Significant Developments in the Immigration Laws of the United States 1986

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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES
1986

This Synopsis highlights significant legal developments which occurred in immigration law in 1986. The Supreme Court decided only one immigration case during this period, dealing with the definition of “child” in Immigration and Nationality Act section 244 suspension of deportation cases. The lower federal courts were highly active, dealing with a wide range of important immigration issues. The most significant development in 1986 was the passage by the 99th Congress of the Immigration Reform and Control Act of 1986 (IRCA). Passage of IRCA culminates six years of congressional attempts to reach an agreement on immigration reform. Seemingly cutting both ways, IRCA provides tough employer sanctions while offering generous legalization provisions and multiple safeguards for the humane administration of new policies.

INTRODUCTION

By presidential proclamation, July 4, 1986, was declared “National Immigrants Day.” On Liberty Weekend, “all America celebrate[d] the memory of those hardy immigrants, who, symbolically at least, looked up and saw the Statue of Liberty lifting her lamp beside the golden door. It [was] a time to smile, to weep, to sigh contentedly.” Meanwhile, despite widespread sympathy for immi-


Since 1820, more than 52 million immigrants have come to the United States from all over the world. They have sought and found a new and better life for themselves and their children in this land of liberty and opportunity. The magnet that draws them is freedom and the beacon that guides them is hope. America offers liberty for all, encourages hope for betterment, and nurtures great expectations. In this free land a person can realize his dreams — going as far as talent and drive can carry him. In return America asks each of us to do our best, to work hard, to respect the law, to cherish human rights, and to strive for the common good.

grants, "[t]here is strong and growing public support for new restrictions on immigration."³

This Synopsis outlines significant developments in immigration law during fiscal year 1986. The United States Supreme Court decided only one immigration case in 1986, INS v. Hector,⁴ dealing with the definition of "child" in Immigration and Nationality Act of 1952 (INA) section 244 suspension of deportation cases. The lower federal courts rendered significant decisions in several areas, including: administrative law and procedure; attorneys; bond conditions; criminal offenses; deportation procedure; domicile; estoppel; extradition; Filipino war veterans; the fourth amendment; labor problems; the Mariel boatlift; marriage fraud; miscellaneous offensive uses of the court system; renunciation of United States citizenship; and visa petitions.

The 99th Congress played a decisive role in formulating and shaping United States immigration policy for years to come. On October 17, 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA).⁵ IRCA is composed of three essential sections: (1) employer sanctions for knowingly hiring undocumented aliens; (2) legalization for aliens who entered the United States without documentation before January 1, 1982; and (3) special protection and legalization for foreign agricultural workers. Numerous other provisions of IRCA make scattered changes in current immigration law. Congress also passed two other significant bills in 1986. The Marriage Fraud Amendments⁶ mandate stricter requirements for obtaining permanent residency and criminal penalties for marriage fraud. The Consular Efficiency Amendments⁷ attempt to streamline the consular visa process by eliminating duplicative government activity.

UNITED STATES SUPREME COURT ACTIVITY

The Supreme Court was not active in immigration law in 1986. The Court decided only one immigration case — INS v. Hector.⁸ The Court granted certiorari in five cases⁹ and denied certiorari in

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9. In INS v. Cardoza-Fonseca, 767 F.2d 1448 (9th Cir. 1985), cert. granted, 106 S. Ct. 1181 (1986), the Court certified the following issue: Whether an alien's burden of proving eligibility for asylum pursuant to Section
fourteen cases.¹⁰

208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. Sec. 1253(h). 63 INTERPRETER RELEASES 187 (1986). Oral argument was heard by the Court on October 7, 1986. On March 9, 1987 the Supreme Court, by a 6-3 vote, held that both the plain meaning and the legislative history of Immigration and Nationality Act [hereinafter INA] sections 208(a) and 243(h) indicate that different standards apply under the two sections. 55 U.S.L.W. 4313 (1987).

In United States v. Mendoza-Lopez, 781 F.2d 111 (8th Cir. 1985), cert. granted, 107 S. Ct. 59 (1986), the Court will review an Eighth Circuit decision holding that “an executed deportation order is subject to collateral attack as a defense to criminal charges of unauthorized reentry following deportation in violation of INA Sec. 276 on a showing that the alien was not accorded due process at the deportation hearing.” 63 INTERPRETER RELEASES 800-91 (1986).

In United States v. Kungys, 793 F.2d 516 (3d Cir.), cert. granted, 107 S. Ct. 431 (1986), the Court will review a Nazi denaturalization case. The Court of Appeals in Kungys applied the test of materiality promulgated in the controversial Supreme Court decision of Chaunt v. United States, 364 U.S. 350 (1960) to find that the defendant’s misrepresentations were material.

In Hohri v. United States, 782 F.2d 227 (D.C. Cir.) cert. granted, 107 S. Ct. 454 (1986), the Court will decide the following issues:

1. Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction under 28 U.S.C. sec. 1295(a)(2) over the appeal in a case brought under both the Tucker Act and the Federal Tort Claims Act (FTCA); and, if not, whether the Federal Circuit nonetheless has exclusive jurisdiction when the FTCA claim is frivolous because plaintiffs never filed an administrative claim as required by 28 U.S.C. sec. 2675(a).


63 INTERPRETER RELEASES 1075 (1986).

In Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir.), cert. granted, 107 S. Ct. 666 (1986), the Court will decide the following issues:

1. Whether 8 U.S.C. sec. 1182(a)(27) permits denial of a visa to an alien only if his activities — and not just his presence or entry — would be prejudicial to the public interest.

2. Whether 8 U.S.C. sec. 1182(a)(27) permits denial of a visa to an alien based on foreign policy concerns only if those concerns are independent of — and not merely in addition to — the alien’s affiliation with organizations listed in 8 U.S.C. sec. 1182(a)(28).

63 INTERPRETER RELEASES 1180 (1986); see infra text accompanying notes 200-06.

10. In a split vote, the Supreme Court denied certiorari in Liphete v. Steierheim, 455 So. 2d 1348 (Fla. Dist. Ct. App. 1984), cert. denied, 106 S. Ct. 829 (1986). In Liphete, a Florida court held that Haitian aliens who do not have permanent residence status are incapable of declaring a Florida home as their permanent home and are thus precluded from seeking a homestead tax exemption. Justices Blackmun and Marshall voted to grant certiorari. See 63 INTERPRETER RELEASES 48 (1986).

In Lachica v. INS, 774 F.2d 1174 (9th Cir. 1985), cert. denied, 106 S. Ct. 805 (1986), the Court denied review of an unreported Ninth Circuit decision. The lower court in Lachica denied the petitioner’s application for a continuance for further hearing on his application for voluntary departure, found him deportable, and denied voluntary departure. See 63 INTERPRETER RELEASES 48 (1986); 62 INTERPRETER RELEASES 1172 (1985).
INS v. Hector

On November 17, 1986, the Supreme Court issued a per curiam opinion granting certiorari and reversing the unreported Third Cir-

Two denaturalization cases were denied certiorari by the Court: United States v. Kowalchuk, 773 F.2d 488 (3d Cir. 1985), cert. denied, 106 S. Ct. 1188 (1986) and Maikovskis v. INS, 773 F.2d 435 (2d Cir. 1985), cert. denied, 106 S. Ct. 2915 (1986). Both cases involved former Nazi supporters who concealed their wartime activities when immigrating to the United States. Each lower court concluded that each petitioner's mis-

representations were "material" and warranted deportation. The courts applied Chaunt v. United States, 364 U.S. 350 (1960), which held that the government must prove that a truthful answer "might have been useful" in an investigation of the applicant "possibly leading to the discovery of other facts warranting denial of citizenship." Id. at 355. See 63 INTERPRETER RELEASES 187-88, 520 (1986); 62 INTERPRETER RELEASES 1058-65 (1985).

