, as needed, implementing additional safeguards such as questioning suspicious passengers and conducting a second check of documents.121 Although airlines regard these as standard operating procedures, the INS provided no specific guidelines on how it expects these procedures to be implemented or carried out, and seemed to correlate validity and success of procedures with results in terms of arrivals in the U.S. of inadmissible passengers. In addition, to be granted a reduction, refund, or waiver of fines, the carrier would have to provide evidence that it had screened all passengers on the conveyance for any given flight.122

121 See 61 Fed. Reg. at 29,323.
122 See 61 Fed. Reg. at 29,325 (to be codified at 8 C.F.R. § 273.4(a)). This provision indicates that the INS intends to require carriers to provide specific proof that any particular passenger who presents problems upon arrival was subject to all applicable screening requirements; it also raises questions about what INS will
The proposed new regulations also set forth "general criteria used for reduction, refund, or waiver of fines." According to the commentary section of the proposed rule, these are "conditions," in addition to those listed above, that the "Service will consider before reducing, refunding, or waiving a fine." These additional criteria are: (1) the effectiveness of the carrier's screening procedures, which is considered under the APL scheme; (2) the carrier's history of fines violations; (3) the carrier's payment record for fines, liquidated damage penalties and user fees; and (4) "the existence of any extenuating circumstances." In the background section of the proposed rule, the Service also included the vague, but potentially ominous notice that "[i]n the future, the Service may consider other factors in evaluating carrier performance including participation in data sharing initiatives or evaluation of a carrier's performance by particular port(s) of embarkation and/or route(s) to determine carrier fines mitigation levels."

The proposed rule also included an Appendix with the proposed MOU that carriers may seek to enter into with the INS so as to obtain automatic reduction, refund, or waiver of fines imposed under section 273. The MOU outlines a detailed series of undertakings for the carrier, and uses the same APL methodology to determine automatic fine reduction for carriers that sign the MOU and implement the procedures prescribed therein. And again, mitigation is limited. Carriers in the APL category are eligible for an automatic twenty-five percent reduction of fines and those in the APL2 category (i.e., the top half of the APL category) are eligible for automatic fifty percent reduction of fines. Upon special showings to the INS, carriers below the APL can also be eligible for a twenty-five percent automatic

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123 61 Fed. Reg. at 29,325 (to be codified at 8 C.F.R. § 273.4(b)).
124 These $500 penalties are assessed under section 238 of the INA and the I-426 Transit Agreement in connection with irregularities with TWOV passengers.
125 Under section 286 of the INA, carriers are obliged to collect this six dollar per passenger "user fee" and remit the totals collected to the INS at regular intervals. See 8 U.S.C.A. § 1356(f) (West 1994 & Supp. 1997). See supra note 2.
127 See id.
reduction of fines. Carriers who receive these automatic reductions can seek further reduction of fines on a case-by-case basis by demonstrating to the INS that "extenuating circumstances" existed in a particular case.128

A substantial number of comments were filed with the Service by the August 9, 1996 deadline set in the NPRM.129 Since that time, there have been no further developments.130

B. DOCUMENT DESTROYING ASYLUM SEEKERS

Until the INS published the NPRM described in the previous section, carriers had been optimistic about the passage of subsection (e) of section 273, believing that the required regulations would provide the standards and guidance they had long sought for cases involving passengers who destroy their documents and then request political asylum. These are the fines that have caused carriers the most difficulty and it is with respect to fines of this type that the carriers have found the response of the Service most frustrating.131 At the time of the onslaught of document destroying asylum seekers in the early 1990s, only one decision of the Board of Immigration Appeals provided any guidance on these cases. During the period of greatest difficulty for the carriers, the only Board case that provided any guidance was In re Scandinavian Airlines Flight #SK 911132 (SAS), which was decided in 1991 after it had been pending before the Board for seven years. The SAS case held that because the carrier could not positively "match" eight document destroyers who disembarked in New York, with eight passengers it had originally

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129 Comments were filed by the United Nations High Commissioner for Refugees, the International Air Transport Association (IATA), the Air Transport Association (ATA), the National Air Carrier Association (NACA), numerous airlines and one law firm. The carrier comments raised numerous objections to the methodology proposed by the Service and argued that the Service proposal was predicated on a basic interpretation of section 273 that the carriers considered erroneous. See supra note 115 and infra notes 131-155 and accompanying text.
130 The Board of Immigration Appeals decision in In re VARIG Flight 830, with its clear guidance on the meaning and applicability of subsection (c) of section 273 (and its discussion of the significance of subsection (e)), might well cause the INS to reconsider its approach to the rulemaking mandated to implement section 273(e). The NPRM reflects the Service interpretation—as argued but rejected in the VARIG case—that section 273, as a whole establishes a strict liability fines scheme. See infra notes 147-155 and accompanying text.
131 The carriers inspect the passengers before boarding, and they are properly (or seemingly properly) documented. See O'Keefe, supra note 1, at 367-71.
boarded in Calcutta (on a flight that transited Denmark, with a change of aircraft there), it had failed to meet the "reasonable diligence" standard of section 273(c), and thus was not eligible for remission of the fine.\(^{138}\)

Despite the existence of the SAS case, carriers who believed themselves, as much as the Service believed itself, to be victims of the document destroying asylum seekers, routinely petitioned the National Fines Office (NFO) for cancellation or remission of fines in these cases. When the NFO routinely denied the defenses and petitions for remission, carriers began to appeal large numbers of the NFO decisions to the Board. It is generally believed that by the mid-1990s hundreds of cases were pending before the Board.\(^{134}\) The carriers believed that many of the document destroyer cases could be or should be distinguished from the SAS case because they involved direct flights or because the carriers were able to provide evidence to match the passengers who disembarked with those they boarded at the last foreign port. The Board surprised the industry with a February 15, 1996, notification to airlines in five cases on appeal, four of which raised these issues.\(^{135}\) The events at issue in each of these four cases took place in 1991.


\(^{133}\) See *id.*

\(^{134}\) A particular feature of INS practice, however, might make the number of cases actually pending before the Board somewhat lower. Appeals from decisions of the NFO, along with the $110 filing fee, are actually filed with the NFO, which passes the materials along to Service attorneys, who when they have completed their work on the case, then forward the case to the Board. As the narrative in the text will demonstrate, the carriers have 15 days from the date of an NFO decision in which to file their appeals, while there seems no deadline on the Service. See 8 C.F.R. §§ 3.3 and 280.13.

\(^{135}\) The fifth case, *In re Air India Flight #A1 101, File Number NYC 932639*, involved the propriety of fines in situations in which the INS grants waivers to permanent residents and admits them upon their return to the U.S. from a visit abroad. Typically these cases involve green card holders who return to the U.S. without having their green cards in their possession. The Board decided this case, Interim Decision 3315 (April 2, 1997), on procedural rather than substantive grounds. See infra note 182.

\(^{136}\) File Number LOS 910599.

\(^{137}\) File Number NYC 920337.

\(^{138}\) File Number LOS 911505.

\(^{139}\) File Number LOS 911430.

\(^{140}\) It is generally estimated that the Board grants requests for oral argument in approximately one percent of the cases that come before it. Included with the notice of oral argument was a notice from the Board that it wanted the oral argument to focus on the legal position advanced by the Service:

> The Immigration and Naturalization Service argues in part on appeal that the carrier in this case would be statutorily eligible for remission under section 273(c) of the Immigration and Nationality Act "only if it did not know that the subject passengers were aliens and that valid passport or visas were required." The Service submits that the "exercise of reasonable diligence" is not relevant to the issue of remission if the carrier did know that the passenger was an alien who required a passport and visa (i.e., that remission is not available even if the carrier could establish that it exercised reasonable diligence to prevent the boarding of the unvisaed alien).

