Reforming the Immigration and Nationality Act: Labor Certification, Adjustment of Status, the Reach of Deportation, and Entry by Fraud

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In its earliest days, the United States did not restrict immigration in any way. Congress imposed the first restrictions in 1875 against "undesirable" aliens.1 Thereafter there were gradual controls until some qualitative limitations found their way into the Immigration Act of 1917.2 The 1924 Act introduced quantitative restrictions.3 This 1924 Act was significant because it established a quota system based on the national origins of those aliens residing in the United States in 1920.

These quantitative and qualitative aspects of the immigration law remained substantially unchanged and were codified in the Immigration and Nationality Act of 1952 (INA).4 The 1965 Amendments to the INA replaced the quota system with a seven category preference system.5 These amendments introduced new restrictions on aliens who were coming to work in the United States,6 thus setting the stage for a major development in immigration policy.

There is great anxiety about the large influx of aliens.7 The discussion becomes more animated when jobs are scarce and aliens may be competing with Americans for opportunities in the labor market.8 To
minimize this competition, the INA requires aliens to obtain certification from the Department of Labor that their employment within the United States will not displace American workers. But this is not the only place where the INA is selective. There are other restrictions which require an alien to disclose any unsavory elements of his past such as criminal convictions or membership in the communist party. The INA also delves into an alien’s mental condition, for he may be excluded on the grounds of mental retardation or insanity. These qualitative restrictions exclude those whom Congress regards as undesirable immigrants. There are also other restrictions and they may be found in the system of seven preferences which distributes the 270,000 visas annually for immigrants throughout the world, except for certain special classes not subject to this numerical restriction.

Even after admission, an alien is subject to a whole host of restrictions. He must watch his conduct lest he run afoul of the various provisions. The INA renders an alien deportable if he was excludable by law at the time of his entry. But it goes further and lists an additional eighteen grounds for deportation. Both the exclusion and the


15. See INA §§ 212(e), 203(a), 8 U.S.C. §§ 1152(e), 1153(a) (1982).


deportation provisions cover such a broad spectrum that it is not unreasonable to suggest that every facet of an alien's background is subject to scrutiny.

This Article will consider some of the controversial sections of the INA and the impact of the pending immigration legislation. Part I considers the labor certification requirement, a prerequisite for third and sixth preference immigrants. This Part concludes that clarification of the division of authority between the Attorney General and the Secretary of Labor, and of the intent of aliens to keep their certified jobs, would be desirable. Part II analyzes the requirements an alien must meet to adjust status to one of the occupational preferences. The statutory refusal to adjust status of aliens who accept "unauthorized employment" must be clarified. Part III discusses two doctrines which extend the time the INS has to investigate and act on mistakes of entering aliens — the lack of a statute of limitations and the reentry doctrine — and suggests methods of altering deportation procedures to provide fairness to the alien. Part IV focuses on the provision excluding aliens for fraud during entry and illustrates how courts have interpreted ambiguous language in the absence of clear legislative direction.

Finally, this Article concludes that current movement toward immigration reform should not ignore these legal ambiguities. A law with such a long and varied history as the INA inevitably contains some ambiguities and inconsistencies, and it is up to the legislature to correct them when the opportunity presents itself.

I. THE LABOR CERTIFICATION REQUIREMENT

Failure of an alien to receive proper labor certification can lead to exclusion or deportation. If an alien seeks entry through the third or sixth preferences, or nonpreference entry, that alien must obtain labor certification. The labor certification states that the alien must possess the minimum qualifications required for the position available. Section 212(a)(14) authorizes the exclusion of aliens coming to the United States to work, unless they can obtain appropriate certification.

24. Approximately five percent of the immigrants admitted into the United States arrive by the occupational preferences. In 1978, for example, 601,442 immigrants were admitted. Of these, 26,295 had occupational preferences. See 1978 INS ANN. REP. 43.
25. INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982). Congress was concerned about "an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." H.R. REP. No. 1365, 82d Cong., 2d Sess. 51, reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653, 1705.
from the Department of Labor. 26 Because the Attorney General can deport any alien who was excludable at time of entry, 27 the requirement of certification affects the alien even after coming into the country. The Department of Labor must certify the alien for specific work in the United States. The Labor Department's determination seems to be limited to the questions of whether there are sufficient qualified workers in the United States and whether allowing the immigration of aliens will adversely affect the employment conditions of such workers. The objective of section 212(a)(14) is to ensure that only workers who are in short supply do qualify for the immigrant preferences. 28

A. The Division of Authority between the Department of Labor and the Immigration and Naturalization Service

Currently, it is unclear whether the Immigration and Naturalization Service (INS) has the authority to review an alien's qualifications - and decide the Labor Department erred in finding the alien qualified for the employment sought - once the Labor Department has issued a labor certificate. Regarding the employment of incoming aliens, the INS and the Labor Department have conflicting responsibilities. The INS has the authority to classify aliens according to the preference categories of section 203, 29 but the Labor Department's authority to determine the availability of qualified American workers and the effect of employing such aliens is beyond review by the INS in the absence of fraud or willful misrepresentation. 30 Because, in making its judgment on an alien's petition for preference classification, the INS has the authority to pass on all matters not specifically delegated to the Labor Department, it seems the INS can review an alien's qualifications after the Labor Department has made its judgment on the two matters assigned to it - absence of qualified American workers and lack of adverse effects on employment conditions. 31 In addition, the

29. See Madany v. Smith, 696 F.2d 1008, 1012 (D.C. Cir. 1983); Castaneda-Gonzalez v. INS, 564 F.2d 417, 429 (D.C. Cir. 1977); 8 C.F.R. § 204.1(c) (1983).
30. See 696 F.2d at 1012; 20 C.F.R. § 656.30(d) (1983).
31. See 8 C.F.R. §§ 204.1(c), 204.2(g) (1983) (requiring alien to submit documentary evidence of qualifications to the Service). The Department of Labor also publishes Schedule A which lists occupations for which the Department has determined that there are not enough United States workers available and that the wages and working conditions of United States workers will not be adversely affected by employing aliens in Schedule A occupations. See 20 C.F.R.
INS has the authority to revoke a visa for good and sufficient cause.\textsuperscript{32} If a petition for an occupational preference visa is supported by willful and fraudulent misrepresentations, the INS can classify its action as revocation of a visa rather than revocation of a labor certificate.\textsuperscript{33}

It occasionally has been said that the Labor Department has the primary authority to review alien qualifications.\textsuperscript{34} But the legislative history of section 212(a)(14) does not support that view.\textsuperscript{35} The discussion leading up to its enactment concerned the two matters specifically covered in the section. Although the Labor Department reviews an alien’s qualifications incidental to its main function under section 212(a)(14), the INS really has primary authority to determine an alien’s qualifications.

1. \textit{The case for keeping the INS out—} In the leading case, \textit{Castaneda-Gonzales v. INS},\textsuperscript{36} the District of Columbia Circuit held that the specific grant of authority in section 212(a)(14) to the Labor Department overrode the INS’s general or inherent power in determining whether an alien is qualified for the certified employment. The INS can invalidate a certificate only if the alien obtained the certificate through willful and material misrepresentation.\textsuperscript{37} The INS cannot merely repeat the inquiry of the Department of Labor and overrule the Department solely on a different interpretation of the facts. Otherwise, the INS’s review is limited to whether the alien possessed a certificate.

In making its decision, the court relied heavily on the language in section 214(a)(14) stating that the Department of Labor must determine and certify the insufficiency of workers for this position in the United States and the lack of adverse effects on wages.\textsuperscript{38} The court rejected the INS’s arguments that the Attorney General’s general powers allowed for independent review.