In United States v. Kairys, 782 F.2d 1374 (7th Cir.), cert. denied, 106 S. Ct. 2258 (1986), the Court declined review of a third Nazi deportation case involving two issues. First, whether the denaturalization ground of illegal procurement, which had been dropped from the denaturalization provisions of the Immigration and Nationality Act 8 U.S.C. §§ 1101-1505 (1982) [hereinafter INA] and restored in the 1961 amendment to INA section 340(a), could be constitutionally applied retroactively to a naturalization decree obtained while illegal procurement was not part of the statute. Second, whether the Constitution guarantees a jury trial in denaturalization cases. The Seventh Circuit concluded that retroactive application of the illegal procurement amendment, INA § 340(a), 8 U.S.C. § 1451(a), did not violate the constitutional prohibition against ex post facto laws. Kairys, 782 F.2d at 1383. Additionally, the court held that denaturalization proceedings are civil in nature. Therefore, "due process [is] satisfied by a fair trial before an impartial decisionmaker." Id. at 1384.

In Linnas v. INS, 790 F.2d 1024 (2d Cir.), cert. denied, 107 S. Ct. 600 (1986), the Court denied certiorari to an ex-Nazi's constitutional challenges to the Holtzman Amendment, INA §§ 241(a)(19), 243(h), 244(e). See infra text accompanying notes 102-12.

In Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 106 S. Ct. 1198 (1986), the Court's denial of certiorari resulted in the first extradition to Israel under the 1963 United States-Israel extradition treaty. The treaty covers war crimes committed during World War II. In Demjanjuk, Israel requested the United States to extradite petitioner to stand trial for murder committed during World War II. The Sixth Circuit held, among other things, that the mass murder of Jews in concentration camps was murder within the meaning of the treaty. See 63 INTERPRETER RELEASES 188 (1986).

In Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 106 S. Ct. 1213 (1986), the Court denied review of a case involving the detention and repatriation of Cuban "Marielitos." The Eleventh Circuit noted that the power of federal courts to review exclusion orders is severely limited and that the "well-founded fear" of persecution standard is appropriate in asylum cases. See 63 INTERPRETER RELEASES 253 (1986); 62 INTERPRETER RELEASES 680-86 (1985); see also Synopsis, Significant Developments in the Immigration Laws of the United States 1985, 23 SAN DIEGO L. REV. 441, 459-62 (1986).

In Kahlenberg v. INS, 763 F.2d 1346 (11th Cir. 1985), cert. denied, 106 S. Ct. 1636 (1986), the Court denied review of a case involving a request for adjustment of status under 8 C.F.R. § 245 (1985) as a nonpreference immigrant. Petitioner requested a waiver of the labor certification requirement under 8 C.F.R. § 212.8(B)(4) (1985). The immigration judge found petitioner ineligible, the Board of Immigration Appeals (BIA) dismissed the appeal and the Eleventh Circuit affirmed. See 63 INTERPRETER RELEASES 367 (1986); 62 INTERPRETER RELEASES 710-16 (1985).

In Kalin v. Casillas, 780 F.2d 533 (5th Cir. 1985), cert. denied, 106 S. Ct. 1643 (1986), the Court denied review of an unreported Fifth Circuit decision. Kalin involved a pro se petitioner trying to immigrate from Canada to the United States. Petitioner's
cuit decision in *Hector v. INS*. The case involved an alien seeking suspension of deportation pursuant to Immigration and Nationality Act (INA) section 244(a)(1). At issue was Hector’s ability to prove the third statutory requirement of section 244(a)(1) — extreme hardship to herself or her child. Hector claimed that deportation would cause extreme hardship to her two nieces, both of whom were United States citizens, who were living with Hector and attending an American school.

Both the immigration judge and the Board of Immigration Appeals (BIA) refused to hear Hector’s argument claiming that a niece is not a “child” within the meaning of section 244(a)(1). The Third Circuit remanded the case to the BIA ordering that testimony be heard as to whether a relationship existed that was functionally equivalent to a parent-child relationship. The Supreme Court reversed, finding the plain language of section 244(a)(1) so compelling that the BIA is not required to consider the hardship to third parties other than a spouse, parent, or child, as defined by the INA. The Court found that the “statutory definition of the term ‘child’ is particularly exhaustive,” limiting the definition to “an unmarried le-

allegations against the INS District Director and the United States for negligence in the handling of his case were dismissed by the district court on defendant’s motion for summary judgment. *See 63 Interpreter Releases* 367 (1986).

In *Sagermark v. INS*, 767 F.2d 645 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2895 (1986), the Court denied rehearing of the appeal of a Swedish national requesting discretionary asylum pursuant to INA § 208, 8 U.S.C. § 1158 and withholding of deportation under INA § 243(h), 8 U.S.C. § 1253(h). Sagermark claimed that due to his massive political campaign in Sweden against the government, he would be jailed if returned. The immigration judge rejected Sagermark’s claim, concluding that he could not demonstrate a “well-founded fear of persecution.” *See 63 Interpreter Releases* 498 (1986).

In *Quinn v. Robinson*, 783 F.2d 776 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986), the Court denied rehearing the appeal of a petitioner seeking political asylum. *See infra* text accompanying notes 133-38.

In *Sachdev v. INS*, 788 F.2d 912 (2d Cir.), *cert. denied*, 107 S. Ct. 315 (1986), the Court denied rehearing an argument that unless the INS strictly complies with the notice requirements in INA § 205, 8 U.S.C. § 1155, a revocation of an approved visa petition has no effect. *See infra* text accompanying notes 85-86.

In *Kashani v. Nelson*, 793 F.2d 818 (7th Cir.), *cert. denied*, 107 S. Ct. 644 (1986), the Court denied certiorari in a case involving judicial review of an INS District Director’s denial of an application for asylum. The Seventh Circuit held that the District Director’s decision “involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the political branches of the government.” *Id.* at 828.

13. *Hector*, 107 S. Ct. at 381; *see also* Tovar v. INS, 612 F.2d 794 (3d Cir. 1980).
15. *Id.*
gitimate or legitimated child or stepchild under 21 years of age.”\footnote{16} The \textit{Hector} opinion effectively overrules \textit{Tovar v. INS}.\footnote{17} The \textit{Tovar} court advocated a functional approach to defining “child” in section 244(a)(1) cases, which tended to expand the statutory definition.

\textbf{Administrative Law and Procedure}

In \textit{Flores v. Bowen},\footnote{18} the Ninth Circuit Court of Appeals held: (1) aliens holding “\textit{Silva}”\footnote{19} letters are entitled to collect Supplemental Security Income (SSI) until such time as the Social Security Administration (SSA) repeals the applicable federal regulation authorizing the aliens to do so\footnote{20} or the INS properly revokes the alien’s work authorization; and (2) the government cannot supersede valid regulations through internal agency instructions.

The \textit{Flores} controversy centered on an SSA directive\footnote{21} to all field employees instructing them to deny SSI benefits to “\textit{Silva}” aliens unless independent evidence of eligibility could be established. The fact that the SSA regulation, which dictates how an alien can prove permanent residency under color of law, had not been repealed by Congress did not deter the SSA.\footnote{22} The \textit{Flores} court struck down the directive, citing “the black-letter principle that properly enacted regulations have the force of law and are binding on the government until properly repealed.”\footnote{23}

The Second Circuit, in \textit{Dina v. Attorney General of the United States},\footnote{24} heard the argument of a J-1 visa holder denied a section 1182(e)\footnote{25} two-year foreign residency waiver. Petitioner argued that

\begin{itemize}
\item \textit{Flores}, 790 F.2d at 740 (9th Cir. 1986).
\item \textit{Flores}, 790 F.2d at 742 (2d Cir. 1986).
\item INA § 212(e), 8 U.S.C. § 1182(e) (Supp. 1985).
\end{itemize}
an unfavorable recommendation by the United States Information Agency (USIA) does not necessarily prohibit the Attorney General from granting the waiver application. The court rejected petitioner's argument and adopted the First Circuit’s decision in Silverman v. Rogers. The Silverman court “looked to legislative history to conclude that a waiver could not be obtained without the positive recommendation of the Secretary of State (who under the earlier version of section 1182(e) . . . performed the function now fulfilled by the USIA.).” The court also rejected petitioner's second argument that the USIA abused its discretion when denying petitioner's waiver application. The government, relying on the Supreme Court opinion in Heckler v. Chaney, argued that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.” The Dina court followed the Heckler decision and denied petitioner's waiver application.

