Introductory Survey

Recent Judicial, Legislative and Administrative Developments Relating to Immigration and Nationality Law

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I. Introduction

In keeping with the unprecedented activity of 1986, 1987 has been an extraordinarily active year in immigration law. Implementation of the Immigration Reform and Control Act of 1986 (IRCA) produced new regulations in many areas and prompted a variety of lawsuits challenging the Immigration and Naturalization Service's interpretations of IRCA. Much of this litigation centered around INS regulations impacting on IRCA's amnesty program, which already in 1987 has led to the legalization of hundreds of thousands of previously undocumented aliens. Other cases involved the employer sanctions provisions of IRCA, which are having a broad impact on employers all over the country.

The Supreme Court rendered several important decisions in the immigration field. In *Cardoza-Fonseca v. INS*, 107 S. Ct. 1207 (1987), the Court ruled that aliens applying for political asylum in the United States need to show a well-founded fear of persecution to qualify for that relief. The Court found that the "well-founded fear of persecution" standard is meaningfully different, and more lenient, than the "clear probability of persecution" standard applied to claims for withholding of deportation. This decision resolved the question left open in 1984 by the Court's decision in *INS v. Stevic*, 104 S. Ct. 2489 (1984).

In *Abourezk v. Reagan*, 108 S. Ct. 252 (1987), an equally divided Supreme Court let stand a decision of the D.C. Circuit Court of Appeals that in order to find an alien excludable as a threat to the national security, the government must raise facts beyond mere membership in a group proscribed by § 212(a)(28) of the Immigration and Nationality Act (INA). While this decision does not create a national precedent, it will have largely the same effect since most cases challenging ideological exclusions are brought in the D.C. Circuit.

The Supreme Court also decided a case impacting on the procedural rights of aliens facing deportation. In *United States v. Mendoza-Lopez*, 107 S. Ct. 2148 (1987), the Court held that in a criminal prosecution for unlawful reentry after deportation, the alien defendant can collaterally attack the validity of the underlying deportation order on the ground that it was entered without due process.

While the proposed regulations relating to H-1 visas discussed in last year's *Immigration and Nationality Law Review* were not finalized in 1987, final regulations affecting business visitors and students were published in the Federal Register and long-awaited revisions of the L visa category were finally promulgated. The H-2A visa category established by IRCA, for the admittance of temporary agricultural workers, also got underway in 1987 in the midst of considerable controversy.
The legislature remained active in the immigration field in 1987, considering bills that would change or eliminate ideological grounds of exclusion, reorganize the process of legal immigration to the United States, and allow for refugees from El Salvador and Nicaragua to remain indefinitely in the United States. Bills were also considered that would provide for administrative naturalization and that would require foreign investors to register any significant U.S. holdings.

Following is an area-by-area survey of these and other major developments in the immigration field. Legislation, judicial and administrative case law, regulations and policy statements are all discussed. Many of these developments have not been finalized as of December 1987. Therefore, 1988 promises to be another active year in immigration law.

II. Legislative Developments

After the extraordinary legislative activity of 1986, 1987 was a relatively calm year insofar as immigration legislation was concerned. Immigration concerns took a back seat to congressional preoccupation with responding to the Iran-Contra crisis, filling the vacancy on the Supreme Court left by the resignation of Justice William Powell, and responding to a fiscal crisis. However some legislative activity did occur, which is summarized below.

Rep. Romano L. Mazzoli (D-KY), chairman of the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law, introduced an efficiency bill on July 13, 1987. H.R. 2921 addresses some of the concerns raised in a July Subcommittee hearing on legal immigration, which focused largely on the economic ramifications of current immigration policy. Rep. Mazzoli's bill, the "Immigration and Nationality Efficiency Amendments of 1987," includes among its provisions an amendment that would make the definition of "entry" in INA § 101(a)(13) inapplicable to lawful permanent residents of the United States, thereby effectively eliminating the "reentry doctrine" established in Rosenberg v. Fleuti, 374 U.S. 449 (1963); an amendment to INA § 101(a)(27) creating a new special immigrant category for executives and managers of certain large, multinational corporations; and an amendment to the definition of "profession" contained in INA § 101(a)(32), whereby a member of a profession would be required to have "an appropriate degree in the respective specialized field from a college or university" or "significant experience in the particular field." This amendment would eliminate the current requirement that an individual must have formal academic training to be recognized as a professional. In contrast, the
INS has proposed regulations that would require an alien to have at least two years of college-level training to qualify as a member of a profession.

Other provisions in H.R. 2921 would amend INA § 201(b) to permit the surviving spouse of a deceased U.S. citizen to remain an immediate relative upon filing of a visa petition within three years of the spouse's death; amend INA § 212(d) by permitting the waiver of an offer of employment in cases involving self-employed aliens of extraordinary ability in the arts seeking third preference status; amend INA § 223 by changing reentry permits to “travel permits” and making them valid for five years; and amend INA § 101(a)(15)(H)(i) to allow aliens of distinguished merit and ability, members of a profession, and high level executives to be admitted on H-1 visas.

The “Immigration and Nationality Efficiency Amendments of 1987” would also amend INA § 207(c) to remove the current one-year waiting period for refugees to be admitted as permanent residents; render deportable aliens admitted for permanent residence on the basis of labor certifications who do not engage in employment in the certified occupational field for the first twelve months; and clarify the temporary nature of detention of aliens detained pending inquiry into their excludability or deportability from the United States. The proposed amendment to INA § 235(b) would require the INS to release aliens on bond or parole unless they pose a danger to the community or are likely to abscond prior to their hearings.

Little progress was made on H.R. 2921 in 1987. However, a similar bill sponsored by Rep. Mazzoli in 1986 almost passed, and proponents of H.R. 2921 believe that it has a likelihood of passage in early 1988.

Senator Edward M. Kennedy (D-MA), chairman of the Senate Judiciary Committee's Subcommittee on Immigration and Refugee Affairs, introduced a bill on August 6, 1987, also calling for reformation of the country’s legal immigration system. Although the bill did not reach the full Senate in 1987, it passed in the Subcommittee on Immigration and Refugee Affairs in December, and is scheduled for consideration by the full Senate Judiciary Committee in early 1988. The Kennedy bill, S. 1611, is entitled the “Immigration Act of 1987.” Its primary feature is to separate the existing family-based preferences (first, second, fourth and fifth) from the two employment-based preferences (third and sixth). Without changing the ultimate number of family-based visas available to applicants for immigration to the United States, the bill would allocate a significantly higher percentage of family preference visas to spouses and minor children of legal permanent resident aliens (65 percent, as opposed to the current 26 percent), in an effort to diminish the lengthy backlogs in second preference visas, for which the waiting period has
reached seven to ten years for some countries. The bill also would eliminate that portion of the current second preference that applies to unmarried children over twenty-one years of age.

In addition to overhauling the second preference, the Kennedy bill would reduce the percentage of fifth preference visas from 24 to 10 percent, and would limit use of this category to unmarried brothers and sisters of adult U.S. citizens. However, the Subcommittee voted to create 30,000 additional visa numbers a year to help clear some of the backlog in the current fifth preference. The bill would also create a new "independent" category of visas to include the current third and sixth preference visa numbers, as well as 50,000 nonpreference visas such as those made available by IRCA. The bill would redefine and severely limit the third preference category to aliens who are "members of the professions holding doctoral degrees (or the equivalent degree)" or of exceptional ability. This would force aliens with bachelor's or master's degrees who could not prove exceptional ability to utilize the already overcrowded sixth preference category, or force them to apply for nonpreference visas.

Under the Kennedy bill, the 50,000 visa numbers for nonpreference immigrants would be apportioned according to a point system similar to those used in Canada and Australia. Of the maximum 147 points allocable under the proposal, the largest number (thirty) was to be reserved for aliens from countries "adversely affected" by the 1965 reforms to the INA. However, the Subcommittee version no longer awards points to immigrants from countries "adversely affected" by the 1965 amendments. Instead, points would be allocated to immigrants on the basis of the following characteristics: possession of skills in short supply in the U.S. (twenty points), prearranged employment (twenty points) (also omitted from the Subcommittee version), age (up to ten points), education (twenty-five points), experience in a desired field (ten points), possession of a U.S. citizen sibling (ten points), and proficiency in English (ten points). The last two criteria would subtly benefit immigrants from "adversely affected" countries, since these countries had high rates of immigration prior to 1965, causing more family connections, and are largely located in Western Europe where English is commonly taught in the schools. Furthermore, the Subcommittee version awards thirty-five points to aliens who speak and read English, instead of the ten points proposed by Kennedy. An alien would have to have at least sixty-five points to apply for one of the nonpreference visa numbers. The nonpreference category would not be subject to a labor certification requirement.

Bills relating to the elimination of ideological grounds of exclusion were presented in both houses of Congress and an interim bill was passed in the final days of 1987, temporarily prohibiting the government from
deporting, excluding or denying a visa to anyone based on "beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States." After many years of negotiation, bills to amend or eliminate INA §§ 212(a)(27), (28) and (29) have now received considerable support from the Administration. They are discussed in detail in the section on Deportation and Exclusion. Additionally, bills that would grant relief from deportation to Salvadorans and Nicaraguans in the United States received unprecedented support in Congress in 1987, and a bill passed that would allow some foreign nationals in extended voluntary departure (EVD) status in the United States to adjust their status to that of permanent residents. These bills are discussed in the section on Refugees and Asylum.

On July 13, 1987, the House of Representatives overwhelmingly approved a bill introduced by Rep. Peter W. Rodino, Jr. (D–MA) providing for administrative naturalization. The bill, H.R. 735, would remove the naturalization process from judicial administration and instead vest naturalization authority in the Attorney General. It would also give newly naturalized citizens the option of having the oath of citizenship administered by a representative of the Attorney General, rather than by a federal judge. Both of these measures would eliminate the burden on applicants created by having two branches of government involved in the naturalization process and minimize the waiting time for naturalization once an application is granted.

Another significant aspect of H.R. 735 is that it allows for an administrative appeal of a denial of citizenship to the Board of Immigration Appeals (BIA) and then to a federal district court. H.R. 735 would also reduce the state residency requirement from six months to three months. Given the noncontroversial nature of these and other provisions, the bill is expected to receive little or no opposition in the Senate.

The other major bill impacting on the immigration field is H.R. 3, the Trade and International Economic Policy Reform Act of 1987 (TIEPRA), approved on April 30, 1987 by the House of Representatives. Section 703 of TIEPRA would require foreign investors living abroad or aliens residing in the United States to register their U.S. holdings if they exceed certain predetermined ownership thresholds. A similar provision is expected to be added to the Senate’s version of the trade bill (S. 1420).

The House provision was introduced in response to growing concern over the enormous increase in foreign ownership of U.S. assets in recent years. The registration requirements of § 703 are intended to help scholars and government policy analysts evaluate foreign investments while the
United States continues to struggle with its massive trade deficit and other trade problems.

Section 703, as passed by the House, would require all foreign nationals with a “significant” equity or ownership interest in a U.S. property or business to register new acquisitions within thirty days after acquisition. Acquisitions of subsidiaries or affiliates would have to be registered within ninety days after the end of the calendar year of acquisition. Foreigners who already have a “significant” interest in a U.S. property or a “controlling” interest in a U.S. business enterprise would have to register within 180 days after the date of enactment. Foreign investors would have to make annual reports to the Commerce Department after the first year, detailing any changes in the disclosure information from the previous year. Strict penalties would be imposed on investors who did not comply with these requirements.

III. Nonimmigrant Classifications

Activity regarding nonimmigrant visas in 1987 was limited, as compared to previous years. The proposed regulations affecting the H-1 nonimmigrant visa category, discussed at length in last year’s *Immigration and Nationality Law Review*, ran into trouble on Capitol Hill when the House Appropriations Committee voted on June 24, 1987 to prohibit the INS from implementing the final version of its regulations for at least one year. There also was renewed interest in the E-2 treaty investor classification, as evidenced by resolutions passed by both the American Bar Association and the American Immigration Lawyers’ Association. However, no formal action was taken by either the INS or Congress to change the current restrictions on issuance of E-2 nonimmigrant visas. In addition, a number of regulations proposed during 1986 were finalized in 1987, and some new regulations were proposed.

A. Regulations Affecting the B-1 Category

In August 1987 the State Department finalized a rule amending 22 C.F.R. § 41.25(b) to bar B-1 classification and admission for aliens seeking to enter the United States to perform building or construction work. See 52 Fed. Reg. 152-29374 (8/7/87). The rule is compatible with a parallel INS rule finalized on December 9, 1986 and discussed in last year’s *Immigration and Nationality Law Review*. Both rules codify the partial stay pending appeal granted by the Ninth Circuit Court of Appeals in *International Union of Bricklayers v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985).
In the August 14 Federal Register, the INS clarified its December 9 rule in light of several concerns raised by the State Department notice. First, the INS reiterates that its December regulation precludes granting B-1 nonimmigrant status to aliens seeking to enter the United States to perform building or construction work, unless the alien is entering to supervise and train U.S. workers. The December 9, 1986 amendment does not allow an exception for building or construction work incident to after-sale installation and service or other warranty work after installation. 52 Fed. Reg. 157-30329 (8/14/87). Second, the new INS notice distinguishes workers in the construction industry from those servicing commercial equipment or machinery, for whom a repair and warranty work exception does exist under INS Operations Instruction § 214.2(b)(5).

The INS has also announced its intention to clarify and perhaps modify the requirements for admission, extension and maintenance of status for nonimmigrant alien visitors for business (B-1) and for pleasure (B-2). The notice of proposed rulemaking, published at 52 Fed. Reg. 190-36783 (10/1/87), proposes to formalize INS policy by moving sections of the Service’s Operations Instructions (OI) to 8 C.F.R. § 214.

The notice also proposes substantive changes to the B-1 visa rules. Some examples are the following: (1) the Service proposes to extend B-1 status to certain members of religious denominations and/or recognized voluntary service programs, especially where the alien has already been employed by an overseas affiliate of the same denomination or service program; (2) the Service suggests extending B-1 status to “key personnel” of foreign film crews coming to the United States to film commercials for foreign use; (3) the Service is considering allowing entertainers to be classified as B-1 visitors if they appear before nonpaying audiences or are amateur entertainers appearing at events organized by nonprofit organizations; and (4) the Service proposes to modify the standards applicable to B-1 visas to allow warranty work to be performed at any time following the purchase of commercial or industrial equipment or machinery, as long as the relevant warranty agreement was entered into at or prior to the time of purchase. The comments period ended on November 16, 1987, and proposed rules are expected in 1988.

B. Changes in Regulations Affecting Foreign Students
On April 22, 1987 the INS announced its final revision of F-1 student regulations. The proposed rule was analyzed in last year’s Immigration and Nationality Law Review. The most significant change in the final rule is that the Service dropped its proposal to bar F-1 students who have engaged in practical training after graduation from changing non-
immigrant status to the H category. The INS agreed with numerous commentators that such a change should not be made until more sufficient statistical data is available that either substantiates or rebuts the perception that an abuse of practical training is occurring.

The final rule also revises the language defining "duration of status," to allow for broader application of that term. Under the final rule, a student remains in status for "the period during which the student is pursuing a full course of studies in any educational program (e.g., elementary or high school, bachelor's or master's degree, doctoral or postdoctoral program) and any periods of authorized practical training, plus sixty days within which to depart from the United States. An F-1 student who continues from one educational level to another is considered to remain in status . . . ." The new rule also provides that an F-1 student is considered to be in status during the summer, if the student is eligible and intends to register for the next term, and that a student who "is compelled by illness or other medical condition to interrupt or reduce a course of study" is considered in status during the illness or other medical condition. The student must resume a full course of study upon recovery in order to maintain his or her status.

Under the new rule, a student must request an extension of stay only after the student has been in the United States in student status for eight consecutive years, or when the student has been at one academic level for "an extended period of time." What constitutes an extended period of time is determined according to the length of time in which the student originally intended to complete the academic level. In addition, students are no longer required to submit applications to the INS to effect school transfers. The final rule became effective on May 22, 1987.

C. Implementation of the H-2A Category for Temporary Agricultural Workers

In May 1987 the Department of Labor (DOL) issued two proposed rules to amend its regulations governing aliens working temporarily in U.S. agriculture or logging. The first rule amends 20 C.F.R. Parts 654 and 655, concerning the procedures by which DOL's Employment and Training Administration (ETA) would certify H-2A aliens. The rule also sets the wage H-2A aliens would have to be paid. The second proposed rule creates a new 29 C.F.R. Part 501, under which the Wage and Hour Division of the DOL would enforce agricultural employers' contractual obligations to their employees. The comment period for both rules ended on May 19, 1987 to facilitate finalization of the H-2A regulations by June 1, 1987, when the H-2A program was to begin. However, the DOL
issued interim regulations on June 1, 1987 to allow itself more time to consider comments. 52 Fed. Reg. 104-20496 (6/1/87).

The H-2A program, established by IRCA § 301, allows agricultural employers to import foreign farm workers to work temporarily in the United States. However, before the foreign workers are allowed to enter the United States, the DOL must certify that (1) there are not enough U.S. workers willing, able, and available to do the work; and (2) employing the alien workers will not harm the wages and working conditions of U.S. farm laborers. Because it is commonly believed that use of foreign farm workers depresses U.S. wages, since 1964 the DOL has promulgated "adverse effect wage rates" (AEWRs) to protect the wages of domestic farm laborers. In effect, an AEWR is an enhanced minimum wage, and employers seeking certification from the DOL to use alien farm workers must agree to pay this enhanced wage to newly-hired American and foreign workers.

