

## Afterword

### THE IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976\*

#### INTRODUCTION

On October 20, 1976, President Ford signed into law a bill effecting the first major revisions of the Immigration and Nationality Act since the 1965 Amendments.<sup>1</sup> The 1976 Amendment<sup>2</sup> contains a number of noncontroversial provisions<sup>3</sup> designed to eliminate inequalities between the Eastern and Western Hemisphere immigrant selection systems. However, it also contains two controversial provisions expected to have a major adverse impact on intending immigrants from the Western Hemisphere in general,<sup>4</sup> and from Mexico in particular.<sup>5</sup>

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\* The Editorial Board would like to express its gratitude to Mr. Stephen H. Legomsky, a Comments Editor of the *San Diego Law Review*, and Mr. Mitchell D. Gravo, a Staff Writer of the *San Diego Law Review*, for their invaluable assistance in researching and preparing this *Afterword*.

1. The 1965 Amendments abolished the concept of differing national quotas. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

2. Pub. L. No. 94-571 (Oct. 20, 1976), *amending* 8 U.S.C. § 101 *et seq.* (1970) [Pub. L. No. 94-571 is hereinafter cited as the 1976 Amendment.].

3. The bill was introduced on the last day of the congressional session, at a time when only about twenty members of Congress were present on the House floor. It was enacted hurriedly under the special rules for unanimous consent of "non-controversial" items. *San Diego Union*, Oct. 22, 1976, § A, at 9, col. 6.

4. See text accompanying notes 28-34 *infra*.

5. See text accompanying notes 15-19 *infra*.

## PREFERENCES AND QUOTAS

Under existing law, immigration from the Eastern Hemisphere is subject to a ceiling of 170,000 people per year,<sup>8</sup> exclusive of special immigrants and relatives.<sup>7</sup> The manner in which these people are selected is governed by a preference system conferring priority on aliens who have specified familial relationships to American citizens and residents or who have specified occupational skills.<sup>8</sup> Additionally, existing law imposes a ceiling of 20,000 immigrants per year on any one Eastern Hemisphere country.<sup>9</sup>

Prior to the 1976 Amendment, however, an entirely different immigrant selection system applied to the Western Hemisphere. The ceiling of 120,000 immigrants per year from the Western Hemisphere<sup>10</sup> was distributed on a first-come, first-served basis, rather than on the basis of preference categories.<sup>11</sup> Also, the limit of 20,000 immigrants from any one country was inapplicable to the Western Hemisphere.<sup>12</sup>

The 1976 Amendment does not alter the basic structure of the Eastern Hemisphere system. It also leaves intact the total ceiling of 120,000 immigrants per year applicable to the Western Hemisphere.<sup>13</sup> However, it does greatly alter the Western Hemisphere

6. Immigration and Nationality Act § 201(a), 8 U.S.C. § 1151(a) (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.].

7. *Id.* Immediate relatives are defined as the "children," spouses, and parents of a citizen of the United States: *Provided*, that in the case of parents, such citizen must be at least twenty-one years of age." *Id.* § 201(b), 8 U.S.C. § 1151(b). Immediate relatives are admitted without regard to numerical limitations. *Id.* In order to qualify as a *child*, a person must, *inter alia*, be unmarried and under age 21. *Id.* § 101(b)(1), 8 U.S.C. § 1101(b)(1).

8. *Id.* § 203(a), 8 U.S.C. § 1153(a).

9. *Id.* § 202(a), 8 U.S.C. 1152(a).

10. *See id.* § 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A); Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 921.

11. That method is not immediately apparent from cursory examination of the statute. The preference system applies only to "aliens who are subject to the numerical limitations specified in section 1151(a) of this title." I. & N. Act § 203(a), 8 U.S.C. § 1153(a) (1970). Section 1151(a), in turn, excludes from its application "special immigrants defined in section 1101(a)(27) of this title." *Id.* § 201(a), 8 U.S.C. § 1151(a). Finally, section 1101(a)(27) defines "special immigrant" to include all immigrants born in the Western Hemisphere. *Id.* § 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A).

12. *See id.* § 202(a), 8 U.S.C. § 1152(a); *id.* § 203(a), 8 U.S.C. § 1153(a).

