Class 1. Overview of Immigration Law: Immigration and the Constitution: Sources of the Federal Immigration Power:

1. Sources of Immigration Power:
   a. The Enumerated Powers:
      (1) Commerce Clause: “regulate commerce with foreign nations;” Art. I, §8, cl. 3 (head taxes, people as objects of commerce); (interstate commerce, movement of people affects interstate commerce—substantially affecting standard, even “indirect)
      ii. two subarguments for an “affecting commerce theory”:
         Immigration affects interstate commerce, or the “affecting commerce” principle extends to the international branch of the commerce clause, and immigration affects international commerce
      (2) Migration or Importation Clause: Art. I, §9, cl. 1, implication that Congress may prohibit migration or importation after 1808, but historical context suggested this was meant to deal with slave trade
      (3) Naturalization Clause: Art. I, §8, cl. 4, “establish a uniform Rule of Naturalization.” Admission and expulsion differ from naturalization, and immigration be considered “necessary and proper to this power”
      (4) War Clause: to declare war, necessary and proper argument again.
   b. Implied Constitutional Powers:
      (1) necessary and proper argument, immigration power by implication
      (2) Chae Chan Ping v. US (The Chinese Exclusion Case)(1899): Congress took away Chinese laborers right to return to the US after he left, he claimed that this was constitutional violation as he had certificate to return.
      ii. Ct held: Jurisdiction over its own territory is incident to every independent nation, part of independence, if it could not exclude aliens it could be controlled by another nation
      iii. “To preserve its independence and give security against foreign aggression and encroachment, duty of every nation, nearly all other consideration subordinated, legislative judgment, conclusive upon judiciary, if gov. of country where foreigners are excluded is upset write congress, b/c this is sovereign power, not questions for judicial determination (national security, foreign affairs, and pol. question)

Class 2 and 3. Immigration and the Constitution: Limits to the Federal Immigration Power:

2. Modern Developments:
   a. Chinese Exclusion Case, Ekiu, and Fong Yue Ting are three basic building blocks of the “plenary” congressional power over immigration.
(1) Chinese Exclusion case recognized an inherent federal power of immigration

(2) *Ekiu* appeared to reject due process limits on the exercise of that power, “As to noncitizens seeking admission the decisions of executive or administrative officers acting within powers expressly conferred by Congress, are due process of law.

(3) *Fong Yue Ting* extended the principles of both cases from exclusion to deportation

(4) *Knauff v. Shaughnessy*(1952): continued this line, holding “Whatever the procedure authorized by Congress is, it is due process as far as alien entry is concerned” when a noncitizen wife of a US citizen excluded without hearing on confidential information, classifying her admission as a privilege rather than a right.

b. *Shaughnessy v. US ex. rel Mezei (Mezei)(1953):* Mezei born in Gibraltar, live in US for over 20 years, went to Europe to take care of dying mom, returned and excluded at Ellis Island based on confidential information, the disclosure of which would be prejudicial to the public interest.

   (1) Ct begins with holding in *Knauff* that “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” (Basically it is a political question not to let them in)

   (2) Harborage at Ellis Island is not an entry into the United States, distinguishes *Kwong Hai Chew v. Colding*, as Chew case did not involve a real departure from the US, but Mezei gave up his status as an entrant when he went “behind the iron curtain” for 19 months, and National Act regards maritime service such as Chews as continuous residence

   (3) Temporary arrangements such as detention at Ellis Island do not effect aliens status- they are treated as stopped at border, cannot make him wait at sea in boat.

   (4) Ends with who comes in is a political question, not going to second guess the judgment of Congress, but if you are returning lawful permanent resident, not gone to long – get procedural due process (LPR almost assimilated, shouldn’t destroy what procedural due process rights already have. *Landon v. Plascentia*)

c. *Harisiades v. Shaughnessy* (1952): Three plaintiffs joined Communist party, all three then left, one quit voluntarily and other two party discontinued membership. Congress enacted state that rendered deportable, amount others, noncitizens who had ever been members of organizations that advocate the overthrow of the government by force and violence. Aliens attack statute on three grounds (1) substantive due process; (2) freedom of speech violating First Amendment; and (3) that it is an *ex post facto* law in forbidden by Art. I, §9, cl. 3 of the Constitution.

   (1) Ct first addresses their substantive due process argument that they have both a vested right to remain in the United States, and that Act does not
meet the Due Process standard as having some reasonable relationship between the Act and its interest to be protected

ii. Vested rights argument fails b/c these aliens are citizens of two countries attempting to derive benefits of both countries, US citizens have to go fight the war, while these citizens don’t have to, they could have become citizens if they wanted to

iii. Due process argument fails b/c court says Act is matter of Foreign Affairs “largely immune from judicial inquiry or interference. Ct does however pay homage to the rational relationship argument by going into the concerns about Communism, and then finished with this is a political question and stare decisis.

(2) First Amendment is argument is put to bed with the court holding that freedom of speech does not equal freedom to advocate violent overthrow of government

(3) **Ex post facto** argument is handled by Court stating that Congress had always prohibited membership in Communist party, this was not new thing, and the Court misinterpreted Congressional intent in *Kessler v. Streckler* (holding that Congress had not clearly expressed an intent that Communist Party membership remained cause for deportation after it ceased). Also Court notes that **Ex post facto** clause has always been limited to penal enactments, and deportation is a civil proceeding (Ct must have decided this based on location in US Code)(Legomsky questions whether deportation is truly civil remedy).

d. *American-Arb Anti-Discrimination Committee v. Meese* *(ADC Case (1989))*: District court found it significant that First Amendment did apply to deportation proceedings in *Harisiades*, court just used wrong test. Court uses correct test in *Dennis*, subsequent decision citing test as clear and present danger.

e. In *Reno v American-Arab Anti-Discrimination Committee* *(1999):* Supremes held that “alien unlawfully in country has no constitutional right to assert selective enforcement s a defense against deportation.” Footnote said that deportable aliens don’t have defense of selective prosecution, Legomsky notes that this would deprive LPR’s of this defense.

f. *Zadvydas v. Davis* *(2001)*: Two aliens were being held in custody pending deportation for various criminal violations, and no country would accept them, so they filed a writ of habeous corpus under 28 U.S.C. §2241

(1) Statute authorizing government to hold aliens pending deportation who were (1) inadmissible… (2) deportable on certain crime related and certain other grounds, or (3) who had been determined by AG to be a risk to the community or unlikely to comply with the order of removal,
beyond the removal period [for an uncertain period of time], and if released shall be subject to terms of supervision.

(2) CT begins initially by noting that “[a]liens who have not yet gained initial admission to the country would present a different question [than those already in the country].”

(3) The Court goes on to say that if they didn’t read a limitation into the statute, that it would raise serious constitutional questions… and goes on to say that where “detention’s goal is no longer practically attainable, detention no longer “bears a reasonable relation to the purpose for which the individual was confined. Seems to say that aliens, once they enter the US, get substantive due process.

(4) Distinguishes Mezei, as an Alien who was treated as if he was stopped at the border, going to give aliens who enter the US more protection…. “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”

(5) Court adds in 6 month period, but concludes that an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future. (Crack in plenary power doctrine)

(6) Scalia dissents: they have no substantive right to release into country, alien on final order of removal equal status with inadmissible alien, no reason why they should be different

(7) Justice Kennedy: dissents on statutory interpretation grounds, can’t read this language into statute, no way you can interpret it this way, inadmissible aliens must now be allowed into country after 6 months of detention, b/c both are addressed in statute and can’t treat them differently, also removable alien does not have same liberty interest citizen does, also cites foreign policy considerations – now going to let courts step into executive arena after 6 months (judicially supervised receivership); encourages dilatory action by aliens (why should they try to go home now); these aliens have different rights than LPR’s, they are removable, and rights should be defined according to that status.

g. Where are we Now:

(1) Courts will often interpret immigration statutes favorably to noncitizens in order not only to avoid the need to decide constitutional questions, but also the harsh results of the plenary powers doctrine

(2) Non citizen has a right to judicial review of removal orders by habeas corpus.

(3) Procedural due process is clearly required in expulsion cases and in most cases involving the exclusion of returning LPR’s

(4) Even with respect to substantive due process or federal “equal protection,” lower courts often translate the plenary power doctrine into a “rational basis test”
(5) There is at least some authority for the proposition that immigration statutes are subject to the same first amendment standards as other statutes.

(6) The Supreme Court decision in *Chadha* suggest that constitutional challenges predicated upon separation of powers (as distinguished from individual rights) might at least be somewhat less vulnerable to the plenary power doctrine.

(7) The recent Supreme's decision in *Zadvydas* might signal a general weakening of the plenary power doctrine, at the very least it signifies a willingness to consider constitutional limitations when prolonged detention is challenged.

(8) Do we now have a Plenary Power Doctrine Light, like old soldiers, has the doctrine merely faded a way, what about 9/11, does this change anything.

Class 4. Immigration Categories: Historical Background; Fundamentals about Quotas and Preferences:

A. Fundamentals: Quotas and Preferences:
   - To qualify for admission, an immigrant must affirmatively fit within one of the various admission categories established by Congress:
     1. Exempt from Quotas:
        a. Immediate relatives: spouses, parents (only if US citizen is over 21), and children of United States citizens, except in the case of a parent the citizen son or daughter must be at least 21. INA § 201(b)(2)(A)(i).
        b. LPRs returning (either they were exempt at the time of their original admission or they have already been counted). INA §101(a)(27(A), 201(1)(A).
        c. Former United States citizens
        d. Children born to LPR’s temporarily abroad
        e. Persons who received certain permanent forms of discretionary relief from removal
        f. Persons fleeing persecution
        g. Parolees: grant of parole not considered admission (Atty. Gen has discretion to “parole” a noncitizen into the US temporarily, typically today used to enable noncitizens to come to the US temporarily for urgent personal reasons or to allow applicants for admission to avoid detention pending determinations of admissibility)
        h. One shot exemptions: Cubans, nurses to cure shortages, etc.

     2. Subject to Quotas:
        a. Family sponsored immigrants: Consist generally of immigrants who have certain family members in the US not close enough to qualify as immediate (qualifying listed in INA § 203(a)). Formula 480,000 minus immediate
relatives who were admitted previous year, plus employment based not used last year, and a ceiling of 226,000.
b. Employment based immigrants: include those with certain occupational skills, certain investors, and miscellaneous others (INA § 203(b)). Formula 140,000 plus any family sponsored visas available last year but not used
c. Diversity immigrants: those who are admitted b/c they hail from countries or regions from which the US has received relatively little immigration in recent years (INA §203(c)). Ceiling is 55,000.
d. Country limits, generally combined numbers of family-sponsored and employment based immigrants cannot exceed 7% of the combined worldwide limits for family-sponsored and employment based immigrants. (Colony of foreign country – number is 2%, INA § 202(a)(2)).

B. Preference Categories and Sub

1. Family sponsored subdivided into four “preference categories” found in INA §203(a), which serve two purposes – describe different groups of people who qualify as family-sponsored immigrants and set annual numerical sub-ceilings for each of these four groups.
   a. First: unmarried sons and daughters of US citizens (under 21) (23,400 plus visas unused by Fourth preference)
   b. Second: spouses and the unmarried sons and daughters of LPR’s (114,200 plus any visas unused First preference, plus amount total world-wide family sponsored ceiling exceeds 226,000)
      (1) 2a: consist of spouses and “children” of LPR (under 21).
      At least 77% of worldwide second preference visas set aside for 2a, 75% of the 2a exempted from country limits.
      (2) 2b: all other Second preference applicants (over 21 unmarried sons and daughters of LPR’s)
   c. Third: the married sons and daughters of US citizens (23,400 plus any visas unused by First and Second preference)
   d. Fourth: siblings of over age 21 US citizens (65,000 plus any unused by First, Second, and Third preferences)

2. Employment based Immigrants. INA §203(b)
   a. First: “priority workers,” includes workers with “extraordinary abilities in the sciences, arts, education, business, or athletics;” “outstanding professors and researchers;” and certain “multinational executives and managers” Annual receive 28.6% of all Employment based visas, plus any visas that the Fourth and Fifth unused.
   b. Second: “members of professions holding advanced degrees (graduate)” and “aliens of exceptional ability.” 28.6%, plus any visas unused by First preference
   c. Third: “skilled workers, professionals (w/out advanced degrees), other workers (10k limit). 28.6% plus any unused of First and Second
d. Fourth: “special immigrants” including religious workers, certain long-term foreign employees who are not exempt from the quota. 7.1%.

e. Fifth: “Employment creation” have to invest at least $1 million in enterprises that employ at least 10 Americans, subject to certain future conditions, receive 7.1%.

3. INA §203(d): a spouse or child who is “accompanying, or following to join” an immigrant who is within any of the three broad preference categories – family, employment, or diversity, is entitled to the same preference and status and to the same place in line as the principal immigrant, but cannot use §203(d) for an immediate relative. (considered accompanying until 6 months after the issuance of the principal immigrants visa). Marriage must take place before admission (6 month after language is for accompanying).

C. Selecting Individual Applicants

1. Clock starts once you filed the first relevant document, this is called the “priority date.”
2. Rollover to next year once your country limit is filled up.
3. Proration within years according to need between different categories for oversubscribed countries, adjustments are made to account for the fact that most of the 2a’s are exempt from the per country limitations. INA § 202(e)(1).

Class 5. Immigration Categories: Family: the Basics; Spouses (including marriage fraud).

A. Family Immigration
1. Basics
   a. INA § 201(b)(2) exempts from quotas “immediate relatives” and children born to LPR’s temporarily abroad
   b. INA § 203(a) bestows special preferences on certain immigrants with slightly less compelling family relationships to US citizens or LPR’s
   c. INA § 203(d) gives preferences to spouses and children accompanying or following to join most class of immigrants. However, there is no provision for spouse following to join a citizen in 203(d).
2. US gov. publishes VISA Bulletin to help gauge waiting list by priority date, but only tells how long people now receiving visas had to wait, crude estimates
3. INS regulations provide that, upon most changes in the status of either the petitioner or the beneficiary (including change in age, marital status, or the US petitioner’s naturalization), the application is automatically treated under whatever category the new circumstances dictate.

---

1 For example, if in a particular year the worldwide family sponsored ceiling turns out to be twice as great as the world wide employment based ceiling, then within a particular oversubscribed country family sponsored applicants will receive twice as many visas as employment based applicants do.
4. Current legislation is considering legislation that would treat the son or daughter as if she is still under age 21 even after reaching age to avoid losing favored status. Passed as Child Status Protection Act: If only thing preventing you from qualifying from status is delayed process of paperwork, treated as same status – processing time not counted against you, but if it is just normal delay – tough luck.

B. Fraudulent Marriages:
1. Marriage can confer immediate relative or family sponsored second preference status, or make the person a spouse “accompanying or following to join” a preference immigrant
2. Test for determining factually genuine marriage, is at the inception, whether parties intended to establish a life together. *Rodriguez v. INS* (1st Cir. 2000).
   (a) Same Sex marriage: not going to work, HI in 1994 said state could not deny marriage license of people of same sex. Defense of Marriage Act passed in reaction to this, No state needs to give credit to marriage obtained in any other state an other provisions if same sex, questionable whether this passes *full faith and credit* Constitutional muster.
   (b) In any federal provision where spouse is mentioned: effect is 1 man and 1 woman.
3. Sham marriages: two types
   (a) bilateral: both spouses marry solely to facilitate immigration (most common).
   (b) Unilateral: feelings deceive other spouse into marriage
4. INS had crack study come out that said that 30% of immigration marriages were sham marriage (actually it was suspected that 30% were sham, and study was developed for budgetary needs to assess INS workload)
5. As a result, Immigration Marriage Fraud Amendments of 1986 (IMFA) passed.
   (a) Section 2(a) added new section to INA § 216 introducing the concept of conditional permanent residence --- whenever a noncitizen receives LPR status as an immediate relative, as a family-sponsored second preference immigrant, or as a fiancé of a US citizen, by virtue of a marriage that is less than two years old, the resulting residence subject to certain conditions:
   (b) If at any time during first 2 years Atty. Gen. finds that marriage was entered into for procuring immigrant status or was judicially annulled or terminated (other than by death) or that a fee (other than usual atty. Fee) was given for filing petition, Atty. Gen. must terminate permanent resident status. INA § 216(b)(1)
   (c) Second: conditional residence and his/her spouse have affirmative duty to jointly petition the INS for removal of the condition and to appear at an INS interview in connection with that petition. INA § 216(c).
(1) Petition for meeting two years after marriage must be filed 90 days before 2 year time limit expires, one way to get around, get married outside of the US for two years, then come in, no longer have to meet requirement. Can also get extension of 90 day time.

(2) Alien spouse includes fiancés of US citizen, immediate relatives as spouse of US citizen, spouse of LPR, but does not include accompanying or following to join spouse.

(3) Waivers authorized in some circumstances: extreme hardship (INA § 216(c)(4)(A), entered into marriage in good faith, but terminated due to “extreme cruelty”

(4) Certain restrictions on spouse who terminate one marriage and then marry again. INA § 204(a)(20.

(5) Can also get paroled by Atty. Gen. under INA § 212(d)(5): does not count as admission, but person allowed in for highly humanitarian reasons.

6. Section 5 of IMFA made marriage entered into while spouse was in removal proceeding subject to requirement that spouse live outside US for two years, later overturned, weird divorce outcomes, divorce only valid under this new provision if actual hostility, no good if entered into to stay together, public backlash. Now Congress permits affected noncitizens to avoid two year foreign residence requirement by proving the genuineness of their marriages (and certain other facts) by “clear and convincing evidence. Also, if removed, have to ask for voluntary departure, b/c certain restrictions on reentry if actually removed.


C. Other Family Members

1. “Parents” and “children” of the US citizens are included in the “immediate relative” definition, INA § 201(b)(2)(A)(i), and a “child” who is accompanying or following to join a preference immigrant also receives preference, INA § 203(d); various other immigration provisions refer to “sons and daughters” and “brothers and sisters”

2. Word “child” is defined in INA § 101(b)(1), child must be unmarried under 21, and number of restrictions apply to child born out of wedlock, stepchildren, and adopted children, and definition of child affects classification of person as son or daughter.

   (a) Child is unmarried person, under 21:

   (1) born in wedlock

   (2) a stepchild, whether or not born out of wedlock, provided the child has not reached the age of 18 years at the time of the marriage creating the stepchild

   (3) a child legitimated under the law of the child’s residence or domicile, if such legitimation takes place before 18th birthday and child is in legal custody of legitimating parents
(4) child born out of wedlock, privilege sought by natural mother or father if father has bonafide parent/child relationship with the person
(5) child adopted while under 16 years of age if in the legal custody of and resided with adopting parents for at least two years (natural parents get nothing)

3. *Mourillon*: Court holds doesn’t meet legitimization requirements under Curacao b/c under US law legitimization has to *afford the same status as a child born in wedlock* and country statutes did not do so
   (a) Court also says can’t get step child of stepfather provision, b/c this was pre-Amended stepfather statute
   (b) Court says he can get step-sibling relationship where (1) the marriage which created the step-relationships continues to exist, or (2) where the parties to the marriage have legally separated or the marriage has been terminated by the death or divorce, the step siblings’ relationship can continue if the family relationship is maintained; question of fact. (here the two parents were married when both kids were under 18)
   (c) Step-siblings have to both be children for relationship to attach, if one sibling is over 18, never be child of other parent, sibling relationship will not exist. *Matter of Garner* (BIA 1975)
   (d) If each of the two siblings can identify a time when he or she was the “child” of the common parent, however, the two will be siblings even through there was no time period during which both siblings met the child definition simultaneously.

4. *New Yeng (sp?)*: Equal protection claim brought for distinguishing between fathers and mothers, upheld b/c easier to fake paternity and biological fact that mothers and children bond is closer. (Now bonafide relationship standard for father).

