CHAPTER ONE: IMMIGRATION & THE CONSTITUTION

SECTION A: Sources of Power to Regulate Immigration

Most requirements come from INS (DOJ). State Dept.

Constitution
1. The constitutionality of the DOJ’s control of immigration is no longer subject to debate in the majority of jurx.

What arguments make immigration different from domestic policy?
1. Foreign relations
2. National security (overlapping but distinct);
   Premised on the fact that nc’s are often seen as security risks, the domestic policy may wish to curtail immigration; foreign policy may dictate

ADMINISTRATION
Several federal agencies administer the Immigration & Naturalization Act (INA). Most authority rests w/the Attorney General – who delegates throughout the DOJ.

I. Immigration & Naturalization Service – law enforcement, inspection of arriving passengers, prosecution at administrative hearings, processing and adjudication of certain applications, and public education.

II. Executive Office for Immigration Review (EOIR) – adjudication. Three units:
   A. Office of the Chief Immigration Judge – coordinates the work of a cadre of immigration judges based throughout the U.S.
      Main function – removal hearings – formal evidentiary hearings in which IJ’s decide whether to admit or expel nc’s.

   B. Board of Immigration Appeals (BIA) – hears appeals from IJ decisions & from certain INS decisions.

   C. Office of the Chief Administrative Hearing Officer (OCAHO) conducts evidentiary hearings in certain cases involving the employment of noncitizens who have not been authorized to work and cases involving certain forms of job discrimination.

III. Office of Immigration Litigation (OIL) – represents the government in most immigration cases that get to federal court;

OTHER DEPTS.:
Dept. of State
Labor Department
Dept. of Health & Human Services

Sovereign power v. enumerated power
I. Commerce Clause
Congress may “regulate commerce with foreign nations.” U.S. Const. art. I, § 8, cl. 3.
A. Pro.
1. Inferred from “head tax” laws that the Court struck down using Commerce Clause powers (p.10).
2. Henderson v. Mayor of New York (1876) – the Court found that the transport of passengers into the US is so voluminous that it is important to commerce in terms of wealth brought, and esp. because of labor. If this is so, then is the INS or new DHS the best place for its regulation?

Migration or Importation clause only applies to slaves, acc. to some.

II. Migration or Importation Clause (art. 1, s 9, c. 1)
“The Migration or Importation of such Persons as any of the States now existing shall think proper to permit, shall not be prohibited by the Congress prior to the year [1808] . . .”

B. Con:
1. (Dissent from ‘head tax’ cases) Should be applied only to where persons enter as articles of commerce – i.e., slaves, or in cases of passenger vessel forfeiture.

III. Naturalization Clause
Art. I, s 8, cl. 4 authorizes Congress “[t]o establish a uniform Rule of Naturalization.”
Legomsky asks whether immigration control might be brought within this clause “with a little help from the ‘necessary and proper’ clause[.]” Congress made lawful admission as a permanent resident a prerequisite to naturalization. INA § 316.

Chief Justice Taney rejected this idea in the Passenger Cases. He contended that it had the goal of clarifying citizenship rights and nothing to do w/immigration. He likely would say that the Naturalization Clause made no pertinent to the Congress’ making LPR status a prerequisite to citizenship because LPR status is the basis from which naturalization powers come into effect (citizenship for those who “reside among us.”); it does not logically follow that the LPR prerequisite would thereby extend the status beyond this basis.

III. War Clause
Maybe b/c regulation of alien enemies is so authorized, alien friends are also. Maybe “alien friends” & the relationships developed from this would imply that Congress is within its power to regulate alien friends.

It is a part of every country’s independence – sovereignty – to regulate immigration.

SECTION B: Limits to the Federal Immigration Power

DUE PROCESS
No initial due process, but
procedural due process for deportation
for returning LPRs possibly
Ekiu (1892) – Supreme Court held that where woman likely to become public charge no procedural due process right for NC at entry.

BUT in Fong Yue Ting, (1893) the Supremes held that in procedural due process is implicated in deportation proceedings.

BUT in Yamataya v. Fisher (1903) the Court amended Fong per deportation – if already admitted, a factual inquiry by an executive officer will suffice to comport w/due process requirements; it may be seen as a limitation on executive action. The modern interpretation is that entry puts due process rights in effect – regardless of length of stay or how entered.

Mezei – not violation of due process to exclude NC at discretion of AG b/c of nat’l security


Substantive Due Process
conferring a vested right and rational basis review by judiciary

First Amendment Issues
Limitations:
Deportation limited to where “clear & present danger” of bringing about a sufficiently important evil. Dennis (1951) re Communist Party member.

Harrisiades (1952) cites Dennis to make deportation test: present or former membership that advocates overthrow of the US government, i.e., the Communist Party.


Possible limitations:
1. The Court did not go so far as to bar all First Am. claims in removal hearings; rationales specific to selective prosecution.
2. Left open the possibility that a prosecution could reflect discrimination “so outrageous that the foregoing considerations can be overcome.”
3. The Court may not have intended to bar LPRs from asserting selective prosecution claims – it repeatedly referred to “continuing presence” violated immigration laws. LPRs’ continued presence would not.

AG has power to deny waiver – based on plenary nature of Congress’ power to regulate immigration. Mandel (1972) noncitizen excluded b/c of alleged communist advocacy. Citizens said their 1st Am. Rights were thus deprived.

J. Marshall’s dissent held this to be unconstitutional where citizens’ right to receive ideas involved.

HARISIADES, cont’d.
I. How far did the Court in Harisiades intend to go?
largely immune from the judiciary
in trying to gauge the breadth of opinion, look at what it did --
  rationality review – they purported to find some reason in what Congress legislated; they
talk about how Soviets have been infiltrating via communist aliens.

But Frankfurter, p.76 – this policy has been a POLITICAL policy wholly outside the realm of
judiciary

II. FIRST AMENDMENT
First Amendment not violated.
  1. FA doesn’t forbid deportation.
  2. FA doesn’t protect speech, assembly, etc advocating violence.

   so you walk outside, you’re a noncitizen, and you say, “I think overthrowing the
gov’t may be a good idea;” you can thereby be deported under this opinion.
   This is a special doctrine applicable only to noncitizens.
   There is not a single reference to the term noncitizen. The FA simply doesn’t protect
advocates of violent overthrow.
   The ballot box protects FA rights to free speech, etc.

Some say that FA standards for noncitizens are the same as for citizens, as the
distinction doesn’t seem to appear here. American-Arab Antidiscrimination (ADC).
Did Harisiades apply the then-prevailing FA standards?
Would you be able to tell whether it’s okay to restrict FA rights?
The Court cites Dennis v. U.S., which holds that “clear and present danger” allows
Congress to restrict speech.

Is there a clear and present danger that Communists could overthrow the government?
The Court’s unwillingness to explore even the reasonableness of the belief that CP members
presented a “clear and present” danger.

III. EX POST FACTO
πs claim that they had already left the CP, and shouldn’t be deported for past
membership.

maybe the Court was thinking that even past membership subjected nc for deportation.
The Court held that legislation was not retroactive, but holds that even if it were it would
not be unconstitutional.

Is it punishment to deport someone for belonging to the CP? What makes something
punishment? This is an important question, as certain protections only apply to punishment.
Suggestions: (a) whether a right is being taken away;
(b) look at goals of punishment – deterrence, rehabilitation, retribution; this reg. might
deter some from CP membership. What about incapacitation? This rids the country of perceived
harm.

Just b/c deportation is not part of crim justice system it is not easily outside the realm of
punishment.

There have been substantial cracks in
1977  Bialo v. Bell – exclusion challenged b/c grounds irrational; an important dictum held that even in exclusion & deportation the courts still have “some limited judicial responsibility.”

p.100  ZADVYDAS v. DAVIS, 121 S.Ct. 2491 (2001): the Court limited detention for NC who has entered the US to six months maximum, once NC shows:

* no significant likelihood of removal to another country; and
* Government can’t rebut that showing with evidence to contrary.

Zadvydas is a statutory interpretation case. Look at Q6, p.113. Suppose there is no wiggle room for interpretation. The Court in Zadvydas says that if Congress made its intent clearer it “must give effect to that intent.” This doesn’t necc. mean it would find the provision constitutional.

One of the things bothering the Court was that this decision was being made by administrative officials, not by Art. 3 judges.

Plaintiffs were convicted felons who were LPR. They were each detained for long periods by the INS as they were unable to gain entry into their countries of origin and others. Filed writ of habeas.

If basis for deportation is a conviction of a crime, the statute in question said that the person could be detained for 90 days.

beyond the removal period – is there a time limit to this period?

The Court defined the Reasonable period: when there is no hope of repatriation.

This was a deportation case, what if like Mezei, these were NCs applying for admission? Would the result have been different? It’s hard to say.

***  The 9th cir. has extended this to exclusion. Others may follow.

Scalia (dissent) characterizes π’s argument as being that they had a right to supervised release into the USA. He says that deportees and excluded people equally have no right to supervised release into the USA.

Are they arguing indeed for such a release?

They have a right not to be detained, recognizing that a practical consequence is release into US. It’s not the same as demanding release into US. There is no question that they’ll be staying in the US, as there’s nowhere else to go.

Life imprisonment part of punishment for noncitizen offenders – can’t Congress prescribe that? then why not life detention? Wouldn’t that violate equal protection? Or can’t Congress treat NC as not the same as citizens? There’s no general prohibition of Congress’ plenary powers to treat the two unequally. But Wong Wing holds that all criminal defendants get the same protections, citizens or not.

Assuming that Congress could punish one group more, is the statute in question in fact punishing deportees for a criminal offense. But the effect comes from some citizens being from countries which won’t take them in. Should say a Turkish Kurd be treated more unfairly than a Swede whose country will welcome him back at deportation.

CHAPTER TWO: IMMIGRANT PRIORITIES

SECTION A. IMMIGRATION LAW HISTORY
1875 – 1st law forbidding entry to prostitutes & convicts
1882 – head tax & barring of “idiots, lunatics, convicts & persons likely to become public charge”
1882 – 1943 Chinese Exclusion Act
1885 & 1887 – contract labor laws, aimed at importing cheap foreign labor under labor k’s which depressed U.S. labor market

1917-1924: intensification of restrictions; Asiatic Barred Zone (excl. Japan); first attempt to limit the number and not just the quality of entrants.
   Quota Law (1921): entry restricted to each nationality totaling 3% of the foreign born persons of that nationality residing in the USA in 1910, totaling approximately 350,000.
   (extended to 1924).
   1924 Immigration Act
   Quota immigrants restricted to c.150k/year.
   Natives of Western Hemisphere could enter w/o numerical restriction.
   All entrants ineligible for citizenship barred – this was aimed at East Asians (including Japanese folks, post Ozawa (1922)).
   1924-52 restrictions remained essentially the same, except expansion of deportation & exclusion grounds for alleged subversives. p.127

Immigration & Nationality Act of 1952
established quotas, incl. special quotas for Asians
preference quotas for skilled imm’s & certain relatives of U.S. citizens & resident aliens
every NC seeking to enter deemed an immigrant unless established to be nonimmigrant

1965 Amendments –
- eliminated discriminations based on race or national origin
- imposed additional limits on entry of labor
- restricted Western Hemisphere immigration
abolished the special imm. restrictions relating to East Asians & forbade imm. discriminations because of race, sex, nationality, place of birth, or place of residence
fixed a unified immigration quota, for areas outside the Western Hemisphere, of 170k annually.
However, no more that 20k from any single foreign state.

Immigration Act of 1990
removed some of the suspicion & hostility characterizing the ’52 Act.
However, some said it unjustifiably curtailed due process rights in deportation proceedings.
marked increase in the number of immigrants/yr.
Overall ceiling of 675,000/yr.
480,000 – family reunification
140,000 – “employment based”
55,000 – “diversity” immigrants
“temporary protected status” instituted – discretionary remedy for NCs fleeing war, natural disaster, etc. but who don’t qualify for asylum.
to minimize delays, it tx’d some procedures from courts to INS
Exclusion Grounds – revamped (“Grounds of Inadmissibility”)
toughened substantive rules

IIRIRA: Illegal Immigration Reform & Immigration Responsibility Act of 1996
Quotas & Preferences

I. Persecution INA § 201(b)(1)(B) says that NC’s who fall under the definitions of § 207
are not subject to the numerical limits of § 201(a).