First, the INS argued that the Attorney General’s administrative and enforcement powers under section 103 allowed review of the Department of Labor’s decision.\textsuperscript{39} Section 103 charges the Attorney General
"with the administration and enforcement of this Chapter and all other laws relating to the immigration and naturalization of aliens . . . . [A] determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 40 The court, however, held that this specific power granted in section 212(a)(14) prevailed over the general grant of power given to the Attorney General. 41 The court acknowledged that it was the Labor Department's function to determine whether the alien's application satisfied the labor certification requirements. 42 Therefore, the INS had to find some basis for ignoring the labor certification other than because it had its own views of the standards required by section 212(a)(14). 43

The INS tried to persuade the court that section 221(h) gives the INS final review over all issues concerning incoming aliens. Section 221(h) says ""[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to enter the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this Chapter . . . ."" 44 Although the court recognized that the INS regularly exercised its power when reviewing the decisions of consular officials giving out United States visas outside the country, 45 it concluded that when the INA specifically delegated power to the Secretary of Labor, the only determination the INS could make was whether the Labor Department had issued the appropriate certification.

Just after Castaneda-Gonzalez was decided, the Labor Department published new regulations providing that the INS or the consul could invalidate a labor certification only if there were fraud or willful misrepresentation of a material fact in the labor certification application. 46 Although this language seemed to be consistent with the decision in Castaneda-Gonzalez, other courts took up the issue of authority to find aliens unqualified for certified labor. Recognizing changes in the INA 47 and the unique factual circumstances of

40. INA § 103(a), 8 U.S.C. § 1103(a) (1982).
41. 564 F.2d at 423.
42. Id.
43. At the time Castadena-Gonzales arose, aliens entering from western hemisphere countries did not rely on the preference system, so the INS could not rely on its powers incident to deciding preference classifications. This was changed by the Immigration & Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 4, 90 Stat. 2703, 2705 (1976).
44. INA § 221(b), 8 U.S.C. § 1201(b) (1982).
46. See 20 C.F.R. § 656.30(d) (1983).
47. See supra note 43. Once western hemisphere aliens enter this country through the preference system, the INS can rely on its powers in §§ 203-204. See infra notes 49-55 and accompanying text. Nevertheless, at least one district court, in the District of Columbia, has recognized that
Castaneda-Gonzales, other courts invalidated labor certificates for reasons other than fraud and misrepresentation.

2. Section 204 and the occupational preferences—The Ninth Circuit, in K.R.K. Irvine, Inc. v. Landon, explained the position of courts that considered the INA and the preference system and concluded that the INS could refuse to issue a visa to an unqualified sixth preference alien. The court concluded that the INS could not invalidate a Department of Labor certificate, but those certificates only included issues the Labor Department properly had before it. Section 212(a)(14), the source of the Department’s power, delegated power to it, but only in two specific areas: availability of American workers and effect on wages. This interpretation is consistent with the INS’s power under section 204.

Section 204, outlining the INS’s authority with regard to the preference classifications, states, “[a]fter an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 1153(a)(3) or 1153(a)(6) of this title [203(a)(3) or (6)], the Attorney General shall, if he determines that the facts stated in the petition are true . . . approve the petition.” This section is more specific than 212(a)(14), because it explains who is responsible for determining the truth of the facts in the alien’s petition, and explains the interrelated duties of the Attorney General and the Secretary of Labor.

The preference situation is different than that raised in Castaneda-Gonzales because the INS’s powers are broader and more specific when considering visa petitions. Once the INS enters the picture to review the petition for preference classification, sections 203(a) and 204(b) of the INA authorize the INS to exercise its discretion. The court in Castaneda-Gonzalez recognized this difference and acknowledged the authority of the INS to determine whether the alien has qualified for the preference requested as well as the broader scope of authority the INS enjoyed in preference determinations.

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48. Because Castaneda-Gonzales was not admitted through the preference system, the INS was not refusing to admit him as a sixth preference alien. He was already in the country and the INS was trying to deport him under § 241(a)(1). The INS claimed he entered the country without a visa, because the visa he had was inaccurate since it authorized him to accept a job for which he was not qualified.
49. 699 F.2d 1006 (9th Cir. 1983) (per curiam).
50. Id. at 1009.
51. Id.
52. INA § 204(b), 8 U.S.C. § 1154(b) (1982).
53. 564 F.2d at 428 & n.27.
54. Id. at 429.
The division of authority requires clarification. The legislative history and a reasonable reading of the relevant INA sections suggest that the Labor Department's power is limited to the two issues enumerated in section 212(a)(14). The INS has the power to determine the truth of facts on the visa applications. Nevertheless, some courts remain unconvinced. In this time of tight labor markets and immigration reform, the legislature should recognize this ambiguity and determine an answer.

B. The Intent of the Alien Receiving the Labor Certification

Whoever determines the alien's qualifications for certified employment — the Attorney General through the INS or the Department of Labor — must consider the alien's intent upon accepting the employment. For example, in *Spyropoulos v. INS*, the controversy concerned an alien's intention to assume the certified job. After receiving certification, but before arriving in the United States, Spyropoulos received no response to his letters to his future employer in Washington, D.C. He brought his family to Massachusetts, where they stayed with friends. After another unsuccessful attempt to reach the employer, Spyropoulos began working in Massachusetts at an uncertified job. The court held the alien was properly inadmissible at the time of his entry because he did not have the appropriate certification for the job that he took in Massachusetts. The court recognized the difficulty in proving whether the alien intended to work at the certified employment, and drew inferences from the alien's decision to enter the country even after suspecting there were problems with the certified job, settling in Massachusetts rather than Washington, D.C., making few attempts to contact the certified employer, and settling quickly into an uncertified job. The *Spyropoulos* case illustrates the difficulties of courts and aliens. How and why courts make these inferences and interpret the facts before them can determine the outcome of the alien's case. There has, however, been little scrutiny of the issues that commonly confront courts when they try to decide whether to allow an occupational preference alien to stay in the United States even after he is not working at his certified job.

55. See Singh v. Attorney General, 510 F. Supp. 351 (D.D.C. 1980) (holding that the power given the Secretary of Labor, along with the ambiguities in the legislative history, indicates the INS could overrule the Labor Department only when the Department abused its discretion), *aff'd mem.*, 672 F.2d 894 (D.C. Cir. 1981).
56. 590 F.2d 1 (1st Cir. 1978).
57. *Id.* at 4.
58. *Id.* at 2.
59. *Id.* at 4.
60. *Id.*
1. Evidence of intent—Obviously, it is difficult for the INS to obtain evidence of an alien’s intent at the time the alien enters the United States. The established rule is that if the alien does not take the certified job, he may be deported only if there is a finding that he obtained his labor certification by fraud or that he never intended to take the certified job when he entered the United States. Therefore, if an alien enters with the full intention of taking his certified employment, he commits no fraud if the employment is no longer available and he accepts other employment.

To implement this rule, courts and the Board of Immigration Appeals (BIA) have developed two inferences when an alien not working at certified employment claims he intended to take the certified job but it was unavailable. First, when an alien begins work immediately in an uncertified job, there is a strong inference that the alien did not intend to take the certified position. Second, the same intent may be inferred when an alien finds out prior to entry that a certified job is no longer available but enters the United States anyway. The court in Spyropoulos used both inferences to exclude the alien.

2. Length of employment at the certified job—There is no requirement that the alien remain permanently in the job for which he has been certified. He must, however, intend to take the position for a reasonable length of time, and the reasonableness of the employment period must be determined in light of “the interest served by the statute and the interest in freedom to change employment.” There is nothing to prevent an alien from changing employment to improve himself. The question that normally arises is whether an alien disqualifies himself from a labor certification if he intends at the time of his application to remain at the certified job only for a temporary period until he can do better.

