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TITLE 8. ALIENS AND NATIONALITY

CHAPTER 12. IMMIGRATION AND NATIONALITY

IMMIGRATION

ADMISSION QUALIFICATIONS FOR ALIENS; TRAVEL CONTROL OF CITIZENS AND ALIENS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

8 USCS § 1182 (2002)

§ 1182. Excludable aliens

(a) Classes of aliens ineligible for visas or admission. Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.

(A) In general. Any alien--

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)--

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized. For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g).

(C) Exception from immunization requirement for adopted children 10 years of age or younger. Clause (ii) of subparagraph (A) shall not apply to a child who--

(i) is 10 years of age or younger,

(ii) is described in section 101(b)(1)(F) [*8 USCS § 1101*(b)(1)(F)], and

(iii) is seeking an immigrant visa as an immediate relative under section 201(b) [*8 USCS § 1151*(b)],

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds.

(A) Conviction of certain crimes.

(i) In general. Except as provided in clause (ii), any alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of--

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802)),*

is inadmissible.

(ii) Exception. Clause (i)(I) shall not apply to an alien who committed only one crime if--

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions. Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers. Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802)),* or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice. Any alien who--

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution. Any alien--

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h) [*8 USCS § 1101*(h)]).

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized. For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) Foreign government officials who have engaged in particularly severe violations of religious freedom. Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time during the preceding 24-month period, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 [*22 USCS § 6402],* and the spouse and children, if any, are inadmissible.

(H) Significant traffickers in persons.

(i) In general. Any alien who is listed in a report submitted pursuant to section 111(b) of the Trafficking Victims Protection Act of 2000 [*22 USCS § 7108*(b)], or who the consular officer or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act [*22 USCS § 7102],* is inadmissible.

(ii) Beneficiaries of trafficking. Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters. Clause (ii) shall not

apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering. Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds.

(A) In general. Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in--

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities.

(i) In general. Any alien who--

(I) has engaged in a terrorist activity,

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv),

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity,

(IV) is a representative (as defined in clause (v)) of--

(aa) a foreign terrorist organization, as designated by the Secretary of State under section 219 [*8 USCS § 1189],* or

(bb) a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities,

(V) is a member of a foreign terrorist organization, as designated by the Secretary under section 219 [*8 USCS § 1189],* or which the alien knows or should have known is a terrorist organization[,]

(VI) has used the alien's position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities, or

(VII) is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this Act, to be engaged in a terrorist activity.

(ii) Exception. Subclause (VII) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the

activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) Terrorist activity defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) Engage in terrorist activity defined. As used in this chapter [Act], the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization--

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for--

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;

(V) to solicit any individual--

(aa) to engage in conduct otherwise described in this clause;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation,

communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or

(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.

This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply.

(v) Representative defined. As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) Terrorist organization defined. As used in clause (i)(VI) and clause (iv), the term "terrorist organization" means an organization--

(I) designated under section 219 [*8 USCS § 1189];*

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or

(III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).

(C) Foreign policy.

(i) In general. An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials. An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens. An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations. If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a

timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party.

(i) In general. Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership. Clause (i) shall not a alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership. Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that--

(I) the membership or affiliation terminated at least--

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members. The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecutions or genocide.

(i) Participation in Nazi persecutions. Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide. Any alien who has engaged in conduct that is defined as genocide for purposes of the International Convention on the Prevention and Punishment of Genocide is inadmissible.

(F) Association with terrorist organizations. Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated

with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(4) Public charge.

(A) In general. Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account.

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A [*8 USCS § 1183a]* for purposes of exclusion under this paragraph.

(C) Family-sponsored immigrants. Any alien who seeks admission or adjustment of status under a visa number issued under section 201(b)(2) or 203(a) [*8 USCS § 1151*(b)(2) or 1153(a)] is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 204(a)(1)(A) [*8 USCS § 1154*(a)(1)(A)(ii), (iii), or (iv)], or

(II) classification pursuant to clause (ii) or (iii) of section 204(a)(1)(B) [*8 USCS § 1154*(a)(1)(B)]; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 213A(f) [*8 USCS § 1183a*(f)] or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 213A [*8 USCS § 1183a]* with respect to such alien.

(D) Certain employment-based immigrants. Any alien who seeks admission or adjustment of status under a visa number issued under section 203(b) [*8 USCS § 1153*(b)] by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 213A [*8 USCS § 1183a]* with respect to such alien.

(5) Labor certification and qualifications for certain immigrants.

(A) Labor certification.

(i) In general. Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that--

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the

wages and working conditions of workers in the United States similarly employed.

(ii) Certain aliens subject to special rule. For purposes of clause (i)(I), an alien described in this clause is an alien who--

(I) is a member of the teaching profession, or

(II) has exceptional ability in the sciences or the arts.

(iii) Professional athletes.

(I) In general. A certification made under clause (i) with respect to a professional athlete shall remain valid with respect to the athlete after the athlete changes employer, if the new employer is a team in the same sport as the team which employed the athlete when the athlete first applied for the certification.

(II) Definition. For purposes of subclause (I), the term "professional athlete" means an individual who is employed as an athlete by--

(aa) a team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $ 10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(bb) any minor league team that is affiliated with such an association.

(iv) Long delayed adjustment applicants. A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) [*8 USCS § 1154*(j)] shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

(B) Unqualified physicians. An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) Uncertified foreign health-care workers. Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is inadmissible unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services, verifying that--

(i) the alien's education, training, license, and experience--

(I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;

(II) are comparable with that required for an American health-care worker of the same type; and

(III) are authentic and, in the case of a license, unencumbered;

(ii) the alien has the level of competence in oral and written English

considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and

(iii) if a majority of States licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, the alien has passed such a test or has passed such an examination.

For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

(D) Application of grounds. The grounds for inadmissibility of aliens under subparagraphs (A) and (B) shall apply to immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b) [*8 USCS § 1153*(b)(2) or (3)].

(6) Illegal entrants and immigration violators.

(A) Aliens present without admission or parole.

(i) In general. An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children. Clause (i) shall not apply to an alien who demonstrates that--

(I) the alien qualifies for immigrant status under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) [*8 USCS § 1154*(a)(1)],

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

(B) Failure to attend removal proceeding. Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

(C) Misrepresentation.

(i) In general. Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) Falsely claiming citizenship.

(I) In general. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A [*8 USCS § 1324a])* or

any other Federal or State law is inadmissible.

(II) Exception. In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (i).

(D) Stowaways. Any alien who is a stowaway is inadmissible.

(E) Smugglers.

(i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990 [*8 USCS § 1255a* note]), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) [*8 USCS § 1153*(a)(2)] (including under section 112 of the Immigration Act of 1990 [*8 USCS § 1153* note]) or benefits under section 301(a) of the Immigration Act of 1990 [*8 USCS § 1255a* note] if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11).

(F) Subject of civil penalty.

(i) In general. An alien who is the subject of a final order for violation of section 274C [*8 USCS § 1324c]* is inadmissible.

(ii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(12).

(G) Student visa abusers. An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) [*8 USCS § 1101*(a)(15)(F)(i)] and who violates a term or condition of such status under section 214(l) [*8 USCS § 1184*(l)] is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

(7) Documentation requirements.

(A) Immigrants.

(i) In general. Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission--

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a) [*8 USCS § 1181*(a)], or

(II) whose visa has been issued without compliance with the provisions of section 203 [*8 USCS § 1183],*

is inadmissible.

(ii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (k).

(B) Nonimmigrants.

(i) In general. Any nonimmigrant who--

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(4).

(iii) Guam visa waiver. For provision authorizing waiver of clause (i) in the case of visitors to Guam, see subsection (l).

(iv) Visa waiver program. For authority to waive the requirement of clause (i) under a program, see section 217 [*8 USCS § 1187].*

(8) Ineligible for citizenship.

(A) In general. Any immigrant who is permanently ineligible to citizenship is inadmissible.

(B) Draft evaders. Any person who has departed from or who has remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency is inadmissible, except that this subparagraph shall not apply to an alien who at the time of such departure was a nonimmigrant and who is seeking to reenter the United States as a nonimmigrant.

(9) Aliens previously removed.

(A) Certain aliens previously removed.

(i) Arriving aliens. Any alien who has been ordered removed under section 235(b)(1) [*8 USCS § 1225*(b)(1)] or at the end of proceedings under section 240 [*8 USCS § 1229a]* initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens. Any alien not described in clause (i) who--

(I) has been ordered removed under section 240 [*8 USCS § 1229a]* or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception. Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) Aliens unlawfully present.

(i) In general. Any alien (other than an alien lawfully admitted for permanent residence) who--

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) [*8 USCS § 1254a*(e)]) prior to the commencement of proceedings under section 235(b)(1) [*8 USCS § 1225*(b)(1)] or section 240 [*8 USCS § 1229a],* and again seeks admission within 3 years of the

date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

(ii) Construction of unlawful presence. For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

(iii) Exceptions.

(I) Minors. No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(II) Asylees. No period of time in which an alien has a bona fide application for asylum pending under section 208 [*8 USCS § 1158]* shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

(III) Family unity. No period of time in which the alien is a beneficiary of family unity protection pursuant to section 301 of the Immigration Act of 1990 [*8 USCS § 1255a* note] shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

(IV) Battered women and children. Clause (i) shall not apply to an alien who would be described in paragraph (6)(A)(ii) if "violation of the terms of the alien's nonimmigrant visa" were substituted for "unlawful entry into the United States" in subclause (III) of that paragraph.

(iv) Tolling for good cause. In the case of an alien who--

(I) has been lawfully admitted or paroled into the United States,

(II) has filed a nonfrivolous application for a change or extension of status before the date of expiration of the period of stay authorized by the Attorney General, and

(III) has not been employed without authorization in the United States before or during the pendency of such application,

the calculation of the period of time specified in clause (i)(I) shall be tolled during the pendency of such application, but not to exceed 120 days.

(v) Waiver. The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

(C) Aliens unlawfully present after previous immigration violations.

(i) In general. Any alien who--

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1) [*8 USCS § 1225*(b)(1)], section 240 [*8 USCS § 1229a],* or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception. Clause (i) shall not apply to an alien seeking

admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) [subsec. (a)(9)(C)(i) of this section] in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A) [*8 USCS § 1154*(a)(1)(A)], or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B) [*8 USCS § 1154*(a)(1)(B)], in any case in which there is a connection between--

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

(10) Miscellaneous.

(A) Practicing polygamists. Any immigrant who is coming to the United States to practice polygamy is inadmissible.

(B) Guardian required to accompany helpless alien. Any alien--

(i) who is accompanying another alien who is inadmissible and who is certified to be helpless from sickness, mental or physical disability, or infancy pursuant to section 232(c) [*8 USCS § 1222*(c)], and

(ii) whose protection or guardianship is determined to be required by the alien described in clause (i),

is inadmissible.

(C) International child abduction.

(i) In general. Except as provided in clause (ii), any alien who, after entry of an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is inadmissible until the child is surrendered to the person granted custody by that order.

(ii) Aliens supporting abductors and relatives of abductors. Any alien who--

(I) is known by the Secretary of State to have intentionally assisted an alien in the conduct described in clause (i),

(II) is known by the Secretary of State to be intentionally providing material support or safe haven to an alien described in clause (i), or

(III) is a spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling, or agent of an alien described in clause (i), if such person has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion, is inadmissible until the child described in clause (i) is surrendered to the person granted custody by the order described in that clause, and such person and child are permitted to return to the United States or such person's place of residence.

(iii) Exceptions. Clauses (i) and (ii) shall not apply--

(I) to a government official of the United States who is acting within the scope of his or her official duties;

(II) to a government official of any foreign government if the official has been designated by the Secretary of State at the Secretary's sole and unreviewable discretion; or

(III) so long as the child is located in a foreign state that is a party to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.

(D) Unlawful voters.

(i) In general. Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.

(ii) Exception. In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such violation.

(E) Former citizens who renounced citizenship to avoid taxation. Any alien who is a former citizen of the United States who officially renounces United States citizenship and who is determined by the Attorney General to have renounced United States citizenship for the purpose of avoiding taxation by the United States is inadmissible.

(b) Notices of denials.

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a), the officer shall provide the alien with a timely written notice that--

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a).

(c) [Repealed]

(d) Exclusion of nonimmigrants described in *8 USCS § 1101*(a)(15)(S); temporary admission of nonimmigrants; waiver of subsection (a)(7) requirements; parole; bond and conditions for temporary admissions; applicability to aliens leaving territories; reciprocal admission of officials of foreign governments, etc.

(1) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(S) [*8 USCS § 1101*(a)(15)(S)]. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(S) [*8 USCS § 1101*(a)(15)(S)], if the Attorney General considers it to be in the national interest to do so. Nothing in this section shall be regarded as prohibiting the Immigration and Naturalization Service from instituting removal proceedings against an alien admitted as a nonimmigrant under section 101(a)(15)(S) [*8 USCS § 1101*(a)(15)(S)] for conduct committed after the alien's admission into the United States, or for conduct or a condition that was not disclosed to the Attorney General prior to the alien's admission as a nonimmigrant under section

101(a)(15)(S) [*8 USCS § 1101*(a)(15)(S)].

(2) [Repealed]

(3) Except as provided in this subsection, an alien (A) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), , (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (B) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

(4) Either or both of the requirements of paragraph (7)(B)(i) of subsection (a) may be waived by the Attorney General and the Secretary of State acting jointly (A) on the basis of unforeseen emergency in individual cases, or (B) on the basis of reciprocity with respect to nationals of foreign contiguous territory or of adjacent islands and residents thereof having a common nationality with such nationals, or (C) in the case of aliens proceeding in immediate and continuous transit through the United States under contracts authorized in section 238(c) [233(c)] [*8 USCS § 1223*(c)].

(5) (A) The Attorney General may except as provided in subparagraph (B) or in section 214(f) [*8 USCS § 1184*(f)], in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 207 [*8 USCS § 1157].*

(6) [Repealed]

(7) The provisions of subsection (a) (other than paragraph (7)) shall be applicable to any alien who shall leave Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United States or any other place under the jurisdiction of the United States: The Attorney General shall by regulations provide a method and procedure for the temporary admission to the United States of the aliens described in this proviso. Any alien described in this paragraph, who is denied admission to the United States, shall be immediately removed in the manner provided by section 241(c) of this Act [*8 USCS § 1251*(c)].

(8) Upon a basis of reciprocity accredited officials of foreign governments, their immediate families, attendants, servants, and personal employees may be admitted in immediate and continuous transit through the United States without

regard to the provisions of this section except paragraphs (3)(A), (3)(B), (3)(C), and (7)(B) of subsection (a) of this section.

(9), (10) [Repealed]

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) [*8 USCS § 1181*(b)] and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) [*8 USCS § 1153*(a)] (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(12) The Attorney General may, in the discretion of the Attorney General for humanitarian purposes or to assure family unity, waive application of clause (i) of subsection (a)(6)(F)--

(A) in the case of an alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation or removal and who is otherwise admissible to the United States as a returning resident under section 211(b) [*8 USCS § 1181*(b)], and

(B) in the case of an alien seeking admission or adjustment of status under section 201(b)(2)(A) [*8 USCS § 1151*(b)(2)(A)] or under section 203(a) [*8 USCS § 1153*(a)],

if no previous civil money penalty was imposed against the alien under section 274C [*8 USCS § 1324c]* and the offense was committed solely to assist, aid, or support the alien's spouse or child (and not another individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.

(13) (A) The Attorney General shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(T) [*8 USCS § 1101*(a)(15)(T)].

(B) In addition to any other waiver that may be available under this section, in the case of a nonimmigrant described in section 101(a)(15)(T) [*8 USCS § 1101*(a)(15)(T)], if the Attorney General considers it to be in the national interest to do so, the Attorney General, in the Attorney General's discretion, may waive the application of--

(i) paragraphs (1) and (4) of subsection (a); and

(ii) any other provision of such subsection (excluding paragraphs (3), (10)(C), and (10(E)) if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) [*8 USCS § 1101*(a)(15)(T)(i)(I)].

[(14)](13) The Attorney General shall determine whether a ground of inadmissibility exists with respect to a nonimmigrant described in section 101(a)(15)(U) [*8 USCS § 1101*(a)(15)(U)]. The Attorney General, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 101(a)(15)(U) [*8 USCS § 1101*(a)(15)(U)], if the Attorney General considers it to be in the public or national interest to do so.

(e) Educational visitor status; foreign residence requirement; waiver. No person admitted under section 101(a)(15)(J) [*8 USCS § 1101*(a)(15)(J)] or acquiring such status after admission (i) whose participation in the program for

which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) [*8 USCS § 1101*(a)(15)(J)] was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) [*8 USCS § 1101*(a)(15)(H) or (L)] until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that the departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States Government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(k) [*8 USCS § 1184*(k)]: And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

(f) Suspension of entry or imposition of restrictions by President. Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

(g) Bond and conditions for admission for permanent residence of mentally retarded, tubercular, and mentally ill but cured aliens. The Attorney General may waive the application of--

(1) subsection (a)(1)(A)(i) in the case of any alien who--

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa,

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; or

(C) qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) [*8 USCS 1154*(a)(1)(A)] or classification under clause (ii) or (iii) of section 204(a)(1)(B) [*8 USCS 1154*(a)(1)(B)];

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe;

(2) subsection (a)(1)(A)(ii) in the case of any alien--

(A) who receives vaccination against the vaccine-preventable disease or diseases for which the alien has failed to present documentation of previous vaccination,

(B) for whom a civil surgeon, medical officer, or panel physician (as those terms are defined by section 34.2 of title 42 of the Code of Federal Regulations) certifies, according to such regulations as the Secretary of Health and Human Services may prescribe, that such vaccination would not be medically appropriate, or

(C) under such circumstances as the Attorney General provides by regulation, with respect to whom the requirement of such a vaccination would be contrary to the alien's religious beliefs or moral convictions; or

(3) subsection (a)(1)(A)(iii) in the case of any alien, in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in the discretion of the Attorney General after consultation with the Secretary of Health and Human Services, may by regulation prescribe.