The proposed and interim regulations put forward by the ETA are extremely controversial. Under these regulations, among other things, the term "temporary" is defined as meaning less than twelve months; growers are required to pay fees of between $110 and $1000 per application; and growers are required to conduct affirmative recruitment efforts for qualified U.S. workers before importing aliens. Furthermore, the method for setting AEWRs is significantly revised. Under the old method, the DOL had produced AEWRs that were approximately 20 percent above the average farm wage. Under the method proposed by the DOL, annual AEWRs would be set at a level equal to the previous year's annual regional average hourly wage rates for field and livestock workers combined, as computed from U.S. Department of Agriculture quarterly wage surveys. This method would serve to decrease the wages paid to H-2A workers by about 20 percent, and has met with an angry response by some members of Congress.

In AFL-CIO v. Brock, 668 F. Supp. 31 (D.D.C. 1987), a federal district court enjoined the DOL from implementing the new AEWR and piece rates for H-2A workers. The court ordered the DOL to issue an interim AEWR within thirty days, subject to court approval. In the meantime, no H-2A labor certifications or visas were to be granted. Agricultural employers immediately responded by petitioning the D.C Circuit Court of Appeals for an emergency stay, which was granted without comment on August 17. AFL-CIO v. Brock, No. 87-5258 (D.C. Cir. Aug. 17, 1987). The decision allows for the issuance of labor certifications and visas to employers wishing to hire foreign agricultural workers under the H-2A program.
D. Changes Relating to the Issuance of J Waivers

Many exchange visitors present in the United States on J visas are required by INA § 212(e) to return to their home countries for two years. The statute allows for a waiver of the two-year foreign residency requirement under certain circumstances, such as when the home country or sponsoring agency acquiesces or when the alien can prove extraordinary hardship. The statute delegates broad discretion to the United States Information Agency (USIA) to determine whether individual waiver applications should be granted.

In an interim final rule amending 22 C.F.R. Part 514, the USIA has established two new boards relevant to exchange visitor programs. See 52 Fed. Reg. 39-5952 (2/27/87). The first, the Exchange Visitor Waiver Board, will review waiver applications in cases where two or more U.S. government agencies disagree whether the waiver should be granted, or which for some other reason are considered unusually significant, sensitive, or controversial. The second board, called the Exchange Visitor Program Designation Suspension and Revocation Board, will rule on revocations and suspensions of designations of exchange visitor programs.

While agency discretion in deciding whether or not to grant waivers to J exchange visitors clearly is very broad, the Third Circuit Court of Appeals recently ruled that it has jurisdiction to review USIA decisions recommending against waiver of the two-year foreign residency requirement under INA § 212(e). In Chong v. Director, USIA, 821 F.2d 171 (3d Cir. 1987), the court held that the regulations contained in 22 C.F.R. Part 514 “provide sufficient guidance to make possible judicial review under an abuse of discretion standard.” The court acknowledged that its holding was contrary to that of two other circuits, citing Dina v. Attorney General, 793 F.2d 473, 477 (2d Cir. 1986) (discussed in last year’s Immigration and Nationality Law Review), and Abdelhamid v. Ilchert, 774 F.2d 1447 (9th Cir. 1985). District courts that have considered the question have also found USIA decisions recommending against waiver of the two-year foreign residency requirement to be immune from judicial review.

Although the Third Circuit found that it had subject matter jurisdiction to review the USIA recommendation in Chong, it also found that the scope of review was extremely limited. “[W]e recognize that our scope of review of the USIA’s recommendation function. . . . is severely limited because the statute and the USIA’s regulations vest rather broad discretion in the Director of the USIA. As the USIA itself concedes, however, its role is to determine the policy, program, and foreign relations aspects of a case, weigh them against the hardship determined by the INS and
make a favorable recommendation for waiver if the hardship clearly outweighs the other aspects. The extent of our review, therefore, is limited to whether the USIA followed its own guidelines.” *Id.* at 176. After briefly reviewing the USIA’s decision not to recommend a waiver, and reviewing in detail the legislative history of the Exchange Visitor Program, the Court ultimately concluded that the USIA decision not to make a favorable recommendation in *Chong* was made in accordance with USIA guidelines and did not disregard congressional intent or policy.

E. Changes Affecting the L Visa Category

On February 26, 1987 the INS promulgated long-awaited revisions of the L visa regulations. In most aspects, the final rule follows the proposed rule, which was discussed in considerable detail in last year’s *Immigration and Nationality Law Review*. However, the final rule, published at 52 Fed. Reg. 38-5738, is more liberal than the proposed rule. For example, under the final rule an employer need not establish that “virtually all” of an alien employee’s time is to be spent performing managerial or executive duties, in order to qualify the alien as a manager or executive for L-1 intracompany transferee visa purposes. Instead, after receiving twenty-seven comments strongly objecting to this requirement, the INS determined that the employer need only establish that the alien’s duties will be “primarily” of an executive or managerial nature to qualify for L-1 status.

In another change from the proposed rule, the final rule drops the requirement that individuals from visa-exempt countries, such as Canada, who are beneficiaries of an approved blanket L-1 visa petition, must obtain consular approval before entering the United States. Such individuals must still obtain advance determinations of eligibility, but the INS office that adjudicated the blanket petition, not the State Department, will make the determinations.

The proposed rule had also defined “specialized knowledge” to require that the knowledge be “unique, narrowly held in the organization, and involve a key process or function which enhances the organization’s operation and competitiveness in the market.” The final rule relaxes the definition to require only “knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization’s product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market.” 8 C.F.R. § 214.2(l)(1)(ii)(D).

In a memorandum to all Service offices, the INS clarified operating procedures to implement the new regulations. For example, the memorandum noted that the definition of “subsidiary” in 8 C.F.R. §
214.2(l)(1)(ii)(K) properly includes relationships where there is over or under 50 percent ownership plus control of the entities by a parent, but improperly fails to include relationships where there is exactly 50 percent ownership plus control. The memorandum makes clear that “50 percent of the ownership plus control of the entities under any business structure shall be considered a qualifying subsidiary relationship for purposes of L classifications.”

The memorandum devotes considerable attention to blanket petitions, clarifying that blanket petitions for commercial businesses approved under the previous regulations may be extended indefinitely under the new regulations. However, since nonprofit organizations are ineligible for blanket petition approval under the new rules, blanket petitions for nonprofit organizations may not be extended. Nonprofits must file individual petitions to support extension of stay requests for aliens who entered the United States under a blanket petition.

The INS memorandum also clarifies that the maximum length of stay of five years, applicable to the L-1 classification, is not affected by short trips abroad, if the alien has resided continuously in the United States. Unless the alien has resided outside the United States for one year, the approval period of any new petition should reflect time accruing toward the five-year limit on temporary stay. Since the five-year limit applies only to H and L classifications, an alien is not precluded under the new regulations from changing to the E category after spending five years in the United States as an L or H.

IV. Temporary Residence Issues

The implementation of IRCA has led to considerable changes in the methods by which undocumented aliens can become residents of the United States. IRCA created a new category of residence, referred to as “temporary residence status,” that is available to undocumented aliens seeking legalization or special agricultural worker status under new INA §§ 210 and 245A. The temporary residence process and a number of its developing problems are described below.

A. Legalization Pursuant to IRCA

IRCA created a new two-step “legalization” program under which certain aliens illegally present in the United States are eligible for resident status. An alien eligible under new INA § 245A can become a temporary resident of the United States, and then apply for permanent residence after a period designated by statute. In order to be eligible for temporary residence status, aliens must establish that they entered the United States
before January 1, 1982 and that they have resided continuously in the United States in illegal status since that date. INA § 245A(a)(2)(A).

"Continuous residence" is defined in the governing regulations to permit aggregate absences from the United States of up to 180 days, with no single absence lasting more than forty-five days and no absence resulting from an order of deportation. 8 C.F.R. § 245a.1(c)(1).

Aliens are also eligible for temporary resident status if they can establish that they entered the United States as nonimmigrants prior to January 1, 1982 and "that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the government as of such date." INA § 245A(a)(2)(B).

Whereas two to four million people were expected to apply for legalization during the May 5, 1987 to May 5, 1988 application period, initial response to the amnesty was lower than anticipated. Nationwide, only 69,299 people applied for legalization in the first month, but the number of applications had increased significantly by September, with 527,451 legalization applications filed by September 2, 1987.

The most often cited reason for the failure of more undocumented aliens to apply for amnesty is an INS policy that family members not individually qualifying for amnesty remain subject to deportation. Under INS interpretation of IRCA, each family member must qualify independently for legalization or seasonal agricultural worker status. This rule is potentially devastating for families where one spouse entered the United States before 1982, and the other spouse and the children joined him or her after 1982, a situation very common among aliens residing in this country. The INS Central Office has authorized regional district directors to determine on a case-by-case basis what procedures to use for close relatives who are ineligible for amnesty.

The INS policy on family (dis)unity has been criticized by aliens' rights advocates, by voluntary agencies, and by various members of Congress. In response to the criticism, the INS Commissioner announced a new formal policy on family unity at the House Immigration Subcommittee's IRCA oversight hearing on October 21, 1987. The INS will grant "indefinite voluntary departure" to unmarried minor children who can establish that they were present in the United States in unlawful status prior to November 6, 1986, if the children live with their parents and both parents are lawful temporary residents. In the case of a single-parent household, the parent the child lives with must have achieved lawful temporary resident status for the child to be granted "indefinite voluntary departure."
The Commissioner pointed out also that the confidentiality provisions of IRCA prevent the INS from acting to deport ineligible family members on the basis of information received through the legalization process. Thus, the only way an ineligible family member is likely to be apprehended by the Service is in the context of workplace raids or other traditional enforcement activities. However, this does not solve the problem because, given the difficulties in finding employment that unauthorized aliens face since passage of IRCA’s employer sanctions provisions, many ineligible family members can no longer support themselves in the United States and may be forced to break up the family even without deportation.

On December 3, 1987 the House passed three immigration-related amendments to H.R.J. Res. 395, the House of Representatives’ continuing resolution to fund government agencies for fiscal year 1988. Included was an amendment prohibiting the INS from spending funds to deport the spouse or child of any alien legalized under the amnesty provisions of IRCA. However, the Senate struck the family unity language from its version of the spending bill, and the joint conference committee went along with the Senate version. Rep. Edward R. Roybal (D-CA), who sponsored the family unity measure, is expected to reintroduce legislation on the issue in 1988.

Several other areas of controversy have developed with regard to the legalization program. At the top of the list is debate about the correct interpretation of IRCA’s requirement that aliens seeking amnesty establish that they have maintained continuous physical presence in the United States since November 6, 1986. INA § 245A(a)(3)(A). IRCA specifically states that “[a]n alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . by virtue of brief, casual, and innocent absences from the United States.” IRCA § 201, INA § 245A(a)(3)(B). The regulations define continuous physical presence to permit eligibility for legalization to aliens who were outside the United States on November 6, 1986 or departed the United States between November 6 and May 1, 1987, the date the final regulations were published, “if they reentered prior to May 1, 1987, provided they meet the continuous residence requirements, and are otherwise eligible for legalization.” 8 C.F.R. § 245a.1(f), 52 Fed. Reg. 84-16189, 16208 (5/1/87).

The INS has defined the phrase “brief, casual and innocent,” as used in INA § 245A(a)(3)(B), to mean “a departure authorized by the Service (advance parole) subsequent to May 1, 1987 of not more than thirty (30) days for legitimate emergency or humanitarian purposes unless a further period of authorized departure has been granted in the discretion of the district director or a departure was beyond the alien’s control.” 8 C.F.R. § 245a.1(g), 52 Fed. Reg. at 16208-9. Needless to say, this
definition of “brief, casual and innocent” has no relation to the definition of “brief, casual and innocent” established over the years by *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) and its progeny.

Under the “Fleuti doctrine,” an innocent, brief and casual departure by a permanent resident alien does not disrupt that alien’s residence, and return to this country following such a departure does not effect an “entry.” The issue, according to the Fleuti doctrine, is whether the alien’s absence from the United States meaningfully interrupted his or her residence here, as determined by such factors as the duration of the absence, the purpose of the trip abroad, and the alien’s remaining ties to the United States during the absence. Intent to commit a crime outside the U.S.—such as smuggling other aliens into the country—has been found to preclude a finding of “innocent” departure as a matter of law. However, the manner of reentry (i.e., with or without inspection) has not been considered relevant to a Fleuti determination.

The INS interpretation of the continuous physical presence requirement is in conflict with the decision of at least one district court that has ruled on the issue. In *Bailey v. Brooks*, — F. Supp. — (W.D. Wash., December 15, 1986), a district court in Washington applied the definition of “brief, casual, and innocent absence” found in *Rosenberg v. Fleuti*, supra, to legalization, holding that an intended overnight absence in Canada by an undocumented alien in the United States, otherwise prima facie eligible for legalization, constituted a “brief, casual and innocent” absence within the meaning of INA § 245A(a)(3)(B).

More significantly, the INS position was challenged in a class action brought by voluntary agencies representing a group of aliens who would be eligible for legalization but for brief departures to Mexico following the passage of IRCA in November 1986. The plaintiffs in *Catholic Social Services, Inc. v. Meese* were successful in obtaining a temporary restraining order from a district court in the Eastern District of California on November 26, 1986, that prohibited the INS from deporting or excluding any alien who might be eligible for legalization but for the INS’s interpretation of the continuous physical presence requirement and required certain safeguards before permitting aliens threatened with deportation to effect voluntary departure.

However, the court of appeals reversed the district court decision in April and found that the Attorney General’s construction of IRCA’s continuous physical presence requirement was reasonable and that the district court had abused its discretion. *Catholic Social Services, Inc. v. Meese*, 813 F.2d 1500 (9th Cir. 1987). After regulations were finalized by the INS on May 1, 1987 (8 C.F.R. § 245a.1(f) and (g)), the court of appeals denied plaintiffs’ petition for rehearing and suggestion for
rehearing en banc as moot, withdrew and vacated its April decision, and remanded to the district court for further proceedings. The plaintiffs moved to amend their complaint to challenge the new May 1 cutoff date for "brief, casual and innocent departures" contained in the INS regulations, claiming that this new cutoff date is as arbitrary and capricious as the November 6 cutoff date contained in the original proposed regulations. The case once again is before the district court, awaiting a decision on the merits.

A separate but related issue involves the INS's interpretation of IRCA's requirement, contained in INA § 245A(a)(2)(A), that aliens applying for legalization establish that they have resided in continuous unlawful status since January 1, 1982. Many aliens who have resided in the United States illegally since prior to 1982 have made brief departures outside this country and then returned on fraudulently obtained tourist visas. Under the INS's initial interpretation of § 245A(a)(2)(A), such aliens would have been ineligible for legalization unless their visas expired prior to 1982, on the premise that their status in the United States was legal for the duration of their visas and, thus, interrupted their continuous unlawful presence. Under this interpretation, aliens who exited and then reentered without inspection were eligible for amnesty, while aliens who reentered on visas were not.

Two class action lawsuits were filed in response to this interpretation. *League of Latin American Citizens v. INS*, No. 87-04757 (C.D. Cal., filed July 22, 1987), challenged the INS's policy to deny stays of deportation, work authorization and legalization to otherwise qualified aliens who reentered the United States after January 1, 1982 with nonimmigrant visas, Forms 1-94, or other forms of documentation. The same issues were raised in *Haitian Refugee Center v. Rivkind*, No. 87-1720 CIV–Atkins (S.D. Fla. filed Sept. 16, 1987).

At a press conference held in Washington, D.C., on October 8, 1987, INS Commissioner Alan C. Nelson announced that the INS was changing its policy on defining "continuous unlawful residence." According to Nelson's statement, an undocumented alien who reentered the United States with a nonimmigrant visa or other documentation, but who really intended to resume his or her residence and remain permanently in this country, accomplished reentry through a fraudulent act and therefore maintained continuous unlawful status. However, since their visa fraud renders them excludable, those aliens will have to file waivers under INA § 212(a)(19) to qualify for legalization. This policy change leaves unclear whether an alien admitted to the United States for permanent residence before January 1, 1982, with an immigrant visa obtained by fraud or by willful misrepresentation of a material fact, is considered to be residing
in the United States in an unlawful status for legalization purposes. This issue has yet to be resolved by the INS.

Another area of controversy has developed concerning the Service's interpretation of the term "known to the Government." INA § 245A(a)(2)(B) requires that an alien who entered the country prior to January 1, 1982 as a nonimmigrant, and who predicates eligibility for legalization on the fact that her status became unlawful prior to January 1, 1982, must show that the unlawful status was "known to the Government" by the January 1982 cutoff date. The INS has defined this provision restrictively, determining that "known to the Government" means known to the INS. 8 C.F.R. § 245a.1(d).