**Class 7. Immigrant Categories: Employment-Related Immigration: The First Three Preferences (including labor certification).**

A. Employment Based Immigration
   1. Immigration Act of 1990
      (a) More than doubled overall ceiling on employment-based immigrants, expanded number of qualifying categories, assigned higher priority to professional and other highly skilled workers (reducing admission of unskilled)
   2. In 2000, virtually exempted employment-based immigrants from per country limits
      (a) First three categories, represent skills that Congress believes are needed in US, each gets approximately 40k visas plus unused 4 & 5, Fourth is employment based only in sense that somehow elate to past or present
work, long term gov employees and embassy workers, etc, Fifth
expected to create jobs for US

B. First Three Preferences: Superstars, Stars, and Others
1. General Eligibility Requirements:
   (a) Clear pecking order
   (b) First preference: superstars, includes immigrants with “extraordinary
ability in arts, sciences, education, business, or athletics which has been
demonstrated by national or international acclaim” and professors and
researches who are outstanding, and multinational executives
   (1) Extraordinary ability: a level of expertise indicated that the individual
is one of that small percentage who have risen to the very top of the
field of endeavor
   (2) Major league athletes sometimes apply, have to be pretty good, not
best thorough
   (c) Second preference: members of professions holding advanced degrees or
their equivalent, and immigrants with exceptional ability in the sciences,
arts or business. Exceptional vs. Extraordinary, does not expressly
include education or athletics, but INS interprets arts to include athletics
   (1) Second preference requires that applicant demonstrate a job offer from
an American employer. INA § 203(b)(2)(A)
   (2) And obtain a “labor certification” from the Department of Labor. INA
§ 203(a)(5)(A,C), generally requiring that able, willing, and qualified
American workers are not available and that the applicants
employment will not adversely affect the wages and working
conditions of similarly employed US workers
   (3) INS has discretion to waive the job offer requirement in the national
interest (INS has determined that this waiver also waives labor
certification requirement).
   (4) Matter of NY State Dept. of Trans. (NYSDOT) restricted national
interest waivers when INS held that it is not enough that the applicant
has a particular level of training or education: applicant must show (1)
that the area of employment is one of substantial intrinsic merit; (2)
that the person’s employment will benefit the national, not just the
local area; and (3) that the particular applicant will serve the national
interest to a substantially greater degree than would an available US
worker having the same minimum qualifications.
   (d) Third preference: Three sub prongs: immigrants capable of performing
 certain “skilled labor” for which qualified US workers are not available;
immigrants who have baccalaureate degrees and are members of the
professions; and “other workers” who are capable of performing
unskilled labor for which qualified US workers are not available
   (1) labor certification required, but NO provision for national interest
waivers, and NO more than 10,000 of the third preference visas may
be awarded to “other workers” spawning backlogs in maids and other
household workers.
2. Labor Certification:
   a. INA requires labor certification for those who apply under the Second and Third employment based preferences. INA § 212(a)(5)(D) (national interest waivers are sometimes granted for second preferences).
   b. Precise statutory criteria for labor certification, are designed to assure that the immigrant’s employment will neither displace nor otherwise disadvantage American workers. See INA § 212(a)(5)(A).
   c. The Labor Department also publishes two “schedules” one list occupations that are “pre-certified” for labor certification (physical therapists, prof. nurses, and immigrants of exceptional ability in arts and sciences – not performing) and the other lists occupations that will not meet statutory criteria for labor certification (laborers, parking lot attendants, janitors, nurses aides, sales clerks, truck drivers, etc.)
   d. If not listed on either schedule, submit application to state employment service, making various findings, then goes to Dept. of Labor, adjudicated by certifying officer (CO). Employer must document unsuccessful attempts to recruit American workers, notify employee bargaining represented (or employees), and they can also submit documentary evidence.
   e. If CO finds applications are met – labor certification is granted, otherwise “Notice of Findings” is issued explaining problem and granting 35 days to submit documentary evidence or written argument to cure the defeat.
   f. Some immigrants also use adjustment of status for lawful temporary workers (if applicants have been waiting more than 180 days, free to change jobs in similar or same occupational classification w/out need for INS or DOL approval.
   g. Board of Alien Labor Certification Appeals in Washington DC – 3 member panel, sometimes en banc, sometimes uses own decisions as precedent.

4. Marion Graham: Labor certification denied for live in housekeeper required to watch kids, answer phones (screen calls); etc.
   a. Under § 212(a)(14) an alien seeking to enter the US for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and the Atty. Gen that (1) there are not sufficient workers in the US who are able willing, qualified, and available at the time of the application for visas and admission into the US and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of US workers similarly employed.
   b. 20 CFR Part 656 require that employer document that the job opportunity has been and is being described without unduly restrictive; (1) other than those normally required for job in the US; exceed requirements listed in the Dictionary of Occupational Titles; (3) include a foreign language; (4) involve a combination of duties or (5) require the worker to live on employer’s premises – presumptively unduly restrictive – employer has to prove business necessity.
c. To demonstrate business necessity, employer must demonstrate requirement is essential to perform, in a reasonable manner, the job duties described by employers, case-by-case basis; are there cost effective alternatives

5. *Information Industries* test for Business necessity: To establish a business necessity an employer must demonstrate (1) that the job requirements bear a reasonable relationship to the occupation in the context of the employer’s business and (2) that the requirements are essential to perform, in a reasonable manner, the job duties as described by the employer.

6. Board examines foreign language cases closely. In *Matter of Lucky Horse Fashion* Board held that foreign language not reasonably related to the occupation of sewing machine repair (even if entire workforce was Chinese and only 10% spoke English); if foreign language requirements to easily met, then little incentive exists to hire American workers

7. Combining two functions: *Matter of Robert L. Lippert Theaters*: wanted to combine accountant and theatre machine operator. Board ruled the employer must demonstrate that hiring two separate employees would not just be inefficient or costly, but so impractical as to be infeasible.

8. INA § 212(a)(5)(A) requires that the applicant for labor certification demonstrate that no “able, willing, and qualified” workers are available. With only two exceptions (teachers and those w/ exceptional ability in the arts & sciences); employer must ordinarily must hire a minimally qualified American over a more qualified non citizen.

9. Also, discussion on crafting job titles to get people in; Programmer example (mixing systems analyst with accounting) and Muslim tutor (for babysitter). Note: Dictionary of Occupational Titles is check on creative classification, b/c may have to prove business necessity if to creative with job description.


A. Fourth Preference: Certain “Special Immigrants”
   1. INA § 203(b)(4) generally not aimed at redressing labor shortages, but serve a variety of miscellaneous functions, mostly concerned with the special circumstances of the people they encompass

B. The Fifth Preference: Immigrant Investors:
   1. Added with Immigration Act of 1990 (previously nonimmigrant investor could enter under INA § 101(a)(15)(E)(ii) and there was also a immigrant provision that made immigrants investing certain amount deemed not to be entering, but evaporated in 1978)
2. INA § 203(b)(5). Approximately 10,000 visas per year reserved for immigrants (and their spouses and children accompanying or following to join, see INA § 203(d)) who establish a new commercial enterprise in the US, invest at least $1,000,000, and employ at least 10 Americans

3. INA § 216A empowers the Attorney General to terminate the immigrant investor’s status within two years upon finding that the “establishment of the commercial enterprise was intended solely as a means of evading the immigrations laws” or that the various requirements of the Fifth preference status (commercial enterprise, minimum investment, etc) are not being maintained.

4. Also affirmative requirement similar to the marriage clause, that during 90 day period preceding 2 year anniversary, must petition for removal of conditions.

5. Investors need not pay the entire minimum amount, need only be “actively in the process of investing” that amount. INA § 203(a)(5)(A)(ii)

6. Practically not really used so much, only a thousand to a few hundred each year, b/c Australia and Canada have lower capital requirements and less restrictions.

C. Diversity Immigrants:

1. 1921 – National Quota system: quota for immigrants from any given country was a fixed percentage of the number of Americans who could trace their ancestries to that country

2. 1965 repealed, per country limitations, instructed several different programs

3. 1990 AA-1 program,
   a. nationals that were “adversely affected by the abolition of national origins quota system: allotted 40,000 vistas, lottery, except 40% (16,000) allotted to country received the greatest number of NP-5 (Ireland)
   b. 50,000 permanent diversity program, elaborate formula laid out in INA § 203(c)

      1. Each year Atty. Gen figures out number from given state who became LPR’s as family related (immediate or family sponsored), any that exceeds 50k classified as “high admission state,” every other state – “low admission state”
      2. All of the 50k allotted to low admission states
      3. Who gets these 50k, divided into region, then reclassified, high admissions and low admissions (high admission if natives accounted for more than 1/6 of the total LPR grants of the preceding 5 year period, every other region is “low admission”)
      4. Low admission regions together receive percentage of last years last 5 year high-admission groups, high admission gets whatever left over
      5. Within low admission groups, visas allocated among different regions in proportion to population of low admission states
      6. Individuals selected on lottery system. INA § 203(e), with 2 qualifications: individual must meet requisite education level or work experience, and no more than 7% of 50k visas (3,500) can go to navies of any single state in fiscal year
      7. Europe does the best, then Africa
D. Essays on Immigration challenge reader to question whether diversity system is fair
   1. Includes open borders argument

Class 9. Impact of Immigration: Race, Culture, and Language; Politics of Immigration; Immigrants, Self-Identity and Home.

A. Immigration, Race, Culture and Language
   1. Do we want multicultural society (what does this mean), do we value assimilation, etc.

B. Brimelow Essay: Alien Nation – Common Sense About America’s Immigration Disaster:
   1. Questions why he want to have new policy that doesn’t focus entirely on national origin (i.e. why do we want to change the makeup of society)
   2. Multicultural societies fail – USSR, Yugoslavia, Pakistan, Malaysia, etc.
   3. Wants one language
   4. If there’s an American Idea, what is it?

C. Perea Essay: Am I an American or Not?
   1. Americanization has less value for immigrants
   2. If expect people to assimilate, remember it’s two way street, act out the ideals you expect them to embrace, mutual and reciprocal process

D. Notes on English only movement, many laws struck down by appellate courts

E. Grunwald Essay: Home is Where you are Happy: Things are tough for immigrants, have a tough road to ahead

F. Esperana: Newcomes & Nativism: A Human Rights Model for the 21st Century:
   Recounts NY dining experience, where she feels like a foreigner b/c of skin color, restaurant owner not treated as foreigner even though she is one, b/c of skin color.

G. Olivas: Grandfather’s Stories: Mexican soldier not allowed to eat, even though going to fight for freedom in WWII, three verities: political and personal loyalties are paramount, children should work hard and respect elders, and people should conduct their lives with honor.

H. Saito: Alien and Non-Alien Alike: Asians have it tough

I. Romero: Law teacher insulted while walking with interracial wife in PA

Class 10. General; Treaty Traders and Investors; Temporary Workers; Students; Exchange Visitors.
A. Nonimmigrant Priorities:
   1. Noncitizens seeking admission are presumed to be immigrants; and therefore subject to the higher standards of immigrant selection; to rebut that presumption they must show they qualify as nonimmigrants. INA § 214(b), and fit within one of the nonimmigrant categories laid out in section 101(a)(15).

B. Statutory Interpretation:
   1. Literal Plain Meaning Rule: focuses on the literal language of the statue
   2. Social Purpose Rule: seek out the purpose of the legislation and adopts whichever interpretation will best advance those purposes
   3. Golden Rule (intermediate approach): give ordinary meaning unless doing so would produce an absurd result.

C. Treaty Traders and Investors
   1. E-1 status treaty traders, E-2 status treaty investors
   2. Person must be entitled to enter the US under and in pursuance of the provisions of a treaty
   3. Normally admitted for two years initially, with unlimited possible two year extensions. 8 C.F.R. § 214.2(e)(19,20)(2001)
   4. Statutes and regs do not expressly require an intent to retain one’s foreign residence, but both INS and State Dept. regs, require an intent to depart upon termination of E-status

D. Temporary Workers
   1. Three categories: H-1B’s, O’s, and P’s
   2. INA §101(a)(15)(H)(i)(b), H1-B category is principal vehicle for the admission of temporary professional workers (does not refer to professionals), requires that person be in a “specialty occupation”
      (a) specialty occupation – requires “theoretical and practical application of a body of highly specialized knowledge, (in US requires at least Bachelors degree or equivalent). INA § 214(i)
      (b) H1-B must be coming “temporarily to the US,” may be admitted for up to 6 years. INA § 214(g)(4)
      (c) Congress in 1990 expressly declared that a noncitizen’s seeking of permanent resident status is not “evidence of an intention to abandon a foreign residence for obtaining” an H-1B visa (or an L-visa).
      (d) Agricultural workers, athletes, and entertainers need H-1A, O, or P
      (e) H-1B employer must file “labor condition application” (LCA) with Dept. Of Labor, attesting to (i) paying at least prevailing wage level in the area of employment or the actual wage level at the place of employment, whichever is greater, (ii) that the working conditions of similarly employed workers will not be adversely affected; (iii) that there is not a strike or lockout; and (iv) that the employer has notified its existing employees of the filing
      (f) Caps increased as part of American Competitiveness and Workforce Improvement Act of 1998, increased again later, but not problem after
technology bust in 2000 ($1000 app fee for employers goes to training US workers); Portability provision added making it easier for H1-B’s to change jobs after arrival. INA § 214(m)

3. O Category covers athletes, entertainers, persons in other arts, the sciences, education, and business.
   (a) Must have extraordinary ability, demonstrated by sustained national or international acclaim (same standard used to judge immigrants under the employment-based first preference)
   (b) O category also covers certain family members of either the principal or the support staff.
   (c) Initial admission up to 3 years, with possible 1 year extension

4. P category covers internationally recognized (but not necessarily “extraordinary”) athletes, and members of internationally recognized entertainment groups, other artists (P-2) who provide culturally unique
   (a) P-1 individual athletes may be admitted up to 5 years initially, and extended for 5 years, so long as not to extend 10 years
   (b) Other P aliens, initial admissions is for 1 year, and extensions are in 1 year increments.

5. O’s and P’s not numerically limited.

6. H2 (a) (perform agricultural labor or services of a temporary or seasonal nature, or (b) to perform other temporary service or labor if unemployed persons cable of performing such services cannot be found
   (a) Cannot have intention of abandoning residence, must be coming temporary
   (b) Employer must obtain Dept. of Labor certification that sufficient American workers cannot be found and that the nonimmigrants employment will not depress the wages or working conditions of American Workers
   (c) Dept of Labor annually publishes “adverse effect wage rates” AEWR’s that vary from state to state – minimum wages that must be paid to H2A farm workers.
   (d) H2b’s initially admitted up to 1 year, one year extensions, total stay up to 3 years
   (e) Granting of temporary labor certification does not bind the INS, individual may overcome Labor Dept’s denial of labor certification by presenting countervailing evidence to INS.

E. Educational Categories

1. Students: §101(a)(15)(F), F-1 --- IIRIRA § 641 requires the Atty. General, in consultation with the Sec. of State & Sec. of Ed. To collect individualized information from colleges and universities on every foreign student they enroll.
   (a) Foreign students admitted for “duration of status” (can take less than full load when there are initial difficulties with English, American teaching methods, or improper course placements).
   (1) “Designated school official” estimates a reasonable “completion date” for the particular and may add a grace period of up to one year.
(2) Extensions will be granted only upon showing of “compelling academic or medical reason” such as change of major or research topics, unexpected research problem, or documented illness.

(3) University must inform INS of extension

(4) F-1 must agree to depart US at expiration of authorized period of extension

(5) F-1 must demonstrate sufficient funds, also stringent restrictions on employment (only 20 hours on campus as part of educational program during school session, and 40 hrs. during vacation); Off campus only allowed when unforeseen circumstances make it necessary (Also McDonald’s program – can work 20 hours off campus at McDonalds); can also engage in some practical training

2. Exchange Visitors: J-1 (spouses & kids J-2)
   (1) more liberal employment rules than F-1
   (2) Many of exchange visitor programs provide fellowships or other funding
   (3) J-students in degree may remain as long as pursing full course of study, and maintaining satisfactory advancement.
   (4) Studies for J- must be part of a specific program approved in advance by the Dept. of State, and the applicant must be sponsored by a US gov. agency, or a recognized international agency, or one of the various private agencies.
   (5) J-entrant subject to 212(e)

3. INA § 212(e): No person admitted under J status or acquiring status after admission (i) who was financed by US gov or agency, (ii) whose country has been designed by US Information Agency as needing services, (iii) who came for graduate medical training, shall be eligible to apply for immigrant visa or permanent residence until person lives outside US for 2 years.
   (1) Hardship waiver if impose hardship on alien spouses or child (if such spouse or child is a citizen of US or LPR), or returning subject to political persecution, or public interest
   (2) Can also get no-objection waiver from country

4. Silverman v. Rogers (1st Cir. 1970) Alien got waiver recommendation from INS for hardship, requested Sec. grant waiver, Sec. of State recommended waiver not be granted, INS didn’t grant waiver.
   (1) Case centered on language of § 212(e)
   (2) Provided further, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested US Gov. Agency, or of the Commissioner of INS after he has determined that departure from the US would impose exceptional hardship upon the alien’s spouse or child …. 
   (3) Court held that while there are two possible interpretations (1) Need favorable recommendation of Sec. of state pursuant to the
request of government agency or INS recommendation… or (2) Need favorable recommendation of Secretary of State pursuant to the request of government agency or INS; in light of legislative history intent was to make statue narrower, requiring more checks and balances

(4) Regulations had consistently given Sec. decisive voice in vetos, and Congress hasn’t changed statue in light of these regs.

(5) Legomsky doesn’t like this: (Insert notes)

Class 11. Nonimmigrants: Tourists; Fiancés and Fiancées; Intent to Remain Permanently; Change of Status.

A. Tourists:
   1. INA § 101(a)(15)(B) authorizes the admission of certain nonimmigrants who want to visit the US either for business or for pleasure (B1 & B2)
      a. Except for those who enter under a special via waiver program, see INA § 217, the authorized period of initial admission ranges from six months to one year, and extensions may be granted in six months increments
      b. Typically when B-2 are denied, consular officer thinks trying to stay

   2. Matter of Healy and Goodchild:
      a. Issue: Whether an alien seeking admission to the US for the primary purpose of attending an educational institution that has not been approved by the Atty. Gen. for attendance, may properly be admitted as a B nonimmigrant visitor
      b. No, it is apparent form the explicit language of the statue that B-2 was not intended to be a “catch-all” classification available to all who wish to come to the US temporarily for whatever purpose.

   3. B-2’s can not get employment, but all other nonimmigrant visa categories either specifically contemplate employment or at least give the INS discretion to authorize employment in individual cases.

B. Few other nonimmigrant categories
   1. INA § 101(a)(15)(T) – victims of “a severe form of trafficking in persons” who are physically present in the US or port of entry as a result of that trafficking (if over age of 15 must help police) and must also demonstrate extreme hardship involving unusual and severe harm upon removal, also can grant T status to family members accompanying or following to join.

   2. U visas – violence against women: “suffered substantial physical or mental abuse” as a result of any several enumerated act of violence, must help law enforcement, family can get if extreme hardship or investigation would be harmed

   3. V for long divided families
C. General Nonimmigrant problems
   1. Intent to remain permanently
      a. Most nonimmigrant categories require enter “temporarily” (B, H, J, L) or that person have a foreign residence with no intention of abandoning (B, F, J) or both
      b. Preconceived intent does not preclude genuine change of mind later
      c. Also can have dual intent: enter the US with alternative plans in mind, “desire to remain in the country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful immigrant status.” *Matter of Hosseinpour*

2. Ethical issues can arise
   a. Cannot assist client in breaking law
   b. Cannot breach confidence unless to prevent crime that result in death or substantial bodily harm

3. Change of Nonimmigrant status:
   a. INA §245 certain nonimmigrants (among others) can become permanent residents without leaving the US
   b. INA § 248 certain nonimmigrants can switch to different nonimmigrant categories without leaving the country – adjusts to permanent resident status under § 245, but change to another nonimmigrant status under § 248
   c. INA § 248: exemption for changing classification for
      (1) an alien classified as a nonimmigrant under subparagraph (C), (D), (K), or (S)
      (2) an alien classified as a nonimmigrant under subparagraph (J) who came to the US or acquired such classification in order to receive graduate medical education or training
      (3) an alien classified as a nonimmigrant under subparagraph (J) who is subject to the two year foreign residence requirement of § 212(e) and has not received a waiver thereof, unless such alien applies to have the alien’s classification changed from (J) to (A) or (G) and
      (4) an alien admitted as a nonimmigrant visitor without a visa under § 212(l)

Class 12. Exclusion Grounds: Historical Background; General; Grounds Related to Immigration Control.

A. Statutes
   1. INA § 212(a)(6). Illegal entrants and immigration violators.
      d. Prohibits: Aliens who: (1) are present without admission or parole (exception for battered women); (2) fail to attend their removal proceeding (no show provision – banned for 5 years); (3) make misrepresentation (willfully) when seeks to procure or has procured visa
or other documentation or claiming citizenship (oral or written)(exception); (4) are stowaways, smugglers, subject to civil penalty, student visa abusers.

4. INA § 212(a)(7). Documentation requirements.
   a. Aliens are inadmissible who (1) do not have documentation (immigrants); do not have valid passport (6 months after expiration of initial admission ; waivers authorized.