In Olinayan v. District Director, INS, the Tenth Circuit considered its own jurisdiction in an appeal from a final deportation order to review a collateral decision of an underlying District Director. The court held that if the tests for exclusive appellate review under INA section 106(a) are met, the district court has no jurisdiction to review deportation decisions. Conversely, if the section 106(a) tests are not met, “exclusive jurisdiction for initial review of those issues lies in the district court.”

In Nocon v. INS, the Third Circuit considered the issue of whether “failure to file timely a petition for review within six months of [a] final deportation order pursuant to 8 U.S.C. § 1105a(a)(1), though filing a timely motion for reconsideration with the BIA,

27. Dina, 793 F.2d at 475.
29. Id. at 830.
30. The Dina court also cited a similar Ninth Circuit case, Abdelhamid v. Ilchert, 774 F.2d 1447 (9th Cir. 1985). Dina, 793 F.2d at 476. In Abdelhamid, the court held that a decision was committed to agency discretion by law and not subject to judicial review.
31. 796 F.2d 373 (10th Cir. 1986).
32. See Kashani v. Nelson, 793 F.2d 818 (7th Cir.) cert. denied, 107 S. Ct. 644 (1986); Ramirez-Durazo v. INS, 794 F.2d 491 (9th Cir. 1986).
33. INA § 106(a), 8 U.S.C. § 1105a(a).
34. 796 F.2d at 376-77 (citing Salehi v. District Director, INS, 796 F.2d 1286 (10th Cir. 1986)).
35. Id. at 377.
36. 789 F.2d 1028 (3d Cir. 1986).
appellate review of the original final deportation order.” 37 The Nocon court held that the filing of a motion for reconsideration does not toll the section 1105a six-month limitation period. 38 "The general rule is that a motion to reopen deportation proceedings is a new, independently reviewable order within the jurisdiction of the court of appeals pursuant to section 1105a." 39 Allowing petitioners extra time to file their petition for reconsideration would directly contravene the congressional intent of "prevent[ing] successive, piecemeal appeals from being used as a dilatory tactic to postpone the execution of deportation orders." 40

ATTORNEYS

While the involvement of attorneys in the immigration process benefits individual aliens and society as a whole, occasionally a situation will arise where attorney involvement creates special immigration issues for judicial consideration. In 1986 three significant decisions dealing with the attorney's role in the immigration process were decided. 41

In Magallanes-Damian v. INS, 42 the Ninth Circuit decided the issue of whether an attorney's tactical decisions which backfire on alien petitioners impinge upon the fundamental fairness of the hearing in violation of the fifth amendment. The case involved aliens arrested in a factory inspection. Their attorney advised them to concede deportability in return for an extended period for voluntary departure. This advice was based upon the attorney's belief that pending amnesty legislation, which would make petitioners eligible for lawful permanent residence, would be passed by Congress before the agreed period for voluntary departure expired. When the legislation failed, petitioners alleged they were denied due process. 43

The Magallanes court recognized petitioners' due process rights. 44

37. Id. at 1029 (citing INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1)).
38. The Nocon decision is illustrative of the disagreement among the circuits over section 1105a interpretation. In Bregman v. INS, 351 F.2d 401 (9th Cir. 1965), the Ninth Circuit held that the section 1105a limitation is suspended when the alien files a motion to reopen before the BIA within six months of the final order. Another Ninth Circuit case, Hyun Joon Chung v. INS, 720 F.2d 1471, 1474 (9th Cir. 1983) (modified Mar. 26, 1984), cert. denied, 467 U.S. 1216 (1984), explained this position by pointing to congressional intent "to create a process in which there is a single judicial review of all questions relating to an alien's deportation.
39. 789 F.2d at 1032 (citing Giova v. Rosenberg, 379 U.S. 18 (1964)).
40. Id. at 1033.
41. Magallanes-Damian v. INS, 783 F.2d 931 (9th Cir. 1986); Committee of Cent. Am. Refugees v. INS, 795 F.2d 1434, amended by 807 F.2d 769 (9th Cir. 1986); Escobar Ruiz v. INS, 787 F.2d 1294 (9th Cir. 1986).
42. 783 F.2d 931 (9th Cir. 1986).
43. Id. at 932-33.
44. Deportation hearings have been deemed civil proceedings and thus not subject to the rigid procedural safeguards afforded criminal tribunals. United States v. Barraza-
but held that failed tactical decisions do not constitute ineffective assistance of counsel. Absent egregious circumstances, aliens are bound by the decisions of their attorneys.

In Committee of Central American Refugees v. INS, petitioners represented a class of deportable aliens apprehended in the INS San Francisco District who would have been, were, or would be subject to transfer to alien deportation facilities away from the San Francisco area. Generally, the Attorney General has discretionary power to choose the facilities where deportable aliens are to be detained. Petitioners sought an injunction to prevent the Attorney General from exercising this power. The petitioners claimed that "the INS' policy of transferring aliens to remote detention facilities violated the due process clause . . . because it effectively deprived them of the right to counsel, the right to gather and present evidence, and the right to apply for political asylum." The court held that a due process violation exists only when there is "an established, ongoing attorney-client relationship." The court relied on Harisiades v. Shaughnessy to support its conclusion that immigration powers, such as the power to choose the place of detention for deportable aliens, "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." In Escobar Ruiz v. INS, the Ninth Circuit considered an appeal concerning attorney fees under the Equal Access to Justice Act (EAJA). The court held that hearings before the immigration judge and BIA "are precisely the type of proceedings to which Congress intended former section 2412(d) to apply." When a litigant is a "prevailing party" within the meaning of the EAJA, attorney

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Leon, 575 F.2d 218, 220 (9th Cir. 1978). Fifth amendment due process rights, however, have been deemed necessary to ensure fundamental fairness. Id.; see also Paul v. INS, 521 F.2d 194 (5th Cir. 1975).
45. 795 F.2d 1434, modified, 807 F.2d 769 (9th Cir. 1986).
47. For a discussion of the INS viewpoint on the transfer of aliens, see Schmidt, Detention of Aliens, 24 SAN DIEGO L. REV. 305 (1987), in this issue.
49. Id. at 1439.
52. 787 F.2d 1294 (9th Cir. 1986).
54. Escobar Ruiz, 787 F.2d at 1297.
55. To be a "prevailing party," a litigant must obtain relief "on the merits of the underlying action." NLRB v. Doral Bldg. Serv., 680 F.2d 647 (9th Cir. 1982).
fees can be awarded for fees incurred at all levels of the litigation.\textsuperscript{66}

**Bond Conditions**

In *National Center for Immigrants Rights v. INS*,\textsuperscript{67} the Ninth Circuit considered the Attorney General’s statutory authority to include a condition in every appearance and delivery bond issued at a deportation proceeding barring unauthorized employment. This case was a class action with the petitioners consisting of “all those persons who have been or may in the future be denied the right to work pursuant to 8 C.F.R. sec. 103.6.”\textsuperscript{68} The INS argued that the Attorney General is granted broad authority under 8 U.S.C. §§ 1103, 1252(a) (1982) to promulgate bond regulations consistent with the goals of the INA. While the court recognized the Attorney General’s wide discretion,\textsuperscript{69} it held that the blanket regulation issued in this case exceeded the legislative purpose of insuring the alien’s appearance at future deportation hearings.\textsuperscript{70} “The peripheral concern of the Act with the employment of illegal aliens is not sufficient to support the imposition of a no-employment condition in every bond.”\textsuperscript{71}

**Criminal Offenses**

By statute,\textsuperscript{62} aliens are excludable or can be deported if convicted of a crime. Hence, numerous cases can be found at the administrative, state, district, and appellate court levels dealing with the rights of aliens who commit, or have committed, a criminal offense. In 1986 four significant cases dealing with this topic were decided at the federal appellate level.\textsuperscript{63}

In *Crespo-Gomez v. Richard*,\textsuperscript{64} petitioner was convicted of possession of cocaine and the INS subsequently commenced deportation proceedings against him. A federal district court issued a preliminary injunction prohibiting petitioner’s deportation concluding that

\textsuperscript{56.} The Escobar Ruiz court dismissed petitioner’s appeal on the grounds that he was not a “prevailing party.” If the BIA on rehearing, however, grants petitioner’s claims on the merits, attorney fees can still be had by Escobar Ruiz. *Escobar Ruiz*, 787 F.2d at 1298.