This definition of "known to the Government" was successfully challenged in a case brought by an Iranian student whose F-1 student visa was valid through June 1, 1982, but who engaged in unauthorized employment from at least December 24, 1980 until April 22, 1982. Farzad v. Chandler, 670 F. Supp. 690 (N.D. Tex. 1987). The INS became aware of Farzad's illegal employment in March of 1982. He ultimately was found deportable, a decision that was upheld on appeal. As a result, the INS issued a warrant of deportation against Farzad.

Farzad applied to the INS for a stay of deportation, arguing that he was prima facie eligible for legalization under IRCA. He established that he legally entered the U.S. prior to January 1, 1982; that he was in unlawful status as of December, 1980; and that the Social Security Administration and the Internal Revenue Service had records of his employment before January 1, 1982. He also established that the INS knew of his status at some point before March 11, 1982, when the Service first contacted his employer.

The INS denied Farzad's application for a stay of deportation, and he then challenged the denial in habeas corpus proceedings as violative of new INA § 245A(e)(1), which provides for temporary stays of deportation when an alien is prima facie eligible for legalization. The district court agreed that the INS regulation defining the phrase "known to the Government" (8 C.F.R. § 245a.1(d)), was inconsistent with congressional intent and outside the scope of INS authority. According to the court, "Congress intended the phrase 'known to the Government' to be broader than merely the INS, and at least broad enough to include the Internal Revenue Service and the Social Security Administration." Id. at 694. The court therefore granted habeas corpus, directed that Farzad remain at liberty without bond, ordered that deportation proceedings be stayed, and prohibited the INS from utilizing their restrictive definition of "known to the Government" as a basis for denying Farzad's legalization application.
This decision is expected to have a far-reaching impact, since it opens the door for legalization of the many nonimmigrant aliens in the United States who engaged in unauthorized employment in violation of their status prior to January 1982, without the INS's direct knowledge. Given the importance of the decision, the INS is expected to appeal.

The impact of criminal convictions on aliens applying for legalization has also given rise to concern. Under new INA § 245(a)(4)(B), an alien applying for legalization cannot have been convicted of any felony or of three or more misdemeanors committed in the United States. The INS defined the terms “felony” and “misdemeanor” for legalization purposes in 8 C.F.R. § 245a.1(o) and (p). 52 Fed. Reg. 84-16190, 16209 (5/4/87). Under these definitions, a misdemeanor is “a crime, committed in the United States, punishable by imprisonment for a term of one year or less but more than five days, regardless of the term such alien actually served, if any.” 8 C.F.R. § 245a.1(o). A felony is “a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any.” 8 C.F.R. § 245a.1(p).

The INS definition of a misdemeanor was intended to promote uniformity, by remaining consistent from state to state, regardless of any individual state's definition of a misdemeanor. However, problems arose over certain states' treatment of motor vehicle violations, in particular driving while intoxicated (DWI). For example, in Texas and South Carolina first offense DWI's are punishable by a term of up to two years in prison, although DWI's are considered misdemeanors. In North Carolina a person convicted of driving without insurance can be imprisoned for up to two years. Thus, people convicted of motor vehicle violations in these states were being rendered ineligible for legalization, while people convicted of these violations in other states remained eligible.

In response to considerable lobbying by legislators from Texas and by other concerned individuals, the INS has proposed a new rule, revising its definitions of “felony” and “misdemeanor” for legalization purposes. See 52 Fed. Reg. 189-36582 (9/30/87). Under the new definitions, a felony is “a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when [under] the state law on which the conviction is based [the crime] is defined as a misdemeanor and the sentence imposed is less than one year. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor.” See revised 8 C.F.R. § 245a.1(p). The new definition of a misdemeanor states that a misdemeanor is “a crime, committed in the United States, either (1) punishable by imprisonment for a term of one year or less but
more than five days, regardless of the term such alien actually served, if
any, or (2) a crime treated as a misdemeanor under 8 C.F.R. 245a.1(p).”
See revised 8 C.F.R. § 245a.1(o).

Further help to aliens with criminal convictions has been provided by
an INS telex on the effect of expungements on eligibility for legalization.
In the telex, the INS stated that “cases involving expungements of crim-
inal records should be recommended for approval by legalization offices
and certified to the regional processing facility. . . .” The regional facilities
then will reach a decision on the effect of particular expungement pro-
visions on eligibility for benefits under INA § 245A. The INS Western
Regional Legalization Office already has advised that in California a writ
of coram nobis acts as a complete expungement of a conviction for
purposes of INA § 245A(a)(4)(B), but an “expungement,” as the term
is used in California, probably will not qualify an alien for legalization.
Other regional legalization offices have yet to issue guidelines on this
issue.

Another provision that is the subject of concern is § 245A(d), which
provides for the waiver of certain grounds of excludability traditional to
the INA. According to INA § 245A(d)(2), many grounds of excludability
under INA § 212(a) are not applicable to INA § 245A. Those that are
applicable generally are waivable “for humanitarian purposes, to assure
family unity, or when it is otherwise in the public interest.” The only
grounds that cannot be waived are INA §§ 212(a)(9) and (10), relating
to criminal convictions; § 212(a)15, relating to aliens likely to become
public charges; § 212(a)(23), relating to drug offenses, except insofar as
single offenses of simple possession of thirty grams or less of marijuana
are concerned; §§ 212(a)(27), (28) and (29), relating to membership in
certain organizations and to national security; and § 212(a)(33), relating
to participation in Nazi persecution. See INA § 245A(d)(2)(B)(ii).

The ground of excludability relating to public charge, § 212(a)(15),
has caused particular concern in the legalization field. The traditional
test for admissibility utilizes the federal poverty guidelines to determine
the likelihood that an alien will become a public charge. Under IRCA,
an alien “is not ineligible for adjustment of status. . . . due to being
inadmissible under section 212(a)(15) if the alien demonstrates a history
of employment in the United States evidencing self-support without re-
cipient of public cash assistance.” INA § 245A(d)(2)(B)(iii). Further, the
public charge ground of excludability is waivable when an alien applies
for temporary resident status; but at the application stage for permanent
resident status, the ground becomes unwaivable. See INA §
245A(d)(2)(B)(ii)(11). These provisions appear to have been designed
to give the benefit of a doubt to aliens who are below the poverty level
but who may nevertheless be able to support themselves without resorting to public assistance.

The INS regulations interpret the public charge ground more restrictively than the legislative intent appears to require, causing concern over the continued eligibility of numerous aliens who are among the "working poor." The legislative history suggests that aliens are only to be rendered inadmissible by having received public cash assistance if they are below the poverty guidelines at the time of application for legalization. However, under the INS regulations (8 C.F.R. § 245a), aliens have the burden of proving that they are not likely to become public charges, regardless of present income level. An alien can meet this burden through evidence of a history of employment, evidence that he or she is "self-supporting" (i.e., bank statements, stock or other assets), or an affidavit of support completed by the applicant's spouse, parents, or another immediate family member. 8 C.F.R. § 245a.2(d)(4). Receipt of "public cash assistance" by the alien at any time since entry will render him or her ineligible for legalization, and force the alien to apply for a waiver. "Public cash assistance" includes all "supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels," but does not include such assistance as food stamps or public housing that are paid to the vendor and not the alien. See 8 C.F.R. § 245a.1(i).

A special waiver provision has been established under 8 C.F.R. § 241a.2(k)(4), whereby an alien who at some time has received public cash assistance may be allowed to proceed with legalization if the INS determines he or she is no longer likely to become a public charge. Pursuant to § 241a.23(k)(4):

An alien who has a consistent employment history which shows the ability to support himself and his or her family, even though his income may be below the poverty level, may be admissible under paragraph (k)(2) of this section [i.e., with a waiver]. The alien's employment history need not be continuous in that it is uninterrupted. It should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income and maintain his or her family without recourse to public cash assistance. This regulation is prospective in that the Service shall determine, based on the alien's history, whether he or she is likely to become a public charge. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an
applicant has received public cash assistance will constitute a significant factor. 52 Fed. Reg. 84-16189, 16212 (May 1, 1987).

Aliens and immigration practitioners also have been concerned about potential tax consequences of legalization for poor aliens. The Internal Revenue Service (IRS) has confirmed that amnesty applicants must pay taxes. IRS Commissioner Lawrence B. Gibbs stated on May 12, 1987 that anyone who has not filed tax returns or paid taxes owed in past years is liable for those taxes if the case comes to the attention of the IRS, regardless of the person's immigration status. It is believed that tax concerns also may be a reason why more undocumented aliens have not come forward to apply for amnesty.

The Tax Reform Act of 1986 created a new § 6039E of the Internal Revenue Code (IRC), effective January 1, 1988, that requires aliens applying for permanent resident status to provide certain information, including whether the individual was required to file tax returns for the previous three years. A $500 fine is imposed for failure to provide the information. Subsection (e) of § 6039E allows the IRS to exempt certain individuals from compliance with this new requirement, and the IRS is apparently considering granting such exemption to aliens applying for legalization under IRCA. However, no exemption has yet been granted.

Under INA § 245A(c)(5), all amnesty applications are confidential and information contained in these applications cannot be reported to the IRS or any other agency. Nevertheless, the new tax information requirement is likely to deter legalization efforts if no exemption is granted, since experts believe that as many as 30 percent of undocumented workers have not paid federal income taxes. In addition, tax concerns are causing employers of undocumented aliens to hesitate to provide verification of employment to aliens seeking to prove residence and a history of employment, since there is nothing to prevent the IRS from auditing employers whose tax returns show an inexplicable jump in the number of employees.

B. Special Agricultural Worker Status

The Immigration Reform and Control Act of 1986 added a new section 210 to the INA, providing for adjustment of status for "Special Agricultural Workers" (SAWs). Like aliens applying for legalization pursuant to INA § 245A, aliens applying for SAW amnesty become eligible for permanent resident status under a two-step program, first adjusting status to that of temporary resident aliens and then to that of permanent residents. The filing period for SAW amnesty applications began on June 1, 1987.
In order to be eligible for SAW status, an alien must establish that he or she has "(i) resided in the United States, and (ii) performed seasonal agricultural services in the United States for at least 90 man-days, during the 12-month period ending on May 1, 1986." INA § 210(a)(1)(B). The alien must also establish that he or she is admissible to the United States as an immigrant. INA § 210(a)(1)(C). However, many of the INA § 212(a) exclusions do not apply to SAWs (see INA § 210(c)(2)(A)), and most of the other grounds of exclusion may be waived by the Attorney General "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." INA § 210(c)(2)(B). The exclusion grounds that cannot be waived are the same as those for legalization applicants.

The biggest controversy surrounding the SAW provisions involves the definition of "seasonal agricultural services." According to IRCA, "the term 'seasonal agricultural services' means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture." INA § 210(h). Despite protests over the definition, the United States Department of Agriculture (USDA) final regulations define "other perishable commodities" as those commodities other than fruits and vegetables that are produced as a result of seasonal field work, and that have critical and unpredictable labor demands. The list includes Christmas trees, cut flowers, herbs, hops, spanish reeds, spices, sugar beets, and tobacco, but does not include any dairy products, livestock, poultry and poultry products or sugar cane. According to the USDA, sugar cane is omitted because it does not meet the tests of critical harvest time and perishability. See 52 Fed. Reg. 104-20372 (6/1/87).

Two immigrants' rights groups and five alien sugar cane workers have intervened in a case filed on June 1, 1987 by the Federation for American Immigration Reform (FAIR), a forestry association, and several individual U.S. citizen forestry and tobacco workers. In the case, Northwest Forest Workers Association v. Lyng, No. 87-1487-H (D.D.C. filed June 1, 1987), FAIR and its co-plaintiffs charge that the definition of "other perishable commodities" adopted by the USDA and the INA is too broad and is in violation of the statutory language and legislative history of IRCA. According to the plaintiffs, only fresh fruits and vegetables should be included in the SAW regulations. They are asking the court to rule that the USDA regulations exceed the limits established by Congress and to issue an injunction against the INS forcing it to revoke any grants of amnesty made pursuant to those portions of the regulations declared illegal by the court.
The sugar cane workers intervening in the case have taken the opposite view: they argue that the USDA's exclusion of sugar cane from the "perishable commodities" list is arbitrary, capricious, an abuse of discretion, and contrary to the statutory provisions of IRCA. They have asked the court to declare sugar cane a vegetable and/or perishable commodity and to enjoin INS from continuing to enforce the current regulation. They also have asked the court to order INS to accept SAW applications from alien sugar cane workers, to grant employment authorization to such applicants, and to allow them to enter the United States under the liberalized transitional admission standards for SAW applicants described below.

A second nationwide class action has been filed, challenging the exclusion of cotton from the USDA definition of "perishable commodities." *Valencia v. Lyng*, No. 87-630 TUC RMB (D. Ariz. filed Aug. 26, 1987). The suit charges that the exclusion of cotton from the list of "perishable commodities" was arbitrary, capricious, and an abuse of discretion. The plaintiffs sought an injunction to stop the USDA from enforcing the regulation, from continuing to exclude cotton from the list, and from refusing to permit plaintiffs and other alien cotton field workers in the class to apply for SAW status.

Attorneys for the plaintiffs notified the INS that if the agency did not voluntarily permit cotton workers to file for SAW status and to obtain work authorization and permission to remain in the United States pending the outcome of the litigation, they would pursue an injunction compelling the same result. In response, the INS agreed to allow alien cotton workers to file completed SAW applications and to grant such workers interim work authorization (Form I-688A) valid for six months. Since the *Valencia* suit is a nationwide class action, this agreement will apply to cotton workers throughout the United States. The INS has indicated that all SAW applications submitted by cotton workers as a result of the agreement will be "provisionally denied" by INS, pending outcome of the case.

While these lawsuits are pending, INS has issued a series of cables clarifying which specific agricultural products and activities qualify an alien for SAW status. For example, the INS has included all grains, corns, beans, melons, grapes, potatoes, and nuts grown for human consumption, as well as mushrooms, within the USDA definition of fruits, vegetables and "other perishable commodities." Beekeeping also can qualify as a seasonal agricultural service within the meaning of IRCA, as long as the bees are kept for pollination of a perishable commodity and not for honey production. Off-site sorting, grading, drying and packing of crops or produce can also qualify as "field work" if at least 85
percent of the produce packed was grown by the employer. If these cables are any indication, it appears that much of the implementation process for the SAW provisions will involve very detailed defining and redefining of the products and activities covered by the provisions, with litigation taking over where disputes cannot be resolved.

Aside from the controversy over which products qualify an alien for SAW status, the other major controversy under the SAW provisions involves the problem of aliens seeking to enter the United States from outlying areas (particularly Mexico) to apply for SAW status. Unlike the legalization provisions, the SAW provisions do not require that an alien be continuously physically present in the United States to qualify for amnesty, and instead recognize and accept that many seasonal agricultural workers commute between Mexico and the United States. See INA § 210(a)(4) and (b)(1)(B). INA § 210(d) specifically provides that no alien shall be deported or excluded who is apprehended prior to or during the SAW application period and who can establish a nonfrivolous case of eligibility for SAW status. However, the INS regulations state that only aliens physically present in the United States before May 1, 1987 can apply for SAW temporary resident status in the United States. All other aliens must apply at an overseas processing office having jurisdiction over their foreign residence. 8 C.F.R. § 210.2(c)(1).

In Catholic Social Services, Inc. v. Meese, 664 F. Supp. 1378 (E.D. Cal. 1987), the district court enjoined the INS from excluding any alien apprehended between November 6, 1986 and June 1, 1987 who has a nonfrivolous claim of eligibility for SAW status, thereby adding one month to the INS regulations. The court based its decision on the fact that “[t]he plain language of [§ 210(d)] demonstrates that Congress intended the section to apply to all aliens with nonfrivolous claims apprehended during the preapplication period, regardless of their date of reentry into the United States.” Id. at 1385.

The problems encountered by foreign farm workers attempting to enter the United States, due to the restrictive definitions of “perishable commodities” adopted by the USDA, to the entry restrictions created by the INS, and to documentation requirements, led to an acute shortage of farm workers during the early summer months, which threatened to cause huge crop losses on the West Coast. As of June 24, 1987 the INS had received only 10,281 SAW applications, indicating that only a small fraction of the number of foreign farm workers relied on to harvest crops in a normal year had returned to the United States.

The primary cause of this problem is believed to be the Service’s interpretation of what constitutes a nonfrivolous case of eligibility for SAW status, allowing an alien’s entry into the United States. The INS
required that applicants in Mexico submit complete applications, including all supporting documentation, before entering the United States and this was the only method by which an alien outside this country could establish a nonfrivolous claim for SAW status. Many legislators consider this requirement far too restrictive. For example, Senator Peter Wilson (R–CA) wrote to President Reagan on June 18, asking for his help in resolving the crisis and suggesting that workers in Mexico who can make basic declarations of the types of documents they intend to submit be allowed to enter this country and proceed to job sites with temporary work authorization.

In response to concerns about crop losses, the INS agreed in late June to several transitional changes in SAW procedures that would allow aliens to enter the country more easily. The most significant of these changes was a postponement to June 26, 1987 of the cutoff date for entry into the United States of agricultural workers wishing to file SAW applications in this country. The INS also adopted Sen. Wilson’s proposal to allow SAW applicants to enter the United States on a transitional basis, upon the filing of applications and fees at an American consulate or at the border, provided that the applicants assemble and submit supporting documentation within ninety days of entry. This transitional SAW provision was made effective until November 1, 1987, when the 1987 growing season ended. The INS also opened a special SAW border processing center at Calexico, California on June 26, and increased the number of consular offices in Mexico authorized to accept SAW applications.