Aside from any other issues addressed, the parties should address the following at oral argument:

1. Is this Service position a correct interpretation of the remission provision of section 273(c) of the Act?
2. Is this interpretation supported by prior Board and judicial caselaw?
3. Does this represent a change of a long-standing interpretation of section 273(c) by the Service? Has it been a long-standing position of the Service that fine proceedings should not be instituted if a carrier uses "reasonable diligence" at the port of embarkation to the U.S. to prevent the boarding of unvisaed aliens. In this regard, attached is a Service document, subject "Stowaways on Commercial Airline Flights," offered into evidence in Matter of Iberia Airlines #IB 3951 . . . .
4. If this Service position is not correct, what are the standards for determining whether a carrier has exercised "reasonable diligence" in seeking to prevent the boarding of unvisaed aliens?

Once their briefs had been submitted, as far as the carriers knew, nothing happened for almost two years. On April 5, 1994, however, the Service staked out its new legal position on section 273 fines. On that date it served its briefs on counsel for Iberia, Avianca, and VARIG, together with an addendum to its brief in the Air New Zealand case. In each of these briefs the Service described the primary issue presented as "whether section 273 of the Act establishes a standard of strict liability." This was the first notice the carriers had that the Service was taking the position that section 273 sets a strict liability standard. Reading the statute in a manner the carriers viewed as overly literal, the Service asserted that subsection (c) of section 273 only becomes operative if the carrier did not know that the passenger in question was an alien and that a passport or visa was required. The Service was quite direct in articulating the bottom-line of its new position: vis-a-vis the Service, the carriers are insurers of the documentation of the passengers. "If alienage and the documentation requirements are known, it is the responsibility of the carrier to assure, not just diligently try to assure, possession of such documents upon arrival in the United States." The INS took

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141 The one development of which carriers were aware was the assertion by the Service for a period of time in 1992 that appeals to the Board would result in interest and penalties accumulating for the entire period an appeal was pending before the Board. The Notices with respect to interest that the NFO mailed to carriers along with its negative decisions supposedly were the result of a determination by the General Counsel of the INS. See O'Keefe, supra note 1, at 370-71. After repeated carrier requests for the General Counsel determination upon which this assertion rested, the NFO eventually stopped including this Notice with its decisions.

142 Addendum to Service Brief at 3, In re Air New Zealand (April 5, 1994) (emphasis in original). See also Brief of the INS at 8, In re Avianca Flight #AV 072; Brief of the INS at 13 n.13, In re Iberia Airlines Flight #IB 3951 ("The carrier knew that the subject passengers were aliens who required to have passports and visas, so 'reasonable diligence' is not relevant for this appeal."); Brief of the INS at 8, In re VARIG Airlines Flight #RG 830:
The carrier would be eligible for remission of the fine only if it did not know that the subject passenger was an alien and that a valid passport or visa was required. As the carrier has admitted knowing, it clearly did know that the subject passenger was an alien and that a valid passport and visa were required. Therefore, the carrier is statutorily barred from remission under section 273(c) of the Act. There is no basis for or reason to consider the issue of "exercise of reasonable diligence," in ascertaining the documents required of these prospective passengers, or even what the applicable or proper articulation of that standard of conduct might be, because such issues are not relevant to the determination of this appeal.

Id. at 8-9.
the position that if a passenger arrives without proper documents, carriers are subject to a strict liability statutory regime. The Service concluded each of its briefs with the following:

The main thrust of the arguments of the carrier in support of its appeal is that it had acted diligently in connection with the subject passenger(s). The applicable standard against which its actions must be judged to avoid fine liability under section 273 of the Act is not whether the carrier fulfilled the responsibility to assure that the subject aliens were in possession of their required documents upon their arrival in the United States.143

143 See, e.g., Brief of the INS at 8, In re Avianca Flight #AV 072 (File Number LOS 911505). Logic would seem to dictate that because the Service argued that reasonable diligence goes only to determinations of whether a passenger is an alien, the Service would change its analysis in cases that involve "U.S. citizens." The Service certainly claimed that it did. See Government's Motion for Reconsideration of the Board's February 18, 1997 Decision Ordering Remission of the Fine Imposed Against VARIG Brazilian Airlines: "it [is] the Service's position that a carrier may only seek remission of a fine under section 273(c) where it incorrectly believes that an alien passenger is a United States citizen." Id. at 2. However, it is not necessarily true that the Service changed its analysis in cases involving claims of U.S. citizenship. In the Service's Brief on Appeal at 3-4, In re American Airlines Flight #1266 (NFO Case Number MIA 930242), the INS argued, in a case involving a convincing and well-documented false claim to U.S. citizenship, that under the "strict liability" standard of section 273, the carriers are insurers that the passengers have proper passports and visas. Despite an extensive record evidencing the specific steps the carrier took in reviewing the passenger's documents before boarding her, the Service asserted that "[t]he record does not reflect that the carrier inquired into the alienage and documentation requirements of the subject prospective passenger beyond her representation of herself as a U.S. citizen," and concluded that "the record is bereft of any evidence to establish any diligence by the carrier in fulfilling its responsibility of ascertaining the alienage and documentation requirements of the subject prospective passenger." Id. at 7. The Service went on to offer its unsupported definition of reasonable diligence: "The specific basis for remission under section 273 of the Act is the exercise of the 'reasonable diligence' in inquiring into and probing the status of its prospective passengers to establish alienage and in determining whether valid passports and unexpired visas are required . . . for lawful admission into the United States." Id. at 11. In addition to this interrogation standard ("inquiring and probing"), which the Service seemingly invented while preparing this brief, the INS also suggested other "options" for carriers to reduce the risk of liability: carefully perusing all documents, checking all passengers and documents for travel at boarding and "collecting and safeguarding . . . travel documents until arrival." Id. at 12. While all carriers routinely follow the first two of these practices (and the Service just as routinely rejects them as indicative of "reasonable diligence"), the last is, in the view of the carriers, as impractical and impossible as the interrogation standard. American Airlines objected strenuously and in detail to the Service's proposal of the standards set by the "options," noting that they were "promulgated" for the first time ever in this brief. See Brief of American Airlines at 21-28, In re American Airlines Flight #1266.
At oral argument on March 19, 1996, the carriers disputed the Service’s assertions on strict liability quite forcefully, arguing that the INS interpretation effectively read subsection (c) out of the statute, that it ignored fifty years of Board and judicial precedent, and that it was contrary to past and current practice of the Service. The carriers also distinguished their cases from SAS, arguing that different facts and the traditional case-by-case analysis the Board applied to section 273 cases required a different result.\textsuperscript{144} Possibly because the carrier briefs did not refute the INS strict liability arguments (because, as far as the carriers

\textsuperscript{144} In Air New Zealand, File Number LOS 910597, the record includes an affidavit by the Air New Zealand check-in agent describing his review of the documents of the 10 passengers at issue, copies of the electronic passenger records, and copies of the tickets through to Lima, Peru for these passengers, along with a detailed description of the international passenger handling procedures at Auckland International Airport, and an official confirmation by New Zealand Customs that these 10 passengers displayed Indian passports upon departure from New Zealand.

The record in the Iberia case, File Number NYC 920337, includes an affidavit of the airline’s boarding agent that the two passengers involved were checked-in at Madrid in accordance with special procedures.

The record in the Avianca case, File Number LOS 911505, includes copies of the passports of the two passengers involved (with pages ripped out and other portions defaced or attempted to be defaced), copies of their roundtrip tickets and a copy of the manifest for the flight, which includes the names of both passengers at issue.

The record in the VARIG case, File Number LOS 911430, includes a photocopy of the Dutch passport of the passenger and a copy of his ticket indicating roundtrip transportation to and from the United States (including a notation, made by the VARIG agent, during the document review at check-in, of the passport number (“PPT 022114”)). The VARIG case differed slightly on the basic facts from the other cases. In this case, a passenger with a seemingly valid Dutch passport traveled to the U.S. as a visa waiver passenger. Upon arrival, however, he refused to sign the form for visa waiver passengers. Only after a prolonged scene at the airport, during which INS officials as well as airline employees tried to convince the recalcitrant passenger did the INS, upon closer examination, decide that the passenger’s passport was false and take him into custody.