\textsuperscript{58.} *Nat’l Center*, 791 F.2d at 1353.

\textsuperscript{59.} Id. at 1354.

\textsuperscript{60.} Id. at 1356.

\textsuperscript{61.} Id.


\textsuperscript{63.} Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986); Trench v. INS, 783 F.2d 181 (10th Cir.) *cert. denied*, 107 S. Ct. 457 (1986); Bull v. INS, 790 F.2d 869 (11th Cir. 1986); Monet v. INS, 791 F.2d 752 (9th Cir. 1986).

\textsuperscript{64.} 780 F.2d 932 (11th Cir. 1986).
INA section 243(h), 8 U.S.C. § 1253(h)(2)(B) (Supp. 1986) required two findings: (1) that the petitioner had been convicted of a particularly serious crime; and (2) that he constituted a danger to society.\(^6\) The district court also found that the statute required an articulation of reasons beyond the mere citation of a conviction.\(^6\) On appeal, the Eleventh Circuit reversed, reasoning that "the fact that the alien has committed a particularly serious crime makes that alien dangerous within the meaning of the statute."\(^6\) Accordingly, the government need only show that the alien has been convicted of a particularly serious crime.\(^8\)

In *Trench v. INS*,\(^6\) the Tenth Circuit heard the appeal of an alien found deportable after being convicted in Colorado and Maryland courts of three crimes involving "moral turpitude." The issues raised on appeal were first, whether due process requires legal representation at a deportation hearing and second, whether the sixth amendment right to effective counsel was violated when the attorney in the underlying criminal case failed to warn petitioner of the immigration consequences of a guilty plea to the criminal charges.

The *Trench* court upheld the traditional rule that, in a deportation hearing, due process merely requires a full and fair hearing.\(^7\) The court stated that "the alien shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as he shall choose." However, . . . "the fact that an alien is without counsel is not considered a denial of due process, if he does not show that he was prejudiced thereby."\(^7\)

The *Trench* court declined to decide the second issue, noting the current split between the circuits.\(^7\) Holding instead that "an alien cannot collaterally attack the legitimacy of a state criminal convic-

65. *Id.* at 934.
66. *Id.*
67. *Id.* (citing *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222 (11th Cir. 1985) (Vance, J., concurring in result)).
68. *Id.* at 934-35.
69. 783 F.2d 181 (10th Cir. 1986).
70. *Id.* at 182-83 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-51 (1950)).
71. *Id.* at 183 (citing INA § 202(b)(2), 8 U.S.C. § 1252(b)(2)); *Burquez v. INS*, 513 F.2d 751, 754 (10th Cir. 1975)).
tion in a deportation proceeding," the court looked to Zinnanti v. INS for guidance. Zinnanti holds that "[i]mmigration authorities must look solely to the judicial record of final conviction and may not make their own independent assessment of the validity of [a] guilty plea." A third significant 1986 criminal offense case is Bull v. INS, decided by the Eleventh Circuit. Bull involved a Nigerian student who pled guilty in 1982 to a charge of passing a bad check. In 1984 Bull married a United States citizen and a year later he was arrested by the INS. At his deportation hearing, Bull requested a continuance so that he might file an application for adjustment of status. This request was denied. The decision was based on the belief that Bull's Florida guilty plea would result in a denial of his adjustment application. Relying on 8 U.S.C. § 1182(a) and 8 U.S.C. § 1182(h) (Supp. 1986), the Eleventh Circuit court reversed. As an exception to section 1182(a), section 1182(h) allows an alien to be issued a visa if he can prove hardship to his spouse and "that his admission into this country 'would not be contrary to the national welfare, safety, or security of the United States.'" The court reasoned that in light of section 1182(h), Bull's criminal conviction is not an absolute bar to approval of his section 1255(a) application; The judge should have granted Bull's request for a continuance.

The Ninth Circuit decided a fourth significant 1986 criminal offense case in Monet v. INS. In Monet, petitioner was a permanent resident when the INS instituted deportation proceedings after learning he had been convicted for a drug offense by a Danish court in 1970. The issue in Monet was whether petitioner was ever "lawfully" admitted into the United States within the meaning of 8 U.S.C. § 1182(c). The court held that Monet's concealment of his criminal past made his entrance into the United States "unlawful." Citing the Fifth Circuit case In re Longstaff, the Monet court

73. Trench, 783 F.2d at 184.
74. 651 F.2d 420 (5th Cir. 1981).
75. Id. at 421.
76. 790 F.2d 869 (11th Cir. 1986).
77. Id. at 870. The adjustment as sought pursuant to 8 U.S.C. § 1255(a) and Bull's marriage to a United States citizen.
78. Id. Section 1255(a)(2) dictates that the alien must be "eligible" to receive an immigrant visa in order to have an adjustment application granted. Since Bull's Florida conviction made him "ineligible" to receive an immigrant visa, the immigration judge reasoned that Bull's section 1255(a) application would be denied.
79. Bull, 790 F.2d at 872-73.
80. Id. at 872 (citing Mattis v. INS, 774 F.2d 965, 967 (9th Cir. 1985)).
81. 791 F.2d 752 (9th Cir. 1986).
82. Id. at 753. Section 1182(c) provides for a discretionary waiver of deportation to "[a]liens lawfully admitted for permanent residence' who have accrued seven years of "lawful unrelinquished domicile."
83. 716 F.2d 1439, 1441 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984). For
noted that "[t]he term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity . . . . An alien is subject to deportation if 'at the time of entry [he] was within one or more of the classes of aliens excludable by the law existing at the time of such entry.' "

DEPORTATION GROUNDS AND PROCEDURE

In *Sachdev v. INS*, the Second Circuit dealt with the argument that unless the INS strictly complies with the notice requirements in 8 U.S.C. § 1155, a revocation of an approved visa petition has no effect. The petitioner in *Sachdev* was granted a "second preference" visa for being the unmarried son of a permanent alien. One week after submitting his application for the visa, but prior to gaining admittance to the United States, petitioner married. Petitioner concealed this marriage until ten months after entering the country, at which time he filed a petition on behalf of his wife and son seeking their admission into the United States. Upon learning of petitioner's marital status, the INS commenced deportation proceedings.

The *Sachdev* court asserted that petitioner's reading of section 1153 would invite fraud by aliens seeking similar "second preference" status. Moreover, the court upheld the current government practice of having an incoming alien sign a "Statement of Marriage-able Age Applicant" which clearly warns that marriage of the applicant before being admitted to the United States could result in a revocation of the visa.

In *Umanzor v. Lambert*, the Fifth Circuit decided a case involving habeas jurisdiction and the definition of "custody." Umanzor, a citizen of El Salvador, was arrested and charged with illegal entry into the United States. While Umanzor was being deported, yet still in United States airspace, his attorney filed a petition for a writ of habeas corpus in the district court. The district court dismissed the petition, reasoning that Umanzor was no longer in the custody of the INS and that, consequently, jurisdiction could not attach.

Four important issues were addressed in *Umanzor*: first, whether the entire matter was mooted by Umanzor's release in El Salvador;
second, whether Umanzor was “in custody” at the time his petition for a writ was filed; third, whether the district court had subject matter jurisdiction to review Umanzor’s order of deportation; and fourth, whether section 1105a(c) is constitutional.

