Recent Developments in Immigration Law 1976

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Synopsis

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INTRODUCTION

Immigration law is constantly developing and changing through the legislative, administrative, and judicial processes. Each Congress witnesses the introduction and enactment of new immigration legislation. Every year the Immigration and Naturalization Service (INS) revises its regulations under the Immigration and Nationality Act. Moreover, immigration decisions seriously affecting the rights and privileges of aliens continually issue from the nation's courts.

This synopsis will discuss significant recent developments in immigration law. Important immigration legislation of the 94th Congress, regulations under the Immigration and Nationality Act since their yearly revision, and immigration decisions by the nation's courts within the past year will be noted and analyzed. The scope of this synopsis makes detailed analysis of each development impossible. However, interrelated developments will be discussed together, and significant trends will be briefly explained.

1. The period of time covered by these developments is as follows. The 94th Congress convened in January 1975. The regulations discussed are those promulgated since January 1, 1976. *Aguilera-Enriques v. INS*, which was decided May 7, 1975, is the earliest decision discussed.
Enacted Legislation

The Immigration and Nationality Act Amendments of 1976

The Immigration and Nationality Act Amendments of 1976² eliminate one of the major problems to emerge since the 1965 amendments³ to the act: the inequality between the Eastern and Western Hemisphere immigrant selection systems. Because the 1976 Amendments became law when this symposium issue was in its final printing stages,⁴ they are discussed more fully in the Afterword⁵ to this issue. The new act becomes effective January 1, 1976,⁶ and is expected to have a major impact on Western Hemisphere immigration.⁷

The Indochina Migration and Refugee Assistance Act of 1975

In response to the crisis in South Vietnam during the spring of 1975, several bills were introduced authorizing assistance to aliens who fled from Cambodia and South Vietnam.⁸ Congress focused on the Indochina Migration and Refugee Assistance Act of 1975, which became law on May 23, 1975.⁹

Transportation and temporary maintenance were two of the concerns which directly motivated the enactment of this legislation. Within a matter of weeks, thousands of refugees were transported from Indochina and temporarily housed at various locations

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⁴. The bill was introduced by Representative Eilberg (D-Pa.) on June 24, 1976. 2 CCH Cong. Index 4313 (1975-76). It passed the House on September 29, 1976, id. 5037, and the Senate on October 1, 1976. Id. 4994. It was finally signed by President Ford on October 20, 1976. San Diego Union, Oct. 22, 1976, § A, at 9, cols. 1-6.
⁷. The bill is also expected to have a serious impact on immigration from Mexico. See Afterword, supra note 5.
⁸. These bills, their authors, and a summary of their contents are contained in 53 INTERPRETER RELEASES 282-90 (1975).
throughout the United States.\textsuperscript{10} This legislation quickly and effectively dealt with these two major difficulties created by the refugees' flight from South Vietnam and Cambodia. Although refugee resettlement was a third concern motivating the enactment of this legislation, it was treated less adequately than either transportation or temporary maintenance for the refugees. Consequently, numerous problems have resulted from this unequal treatment.\textsuperscript{11}

The Single Parent Adoptions Bill

The Single Parent Adoptions Bill\textsuperscript{12} grants alien children adopted by an unmarried United States citizen the same immediate relative status\textsuperscript{13} for immigration purposes as alien children adopted by married United States citizens. This bill facilitates the immigration of alien children adopted by unmarried United States citizens by treating those children like children adopted by married citizens.

Contemplated Legislation

Undocumented Aliens

Several bills\textsuperscript{14} introduced during the 94th Congress address the impact of undocumented aliens on the national economy.\textsuperscript{15} S. 3074,
introduced on March 4, 1976, by Senator Eastland, but as yet unenacted is the most recent of these bills. Because the undocumented alien provisions of the Eastland bill are similar to those of the other contemplated legislation directed at this problem, those provisions will be discussed here.

Because the possibility for employment is an important motive for aliens to illegally enter this country, Senator Eastland's bill would punish employers who knowingly hire such aliens. The fundamental element of section 12, which treats this problem, is the employer's knowledge that he is hiring an undocumented alien. Absent such knowledge there would be no violation. In addition, this section provides that an employer making a bona fide inquiry into the citizenship or alienage of a prospective employee cannot be found liable. An employer who obtains a signed statement from a prospective employee asserting that he is not an alien is also protected from liability. Moreover, this section provides exclusively for civil penalties which may be imposed only after a due process hearing before an immigration judge.

Search and Seizure in Deportation Cases, 14 SAN DIEGO L. REV. 151 (1976).
16. 94th Cong., 2d Sess. (1976). For a further discussion of the bill, see 122 CONG. REC. S2800-1 (1976). S. 3074 also addressed many important problems other than undocumented aliens. Its provisions on equalization of treatment between the two hemispheres were similar to those enacted by the Immigration and Nationality Act Amendments of 1976. Compare the discussion of the bill in 122 CONG. REC. S2800-1 (1976), with the discussion of the 1976 amendments in Afterword, supra note 5.
17. 122 CONG. REC. S2800-1 (1976) contains a further discussion of these provisions.
18. On this point Senator Eastland remarked: "My bill, recognizing that it is the economic incentive or the lure of jobs that motivates most illegal immigration, would make it unlawful for an employer to hire an illegal alien." 122 CONG. REC. S2800 (1976).
19. Id.
20. Id.
21. Id.
22. In providing for only civil penalties, section 12 of the Eastland bill differs substantially from H.R. 982, 94th Cong., 1st Sess. (1975), introduced by Representative Peter W. Rodino, Jr. (D-N.J.). Representative Rodino's bill provides a civil penalty for the initial violation of its provisions; any subsequent violation would be a misdemeanor, punishable by either a fine not exceeding $10,000 or imprisonment not exceeding one year or both for each alien involved.