§ 207 defines refugees & declares limit to be decided by the President.

The rules for past immigration can come back to haunt an immigrant years into the future, b/c of
re-entry, etc. Also, explaining 1990 Act will help to understand the present system (though the
1990 is not on exam).

Note that in the past few years, someone introduces leg. that would drastically alter
who/how many get in – usually reducing. In Congress there is generally no support for reducing
legal immigration.

SECTION B: QUOTAS  p.136
Not everyone is subject to quotas. pp 136-38

§ 201(b)(2)(A)(i) (§p55) Immediate relatives [memorize this definition]
--any person who falls into any one of 3 categories
spouses of US citizens
“children” of US citizens (unmarried, under 21)
parents of US citizens – but only if the US citizen is over age 21. Why is this proviso in
place? So that parents don’t come over to have a child in order to gain US citizenship.

For purposes of the quota, the US recognizes 3 programs:

I. Family-sponsored
   People who are not immediate relatives of citizens or LPRs, but who may be
   admitted via this quota.
   480,000 minus immediate relatives from preceding fiscal year (pfy) + any
   unused employment-based visas from the pfy; subject to minimum of 226,000.

II. Employment-based
   140,000 + any leftover family-sponsored visas from pfy.

III. Diversity
   55,000, but as a practical matter due to a statute, the actual amount is 50,000.

Why is the system criss-crossed? What patterns foreseen?
Congress predicted that year after year family visas would be oversubscribed, and
employment visas underused. Without the crisscross, the people who really need the visas may
not get them.

If, say, a million people qualify under these categories, how are they prioritized? By
preference categories – each with its own subset.

Summary
1. Most immigrants are subject to quota.

2. Quotas are family, employment and diversity – each w/its own worldwide ceiling.

3. Within the family program, and within the E program, preference categories subdivide each w/its own sub-ceiling.

   **Assuming that the limit is 30,000 family 1st visas, and there are 50k apps. Who gets the available visas?**

   **Priority dates** – the date on which applicant files the first relevant document -- determine – **first come first served.** However, there are country limits. The line stops if too many people from a country get in already.

   7% of total family-sponsored programs worldwide. (e.g., 480k, 7%=28k)

   **Pro-ration**  Under 202(e), if, for example in a particular year the worldwide family ceiling turns out to be twice as great as the worldwide-b ceiling, then within a particular oversubscribed country family-sponsored applicants will receive twice as many visas as employment-based applicants do.

   **Pro-rating preferences:** Within the family or e-based programs, the visas for an oversubscribed country are allocated among the 4 preference categories in the same proportions that apply worldwide for that year. §202(e)(2).

   **2(A)s:** Family sponsored 2d preference – the only which refers to relatives of LPRs.

   IN 1990 the quota was increased.

   The preference was subdivided into 2a and 2b.

   **2a:** spouses and unmarried children (<21) (**note:** if the NC changes status – age, marital status, or petitioner’s naturalization), the application is automatically treated as if the new circumstances existed at the time of application.

   **2b:** over-21 sons and daughters

   *At least 77% reserved for 2a’s.* Of this 77%, 75% would be exempt from per-country limits. Determining whom is in the 75% is very complicated.

   **Employment Preferences** text p.142  §203(b) (§p.62)

   **1st priority workers** – “extraordinary ability in sciences, arts, education, business, or athletics;” “outstanding professors and researchers;” and certain “multinational executives & managers.”

   **28.6% + unused 4th & 5th**

   **2d advanced degrees & exceptional ability**

   **28.6% + unused 1sts**

   **3d skilled workers, “and other workers” who can show they’re needed. 28.6% + 1st & 2d unused**

   **4th “special immigrants” – not exempt from quota; religious workers, long-term foreign employees of the U.S. gov’t. 7.1% + no others!**

   **5th “Employment creation” entrepreneurs who invest at least $1 million each in enterprises that employ at least 10 Americans. 7.1%+others unused**

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**SECTION C: FAMILY IMMIGRATION**

one central value in US immigration laws is to unite families.

201(b)(2) exempts IRs and cborn to LPRs temporarily abroad from quotas

203(a) gives special preference to less compelling family R’s to citizens or LPRS

§203(d) gives preference to spouses and accompanying or following most classes of immigrants
a “spouse or child” accompanying or following to join an immigrant within family, employment, or diversity is entitled to the same preference status & to the same place in line as the principal immigrant.

must be acquired before principal immigrant’s admission as LPR

Bulletins – The DOS Visa Office puts out a monthly “Visa Bulletin” that shows priority dates for people who will be first in line for the next month. “C” indicates “current” (no backlog), “U” for unavailable – for countries where the numerical limit has been met.

MARRIAGE

§ 201(b)(2)(A)(i) (§p.55) a spouse qualifies as an immediate relative;

1. Widow/widower – if married at least 2 years to a U.S. citizen at the time of citizen’s death, the NC and and each č of the alien, shall be considered to remain an IR after the date of the citizen’s death but only if

   * spouse files petition under § 204(A)(1)(ii)
   * within 2 yrs after the date of the citizen’s death
   * and only until the spouse remarries

2. Same-sex couples: do not qualify under § 201(b). Adams v. Howerton, 9th Cir. (1982). This is due to the fact that

   a. any marriage must be valid under state law, AND
   b. any state-approved marriage must qualify under the Act; the court finds independent grounds for Congress to regulate marriage on other grounds – such as requiring that the marriage be consummated or the spouses physically present.

§ 101(a) makes no mention of the sex of a spouse; the 9th Cir. therefore construed the statute acc. to the “fundamental canon” that “unless otherwise defined, words will be interpreted as taking thier ordinary, contemporary, common meaning.” The term “marriage,” acc. to the court, “contemplates a relationship between a man and a woman” – relying on a 1971 Webster’s Dictionary, and a 1979 Black’s Law Dictionary. [I would argue that the word contemporary would suggest that current perceptions of gay unions prevail; the very fact that there is debate about gay marriage should indicate that it is an idea that is firmly within the imagination of Congress.]

The 9th Cir. refused to consider the claim that denying gay marriage violated the equal protection clause, holding that “Congress has almost plenary power to admit or exclude aliens, and the decisions of Congress are subject only to limited judicial review.” Text p.153.

The court pointed out that the beneficiary of allowing a homo. spouse entry would go to an excluded class under the then-existing statute (§ 212(a)). Legomsky asks whether the 1990’s statute removal of this denial ground might change this decision.

The intent – family reunification – behind the statute is not considered. Legomsky draws analogy to the absurd result where the literal intent of statute criminalizing interference w/a mail carrier (intent being to make mail delivery unobstructed) when applied to law enforcement officers arresting mail carriers. “[C]ountervailing considerations” might be to blame for ignoring this content; i.e., the court here saw fit to ignore these concerns in light of what it saw its duty to uphold traditional heterosexual marriage.

3. FRAUDULENT MARRIAGES (p.164)

   A marriage must be legally valid in the jurx where celebrated, but factually genuine.

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A. Test: whether the parties intended to establish a life together. Interviews are the main investigatory tool – interviewing spouses separately to check for discrepancies; questions re courtship, wedding, décor of residence, chores, breakfast that morning; sometimes intimate stuff, too, like sexual conduct, birth control.

B. Usually two types of “sham” marriages:
   (i) Bilateral arrangements – both spouses marry solely to facilitate immigration; typically, the immigrant pays the citizen or LPR spouse
   (ii) Unilateral fraud – the immigrant spouse deceives the citizen/LPR spouse re intentions & feelings

C. IMMIGRATION MARRIAGE FRAUD ACT OF 1986 (IMFA) ---->

§ 216(a)(1) (§p.186) LPR status for alien spouse subject to conditional basis.
If at any time the AG (via INS District Directors) finds within the NC’s first 2 YEARS of immigrant status:
the marriage was entered into for procuring immigrant statuts
marriage has been judicially annulled or terminated (other than by death)
a fee, other than a fee, was given for filing petition
PETITION FOR REMOVAL – must be filed jointly by immigrant & spouse and appear at an INS interview (§ 216(c)) during the 90-day period immediately preceding the 2d anniversary of the immigrant’s admission for permanent resident. (§ 216(d)(2)).
WAIVER – if immigrant is unable to meet the usual requirements for removing the conditions subsequent they may ask the AG to waive those requirements, under specific circumstances:
“extreme hardship” (§ 216(c)(4)(A)) – INS suggests this could be suffered by immigrant, spouse, or dependent child;
immigrant shows that he or she (§ 216(c)(4)(B)) entered marriage in good faith;
terminated marriage for good cause, and
was not at fault in failing to meet the usual requirements
battered spouse or spouses subjected to “extreme cruelty” (§ 216(c)(4))

§ 216(g)(1) [definitions] (§p.191) includes 201’s def. of IR, plus fiancées who have met with 2 yrs. before filing petition date in person (though AG may waive this requirement)
bona fide intention to marry, & are able & willing to marry within 90 days of arrival of alien & minor c.
§ 204(a)(2) places restrictions on LPR spouse who marries another NC & seeks 2d pref. family status for latter. To avoid rewarding marriage sham-ers, the § requires: 5 yrs. to elapse (note: citizenship elig.) after admission, OR alien establishes to satisfaction of AG by clear & convincing evidence that the prior marriage was not a sham.
§ 204(g) If marriage entered during exclusion or deportation hearings, alien must reside outside the US for 2 yrs. beginning after date of marriage. NC’s can avoid the two-year foreign residence requirement by proving the genuineness of their marriages, etc., by “clear and convincing evidence.
4. OTHER FAMILY MEMBERS
A. Siblings – share a common parent;

i) the father has a bona fide parent=č R w/č. § 101(b)(1)(D).

ii) the č has been “legitimated” under the law

iii) as in case of Amerasian kids after Vietnam, Congress passes special provisions for letting kids in – in 1982 the č came to Am. sponsors’ homes.

Mothers not held to this std. b/c biological fact that mother carries & bonds w/č more closely, presumably; and it’s easier to fake paternity than it is to fake maternity.

C. Stepchildren – the Board recognizes step-relationships even if the marriage that created it has terminated, but only if the step-R continues “as a matter of fact.” The INS, following the 9th Cir., has held that as long as the marriage had taken place before the č turned 18, & the marriage was still intact, a step-R would be found even if there was no parent-č R in fact.

step-siblings – considered siblings only if they were once č of a common parent; if one of the allged sibs was never a č of the claimed common parent b/c, for example, the claimed step-R rested on a marriage that took place after the č had turned 18, a sib R doesn’t exist. If each of the two purported sibs can identify a time when he or she was the č of the common parent, the two will be siblings even though there was no time period during which both siblings met the č definition simultaneously.
D. No preference given to grandparents, grandchildren, nephews & nieces.

SECTION D EMPLOYMENT-BASED IMMIGRATION p.189
Employment-based immigrants are exempt from per-country limits during any calendar quarter in which the total worldwide ceiling for employment-based immigrants exceeds the worldwide number of qualified applicants. § 104 of the American Competitiveness in the 21st Century Act, 114 Stat. 1251 (Oct. 17, 2000).

§ 203(b) Preference allocation for e-based immigrants. (§p62)
Allocations

1st Priority workers --- c. 40,000
2d Advanced degrees or exceptional ability (cf. extraordinary) c.40,000
3d Skilled workers, professionals & other workers c.40,000
4th Special immigrants c. 10,000
5th Entrepreneurs c.10,000

1. The 1st 3 Preferences: Superstars, Stars & Others
   a. 1st pref. – extraordinary ability in sciences, art, education, athletics, or business – must be nationally or internationally acclaimed; professors need only be outstanding. Multinational executives & managers need not demonstrate fame or success.
      extraordinary ability – a level of expertise indicating that the individual is one of that small percetnaje who have risen to the very top of the field of endeavor.
b. **2d pref.** – *exceptional*, v. extraordinary, ability in sciences, arts, or business; it does not expressly include ability in the fields of education or athletics (though arts incl. athletics).

Job offer from an American employer usually necessary. INS has discretion to waive* this requirement.