The Ninth Circuit’s opinion in Yui Sing Tse v. INS illustrates the opposing views on this issue. In this case, an alien obtained certification as a cook and intended to work in that capacity until he could qualify as a dentist. The court weighed the interest protected by the

61. See Jang Man Cho v. INS, 669 F.2d 936, 939 (4th Cir. 1982).
62. Id. at 940.
65. 590 F.2d at 4.
66. Yui Sing Tse v. INS, 596 F.2d 831, 835 (9th Cir. 1979). These interests are reflected essentially in § 212(a)(14) of the Act which addresses the availability of qualified workers and the impact of alien workers on domestic wages and working conditions, and in § 203(a)(6) which requires the alien to perform work “not of a temporary or seasonal nature.” See 8 U.S.C. §§ 1182(a)(14), 1153(a)(6) (1982).
67. 596 F.2d 831 (9th Cir. 1979).
INS — protecting American workers — with the alien’s interest in obtaining “[t]he opportunity to earn a living, to improve his economic circumstances, and to engage in common occupations, without unreasonable limitation or invidious discrimination.” 68 Because the alien’s hopes of being a dentist could not be realized until the distant future, the INS was being overly protective of the interests of American workers. Furthermore, restricting job opportunities on the basis of alienage and freezing aliens in their certified jobs raise substantial constitutional problems. 69 The court found no difficulty with the alien’s aspirations and upheld the certification.

Judge Wallace’s dissent focused on the alien’s intent at the time of certification and found that the alien was interested in pursuing the certified employment only until he could obtain other employment. 70 He said that the alien had “[t]he ultimate intent . . . not to work as a chinese food cook but to work as a dentist.” 71 It depends, of course, on what Judge Wallace meant by the alien’s “ultimate intent.”

Wallace’s approach to this issue would disqualify many aliens who have a bona fide intention of working at the certified employment but who also have hopes of improving their economic situation or of pursuing further studies in their own self-interest. Therefore, it may be misleading to suggest that an alien has obtained a labor certificate for only temporary employment 72 when he intends at the time of entry to assume his certified position, at least for a period of time that is reasonable in light of the statutory interests to be served. In terms of the statutory interests, there is a question of the availability of workers and the adverse affect of employing the alien.

Furthermore, the certified employment should be more than temporary or seasonal in nature, but this does not mean that the alien must remain permanently in the original certified job. These statutory interests do not require the immigrant to ignore his future or to commit himself irrevocably to his certified employment. It is relevant that the alien should have some bona fide intent to remain with his employment for some reasonable length of time. To require any further commitment would be to impose an unreasonable restraint on the alien that is not normally required of others. 73

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68. Id. at 834.
69. Id. at 835.
70. Id. at 837 (Wallace, J., dissenting).
71. Id.
72. The immigrant alien must be coming to the United States to perform work not of a temporary nature. INA § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1982). However, that is not to say that he must remain in the position permanently.
73. See 596 F.2d at 835 (citing Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)) for the constitutional issues that might arise if the alien was required to remain permanently in the certified employment.
3. **Licensed professions**— If an alien is a licensed professional and the job certification requires a license for those pursuing this profession, then he must obtain the necessary license within a reasonable period of time. A good example of the licensing requirement came in *Madany v. Smith,* where a nurse was certified for a job in the United States on the condition that she "[b]e able to obtain, or already have, a Virginia nursing license." The alien argued that the language "able to obtain" was synonymous with "eligible to sit" for the examination. The court held that mere eligibility to sit for the examination was not enough to fulfill the certification requirement. The alien also had to demonstrate an ability to pass the examination. For example, the alien could demonstrate this ability with proof of passing a similar exam or having enrolled in preparatory courses for the examination. Once the alien satisfied this showing of probable success, it would be an abuse of discretion for the INS to deny a preference petition.

4. **Business investor status**— Aliens who want to immigrate to the United States as professionals, skilled or unskilled workers, or non-preference immigrants require a labor certification. An alien does not require a labor certification if he seeks a visa as a business investor. Although the business investor exemption has undergone some change in recent times, the basic objective is the same: to avoid competition with Americans for skilled and unskilled positions while stimulating investment in the United States.

Prior to 1973 the regulations did not mandate a labor certification if an alien invested a substantial amount of capital in a commercial or agricultural enterprise. Eventually the BIA thought it necessary to impose two alternative requirements to buttress the "substantial investment" stipulation. In *In re Heitland,* it explained that the investment (1) "[m]ust tend to expand job opportunities" or (2) "[b]e of
an amount adequate to insure, with sufficient certainty, that the alien’s primary function with respect to the investment, and with respect to the economy, will not be as a skilled or unskilled laborer." Even after a 1973 amendment became more specific by requiring a $10,000 investment and a minimum of one year’s experience, the INS still thought it defensible to adhere to the additional alternatives set down in In re Heitland. It was not long before an issue was raised concerning the legitimacy of the BIA’s imposing these Heitland criteria. Not only did they cause confusion for alien investors, but they resulted in an “[i]mproper circumvention of rule-making procedure.”

When the INS amended the business investor exemption again in 1976, it implemented the basic concepts of the Heitland formula. The adequacy of the investment is ensured by virtue of the high minimum investment amount, and the enterprise must offer employment for at least one person exclusive of the alien and his immediate family.

There is a question whether an alien who intends to practice his profession in the United States may qualify as a business investor. More specifically, can the regulations keep the alien from working in his own enterprise? It is clear that the exception was intended to prevent the entrepreneur from competing with his skills against American workers.

Because the Heitland test is met if the investment accomplishes either of the two objectives, it seems the alien should be able to work in the enterprise if the net effect is “to expand job opportunities . . . or . . . to insure . . . that the alien’s primary function . . . will not be as a skilled or unskilled laborer.” If the alien’s “price” for entering the job market is a substantial investment, and the investment expands job opportunities for others, then it would seem that the statutory mandate is fulfilled even if the alien himself is licensed to work in the enterprise. The new version of the statute follows this interpretation by requiring that the business employ at least one person who is a United States citizen or a lawful permanent resident.

85. Id. at 567.
87. See Bahat v. Sureck, 637 F.2d 1315 (9th Cir. 1981); Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978).
88. Patel v. INS, 638 F.2d 1199, 1205 (9th Cir. 1980). A 1972 amendment had imposed requirements similar to the Heitland criteria but was rejected. 37 Fed. Reg. 23,274 (1972).
91. 14 I. & N. Dec. at 567.
92. 8 C.F.R. § 212.8(b)(4) (1983).
II. LABOR CERTIFICATION, EMPLOYMENT, AND ADJUSTMENT OF Status

Under section 245, a nonimmigrant may obtain employment in the United States by applying for adjustment of status to that of a lawful permanent resident while he is in the United States. This provision allows an alien to remain in the country while his application for permanent residence is pending. If the alien accepts unauthorized employment prior to filing his application, however, he will be unable to adjust his status. This provision denying the alien the opportunity to adjust his status if he engages in unauthorized employment was intended to protect the American labor force from the unfair competition of nonimmigrant aliens who violate their status by working. If an alien obtains labor certification, files for adjustment, and then goes to work before the approval of the adjustment application, he will not be penalized. Even if the alien takes a position with an employer other than the employer who certified the alien, there is no penalty under section 245.

Even if the adjustment application is denied, the alien can renew it at the deportation hearing and the application for adjustment at the deportation proceeding is regarded as a renewed application rather than a new submission. The labor certification remains valid at the deportation hearing as long as the employer still intends to hold the job open and the alien intends to work for the employer. The mere fact that the alien has stopped working for the employer while his adjustment application is pending does not necessarily result in an abandonment of his adjustment application. The issue in these cases depends on whether the parties intend to continue the employment relationship.