During the first session of the 94th Congress, extensive hearings were held on H.R. 982. It was finally marked up as a clean bill, H.R. 8713, 94th Cong., 1st Sess. (1975), and introduced on July 17, 1975. It was reported by the House Judiciary Committee on October 25, 1975, but no further action has been taken on the bill. 52 INTERPRETER RELEASES 277-79 (1975); 53 INTERPRETER RELEASES 66 (1976).
Section 12 further states that members or representatives of employment agencies or labor organizations who refer undocumented aliens for employment, along with the alien's employers, may be parties chargeable under the amendment. Because this is a substantial expansion of previous sanction provisions, it is expected to receive vigorous opposition from organized labor.

However, Senator Eastland in an apparent response to these objections argued that the combination of section 12 and section 2, which allows employment of aliens when a legitimate need arises, strikes a balance between penalizing those who knowingly employ undocumented aliens and meeting the legitimate needs of American employers. This balance in no way undercuts the bill's second major objective of decreasing the purportedly detrimental impact of undocumented aliens on the national economy. Rather, the bill offers a compromise between the job opportunities for resident employees and the needs of American employers. American citizens and legal resident aliens would no longer have to compete with undocumented aliens for a limited number of jobs. However, when there are more jobs than there are available employees, nonimmigrant alien workers may be hired by American employers.

Finally, section 249 of the Immigration and Nationality Act, which currently affords relief to undocumented aliens who have maintained continuous residence in the United States following an

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24. 52 INTERPRETER RELEASES 67 (1976).
25. Nonimmigrant alien workers may currently be imported for employment only if 1) their jobs are temporary and 2) unemployed people capable of performing those jobs cannot be found in this country. Section 2 would delete the requirement that these workers perform only temporary jobs, and it would further provide that the unavailability of unemployed people who are capable of performing the jobs in question be determined not with reference to the entire country, but with reference to the locality in which the work is to be performed. 122 Cong. Rec. S2801 (1976).
26. Senator Eastland expressed this idea when he stated: "At the same time that we seek to penalize those who knowingly employ illegal aliens, we must also make sure that the legitimate needs of American employers are met."
27. For a further discussion of this issue, see Chapman, A Look at Illegal Immigration: Causes and Impact on the United States, 13 SAN DIEGO L. REV. 34 (1975) and Manulkin, A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker, id. at 42.
arrival prior to June 30, 1948, would be amended by section 11 of the Eastland bill to advance the eligibility date a full twenty years to July 1, 1968. This amendment is consistent with the traditional practice of treating undocumented aliens who have been in this country for a considerable period of time more leniently than those who have just arrived.

Amendments and Supplements to the Indochina Migration and Refugee Assistance Act of 1975

The hasty enactment of the Indochina Migration and Refugee Assistance Act of 1975 resulted in the inadequate treatment of resettlement problems. Therefore, various members of Congress have introduced subsequent bills either amending or supplementing the basic Act.

Several of the pending bills deal with status and citizenship problems of certain refugees. One such bill would authorize the change in status of Indochina refugees from parolees to permanent resident aliens. Another would confer United States citizenship rather than mere permanent resident status on certain Vietnamese children and provide for their adoption by American families. Both bills would greatly facilitate the resettlement of orphan and adult refugees from Indochina.

The cultural and language barriers confronting the refugees make assimilation into our educational system particularly difficult. In

28. Before complete relief is afforded, these aliens must prove that they have maintained continuous residence and show that they have good moral character, are eligible for citizenship, and are not disqualified from admission to the United States on certain aggravated grounds, I. & N. Act § 249, 8 U.S.C. § 1259 (1970). For a discussion of registry, see Comment, How to Immigrate to the United States: A Practical Guide for the Attorney, 14 SAN DIEGO L. REV. 193 (1976).
29. Id. There are definite indications that this bill will be enacted during the present Congress. It was introduced by Senator Eastland, the powerful chairman of the Senate Judiciary Committee. In addition, prior similar legislation had significant support. H.R. 981, 93d Cong., 1st Sess. (1973); H.R. 982, 93d Cong., 1st Sess. (1973); and H.R. 8713, 94th Cong., 1st Sess. (1975), covered the same issues as the Eastland bill, but final action was not taken on any of these. H.R. 8713 is presently in the House Judiciary Committee. 53 INTERPRETER RELEASES 66 (1976). Furthermore, tentative action was quickly taken on the Eastland bill. It was immediately scheduled for hearings, which were held March 17, 1976. 1 CCH CONG. INDEX 2463 (1975-76).
30. S. 2312, 94th Cong., 1st Sess. (1975). This bill was introduced by Senator Scott (R-Pa.) on September 10, 1975. 1 CCH CONG. INDEX 2106 (1975-76).
31. H.R. 4810, 94th Cong., 1st Sess. (1975). This bill was introduced by Representative Steiger (R-Wis.) on March 12, 1975. 2 CCH CONG. INDEX 3763 (1975-76).
passing the basic Act, Congress did not anticipate the magnitude of this problem. Congress failed to allocate sufficient federal funds to assist local educational agencies in preparing refugees for entry into the educational system. However, several pending bills would provide the needed funds. 33

The opportunity for employment in this country was a consideration which motivated some Vietnamese refugees to enter the United States. However, cultural and language barriers heighten the difficulty that the refugees have in securing employment. Although the Act does not deal directly with this difficulty, one pending bill authorizes the use of appropriated funds to remunerate those Indochina refugees who may subsequently be employed by the United States Government. 34

Finally, a refugee may wish to repatriate when confronted with significant status, citizenship, education, and employment problems. Emigration from the United States presents difficulties just as serious as does immigration. 35 Two bills would facilitate a refugee’s repatriation by mitigating any emigration problems that might arise. 36

All of these bills would effectively treat serious resettlement problems. However, they are languishing in their respective congressional committees. 37 The basic Act was signed into law within