Labor certification required from DOL. § 212(a)(5)(A,C). INS has discretion to waive*.

**waivers**

It is not enough to show:

- that the applicant has a particular level of training or education
- importance of a given field
- urgency of a given issue
- shortage of workers in a given field;

An applicant must show:

- that the area of E is one of “substantial intrinsic merit;”
- the person’s E will benefit the *nation*, not just the local area;
- that the particular applicant “will serve the national interest to a *substantially* greater degree than would an available U.S. worker having the same minimum qualifications.

c. **3d Preference:**

Immigrants capable of performing certain “skilled labor” for which qualified U.S. workers are not available;

- Immigrants who have baccalaureate degrees and are members of the professions;
- “Other workers” – who are capable of performing unskilled labor *for which U.S. workers are not available.*

Requirements:

Labor certification
No provision for waiver.
No more than 10,000 3d pref. visas can go to “other” workers.

d. **Fifth Preference** – is this a good idea?

- **No:** encourages capital flight from countries; allows rich to buy their way in;
- **Yes:** jobs for Americans; capital would leave those countries anyway; may impel home country to improve investment conditions in order to keep capital.

2. **LABOR CERTIFICATION**

“long considered the staple of the immigration lawyer’s work.”

**Schedule A (pre-certified)** – at this time, physical therapists, professional nurses, and immigrants of “exceptional ability in the sciences & arts (not including the performing arts).”

**Schedule B** – lists unskilled jobs such as assemblers, bartenders, etc. who have to make application for waiver, making showings beyond the usual requirements.

Employers must document their unsuccessful attempts to recruit US workers at the prevailing wages and notify employees or their bargaining reps of the filing, who may submit doc. evidence bearing on the app. (Imm. Act of 1990).

**Business necessity** – if an employment position offered to an alien has restrictive job requirements, the employer must show that the requirements are a business necessity in order to overcome presumption that jobs w/overly restrictive requirements can’t be offered to aliens.
Matter of Marion Graham, BALCA (1990). The goal is to keep aliens from taking US workers’ jobs.

DOT – the Dictionary of Occupation Titles publ. by DOL provides job requirement descriptions that can help an ER avoid having to demonstrate business necessity. (p.208)

Information Industries Test: (p.200) The job req.’s have to bear a reasonable relationship to the occupation in the context of the Er’s biz. The req’s are essential to perform the duties in a reasonable manner.

Are these requirements redundant? L gives the example of a law firm, where the firm wants to hire a good golfer to do biz w/golf-loving client; golfing wd. meet req. ii, but fail i.

The Board generally accepts language requirements for businesses w/clientele that speaks that language.

Two jobs in one: ER must show it is infeasible to split the position & hire two people to do it.

What if a NC is the best among, say, three qualified applicants? The INS generally requires that a qualified citizen be hired. Exceptions: teaching, and a few others.

Applications are made to state employment office, who --> to DOL certifying officer.

Change of job – applicants who have been waiting for 180 days for adjustment of status can go to another job “in the same or similar occupational classification.”

What if a NC comes in via labor cert., then wants to change to a job where no labor cert. available? The courts have generally held that the NC have had the intent to remain in the original position at the time of admission.

Appeals of CO decisions go to the Board of Alien Labor Cert. Appeals (BALCA), subject to review in federal district courts.

SECTION E: DIVERSITY IMMIGRANTS preferences immigrants from countries where the AG has tabulated, each year, the number of people from each foreign state for the past 5 yrs. States with admission under 50,000 are “low admission” states qualifying for diversity visas. The world is the divided into 6 “regions”; regions whose natives accounted for 1/6 or less of total LPR grants of preceding 5 yrs. qualify.

Then the AG computes the total population of the low-admission states of that region. If a higher percentage of LPRs came from high-admission regions, the low-admission regions would get the same percentage of diversity visas as an offset.

Applicants are selected by lottery, by the Sec. of State.

Requirements:

a. individual must meet specified educational or work experience requirements;

b. not more than 7% of the 50k visas (i.e., 3500) may go to natives of any single state per fiscal year.
CHAPTER THREE: NONIMMIGRANTS

Nonimmigrants must show they qualify as nonimmigrants under 101(a)(15). INA § 214.

Nonimmigrants must overcome two separate hurdles:
establishing qualification under one of the specific statutory categories
avoiding the various affirmative grounds of inadmissibility

A. COMMERCIAL CATEGORIES OF NONIMMIGRANTS

1. Temporary Visitors for Business aka “B-1” Visa § 101(a)(15)(B)
maintains residence in foreign country and who is visiting temporarily for biz.

business: “the legitimate activities of a commercial or professional character. It does not include purely local employment or labor for hire.

Contract or other prearranged labor has to come in under H-1 Visa.

2. Temporary Workers aka “H-2” Visa
maintains residence in for. country and comes temporarily to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in the US.

Can the INS properly issue B-1 (v. H-2) visas to skilled laborers entering the US to perform k or temporary work, circumventing labor cert. procedures in the process? Int’l Union of Bricklayers & Allied Craftsmen v. Meese, (N.D. Cal. 1985). However, following this decision in Bricklayers Union the INS promulgated a new reg. permitting B-1 immigration status for aliens who supervise & train those engaged in construction workers themselves.

No. The ins may not properly issue B-1 visas to skilled laborers entering the US to perform k or temp. work. Congress, concerned for the welfare of American workers, defined a special class of visas for temp. alien workers, the H-2 class. B-1 visas or for conducting business transactions, not labor.

(Deference to admin. interpretations of laws overridden by direct congressional intent, as determined by the cong. hx of the agency reg.’s.)

Three Rules of Statutory Interpretation:
1. Literal Plain Meaning – focuses on literal lang.; when it admits of only one meaning the court must adopt that meaning, even if doing so will produce absurd results. (No applic. where ambiguous lang.)

2. Social Purpose Rule – court seeks of purpose of legislation & adopts whichever best advances these purposes. Statutory lang. is just one way of ascertaining purposes.


(i) – “E-1”: entering solely to carry on substantial trade in services or trade in technology, principally b/w US & their country;
(ii) - “E-2”: entering solely to develop & direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively i the process of investing, a substantial amount of capital.

Usually admitted for 2 years initially.
Neither category requires an intent one’s foreign residence
Both require an intent to depart upon termination of E-status

3. TEMPORARY WORKERS
a. “Specialty Occupations,” Athletes, and Entertainers: H-1B’s, O’s & P’s.

A “specialty” occupation is one that requires “theoretical and practical application of a body of highly specialized knowledge and that, in the US, requires at least a bachelor’s degree in the part. specialty or the “equivalent.” INA § 214(i)(1). §p.176. 214(i)(2) spells out the necessary credentials.

H-1B
1. May be admitted for up to 6 years. (pp.333-34)
2. Employer must file a labor condition application w/ DOL. § 101(a)(15)(H)(i)(b) and show:
a. ER is paying at least prevailing wage or the actual wage level at place of E, whichever is greater;
b. that the working conditions of similarly employed workers will not be adversely affected;
c. that there is not a strike or lockout;
d. that the ER has notified its existing employees of the filing, in spec. ways (so they can object if they wish).

DOL’s Er & Training Admin. provides cert. unless LCA is incomplete or obviously inaccurate.

Complaints may be filed w/ DOL’s Wage & Hour Division, which investigates; if violation penalty can include fines, back pay, & sometimes an order making ER ineligible for visas, etc.

Appeals may be to an ALJ, then to Sec. of Labor, then eventually, to a fed. ct. § 212(n)
Method for computing prevailing wage – a controversial area.

O-category up to 3 years – athletes, entertainers., other arts § 101(a)(15)(O).

P-category –
P-1: (up to 5 yrs., +5 ext. >10) internationally recognized, but not nec. ‘extraordinary’ athletes, and members of internationally recognized entertainment groups performing in specific events.
P-2 (1 yr., 1 yr. ext.’s) artists & entertainers who wish to enter under reciprocal exchanges
P-3 (1 yr., 1 yr. ext.’s) entertainers & artists providing “culturally unique” programs.
Nursing shortages – Congress enacted a modest program in ’99 for four years, to allow 500 nurses/yr. for only 3 yrs. each.

B. EDUCATIONAL CATEGORIES
1. STUDENTS § 101(a)(15)(F) F1-student F2-spouses & ċ p.350

[Note: must be distinguished from vocational or other nonacademic students, who enter under § 101(a)(15)(M).]

must be a “bona fide student qualified to pursue a full course of study seeks to enter US temporarily

& solely for the purpose of pursuing a course of study c/w § 214(m) [§p.180] — which puts restrictions on study (e.g., no public elem. schools; secondary sch. only w/full per capita tuition, etc.).

2. EXCHANGE VISITORS J1-student J2-spouses & ċ p.354

Students, teachers, scholars & others enter temporarily to pursue ed.-related goals. Purposes are to provide training to benefit their countries, to foster intellectual & cultural interchange, & thus build positive foreign relations.

Au pairs are a controversial component b/c exploitation, bad care, etc. This has led to more rigorous requirements.

For students, the advantage of a J-1 visa over F-1 lies in the slightly more liberal employment rules, plus many provide fellowships or other funding.

*** § 212(e) requirements [§pp.131-32]: J-1 visitors

who are financed by their country or by a US agency, directly or indirectly who are from countries that the USIA designated as requiring their services, OR

who received grad. medical ed. or training aren’t eligible for adjustment to LPR or H-1 status until they’ve resided in their country for at least 2 years following departure.

waiver — AG can waive 2 yr. req. in cases of exceptional hardship to alien’s LPR or citizen spouse or ċ

persecution in home country per race, religion or political opinion except where Dept. of Public Health or other agency.

INA § 212(e) The Secretary of State has veto power over waivers of the two-yr. foreign res. req. (p.359) Silverman v. Rogers (1st Cir. 1970). In a complicated case about statutory construction, the First Cir. found that it would be illogical to find that the number of agencies w/veto power over a waiver would be reduced, when the statute’s purpose was to curtail the liberality of waiver grants. Additionally, the reg’s have always given the SoS a voice in waiver decisions.

[Au contraire: L asks whether this construction is proper, considering that a common statutory interpretation technique is to avoid construing one phrase i a way that would render a related phrase superfluous. SEE THE STATUTE, P.360. In this case, the 1st Cir’s interpretation would render superfluous the phrase, “or of the Commissioner [of INS] after he has determined that departure from the U.S. would impose exceptional hardship . . . “]

ALTERNATIVE WRITINGS:
The SOS has discretion to approve a waiver after she or he

(a) has rec’d the request for waiver from an IGA; or

(b) has received te request of the INS after a finding of exceptional hardship.

OR (for the plaintiff’s interpretation)

A waiver may be granted on the favorable recommendation of either

(a) the SOS, per request of an IGA,

OR
(b) of the INS Commissioner, after a finding of exceptional hardship.

Can a NC come in on a B-2 visa to study at a non-accredited school? NO. Matter of Healy & Goodchild.

E. OTHER NONIMM. CATEGORIES
   1. “T-visas” – for victims of “a severe form of trafficking in persons,” plus designated family members at AG’s discretion. Limit: 5k/yr., not counting family. must be physically present in the US or a port of entry as a result of that trafficking. if over 15 y.o., must assist in prosecution of that trafficking. must demonstrate “extreme hardship” involving unusual & severe harm upon removal. the principle T-nonimm. may work. may adjust to LPR status under § 245(l).

   2. VAWA – Violence against Women Act. “U-Visas” under § 101(a)(15)(U). For those who have suffered “substantial physical or mental abuse” as a result of any of several enumerated acts of violence, incl. rape, torture, trafficking, incest, etc. See p.373 must help investigate and/or prosecute criminal activity limit is 10k, not counting family 214(o)(2)(A) U-nonimm’s may work. 214o3B after 3 yrs., U-nonimm.’s may adjust to LPR under prescribed conditions § 245(l)

   3. LIFE Act § 101(a)(15)(V) provides limited relief permitting admission as nonim’s while waiting for priority dates to become current, but only if applied before Dec. 21, 2000, and only after the wait has exceed 3 yrs. INA § 101(a)(15)(V). expanded K (fiancé) visas to admit spouses of citizens as non immigrants. provides much more limited relief for spouses and children of LPRs V nonimm’s may work No numerical limits Adjustment of status to permanent residence is contemplated.