5. INA § 212(a)(9). Aliens previously removed.
   a. Aliens who are ordered removed and seek readmission w/in 5 years (20 years if removed twice or aggravated felony), inadmissible (ARRIVE); other aliens otherwise ordered removed or departed while order of removal was outstanding who seek admission within 10 years (20 years if removed twice or forever aggravated felony) inadmissible (REMOVED INSIDE).
   b. Debate whether holding period or amount of time that elapses between “notice to appear” and actual proceeding constitutes unlawful presence. INS says yes, but the Board of Immigration appeals says no. Still awaiting final rules.
   d. Aliens unlawfully present in the US for more than 180 days, but less than year, and voluntarily departed, and seeks admission within 3 years, or has been unlawfully present in the US for more than year, and seeks readmission within 10 years is inadmissible. Unlawfully present if present after authorized stay ends. (Have to leave before proceedings commenced)
   e. Exceptions for minors (under 18), asylees (bonafide application pending), family unit (§301), or battered women. Tolling for good cause for alien (i) lawfully admitted into US, (ii) nonfrivolous application filed for change of status or extension, and (iii) has not been employed without authorization, tolled during pendency of application, not to exceed 120 days. INS in 2000 issued memo that designates the entire period during which a timely filed, nonfrivolous application for either extension stay or change of status is pending as “a period f stay authorized by atty. gen. for purposes of 212(a)(9).
   f. Atty general can grant waiver for spouse or daughter upon showing of extreme hardship to the citizen or LPR spouse or parent of such alien
   g. Alien who is unlawfully present after previous violations for an aggregate period of more than 1 year, is inadmissible (except shall not apply to alien seeking admission more than 10 years if consented by atty. gen)

6. INA § 212(d)(3). Atty General can approve after recommendation by Sec. State or consular officer that alien be admitted temporarily despite inadmissibility, and one who is in possession f appropriate documents or is granted waiver and
seeking admission may be admitted into US as temporary non immigrant. Does not apply to immigrants not admissible for espionage/sabotage, conduct any other unlawful activity, other activities to overthrow government, adverse foreign policy considerations, and participants in Nazi persecutions or genocide

7. INA § 212(d)(11) Atty general can waive for humanitarian purposes smugglers clause if otherwise admissible as returning resident if helped smuggle spouse, parent, son, or daughter over the border

8. INA § 212(d)(12) Atty general can waive civil penalty prohibition (for document fraud) for purposes of unity and humanitarian purposes, for helping to get kids across, if alien is otherwise lawfully admitted for permanent residence and was not under order to remove. No judicial review.

9. INA § 212(i) Atty general can waive application of misrepresentation clause for spouse, son, or daughter of US citizen or LPR if refusal would result in extreme hardship to citizen or LPR or parent. No review.

10. Also remember important waiver provision: § 212(d)(3) waives almost every ground for NONimmigrants: except sabotage grounds, foreign policy, nazi participant

Class 13. Exclusion Grounds: Political Grounds; Criminal Grounds (start)

A. Political and National Security Grounds:

1. § 212(a)(3):
   (a) reasonable ground to believe engage in espionage, sabotage, or to violate any law prohibiting export of US goods, technology or sensitive information, any other unlawful activity (presumably within the same group as the first violations0; any activity directed at overthrowing US gov. by violence;
   (b) Terrorists: Broad definition waiver exists b/c definition is so broad - § 212(d)(3);
   (c) Foreign policy: reasonable ground to believe would have potentially serious adverse foreign policy consequences
      (1) exemption for official of foreign gov or candidate for office during period immediately preceding election, cannot be excluded solely b/c of past/ present beliefs;
      (2) other propel not excludable b/c of past/current beliefs, if such beliefs/statements lawful in US, unless Sec. personally determines.
   (d) Membership of totalitarian party; except if involuntarily or solely under age of 16 by operation of law, for obtaining employment, or other necessary purposes
(1) does not apply to past membership if establish (i) membership is terminated 2 years before date of such application or 5 years before application if affiliated with controlling dictatorship, (ii) not threat to national security
(2) Att'y. General can waive in case of immigrant who is the parent, spouse, son or daughter, brother, or sister of US citizen; or spouse, son, or daughter of LPR (narrower)
(e) Participants in Nazi persecutions or genocide

B. Criminal Grounds:
1. § 212(a)(2):
   (a) Aliens who admit to having committed or convicted of committing (I) crime of moral turpitude or attempt to commit; (II) violation of controlled substance statute is inadmissible
       (1) Exception; Clause (I) not apply to aliens who commit one crime if (I) crime committed by alien when alien was under 18 and released from confinement more than 5 years before date of application for visa; or (II) maximum penalty did not exceed imprisonment for one year, and if convicted was not sentenced to a term in excess of 6 months;
   (b) Any alien convicted of two or more offenses, which aggregate sentences more than 5 years, inadmissible
   (c) Controlled substance traffickers – inadmissible or son or daughter if financial benefit and knew
   (d) Prostitution, can’t come in for 10 years
   (e) Assert immunity from prosecution, left, inadmissible
   (f) Gov. official violate religious freedom
   (g) Trafficking of persons
   (h) Money laundering

2. § 212(h): Att'y. Gen. can waive (A)(i)(I), (B), (D), (E) of (a)(2) and (A)(i)(II) if it involves simple possession of 30 grams or less of MJ, if
   (a) (i) In the case of an immigrant it is established that inadmissible only under subparagraph (D) of subsection OR activities occurred more than 15 years before date of application for a visa, admission, or adjustment; (ii) Admission not contrary to public interest; (iii) Alien has been rehabilitated
   (b) IN case of immigrant who is the spouse, parent, son, or daughter of US citizen or LPR if result in extreme hardship to US citizen or LPR spouse, parent, son or daughter of alien
   (c) Alien qualifies for classification under clause (iii) or (iv) of section 204(a)(i)(A) or classification under clause (ii) or (iii) of section 204(a)(1)(B) and attorney general consent
   (d) NO waiver shall be granted in case of alien convicted of certain murderous acts or conspiracy and NO waiver granted in case of alien who has been previously been admitted for LPR if either since the date of such admission the alien has been convicted of felony OR the alien
Class 14: Exclusion Grounds: Criminal (finish); Economic; Health-Related; Moral.

A. Economic Grounds
1. §212(a)(5)(A) (labor certification)
2. §212(a)(4) (public charge); factors: age, health, family status, assets, resources, financial status, education and skills; also can consider affidavits of support
   a. State Department defines public charge to mean: primarily dependent on the government for subsistence as demonstrated by either the receipt of public cash assistance for income maintenance of institutionalization for long-term care at government expense.
   b. §423 of Welfare Act put severe restrictions of affidavits of support
      (1) must be legally binding for 40 qualifying quarters
      (2) sponsor must be US citizen or LPR over the age of 18, domiciled in the US and must be the person who is petitioning for the immigrants admission
      (3) co-sponsoring is possible
      (4) sponsors income must be at least 125% of the poverty level, for immediate relative and family sponsored petitions, affidavits of support are mandatory. §212(a)(4)(C)
      (5) Atty. Gen. has discretion to waive the public charge ground upon the giving of what is usually called a “public charge” bond,” where person furnishes a bond and promises to indemnify the US gov.

B. Public Health and Morals
1. §212(a)(1) (various physical and mental disorders)
2. Drug Addicts and Drug abusers are specifically inadmissible.
3. Have to get vaccinations
4. Physical or mental disorder has to pose a specified threat
5. AIDS- cannot come in (HIV), and other alien who are determined to have a disease (communicable) of public health significance.
   a. Atty. Gen. has discretion to waive exclusion for spouses and certain other close family members of US citizens or LPRs
6. “Coming to the US to practice polygamy”

Class 15. Admission Procedure: History; General; Visa Petitions.

A. Modern Procedure
1. First hurdle: If seek certain status – have to prove status (i.e. labor certification)
2. Second hurdle: Visa Petition
3. Third hurdle: Getting Visa, have to file application
4. Fourth hurdle: Actual admission – person appears at point of entry and formally applies for admission, INS immigration inspector may reexamine the noncitizen to assure that none of the statutory inadmissibility grounds apply

B. Visa Petitions
1. Employer or family member (in case of family preference) must file visa petition.
2. Certain battered spouses can file their own petition. See INA §204(a)(1) – provision applies to those who have been battered by, or subjected to “extreme cruelty” by, their US citizen or LPR spouses.
   a. Requirements
      (1) Good moral character
      (2) Prior residence in US w/ spouse
      (3) Good faith in entering into the marriage
      (4) Extreme hardship to the petitioner or petitioner’s child.
   b. Problems:
      (1) Nothing in the law exempts the self-petitioner from removal on the ground of presence without admission, can risk removal if petition is denied
      (2) Might be difficult to establish good moral character.
3. Certain employment-based first preference immigrants (those with “extraordinary ability”) may either petition for themselves or have others such as their employees petition for them. INA § 204(a)(1)(6).
4. Numerical priority date is date visa petition was filed – family, for employment filed on date when the request for labor certification was accepted for processing (assuming this is required)
5. INS has discretion to require both petitioner and beneficiary to appear at interview.
6. INS must state reasons for denying petitioner, subject to administrative and judicial review.
7. When INS approves an immigrant visa petition, it forwards the approval to the State Department’s National Visa Center (NVC) in Portsmouth, New Hampshire.
8. For $1000 employment petitioners can jump ahead of the backlog (processed w/in 15 days).

Class 16. Admission Procedure: Unauthorized Practice of Law; Visa Applications; Actual Admission.

A. Florida Bar v. Matus: Florida man was practicing law by assisting aliens in filling out immigration forms and arranging sham marriages
B. INS regulations define practice to include “the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person.” 8 C.F.R. § 1.1(h)(i)(2001).
1. Preparation is defined as the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces printed on Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in INS procedure.

2. *Cortez:* Although the act of recoding a client’s responses to the questions of the form I-140 probably does not require legal skill or knowledge, the act of determining whether the I-130 should be filed at all does.

3. INA § 274C(a)(5) makes it a civil offense, punishable by fines of $250 to $2,000 for first time offenders “to prepare, file, or assist” the filing of any immigration related application or document “with knowledge or reckless disregard of the fact that such application or document was falsely made.”

4. Criminal cod punishable knowing conduct up to 10 years

5. 5 years for “knowing and willfully failing to disclose, conceal or cover up the fact that they have, on the behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an INS application which was false made” INA § 274(e). Falsely made is defined in § 274C(f) as “preparing or providing an application or document, with knowledge or in reckless disregard of the fact that the application or documents contains a false, fictitious, or fraudulent statement or material misrepresentation …”

C. Visa Application:

1. With only few exceptions noncitizens need Visas to enter the US

2. One major exception is Visa waiver program, national of countries with traditionally low rates of visa refusals and fraud abuse may enter US as tourists or business visitors for up to 90 days without having to procure visas.

3. Attorneys not usually present at visa applications

4. No administrative appeal and no judicial review of consular decision denying an application for either an immigrant or nonimmigrant visa…. INA §104(a) charges Secretary of State with the administration and enforcement of all immigration laws “relating to (1) the powers duties and functions of diplomatic and consular officers of the US, except those powers, duties and functions conferred upon consular officers relating to the granting or refusal of visas.

5. Justification for no review: efficiency, expertise of consular officers,

6. H.R. 2567 died, proposed judicial review by review board
   a. Pros: check on discretion, documented problems, board more efficient than federal courts, short time limitations, only applies to limited applicants, confidential info
   b. Cons: consular officers on ground, admin hassle, costly, atty./board not have same expertise, only one is consular officer, clog system, precedent of board impair consular decision.

C. Actual Admission:
1. INS person checks at border, checks lookout lists
2. Immigration officer decides whether the noncitizen is “clearly and beyond a doubt entitled to be admitted.” If so, then the person is admitted; if not, then he or she “shall be detained” for a removal proceeding. INA § 235(b)(2)(A)
3. Attorney general had discretion to permit noncitizens to withdraw their applications for admission and depart immediately. INA § 235(a)(4)
4. Removal proceeding begins with “Notice to Appear”, have 10 days to secure counsel, hearings are recorded, formal rules of evidence does not apply. INA § 291 – Noncitizen bears burden of admissibility.
5. INA § 240(c)(2)(A) provides the standard is “clearly and beyond a doubt entitled to be admitted and is not inadmissible under § 212.” (Question of whether “clearly and beyond… language applies to both admissibility and nonadmissibility)
6. Tough to get atty
7. Can appeal to BIA

D. Expedited Removal
1. 60 minutes reported people let out to roam around
2. Now summary exclusion proceeding. Applies whenever the immigration officer at the border “determines” that an arriving noncitizen is inadmissible under either §212(a)(6)(C)(fraud) or §212(a)(7) (lack of proper documents).
   a. Once the immigration inspector concludes that an arriving noncitizen is inadmissible under either of the two listed grounds, the person is ordered removed without further hearing. INA § 235(b)(1)(A)(i).
   b. There is no administrative appeal, except for returning LPRs, admitted refugees, and people who have already received asylum. INA § 235(b)(1)(C).
   c. No judicial review (same exceptions), “whether the alien is actually inadmissible or entitled to any relief from removal.” INA § 242(e)(5).
   d. Only permissible judicial review of expedited removals is on issues of whether person is a citizen, whether the person was in fact ordered removed, and whether the person comes within one of the above exceptions (LPRs, refugees, and asylees). INA § 242(e)(2).
   e. Expedited removal applies to noncitizens upon arrival, but Attorney Gen. has unreviewable discretion to extend it to noncitizens who are present in the US without having been admitted and who are unable to prove continuous physical presence in the US for the immediately preceding 2 years. INA § 235(b)(1)(A)(iii).
   f. 1999 – 180 day pilot program for extending expedited removal to noncitizens who had been convicted of the criminal offense of entry without inspection, were serving their sentences in any three correctional facilities in TX, and had been present for less than 2 years.
3. Statistics on Summary Proceedings
   a. 99% of expedited removal, only 1% referred to asylum officers of asylum screening, but 88% of those referred found to have produced sufficient evidence to justify a full asylum adjudication
b. Remember that under INA § 212(a)(6)(C)(i) inadmissibility is permanent (fraud), but no exclusion ground for person in past who attempt to enter without sufficient documentation, so categorization is important, 800-89% during three year study were suspected fraud

4. National Security and Foreign Policy
   a. INA § 235(C) sets up a special procedure for cases that present such issues --- “If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under [INA §§212(a)(3)(A)(i or iii), (B), or (C)], the officer or judge shall order the alien removed. INA § 235(c)(1). (covers sabotage, espionage, violent overthrow of gov.; involved in terrorism, and adversely effect foreign policy
   b. Atty. general automatically reviews these removal order, and may remove w/out further hearing if disclosures of “confidential information” would be prejudicial to the public interest..

Class 17. Admission Procedure: Adjustment of Status; Deportability Grounds: History; Theory of Deportation; Current Grounds.

A. Adjustment of Status
   1. Background:
      a. Does it make sense to require the immigrants to leave the US, get an immigrant visa, then come back if he/she meets the substantive requirements for admission as an immigrant
      b. This was required until 1952, when Congress enacted the INA, it included for the first time a provision authorizing certain noncitizens already here to “adjust their status” to that of an LPR without having to leave the country. INA § 245.
   2. INA § 245:
      a. (a) Status adjusted to LPR if (1) alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the US for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed
      b. (b) Atty. general shall record lawful admission for permanent residence and sec. state shall reduce preference visas within the class to which alien is chargeable for current fiscal year.
      c. (c) Not available for: alien crewman, I, J, H, or K who accepts unauthorized employment or failed to maintain continuously lawful status, admitted in transit w/out visa, visitors w/out visa, S nonimmigrant, alien deportable under 237(a)(4)(B), alien seeks adjustment of status under 203(b) and is not a lawful nonimmigrant status, or alien who was employed while unauthorized or who has otherwise violated terms of nonimmigrant visa
      d. (k) An alien who is eligible to receive an immigrant visa under (1),(2),or (3) of section 203(b) (or 101(a)(27)(c) – 203(b)(4) (employment-based
slots) may adjust status pursuant to subsection (a) notwithstanding (c)(2)(7)or(8) if
(1) alien on the date of filing an application for adjustment of status, is present in the US pursuant to a lawful admission
(2) the alien subsequent to the lawful admission has not for an aggregate period of 180 days (A) failed to maintain continually a lawful status, engaged in unauthorized employment; or otherwise violated the terms and conditions of the alien’s admission.

3. Provision of 245:
   a. Immediately available in §245(a) means that the latest Visa Office Bulletin shows either that the particular preference category is current in the applicant’s country or that the person’s priority date has been reached. (not applicable to immediate relatives or other exempt from numerical limitations)
   b. For administrative convenience – INS generally permits the simultaneous submission of the visa petition and the adjustment of status application, provided approval of the visa petition would make the visa immediately available.
   c. No administrative appeal from an INS decision denying an application for adjustment of status, can renew in front of an immigration judge, but might run into § 245(c)(2) problem.
   d. 245(i) has lapsed, but used to exempt certain noncitizens form the disqualifications created by their entries without inspection or by subsection 245(c) (had to pay additional penalty fee of $1000). This provision was a big help to immigrants subject to INA § 212(a)(9)(B)(i)(II), not these folks didn’t have to leave the country, b/c when they did they became inadmissible.
   e. Under certain conditions the INS is permitted to rescind a grant of adjustment of status.

B. Deportability Grounds:
   1. Background:
      a. Removal proceeding beings by INS serving “Notice to Appear,” alleging facts and specifying the statutory deportability (or inadmissibility) grounds that the INS is charging, in much the same way that a criminal indictment or information alleges facts and specific criminal offenses.
      b. Immigration judge presides over the hearing, and determines deportability
      c. Can appeal decision to BIA, and noncitizen can appeal to Ct. of appeals.

   2. Current § 237(a) of INA lays out grounds for removing deportable noncitizens from the US as well as some provisions for waivers of, and exemptions from, those grounds.
A. The Meaning and Significance of “Entry” and “Admission”
   1. Now Admission, not entry determines whether a noncitizen will be justice to the
      inadmissibility or deportability grounds. See INA §2240(e)(2).
   2. Entry is still a crucial concept for some reason --- some of the inadmissibility
      grounds still use the word entry or enter and some use similar terms, and some
      statutory relief provisions retain the word entry
   3. Entry can also make a difference when it comes to procedure
   4. Definition of admission itself refers to entry.
      a. The terms “admission” and “admitted” mean with respect to an alien, the
         lawful entry of the alien into the United States after inspection and
         authorization by an immigration officer. (emphasis added). INA §
         101(a)(13).

B. Rosenberg v. Fleuti (1963): Fleuti, LPR, but went for shopping trip to Mexico for a
   couple of hours. When he returned, he was accused of being “afflicted with psychopathic
   personality,” b/c he was homosexual. Court side stepped this issue by moving to see
   whether Fleuti’s return constituted reentry.
   1. The term “entry” means any coming of an alien into the US from a foreign port or
      place or from an outlying possession, whether voluntarily or otherwise, except
      that an alien having a lawful permanent residence in the US shall not be regarded
      as making an entry in the US for the purposes of immigration laws if the alien
      proves to the satisfaction of the AG that his departure to a foreign port or place to
      an outlying possession was not intended or reasonably to be expected by him…or
      was not voluntary.
   2. Several cases have expanded definition of entry over time, hinging on no intent to
      leave (Di Pasquale v. Karnuth), exigencies of war (Delgadillo v. Carmichael)
   3. Court holds that §101(a)(13) should be read no restrictively, look at six months
      for continuous residence requirement, §101(a)(13) should be read to protect
      resident aliens who are only briefly absent from the country.
   4. §101(a)(13) would be “fortuitous” and “capricious” to hold that alien deported for
      couple hour visits to Mexico, what about one who steps over than right back in,
      want rational policy. Purpose of this section was to ameliorate the severe effects
      of the strict “entry” doctrine.
   5. Court construes the intent exception of §101(a)(13) as requiring an intent to
      depart in a manner which can be regarded as meaningfully interruptive of the
      alien’s permanent residence.
   6. Factor: Length of time, purpose of the visit, do have to procure travel documents”
      Factors to be developed over “gradual process of judicial inclusion and exclusion”
      – but clearly brief casual exclusions not intended as reentry
   7. Justice Clark: vigorous dissent, based on court rewriting of statute

C. Legomsky’s converse problem: INA §101(a)(13) defines “admission” as “lawful entry”
   after inspection and authorization, and then creates an exception; an LPR will not be
   regarded as seeking admission “unless” one of certain things is true – the person has
relinquished permanent residence, or the absence has been greater than 180 days, or the person has committed a crime covered by §212(a)(2), etc. Thus if there has been a lawful entry, and a returning LPR does not fall within any of the listed categories, there will not be a new admission. If one of the listed events apply, does the statute imply that an LPR who has made an entry is regarded as seeking an admission?