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34. S. 2314, 94th Cong., 1st Sess. (1975). This bill was introduced by Senator Scott (R-Pa.) on September 10, 1975. 1 CCH Cong. Index 2106 (1975-76).
37. The status and citizenship bills remain in their respective Judiciary Committees. 1 CCH Cong. Index 2106 (1975-76); 2 CCH Cong. Index 3763 (1975-76). The various education bills are also still in committee. H.R. 8949 is in the House Judiciary Committee. 2 CCH Cong. Index 5091 (1975-76). H.R. 10877 is in the House Education and Labor Committee. 2 CCH Cong. Index 4107 (1975-76). The last action taken on S. 2145 was the ap-
a month of its introduction into Congress. Admittedly, the crisis surrounding the abrupt ending of the Vietnam War stimulated this prompt and compassionate response. However, for the refugees now struggling to assimilate into our culture, the crisis has not ended. Unless Congress enacts corrective legislation, Indochina refugees, at a loss in our society, will continually face serious resettlement problems. 38

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**Regulations**

**Enacted Amendments**

**Fees and Attendance at Final Naturalization Hearings**

Minor changes concerning fees and attendance at final naturalization hearings have been enacted. Fees have been increased, 39 and attendance at the hearings by members of the Immigration and Naturalization Service is now mandatory rather than discretionary. 40

**Alien Student Part-Time Employment**

Under the former regulations, 41 a nonimmigrant student who had requested permission to accept part-time employment because of economic necessity had to establish that the economic necessity was caused by unforeseen circumstances occurring subsequent to entry. The phrase "subsequent to entry" presented problems under the former regulations. It would have included the last entry of a nonimmigrant student who had been granted permission to accept part-time employment. 41

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38. For a further discussion of this and other enacted and contemplated immigration legislation, see 52 INTERPRETER RELEASES 34-44 (1975); id. at 277-90; 53 INTERPRETER RELEASES 1-7 (1976); id. at 66-73.

39. 8 C.F.R. §§ 103.7(a) & (b) (1976) have been amended so that a charge of $5.00 will be imposed if a check in payment of a fee is not honored. In addition, the cost for filing certain applications, petitions, appeals, and motions under the Immigration and Nationality Act has been changed. 41 Fed. Reg. 1887 (1976).

40. Prior to this amendment, attendance at final naturalization hearings or other naturalization proceedings was required only when convenient. Now, however, attendance by naturalization examiners and other members of the Immigration and Naturalization Service at such proceedings is required. 41 Fed. Reg. 5110 (1976).

time employment. If such a student left the country subsequent to being granted permission to engage in part-time employment, the student's reapplication to continue that employment would not have been considered under the standard of unforeseen circumstances subsequent to entry. The Immigration and Naturalization Service has amended the regulations so that a student's reapplication to continue previously authorized part-time employment will not be prejudiced by any short absence from the United States subsequent to the original employment authorization.  

Status of Aliens Adopted by Unmarried United States Citizens

The regulations pertaining to the filing of an orphan visa petition have been amended to conform to the Single Parent Adoptions Bill. These regulations now confer immediate relative status on all adopted alien orphans, whether their adoptive parents are married or single.

Exemption from Labor Certification Requirement

Under previous regulations, an alien was exempted from the labor certification requirement of the Immigration and Nationality Act if he wanted to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he had invested, or was in the process of investing, a minimum of $10,000. This exemption was designed to ensure that the alien's primary function with respect to the investment and the economy would not be as a skilled or unskilled laborer, but rather as a genuine and recognizable economic unit which would potentially employ not only

43. 8 C.F.R. §§ 204.1(b) & .2(d) (1976).
44. See text accompanying notes 6-7 supra.
45. 41 Fed. Reg. 11171 (1976). Finally, 8 C.F.R. § 204.2(e) (1976) has been amended to incorporate the holding of the recent administrative decision, In re The, 13 I. & N. Dec. 675 (Regional Comm'r, 1971). This decision held that an alien dentist, in order to be classified as a member of the professions, must be a graduate of a dental school of some other country and have been granted full and unrestricted license to practice dentistry in the country where he or she obtained a dental education. 41 Fed. Reg. 11015-16 (1976).
47. 8 C.F.R. § 212 8 (b) (14) (1976).
the alien and his immediate family but also other United States residents.\footnote{48} The Immigration and Naturalization Service and the Department of State have increased the amount of investment to $40,000.\footnote{49} This increase was based on the argument that wealthy aliens are currently using the exemption to buy their way out of the labor certification requirement of the Act.\footnote{50} The Service and the State Department suggested that increasing the amount under the exemption would eliminate this problem.\footnote{51} Nevertheless, this increase will not necessarily stop abuse of the investor exemption. It will continue to be used by aliens entering the country as skilled or unskilled laborers. However, this abuse will now be considerably more expensive. Moreover, if the investment figure is increased to $40,000, the exemption's objective may once again be accomplished.

\textbf{Contemplated Amendments}

\textbf{Exemption from the Thirty-Day Delay in Enforced Departure Following Denial of Application}

The current regulations provide that upon the denial of an application for political asylum, notification must be given to the Department of State. Thus, the department is provided an opportunity to supply information favorable to the applicant. In addition, deportation of the applicant is not enforced for thirty days following the date of notification unless a negative reply has been received from the department.\footnote{52}

There are cases, however, in which the department has notified the Immigration and Naturalization Service that it does not wish to be consulted.\footnote{53} A proposed amendment would exempt these cases from the thirty-day delay procedure. Enforced departure would follow immediately upon a negative determination by the District Director concerning political asylum.\footnote{54} Thus, in these cases, swift action must be taken to avoid immediate deportation.