Despite the fact that the VARIG case did not involve the classic document destroyer scenario, it did present the same legal question: Is section 273 a strict liability statute and is carrier diligence in examining documentation before boarding the passenger “irrelevant,” as the Service was asserting? During the oral argument, the Service also acknowledged, in response to a question from a member of the Board, that, in the VARIG case, there was no action the carrier could have taken to avoid liability. See Transcript of March 19, 1996 Oral Argument at 19, In re VARIG Airlines Flight #RG 830. The Service also acknowledged that VARIG could only have avoided the fine in this case by means of clairvoyance—by being able to read the mind of the passenger before allowing him to enter the VARIG aircraft in Rio de Janeiro and discern his intentions with respect to his behavior upon arrival in the United States. See id. at 22.
knew, that argument was advanced for the first time in the Service briefs, which were submitted two years after the carriers had submitted their briefs, the Board ordered the parties to submit supplemental briefs. The Service submitted one two-page Supplemental Brief captioned for all five of the cases argued before the Board. The four carriers for which the Service’s strict liability interpretation of section 273 was at issue (VARIG, Avianca, Air New Zealand, and Iberia) filed a Supplemental Joint Brief. The International Air Transport Association (IATA), a

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146 The carriers made eight major arguments in the Supplemental Joint Brief:

1. *The Service’s interpretation of section 273 is incorrect for three reasons.* On its face it is not a strict liability statute; the interpretation proposed by the Service effectively reads subsection (c) out of the statute; and the Service’s interpretation is at odds with the Congressional objective in section 273.

2. *Neither prior Board decisions nor judicial case law support the position of the Service.* Fifty years of BIA and court decisions base eligibility for remission on the reasonableness of pre-boarding inspection of passengers and their documents; the SAS case is inapposite.

3. *Recent decisions in the detention cases indicate that the courts will not tolerate the irrational position proposed by the Service.* In the *Lan-Chile* decision, the Eastern District of New York commented on what it considered the unreasonable position of the Service—that carriers implement supernatural screening procedures: “Reasonable diligence’ in the form of checking and photocopying documents does not provide the carrier with the ability to read the minds of these passengers to insure that those who plan to seek asylum will not be allowed to board.” *Lan-Chile,* 865 F. Supp. at 987.

4. *The position of the Service is inconsistent with its own prior interpretations and with its past and present practices.* The Service acknowledged its “mutual problem” with the carriers with respect to document destroying asylum seekers. See discussion of the “Stowaway Wire,” *supra* note 140. See also O’Keefe, *supra* note 1, at 368-69.

5. *The asylum laws of the U.S. have bearing on the cases of document destroyers.* Because the law in effect at the time required extensive examination of claims of political asylum and preempted the applicability of all other laws, the carriers could not avoid fines by simply returning those ineligible for admission to their point of origin.

6. *The Service suggestion that carriers collect passenger documents has no legal basis and is unworkable.* Both U.S. and foreign law present problems with such schemes, and even if they were unquestionably legal, they are impossible on aircraft that carry in excess of 400 passengers.

7. *The appropriate standard for reasonable diligence is a negligence standard.* Standards for reasonable diligence can be set on the basis of internal materials the INS has refused to share with carriers and by reference to the standards set by the Service in other situations and by other agencies in analogous situations.

8. *Board decisions in these cases would establish a rule of only limited applicability.* Even though these cases would not set all future standards, in light of the change in section 273 in 1994, the Board could, in these decisions, provide the Service with additional guidance as it works to arrive at the standards it must set in the regulations it is directed to promulgate by subsection (e) of section 273. Supple-
non-profit trade association that represents more than 235 airlines worldwide, filed an amicus brief in support of the carriers.

The Board issued its first decision in the these cases in *In re VARIG Flight #RG 830* on February 18, 1997, decisively rejecting the Service’s interpretation of section 273. In this decision, the Board refused to endorse the Service’s position that the fines statute imposes strict liability on carriers and that reasonable diligence applies only to determination of whether the passenger is an alien. Although the Board held that VARIG violated section 273(a) of the Act, by bringing to the U.S. a passenger who did not possess the required visa, it also held that its “inquiry does not end there” because it “reject[ed] the Service interpretation that section 273(c) of the Act has no applicability once it is established that the passenger is an alien who needs a visa or other entry document.” The Board agreed with the mental Joint Brief of VARIG Brazilian Airlines, Avianca Airlines, Air New Zealand and Iberia Airlines of Spain (June 12, 1996). For a discussion of the 1994 legislative changes, see supra notes 103-130 and accompanying text.

*In re VARIG Flight #RG 830* (Interim Decision 3304, 1997 WL 80988 (Feb. 18, 1997)).

Board decisions are “binding on all officers and employees” of the INS, and “selected decisions designated by the Board...serve as precedents in all proceedings involving the same issue or issues.” 8 C.F.R. § 3.1 (g) (emphasis added). See O’Keefe, supra note 1, at 364 n.19. As issued by the Board, the VARIG case was assigned an “Interim Decision” number and designated “Publish,” indicating its status as a precedent decision.

The ruling of the Board can be summarized as follows:

*Reasonable diligence applies to carrier examination of passenger documents.* “The reasonable diligence standard...applies both to the determination of whether [a] passenger [is] an alien and to the adequacy of the carrier’s examination of the passenger’s documents.” VARIG, 1997 WL 80983, at *1.

*Reasonable diligence in document review procedures can result in cancellation of fines.* To demonstrate “reasonable diligence” and be excused from fines, “the carrier must demonstrate by a preponderance of the evidence that it has established, and its staff has complied with, procedures to ensure that all of its passengers’ travel documents have been inspected prior to boarding so that only those with valid passports and visas are permitted to board.” Id.

*Carriers exercise reasonable diligence with respect to irregular documents when they act as a “reasonable person” would.* “Where a document is altered, counterfeit, or expired, or where a passenger is an imposter, to the extent that a reasonable person should be able to identify the deficiency, a carrier is required to refuse boarding as a matter of reasonable diligence.” Id.

Id. at *4. At this point in its decision the Board noted that this was an interpretation the Service had advanced only at the appeal level:

As an initial matter, we note that the Service has set forth this argument for the first time on appeal, and it was not the basis for the director’s [of the National Fines Office] decision presently on appeal to the Board. The record shows that in his decision the direc-
carriers that a review of its decisions on section 273 "reveals that none of these cases links strict liability and remission," and that

the cases have consistently held that determinations of whether carriers meet the reasonable diligence standard, and are thus eligible for remission or refund of fines, are to be made on a case-by-case basis. Each holds that reasonable diligence, and thus eligibility for remission of fines, is to be determined on the basis of the carrier's actions at the last boarding station. These cases do not base judgment of reasonable diligence, without more, on whether or not the passengers had the proper documents in their possession upon arrival in the United States.\footnote{151}

The Board also noted that over the years it had held that "under the appropriate facts, remission is available, even in cases not involving a claim to United States citizenship by a passenger."\footnote{152}

The Board distinguished the \textit{SAS} case, noting that its decision in \textit{SAS} and its decision in the \textit{VARIG} case were consistent in that they both involve determinations of the applicability of the "reasonable diligence" standard.\footnote{153} The Board used the \textit{VARIG} decision to set the following guideline for determinations of carrier reasonable diligence:

We find that, in a determination of reasonable diligence under section 273(c) of the Act, the carrier must show that it has established adequate procedures to ensure that all of its passengers' travel documents have been inspected prior to boarding so that only those with valid passport and visas are permitted to board. The procedures established by the carrier to satisfy this obligation must be consistent with the applicable statutes and regulator applied the reasonable diligence standard to not only the carrier's actions in determining if the passenger was an alien, but also to its review for adequacy of the alien's documents. Our role is to review for adequacy and legal correctness the director's December 10, 1991 decision, not an after-the-fact rationale. However, we will address the Service's argument in this case because it presents a legal issue of substantial significance and is based in part on the legal effect of a statute, section 273(e) of the Act, which was not in existence at the time of the director's original decision.\footnote{154} The decision of the Director of the NFO had indeed focused on "reasonable diligence" rather than declaring it irrelevant. "The sole issue to be decided is whether the carrier did exercise reasonable diligence in determining the alienage and visa requirements for this alien passenger prior to departure from the last foreign port outside the United States." Order of the NFO, December 9, 1991, attached to December 10, 1991 Decision in File Number LOS 911430 (on file with \textit{Journal of Air Law and Commerce}).