1. *Matter of Collado-Munuz*: yes, meet category regarded as seeking admission, and *Fleuti* is irrelevant
2. *Dissent*: Rosenberg said unless does not imply converse, and several district courts adopted suit as well as the Eleventh Circuit. *Richardson v. Reno*;

D. Overview of Deportation Procedure:

1. **Apprehension**: Power to investigation “without a search or arrest warrant” – interrogate any person to believe noncitizen, arrest if believe in violation of immigration laws and likely to escape before arrest, board vessels w/ 100 miles of US territorial waters of train, aircraft, w/in 25 miles, enter private lands --- every immigration officer can enforce. Looser 4th Amendment requirements, must have reasonable suspicion, some actions require probable cause

2. Before Hearing (W/in 48 hours of arrest – 7 days for terrorists), unless INS granted voluntary departure, must decide whether there is prima facie evidence that the arrested alien is in violation of US law, if Yes – Notice to Appear is served
   a. Notice to Appear explains the nature of the proceedings, specifies deportability grounds, recites factual allegations, have to keep gov. apprised of address (if don’t risk abstentia hearing); also starts 10 day waiting period to secrete counsel; INS must also decide whether to detain
   b. Detention mandatory for: aggravated felons, everyone who is inadmissible or deportable on crime related grounds, terrorist grounds, most arriving passengers, individuals awaiting execution of final orders
   c. INS can determine bond amount
   d. No Miranda rights
   e. Have to notify person of right to speak with consulate

3. **Master Calendar hearing** – soon after notice to appear, limited discovery, trial attorney for INS there

4. **Removal Hearing**: exempted form APA, must admit or deny allegations, and can designate country, INS has to prove by clear and convincing evidence that subject is noncitizen, then burden shifts to noncitizen to prove by clear and convincing evidence that he/she lawfully present pursuant to a prior admission, then burden back on INS to show deportability grounds. Ins can always grant additional charges (may get continuance for new charges)

5. **Administrative review**: Appeal ILJ to BIA, 30 days, notice of appeal summarizing grounds, BIA has discretion to hold oral argument, stays execution of decision, BIA normally defers to determination of credibility of ILJ. Can summarily dismiss if appeal lacks substance, sometimes sit en banc
6. Judicial review, must exhaust all administrative remedies, must be filed w/ in 30 days of final removal order

7. Execution of Removal order, can file motion to reopen with new evidence, motion to reconsider, get formal notice (bag and baggage or run letter)

Class 19. Deportability Grounds: Entry Without Inspection; Entry While Inadmissible; Post-Entry Conduct Related to Immigration Control; Crime-Related Grounds (begin).

A. Deportability Grounds Concerned with Immigration Control
   1. Entry without Inspection
      a. Presence in the US w/out admission is ground for inadmissibility, also offense committed for entering without inspection (after prior removal offense can be felony)
      b. INA §237(a)(1)(A) covers “any alien who at the time of entry of adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time.”
      c. Common use is where person entered while inadmissible b/c of fraud
      d. 237(a)(1)(H). The provisions of this paragraph relating to the removal of aliens within the US on the ground that they were inadmissible at the time of admission as aliens, described in §212(a)(6)(C), whether willful or innocent, may, in the discretion of the AG, be waived for any alien who is spouse, parent, son or daughter of citizen or LPR, in possession of immigrant visa (except for §212(a)(5)(A) & 212(a)(7)(A) which were direct result of fraud, is alien who qualifies for classification under 204(a)(1)(A)(iii) & (iv). Waiver also operates to waive grounds of inadmissibly directly resulting from such fraud or misrepresentation. Need favorable exercise of discretion.

B. Post-Entry Conduct Related to Immigration Control:
   1. INA §237(a)(1)(B) “present in the US in violation of this Act or any other law.”
   2. INA §237(a)(1)(E): aiding and abetting people smuggling; doesn’t apply for family reunification, and waiver for family unity in public interest.

C. Crime-Related Deportability Grounds:
   1. Background: Criminal activity can constitute a ground for inadmissibility or a ground for deportability or both; can destroy statutory eligibility for various forms of affirmative relief form removal; determine if person will detained while removal proceedings are pending; make a person ineligible for naturalization; weigh against the favorable exercise of administrative discretion.
   2. Fullerton & Kinigstein:
      a. Three states when INS will be informed that an alien has run afoul of law: when arrested by the police, when prosecuted by DA, when investigated by probation officers. Liaison system
      b. Procedures vary by jurisdiction; INS notification procedures
c. Immigration Act of 1990 §507 created 42 USC §3753(a)(11), under which any state that wants to receive federal drug control grants must agree to furnish the INS free of charge and within 30 days, certified records of the conviction of noncitizen who are convicted of crimes in that state.

3. What is a conviction
   a. Was there ever a conviction: Matter of Ozkok: 32 yr. old Turkish citizen, pleaded guilty to unlawful possession with intent to distribute coke, Ct stayed judgment and placed him on probation for 3 years and ordered community service; INS tried to deport, Turkish citizen said there was no conviction. CT held:
      (1) Don’t want to discriminate against aliens based on criminal procedures of different states.
      (2) Now, person considered convicted if:
         (a) Court has adjudicated him guilty or has entered a former judgment of guilt
         (b) Judge or jury found alien guilty or entered plea of guilty or nolocontendere or has admitted sufficient facts to find guilt; judge has ordered some form of punishment, not limited to incarceration, probation, fine or restitution, or community sanctions; and a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with court order.
      (3) Conviction does not attain sufficient degree of finality until direct appellate review has been exhausted
   b. Erasing a conviction: Withdrawing Guilty Pleas:
      (1) US v. Parrino (2nd Cir): Defendant wanted to withdraw plea of guilty after doing so after lawyer advised him that plea would not subject to him to deportation. Cites R. 32(d) of Fed.R.Crim.P. “reliance on assurance of his counsel” resulting in “manifest injustice”
         (a) Defendant’s surprise as to the severity of the sentence is not enough, especially, when this is just a collateral consequence – deportability
         (b) Court compares with felony, that lose civil rights, or loss of employment, can’t enroll in armed services
         (c) Dissent disagrees with characterization of deportation as collateral, and there is case law to suggest that erroneous legal advice can warrant withdrawal, lawyer was very bad here to not spot immigration issue, how can we say no manifest injustice had occurred.
      (2) People v. Pozo (S.Ct. Col): Same case basically; Court goes with 6th Amendment argument, has to show fell below objective
standard of reasonableness and deficient performance resulted in prejudice to defendant.

(a) Trial court has duty to stratify due process concerns that a plea be made knowingly and with full understanding of the consequences

(b) Assume attorney will provide sufficiently accurate advice to enable the defendant to fully understand and assess the serious legal proceeding in which he was involved.

(c) When defense counsel in a criminal case is aware that his client is an alien, he may reasonable be required to investigate relevant immigration law – not in record whether counsel should have known Pozo was an alien.

(d) Dissent: This is collateral issue and collateral consequence, don’t have right to be apprised on collateral consequence.

c.  *Hill v. Lockhart*: For ineffective assistance of counsel, attorney’s performance must fall below an objective reasonableness standard, and the defendant must be prejudiced as a result.

d. Courts are more likely to find ineffective assistance in cases of affirmative misinformation than in cases where the attorney and the client did not discuss the issue at all.

e. A number of states now have legislation or formal rules of court that require trial judges to advise defendants of possible removal consequences before accepting guilty pleas.

f. Justice Department has issued a regulation specifying that the INS will not be bound by plea agreements unless government agent who makes the promise has first secured a written authorization from the INS. 28 C.F.R. §.197(2001).

4. Expungements: Sometimes possible to expunge criminal convictions

a. INA § 101(a)(48)(A)

b. *Lujan-Armendariz*: 9th Cir: expungement under a statute statute analogous to the federal statute for first time drug offenders erases the conviction for removal purposes

c. If courts vacates – erases

d. Foreign expungements also found okay

e. In general cases though, expungement under state statute does not erase the conviction for immigration purposes. *See Matter of Roldan* (BIA 1999)(only youth offender or fist time offender statues). *See Murillo-Espinoza v. INS* (court declined to recognize an expungement entered pursuant to a general adult expungement statute).

5. Can also get Executive pardon

a. Under INA §237(a)(2)(A)(v), a presidential or gubernatorial pardon eliminated deportability under §237(a)(2)(A), which cover moral
turpitude crimes, aggravated felonies, and conviction of high speed flight from immigration checkpoints.

6. Collateral attacks also possible

**Class 20. Deportability Grounds: Crime Related Grounds (continue).**

A. More on Crime Related Deportability Grounds

1. **Sentencing Requirements:** Another requirement under §237(a)(2)(A)(i) “a sentence of one year or longer may be imposed.”, now potential punishment is what counts.

2. **Two Crimes Involving Moral Turpitude:** §237(a)(2)(A)(ii) reaches noncitizens who after admission have been convicted of two crimes involving moral turpitude “not arising out of a single scheme of criminal misconduct (regardless of how many years after admission/nature of length of sentence)”
   a. First Circuit uses “substantial interruption” that would allow the participant to disassociate himself from his enterprise and reflect on what he has done. *Pacheco.* BIA approved.
   b. Ninth Circuit: emphasis single scheme held it sufficient that the two crimes “were planned at the same time and executed in accordance with that plan. *Gonzalez-Sandoval*”
   c. *Chevron:* S.Ct. held that court must defer to “reasonable” interpretation of a statute by an administrative agency charged with implementing it. Leaves open where BIA interpretation should control.

B. **Judicial Recommendations Against Deportation:** Until 1990, former INA §241(b)(2), law provided remedy known as “judicial recommendation against deportation” (JRAD) (applied only to those noncitizens otherwise deportable – for moral turpitude or two or more crimes, drug offenses), w/ in 30 days, had to give prosecution & INS due notice and opportunity to be heard, prevented INS from deporting the person on the basis of the particular crime, time provisions strictly interpreted (although failure to request JRAD by defense has been held to constitute ineffective counsel).

C. **Drug Offenses:** Anti-Drug Abuse Act of 1986: referred to noncitizens who had been convicted of violating “any law or regulation … relating to a controlled substance (as defined in 21 USC §802).”
   1. Trafficking is an aggravated felony. INA § 101(a)(43)(B)
   2. Before 1986 there were problems b/c Congress attempted to catalog specific drugs, and inconsistent results, and state law played role to b/c different states classified different drugs as narcotics.
   3. 1986 law attempted to plug gaps.
   4. INA § 237(B): Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in §802 of Title 21), other than a single offense involving possession for
one’s own use of 30 grams or less of marijuana, is deportable (Also addicts are deportable)

5. Deportability provisions treat even the mildest drug offenses more severely than some of the more serious crimes involving moral turpitude: the five-years-after-entry requirement that is part of INA § 237(a)(2)(A)(i) but not part of section 237(a)(2)(B)(i); the one-year-sentence requirement for which the same is true; and the availability of executive pardons when deportability is based on § 237(a)(2)(A)(i) but not when it is based on § 237(a)(2)(B)(i). Similar pattern with inadmissibility grounds.

D. Aggravated Felons:

1. Aggravated felons don’t have to be committed within 5 years after admission, makes the person deportable without regard to the potential or actual sentence, also eliminates most discretionary relief possible, triggers mandatory detention from the time removal proceedings begin until the time the person is removed, INA § 236(c)(1), prevents the person after removal from ever returning the US w/out special permission from the AG, INA § 212(a)(9)(A)(ii), and subjects the person to a 20-yr. prison term in found in the US unlawfully w/out that special permission, INA §276(b)(2), sentencing guidelines can be increased.

2. Aggravated felony definition has expanded dramatically
   a. Immigration Act of 1990, §501(a)(3) “any crime of violence … for which the term of imprisonment imposed … is at least 5 years. (now reduced to 1)
   b. Immigration and Nationality Technical Corrections Act of 1994 added, theft, receipt of stolen property, burglary, trafficking in fraudulent documents, violations of RICO, provided that sentence of 5 years imposed; certain management-level position, fraud if loss exceeded 200k (now 10k)
   c. 2 most dramatic in 1996: reduced 5 year sentence requirement of document fraud to 18 months, added commercial bribery, counterfeiting, forgery, certain kinds of stolen vehicle trafficking, obstruction of justice, perjury and bribery of witness, provided 5 year sentence may be imposed.
   d. Rape and sexual abuse of minor (including statutory) added by IIRIRA, reduced 5 year sentence impose – to 1 year
   e. Have to be careful b/c some require sentence of 1 year, some require sentence may be imposed.

3. INA § 101(a)(43)(F) covers any “crime of violence” (above), for which the term of imprisonment is at least one year (refers to sentence imposed by the judge)
   a. Crime of violence is defined as one involving (a) an element of force is part of the offense, (b) or the offense by its nature involves a substantial risk of force and is a felony.
b. Comes up a lot with burglaries, b/c can involve imprisonment for one year or INS will argue crime of violence; split authority over whether this argument will stand up

c. DUI, courts divided

4. IIRIA, § 321(b), “Notwithstanding any other provision of law (including any effective date), the term ['aggravated felon'] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.” INA § 101(a)(43). Note that in any case the IIRIRA changes are limited to “actions taken on or after the date of enactment of this Act, regardless of when the conviction occurred.”

5. Strategies have arisen in light of the 1 year sentencing provisions, defense counsel requesting 364 days vs. 1 year. BIA has held that if a sentence of one year or more is imposed but then vacated to permit the judge to reduce the sentence to under one year, the new sentence is the one that counts. *Matter of Min Song*

---

**Class 21. Deportability Grounds: Crime-Related Grounds (finish).**

A. Miscellaneous Criminal Grounds:

1. INA §237(a)(2)(C) – certain firearms offenses, (2)(D) national security offenses, (2)(E) domestic violence, 3(B) failure to register and document fraud – none of these miscellaneous grounds requires either that a particular sentence be imposed or that the crime be committed within a certain number of years after admission.

2. §237(a)(1)(E) smuggling immigrants into US, §237(a)(1)(G) marriage fraud, §237(a)(3)(A) breach of certain registration and reporting requirements. Do not require a criminal conviction (even though conduct constitutes criminal offense), certain grounds concerned with war crimes, §237(a)(4)(A,B,D)

3. Status, §214(a) admission of nonimmigrants shall be for such time and under such conditions as the AG may by regulations prescribe --- condition of every nonimmigrant stay is obedience to all federal or state laws prohibiting “the commission of crimes of violence and for which a sentence of more than one year of imprisonment may be imposed.” 8 CFR §214.1(g)(2001). – conviction of such crime makes person deportable for having failed to maintain status.

B. Political and National Security Grounds

1. *Kulle v. INS:* Kulle was member of SS, guard in France and Australia. Kulle attacked constitutionality of provision that mandated deportation for Nazi’s. Court holds that actual participation not be proven, assistance can be inferred from circumstances, doesn’t buy into fact that Kulle said that where he worked was incarnation.² Looses on clear and convincing standard.

---

² §241(a)(19) of the INA known as the Holtzman Amendment mandates deportation of any alien who: during the period beginning on March 23, 1993, and ending on May 8, 1945, under the direction of, or in association with (A) the Nazi government of Germany, (B) any government in any area occupied by the military forces of Nazi government of Germany, (C) any government established with the assistance of cooperation of the Nazi government
2. 1990 Act repealed other deportability grounds based solely on statements or beliefs, terrorism provisions hinge on associations however. See, e.g. INA § 237(a)(4)(B)(3), as enlarged by 411 of the USA PATRIOT Act of 2001. In certain cases, too, the foreign policy deportability ground might be read to permit removal on the basis of statements and beliefs. Also, noncitizens are deportable for entering while inadmissible (INA § 237(a)(1)(A), and inadmissibility might be based on similar associations adversely affecting foreign policy, INA § 212(a)(3)(C), or on membership in a terrorist organization.

C. Other Deportability Grounds:
   1. INA § 237(a)(5) noncitizen who becomes “public charge” within 5 years of entry is deportable unless he or she can affirmatively show causes after entry.
   2. INA § 237(a)(1)(C)(i) violating health related conditions imposed at entry
   3. INA § 237(a)(2)(B)(ii) past or present drug abuse or addiction.

Class 22. Relief from Deportability: Cancellation of Removal Part A.

A. Relief from Deportability:
   1. Background
      a. Immigration laws do not require removal of every deportable noncitizen, several forms of relief available, reflecting policy that deportability grounds must be weighted against other factors – long term residence, unusual degree of hardship, likelihood of persecution in a foreign country
      b. Relief provisions can be thought of as affirmative defenses, for which the noncitizen has burden of proof
      c. Many of the major remedies require specified periods of prior residence, so only returning residence qualify
      d. Variables that distinguish various remedies:
         (1) kinds of charges to which the provision supplies a defense
         (2) prerequisites to obtaining relief
         (3) whether once those prerequisites are met, relief is automatic or subject to the exercise of someone’s discretion
         (4) how far-reaching the consequence are (permitting the person to remain permanently, or simply putting removal on temporary hold, or something lesser)
         (5) who decides whether to grant relief (the immigration judge and the BIA in removal proceedings or the INS outside of removal proceedings)
      e. Recurring limitations:
         (1) Individuals who are properly notified of their removal hearings and fail to appear, or who receive voluntary departure and fail to leave on time, become ineligible to apply for any of several specified
remedies for 10 years (cancellation of removal, voluntary departure, and registry) See INA §§ 240(b)(7), 240B(d)

(2) Aggravated felons are expressly disqualified from most of the major relief provisions, including cancellation of removal. INA §§ 240A(a)(3), 240A(b)(1)(C), voluntary departure, INA § 240B(a)(1), and registry, INA § 249. Conviction of an aggravated felony precludes the showing of good moral character

(3) Anyone deportable on terrorist grounds is also barred from several forms of discretionary relief. See INA § 240A(c)(4) cancellation of removal, 240B(a)(1), 240B(b)(1)(C) voluntary departure, 249(d) registry.

(4) IIRIRA severely curtailed judicial relief of denials of discretionary relief: amended INA § 242(a)(2)(B) to bar judicial review of “any judgment regarding the granting relief under” certain provisions (which include cancellation of removal, voluntary departure, and adjustment of status).

B. Lasting Relief:
   1. Cancellation of Removal: Part A and Part B, A only for LPRs, B LPR’s and everyone else
      a. Cancellation of Removal Part A:
         (1) History of odd statutory interpretation: originally dealt with aliens returning after 7 years residence, admission
             a) Matter of L: LPR convicted of crime of moral turpitude after 5 years admission, left for two months, readmitted, then charged as deportable, AG concluded that waive inadmissibility that had existed at the time of readmission (nunc pro tunc)
             b) Matter of GA: convicted of marihuana, rendered him deportable under § 237(a)(2)(B)(i), he departed and returned, BIA granted nunc pro tunc waiver, and held that when section 212(c) is invoked to waive ground of inadmissibility, INS may not base deportability on the same conviction. (Now odd though, b/c get better treatment if you leave)
             c) Francis v. INS (2nd Cir) held that violate equal protection to grant section 212(c) relief to LPR’s who leave after events, extending to eligible individuals who had never left.
             d) Matter of Granados, BIA halted expansion, said that 212(c) relief would not be a defense to deportability unless the particular deportability is also a ground of inadmissibility
             e) Matter of Hernandez-Casillas.: Board observed that § 212(c) by its terms, made certain exclusion grounds nonwaivable. As long as the particular deportability ground was not analogous to one of these nonwaivable exclusion grounds, the Board held, § 212(c) would apply.
(reversed by AG), and reinstate Granados, said that §212© was meant to waive only those deportability grounds that are also grounds for exclusion – this way it bore some reasonable relationship.

(f) Odd results: some deportability grounds embrace conduct that gives rise not only to removal but also to future inadmissibility, others embrace conduct less serious – Effect of the AG’s interpretation is that relief will be available to noncitizens charged with offenses Congress regarded as the most serious, but not less serious.

(g) IIRIRA codified many of these developments new provision does not require deportable noncitizens to identify a comparable inadmissibility grounds, as the AG had required under the old provision.

(2) Timing:
   (a) Lawful residence no longer required, only continuous residence for 7 years after having been admitted in any status. INA § 240A(a)(2).

(3) Disqualifications: short time certain criminal convictions disqualified, changed by IIRIRA (when §212(c) replaced with cancellation of removal, INA §240A) to exclude aggravated felons and inadmissible on national security grounds.

(4) Discretion:
   (a) BIA in 1978 summarized the common positive and negative factors that would guide the discretionary determination under then INA § 212(c), same factors govern cancellation of removal part A, many cases that involve drug offenses require “unusual or outstanding equities.”

(5) §240A. Cancellation of removal; adjustment of statute
   (a) Cancellation of removal for certain permanent residents: The Attorney General may cancel removal in the cases of an alien who is inadmissible or deportable from the US if the alien – (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the US continuously for 7 years after having been admitted in any status, (3) has not been convicted of any aggravated felony.

Class 23. Relief from Deportability: Cancellation of Removal Part B.

A. Cancellation of Removal: Part B
   1. INA § 240A (b) Cancellation of removal and adjustment of status for certain nonpermanent residents: AG may cancel removal & adjust status of any alien lawfully admitted for permanent residence, if the alien(A) has been physically present for 10 years preceding date of application; (b) good moral character; (c)
not been convicted of an offense under §212(a)(2)(criminal and related grounds),
237(a)(2)(crime offenses)(except if AG grants waiver under 237(a)(7)((domestic
violence), and establishes that removal would result in exceptional and extremely
unusual hardship to alien’s spouse, parent or child who is citizen or LPR. (3 years
present for battered women)
2. (d) no maintain continuous presence if alien has departed for period of 90 days or
180 days aggregate.
3. (e) No more than 4,000 per year.

B. Analysis:
1. Remedy is available to both inadmissible and deportable aliens
2. Arriving noncitizens who return from temporary visits abroad after 10 years of
undocumented presence in the US may also apply for cancellation part B.
3. Two branches: general & one for battered women and children (1994 Violence
against women Act)
4. Applicants must establish statutory eligibility, and favorable exercise of discretion
5. Nicaraguan, Guatemala, El Salvador, Soviet Union, others under Nicaraguan
Adjustment and Central American Relief Act are not counted.