\footnote{49} Id. at 37574. \asterisk
\footnote{50} Id. at 10231.
\footnote{51} Id.
\footnote{52} 8 C.F.R. \S 108.2 (1976).
\footnote{54} Id.
Entry into the United States

In United States v. Martinez-Fuerte, the Supreme Court held that routine fixed checkpoint stops and inquiries about citizenship do not violate the fourth amendment's ban on unreasonable searches and seizures. The Court refused to extend to permanent checkpoints the restrictions it had imposed on roving border patrols in United States v. Brignoni-Ponce. This decision, therefore, is a retreat from the Court's recent trend of restricting the activities of the Border Patrol.

In Martinez-Fuerte, the Court balanced the "minimal" invasion of privacy involved in slowing traffic at checkpoints and briefly scanning the faces of passengers against the genuine "public inter-

55. Those important recent immigration decisions not discussed are: Ribeiro v. INS, Civil No. 75-1761 (3d Cir., March 2, 1976) (what constitutes gain in smuggling case); United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976) (search warrants for illegal aliens); Giambanco v. INS, 531 F.2d 11 (3d Cir. 1976) (effect of judicial recommendation against deportation as factor in exercising discretion); Bagamasbad v. INS, 531 F.2d 11 (3d Cir. 1976) (discretionary denial of relief without determining eligibility); Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976) (withholding of deportation on political persecution ground); Brea-Garcia v. INS, 531 F.2d 693 (3d Cir. 1976) (adultery and good moral character); Castaneda-Delgado v. INS, 525 F.2d 1295 (7th Cir. 1975) (due process denial of continuance to obtain counsel not harmless error); Marlidis v. Sewell, 524 F.2d 371 (9th Cir. 1975) (deserting crewmen deportable under consular conventions); De Pina v. Kissinger, 75 Civil No. 75-414 (S.D.N.Y., March 2, 1976) (judicial review of visa denial).

Administrative decisions of the Board of Immigration Appeals play a substantial role in the development of immigration law. A detailed discussion of those decisions is beyond the scope of this synopsis. However, for a summary and discussion of the most significant administrative decisions within the past year, see 52 Interpreter Releases 320-29 (1975); 53 Interpreter Releases 8-17 (1976).

56. 96 S. Ct. at 3086-87.
57. 96 S. Ct. at 3086-87.
est" in halting the flow of illegal aliens into this country. The limited intrusion was held not sufficient to counter the significant public interest, and the Court therefore concluded that the checkpoints are constitutional.

In *Fiallo v. Levi*, a United States district court upheld the constitutionality of certain sections of the Immigration and Nationality Act which extend immigration benefits to the natural mother of an illegitimate child, but deny such benefits to the biological father of the child. The plaintiffs in this case were three sets of unwed biological fathers and their illegitimate offspring. Neither the fathers nor their children could attain immediate relative status because of this special relationship. The statutory language excludes from immediate relative status the relationship between unwed biological fathers and their children. The court upheld this statutory distinction as neither unreasonably discriminatory, a denial of equal protection, nor cruel and unusual punishment. So long as

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60. 96 S. Ct. at 3084-87.
61. Justice Brennan strongly dissented, stating:
   
   Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation. That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant.
   
   Id. at 3088 (dissenting opinion).
64. 406 F. Supp. at 163.
65. Under the sections cited in note 63 supra, an "immediate relative" means "the children, spouses, and parents of a citizen of the United States." "Child" means an unmarried person under twenty-one years of age who is "an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother" and the term "parent," "father," or "mother" means a parent, father, or mother "only where the relationship exists by reason of any of the circumstances" above. Therefore, these definitions exclude for immediate relative status and immigration the relationship between unwed biological fathers and their illegitimate children.
66. The court declined to substitute its judgment for that of the legislative branch in determining the reasonableness of this classification. "It is not for the judiciary to usurp the legislative function and replace the Congressional standards with its own." 406 F. Supp. at 166. The court also stated that this classification does not deny equal protection because it is 1) not wholly devoid of any rational purpose and 2) not fundamentally aimed at achieving a goal unrelated to the regulation of immigration. Finally, the court argued that although the hardship involved in this classification is considerable, it is not one which is forbidden by the Constitution. Id. at 162-68.
the immigration laws are not wholly devoid of any conceivably rational purpose, the court held they are not an encroachment on the right to equal protection.\textsuperscript{67}

Various decisions have issued from the federal courts within the past year clarifying the elements required for labor certification. Unless an alien falls within a specific exemption, he may not enter the United States to perform labor without qualifying for a labor certification.\textsuperscript{68} Qualification is based on two elements. First, there must be no available American workers capable of performing the labor for which the alien is qualifying.\textsuperscript{69} Second, granting the labor certification must have no adverse effect on the wages and working conditions of American workers.\textsuperscript{70} \textit{Jersey Plastic Molders, Inc. v. Secretary of State}\textsuperscript{71} clarified the first element by holding that a labor certification may not be denied on the basis that there are unskilled American workers who are “available” and who can be trained for the job within one to three months.\textsuperscript{72} \textit{Naporano Metal and Iron Co. v. Secretary of Labor}\textsuperscript{73} clarified the second element by holding that a labor certification may not be denied on the ground of “adverse effect” when an employer agrees to pay an alien on the same wage scale under a negotiated union contract as is paid to non-alien employees.\textsuperscript{74} Moreover, this holding applies even when the Secretary of Labor finds that this wage is less than the prevailing wage for similar employment in the area.\textsuperscript{75} Finally, the Fifth Circuit in \textit{Pierre v. United States}\textsuperscript{76} held that labor certification requirements do not apply to aliens seeking political asylum.\textsuperscript{77}