Immigration officials and courts have had difficulty in deciding whether a self-employed alien is involved in unauthorized employment. The BIA originally ruled that self-employment is still unauthorized employment. This was not surprising, for the BIA took a rather tradi-

94. INA § 245(c), 8 U.S.C. § 1255(c) (1982); 2 C. Gordon & H. Rosenfield, supra note 28, at § 7.7(b).
96. INA § 245(c), 8 U.S.C. § 1255(c) (1982); see Pei-Chi Tien, 638 F.2d at 1329.
98. See Ka Fung Chan v. INS, 634 F.2d 248 (5th Cir. 1981); In re Huang, 16 I. & N. Dec. 3621 (BIA 1978).
99. Pei-Chi Tien v. INS, 638 F.2d 1324, 1328 (5th Cir. 1981); see also Yui Sing Tse v. INS, 596 F.2d 831, 835 (9th Cir. 1979); 8 C.F.R. § 204.4(b) (1983).
100. See In re Tong, 16 I. & N. Dec. 593 (BIA 1978); see also In re Hall, 1. & N. Int. Dec. 2897 (Feb. 4, 1982) (alien's activities as fundraiser for church were unauthorized employment).
tional view of the meaning of "employment" and left little room for innovative interpretation. More recently, the BIA found a difference between unauthorized employment and self-employment in *In re Lett* and did not apply section 245(c) to an alien who qualified for adjustment as a nonpreference business investor.

The BIA's conclusion in *In re Lett* may be explained in part by the presumption that an alien's business investment provides opportunities for American workers and, therefore, it would be consistent with the policy underlying section 245(c) to construe "unauthorized employment" in this way. Therefore, the BIA seems to put a premium on an alien's compliance with the business investor requirements if an alien expects to avoid the strictures of section 245.

One might wonder, though, what would happen to an alien who engages in activities that qualify him for the nonpreference investment category but who then applies for adjustment as a preference immigrant. If such activities precede the alien's filing for adjustment, there is little reason for denying adjustment on those grounds if the true statutory intent is to protect the American labor market.

According to one decision, a self-employed alien was granted an adjustment of status, despite his self-employment and his failure to meet the requirements of a business investor. In *Bhakta v. INS*, the Ninth Circuit reversed a BIA decision denied adjustment of status by recognizing that the alien's management of his own motel investment did not reduce the number of jobs for citizens or lawful permanent residents in the United States. Thus, for section 245(c) purposes, this was not unauthorized employment, and it did not matter that the alien's enterprise had not satisfied the nonpreference investor requirements.

The *Bhakta* decision seems to undermine the purpose of limiting the classification of business investors. If an investor-manager falls short of the regulatory requirements applicable to the investor classification, he should still be subject to the labor certification requirement and should be regarded as engaged in unauthorized employment. The *Bhakta* court seemed confident in distinguishing the case of an alien professional because the professional "competes directly with all other professionals similarly employed in such practice." But an alien investor who has not quite met the statutory requirement for a business in-

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101. The BIA said that the term "'employment' is a common one, generally used with relation to the most common pursuits, and therefore ought to be received as understood in common parlance." *In re Tong*, 16 I. & N. Dec. 593, 595 (BIA 1978).
103. 667 F.2d 771 (9th Cir. 1981). Bhakta applied for a fifth preference visa but could not qualify as a business investor because he lacked the experience required by the regulations. The BIA denied the application on the ground that the alien was engaged in unauthorized employment.
104. 667 F.2d at 773.
105. *Id.*
106. *Id.* (quoting Yiu Tsang Cheung v. District Director, 641 F.2d 666, 670 (9th Cir. 1981)).
vestor is still protected even though he competes with others in the marketplace who may have been held to strict compliance because their visas depended on it. If the "unauthorized employment" bar to adjustment is intended to protect the American labor market, then there is no guarantee of protection if adjustment is available to those who approach, but do not quite reach, the investment standard.

In view of the court's novel approach in Bhakta, it was not surprising that other aliens would want to use that decision to rid themselves of the "unauthorized employment" label. In Wettasinghe v. INS,107 the Sixth Circuit sought to distinguish Bhakta. Wettasinghe was a student attempting to avoid a departure order alleging he violated his student status by working. The court observed that the regulations prohibited a student from working without permission "either for an employer or independently."108 The court interpreted this to mean "self-employment by students as well as employment by another."109 The adjustment provision does not contain such language. Instead, the statute denies the adjustment privilege to an alien who "accepts" employment,110 and the implementing regulation denies it to one who accepts "unauthorized employment."111 Thus there is continuing doubt because a self-employed investor really does not "accept" employment from anyone.

The current immigration reform movement should consider this ambiguity. The lack of a definition of "unauthorized employment" has created controversy among the courts and decisions contrary to the policies of the employment-related provisions of the INA.

III. LIMITING THE REACH OF EXCLUSION AND DEPORTATION

There is some concept in the INA that, after a certain time, mistakes committed by the alien should not result in deportation. This is not uniformly the case, however, and through two doctrines — the lack of a statute of limitation for grounds of deportation and the reentry doctrine — the INS is virtually unlimited in how far it can look into an alien's past to find acts which can result in exclusion or deportation.

A. Absence of a Statute of Limitations for the Grounds of Deportation

There are basically two ways for an alien to become a lawful perma-
nent resident of the United States. An alien may obtain an immigrant visa at a consulate abroad\(^\text{112}\) or, if he is already in the United States as a nonimmigrant, he may adjust his status to that of a lawful permanent resident.\(^\text{113}\) Although adjustment of status is a convenient mechanism for the alien, the Attorney General may rescind an alien’s adjusted status within five years if it appears to his satisfaction that the alien was not in fact eligible for the adjustment.\(^\text{114}\) There is no corresponding statute of limitations for the deportation statute.\(^\text{115}\)

1. **Adopting a statute of limitations for all but serious deportable acts**— The absence of such a statute of limitations is quite threatening to aliens. It simply means that a deportable alien is always subject to expulsion no matter how long he has lived in the United States. Although deportation is civil in nature,\(^\text{116}\) it is sometimes said that the criminal law provides a good basis of analogy for supporting a statute of limitations in the deportation context.\(^\text{117}\) Although deportation is not “punishment,” it can mean sacrificing the efforts of a lifetime and abandoning family and friends.\(^\text{118}\)

As a compromise between the government’s interests and the alien’s interests, the INA could provide a statute of limitations for all but the most serious grounds of deportation. Obviously there will be differences of opinion on what constitutes serious grounds for deportation, but one would certainly include threats to national security,\(^\text{119}\) drug trafficking,\(^\text{120}\) and persecution of others.\(^\text{121}\) Immigration law, at a minimum, should protect from the limitless applications of the depor-

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115. See Oloete v. INS, 643 F.2d 679, 683 (9th Cir. 1981); Fulgencio v. INS, 573 F.2d 596, 598 (9th Cir. 1978); In re S—, 9 I. & N. Dec. 548, 553 (AG 1962); IA C. Gordon & H. Rosenfield, supra note 28, at § 4.6b.
117. Final Report, supra note 7, at 281 (some commissioners supported the concept that “the government should take action against an individual within a certain specified period of time following the commission of a deportable offense, or not at all”).
118. See Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) (“deportation is a drastic sanction, one which can destroy lives and disrupt families”); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (“Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.”); Gordon, The Need to Modernize Our Immigration Laws, 13 San Diego L. Rev. 1, 19 (1975) (advocating statute of limitations because of “compelling humanitarian concerns developed by aliens during long residence in this country, included family ties, economic interests, and deep roots in the community”).
tation provisions those aliens who pose no real threat to society.\textsuperscript{122} This would not be a new policy judgment since the INA already makes such distinctions elsewhere.\textsuperscript{123} It would be merely a question of transferring the concept to a provision dealing with a statute of limitations.

2. \textit{Adopting a statute of limitations to equalize rescission and deportation procedures}— Another aspect of this problem of no statute of limitations on deportation actions occurs when the INS tries to deport an alien who has adjusted his status. If a nonimmigrant adjusts his status and the INS wishes to take action against the alien after the five-year statute of limitations has expired, it can proceed through deportation rather than rescission of the status adjustment.