On October 15, 1987 a Federal district court judge in Arizona issued a preliminary injunction against the INS that, among other things, extends the cutoff date for those applying for SAW amnesty in the United States even further, to December 1, 1988. Romero-Romero v. Meese (D. Ariz., No. 87-407 PHX RCB). The judge noted that the Service’s repeated changing of the cutoff date demonstrated that “the agency’s action tends to be arbitrary and has little basis in IRCA.” He enjoined the INS from deporting or excluding any apprehended alien who entered this country prior to December 1, 1988, without first determining whether the alien has a nonfrivolous claim for SAW status.

In another development, a national class action lawsuit has been filed against the INS by the United Farm Workers (UFW) and thirteen named plaintiffs, that challenges the Service’s refusal to grant SAW status or interim work authorization to undocumented alien farm workers already present in the United States who do not have corroborative evidence of their work history. See 8 C.F.R. §§ 210.3(b)(3) and 210.4(b)(2). Application of strict documentation requirements to farm workers who have been physically present in the United States since prior to May 1, in
conjunction with the loosening of restrictions toward applicants outside the United States described above, has had the effect of allowing U.S. growers to replace unionized workers with nonunion workers who have just come over from Mexico. The UFW’s suit seeks a declaratory judgment and an injunction against further enforcement of the current INS procedures, as well as an order that the INS subpoena corroborative documents from growers unwilling to provide them. See United Farm Workers of America v. INS, No. 87-1064-MLS-EM (E.D. Cal. filed July 22, 1987).

V. Permanent Residence Issues

In contrast to many other areas of immigration law, there were few developments regarding permanent residence issues in 1987. One change, however, was the establishment by the Department of Labor (DOL) of the Board of Alien Labor Certification Appeals to review labor certification denials filed after May 8, 1987. See 52 Fed. Reg. 67-11217 (4/8/87). The Board is chaired by the Labor Department’s Chief Administrative Law Judge and consists of seven administrative law judges appointed under 5 U.S.C. § 3105, assigned to the Department, and selected by the Chief Administrative Law Judge. Requests for review will be considered by panels of the Board or by individual recommendations of an administrative law judge to such panels. Procedures will be governed by the Labor Department’s “Rules of Practice and Procedure Before the Office of Administrative Law Judges.” See 29 C.F.R. Part 18.

Since May 8, 1987, all labor certification appeals have gone to the full panel. Each case has been assigned to one member, who drafts a memorandum about the facts and issues and distributes it to the other Board members. The full Board meets about every two weeks to vote on cases, after which opinions are drafted. While the Board’s decisions are not formally designated as precedents, the decision-making process is designed to insure consistency in future cases involving similar issues.

The Board issues its first decision on October 15, 1987, in Matter of Amger Corp., 87 I.N.A. 545, affirming a decision that no bona fide job opening was available to U.S. workers where the alien’s family owned 100 percent of the stock in a closely held corporation and the beneficiary was both president and general manager of the company.

Also affecting cases based on job offers was a decision by the Public Health Service (PHS) to discontinue its involvement in labor certifications for foreign physicians. The PHS discontinued its participation in Schedule A Group I precertifications based on an internal study finding, among other things, that less than one-third of the foreign physicians
certified continued to provide direct patient care for any significant time in the shortage areas for which they were certified. The Labor Department followed suit in June 1987 with publication of a final rule amending 20 C.F.R. Part 656 to remove alien graduates of foreign medical schools from the Schedule A Group I precertification list. 52 Fed. Reg. 105-20593 (6/2/87). The change applies to applications for permanent alien labor certification received for processing on or after July 2, 1987. Under the new system, foreign physicians can still obtain labor certification through the normal process, i.e., by having an employer petition on their behalf. In addition, alien physicians and surgeons may still qualify for Schedule A Group II precertification as persons of exceptional ability in a science.

Regarding family-based applications for lawful permanent resident (LPR) status, the biggest changes resulted from implementation of the Immigration Marriage Fraud Amendments (IMFA) of 1986, Pub. L. No. 99-639. The IMFA, effective November 10, 1986, overhauled both adjustment of status based on marriage to a U.S. citizen or lawful permanent resident alien (LPR) and the processing of fiance nonimmigrant visa applicants under INA § 101(a)(15)(K). Fiance(e) visas are only to be issued, under the Act, “after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien’s arrival, except that the Attorney General in his discretion may waive the requirement that the parties have previously met in person.” See INA § 214(d). Once married, aliens entering the United States on K visas must now go through formal adjustment procedures under INA § 245(a).

Under IMFA, permanent resident status is granted only on a conditional basis to aliens obtaining their status via a marriage to a U.S. citizen or an LPR, if the “qualifying marriage” was entered into less than two years before seeking permanent residence. The same conditional status applies to the derivative beneficiary children of individuals adjusting status through a “qualifying marriage.” During the first two years of residence, the conditional resident status will be terminated and the spouse and children subject to deportation if the INS discovers that the “qualifying marriage” was entered into for immigration purposes, has been judicially annulled or terminated (other than by death of a spouse), or a fee or other consideration was paid to the citizen or LPR spouse in exchange for filing the immigration petition.
To remove the conditional status, a joint petition must be filed by the couple within ninety days preceding the second anniversary of the granting of conditional status, and the couple must appear at an interview unless waived by the INS. At that time, the couple has the burden of proving that the marriage is still legally valid, and that none of the conditions described above apply. If the couple can meet these requirements, the INS will remove the conditional status, and the alien will become an LPR. In the case of an adverse determination, the conditional status will be terminated and the alien will be subject to deportation.

The Act further restricts marriage-based adjustments by providing that an alien who became an LPR based on marriage to a U.S. citizen or an LPR, and subsequently divorced, cannot remarry and file a spousal visa petition on behalf of a new alien spouse unless: (1) five years have elapsed since she or he first acquired LPR status; or (2) the INS is satisfied by “clear and convincing evidence” that the prior marriage was not contracted to evade the immigration laws; or (3) the prior marriage was ended by the other spouse’s death.

The most controversial aspect of the new marriage fraud law is § 5, new INA § 204(h), that prevents an alien who marries while subject to exclusion or deportation proceedings from adjusting status based on that marriage until the alien has resided outside the United States for two years after the marriage. Any alien who marries between the issuance of an order to show cause and the alien’s departure from the United States will be subject to this two-year foreign residency requirement.

This section has been attacked as unconstitutional in several lawsuits. In Smith v. INS, No. 87-1988-C (D. Mass. filed Aug. 6, 1987), a U.S. citizen woman and her Nigerian husband charged that § 5 of the marriage fraud law violates due process by depriving them of a hearing or other opportunity to show that their marriage is genuine. Plaintiffs also charge that § 5 violates their rights to equal protection by establishing an “irrebuttable presumption” that all marriages entered into by aliens in deportation proceedings are fraudulent. They are seeking a declaration that § 5 is unconstitutional, and an order forcing the INS to adjudicate an 1-130 marriage petition filed by Ms. Smith on behalf of her husband.

Similar issues have been raised in Almario v. Attorney General, No. 87CV73219DT (E.D. Mich. filed Aug. 28, 1987), and other cases pending before the Board of Immigration Appeals.

IRCA also had an effect on family-based immigration cases. Section 315, new INA § 101(b)(1)(D), grants to natural fathers of illegitimate children the same rights as those granted to mothers, provided that a father has or had a bona fide parent-child relationship with the illegitimate child. In a recent decision, the BIA has held that even though an ile-
A legitimate child can now qualify for immigration purposes as the "child" of his or her natural father, a visa petition filed prior to IRCA's effective date of November 6, 1986 may not be used to obtain preference status because approval of the petition would give the beneficiary a priority date to which he or she was not entitled at the time the petition was filed. *Matter of Atembe,* Int. Dec. 3023 (B.I.A. 1986).

Another change in the adjustment of status process was brought about by an IRCA provision precluding adjustment to aliens who have failed (other than through no fault of their own for technical reasons) to maintain continuously a legal status since entry into the United States. See INA § 245(c)(2). New 8 C.F.R. § 245.1(c) defines "legal immigration status" to include five enumerated groups. The definition does not include aliens in voluntary departure status (including extended voluntary departure) or aliens reinstated to student status after a lapse of such status. See 52 Fed. Reg. 41-6320, 6321 (3/3/87).

Termination of the Stateside Criteria Program also affected the family-based immigration area. The program was established in the 1970s to allow aliens seeking immigrant status through close family relationships, but ineligible for adjustment of status, to remain in the United States while their applications were pending and then to process their visas in Canada or Mexico, rather than in their native countries.

The program was to be terminated July 1, 1987 due to the passage of IRCA, which the State Department believed to render the program an anomaly, and because of doubts as to whether the program could survive the State Department's 1987 budget cuts. However, in a notice published in the Federal Register on June 30, 1987, the State Department rescinded its previously announced termination date, and extended the comment period on the proposal for two weeks. The announcement stated that it was the State Department's intention to make a final determination concerning the termination of the Stateside Criteria Program no later than September 1, 1987. See 52 Fed. Reg. 125-24362. However, it was not until late November that the State Department finally acted to terminate the Stateside Criteria Program, effective December 31, 1987. See 52 Fed. Reg. 227-45272 (11/25/87).

In addition to these changes, IRCA created two new mechanisms by which aliens can obtain lawful permanent residence in the United States. By updating the registry provisions contained in INA § 249, IRCA reactivated a provision which had been of little use for many years. Under the amended § 249, aliens who have been present in the United States since January 1, 1972 now are eligible to adjust status to lawful permanent residents. An alien must prove that: (1) he or she entered the United States prior to January 1, 1972; (2) he or she has resided in this country
continuously since that entry; (3) he or she is a person of good moral character; and (4) he or she is not ineligible for citizenship.

Most exclusion grounds do not apply to applicants for registry, although INS contends that the § 212(e) foreign residency requirement, applicable to many J-1 visa holders, applies to registry applicants; that excludability under INA § 212(a)(33), relating to the persecution of others, renders an alien "statutorily ineligible" for registry; and that excludability under § 212(a)(32), as it relates to certain graduates of foreign medical schools, will be viewed as "a serious negative factor." These positions almost certainly will lead to litigation.

Most significantly in the immigrant visa area, IRCA created 10,000 nonpreference immigrant visas, 5000 to be made available in each of fiscal years 1987 and 1988. Section 314 of IRCA provides that the visa numbers first shall be made available to qualified immigrants who are natives of foreign states "adversely affected" by the 1965 amendments to the INA. The State Department set up a very specific procedure whereby aliens could apply for the nonpreference (NP-5) visas. Under this procedure, the State Department only accepted applications by mail, at a central post office box in Washington, D.C., between Wednesday, January 21, 1987 and Tuesday, January 27, 1987. After January 27, the State Department held a lottery among the applicants, and then assigned priority dates to successful applicants based upon the actual date and time on which the selected applications were formally filed.

Approximately 1.3 million people applied for the 10,000 spots in the NP-5 program. Of these 1.3 million people, the Irish fared best, collecting 3,112 visas. Canada finished second in the visa lottery, followed by Great Britain, Indonesia, Poland, Japan, Italy and West Germany. In March the State Department issued Packet 3s to the lucky beneficiaries of NP-5 visas, to enable authorities to process the first 5,000 applicants by September 30, 1987. The remaining 5,000 applicants are to be processed by September 30, 1988.

The NP-5 program was challenged in Fakheri-Rad v. George Shultz, Secretary of State, No. CV 87-00393 (IH) (C.D. Calif.), on the grounds that the NP-5 program discriminates against Latin Americans and Asians in favor of more “traditional” immigrants from Northern Europe and that the State Department’s failure to engage in formal notice and comment rulemaking in setting up its implementation procedures rendered the procedures illegal. The court denied the plaintiffs’ application for a temporary restraining order when the Assistant U.S. Attorney stipulated that none of the nonpreference visa numbers would be designated or issued for at least sixty days. After a hearing on the merits of the case, the district court upheld the State Department’s implementation of IRCA
§ 314 and denied the plaintiffs’ application for a stay, thus clearing the way for the government to begin assigning visa numbers to the visa lottery winners.

The State Department shortly announced that nonpreference visa numbers in the NP-5 category would be made available beginning April 15, 1987. However, only those aliens assigned priority dates earlier than February 7, 1987 at 12:01 A.M. were to be eligible for visas on that date. Given the number of applicants whose applications were formally filed prior to the February 7 cutoff date, the State Department expected the NP-5 priority date to progress very slowly. As it turned out, there was no further progress during fiscal year 1987, but with the opening of fiscal year 1988 on October 1, 1987 the NP-5 priority date advanced to February 12, 1987 at 12:01 A.M., where it has remained ever since. Since the first 10,000 NP-5 applicants were all assigned priority dates of February 11 or earlier, they all now are eligible for visas, and no further progress in the priority date is expected until they all have been given the opportunity to apply.

A second challenge to the NP-5 program resulted in a U.S. District Court dismissal with prejudice of the plaintiffs’ actions in Mulligan v. Shultz, CA 3-87-1466-G, (N.D. Tex.). The judge in Mulligan relied on the principle that “[d]ecisions of United States consulars on visa matters are nonreviewable by the courts” to find that the court lacked subject matter jurisdiction to consider plaintiffs’ claim that their applications for NP-5 visas were wrongfully rejected by consular officers abroad. This same principle also provided the basis for a similar decision relating to the issuance of nonimmigrant visitor’s visas by consular officials in Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987).

VI. Refugee and Asylum Issues

A. Political Asylum

1. Standards of proof.

In 1987 the Supreme Court finally resolved the question of the applicable standard of proof for requests for political asylum under INA § 208(a). Cardoza-Fonseca v. INS, 107 S. Ct. 1207 (1987). INA § 208(a) provides for the discretionary grant of political asylum to an alien who qualifies as a refugee under INA § 101(1)(42)(A). A refugee is defined as “any person who is outside any country of such person’s nationality and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, na-

In contrast, INA § 243(h) provides for mandatory withholding of deportation to any country where an alien's life or freedom would be threatened because of race, religion, nationality or membership in a particular social group. In *INS v. Stevic*, 104 S. Ct. 2489 (1984), the Supreme Court held that in order to meet their burden of proof under § 243(h), aliens must show a “clear probability” of persecution. This standard requires a showing by the alien that it is *more likely than not* that their life or freedom would be threatened in the country to which they would be deported. *Id.* at 1398.

Since the Supreme Court's decision in *Stevic*, the circuits have been divided over the question of whether the “well-founded fear” standard of § 208(a) is meaningfully different from the “clear probability” standard of § 243(h). The decisions of the various circuits on this subject are discussed at considerable length in the introductory survey to the 1986 *Immigration and Nationality Law Review*. The controversy created by these decisions has now been settled by the Supreme Court's decision in *Cardoza-Fonseca*.

In *Cardoza-Fonseca*, the Court held that the “well-founded fear” standard applicable to asylum claims is significantly more lenient than the “clear probability” standard applicable to claims for withholding of deportation. The Court based this holding on the plain language of the statute, as well as the legislative history of INA. According to the Court, the “well-founded fear” standard requires consideration of subjective factors, i.e., the alien's fear, not considered in an application for withholding of deportation. “That the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a 'more likely than not' one.” 107 S. Ct. at 1213.

While the Court was unequivocal in its finding that the standards applicable to asylum and withholding are meaningfully different, it deferred to future administrative decisions to establish the precise meaning of a “well-founded fear of persecution.”

The BIA began the process of defining “well-founded fear” in *Matter of Mogharrabi*, Int. Dec. 3028 (B.I.A. 1987). After reviewing the decisions of all the circuits taking a position on the issue, the Board adopted the Fifth Circuit's general approach as set forth in *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986). In *Guevara-Flores*, the court held that “[a]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country.” *Id.* at 249. The BIA adopted this “rea-
reasonable person” approach, stating: “this ‘reasonable person’ standard appropriately captures the various formulations that have been advanced to explain the well-founded fear test. Carcamo-Flores v. INS, [805 F.2d 60 (2d Cir. 1986)] at 68. It is a standard that provides a ‘common sense’ framework for analyzing whether claims of persecution are well-founded. Moreover, a reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable.” Mogharrabi at 10.

In Mogharrabi, the BIA also discussed some of the evidentiary issues facing applicants for political asylum. The Board first addressed the problem of lack of documentary and corroborative evidence in many asylum cases. According to the Board:

Although every effort should be made to obtain [documentary or other corroborative evidence to support their claims of persecution], the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear. Mogharrabi at 10 (emphasis added).

The Board also suggested that where an alien has applied for both political asylum and withholding of deportation, “evidence and testimony may still be presented in a single hearing. However, in actually adjudicating the applications, a clear delineation of the findings should be made as to each application. We anticipate that as a general rule the asylum application, with its lower burden of proof, will be adjudicated first. If the applicant is found eligible for asylum, and worthy of the relief as a matter of discretion, there may be no need to determine as well whether a clear probability of persecution exists.” Mogharrabi at 12.