C. Continuous Physical Presence:
1. “for a continuous period of not less than 10 years immediately preceding the date
of the application.” INA § 240A(b)(1)(A).
2. IIRIRA: notice to appear automatically ends a person’s continuous physical
presence. INA § 240A(d)(1)
3. 90 days and 180 day aggregate codified “meaningful interruption standard”,
replaced with two bright line rules.

D. Hardship:
1. Tough standard b/c of “exceptional and extremely unusual language”
2. Committee report said the change was meant to emphasize that the harm must be
“substantially beyond that which ordinarily would be expected to result from the
alien’s departure. (Acclimated now removed wasn’t good enough for committee)
3. IIRIRA § 306 bars courts from reviewing “any judgment regarding the grating of
relief under § 240A
4. Often applicants will apply to reopen removal proceedings, 8 CFR §§3.2, 3.23
(2001), b/c of hardship

E. INS v. Jong Ha Wang: Economic hardship will not cut it, S.Ct. reversed 9th Circuit b/c of
insufficient evidence to reconsider (no evidentiary material submitted), and more
importantly, AG has discretion to construe “extreme hardship” Also Gov. has legitimate
interest in creating official procedures for handling motions to reopen deportation
proceedings so as readily to identity those cases raising new and meritorious
considerations (Don’t want everyone obtaining hearing on minimal showing).
1. What if Board concludes, that even if the person ultimately proves statutory
eligibility, there are negatives that would persuade the Board to deny cancellation
on discretionary grounds in any event. The Supreme Court held in *INS v. Rios-Pineda* that in such a case the BIA does not abuse its discretion by denying reopening.

2. Justice Department regulations now expressly say “BIA has discretion to deny motion to reopen even if the party moving has made out a *prima facie* case for relief.” 8 CFR § 3.2(a) 2001.

3. In concurring opinion, Judge Sneed of 9th Cir, said difference between saying “So what” with respect to applicants *prima facie* evidence – i.e. that allegations are insufficient to constitute hardship as compared to “We don’t believe that”, based on the facts that they didn’t believe what the alien is saying. In the latter case it would be a abuse of discretion not to have a hearing

F. *Hee Yung Ahn v. INS*: have to consider factors cumulatively.

G. INSERT NOTES

H. Judicial reactions to *Wang* have been mixed.

1. *Hamid*: Noncitizen moved to reconsider its denial of his motion to reopen, attached his affidavit, which BIA found “inherently unbelievable,” Ninth Circuit upheld ; 5th Circuit has also read *Wang* broadly (*Ramos v. INS*), said in light of light of *Wang* “we doubt that there remains much, if any, scope for judicial substantive review of no ‘extreme hardship’ determinations.

2. Most reversals are on procedural grounds, of which three are particularly common: the failure to consider a relevant factor, the failure to weigh the various hardship comments cumulatively, and the failure to give reasons for the decision.

I. Other Hurdles: Good Moral Character, Disqualified Groups, Discretion, and Reporting to Congress.

1. INA § 240A(b)(1)(B) requires good moral character for the entire 10 years.

2. §101(f) lays out several classes of noncitizens who, as a matter of law, lack good moral character (not only for purposes of cancellation, but also for purposes of other provisions of the Act), including alcoholism, specific criminal activities, and “false testimony for the purpose of obtaining any benefits” (not exhaustive)

3. Other people disqualified regardless: crew members, certain exchange visitors, and most people who are inadmissible or deportable on political or national security grounds.

4. *Also word may* implies discretion, broader than the discretion inherent in the “exceptional and extremely unusual hardship determination.” (not normal once statutory eligibility is established

5. Denial of cancellation of removal appear generally reviewable, the only context in which the BIA’s decision to deny removal on discretionary grounds is a *Rios-Pineda* situation where the BIA denies a motion to reopen in anticipation of denying cancellation of discretionary grounds.

J. NACRA:
1. More generous relief nature of amnesty for certain nationals of Nicaragua and Cuba; nationals of Guatemala, El Salvador, former USSR, and successor republics received a lesser form of relief (right to cancellation of removal under less onerous substantive criteria) (entered before certain date in 1990, 7 year phys. presence requirement, extreme hardship, inapplicability of IIRIA rule that continuous physical presence ends with the filing of a notice to appear or with the commission of a designated crime); remedy still discretionary

2. Rebuttable presumption of “extreme hardship” in interim rules (took effect June 1999), INS has burden of proving removal will not cause extreme hardship, can rebut by showing no evidence of extreme hardship or great wealth,

3. Adjustments of status exempt from 4,000, but will exempt from future quotas (not to exceed 5,000).

Class 24. Relief from Deportability: Registry; Legalization; Adjustment of Status; Private Bills; Deferred Action; Voluntary Departure; Objections to Destination; Stays of Removal; Miscellaneous.

A. Registry:

1. INA § 249: Discretionary authority on AG to award LPR status to certain noncitizens who entered between 1948 and 1972; cannot fall within serious exclusion grounds; must have maintained continuous residence (not the more easily interrupted physical presence) since entry; must be of good moral character; and must not be ineligible for citizenship (excludes those who invoke military service exemption), not available for individuals who fail to appear at removal hearings; No hardship requirement.

B. Legalization:

1. Allowed certain noncitizens who had been residing unlawfully in the US for several years to regularize their status: arose b/c of compassion for people who had become part of American society, realistic appreciation that the millions of immigrants living underground would never be apprehended and removed, the social harms that inevitably flow from the existence of a huge underground subculture, and the political judgment that a collation with legalization was crucial to the enactment of employer sanctions.

2. IRCA created three different legalization programs – a general legalization plan, a special legalization program for agricultural workers, and a special program for Cubans and Haitians
   a. General Legalization in 1986: INA § 245A, “temporary resident alien”, principal eligibility requirement was the “continuous unlawful residence” from Jan. 1982 until the filing of the application. INA § 245A(a)(2)(A), no discretionary hurdles, if establish eligibility – has to be granted.
      Second phase – Person who received temporary resident status had to apply for LPR status during the two-year period that began 1 and ½ years after he or she attained TRA status., b/c last date to apply was 1988,
wound done after 1991; not subject to numerical quotas, no provision for
the familiares of legalized immigrants, LPR statutes just need continuous
residence after TRA status, need to have knowledge of English language,
American history and government

b. Legalization of Agricultural Workers in 1986 – Liberalized the provisions
for the admission of nonimmigrant agricultural workers, “special
agricultural workers”, two phases like General Legalization, main
requirement perform agricultural work for 90 days during 12 month period
after 1986 (have to apply between ’87-’88)

c. Cubans & Haitians in 1986: No TRA phase, eligible immediately,
Application have to be filed before Nov. 7, 1988.

d. Nicaraguans and Cubans: amnesty program for Cubans and Nicaraguans
continuously physically present in the US since Dec. 1, 1995, person had
to be otherwise admissible (common inadmissibility grounds made
inapplicable – public charge, lack of labor certification, presence without
admission, and inadequate document), mandatory – “shall adjust status”,
have to be filed by Apr. 1, 2000

asylum or had been paroled before that date. Applications due by April 1,
2000)

C. Adjustment of Stats:
   1. Deportability context, adjustment can serve a dual function: affirmative relief
   from removal and a means of attaining LPR status without leaving the US, 
   requirement that person be “admissible”
   2. Congress in 1986 required adjustment applicants to have continuous lawful status
   3. Main categories of deportable noncitizens who, immediately after 1986, could
   still benefit from adjustment are those whom Congress exempted from the 
   continuous status requirement: immediate relatives, special immigrants, and those
   whose transgressions were “through no fault of the noncitizen or for technical
   reasons.” INA § 245(c).
   4. Unavailable for 10 years to those noncitizens who fail to appear at removal
   hearing or fail to comply with the terms of their voluntary departure orders.
   5. Once removal proceedings have begun, application for adjustment of status is
   filed with the IJ, decision of the BIA denying adjustment of status is not subject to
   judicial review. INA § 242(a)(2)(B)(i).

D. Private Bills:
   1. Legislation that provides LPR status for a specific individual when existing 
   general provisions would not.
   2. Used to be more common, now much less, b/c have to persuade member of
   Congress to introduce it, then go to subcommittee of Judiciary

E. Limited Relief
   1. Deferred Action: INS does not bring removal proceedings against every
   noncitizen whom it suspects of being deportable.
a. Removal proceedings require apprehension, investigation, processing, possibly detention, prosecution, adjudication, removal, and record-keeping.

b. Different names over the years: prosecutorial discretion, nonpriority status, deferred action

c. INS published Operation Instructions used to exist, but later rescinded, prosecutorial discretion remains, last day of former Commissioner’s (Meissner) work, memo issued to encourage greater INS use of prosecutorial discretion in compassionate cases, explained discretion was its finite resources, also what is governments interest, she provided a list of factors: LPR, duration of residence, criminal history, humanitarian concerns, past immigration visitors, likelihood of ultimate removal, availability of alternative courses of action, how long a bar to future return removal would create, past cooperation with authorities, military service, person’s role in the community, and availability of detention space.

d. INA §237(a) provides that “shall,” upon the order of AG, be removed if alien is within one or more of the following classes of deportable aliens…” Argument is that discretion comes in “upon the order” language.

e. Today, as a result of IIRIA §306(b), the decision to commence removal proceedings is clearly unreviewable.

2. Voluntary departure:

a. Person who receives and accepts a grant of voluntary departure under INA § 240B leaves the US “voluntarily” in exchange for no formal removal order.

b. Subsection (a) - AG may permit certain noncitizens to depart voluntarily, at their own expense, either in lieu of removal proceedings or before removal proceedings have been completed. (INA §241(e)(3)(C), person “may” be required to post bond, voluntary departure may be as long as 120 days.

c. Subsection (b) authorizes voluntary departure at the conclusion of removal proceedings (at individuals expenses), several other disqualifications, Bond is mandatory, maximum departure period is 60 days.

d. INS has authority to grant voluntary departure only under (a) of section 240B, and only in lieu of removal proceedings, once proceedings commence INS can move to dismiss case (and then grant voluntary departure), or request the IJ to grant voluntary departure.

   (1) Before removal hearing IJ schedules a “master calendar” hearing,

   (2) Under DOJ regs, one who applies for voluntary departure under subsection (a) must apply either before or during the master calendar hearing, IJ can only grant voluntary departure only up to 30 days after the master calendar, unless INS stipulates to another time
(3) Thus (absent INS stipulation) IJ only can grant subsection (b) voluntary departure, thus subsection (a) barred subsection (a) voluntary departure application at a point long “before removal proceedings have been completed” – deadline that statute imposes under subsection (a).

(4) Justice Department regulations commendably take a nonliteral approach and allow the more lenient subsection (a) voluntary departure even after commencement of removal proceedings.

e. Under INA § 212(a)(9)(B)(i), one who was unlawfully present in the US for more than 180 days but less than a year, and who “voluntarily departed prior to the commencement of [removal] proceedings” is inadmissible to return for three years. Whether one departs before or after the filing of the Notice to Appear therefore has legal significance

f. Why voluntarily leave: Noncitizens who are formally ordered “removed (other than upon arrival at a port of entry) are ineligible to return to the US for at least 10 years, unless they can obtain INS permission to reapply for admission sooner; Often there is little to gain by removal hearing and individual must post bond or remain in detention

g. Voluntarily departure not available for 10 years to noncitizens who fail to appear at removal hearing after proper notice, or who have failed to honor terms of prior voluntary departure order.

h. INA § 240B(f) bars judicial review of an order denying voluntary departure under subsection (b).


4. Objections to Destination:

a. Internal Security Act of 1950, §23, Congress for the first time gave the noncitizen the right to designate the country of deportation; that designation bound the administrative authorities unless the particular refused to accept the person

b. Current Rules are in INA § 241(b):

(1) Arriving: Alien who arrives at US, shall be removed to country in which alien boarded vessel, if it is contiguous or adjacent country, country where boarded vessel to that country, if gov. unwilling to take, shall be as directed by AG to (i) country of alien’s citizenship, (ii) country in which alien was born, (iii) country in which alien has residence, (iv) country of gov. that will accept alien if no (i-iii)

(2) Others: (A) others can designate one country to which the alien wants to be removed, AG shall remove to this country (B) Limitations: (C) AG an disregard is alien does not act promptly, gov. of country no tell AG w/in 30 days if
accept, gov. not willing to accept, AG decides that removing alien to country is prejudicial to US (D)
Alternative country: AG shall remove to country which alien is subject, national, or citizen unless gov of country does not inform w/ in 30 days or reasonable period (E)
Additional removal countries:
(h) country from which alien was admitted into US
(i) country in which is located foreign port from which alien left
(j) country alien resided in before US
(k) country where alien born
(l) country sovereign over aliens birthplaces where alien is born
(m) country in which aliens birthplace is located when alien ordered removed
(n) if impracticable, inadvisable – another country who will accept alien
(3) Restriction where live removal: (Withholding removal): Not going to remove to country if AG decides that alien’s life or freedom would be threatened in that country b/c of alien’s race, religion, etc. (NOT apply if incited riot, convicted of final judgment of “particularly serious” crime – danger to community, serious nonpolitical crime before arriving (serious reasons to believe), national security grounds) (If commit aggravated felony + sentence at least 5 years – considered to be particularly serious crime, not preclude AG from determining notwithstanding sentence-crime is serious enough.

c. *Linnas v. INS*: Designated place of deportation as a building in NY, he argues that sending him to Estonia would be extradition; Court says that ruling this is extradition would greatly reduce that ability of nation to deport those who have committed crimes of moral turpitude in their own countries; Court says that there could be situation where person removed could be subjected to “procedures & punishment so antipathetic to sense of decency as to require judicial intervention” – Not here though, finds irony that he executed people, now pleas for mercy.

5. Stays of Removal:
   a. INS can grant temporary stay under 8 CFR §241.6 (2001), especially important in motions to reopen
   b. Mere filing of a motion to reopen does not automatically stay removal, and once removal occurs, motion is deemed withdrawn.
   c. Regulations expressly contemplate coupling of a motion to reopen with a request for a stay to permit a decision on the motion.
A. IJ Independence
   1. Office of Chief Immigration Judge intervened and ordered case recalendered on its own motion, over IJ’s objection in response to a telephone call by the INS district’s counsel, ethical rules require Chief Immigration Judge as well as IJ to refrain from taking action in a specific case following ex parte communication about the case by one of the parties (ABA Model Code of Judicial Conduct), judge with drew

B. Representation:
   1. Authority to practice: law students w/ supervision can practice, attorneys, reputable individuals of good moral character (no direct remuneration), accredited representative (representing recognized organization)
   2. Organizations qualified for recognition: nonprofit religious, charitable, social service, etc. may designate representative to practice, if only make nominal charge, have adequate knowledge

C. Discipline of Practitioners
   1. 8 CFR § 3.102 (2001): Board will impose disciplinary sanctions against any practitioners who (not exclusive): Charges or receives excessive fees, any fees for accredited representative (except that accredited representative may be compensated by organization); any fee for law student; bribes anyone; makes false statement of material fact; solicits professional employment through in-person or live telephone contact or use of runners, subject to final order of disbarment, makes false statement about qualifications; engages in obnoxious conduct, pleaded nolo contendo to serious crime, falsifies copy of document, engages in frivolous behavior (R. 11 qualifier), engages in conduct constituting ineffective assistance of counsel, fails to appear w/out good cause, assists any person other than practitioner constituting unauthorized practice of law.
   2. Frivolous behavior is broad, what if fail to provide zealous representation, now (k) disciplines someone who “engages in ineffective assistance of counsel” (DOJ worried about applicant moving to reopen and counsel saying that they were ineffective, w/out consequences.
   3. ABA objected to this provision b/c lawyers already subject to state ethical provisions, and Justice rules are unnecessary except for nonlawyer representatives.
   4. Hard to get counsel often b/c immigrants are in odd places, counsel cannot go to them, and gov. will not pay anything for lawyer, what about really complex cases?

D. Legal Aid:
   1. IJ must advise the respondent of the availability of free legal services programs. 8 CFR §240.10(a)(2)(but Legal Services Corporation restricted on what they can provide)
2. Only noncitizens eligible for legal assistance under 1982 legislation (assuming they meet the financial guidelines were (a) LPR’s (b) those who possess specified relationships to US citizens, have already applied for adjustment of status, and have not yet been rejected (c) those who have already been granted refugee or asylum status, and now certain battered spouses and children; 1996 – further restrictions, prohibited LSC funds if help certain noncitizens, overwhelming majority within ineligible categories.

3. Sometimes bar associations maintain referral services

E. Other Illegally Obtained Statements

1. Court leaves open in Lopez-Mendoza, whether egregious violations of 4th Amendment or other liberties might compel exclusion; Violations of 5th Amendment – different story, they are suppressible

2. Interesting problem arises under §235, involving self-incrimination: “An applicant for admission may be required to state under oath any information sought by an immigration officer regarding … whether the applicant is inadmissible”

3. 4th Amendment does not apply to overseas searches and seizures, but US officials, of property of noncitizens who reside outside the US.

4. Vienna Convention on Consular Relations requires law enforcement officials to advise any arrested foreign nationals of their right to communicate with their consulates.

F. Woodby v. INS: What burden of proof does Gov. have in immigration cases.

1. Court concludes: “clear, unequivocal, and convincing evidence,” needed for deportation order

2. Court reads lower courts finding of “reasonable, substantial, and probative evidence” as relating only to judicial review of deportation order --- much like the substantial evidence standard as the provision they were focusing on §106(a)(4) related exclusively to judicial review

3. Court draws analogy to denaturalization cases: Gov. has to establish its allegations by clear, unequivocal, and convincing evidence – same burden in expatriation cases. Courts want same burden here

4. Dissent: Goes with plain language of statute, said Congress said this is the language … “no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence” and that this standard shall be the “sole and exclusive procedure” and that this standard shall be the “sole and exclusive procedure for determining the deportability of an alien this section”… Furthermore, denaturalization and expatriation are much more oppressive than deportation, there already is a standard for review: §242(b)

5. Notes: Majority applies contextual approach, look to overall context of a statutory scheme to gain insight into the meaning of a particular provision; text asks why would you want to have low standard for deportation (dissent interpretation).

---

3 Court noted language of the act “to create a single, separate, statutory form for judicial review of administrative orders for the deportation and exclusion of aliens form the US”
G. Harlan: Types of Errors

1. If you have a looser standard of proof – you’re going to deport more people, if stricter standard, more people allowed to stay, which types of error would we rather have, in criminal cases – we err on the side of caution


A. After Woodby, DOJ codified “clear, unequivocal, and convincing evidence” standard to “clear and convincing” 8 CFR § 240.8(a)

1. BIA, in Matter of Patel, said this falls somewhere in between beyond reasonable doubt and substantial evidence. (not required to dispel all doubt)
2. Now word unequivocal has been dropped,
3. NOW “clear and convincing” INA §240(c)(3)(A)
4. This only applies to noncitizens who have been previously admitted.
5. In every removal proceeding, the burden is on the noncitizen to prove either “(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under §212; or (B) by clear and convincing evidence, that the alien is lawfully present in the US pursuant to a prior admission.” INA §240(c)(2)

B. INA § 291: creates an exception to the governments burden of proof in deportability cases – A person against whom proceedings are brought has the burden of proving the “time, place, and manner” of his or her entry into US.” If not carried, they are presumed to be in the US in violation of law and deportable under INA § 237(a)

1. Courts have presumed that INS must establish alienage before burden shifts
2. IIRIRA made significant changes have made §291 largely superfluous – every noncitizen in removal proceedings has the burden of proving either admissibility or lawful admission pursuant to a prior admission.” A noncitizen who remain mute, will found to be present w/out admission – which is inadmissibility ground, INA § 212(a)(6)(A)(i)
3. What do you do if person refuses to answer, DOJ will grant immunity to make testimony nondiscriminating
4. Can draw adverse inference b/c civil case if person refuses to testify.
5. Inferences will not satisfy INS burden of proof alone, however, need inference combined with other evidence.

C. Judicial Review of Removal Orders

1. No judicial review for decisions of consular officers denying via
2. Rule was that noncitizen had right to review of administrative decision, now big hole
3. 1996, IIRIA inserted INA § 242, now petition for review is still usually exclusive method for obtaining review of final order, but provisions report to bar judicial review of whole categories of removal orders, prohibit review of most denials of discretionary relief, make several forms of action unavailable, eliminate certain judicial remedies for unlawful administrative action, and erect several other
significant barriers to judicial review of administrative decisions in removal orders.

4. §242 (a)(1) says that “judicial review of a final order of removal is governed only by chapter 158 of title 28 of the US Code (Hobbs Act – must file petition for review in courts of appeals)

5. Petition for review is filed in the circuit in which the removal hearing was held. INA § 242(b)(2), must be filed no later than 30 days after administrative final removal order, Motion to reopen or reconsider does not toll clock. Stone v. INS., have to file brief w/45 days after administrative record is available, otherwise dismissed unless manifest injustice

6. Have to move to grant stay, §242(b)(3)(B), but departure no longer bar’s judicial review, case proceeds in person’s absence.