(h) Nonapplicability of subsec. (a)(2)(A)(i)(I), (II), (B), (D), and (E). The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status, and

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States,

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter

of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) [*8 USCS § 1154*(a)(1)(A)] or classification under clause (ii) or (iii) of section 204(a)(1)(B) [*8 USCS § 1154*(a)(1)(B)]; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i) Nonapplicability of subsec. (a)(6)(C)(i).

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) [*8 USCS § 1154*(a)(1)(A)] or clause (ii) or (iii) of section 204(a)(1)(B) [*8 USCS § 1154*(a)(1)(B)], the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(j) Limitation on immigration of foreign medical graduates.

(1) The additional requirements referred to in section 101(a)(15)(J) [*8 USCS § 1101*(a)(15)(J)] for an alien who is coming to the United States under a program under which he will receive graduate medical education or training are as follows:

(A) A school of medicine or of one of the other health professions, which is accredited by a body or bodies approved for the purpose by the Secretary of Education, has agreed in writing to provide the graduate medical education or training under the program for which the alien is coming to the United States or to assume responsibility for arranging for the provision thereof by an appropriate public or nonprofit private institution or agency, except that, in the case of such an agreement by a school of medicine, any one or more of its affiliated hospitals which are to participate in the provision of the graduate medical education or training must join in the agreement.

(B) Before making such agreement, the accredited school has been satisfied that the alien (i) is a graduate of a school of medicine which is accredited by

a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States); or (ii)(I) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), (II) has competency in oral and written English, (III) will be able to adapt to the educational and cultural environment in which he will be receiving his education or training, and (IV) has adequate prior education and training to participate satisfactorily in the program for which he is coming to the United States. For the purposes of this subparagraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

(C) The alien has made a commitment to return to the country of his nationality or last residence upon completion of the education or training for which he is coming to the United States, and the government of the country of his nationality or last residence has provided a written assurance, satisfactory to the Secretary of Health and Human Services, that there is a need in that country for persons with the skills the alien will acquire in such education or training.

(D) The duration of the alien's participation in the program of graduate medical education or training for which the alien is coming to the United States is limited to the time typically required to complete such program, as determined by the Director of the United States Information Agency at the time of the alien's admission into the United States, based on criteria which are established in coordination with the Secretary of Health and Human Services and which take into consideration the published requirements of the medical specialty board which administers such education or training program; except that--

(i) such duration is further limited to seven years unless the alien has demonstrated to the satisfaction of the Director that the country to which the alien will return at the end of such specialty education or training has an exceptional need for an individual trained in such specialty, and

(ii) the alien may, once and not later than two years after the date the alien is admitted to the United States as an exchange visitor or acquires exchange visitor status, change the alien's designated program of graduate medical education or training if the Director approves the change and if a commitment and written assurance with respect to the alien's new program have been provided in accordance with subparagraph (C).

(E) The alien furnishes the Attorney General each year with an affidavit (in such form as the Attorney General shall prescribe) that attests that the alien (i) is in good standing in the program of graduate medical education or training in which the alien is participating, and (ii) will return to the country of his nationality or last residence upon completion of the education or training for which he came to the United States.

(2) An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 101(a)(15)(H)(i)(b) [*8 USCS § 1101*(a)(15)(H)(i)(b)] unless--

(A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or

(B) (i) the alien has passed the Federation licensing examination

(administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services, and

(ii) (I) has competency in oral and written English or (II) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States).

(3) [Omitted]

(k) Attorney General's discretion to admit otherwise excludable aliens who possess immigrant visas. Any alien, inadmissible from the United States under paragraph (5)(A) or (7)(A)(i) of subsection (a), who is in possession of an immigrant visa may, if otherwise admissible, be admitted in the discretion of the Attorney General if the Attorney General is satisfied that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure of the vessel or aircraft from the last port outside the United States and outside foreign contiguous territory or, in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission.

(l) Guam; waiver of requirements; nonimmigrant visitors; acceptance of funds from Guam.

(1) The requirement of paragraph (7)(B)(i) of subsection (a) of this section may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State, and the Secretary of the Interior, after consultation with the Governor of Guam, jointly determine that--

(A) an adequate arrival and departure control system has been developed on Guam, and

(B) such a waiver does not represent a threat to the welfare, safety, or security of the United States or its territories and commonwealths.

(2) An alien may not be provided a waiver under this subsection unless the alien has waived any right--

(A) to review or appeal under this Act of an immigration officer's determination as to the admissibility of the alien at the port of entry into Guam, or

(B) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

(3) If adequate appropriated funds to carry out this subsection are not otherwise available, the Attorney General is authorized to accept from the Government of Guam such funds as may be tendered to cover all or any part of the cost of administration and enforcement of this subsection.

(m) Requirements for admission of nonimmigrant nurses.

(1) The qualifications referred to in section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)], with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien--

(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States;

(B) has passed an appropriate examination (recognized in regulations

promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

(2) (A) The attestation referred to in section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)], with respect to a facility for which an alien will perform services, is an attestation as to the following:

(i) The facility meets all the requirements of paragraph (6).

(ii) The employment of the alien will not adversely affect the wages and working conditions of registered nurses similarly employed.

(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility.

(iv) The facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses.

(v) There is not a strike or lockout in the course of a labor dispute, the facility did not lay off and will not lay off a registered nurse employed by the facility within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

(vi) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)], notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to the registered nurses employed at the facility through posting in conspicuous locations.

(vii) The facility will not, at any time, employ a number of aliens issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] that exceeds 33 percent of the total number of registered nurses employed by the facility.

(viii) The facility will not, with respect to any alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)]--

(I) authorize the alien to perform nursing services at any worksite other than a worksite controlled by the facility; or

(II) transfer the place of employment of the alien from one worksite to another.

Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999]. A copy of the attestation shall be provided, within 30 days of the date of filing, to registered nurses employed at the facility on the date of filing.

(B) For purposes of subparagraph (A)(iv), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

(i) Operating a training program for registered nurses at the facility

or financing (or providing participation in) a training program for registered nurses elsewhere.

(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

(iv) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

The steps described in this subparagraph shall not be considered to be an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv). Nothing in this subparagraph shall require a facility to take more than one step if the facility can demonstrate that taking a second step is not reasonable.

(C) Subject to subparagraph (E), an attestation under subparagraph (A)--

(i) shall expire on the date that is the later of--

(I) the end of the one-year period beginning on the date of its filing with the Secretary of Labor; or

(II) the end of the period of admission under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] of the last alien with respect to whose admission it was applied (in accordance with clause (ii)); and

(ii) shall apply to petitions filed during the one-year period beginning on the date of its filing with the Secretary of Labor if the facility states in each such petition that it continues to comply with the conditions in the attestation.

(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

(E) (i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for nonimmigrants under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

(ii) The Secretary of Labor shall establish a process, including reasonable time limits, for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to. Subject to the time limits established under this clause, this subparagraph shall apply regardless of whether an attestation is expired or unexpired at the time a complaint is filed.

(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

(iv) If the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such

finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 1,000 per nurse per violation, with the total penalty not to exceed $ 10,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least one year for nurses to be employed by the facility.

(v) In addition to the sanctions provided for under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

(F) (i) The Secretary of Labor shall impose on a facility filing an attestation under subparagraph (A) a filing fee, in an amount prescribed by the Secretary based on the costs of carrying out the Secretary's duties under this subsection, but not exceeding $ 250.

(ii) Fees collected under this subparagraph shall be deposited in a fund established for this purpose in the Treasury of the United States.

(iii) The collected fees in the fund shall be available to the Secretary of Labor, to the extent and in such amounts as may be provided in appropriations Acts, to cover the costs described in clause (i), in addition to any other funds that are available to the Secretary to cover such costs.

(3) The period of admission of an alien under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] shall be 3 years.

(4) The total number of nonimmigrant visas issued pursuant to petitions granted under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] in each fiscal year shall not exceed 500. The number of such visas issued for employment in each State in each fiscal year shall not exceed the following:

(A) For States with populations of less than 9,000,000, based upon the 1990 decennial census of population, 25 visas.

(B) For States with populations of 9,000,000 or more, based upon the 1990 decennial census of population, 50 visas.

(C) If the total number of visas available under this paragraph for a fiscal year quarter exceeds the number of qualified nonimmigrants who may be issued such visas during those quarters, the visas made available under this paragraph shall be issued without regard to the numerical limitation under subparagraph (A) or (B) of this paragraph during the last fiscal year quarter.

(5) A facility that has filed a petition under section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)] to employ a nonimmigrant to perform nursing services for the facility--

(A) shall provide the nonimmigrant a wage rate and working conditions commensurate with those of nurses similarly employed by the facility;

(B) shall require the nonimmigrant to work hours commensurate with those of nurses similarly employed by the facility; and

(C) shall not interfere with the right of the nonimmigrant to join or organize a union.

(6) For purposes of this subsection and section 101(a)(15)(H)(i)(c) [*8 USCS § 1101*(a)(15)(H)(i)(c)], the term "facility" means a subsection (d) hospital (as defined in section 1886(d)(1)(B) of the Social Security Act *(42 U.S.C. 1395ww*(d)(1)(B))) that meets the following requirements:

(A) As of March 31, 1997, the hospital was located in a health professional shortage area (as defined in section 332 of the Public Health Service Act *(42 U.S.C. 254e)).*

(B) Based on its settled cost report filed under title XVIII of the Social

Security Act [*42 USCS §§ 1395* et seq.] for its cost reporting period beginning during fiscal year 1994--

(i) the hospital has not less than 190 licensed acute care beds;

(ii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of such title is not less than 35 percent of the total number of such hospital's acute care inpatient days for such period; and

(iii) the number of the hospital's inpatient days for such period which were made up of patients who (for such days) were eligible for medical assistance under a State plan approved under title XIX of the Social Security Act [*42 USCS §§ 1396* et seq.], is not less than 28 percent of the total number of such hospital's acute care inpatient days for such period.

(7) For purposes of paragraph (2)(A)(v), the term "lay off", with respect to a worker--

(A) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract; but

(B) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

Nothing in this paragraph is intended to limit an employee's or an employer's rights under a collective bargaining agreement or other employment contract.

(n) Labor condition application.

(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer--

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B non-immigrant wages that are at least--

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

(B) There is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.

(C) The employer, at the time of filing the application--

(i) has provided notice of the filing under this paragraph to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or

(ii) if there is no such bargaining representative, has provided notice of filing in the occupational classification through such methods as physical posting in conspicuous locations at the place of employment or electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought.

(D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

(E) (i) In the case of an application described in clause (ii), the employer did not displace and will not displace a United States worker (as defined in paragraph (4)) employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application.

(ii) An application described in this clause is an application filed on or after the date final regulations are first promulgated to carry out this subparagraph, and before October 1, 2003, by an H-1B-dependent employer (as defined in paragraph (3)) or by an employer that has been found, on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998], under paragraph (2)(C) or (5) to have committed a willful failure or misrepresentation during the 5-year period preceding the filing of the application. An application is not described in this clause if the only H-1B nonimmigrants sought in the application are exempt H-1B nonimmigrants.

(F) In the case of an application described in subparagraph (E)(ii), the employer will not place the nonimmigrant with another employer (regardless of whether or not such other employer is an H-1B-dependent employer) where--

(i) the nonimmigrant performs duties in whole or in part at one or more worksites owned, operated, or controlled by such other employer; and

(ii) there are indicia of an employment relationship between the nonimmigrant and such other employer;

unless the employer has inquired of the other employer as to whether, and has no knowledge that, within the period beginning 90 days before and ending 90 days after the date of the placement of the nonimmigrant with the other employer, the other employer has displaced or intends to displace a United States worker employed by the other employer.

(G) (i) In the case of an application described in subparagraph (E)(ii), subject to clause (ii), the employer, prior to filing the application--

(I) has taken good faith steps to recruit, in the United States using procedures that meet industry-wide standards and offering compensation that is at least as great as that required to be offered to H-1B nonimmigrants under subparagraph (A), United States workers for the job for which the nonimmigrant or nonimmigrants is or are sought; and

(II) has offered the job to any United States worker who applies and is equally or better qualified for the job for which the nonimmigrant or nonimmigrants is or are sought.

(ii) The conditions described in clause (i) shall not apply to an application filed with respect to the employment of an H-1B nonimmigrant who is described in subparagraph (A), (B), or (C) of section 203(b)(1) [*8 USCS § 1153*(b)(1)].

The employer shall make available for public examination, within one working day after the date on which an application under this paragraph is filed, at the employer's principal place of business or worksite, a copy of each such application (and such accompanying documents as are necessary). The Secretary shall compile, on a current basis, a list (by employer and by occupational classification) of the applications filed under this subsection. Such list shall include the wage rate, number of aliens sought, period of intended employment, and date of need. The Secretary shall make such list available for public examination in Washington, D.C. The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary

finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) [*8 USCS § 1101*(a)(15)(H)(i)(b)] within 7 days of the date of the filing of the application. The application form shall include a clear statement explaining the liability under subparagraph (F) of a placing employer if the other employer described in such subparagraph displaces a United States worker as described in such subparagraph. Nothing in subparagraph (G) shall be construed to prohibit an employer from using legitimate selection criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

(2) (A) Subject to paragraph (5)(A), the Secretary shall establish a process for the receipt, investigation, and disposition of complaints respecting a petitioner's failure to meet a condition specified in an application submitted under paragraph (1) or a petitioner's misrepresentation of material facts in such an application. Complaints may be filed by any aggrieved person or organization (including bargaining representatives). No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively. The Secretary shall conduct an investigation under this paragraph if there is reasonable cause to believe that such a failure or misrepresentation has occurred.

(B) Under such process, the Secretary shall provide, within 30 days after the date such a complaint is filed, for a determination as to whether or not a reasonable basis exists to make a finding described in subparagraph (C). If the Secretary determines that such a reasonable basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of title *5, United States Code, within 60* days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing. In the case of similar complaints respecting the same applicant, the Secretary may consolidate the hearings under this subparagraph on such complaints.

(C) (i) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), (1)(E), or (1)(F), a substantial failure to meet a condition of paragraph (1)(C), (1)(D), or (1)(G)(i)(I), or a misrepresentation of material fact in an application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 1,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or 1184(c)] during a period of at least 1 year for aliens to be employed by the employer.

(ii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1), a willful misrepresentation of material fact in an application, or a violation of clause (iv)--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 5,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or 1184(c)] during a period of at least 2 years for aliens to be employed by the employer.

(iii) If the Secretary finds, after notice and opportunity for a hearing, a willful failure to meet a condition of paragraph (1) or a willful misrepresentation of material fact in an application, in the course of which failure or misrepresentation the employer displaced a United States worker employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition supported by the application--

(I) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 35,000 per violation) as the Secretary determines to be appropriate; and

(II) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) [*8 USCS § 1154* or 1184(c)] during a period of at least 3 years for aliens to be employed by the employer.

(iv) It is a violation of this clause for an employer who has filed an application under this subsection to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee (which term, for purposes of this clause, includes a former employee and an applicant for employment) because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of this subsection, or any rule or regulation pertaining to this subsection, or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of this subsection or any rule or regulation pertaining to this subsection.

(v) The Secretary of Labor and the Attorney General shall devise a process under which an H-1B nonimmigrant who files a complaint regarding a violation of clause (iv) and is otherwise eligible to remain and work in the United States may be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

(vi) (I) It is a violation of this clause for an employer who has filed an application under this subsection to require an H-1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. The Secretary shall determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.

(II) It is a violation of this clause for an employer who has filed an application under this subsection to require an alien who is the subject of a petition filed under section 214(c)(1) [*8 USCS § 1184*(c)(1)], for which a fee is imposed under section 214(c)(9) [*8 USCS § 1184*(c)(9)], to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation of this clause for such an employer otherwise to accept such reimbursement or compensation from such an alien.

(III) If the Secretary finds, after notice and opportunity for a hearing, that an employer has committed a violation of this clause, the Secretary may impose a civil monetary penalty of $ 1,000 for each such violation and issue an administrative order requiring the return to the nonimmigrant of any amount paid in violation of this clause, or, if the nonimmigrant cannot be located, requiring payment of any such amount to the general fund of the Treasury.

(vii) (I) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a full-time employee on the petition filed

under section 214(c)(1) [*8 USCS § 1184*(c)(1)] by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license, to fail to pay the nonimmigrant full-time wages in accordance with paragraph (1)(A) for all such nonproductive time.

(II) It is a failure to meet a condition of paragraph (1)(A) for an employer, who has filed an application under this subsection and who places an H-1B nonimmigrant designated as a part-time employee on the petition filed under section 214(c)(1) [*8 USCS § 1184*(c)(1)] by the employer with respect to the nonimmigrant, after the nonimmigrant has entered into employment with the employer, in nonproductive status under circumstances described in subclause (I), to fail to pay such a nonimmigrant for such hours as are designated on such petition consistent with the rate of pay identified on such petition.

(III) In the case of an H-1B nonimmigrant who has not yet entered into employment with an employer who has had approved an application under this subsection, and a petition under section 214(c)(1) [*8 USCS § 1184*(c)(1)], with respect to the nonimmigrant, the provisions of subclauses (I) and (II) shall apply to the employer beginning 30 days after the date the nonimmigrant first is admitted into the United States pursuant to the petition, or 60 days after the date the nonimmigrant becomes eligible to work for the employer (in the case of a nonimmigrant who is present in the United States on the date of the approval of the petition).

(IV) This clause does not apply to a failure to pay wages to an H-1B nonimmigrant for nonproductive time due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work.