The possibility for inconsistent results was made clear in \textit{In re Belenzo}.\textsuperscript{124} The alien there adjusted his status in 1972 on the basis of an invalid marriage. More than five years later, the INS felt it was too late for a rescission proceeding but subjected Mr. Belenzo to deportation proceedings because he had left the country after his adjustment of permanent status and the INS deemed him excludable upon his return as a result of a fraudulent adjustment of status.\textsuperscript{125} Both the immigration judge and the BIA found in favor of the alien on the theory that it was too late for his status to be affected by rescission and therefore by deportation. The BIA certified the case to the Attorney General for review\textsuperscript{126} and the Attorney General reversed the BIA’s decision.\textsuperscript{127}

The Attorney General seemed convinced that rescission was meant to be an informal and expeditious procedure and that Congress wanted to put a time limit on the availability of that procedure.\textsuperscript{128} But under that construction, the statute of limitations for rescission has little mean-

\textsuperscript{122} It has been suggested that there be a ten-year statute of limitations, but that no statute of limitations be applied to deportation based on conviction for a crime which is not subject to a statute of limitations under 18 U.S.C. § 3281 (1982) (capital offenses). See \textit{Joint Hearings, supra} note 8, at 289 (prepared statement of David Carliner); see also \textit{Final Report, supra} note 7, at 280 (some commissioners supported statute of limitations for deportation against long-term permanent residents, except in cases of heinous crimes).

The Select Commission on Immigration and Refugee Policy could not reach a consensus on the application of a statute of limitations to deportation proceedings. See \textit{Final Report, supra} note 7, at 279. One commissioner thought that a statute of limitations should not apply to deportation because deportation is not a penalty but represents a judgment that certain aliens are currently undesirable residents. See id. at 407 (supplemental statement of Commissioner Simpson).


\textsuperscript{125} The INS charged the alien with deportability under § 241(a)(1) because at the time of entry he was excludable under § 212(a)(14) for lacking a labor certification and under § 212(a)(19) for obtaining documentation by fraud. \textit{id.} at 374.

\textsuperscript{126} The Board must refer to the Attorney General for review of all cases which “the Commission requests be referred to the Attorney General for review.” 8 C.F.R. § 3.1(h)(1)(iii) (1983).


\textsuperscript{128} 17 I. & N. Dec. at 382-83 (quoting \textit{In re S—}, 9 I. & N. Dec. 548, 555 n.8 (AG 1962)).
ing if the Attorney General can still revert to the deportation proceeding after the five-year period has elapsed. The five-year limitations period should apply to any fraud in connection with the adjustment of the alien's status and deportation should not be entertained as a substitute mechanism once the five-year period has passed.

Section 246 provides that when rescission occurs, the alien shall be subject thereafter to all provisions of the INA as if there had been no adjustment of status.\(^\text{129}\) This suggests that the alien reverts to the status which existed prior to his adjustment and, therefore, if rescission is foreclosed because of the expiration of the statutory period, then the statute should be interpreted to foreclose his return to a status which would subject him to the deportation provision.\(^\text{130}\)

In addition, there seems to be little support for the position that rescission was intended to be an informal procedure designed for the Attorney General's quick action. If there was any thought of summary action, it would certainly be dispelled by the statutory requirement that for those aliens adjusted under section 244 of the INA after suspension of deportation, Congress would have to pass a resolution withdrawing that suspension.\(^\text{131}\) Section 246 also contains this requirement and, therefore, there is little evidence that this procedure was meant merely as an alternative procedure for terminating the alien's lawful permanent residence. As a matter of fact, in *Oloteo v. INS* the court referred to the INS's concession that "the five-year limitation in Section 246(a) is a historical anomaly or the result of an accident in the legislative process."\(^\text{132}\)

3. Applying the statute of limitations fairly in rescission proceedings—Section 246(a) requires rescission if "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status."\(^\text{133}\) At what point is the Attorney General to be satisfied about the alien's ineligibility? Must the Attorney General issue a final order for rescission within the five-year period or does the mere institution of rescission proceedings suffice to toll the statute of limitation? The issue arose in *Zaoutis v.*

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\(^\text{129}\) Section 246(a) states that after rescission the alien "shall thereupon be subject to all provisions of this Chapter to the same extent as if the adjustment of status had not been made." 8 U.S.C. § 1256(a) (1982). Thus, deportation does not necessarily follow rescission. See 17 I. & N. Dec. 374, 378 (BIA 1980).

\(^\text{130}\) See 17 I. & N. Dec. at 378-79.

\(^\text{131}\) Section 244(c)(2) provides that one house of Congress can veto the suspension of deportation granted to an alien. 8 U.S.C. § 1254(c)(2) (1983). However, in *INS v. Chadha*, 103 S. Ct. 2764 (1983), Congress held this veto power unconstitutional.

\(^\text{132}\) 643 F.2d 679, 683 n.8 (1981). Earlier deportation statutes contained statutes of limitation. A proposed amendment of the 1952 Act would have added a five-year statute of limitations for deporting aliens, but it was rejected. See S. 1515, 81st Cong., 2d Sess. 289 (1950).

\(^\text{133}\) INA § 246(b), 8 U.S.C. § 1256(a) (1982).
Kiley,\textsuperscript{134} where the alien argued that a mere notice of intent to rescind did not comply with the statutory requirement that "it shall appear to the satisfaction of the Attorney General" that the alien was ineligible for the adjustment of status.

The court held that when the Attorney General, acting through the INS, institutes rescission proceedings in good faith on the basis of evidence which would reasonably suggest a basis for rescission, the Attorney General's satisfaction has been met under the statute.\textsuperscript{135} After all, if the determination about the Attorney General's satisfaction was made only after a final order by the BIA, then this could provide an incentive for the alien to prolong the proceedings in order to get the benefit of the delay. On the other hand, this interpretation protects the government's interests by recognizing the commencement of proceedings as the time tolling the statute of limitations, thus avoiding the compulsion to enter a rescission order before the five-year period expires.\textsuperscript{136} The court also held that proceedings instituted and then dropped, before the five-year statute runs, do not toll the statute for subsequent proceedings if the INS brought the original proceedings in bad faith, or based its claim on speculation.\textsuperscript{137}

\textbf{B. The Reentry Doctrine}

The reentry doctrine applies the exclusion provisions to any alien, including a lawful permanent resident, who is returning to the United States after a temporary visit abroad. The doctrine is far reaching and has caused mischief over the years. An alien who has been admitted for permanent residence may live here for years without difficulty. If he goes across the border to Mexico and commits an offense, he may find himself unable to gain readmission to the United States.\textsuperscript{138}

There is also the possibility that an alien may commit an offense or become bankrupt or do a number of things while he is living in the United States which are not serious enough to warrant deportation.
but which would render him excludable as an initial immigrant. 139 If
that alien leaves and then seeks to return, the same rules of admission
apply that applied on the initial entry. This is because an "entry" is
regarded as "any coming of an alien into the United States." 140

The Supreme Court in Rosenberg v. Fleuti, 141 provided some relief
from this reentry doctrine. The Court held that a lawful permanent
resident who makes a trip abroad that is "innocent, casual and brief"
will not be subject to the exclusion provisions on his return because
he will not be making an "entry." 142 As one might have guessed, the
Court's application of the reentry doctrine to permanent residents did
not solve all the problems because the lower courts then had to deter-
mine when a trip was "innocent, casual and brief." 143 An alien who
prepared too much for his trip ran the risk of his trip not being casual; 144
one who wandered too far afield might find that his excursion was
not brief enough. 145 Although the courts are gaining experience inter-
preting this exception to the reentry doctrine, the rules are not clear,
and aliens still risk exclusion following long residence in the United
States, based on activity that could not have resulted in deportation.