7. Problem – how much should you look at motion to stay (facts); Ninth Circuit, removal automatically stayed until court can rule on motion : must show (1) probability of success & irreparable injury or (2) that serious legal questions are raised and balance of hardships tip in you favor. Andrieu v. Ashcroft

8. Must exhaust all administrative remedies. INA §242(d)(1), if overcome barriers, reviewing courts decides merits solely on basis of administrative record. INA § 242(b)(4)(A) ---- According to INA §242(b)(4)(B) “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”(functional equivalent of substantial evidence test)

D. Exceptions to review:

1. INA §242(a)(2)(c)”no court shall have jurisdiction to review” a removal order if the person “is removable” on almost any of the crime related grounds. (aggravated felonies, controlled substance offenses, firearms, other misc. crimes and two moral turpitude punishable by one year each). Courts can still review whether the crime constitutes an aggravated felony. Courts still have habeas corpus jurisdiction to review removal orders (INS v. St. Cyr)

2. INA §242(a)(2)(B)(i): Can’t review: any judgment regarding the granting of relief under several provisions including most affirmative relief provisions: cancellation of removal (both part A & B); voluntary departure; adjustment of status; and waivers of inadmissibility under §212(h)(relief from certain crime related grounds) and §212(i)(relief from inadmissibility based on fraud). Once again, can still review factual and legal issues concerning the applicants eligibility for discretionary relief, as well as claims based upon procedural due process

3. INA §242(a)(2)(B)(ii): Cannot review “any other decision or action of the AG the authority of which is specified under this title to be in the discretion of AG (except asylum). Only covers Title II of the INA, not covered are AG decision under other titles – i.e. Title III – citizenship, and other statutes (maybe even decisions that are authorized by regulation – but can argue that regulations are passed pursuant to statute). This provision definitely covers discretionary decisions under INA §§205(revocation of visa petition); 207 (refugee admissions); 209 (adjustment of status of refugees; 236 (detention pending removal of arriving noncitizens); 248 (change of nonimmigrant status); and 249
(registry). Other provision of title II are worded in mandatory terms. Still once again can review determination of whether person qualifies.

E. Expedited Removal Orders:
   1. INA §235(b)(1) authorizes “expedited removal of arriving noncitizens whom immigration inspectors believe to be inadmissible on documentary or fraud grounds,” AG has discretion to extend the expedited removal procedure to those who are present in the US and unable to prove 2 years continuous physical presence. INA §235(b)(1)(A)(iii)
   2. Under INA §242(a)(2)(A): CT lacks jurisdiction to review, on their merits, either kind of expedited removal order. Can use habeas corpus to review claim that person is citizen

F. Voluntary Departure:
   1. No constraints to limits AG can put on eligibility for voluntary departure, same subsection (INA §240B(e)) bars judicial removal of any regulations of such

G. Prosecutorial Discretion:
   1. INA §242(g) no court has jurisdiction to hear claim arising out of AG to commence proceedings, adjudicate cases.
   2. Narrowly construed to bar only three specific decisions involving prosecutorial discretion: commence proceedings, adjudicate cases, or execute removal orders.

H. Detention Decisions:
   1. While removal orders pending, AG has discretion whether to detain the person, release him, or grant parole. INA §236(a), detention is mandatory for people who are deportable under most of the criminal provisions. INA §236(c).
   2. Under INA §236(e) “no court may set aside any action or decision of the AG under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”

I. Habeas Corpus:
   1. §242(a)(1) says: “Judicial review of a final order of removal [other than expedited removal] is governed only by [the petition for review procedure]”, later Congress repealed provision that allowed habeas corpus proceedings (Former INA §1066(a)(10)) a form of judicial review for those in custody. Question: Did this foreclose habeas petitions?
   2. For purpose of general federal habeas corpus provision, 28 U.S.C. §2241: S.Cct. had interpreted the word “custody” not to require physical detention. Jones v. Cunningham. (prisoner released on parole still in custody), Daneshvar v. Chauvin (8th Cir)(noncitizens under deportation orders in custody)

**Class 27. Deportation Procedure: Judicial Review (continue).**
A. *INS v. St. Cyr.* (SCt 2001): Whether IIRIRA eliminated the availability of general habeas corpus jurisdiction in deportation?
   1. SCT construes the statute to avoid constitutional problems.
   2. Begins with history of habeas corpus jurisdiction
   3. Starts with proposition that courts have had power to review pure questions of law, then did congress intend to take this away?
   4. Historically, habeas corpus always been available to review the legality of executive decisions
   5. Courts recognize distinction between eligibility for discretionary relief vs. favorable exercise of discretion
   6. Eligibility for discretionary relief is a question of law
   7. Courts traditionally have power to review questions of law, now question becomes did new act intend to take that away
   8. Text of statute does not mention habeas corpus (28 USC §2241)
   9. INS argument that 1961 Amendment providing habeas review as exception (which was eliminated by IIRIRA) is weak, b/c this statute didn’t originally grant habeas.
   10. Other provisions INS cites deal with judicial review, this concept is distinct from habeas review

B. Scalia dissent: Why have 1961 language if §2241 not governed by “sole and exclusive” language, in immigration context judicial review and habeas have distinct meanings, judicial review clearly includes habeas proceedings (citing statues), case in which majority cites doesn’t stand for proposition, shouldn’t get judicial review of deportation

C. Other Strategies:
   1. General Federal Question Jurisdiction: t lease one court has held that §242(a)(2)(C)(which eliminates “jurisdiction to review” most crime-related removal orders) forecloses not only petitions for review but also general federal question jurisdiction.
   2. Class actions & Injunctions: INA §234(b) governs the inspection, examination, and removal of arriving noncitizens and of those who are present w/out admission. INA §235(b) says can only challenge legality of regulations issued under the section, and can only bring injunction in District of Columbia for 60 days when you can challenge INA §235(b) and no such action can be brought by class action. INA §242(e)(1)(B). In other case *McNary v. Haitian Refugee Center* (S.Ct. said analogous exclusivity provision concerned with the legalization of agricultural workers), held district court could hear class action, noting that regulating plaintiffs petition for review would be functionally equivalent to withholding review entirely, b/c person would have to submit to legalization proceeding in order to review denial.
   3. Collateral Attack in Criminal Proceeding: *US v. Mendoza-Lopez* held that the validity of the underlying removal order may not be collaterally attacked in subsequent criminal proceedings unless the defendant had not earlier had been given a meaningful opportunity to seek direct judicial review of the deportation order; AEDPA codified holding, barred collateral attack w/ INA §276 unless person had exhausted all administrative remedies, unless he had been deprived of opportunity for review and removal order had been fundamentally unfair.
4. Claims of US Nationality: *Ng Fung Ho. V. White*: Set sad person who makes nonfrivolous claim of citizenship has due process right not to be deported w/out judicial trial.

D. Consolidating Reviewable Claims:
   1. INA §242(b)(6): requires that any judicial review of an order denying a motion to reopen or reconsider a removal order be consolidated with any judicial review of the original removal order.
   2. Review can only be of final orders under §242(b)(9).

E. Exceptions to Usual Removal Procedures
   1. Expedited Removal: various short cuts to removal for documentary fraud
   2. Criminal Cases
      a. Prison Hearings: IRCA §701 required that deportation proceedings based on criminal convictions be started “as expeditiously as possible after the date of the conviction” Instituted institutional hearing program with hearings heard at prisons, now these are held for aggravated felons (also two crimes of moral turpitude) and drug and firearm offenses
      b. INA §241(a)(2) requires the AG to detain most noncitizen criminal offenders as soon as they are released from criminal incarceration.
      c. INA §242A(b) requires AG when selecting prison sites at which removal hearings will be held, to “make reasonable efforts to ensure that the alien’s access to counsel and right to counsel”
      d. Normally early release for purposes of removal is not permitted. INA §241(a)(4)(A) – as a result of 1996 legislation, AG has discretion to remove many categories of nonviolent offenders before completion of their federal sentences (or state sentences, upon the request of state authorities).
   3. Administrative Removal: procedure replaces usual removal procedure (an evidentiary hearing before an immigration judge and a right of appeal to the BIA), with an administratively final decision by the INS. Used for aggravated felons, adjudicator is an INS law enforcement officer, procedure done on paper w/out opportunity for evidentiary hearing or even informal interview.
   4. Judicial Removal: Sentencing courts can play a more direct role, deciding on their own whether the defendants ought to be removed from the US (use to have JRAD), but cannot recommend non-removal orders. Can recommend removal orders as part of criminal sentences, extends to cases whether criminal defendants are deportable, and exists only if prosecutor requests removal order and INS concurs, must hold mini-removal hearings, but AG gets a second shot if does not recommend removal order, INA §238(c)(4)
   5. In Abstentia Removal Hearings: Once notice to appear has been issued, person has to provide telephone number, if persons fails to do this, hearing held in abstention, INS must provide clear, unequivocal and convincing evidence that the required notice was provided, to get rescinded, person must move to reopen w/in 180 days upon exceptional circumstances, move to reopen and show that he/she
did not review required notice. (can’t litigate discretionary relief only adequacy of notice, reasons for absence, and deportability. INA §240(b)(5)(D))

F. Noncitizens Reentering after Prior Removals:
   1. INA §241(a)(5) expedites the removal of noncitizens who were previously removed or who voluntarily departed, but who then reentered unlawfully, once AG finds the person reentered unlawfully, the prior removal order is reinstated and the person may be removed without further removal.

G. Crew Members: A noncitizen who serves on board vassal typically allowed to stay up to 29 days, get “conditional permit,” INA §252(a), if determine not bonefide crewman or not intend to depart, has discretion to revoke permit, take person into custody and require the captain to detain him or her on board the vessel if practice. INA §252(b).

H. Terrorist Removal Practices
   1. After OK city bombing, AEDPA §401 created elaborate new procedure for adjudicating either the inadmissibility or the deportability of suspected terrorists
   2. Alien terrorist is a noncitizen who is linked in any of several specified ways to any of the several designed unlawful events (hijacking, sabotage, assassination,, threat conspiracy to do the enumerated acts).
   3. INA §502(a) requires the Chief Justice of US to appoint five federal district judges to a “removal court,” (p. 844), basically can conduct trial w/ secret information if in the interest of national security, special attorney can challenge veracity – never used
   4. INA really just institutes removal in usual way and can use various secret evidence provisions, right to examine unless national security at issue (only for admission or discretionary relief), so have to tell information, but can offer evidence in camera to eliminate various statutory eligibility for discretionary relief or the favorable exercise of discretion.

I. Rescission of Adjustment of Stats
   1. Under INA § 246, AG may rescind a grant of adjustment of status, w/in 5 years, if person was in fact ineligible for adjustment at the time it was granted, then can institute removal proceedings on ground person has overstayed.

Class 29. Refugees: Overseas Refugees.

A. Background:
   1. Refugees are often distinguished from immigrants, refugees are forcibly displaced, while immigrants are thought of as willing migrants
   2. Offshore vs. Onshore refugees
   3. Analytically, the admission of overseas refugees can be thought of as simply one element of legal migration, analogous to immigration based on family or employment or diversity, whereas when people reach the US and seek relief at the
frontier or in the interior, the requested remedies resemble waivers of inadmissibility or deportability

4. Overseas refugees are often described as refugees or overseas refugees, but on shore refugees are referred to as asylum seekers.

5. Asylum is distinct from withholding of removal or nonrefoulment

B. Overseas Refugees:
   1. Suhrke: Push vs. Pull factors
   2. History: We turned away Jewish people that were then executed, part of relentless restrictionism of the 1930’s
   3. Divine: Problems with returning displaced people
   4. Goodwin-Gill: Definition of refugee – grew out of UNCHR, US used parole system before refugee statues enacted, refugee statute grew out of 7th preference (for those who feared persecution and were fleeing either a “Communist-dominated” country or a country “within the general area of the Mid-East”); Refugee-Act of 1980, provided first US definition of refugee: requiring a “well founded fear of persecution on account of race, religion, membership in a particular social group, or political opinion.”
   5. Under INA §207(a) also added in 1980: the President makes an annual determination of how many refugees may be admitted in the upcoming fiscal year, and may provide additional slots in an “unforeseen emergency refugee situation arises. §207(b), but before making any of these determinations, President must engage in “appropriate consultation” with Congress. INA §§207(a)(1,2,3), 207(b) (congress was previously dissatisfied with its old role)
   6. Can’t be firmly resettled into another country, and must be admissible, INA §207(c)(1), refugees are automatically excepted from certain exclusion grounds (labor certification, public charge, and required documents), and Atty Gen. given discretion to waive most others.
   7. Spouses and children accompanying or following to join qualifying refugees are admitted under the same criteria. INA §207(c)(2), can later terminate if find out didn’t meet refugee determination, receive LPR status after 1 year. INA §209(a)
   8. AG can no longer parole refugee absent “compelling reasons in the public interest with respect to that particular alien.” INA §212(d)(5)(B)

C. Statutes:
   1. INA §101(a)(42): refugee (outside any country of person’s nationality or country of last residence if no nationality) and who is unable or unwilling to return/avail protection b/c of persecution or well-founded fear of persecution on account of race, religion, nationality, membership in social group or political opinion, or person who president consults with Congress; does not include persecutor. Forced abortion or sterilization, deemed persecuted, and if fear procedure – deemed well founded fear on pol. opinion.
   2. INA § 207: Annual admission of refugees, numbers different per year, no more than 1,000 for population control; emergency provision, spouse gets following to join, procedures and appropriate consultation
3. INA § 209(a): Adjustment of status, after been here one year, status adjusted, no more than 10,000 adjustments per year
4. INA §209(c): Certain provisions not applicable: Labor Certification, Public Charge, and Document requirements
5. INA §212(d)(5)(B): Can’t parole aliens unless compelling reasons in public interest

D. Refugee selection:
1. Heavy influence of foreign policy on refugees
2. Most come from east Asia and soviet union
3. Heavy participation by State Department (p. 865), §207(a)(3): dictates that the admission of overseas refugees “be allocated among refugees of special humanitarian concern to the US”

Class 30. Refugees: Asylum and Withholding: Generally; Meaning of Persecution

A. Asylum and Nonrefoulement:
1. Asylum permits person to remain in the US temporarily and in most cases permanently, and Nonrefoulement, is a narrower remedy, that prohibits forcible return to the country of persecution but not to third countries --- US this is called withholding of removal. INA §241(b)(3)
2. Procedures for both is exactly the same, and under 8 CFR 208.3(2002), an application for asylum under §208 is automatically treated as an application for withholding of removal under §241(b)(3) in the event relief under §208 is denied
3. §241(b)(3): Notwithstanding paragraphs (1) and (2) the AG may not remove an alien to a country if the AG decides that the alien’s life or freedom would be threatened in that country b/c of race, religion, etc; except if alien is a persecutor, having been convicted of serious crime is a danger to community, or believe alien committed nonpolitical crime outside US before arrival, or national security, aggravated felony w/ sentence of more than 5 years, is considered particularly serious, AG can determine notwithstanding length of sentence, crime is particular serious.
4. §208: Same exceptions as withholding removal (criminals, inciting, etc), Also, safe third country exception. Can’t get asylum if AG can remove to safe third country (or withholding), need to apply within one year and can’t have previously applied and been denied unless changed circumstances. Also, can’t have been firmly resettled, but this doesn’t matter for withholding (b/c can still have life or freedom threatened). No review of AG decision whether alien committed serious crime, etc; spouse also gets same status
   a. Get authorization to work, can travel with consent of AG
   b. AG can terminate asylum if no longer meet circumstances to change in circumstances, constitutes a danger, bilateral w/ equal protection, voluntarily availed by returning to another country, acquire new nationality, if asylum terminated, can be removed
   c. Applicants can’t work, fees can be assessed
d. Procedure: Have to check identity, initial interview w/in 45 days, final administrative decision w/in 180 days, administrate appeal w/in 30 days, dismissal if no comply, can issue other requirements by regulation, if file frivolous application knowingly, permanently ineligible for benefit

e. No private action

5. Applicant has right to counsel, Two different procedures depending on timing: walk in – go in and apply for affirmative action, asylum officer grants asylum or refers case to IJ for removal proceedings, if refers, can renew before IJ de novo, subject to BIA appeal and judicial review

B. Persecution or Fear of Persecution:

1. Matter of Acosta: founded CoTaxi, cooperative of taxis, anti-government guerrillas wanted them to participate in work stoppages, taxis seized and burned, friends killed, threatening note.
   a. Court: §101(a)(42) need to prove four separate elements: (1) must have a “fear” of “persecution”; (2) fear must be “well-founded”; (3) persecution must be “on account of race, religion, nationality, membership in a particular social group or political opinion; (4) alien must be unable or unwilling to return to his country of nationality or country b/c of this.
   b. “persecution” clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing belief or characteristic, does not included person displaced by civil or military strife
   c. “Well founded”: must demonstrate that (1) that he possesses characteristics the government or the guerillas seek to overcome by means of punishment of some sort; (2) the government or the guerrillas are aware or could easily become aware that he possesses these characteristics; (3) government or guerillas have capability of punishing and (4) inclination to punish him.
   d. Here purely on subjective impression, not enough, he does not intend to work as a taxi driver when returning to El Salvador
   e. For unable or unwilling to return to country – has to be country wide, no showing that the couldn’t go somewhere else

2. Osorio v. INS (2nd Cir): court held that a person who has a well-founded fear of persecution on account of political opinion does not become ineligible for asylum just b/c the person additionally fears economic hardship.

3. DOJ regulations (proposed) would define “persecution” as “the infliction of objectively serious harm or suffering that is subjectively experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm.” 65 Fed. Reg. 76588

4. Board in Acosta says that “generally harsh conditions shared by many other persons does not count as persecution,” some courts have extended to even particularized threat if threatened harm was too common, but this approach has also been rejected by leading treatise. See ANKER, and by the 9th Cir. Reversed BIA determination, stating that “general evidence of violence, while not in itself
sufficient to establish persecution, does not *negate* persecution when the applicant has also received an individualized threat; if anything, the court pointed out, general violence makes the specific threat credible.

5. Usually inclusion within a particular group will help to show whether fear is well-founded.

6. 9th Circuit also rejected *Acosta’s* view of harm inflicted on punishment: (Russian gov. treatment of homosexuality with shock treatment is persecution)

7. How serious does it have to be, under proposed regulation, would require “objectively serious harm or suffering that is subjectively experience by applicant”

8. Distinction between “withholding of removal” and persecution, withholding no mention persecution, just “life or freedom threatened” BIA and courts freely discuss likelihood of persecution even when considering withholding ---- assumption seems to be that “life or freedom” for purposes of withholding is broad enough to cover the same deprivations that would constitute persecution.

C. Coercive Population Controls as Persecution

1. *Matter of Chang* (China’s one couple, one child policy), not enough, just economic sanctions if fail to comply, superceded by IIRIA, now “any forced abortion or sterilization, or persecution for failure or refusal to submit to abortion or sterilization, constitutes persecution on account of political opinion. See INA §101(a)(42), and in *Matter of XPT*, Board held that 1996 Amendment applies to withholding of removal

2. Still need favorable exercise of discretion, when refugee status is based only on past persecution, rather than on a well-founded fear of future persecution, the favorable exercise of discretion is more tenuous. And 1000 limit for 1996 Amendment. INA §207(a)(5)

3. *Matter of CYZ*: Past persecution triggers presumption of future persecution, INS can rebut through any evidence that tends to show the absence of required well-founded fear, still have to demonstrate well founded fear, going to be hard if live in non-rural area where doesn’t really occur.

**Class 31. Refugees: Asylum and Withholding: Generally; Meaning of “Persecution.”**

A. “On Account of Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion.”

1. Race, Religion, Nationality:
   a. UNHCR Handbook defines race “in its wildest sense to include all kinds of ethnic groups that are referred to as ‘races’ in common usage.” Nationality is defined to include not only citizenship status, but also “membership of an ethical or linguistic group.”
   b. Race and Nationality claims have been relatively infrequent
Religion has played an important role in US overseas admission program, particularly with respect to Soviet Jews and Soviet evangelical Christians, until recently, these claims have been relatively few.

2. Political Opinion:
   a. **INS v. Elias-Zacarias**: Whether a guerilla org’s attempt to coerce a person into performing military service necessarily constitutes “persecution on account of political opinion” under §101(a)(42), Zacharias did not want to join the guerrillas b/c guerrillas are against gov. and he was afraid that gov. would retaliate against him if he did join
      
      (1) Didn’t join b/c he was afraid that gov. would retaliate (Didn’t express political opinion).
      (2) Persecution has to be b/c of the victim’s political opinion not the persecutors, mere existence of a generalized “political” motive underlying the guerillas’ forced recruitment is inadequate to establish the proposition that Elias-Zacariais fears persecution on account of political opinion, as §101(a)(42) requires. (persecution not b/c of political opinion).
   b. Stevens dissent: can express political opinion negatively as well as affirmatively, refusal can constitute an expression of political opinion.
   c. Imputed political opinion (as long as persecutor believes the applicant holds a particular view and intends to persecute the person b/c of it, it doesn’t matter if the belief it wrong) is now accepted doctrine.
   d. 9th cir. has held that even mistaken, or falsely imputed political opinion could suffice *(Lazo-Majano)* (901), but not okay if person doesn’t care, 9th Cir. in *RA*, AG vacated on her last day in office (for reasons related to Board’s analysis of social group).