(V) This clause shall not be construed as prohibiting an employer that is a school or other educational institution from applying to an H-1B nonimmigrant an established salary practice of the employer, under which the employer pays to H-1B nonimmigrants and United States workers in the same occupational classification an annual salary in disbursements over fewer than 12 months, if--

(aa) the nonimmigrant agrees to the compressed annual salary payments prior to the commencement of the employment; and

(bb) the application of the salary practice to the nonimmigrant does not otherwise cause the nonimmigrant to violate any condition of the nonimmigrant's authorization under this Act to remain in the United States.

(VI) This clause shall not be construed as superseding clause (viii).

(viii) It is a failure to meet a condition of paragraph (1)(A) for an employer who has filed an application under this subsection to fail to offer to an H-1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation, such as stock options (whether or not based on performance)) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.

(D) If the Secretary finds, after notice and opportunity for a hearing, that an employer has not paid wages at the wage level specified under the application and required under paragraph (1), the Secretary shall order the employer to provide for parent of such amounts of back pay as may be required to comply with the requirements of paragraph (1), whether or not a penalty under

subparagraph (C) has been imposed.

(E) If an H-1B-dependent employer places a nonexempt H-1B nonimmigrant with another employer as provided under paragraph (1)(F) and the other employer has displaced or displaces a United States worker employed by such other employer during the period described in such paragraph, such displacement shall be considered for purposes of this paragraph a failure, by the placing employer, to meet a condition specified in an application submitted under paragraph (1); except that the Attorney General may impose a sanction described in subclause (II) of subparagraph (C)(i), (C)(ii), or (C)(iii) only if the Secretary of Labor found that such placing employer--

(i) knew or had reason to know of such displacement at the time of the placement of the nonimmigrant with the other employer; or

(ii) has been subject to a sanction under this subparagraph based upon a previous placement of an H-1B nonimmigrant with the same other employer.

(F) The Secretary may, on a case-by-case basis, subject an employer to random investigations for a period of up to 5 years, beginning on the date (on or after the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998]) on which the employer is found by the Secretary to have committed a willful failure to meet a condition of paragraph (1) (or has been found under paragraph (5) to have committed a willful failure to meet the condition of paragraph (1)(G)(i)(II)) or to have made a willful misrepresentation of material fact in an application. The preceding sentence shall apply to an employer regardless of whether or not the employer is an H-1B-dependent employer. The authority of the Secretary under this subparagraph shall not be construed to be subject to, or limited by, the requirements of subparagraph (A).

(G) (i) If the Secretary receives specific credible information from a source, who is likely to have knowledge of an employer's practices or employment conditions, or an employer's compliance with the employer's labor condition application under paragraph (1), and whose identity is known to the Secretary, and such information provides reasonable cause to believe that the employer has committed a willful failure to meet a condition of paragraph (1)(A), (1)(B), (1)(E), (1)(F), or (1)(G)(i)(I), has engaged in a pattern or practice of failures to meet such a condition, or has committed a substantial failure to meet such a condition that affects multiple employees, the Secretary may conduct a 30-day investigation into the alleged failure or failures. The Secretary (or the Acting Secretary in the case of the Secretary's absence or disability) shall personally certify that the requirements for conducting such an investigation have been met and shall approve commencement of the investigation. The Secretary may withhold the identity of the source from the employer, and the source's identity shall not be subject to disclosure under section 552 of title 5, United States Code.

(ii) The Secretary shall establish a procedure for any person, desiring to provide to the Secretary information described in clause (i) that may be used, in whole or in part, as the basis for commencement of an investigation described in such clause, to provide the information in writing on a form developed and provided by the Secretary and completed by or on behalf of the person. The person may not be an officer or employee of the Department of Labor, unless the information satisfies the requirement of clause (iii)(II) (although an officer or employee of the Department of Labor may complete the form on behalf of the person).

(iii) Any investigation initiated or approved by the Secretary under clause (i) shall be based on information that satisfies the requirements of such clause and that (I) originates from a source other than an officer or employee

of the Department of Labor, or (II) was lawfully obtained by the Secretary of Labor in the course of lawfully conducting another Department of Labor investigation under this Act or any other Act.

(iv) The receipt by the Secretary of information submitted by an employer to the Attorney General or the Secretary for purposes of securing the employment of an H-1B nonimmigrant shall not be considered a receipt of information for purposes of clause (i).

(v) No investigation described in clause (i) (or hearing described in clause (vii)) may be conducted with respect to information about a failure to meet a condition described in clause (i), unless the Secretary receives the information not later than 12 months after the date of the alleged failure.

(vi) The Secretary shall provide notice to an employer with respect to whom the Secretary has received information described in clause (i), prior to the commencement of an investigation under such clause, of the receipt of the information and of the potential for an investigation. The notice shall be provided in such a manner, and shall contain sufficient detail, to permit the employer to respond to the allegations before an investigation is commenced. The Secretary is not required to comply with this clause if the Secretary determines that to do so would interfere with an effort by the Secretary to secure compliance by the employer with the requirements of this subsection. There shall be no judicial review of a determination by the Secretary under this clause.

(vii) If the Secretary determines under this subparagraph that a reasonable basis exists to make a finding that a failure described in clause (i) has occurred, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing, in accordance with section 556 of title *5, United States Code, within 60* days after the date of the determination. If such a hearing is requested, the Secretary shall make a finding concerning the matter by not later than 60 days after the date of the hearing.

(H) Nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act (such as the authorities under section 274B [*8 USCS § 1324b]),* or any other Act.

(3) (A) For purposes of this subsection, the term "H-1B-dependent employer" means an employer that--

(i) (I) has 25 or fewer full-time equivalent employees who are employed in the United States; and (II) employs more than 7 H-1B nonimmigrants;

(ii) (I) has at least 26 but not more than 50 full-time equivalent employees who are employed in the United States; and (II) employs more than 12 H-1B nonimmigrants; or

(iii) (I) has at least 51 full-time equivalent employees who are employed in the United States; and (II) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(B) For purposes of this subsection--

(i) the term "exempt H-1B nonimmigrant" means an H-1B nonimmigrant who--

(I) receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $ 60,000; or

(II) has attained a master"s or higher degree (or its equivalent) in a specialty related to the intended employment; and

(ii) the term "nonexempt H-1B nonimmigrant" means an H-1B nonimmigrant who is not an exempt H-1B nonimmigrant.

(C) For purposes of subparagraph (A)--

(i) in computing the number of full-time equivalent employees and the

number of H-1B nonimmigrants, exempt H-1B nonimmigrants shall not be taken into account during the longer of--

(I) the 6-month period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998]; or

(II) the period beginning on the date of the enactment of the American Competitiveness and Workforce Improvement Act of 1998 [enacted Oct. 21, 1998] and ending on the date final regulations are issued to carry out this paragraph; and

(ii) any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 [*26 USCS § 414]* shall be treated as a single employer.

(4) For purposes of this subsection:

(A) The term "area of employment" means the area within normal commuting distance of the worksite or physical location where the work of the H-1B nonimmigrant is or will be performed. If such worksite or location is within a Metropolitan Statistical Area, any place within such area is deemed to be within the area of employment.

(B) In the case of an application with respect to one or more H-1B nonimmigrants by an employer, the employer is considered to "displace" a United States worker from a job if the employer lays off the worker from a job that is essentially the equivalent of the job for which the nonimmigrant or nonimmigrants is or are sought. A job shall not be considered to be essentially equivalent of another job unless it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job.

(C) The term "H-1B nonimmigrant" means an alien admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(B) [*8 USCS § 1101*(a)(15)(H)(i)(B)].

(D) (i) The term "lays off", with respect to a worker--

(I) means to cause the worker's loss of employment, other than through a discharge for inadequate performance, violation of workplace rules, cause, voluntary departure, voluntary retirement, or the expiration of a grant or contract (other than a temporary employment contract entered into in order to evade a condition described in subparagraph (E) or (F) of paragraph (1)); but

(II) does not include any situation in which the worker is offered, as an alternative to such loss of employment, a similar employment opportunity with the same employer (or, in the case of a placement of a worker with another employer under paragraph (1)(F), with either employer described in such paragraph) at equivalent or higher compensation and benefits than the position from which the employee was discharged, regardless of whether or not the employee accepts the offer.

(ii) Nothing in this subparagraph is intended to limit an employee's rights under a collective bargaining agreement or other employment contract.

(E) The term "United States worker" means an employee who--

(i) is a citizen or national of the United States; or

(ii) is an alien who is lawfully admitted for permanent residence, is admitted as a refugee under section 207 [*8 USCS § 1157],* is granted asylum under section 208 [*8 USCS § 1158],* or is an immigrant otherwise authorized, by this Act or by the Attorney General, to be employed.

(5) (A) This paragraph shall apply instead of subparagraphs (A) through (E) of paragraph (2) in the case of a violation described in subparagraph (B), but shall not be construed to limit or affect the authority of the Secretary or the

Attorney General with respect to any other violation.

(B) The Attorney General shall establish a process for the receipt, initial review, and disposition in accordance with this paragraph of complaints respecting an employer's failure to meet the condition of paragraph (1)(G)(i)(II) or a petitioner's misrepresentation of material facts with respect to such condition. Complaints may be filed by an aggrieved individual who has submitted a resume or otherwise applied in a reasonable manner for the job that is the subject of the condition. No proceeding shall be conducted under this paragraph on a complaint concerning such a failure or misrepresentation unless the Attorney General determines that the complaint was filed not later than 12 months after the date of the failure or misrepresentation, respectively.

(C) If the Attorney General finds that a complaint has been filed in accordance with subparagraph (B) and there is reasonable cause to believe that such a failure or misrepresentation described in such complaint has occurred, the Attorney General shall initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service. The procedure and rules of such Service shall be applicable to the selection of such arbitrator and to such arbitration proceedings. The Attorney General shall pay the fee and expenses of the arbitrator.

(D) (i) The arbitrator shall make findings respecting whether a failure or misrepresentation described in subparagraph (B) occurred. If the arbitrator concludes that failure or misrepresentation was willful, the arbitrator shall make a finding to that effect. The arbitrator may not find such a failure or misrepresentation (or that such a failure or misrepresentation was willful) unless the complainant demonstrates such a failure or misrepresentation (or its willful character) by clear and convincing evidence. The arbitrator shall transmit the findings in the form of a written opinion to the parties to the arbitration and the Attorney General. Such findings shall be final and conclusive, and, except as provided in this subparagraph, no official or court of the United States shall have power or jurisdiction to review any such findings.

(ii) The Attorney General may review and reverse or modify the findings of an arbitrator only on the same bases as an award of an arbitrator may be vacated or modified under section 10 or 11 of title 9, United States Code.

(iii) With respect to the findings of an arbitrator, a court may review only the actions of the Attorney General under clause (ii) and may set aside such actions only on the grounds described in subparagraph (A), (B), or (C) of section 706(a)(2) of title 5, United States Code. Notwithstanding any other provision of law, such judicial review may only be brought in an appropriate United States court of appeals.

(E) If the Attorney General receives a finding of an arbitrator under this paragraph that an employer has failed to meet the condition of paragraph (1)(G)(i)(II) or has misrepresented a material fact with respect to such condition, unless the Attorney General reverses or modifies the finding under subparagraph (D)(ii)--

(i) the Attorney General may impose administrative remedies (including civil monetary penalties in an amount not to exceed $ 1,000 per violation or $ 5,000 per violation in the case of a willful failure or misrepresentation) as the Attorney General determines to be appropriate; and

(ii) the Attorney General is authorized to not approve petitions filed, with respect to that employer and for aliens to be employed by the employer, under section 204 or 214(c)--

(I) during a period of not more than 1 year; or

(II) in the case of a willful failure or willful misrepresentation, during a period of not more than 2 years.

(F) The Attorney General shall not delegate, to any other employee or official of the Department of Justice, any function of the Attorney General under this paragraph, until 60 days after the Attorney General has submitted a plan for such delegation to the Committees on the Judiciary of the United States House of Representatives and the Senate.

(o) [Terminated]

(p) Computation of prevailing wage level.

(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (n)(1)(A)(i)(II) and (a)(5)(A) in the case of an employee of--

(A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 [*8 USCS § 1101*(a)]), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.

(2) With respect to a professional athlete (as defined in subsection (a)(5)(A)(iii)(II)) when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations shall be considered as not adversely affecting the wages of United States workers similarly employed and be considered the prevailing wage.

(q) Academic honoraria. Any alien admitted under section 101(a)(15)(B) [*8 USCS § 1101*(a)(15)(B)] may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

(r) Certification for certain alien nurses. Subsection (a)(5)(C) shall not apply to an alien who seeks to enter the United States for the purpose of performing labor as a nurse who presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certified statement from the Commission on Graduates of Foreign Nursing Schools (or an equivalent independent credentialing organization approved for the certification of nurses under subsection (a)(5)(C) by the Attorney General in consultation with the Secretary of Health and Human Services) that--

(1) the alien has a valid and unrestricted license as a nurse in a State where the alien intends to be employed and such State verifies that the foreign licenses of alien nurses are authentic and unencumbered;

(2) the alien has passed the National Council Licensure Examination (NCLEX);

(3) the alien is a graduate of a nursing program--

(A) in which the language of instruction was English;

(B) located in a country--

(i) designated by such commission not later than 30 days after the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999], based on such commission's assessment that the quality

of nursing education in that country, and the English language proficiency of those who complete such programs in that country, justify the country's designation; or

(ii) designated on the basis of such an assessment by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection; and

(C) (i) which was in operation on or before the date of the enactment of the Nursing Relief for Disadvantaged Areas Act of 1999 [enacted Nov. 12, 1999]; or

(ii) has been approved by unanimous agreement of such commission and any equivalent credentialing organizations which have been approved under subsection (a)(5)(C) for the certification of nurses under this subsection.

[(s)](p) Receipt of benefits by family-sponsored immigrants. In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 501 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 *(8 U.S.C. 1641*(c)).

HISTORY: (June 27, 1952, ch 477, Title II, Ch 2, § 212, 66 Stat. 182; July 18, 1956, ch 629, Title III, § 301(a), 70 Stat. 575; July 7, 1958, P.L. 85-508, § 23, 72 Stat. 351; March 18, 1959, P.L. 86-3, § 20(b), 73 Stat. 13; July 14, 1960, P.L. 86-648, § 8, 74 Stat. 505; Sept. 21, 1961, P.L. 87-256, § 109(c), 75 Stat. 535; Sept. 26, 1961, P.L. 87-301, §§ 11-15, 75 Stat. 654; Oct. 3, 1965, P.L. 89-236, §§ 10, 15, 79 Stat. 917, 919; April 7, 1970, P.L. 91-225, § 2, 84 Stat. 116; Oct. 12, 1976, P.L. 94-484, Title VI, § 601(a), (c), (d), 90 Stat. 2300, 2301; Oct. 20, 1976, P.L. 94-571, §§ 5, 7(d), 90 Stat. 2705, 2706; Aug. 1, 1977, P.L. 95-83, Title III, 307(q)(1), (2), 91 Stat. 394; Oct. 30, 1978, P.L. 95-549, Title I, §§ 101, 102, 92 Stat. 2065; Sept. 27, 1979, P.L. 96-70, Title III, Ch 2, § 3201(b), 93 Stat. 497; March 17, 1980, P.L. 96-212, Title II, § 203(d), (f), 94 Stat. 107; Dec. 17, 1980, P.L. 96-538, Title IV, § 404, 94 Stat. 3192; Dec. 29, 1981, P.L. 97-116, §§ 4, 5(a), (b), 18(e), 95 Stat. 1611, 1612, 1620; Oct. 5, 1984, P.L. 98-454, Title VI, § 602 [(a)], 98 Stat. 1737; Aug. 27, 1986, P.L. 99-396, § 14(a), 100 Stat. 842; Oct. 27, 1986, P.L. 99-570, Title I, Subtitle M, § 1751(a), 100 Stat. 3207-47; Nov. 10, 1986, P.L. 99-639, § 6(a), 100 Stat. 3543; Nov. 14, 1986, P.L. 99-653, § 7(a), 100 Stat. 3657; Oct. 12, 1984, P.L. 98-473, Title II, Ch II, § 220(a)(9), 98 Stat. 2027; Aug. 27, 1986, P.L. 99-396, § 14(a); Nov. 14, 1986, P.L. 99-653, § 7(d)(2); Dec. 22, 1987, P.L. 100-204, Title VIII, § 806(c), 101 Stat. 1399; Oct. 24, 1988, P.L. 100-525, §§ 3(1)(A), 7(c), 8(f)(2), 9(i), 102 Stat. 1614, 2614, 2616, 2617, 2620; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle J, § 7349(a), 102 Stat. 4473; Dec. 18, 1989, P.L. 101-238, § 3(b), 103 Stat. 2100; Feb. 16, 1990, P.L. 101-246, Title I, Part C, § 131(a), (c), 104 Stat. 31; Nov. 29, 1990, P.L. 101-649, Title I, Subtitle E, § 162(e)(1), (f)(2)(B), Title II, Subtitle A, § 202(b), Subtitle B, § 205(c)(3), Title V, Subtitle A, §§ 511(a), 514(a), Title VI, §§ 601(a), (b), (d), 603(a)(19), 104 Stat. 5011, 5012, 5014, 5020, 5052, 5053, 5067, 5075, 5084; Dec. 12, 1991, P.L. 102-232, Title III, §§ 302(e)(6), (9), 303(a)(5)(B), (6), (7)(B), 306(a)(10), (12), 307(a)-(g) , 105 Stat. 1746, 1747, 1751, 1753; June 10, 1993, P.L. 103-43, Title XX, § 2007(a), 107 Stat. 210; Aug. 26, 1994, P.L. 103-317, Title V, § 506(a), 108 Stat. 1765; Sept. 13, 1994, P.L. 103-322, Title XIII, § 130003(b)(1), 108 Stat. 2024; Oct. 25, 1994, P.L. 103-416, Title II, §§

203(a), 219(e), (z)(1), (5), 220(a), 108 Stat. 4311, 4316, 4318, 4319; April 24, 1996, P.L. 104-132, Title IV, Subtitle B, §§ 411, 412, Subtitle C, § 440(d), 110 Stat. 1268, 1269, 1277; Sept. 30, 1996, P.L. 104-208, Div C, Title I, Subtitle B, § 124(b)(1), Title III, Subtitle A, §§ 301(b)(1), (c)(1), 304(b), 305(c), 306(d), 308(c)(2)(B), (d)(1), (e)(1)(B), (C), (2)(A), (6), (f)(1)(C)-(F), (3)(A), (g)(4)(B), (10)(A), (H), Subtitle B, § 322(a)(2)(B), Subtitle C, §§ 341(a), (b), 342(a), 343, 344(a), 345(a), 346(a), 347(a), 348(a), 349, 351(a), 352(a), 355, Title V, Subtitle B, § 531(a), Title VI, Subtitle A, § 602(a), Subtitle B, §§ 622(b), 624(a), Subtitle E, § 671(e)(3), 110 Stat. 3009-562, 3009-575, 3009-578, 3009-597, 3009-607, 3009-612, 3009-616, 3009-619, 3009-620, 3009-621, 3009-622, 3009-625, 3009-629, 3009-635, 3009-636, 3009-637, 3009-638, 3009-639, 3009-640, 3009-641, 3009-644, 3009-674, 3009-689, 3009-695, 3009-698, 3009-723.)