“Dual Intent” The BIA & several cts. have held that “a desire to remain permanently, if legally possible, is not necc. inconsistent w/lawful nonimmigrant status. p.374

4. CHANGE OF NONIMMIGRANT STATUS
   A. §245 Certain nonimmigrants can be lpr’s w/o leaving.
   B. § 248 [p.331] allows some to change to another nonimmigrant status.

NC who are inadmissible for having been unlawfully present for more than six months, and certain other designated NCs
CHAPTER FOUR: EXCLUSION GROUNDS & WAIVERS

Under § 212(a) [§p.105], various classes of noncitizens are “ineligible to receive visas and ineligible to be admitted to the United States” unless they qualify for WAIVERS.

Nonimmigrants can sometimes adjust to immigrant status w/o having to go abroad for new visas, but only if they are admissible. § 245(a).

Many years after entry a NC can be removed if, at the time of entry or adjustment of status, he was in fat inadmissible. § 237(a)(1)(A).

Admission can be an issue upon app. for naturalization. § 316(a).

Entry w/o inspection -- NCs who enter w/o inspection are considered applicants, and inadmissible under § 212(a)(6)(A).

§ 101(a)(13) [p.19]
Note that §101a13C holds that NC shall not be regarded as seeking admission (reentry, hence – has not been deprived of initial lawful entry status) unless the NC:

i has abandoned or relinquished that status
ii has been absent US for a continuous period of 180 days
iii has engaged in illegal activity after having departed the US
iv has departed while under removal proceedings
v committed a 212a2 crime, unless relieved under 212h

A. GROUNDS RELATED TO IMMIGRATION CONTROL

212(a)(6) – entry, overstay, etc.
212(a)(7) – docs
212(a)(9) – aliens previously removed;

1. § 212(a)(7)(A) -- immigration documents
   (7)(B) -- nonimmigrant docs
   (5)(A) -- no labor cert.
   (6)(D) -- stowaways inadm.


NC who procure visas, admission, or certain other docs or benefits by fraud or misrepresentation become inadmissible for life. § 212(a)(6)(C)(i).

False claims of citizenship – in admissible under “” (ii).

*2. § NC who have been unlawfully present (expired visa or w/o admission or w/o parole) for 180 days inadm. for 3 yrs., or
   1 yr. + inadm. for 10 yrs.
   Who is over 18 years of age (i.e., no period before 18th b-day considered against unlawful presence); § 212(a)(9)(B)(iii)(I) [§p.124].

Note: this is construed to be continuous presence, not aggregate.

Aggregate unlawful presence for more than one year, or having been removed for any reason, and who then enters or attempts to enter w/o being admitted, renders person inadmissible for at least 10 yrs., after which time AG may grant permission to reapply for admission. INA § 212(a)(9)(C).

A person who is granted the remedy of “voluntary departure” is not considered “unlawfully present” until the due date for departure.
What happens if someone violates the terms of their visa? Their presence doesn’t become “unlawful” such that the 180 day or year periods would run, until the IJ hears the case & finds violation.

Notices to appear – Does the time from the notice to appear until the issuance of a removal order count as unlawful presence? Yes, per INS memo; however, the Executive Office for Imm. Review (BIA, etc.), disagrees, though. At this time DOJ hasn’t issued final reg’s.

Extension applicants – In 2000 INS issued a memo [p.397] that designate the entire period during which a timely filed, nonfrivolous application for either extension or status change is pending as authorized time per AG, for purposes of § 212(a)(9), provided no work w/o auth. Covers 3 yr & 10 yr bars.

Without that memo: technically, where app. made before expiration, § 212(a)(9)(B)(iv) tolls accumulation of unlawful presence time during hte period from expiration, provided application is nonfrivolous.

maximun tolling is 120 days;
applicant doesn’t work during that time
covers only the 180 day limit, not the year one.

3. Failure to attend removal hearing – bars admission for 5 years where no reasonable cause. § 212a6B. They are inadmissible for
   5 yrs. – if removed upon arrival
   10 yrs. – if removed after arrival
   Under § 212(a)(9)(A)(iii), the AG has discretion to waive this inadmissible ground by consenting to person applying for admission.

4. § 212(d) – waivers
   (3) nonimmigrants ineligible under 212a may get waiver by Dept. of State rec. to AG, for temporary stay.
   (11) AG may use discretion for humanitarian or family unity purposes when someone smuggles in a relative (a6Ei).
   (12) waivers for those who committed doc fraud -- violated 274C & fined under 212a6Fi , -- & were NOT previously fined for 274C (doc fraud) violations, and offense was committed to assist family member

B. POLITICAL & NAT’L SECURITY GROUNDS

1. § 212(a)(2)(G) - renders inadmissible foreign gov’t. officials who have engaged in “particularly severe” religious persecution are inadmissible for two years.

2. § 212(d)(3) authorizes AG, after fav. rec. of SoS or consul. officer, to admit a nonimmigrant who is inadmissible on any ground other than a specified few. The pre-1990 political views exclusions (27, 29 & 33) were not permitted. Those exludable under 28 qualified. Most succeeded in obtaining these waivers.

renders inadmissible for (A) (i) espionage or sabotage; or to violate IP laws; (ii) any other unlawful activity; (perhaps the principal of ejusdem generis – same class of things – shd. be invoked; maybe those things that undermine US nat’l security & economic interests; (ii) to control or overthrow the government of the US by force, violence, or other unlawful means.
and (B) Terrorist Activity. Such activities defined on §p.111, in (iii).

“Representative” defined on §p.113, §§(v): “officer, official, or spokesman of an org., and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

NOTE: §212(f) auth. the President to exclude NC whose entry “would be detrimental to the interests of the US.”

The 1st Am. protects the advocacy of even lawless action, unless intended to incite imminent lawless action. Brandenburg v. Ohio, (Sup. Ct. 1969).

Association or org.: can’t be made illegal absent clear showing that
1. actively engaged in lawless conduct, or
2. in such incitement to lawless action as would itself be punishable
3. as a clear & present danger of harm that more speech could not avoid.
Individual cannot be punished for joining, assoc. w/or attending meetings unless the assoc. meets the first requirement, and
4. the assoc. meets the 1st req., AND
5. the individuals affiliates w/
   a. knowledge of illegality, and
   b. specific intent to further illegal aims by such affiliation
p.403, Prof. Tribe.

See § 212(a)(3)(D) [§p.114] for membership in totalitarian party exclusions

§ 212(a)(3)(C)(i) gives grounds to refuse admission, if the US feels it’s in its best interests not to thereby anger the foreign President. If that Pres. is a charmer such as S. Hussein, then they may welcome Y & Z with welcome arms.

However, as political candidates they are also not excludible if their campaigning would be in accord w/our laws. § 212(a)(3)(C)(ii) & (iii).

C. CRIMINAL GROUNDS
§ 212(a)(2) [§p106] and 212(h) (waiver) [§p.134].
a(2)(i) says inadmissible if
(I) moral turpitude, or attempt or consp. to committ m.t. crime
(II) violation of controlled sub. laws of US or for. country
but
(ii) EXCEPTIONS apply if
(I) the crime was committed
   ▪ only one crime
   ▪ when alien was <18 AND
   ▪ 5 yrs. + before app. OR
(II) if convicted or admits committing
   q the max penalty for conviction < 1 yr prison; AND
   q alien not sentenced in >6 mos., regardless of how long ultimately served.
WAIVER: AG may use discretion to admit if <30 grams of marijuana IF
1Ai crime was prostitution & occurred 15+ yrs before app.
iTi admission wd. not be contrary to nat’l security; and
ii rehabilitated
(B) allows waiver where extreme hardship to citizen or LPR relative.
(C) alien qualifies as certain IR or relatives under 204(a)(1)(A)(iii)&(iv).

No waivers if
- murder
- torture
- previously admitted as LPR & convicted of aggravated felony or
- alien not lawfully resided continuously in us for 7 yrs.+ before removal proceedings initiated.

Tension w/§212(a)(9)(A)(ii)? – AG can waive practically in practically any case, per her discretion.
Generally, AG confers this power to INS commissioner, who has protocol for sifting it.

D. ECONOMIC GROUNDS
§ 212(a)(4) [§p.116] PUBLIC CHARGE
(C) Family-sponsored immigrants who are spouses or c of citizens, or who get an AFFIDAVIT OF SUPPORT
Sponsor must make one promising to support NC, enforceable since ’96.
See § 213A(f) [§p.162] for sponsor guidelines.

WAIVER – AG has discretion to waive public charge grounds upon obtaining “public charge bond.” § 213.§p.158

This is the single most common affirmative substantive grounds for immigrant visa denials & among the most common for nonimmigrants.

E. PUBLIC HEALTH & MORALS
§ 212(a)(1) neither a physical nor a mental disorder is generally a basis for exclusion unless it poses a specific threat. “” A(ii). Waivers are still possible. 212(g)(2).
Drug addicts & abusers are specifically inadmissible. 212a1Aiii.

HIV is an exclusion grounds, as are other communicable disease of p.h. significance. Waivers possible for spouses and close family; gay males not generally benefited.
CHAPTER FIVE: ADMISSION PROCEDURE

A. HISTORICAL
Discrimination a big factor, esp. for Asians.
Most entry through Ellis Island or Angel Island.

B. PRELIMINARY
Agencies Involved:
1. DOS
2. DOJ, though both:
   a. INS
   b. Office of Immigration Review (EOIR)
3. DOL
4. DHHS – where medical exclusions involved

STEPS
1. Applies only for those who seek certain statuses: DOL must give labor cert. to 2d & 3d pref. E-B applicants.
   Ers must apply for labor cert., or in some cases, file “labor condition applications.”

2. Visa Petition (also limited to certain statuses): established NC meets definition of part. status.
   *If country has a low rate of fraud or applications, they may qualify for visa waiver.
   *IF APPROVED...

3. APPLICATION
   ☐ Where: at US consulate abroad (DOS).
   ☐ What: NC establishes that s/he
      o meets definition of status
      o no exclusion grounds apply
   ☐ How: Paperwork
      o Sometimes, interviews

4. ADMISSION – at port of entry
   INS double-checks for admissibility.

C. VISA PETITIONS
Family form: I-130
E-B form: I-140

1. Family
Normally, in IR & family pref. – the US citizen or LPR must file. § 204(a)(1)(A,B). [§p.73]
   Exception: § 204(a)(1) battered immigrants – those subject to battery or “extreme cruelty” by US or LPR spouse. Pet. must show good moral character, prior residence in US w/spouse, goof faith marriage, and extreme hardship to petitioner or č.
   Problems with battered spouses/objects of “extreme cruelty”: Linda Kelly
   1. DV often goes unreported.
   2. Med. rec’s may not indicate DV.
3. Victim may not have enough English to tell.
4. If V is undocumented, she may fear discovery worse than need to report.
5. Has to prove good faith marriage; spouse won’t corroborate, or people may ask why she married if he’s an abuser.

Remember: an approved visa may be revoked.

2. Employment
   1st Pref’s can do it, or their ER can.
   Most others must be done by Ers.
3. Where – INS regional offices, where interviews not necessary. (3 – Burlington, VT, Dallas, TX, and Laguna Niguel, Cal.)
   INS overseas offices
   Consulates may approve “clearly approvable” petitions.

4. Interviews – at INS discretion

5. Hearings – no right to hearing; however, before an adverse decision can be made on basis of derogatory non-classified info. that petitioner or benef. unaware, he or she must be given that info. & an opp. to respond. Due process demands must be met.

Review – denials are subject to both administrative & judicial review.
   a. Administrative – generally, family based done by BIA. Fiancé or orphan pet.
      reviewed by INS Associate Commissioner for Examinations.
      Employment – Administrative Appeals Unit.
      IIRIRA § 381, INA § 279,

SEE HANDWRITTEN NOTES FOR THIS PROCESS.

PRACTITIONERS PP. 428-32
Law practice: preparation or filing of any brief or other doc., paper, application or petition on behalf of another person;
   q lawful functions of a notary
   q service consisting solely of assistance in the completion of blank spaces on printed INS forms by one:
      o who receives, if any, nominal remuneration; and
      o does not hold himself out as qualified in legal or immigration & nat. procedure.