\footnote{151} \textit{VARIG}, 1997 WL 80983, at *4-5.
\footnote{152} \textit{Id.}
\footnote{153} See \textit{id.} at *5.
tions. Where a document is altered, counterfeit, or expired, or where a passenger is an imposter, to the extent that a reasonable person should be able to identify the deficiency, a carrier is required to refuse boarding as a matter of reasonable diligence.154

The Board went on to add that "before remission will be granted, the carrier must also demonstrate that the procedures established have been carefully and accurately executed by the carrier's staff," and that "the carrier must demonstrate by a preponderance of the evidence that it has complied with these above-stated requirements."155

154 Id.
155 Id. On March 20, 1997, the INS filed a motion for reconsideration of the Board's decision to order remission of the fine imposed against VARIG. See Government's Motion for Reconsideration of the Board's February 18, 1997, Decision Ordering Remission of the Fine Imposed Against VARIG Brazilian Airlines, In re VARIG Airlines Flight #RG 830.

The Service stated that it was "requesting reconsideration because the Board has misconstrued the plain meaning of section 273(c) and did not adequately consider the Service's argument that its interpretation of section 273(c) is supported by the recently enacted section 273(e)." Id. at 2. Aside from telling the Board that its decision was wrong, the Service focused its energies on arguing that its interpretation of subsection (c) was validated by the enactment of subsection (e) and that because Congress chose to amend the statute, it was acknowledging that the "harsh effect" of subsection (c) needed amelioration. See id. at 3-6. According to the Service: "Congress, by enacting section 273(e), recognized that section 273(a) provides that a carrier which brings to the United States an alien passenger who needs a visa or other entry document is strictly liable if the alien passenger does not have the proper document." Id. at 6.

Borrowing an argument from the briefs of the carriers, the Service argued that the "the Board's construction of section 273(c) reads section 273(e) out of the statue, making it superfluous." Id. In making this argument, the Service not only ignores the fact that section 273(e) has no applicability to this case because it was not in existence at the time of the events at issue, but also overlooks the analysis the Board nevertheless conducted in its decision. See supra note 150 and accompanying text.

VARIG responded with a brief in opposition to the INS motion for reconsideration on April 1, 1997. See Brief in Opposition to INS Motion for Reconsideration, In re VARIG Airlines Flight #RG 830. VARIG opposed the Motion of the Service, arguing that the Board's February 18, 1997, decision gave the INS everything it had asked for, including a precedent decision on the questions of whether section 273 is a strict liability statute and whether carrier reasonable diligence is relevant or irrelevant to eligibility for remission or refund of fines. See id. at 1-2. VARIG emphasized that the Board's decision considered all of the arguments of the Service, including, specifically, its arguments with respect to the significance of section 273(e). See id. at 3-6. VARIG pointed out that the Service was ascribing specific motives to the actions of Congress in a situation completely devoid of legislative history, and that Congress had merely added to the statute. VARIG noted that if indeed Congress had replaced subsection (c) with subsection (e) that might have indicated that Congress intended to ameliorate the "harsh effect" of subsection (c) (an effect that only the Service seems to perceive). In
C. TWOVs Not Presented

In the late 1980s and early 1990s, the INS imposed large numbers of fines on carriers for "TWOVs Not Presented." The Service attempted to charge the airlines for each transiting passenger who accidently entered a regular INS inspection line. There is no statutory or regulatory requirement that the carriers adopt the special, individual "presentation" procedures the INS had suggested to carriers for handling such passengers, much less any justification for a $3,000 fine if those suggested procedures were accidently not followed in the case of a particular transit passenger. The NFO withdrew this category of fines in 1991, referring to a November 12, 1991, "policy directive" from headquarters, while continuing to maintain that the withdrawal of that type of fine "was in no way intended to imply that INS was incorrect in fining for these cases in the past," and asserting that the policy could be reinstated in the future.

Reinstatement, however, seems unlikely because the Board has ruled that the policy has no legal basis. In the unreported decision of In re Avianca Airlines Flight AV #068, the INS imposed section 273 fines on the carrier for two TWOV passengers who arrived in the U.S. on December 11, 1988. The carrier appealed the February 8, 1989, decision of the district director to the Board, which issued its opinion four years later. In defending the fine before the Board, the Service referred to and relied on a telegram sent from its headquarters to ports and carriers, suggesting and requesting special presentation procedures for TWOVs. In its decision, the Board reviewed the I-426 Transit Agreement between the INS and the carriers that governs matters connected with transit passengers as well as the fact, however, Congress merely expanded the statute, and, as the Board noted in its decision, that expansion does nothing to support the position of the Service. See VARIG, 1997 WL 80983, at *4-6.

The Board denied the Service's motion for reconsideration in a decision dated October 22, 1997. See In re VARIG Flight #830 (Interim Decision 3304, File Number LOS 911430 (Oct. 22, 1997)).

156 For specifics of the INS's requested procedures and a detailed history of the Service's actions in imposing fines for TWOVs Not Presented, see O'Keefe, supra note 1, at 373-74.

157 See id. at 374 n.46.


159 Before the NFO was fully operational, fines were decided by the directors of the various INS districts. See O'Keefe, supra note 1, at 366 n.24.

160 See supra notes 5, 47, and 82 and accompanying text.
applicable regulations,\textsuperscript{161} and concluded that there was no reference to the presentation policy therein. The Board concluded that it agreed "with the carrier that the Service has failed to establish a liability to fine."\textsuperscript{162}

\section*{D. I-193 Waivers}

Another unreported BIA decision, \textit{Air BVI Ltd. Flight BL 410},\textsuperscript{163} has had a significant effect on the fines battle between the carriers and the Service. The \textit{Air BVI} case involved arrival in the U.S. of a non-immigrant, who, even though she lacked a proper visa,\textsuperscript{164} was admitted by the Service pursuant to a waiver on an INS Form I-193.\textsuperscript{165} In defending the fine proposed

\begin{footnotesize}
\textsuperscript{161} See 8 C.F.R. § 212.1(f)(1); 8 C.F.R. § 214.2(c).
\textsuperscript{162} In re Avianca Flight #068, supra note 158, at 4.
\textsuperscript{163} SAJ 10/50.670 - San Juan (Aug 26, 1992) (on file with \textit{Journal of Air Law and Commerce}).

\textsuperscript{164} Jane Emelda N. Clyne arrived in the United States on board an Air BVI flight from the British Virgin Islands on January 13, 1984. She applied for admission to the United States as a visitor for pleasure. Although Ms. Clyne had a nonimmigrant visa in her possession, inspection revealed that it was a single entry visa that had already been used. Passenger Clyne was granted a visa waiver pursuant to section 212(d)(4) of the Act and admitted to the U.S. as a nonimmigrant visitor. These facts are set forth in the March 6, 1985 Formal Order of the District Director (San Juan), and the August 26, 1992 Decision of the BIA.

\textsuperscript{165} As mentioned in the previous note, this waiver on INS Form I-193 was granted pursuant to Section 214(d)(4) of the Act. The history of these waivers under section 212(d)(4) is easily summarized: The first post-McCarran-Walter Act regulation on admission of nonimmigrants who failed to meet documentary requirements was added to 8 C.F.R. as § 212.9 of Part 212 at the end of 1952. \textit{See} 17 Fed. Reg. 11469, 11486 (1952). This section made provisions for parole of aliens into the United States by the INS official with jurisdiction at the port of entry. It allowed for payment of a bond by the parolee as a condition of the parole. This provision remained in effect until early 1958.

Late in 1957, the INS proposed a new regulation on passport and visa waivers for nonimmigrants. \textit{See} 22 Fed. Reg. 9,002 (1957). When the new provisions on waivers for nonimmigrants, §§ 212.1(a)(7) and (b)(16), went into effect in early 1958, the § 212.9 parole provision was dropped. \textit{See} 23 Fed. Reg. 140 (1958). The new 1958 provision set up the I-193 waiver process and stated that valid, unexpired documents were \textit{not required} for nonimmigrants granted such waivers by the INS official with jurisdiction at the port of entry. Thus, the I-193 waiver procedure has been in effect since 1958. "A review of the historical file reveals that the language . . . has been in use since at least 1958." 59 Fed. Reg. 1,473 (1994).