The mootness issue was resolved by looking to the Supreme Court decision in *Carafas v. LaVallee* and its Fifth Circuit progeny. *Carafas* holds that a prisoner’s release from custody does not render moot a court’s habeas jurisdiction if there is a possibility of adverse consequences flowing from the conviction. Applying the *Carafas* rationale, the possibility of Umanzor’s persecution upon his arrival in El Salvador led the court to conclude that Umanzor’s appeal was not rendered moot.

The second issue, the definition of “custody,” was resolved by looking to the Supreme Court decision in *Braden v. Thirtieth Judicial Circuit Court of Kentucky*. Expanding the Fifth Circuit’s existing rule, the *Umanzor* court held that a habeas petitioner can be considered “in custody” when in the custody of an agent of the government. Thus, confinement on an airliner bound for El Salvador is within the definition of “custody.”

The court declined to decide the third issue, that of subject matter jurisdiction, holding that petitioner could present no evidence to demonstrate that his deportation was effected illegally. The court stated that “[d]ue process is satisfied if the discretion was not exercised in an arbitrary and capricious manner.”

The Supreme Court decision in *Palmore v. United States* helped resolve the issue of the constitutionality of section 1105a(c). In *Palmore*, the Court stated that “[t]he decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress.” Accordingly, since the language of section 1105a(c) clearly shows congressional intent to limit the jurisdiction of the courts, the *Umanzor* court must “obey its

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89. *Id.* at 1303. INA § 106(c), 8 U.S.C. § 1105a(c) provides: “An order of deportation . . . shall not be reviewed by any court if [the alien] had departed from the United States after the issuance of the order.”

90. *Umanzor*, 782 F.2d at 1304.


94. *Umanzor*, 782 F.2d at 1301.


96. “Congress intended ‗held in custody‘ as used in Sec. 1105a(a)(9) to require ‘actual, physical custody in a place of detention.'” *Umanzor*, 782 F.2d at 1302 (citing United States ex rel Marcello v. District Director of INS, 634 F.2d 964, 969 (5th Cir. 1981)).

97. *Id.* at 1304 (citing Tuan v. INS, 531 F.2d 1337, 1338 (5th Cir. 1976)).


99. *Id.* at 400.
In *Linnas v. INS*, the Second Circuit decided a significant case involving an ex-Nazi’s constitutional challenges to the Holtzman Amendment. Specifically, Linnas raised two issues on appeal: first, whether the Holtzman Amendment constitutes a bill of attainder in violation of Article I, section 9 of the United States Constitution and second, whether deportation to the Soviet Union would violate his rights to due process and equal protection.

Addressing the first issue, the *Linnas* court defined “bill of attainder” as “a legislative act which inflicts punishment without a judicial trial.” Relying upon *Artukovic v. INS*, the court held that “deportation is not punishment.” Thus, legislative activity concerning deportation cannot constitute a bill of attainder.

The second issue raised by Linnas centered on his contention that deporting him to the Soviet Union where a death sentence awaited him “is in fact a disguised extradition.” Extradition in the absence of a treaty, Linnas argued, would violate his rights to due process. The *Linnas* court responded that “[e]xtradition is initiated by a foreign state.” Since the impetus of Linnas’ deportation came from the United States government, there was no “extradition” in this case. Furthermore, Linnas’ claim that he would be denied due process in the Soviet Union was rejected on jurisdictional grounds. Finally, the court stated, “Nazi war criminals are not a class of persons entitled to enhanced scrutiny under the equal protection clause.”

**DOMICILE**

INA section 244(a)(1) allows the Attorney General to suspend deportation and adjust the status of an alien if the alien has continu-
ously resided in the United States for seven years, is of good moral character, and can demonstrate that deportation would result in extreme hardship to the alien or to his spouse, parent, or child who is a lawful citizen of the United States. In 1986 the Ninth Circuit decided two significant cases relating to section 244(a)(1) and the topic of domicile.

In *Gonzalez Batoon v. INS*, the Ninth Circuit reviewed the effect of the recent Supreme Court case of *INS v. Rios-Pineda* upon the BIA’s discretion to deny relief under 8 U.S.C. § 1254(a)(1). *Gonzalez Batoon* held that the BIA “may reject a petition to reopen for suspension of deportation on discretionary grounds without considering whether the alien is eligible for relief under Sec. 1254(a)(1).” Nevertheless, as *Rios-Pineda* dictates, the BIA’s discretion is subject to judicial review if unreasonable or arbitrary.

The second significant 1986 domicile case was *Chavez-Ramirez v. INS*, where the court accepted the task of articulating “a standard for determining which visits abroad are temporary and which are not” within the meaning of “returning resident immigrant.” After analyzing almost sixty years of case law, the court devised the following two prong test:

[We hold that a permanent resident returns from a ‘temporary visit abroad’ only when (a) the permanent resident’s visit is for ‘a period relatively short, fixed by some early event,’ or (b) the permanent resident’s visit will terminate upon the occurrence of an event having a reasonable possibility of occurring within a relatively short period of time.]

**ESTOPPEL**

In *Jaa v. INS*, a Ninth Circuit court heard the appeal of a petitioner whose permanent resident status application had been pending with the INS for fifty-eight months before being denied. The peti-

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114. Gonzalez Batoon v. INS, 791 F.2d 681 (9th Cir. 1986); Chavez-Ramirez v. INS, 792 F.2d 932 (9th Cir. 1986).
115. 791 F.2d 681 (9th Cir. 1986).
118. *Id.* (citing INS v. Rios-Pineda, 471 U.S. 444 (1985)); *see also Fazeliorkomabad v. INS, 794 F.2d 1470 (9th Cir.), petition for cert. filed, 55 U.S.L.W. 3475 (1987).)
119. 792 F.2d 932 (9th Cir. 1986).
120. *Id.* at 933.
121. *Id.* at 935-36 (citing United States ex rel. Lesto v. Day, 21 F.2d 307 (2d Cir. 1927); United States ex rel. Alther v. McCandless, 46 F.2d 288 (3d Cir. 1931); United States ex rel. Polymeris v. Trudell, 49 F.2d 730 (2d Cir. 1931)).
122. *Chavez-Ramirez*, 792 F.2d at 936-37 (citations omitted).
123. 779 F.2d 569 (9th Cir. 1986).
124. The INS offered two explanations for its delay: first, news of Jaa’s pending divorce; second, overwork due to the flood of applications filed by Iranians in 1981. *Id.* at 570.
tioner argued that the INS should be estopped from denying Jaa’s application due to its lack of diligence in processing her application. The court concluded otherwise. It stated that estoppel claims against the government require a higher burden of proof than traditional estoppel claims. The party asserting estoppel has a special burden of proving affirmative government misconduct. Moreover, even when affirmative misconduct is demonstrated, it will not be sufficient for estoppel unless the conduct “threaten[s] to work a serious injustice and . . . the public’s interest would not be unduly damaged by the imposition of estoppel.”

In *Mukherjee v. INS*, the Ninth Circuit decided another estoppel case using the same arguments as in *Jaa*. Of additional significance, the court cited *Lavin v. Marsh* for the proposition that “[p]ersons dealing with the government are charged with knowing government statutes and regulations, and they assume the risk that government agents may exceed their authority and provide misinformation.”

A third significant estoppel case was decided by the Fourth Circuit in *Paul v. Smith*. In *Paul*, a United States citizen’s continued citizenship was contingent upon his living in the United States for two consecutive years between his fourteenth and twenty-eighth birthdays as was required by 8 U.S.C. § 1401. After failing to meet the section 1401 requirements, Paul sought to estop the INS from denying his citizenship. The basis for Paul’s assertion was that on numerous occasions over a nineteen year period when he crossed the United States/Canada border, he was not notified by border officials of the section 1401 requirements.

In denying Paul’s argument, the Fourth Circuit relied on *INS v. Hibi*. In *Hibi*, the court held that failure to publicize the rights of

125. In the Ninth Circuit, the traditional test for estoppel has four parts:
(1) The party to be estopped must know the facts;
(2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
(3) The latter must be ignorant of the facts; and
(4) He must rely on the former’s conduct to his injury.