13. 1976 Amendment § 2.

quota system in two ways: First, it extends to the Western Hemisphere the preference system previously applicable only to the Eastern Hemisphere.<sup>14</sup> Second, it applies the 20,000-per-country limitation to the Western Hemisphere.<sup>15</sup>

The latter provision has created considerable controversy because of the extreme effect it will have on immigration from Mexico. In 1975 more than 42,000 Mexican immigrants, exclusive of immediate relatives, secured visas.<sup>16</sup> Thus, the 20,000-per-country limit will reduce this portion of Mexican immigration by more than half. Because the national limitation applies regardless of a particular nation's population, demand for visas, or any other factors, the ceiling on Mexico is the same as the ceiling on Iceland, even though the demand for visas from Iceland in 1975 was only 10 percent of that for visas from Mexico!<sup>17</sup>

To remedy this problem, President Ford pledged to submit legislation to Congress in January, 1977, to increase the Mexican quota.<sup>18</sup> In doing so, the President recognized this nation's "very special and historic relationship with Mexico."<sup>19</sup> If corrective legislation is not promptly enacted, that relationship could be seriously damaged by an apparently arbitrary provision.

The Amendment also alters the requirements of the third and fifth preference categories. Under existing law the third preference applies to "members of the professions" and people "who, because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States."<sup>20</sup> The 1976 Amendment imposes the additional requirement that the immigrant be sought by an American employer.<sup>21</sup>

Under existing law the fifth preference applies to brothers and sisters of United States citizens.<sup>22</sup> The Amendment adds the requirement that the citizen be at least 21 years of age.<sup>23</sup>

The new law also changes the way in which immigrant visas are allocated *within each country*. Existing law limits the percentage

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14. *Id.* §§ 2, 4.

15. *Id.* § 3.

16. San Diego Union, Oct. 22, 1976, § A, at 9, cols. 4-5.

17. *Id.* col. 3.

18. *Id.* col. 2.

19. *Id.*

20. I. & N. Act § 203(a) (3), 8 U.S.C. § 1153(a) (3) (1970).

21. 1976 Amendment § 4.

22. I. & N. Act § 203(a) (5), 8 U.S.C. § 1153(a) (5) (1970).

23. 1976 Amendment § 4.

of total Eastern Hemisphere visas allocated to each preference category.<sup>24</sup> However, there is no existing requirement that each country internally allocate immigrant visas in accordance with the prescribed percentages. Within each country visas are allocated on a first-come, first served basis.<sup>25</sup> As a result, oversubscription of a preference category for a particular country often prevents aliens in other preference categories in that country from immigrating to the United States.<sup>26</sup> To remedy this problem, the 1976 Amendment provides that if a country fills its annual quota of 20,000 visas, the statutory preference category percentages will govern the allocation of visas within that country in the succeeding year.<sup>27</sup>

#### LABOR CERTIFICATION

A second controversial change effected by the 1976 Amendment concerns the labor certification requirement. To immigrate to the United States, an alien must obtain from the Secretary of Labor a certificate declaring that his job is one for which there are no workers in the United States who are "able, willing, qualified, and available," and that his employment will not adversely affect the wages and working conditions of such workers similarly employed.<sup>28</sup> Because the first showing is ordinarily impossible to make, the alien will generally be able to immigrate only if he can qualify for a statutory exemption from the labor certification requirement. Under existing law, Eastern Hemisphere immigrants are exempt if they are immediate relatives, or if they fall within any of preference categories 1, 2, 4, or 5.<sup>29</sup> However, Western Hemisphere immigrants were exempt only if they were immediate

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24. I. & N. Act § 203(a), 8 U.S.C. § 1153(a) (1970). The extension of the entire preference system to the Western Hemisphere makes the specific percentages equally applicable to the Western Hemisphere. See 1976 Amendment §§ 2, 4.

25. H.R. REP. No. 94-1553, 94th Cong., 2d Sess. 9-10 (1976).

26. *Id.*

27. 1976 Amendment § 3(3).

28. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970). For a full discussion of the labor certification requirement, see Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

29. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970). These preference categories are respectively defined at *id.* § 203(a)(1), (2), (4), (5), 8 U.S.C. § 1153(a)(1), (2), (4), (5). Those are the categories corresponding to familial relationships.

relatives or the parents, spouses, or children of United States citizens or of permanent resident aliens.<sup>30</sup> The 1976 Act amends the Western Hemisphere exemptions by making them the same as the Eastern Hemisphere exemptions.<sup>31</sup>

The labor certification exemption amendment will have a major impact on those Western Hemisphere immigrants whose only family connection to the United States is a United States citizen child under age 21. Because such an immigrant is the parent of a United States citizen, he was previously exempt. However, he does not qualify as an *immediate relative*<sup>32</sup> and does not fit within any of preference categories 1, 2, 4, or 5,<sup>33</sup> and therefore is no longer exempt under the 1976 Amendment. By preventing the parent from immigrating, the 1976 Amendment thus forces the United States citizen child either to leave his parents or to leave his country.

#### OTHER PROVISIONS

Another major provision<sup>34</sup> of the 1976 Amendment extends to the Western Hemisphere the adjustment of status provisions previously applicable only to the Eastern Hemisphere.<sup>35</sup> However, the Act also makes two classes of aliens ineligible for adjustment of status. First, it renders ineligible those aliens who accept unauthorized employment in the United States prior to filing their adjustment applications and who are not immediate relatives.<sup>36</sup> Second, it bars aliens who entered the United States on a transit<sup>37</sup> visa from applying for adjustment.<sup>38</sup>

The 1976 Amendment also provides that Cuban refugees who adjust their status pursuant to special legislation enacted in 1966

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30. *Id.* § 212(a) (14), 8 U.S.C. § 1182(a) (14).

31. *Compare id.*, with 1976 Amendment § 5.

32. The parent of a United States citizen qualifies as an immediate relative only if the citizen child is over 21 years of age. I. & N. Act § 201(b), 8 U.S.C. § 1151(b) (1970).

33. *See id.* § 203(a) (1), (2), (4), (5), 8 U.S.C. § 1153(a) (1), (2), (4), (5).

34. 1976 Amendment § 6.

35. Under the existing adjustment of status provision, an Eastern Hemisphere alien other than a crewman could become a permanent resident without having to return to his homeland to procure a visa, provided several conditions were met. I. & N. Act § 245(a), 8 U.S.C. § 1255(a) (1970). Adjustment was not available to Western Hemisphere aliens. *Id.* § 245(c), 8 U.S.C. § 1255(c).

36. 1976 Amendment § 6(c) (2).

37. Transit visas are issued pursuant to I. & N. Act § 212(d) (4) (C), 8 U.S.C. § 1182(d) (4) (C) (1970).

38. 1976 Amendment § 6(c) (3).

will not be charged to the Western Hemisphere quota.<sup>39</sup> The Amendment raises the subquota for colonies and dependencies from 200 per year to 600.<sup>40</sup> Finally, it eases slightly the burden faced by teachers and others with exceptional abilities in the arts and sciences in their applications for labor certification. The Amendment requires that the Labor Secretary determine that there are *equally* qualified American workers available before he denies labor certification to those groups.<sup>41</sup>

#### EFFECTIVE DATE AND SAVINGS CLAUSE

The 1976 Amendment becomes effective on January 1, 1977.<sup>42</sup> Included among its provisions is a two-part savings clause which appears to raise several crucial questions. Because the bill was passed while this symposium issue was in the final stages of printing, obtaining definitive answers was not possible. The following discussion will raise the issues with the hope that any ambiguities in the statutory language will soon be resolved.

Section 9(a) of the savings clause applies to Eastern Hemisphere aliens.<sup>43</sup> It provides that the bill does not "affect the *entitlement to immigrant status* or the order of consideration for issuance of an immigrant visa" of an alien who would have been entitled to preference status under the old law, provided the alien filed his preference petition with the Immigration and Naturalization Service prior to January 1, 1977.<sup>44</sup>

The meaning of the phrase "entitlement to immigrant status" is unclear. One likely possibility is that an alien who shows he either possesses, or is exempt from the requirement of possessing, labor certification, is entitled to immigrant status within the meaning of the Amendment.<sup>45</sup>

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39. *Id.* § 8.