It was not surprising, therefore, that there would be agitation for
some change in the application of the reentry doctrine. The Select Com-
misson on Immigration and Refugee Policy heard some concerns about
the present problems in this area and recommended that the reentry
document itself be modified. 146 Such a modification would result in the
application of the doctrine to returning permanent residents only in
very limited circumstances. 147 That seems preferable to dealing with
further clarification of the elements that comprise an "innocent, casual
and brief” trip.


140. See Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977); Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972).

141. See Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977); Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972).


143. See Mamanee v. INS, 566 F.2d 1103, 1105 (9th Cir. 1977) (alien's entire family left United States for indefinite time); Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974) (return after 27-day trip abroad resulted in entry).

144. See Final Report, supra note 7, at 284. The Commissioner recommended that returning lawful permanent residents not be subject to the exclusion laws, except the following: criminal grounds, political grounds, entry without inspection, and engaging in persecution.

145. See id.
IV. FRAUD OR WILLFUL MISREPRESENTATION UNDER SECTION 212(a)(19)

An alien is excludable,\(^\text{148}\) and therefore deportable, if he procures or has sought to procure a visa or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact.\(^\text{149}\) An alien makes a willful misrepresentation when he makes an intentional, false statement. Motivation is irrelevant in this respect.\(^\text{150}\) There is no requirement, therefore, that the INS show the alien's intent to deceive as long as it can prove that the alien made a statement knowing it to be false.\(^\text{151}\)

A. Materiality of the Misrepresentation

The misrepresentation must also concern a material fact. A misstatement that has nothing to do with the alien's admission is not relevant to a determination of exclusion and deportation. There is difference of opinion, though, about what constitutes materiality. Some courts find materiality if the alien's misstatement prevents the INS or the consul from conducting an investigation into legitimate matters affecting the issuance of the visa.\(^\text{152}\) Other courts hold a misstatement material if the truth might have resulted in a denial of the visa.\(^\text{153}\)

In Chaunt v. United States,\(^\text{154}\) the Supreme Court provided some guidance on this question of materiality, but in a proceeding to revoke an alien's citizenship. The Court said that facts are material which (1) "if known, would have warranted denial of citizenship," or (2) "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."\(^\text{155}\)

In Fedorenko v. United States,\(^\text{156}\) the Court used an approach similar to the first part of the Chaunt test.\(^\text{157}\) Fedorenko was a concentration...
camp guard during World War II and lied about his whereabouts during the war to enter the United States under the Displaced Persons Act. The alien's truthful answer would have disqualified him for a visa. In interpreting the Displaced Persons Act, the Court upheld the circuit court's decision to revoke Fedorenko's citizenship. Had the Court addressed the materiality question, it would have been forced to deal with the effect of material misrepresentations in the visa issuance process. The alien obtained his visa by providing inaccurate information about his background. In cases like Fedorenko, the decision about material misrepresentations should be concerned, therefore, with what occurred at the visa stage. If the INS seeks the alien's denaturalization on the basis of material misstatements in the application for citizenship, then there is a basis for applying the strict test laid down in Chaunt before the alien's citizenship can be withdrawn.

If the INS bases its case on the alien's material misrepresentations at the visa stage, the Chaunt test should not be applied. The decision about materiality should be based on the context in which the alien gives his answers, not on the potential damage which such answers might cause when the alien seeks a later benefit on the basis of his admission. Justice White's dissent favored a remand for a review of the alien's concealment at the citizenship application stage. He must have thought that different considerations applied in determining materiality in a visa application and materiality in an application for citizenship.

Although the Court in Chaunt provided a test for materiality in the denaturalization context, it is obvious that the test is not a model of clarity. Although the Court had a chance to clarify the Chaunt test, it avoided the issue by settling for another disposition of the question before it. Justice Blackmun's concurring opinion, however, may aid in interpreting the status of the INA's "material misrepresentation" provisions. He suggested that the Chaunt test may be satisfied in either of two ways. First, facts are material if, known by government officials, they would have justified denial of eligibility. Second, facts are also material if they might have been useful to an investigation resulting in other facts that warranted denial of citizenship. Thus in either case, there must be proof of actual disqualifying facts. This stringent test is justified on the basis of the interest to be protected in denaturalization for admission under the Displaced Persons Act because of his willful misrepresentation, Pub. L. No. 80-774, § 10, 62 Stat. 1009, 1013 (1948), the court relied on the statutory ground that his naturalization was illegally procured under INA § 340(a), 8 U.S.C § 1451(a). 449 U.S. at 514-16, 518.

158. 449 U.S. at 528 (White, J., dissenting).
tion cases. The alien must feel secure with his acquisition of citizenship and his citizenship should be taken away only on a clear and convincing showing that the alien has never met the prescribed statutory conditions.161

When materiality affects the visa process, however, the interest to be protected is not as great as in the case of denaturalization. Therefore, it is understandable that the Attorney General opted in *In re S— & B—C*—162 for an approach that considered whether the misrepresentation shut off a line of inquiry that might have resulted in the alien’s exclusion.163 This gives proper weight to the excludability provision because the alien could be refused admission not only if he is excludable on the “true facts,” but also if his false statements led the consul astray, thus denying the latter the opportunity of making a full inquiry concerning the alien’s application.164 The BIA has clarified this by stating that after the INS shows that the authorities might have developed enough facts possibly leading to the denial of a visa or entry, the burden then shifts to the alien to show that he could not be excluded.165

B. Misrepresentation and Marriage

Many of the problems concerning fraud or misrepresentation have to do with marriages. Section 241(c) of the INA creates a presumption that a marriage is fraudulent, if it is terminated either by divorce or annulment, within two years after the alien’s entry, unless the alien can show there was no intention to evade the immigration laws.166 The rationale for this provision is to create a deterrent against an alien’s entry into the United States on the basis of a sham relationship.167 If an alien does not have a valid, unexpired immigrant visa, he will be excludable at entry.168 Therefore, if an alien seeks entry on the basis of a marital relationship, the termination of that relationship before the alien’s entry will render the alien excludable, and even if entry is secured, will render the alien deportable.169 Mere withdrawal of a petition to grant an alien immigrant status, however, will not affect the alien’s admissibility unless the government informs the alien prior to

161. *Id.* at 525.
163. *Id.* at 447.
166. INA § 241(c), 8 U.S.C. § 1251(c) (1982).
169. *See Chan v. INS*, 629 F.2d 579 (9th Cir. 1980) (marriage annulled before entry and therefore alien is deportable even if unaware of annulment).
his departure for the United States that the petition has been withdrawn.\textsuperscript{170} The relationship between the alien and the petitioner must still exist at the time of admission.\textsuperscript{171} This policy avoids the hardship that might otherwise ensue if the alien were forced to return to his homeland even though he was unaware of any visa problems prior to his departure.

1. \textit{Change in marital status}— Occasionally an alien’s status may change and he is no longer entitled to the type of visa which the consul issued to him. In such a case, the alien is excludable for not having a valid visa. It does not matter that the alien is not advised prior to his departure for the United States that his visa has been revoked.

This was readily brought out in \textit{In re Alarcon}.\textsuperscript{172} In that case the alien obtained her visa as the unmarried daughter of a lawful permanent resident when in fact she was married. The alien argued that she had a valid immigrant visa when she entered because the visa was not revoked in time. The BIA held that even if revocation was not effective, the INS still had jurisdiction to determine the validity of the visa by determining whether the underlying relationship between the parties still existed. In \textit{Alarcon} the alien was no longer unmarried and thus was not entitled to the classification accorded to an unmarried daughter of a lawful permanent resident.\textsuperscript{173} This was the feature that distinguished the case from \textit{In re Salazar},\textsuperscript{174} for in \textit{Salazar} the alien was still married to a United States citizen who had previously petitioned for him. Therefore, there was no change in the relationship which was the basis for issuing the visa, and thus, no grounds for exclusion.