A late 1958 amendment (\textit{see} 23 Fed. Reg. 7,465 (1958)) combined the passport and visa waivers into one subsection of the regulations and redesignated the applicable section as 8 C.F.R. § 212.1(f). An additional amendment in 1961 made I-193 waivers revocable. \textit{See} 26 Fed. Reg. 12,066 (1961). It was this version of the regulations that was in effect at the time of the Board's decision \textit{In re Flight SR-4}, 10 I. & N. Dec. 197 (1963), and it remained essentially the same through the time
\end{footnotesize}
against it before the District Director of San Juan, Air BVI relied on the grant of the waiver and asked that the Service cancel the fine.\footnote{166} The decision of the District Director upholding the fine, while citing no cases, apparently relied on the Board's 1981 decision in \textit{In re M/V “Runaway.”}\footnote{167} In appealing the case to the Board, Air BVI argued that the facts of the case were such that \textit{M/V “Runaway”} was inapposite and that a 1963 case, \textit{In re Flight SR-4}, governed.\footnote{168} After three years passed and repeated inquir-


The only change of any significance in this regulation in the last 37 years prior to the change discussed at infra notes 176-79 and accompanying text (which was made by the Service in reaction to the \textit{Air BVI} Case), was one put into effect in 1994. And this change, which eliminated the need for the concurrence of the Department of State for the grant of nonimmigrant passport and visa waivers by INS port directors, was one designed merely to "simplify the administrative procedure for granting a waiver." 59 Fed. Reg. 1,467 (1994).

\footnote{166} See Letter from \textit{Air BVI} Marketing Manager, February 14, 1984 (on file with \textit{Journal of Air Law and Commerce}).

\footnote{167} Decision and Order of the District Director (March 6, 1985) (on file with \textit{Journal of Air Law and Commerce}). \textit{In re M/V “Runaway,”} 18 I. \& N. Dec. 127 (1981), arose in the context of the 1980 "Freedom Flotilla" from Cuba to Florida. Those transported in the flotilla were admitted to the U.S. as refugees, but the BIA rejected the carrier's arguments that the admission vitiated fines. The case contains no information on the "waiver" the carrier claimed was the means by which the aliens were admitted to the U.S., but there is no indication that it was either the 8 C.F.R. § 212.1(g) waiver at issue in the \textit{Air BVI} Case, or the 8 C.F.R. § 211.3 waiver for immigrants. The \textit{M/V “Runaway”} decision also discussed the strictness of subsection (a), which, according to the Board, "in effect, makes the carrier of aliens an insurer that his passenger have met the visa requirements of the Act and that any bringing to the United States of an alien who does not meet these requirements incurs liability." \textit{Id.} at 128. The \textit{M/V “Runaway”} decision also considered "reasonable diligence," but found that the carrier, in this case, did not meet that standard—the carrier had knowingly boarded undocumented aliens.

\footnote{168} 10 I. \& N. Dec. 197 (1963). \textit{Flight SR-4} and \textit{Air BVI} hold that liability for fines under section 273(a)(1) "is determined on the basis of an evaluation of the alien's circumstances \textit{at the time of his arrival.} " \textit{Air BVI, supra} note 163, at 5 (emphasis in original).

Five years before \textit{Flight SR-4} was decided, the Board followed the same analysis in \textit{In re Plane CUT-604}, 7 I. \& N. Dec. 701 (1958), which in turn relied on \textit{In re Plane CUT-532}, 6 I. \& N. Dec. 262 (1954). In both cases involving returning residents (immigrants), the waiver regulations pursuant to which the passengers were admitted to the United States were phrased like the regulation at issue in the \textit{Air BVI} case.

In \textit{Plane CUT-604}, the applicable regulation, as amended in 1957, read:

\begin{quote}
[A] valid unexpired immigrant visa shall be presented by each arriving alien except an immigrant who . . . satisfies the district director in charge of the port of entry that there is good cause for the
failure to present the required document, in which case an application for waiver shall be made on Form I-193.


In Plane CUT-532, the applicable regulation (§ 211.3), according to the Board of Immigration Appeals in Plane CUT-604, read:

Immigrants not required to present visas. Aliens of the following described classes . . . who are otherwise admissible, who have been lawfully admitted to the United States for permanent residence, and who are applying for admission to the United States after a temporary absence, are not required to present visas: . . . (e) Any alien in whose particular case a waiver of the visa requirements is granted . . . upon a determination . . . that presentation of a visa is impracticable because of emergent circumstances over which the alien had no control and that undue hardship would result to such alien if such presentation is required.

7 I. & N. Dec. at 702. See also 17 Fed. Reg. 11,469, 11,483-84 (1952). In Plane CUT-532, the Board of Immigration Appeals cited a slightly different version of applicable regulations, which went into effect shortly after the alien admission that triggered the Plane CUT-532 case. See 18 Fed. Reg. 6,233 (1953). Nevertheless, both the 1952 and 1953 versions of section 211.3 put the subject alien in a category not required to present visas. As the Board of Immigration Appeals put it in Plane CUT-532: "Since the regulation provides that a visa is not required if a waiver in an individual case is granted, we must find a penalty under section 273 has not been incurred . . ." 6 I. & N. Dec. at 264. The Board confirmed four years later that its decision in Plane CUT-532 was based on the same reasoning: the regulation as . . . phrased created a blanket visa waiver, and . . . a visa was not required because a waiver in an individual case had been granted. Therefore, we concluded that liability to fine had not been incurred because the statute only applied to the bringing of aliens without a visa "if a visa was required."

7 I. & N. Dec. at 702. See also In re KLM Plane PH-LKA, 7 I. & N. Dec. 704, 705 (1958), in which the Board reviewed the decision in Plane CUT-604 and made it clear that "no fine would lie" in cases in which nonimmigrant waivers were granted pursuant to the "blanket general waiver" created by the regulations that went into effect January 8, 1958. See 23 Fed. Reg. at 140.

In reaching its conclusions in these cases, the BIA held that waivers under these provisions could not result in fine liability under section 273(a), because that "statute provides for a penalty only if a visa is required, and under this regulation . . . a visa is not required." 7 I. & N. Dec. at 703. The BIA expressly distinguished In re Plane PAA 204, 6 I. & N. Dec. 810 (1955); and In re SS. Florida, 6 I. & N. Dec. 85 (1954), aff'd sub. nom., Peninsular & Occidental Steamship Co. v. United States, 242 F.2d 639 (5th Cir. 1957). Again reading the changing regulations with great precision, the Board took note of the regulation in effect at the time of these two cases (in which the events triggering the fines cases occurred in 1953 and 1954), which described the authority of port directors to "grant individual waivers." In Plane CUT-604, the Board "distinguished[d] that situation [of individual waivers] from one involving a standing or blanket general waiver" granted jointly by the Attorney General and the Secretary of State and published in the regulations under the authority of section 212(d) (4) (B) and (C) of the Act, "in which case a fine would not lie." 7 I. & N. Dec. at 703. In a footnote to this last statement, the Plane CUT-604 BIA panel noted that blanket waivers under section 212(d) (4) were available in "(A) type cases, just as in (B) and (C) types," as of
ies were made by Air BVI counsel, the District Director, with whom the appeal was filed, forwarded the file to the Board. The INS filed an "Informative Motion" and a "Brief in Opposition to Carrier's Appeal" on June 14, 1988. In its Brief to the Board, the INS again relied on M/V "Runaway" and asked that the Board overrule Flight SR-4. However, in its decision of August 1992, the Board of Immigration Appeals declined to do so in unequivocal terms.

In ultimately deciding the Air BVI case, the Board clearly distinguished as inapplicable the alleged precedents urged upon it by the INS, and relied upon the one applicable precedent, Flight SR-4, as determinative. Thus the Air BVI decision, by rejecting the Service's request to overrule Flight SR-4, confirmed applicability of a Board precedent of more than thirty years standing. Air BVI clarified the proper standards for fine liability—standards that had been obfuscated by INS reliance on improper reading of BIA decisions in the period between Flight SR-4 and Air BVI.