\textsuperscript{67} Id. at 167-68.
\textsuperscript{68} An alien needs a labor certification to immigrate to the United States unless that alien qualifies for a specific exemption—for example, immediate relative status. See 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.5(b) (rev. ed. 1975). See also note 28 supra and I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a)(14) (1970).
\textsuperscript{70} Id. § 212(a) (14) (B), 8 U.S.C. § 1182(a)(14)(B).
\textsuperscript{71} Civil No. 74-845 (D.N.J., July 2, 1975).
\textsuperscript{72} Id.
\textsuperscript{73} 529 F.2d 537 (3d Cir. 1976).
\textsuperscript{74} Id. at 542-43.
\textsuperscript{75} Id.
\textsuperscript{76} 525 F.2d 933 (5th Cir. 1976).
\textsuperscript{77} Id. at 935-36. Along with DeCanas v. Bica, 96 S. Ct. 933 (1976), and Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976), therefore, these cases establish a trend within the past year increasing the rights and privileges of aliens in relation to employment possibilities in this country. For a dis-
Deportation

Courts invariably hold that deportation is a civil rather than a criminal proceeding. In *United States v. Gasca-Kraft*, the Ninth Circuit affirmed an alien's conviction for attempted reentry after deportation. As a result of being apprehended while attempting to reenter the country, the alien was the subject of a criminal action. Therefore, the alien argued that the subsequent deportation order was invalid because the criminal hearing had been conducted without an offer of counsel at government expense. However, the court noted the right to counsel is constitutionally required only in criminal actions, and adhered to the concept that deportation is civil rather than criminal in nature.

In upholding this distinction, the Ninth Circuit failed to note the recent Sixth Circuit decision, *Aguilera-Enriques v. INS*, which indicated that the distinction between criminal cases and civil proceedings in relation to assigned counsel at deportation hearings was outmoded. Although the *Aguilera* court found respondent had not been prejudiced by lack of counsel, it stated that fundamental fairness requires that an attorney be provided at government expense whenever an unrepresented indigent alien requires counsel to present his position adequately. Prior to *Aguilera*, no federal court had expressed this view.

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78. 522 F.2d 149 (9th Cir. 1975).
79. Id. at 150-51.
81. 522 F.2d at 152.
82. A deportation hearing is a civil proceeding, not a criminal one, and a deportation order is not criminal punishment. ... [C]ourts have uniformly held in this circuit and elsewhere that in light of the noncriminal nature of both the proceedings and the order which may result, that respondents are not entitled to have counsel appointed at government expense.
83. 516 F.2d 565 (6th Cir. 1975).
84. Id. at 568 n.3.
85. Id. at 569.
86. The court today has fashioned a test to resolve whether a resident alien's due process rights require appointment of counsel. That test is whether "... in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness—the touchstone of due process'".
87. See, e.g., Martin Mendoza v. INS, 499 F.2d 918 (9th Cir. 1974); Dunn-Marin v. District Director, 426 F.2d 894 (9th Cir. 1970); Murgia-Meledrez
**Chavez-Raya v. INS** further exemplifies the civil nature of deportation. The Seventh Circuit ruled that failure to give the *Miranda* warnings to an alien does not render that alien's statement inadmissible as evidence in his deportation proceedings. Emphasizing the differences between a civil deportation hearing and a criminal trial and the fact that *Miranda* warnings are not mandated by the Constitution itself, the court held the alien's statements admissible.

Similarly, the Second Circuit in *Oliver v. INS* upheld respondent's deportation, despite her twenty-year residence in this country, because she had been convicted of possessing narcotics. The court rejected respondent's argument that deportation under such circumstances was cruel and unusual punishment by distinguishing deportation as a civil rather than a criminal proceeding. Moreover, this rationale, although not expressed, was clearly indicated by the Seventh Circuit when it reversed without publishing an opinion the district court's holding in *Lieggi v. INS*. Although its decision was based on the peculiar facts of the case, the district court held that the lack of *Miranda* warnings does not render the statement inadmissible in deportation proceedings.

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v. INS, 407 F.2d 207 (9th Cir. 1962). See also Rosales-Caballero v. INS, 472 F.2d 1158 (5th Cir. 1973); Henriques v. INS, 465 F.2d 119 (2d Cir.), cert. denied, 410 U.S. 968 (1972); Carbonell v. INS, 460 F.2d 240 (2d Cir. 1972); Tupacypuanqui-Marin v. INS, 447 F.2d 603 (7th Cir. 1971).

88. 519 F.2d 397 (7th Cir. 1975).

89. *Id.* at 402.

90. Given the differences between a deportation hearing and a criminal trial and the fact that *Miranda* warnings "are not mandated by the Constitution itself", we conclude that, although the lack of *Miranda* warnings would render an alien's statement, made during a custodial interrogation, inadmissible in a criminal prosecution for violation of the immigration laws, the failure to give the *Miranda* warnings does not render the statement inadmissible in deportation proceedings.

91. *Id.* at 426.

92. *Id.* at 428.

93. Finally petitioner's contentions that her deportation constitutes the infliction of double jeopardy and is cruel and unusual punishment fail, among other reasons under the principle so clear to judges, however difficult for laymen to comprehend, that "deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."