40. *Id.* § 3(2).

41. *Id.* § 5.

42. *See id.* § 10.

43. The statutory language refers to an alien who is "entitled to a preference status, under section 203(a) of the Immigration and Nationality Act, as in effect on the day before the effective date of this Act." *Id.* § 9(a). Under the old law, section 203(a) applied only to Eastern Hemisphere aliens. *See* note 24 *supra*. Therefore it would be impossible for a Western Hemisphere alien to qualify under section 9(a).

44. *Id.* § 9(a) (emphasis added).

45. Nonexempt aliens who do not possess labor certification are exclud-

There are two principal classes of Eastern Hemisphere aliens who will be affected by the savings clause. As noted earlier, aliens who are skilled in the professions or the arts, or who possess some other exceptional ability, fit within the third preference category under existing law.<sup>46</sup> To qualify for third preference classification the 1976 Amendment imposes the additional requirement that the alien have an actual offer of employment in the United States.<sup>47</sup> Thus such a skilled alien who does *not* have an offer of employment would have been eligible for a third preference visa under the old law, but is not now eligible under the new law. Whether he will be within the purview of the savings clause is an issue not readily answerable from the statutory language alone.

The second type of Eastern Hemisphere alien for whom construction of the savings clause is critical is the alien who has a United States citizen brother or sister *under* age 21. As noted earlier, that alien was eligible for a fifth preference visa,<sup>48</sup> and therefore exempt from the labor certification requirement<sup>49</sup> under the old law. Under the new law, neither of these statements is true.<sup>50</sup> Presumably, because his "immigrant status" would depend on whether he is exempt from labor certification, and because the order in which his visa issuance would be considered depends on his preference category, he would be unaffected by the new law if he files his visa petition with the Immigration and Naturalization Service before January 1, 1977.<sup>51</sup>

Section 9 (b) of the savings clause applies to Western Hemisphere aliens.<sup>52</sup> It provides that an alien who "established a priority date at a consular office on the basis of entitlement to immigrant status under statutory or regulatory provisions in existence on . . . [December 31, 1976] . . . shall be deemed entitled to immigrant status under section 203 (a) (8) . . . and shall be accorded the priority date previously established by him."<sup>53</sup> Again, the phrase "entitle-

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able from the United States. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970).

46. *Id.* § 203 (a) (3), 8 U.S.C. § 1153 (a) (3).

47. 1976 Amendment § 4.

48. I. & N. Act § 203 (a) (5), 8 U.S.C. § 1153 (a) (5) (1970).

49. *Id.* § 212(a) (14), 8 U.S.C. § 1182 (a) (14).

50. 1976 Amendment § 4.

51. The visa petition for a fifth preference alien is filed with the Immigration and Naturalization Service pursuant to 8 C.F.R. § 204.1(a) (1976).

52. The statutory language is "[a]n alien chargeable to the numerical limitation contained in section 21(e) of the Act of October 3, 1965. (79 Stat. 921)." 1976 Amendment § 9(b). Section 21(e) of the 1965 Act in turn refers to aliens subject to the Western Hemisphere quota.

53. 1976 Amendment § 9(b).

ment to immigrant status" raises a number of issues.

There are three principal classes of Western Hemisphere aliens who were exempt from labor certification under the old law, but who are *not* exempt under the new law. They are as follows:

- (1) the parent of a United States citizen child under age 21;
- (2) the parent of a permanent resident alien; and
- (3) the married son or daughter of a permanent resident alien, if the son or daughter is under age 21.<sup>54</sup>

For those aliens the scope of the savings clause is crucial. The clearest example of an alien to whom the clause applies would seem to be the person who actually obtains his priority date before January 1, 1977. The earlier the stage of the immigration process, however, the more questionable becomes the applicability of the savings clause of section 9(b). The situations in which problems could arise, in order by stage of the immigration process, are the following:

- (1) The alien files his visa application with the consulate before January 1, 1977, but it is not processed by the consulate until on or after January 1, 1977. Because the priority date is

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54. These three categories were determined by compiling all possible combinations of family members—*e.g.*, parent, spouse, and child—person to whom related (United States citizen or permanent resident alien), age of the alien, age of the person to whom the alien claims a relationship, and marital status. These are the traits by which the labor certification requirements are defined under both the old law and the new law. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970); *id.* § 203(a)(1),(2),(4),(5), 8 U.S.C. § 1153(a)(1),(2),(4),(5); *id.* § 201(b), 8 U.S.C. § 1151(b); *id.* § 101(b)(1), 8 U.S.C. § 1101(b)(1) (definition of *child*).