In reaching its Air BVI decision, the Board noted that the applicable statute was section 212(d)(4) of the Act, and corres-

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January 8, 1958. Id. Thus, the Board was quite clear that its decisions in Plane PAA 204 and SS. Florida have no relevance in cases where the applicable regulations establish blanket waiver authority for port directors under which they admit aliens, and where such admissions are made under the standard set forth in the regulation that visas are not required of aliens determined to be eligible for blanket waiver relief and so admitted. In addition, SS. Florida can be distinguished on two additional grounds. At the time the waiver in that case was granted, there were no blanket waiver provisions in the regulations pursuant to section 212(d)(4)(A), and, as a factual matter, the waiver was granted after arrival, refusal of admission, and exclusion, and only upon special post-exclusion application to the Department of State.

169 Subsection (d)(4) of section 212 allows waivers of either or both of the passport and visa requirements on three bases: unforeseen emergency in individual cases; reciprocity with respect to nationals and certain residents of contiguous territories and adjacent islands; and aliens in immediate and continuous transit through the U.S. These waivers set forth the exceptions to the standards for admission of nonimmigrants to the United States established in section 212(a)(7)(B) of the INA:

Subparagraphs (i)-(II) make those not in possession of appropriately valid passports or visas excludable.

Subparagraph (ii) is entitled "General waiver authorized" and notes the existence of a provision authorizing waivers of subparagraph (i), referring to subsection (d)(4) of section 212 of the INA.

Subparagraph (iii) notes the existence of a provision authorizing waivers of subparagraph (i) with respect to visitors to Guam and refers to subsection (f) of section 212(a)(7) of the INA. Subsection (f) allows the Attorney General, the Secretary of State and the Sec-
lated subsection (A) of section 212(d)(4) to a specific subparagraph of §212.1 of the regulations (i.e., correlated section 212(d)(4)(A) of the Act to 8 C.F.R. §212.1). All INS's regulations implementing the exceptions to visa and passport requirements for admission are grouped in 8 C.F.R. §212.1. The introduction to §212.1 states that "[a] valid unexpired visa and an unexpired passport . . . shall be presented by each arriving nonimmigrant alien . . . except . . . for the following classes . . . ," and goes on to enumerate those classes. One of the specific exceptions (subsection (g)) on the face of the regulations, and as confirmed by the Air BVI case, applies to an alien admitted pursuant to an I-193 waiver. As noted above, the Air BVI case was not published. The Service did not follow it and the NFO continued to issue formal orders relying on M/V "Runaway" to impose liability on carriers in situations in which nonimmigrants were granted I-193 waivers. This ceased at about the

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Subparagraph (iv) refers to section 217 of the Act for "authority to waive the requirement of [subparagraph] (i) under a pilot program." Section 217 of the Act established the Visa Waiver Pilot Program.

Section 212(d)(4) of the Act states that the requirements of section 212(a)(7)(B)(i) of the Act "may be waived by the Attorney General." Note, too, that section 212(a)(7)(B)(ii) of the Act also refers back to section 212(d)(4) for the scope of "general waiver" of the provisions of the preceding subparagraph (section 212(a)(7)(B)(i)). One of the exceptions, on the face of the regulations, and as confirmed by the Air BVI case, is an alien admitted pursuant to an I-193 waiver. The regulation that sets forth the particulars of the section 212(d)(4) waiver, 8 C.F.R. §212.1(g), provides for general or blanket waivers.

170 At the time of the alien admission that triggered the Air BVI case, the applicable subsection of 8 C.F.R. §212.1 was subparagraph (f). Due to a redesignation, it is now subparagraph (g). See 53 Fed. Reg. 48,083 (1987). See also supra note 165.

171 The Air BVI case was the culmination of a number of Board cases that carefully considered the regulations in effect when the alleged offense occurred. See supra note 168. Like its predecessors, the Flight SR-4 case, and on the parallel question of waivers for immigrants, the CUT cases, it examined the arrangement of the regulations governing admissibility, their long history and their utility to the Service (as evidenced by their heavy usage in administering admissions throughout that history).


173 As noted, at supra note 163, although Air BVI, under 8 C.F.R. §3.1(g), does not serve as official BIA precedent, it is a decision of the Board, and it does
time of the issuance of an August 8, 1994, Opinion by the Office of the General Counsel of the INS concluding that there was no legal basis for fines in such situations.\textsuperscript{174}

\textsuperscript{174} No materials distributed by the INS or the NFO to carriers prior to publication of Annual Report of the NFO for FY 1994 referred to any exception to fines against carriers for bringing to the U.S. nonimmigrants without unexpired passports or visas. In that report, the NFO made the following statement:

\begin{quote}
NO FINES IF NONIMMIGRANTS ADMITTEN WITH I-193 WAIVERS: In FY 94, the NFO suspended its practice of imposing fines under section 273 in cases where nonimmigrants were admitted with I-193 waivers. This change in policy was a result of a General Counsel opinion which reasoned that under the current language of 8 C.F.R. 212.1(g) the granting of a visa waiver to a nonimmigrant implied that a visa was not required, and therefore, no violation had occurred. Headquarters Inspections notified all Ports-of-Entry of this change and requested that inspectors refrain from recommending fines to the NFO in instances where I-193 waivers are granted to nonimmigrants who arrive in the United States without proper documentation. As a result of this change, the NFO terminated all pending fines in which I-193 waivers were granted to nonimmigrants, including those on appeal to the Board of Immigration Appeals ....
\end{quote}

I.N.S., NATIONAL FINES OFFICE, ANNUAL REPORT FISCAL YEAR 1994 (1994) (on file with Journal of Air Law and Commerce). This Report, with its indication that the NFO considers itself to be guided by INS policy rather than by decisions of the Board, perhaps explains why the NFO continued to impose fines of this type for two years after the Board's decision in the \textit{Air BVI} case. The Service refused to release the opinion of the General Counsel to carriers absent a Freedom of Information Act request. One carrier engaged in a year-and-a-half effort pursuant to FOIA that finally resulted in release by the Service of three documents.

The first was a March 30, 1983, opinion of the INS General Counsel that failed to parse the various applicable regulations as carefully as the Board had, merely noting that BIA cases support both fining and not fining and concluding that "given the rather confused state of interpretation on this issues, it is our opinion that there is liability under section 273(a)." This opinion concluded with the observation that "[t]he carrier would also be liable if the alien passenger was paroled, after arrival in the United States, and subsequently granted a waiver."

The second document was a seemingly irrelevant opinion of the Office of the INS General Counsel transmitted to the Director of the National Fines Office and discussing the propriety of fines against a carrier that transports to the U.S. a British subject resident in the Cayman Islands who is in possession of a document from the Clerk of the Court of the Cayman Islands that evidences one or more convictions.
but recommending that the regulations be amended.\textsuperscript{175}

The Service set out to do exactly that. It issued a Proposed Rule to amend 8 C.F.R. § 212.1(g) in April, 1995,\textsuperscript{176} which according to the Service’s Summary was designed to:

clarify that carriers are liable for fines imposed under section 273(a) of the Act for bringing nonimmigrants to the United States who do not have a valid passport or nonimmigrant visa . . . , even if a waiver of these documents is granted by the district director at the time of admission into the United States. This change is necessary to conform the language of the regulations with the statutory requirement that a fine be imposed when a nonimmigrant is transported to the United States without the proper documentation.\textsuperscript{177}

The third document was \textit{Genco Opinion 94-32}, an August 8, 1994, opinion of the Office of the General Counsel transmitted to the Assistant Commissioner, Inspections, concluding that “[u]nder the current regulations, a carrier does not violate section 273 when the alien has subsequently been admitted into the United States under a section 212(d)(4)(A) waiver.” All three of these documents are on file with \textit{Journal of Air Law and Commerce}.