126. *Jaa*, 779 F.2d at 571-72 (citing Johnson v. Williford, 682 F.2d 868, 872 (9th Cir. 1982); United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970)).

127. 793 F.2d 1006 (9th Cir. 1986).
128. 644 F.2d 1378, 1383 (9th Cir. 1981).
129. *Mukherjee*, 793 F.2d at 1009.
130. 784 F.2d 564 (4th Cir. 1986).
certain soldiers to become United States citizens did not estop the government from enforcing statutory guidelines for naturalization petitions. Building upon Hibi, the Paul court resolutely held that "the INS cannot be estopped for failing to act when it has no duty to act."132

EXTRADITION

In Quinn v. Robinson,133 the Ninth Circuit seized a valuable opportunity "to examine the parameters of a foreign sovereign's right to bring about the extradition of an accused who maintains that the offenses with which he is charged are of a political character,"134

The court analyzed Quinn's charges using the two prong "incidence" test defined in In re Ezeta.135 The first prong requires "the occurrence of an uprising or other violent political disturbance at the time of the charged offenses."136 The second prong requires "a charged offense that is 'incidental to,' 'in the course of,' or 'in furtherance of' the uprising."137 Through proper application of the "incidence" test, the Quinn court stressed that the desired goals of international terrorist extradition and continued protection for traditional domestic revolutionaries can be achieved without an aberration of the judicial role.138

FILIPINO WAR VETERANS

In Pangilinan v. INS,139 fifteen Filipino nationals "who served honorably in the United States armed forces during World War II,"140 claimed they were entitled to United States citizenship pursu-

132. Paul, 784 F.2d at 566.
133. 783 F.2d 776 (9th Cir.), cert. denied, 107 S. Ct. 271 (1986). For an analysis of Quinn and the political offense exception to extradition, see Comment, The Turning Point Approaches: The Political Offense Exception to Extradition, 24 SAN DIEGO L. REV. 549 (1987), in this issue.
134. Quinn, 783 F.2d at 781.
135. 62 F. 972 (N.D. Cal. 1894); see also Quinn, 783 F.2d at 776; Eain v. Wilkes, 641 F.2d 504 (7th Cir.), cert. denied, 454 U.S. 894 (1981); Sindona v. Grant, 619 F.2d 167 (9th Cir. 1980); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972).
136. Quinn, 783 F.2d at 797. The Quinn court defined "uprising" as "a revolt by indigenous people against their own government or an occupying power." Id. at 807. Furthermore, "[t]hat revolt can occur only within the country or territory in which those rising up reside." Id. Thus, the Quinn court limited an uprising not only temporally, but also spatially. With this strict definition, acts of international terrorism will almost always fail the "uprising" component of the incidence test.
137. Id. at 797. The "incidental to" component historically involves a liberal search for a nexus between the act and the uprising. A consideration of the efficacy of specific tactics is unnecessary. This easily satisfied component is primarily constrained by the geographic confines of "uprising." Id. at 809.
138. Id. at 805-10.
139. 796 F.2d 1091 (9th Cir. 1986).
140. Id. at 1093.
tant to sections 701 through 705 of the Nationality Act of 1940 (Act). The veterans claimed that actions of the Attorney General to prevent Filipino participation under the Act were unconstitutional and violated the obvious intent of Congress. In deciding the case, the Ninth Circuit found that when drafting the Act, "Congress's intent was to provide that 'if a man is ready to fight for our country we ought to give him the benefits of citizenship without the normal peacetime requirements of time, declaration of intention, and so forth...'."\textsuperscript{142}

After dismissing a number of INS threshold arguments, the \textit{Pangilinan} court held that the Act did not implicitly delegate to the Attorney General the discretion to selectively deny the benefits of the Act on policy grounds.\textsuperscript{143} The Attorney General's revocation of naturalization authority in 1945 was beyond his statutory power and erroneous.\textsuperscript{144} Therefore, "the only effective remedy available to 'rectify the agency action taken,'"\textsuperscript{145} was to grant citizenship to the fifteen Filipino veterans.

\textbf{THE FOURTH AMENDMENT}

In \textit{United States v. Ortega-Serrano},\textsuperscript{146} the Fifth Circuit ruled on a stop and search issue. Using \textit{United States v. Brignoni-Ponce}\textsuperscript{147} for support, the \textit{Ortega-Serrano} court set out five factors useful in determining the constitutionality of these stop and search cases, including: (1) characteristics of the area where the vehicle is first encountered;\textsuperscript{148} (2) information about recent illegal immigration;\textsuperscript{149} (3) evasive driving;\textsuperscript{150} (4) characteristics of the vehicle being driven by the alien suspect(s);\textsuperscript{151} and (5) the apparent Hispanic ancestry of the

\begin{footnotesize}
\begin{enumerate}
\item 796 F.2d at 1093 (citing Statements in Executive Session on S. 2208, Senate Committee on the Judiciary, Jan. 19, 1942).
\item Id. at 1098.
\item Id. at 1100.
\item Id. at 1103 (citing Harper v. Levi, 520 F.2d 53, 60 (9th Cir. 1975)).
\item 788 F.2d 299 (5th Cir. 1986).
\item 422 U.S. 873 (1975). \textit{Brignoni-Ponce} holds that Hispanic appearance alone is insufficient to justify a stop. \textit{Id.} at 886-87.
\item \textit{Ortega-Serrano}, 788 F.2d at 301.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
LABOR PROBLEMS

In Local 512, Warehouse & Office Workers’ v. NLRB\(^{153}\) and Bevies Co. v. Teamsters Local 986,\(^{154}\) the Ninth Circuit decided whether an undocumented alien who remains in the United States, and who has not been the subject of any INS deportation proceedings, is barred from receiving backpay to remedy a National Labor Relations Act\(^{155}\) violation. Both decisions rejected arguments that Sure-Tan, Inc. v. NLRB\(^{156}\) dictates that an “undocumented alien worker would never be entitled to backpay.”\(^{157}\) Citing a “significant line of precedent,”\(^{158}\) the Local 512 court held that only a discriminated worker’s availability to work, not the employee’s legal status, determines his or her eligibility for backpay.\(^{159}\)

MARIEL BOATLIFT

During the spring of 1980, a “freedom flotilla” brought to United States ports over 100,000 Cuban refugees.\(^{160}\) On numerous occasions, the INS seized boats carrying Marielitos and imposed substantial fines on the boats' owners. The litigation erupting from this situation has arisen almost exclusively in the Eleventh Circuit. Two significant cases dealing with the Mariel boatlift were decided in 1986.

Both Lyden v. Howerton\(^{161}\) and United States v. Armendaris\(^{162}\) are Eleventh Circuit cases dealing with boat owner challenges to INS fines. The boat owners and captains in both cases argued that “duress” is a proper defense to penalties under 8 U.S.C. § 1323. Both the Lyden and Armendaris courts agreed with petitioners, holding that duress is now an accepted defense. Looking to United States v. Blanco\(^ {163}\) for support, the Lyden court promulgated the following three-prong test to establish a defense of duress:

[A] party must show that he or she performed the unlawful act because he or she (i) was under an immediate threat of death or serious bodily injury,
(ii) had a well grounded fear that the threat would be carried out, and (iii) had no reasonable opportunity to escape.164

**Marriage Fraud**

In *Israel v. INS*,165 petitioner conceded her deportability in a bond-reduction hearing, and was granted thirty days to voluntarily depart. One condition for the voluntary departure grant was that the petitioner not marry a United States citizen during the thirty day departure period.166 Eleven days later, petitioner married a United States citizen.167 When petitioner filed a motion to reopen her deportation hearing to allow consideration of her marital status, the immigration judge rejected her application, citing "a breach of faith and a misrepresentation to the Court."168 On appeal from a BIA dismissal, petitioner asserted that the BIA acted arbitrarily.

Citing *Sang Seup Shin v. INS*,169 the *Israel* court stated that "[t]he BIA acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation for doing so."170 In *In re Garcia*,171 the BIA established a policy of reopening deportation proceedings in situations like petitioner's "unless clear ineligibility is apparent in the record."172 Lacking a reasonable explanation by the BIA or "clear ineligibility in the record," the *Israel* court held that petitioner's motion to reopen should be granted.