The decision of the Supreme Court in Cardoza-Fonseca, and the Board’s response to it in Mogharrabi, have clearly had an impact on the political asylum process. In a cable to INS field offices from the Central office, INS acknowledged that many motions to reopen or reconsider were likely to follow the Supreme Court’s decision in Cardoza-Fonseca. The cable instructed the field offices that: “Such motions should be considered if the applicants relate specific evidence to the lesser standard of evidence which the Supreme Court laid down in Cardoza-Fonseca. . . . When such motions are accepted, employment authorization should be normally granted for six months or until a decision is likely to be rendered on the motion and claim.”

While Cardoza-Fonseca and Mogharrabi answered several of the more pressing questions plaguing the asylum field, there are significant areas
of disagreement still being debated in the courts. Two of these areas are discussed below.

2. **Persecution based on the enumerated grounds: When is persecution “political”?**

In order for a person to be eligible for either political asylum or withholding of deportation, he or she must show a clear probability or a well-founded fear of persecution on account of one of the grounds enumerated in the Refugee Act of 1980. As stated in *Mogharrabi*:

[a]n alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Thus, for example, aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of [the enumerated grounds]. *Mogharrabi* at 12.

In 1987 two circuit courts directly addressed the question of when persecution is personal, and consequently irrelevant to an asylum claim. In the first case, *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), the Fifth Circuit ruled that Ms. Campos-Guardado failed to establish a political basis for her persecution and denied her claims for both political asylum and withholding of deportation.

Ms. Campos-Guardado, a native of El Salvador, alleged that she experienced political persecution during a visit to her uncle, the chairman of a local agricultural cooperative. While Ms. Campos-Guardado was at her uncle’s home, the house was attacked by two young men and an older woman. The men forced her to watch while they mutilated and murdered her uncle and male cousins, then they raped her and her female cousins and threatened to kill them unless they fled immediately. The older woman “shouted political slogans” during the attack.

Ms. Campos-Guardado did not return to her home after the attack, but remained in San Salvador, working in a factory. On her first visit home to see her parents, she discovered that one of her attackers was a cousin who had recently moved into the neighborhood after fleeing the guerrillas. He later sought her out several times and threatened to kill her and her family if she identified him to the authorities. She remained in San Salvador until the factory she worked in was burned down by guerrillas, at which time, afraid to return to live at her parents’ home near her assailant, she fled to the United States.
The court upheld the BIA’s finding that the persecution suffered by Ms. Campos-Guardado was not on account of either her own personally held political opinion or a political opinion imputed to her by others because of her association with her uncle or her having witnessed an act of political persecution. According to the Board and the Fifth Circuit, the initial attack against Ms. Campos-Guardado was a result of her being in the wrong place at the wrong time, and the continuing threats to her “were personally motivated—to prevent her from exposing [her cousin’s] identity—and . . . there was ‘no indication he maintained an interest in her because of her political opinion or any other grounds specified in the Act.’” *Campos-Guardado* at 288. Although Ms. Campos-Guardado appealed this horrific decision, the Supreme Court recently denied certiorari. 108 S. Ct. 92 (1987).

In contrast, the Ninth Circuit has taken a much less restrictive approach to interpreting the meaning of persecution “on account of political opinion.” In *Lazo-Majano v. INS*, 813 F.2d 1432, the Ninth Circuit reversed a BIA decision finding an applicant ineligible for political asylum or withholding of deportation in a fact situation similar to that described above. Ms. Lazo-Majano worked as a laundress in El Salvador for a sergeant in the Fuerza Armada, or National Police Force. After several months of employment, he beat and raped her and threatened that if she did not submit to his continued brutality he would denounce her as a subversive. Many months of violence followed, with the sergeant consistently beating and raping Ms. Lazo-Majano and threatening to kill her. Although the Board found that this violence was personal and thus did not qualify Ms. Lazo-Majano for asylum or withholding, the Ninth Circuit disagreed, granted withholding of deportation, and remanded to the Board for an exercise of discretion on her asylum claim.

In its decision, the Ninth Circuit emphasized the relevance of the political climate in El Salvador to Ms. Lazo-Majano’s asylum claim. Lazo-Majano’s awareness of the political climate prevented her from seeking protection from the police, and because she believed that the authorities would not act to save her from one of their own, she was subjected to the sergeant’s brutality. Furthermore, she knew that if the sergeant denounced her as a subversive, torture and/or death would almost certainly follow. The Court found that Ms. Lazo-Majano’s beliefs constituted a political opinion and rendered her eligible for political asylum and withholding of deportation.

The government petitioned for rehearing of *Lazo-Majano*, and suggested a rehearing en banc, but in a decision filed December 18, 1987, the petition for rehearing was denied.
3. Exercise of discretion in asylum cases.

In Cardoza-Fonseca, the Court suggested that a lesser standard of proof is appropriate in asylum cases partly because the Service retains the power to deny asylum as a matter of discretion where an alien has met the "well-founded fear" standard but the Service rules that the alien's case does not merit the favorable exercise of discretion. One possible result of this view will be an increase in discretionary denials of asylum claims in the upcoming years.

Since 1983 the BIA has taken the position that "the fraudulent avoidance of the orderly refugee procedures that this country has established is an extremely adverse factor [warranting the discretionary denial of asylum] which can only be overcome with the most unusual showing of countervailing equities." Matter of Salim, 18 I. & N. 311, 315-16 (B.I.A. 1982). Since most asylum applicants have entered the United States illegally, this position has threatened to impede asylum-seekers' chances of receiving favorable exercises of discretion. However, in Matter of Pula, File A26 873 482 (not designated for publication), the BIA has receded from this position.

Matter of Pula involved in a native of Albania and citizen of Yugoslavia who entered the United States by means of a fraudulently obtained Belgian travel document. In exclusion proceedings, the immigration judge granted Pula's application for withholding of deportation, but denied his asylum request as a matter of discretion under the doctrine enunciated in Matter of Salim. The BIA reversed and granted asylum, stating that:

"While we find that an alien's manner of entry is a proper and relevant discretionary factor to consider in adjudicating asylum applications ... Matter of Salim ... places too much emphasis on the circumvention of orderly refugee procedures. This circumvention is a serious adverse factor, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases. This factor is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case. ... Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted. Matter of Pula at 7.

The BIA enumerated the relevant factors for exercising discretion under their new "totality of the circumstances" approach. They first suggested examining what countries, if any, an asylum-seeker transitted
on his or her way to the United States, and whether "orderly refugee procedures" were available to help him or her in those countries. The length of time an alien remained in a third country and the potential for long-term resettlement there are also relevant factors. In addition, the BIA found relevant the applicant's family ties in the United States, or in any other country where the alien would not be in danger of persecution. Finally, if an alien engages in fraud to enter the United States, the Board would examine the seriousness of the fraud. If the alien did not obtain fraudulent documents directly from the U.S. government, the fraud would be considered a less serious adverse factor.

After listing these and other factors relating to the alien's flight from his or her home country to the United States, the BIA went on to state that:

[G]eneral humanitarian considerations, such as an alien's tender age or poor health, may also be relevant in a discretionary determination. A situation of particular concern involves an alien who has established his statutory eligibility for asylum but cannot meet the higher burden required for withholding of deportation. Deportation to a country where the alien may be persecuted thus becomes a strong possibility. In such a case, the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors. Matter of Pula at 8.

This decision represents a remarkable turnaround from the Board's previous position, espoused in Matter of Salim, supra, and Matter of Shirdel, Int. Dec. 2958 (B.I.A. 1984), and suggests that the Board is taking seriously the Supreme Court's suggestion that the Refugee Act of 1980—and, specifically, § 208(a) of the INA—must be interpreted with greater flexibility to comport with congressional intent. However, practitioners must be prepared to develop fully any evidence relevant to the favorable exercise of discretion. As stated in Pula, "[t]he mere absence of adverse factors in the record is not necessarily sufficient to satisfy the alien's burden." Id. at 8.


As a result of final regulations promulgated under the Immigration Reform and Control Act, published at 52 Fed. Reg. 16216 (5/1/87), there have been several significant changes in INS employment authorization procedures affecting applicants for political asylum. The final regulations, codified at 8 C.F.R. § 274a, distinguish between three classes of aliens:
those persons automatically authorized to be employed in the United States incident to their immigration status, for whom specific employment authorization need not be obtained from the INS, § 274a.12(a), including persons granted refugee status, § 274a.12(a)(3), political asylum, § 274a.12(a)(5), or withholding of deportation, § 274a.12(a)(10); (2) those nonimmigrants who are only authorized to work for a specific employer incident to their status in the United States, § 274a.12(b); and (3) those persons who must individually apply for employment authorization from the INS, § 274a.12(c).

This last category includes applicants for political asylum. It provides that employment authorization should be granted, on an individual basis to “[a]ny alien who has filed a nonfrivolous application for asylum pursuant to Part 208 of this chapter [8 C.F.R.]. Employment authorization shall be granted in increments not exceeding one year during the period the application is pending (including any period when an administrative appeal or judicial review is pending) and shall expire on a specified date.” 8 C.F.R. § 274a.12(c)(8).

One very significant change in these regulations is the removal of discretion to deny employment authorization from the district director. Employment authorization now is mandatory for all asylum applicants who can demonstrate nonfrivolous claims. The INS indicated its definition of the term “nonfrivolous” in a July 9, 1987 memorandum from the Associate Commissioner for Examinations to all INS offices. The memorandum specifies two distinct situations in which an asylum application can normally be considered frivolous:

(1) An asylum claim of an individual who is from a country where the government does not have a pattern of government sponsored persecution, does endeavor to prevent private persecution, and has a judicial system which is equitable and fair; and;

(2) An asylum claim in which the individual, after in-depth questioning, is unable to specify any of the five grounds of persecution (race, religion, nationality, political opinion, membership in a particular social group). These two broad categories form a basis for the determination of a frivolous asylum claim. However, neither is a presumption which could not be overcome by unusual circumstances.

The INS has indicated that it will not specify which countries meet the test under the first category. However it seems apparent that most Western European countries would fall within this category. Beyond that, INS suggests examining the State Department’s or Amnesty International’s annual reports on human rights practices in individual countries
for an indication of a country's likelihood of falling within the first category.

5. Proposed asylum regulations.

In June 1980 the INS issued interim asylum regulations to comply with the 1980 Refugee Act's requirement to establish asylum procedures for refugees present in the United States. See 45 Fed. Reg. 37-392 (6/2/80). For the most part, these interim regulations remained in effect through the start of 1987. However, in 1987 the INS proposed new asylum regulations which would have drastically changed the asylum process in effect for the past six years.

In stark contrast to the trend toward a more generous approach to asylum adjudications exemplified by Cardoza-Fonseca and its progeny and by the new work authorization regulations, the 1987 asylum regulations proposed by INS substantially reduced due process protections of asylum-seekers by denying asylum applicants the right to hearings in front of neutral arbiters. The proposed regulations, published on August 28, 1987, at 52 Fed. Reg. 32-552, provided that immigration judges would no longer have jurisdiction over asylum and withholding requests. Instead, these requests were to be handled by "Asylum Officers," employees of the INS, who would conduct "non-adversarial" interviews with the applicants "to elicit all relevant and useful information bearing on the applicant's eligibility for the form of relief sought" and then render decisions.

A coordinated national response to the proposed asylum regulations was spearheaded by the American Immigration Lawyers Association and various service-providers. The campaign focused largely on the denial of due process inherent in the new "non-adversarial" process, which failed to guarantee an alien an opportunity to confront or cross-examine the government's witnesses, a right to object to the government's evidence, a right to present evidence in his or her own behalf, or a meaningful opportunity for intercession by an attorney.

The INS received such consistent and strenuous objections to the proposals that they agreed to withdraw them until appropriate changes could be made. The INS has firmly committed itself to the reincorporation of immigration judges into the asylum process in its next set of proposals. However, it remains an open question whether other aspects of the proposed regulations, such as the priority given State Department reports on human rights practices and the mandate to exercise discretion negatively where an applicant does not present his or her asylum claim "promptly" will be in the next proposed asylum regulations.
In contrast to this failed effort by the INS, the Department of Justice successfully created a new “Asylum Policy and Review Unit” within the Justice Department’s Office of Legal Policy. See 52 Fed. Reg. 66-11043. The new Unit is headed by Roger Pilon, former Director of Policy at the State Department’s Bureau of Human Rights and Humanitarian Affairs, under the direct supervision and direction of the Assistant Attorney General, Office of Legal Policy. The new Unit was created to “increase uniformity and efficiency in the process of determining eligibility for political asylum.” It has the authority to: (1) compile and disseminate to INS officers information concerning the persecution of persons in other countries on account of the grounds enumerated in the Refugee Act of 1980; (2) review cases decided by the BIA; (3) review INS asylum decisions in cases that the Deputy Attorney General directs the INS to refer to him; and (4) assist the INS in conducting training concerning asylum and assist in resolving policy questions that may arise.

6. **BHRHA advisory opinions.**

The Bureau of Human Rights and Humanitarian Affairs (BHRHA) has announced that its representatives will no longer provide advisory opinions in every political asylum case, effective November 2, 1987. According to the BHRHA, they will “address only those cases where [their] input would provide information not routinely available to the District Director. In some cases, [they] will provide a ‘generic’ response, not specifically tailored to the individual application but which [they] believe will be useful in understanding the human rights situation in the applicant’s country of nationality. In a few cases, where [they] feel [their] input would be especially helpful, [they] will provide an individually prepared advisory opinion.”

BHRHA cautions that its failure to comment individually on an asylum claim should not be taken as a signal to the INS or the Executive Office of Immigration Review (EOIR) that the case lacks merit. The BHRHA counsels the INS and immigration judges to consult the State Department’s annual *Country Reports on Human Rights Practices* in cases where the BHRHA declines to issue an opinion.

**B. Other Refugee Issues**

1. **Extended voluntary departure.**

In 1987 extended voluntary departure was again granted to Poles, Ethiopians and Afghans in the United States. Extended voluntary departure (EVD) is a humanitarian grant of temporary status to members of particular national groups in the United States who fear violence and disorder
in their home countries, but not necessarily the individually based persecution necessary to qualify for political asylum.

Considerable controversy surrounded the continuation of EVD for Polish nationals in 1987. EVD status currently applies to all Poles who have been in the United States since before July 21, 1984, except those who express a desire to return to Poland, who are permanent residents of a third country, or who have been convicted of a crime while in the United States. This policy came into question after economic sanctions against Poland were lifted in February 1987 and the State Department recommended an end to EVD for Poles. Nevertheless, EVD for Poles was extended until December 31, 1987 and is expected to be extended again until at least December 31, 1988.

In one of its final actions before adjourning for the Christmas holidays, Congress approved H.R. 1777 that, among other things, permits aliens in EVD status to adjust their status to that of temporary residents. H.R. 1777 was signed into law by President Reagan in late December 1987. Section 902 of the bill applies to all aliens granted EVD status during the last five years, thereby benefiting nationals of Poland, Afghanistan, Ethiopia and Uganda. To be eligible for adjustment of status under § 902, aliens must apply within two years, establish that they entered the United States prior to July 21, 1984 and have been continuous residents since entry, and prove continuous physical presence in this country since enactment of the bill. Beneficiaries of § 902 are placed on the same legal footing as aliens provided amnesty under INA § 245A.

Bills granting temporary relief from deportation to Salvadorans and Nicaraguans received considerable support in Congress in 1987. However, the issue of EVD or safe haven for Salvadorans and Nicaraguans present in the United States was complicated by two unexpected occurrences. In April El Salvador’s President Jose Napoleon Duarte appealed to President Reagan to grant EVD to the estimated 400–600,000 undocumented Salvadorans who entered the United States since 1982 and therefore are ineligible for legalization under IRCA. According to Duarte, improved human rights conditions in El Salvador do not justify granting political asylum to Salvadorans, but the continued fighting in El Salvador, the severe economic crisis, and the October 1986 earthquake that left 300,000 Salvadorans homeless create conditions that render EVD appropriate. Duarte also fears that if a large number of Salvadorans return home from the United States as a result of IRCA, this would profoundly destabilize his country. Duarte has further stated that El Salvador is dependent on the estimated $350 to $600 million that Salvadorans in the United States send home to their families in El Salvador each year.
The Administration refused Duarte's request, citing a desire to "avoid exceptions which might be taken as a precedent." The Administration's position is that EVD represents a special exception to the asylum system established under the Refugee Act of 1980. Further, the Administration has consistently maintained that Salvadorans in the United States are "economic refugees," whose flight from their home country is a response to poverty and not war.

Having rejected Duarte's plea that Salvadorans be granted special treatment, the Administration promptly extended special protections to Nicaraguans who have come to the United States in recent years. Attorney General Meese signed an order directing the INS not to deport any Nicaraguan "who has a well-founded fear of persecution," unless the Justice Department finds that "the individual has either engaged in serious criminal activity or poses a danger to the national security"; to grant expeditiously work authorization to every eligible Nicaraguan; to encourage Nicaraguans whose claims for asylum or withholding of deportation have been denied to reapply for reopening or rehearing of such claims in accordance with the standard spelled out by the Supreme Court in the recent Cardoza-Fonseca decision; and to "encourage and educate Nicaraguans who may be eligible for legalization under the Immigration Reform and Control Act to apply."