I-130 FILLING OUT THE FORM ISN’T PRAX, BUT DECIDING WHETHER OR NOT TO FILE IS. CORTEZ,
D. VISA APPLICATIONS
An alien living in the U.S. temporarily is considered to be a resident of the consular district of his/her last residence abroad.

At the end, the applicant must physically attend the scheduled interview. This is a big hardship for some applicants, to return to home country.

If the applicant is successful, the processing culminates in an interview w/a consul at which a formal application, FORM OF-230 Parts I & II is signed, and the visa issued on Form OF-155.

As a practical matter, consular officers exercise a great deal of subjective discretion.

Consular Discretion: by James Nafziger (p.439)
Pro:
1. experienced eye for fraud & chutzpah by app’s.
2. familiarity w/local culture
3. Demanor & credibility are subjective judgments, as well as are “evolving circumstances in the local socioeconomic environment.” Hence, a “relatively limited standard of review of consular discretion” needed.
4. Review might be a perceived threat & nuisance to already overburdened officers.

Con:
1. Human err is great, hence other agencies’ decisions are subject to review.
2. “Public charge” and “reason to believe” are subjective determinations, and guidelines not effective ---> uniformity always.
3. Officers have little time to investigate; may rely heavily on easier to obtain info & hence make cursory appraisal.
4. Oversight by Visa Office, congressional inquiries, etc. are too sporadic to substitute for careful review.
5. Too little time & money is available for thorough review.

Recommends Review:
1. A correct standard review would avoid court congestion (when millions are denied).
2. Only a small proportion of denials likely to seek review, because:
   a. no incentive to file frivolous actions to obtain delay
   b. financial costs of review, esp. when NC must arrange for filing from abroad.
   c. exclusion cases provide an example: only 27 out of thousands of excluded aliens filed for review; only 10 were non-asylum petitioners.
3. Congress might limit categories of denials elig. for review.
4. Record for review: more resources to create a clearer, more complete record for appeal needed, as present consular notes & denial notices (which usu. just state authority and perhaps “a few scribbled words of factual explanations” inadequate.
   * Audio tape rec. not a good idea:
      a. the recording itself might encourage “performances”
      b. voice recordings don’t contain paralanguage, etc., that convey credibility

E. ACTUAL ADMISSION
1. At the Border
INS immigration inspectors encounter nc’s at port of entry. Determines whether traveler is a citizen, and, if not whether any inadmissibility grounds in §212(a) apply

a. Primary inspection – a quick process that entails scanning the passport, and visa if there is one, and possibly checking a “lookout” on the computer.
If doubts or complications, go to
b. Secondary inspection – more intensive scrutiny.
c. EXPEDITED REMOVAL or SUMMARY EXCLUSION – whether nc is “clearly and beyond a doubt entitled to be admitted; if so, then admitted; if not, nc is detained for a removal proceeding. § 235(b)(2)(A). Doesn’t literally require detention in all cases. AG has discretion to parole under 212d5, constrained by criminal or nat’l sec. risks.

2. HEARINGS BEFORE IMMIGRATION JUDGES – REMOVAL HEARING
Most do not exercise right to removal hearing:
   a. new expedited removal procedure
   b. many unwilling to accept detention
   c. some are intimidated b/c no
   d. might want to avoid a formal removal order, wich would bar future admission for up to 5 years+

   Begins w/NOTICE TO APPEAR.
   When: may not start until 10 DAYS after Notice service, unless nc requests earlier.
   § 240 governs procedure, & Rules & Procedure for IJ Proceedings”

Hearing:
   Applicant must prove that he or she is “clearly and beyond a doubt” admissible and not inadmissible under § 212. (seems stronger than beyond a resonable doubt, b/c not even a reasonable doubt is permitted).

3. APPEALS FROM IJ DECISIONS
Both the NC and the INS can appeal to teh AG. § 236(b), who sends it to the BIA (part of the Executive Office of Immigration Review [EOIR]).

Pre-IIRIRA – apply for habeas corpus in fed. dist. ct.
Now: petition the court of appeals directly (whether for inadm. or deportability)
   Exceptions: (see below, Exp. Removal, & Ch. 8 – Deportation Procedure)

4. EXPEDITED REMOVAL aka “Summary Exclusion”, p.458
§ 235(b)(1).
   When Imm. officer at border determines nc inadmissible b/c either:
   - fraud 212a6C
   - lack of proper docs 212a7
     EXCEPT NC who indicate fear of persecution or intention to apply for asylum receive screening inteviews, to determine whether case strong enough to warrant providing regular asylum procedures. § 235(b)(1)(A)(i,ii).
Procedure for Exp. Rx’l:

1. Imm. inspector determines that NC is inadmissible under fraud or docs;
2. NC ordered removed w/o further hearing. § 235b1Ai.

No administrative appeal, except for returning LPRs, admitted refugees, & people who have already received asylum. § 235b1C.

The only permissible judicial review is whether person is actually a citizen, or fits one of the above exceptions. 242e2.

Applies to:

1. NC upon arrival, AND
2. at AG’s discretion, NC’s present w/o admission & who are unable to prove continuous physical presence in the US for the immediately preceding 2 years. § 235b1Aiii

NOTE: Under § 212(a)(6)(C)(i) (fraud) inadmissibility is permanent. Insufficient docs. do not render inadmissible the nc upon subsequent attempts at entry. Significantly, 80-89% of expedited removals were for suspected fraud, not improper docs.

Congressional concerns:

1. Possibly high numbers of potential asylees are slipping through and removed.
2. Prax of allowing nc to withdraw application for admission rather than become subject to expedited removal gives rise to concern that genuine refugees or other meritorious cases are pressured to w/draw.
3. That applicants are being erroneously returned to persecution.
4. Whether INS systematically detains people who are neither a danger to community nor at risk of absconding.

Congress also requested info. re confinement conditions.

5. OTHER SPECIAL REMOVAL PROCEDURES

a. National Security & Foreign Policy Cases

§ 235(c) – special procedure for cases that present nat’l security issues.

The AG automatically reviews these removal orders.

1. If AG concludes, based on confidential info. the disclosure of which wd. be ‘prejudicial to the public interest,” that a NC is inadmissible on one of the specified grounds, then AG may order rx’l w/o further hearing.
2. AG may decide that further inquiry needed.
3. The NC or representative of NC may submit a written statement and add’l info. for the AG to consider. § 235(c)(3).

F. ADJUSTMENT OF STATUS p.462

Since 1952, under § 245, certain NC’s already here can adjust their states to LPR w/o leaving the USA, provided

- admissible as immigrant
- particular immigrant category must be current
- Extra requirements, which have changed frequently over time.
There is a narrow statute, § 245(k) [§p.313], presently in effect:
1. If E-based nonimmigrant
2. If lawfully admitted
3. If possessing a nonimmigrant visa already
4. If overstayed < 180 days.

eligible to apply for & receive adjustment of status (to LPR) within the USA.

For applications made between 1994-1998, § 245(i) applies: p.463
If entered w/o inspection, OR otherwise fell within 245c2 disqualifications, (including:
   - alien crew members
   - most people who have been out of status at any time after entry
   - certain nonim’s admitted w/o visas

yet otherwise admissible, you can apply for adjustment if you pay a penalty of $1,000 (at the time).

_Tension b/w 212(a)(9)(B)(i) & 245(i):_
When Congress passed IIRA in ’96, it passed 212a9Bi.
If a person left the country, they would become inadmissible if departed after overstaying over 180 days (for three years), or over a year (for 10 years).

245c2 overridden by § 245(i); hence, determined that some could get LPR status and avoid 212 exclusions.

2. **Appeal:** Normally there is no administrative appeal from INS decision denying application for adjustment of status. The only administrative recourse is to wait for the INS to initiate removal proceedings (typically b/c by then their authorized stay will have expired), and then renew the adjustment application before the IJ. But then a 245c2 problem might present (for failure to maintain lawful status since entry).

3. **Judicial Review:** courts are divided – some permitting review of those adjustment applications that were denied during rx’l proceedings while withholding review of those app’s that were filed before removal proceedings.

   HOWEVER: 242a2Bi provides that “no court shall have jurx to review . . . any judgment regarding the granting of relief under” § 245.

   One favorable interpretation of this provision is that it merely bars independent district court review of such adjustment denials, not courts of appeal review as part of the usual review of the removal order.
CHAPTER EIGHT: DEPORTATION PROCEDURE – OVERVIEW (pp630-43)

1. Apprehension
   a. Who apprehends: INS, customs service, local & state police, DEA or other feds – usually when they discover the individual is not a citizen.

   b. INS may exercise these powers w/o a search or arrest warrant:
      1. interrogate any person believed to be a NC as to her or his right ot be in the USA;
      2. arrest any nc in the country if there is “reason to believe that the alien so arrested
         a. is in the US in violation of [the immigration laws] and
         b. is likely to escape before [an arrest] warrant can be obtained;”
      3. board vessels within a “reasonable distance – usu. 100 miles – to search for NC
      4. enter private lands other than dwellings for purposes of patrolling the border, within 25 miles of the border.

   c. Fourth Amendment Limitations
      Depending upon factors such as how close to border, whether engaging IO is in mobile unit or stationary checkpoint, whether search v. stop/interrogation, the standards are:
      (i) “reasonable suspicion” – in some cases immigration officer (IO)
         1. must reasonably suspect that subject is not a citizen;
         2. in others, must reas. suspect not only that person is nc, but that s/he is in US in violation of law;
      (ii) probable cause (higher standard than reas. susp.) to believe the person is a nc who is here unlawfully

2. Before the Hearing
   a. Within 48 hours of the arrest, unless VD, INS must decide whether there’s prima facie evidence that nc is in us in violation of law. If so:
      NOTICE TO APPEAR served on NC & filed w/Imm. ct., thus officially commencing removal proceedings.
      explains nature of proceeding
time & place to appear
instructs nc to keep gov’t apprised of address change, etc. & consequences for failure (which include removal order issued in absentia).

   b. Detainment decision – must be decided before notice issued; can be for several months.
   Detention is mandatory for:
   In 1988: aggravated felons
   AEDPA & IIRIRA extended mand. det. to:
   1. almost anyone inadmissible or deportable on crime related grounds (not just agg. felons);
   2. those inadmissible or deportable on terrorism grounds
   3. most arriving passengers (incl. those subject to expedited removal)
   4. individuals awaiting execution of final removal orders
   For non-mandatory cases, the INS has discretion whether to detain w/o bond, release on cash bond of at least $1500, or release on “conditional parole.” § 236(a).
c. **48 hour detention**: the interim rule in effect since 2001 allows 48 hours’ detention w/o notice to appear; allows additional time where “emergency or other extraordinary circumstances.”

d. **Miranda** rule inapplicable to deportation proceedings, acc. to the lower courts. However, INS advises that any statements the person makes can be used against them, advises right to counsel at person’s own expense, and provides a list of any free legal services available. *No mention of a right to remain silent.*

   **Note**: all these provisions come into play only after the INS has decided to institute formal proceedings. *By delaying that decision, the INS can obtain valuable info. before the nc learns of his/her rights.*

e. Consulates have the right to represent their own nationals before host state tribunals. When US officials believe Mexican nat’ls are illegally present, they must notify the person of his/her right to communicate with the Mexican consulate.

f. **Master calendar hearing**: NC designates country where desires to be sent if removed. Simple cases & uncontested cases are sometimes decided here. Otherwise, the IJ identifies issues & sets schedule for motions or applications for relief. IJ estimates amount of time

g. **Between mch & removal hearing** – either party may request continuance, change of venue, remand to INS for consideration of application that would moot removal, or suppress evidence (though the grounds for this are narrow); limited discovery; IJ may hold conference(s)

3. **Removal Hearing**
   a. RHs are not subject to the Administrative Procedure Act.
   b. NC has burden of proving by *clear and convincing evidence* that lawfully present pursuant ot prior admission.

   Burden shifts to INS to prove deportability by clear & conv. ev.