3. Neutrality as Political Opinion
   a. Pro: Can’t take a neutral stance, if you’re taking a neutral stance, it’s a political decision, Refugee Act shouldn’t discriminate on ideology, don’t want to look at motives underlying an individual's political decision, and motives will be complex and difficult to ascertain, and it’s irrelevant why person made choice. *Bolanos-Hernandez* (9th Cir.) opinion of Reinhard J
   b. Con: Neutrality eviscerates political opinion out of statute, asylum grew out of need to protect those who had performed pol. acts or acted in defiance of state, don’t want political aloofness. *Mendoza Perez v. INS* (9th Cir.)opinion of Sneed concurring (unaware of previous 9th cir. opinion requiring “made a conscious and deliberate choice” to remain neutral – failure to take position does not suffice.

4. Refugees Sur Place:
   a. Neither the refugee definition contained in article 1 of the 1951 Convention nor any of the relevant US statutory provisions (INA
§101(a)(42), 208, 241(b)(3)) are restricted to refugees who fled persecution, they just need to meet statutory criteria, applicants who were not refugees when they left home, but are now refugees are “refugees sur place”.

b. Often condition change while they are away, sometimes arise b/c of actions while away, look carefully at circumstances, don’t want self-induced refugees – these situations are regarded more skeptically, did they make a choice, is it prosecution or persecution, are there political motives, is the fact of having applied for asylum make him subject to persecution ---- all of these are viewed skeptically.

Class 32. Refugees: Social Group: General; Sexual Orientation; Gender (begin).

A. Particular Social Group:
   1. Social group raise the fundamental philosophical questions of why govs. grant asylum and why they limit it, social group has proved critical in most claims based on general related persecution.

   2. Matter of Acosta: (BIA)
      a. Ct uses doctrine of ejusdem generic, meaning literally of the same kind, to be the most helpful in construing the phrase “membership in a particular social group.” (construe general words used in an enumeration with specific words), each of the other phrases – race, religion, nationality, and political opinion (?) describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identify or conscience that it ought not be required to be changed.
      b. Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change b/c it is fundamental to their identities or consciences.
      c. With Cotaxi case, none of characteristics is immutable b/c the members of the group could avoid the threats of the guerillas by changing job or cooperating in work stoppage – not guaranteed work of your choice.

3. Sanchez-Trujilo v. INS: Whether young Salvadorian males constitutes “particular group” (9th Cir)
   a. Statutory words “particular” and “social,” which modify “group,” INA §§101(a)(42)(A), 243(h) indicate that the term does not encompass every broad defined segment of a population, implies a collection of people “closely affiliated with each other,” who are actuated by some common impulse or interest --- Of central concern is the existence of a “voluntary associational relationship”, want it to be limited…. “Major segments of the population of an embattled nation, even though undoubtedly at some risk of general population violence, will rarely, if
ever, constitute a distinct “social group” for the purposes of establishing refugee stats.

4. *Hernandez-Montiel v. INS* (9th Cir. 2000), interpreted *Sanchez-Trujillo* as prescribing an alternative to the *Acosta test*, not as rejecting it: We thus hold that a “particular social group” is one united by a voluntary association, including a former association or by an innate characteristic of its members that members either cannot or should not be required to change it.

5. United States Department of Justice Proposed Rule: Borrows from *Acosta*, includes gender.
   a. Principle that the particular social group in which an applicant claims membership cannot be defined by harm which the applicant claims as persecution (no circular reasoning), must exist independently of persecution.
   b. Under proposal when past experience defines a particular social group, past experience must be an experience at time occurred member could not have changed or was so fundamental to his identity or consciousness, that he should not have been required to change it --- not all past experiences should qualify
   c. Nonexclusive list of additional factors: (drawn from 9th Circuit’s opinion in *Sanchez-Trujillo*), relevant, but not requirements; Factors: whether: (1) members of the group are closely affiliated with each other (2) members are driven by a common motive or interest (3) voluntary associational relationship exists among members (4) group is recognized to be a societal faction or other segment (5) members view themselves as members of a group (6) society in which group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

B. Helton: Persecution on Acct. of Social Group: social group meant to be a catchall all, just an example, not meant to restrict. This view sucks – it could swallow entire rule.

C. Other Circuits:
   1. First Circuit – adopted *Acosta* (nuclear family constitutes a particular social group); Third Circuit has adopted *Acosta* (women constitutes social group), no one adopted Ninth Circuit’s view,
   2. Second Circuit took third approach (holding that social group requires a common fundamental characteristic that is recognizable to its persecutors and the outside world)

D. Sexual Orientation: *Matter of Toboso-Alfonso*: held that homosexuality is an immutable characteristic, question of whether prosecution vs. persecution
E. INS GC, David Martin, sent a memo to all INS attys. reminding them that *Toboso-Alfonso* is binding precedent, that the INS now regards homosexuals as a social group, and that INS attys. should not argue to the contrary.

F. Greatback: Genders should be added to the list of race, nationality, etc.

**Class 33. Refugees: Social Group and Gender (finish).**

A. *Fatin v. INS* (3rd Cir. 1993): Gender can constitute social group, but she does not show well founded fear of persecution (just by showing she’s an Iranian women b/c no evidence that she would be singled out), if take subgroup – she can’t show her membership in this group, can’t show that she’s abhorrent to wearing scarf (wearing veil doesn’t meet persecution given her religious beliefs maybe a devout Sh’te, but not her)

B. INS Gender Guidelines: review various relevant international human rights instruments, confirm that sexual violence can constitute persecution, want them to take asylum for gender-related asylum seriously, degree of influence has varied

C. Cultural relativism vs. Cultural universalism
   1. Cultural relativism emphasizes respect for the cultural norms of the country of origin
   2. Cultural universalism: stresses the universality of international recognized human rights

D. *Matter of Kasinga* (BIA): Female genital mutilation case, court said she’s credible, vivid description of FGM (941), no problem with any of elements
   1. INS wants a new framework, want a “shocks the conscience theory”, they are worried about flood of applicants, Court – Board can’t engage in rulemaking by judicial decision, they want this decision to act as a gatekeeper, they want to exclude some other practices, get rid of people who consent, get rid of claims where it’s not intended to punish, try to define group by harm sought to be protected
   2. Rosenbury: Social groups do not require showing presence of opinion which spurs wrath, attitude not relevant once you are placed within the social group, role of Board is not rulemaking.

E. Commentators disappointed that there was no consistent role, Board is bound by *Fatin* b/c in the Third Circuit, but Board rejected idea that applicant being “opposed” to the particular practice, seems to depart from *Fain*, (requiring them to be so opposed to practice that she will defy law and suffer consequences) How reconcile:
   1. Fain involved clothing not persecution
   2. Fatin can chose not to wear clothing, not immutable, characteristic, only gender was immutability
   3. Here genital is immutable characteristic
   4. Fatin not persecuted b/c of gender, b/c not wearing fatiwa, not same as genital
   5. Rosenbury is the only one who seems to notice that it is “surplus age” to include the applicant’s opposition to FGM in the social group definition.
A. The Problem of the Non-State Actor
   1. Moore: Will not vs. Unable to, Under UNHCR get protection either way, whether refuse or unable to help (gov); Refugee has claim to effective national protection, shouldn’t matter when doesn’t get it.
   2. Anker: Nonstate actor, big problem for women asylum seekers, New Zealand case: persecution consists; Shah: failure of state actions has to be on account of; New Zealand Case: nexus still satisfied as long as failure by one to act is on account of. New Zealand- state fails to protect when does not bring below level of well-founded fear
   3. DOJ proposed regs note, “serious harm must be inflicted by the gov. of the country of persecution or by a person or group that government is unwilling or unable to control --- in evaluating whether gov. is unwilling or unable to control, consider whether government takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to the state protection that exists (consider gov. complicity, attempts by applicants, official action that is perfunctory, pattern of unresponsiveness, general country conditions, nature of government policies, any steps taken by gov). 65 Fed. Reg. 76597
   4. “On Account Of” : The Nexus Requirement:
      a. Congress thinks that “on account of” should be interpreted according to its common sense, standard English, meaning, i.e. “because of. INA §241(b)(3)
   5. Islam v. Secretary of State for the Home Department (UK House of Lords): two women victims of domestic violence, on account of met, gives Jewish shopkeeper example, competitor motivated by desire to put out of business, gov. won’t help b/c Jewish, met, Dissent: Wants to keep social group as broad as possible, then use constricting factors to show fear was well-founded, this social group is defined by persecution (persecuted b/c thought to have transgressed social norms, not b/c they are women, no evidence that men who transgress social norms treated more favorably)
   6. DOJ commentary to proposed asylum regulations, acknowledge that “under long-standing principles of US refugee law, it is not necessary for an applicant to show that his or her possession of a protected characteristic is the sole reason that the persecutor seeks to harm him or her. 65 Fed. Reg. at 76591., but does require that it be central.

Class 35. Refugees: Problems on Substantive Criteria for Asylum and Withholdings; Standards of Proof.

A. “Well Founded” Fear and “Would Be Threatened”: The Standards of Proof:
   1. Law governing standard of proof for withholding of removal claims, for many years §241(b)(3) - INS v. St. Cyr: S.Ct. held that a person seeking withholding of
removal must still establish “clear probability” that his life would be threatened —--- this means more likely than not.

2. Well founded fear – refugee element, S.Ct. said in INS v. Cardoza-Fonseca required less, lower courts and BIA have said that “well founded if a reasonable person in the applicant’s circumstances would fear persecution.”

3. Must be country wide, but if the government is either the perpetrator or the sponsor of the persecution (or the applicant has demonstrated past persecution), there is a rebuttable presumption that relocation is not a reasonable alternative.

Class 36. Refugees: Methods of Proof; Discretion in Asylum Cases.

A. Methods of Proof: What commonly occurring facts are material to the likelihood of persecution and what evidence is relevant to (and sufficient to establish) those facts or any other facts affecting the likelihood of persecution?

B. Material Facts:

1. Membership: Usually more than just group membership will be required to show that particular applicant would actually suffer the feared persecution (unless special circumstances), but you can show pattern or practice based on group

2. Past Persecution: Evidence of past persecution can help establish fear of persecution, and refugee definition in INA § 101(a)(42) makes past persecution an independent basis or refugee status; Following Matter of Chen, DOJ regulations provide a rebuttable presumption that one who has suffered past persecution has a well-founded fear of future persecution. (INS can rebut by showing fundamental changed circumstances – personal or country or by showing that applicant could avoid by relocating), if solely on the basis of past persecution is found to be refugee, deny discretionary relief unless person has demonstrated either (a) compelling reasons for being unable or unwilling to return or (b) has a “reasonable probability that the or she suffer other serious harm upon removal.

C. Relevant Evidence:

1. Applicants own testimony – hard to get evidence other than this b/c usually don’t build case before they leave – question becomes, how to assess credibility, and what should happen when testimony is found to be credible.

2. Past few years, Board seems increasingly included to allow immigration judges to deny asylum claims based on lack of corroborating evidence.

3. Damaize-Job v. INS: Court found that simply disbelieving applicant without any underlying reasons is insufficient, also that minor discrepancies in date when applicant had not reason to lie, insufficient.

4. Usually reviewing courts great deference to lower court’s perception of testimony, but as Damaize-Job indicates, an immigrant judge who disbelieves the applicant’s testimony must give specific reasons for doing so.

5. Articulable bases can include: demeanor, evidence from other sources refutes testimony, internally consistent (or inconsistent with written testimony) (not minor), vague or evasive statements

6. Matter of A-S, Board set out a three part test for assessing an IJ’s adverse credibility determination when it is based on “discrepancies involving the heart of the applicant’s claim.” --- (1) discrepancies and omissions described by the IJ are
actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) respondent has not provided a convincing explanation for the discrepancies and omissions. (dissent argued test undermined de novo review responsibility)

7. Don’t rely too much on handwritten notes at airport. *Balasubramanrim v. INS*

8. Deliberate lies hurt a lot, but sometimes lie not always support adverse credibility findings. *Turcios v. INS* (Court found that fact that applicant had said he was Mexican, not Salvadorian, showed that supported credibility – wanted to be returned to Mexico b/c scared of El Salvador

9. Certain testimony can be rejected as inherently unbelievable

10. DOJ: “Testimony of the applicant, if credible, may be sufficient to sustain the burden of proof w/out corroboration.” 8 CFR § 208.13(a), 208.16(b)(2001). *Matter of MD* (when reasonable to expect corroborating evidence, but explain failure to produce)(BIA)(approved by 2nd Cir); 9th Cir went other way, if testimony is credible, no need to corroborate. *Ladha v. INS*.

D. State Department Opinions:

1. Country reports, problems with relying on to heavily b/c they were developed for foreign assistance program, and have significant foreign policy considerations which may be at odds with the asylum process and may make reports unbalanced

2. State Department’s Bureau of Human Rights and Humanitarian Affairs may supply “advisory opinions” in individual asylum cases. Under new policy, individualized letters rare, most sticker opinions. INS announced, its asylum officers would only be influenced by info they didn’t already have. 8 CFR §208.11 (2001)

3. Procedural fairness issues arise when relying on those opinions as well, no opportunity to respond to them, legislative facts – general events, conditions, no need to cross examine, but adjudicative facts should not be received into evidence w/out cross examine (particular individual would be persecuted is adjudicative)

4. Advice from UNHCR – no provision for UNCHR participation, sometimes asked for opinions, and resulting letters can be admissible as evidence.

5. Other Sources: 1990 establishment, within INS of a documentation center w/ information on human rights conditions. 8 CFR 208.1(b), authorize reliance on other “credible sources, such as international organizations, private voluntary agencies, news organization, or academic institutions – reduce dependence on State Department opinions. Also, BIA often takes administrative notice of country conditions if facts cannot be controverted, are commonly acknowledged, and are not used in a way to deny applicant individualized adjudication, and must have meaningful opportunity to submit rebuttal evidence.

E. Discretion in Asylum Cases:

1. At first, fraud would constituted extreme adverse factor which can only be overcome with the most unusual showing of countervailing equities. *Matter of Salim*
2. *Matter of Pula*: BIA will focus on the totality of circumstances and actions of an alien in his flight from the country where he fears persecution, among factors which can be considered are:
   a. whether alien passed through any country or arrived in the US directly,
   b. whether orderly refugee procedures were in fact available to help in country passed through
   c. whether he made attempts to seek asylum before coming to US
   d. length of time in third country, safety, living conditions, potential for long term residence
   e. whether alien has relatives legally in the US or personal ties to country
   f. if engaged in fraud – seriousness of fraud shall be considered (entry w/ assumed passport – very serious)
   g. age, poor health
3. Alien should present evidence about discretionary acts
4. Board suggest that one who demonstrates a well-founded fear of persecution but not the clear probability required for withholding of removal should receive asylum unless the adverse factors are most egregious.
5. Still unsettled whether foreign policy is a proper subject of the discretion involved in asylum cases.

**Class 37. Refugees: Exceptions to Eligibility**

A. Exceptions to Eligibility: Need vs. Desirability
   1. Firmly resettled in third countries, INA § 207(c), no analogous limitation to withholding of removal; the fact that someone is firmly resettled, wouldn’t matter if their life or freedom would be treatment.
      a. DOJ regulations: a person will be considered “firmly resettled” in another country, if before arriving in the US, the person received an offer to resettle permanently in that country. 8 CFR § 208.15, conditions attached to resettlement can be so restrictive as to negate resettlement, or if person’s entry was to escape from persecution and established no ties
      b. US law also permits INS to remove asylum applicants even to third countries in which they are not firmly resettled if there is a bilateral or multilateral agreement and certain minimum safeguards are present. INA § 208(a)(2)
   2. Past wrongdoing: danger to security of US, certain criminal provision (noted above with exceptions)
      a. *Matter of Carballe*: argued that he must be found to be “a danger to the community as well as that he’s committed particular serious crime,” Service reads definition together, noting legislative history includes language … who have been convicted of a particular serious crime which makes them a danger to the community.” Danger to community is an aid for defining a particularly serious crime
(1) Court holds: Read together b/c particularly serious crime is not defined in the statute, and danger to the community is aid to defining, you should evaluate the crime in light of the danger to the community.
(2) As opposed to moral turpitude determinations which rest solely in crime in abstract, not on evidence in individual case.

b. Aggravated felony is automatically considered a “particularly serious crime” for purposes of asylum, see INA § 208(b)(2)(B)(i), and an aggravated felony for which the person has been sentenced to at least 5 years in prison is automatically considered a “particularly serious crime” for purposes of withholding of removal, see INA §241(b)(3)(B). (Latter provision does not mean that an aggravated felony for which person is sentenced to less than 5 years is not a particular serious crime.
c. Since courts have accepted the holding in Carballe that a particularly serious crime automatically makes the person a danger to the community, the bottom line is that an aggravated felony conviction alone precludes asylum and an aggravated felony conviction w/ a 5 year sentence bars even withholding of removal.
d. For purposes of withholding, when a person has been convicted of an aggravated felony, but not sentenced to 5 or more years of confinement, a finding of “particular serious crime” is not automatic, then you reference seriousness to case.

3. Serious nonpolitical crime: BIA rejected balancing approach in UNHCR, holding level of seriousness depends solely on nature of crime
   a. How to determine whether political. Whether it was committed for political gains? Ninth Circuit: “Incident to or in furtherance of” an insurrection or rebellion are regarded as political for extradition purposes. McMullen v. INS

**Class 38. Refugees: Asylum Procedure Generally.**

A. Procedure:
   1. Two separate adjudication systems, both w/in DOJ, one system administered by INS, other by EOIR
   2. Each system, application procedure under §208 essentially the same as withholding form removal under §241(b)(3) (application for asylum treated for withholding in alternative)
   3. Person already subject to removal files application with IJ (appellable to BIA and with court under INA §242(a)(defensive actions)
   4. If not subject to removal, apply with INS (affirmative actions)
   5. 1990, INS created new corps. of asylum officers, specially trained in asylum law, and based in several major cities, who conducts nonadversarial interview at which claimant may be represented by counsel
   6. INS officer, no longer “denies” an application for asylum or withholding of removal”, but grants application or refers the case to an immigration judge for the initiation of removal proceedings, right of judicial review after appeal to BIA
7. In 1996, Congress created new AEDPA – expedited removal, certain arriving noncitizens – generally those without documents and those whom immigration inspectors suspect of fraud – or relegated to a summary procedure

B. Problems
1. Politics:
   a. Admission under the overseas refugee program have historically been titled dramatically to those fleeing countries unfriendly to US, foreign relations agenda, most from communist country,
   b. 1985 class action by Salvadoran and Guatemalan, permitted Salvadorans and Guatemalans turned down to apply for asylum
   c. Now far fewer communist countries, and such ideological patterns are not obvious today
   d. Exception – Cuba – application approval 64%
2. Long Delays: INS asylum officer could handle only a fraction of the applications filed, backlog kept growing, overload at administrative level, prolong uncertainty
3. Unfounded claims: hope that claim will be erroneously granted, interim benefits such as permission to work, but 1994 restrictions greatly restricted this
4. Fiscal Costs: expensive, application to INS and then to IJ, two bites at appeal
5. Procedural fairness, due process does not have right to know of asylum, have to provide application form if person expresses fear, adequacy of foreign language interpreters in proceedings
6. Time constraints: (IIRIA)
   a. With narrow exceptions, an asylum application may not be filed more than one year after the applicants arrival in the US. INA §208(a)(2)(B,D)
   b. Hearing or interview must begin w/in 45 days of filing, and asylum officer or IJ must decide the case no later than 180 days after the filing. INA §208(d)(5)(A)(ii,iii)
   c. Any administrative appeal must be filed w/in 30 days of the initial decision.