(As amended Nov. 12, 1997, P.L. 105-73, § 1, 111 Stat. 1459; Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, §§ 412(a)-(c), 413(a)-(e)(1), (f), 415(a), Subtitle C, § 431(a), Div G, Subdiv B, Title XXII, Ch 2, § 2226(a), 112 Stat. 2681-642, 2681-645, 2681-651, 2681-654, 2681-658, 2681-820; Oct. 27, 1998, P.L. 105-292, Title VI, § 604(a), 112 Stat. 2814; Nov. 12, 1999, P.L. 106-95, §§ 2(b), 4(a), 113 Stat. 1312, 1317; Dec. 3, 1999, P.L. 106-120, Title VIII, § 809, 113 Stat. 1632; Oct. 17, 2000, P.L. 106-313, Title I, §§ 106(c)(2), 107(a), 114 Stat. 1254, 1255; Oct. 28, 2000, P.L. 106-386, Div A, §§ 107(e)(3), 111(d), Div B, Title V, §§ 1505(a), (c)(1), (d)-(f), 1513(e), 114 Stat. 1478, 1485, 1525, 1526, 1536; Oct. 30, 2000, P.L. 106-395, Title II, § 201(b)(1), (2), 114 Stat. 1633; Oct. 30, 2000, P.L. 106-396, Title I, § 101(b)(1), 114 Stat. 1638; Oct. 26, 2001, P.L. 107-56, Title IV, Subtitle B, § 411(a), Title X, § 1006(a), 115 Stat. 345, 394; March 13, 2002, P.L. 107-150, § 2(a)(2), 116 Stat. 74.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act June 27, 1952, ch 477, 66 Stat. 163, popularly known as the Immigration and Nationality Act, which appears generally as *8 USCS §§ 1101* et seq. For full classification of such Act, consult USCS Tables volumes.

"Section 7 of the Subversive Activities Control Act of 1950," referred to in this section, which formerly appeared as *50 USCS § 786,* was repealed by Act Jan. 2, 1968, P.L. 90-237, § 5, 81 Stat. 766.

The "effective date of this subsection", referred to in subsec. (j)(2), is 90 days after enactment of Act Oct. 12, 1976, as provided by § 601(f) of Act Oct. 12, 1976, which appears as a note to this section.

Explanatory notes:

The bracketed comma has been added at the end of subcl. (V) of subsec. (a)(3)(B)(i) in order to indicate the probable intent of Congress to include such punctuation.

The bracketed word "Act" has been inserted in the introductory matter of subsec. (a)(3)(B)(iv) to indicate the word probably intended by Congress.

The bracketed paragraph designator "(14)" has been inserted in subsec. (d) in order to maintain numerical continuity.

The bracketed section number "233(c)" has been inserted in subsec. (d) on the authority of § 308(g)(1) of Act Sept. 30, 1996, P.L. 104-208, which appears as a note to this section.

The bracketed title "Director of the United States Information Agency" was inserted in subsec. (e) of this section on the authority of Reorg. Plan No. 2 of

1977, § 7(a)(8), *42 Fed. Reg. 62461,* 91 Stat. 1637, which appears as *5 USCS § 903* note, and Act Aug. 24, 1982, P.L. 97-241, Title III, § 303(a), which appears as *22 USCS § 1461* note. See the Transfer of functions notes to this section.

Subsec. (j)(3) of this section, which has been omitted, terminated effective May 15, 2000, pursuant to § 3003 of Act Dec. 21, 1995, P.L. 104-66, which appears as *31 USCS § 1113* note (see also page 193 of House Document No. 103-7). Such subsection required the Director of the United States Information Agency to transmit an annual report to Congress on aliens submitting affidavits described in subsection (j)(1)(E) of this section.

The bracketed subsection designator "(s)" has been inserted in order to maintain alphabetical continuity.

The subsection designation "(a)" was inserted in brackets in the history line of this section because such designation was omitted from § 602 of Act Oct. 5, 1984, P.L. 98-454 (subsec. (b) of which amended *8 USCS § 1184).*

Prospective amendment:

Termination of amendment adding subsec. (n)(2)(G), effective Sept. 30, 2003. Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, § 413(e)(2), 112 Stat. 2681-651; Oct. 17, 2000, P.L. 106-313, Title I, § 107(b), 114 Stat. 1255, provides: "The amendment made by paragraph (1) [adding subsec. (n)(2)(G) of this section] shall cease to be effective on September 30, 2003.".

Effective date of section:

This section became effective at 12:01 ante meridian United States Eastern Standard Time on the 180th day immediately following enactment, as provided by § 407 of Act June 27, 1952, ch 477, which appears as *8 USCS § 1101* note.

Amendments:

1956. Act July 18, 1956, (effective 7/19/56, as provided by § 401 of sub Act), in subsec. (a)(23), inserted ", or a conspiracy to violate," in two places and "possession of or".

1958. Act July 7, 1958, in subsec. (d)(7), deleted "Alaska,".

1959. Act March 18, 1959, in subsec. (d)(7), deleted "Hawaii," and ": Provided, That persons who were admitted to Hawaii under the last sentence of section 8(a)(1) of the Act of March 24, 1934, as amended (48 Stat. 456), and aliens who were admitted to Hawaii as nationals of the United States shall not be excepted by this paragraph from the application of paragraphs (20) and (21) of subsection (a) of this section, unless they belong to a class declared to be nonquota immigrants under the provisions of section 101(a)(27) of this Act, other than subparagraph (C) thereof, or unless they were admitted to Hawaii with an immigration visa".

1960. Act July 14, 1960, in subsec. (a)(23), inserted "or marihuana" following "narcotic drugs".

1961. Act Sept. 21, 1961 redesignated former subsec. (e) to be subsec. (f); and added subsec. (e).

Act Sept. 26, 1961, substituted subsec. (a), in para. (6) for one which read: "Aliens who are afflicted with tuberculosis in any form, or with leprosy, or any dangerous contagious disease;"; in para. (9), inserted the sentence beginning "Any alien . . ."; added subsecs. (f)-(h) which are inserted as (g)-(i) because Act Sept. 21, 1961 redesignated another subsection as (f).

1965. Act Oct. 3, 1965 (effective on the first day of the first month after the expiration of 30 days following enactment on 10/3/65, except as provided herein, as provided by § 20 of such Act, which appears as *8 USCS § 1151* note), in subsec. (a), in para. (1), substituted "mentally retarded" for

"feebleminded", in para. (4), substituted "or sexual deviation" for "epilepsy"; substituted para. (14) for one which read: "Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply only to the following classes: (i) those aliens described in the nonpreference category of section 203(a)(4)(ii) those aliens described in section 101(a)(27)(C), (27)(D), or (27)(E) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), unless their services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interest or welfare of the United States;", in para. (20), substituted "(a)" for "(e)", in para. (21), deleted "quota" preceding "immigrant", and in para. (24), substituted "other than aliens described in section 101(a)(27)(A) and (B)" for "other than those aliens who are native-born citizens of countries enumerated in section 101(a)(27)(C) and aliens described in section 101(a)(27)(B)"; redesignated subsecs. (f)-(h), added by Act Sept. 26, 1961, to be (g)-(i); and in subsec. (g) as redesignated, inserted "who is excludable from the United States under paragraph (1) of subsection (a) of this section, or any alien" and added the sentence beginning "Any alien excludable . . .".

1970. Act April 7, 1970, substituted subsec. (e) for one which read: "No person admitted under section 101(a)(15)(J) or acquiring such status after admission shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) until it is established that such person has resided and been physically present in the country of his nationality or his last residence, or in another foreign country for an aggregate of at least two years following departure from the United States: Provided, That such residence in another foreign country shall be considered to have satisfied the requirements of this subsection if the Secretary of State determines that it has served the purpose and the intent of the Mutual Educational and Cultural Exchange Act of 1961: Provided further, That upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency, or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That the provisions of this paragraph shall apply also to those persons who acquired exchange visitor status under the United States Information and Educational Exchange Act of 1948, as amended.".

1976. Act Oct. 13, 1976 (effective 90 days after 10/12/76, as provided by § 601(f) of such Act, which appears as a note to this section), in subsec. (a), in para. (31), substituted a semicolon for the period, and added para. (32); in subsec. (e), substituted "(i) whose" for "whose (i)", struck out "or" before

"(ii)", added cl. (iii) and ", except in the case of an alien described in clause (iii)"; and added subsec. (j).

Act Oct. 20, 1976 (effective on the first day of the first month which begins more than 60 days after enactment on 10/20/76, as provided by § 10 of such Act, which appears as *8 USCS § 1101* note), in subsec. (a), substituted para. (14) for one which read: "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8);", and in para. (24), substituted "101(a)(27)(A) and aliens born in the Western Hemisphere" for "101(a)(27)(A) and (B)".

1977. Act Aug. 1, 1977, in subsec. (a)(32), inserted "not accredited by a body or bodies approved for the purpose by the Commissioner of Education (regardless of whether such school of medicine is in the United States", and substituted "The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a) (3) and (6) and to nonpreference immigrant aliens described in section 203(a)(8)." for "The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) [other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted for permanent residence), to nonpreference immigrant aliens described in section 203(a)(8), and to preference immigrant aliens described in section 203(a)(3) and (6)."; in subsec. (j)(1), in subpara. (B), inserted "(i) is a graduate of a school of medicine which is accredited by a body or bodies approved for the purpose by the Commissioner of Education (regardless of whether such school of medicine is in the United States); or (ii)" in subpara. (C), substituted "that there is a need in that country for persons with the skills the alien will acquire in such education or training" for "that upon such completion and return, he will be appointed to a position in which he will fully utilize the skills acquired in such education or training in the government of that country or in an educational or other appropriate institution or agency in that country; and", in subpara. (D), substituted "at the written request" for "at the request", deleted "(i) such government provides a written assurance, satisfactory to the Secretary of Health, Education, and Welfare, that the alien will, at the end of such extension, be appointed to a position in which he will fully utilize the skills acquired in such education or training in the government of that country or in an educational or other appropriate institution or agency in that country," and redesignated cls. (ii) and (iii) to be cls. (i) and (ii) respectively; and in subsec. (j)(2)(A), substituted "(A) and (B)" for "(A) through (D)".

1978. Act Oct. 30, 1978, in subsec. (a), in para. (32), substituted the semicolon at the end for a period; added para. (33); and, in subsec. (d)(3), substituted "(27), (29), and (33)" for "(27) and (29)".

1979. Act Sept. 27, 1979 (effective 9/27/79, as provided by § 3201(d)(1) of said Act, which appears as *8 USCS § 1101* note), in subsec. (d) added paras. (9)

and (10).

1980. Act March 17, 1980, § 203(d) (effective 3/17/80, except as provided and specifically made applicable therein by § 204 of such Act, which appears at *8 USCS § 1101* note), in subsec. (a), in paras. (14) and (32), substituted "section 203(a)(7)" for "section 203(a)(8)".

Section 203(f) of such Act (applicable as provided by § 204 of such Act, which appears as a note to this section, in subsec. (d)(5), designated the existing provisions as subpara. (A) and, in subpara. (A) as so designated, inserted "except as provided in subparagraph (B)", and added subpara. (B).

Act Dec. 17, 1980, in subsec. (j)(2)(A), substituted "1981" for "1980".

1981. Act Dec. 29, 1981 (effective on enactment on 12/29/81 except as provided by § 5(c), as provided by § 21(a) of such Act, which appears as *8 USCS § 1101* note), in subsec. (a), in para. (17), inserted "and who seek admission within five years of the date of such deportation or removal,", in para. (32), inserted closing parenthesis following "is in the United States", and inserted the sentence beginning "For the purposes of this paragraph, . . ."; in subsec. (d)(6), deleted "The Attorney General shall make a detailed report to the Congress in any case in which he exercises his authority under paragraph (3) of this subsection on behalf of any alien excludable under paragraphs (9), (10), and (28) of subsection (a)." following "subsection."; in subsec. (h), substituted "paragraphs (9), (10), or (12) of subsection (a) or paragraph (23) of such subsection as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana" for "paragraphs (9), (10), or (12) of this section"; in subsec. (j), para. (1), introductory matter, inserted "as follows", in subpara. (A), substituted "Secretary of Education" for "Commissioner of Education" and substituted a period for the final semicolon, in subpara. (B), substituted "Secretary of Education" for "Commissioner of Education", inserted "(I)", substituted "and Human Services" for ", Education, and Welfare" inserted "(II)", "(III)" and "(IV)", substituted a period for the semicolon following "United States", and inserted the sentence beginning "For the purposes of this subparagraph, . . .", in subpara. (C), deleted "(including any extension of the duration thereof under subpara (D))" following "United States", substituted "Secretary of Health and Human Services" for "Secretary of Health, Education, and Welfare", and substituted a period for "; and", substituted subpara. (D) for one which read: "The duration of the alien's participation in the program for which he is coming to the United States is limited to not more than 2 years, except that such duration may be extended for one year at the request of the government of his nationality or last residence, if (i) the accredited school providing or arranging for the provision of his education or training agrees in writing to such extension, and (ii) such extension is for the purpose of continuing the alien's education or training under the program for which he came to the United States.", and added subpara. (E), in para. (2), in subpara. (A), substituted "and (B)(ii)(I) of paragraph (1)" for "and (B) of paragraph (1)", substituted "December 31, 1983" for December 31, 1981", inserted "(i) the Secretary of Health and Human Services determines, on a case-by-case basis, that", inserted the matter beginning ", and (ii) the program has . . . :" and clauses (I)-(IV), in subpara. (B), inserted the sentence beginning "The Secretary of Health and Human Services, . . .", added subpara. (C), and added para. (3); and added subsec. (k).

1984. Act Oct. 5, 1984 added subsec. (l).

Act Oct. 12, 1984 (effective on the first day of the first calendar month beginning 36 months after enactment on 10/12/84, as provided by § 235(a)(1) of such Act and applicable as provided by such § 235, which appears as *18 USCS § 3551* note), in subsec. (a)(9), substituted the sentence beginning "An alien who

would be excludable . . ." for: "An alien 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, by reason of the punishment actually imposed, or who would be excludable as one who admits the commission of an offense that is classifiable as a misdemeanor under the provisions of section 1(2) of title 18, United States Code, by reason of the punishment which might have been imposed upon him, may be granted a visa and admitted to the United States if otherwise admissible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense.".

1986. Act Aug. 27, 1986, as amended by Act Oct. 24, 1988, substituted subsec. (l) for one which read:

"The requirement of paragraph (26)(B) of subsection (a) may be waived by the Attorney General, the Secretary of State, and the Secretary of the Interior, acting jointly, in the case of an alien applying for admission as a nonimmigrant visitor for business or pleasure and solely for entry into and stay on Guam for a period not to exceed fifteen days, if the Attorney General, the Secretary of State, and the Secretary of the Interior jointly determined that--

"(1) Guam has developed an adequate arrival and departure control system, and

"(2) such a waiver does not represent a threat to the welfare, safety, or security of the United States.".

Act Oct. 27, 1986 (applicable as provided by § 1751(c) of such Act, which appears as a note to this section), in subsec. (a)(23), substituted "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802))*" for "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate", and substituted "any such controlled substance" for "any of the aforementioned drugs".

Act Nov. 10, 1986 substituted subsec. (a)(19) for one which read: "Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;".

Act Nov. 14, 1986, in subsec. (a), deleted para. (24), which read: "Aliens (other than aliens described in section 101(a)(27)(A) and aliens born in the Western Hemisphere) who seek admission from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory line, or if signatory, a noncomplying transportation line under section 238(a) and who have not resided for at least two years subsequent to such arrival in such territory or adjacent islands;".

Act Nov. 14, 1986 (applicable as provided by § 23 of such Act, which appears as *8 USCS § 1101* note), as amended by Act Oct. 24, 1988, P.L. 100-525, in subsec. (d)(4), substituted "238(c)" for "238(d)".

Such Act further (applicable as provided by § 6(c) of such Act, which appears as a note to this section), as amended by Act Oct. 24, 1988, P.L. 100-525 (effective as if included in Act Nov. 14, 1986, as provided by § 7(d) of the

1988 Act, which appears as a note to this section), in subsec. (i), inserted "or other benefit under this Act".

1987. Act Dec. 22, 1987 (effective on enactment as provided by § 1301 of such Act, which appears as *22 USCS § 2651* note), in subsec. (a), substituted para. (23) for one which read: "Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802));* or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any such controlled substance;".