\textsuperscript{175}The Opinion of the General Counsel concluded:

\begin{quote}
In light of the above, we suggest amending 8 C.F.R. Sec. 212.1(a). Instead of providing that a visa and passport are not required under certain circumstances, the revised version should provide that the document requirements may be waived upon the District Director’s determination of an unforeseen emergency. Such an amendment will allow the District Director more discretion in determining whether a waiver is appropriate and would cause fine liability to attach regardless of the eventual granting of an unforeseen emergency waiver.
\end{quote}

\textit{Genco Opinion 94-32, supra} note 174.


\textsuperscript{177}\textit{Id.} The Service went on to discuss the \textit{Air BVI} decision:

\begin{quote}
In \textit{Air BVI Ltd., Flight BL 410} . . . the Board . . . characterized the current regulation as creating a “blanket” waiver because of language in the regulation stating that “a visa . . . is not required.” The Board bases its decision on whether an alien’s admission with a waiver relieves the carrier of liability to find by interpreting the regulations in effect at the time involved. \textit{See In re Plane CUT-604, 7 I. \& N. Dec. 701 (1958)}. If the regulation creates a blanket waiver, by stating that no visa is required, no fine liability is incurred by the carrier. By contrast, a regulation that provides an “individual” waiver, by requiring a visa and a passport to be presented by a nonimmigrant, but providing for a waiver of this requirement, will not relieve the carrier of fine liability.
\end{quote}

60 Fed. Reg. 19,001 (1995). Note that in the view of the Service, the blanket nature of the waiver derives from the language of the regulation and has nothing to do with how the waiver is applied. Therefore, to remedy the situation, in the words of the Service:
When an unchanged final rule was promulgated by the Service on March 22, 1996,\textsuperscript{178} the Assistant Commissioner for Inspections wrote to carrier associations stating that the “amending of § 212.1(g) of 8 C.F.R. enables the Service to close a loophole and fine carriers which transport improperly documented non-immigrants to the United States even if a waiver is granted.”\textsuperscript{179} There is little doubt that the Service believed all along that fines were appropriate, despite the actual language of the regulations and despite the \textit{Air BVI} decision. While the rulemaking was pending, the Service took its own actions to “close the loophole,” by altering its procedures at the airports. Carriers saw the number of I-193 waivers decline dramatically, while the number of paroles increased.\textsuperscript{180} That this was a conscious choice on the part of the Service was confirmed for the carriers when one inspector dutifully recorded on a “fine form” that his reason for paroling an individual into the U.S. was “to preserve the fine.”\textsuperscript{181} A group of carriers filed suit seeking recovery of fines paid when passengers were admitted pursuant to I-193 waivers, while other carriers sought administrative remedies.\textsuperscript{182}


\textsuperscript{179} Letter from Michael D. Cronin, Assistant Commissioner, Inspections, I.N.S., (April 17, 1996) (on file with \textit{Journal of Air Law and Commerce}). The letter went on to state that “[t]his waiver may be granted on a case-by-case basis, if the district director is satisfied that the nonimmigrant cannot present the required documents \textit{because of an unforeseen emergency}.” \textit{Id.} (emphasis added). Notwithstanding this limitation to situations involving “unforeseen emergencies,” which is clearly present in the regulation and here acknowledged by the Assistant Commissioner, the INS nevertheless today routinely grants nonimmigrants I-193 waivers in the most everyday circumstances—such as cases where the traveler had merely not realized that his or her visa had expired—and even in cases in which the documentation prepared to fine the carriers includes an unequivocal statement by the passenger that no emergency was involved in his or her travel.

\textsuperscript{180} The March 30, 1983 opinion of the INS Office of the General Counsel asserted that fines would be appropriate in situations in which the passengers are paroled rather than waived into the United States. \textit{See supra} note 149.

\textsuperscript{181} \textit{See} I.N.S. Report to National Fines Office of Possible Violation of the INA, Form I-849 (July 29, 1995) (on file with \textit{Journal of Air Law and Commerce}).

\textsuperscript{182} \textit{Air España} v. \textit{Una Brien}, No. 95-CV-1650, 25 Av. Cas. (CCH) 18,348, 1997 WL 469992 (E.D.N.Y. June 18, 1997). In this lawsuit, commenced in April 1995, a
group of 12 carriers who provide international service at JFK International Airport relied primarily on the APA in challenging the INS policy of fining carriers in connection with the arrival of both immigrant and nonimmigrant passengers who are granted I-193 waivers. The carriers sought declaratory and injunctive relief with respect to the imposition of the fines as well as a refund of $8 million of fines of these types.

The plaintiffs wanted the court to condemn INS fines in all cases between 1988 and 1993 in which the INS permitted “undocumented aliens to enter the United States if they are granted a documentary waiver or if they are paroled.” 1997 WL 469992, at *1. The pleadings of the carriers, which were drawn with an unusually broad brush, relied primarily on affidavits of counsel, who estimated that “forty to fifty percent” of the fines . . . paid between 1988 and 1994 were incurred for bringing to the United States aliens who were ultimately permitted to enter the country pursuant to documentary waivers.” Id.

In June 1997, the Eastern District of New York, in a decision by the same judge who decided the Lan-Chile case (see supra notes 6-71 and accompanying text) granted the government’s motion for summary judgment. The opinion complains of the lack of information presented by both parties. For example, it notes that the government asserted that all fines related to waivers granted to immigrants “where the fine was not paid and an administrative challenge was made . . . have been consolidated before the Board of Immigration Appeals.” Id. The court noted that neither party had attached the administrative records or identified the passengers involved or any relevant procedural dates, see id. at *1-2, and that the only case referred to with any specificity was In re Air India Flight #101 (Interim Decision 3915, 1997 WL 169314 (Apr. 2, 1997)), in which the propriety of fines against carriers when immigrants are granted I-193 documentary waivers was at issue. As the Air España court noted, when the Board decided Air India, rather than ruling on the propriety of the fine imposed on the carrier, it remanded the case to the National Fines Office. See Air España, 1997 WL 469992, at *2. The Board began its analysis of the case: “We note at the outset our concerns regarding the adequacy of the director’s November 5, 1993 decision for purposes of appellate review.” Air India, 1997 WL 169314. In describing its reasons for the remand, the Board stated that the “decision of the director is abbreviated and fails to explain the director’s rationale,” and therefore failed to comply with regulatory requirements. Id. The Board elaborated:

Requiring the director to state the reasons for his determination helps ensure that he fully considers the arguments the carrier has set forth in its defense. Such a requirement also puts the carrier on notice concerning the issues which the director finds determinative. In the present case, the Service, apparently for the first time on appeal, stated its opinion that remission under section 273(c) of the Act was precluded under its interpretation of Board cases dealing with that provision. Such after-the-fact arguments, concerning which the carrier had no prior notice, place the carrier at a disadvantage in presenting its defense.

Finally, requiring the director to state the reasons for his determination also assures that the Board will be provided with a meaningful basis for review. In the present case, because of the inadequacies of the director’s decision, we are left to consider an appeal of a decision, the reasons for which were never articulated.

Id. Thus, while not deciding the question of the propriety of fines when immigrants are waived into the United States, the Air India decision did give carriers
reason to hope that future NFO decisions will include something more that the
conclusory pronouncements and uniform findings of liability they have come to
expect. See also supra note 135.

The Air España court devoted the majority of its decision to analysis of the fines
involving immigrant aliens (i.e., “green card” holders) who were granted docu-
mentary waivers. The court reviewed the standards of the Declaratory Judgment
Act, noting that first, an actual controversy must exist and, if there is a contro-
versy, the court should then “exercise its discretion in deciding whether to en-
ter a declaratory action” and choose to do so only when it can “serve a useful
purpose in clarifying and settling the legal relations in issue and . . . when it will
terminate and afford relief from the uncertainty, insecurity and controversy giv-
ing rise to the proceeding.” Air España, 1997 WL 469992, at *6 (quoting Kidder,
Peabody & Co v. Maxus Energy Corp., 925 F.2d 556, 562 (2d Cir. 1991)). Applying
these standards, the court concluded that the contention of the plaintiffs “presents an actual controversy appropriate for consideration in an action seek-
ing declaratory judgment.” Id.