94. 529 F.2d 530 (7th Cir. 1976).

court was the first court to hold that deportation is cruel and unusual punishment. 96

In Lennon v. INS, 97 the Second Circuit did not strictly adhere to the distinction it had drawn in Oliver between deportation hearings and criminal proceedings. 98 Lennon had been convicted of marijuana possession under an English statute which did not require guilty knowledge as an element of the offense. The Second Circuit held under these facts that the narcotics conviction section 99 of the Immigration and Nationality Act did not preclude Lennon from entering the United States. In comparing deportation hearings to criminal proceedings, the court noted that harsh sanctions are not imposed in criminal proceedings when moral culpability is lacking. Therefore, Lennon was not deportable under these sections of the Immigration and Nationality Act. 100

Finally, the Second Circuit in Francis v. INS 101 held section 212 (c) of the Immigration and Nationality Act unconstitutional as applied because it denied certain aliens equal protection of the laws. 102 Under this section of the Act, those permanent resident aliens who have lived in this country for seven years, have become deportable, but have then voluntarily left the country and returned are eligible for discretionary relief granted by the Attorney General. However, aliens in the same circumstances who have not voluntarily left the country subsequent to becoming deportable are not eligible for this relief. 103 Petitioner argued that this distinction denied him equal


98. Compare note 93 supra, with note 100 infra.


100. Deportation is not, of course, a penal sanction. But in severity it passes all but the most Draconian criminal penalties. We therefore cannot deem wholly irrelevant the long unbroken tradition of the criminal law that harsh sanctions should not be imposed where moral culpability is lacking. Given, in sum, the minimal gain in effective enforcement, we cannot imagine that Congress would impose the harsh consequences of an excludable alien classification upon a person convicted under a foreign law that made guilty knowledge irrelevant. We hold that it did not.

Id. at 193-94.

101. 532 F.2d 266 (2d Cir. 1976).

102. Id. at 273.

protection because it created two classes of aliens identical in every respect except one.\textsuperscript{104} The court accepted this argument, holding that the distinction between departing and non-departing aliens was not rationally related to any legitimate purpose of the statute.\textsuperscript{105}

\textit{Francis} is significant for two reasons. It establishes a rare defense to a drug deportation,\textsuperscript{106} but more importantly, it is the only decision in which a court has ruled a section of the Immigration and Nationality Act unconstitutional on equal protection grounds.\textsuperscript{107} An effective equal protection argument may now be available to aliens in other immigration law contexts.

\textbf{Rights and Privileges of Legally Resident Aliens}

In \textit{Hampton v. Mow Sun Wong},\textsuperscript{108} the Supreme Court considered whether the Civil Service Commission's bar of permanent resident aliens from employment in competitive civil service deprived those aliens of liberty without due process of law.\textsuperscript{109} The Court utilized

\begin{itemize}
  \item Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate government interest. We find that the Board's interpretation of Section 212(c) is unconstitutional as applied to this petitioner. \textsuperscript{106}
  \item Neither the Supreme Court, nor any court of appeals, nor any district court had struck down a section of the Act on equal protection grounds. Cf. Lieggi v. INS, 389 F. Supp. 12, 16-19 (N.D. Ill. 1975).
  \item 96 S. Ct. 1912. The Court specifically stated it was not deciding whether the President or Congress had the authority to promulgate the regulation in issue:
    \begin{itemize}
      \item The question is whether the regulation of the United States Civil Service Commission is valid. We proceed to a consideration of that question, assuming without deciding, that the Congress and the President have the Constitutional power to impose the requirement that the Commission has adopted.
    \end{itemize}
\end{itemize}
a combination of a substantive and a procedural due process analysis. It first identified eligibility for federal competitive civil service as a significant interest, and then it indicated more than minimal judicial scrutiny would attach to a deprivation of that interest.\textsuperscript{110} Administrative convenience was the only legitimate interest the Government could propose as a justification for this rule.\textsuperscript{111} But the Court found this insufficient. The Commission did not perform with the requisite degree of expertise in choosing the classification to facilitate administrative convenience.\textsuperscript{112} In addition, the interest at stake far outbalanced any hypothetical gain to be achieved by such a classification.\textsuperscript{113} Thus, the Court held regulations denying permanent resident aliens liberty without due process of law unconstitutional.\textsuperscript{114} As a result of *Hampton*, permanent resident aliens will now be able to compete with citizens for the 300,000 federal jobs which become available each year.\textsuperscript{115}

\textsuperscript{110} The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy is of sufficient significance to be characterized as a deprivation of an interest in liberty. Indeed, we deal with a rule which deprives a discreet class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that some judicial scrutiny of the deprivation is mandated by the Constitution. Id. at 1905.

\textsuperscript{111} That one exception is the administrative desirability of having one simple rule excluding all noncitizens when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions. Arguably, therefore, administrative convenience may provide a rational basis for the general rule. Id. at 1911.

\textsuperscript{112} Id.

\textsuperscript{113} Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification requires rejection of the argument of administrative convenience in this case. Id.

\textsuperscript{114} A dissenting Justice Rehnquist viewed the issue quite differently. He found no problem with the Civil Service promulgating the rule in question.

For this Court to hold . . . that the agency [Civil Service Commission] chosen by Congress, through the President, to effectuate its policies, has "no responsibility" in that area is to interfere in an area in which the Court itself clearly has "no responsibility": the organization of the Executive Branch. Id. at 1915-16 (dissenting opinion).

\textsuperscript{115} Id. at 1900. *Hampton* decided the issue of whether the Civil Service Commission could bar permanent resident aliens from competitive civil service. However, it specifically left open the question of whether the President could decree such a bar. Id. at 1906-10. President Ford has subsequently issued an Executive Order requiring citizenship for employment or appointment to competitive civil service positions. Exec. Order No. 11935, 41 Fed. Reg. 37301 (1976).
Mathews v. Diaz116 upheld statutory provisions making eligibility for Medicare benefits contingent upon an alien’s admission for permanent residence and upon his presence in the United States for at least five years.117 The Court analyzed this issue by distinguishing legitimate discrimination between citizens and aliens from prohibited discrimination within the class of aliens.118

It decided the merits of the case in the following steps. First, it recognized the executive and legislative branches were best suited to deal with immigration issues.119 Second, it stated Congress had no duty to provide aliens and citizens with the same welfare benefits.120 Finally, it ruled that a challenge to the constitutionality of congressional legislation must advance principled reasoning that will both invalidate the congressional prohibition against Government benefits and support other requisite eligibility requirements for those same benefits.121