The Attorney General's order, in fact, is little more than a restatement of existing immigration policies as they apply to all nationalities. However, the act of signing and presenting the order communicated a message to the INS that special consideration should be given to Nicaraguans, and the Service has clearly taken this message to heart. As stated by Perry Rifkin, INS District Director in Miami where up to 50 percent of Nicaraguans in the United States reside, Mr. Meese's order will mean a "much more liberal interpretation of the [Nicaraguan] asylum claim." A Justice Department spokesman also has noted that Nicaraguans should be singled out for special consideration since: "It is obvious to us, at least, that people who are fearful of being deported to Marxist, totalitarian countries are more likely to establish a well-founded fear of persecution than those from a country with a democratically elected government." INS has sent a cable to all field offices that includes an order prohibiting the execution of a final order of deportation for a Nicaraguan until the case is reviewed by the Central Office. So far in 1987 the INS has granted political asylum to 88 percent of Nicaraguan applicants, while it has granted the asylum requests of only 3 percent of applicants from El Salvador.

While the Administration refused to extend EVD to Salvadorans and stopped short of extending the full protection of EVD to Nicaraguans,
in July the Senate Judiciary Committee approved S. 332 that provides for EVD for Nicaraguans and Salvadorans living illegally in the United States. The House Judiciary Committee approved a companion bill, H.R. 618, in June, and the full House approved the bill on July 28, 1987. The full Senate was expected to vote on S. 332 in the late fall, but the resignation of Justice William Powell from the Supreme Court and the resulting confirmation hearings delayed any further action on the bill. Furthermore, the Reagan Administration vowed to veto the EVD bill. Nevertheless, Sen. Dennis DeConcini (D-AZ), the sponsor of S. 332, was expected to attach the EVD bill to the continuing spending bill (H.J. Res. 395) in a last effort at 1987 passage. DeConcini agreed not to do this in exchange for a promise from Sen. Simpson (R-WY) that he would not block attempts to allow the measure to be debated on the Senate floor in early 1988.

A slightly different approach to the EVD problem has been proposed by Rep. Romano L. Mazzoli (D-KY), chairman of the House Judiciary Committee’s Subcommittee on Immigration, Refugees, and International Law. Rep. Mazzoli has introduced a bill, the “Temporary Safe Haven Act of 1987” (H.R. 2922), that would allow the Attorney General to grant “authorization to remain temporarily” (ART) to foreign nationals in the United States if the Attorney General determines that any of the three following conditions exist in their homelands: (1) an ongoing armed civil conflict, (2) an earthquake, flood, drought or other environmental disaster; or (3) other extraordinary and temporary conditions, taking into account “immigration, humanitarian, and international concerns.”

Rep. Mazzoli and his co-sponsors advocate the adoption of generic criteria for granting ART, to avoid the necessity of legislating temporary safe haven, or EVD, on a case-by-case, country-specific basis as in the current proposals. Passage of their bill could obviate the need for the specific grants of EVD to Salvadorans and Nicaraguans envisioned by pending legislation.

2. Mariel Cubans detained in the United States.

In 1987 the problems facing the approximately 3500 Mariel Cubans in detention in the United States became a focus of national attention. In 1980, approximately 125,000 Cubans came to the United States from Mariel Harbor in Cuba. After a brief detention period at temporary INS processing centers, most of them were released to family and friends in the United States and many of them have had their status adjusted to that of permanent residents. However, over 3000 Cubans continue to be imprisoned in the United States. Most of these Marielitos either admitted
to having committed serious crimes in Cuba or committed such crimes after they came to the United States.

In 1984 the United States and Cuba reached an agreement whereby more than 2,700 detained Cubans who had been found excludable were to be returned to Cuba. However, the agreement was suspended by Cuba in May 1985, after the United States began airing anti-Castro broadcasts over “Radio Marti.” Therefore, instead of being returned to Cuba by a systematic process, the detained Marielitos have continued to be imprisoned in various federal prisons and in the INS detention facility in Oakdale, Louisiana. They faced indefinite incarceration, since the INS refused to release them and Cuba refused to take them back.

In June 1987, the INS announced that it was reinstating its Mariel Cuban Review Program, to review systematically the cases of the estimated 3,500 detained Marielitos. The program was intended to facilitate the release of Marielitos to their immediate families or to halfway houses, if such release would be appropriate. Panels of Service personnel were to travel to detention locations every six months to interview detainees and make recommendations as to their releasability.

Five months later, on November 20, 1987, the State Department announced the revival of the 1984 agreement with Cuba, providing for repatriation of excludable Cubans. This announcement was received with outrage by the Marielitos imprisoned in Oakdale who rioted, occupied and destroyed much of the detention facility and seized twenty-eight workers as hostages. Cuban prisoners at the federal penitentiary in Atlanta, Georgia also rioted on November 23, taking even more hostages. The two takeovers led to negotiations between the Marielitos and the Justice Department, with a final agreement reached at Oakdale on November 29, and at Atlanta on December 4, that provided for medical treatment of detainees, permission for some detainees to go to third countries if they can gain admittance, release on parole with work authorization of detainees who qualify, and individual review of all cases not yet reviewed.


As required by the Refugee Act of 1980, President Reagan made his annual designation for refugee admissions in October 1987. For fiscal year 1988, the refugee admissions ceiling has been raised to 72,500, up 2,500 from 1987. Of the 72,500 proposed slots, 68,500 would be for refugees admitted according to regional ceilings. As in 1987, an additional unallocated reserve of 4,000 slots would be created to serve currently unanticipated needs. The filling of these 4,000 unallocated slots would be dependent on the availability of private funds to cover the refugees’
expenses. In 1987 the unallocated slots went unfilled after such funds failed to materialize.

The maximum admissions figure of 72,500 is broken down as follows: Africa, 3,000; East Asia–First Asylum, 29,500; East Asia–Orderly Departure Program, 8,500; Eastern Europe/USSR, 15,000; Latin America/Caribbean, 3,500; Near East/South Asia, 9,000; and unallocated reserve, 4,000. The allocations for Africa, Eastern Europe/USSR and Latin America/Caribbean have been increased for 1988, and the East Asia Orderly Departure Program has been resumed after an eighteen-month suspension. Admission levels for all other regions have been reduced.

VII. Exclusion and Deportation

1987 saw a good deal of activity in the deportation and exclusion area, relating both to the substantive grounds for deportation and exclusion and to procedural issues.

A. Ideological Exclusions

In 1987 the Supreme Court entered the debate on ideological exclusions by accepting certiorari in *Abourezk v. Reagan*, 108 S. Ct. 252 (1987). The *Abourezk* case revolved around two grounds for exclusion, found in INA §§ 212(a)(27) and (28). Section 212(a)(27) bars entry to aliens who "seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. § 1182(a)(27). Section 212(a)(28) bars entry to aliens who are anarchists or communists; or who advocate, teach, are members of, or affiliated with, any organization that advocates or teaches, or who write or publish material that advocates or teaches the governmental doctrines of world communism, opposition to all organized government, or the overthrow by force, violence, or other unconstitutional means of the government of the United States or of all forms of laws.

Section 212(a)(28) has received a great deal of publicity in recent years since it has been the basis for exclusion from entry into the United States of internationally recognized authors and artists from around the world, including Italian playwright Dario Fo, Canadian author and environmentalist Farley Mowat, Nobel laureates Gabriel García Márquez, Pablo Neruda, and Czeslaw Milosz, as well as Mexican writer Carlos Fuentes, English novelist Graham Greene, and Spanish filmmaker Luis Buñuel.

The *Abourezk* case involved the exclusions of Tomas Borge, the Interior Minister of Nicaragua; two officials of a women's organization in Cuba;
and Nino Pasti, former Italian representative to the NATO Military Committee, NATO vice-supreme allied commander in Europe for nuclear affairs, representative in the Italian senate, and currently an outspoken advocate of international disarmament. The United States found that his admission, like those of the other plaintiffs described above, would be “prejudicial to the public interest.” All of the above-named individuals had been invited to the United States by United States citizens interested in meeting with them and hearing their opinions on various issues of national and international concern. They were all denied visas under INA §§ 212(a)(27) and (29).

In 1986 the D.C. Circuit Court of Appeals vacated the district court’s order granting the government’s motion for summary judgment. The circuit court decision was based primarily on changes to INA § 212(a)(28) enacted in 1977 in the McGovern Amendment, 22 U.S.C. § 2691. The McGovern Amendment was intended specifically to bring the United States into compliance with the Helsinki Final Act with regard to free movement across international borders. Under the amendment, within thirty days of a visa denial because of affiliation with a proscribed organization, under § 212(a)(28), the Secretary of State “should” recommend to the Attorney General that a waiver be granted if the alien is “otherwise admissible to the United States.” The only basis for not recommending the waiver arises when the Secretary determines that the admission of the alien would be contrary to the “security interests” of the United States, or when the alien is a member of the Palestinian Liberation Organization or another specifically barred organization.

To avoid compliance with the McGovern Amendment, the State Department began excluding people under § 212(a)(27) who would previously have been found excludable under INA § 212(a)(28). Section 212(a)(27) has no waiver provision comparable to the McGovern Amendment. The plaintiffs in Abourezk all allegedly were excludable as members of proscribed organizations under § 212(a)(28), but the State Department found them excludable under § 212(a)(27), thereby avoiding the waiver provision of the McGovern Amendment. This was the basis of the Court of Appeals’ decision.

The Court of Appeals held that in order to find an alien excludable under INA § 212(a)(27), the government must raise facts beyond membership in or affiliation with an organization that renders the alien excludable under § 212(a)(28). These facts must relate to some aspect of the alien’s activities not dependent on the organizational affiliation: “A reason that is in addition to the fact of membership but not independent of that fact provides an insufficient bulwark against the possibility of Executive evasion of the will of Congress as expressed in the McGovern

On October 19, 1987 the Supreme Court let the Court of Appeals’ decision in *Abourezk* stand, without written opinion, after deadlocking 3–3, with Justice Powell having resigned from the Court and Justices Brennan and Scalia disqualifying themselves. Since there was no majority decision, the Supreme Court’s affirmance of the Court of Appeals’ decision creates a binding precedent in the D.C. Circuit only. However, since most litigation involving visa denials is brought in the D.C. Circuit, the affirmance is expected to have much the same effect as would a national precedent. In the meantime, Congress and the executive branch are increasingly interested in the ideological exclusion issue and may legislate changes in the field before the Supreme Court accepts another opportunity to rule.

In February 1987 Rep. Barney Frank (D–MA) introduced a bill to amend INA §§ 212 and 241 to remove the grounds for ideologically based exclusions and deportations. Rep. Frank has introduced similar bills in the last several sessions of Congress. The 1987 bill, H.R. 1119, is broader in scope than previous bills in that it proposes particular standards that the government must meet to bar entry to an alien for national security reasons. Also, it permits adverse decisions to be reviewed in federal district court, as well as ending exclusions based solely on political opinion as in previous legislative proposals. The Frank bill would permit the continued exclusion of aliens on grounds of health, criminal record, narcotics addiction or involvement with terrorism, but would remove homosexuality as a ground for exclusion. Senator Daniel P. Moynihan (D–NY) has introduced a similar but narrower bill (S. 28) to remove the INA § 212(a)(28) as a ground for exclusion, and to limit the government’s power to exclude under §§ 212(a)(27) and (28).

Although neither of these bills passed in 1987, in December Congress did pass a temporary measure prohibiting the United States government from deporting, excluding or denying visas to aliens based solely on “beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.” The temporary measure forms § 901 of the Foreign Relations Authorization Act, fiscal years 1988 and 1989 (H.R. 1777). It covers aliens requesting visas or admission to the United States during 1988, and deportations based on activities occurring during 1988 or for which deportation proceedings are pending at any time during 1988.

Section 901 was passed as a temporary measure, based on a commitment by Congress to consider the full Frank and Moynihan bills during
early 1988. Proponents of these bills remain optimistic that at least one will pass in 1988, given the present climate in Washington. Despite reservations, it appears that the Administration supports Rep. Frank's bill and the State Department itself is working on a proposal to amend the INA that may include a repeal of the provisions excluding aliens solely on the basis of political affiliation or ideology. The State Department's change of heart results from concern that the present system creates an "undesirable appearance" and is bureaucratically burdensome since of the 45,923 visa applications denied in 1986 under INA §212(a)(28), 45,375 (or 99 percent) of the applicants subsequently received waivers.

B. Health-Related Exclusions: the AIDS Controversy

In June 1987 the Public Health Service amended 42 C.F.R. 34.2(b) to add AIDS to the list of dangerous contagious diseases that render an alien inadmissible to the United States under INA § 212(a)(6). 52 Fed. Reg. 109-21532. The new AIDS testing requirement, which became effective on July 8, 1987, applied to all immigrant and fiance(e) visa applicants, refugees, legalization applicants, and applicants for adjustment of status under § 245. It did not apply to tourists, students, and other nonimmigrants. The rule represented a turnaround by the PHS, which had initially proposed handling AIDS under § 212(a)(7), the provision excluding aliens certified by a doctor as having "a physical defect, disease, or disability" that may affect their ability to earn a living.

The PHS and the Centers for Disease Control (CDC) notified all physicians authorized to conduct medical examinations for the INS of the new requirements. Any alien examined on or after July 8, 1987, was presumed by the Service to have been checked for AIDS. Since the rule did not refer to the presence of the human immunodeficiency virus (HIV) or of antibodies to it, but only to AIDS itself, no HIV antibody test was required unless a "clinical observation of AIDS" was first established. Service personnel were authorized to require updated examinations by physicians if an alien exhibited "the physical symptoms of AIDS."

The INS established a very strict test for qualifying for a waiver of excludability under § 212(a)(6) on account of AIDS, which had to be approved by the Central Office. The discretionary authority of the Attorney General to waive § 212(a)(6) because of AIDS for refugees, amnesty applicants and nonimmigrants was not to be used unless the applicant could establish that the potential danger to the public health and the possibility of the spread of the disease was minimal and that there would be no cost incurred by any level of government agency of the United States without prior consent of that agency.
While the addition of AIDS to the list of dangerous contagious diseases generated some controversy, this controversy was quickly overshadowed by the PHS's next proposal. Simultaneous with publication of their final rule on AIDS, the PHS also published a proposed rule to amend the final rule described above to substitute “HIV” for “AIDS” on the list of dangerous contagious diseases. HIV—human immunodeficiency virus—is the virus that is believed to cause AIDS. Antibodies to it appear in the bloodstream of individuals who have been exposed to HIV long before they manifest symptoms of AIDS. It is still not known what percentage of people infected with the virus and who test positive for HIV antibodies will develop AIDS. The CDC currently estimates that someone with HIV antibodies has about a 30 percent chance of developing AIDS within five years. However, all HIV-infected persons probably can transmit the virus, but only by transferring their body fluids, such as blood or semen.

The HIV proposal generated fierce debate, especially concerning the extremely high rate of “false positives,” i.e., tests that incorrectly indicate that a person has antibodies to HIV in their bloodstream. The false positive rate is particularly critical when testing low-risk groups, since the false positives in these groups far outnumber the true positives. For example, according to public health experts, in a population with a low infection rate of 30 per 100,000, only 11 percent of positives would be true positives using the standard ELISA HIV antibody test. The result of a false positive test for an alien would be particularly devastating: an alien overseas who is not in fact infected with HIV nevertheless would be barred from entry; an alien present in the United States would be unable to adjust status to that of a lawful permanent resident; and an alien otherwise eligible for amnesty would be denied legalization.

Another concern voiced by critics of the proposed rule was that implementation of mandatory HIV-antibody testing for aliens seeking admission to the United States would have an adverse international impact. First, critics were concerned that testing is unavailable or difficult to obtain in many countries, causing substantial delays and hardship for aliens seeking admission. Further, given the false positive rate in the United States, the likelihood of even greater numbers of inaccurate results emanating from less technologically developed countries is extremely high. Finally, there may be an adverse impact on international travel by American citizens, since the United States has a substantially higher positive rate on the HIV-antibody test than many other countries that may retaliate by imposing their own testing requirements.

Despite strenuous objections to the proposed rule—the Department of Health and Human Services admits that the majority of comments
received opposed the amendment of § 212(a)(6) to read “HIV” instead of “AIDS”—the final rule was published on August 28, 1987 with few, if any, changes. 52 Fed. Reg. 167-32540. Under the final rule, all immigrant and fiance(e) visa applicants, refugees, legalization applicants and applicants for adjustment of status will have to be tested for antibodies to the AIDS virus, or HIV, effective December 1, 1987. Aliens who applied for amnesty before December 1 will be expected to undergo an HIV-antibody test as part of their second stage application process for obtaining permanent resident status. Aliens under fifteen will not be tested unless there is “reason to suspect infection with . . . HIV.” Those aliens who test positive will be denied visas or refugee status for entry into the United States, will be unable to adjust status, and may not qualify for amnesty under the legalization provisions of IRCA. As with the final rule of AIDS, effective July 8, 1987, it appears that waivers will only be possible for refugees and amnesty applicants, and that these waivers will be extremely difficult to obtain.