2. \textit{Retroactive annulment of marriage}— If an alien obtains entry as a result of a misrepresentation that he is unmarried or that he was not previously married, he cannot avoid deportation by seeking to make the annulment of his marriage retroactive.\textsuperscript{175} This policy assures that aliens will not profit from changes in marital status that are not bona fide.\textsuperscript{176} On the other hand, the annulment of an alien's marriage will not be given retroactive effect if to do so would result in a “gross miscarriage of justice.”\textsuperscript{177} It has been the BIA’s policy that “annul-

\textsuperscript{170} \text{INA § 206, 8 U.S.C. § 1155 (1982).}
\textsuperscript{171} \text{See \textit{In re Salazar}, 17 I. & N. Dec. 167 (BIA 1979).}
\textsuperscript{172} \text{17 I. & N. Dec. 574 (BIA 1980).}
\textsuperscript{173} \text{The alien was entitled to a second preference visa. See \text{INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1982).}}
\textsuperscript{174} \text{17 I. & N. Dec. 167 (BIA 1979).}
\textsuperscript{175} \text{See Hendrix v. INS, 583 F.2d 1102 (9th Cir.: 1978); \textit{In re Magana}, 17 I. & N. Dec. 111 (BIA 1979); \textit{In re Wong}, 16 I. & N. Dec. 87 (BIA 1977).}
\textsuperscript{176} \text{Hendrix v. INS, 583 F.2d 1102, 1104 (9th Cir. 1978).}
\textsuperscript{177} \text{In re Castillo-Sedano, 15 I. & N. Dec. 445, 446 (BIA 1975) (default decree of annulment was secured by applicant’s wife and no fraud was involved; therefore, relation-back doctrine would result in miscarriage of justice if applicant was excluded from United States); cf. \textit{In re}
ment decrees may have different effects depending on the nature of the case and the purposes to be served by giving an annulment decree retroactive effect. 178

C. **Waiver of Fraud**

An alien whose deportation hinges on his excludability at entry because of fraud may seek relief from deportation under section 241(f) if he is the spouse, child, or parent of a United States citizen or of an alien lawfully admitted for permanent residence. 179 Before 1981, 180 the waiver was automatic but the INS sometimes sidestepped the waiver by charging the alien not only with fraud, 181 but with other violations such as failure to obtain a labor certification, 182 or a valid immigrant visa. 183 The courts allowed the INS to become successful with this tactic, consistently holding that the section 241(f) waiver could not be applied to a charge which did not sound in fraud. Obviously this frustrated aliens who, under normal circumstances, would qualify for this relief because of the necessary family relationship.

The interpretation of section 241(f) took on real significance in *INS v. Errico*. 184 The aliens in that case had obtained a quota advantage on the basis of misrepresentations, but the INS instituted deportation proceedings against them on the basis of section 241(a)(1), alleging that they were not “otherwise admissible” because of their failure to comply with the quota provisions. 185 The Court decided that the aliens were in fact “otherwise admissible” within the meaning of section 241(f).

The Court looked to the predecessor of section 241(f), section 7 of

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178. 17 I. & N. Dec. at 4. Compare Hendrix v. INS, 583 F.2d 1102 (9th Cir. 1978) (marriage annulled will not relate back to ground of exclusion or deportation if alien enters on the basis of not being married); *In re Wong*, 16 I. & N. Dec. 87 (BIA 1977) (same); *In re Castillo-Sedano*, 15 I. & N. Dec. 445 (BIA 1975) (annulment will not relate back where there was not immigration fraud and injustice would result) and *In re R—J—*, 7 I. & N. Dec. 182 (BIA 1956) with *In re Samedi*, 14 I. & N. Dec. 625 (BIA 1974) (annulment retroactive) and *In re T—*, 3 I. & N. Dec. 528, 530-31 (BIA 1949) (same).


185. At the time of the *Errico* case there was a quota system. See Immigration and Nationality Act of 1952, Pub. L. No. 414, §§ 201-211, 66 Stat. 163, 173-81. Although this case involved deportation due to fraud, the aliens were not being deported for being excludable under § 212(a)(19) (seeking to enter by fraud or willful misrepresentation).
the 1957 Act,\(^{186}\) which waived deportation for two types of aliens who had entered the United States through fraud or misrepresentation. An alien who was the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence could seek a waiver if he was otherwise admissible at the time of entry. But an alien who had misrepresented his nationality and had entered during the postwar period could seek a waiver if he was otherwise admissible at the time of entry and if he did not engage in misrepresentations to evade quota restrictions or an investigation. The Court interpreted this to mean that despite two kinds of fraud, an alien would still remain "otherwise admissible." If the required family relationship was missing, however, either of those types of fraud would prevent the alien from benefiting from the section.\(^{187}\) The Court also indicated that the section was intended to provide humanitarian relief by preventing the separation of families.\(^{188}\)

Justice Stewart's dissent stressed that section 241(f) applied only to deportation based on fraudulent entry. The aliens in *Errico* were to be deported under a different section.\(^{189}\) He also said that the aliens were not "otherwise admissible" because they were not within their proper quotas.\(^{190}\) Justice Stewart took the view that the section was intended to have no effect on the quota system.\(^{191}\) In looking at the use of the term "otherwise admissible" in other sections of the INA, Justice Stewart found that it usually followed grounds for admissibility or exceptions to deportation, thus suggesting that all other immigration requirements would be covered by the term.\(^{192}\)

The Court did not even discuss the question whether the aliens' failure to comply with the documentary requirements section constituted a ground for excludability as the term is used in section 241(a)(1).\(^{193}\) Even under the *Errico* doctrine, if excludability were to be determined by reference solely to section 212(a)(19), then there would be a legitimate question whether the aliens in *Errico* could benefit from the waiver or even whether they were "otherwise admissible." Needless to say, the *Errico* approach left the lower courts in a state of confusion about

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187. 385 U.S. at 223.
188. *Id.* at 225; *see also* H.R. Rep. No. 1086, 87th Cong., 1st Sess. 37 (1961).
189. 385 U.S. at 227 (Stewart, J., dissenting).
190. *Id.* at 228 (Stewart, J., dissenting).
191. *Id.* at 228 & n.4 (quoting Senator Eastland that "the bill does not modify the national origins quota provisions." 103 Cong. Rec. 15,487 (1957)).
192. 385 U.S. at 229.
193. Section 241(f) really only deals with excludability under section 212(a)(19) because of fraud. The INS relied in *Errico* on a different provision, § 211, which had to do with the alien's being charged to the proper quota and which was not the excludability provision requiring fraud. It is surprising, therefore, that the Court in *Errico* did not discuss this specific question about the section upon which it relied.
the appropriate application of section 241(f). Some courts found that it waived quantitative grounds\(^1\) while others thought it waived any deportation charge for which fraud was germane.\(^2\)

In *Reid v. INS*,\(^3\) the Supreme Court had another opportunity to apply section 241(f) and held the waiver is available only to persons subject to deportation under section 241(a)(1) because their entry was procured by fraud.\(^4\) In that case the INS wanted to deport the aliens on the basis of their entry without inspection,\(^5\) an independent ground of deportation under section 241(a)(2). The aliens claimed that section 241(f) applied to them because they had secured entry into the United States through fraud which rendered them excludable at the time of entry,\(^6\) and therefore deportable.\(^7\)

The Court disagreed with the aliens. Unfortunately, the aliens in *Reid* had misrepresented themselves as citizens of the United States and therefore had completely frustrated the inspection process. On this basis, the Court had no difficulty in upholding the legitimacy of the deportation charge under section 241(a)(2), even though it conceded that the aliens would have been excludable under section 212(a)(19) if their fraud had been detected at the time of entry.