The same provisions, together with 1976 Amendment § 4, can be used to calculate the categories of Western Hemisphere aliens who were *not* exempt under the old law, but who are exempt under the new law. They are:

- (1) the unmarried son or daughter of a United States citizen, if the son or daughter is over age 21;
- (2) the unmarried son or daughter of a permanent resident alien, provided that the son or daughter is over age 21;
- (3) the married son or daughter of a United States citizen; and
- (4) the brother or sister of a United States citizen, if the citizen is over age 21.

The statutory definition of *child*, besides being limited to unmarried people under age 21, contains other restrictions of which the practitioner should be aware. See I. & N. Act § 1101(b)(1), 8 U.S.C. § 1101(b)(1).



established by the consulate as of the time of the application is filed, apparently the alien would be unaffected by the new law.

- (2) The alien mails his visa application before January 1, 1977, but it is not received by the consulate until after January 1, 1977. Because of long mail delays in many countries such an occurrence could be sufficiently frequent to warrant careful consideration.
- (3) In many cases the Western Hemisphere alien's exemption from labor certification arises from his relationship to a permanent resident alien. In those situations the intending immigrant begins the immigration process by filing a visa petition with the Immigration and Naturalization Service to verify his claimed relationship to the permanent resident alien. The approved petition is then forwarded to the consulate where the alien will be applying for his immigrant visa. If the visa petition is filed with the Service before January 1, 1977, but approved and forwarded to the consulate after January 1, 1977, the applicability of the savings clause is in issue.

If comparison with the Eastern Hemisphere savings clause is an accurate guide, even the alien in the last described category should be "saved." The Eastern Hemisphere fifth preference petitioner, for example, an alien with a United States citizen sibling, is saved from the new requirement that the citizen be over age 21 if his visa petition is filed with the Service before January 1, 1977.<sup>55</sup> Similarly, the Western Hemisphere alien whose relative files a visa petition with the Service before January 1, 1977, should also be saved from the new requirements for labor certification exemption. Such an interpretation would be consistent with the 1976 Amendment's policy of equalizing treatment between the two hemispheres.<sup>56</sup>

One final area in which the scope of the savings clause is subject to varying interpretations concerns aliens who have been excluded from the United States within the past year and aliens who have previously been deported. Both categories of aliens must apply to the Attorney General for special permission to file a visa application.<sup>57</sup> It is not clear whether the alien who files an application for permission before January 1, 1977, but who receives permission

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55. See text accompanying notes 48-51 *supra*.

56. H.R. REP. No. 94-1553, 94th Cong. 2d Sess. 1 (1976).

57. See I. & N. Act § 212(a)(16)(17), 8 U.S.C. § 1182(a)(16)(17) (1970).

and applies for his visa after January 1, would be within the savings clause.

### CONCLUSION

The 1976 Amendment accomplishes a much needed equalization of treatment between aliens from the two hemispheres. However, some of its provisions which purport to accomplish this equalization actually effect precisely the opposite result. The extension of the 20,000-per-country limitation to the Western Hemisphere is one such example. The alien from Mexico, other than one within the narrowly defined class of "immediate relatives,"<sup>58</sup> will now find it much more difficult to immigrate to the United States than will the alien from another country in which the demand for immigrant visa is not as great.<sup>59</sup>

Because of the hurried manner in which the bill was enacted,<sup>60</sup> many of its provisions are subject to varying constructions.<sup>61</sup> It is hoped the Immigration and Naturalization Service and the State Department will adopt clear interpretations consistent with the equalizing policy of the new law.

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58. *Id.* § 201(b), 8 U.S.C. § 1151(b).

59. See text accompanying notes 15-19 *supra*.

60. See note 3 *supra*.

61. See text accompanying notes 43-56 *supra*.