1988. Act Oct. 24, 1988, in subsec. (a)(32), substituted "Secretary of Education" for "Commissioner of Education" and "Secretary of Health and Human Services" for "Secretary of Health, Education, and Welfare"; in subsec. (e), substituted "Director of the United States Immigration Agency" for "Secretary of State" and "Director" for "Secretary of State" wherever appearing; in subsec. (g), substituted "Secretary of Health and Human Services" for "Surgeon General of the United States Public Health Services" wherever appearing; and, in subsec. (h), substituted "paragraph (9), (10), or (12)" for "paragraphs (9), (10), or (12)".

Such Act further (effective as if included in Act Aug. 27, 1986, as provided by § 3 of the 1988 Act) made style changes to Act Aug. 27, 1986, P.L. 99-396, which did not affect the text of this section.

Act Nov. 18, 1988 (applicable as provided by § 7349(b) of such Act, which appears as a note to this section), in subsec. (a)(17), inserted "(or within ten years in the case of an alien convicted of an aggravated felony)".

1989. Act Dec. 18, 1989 (applicable as provided by § 3(d) of such Act, which appears as a note to this section) added subsec. (m).

1990. Act Feb. 16, 1990, in subsec. (a), in para. (33), in the concluding matter, substituted "; and" for the concluding period, and added para. (34); and in subsec. (h), substituted "(12), or (34)" for "or (12)".

Act Nov. 29, 1990, § 601(a), (b) (applicable to individuals entering the United States on or after June 1, 1991, as provided by § 601(e)(1) which appears as a note to this section) substituted subsecs. (a) and (b) for ones which read:

"(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

"(1) Aliens who are mentally retarded;

"(2) Aliens who are insane;

"(3) Aliens who have had one or more attacks of insanity;

"(4) Aliens affected with psychopathic personality, or sexual deviation, or a mental defect;

"(5) Aliens who are narcotic drug addicts or chronic alcoholics;

"(6) Aliens who are afflicted with any dangerous contagious disease;

"(7) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living;

"(8) Aliens who are paupers, professional beggars, or vagrants;

"(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; except that aliens who have committed only one such crime while under the age of eighteen years may be granted a visa and admitted

if the crime was committed more than five years prior to the date of the application for a visa or other documentation, and more than five years prior to date of application for admission to the United States, unless the crime resulted in confinement in a prison or correctional institution, in which case such alien must have been released from such confinement more than five years prior to the date of the application for a visa or other documentation, and for admission, to the United States. An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: Provided, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements or admits the commission of acts which constitute the essential elements of only one such offense.

"(10) Aliens who have been convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were five years or more;

"(11) Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy;

"(12) Aliens who are prostitutes or who have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution; aliens who directly or indirectly procure or attempt to procure, or who have procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose; and aliens who are or have been supported by, or receive or have received, in whole or in part, the proceeds of prostitution or aliens coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution;

"(13) Aliens coming to the United States to engage in any immoral sexual act;

"(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(7);

"(15) Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges;

"(16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their reapplying for admission;

"(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 242(b), and who seek admission within five years (or within 20 years in the case of an alien convicted of an aggravated felony) of the date of such deportation or removal, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;

"(18) Aliens who are stowaways;

"(19) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure, or has sought to procure or has procured, a visa, other documentation, or entry into the United States or other benefit provided under this Act;

"(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(a);

"(21) Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission whose visa has been issued without compliance with the provisions of section 203;

"(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrants;

"(23) Any alien who--

"(A) has been convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802));* or

"(B) the consular officers or immigration officers know or have reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance;

"(24) [Repealed]

"(25) Aliens (other than aliens who have been lawfully admitted for permanent residence and who are returning from a temporary visit abroad) over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect;

"(26) Any nonimmigrant who is not in possession of (A) a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission or contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period; and (B) at the time of application for admission a valid nonimmigrant visa or border crossing identification card;

"(27) Aliens who the consular officer or the Attorney General knows or has reason to believe 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;

"(28) Aliens who are, or at any time have been, members of any of the following classes:

"(A) Aliens who are anarchists;

"(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt: Provided, That nothing in this paragraph, or in any other provision of this Act, shall be construed as declaring that the Communist Party does not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means;

"(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

"(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization;

"(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

"(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching (i) the overthrow by force, violence, or other unconstitutional means of the Government

of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific, individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

"(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (G);

"(I) Any alien who is within any of the classes described in subparagraphs (B), (C), (D), (E), (F), (G), and (H) of this paragraph because of membership in or affiliation with a party or organization or a section, subsidiary, branch, affiliate, or subdivision thereof, may, if not otherwise ineligible, be issued a visa if such alien establishes to the satisfaction of the consular officer when applying for a visa and the consular officer finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes, or (ii)(a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for a visa, actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. Any such alien to whom a visa has been issued under the provisions of this subparagraph may, if not otherwise inadmissible, be admitted into the United States if he shall establish to the satisfaction of the Attorney General when applying for admission to the United States and the Attorney General finds that (i) such membership or affiliation is or was involuntary, or is or was solely when under sixteen years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and when necessary for such purposes, or (ii)(a) since the termination of such membership or affiliation, such alien is and has been, for at least five years prior to the date of the application for admission actively opposed to the doctrine, program, principles, and ideology of such party or organization or the section, subsidiary, branch, or affiliate or subdivision thereof, and (b) the admission of such alien into the United States would be in the public interest. The Attorney General shall promptly make a detailed report to the Congress in the case of each alien who is or shall be admitted into the United States under (ii) of this subparagraph;

"(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security, (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means, or (C) join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 7 of the Subversive

Activities Control Act of 1950;

"(30) Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 237(e), whose protection or guardianship is required by the alien ordered excluded and deported;

"(31) Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

"(32) Aliens who are graduates of a medical school not accredited by a body or bodies approved for the purpose by the Commissioner of Education (regardless of whether such school of medicine is in the United States) and are coming to the United States principally to perform services as members of the medical profession, except such aliens who have passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health, Education, and Welfare and who are competent in oral and written English. The exclusion of aliens under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6) and to nonpreference immigrant aliens described in section 203(a)(7). For the purposes of this paragraph, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners examination if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date;

"(33) Any alien who during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with--

"(A) the Nazi government in Germany,

"(B) any government in any area occupied by the military forces of the Nazi government of Germany,

"(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

"(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion; and

"(34) Any alien who has committed in the United States any serious criminal offense, as defined in section 101(h), for whom immunity from criminal jurisdiction was exercised with respect to that offense, who as a consequence of the offense and the exercise of immunity has departed the United States, and who has not subsequently submitted fully to the jurisdiction of the court in the United States with jurisdiction over the offense.

"(b) The provisions of paragraph (25) of subsection (a) shall not be applicable to any alien who (1) is the parent, grandparent, spouse, daughter, or son of an admissible alien, or any alien lawfully admitted for permanent residence, or any citizen of the United States, if accompanying such admissible alien, or coming to join such citizen or alien lawfully admitted, and if otherwise admissible, or (2) proves that he is seeking admission to the United States to avoid religious persecution in the country of his last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith. For the purpose of ascertaining whether an alien can read under paragraph (25) of subsection (a), the consular officers and immigration officers shall be furnished with slips of uniform size, prepared under direction of the Attorney General, each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible

type, in one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made and shall be required to read and understand the words printed on the slip in such language or dialect.".

Section 601(d) of such Act further (applicable as above), in subsec. (c), substituted "subsection (a) (other than subparagraphs (A), (B), (C), or (E) of paragraph (3))" for "paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a)". Section 603(d)(2) of such Act further (applicable as above), in subsec. (d), deleted paras. (1), (2), (6), (9) and (10) which read:

"(1) The provisions of paragraphs (11) and (25) of subsection (a) shall not be applicable to any alien who in good faith is seeking to enter the United States as a nonimmigrant.

"(2) The provisions of paragraph (28) of subsection (a) of this section shall not be applicable to any alien who is seeking to enter the United States temporarily as a nonimmigrant under paragraph (15)(A)(iii) or (15)(G)(v) of section 101(a).

"(6) The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of excludable aliens applying for temporary admission under this subsection.

"(9) [Terminated]

"(10) The provisions of paragraph (15) of subsection (a) shall not be applicable to any alien who is seeking to enter the United States as a special immigrant under subparagraph (E), (F), or (G) of section 101(a)(27) and who applies for admission as such a special immigrant not later than March 31, 1982.".

Section 601(d) of such Act further (applicable as above), in subsec. (d), in para. (3), substituted "under subsection (a) (other than paragraphs (3)(A), (3)(C), and (3)(D) of such subsection)" for "under one or more of the paragraphs enumerated in subsection (a) (other than paragraphs (27), (29), and (33))" each place it appears and added the sentence beginning "The Attorney General shall prescribe . . .", in para. (4), substituted "(7)(B) (i)" for "(26)", in para. (7), substituted "(other than paragraph (7))" for "of this section, except paragraphs (20), (21), and (26),", in para. (8), substituted "(3)(A), (3)(B), (3)(C), and (7)(B)" for "(26), (27), and (29)", and added para. (11); substituted subsecs. (g)-(i) for ones which read:

"(g) Any alien, who is excludable from the United States under paragraph (1) of subsection (a) of this section, or any alien afflicted with tuberculosis in any form who (A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or (B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence in accordance with such terms, conditions, and controls, if any, including the giving of a bond, as the Attorney General, in his discretion after consultation with the Secretary of Health and Human Services, may by regulations prescribe. Any alien excludable under paragraph (3) of subsection (a) of this section because of past history of mental illness who has one of the same family relationships as are prescribed in this subsection for aliens afflicted with tuberculosis and whom the Secretary of Health and Human Services finds to have been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery shall be eligible for a visa in accordance with the terms of this subsection.

"(h) Any alien, who is excludable from the United States under paragraph (9), (10), (12), or (34) of subsection (a) or paragraph (23) of such subsection as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana, who (A) is the spouse or child, including a minor unmarried adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or (B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States.

"(i) Any alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and who is excludable because (1) he seeks, has sought to procure, or has procured, a visa or other documentation, or entry into the United States, or other benefit under this Act by fraud or misrepresentation, or (2) he admits the commission of perjury in connection therewith, may be granted a visa and admitted to the United States for permanent residence, if otherwise admissible, if the Attorney General in his discretion has consented to the alien's applying or reapplying for a visa and for admission to the United States.".

Section 601(d) of such Act further (applicable as above), in subsec. (k), substituted "paragraph (5)(A) or (7)(A)(i)" for "paragraph (14), (20), or (21)" and in subsec. (l)(1), in the introductory matter, substituted "paragraph (7)(B)(i)" for "paragraph (26)(B)".

Section 514(a) of such Act (applicable to admissions occurring on or after 1/1/91, as provided by § 514(b) of such Act, which appears as a note to this section), as amended by Act Dec. 12, 1991, in subsec. (a)(17), substituted "20 years" for "10 years".

Section 511(a) of such Act further (applicable as provided by § 511(b) of such Act, which appears as a note to this section), in subsec. (c), added the sentence beginning "The first sentence of this subsection . . .".

Section 202(b) of such Act further (effective 60 days after enactment as provided by § 202(c) of such Act, which appears as a note to this section), in subsec. (d)(5)(A), inserted "or in section 214(f)".

Section 603 (a)(19) of such Act purported to repeal § 14 of Act Aug. 27, 1986, P.L. 99-396, 100 Stat. 842, which had enacted subsec. (l) of this section and notes to this section; however, pursuant to the amendments made to subsec. (l) of this section by Act Nov. 29, 1990, the repeal was not executed.

Section 162(f)(2)(B) of such Act further (applicable as though included in the enactment of Act Dec. 15, 1989, P.L. 101-238, as provided by § 161(f)(3) of the 1990 Act, which appears as *8 USCS § 1101* note) in subsec. (m)(2)(A), in the introductory matter, deleted ", with respect to a facility for which an alien will perform services," preceding "is an attestation as to the following", in cl. (iii), inserted "employed by the facility", and in the concluding matter, added the sentence beginning "In the case of an alien . . .".

Section 205(c)(3) of such Act further (effective 10/1/91 as provided by § 231 of such Act, which appears as *8 USCS § 1101* note) added subsec. (n).

Section 162(e)(1) of such Act (effective 10/1/91 and applicable beginning

with fiscal year 1992, as provided by § 161(a) of such Act, which appears as *8 USCS § 1101* note, and repealed by § 302(e)(6) of Act Dec. 12, 1991, which appears as a note to this section), in subsec. (a)(5), in subpara. (A), substituted "Any alien who seeks admission or status as an immigrant under paragraph (2) or (3) of section 203(b)" for "Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor", in subpara. (B), inserted "who seeks admission or status as an immigrant under paragraph (2) or (3) of section 203(b)" after "An alien" the first place it appears, and deleted subpara. (C).

1991. Act Dec. 12, 1991 (effective as if included in Act Dec. 18, 1989, as provided by § 302(e)(9) of the 1991 Act), in subsec. (m)(2)(A), in the concluding matter, added the sentence beginning "Notwithstanding the . . .".

Such Act further (effective as if included in the enactment of Act Nov. 29, 1990, as provided by § 310(1) of the 1991 Act, which appears as *8 USCS § 1101* note), in subsec. (a), in para. (1)(A)(ii)(II), added "or" after the concluding comma and, in para. (3), in subpara. (A)(i), inserted "(I)" and "(II)", in subpara. (B)(iii)(III), substituted "a terrorist activity" for "an act of terrorist activity", in subpara. (C)(iv), substituted "identity" for "identities" and, in subpara. (D)(iv), substituted "if the immigrant" for "if the alien".

Such Act further (effective as above), as amended by Act Oct. 25, 1994 (effective as if included in Act Dec. 12, 1991, as provided by § 219(z) of the 1994 Act), in subsec. (a), in para. (5)(C), substituted "immigrants seeking admission or adjustment of status under paragraph (2) or (3) of section 203(b)." for "preference immigrant aliens described in paragraph (3) or (6) of section 203(a) and to nonpreference immigrant aliens described in section 203(a)(7).".

Such Act further (effective as above), in subsec. (a), in para. (6), in subpara. (B), in the concluding matter, substituted "(a) who seeks" for "who seeks" , ", or (b) who seeks admission" for "(or", and "felony," for "felony)" and, in subpara. (E), redesignated cl. (ii) as cl. (iii) and added a new cl. (ii), in para. (8)(B), substituted "person" for "alien" following "Any" and, in para. (9)(C), in cl. (i), substituted "an order by a court in the United States granting custody to a person of a United States citizen child who detains or retains the child, or withholds custody of the child, outside the United States from the person granted custody by that order, is excludable until the child is surrendered to the person granted custody by that order." for "a court order granting custody to a citizen of the United States of a child having a lawful claim to United States citizenship, detains, retains, or withholds custody of the child outside the United States from the United States citizen granted custody, is excludable until the child is surrendered to such United States citizen.", and, in cl. (ii), substituted "so long as the child is located in a foreign state that is a party" for "to an alien who is a national of a foreign state that is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.".

Such Act further (effective as above), in subsec. (c), substituted "paragraphs (3) and (9)(C)" for "subparagraphs (A), (B), (C), or (E) of paragraph (3)" and substituted "one or more aggravated felonies and has served for such felony or felonies" for "an aggravated felony and has served"; in subsec. (d), in para. (3), substituted "(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii)," for "(3)(A)," wherever appearing, and substituted "(3)(E)" for "(3)(D)" wherever appearing, and, in para. (11), inserted "and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof)"; and, in subsec. (g)(1), in the introductory matter, substituted "subsection (a)(1)(A)(i)" for "section

(a)(1)(A)(i)".

Such Act further (effective as above), in subsec. (h), in the introductory matter, deleted "in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or alien lawfully admitted for permanent residence" following "marijuana", in para. (1), in the introductory matter, inserted "(A) in the case of any immigrant", redesignated former subparas. (A)-(C) as cls. (i)-(iii), respectively, in cl. (i) as redesignated, deleted "and" after the concluding comma, in cl. (iii) as redesignated, substituted "or" for "and", and added a new subpara. (B); in subsec. (i), in para. (1), substituted "immigrant" for "alien" wherever appearing and, in para. (2), substituted "immigrant's" for "alien's" and "immigrant" for "alien"; and, in subsec. (j), substituted para. (2) for one which read:

"(2)

(A) Except as provided in subparagraph (B), the requirements of subparagraphs (A) and (B)(ii)(I) of paragraph (1) shall not apply between the effective date of this subsection and December 31, 1983, to any alien who seeks to come to the United States to participate in an accredited program of graduate medical education or training if (i) the Secretary of Health and Human Services determines, on a case-by-case basis, that there would be a substantial disruption in the health services provided in such program because such alien was not permitted, because of his failure to meet such requirements, to enter the United States to participate in such program, and (ii) the program has a comprehensive plan to reduce reliance on alien physicians, which plan the Secretary of Health and Human Services finds, in accordance with criteria published by the Secretary, to be satisfactory and to include the following:

"(I) A detailed discussion of specific problems that the program anticipates without such waiver and of the alternative resources and methods (including use of physician extenders and other paraprofessionals) that have been considered and have been and will be applied to reduce such disruption in the delivery of health services.

"(II) A detailed description of those changes of the program (including improvement of educational and medical services training) which have been considered and which have been or will be applied which would make the program more attractive to graduates of medical schools who are citizens of the United States.

"(III) detailed description of the recruiting efforts which have been and will be undertaken to attract graduates of medical schools who are citizens of the United States.

"(IV) A detailed description and analysis of how the program, on a year-by-year basis, has phased down and will phase down its dependence upon aliens who are graduates of foreign medical schools so that the program will not be dependent upon the admission to the program of any additional such aliens after December 31, 1983.