   NC may be removed only on grounds formally charged, but INS may lodge additional charges at any point (at which nc can get reasonable continuance to meet these). NC must establish eligibility & deservedness for any affirmative relief for which applying at hearing.

c. If NC found deportable – NC may then apply for affirmative relief *(voluntary dep., cancellation of rx’l, adjustment, asylum, etc.)*.

   Rights: EOIR supplies interpreter for NC’s own testimony, but not for the testimony of other witnesses or exchanges b/w IJ and counsel.

4. **Administrative Review**

   **Either the nc or INS may appeal to BIA.**

   Appeals
   a. must be filed no later than 30 days after service of decision.
   b. stay the execution of IJ’s decision
   c. review is confined to record, but decisions are made w/independent substitution of judgment, even per witness credibility (though not often in prax).
   d. BIA may “summarily dismiss” if it lacks an arguable basis in law or fact.
e. *Controversial*: one-member decisions may be issued “without opinion” in a wide variety of cases that member believes do not raise significant factual or legal issues.

f. AG reserves power to review decisions by BIA.

5. Judicial Review
   a. After *administratively final* BIA decision, file petition for review before US Ct. App. in that circuit.
   
   b. **Immune from judicial review**: expedited removal, most removal orders based on crime-related deportability, almost all denials of discretionary relief.

   c. Habeas corpus, class actions, and suits for injunctive relief have been eliminated or severely curtailed. *However, the Supremes interpreted IIRIRA restrictions on habeas narrowly; many nc’s blocked from filing petitions for review in cts. app. will be ability to file habeas corpus app’s in district courts.*

   d. Terminology: petitioner – NC  respondent – INS

6. Execution of Final Removal Order
   *Within 90 days of times where orders became admin. final.*
CHAPTER SIX: DEPORTABILITY GROUNDS

A. Overview
§ 237(a)(1)(A) deportable if inadmissible at time of entry
§ 237(a)(1)(H) allows AG to waive
  § 237(a)(1)(A) IF
  1. qualifying relative
  2. otherwise admissible
  OR
  1. admissible, except under
     a. 5A, labor cert. &
     b. 7A, b/c visa based on fraud itself invalid.

Procedure:
1. Notice to Appear
deportability grounds listed like criminal indictment or info. alleges facts
2. IJ (DOJ) presides over removal hearing, and determines whether NC, and whether “deportable.”
3. INS or NC may appeal to BIA.
4. NC, but NOT INS, may appeal BIA by filing “petition for review” directly in the applicable US Ct. App., subject to important exceptions.

B. JUSTIFICATIONS
1. Deportability as punishment
can have harsh consequences – separation from one’s life in US. pp470-71
   2. Check on the admission process. Rx’s those who shd. not have been entered in the
      first place – either b/c never admitted or b/c shd. not have been.
      K analogy: a remedy akin to rescission – the k (b/w nc & USA) was void or at least
      voidable right from the start;
   3. Breach of valid k: nc violated conditions that had been imposed at time of entry.
      E.G., working w/o author.
      4. Remove nc injurious to public welfare;
         k analogy – implied term that certain behavior will be grounds for rxl.

C. DEPORTATION & STATUTORY INTERPRETATION
1. Criminality –
   “Sentenced once” means that received judgment ONCE, for one or for several crimes.
   Sentenced more than once occurs when this happens again. Fong Haw Tan v. Phelan (U.S. 1948).
ENTRY v. ADMISSION

This is a crucial distinction:
1. Inadmissibility grounds using “entry” -- §§ 212a3Ci, a5Ai, a6E, a7AI.

2. Deportability grounds:
   a. 237a1A (inadmissibility at “entry”),
   b. a1E (smuggling nc’s w/in 5 yrs. of “entry.”)
   c. a5 (becoming a public charge w/in 5 yrs. of “entry.”)

Congress’ decision to change only selected grounds of adm. & deportability, and to leave others intact, was clearly deliberate.

3. E.g., Arriving NC’s who are inadm. on document or fraud grounds are automatically subject to expedited removal.
   If present for at least 2 yrs., no expedited removal; even if <2 yrs., it’s at AG’s discr.

Fleuti (U.S. 1963) p.482
May one leaving teh US briefly be considered to have made entry for purposes of deportation? NO. Leg. hx shows Congress concerned w/harsh consequences of strict application of entry doc.

Statutory interp. analysis: As a general rule of statutory construction, statutory exceptions to any rule are narrowly construed; additional exceptions are not to be inferred. The Court appears to ignore this rule here; nonetheless, Congress has never overturned this dec.

Now, a return after an absence for a continuous period of <180 days is considered an entry. § 101(a)(13)(C)(iii) §p.19.

Under 101 (a)(13)(C):
   i abandoned or relinquished status
   ii absent > 180 days
   iii illegal activity after departed US
   iv departed while under removal or extradition proceedings
   v committed an offense in 212a2, unless 212h waived.
   v. attempts entry at unauthorized place.

Acc. to the BIA, anyone who falls w/in one of these subcategories is regarded as seeking admission. Matter of Collado-Munoz (BIA 1997). However, several courts dispute this.
D. CRIME-RELATED DEPORTABILITY GROUNDS

1. Fourteenth Amendment
Is surprise as to the collateral consequences of a sentence that results from erroneous information received from the defendant’s own attorney sufficient ground to permit the withdrawal of a guilty plea, under Rule 32(d) of the Fed. R. Crim. P.? No. U.S. v. Parrino (2d Cir. 1954).

Under Parrino, are there ever grounds for withdrawal of guilty plea? Yes. To prevent “manifest injustice,” permission to withdraw a guilty plea must be granted if a defendant’s surprise relates to the length of his sentence and stems from defendant’s reasonable misunderstanding of remarks made by the judge or by the prosecutor.

The Parrino court found in this case that the defendant’s surprise was from consequences in much the same way that felons are surprised at loss of civil rights or ineligibility for armed service.

What about due process concerns under the 14th Am.? Generally, a trial court is not required to advise sua sponte of potential deportation consequences for a plea. The trial court must only tell the defendant of the direct consequences of the conviction in order to satisfy due process concerns that a plea be made knowingly & with full understanding of the consequences thereof.

2. Sixth Amendment
However, under the 6th Am it may be grounds for considering it ineffective assistance of counsel, and thus render the plea involuntary. See, e.g., People v. Pozo, (Col. S. Ct. 1987.)

In Pozo, the court found that ineffective assistance could be found where:
- atty. performance fell below an objective standard of reasonableness, and
- the deficient performance resulted in prejudice.

Today the vast majority of courts subscribe to the idea that the judge must advise of direct consequences but not the collateral ones, and that deportation is collateral. Courts are split as to the Pozo holding.

Courts are also split as to whether prosecutors’ promises that NC would not be removed if they plead guilty to a crime can be binding. The 11th Circuit held (In San Pedro v. U.S., 1996) that actual authority is required for such a promise to be binding; hence, such promises by prosecutors – who have not been accorded this power by the AG – are not binding.

3. Expungements p.523-24
   a. The BIA held in 1999 that state rehab statute expungements never erase convictions for immigration purposes. matter of Roldan.
   b. NOW, both BIA & the courts have retreated from Roldan. the 9th Cir. found that a 1st time drug conviction state statute, analagous to a fed. statute, erases teh conviction for removal purposes. Lujan-Armandariz v. INS, 2000.

   The Ninth Cir. recognized a foreign expungement of a drug conviction, where the person would have qualified for expungement under the federal First Offenders Act. (using equal protection grounds, finding no rational basis for recognizing exp.’s under US fed. & state law but not under foreign law).

   Similarly, the BIA has held that exp. under a state statute that corresponds to juvenile delinquency under fed. law eliminates the conviction for removal purposes. Devison. BIA 2000.
Absent special expungement procedures like youth offender or first offender statutes, however, *Roldan* is still alive; even in the 9th Cir.

4. Executive Pardons p.524

§ 237(a)(2)(A)(v) states that a Presidential or gubernatorial pardon eliminates deportability under 237(a)(2)(A), which covers moral turpitude crimes, aggravated felonies, and convictions of high-speed flight from imm. checkpoints. There is no analogous provision for the other crime-related deportability grounds.

b. “COMMITTED WITHIN FIVE YEARS . . . AFTER . . . ADMISSION

1. Note pre-1996 (AEDPA) language: requires that actual sentence be for a year or more.
   post-1996 AEDPA: requires only that a potential sentence be for 1 yr.+

2. Two crimes involving moral turpitude (TM)
   § 237(a)(2)(A)(ii) reaches two crimes involving mt “not arising out of single scheme,” regardless of how many years after admission and regardless of nature or length of the sentence.
   The courts are split:
   1st Cir. & BIA: crimes must take place at one time to be a single scheme, w/no substantial interruption that would allow the participant to disassociate & reflect. Two days did not arise out of a single scheme” when applied to two break ins. *Pacheco & Adtiba* (192)

   9th Cir.: rejects *Pacheco & Adtiba*. emphasizes scheme v. act. To be single scheme, must have been planned at the same time and executed in accordance w/that plan.

3. JRADs important for pre-1990 convictions for m.t., or 2 or more crimes; it’s a judicial recommendation against deportation. Must be made at sentencing or within 30 days.
   Repealed by Imm. Act of ’90.
   Alternatives proposed: barring deportation unless judge rec’s in favor of removal
   Recently, Congress authorized sentencing judges to enter removal orders themselves in certain crim. cases.

III. DRUG OFFENSES

Anti-Drug Abuse Act of 1986 modified to § 237(a)(2)(B) [p., which holds deportable anyone who, at any time after admission, has been conviction of a violation of any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance, other than a single offense involving 30g or less of pot. Same with drug abusers & addicts.

**Trafficking** is an aggravated felony. § 101(a)(43)(B).

IV. AGGRAVATED FELONIES for current, see § 101(a)(43) [§p.36]

- Do not have to be committed w/in five years of admission to give rise to deportability. It also relieves certain discretionary relief poss.
- deletes certain procedural safeguards
- triggers mandatory detention from the time removal proceedings begin until removal
- after removal, no admission w/o special permission of AG
subjects nc to 20yr prison term if caught in us unlawfully
if previously deported, the sentence imposed in a fed. crim case can be dramatically increased

Definition: Under 1994 Imm. & Nat. Tech. Corrections Act:
  1. Any crime of violence w/ at least 5 yrs. sentence imposed.

Also, if five year sentence imposed:
  2. Theft
  3. receipt of stlen property
  4. burglary
  5. trafficking in fraudulen docs
  6. RICO violations

others
  7. certain managment-levl prostitution offenses
  8. any offense involving fraud or deceit of loss to victim exceeded $200k
  9. tax evasion in an amoun to fat least $200k
 10. smuggling nc’s for commercial advantage

Under AEDPA, 5 yrs reduced to 18 months imposed for if 5 yrs. may be imposed:
  11. commercial bribery
  12. counterfeiting
  13. forgery
  14. certain kinds of stolen vehicle trafficking
  15. obstruction of justice
  16. perjury
  17. bribery of a witness

IIRIRA § 321 added:
  18. rape
  19. sexual abuse of minor, incl. statutory rape

UNDER IIRIRA § 321 FOR ONE YEAR SENTENCE p.541

See § 101(a)(48)(B) and § 101(a)(43) §pp.36-40.
  1. crimes of violence
  2. theft
  3. receipt of stolen property
  4. burglary
  5. RICO
  6. commercial bribery
  7. counterfeiting
  8. forgery
  9. vehicle trafficking
 10. obstr. of justice
 11. perjury
 12. bribery of a witness
 13. smuggling of nc’s w/exceptions
 14. document fraud w/exceptions

Suspended sentence is treated the same as any other sentence of the same duration.
  15. fraud for 10k
  16. deceit for 10k
17. tax evasion for 10k

**Note:** #8, p.552: *The def.of aggravated felony § 101(a)(43)(F)* for “crime of violence” includes non-felonies, which requires that the violent act be an *element* of the crime.  
(b) does not require it to be an element, but requires felony.

**Burglary:** can be crime of violence. Vehicle burglaries can become aggravated felonies in two ways:

1. under 101a43G, where burglary is a.f., per se, as long as imprisonment is at least one year. But for *vehicle burglary* the BIA & Supremes hold that it doesn’t satisfy a43G.