C. Barring or Discouraging Access to Asylum Systems (case management strategies)
1. Filing Deadlines – one year, unless changed circumstances which materially affect the applicant’s eligibility for asylum or extraordinary circumstances related to the delay in filing. INA § 208(a)(2)(D) (regs define as events or factors directly related to the failure to meet the one year deadline)(includes physical, mental, or legal disabilities, ineffective asst. of counsel provided strict requirements are met)...Only Asylum not Withholding of removal – would violate convention of ‘51
2. Safe Countries Europe not US, asylum – presumed ineligible, firmly resettled, or if AG can remove to country pursuant to bilateral or multilateral agreement – to a third country in which a person’s life or freedom would not be threatened on account of race, religion, etc., “and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection” (§208(a)(2)(A)(no subject to judicial review INA §208(a)(3))...
such agreement yet exists – US and Canada on the verge… Chain refoulement issues

3. Expedited removal, summary procedures
   a. Kicks in when immigration officer “determines” that an arriving noncitizen is inadmissible for lack of documents or for fraud. INA §235(b)(1)(A)(i)
   b. Special exclusion provision, if person invokes asylum, determine whether there is a “credible fear of persecution.” INA §235(b)(1)(B)(i,ii), requires significant possibility… that the alien could establish eligibility for asylum. INA §235(b)(1)(B)(v)… if credible fear person detained for “further consideration of the application for asylum.” INA §235(b)(1)(B)(ii), if no credible fear found, asylum officer orders the person removed and writes up a report summarizing the facts and the reasons for the finding. INA §235(b)(1)(B)(iii)(I,II), IJ upon individual requires, an IJ will promptly review finding of no credible fear, whether in person or telephone or video, w/in 24 hours if possible, and in no circumstances later than 7 days after determination.
   c. NO administrative review unless person attests under penalty of perjury that he or she has already been admitted as LPR, refugee or asylee
   d. Nor any judicial review. INA §§242(a)(2)(A)(limited exceptions)
   e. 80-90% of expedited removal, b/c of suspected fraud, significant, b/c immigration laws render inadmissible for life, any person who has ever been removed on fraud grounds under INA §212(a)(6)(C) (“or has sought”); those removed only b/c of invalid documentation under §212(a)(7) become inadmissible only for 5 years. §212(a)(9)(A)(i)

4. Congress was concerned about INS inappropriately encouraging people to withdraw, and wrongfully failing to refer people for credible fears (or incorrectly removing them) and also concerned about detention
   a. Upon finding of credible fear, usual practice is for parole if not dangerous to community and likely to show up for hearing, but different policies based on geographic areas, and different standards for conditions for confinement.
   b. Some concerned expedited removal to cheap and efficient, sacrifices accuracy and procedural fairness for efficiently

5. Detention: More and more, congress and INS have increasingly resorted to detention pending final adjudication, no provision for detaining those who file affirmative applications, but those who apply for asylum in removal are subject to same detention rules as anyone else, they can be held without bond, released w/ bond or paroled. INA §236(a)

6. Denying Employment Authorization, After 1995, INA is barred from granting employment authorization until 180 days after filing the asylum application, §208(d)(2), person automatically acquires right to work when receiving asylum. INA §208(c)(1)(B) – goal to discourage unfounded claims (which it did)

7. Sanctioning Frivolous Applications: In addition to potential sanctions on the attys and representatives, under INA §208(d)(4), AG must warn every asylum applicants of the consequences of filing a frivolous application, which under
§208(d)(6) render any noncitizen who has “knowingly made a frivolous application for alysson, permanently ineligible for benefits under the INA.” Must make specific finding regarding frivolousness

8. Application Fees: No fees currently required, although there is a fee for renewing or replacing a work authorization, if had fees, many need waiver for indigent, which would cost more money to decide, not worth it.

9. Preinspection: Canada, Bahamas, Bermuda Aruba, and Ireland, can get inspected before travel, not face voyage home, but no recourse to adjudicative system, no evidentiary hearing, appeal, or judicial review

10. Interdiction: Boat-people, turn them back, reality if intercepted, not going to get asylum

Class 39. Undocumented Migrants: Generally; Immigration Offenses; Employer Sanctions.

A. Background:
   1. Push factors vs. pull factors
   2. Recent focus on law enforcement (from adjudication)
      a. IIRIA § 132 increased number of authorized overstay investigators
      b. §133 brought state law enforcement officers into the process
      c. §131 bolstered the ranks of employer sanctions investigators
      d. §2404: increased the number of federal prosecuting attys to enforce immigration-related criminal violations
      e. §656 and 657 took steps to make birth certificates and social security cards more counterfeit-resistance
      f. USA Patriot Act of 2001 need to set up database

3. Harboring aliens crime under §274(a)(bringing them in, transporting, or harboring), but §274(a) employment (including the usual and normal practices incident to employment shall not be deemed harboring (Texas Proviso, repealed), but INS says still employing does not constitute harboring, also government prosecuted sanctuary people, and subjected commercial carriers to fines for failing to check documents

B. Employer Misconduct
   1. Congress wanted to decrease number of job opportunities for undocumented migrants, added §274(a), imposing civil fines, and in some instances, criminal punishment, on those who knowingly hire anyone not authorized to work, also to continue to employ
   2. Grandfather provision, not apply to hiring or recruiting or referring before the date of the Act (1986), and shall not apply to continuing employment of an alien who was hired before then, but employment DOES NOT include “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent.
   3. What does knowingly mean:
a. *Mester Mfg. Co. v. INS* (9th Cir): Court held that “constructive knowledge” was enough. Deliberate failure to investigate suspicious circumstances imputes knowledge.

b. *Collins Foods Interl. Inc. v. INS* (9th Cir) Document only need to appear genuine on its face, comparison with samples display in an INS manual, not necessary.

c. INS regulations interpret “knowing” to include “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. 8 CFR §274(a)

d. *New El Rey Sausage* (9th Cir): INS must provide an employer with a reasonable amount of time for compliance after the employer acquires knowledge that an employee is unauthorized.

4. Subsection (a)(1)(B) creates a separate procedural offense, imposes on employer an affirmative obligation to perform certain paperwork before hiring any individual – whether citizen or not, good faith attempt to comply with verification procedures will excuse a “technical or procedural” failure. INA §274A(b)(6), actual good faith compliance is also automatic defense – must examine certain documents, three categories (reasonably on face appear genuine), then attest under penalty of perjury, on standard form that performed verification, employee must also swear, and must retain document

   a. Variety of enforcement techniques used, one is teaming up with Dept. of labor who tells INS about applications for labor certification

5. Procedure

   a. Persons with knowledge may complain to INS,

   b. If INS finds a violation, serves Notice of Intent to Fine, and party has right to request formal hearing before ALJ

   c. INS must prove case by preponderance of evidence, if does, ALJ imposes civil crimes, criminal provisions apply only to substantive violation

   d. As a result of IIRIRA, INA §274(a)(3) sentence can be as long as 5 years, if w/in 12 months, employer has hired 10 or more unauthorized workers w/ actual knowledge of status.

   e. Decision of ALJ reviewable to Chief Administrative Hearing Officer, Judicial Review of final administrative decision available to CT of appeals, INA §274A(e)(8)

6. GAO had to prepare annual report, to review, found that the law reduced illegal immigration and is not unnecessary burden, but there was some widespread discrimination

7. Also computerized registry, but not widespread, just pilot program, compliance with registry, presumes compliance.

C. §274A: Unlawful employment of aliens

   a. Making employment of unauthorized aliens unlawful

      (1) It is unlawful for a person or other entity
(A) to hire, recruit or refer for a fee, an alien, knowing the alien is an unauthorized alien or

(B) Hire for employment in the US an individual without complying with document requirements

(2) Continuing employment: unlawful for a person or entity after hiring alien, to continue employ the alien knowing the alien is unauthorized

(3) Defense: person or alien that shows complied with subsection (b) with respect to hiring or recruiting has not violated (1)(A)

(4) Also applies to labor through contract, subcontract

(5) If use state employment agency documentation, deemed to comply if retain appropriate documentation

(6) If you’re member of collective bargaining unit, w/ one or more organization, and one employer complies, subsequent employer okay (3 yrs. Time limit)

b. Employment verification system:

(1) Must attest under penalty of perjury that you have seen either passport, resident alien card or both social security card and drivers licensees (AG can prohibit certain documents

(2) Individual must also attest to using

(3) Must retain record for three years after hiring or one year after termination, whichever is longer

(4) You can copy documents

(5) Good faith compliance, considered to comply in good faith, notwithstanding a technical or procedural failure if good faith attempt, but NOT if you fail to correct w/in 10 days after notice from INS that not incompliance, and NOT if pattern or practice

c. No authorization of national identification cards
d. GAO report
e. Fines: cease and desist order (get hearing), schedule of fines, on pg. 367, paperwork violation - $100-$1,000, pattern or practice not more than $3,000 and 6 months (only for substantive violations), can get judicial review after 45 days of final order w/ Ct. of Appeals, AG can file suit to enforce in district court.
f. Cannot require indemnity bonds (g)
g. Definition of unauthorized alien: alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or the AG.

Class 40. Undocumented Migrants: Prohibitions on Discrimination; Public Benefits and Proposition 187.

A. §274B. Unfair immigration-related employment practices
1. It is an unfair immigration-related employment practice to discriminate against anyone other than unauthorized alien (A) b/c of national origin, (B) IF protected individual b/c of citizenship status;

2. EXCEPTIONS – not apply to entity that employs 3 or less people, a bonefide occupational qualification, discrimination b/c of citizenship status which is otherwise required to comply with law

3. Protected individual: citizen or national of US or alien who is LPR, NOT INCLUDE alien who fails to apply for naturalization w/in 6 months of first eligible for naturalization or if later 6 months after Nov. 6, 1986 and an alien who has applied for naturalization abut has not been naturalized w/in 2 years of application, unless can show that actively pursing naturalization (time consumed in processing not counted)

4. Not discrimination to hire US citizen over another individual who is an alien if equally qualified

5. Can’t retaliate b/c person told on you

6. Can’t require more documents than necessary or refuse to honor documents that look genuine IF made for purpose of discriminating

7. Can file charges w/ EEOC or INS, can’t overlap, only get one recovery, get private action though (within 90 days after receiving notice), if INS does not bring charges (file complaint) w/ 120 days if allege knowing and intentional discriminatory activity or pattern or practice

8. Hearing:

9. Violations punishable by civil fines, graded, lesser fines for zealous document checking. INA §274B(g)(2)(B)(iii)IV), no criminal penalties for pattern or practice

10. Congress established Office of Special counsel to prosecute (appointed to serve term of 4 years)

11. Process beings when party who alleges discrimination, direct victim, another person “adversely affected,” or an INS officer – files a charge with the office of Special Counsel (can’t file charge with both EEOC and INS, and must file w/180 days of discriminatory act (same period for Title VII). INA §274B(d)(3)

12. ALJ conducts recorded evidentiary hearing. INA §274B(e,f), look for preponderance of evidence, ALJ will order cease and desist, and order pay civil fine (discretion to order additional sanctions). INA §274B(g)(2), no find violation – complaint is dismissed

13. NO direct administrative review, but can go to court of appeals (either party). INA §274B(i)

B. Prohibitions on Discrimination:

1. Gaps in civil right coverage for Title VII claim, have to have at least 15 people employed, and does not bar discrimination in favor of US citizen against LPR

2. Civil rights law distinguishes “disparate treatment” from “disparate impact”, no get disparate impact in INA, lacks counterpart (Title VII) in INA, also knowingly language, seems to undermine disparate impact – require intent, dicta from ALJ decisions have accepted this (Reagan’s interpretation)
C. Benefits

1. Undocumented migrants are now ineligible for all “federal public benefits” a term defined broadly to include any contracts, loans, professional or commercial licenses, retirement benefits, welfare, health or disability benefits, food assistance, housing, post-secondary education, or any other “similar” benefits provided by the federal government. Welfare Act §401(a,c)

2. Exceptions – emergency medical care, non-cash emergency disaster

3. Cannot receive social security payments, regardless of how much they contribute. IIRIRA §503

D. Equal Protection Law

1. Ordinarily under equal protection law, either the federal government or a state may treat two groups of people differently as long as there is some rational basis for the distinction

2. Certain classification are said to be suspect, giving rise to “strict scrutiny,” under which the Court insists that the distinction be “necessary” to a “compelling” governmental interest. Race is the paradigm suspect classification

3. Court has held that state action discriminating against noncitizens will trigger strict scrutiny.

E. Proposition 187: CAL. tried to keep illegal immigrants out of state school, schools would have had to report to INS suspected out of status kids and parents, also prohibit health facilities (publicly funded) from servicing undocumented migrants except in medical emergencies

1. Federal district judge enjoined enforcement of most of the provisions of proposition 187

2. Court held that Welfare Act reflects “intention of Congress to occupy the field of regulation of government benefits to aliens”

3. S.Ct cases offer two distinct reasons for interpreting the Constitution to bar state regulation of immigration

   a. In Henderson: Ct emphasized the importance of uniform immigration restrictions

   b. In Chy Lung: Ct sought to prevent one state from taking action that could antagonize other nations and thus create foreign relations problems for US

   c. State to defeat equal protection argument, has to identify some legitimate state interest to which the challenged classification is at least rationally related.
A. Background:
   1. Noncitizen nationals, neither citizens nor aliens, see INA §101(a)(3), consists mainly of those born in American Samoa or Swains Islands, have almost same rights as citizens, but more limited capacity to transmit citizenship to children (free from immigration control b/c inadmissibility and deportability grounds refer only to aliens).
   2. Importance of Citizenship and Rules for Attaining and Keeping Citizenship

B. Significance of Citizenship:
   1. Most significant consequence – freedom from immigration laws, right to pass citizenship on, nation can intervene if citizen is threatened, eligibility for government employment, public benefits, property ownership, political participation (some countries insulate from extradition)
   2. Congressional action that discriminates against noncitizens – even LPR’s has been upheld, b/c of plenary power to regulate immigration and assumed similarity between immigration and other regulation of noncitizens (but equal protection concerns)
   3. States may favor US citizens – even over LPR’s – when the befit in question sufficiently implicates the “political function of the state” States limit vote to US citizens – upheld, sometimes goes further – state action requiring citizenship for state troopers upheld, public school teachers, and probation officers ---- Court emphasized the power of the state to confine important sovereign functions to those who make up the political community.

C. Citizenship and Welfare Reform:
   1. Undocumented migrants disqualified from Fed and State welfare programs,
   2. Personal Responsibility and Work Opportunity Reconciliation Act made fundamental changes to the law governing public assistance – eliminating longstanding safety nets, and shifting much of the responsibility of supporting needy to states, Title IV classifies noncitizens as “qualified or unqualified” Qualified includes LPR’s, noncitizens who have been admitted through overseas asylum or nonreturn and certain paroles. Unqualified includes (mainly undocumented migrants and nonimmigrant – are ineligible for almost all public assistance. Even benefits for qualified are limited (not eligible for SSI and food stamps)(exception during first 5 years after admission/asylum/withholding, LPRs worked for 40 SSI qualifying hears w/out having received any means tested benefits, and people on active duty/hon. discharged). States decide state benefits
   3. Hard for even qualified persons, b/c have to have sponsor who has to show support, resources deemed available for financial eligibility, and if immigrant gets welfare w/in 5 years is deportable, unless show circumstances necessitating welfare arose after entry.
4. Congress allowed persons who were in the US as of 1996 to continue to receive SSI and Food stamps

D. Differences between Citizens and LPR’s: Two Commentators:
   1. Schuck: Membership in the Liberal Party: Is citizenship becoming devalued (aliens are seeking it lest); prospect poses 4 dangers: political – concern for the quality of gov. process and policy outcomes (want people participating who are effected); cultural – need assimilation for effective society; spiritual- success of democracy depends upon shared interests/civic virtues; emotional – bonds us together. He has no empirical data
   2. Aleinikoff, Citizens Aliens Membership & Constitution: Doesn’t like citizenship as membership mentality, most tough decision made at entry, function like citizens, kids to school, etc., *Graham v. Richardson* (S.Ct. struck down statutes that excluded permanent resident aliens form state welfare programs)(links to membership theory, doesn’t like Blackmun’s designation of distinct and insular minority, triggering strict scrutiny; idea of community is broader than citizenship, contradiction with Blackmun language, and reasoning behind opinion (not treat aliens differently). Maybe

E. Citizenship Acquired at Birth:
   1. *Jois soli*: right of the land, generally confers a nation’s citizenship on persons born within that nation’s territory
   2. 14th Amendment: All persons born or naturalized in the US and subject to the jurisdiction thereof, are US citizens and of the state wherein they reside
   3. Also §301, “a person born in the US to a member of Indian, Eskimo, Aleutian, or other aboriginal tribe” now becomes citizen at moment of birth – but citizenship not constitutionally compelled
   4. Even someone born to two noncitizens
   5. United States, includes Puerto Rico, Guam, and US Virgin Islands. INA §101(a)(38).
   6. American Samoa and Swains Island – become noncitizen nationals. INA §101(a)(29), 308(1).

**Class 42. Citizenship: Acquiring Citizenship (Jus Sanguinis, Naturalization): Losing Citizenship (Introduction to Denaturalization and Expatriation)**

A. *Jus Sanguinis*: Citizenship by descent, requires that one or both parents be citizens at the time of the child’s birth.
   2. To prevent passing citizenship into perpetuity without having ever stepped into the US, Congress has imposed two limits: a residence limit and a retention requirement, 1978 Congress abolished the retention requirement, and in 1994 Congress enacted legislation permitting anyone who had lost his or her citizenship because of the retention requirement (except for certain people ineligible on ideological grounds) to regain citizenship simply by taking an oath of allegiance to the United States.
3. Mautino’s Acquisition of Citizenship:

<table>
<thead>
<tr>
<th>Date of Birth of Child</th>
<th>Residence Required of Parent(s) to Transmit Citizenship</th>
<th>Residence Required of Child to Retain Citizenship</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 5/24/34</td>
<td>Parent is citizen who resided in US before birth</td>
<td>None</td>
</tr>
<tr>
<td>On or after 5/24/34 and before 1/13/41</td>
<td>a. Both parents are citizens, one with prior residence</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>b. One parent is citizen with prior residence</td>
<td>Same as immediately below</td>
</tr>
<tr>
<td>On or after 1/13/41 and before 12/24/52</td>
<td>a. One parent is citizen with 10 years of prior residence in US, at least 5 of which were after age 16</td>
<td>2 years continuous presence in US between ages of 14-28, except no retention requirement if born on or after 10/10/52</td>
</tr>
<tr>
<td></td>
<td>b. Both parents are citizens, one with prior residence in US</td>
<td>None</td>
</tr>
<tr>
<td>On or after 12/24/52 (same as §301(g))</td>
<td>a. Both parents are citizens, one with prior residence in the US</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>b. One citizen parent with 10 years of prior physical presence in the US, at least 5 of which were after age of 14 (for births 12/24/52 to 11/13/86)</td>
<td>None. The retention requirement was abolished effective 10/10/78. Persons still citizens on that date have no retention requirements.</td>
</tr>
<tr>
<td></td>
<td>or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>One citizen parent with 5 years of prior physical presence in the US at least 2 of which were after age 14 (for births on or after 11/14/86)</td>
<td></td>
</tr>
</tbody>
</table>

B. Citizenship Acquired After Birth:
1. United States Constitution authorizes congress to “establish an uniform Rule of Naturalization.” US Const. art. I § 8, cl. 4
2. INA §310(a) (Im. Act of 1990) transferred from courts to AG the authority to grant naturalization
3. Courts have jurisdiction to review naturalization denials de novo. See INA §§310(b,c)

C. Administrative naturalization:
1. Created to deal with backlogs, Republicans and Democrats hash it out
2. Substantive criteria:
   e. Lawful permanent resident (INS §318) (leaves out those who were admitted as LPR fraudulently)
   f. Residence and Physical presence requirement: must reside continuously in the US for 5 years preceding filing of application, all after admission as LPR; must be “physically present” in the US for at least ½ that period, and must “reside continuously” in the US from the filing of the application to the grant of the naturalization. INA §316(a). 3 years if married to citizen
   g. Good moral character. INA §316(a).
   h. Age. 18 & up (administrative naturalization); children eligible for derivative naturalization
   i. English Language: “an understanding of the English language, including the ability to read, write, and speak words of ordinary usage.” INA §312(a)(1).
   j. Knowledge of Civics: a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States.” INA §312(a)(2)
   k. Political requirement: INA §313 disqualifies all applicants who either during the ten year period immediately preceding the filling of the application or during the interval between the filing and the taking of the final oath of citizenship, fell within any of the several related classes (advocates of opposition of gov, members of communist part, and others)

3. Petitioner must affirmatively demonstrate attachment to the principles of Unties “State Constitution. INA §316(a), take oath of allegiance, 8 CFR §337(a)(a)(2001).

D. Procedure:
   1. §401 Im. Act. 1990: AG ‘sole authority to naturalize persons,’ some people still go to court to take oath (solemnity of ceremony) (courts exclusive ability for 45 days, just ceremony)
   2. Process begins – file application with INS, §334(a), examined by interviewer, questioned, background check, record, either granted or denied, if not within 120 days, can go to district court (INA §336(b)); can requires evidentiary hearing if denied before “immigration officer,” can seek review in district court.
   3. Other: “collective naturalization – private bills”, Child Citizenship Act of 2000-automatically confers US citizenship on any child who (a) has a US citizen parents; (b) is under age of 18; (c) resides in US as LPR in the custody of the parent. INA §320, no need to apply, operation of law (wise to get proof though – passport); Also can petition if kid doesn’t apply under §322 if (1) has citizen parent (who files application); (2) either citizen parent or citizen grandparent has been physically present in the US for 5 years, at least 2 of which after applicant was 14; (3) kid is under 18; and (4) kid resides outside US in custody of parent, but temporary in the US after lawful admission (not clear if entire process needs to be complete before kid is 18)
E. Dual Nationality:
   1. More and more common usually happens when citizenship by birth and descent overlap, and when foreign gov or US gov. doesn’t retract citizenship
   2. Scholars less critical today

F. Statelessness:
   1. Opposite of dual nationality – here you fall between the cracks
   2. There is a minority treaty that says country where you are born must take you, but limited significance b/c minority.