"(B) In the administration of this subsection, the Attorney General shall take such action as may be necessary to ensure that the total number of aliens participating (at any time) in programs described in subparagraph (A) does not, because of the exemption provided by such subparagraph, exceed the total number of aliens participating in such programs on the effective date of this subsection. The Secretary of Health and Human Services, in coordination with the Attorney General and the Director of the International Communication Agency, shall (i) monitor the issuance of waivers under subparagraph (A) and the needs of the communities (with respect to which such waivers are issued) to assure that quality medical care is provided, and (ii) review each program with such a waiver to assure that the plan described in subparagraph (A)(ii) is being

carried out and that participants in such program are being provided appropriate supervision in their medical education and training.

"(C) The Secretary of Health and Human Services, in coordination with the Attorney General and the Director of the International Communication Agency, shall report to the Congress at the beginning of fiscal years 1982 and 1983 on the distribution (by geography, nationality, and medical specialty or field of practice) of foreign medical graduates in the United States who have received a waiver under subparagraph (A), including an analysis of the dependence of the various communities on aliens who are in medical education or training programs in the various medical specialties.".

Such Act further (effective as above); as amended by Act Oct. 25, 1994 (effective as if included in Act Dec. 12, 1991, as provided by § 219(z) of the 1994 Act), in subsec. (n), in para. (1), in subpara. (A), in cl. (i), in the introductory matter, substituted "admitted or provided status as a nonimmigrant described in section 101(a)(15)(H)(i)(b)" for "and to other individuals employed in the occupational classification and in the area of employment", substituted subcl. (I) for one which read: "the actual wage level for the occupational classification at the place of employment, or" and, in the concluding matter, substituted "based on the best information available" for "determined", in cl. (ii), substituted "for such a nonimmigrant" for "for such aliens", in subpara. (D), substituted "(and such accompanying documents as are necessary)" for "(and accompanying documentation)", restyled the sentences beginning "The employer shall . . .", "The Secretary shall compile . . .", "Such list . . .", and "The Secretary shall make . . .", as concluding matter and, in such concluding matter, added the sentences beginning "The Secretary shall review . . ." and "Unless the Secretary . . ." and, in para. (2), in subpara. (C), in the introductory matter, substituted "of subparagraph (1)(B), a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), or a misrepresentation" for "(or a substantial failure in the case of a condition described in subparagraph (C) or (D) of paragraph (1)) or misrepresentation" and, in subpara. (D), substituted "If" for "In addition to the sanctions provided under subparagraph (C), if" and inserted ", whether or not a penalty under subparagraph (C) has been imposed".

Such Act further (effective on enactment as provided by § 310(3) of such Act, which appears as *8 USCS § 1101* note), in subsec. (j)(3), substituted "United States Information Agency" for "International Communication Agency".

Such Act further amended the directory language of § 514(a) of Act Nov. 29, 1990, P.L. 101-649, without affecting the text of this section.

1993. Act June 10, 1993 (effective 30 days after the date of the enactment of such Act, as provided by § 2007(b) of such Act), in subsec. (a)(1), in subpara. (A)(i), inserted "which shall include infection with the etiologic agent for acquired immune deficiency syndrome,".

1994. Act Aug. 26, 1994 (effective from 10/1/94 until 10/23/97, as provided by § 506(c) of such Act, which appears as a note to this section) added subsec. (o), which read:

"(o) Requirements for receipt of immigrant visa within ninety days following departure. An alien who has been physically present in the United States shall not be eligible to receive an immigrant visa within ninety days following departure therefrom unless--

"(1) the alien was maintaining a lawful nonimmigrant status at the time of such departure, or

"(2) the alien is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and

Control Act of 1986 at any date, who--

"(A) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986;

"(B) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

"(C) applied for benefits under section 301(a) of the Immigration Act of 1990.".

Act Sept. 13, 1994, in subsec. (d), added para. (1).

Act Oct. 25, 1994 (applicable to convictions occurring before, on, or after enactment, as provided by § 203(c) of such Act, which appears as a note to this section), in subsec. (a)(2)(A)(i), in subcl. (I), inserted "or an attempt or conspiracy to commit such a crime", and, in subcl. (II), inserted "or attempt"; and, in subsec. (h), in the concluding matter, inserted ", or an attempt or conspiracy to commit murder or a criminal act involving torture".

Such Act further (effective as if included in the enactment of Act Nov. 29, 1990, P.L. 101-649, 104 Stat. 4978, as provided by § 219(dd) of the 1994 Act, which appears as *8 USCS § 1101* note), in subsec. (d)(11), substituted "voluntarily" for "voluntary".

Such Act further (effective as if included in Act Dec. 12, 1991, P.L. 102-232, as provided by § 219(z) of the 1994 Act) made changes in the directory language of Act Dec. 12, 1991, which did not affect the text of the section.

Such Act further (applicable as provided by § 220(c) of such Act, which appears as a note to this section), in subsec. (e), inserted "(or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent)" and "except that in the case of a waiver requested by a State Department of Public Health, or its equivalent the waiver shall be subject to the requirements of section 214(k)".

1996. Act April 24, 1996, in subsec. (a), in para. (3)(B), in cl (i), in subcl. (I), deleted "or" after the concluding comma, in subcl. (II), inserted "is engaged in or", and added subcls. (III) and (IV), and added cl. (iv) and, in para. (5)(A), added cl. (iii); in subsec. (b), substituted "(1) Subject to paragraphs (2) and (3), if" for "If", redesignated former paras. (1) and (2) as subparas. (A) and (B), respectively, and added paras. (2) and (3); and, in subsec. (c), substituted "This" for "The first sentence of this".

Such Act further, as amended by Act Sept. 30, 1996 (effective as if included in the enactment of Act April 24, 1996, as provided by § 306(d) of Act Sept. 30, 1996, which appears as a note to this section), in subsec. (c), substituted "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 237(a)(2)(A)(i)." for "has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.".

Act Sept. 30, 1996, in subsec. (a), in para. (5), redesignated subpara. (C) as subpara. (D), and added new subpara. (C) and, in para. (6), substituted subpara. (F) for one which read: "(F) Subject of civil penalty. An alien who is the subject of a final order for violation of section 274C is excludable."; in subsec. (d), in para. (5)(A), substituted "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit" for "for emergent reasons or for reasons deemed strictly in the public interest", in para. (11), inserted a comma after "(4) thereof)", and added para. (12); in subsec. (e), inserted ", or in the case of a waiver requested by an interested United States

Government agency on behalf of an alien described in clause (iii),"; in subsec. (f), inserted the sentence beginning "Whenever the Attorney General finds . . ."; and substituted subsec. (i) for one which read:

"(i) The Attorney General may, in his discretion, waive application of clause (i) of subsection (a)(6)(C)--

"(1) in the case of an immigrant who is the spouse, parent, or son or daughter of a United States citizen or of an immigrant lawfully admitted for permanent residence, or

"(2) if the fraud or misrepresentation occurred at least 10 years before the date of the immigrant's application for a visa, entry, or adjustment of status and it is established to the satisfaction of the Attorney General that the admission to the United States of such immigrant would not be contrary to the national welfare, safety, or security of the United States.".

Such Act further (effective and applicable as provided by §§ 301(c)(2) and 309(a) of such Act, which appear as notes to this section and *8 USCS § 1101,* respectively), in subsec. (a), in para. (6), substituted subparas. (A) and (B) for ones which read:

"(A) Aliens previously deported. Any alien who has been excluded from admission and deported and who again seeks admission within one year of the date of such deportation is excludable, unless prior to the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory the Attorney General has consented to the alien's reapplying for admission.

"(B) Certain aliens previously removed. Any alien who--

"(i) has been arrested and deported,

"(ii) has fallen into distress and has been removed pursuant to this or any prior Act,

"(iii) has been removed as an alien enemy, or

"(iv) has been removed at Government expense in lieu of deportation pursuant to section 242(b),

and (a) who seeks admission within 5 years of the date of such deportation or removal, or (b) who seeks admission within 20 years in the case of an alien convicted of an aggravated felony, is excludable, unless before the date of the alien's embarkation or reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory the Attorney General has consented to the alien's applying or reapplying for admission.".

Such Act further (effective and applicable as provided by §§ 301(b)(3) and 309 of such Act, which appear as notes to this section and *8 USCS § 1101,* respectively), in subsec. (a), redesignated para. (9) as para. (10), and added new para. (9).

Such Act further (effective as provided by § 309(a) of such Act, which appears as *8 USCS § 1101* note) purported to amend the section heading by substituting "ineligible for" for "excluded from"; however, this amendment could not be executed because "excluded from" did not appear in the section heading.

Such Act further (effective as above), in subsec. (a), substituted the heading for one which read: "Classes of excludable aliens.", substituted the introductory matter for matter which read: "Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:", in para. (2)(D), in cls. (i) and (ii), substituted "admission" for "entry".

Such Act further (effective as above), purported to amend subsec. (a)(4) by substituting "237(a)(5)(B)" for "241(a)(5)(B)"; however, this amendment could not be executed because "241(a)(5)(B)" did not appear in such subsection.

Such Act further (effective as above), in subsec. (a), substituted "is

inadmissible" for "is excludable" wherever appearing, in para. (5), in subpara. (D) as redesignated, substituted "inadmissibility" for "exclusion", in para. (6)(C)(i), substituted "admission" for "entry", in para. (10), substituted subpara. (B) for one which read: "(B) Guardian required to accompany excluded alien. Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 237(e), whose protection or guardianship is required by the alien ordered excluded and deported, is excludable."; and, in subsec. (b), substituted "inadmissible" for "excludable" wherever appearing.

Such Act further (effective as above) purported to amend subsec. (b)(2) by deleting "or ineligible for entry"; however, in order to effectuate the probable intent of Congress, the deletion was made in subsec. (b)(1)(B) (formerly subsec. (b)(2)), preceding "or adjustment".

Such Act further (effective as above) deleted subsec. (c) which read: "(c) Nonapplicability of subsection (a)(1) to (25), (30), and (31). Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 237(a)(2)(A)(i)."; in subsec. (d), in para. (1), substituted "inadmissibility" for "exclusion" and substituted "removal" for "deportation", in para. (3), substituted "inadmissible" for "excludable", in para. (7), substituted "denied" for "excluded from", substituted "removed" for "deported", and substituted "241(c)" for "237(a)" and, in para. (11), substituted "removal" for "deportation"; in subsec. (h)(1), in subpara. (A)(i), substituted "inadmissible" for "excludable" wherever appearing and substituted "admission" for "entry" and, in subpara. (B), substituted "denial of admission" for "exclusion".

Such Act further (effective as above) purported to amend subsec. (h) by substituting "paragraphs (1) and (2) of section 240A(a)" for "section 212(c)"; however, this amendment could not be executed because "section 212(c)" did not appear in such subsection.

Such Act further (effective as above), in subsec. (j)(1)(D), in the introductory matter, substituted "admission" for "entry" and, in cl. (ii), substituted "is admitted to" for "enters"; in subsec. (k), substituted "inadmissibility" for "exclusion" and substituted "inadmissible" for "excludable"; and, in subsec. (l)(2)(B), substituted "removal of" for "deportation against".

Such Act further (effective as if included in the enactment of Act April 24, 1996, as provided by § 306(d) of such Act, which appears as a note to this section), amended the directory language of § 440(d) of Act April 24, 1996, which amended subsec. (c) of this section.

Such Act further (applicable as provided by § 322(b) of such Act, which appears as *8 USCS § 1101* note), in subsec. (a)(2)(B), deleted "actually imposed" following "confinement".

Such Act further (applicable as provided by § 341(c) of such Act, which appears as a note to this section), in subsec. (a)(1)(A), redesignated cls. (ii) and (iii) as cls. (iii) and (iv), respectively, and added new cl. (ii); and, in

subsec. (g), in para. (1), in subpara. (B), substituted the concluding semicolon for ", or", and added the concluding matter, substituted paras. (2) and (3) for former para. (2), which read: "(2) subsection (a)(1)(A)(ii) in the case of any alien,", and deleted the concluding matter, which read: "in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General, in his discretion after consultation with the Secretary of Health and Human Services, may by regulation prescribe.".

Such Act further (effective as provided by § 342(b) of such Act, which appears as a note to this section), in subsec. (a)(3)(B), in cl. (i), redesignated subcls. (III) and (IV) as subcls. (IV) and (V), respectively, and added new subcl. (III) and, in cl. (iii)(III), inserted "documentation or".

Such Act further (applicable as provided by § 344(c) of such Act, which appears as a note to this section), in subsec. (a)(6)(C), redesignated cl. (ii) as cl. (iii), and added a new cl. (ii).

Such Act further (applicable as provided by § 346(b) of such Act, which appears as a note to this section), in subsec. (a)(6), added subpara. (G).

Such Act further (applicable as provided by § 347(c) of such Act, which appears as a note to this section), in subsec. (a)(10), added subpara. (D).

Such Act further (effective and applicable as provided by § 348(b) of such Act, which appears as a note to this section), in subsec. (h), in the concluding matter, added the sentences beginning "No waiver shall be granted . . ." and "No court shall have jurisdiction . . .".

Such Act further (applicable as provided by § 351(c) of such Act, which appears as a note to this section), in subsec. (d)(11), inserted "an individual who at the time of such action was".

Such Act further (applicable as provided by § 352(b) of such Act, which appears as a note to this section), in subsec. (a)(10), added subpara. (E).

Such Act further (effective as provided by § 358 of such Act, which appears as a note to this section) purported to amend cl. (IV) of subsec. (a)(3)(B)(i), as added by Act April 24, 1996, by inserting "which the alien knows or should have known is a terrorist organization"; however, because that clause had subsequently been redesignated cl. (V), the insertion was made in cl. (V) in order to effectuate the probable intent of Congress.

Such Act further (applicable as provided by § 531(b) of such Act, which appears as a note to this section), in subsec. (a), substituted para. (4) for one which read: "(4) Public charge. Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.".

1997. Act Nov. 12, 1997, in subsec. (a)(1), in subpara. (A)(ii), inserted "except as provided in subparagraph (C),", and added subpara. (C).

1998. Act Oct. 21, 1998 (applicable as provided by § 2226(b) of Division G of such Act, which appears as a note to this section), in subsec. (a)(10)(C), substituted cl. (ii) for one which read: "(ii) Exception. Clause (i) shall not apply so long as the child is located in a foreign state that is a party to the Hague Convention on the Civil Aspects of International Child Abduction.".

Such Act further (applicable as provided by § 412(d) of such Act, which appears as a note to this section), in subsec. (n)(1), added subparas. (E)-(G), and, in the concluding matter, added the sentences beginning "The application form shall include . . ." and "Nothing in subparagraph (G) . . .".

Such Act further (effective on enactment, as provided by § 412(d) of such Act, which appears as a note to this section), in subsec. (n), in para. (1), in the introductory matter and in subpara. (A), substituted "an H-IB nonimmigrant" for "a nonimmigrant described in section 101(a)(15)(H)(i)(b)", in subpara. (C),

substituted cl. (ii) for one which read: "(ii) if there is no such bargaining representative, has posted notice of filing in conspicuous locations at the place of employment.", and added paras. (3) and (4).

Such Act further, in subsec. (n)(2), in subpara. (A), substituted "Subject to paragraph (5)(A), the Secretary" for "The Secretary", substituted subpara. (C) for one which read:

"(C) If the Secretary finds, after notice and opportunity for a hearing, a failure to meet a condition of paragraph (1)(B), a substantial failure to meet a condition of paragraphs (1)(C) or (1)(D), a willful failure to meet a condition of paragraph (1)(A), or a misrepresentation of material fact in an application--

"(i) the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 1,000 per violation) as the Secretary determines to be appropriate, and

"(ii) the Attorney General shall not approve petitions filed with respect to that employer under section 204 or 214(c) during a period of at least 1 year for aliens to be employed by the employer.",

and added subparas. (E) and (F).

Such Act further (effective until 9/30/01, as provided by § 413(e)(2) of such Act, which appears as a note to this section), in subsec. (n)(2), added subpara. (G).

Such Act further, in subsec. (n)(2), added subpara. (H).

Such Act further (applicable as provided by § 415(b) of such Act, which appears as a note to this section) added subsec. (p).

Such Act further (applicable as provided by § 431(b) of such Act, which appears as a note to this section) added subsec. (q).

Act Oct. 27, 1998 (applicable as provided by § 604(b) of such Act, which appears as a note to this section), in subsec. (a)(2), added subpara. (G).

1999. Act Nov. 12, 1999 (applicable as provided by § 2(e) of such Act, which appears as a note to this section), substituted subsec. (m), for one which read:

"(m) Requirements for admission of nonimmigrant nurses during five-year period.

(1) The qualifications referred to in section 101(a)(15)(H)(i)(a), with respect to an alien who is coming to the United States to perform nursing services for a facility, are that the alien--

"(A) has obtained a full and unrestricted license to practice professional nursing in the country where the alien obtained nursing education or has received nursing education in the United States or Canada;

"(B) has passed an appropriate examination (recognized in regulations promulgated in consultation with the Secretary of Health and Human Services) or has a full and unrestricted license under State law to practice professional nursing in the State of intended employment; and

"(C) is fully qualified and eligible under the laws (including such temporary or interim licensing requirements which authorize the nurse to be employed) governing the place of intended employment to engage in the practice of professional nursing as a registered nurse immediately upon admission to the United States and is authorized under such laws to be employed by the facility.

"(2)

(A) The attestation referred to in section 101(a)(15)(H)(i)(a) is an attestation as to the following:

"(i) There would be a substantial disruption through no fault of the facility in the delivery of health care services of the facility without the services of such an alien or aliens.

"(ii) The employment of the alien will not adversely affect the

wages and working conditions of registered nurses similarly employed.

"(iii) The alien employed by the facility will be paid the wage rate for registered nurses similarly employed by the facility. In the case of an alien for whom an employer has filed an attestation under this subparagraph and who is performing services at a worksite other than the employer's or other than a worksite controlled by the employer, the Secretary may waive such requirements for the attestation for the worksite as may be appropriate in order to avoid duplicative attestations, in cases of temporary, emergency circumstances, with respect to information not within the knowledge of the attestor, or for other good cause.