C. Crime-Related Exclusions and Deportations

1. Section 212(a)(9) and the petty offense exception.

Section 212(a)(9) renders excludable aliens convicted of a crime involving moral turpitude or aliens who admit having committed such a crime. The section also creates an exception for aliens who “would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of Title 18, United States Code [18 U.S.C.S. § 1(3)], by reason of the punishment actually imposed . . . Provided, that the alien has committed only one such offense. . . .”

Until 1984, Section 1(3) of Title 18, United States Code, defined a petty offense as “any misdemeanor, the penalty for which does not exceed imprisonment for a period of 6 months or a fine of not more than $500.00 or both.” However, INA § 212(a)(9) was simplified in 1984 by the Comprehensive Crime Control Act, Pub. L. No. 98-473, that added a new definition of “petty offense” into the text of § 212(a)(9) itself. Under the new definition, a petty offense is one “for which the sentence actually imposed did not exceed a term of imprisonment in excess of one year.” 98 Stat. 2028. This change was initially scheduled to take effect on November 1, 1986. However, the Crime Control Act was subsequently amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, to delay the effective date to November 1, 1987. Thus, the new definition of “petty offense” is only very recently in effect.

The amended effective date remained largely unnoticed by INS until early 1987, and some INS offices and consular posts abroad erroneously
started applying § 212(a)(9) in its new form on November 1, 1986. This created complications for aliens who were processed under the new definition before it legally took effect. In an effort to prevent undue confusion, the INS Central Office issued a memorandum in February 1987, containing detailed guidelines for Service personnel and advising that aliens admitted under the new version of § 212(a)(9) would not be adversely affected by INS's mistake.

Since the new version of § 212(a)(9) did go into effect on November 1, 1987, the confusion created by INS's error should have dissipated by the time of publication, and the amendment to INA § 212(a)(9) should prove extremely beneficial to aliens seeking admission to the United States or adjustment of status. Because the change is retroactive, many aliens who were previously excludable will now be admissible to the United States. Aliens awaiting adjudications of their waivers of excludability under § 212(h) should carefully examine the new language of § 212(a)(9) to see if their convictions now qualify as petty offenses. If so, the waiver applications can be withdrawn and the cases adjudicated on the merits without further delay.

2. Section 212(a)(9) and juvenile criminals.

On August 12, 1987 the State Department published a final rule in the Federal Register amending its regulations at 22 C.F.R. § 41.91(a)(9) and (10) and 22 C.F.R. § 42.91(a)(9) and (10) concerning the eligibility of aliens to receive visas because of criminal offenses involving moral turpitude committed before the aliens turned eighteen. See 52 Fed. Reg. 155-29842 (8/12/87). Prior State Department regulations stated that such aliens were not ineligible to receive visas under INA § 212(a)(9), as long as they were tried and treated as juveniles. Under the new rule, INA § 212(a)(9) is modified to state that aliens between fifteen and eighteen who are tried and convicted as adults for felonies involving violence—as defined in 18 U.S.C. §§ 1(1) and 16—are subject to exclusion under § 212(a)(9), but no alien is ineligible under § 212(a)(9) for a crime committed before that alien's fifteenth birthday. The same changes apply to § 212(a)(10).


3. The Anti-Drug Abuse Act; INS interim regulations.

Provisions within the Anti-Drug Abuse Act, entitled the Narcotics Traffickers (sic) Deportation Act, amend INA §§ 212(a)(23) and 241(a)(11) to provide for exclusion or deportation of any alien convicted of a violation involving a “controlled substance” as defined under 21 U.S.C. § 802, the Controlled Substances Act. Prior to passage of the law, the INA section referred only to specific types of narcotic drugs such as cocaine, opium, heroin and marijuana, thereby limiting applicability of INA where the alien had been convicted of a drug offense involving a synthetic substance such as LSD. The change applies to convictions which occurred both before and after the October 27, 1986 enactment date of the Act, but only applies to entries into the United States after October 27, 1986.

The Anti-Drug Abuse Act also amends INA § 287 by adding a subsection (d) that requires the INS to determine promptly whether to issue a detainer after it has been notified that an alien has been arrested on a drug charge. Interim regulations, found at 52 Fed. Reg. 86-16370 (5/5/87), provide that no detainer shall be issued against a legalization or SAW applicant unless the Service has denied, or issued notice of intent to deny, the benefit applied for. While no final regulations have yet been promulgated, the interim regulations became effective immediately upon publication.

D. Relief Under INA § 212(c)

Several changes occurred concerning § 212(c) waivers in 1987. Under INA § 212(c), a permanent resident alien who has resided in the United States for at least seven years is eligible for a waiver of most grounds of excludability, including excludability based on convictions for drug offenses. In Francis v. INS, 532 F.2d 268 (2d Cir. 1976), the Second Circuit held that § 212(c) also applies to grounds of deportation, as long as the basis for deportation is also a basis for exclusion, and the BIA adopted that position. Matter of Silva, 16 I. & N. Dec. 26 (B.I.A. 1976). Since all drug offenses that would render an alien deportable under § 241(a)(11) also render the alien excludable under § 212(a)(23), § 212(c) waivers are available to permanent residents faced with deportation for drug-related activity and often are an alien’s only hope of avoiding deportation or exclusion on that basis.

In order to be eligible for § 212(c) relief, an alien must meet two statutory requirements. First, the alien must have been lawfully admitted to permanent resident status and must have acquired his or her permanent resident status lawfully, i.e., not through fraudulent means. Second, the alien must have maintained a “lawful unrelinquished domicile” in the United States for at least seven consecutive years. The INS takes the position that the seven-year domicile required for § 212(c) relief commences only after the date an alien is granted permanent resident status.
In a recent decision, the Fifth Circuit Court of Appeals, in considering the issue of when domicile for § 212(c) purposes terminates, held that lawfulness of domicile terminates when an immigration judge's deportation order becomes administratively final, i.e., on affirmance by the B.I.A., waiver of the right to appeal, or expiration of the appeals period. *Rivera v. INS*, 810 F.2d 540 (5th Cir. 1987). *Rivera* involved a Salvadoran man who had been admitted to the United States as a permanent resident in November 1976. After being paid to assist four Salvadors to enter this country illegally, Mr. Rivera pled guilty to a violation of INA § 274(a)(4), inducing an alien to enter the United States.

An immigration judge found him deportable and Rivera's appeal to the B.I.A. was dismissed. Subsequently, in August 1984, more than seven years having passed since his admission as a permanent resident, Rivera filed a motion to reopen with the BIA to enable him to apply for § 212(c) relief. The BIA denied Rivera's motion, on the ground that Rivera's lawful permanent resident status had terminated when the BIA affirmed his deportation order, and that consequently he was no longer eligible for § 212(c) relief at the time he moved to reopen. Rivera appealed to the Fifth Circuit, arguing that his status as a permanent resident did not terminate until the court of appeals affirmed the deportation order.

The Fifth Circuit affirmed the Board's decision denying Rivera's motion to reopen, noting that "[r]equiring the alien to assert his claim for discretionary relief from deportation while his deportation order is on appeal to the Board permits the Board to consider both claims together; this in turn prevents the alien from stringing out his claims and delaying the ultimate disposition of his case." 810 F.2d at 541. The court also pointed out that, since the applicable regulations allow an alien to apply for § 212(c) relief and fully reserve all of his or her arguments that he or she is not deportable, application for § 212(c) relief while in proceedings will not be inconsistent with denial of the underlying offense. Based on these two considerations, the court found reasonable the Board's position that an alien's lawful resident status terminates upon entry of a final administrative order of deportation.

As a result of *Rivera*, a permanent resident alien residing in the Fifth Circuit, whose seven years of residence accrue while a deportation appeal is pending before the BIA, must file a motion to reopen for consideration of § 212(c) relief before the BIA rules on his or her appeal, since the Board's decision affirming the alien's deportability terminates the alien's eligibility for a § 212(c) waiver. Other circuits have taken a variety of positions on this issue. *See Marti-Xigues v. INS*, 741 F.2d 350 (11th Cir. 1984) (lawful residence ends at the commencement of exclusion or deportation hearings); *Dabone v. Karn*, 763 F.2d 593 (3d Cir. 1985) (lawful
residence ends when a final administrative order of deportation or exclusion is entered); *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984) (lawful residence continues until administrative and, if taken, judicial appeals are complete).

The INS also has made several changes in the operation of § 212(c) in 1987. Effective March 2, 1987 the INS has altered the procedure for appealing denials of § 212(c) waivers. As of that date, denials of § 212(c) waivers by district directors can not be appealed to the BIA. 52 Fed. Reg. 19-2942 (1/29/87). However, requests for § 212(c) waivers of excludability or deportability can be renewed in front of the immigration judge during proceedings, and the immigration judge’s decision on the waiver can be appealed to the BIA.

More significantly, the INS has recently clarified the duration of validity of a grant of a § 212(c) waiver by the district director or the immigration judge. The INS amended 8 C.F.R. Part 212.3 to clarify that, once granted, the approval of a § 212(c) waiver application is valid indefinitely. 52 Fed. Reg. 69-11620 (4/10/87). This change recognizes that “approval of a 212(c) application is full and independent deportation relief like that under section 244 (suspension of deportation), section 245 (adjustment of status), and section 249 (registry).” 52 Fed. Reg. at 11621.

**E. Suspension of Deportation**

While the Supreme Court did not rule on any cases concerning suspension of deportation in 1987, two circuit court decisions on the “extreme hardship” determination are noteworthy. The first, *Hernandez-Cordero v. USINS*, 819 F.2d 558 (5th Cir. 1987), involved a Mexican couple who fulfilled the statutory eligibility requirements for suspension of deportation, under INA § 244(a), by establishing seven years’ continuous residency in the United States and good moral character. They based their suspension application on the extreme hardship that deportation would cause to themselves and their three U.S. citizen children.

The immigration judge denied the Hernandez request for suspension of deportation, finding that the hardship involved was not sufficiently extreme. The BIA affirmed, but a panel of the Fifth Circuit Court of Appeals reversed, *Hernandez-Cordero v. USINS*, 783 F.2d 1266 (5th Cir. 1986), ruling that even though each element of hardship considered individually might be insufficient to constitute extreme hardship, cumulatively they might fulfill the statutory requirement. Since the court found that the Board failed to consider the hardship evidence cumulatively, the court remanded.

Following a rehearing en banc, the court of appeals vacated the panel decision and affirmed the BIA decision. The court’s decision was premised
on its view that the language of the statute, the nature of the remedy, and Supreme Court and circuit court holdings all mandate that the standard of judicial review for extreme hardship decisions be very narrow. As stated by the court:

We are persuaded that in the substantive review of a no “extreme hardship” determination, we are entitled to find that the BIA abused its discretion only in a case where the hardship is uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme. *Id.* at 562–63.

The court concluded that it “has virtually no substantive review” of extreme hardship findings by the Board. However, where procedural irregularities have occurred—such as total failure by the Board to consider hardship factors offered into evidence by the suspension applicants—this can be the basis for very limited judicial scrutiny.

The BIA will ordinarily satisfy its procedural responsibilities by demonstrating that it has considered all the relevant factors of an “extreme hardship” determination, both individually and collectively. [Cites omitted.] “It has no duty to write an exegesis on every contention. What is required is merely that it consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.” *Id.* at 563, citing *Oschukwu v. INS*, 744 F.2d at 1142–43.

In *Hernandez-Cordero*, the court found that the Board had not abused its discretion nor committed substantial procedural error, in a situation where the Board stated simply that it had “considered all of the factors presented, both individually and cumulatively.” If no more than this recitation is enough to satisfy the court’s test that the Board show it considered all the relevant hardship factors in making its determination, then it appears that the Fifth Circuit has adopted a “hands-off” approach to suspension cases, and will not reverse an agency determination unless unusually egregious errors have been committed.

The Ninth Circuit has taken a different view of the appropriate role of the courts in reviewing suspension cases. In *Cerillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987), the court considered the meaning of “extreme hardship” in a case involving a Mexican couple claiming eligibility for suspension of deportation on the basis of the extreme hardship their deportation to Mexico would cause the three of their nine children who were U.S. citizens.
The immigration judge found the couple had not established extreme hardship, and the BIA affirmed on the assumption that the three U.S. citizen children would return with their parents to Mexico, making a transition typical of any family moving to a new country. However, the court of appeals ruled that the Board had failed to consider all the hardship factors relevant to the petitioners' claim, in particular the factor of the hardship to the U.S. citizen children if their parents chose to leave them in the United States in order to retain the benefits of growing up in this country. As the Court explained:

The Cerrillos are faced with a difficult choice. Either they can keep their family together and bring all of their children with them to Mexico or they can break up their family and arrange for three of their children to remain in this country. Faced with similar dilemmas, parents have often made the painful choice of dividing their family in order to provide members of the younger generation with an opportunity for a better life. . . . The BIA cannot adopt a general presumption that separation of parents and children will not occur and thereby relieve itself of its duty to consider applications on an individual basis. It must consider the specific facts and circumstances of each case. In failing to consider the factor of separation, the BIA "overlooked or evaded an inquiry necessary to a reasoned decision." [Cities omitted.] Id. at 1423–24, 1426–27.

Because the Board in Cerillo-Perez had failed to consider this factor in making its hardship determination, the court reversed and remanded. This decision is consistent with other Ninth Circuit decisions reprimanding the BIA for failing to examine all the evidence and articulate specific bases for their decisions in suspension cases.

F. Procedural Safeguards

During 1987, the Supreme Court decided one case impacting on the procedural rights of aliens facing deportation. United States v. Mendoza-Lopez, 107 S. Ct. 2148 (1987), involved two aliens from Mexico who had lived in the United States illegally for over seven years when they were arrested by INS agents in Nebraska in October 1984. They were transported to Denver, Colorado where they were given a group deportation hearing along with eleven other Mexican aliens. Although they were eligible for suspension of deportation, the immigration judge did not afford them the opportunity to pursue this remedy. Instead, he found them deportable and, after they had waived their right to apply for suspension of deportation and their right to appeal, he had them deported to Mexico on November 1, 1984. At the time of deportation, each received a copy of Form 1–294 advising them that return to the United States without permission constituted a felony.
Both aliens were rearrested in Nebraska in December 1984, only six weeks after their deportation. They were indicted for unlawful reentry in violation of INA § 276. They challenged the indictments on the ground that the underlying orders of deportation were obtained in violation of their due process rights, because they were denied their right to apply for suspension of deportation. The district court ruled that the aliens could collaterally attack their deportation orders and dismissed both indictments. The court concluded that the aliens had been denied due process at their deportation hearing because they had not made knowing and intelligent waivers of their right to apply for suspension or their right to appeal. The court of appeals affirmed. 781 F.2d 111 (8th Cir. 1985).

The Supreme Court granted certiorari to resolve a conflict among the circuits over whether a deportation order is conclusive evidence of a § 276 violation, even if the deportation proceeding was not conducted in conformity with due process, or whether an alien can collaterally attack the deportation order during a trial for violation of INA § 276. By a vote of 5–4, the Supreme Court affirmed the Eighth Circuit’s holding that in a criminal prosecution for unlawful reentry after deportation in violation of § 276, the defendant can collaterally attack the validity of the underlying deportation order on the ground that it was entered without due process. As explained by the Court, unless collateral attack is allowed in cases where an alien has waived his or her right to appeal in an unknowing or unintelligent manner, no judicial review of the underlying deportation order ever will occur.

In addition to the Supreme Court activity described above, several noteworthy decisions by the Ninth Circuit impact on the safeguards available to aliens in immigration proceedings. In Castro-O’Ryan v. U.S. Dept. of Immigration & Naturalization, 821 F.2d 1415 (9th Cir. 1987), the Court examined an alien’s right to counsel in deportation proceedings. Castro-O’Ryan was unrepresented by counsel at his hearing since his Arizona attorney resigned from the case and the immigration judge refused to grant a change of venue to San Francisco where his attorney of choice and several witnesses resided. After the immigration judge denied Castro-O’Ryan’s applications for asylum and withholding of deportation, made without the assistance of counsel, and the BIA affirmed, Castro-O’Ryan appealed to the Ninth Circuit Court of Appeals. The court reversed and remanded on the basis that Castro-O’Ryan effectively had been denied his right to counsel, to his prejudice.

Castro asked for the opportunity to have counsel of his choice in San Francisco. Judge Nail never ruled on that request but effectively denied
it. Castro's laconic answer to Judge Nail [asking whether Castro intended to speak for himself at trial] was not an intelligent, voluntary waiver of counsel. . . . Without being informed by the immigration judge "of the complexity of [his] dilemma and without any awareness of the cogent legal arguments which could have been made on [his] behalf," Castro did not competently and understandingly waive his statutory right. 

Castro-O'Ryan at 1420, citing Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979).

The court went one step further in its analysis of the importance of Castro-O’Ryan's right to counsel. Castro-O’Ryan failed to obtain counsel for his appeal to the BIA, handling the appeal himself. While there is no apparent reason why Castro-O’Ryan could not have had his attorney of choice in San Francisco handle his BIA appeal, the court nevertheless found error in the Board’s adjudication of the case.

Castro, it may be observed, had the opportunity to engage counsel to argue his appeal before the Board; he did not do so; he slept on his rights. This argument has force but does not cure the unfair proceeding before Judge Nail on which the Board's opinion rests. . . . [T]he Board's fundamental error was to affirm a decision reached in a hearing marred by the denial of counsel. Id. at 1420–21.