The Court went further and affirmed the holding in *Errico* that the section 241(f) waiver applies not only to deportation based on excludability under section 212(a)(19), but also to deportation based on the quota requirements of section 211(a).\(^8\) Further, the Court said that section 241(f) would not apply to waive any ground of excludability other than that in section 212(a)(19). This was an important clarification because the INS often alleged that the alien was deportable because of his excludability under provisions other than section 212(a)(19). After *Reid*, aliens found it difficult to get the benefit of section 241(f) as long as the INS relied on some provision other than section 212(a)(19).\(^9\)

\(^{194}\) See *Jolley v. INS*, 441 F.2d 1245, 1252-54 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971); *Godoy v. Rosenberg*, 415 F.2d 1266, 1270-71 (9th Cir. 1969).

\(^{195}\) See *Muslemi v. INS*, 408 F.2d 1196 (9th Cir. 1969).

\(^{196}\) 420 U.S. 619 (1975).

\(^{197}\) *Id.* at 630.

\(^{198}\) An alien is deportable if he "entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Chapter or in violation of any other law of the United States." *INA* § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1982).


\(^{201}\) 420 U.S. at 630.

\(^{202}\) See *Morales-Cruz v. United States*, 666 F.2d 289 (5th Cir. 1982) (entry without labor certification under § 212(a)(14)); *Skelly v. INS*, 630 F.2d 1375 (10th Cir. 1980) (entry without labor certification under § 212(a)(14)); *Escobar-Ordenez v. INS*, 526 F.2d 969 (5th Cir.) (per curiam) (alien deportable for entry with fraudulent visa), *cert. denied*, 426 U.S. 938 (1976); *Castro-Guerrero v. INS*, 515 F.2d 615 (5th Cir. 1975) (alien deportable for entry without proper registration). But see *Cacho v. INS*, 547 F.2d 1057 (9th Cir. 1976) (waiver still available even though
After *Reid*, the 1981 amendments to section 241(f) provided further clarification on the extent of the section 241(f) waiver.\(^{203}\) The statute now covers innocent, as well as willful, misrepresentations, thus clarifying doubts about that question.\(^{204}\) The statute now limits relief to an alien who is in possession of "an immigrant visa or equivalent document." This is an important provision because it affirms decisions which have denied relief to aliens who entered without inspection,\(^{205}\) or surreptitiously,\(^{206}\) and even to aliens who entered as nonimmigrants.\(^{207}\)

The other significant achievement of the 1981 amendments is the application of the waiver to an inadmissibility based on the alien’s lack of labor certification or of a valid immigrant visa, or to inadmissibility based on an allocation of the alien’s visa to the wrong preference category, all resulting from the alien’s fraud. Obviously, this broadens the scope of section 241(f) for aliens because they have had to contend in the past with deportation charges which, though sounding in fraud, were technically outside the scope of the waiver because they could be classified under sections other than 212(a)(19).

**CONCLUSION**

There is a growing consensus in the United States favoring reform of the immigration system. There is a feeling that the government has little control over the number of immigrants coming into this country and that the system is unable to absorb all of those who enter the labor market. Further, the present labor certification procedure may give entering aliens and the American public the perception that "many illegal aliens are working in non-menial jobs which unemployed, underemployed, or less well paid Americans would clearly take."\(^{208}\) The continuing discussion by Congress of the Immigration Reform and

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deportation charged under § 212(a)(20) because of invalid visa); Persaud v. INS, 537 F.2d 776 (3d Cir. 1976) (same); *In re Da Lomba*, 16 I. & N. Dec. 616 (BIA 1978) (§ 241(f) forgives deportability under § 212(a)(20) and § 241(c)).


206. *Cortez-Flores v. INS*, 500 F.2d 178 (5th Cir. 1974) (per curiam); *Monarrez-Monarrez v. INS*, 472 F.2d 119 (9th Cir. 1972) (per curiam); *In re Checa*, 14 I. & N. Dec. 661 (BIA 1974).

207. *Delgado v. INS*, 637 F.2d 762 (10th Cir. 1980); *Cortez-Flores v. INS*, 500 F.2d 178 (5th Cir. 1974) (per curiam).

Control Act\textsuperscript{209} provides some hope for a resolution of these immigration problems.

The Senate version of the Reform Act makes some changes in the labor certification procedure by requiring the Labor Department to consider the availability of qualified workers throughout the United States rather than restricting its findings to the place where the alien will be employed.\textsuperscript{210} This represents a decided shift in the concept of labor availability and places the burden on the employer to seek out workers in other areas of the United States. Furthermore, the Labor Department must certify that there are not sufficient workers in the United States that could be trained for the position within a reasonable period of time.\textsuperscript{211} The Department’s certification decisions would be reviewable but could not be set aside unless they were arbitrary and capricious.\textsuperscript{212}

Despite this new language, neither the House nor the Senate version of the Reform Act deals with the division of jurisdiction between the Labor Department and the INS. There is room for clarification whether the Labor Department’s certification is merely an assurance that there are not sufficient workers in the United States available for the particular assignment and that the alien’s employment will not adversely affect the wages and working conditions of workers already here.\textsuperscript{213} The difficulty arises because the INS has the jurisdiction to evaluate a preference petition and the language in the statute requiring a “consultation with the Secretary of Labor” is not clear enough to delineate the extent of jurisdiction for the INS in passing on the petition.\textsuperscript{214} If this matter is not addressed, the conflict will continue over the functions of the INS and the Labor Department.\textsuperscript{215} There is also a need to clarify the language in the INA used by courts to determine the alien’s intent regarding his certified employment. The law must strike


\textsuperscript{211} Id.

\textsuperscript{212} Id.


\textsuperscript{214} See INA § 204(b), 8 U.S.C. § 1154(b) (1982).

\textsuperscript{215} See K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983) (per curiam).
a balance between upward mobility for aliens and security for American jobs and wages.

There has been some discomfort with the practice of adjusting aliens from nonimmigrant to immigrant status. The House reform bill denies adjustment to an alien who has accepted unauthorized employment or who is not in a legal status at the time the adjustment application is filed.\(^\text{216}\) The Senate’s version goes even further by denying adjustment of status if the alien "has failed to maintain continuously a legal status since entry into the United States."\(^\text{217}\) The latter restriction would deny adjustment, therefore, not only to aliens who have accepted unauthorized employment, but also to those who have overstayed without permission of the INS. Since the adjustment is discretionary with the Attorney General, the privilege is therefore restricted to those aliens who have not violated their status; this would turn out to be a privilege since many violations are related to unauthorized employment.

Unfortunately, the Reform Act does not deal with the relationship between rescission and deportation, and the question about the statute of limitations still exists. Although the Attorney General’s decision in \textit{In re Belenzo} was clear, a tension still exists between the rescission and deportation provisions concerning the issue. If Congress intended to give the Attorney General the discretion to use either provision regardless of the circumstances, then there is a need for statutory clarification. It is certainly reasonable to construe the rescission statute as the exclusive method for proceeding against aliens who have obtained legal permanent residence through adjustment. If the limitation of the rescission provision is a matter of legislative oversight,\(^\text{218}\) then now is the time to correct the imprecision, since the Act is being revised. There is no need to provide an additional vehicle for removing an alien’s lawful permanent status if the deportation procedure already exists and if nothing is intended to be added by the rescission provision.

Our immigration law has a long and varied history.\(^\text{219}\) Amendments occurring at different times have been the result of different constituencies and different, and sometimes contradictory, motivations.\(^\text{220}\) As certain provisions become outmoded, or advocates and courts find new ways to interpret them, ambiguities and inconsistencies arise. For the most part, the BIA and the courts have followed principles of equity


\(^{217}\) S. 529, 98th Cong., 1st Sess. § 131(a), 129 CONG. REC. S6977-79 (daily ed. May 18, 1983).

\(^{218}\) See Oloteo v. INS, 643 F.2d 679, 683 n.8 (9th Cir. 1981).


\(^{220}\) Id.
and statutory interpretation to develop satisfactory solutions. Since Congress is considering major changes in the INA, these interpretive problems should be addressed. The result will be a fairer, clearer American law of immigration.