"(iv) Either (I) the facility has taken and is taking timely and significant steps designed to recruit and retain sufficient registered nurses who are United States citizens or immigrants who are authorized to perform nursing services, in order to remove as quickly as reasonably possible the dependence of the facility on nonimmigrant registered nurses, or (II) the facility is subject to an approved State plan for the recruitment and retention of nurses (described in paragraph (3)).

"(v) There is not a strike or lockout in the course of a labor dispute, and the employment of such an alien is not intended or designed to influence an election for a bargaining representative for registered nurses of the facility.

"(vi) At the time of the filing of the petition for registered nurses under section 101(a)(15)(H)(i)(a), notice of the filing has been provided by the facility to the bargaining representative of the registered nurses at the facility or, where there is no such bargaining representative, notice of the filing has been provided to registered nurses employed at the facility through posting in conspicuous locations.

A facility is considered not to meet clause (i) (relating to an attestation of a substantial disruption in delivery of health care services) if the facility, within the previous year, laid off registered nurses. Notwithstanding the previous sentence, a facility that lays off a registered nurse other than a staff nurse still meets clause (i) if, in its attestation under this subparagraph, the facility has attested that it will not replace the nurse with a nonimmigrant described in section 101(a)(15)(H)(i)(a) (either through promotion or otherwise) for a period of 1 year after the date of the lay off. Nothing in clause (iv) shall be construed as requiring a facility to have taken significant steps described in such clause before the date of the enactment of this subsection [enacted Dec. 18, 1989].

"(B) For purposes of subparagraph (A)(iv)(I), each of the following shall be considered a significant step reasonably designed to recruit and retain registered nurses:

"(i) Operating a training program for registered nurses at the facility or financing (or providing participation in) a training program for registered nurses elsewhere.

"(ii) Providing career development programs and other methods of facilitating health care workers to become registered nurses.

"(iii) Paying registered nurses wages at a rate higher than currently being paid to registered nurses similarly employed in the geographic area.

"(iv) Providing adequate support services to free registered nurses from administrative and other nonnursing duties.

"(v) Providing reasonable opportunities for meaningful salary advancement by registered nurses.

The steps described in this subparagraph shall not be considered to be

an exclusive list of the significant steps that may be taken to meet the conditions of subparagraph (A)(iv)(I). Nothing herein shall require a facility to take more than one step, if the facility can demonstrate that taking a second step is not reasonable.

"(C) Subject to subparagraph (E), an attestation under subparagraph (A) shall--

"(i) expire at the end of the 1-year period beginning on the date of its filing with the Secretary of Labor, and

"(ii) apply to petitions filed during such 1-year period if the facility states in each such petition that it continues to comply with the conditions in the attestation.

"(D) A facility may meet the requirements under this paragraph with respect to more than one registered nurse in a single petition.

"(E)

(i) The Secretary of Labor shall compile and make available for public examination in a timely manner in Washington, D.C., a list identifying facilities which have filed petitions for nonimmigrants under section 101(a)(15)(H)(i)(a) and, for each such facility, a copy of the facility's attestation under subparagraph (A) (and accompanying documentation) and each such petition filed by the facility.

"(ii) The Secretary of Labor shall establish a process for the receipt, investigation, and disposition of complaints respecting a facility's failure to meet conditions attested to or a facility's misrepresentation of a material fact in an attestation. Complaints may be filed by any aggrieved person or organization (including bargaining representatives, associations deemed appropriate by the Secretary, and other aggrieved parties as determined under regulations of the Secretary). The Secretary shall conduct an investigation under this clause if there is reasonable cause to believe that a facility fails to meet conditions attested to.

"(iii) Under such process, the Secretary shall provide, within 180 days after the date such a complaint is filed, for a determination as to whether or not a basis exists to make a finding described in clause (iv). If the Secretary determines that such a basis exists, the Secretary shall provide for notice of such determination to the interested parties and an opportunity for a hearing on the complaint within 60 days of the date of the determination.

"(iv) if the Secretary of Labor finds, after notice and opportunity for a hearing, that a facility (for which an attestation is made) has failed to meet a condition attested to or that there was a misrepresentation of material fact in the attestation, the Secretary shall notify the Attorney General of such finding and may, in addition, impose such other administrative remedies (including civil monetary penalties in an amount not to exceed $ 1,000 per violation) as the Secretary determines to be appropriate. Upon receipt of such notice, the Attorney General shall not approve petitions filed with respect to a facility during a period of at least 1 year for nurses to be employed by the facility.

"(v) In addition to the sanctions provided under clause (iv), if the Secretary of Labor finds, after notice and an opportunity for a hearing, that a facility has violated the condition attested to under subparagraph (A)(iii) (relating to payment of registered nurses at the prevailing wage rate), the Secretary shall order the facility to provide for payment of such amounts of back pay as may be required to comply with such condition.

"(3) The Secretary of Labor shall provide for a process under which a State may submit to the Secretary a plan for the recruitment and retention of United States citizens and immigrants who are authorized to perform nursing

services as registered nurses in facilities in the State. Such a plan may include counseling and educating health workers and other individuals concerning the employment opportunities available to registered nurses. The Secretary shall provide, on an annual basis in consultation with the Secretary of Health and Human Services, for the approval or disapproval of such a plan, for purposes of paragraph (2)(A)(iv)(II). Such a plan may not be considered to be approved with respect to the facility unless the plan provides for the taking of significant steps described in paragraph (2)(A)(iv)(I) with respect to registered nurses in the facility.

"(4) The period of admission of an alien under section 101(a)(15)(H)(i)(a) shall be for an initial period of not to exceed 3 years, subject to an extension for a period or periods, not to exceed a total period of admission of 5 years (or a total period of admission of 6 years in the case of extraordinary circumstances, as determined by the Attorney General).

"(5) For purposes of this subsection and section 101(a)(15)(H)(i)(a), the term 'facility' includes an employer who employs registered nurses in a home setting.".

Such Act further (effective as provided by § 4(b) of such Act, which appears a note to this section), in subsec. (a)(5)(C), substituted "Subject to subsection (r), any alien who seeks" for "Any alien who seeks"; and added subsec. (r).

Act Dec. 3, 1999 (effective on enactment, as provided by § 811 of such Act, which appears as *21 USCS § 1901* note), in subsec. (a)(2), substituted subpara. (C) for one which read: "(C) Controlled substance traffickers. Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible.".

2000. Act Oct. 17, 2000, in subsec. (a)(5)(A), added cl. (iv); and, in subsec. (n)(1)(E)(ii), substituted "October 1, 2003" for "October 1, 2001".

Act Oct. 28, 2000, in subsec. (a), in para. (2), added subpara. (H), and, in para. (9)(C)(ii), added the sentence beginning: "The Attorney General . . ."; in subsec. (d), added paras. (13) and [(14)](13); in subsec. (g)(1), in subpara. (A), deleted "or" following the concluding comma, in subpara. (B), added "or" following the concluding semicolon, and added subpara. (C); in subsec. (h)(1), in subpara. (B), substituted "and" for "or", and added subpara. (C); in subsec. (i)(1), inserted "or, in the case of an alien granted classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B), the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child"; and added subsec. [(s)](p).

Act Oct. 30, 2000, P.L. 106-395 (effective and applicable as provided by § 201(b)(3) of such Act, which appears as a note to this section), in subsec. (a), in para. (6)(C), substituted cl. (ii) for one which read: "(ii) Falsely claiming citizenship. Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.", and, in para. (10), substituted subpara. (D) for one which read: "(D) Unlawful voters. Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is inadmissible.".

Act Oct. 30, 2000, P.L. 106-396, in subsec. (a)(7)(B)(iv), in the heading, deleted "pilot" preceding "program" and, in the text, deleted "pilot" preceding "program".

2001. Act Oct. 26, 2001 (effective and applicable as provided by § 411(c) of such Act, which appears as a note to this section), in subsec. (a)(3), in subpara. (B), in cl. (i), in subcl. (II), substituted "clause (iv)" for "clause (iii)", substituted subcl. (IV) for one which read: "(IV) is a representative (as defined in clause (iv)) of a foreign terrorist organization, as designated by the Secretary under section 219, or", in subcl. (V), inserted "or" after "section 219,", redesignated cls. (ii)-(iv) as cls. (iii)-(v), respectively, and inserted new cl. (ii), in cl. (iii) as redesignated, in the introductory matter, inserted "it had been" and, in subcl. (V)(b), substituted ", firearm, or other weapon or dangerous device" for "or firearm", substituted new cl. (iv) for cl. (iv) as redesignated, which read:

"(iv) Engage in terrorist activity defined. As used in this Act, the term 'engage in terrorist activity' means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:

"(I) The preparation or planning of a terrorist activity.

"(II) The gathering of information on potential targets for terrorist activity.

"(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

"(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

"(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.",

and added cl. (vi), and added subpara. (F).

Such Act further (effective as above) purported to amend subsec. (a)(3)(B)(i) by adding at the end subcls. (VI) and (VII); however, the amendment was executed by inserting subcls. (VI) and (VII) after subcl. (V) and before the concluding matter in order to effectuate the probable intent of Congress.

Such Act further, in subsec. (a)(2), added subpara. (I).

2002. Act March 13, 2002 (applicable as provided by § 2(b) of such Act, which appears as a note to this section), in subsec. (a)(4)(C)(ii), substituted "(and any additional sponsor required under section 213A(f) or any alternative sponsor permitted under paragraph (5)(B) of such section)" for "(including any additional sponsor required under section 213A(f))".

Transfer of functions:

The office of Surgeon General was abolished and functions of the Public Health Service were transferred to the Secretary of Health, Education, and Welfare to be performed by the officer or agency designated by him by Reorg. Plan No. 3, of 1966, *31 Fed. Reg. 8855,* 80 Stat. 1610, which appears as *5 USCS § 903* note.

Act Oct. 17, 1979, P.L. 96-88, Title V, § 509, 93 Stat. 695, which appears as *20 USCS § 3508,* redesignated the Secretary of Health, Education, and Welfare as the Secretary of Health and Human Services and provided that any reference to the Secretary of Health, Education, and Welfare, in any law in force on the effective date of such Act on Oct. 17, 1979, shall be deemed to refer and apply to the Secretary of Health and Human Services, except to the extent such reference is to a function or office transferred to the Secretary of Education

or the Department of Education under such Act Oct. 17, 1979.

All functions vested in the Secretary of State under subsec. (a)(15)(J) of this section were transferred to the Director of the International Communication Agency by Reorg. Plan No. 2 of 1977, § 7a)(8), *42 Fed. Reg. 62461,* 91 Stat. 1637, which appears as *5 USCS § 903* note, effective on or before July 1, 1978, at such time as specified by the President.

The International Communication Agency was redesignated as the United States Information Agency and the Director of the International Communication Agency was redesignated the Director of the United States Information Agency by Act Aug. 24, 1982, P.L. 97-241, Title III, § 303, 96 Stat. 291, which appears as *22 USCS § 1461* note.

Other provisions:

Creation of record of admission for permanent residence in the case of certain Hungarian refugees. Act July 25, 1958, P.L. 85-559, 72 Stat. 419, provided:

"That any alien who was paroled into the United States as a refugee from the Hungarian revolution under section 212(d)(5) of the Immigration and Nationality Act [subsection (d)(5) of this section] subsequent to October 23, 1956, who has been in the United States for at least two years, and who has not acquired permanent residence, shall forthwith return or be returned to the custody of the Immigration and Naturalization Service, and shall thereupon be inspected and examined for admission into the United States, and his case dealt with, in accordance with the provisions of sections 235, 236 and 237 of that Act [*8 USCS §§ 1225,* 1226 and 1227].

"Sec. 2. Any such alien who, pursuant to section 1 of this Act, is found, upon inspection by an immigration officer or after hearing before a special inquiry officer, to have been and to be admissible as an immigrant at the time of his arrival in the United States and at the time of his inspection and examination, except for the fact that he was not and is not in possession of the documents required by section 212(a)(20) of the Immigration and Nationality Act [subsection (a)(20) of this section], shall be regarded as lawfully admitted to the United States for permanent residence as of the date of his arrival.

"Sec. 3. Nothing contained in this Act shall be held to repeal, amend, alter, modify, affect, or restrict the powers, duties, functions, or authority of the Attorney General in the administration and enforcement of the Immigration and Nationality Act [*8 USCS §§ 1101* et seq., generally; for full classification, consult USCS Tables volumes] or any other law relating to immigration, nationality, or naturalization.".

Resettlement of refugee-escapee; reports; formula; termination date; persons difficult to resettle; creation of record of admission for permanent residence. Act July 14, 1960, P.L. 86-618, §§ 1 to 4, 11, 74 Stat. 504, as amended by Act June 28, 1962, P.L. 87-510, § 6, 76 Stat. 124; Oct. 3, 1965, P.L. 89-236, § 16, 79 Stat. 919, provided:

"Section 1. [Repealed. Oct. 3, 1965, P.L. 89-236, § 16, 79 Stat. 919.]

"Sec. 2. [Repealed. Oct. 3, 1965, P.L. 89-236, § 16, 79 Stat. 919.]

"Sec. 3. Any alien who was paroled into the United States as a refugee-escapee, pursuant to section 1 of the Act, whose parole has not theretofore been terminated by the Attorney General pursuant to such regulations as he may prescribe under the authority of section 212(d)(5) of the Immigration and Nationality Act [subsec. (d)(5) of this section]; and who has been in the United States for at least two years, and who has not acquired permanent residence, shall forthwith return or be returned to the custody of the Immigration and Naturalization Service and shall thereupon be inspected and

examined for admission into the United States, and his case dealt with in accordance with the provisions of sections 235, 236, and 237 of the Immigration and Nationality Act [*8 USCS §§ 1225,* 1226 and 1227].

"Sec. 4. Any alien who, pursuant to section 3 of this Act, is found, upon inspection by the immigration officer or after hearing before a special inquiry officer, to be admissible as an immigrant under the Immigration and Nationality Act [this chapter] at the time of his inspection and examination, except for the fact that he was not and is not in possession of the documents required by section 212(a)(20) of the said Act [subsec. (a)(20) of this section], shall be regarded as lawfully admitted to the United States for permanent residence as of the date of his arrival.

. . .

Sec. 11. [Repealed. Oct. 3, 1965, P.L. 89-236, § 16, 79 Stat. 919.]".

Labor certification for graduates of foreign medical schools; development of data by Secretary of Health, Education, and Welfare not later than Oct. 12, 1977. Act Oct. 12, 1976, P.L. 94-484, Title IX, § 906, 90 Stat. 2325, provided:

"(a) The Secretary of Health, Education, and Welfare shall (not later than one year after the date of the enactment of this Act [enacted Oct. 12, 1976]) develop sufficient data to enable the Secretary of Labor to make equitable determinations with regard to applications for labor certification by graduates of foreign medical schools.

"(b) The data required under subsection (a) shall include the number of physicians (by specialty and by percent of population) in a geographic area necessary to provide adequate medical care, including such care in hospitals, nursing homes, and other health care institutions, in such area.

"(c) The Secretary of Health, Education, and Welfare shall develop such data after consultation with such medical or other associations as may be necessary.".

Repeal of provision on National Board of Medical Examiners Examination. Act Oct. 12, 1976, P.L. 94-484, Title VI, § 602(a), (b), as added by Act Aug. 1, 1977, P.L. 95-83, Title III, § 307(q)(3) which formerly appeared as a note to this section, was repealed by Dec. 29, 1981, P.L. 97-116, § 5(a)(3), 95 Stat. 1612, effective on enactment on Dec. 29, 1981, as provided by § 21(a) of such Act, which appears as *8 USCS § 1101* note. It provided that an alien who is a graduate of a medical school would be considered to have passed parts I and II of the National Board of Medical Examiners Examination if the alien was on January 9, 1977, a doctor of medicine fully and permanently licensed to practice medicine in a State, held on that date a valid specialty certificate issued by a constituent board of the American Board of Medical Specialities, and was on that date practicing medicine in a State.

Implementation of pardon for draft evaders. Ex. Or. No. 11967 of Jan. 21, 1977, *42 Fed. Reg. 4393,* which appears as *50 USCS Appx. 462* note, provided, in sec. 3:

"Any person who is or may be precluded from reentering the United States under *8 U.S.C. 1182*(a)(22) [*8 USCS § 1182*(a)(22)] or under any other law, by reason of having committed or apparently committed any violation of the Military Selective Service Act shall be permitted as any other alien to reenter the United States.

"The Attorney General is directed to exercise his discretion under *8 U.S.C. 1182*(d)(5) [*8 USCS § 1182*(d)(5)] or other applicable law to permit the reentry of such persons under the same terms and conditions as any other alien.

"This shall not include anyone who falls into the exceptions of paragraphs 1(a) and (b) and 2(a) and (b) above."

Assignment and delegation of authority to International Communication Agency. Ex. Or. No. 12048 of March 27, 1978, *43 Fed. Reg. 13361,* § 2 in part, which appears as *22 USCS § 1461* note, provided: "All authority vested in the United States Information Agency or its Director by Executive order is reassigned and redelegated to the International Communication Agency or its Director, respectively.".

Report by Attorney General to Congressional Committees on admission of certain excludable aliens. Act Sept. 17, 1978, P.L. 95-370, Title IV, § 401, 92 Stat. 627, required the Attorney General, by October 30, 1979, to report to specific congressional committees on certain cases of the admission to the United States of aliens that may have been excludable under subsec. (a)(27)-(29) of this section.

Retroactive adjustment of refugee status. Act Oct. 5, 1978, P.L. 95-412, § 5, 92 Stat. 909, as amended by Act March 17, 1980, P.L. 96-212, § 203(g), 94 Stat. 108, provided: "Notwithstanding any other provision of law, any refugee, not otherwise eligible for retroactive adjustment of status, who was or is paroled into the United States by the Attorney General pursuant to section 212(d)(5) of the Immigration and Nationality Act [subsec. (d)(5) of this section] before April 1, 1980, shall have his status adjusted pursuant to the provisions of section 203(g) and (h) of that Act [*8 USCS § 1153*(g) and (h)].".