Next, despite the lack of administrative record noted by the court and in the
face of the government’s arguments that the plaintiffs had failed to exhaust their
administrative remedies, the Air España court noted that the INA does not man-
date such exhaustion. See id. at *6. The court therefore proceeded to consider
whether it should “exercise its discretion to determine whether exhaustion
should be required.” Id. Taking note that “both the government and the plain-
tiffs agree that an appeal to the BIA may be left pending for years at a time,” (as
the history of the document destroyer cases illustrates, see supra notes 131-155 and
accompanying text), the court found that “the issues raised in this action have
already been pending for a substantial period of time, to the plaintiff’s significant
disadvantage.” Id. at *6-7.

On the plaintiff’s APA claim that the INS fine policy is arbitrary, capricious and
in excess of statutory authority, the court noted that normally an APA case can-
not be entertained if the “administrative records being challenged are not before
it.” Id. at *8. And, as the court had noted previously, neither the government
nor the plaintiffs had provided any information on “the many cases the plaintiffs
allege to be pending before the Board of Immigration Appeals.” Id. at *9. Never-
theless, because the issue arose in the context of a motion for summary judg-
ment, the court held that the only relevant question was whether there was a
genuine issue for trial—in this case whether there is an “issue of fact as to the
basis for the fine determinations rendered by the INS.” Id. Reviewing docu-
ments submitted by both parties, the court discerned evidence of a clearly articu-
lated basis for the fines by the government and evidence that “the plaintiffs do
not in fact dispute the existence of the policy.” Id. at *9-10. The court then went
on to analyze the legality of INS action in fining carriers in connection with im-
migrants who are granted documentary waivers under 8 C.F.R. § 211.1 (see supra
notes 167, 168 and 171), employing the same sort of close analysis the Board
adopted in the Air BVI case. See supra notes 164-171 and accompanying text.

The Air España court reviewed the various versions of the waiver provision for
immigrants and related those provisions to the facts of BIA decisions interpreting
those different versions of the immigrant waiver. The court reviewed the CUT-
532 case, the PAA Flight 204 case, the CUT-604 case and the Air BVI case. The
court concluded that in every instance, the Board had considered the regulations
in effect at the time of each decision and had followed the “plain meaning” of
the fines statute and the regulations. 1997 WL 469992, at *11-12. Then, reviewing
the current language of the regulation on documentary waivers for immi-
grants, 8 C.F.R. § 211.1, the Air España court concluded that the “plain meaning of the statute is clear.” Id. at *13. Because the regulations do not include any language that immigrants granted documentary waiver are “not required to present visas,” the court held fines assessed in these cases to be lawful. See id. at *13. The Air España court made the same careful distinctions the Board had historically required for analysis of these cases. See supra notes 165, 168 and 169.

Turning to the carriers’ claims with respect to fines involving nonimmigrants, the court dismissed as moot all claims related to the fines assessed under the pre-amended version of 8 C.F.R. § 212.1(g) (see supra note 176 and accompanying text) but then forgiven. The court rejected the plaintiffs’ request for a declaratory judgment that the parole policy was unlawful (see supra notes 174 and 180-81 and accompanying text), holding that if indeed the Service had such a policy, “it would be lawful.” Id. at 14.

The Air España court also ruled that all payments made by the carriers between 1988 and 1993 were voluntary and as such could not be recovered. See id. at *5. In reaching this conclusion, the court pointed to the fact that the carriers failed to challenge the fines when they were imposed. Relying on United States v. New York and Cuba Mail, 200 U.S. 488 (1906), the Air España court held that “even if a demand is illegal, unless payment is made under duress,” recovery is barred. 1997 WL 469992, at *4. As long as the payment was made “with full knowledge of all the facts which render such demand illegal . . . such payment is deemed voluntary, and cannot be recovered back.” Id. In determining that the carriers had full knowledge of all the facts that rendered the fines demands illegal, the court noted that the plaintiffs claimed that “they did not know the INS had granted documentary waivers to some of the aliens they were being fined for transporting,” id. at *5, and that the Service’s description of the typical processing procedures for passengers with problem documents indicated that carrier representatives are generally present when determination for admission by means of waiver is made. See id. See also O’Keefe, supra note 1, at 366 n.24. The court held that the “[p]laintiffs know or should have known all the facts which they now allege rendered the INS demand illegal.” Air España, 1997 WL 469992, at *5.

The carriers who chose to pursue administrative remedies relied on the plain meaning of the fines statute rather than broad equitable doctrines; they also requested a much more limited remedy. Relying on the refund provision of section 273(c) of the INA, two carriers filed motions for reconsideration and refund with the NFO in specific cases they had paid involving nonimmigrants who were granted documentary waivers and admitted to the United States after the Air BVI decision but before the implementation of the INS policy described in the NFO FY 1994 Annual Report. See supra notes 172-75 and accompanying text. The carriers relied on the fact that even after the Air BVI decision was issued by the Board (but not published), the NFO continued to impose fines when nonimmigrants were granted documentary waivers. The NFO also continued to issue orders relying on BIA decisions rendered inapposite by the Air BVI case, including orders issued in cases involving the carriers making the motions. The carriers argued that because they reasonably relied on the decisions of the NFO as accurately reflecting the decisions of the Board, they were entitled to refunds in cases they had paid, even though they had not contested most of them at the NFO. The carriers also relied on the fact that the Service would not, absent FOIA requests, release the opinion of the General Counsel referenced in the NFO Report (see supra note 174 and accompanying text) and that the NFO had in some instances reopened similar cases and made refunds to carriers, on its own initia-
IV. CONCLUSION

The INS has a major impact on the operations of each carrier that brings passengers to the United States. The interaction of the Service and the airlines affects passenger service, operational efficiency, employee morale and, as the disputes described in this Article illustrate, the carriers' bottom lines. While carriers must maintain their willingness to work with the INS, recent history, as outlined in this Article, unfortunately indicates that the INS has been brought to compromise only after protracted legal battles. All international carriers that serve the United States must therefore keep U.S. immigration issues a high priority.

tive. In addition to providing full review of the administrative records of the particular cases in which they requested refunds, the carriers also provided lists with all relevant information on similarly situated cases involving nonimmigrants granted documentary waivers in the relevant period and asked that the NFO, sua sponte, reconsider these cases as well and grant refunds.

The NFO, in denying the motions, issued Orders that acknowledged that the fines were imposed in the face of the Air BVI decision. The NFO also acknowledged that Air BVI "does tend to suggest" that the fines could have been successfully challenged. Indicating that it still disagreed with the Board's decision in Air BVI, the NFO asserted that that likelihood of success did not make the decision to fine improper, because "the only practical way for the Service to pursue its claim that the Board should overrule Matter of Flight SR-4 as wrongly decided was to institute fine proceedings in which the Service has granted the nonimmigrant waiver under 8 C.F.R. § 212.1(g)." Orders in Fine Proceedings, In re American Airlines Flight AA 1114 and In re Korean Airlines Flight KE 026 (December 19, 1995) (on file with Journal of Air Law and Commerce). The carriers appealed to the Board, arguing that the NFO had revealed in these Orders that the Service had followed a course of imposing fines in conscious disregard of governing BIA precedent holding such fines improper. The carriers argued that the Service position, that continuing to impose fines in the face of Board precedent was the "only practical way" for it to pursue its claim that Board decisions should be overruled was "unpersuasive at best, disingenuous at worst." The carriers noted that "[i]f this were indeed the only course open to the Service, the Service would not have abandoned it, cancelled other cases of this type (even cases where carriers filed no defenses) and undertaken to revise the regulations on 1-193 waivers." Notice of Appeal to the Board of Immigration Appeals, In re American Airlines Flight AA 1115 and In re Korean Flight 026 (January 4, 1996) (on file with Journal of Air Law and Commerce). The carriers went on to ask the Board to reverse the NFO denials of the motions for reconsideration and condemn the "Service's conscious disregard of Board precedent." The carriers also pointed out that the INS position that it had to impose these fines would have the effect of encouraging carriers to "always chose to appeal [to the Board] rather than to ever pay a fine at the NFO level." At the time this Article went to press, these appeals remained pending before the Board.