**Miscellaneous Offensive Uses of the Court System**

The conduct of INS officials occasionally gives rise to a cause of action against the INS. In 1986, two such cases arose. In *Guerra v. Sutton*,173 several Hispanics fell prey to warrantless searches/raids in their homes giving rise to *Bivens*174 and Federal Tort Claims Act (FTCA)175 actions against several INS defendants. The district court held that the rights of petitioners had been violated; however,

164. *Lyden*, 783 F.2d at 1557.
165. 785 F.2d 738 (9th Cir. 1986).
166. *Id.* at 739.
167. *Id.*
168. *Id.* at 739-40.
169. 750 F.2d 122 (D.C. Cir. 1984).
170. *Israel*, 785 F.2d at 740 (citing *Sang Seup Shin*, 750 F.2d at 125).
172. *Id.*
173. 783 F.2d 1371 (9th Cir. 1986).
the INS defendants were not found liable due to a qualified immunity. On appeal, the Ninth Circuit reversed the district court's dismissal of the Bivens and FTCA claims. While recognizing a federal officer's right to qualified immunity for actions taken in the course of duty, the court emphasized that such actions must be "reasonable (even if mistaken)."

In Chairez v. INS, the INS appealed from a district court ruling that a private right of action is available to aliens detained in violation of 8 U.S.C. § 1357(a)(2) and 8 C.F.R. section 287.3 (1986). In reversing the district court, the Sixth Circuit held that the requisite congressional intent to create a private right of action was not present.

In its analysis, the Sixth Circuit utilized the four-part test established in Cort v. Ash. This test allows a cause of action to be inferred from a federal statute only if:

1. the plaintiff is "one of the class for whose especial benefit the statute was enacted;"
2. some "indication of legislative intent, explicit or implicit," suggests that Congress wanted "to create such a remedy [and not] to deny one;"
3. implying such a remedy for the plaintiff would be "consistent with the underlying purposes of the legislative scheme;" and
4. the cause of action is not "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action."

Failing to satisfy the Cort test, Chairez's cause of action was dismissed.

RENUNCIATION OF UNITED STATES CITIZENSHIP

In Whitehead v. Haig, the Third Circuit decided an appeal questioning whether either approval of a Certificate of Loss of Nationality or denial of a passport application constitutes a "final administrative denial" sufficient to trigger the five-year statute of limitations on actions seeking a declaration of United States citizenship.

176. Guerra, 783 F.2d at 1373.
177. Id. at 1374 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982); Davis v. Scherer, 468 U.S. 183 (1984)).
178. Id.
179. 790 F.2d 544 (6th Cir. 1986).
180. Section 1357(a)(2) provides, in pertinent part, that the INS may arrest an alien when the officer:
   has reason to believe that the alien so arrested is in the United States in violation of [the INA] . . . and is likely to escape before a warrant can be obtained . . . but the alien arrested shall be taken without unnecessary delay for examination before [a hearing officer].
181. Similar to section 1357(a)(2), section 287.3 is the regulatory approach to the disposition of cases of aliens arrested without a warrant.
183. Chairez, 790 F.2d at 546 (citing Cort, 422 U.S. at 78).
184. 794 F.2d 115 (3d Cir. 1986).
citizenship. The court held that the processing of a Certificate of Loss of Nationality is apparently for the purposes of “governmental record-keeping and notification to the affected person of the existence of such record.” The process is so automatic and mechanical that the court cannot regard it as a “final administrative denial.” On the other hand, the denial of a passport application is not a mechanical process and hence can be considered a “final administrative denial” for purposes of INA section 1503(a). The gravamen of the Whitehead court’s argument was that an “administrative denial” must involve some type of proceeding or contemplation of alternatives before a “decision” is made. Mere bureaucratic procedure is insufficient.

**VISA PETITIONS**

Legal problems arise when aliens want to come to the United States for a very limited time and purpose. In 1986 three significant decisions dealing with the rights of visa-seekers were decided.

In *Wong v. Department of State,* the petitioners brought an action for declaratory and injunctive relief after their visas were revoked. Reviewing the scope of the Secretary of State’s visa revocation authority, the Ninth Circuit used 22 C.F.R. section 41.134(a) (1983) to detail two instances when substantive defects in a visa application would justify revocation. Because Wong’s visa application defects were merely procedural, section 41.134(a) does not authorize visa revocation.

In *Li Hing of Hong Kong, Inc. v. Levin,* the petitioner was a Hong Kong citizen employed by a California corporation. The United States Consul in Hong Kong rejected petitioner’s nonimmigrant visa application on the presumption that petitioner failed to establish that he was a bona fide nonimmigrant. The Ninth Cir-

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185. INA § 360, 8 U.S.C. § 1503(a).
187. *Whitehead,* 794 F.2d at 118.
188. *Id.*
189. *Id.* at 119.
190. 789 F.2d 1380 (9th Cir. 1986).
192. *Wong,* 789 F.2d at 1386.
193. 800 F.2d 970 (9th Cir. 1986).
194. Pursuant to INA § 214(b), 8 U.S.C. § 1184(b).
195. *Li Hing,* 800 F.2d at 970.
cuit distinguished *Wong v. Department of State* when it affirmed
the district court's ruling that the judiciary lacks jurisdiction to re-
view a consul's decision to grant or deny a visa. Noting a “long-
recognized [policy of] judicial nonreviewability,” *Li Hing* held
that a “court is without power to substitute its judgment for that of
a Consul, acting pursuant to valid regulations promulgated by the
Secretary, on the issue of whether a visa should be granted or
denied.”

A third significant visa petition case was decided by the D.C. Cir-
cuit in *Abourezk v. Reagan*. The plaintiffs in *Abourezk* were three
disparate groups which had invited a number of prominent aliens to
come to the United States to address and consult with them. Upon
the advice of the State Department, the consular officers denied the
aliens' visa requests, citing INA section 212(a)(27). Each group
filed an action seeking declaratory and injunctive relief in the
district court. These actions were defeated by a summary judgment motion.

On appeal, the *Abourezk* court was faced with numerous complex
issues of statutory construction. First, plaintiffs argued that section
212(a)(27) does not authorize exclusion on the basis of foreign pol-
icy considerations, as distinguished from the specific provisions of
section 212(a)(27). Rejecting plaintiff's argument, the court as-
serted that the “broad language of (27) evinces no intent to restrict
the kinds of governmental concerns that would qualify.”

A second statutory construction issue which, unlike the first, was
successfully advanced concerned Congress’ explicit use of the words
“activities” and “engage” in section 212(a)(27). The court stated
that “[t]he specific reference to activities would be superfluous, in-
deed, misleading, if entry or presence alone could justify exclusion.”

A third and final statutory construction issue successfully ad-
vanced by plaintiff was that the government’s interpretation of section 212(a)(27) was so broad that it effectively destroyed section 212(a)(28) and thereby nullified the restrictions placed by the McGovern Amendment on the use of the latter.

Tying everything together, the court concluded by saying:

The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

**LEGISLATIVE DEVELOPMENTS**

On October 17, 1986, the 99th Congress gave final approval to the Immigration Reform and Control Act of 1986 (IRCA). Passage of IRCA culminates six years of congressional attempts to reach an agreement on immigration reform. IRCA is composed of three essential sections: (1) sanctions for knowingly hiring undocumented aliens; (2) legalization for aliens who entered the United States without documentation before January 1, 1982, and (3) special protection and legalization for foreign agricultural workers.