2. INS frequently argues that vehicle burg. is a crime of violence under 101a43F. There is a division of authority over whether vehicle burglaries are branch (b) crimes of violence. p.553

**DUI**

*Does DUI satisfy prong (b)?* Courts are divided.

**Misdemeanors** – other relatively minor misdemeanors, such as petty larceny, can give rise to “aggravated felony” removals, as long as the person receives at least a one-yr. sentence.

**Note:** Is is necessary to distinguish b/w the effective date of a change in the *definition* of an aggravated felony, and the effective dates of the provisions that assign various specific consequences to a.f. convictions. See p.555.

V. MISCELLANEOUS CRIMINAL GROUNDS

1. See § 237(a)(2)(C,D,E) & (3)(B). None requires particular sentence, or that the crime be committed w/in certain number of years after admission.

2C certain firearms offenses

2D nat’l security offenses

2E domestic violence

3B failure to register & doc fraud

2. Crimes not requiring a conviction

a1E smuggling noncitizens

a1G marriage fraud

a3A breach of certain reg. requirements

a6 illegal voting

a4A,B,D war crimes, affiliation w/subversive groups, nat’l security.

***3. Nonimmigrants who fail to maintain status or comply w/status conditions.***

§237a1Ci. A condition of maintaining status 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 imprisonment ma be imposed.” Under that reg., a conviction of such a crime makes the person deportable for having failed to maintain status.
CHAPTER SEVEN: RELIEF FROM DEPORTABILITY

Affirmative defenses from which NC has burden of proof; some which are applicable to inadmissibility as well as deportability.

Can only be applied for while removal proceedings are pending. Hardship is often the hurdle that must be overcome upon motion to reopen removal proc.

Distinguishing variables for relief
1. kinds of charges to which provision supplies a defense
2. prerequisites for relief
3. whether relief is automatic or subject to discretion
4. how far-reaching the consequences are
5. who decides whether to grant relief (IJ & BIA at rx’l proceedings, or INS outside rx’l proceedings).

BARS TO REMEDIES
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 relief for 10 years. § 240b7 & 240B(d).

2. Aggravated felons, and in some cases other criminal offenders, are disqualified from most relief, including
   - cancellation of removal 240A(a)(3), 240A(b)(1)(C)
   - voluntary departure 240B(a)(1)
   - registry § 249
An a.f. precludes a showing of good moral character, under § 101(f)(8), required for much relief.

3. Anyone deportable on terrorist grounds, and in some nat’l sec. grounds, is barred from several forms of discretionary relief. E.g., cancellation of removal, voluntary departure, & registry.

A. LASTING RELIEF p.570
1. Cancellation of Removal § 240A [§p268]
   Relief will be available to both inadmissible and deportable nc’s, even when the particular charge does not rest on entry. A deportable nc will not have to leave and return in order to qualify. Deportable nc’s do not have to identify a comparable inadmissibility ground (as had previously been required by AG).
   Trilogy giving rise to 240A:

   For LPR who was not deportable b/c of 5 yrs.+ in US before moral turp. crime, inadmissibility grounds waived nunc pro tunc for reentry (for meaningful length of time). MATTER OF L. (BIA 1940).

   Then-current 212c extends to deportability even where the particular deportability ground did not hinge on inadmissibility at entry.

   Equal protection demands that even those who haven’t left should be eligible for relief under 212c. Francis v. INS. (2d Cir. 1976).
212c relief not a defense to deportability unless the particular deportability ground is also a ground of inadmissibility. Matter of Granados. (BIA 1979).

2. **TIMING**

   a. **Must have been LPR for five years upon application.** Status cd. have terminated at time of app., but had to have been in for 5 yrs. preceding.

   b. **Must have been domiciled continuously in US for 7 years, lawfully or not.** Continuous presence ends upon service of notice to appear OR when alien has committed an offense referred to in 212a2, rendering inadmissible. [§p.106]. § 240A(d)(1).

   *When does LPR status end?* when an administratively final deportation order (not necc. judicially final) ended, per BIA & several circuits. The DOJ regs provide tat it terminates “upon entry of a final admin. order of [removal].”

   *Other courts have held that LPR status ends when person physically rx’d.*

   **Breaks in presence:** over 90 days continual, or 180 days aggregate = break in continuous presence. § 240A(d)(2); but see armed services exceptions in (d)(3). [§p 272].

3. **Disqualifications** Since AEDPA, limited to:

   - aggravated felons
   - those inadmissible or deportable on nat’l sec. grounds

   Pre-AEDPA convictions (1996) from pleas use old 212c disqualifications, which includes drugs, aggravated f.’s, firearms, most m.t. crimes.

   § 240A(c) [§p.271] ineligibility:
   - alien crewmen post-1964
   - J visaholders
   - those subject to 212e 2 yr foreign residence required for adjustment or who got a waiver.

4. **Discretion** Applicant must show he or she merits favorable exercise of discretion. E.g., “unusual equities” must offset a “serious” drug offense.

B. **CANCELLATION OF REMOVAL PART B** Applies to any NC, not just ot LPRs.

Most beneficiaries are undocumented.

1. **10 yrs. continuous physical presence.**

   Likely humanitarian reasons – after 10 yrs. the bonds to US citizens, etc., likely great. Continuous, not aggregate, likely b/c roots rewarded thus.

   **TWO BRANCHES: GENERAL & BATTERED SPOUSE/’ê BRANCH (PER VAWA)**

   **CONTINUOUS PHYSICAL PRESENCE**

   **GOOD MORAL CHARACTER**

   **HARDSHIP**

   The requirements for VAWA folks are loosened.

   **Two accomplishmentsu:** (1) accords LPR status; and (2) cancels removal
**Limit:** 4000 individuals; this limit says BIA & IJs may not grant any further relief after that.

*Nicaraguan Adjustment & Central Am. Relief Act* (1997) interalia relaxed substantive criteria for part B cancellation for certain nationals of USSR+, most East Euro’s, Guatemalans, El Salvadorans. These are not counted toward the 4000 limit.

1. **Continuous Physical Presence**
   **Not less than 10 yrs.** (IIRIRA changed this from 7). This can only be interrupted by 90 days’ continuous, r 180 days’ aggregate, absence.

2. **Hardship:** *How severe?*
   *see p.584*
   must occur to qualifying family member
   must be “exceptional & extremely unusual hardship”

   Battered sp/c – only “extreme hardship”

**DOJ DISCRETION**

_Jong Ha Wang_ (US 1981): *May the INS narrowly construe the statutory requirement of “extreme hardship” necessary to suspend deportation of an otherwise deportable alien?* YES.

The courts may not substitute their judgment as long as INS draws a permissible construction.

_Príma Facie Case_ does not _require_ the BIA to reopen a removal case; it retains discretion. INS v. Rios-Pineda (U.S. 1985). It may also exercise discretion to deny reopening if it finds that allegations that _would_ establish extreme hardship, if true, but which the BIA finds outlandish on their face.

p.602 Post-Wang, the BIA found that a child who would have life-threatening reactions to immunizations if sent back to Pakistan did not rise to level of except. and extremely unusual hardship. The court of appeals upheld, in deference to BIA’s decision following _Wang_.

_Wang_ holds that judicial review is limited in BIA denials of motions to reopen that where BIA decision is based on factors that do not add up to the BIA’s conclusions judicial review can overturn; otherwise, BIA has great width of discretion.

3. **Other Hurdles:** Good Moral Character, Disqualified Groups, Discretion, and Reporting to Congress.
   a. GMCharacter – for the entire 10 years under b1B.
   §101(f) §p.44 -- note that classes are not limited to those listed.

   b. Crewmembers, certain exchange visitors, nat’l sec. or political grounds, or _those who fail to appear at removal hearings_ or who fail to meet other specified obligations are ineligible to obtain for 10 years.

4. **NACARA** p.604.
   Must have entered before a date in _1990_, dep. on nat’lity.
7, not 10 yrs. req.
Extreme hardship to oneself or family; note: rebuttable presumption of e.h.
w/Guatemalans & Salvadoreans only.
continuous phys. presence beyond service of n.to app.
However, it’s still discretionary. No judicial review by IJ or BIA denying special rule canx.

2. Registry § 249 §p332.
For folks here since 01/01/1972.
No hardship requirement. Good moral char., free from 212a3 crimes & 237a4 deportability.

3. Legalization
There are current talks w/Vicente Fox re this, but 9/11 may have pushed aside for a while.

Amnesty for those present since 01/01/1982.

b. Agricultural workers p.95s

Almost all these cases are over with, b/c the deadline for app.’s ended shortly after passage.
Sometimes, however, deadline was extended for those who were wrongfully processed by INS.

4. Adjustment of Status under § 245. [§p.308]

5. Private Bills used to be very common. (p.613)

B. LIMITED RELIEF
1. Deferred Action -- Prosecutorial Discretion p.614
As a result of Lennon & Ono’s search for Kyoko in 1972, INS published an Operations
Instruction for deprioritizing deportation. Now rescinded.

2. Voluntary Departure p. 616 § 240B [§p.273]
For every removal order, 20 VD’s take place.
Can happen: a. If not removal process has begun or been completed.
   b. If someone applies at conclusion of removal proceedings.
   c. Must show (per 240B(b)):
      A. physical presence of at least 1 yr. prior to notice of appear.
      B. “good moral character” for at least 5 years prior to application
      C. not deportable under 237a2Aiii (agg. felon) or 237a4 (nat’l sec.)
      D. shows by clear & conv. evidence that NC has means and intent to depart
   d. Must go w/in 60 days after order.
   e. Bond must be paid.

Why accept VD? 1. Removal makes nc ineligible to return for at least 10 years § 212a9 (20 for
2d offense, forever if agg. felony), unless INS gives permission to reapply sooner. If returning
anyway, they face felony charges.

- 40 -
By contrast, those who accept voluntary departure (and who pay their own way) are not subject to that bar.

2. There is often little to gain by waiting for a removal hearing. In the meantime, must post bond or remain in detention. Might try to reenter surreptitiously & evade apprehension.

**The huge risk is that application for VD will be denied.**

§ 240B(f) bars judicial review of an order denying VD under §§(b).

3. **OBJECTIONS TO DESTINATION** § 241(b) [§p.280]


Recognition of a country by USA is not necessary. *Osmani v. INS* (7th Cir. 1994).

*Gallina v. Fraser* held that “there could arise a situation in which the person to be removed from the United States would be subjected to “procedures or punishment so antipathetic to a federal court’s sense of decency as to require judicial intervention.”

4. **STAYS OF REMOVAL** P. 627 The mere filing of a motion to reopen does not stay removal; once removal occurs, the motion is deemed withdrawn. Hence, INS cd. prevent a decision on reopening – so watch out for your clients on this one.
I. Authorization to Practice
Who:
- Attorneys
- Law students
- Reputable individuals

See regulations on p.652.

1997 changes:
a) Students can be any year in law school.
b) must be supervised by an attorney, faculty, or accredited representative, in a program, nonprofit.
c) no direct or indirect remuneration from client; may come from org. or school.

II. Discipline of Practitioners  p.655

Note: A prax shall not state or imply that he or she has been recognized or certified as a specialist in immigration and/or nationality law unless such certification is granted by the appropriate state regulatory authority or by an org. that has been approved by the a.s.r.a. to grant it.

INEFFECTIVE ASSISTANCE OF COUNSEL: may be disciplined for this if the Board or an Immigration Judge finds for petitioner on complaint filed within one year of finding. Generally, there is NO NEED to show Prejudice.

III. Legal Aid

1. LSC appointees cannot provide services to nc’s unless:
   - LPR
   - possess specified R’s to citizens, have already applied for adjustment of status, and have not been rejected yet;
   - those who have already been granted refugee or asylum status

IV. EVIDENCE & PROOF

1. Admissibility –
   - Generally Hearsay is admissible in removal:
     - must be probative
     - cannot be fundamentally unfair

Exclusionary Rule: In Lopez-Mendoza (1984) the Supremes held that unless the means used to obtain evidence were egregious then the evidence is not excludable; this includes unlawfully obtained evidence.

2. Burden of Proof
The INS must establish the facts supporting deportability by clear, unequivocal, and convincing evidence. Woody v. INS p. 701

Congress hadn’t made it clear what itnetn was; the Act of 1952 though states that the burdenin deportation cases be “reasonable substantial and probative” evidence – a higher standard.