The Court ruled that the challenged requirements were not wholly irrational.122 Moreover, the challenging parties could not substitute another standard whose reasoning would simultaneously invalidate these requirements and substantiate itself.123 Therefore, the Court concluded that the challenging parties

... merely invited us to substitute our judgement for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program on the same conditions as citizens. We decline the invitation.124

117. Id. at 1895.
118. The real question presented by this case is not whether the discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination within the class of aliens—allowing benefits to some aliens but not to others—is permissible.
119. Id. at 1892.
120. Id. at 1893.
121. Id.
122. But if these requirements were eliminated, surely Congress would at least require that the alien’s entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, some durational requirements would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien’s eligibility depend on both the character and duration of his residence.
123. Id.
124. Id. Mathews had the potential under the equal protection analysis
Government Estoppel

Detrimental reliance upon the conduct of another is one of the essential elements of an estoppel. Recent immigration cases have attempted to characterize types of conduct giving rise to an estoppel against the Government. The United States Supreme Court had held in *INS v. Hibi* that absent "affirmative misconduct" an estoppel may not be invoked to protect an alien in naturalization proceedings. In *Hibi* the Government failed to fully publicize the special statutory rights of numerous Filipinos, thereby causing them to lose their opportunity for special naturalization. The Court in holding that this inaction did not constitute "affirmative misconduct" failed to elaborate on the meaning of that term.

In an en banc opinion, *Santiago v. INS*, the Ninth Circuit heard several consolidated lower court cases involving estoppel. Although these decisions differed factually, all were deportation proceedings against an alien who was either the spouse or child of another alien qualified for visa preference under the Immigration and Nationality Act. The Immigration and Naturalization Service had mistakenly admitted these aliens who were not "following or accompanying" the preference immigrants.

A three-judge panel decided the Government's action constituted "affirmative misconduct" and therefore estopped it from deporting

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of Francis (see text accompanying notes 101-07 supra) to be significantly expansive, but the Court failed to take the opportunity. The aliens' situation in Mathews was similar to that in Francis, and therefore the Francis analysis and holding could have been equally applicable in Mathews. See note 105 supra.

125. Equitable estoppel contains four essential elements: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon 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 true facts; and (4) he must rely on the former's conduct to his injury. 18 Cal. Jur. 2d Estoppel § 7 (1969).


128. Id. at 8-9.

129. Id. at 5-6.

130. Id. at 8-9.

131. 526 F.2d 488 (9th Cir. 1975).

132. Id. at 489.

133. The error occurred in giving them preference under I. & N. Act § 203(a) (9), 8 U.S.C. § 1153(a) (9) (1970), which states: "A spouse or child . . . shall . . . be entitled to the same status, and the same order of consideration provided in subsection (b), if accompanying, or following to join, his spouse or parent."
the aliens. The panel distinguished Santiago from Hibi by finding that in Santiago the Government had affirmatively misled the aliens, whereas in Hibi the Government had merely failed to act. However, the en banc court rejected this misfeasance-nonfeasance distinction. Rather, it viewed the Service action in Santiago as less blameworthy than that in Hibi. Utilizing this "less blameworthy" rationale, it refused to find an estoppel. Therefore, it also avoided giving definition to the term "affirmative misconduct." However, the Ninth Circuit in Sun Il Yoo v. INS found "affirmative misconduct" when the Service delayed over a year in adjudicating an alien's labor certification and therefore made that alien's immigration impossible. The Service contended that an estoppel was barred under Hibi and Santiago. In distinguishing those cases, this court finally articulated principles for determining what constitutes "affirmative misconduct." It stated that in Hibi

134. Santiago v. INS, Civil No. 73-2497 (9th Cir., March 4, 1975) (A copy of this unreported opinion is on file at the San Diego Law Review.).
135. Id.
136. That term, as well as the use in Hibi of a quotation from Utah Power & Light Co. v. United States concerning "neglect of duty," suggests that a distinction might be drawn between nonfeasance and misfeasance. But these are slippery terms. The two "failures" in Hibi can be viewed as either, a point which Mr. Justice Douglas made in characterizing the governmental conduct there as a "deliberate effort." The same semantic problem exists here. There was alleged nonfeasance in the failure to inform or inquire as well as alleged misfeasance in the act of admission. Misfeasance is particularly stressed in the case of petitioner Khan for the immigration officer there knew that Khan's father remained in Pakistan. But it is obvious to us that the central complaint of each petitioner is not the act of admission but the failure to inform or inquire. This is equally true in the case of Khan who, in attempting to show reliance, argues that the immigration officer failed to tell him that his visa was invalid. We therefore weigh these failures against those in Hibi. Only if they are more blameworthy are we entitled to depart from its teaching.
526 F.2d at 493.
137. If there was governmental "misconduct" here it is of less serious nature than that in Hibi. Likewise the result of the Government's failures here is less serious. Hibi lost his opportunity, granted by Act of Congress, to be naturalized as a United States citizen.

Id.
138. Id.
139. See note 130 supra.
140. 534 F.2d 1325 (9th Cir. 1976).
141. Id. at 1329.
142. Id. at 1328.
the petitioner could have taken more affirmative action to learn of his rights, whereas Yoo had completed all the Service procedures for acquiring his labor certification. \[143\] It distinguished Santiago by stating that there the Service’s failure to properly inform the aliens was justifiable because of the hectic atmosphere in admitting numerous aliens, whereas here the Service had over a year to process Yoo’s application. \[144\] The court therefore held Yoo was entitled to an estoppel because he had exercised due diligence and the Service had breached its statutory duty, thus depriving Yoo of immigrant status. It stated:

Immigration agents may have no duty to inform aliens of matters which the aliens have primary responsibility for knowing and could discover through the application of due diligence, but once an alien has gathered and supplied all relevant information and has fulfilled all requirements, INS officials are under a duty to accord him within a reasonable time the status to which he is entitled by law. \[145\]

Although Corniel-Rodriguez v. INS \[146\] was decided before Sun Il Yoo, it illustrates Sun Il Yoo’s principles. In Corniel-Rodriguez, a consular official’s failure to comply with state department regulations requiring a warning to a visa applicant that her marriage prior to entering the United States would undermine the validity of her immigrant visa constituted “affirmative misconduct” and gave rise to an estoppel. \[147\] This failure resulted in the loss of petitioner’s preference category. \[148\] Although the court’s decision was based on the equities of the case, it could have reached its result by utilizing Sun Il Yoo’s principles. The petitioner had exercised due diligence, and the consular official had breached his statutory duty.