Title I of IRCA addresses control of illegal immigration. Section 101 declares “[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States . . . an alien.” Penalties for violations of section 101 include sanctions ranging from $250 to $10,000 per unauthorized alien and the possibility of criminal penalties. This feature of IRCA is the first time civil and criminal penalties have been imposed upon culpable employers. Furthermore, the sanctions apply to all employers, re-

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206. *Abourezk*, 785 F.2d at 1061.
208. “The bill itself is a surprising compromise between S.1200, the more enforcement-minded bill passed by the Senate in September 1985, and H.R. 3810, the House bill that worked its way slowly through committees” during the 1986 summer. 63 INTERPRETER RELEASES 905 (1986). For an historical overview of the legislative process, see Lungren, *supra* note 5, at 277-91.
209. IRCA § 101(a), 100 Stat. at 3360 (amending/adding INA § 274A).
210. *Id.* §§ 201-204, 100 Stat. at 3394-3411 (amending/adding INA § 245A).
211. *Id.* §§ 301-305, 100 Stat. at 3411-34 (amending/adding INA §§ 101(a) (15)(H), 214(c), 216, 210, 210A).
212. *Id.* § 101(a), 100 Stat. at 3360 (amending/adding INA §274A(a)(1)).
213. *Id.* § 101(a), 100 Stat. at 3366 (amending/adding INA § 274A(e)(4)(A)).

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Regardless of size, although they apply only to “knowing” violations. IRCA itself does not define “knowing.” Presumably, “the standard requirement of subjective, actual knowledge, rather than an objective, ‘reason to know’ test, will apply.”

Other important features of Title I include a directive to the Attorney General to develop and implement verification procedures to determine work eligibility; an eighteen month grace period before implementation of employer sanctions; a prohibition against discrimination based on national origin or citizenship status; an authorization of appropriations for the INS and other enforcement-related endeavors; and increased fines of up to $10,000 for transporting or harboring illegal aliens.

Title II of IRCA grants temporary resident status to aliens who have continuously resided in the United States without documentation prior to January 1, 1982. Eligible aliens must apply for legalization within twelve months of a date (not later than 180 days after enactment of IRCA) designated by the Attorney General. Other important features of Title II include a provision for Cuban-Haitian adjustment; a provision updating the registry date from June 30, 1948 to January 1, 1972; and an appropriation of one billion dollars per year for four years to reimburse state and local governments for costs associated with legalization.

Title III of IRCA provides relief for temporary agricultural workers. The controversy over foreign agricultural workers almost resulted in the failure of IRCA’s passage. Growers contended that the average American worker does not want to perform temporary agricultural labor. With employer sanctions being a major element of

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214. Id. § 101(a), 100 Stat. at 3360 (amending/adding INA §§ 274A(1)(A), (a)(2)).
215. 63 INTERPRETER RELEASES 991 (1986).
216. IRCA § 101(a), 100 Stat. at 3361 (amending/adding INA § 274A(b)(1)(A)).
217. Id. § 101(a), 100 Stat. at 3368 (amending/adding INA § 274(i)).
218. Id. § 102(a), 100 Stat. at 3374 (amending/adding INA § 274B). This feature of IRCA places employers in a very delicate position. On the one hand, sanctions can now be used to penalize employers for knowingly hiring undocumented aliens. On the other hand, employers can be penalized if they fire or refuse to hire authorized aliens or foreign-looking citizens.
219. Id. § 111, 100 Stat. at 3381.
220. Id. § 112, 100 Stat. at 3381 (amending/adding INA § 274(A)).
221. Aliens must establish that they entered the United States before January 1, 1982, and that they resided continuously in an unlawful status. Aliens lawfully admitted as nonimmigrants and exchange students subject to the INA section 212(e) two-year foreign residency requirement are not eligible for Title II legalization. Id. § 201(a), 100 Stat. at 3394 (amending/adding INA § 245(a)(2)(B),(C)).
222. Id. § 201(a), 100 Stat. at 3394 (amending/adding INA § 245(a)(1)(A)).
223. Id. § 202, 100 Stat. at 3404.
224. Id. § 203, 100 Stat. at 3405 (amending/adding INA § 249).
225. Id. § 204, 100 Stat. at 3405.
IRCA, growers wanted some assurance of the availability of a sufficient labor pool. The major provision of Title III is the Schumer plan, creating a “seasonal agricultural worker program.” Under the Schumer plan, temporary and permanent residency is granted to aliens who perform seasonal agricultural services in the United States and who meet specific time requirements. Other important features of Title III include the creation of a new H-2A classification as an amendment to the current H-2 program; a new requirement that the Secretaries of Labor and Agriculture annually assess United States seasonal worker needs; the establishment of a Commission of Agricultural Workers; and a provision qualifying H-2A agricultural workers for certain legal assistance.

Aside from the three main provisions, numerous other provisions make scattered changes in current immigration laws. In section 315(b) of IRCA, Congress nullified the Supreme Court's strict approach to the “continuous physical presence” requirement of INA section 244(a)(1). Under IRCA, “if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence,” an alien can still be considered eligible for a section 244(a)(1) waiver.

In section 501 of IRCA, Congress provided for federal reimbursement to states for "costs incurred by the State for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such State." Similarly, in section 701, Congress ordered the Attorney General to expeditiously begin deportation proceedings of aliens convicted of deportable offenses.

The future of IRCA is now in the hands of the INS, the courts, and immigration practitioners. Representative Mazzoli commented on IRCA saying “[i]t's not a perfect bill, but its the least imperfect
bill we will ever have before us. Fortunately, IRCA is built on compromise and seems to provide a little for everyone.

A second significant 1986 legislative development was the enactment of the Marriage Fraud Amendments. The Marriage Fraud Amendments impose a two-year conditional residency requirement upon aliens who marry United States citizens before they can gain permanent resident status. Other important features of the Marriage Fraud Amendments include a prohibition against aliens who marry while in exclusion or deportation proceedings from obtaining any preference status until the alien has resided outside the United States for at least two years; criminal and immigration penalties for marriage fraud; and more restrictive second preference and "K" nonimmigrant visa requirements.

A third significant legislative development was the enactment of the Consular Efficiency Amendments. The goal of the legislation is to streamline the visa process by eliminating duplicative government activity. Among other things, the legislation includes an extension of the foreign-state chargeability benefits to those qualified to "follow to join" an alien immigrant to the United States; a waiver of fingerprint requirements for visa applications; and the elimination of the requirement that posts keep duplicate copies of visa petitions and supporting documentation.

CONCLUSION

The year 1986 came one day away from being a very uneventful year in immigration law. The passage of IRCA marked the culmination of six years of congressional attempts to address the problem of illegal immigration in the United States. Seemingly cutting both ways, IRCA provides tough employer sanctions while offering generous legalization provisions and multiple safeguards for the humane administration of new policies.

The Supreme Court's per curiam decision in INS v. Hector clarified the definition of "child" in an INA section 244(a)(1) context, but did little to indicate how future immigration cases will be viewed

236. 63 INTERPRETER RELEASES 907 (1986).
237. Marriage Fraud Amendments § 2, 100 Stat. at 3537-42 (amending/adding INA § 216(a)).
238. Id. § 5(b), 100 Stat. at 3543 (amending/adding INA § 204).
239. Id. §§ 2(d), 4(a), 100 Stat. at 3542, 3543 (amending/adding INA §§ 204(c), 275).
240. Id. § 3, 100 Stat. at 3542 (amending/adding INA § 214(d)).
241. 63 INTERPRETER RELEASES 907 (1986).
242. Consular Efficiency Amendments § 4, 100 Stat. at 3655 (amending/adding INA § 202(b)).
243. Id. § 5, 100 Stat. at 3656 (amending/adding INA § 221).
244. Id. § 6, 100 Stat. at 3656-57 (amending/adding INA § 222).
245. IRCA was passed less than one day before adjournment of the 99th Congress.
by the new Rehnquist Court. With certiorari granted in cases dealing with eligibility for asylum, collateral attack of an executed deportation order, "materiality" in Nazi deportation cases, the constitutional rights of Japanese-Americans during World War II and the parameters of executive authority to grant or deny visa petitions pursuant to U.S.C. § 1182(a)(27), 1987 promises to provide much insight into how the Rehnquist Court will shape immigration law.

Lower federal courts continue to battle with a multiplicity of issues across the entire immigration spectrum. Interpretation and application of IRCA promises to keep the courts quite occupied in the near future.

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