§ 240(c)(3)(A) [p.264]: INS must prove deportability by clear & convincing evidence IF
NC previously admitted; admission must be proven.

§ 291 rebuttable presumption that NC is lawfully present. A person against whom proceedings are brought has burden of proving “time, place & manner of entry.” If not, deportable under § 237a1B

Non-incrimination: A NC questioned by INS can remain silent; however, the nc’s silence can be used in removal to infer inadmissability. u.s. v. solano-godines, p. 711

***SUMMARY***

Admission
NC has burden of proving not inadmissible.

If Admitted:
INS has burden, by clear & convincing evidence, of showing NC falls w/in removability grounds.

If disputed whether admitted: NC must prove admission.

Principle of Burden of Proof:
1. Party seeking to change status quo. Arguably, that’s the INS.
2. Whomever has greater access to information (party trying to prove positive – i.e., I am a citizen – has an easier time than party proving negative – No you’re not.) This is the NC, who has docs pertinent to citizenship, etc.
3. Harlon’s “comparative social disutility” test: wherever the risk of error is less dangerous to society the burden will be allocated. The Supreme Court in Woodby held that the harm to NC is greater than the potential harm to the state; nevertheless, the NC has the burden.

V. JUDICIAL REVIEW  INA § 242 [§p 290] text pp.721-
General rule: if administratively final (i.e., all admin. remedies exhausted), NC can file petition for review of removal order in the U.S.Ct. App.
   BUT there are many exceptions: § 242(a) [§p290-291]
1. expedited removal
2. adjustment of status decisions (245)
3. Cancellation of rx’l decisions (240A)
4. Voluntary departure decision (240B)
5. Most crime related grounds (237a2) for deportation, or inadmissibility 212a2
6. AG waivers (212h) & most other discretionary relief. Also included:
   a. Appears to cover
      i. 205 revocation of visa petition
      ii. 207 refugee admissions
      iii. 209 adjustment of status of refugees
      iv. 241(b)(3) no removal to country of persecution
      v. 245A legalization, but
vi. 246 rescission of adjustment of status.
   b. **Big exceptions** (i.e., still reviewable) are citizenship, asylum. HOWEVER, it is not clear that all judicial review is barred.

St. Cyr: The Supremes took on the issue of judicial review of AG decisions:
1. Congress must articulate specific & unambiguous statutory directives to effect a repeal of habeas corpus. Implications from statutory text or leg. history aren’t sufficient to repeal what the Constitution guarantees.
   - Under the Constitution’s Art. I, § 9, cl.2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” This clause “unquestionably” gives rise to some judicial intervention in deportation cases.
   - INS argued that writ protected individuals held w/o legal auth., but not where an official had statu. authorization to detain using his discretion. The Supremes cite precedent, Heikkila v. Barber, that did apply in such a case.
   - Cites traditional power of courts to review *legal determinations* by Executive. Draws distinction b/w eligibility for discret. relief and the favorable exercise of discretion – a legally erroneous failure to exercise discretion is subject to inquiry by writ, but not the “substantively unwise exercise of discretion.” (741).
   - “Judicial review” is distinct from “habeas corpus” so Congress’ intent must have not been to repeal habeas with IIRIA provisions now codified in 242. (742). Without a clear statement removing habeas expressly, the Court refused to read this into Cong. intent.s

VI. OTHER STRATEGIES


ii. Injunctions & Class Actions
   IIRIRA has narrowed class actions considerably. see p.752-53.

iii. Collateral Attack in Crim. Proceedings p. 753
   The validity of the underlying removal order may not be collaterally attacked in subsequent crim. proceedings unless the defendant had not earlier been given a meaningful opportunity to seek direct judicial review of the deportation order. *Mendoza-Lopez* (U.S. 1987). In M-L, the Court concluded that the lack of advice as to the possibility of judicial review had effectively deprived the δs of such an opportunity.
   - Now, *INA § 276* says *no collateral attack unless person has exhausted all administrative remedies* re the underlying rx’l order, he had been improperly deprived of opp. for judicial review and the removal order had been “fundamentally unfair.”
   - § 302(a) prohibits coll. attack on orders of “expedited removal.”

iv. Claims of U.S. Nationality A person who makes a *nonfrivolous claim* of citizenship has a due process right not to be removed w/o a judicial trial on issue of citizenship. See § 242b5.
v. CONSOLIDATING REVIEWABLE CLAIMS  All claims must be heard together, not piecemeal. § 242(b)(9), and only after final judicial order.

E. Exceptions to usual Removal Procedures
1. Expedited Removal  p.837

2. Criminal Cases
   a. Prison Hearings
   b. Administrative Removal § 238(b). re aggravated felons
      NC must receive:
      1. reasonable notice of charges
      2. opportunity to be heard
      3. may be represented by counsel at own expense
      4. inspect adn rebut evidence
      5. record must be maintained
      6. adjudicator may not be person who issued charges.
      7. AG must wait 14 days before executing removal order so that person will have time to seek (extremely limited) judicial review.
   c. Judicial Removal: § 238(c) judges may decide whether δs ought to be removed as part of crim. sentence. Only if prosecutor requests rx’l order & INS concurs. May be appealed to ct. appeals.

3. In Absentia Removal Hearings
   If NC doesn’t appear, § 240b5(A,B) says rx’l hearing held in absentia:
   - INS must prove by clear, unequivocal, & convincing evidence that the required notice was provided or attempted & that person is deportable.
   - To rescind order, NC must either:
     - move to reopen within 180 days, showing “exceptional circumstances,” (serious illness of nc, death of IR or something no “less compelling” and beyond nc’s control) or
     - move to reopen at any time, showing he or she didn’t receive notice or was in custody and not at fault for not appearing.

4. NC Reentering after Prior Removals.
   § 241(a)(5) expedites removals for these; prior removal order may be reinstated and the person removed w/o further proceedings.
Refugees/Asylees/Nonrefoulement

A. Refugee: § 101(a)(42) (§p.35) (A): generally (B) by Presidential specification
   1. any person who is outside country of nationality, or where habitually resided
   2. who is unable or unwilling to return or avail herself of protection of
   3. b/c of persecution or a well founded fear of persecution
   4. on account of
      a. race
      b. religion
      c. nationality
      d. membership in a social group
      e. political opinion – includes forced abortion or sterilization

Does not include: people fleeing “only” war or natural catastrophe (who may thus get parole power).

Filing Deadlines
Within one year of arrival, unless there's been a big change
Extraordinary circumstances can explain delay

§ 207(a) The President makes w/approp. consultation w/Congress, an annual determination of #
of refugees to be admitted; “unforeseen emergency refugee situation” slots may be added.

§ 209 Adjustment of Status of Refugees [§p93]
(a)(1) Refugees who have been admitted:
   (A) whose admission not terminated by AG,
   (B) who has been physically present in US for at least one year
   (C) who has not acquired permanent resident status,

shall be returned to INS for inspection & exam. for admission as immigrant under § 235, § 240,
& 241 (removal stuff).
   (2) If admissible under the above, refugee will be admitted as LPR.

These requirements do not apply: § 209(c)
   ☐ Public charge § 212(a)(4)
   ☐ Labor cert. (a)(5)
   ☐ Doc req.’s (a)(7)(A)

B. Asylum & Nonrefoulement (withholding of removal)  p.872
§ 208 [§p.88] Asylum permits person already inside US, either at border or at interior, to
remain at least temporarily, in most cases permanently.

§ 241(b)(3) [§p.283] Nonrefoulement – prevents return to country of persecution (3d country
ok).

Applications for asylum under 208 are automatically treated as application for nonrefoulement
as well.

When to apply: Usually, this happens at removal proceedings, and the app. filed w/IJ.
   Appealable to BIA
   Walk-ins – one may take initiative and apply to INS.

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Except in expedite removal, cases get nonadversarial interview.

I. HOW ADJUDGED:

POLITICAL OPINION

Does refusing to join a guerilla group & concomittant coercion by guerrillas constitute “persecution on account of political opinion?” NO. Elias-Zacharias (U.S. 1992)

Refusing to take sides in a governmental dispute does not constitute a political opinion, but simply a fear of retaliation.

Political expressions, acts, speeches, etc. would qualify.

Imputed political opinion – lower courts since EZ have held that imputed political opinion can apply.

Neutralitiy? Conscious & deliberate choice must be involved.

SOCIAL GROUP

1. Immutability Test Acosta, BIA 1995

Likely the most common worldwide.

Is the characteristic defining the group immutable? i.e, can’t be changed or should not be forced to change?

2. Sanchez-Trujillo (VERY NARROW) 9th Cir. 1986

voluntarily associational group
homogeneous & cohesive (common impulse or interest)

3. DOJ Proposed rule – adopts immutability + “additional factors” but past persecution cannot define the social group.

   a. It is unclear whether the “additional factors” that may be considered” can overcome the immutability requirement.

   i. close affiliation

   ii. common motive or interest

   iii. voluntary or associational relationship among members

   iv. recognized to be a societal faction or is otherwise a recognized segment of pop.

   v. members view themselves as members of the group

   vi. the society distinguishes members for different status or treatment than is accorded nonmembers.

   b. it suggests also that these factors may be left out and there is still a social group

   c. Can these characteristics alone determine immutability?


   a. Homosexuality is an immutable characteristic. (Here, persecution was not for any homosexual acts but b/c of his status).
5. **FATIN v. INS**

In order for an alien to obtain asylum using gender as a “particular social group” NC must show that members are “persecuted” for membership.

Here, the petitioner: failed to demonstrated that she would be singled out for persecution for being a member of that group. She would simply be required to follow the same laws as all other women.

*Unless willing to die for beliefs, not qualifying.*

**TEST:**
1. NC must identify a particular social group.
2. NC must establish membership in the psg
3. NC must show that s/he would be persecuted or has a well-founded fear of persecution based on that membership.

6. **Kasinga** *In certain cases, female genital mutilation is sufficient basis for asylum.*

1. immutable social group: young women of her tribe who have not undergone fgm and who oppose the practice.
2. well-founded fear
3. fears are countrywide

**Past persecution:** such app’s are usually denied unless particularly egregious indicative of future persecution

Note: 241(b)(3) doesn’t list past persecution as a factor in nonrefoulment.

**II. CREDIBILITY**

Moral failings may not go to credibility. *Damaize-Job v. INS*

- disappearance of family members
- prior arrests
- imprisonment due to political beliefs or ethnicity
- explicit threats on individual’s life

= substantial evidence of a clear probability or a well-founded fear of persecution

**III. INELIGIBILITY FOR ASYLUM/NONREFOULEMENT B/C OF CRIMINALITY**

*Under INA § 243(h)(2)(B), is an alien ineligible for w/holding of deportaito if he has been finally convicted of a particularly serious crime of the type indicating that he poses a danger to community?* YES. *Matter of Carballe.*

**Danger to community test** is merely whether crime was “particularly serious”, not likelihood of recidivism, or though BIA STILL FAILS TO DEFINE EXACTLY PARTICULARLY SERIOUS CRIME.

*Which is more friendly to applicant, abstract concept of moral turp., or fact-specific?*  
The test courts have used is “ can you say that anyone who commits a crime hasn’t committed a moral turp. crime. In fact, fact-specific is less friendly to applicant.
IV. SAFE COUNTRIES usually circuitous route to country where applying. The US may send back to another country hit en route. 
   As a result of ’96 legislation, the US will return applicants to 3d countries where 
   1. Safe 
   2. Treaty/agreemtn twtih that country not to send to countries where persecution likely 

VI. TORTURE VICTIMS – can now get relief akin to asylum. 
   Where sub. grounds for believing danger of being subjected to torture. 
   **Non state actors** NOT recognized.
§ 274A & 274B [§p.357]

CITIZENSHIP § 301 [§p.410]

pp. 1169-1261

p.1193 JUS SOLI
Birth in the USA imbues citizenship for most. § 301

p.1195 JUS SANGUINIS
One or both parents must be citizens.
Trickiest may be § 301(g)
Person born outside USA
ONE parent citizen, who was
    physically present in US for aggregate of five years+
    two of which were after 14 years old.
SEE CHART, P.1197