Sun Il Yoo and Corniel-Rodriguez indicate “affirmative misconduct” occurs when an alien has prepared for entry into this country with due diligence and the Service or other Government agency unjustifiably fails to perform its statutory duty to properly complete that entry. This gives rise to an estoppel. However, Santiago demonstrates that if the Government commits a good faith breach of its statutory duty, even though an alien has performed with due diligence, an estoppel may not arise.

Whether the Supreme Court will accept these lower court characterizations is an unanswered question. In Hibi the Government

\[143\] Id. n.4.
\[144\] Id.
\[145\] Id.
\[146\] 532 F.2d 301 (2d Cir. 1976).
\[147\] Id. at 307.
\[148\] Id. at 303-04.
conspicuously failed to publicize the aliens' special statutory right to naturalization, causing them to lose this right. However, the normal procedure for naturalization remained open to them. Nevertheless, the Court held the Government's unjustifiable failure to fully publicize the aliens' statutory rights did not constitute "affirmative misconduct." Because an unjustifiable breach of a statutory duty was an essential fact giving rise to an estoppel in *Sun Il Yoo* and *Corniel-Rodriguez*, *Hibi* seems inconsistent with these cases. However, *Hibi* can be distinguished on two facts. First, the aliens did not investigate their potential rights with due diligence. An estoppel was granted in the lower court cases only when the due diligence element was present. More importantly, the aliens in *Hibi* lost only their special right to naturalization. They were still able to naturalize under the normal procedure. The unjustifiable mistake by the Government did not cause them irreparable harm. However, the mistake by the Government in each of the lower court cases did cause irreparable harm. In each instance the aliens lost their only chance to enter the country. While not present in *Hibi*, due diligence and irreparable harm were essential facts in the lower court cases. It is therefore arguable that the Supreme Court will accept these lower court characterizations because they can be distinguished from *Hibi*.149

149. The question of whether an estoppel will arise when an alien fails to act diligently, the Government unjustifiably breaches a statutory duty, and the alien is irreparably harmed also remains unanswered. The lower court cases included due diligence, and *Hibi* did not include irreparable harm.

An estoppel would probably arise in a case involving these three elements if the irreparable harm was caused by the Government and not by the alien. This could occur only if the alien had exercised due diligence and if he had been irreparably harmed. For example, due diligence would not have discovered a regulation which the Government was under a duty to disclose. In these circumstances, *Sun Il Yoo* and *Corniel-Rodriguez* would support an estoppel because there is little difference between exercising due diligence which does not protect and not exercising due diligence which would not protect. In each instance the Government's unjustifiable failure to perform a statutory duty irreparably harms the alien.

Whether an estoppel will arise when both the Government and the alien cause such harm is less clear. *Sun Il Yoo* and *Corniel-Rodriguez* will not support an estoppel because in each of those cases the alien was harmed solely by the Government. However, *Hibi* will not prevent an estoppel because there the alien was not irreparably harmed, whereas under these facts the alien is so harmed. None of these cases controls this issue. Therefore, a court would probably determine which party was most responsible for
In *DeCanas v. Bica* the Supreme Court upheld section 2805 of the California Labor Code, which prohibits an employer from knowingly employing an undocumented alien if that employment would adversely affect lawful resident workers. A California court of appeal had held that section 2805 was preempted by Congress's exclusive power to regulate immigration.

However, the Supreme Court declared that not every statute which affects aliens is necessarily a regulation of immigration and that the California statute was not of this type. Moreover, the Court found authority for this statute under the state police power. Therefore, it concluded that nothing in the enactment, scope, and detail of the Immigration and Nationality Act indicated that Congress intended to preempt the states' power to regulate the employment relationship covered by this statute.

A statute may be held preempted because its operation is an obstacle to the objectives of congressional legislation. The Court chose not to address this issue for two reasons. First, the California court of appeal decision did not address it. Second, the issue involves construction of section 2805 and the relationship of certain regulations promulgated under the statute. The Court concluded these were questions which the California courts should
It therefore reversed and remanded the case for further proceedings consistent with its opinion.\textsuperscript{161}

\textit{DeCanas} substantially affects undocumented aliens, legal resident aliens, and American employers. The possibility of employment in California and in other states which enact such legislation will be curtailed for undocumented aliens. Therefore, more jobs will be available for legal resident aliens. Furthermore, these legal resident aliens will be able to bargain more securely with their American employers for better wages and working conditions because they will no longer be threatened by replacement with undocumented aliens.

\textbf{CONCLUSION}

No definite trend emerges from recent legislative, administrative, and judicial developments. They both expand and contract the rights and privileges of aliens. However, the balance seems tipped toward contraction. \textit{Martinez-Fuerte} is a striking example of infringement upon the rights and privileges of aliens. \textit{DeCanas}, \textit{Mathews}, and the reversal of \textit{Lieggi} are further examples of infringement which overshadow expansive developments like \textit{Hampton} and the Indochina Migration and Refugee Assistance Act of 1975. In sum, aliens have lost more than they have gained from recent immigration developments.

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\textbf{MITCHELL D. GRAVO}
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\textsuperscript{160} Id. \\
\textsuperscript{161} Id.
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