Another case reargued before the Ninth Circuit in 1987 involved the availability of attorney's fees to practitioners representing aliens in deportation proceedings. In Escobar-Ruiz v. INS, 787 F.2d 1294 (9th Cir. 1986), the court held that the provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 2412, permitting the award of attorney's fees to the prevailing party in a civil action, apply to immigration proceedings before an immigration judge and the BIA. The INS petitioned for rehearing, with suggestion for a rehearing en bane. On March 25, 1987, the three-judge panel that originally heard the case denied the petition, 813 F.2d 283 but on June 3, 1987, the court of appeals en bane ordered the case reheard on the issue of whether deportation proceedings are "adversary adjudications" within the meaning of 5 U.S.C. § 504. Parties are now awaiting the en bane decision of the court.

In a third Ninth Circuit decision, the court of appeals held that the doctrine of res judicata applies in deportation hearings. Ramon-Sepulveda v. INS, 824 F.2d 749 (9th Cir. 1987). That case involved a Mexican petitioner who invoked his Fifth Amendment privilege to remain silent at his deportation hearing and refused to answer questions posed by the INS trial attorney and the immigration judge. The immigration judge terminated the proceedings when the INS failed to prove that the peti-
tioner was an alien. The immigration judge later granted an INS motion to reopen the deportation proceedings on the basis of new evidence of Ramon-Sepulveda’s alienage in the form of a Mexican birth certificate bearing Ramon-Sepulveda’s name, and the BIA affirmed. The court of appeals held that the grant of reopening was erroneous because the new evidence—the Mexican birth certificate—could have been discovered by the exercise of due diligence by the INS before the original deportation hearing and therefore was not “newly discovered evidence” within the meaning of 8 C.F.R. § 242.22 requirements for reopened hearings.

VIII. Employer Sanctions and Discrimination

Two of the most controversial provisions of IRCA relate to the employment of undocumented aliens. Under IRCA, employers are subject to civil and/or criminal penalties if they hire aliens not authorized to work after November 6, 1986 and/or if they fail to maintain paperwork verification of work eligibility of all new employees. Employers also will be liable if they unjustifiably discriminate against aliens authorized to work in the United States in their efforts to comply with the employer sanctions provisions.

A. Employer Sanctions

The employer sanctions provisions of the Act, INA § 274A, make it illegal to hire aliens not authorized to work in the United States, and also impose civil penalties on employers for failure to comply strictly with verification requirements. Specifically, employers must see and document proof of identity and work authorization from every employee, on the Employment Eligibility Verification Form (1–9) provided by the INS, within three business days of hire. Employers must have 1–9 forms on file for every employee—even native-born U.S. citizens—hired after November 6, 1986, and failure to do so will result in liability even if no unauthorized aliens are hired. Employees hired prior to November 6, 1986 are expressly exempted from employment eligibility verification requirements under a “grandfather clause” in IRCA. See INA § 274A; 8 C.F.R. § 2741.7.

The employer sanctions provisions of IRCA were not scheduled to be enforced until June 1987, at which time the INS was authorized to issue civil citations. Enforcement of the paperwork requirement was ultimately postponed by Congress until September 1, 1987, due to delays in availability of 1–9s and in employer education programs. No fines or potential criminal penalties were authorized until after June 1, 1988, unless the
employer had already received a personal warning and citation from the INS.

The delay in enforcement meant that the INS would not issue any written citations or take any enforcement action beyond informational and educational activities, for an employer's failure to have completed required 1–9 work eligibility verification forms before September 1, 1987. However, the INS could take action against employers knowingly hiring unauthorized aliens after June 1, 1987. The INS indicated that with regard to all employers, a multi-tiered enforcement process would be implemented during the citation period (June 1987 to June 1988) whereby the INS would first visit employers to provide information and consultation about employer sanctions, then issue citations to employers who fail to comply with the law after an informational visit, and finally levy money fines only after the two preceding visits have occurred. Subsequent visits will be subject to the graduated schedule of fines and criminal penalties prescribed by statute. The INS has stated that it may make an exception to the policy of an initial informational visit in the case of "a blatant violator who willfully and knowingly shows wanton disrespect for this law."

On August 21, 1987 the INS issued its first warning citation under the employer sanctions provisions of IRCA. The citation caught many employers and attorneys by surprise since there was general understanding that no citations would be issued until September, under the delay provision passed by Congress. However, the INS defended its action on the ground that the delay provision applied only to the paperwork sections of IRCA, while the employer cited in fact was hiring unauthorized aliens. Further, on October 2, 1987, the INS issued its first notice of intent to fine an employer for hiring unauthorized aliens. After initially contesting the fine, the employer has now settled with the INS and agreed to pay. According to INS statistics, this notice of intent to fine was the first of seven such notices issued as of November 27, 1987. The INS has also issued 605 citations.

A special provision of IRCA provides that no penalties are to be imposed before November 30, 1988 against any employers of aliens in seasonal agricultural services. INA § 243A(i)(3)(A). November 30, 1988 marks the end of the legalization application period for special agricultural workers (SAWs). See INA § 210(a)(1). However, confusion remains regarding agricultural employers' obligation to complete 1–9 employment verification forms for their employees prior to November 30, 1988, and whether they are subject to citations for failing to do so. The Service's May 1987 implementing regulations failed to refer to the deferral of sanctions for agricultural employers, so no clear answer from the INS is
available. However, the INS is—at the very least—“encouraging” growers to complete the forms. In the meantime, confusion about the compliance requirements for employers of agricultural workers has led to the firing of agricultural workers who are unable to produce work authorizations. Farmworkers have filed suit against the INS, challenging the Service over a variety of policies adversely affecting farm workers, including INS’s failure to issue regulations or a clear policy on the issue of deferred enforcement. See United Farm Workers of America v. INS, No. S-87-1064-MLS-EM (E.D. Cal. filed July 22, 1987).

B. Immigration-Related Employment Discrimination

In addition to IRCA’s employer sanctions provisions, Section 102 of IRCA creates an entirely new category of “unfair immigration-related employment practices,” codified at INA § 274B, 8 U.S.C. § 1324B. The provision, commonly referred to as the “Frank Amendment” because of its sponsor Rep. Barney Frank (D-MA), provides in part that “[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment” on grounds of national origin or citizenship status. To be applicable, an employer must have more than three employees and, to avoid duplication with Title VII, United States Code, the section does not apply to national origin discrimination by employers with fifteen or more employees.

Section 274B protects all workers authorized to work in the United States and not employed in a workplace covered by Title VII against employment discrimination on the basis of national origin. It also protects citizens, nationals and “intending citizens” from discrimination on the basis of citizenship. “Intending citizens” are defined as noncitizens satisfying three requirements (1) the alien must be a lawful permanent resident, lawful temporary resident, refugee or asylee; (2) he or she must manifest the intention to become a citizen by completing a written declaration of intent; and (3) the alien must apply for naturalization within six months of becoming eligible, and must be naturalized within two years of applying or otherwise demonstrate active pursuit of naturalization. The INS has produced a new “Declaration of Intending Citizen” form (I-772) that became available in September 1987. Due to the delay in availability, the Justice Department’s final regulations postponed the effective date of the declaration of intent requirement until December 1, 1987. However, as of December, an alien must have completed Form I-772 prior to the occurrence of the alleged discriminatory acts, or the
Special Counsel will refuse to investigate. See 52 Fed.Reg. 193-37402, 37406-7 (10/6/87).

Other aliens authorized to work in the United States—such as aliens who have been granted extended voluntary departure or who have applications pending for adjustment of status, political asylum or legalization—are largely unprotected by the Frank Amendment, since many of them work for employers with fifteen or more employees, and therefore their cases technically fall under Title VII. However, Title VII does not protect against discrimination on the basis of alienage, so aliens not qualifying as "intending citizens" under IRCA may find their discrimination remedies severely limited.

In addition, the Frank Amendment sets forth four important limitations on the scope of § 274B, each of which may be raised by an employer as a defense to an IRCA discrimination charge. First, § 274B explicitly does not apply to persons or entities employing three or fewer employees. INA § 274B(a)(2)(A). Second, § 274B does not provide a remedy against national origin discrimination which would be allowed under the "bona fide occupational qualification" exception to Title VII. Section 703 of Title VII permits an employer to base employment decisions on an otherwise prohibited criterion where the criterion constitutes a "bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that particular business or enterprise." See 42 U.S.C. § 2000e-2(e). IRCA adopts this BFOQ defense in § 274B(a)(2)(b) with regard to national origin discrimination, suggesting that, for example, English-only workplace rules or language aptitude tests, which inevitably result in national origin discrimination, may be allowed under IRCA if the employer can meet its burden of proving that knowledge of English is a BFOQ.

The third limitation on the applicability of the Frank Amendment is that the employment discrimination provisions do not apply to discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.” 8 U.S.C. § 1324B(a)(2)(C).

The fourth limitation on the applicability of IRCA's employment discrimination provisions is the "Lungren Amendment," sponsored by Daniel Lungren (R-CA) and codified at INA § 274B(a)(4), that provides that "[n]otwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or
national of the United States over another individual who is an alien if the two individuals are equally qualified. 8 U.S.C. § 1324B(a)(4). This exception, allowing for preference of U.S. citizens over "equally qualified" aliens, could eviscerate the protections of the Frank Amendment unless narrowly construed.

Section 274B(b) provides for enforcement of the employment discrimination provisions established in § 274B(a). As a means of handling discrimination charges stemming from immigration-related unfair employment practices, the Frank Amendment created a new enforcement agency of the federal government, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, housed within the Department of Justice. According to the Act, "any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice" may file charges with new regional offices of the Special Counsel, which must then investigate each charge within 120 days. Charges must be filed with the Special Counsel's office within six months of the incident or occurrence giving rise to the charge.

A major controversy has developed around the correct standard of proof to establish that an employer has committed an unfair immigration-related employment practice. Prior to IRCA's enactment, most commentators, including the amendment's author, Rep. Frank, had assumed that the test for immigration-related employment discrimination would be the same as that in Title VII, i.e., proof of either "disparate treatment" or "disparate impact." While "disparate treatment" discrimination involves intentional discrimination, "disparate impact" discrimination involves facially neutral employment practices that serve disproportionately to disqualify protected classes of employees from hiring or promotion. However, the Justice Department has taken the position that only intentional "disparate treatment" discrimination is actionable under IRCA's anti-discrimination provisions.

Despite strong negative comments from Rep. Frank, the American Civil Liberties Union, and other organizations, the Justice Department's proposed and final regulations included a requirement that employees filing charges alleging unfair immigration-related employment practices prove the employer has "knowingly and intentionally" discriminated or has engaged in "a pattern or practice of knowing and intentional discrimination." 52 Fed. Reg. 55-9274 (3/23/87); 52 Fed. Reg. 193-37402, 37403-37405 (10/6/87).

The Justice Department's response to the criticism was its statement that: "The intent standard makes illegal facially neutral policies which are intended to discriminate on prohibited bases and have that effect." The supplementary information portion of the final rule says:
Discriminatory intent may be shown by both direct and circumstantial evidence. Thus, the discriminatory intent standard encompassed more than just cases where employers have made bigoted remarks or openly engage in facially (sic) disparate treatment. In order for an individual to prevail in a case of disparate treatment... an individual would make a *prima facie* showing by proving that he or she is part of a national origin or citizenship status group, that he or she applied for a job and was rejected, that the job was kept open and given to another individual of similar qualifications. At this point, the burden of production shifts to the employer to come forward with a nondiscriminatory explanation for the rejection of the charging party. If an explanation is produced, the charging party then has the opportunity to show that this reason was a pretext and that the employer's refusal to hire him or her is because of national origin or citizenship status. Moreover, while under this standard it is not sufficient to allege that an action results in disproportionate impact, statistics may be used in appropriate cases to aid in proving discriminatory intent.

The standard articulated here is substantially similar to that in Title VII cases.

Whereas the IRCA employer sanctions provisions were originally intended to take effect only after a lengthy education period, the discrimination provisions were to be effective immediately on November 6, 1986. However, no proposed regulations were promulgated until March 1987, and no Special Counsel was formally appointed until November. The Justice Department announced the appointment of Mary E. Mann as Acting Special Counsel on April 21, 1987 and also made public at that time the address to which anti-discrimination complaints should be sent. Lawrence J. Siskind finally was confirmed by the Senate as Special Counsel for Immigration-Related Unfair Employment Practices on November 5, 1987. In the meantime, delays in implementing the Frank Amendment have called into question the continuing validity of the 180-day statute of limitations contained in INA § 274B(d)(3), as applied to individuals illegally fired shortly after the new law took effect. For such persons, the statute of limitations expired in May 1987, less than a month after the Office of Special Counsel opened to receive complaints. The Justice Department takes the position that the 180-day statute of limitations still applies to these individuals, but this issue is likely to be litigated if discriminatees are injured by it.

C. Litigation Arising from IRCA's Employer Sanctions and Discrimination Provisions

Despite the relatively short time that IRCA has been in effect, the employer sanctions and discrimination provisions have already generated litigation in the federal courts and before the National Labor Relations
Board (NLRB). In League of United Latin American Citizens (LULAC) v. Pasadena Independent School District, 662 F. Supp. 443 (S.D. Tex. 1987), the district court ordered four discharged alien employees reinstated with back pay after they had been fired for obtaining their jobs by the use of false Social Security numbers. The four Mexican and Salvadoran women had been working as maintenance workers with the Pasadena Independent School District since prior to November 6, 1986, after using false Social security numbers in their job applications. When the false numbers were discovered in 1987, they all were given five days to secure valid Social Security numbers and informed that, if they complied, they could keep their jobs. All four plaintiffs were eligible for legalization under IRCA, but as no mechanism had yet been established whereby qualified undocumented aliens could obtain valid Social Security numbers, they were unable to comply and were subsequently fired for having given false information on a job application in violation of district policies. They filed a class action suit against the school district, alleging that 89.3 percent of the school district’s maintenance workers are Hispanic, almost 90 percent of undocumented Hispanic workers rely on false Social Security numbers, and the school district policy therefore would have a disparate impact on Hispanics, in violation of the Act’s provisions forbidding discrimination on the basis of national origin or citizenship status. As stated by the court:

When applied to those who are qualified for legalization, and who intend to become citizens, a policy of terminating undocumented aliens for no other reason than that they have given employers a false social security number constitutes an unfair immigration-related employment practice under § 274B(a) of the act. Only because of plaintiffs’ citizenship status have they been unable to secure valid social security numbers. Id. at 448.

The court found that the lawsuit was not precluded by the Act’s provision requiring that employment discrimination charges be filed with the Special Counsel before any private right of action accrues and that administrative remedies be exhausted before intervention by a district or appellate court. Under IRCA, no private right of action against the employer arises unless and until the Special Counsel fails to act within 120 days of the filing of a charge by the alien, or notifies the alien within 120 days that no action will be brought before an administrative law judge. See INS § 274B(b) et seq.; 22 C.F.R. § 44.303(c). In LULAC, supra, the court noted that no Special Counsel had yet been appointed and ruled that it would be unreasonable to require the discharged plaintiffs
to wait until someone has been appointed and given the opportunity to act.

The court found a substantial likelihood of irreparable injury to the plaintiffs, due to the greatly increased probability that they would be rejected for legalization as potential public charges if they remained unemployed until their legalization applications were processed. On this basis, the court granted an injunction requiring that the plaintiffs immediately be reinstated with back pay and the school district refrain from dismissing any other employee who is an undocumented alien qualified for legalization under IRCA on the ground that the alien provided a false Social Security number.

While undocumented aliens eligible for amnesty have received considerable protection from the courts, aliens protected by IRCA’s “grandfather clause” have not fared nearly as well. These aliens are not covered by the anti-discrimination provisions of IRCA, since they are “unauthorized aliens.” Nevertheless, in order to render the grandfather clause meaningful, it was expected that these aliens would be protected from immigration-related firings by the procedures governing illegal dismissals of any worker, as established under American labor law. However, on October 27, 1987, the Office of General Counsel for the National Labor Relations Board issued a memorandum to all regional directors, officers-in-charge and resident officers, instructing them that aliens ineligible for legalization also would be ineligible for reinstatement or backpay. Pursuant to this directive, only unauthorized aliens eligible for legalization, and who actually apply for legalization within the statutory period, will be eligible for reinstatement and backpay in cases before the NLRB. Further, aliens who apply for legalization but are ultimately found ineligible will be unprotected from firings as of the date of the ineligibility determination. This position leaves aliens covered by IRCA’s grandfather clause essentially unprotected: their firing may be illegal, but no remedy exists.

The restrictive interpretation of the protections available to “grandfathered” aliens evidenced by the NLRB memorandum is echoed in a district court decision from Alabama. In Patel v. Sumani Corp., Inc., 660 F. Supp. 1528 (N.D. Ala. 1987), the court held that an undocumented alien is not an “individual” within the Fair Labor Standards Act’s definition of “employee,” and therefore has no standing to complain of minimum wage and overtime violations under that Act. This decision was opposite to one reached in In re Reyes, 814 F.2d 168 (5th Cir. 1987), where that court found, without explanation, that it was “well established” that the protections of the Fair Labor Standards Act apply to undocumented aliens.
PART 1

Immigration Court Rules