Refugees from Democratic Kampuchea (Cambodia); temporary parole into United States for fiscal years 1979 and 1980.Act Oct. 10, 1978, P.L. 95-431, title VI, § 605, 92 Stat. 1045, provided:

"It is the sense of the Congress that--

"(1) the Government of the United States should give special consideration to the plight of refugees from Democratic Kampuchea (Cambodia) in view of the magnitude and severity of the violations of human rights committed by the Government of Democratic Kampuchea (Cambodia); and

"(2) the Attorney General should exercise his authority under section 212(d)(5) of the Immigration and Nationality Act [subsec. (d)(5) of this section] to parole into the United States--

"(A) for the fiscal year 1979, 7,500 aliens who are nationals or citizens of Democratic Kampuchea (Cambodia) and who are applying for admission to the United States; and

"(B) for the fiscal year 1980, 7,500 such aliens.".

Termination of subsec. (d)(9). Act Sept 27, 1979, P.L. 96-70, Title III, ch 2, § 3201(d)(2), 93 Stat. 497, provided: "Paragraph (9) of section 212(d) of the Immigration and Nationality Act, as added by subsection (b) of this section [subsec. (d)(9) of this section], shall cease to be effective at the end of the transition period [midnight March 31, 1982, see *22 USCS § 3831].*".

Applicability of 1980 amendments of subsec. (d). Act March 17, 1980, P.L. 96-212, Title II, § 204, 94 Stat. 108, which appears as *8 USCS § 1101* note, provided in part that, except as provided and specifically made applicable therein, the amendments made to subsec. (d) of this section by such Act are applicable to aliens paroled into the United States on or after the sixtieth day after enactment on March 17, 1980.

Applicability to aliens entering United States prior to April 1, 1980. Act March 17, 1980, P.L. 96-212, Title II, § 204(c)(3), 94 Stat. 109, which appears as *8 USCS § 1101* note, provided that subsec. (a)(14), (15), (20), (21), (25), and (32) of this section are not applicable to any alien who entered the United States before April 1, 1980, pursuant to *8 USCS § 1153*(a)(7) or who was paroled as a refugee into the United States under subsec. (d)(5) of this section and who is seeking adjustment of status, and the Attorney General may waive any other provision of subsec. (a) of this section (other than paragraph (27), (29), or

(33) and other than so much of paragraph (23) as relates to trafficking in narcotics) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

High seas interdiction of illegal aliens proclamation. Proc. No. 4865 of Sept. 29, 1981, *46 Fed. Reg. 48107,* provided:

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended *(8 U.S.C. 1182*(f) and 1185(a)(1)), in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

Ex. Or. No. 12324 revoked. Ex. Or. No. 12324 of Sept. 29, 1981, *46 Fed. Reg. 48109,* which formerly appeared as a note to this section, was revoked by Ex. Or. No. 12807 of May 24, 1992, *57 Fed. Reg. 23133.* The Order provided for high seas interdiction of illegal aliens.

Application of amendments to subsec. (j)(1)(C), (D), and (E) made by Act Dec. 29, 1981. Act Dec. 29, 1981, P.L. 97-116, § 5(c), 95 Stat. 1614, provided: "The amendments made by paragraphs (2), (5), and (6) of subsection (b) [deleting '(including any extension of the duration thereof under subparagraph (D))' in subpara. (C) of para. (1) of subsec. (j), amending subpara. (D) thereof, and adding subpara. (E) thereof] shall apply to aliens entering the United States as exchange visitors (or otherwise acquiring exchange visitor status) on or after January 10, 1978.".

Adjustment of status of nonimmigrant aliens residing in the Virgin Islands to permanent resident alien status. Act Sept. 30, 1982, P.L. 97-271, 96 Stat. 1157, which appears as *8 USCS § 1255* note, provided that upon application during the one-year period beginning Sept. 30, 1982, by a nonimmigrant alien worker or the spouse or minor child of such worker who has resided continuously in the Virgin Islands since June 30, 1975, the Attorney General may adjust the status of such nonimmigrant alien to that of an alien lawfully admitted for permanent residence, provided among other conditions, that the alien is otherwise admissible to the United States for permanent residence, except for the grounds of exclusion specified in subsec. (a)(14), (20), (21), (25), (32) of this

section, and such alien is not to be deported for failure to maintain nonimmigrant status until final action is taken on the alien's application for adjustment.

Sharing of information concerning drug traffickers. Act Aug. 16, 1985, P.L. 99-93, Title I, § 132, 99 Stat. 420 provided:

"(a) Reporting systems. In order to ensure that foreign narcotics traffickers are denied visas to enter the United States, as required by section 212(a)(23) of the Immigration and Naturalization Act *(22 U.S.C. 1182*(a)(23)) [probably intended as a reference to *8 USCS § 1182*(a)(23), which is subsec. (a)(23) of this section]--

"(1) the Department of State shall cooperate with United States law enforcement agencies, including the Drug Enforcement Administration and the United States Customs Service, in establishing a comprehensive information system on all drug arrests of foreign nationals in the United States, so that that information may be communicated to the appropriate United States embassies; and

"(2) the National Drug Enforcement Policy Board shall agree on uniform guidelines which would permit the sharing of information on foreign drug traffickers.

"(b) Report. Not later than six months after the date of the enactment of this Act [enacted Aug. 16, 1985], the Chairman of the National Drug Enforcement Policy Board shall submit a report to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate on the steps taken to implement this section [this note].".

Application of Oct. 27, 1986 amendments. Act Oct. 27, 1986, P.L. 99-570, Title I, Subtitle M, § 1751(c), 100 Stat. 3207-47, provided "The amendments made by the subsections (a) and (b) of this section [amending subsec. (a)(23) of this section and *8 USCS § 1251*(a)(11), respectively] shall apply to convictions occurring before, on, or after the date of the enactment of this section, and the amendments made by subsection (a) [amending subsec. (a)(23) of this section] shall apply to aliens entering the United States after the date of the enactment of this section.".

Application of 1986 amendment of subsec. (a)(19). Act Nov. 10, 1986, P.L. 99-639, § 6(b), 100 Stat. 3544, provided: "The amendment made by subsection (a) [amending subsec. (a)(19) of this section] shall apply to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment of this Act based on fraud or misrepresentations occurring before, on, or after such date.".

Repeal of subsec. (a)(24) with no consequent renumbering. Act Nov. 14, 1986, P.L. 99-653, § 7(a), 100 Stat. 3657, provided "Section 212(a) *(8 U.S.C. 1182*(a)) [subsec. (a) of this section] is amended by: repealing paragraph (24) thereof: Provided, That no paragraph following paragraph (24) shall be redesignated as a result of this amendment.".

Repeal of provisions relating to regulations and reports. Act Aug. 27, 1986, P.L. 99-396, § 14(b), (c), 100 Stat. 842; Oct. 24, 1988, P.L. 100-525, § 3(1)(B), (C), 102 Stat. 2614 (effective as if included in Act Aug. 27, 1986, as provided by § 3 of the 1988 Act), was repealed by Act Nov. 29, 1990, P.L. 101-649, Title VI, § 603(a)(19), 104 Stat. 5084, applicable to individuals entering the United States on or after June 1, 1991 as provided by § 601(e)(1) of such Act, which appears as *8 USCS § 1101* note. Such section provided for the regulations and rules governing the admission, detention, and travel of nonimmigrant aliens.

Application of 1986 amendment of subsecs. (a) and (i). Act Nov. 10, 1986, P.L. 99-639, § 6(c) [(b)], 100 Stat. 3544; Oct. 24, 1988, P.L. 100-525, §

7(c)(2), 102 Stat. 2616, effective as if included in Act Nov. 10, 1986 as provided by § 6(d) of the 1988 Act, which appears as a note to this section, provides: "The amendment made by this section [amending subsecs. (a)(19) and (i) of this section] shall apply to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment of this Act based on fraud or misrepresentations occurring before, on, or after such date.".

Repeal of prohibition on exclusion or deportation of aliens on certain grounds. Act Dec. 22, 1987, P.L. 100-204, Title IX, § 901, 101 Stat. 1399, effective on enactment as provided by § 1301 of such Act, which appears as *22 USCS § 2651* note; Oct. 1, 1988, P.L. 100-461, Title V, § 555, 102 Stat. 2268-36; Feb. 16, 1990, P.L. 101-246, Title I, Part B, § 128, 104 Stat. 30, was repealed by Act Nov. 29, 1990, P.L. 101-649, Title VI, § 603(a)(21), 104 Stat. 5084, applicable to individuals entering the United States on or after June 1, 1991, as provided by § 601(e)(1) of such Act, which appears as *8 USCS § 1101* note. Such section provided for the prohibition on exclusion or deportation of aliens on certain grounds.

Effect of Oct. 1, 1988 amendment on deportation of aliens. Act Oct. 1, 1988, P.L. 100-461, Title V, § 555, 102 Stat. 2268-37, provides: "The amendment made in the preceding sentence [amending Act Dec. 22, 1987, P.L. 100-204, § 901, which appears as a note to this section] shall not require the deportation of aliens admitted for permanent resident status under section 901 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [note to this section], as in effect before the date of enactment of this Act".

Effective date of Oct. 24, 1988 amendment of Act Nov. 6, 1986. Act Oct. 24, 1988, P.L. 100-525, § 7(d), 102 Stat. 2617, provides: "The amendments made by this section [amending this section and *8 USCS §§ 1186a,* 1255] shall be effective as if they were included in the enactment of the Immigration Marriage Fraud Amendments of 1986 [Act Nov. 6, 1986, P.L. 99-639].".

Application of Nov. 18, 1988 amendment of subsec. (a)(17). Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle J, § 7349(b), 102 Stat. 4473, provides: "The amendment made by subsection (a) [amending subsec. (a)(17) of this section] shall apply to any alien convicted of an aggravated felony who seeks admission to the United States on or after the date of the enactment of this Act.".

Implementation of subsec. (m). Act Dec. 18, 1989, P.L. 101-238, § 3(c), 103 Stat. 2103, applicable as provided by § 3(d) of such Act, which appears as a note to this section, provides:

"The Secretary of Labor (in consultation with the Secretary of Health and Human Services) shall--

"(1) first publish final regulations to carry out section 212(m) of the Immigration and Nationality Act [subsec. (m) of this section] (as added by this section) not later than the first day of the 8th month beginning after the date of the enactment of this Act; and

"(2) provide for the appointment (by January 1, 1991) of an advisory group, including representatives of the Secretary, the Secretary of Health and Human Services, the Attorney General, hospitals, and labor organizations representing registered nurses, to advise the Secretary--

"(A) concerning the impact of this section on the nursing shortage,

"(B) on programs that medical institutions may implement to recruit and retain registered nurses who are United States citizens or immigrants who are authorized to perform nursing services,

"(C) on the formulation of State recruitment and retention plans under section 212(m)(3) of the Immigration and Nationality Act [subsec. (m)(3) of this section], and

"(D) on the advisability of extending the amendments made by this

section beyond the 5-year period described in subsection (d)."

Limiting application of nonimmigrant changes to 5-year period. Act Dec. 18, 1989, P.L. 101-238, § 3(d), 103 Stat. 2103, provides: "The amendments made by the previous provisions of this section [adding subsec. (m) to this section and a note to this section] shall apply to classification petitions filed for nonimmigrant status only during the 5-year period beginning on the first day of the 9th month beginning after the date of the enactment of this Act.".

Changes in labor certification process. Act Nov. 29, 1990, P.L. 101-649, Title I, Subtitle B, Part 2, § 122, 104 Stat. 4994 (effective Oct. 1, 1991, and applicable beginning with fiscal year 1992, as provided by § 161(a), of such Act); Oct. 25, 1994, P.L. 103-416, Title II, § 219(ff), 108 Stat. 4319 (effective as if included in the enactment of Act Nov. 29, 1990, as provided by § 219(dd) of the 1994 Act, which appears as *8 USCS § 1101* note), provides:

"(a) [Deleted]

"(b) Notice in labor certifications. The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act [subsec. (a)(5)(A) of this section], that--

"(1) no certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations; and

"(2) any person may submit documentary evidence bearing on the application for certification (such as information on available workers, information on wages and working conditions, and information on the employer's failure to meet terms and conditions with respect to the employment of alien workers and co-workers).".

General transitions, admissibility standards, and construction. For provisions relating to the general transitions, admissibility standards and construction of the amendments made by Act Nov. 29, 1990, P.L. 101-649, see § 161(c)-(e) of such Act, which appears as *8 USCS § 1101* note.

Effective date of amendments made by § 202 of Act Nov. 29, 1990. Act Nov. 29, 1990, P.L. 101-649, Title II, Subtitle A, § 202(c), 104 Stat. 5014, provides: "The amendments made by this section [amending subsec. (d)(5)(A) of this section and *8 USCS § 1184*(f)] shall take effect 60 days after the date of the enactment of this Act.".

Application of Nov. 29, 1990 amendment of subsec. (c). Act Nov. 29, 1990, P.L. 101-649, Title V, Subtitle A, § 514(b), 104 Stat. 5052, provides: "The amendment made by subsection (a) [amending subsec. (c) of this section] shall apply to admissions occurring after the date of the enactment of this Act.".

Application of Nov. 29, 1990 amendment of subsec. (a)(17). Act Nov. 29, 1990, P.L. 101-649, Title V, Subtitle A, § 511(b), 104 Stat. 5053, provides: "The amendment made by subsection (a) [amending subsec. (a)(17) of this section] shall apply to admissions occurring on or after January 1, 1991.".

Review of exclusion lists. Act Nov. 29, 1990, P.L. 101-649, Title VI, § 601(c), 104 Stat. 5075; Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 308(d)(3)(B), (f)(1)(Q), 110 Stat. 3009-617, 3009-621 (effective as provided by § 309(a) of such Act, which appears as *8 USCS § 1101* note), applicable to individuals entering the United States on or after June 1, 1991, provides:

"The Attorney General and the Secretary of State shall develop protocols and guidelines for updating lookout books and the automated visa lookout system and similar mechanisms for the screening of aliens applying for visas for admission,

or for admission, to the United States. Such protocols and guidelines shall be developed in a manner that ensures that in the case of an alien--

"(1) whose name is in such system, and

"(2) who either (A) applies for admission after the effective date of the amendments made by this section, or (B) requests (in writing to a local consular office after such date) a review, without seeking admission, of the alien's continued inadmissibility under the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification, consult USCS Tables Volumes],

if the alien is no longer inadmissible because of an amendment made by this section the alien's name shall be removed from such books and system and the alien shall be informed of such removal and if the alien continues to be inadmissible the alien shall be informed of such determination.".

Visa lookout systems. Act Oct. 28, 1991, P.L. 102-138, Title I, Part B, § 128, 105 Stat. 660; Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 308(d)(3)(C), 110 Stat. 3009-617, provides:

"(a) Visas. The Secretary of State may not include in the Automated Visa Lookout System, or in any other system or list which maintains information about the inadmissibility of aliens under the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification of such Act, consult USCS Tables volumes], the name of any alien who is not inadmissible from the United States under the Immigration and Nationality Act, subject to the provisions of this section.

"(b) Correction of lists. Not later than 3 years after the date of enactment of this Act, the Secretary of State shall--

"(1) correct the Automated Visa Lookout System, or any other system or list which maintains information about the inadmissibility of aliens under the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification of such Act, consult USCS Tables volumes], by deleting the name of any alien not inadmissible under the Immigration and Nationality Act; and

"(2) report to the Congress concerning the completion of such correction process.

"(c) Report on correction process.

(1) Not later than 90 days after the date of enactment of this Act, the Secretary of State, in coordination with the heads of other appropriate Government agencies, shall prepare and submit to the appropriate congressional committees, a plan which sets forth the manner in which the Department of State will correct the Automated Visa Lookout System, and any other system or list as set forth in subsection (b).

"(2) Not later than 1 year after the date of enactment of this Act, the Secretary of State shall report to the appropriate congressional committees on the progress made toward completing the correction of lists as set forth in subsection (b).

"(d) Application. This section refers to the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification of such Act, consult USCS Tables volumes] as in effect on and after June 1, 1991.

"(e) Limitation.

(1) The Secretary may add or retain in such system or list the names of aliens who are not inadmissible only if they are included for otherwise authorized law enforcement purposes or other lawful purposes of the Department of State. A name included for other lawful purposes under this paragraph shall include a notation which clearly and distinctly indicates that such person is not presently inadmissible. The Secretary of State shall adopt procedures to ensure that visas are not denied to such individuals for any reason not set forth in the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally;

for full classification of such Act, consult USCS Tables volumes].

"(2) The Secretary shall publish in the Federal Register regulations and standards concerning maintenance and use by the Department of State of systems and lists for purposes described in paragraph (1).

"(3) Nothing in this section may be construed as creating new authority or expanding any existing authority for any activity not otherwise authorized by law.

"(f) Definition. As used in this section the term 'appropriate congressional committees' means the Committee on the Judiciary and the Committee on Foreign Affairs of the House of Representatives and the Committee on the Judiciary and the Committee on Foreign Relations of the Senate.".

Repeal of amendments made by § 162(e)(1) of Act Nov. 29, 1990. Act Dec. 12, 1991, P.L. 102-232, Title III, § 302(e)(6), 105 Stat. 1746 (effective as if included in the enactment of Act Nov. 29, 1990, as provided by § 310(1) of the 1991 Act, which appears as *8 USCS § 1101* note), provides: "Paragraph (1) of section 162(e) of the Immigration Act of 1990 [amending subsec. (a)(5) of this section] is repealed, and the provisions of law amended by such paragraph are restored as though such paragraph had not been enacted.".

Interdiction of illegal aliens. Ex. Or. No. 12807 of May 24, 1992, *57 Fed. Reg. 23133,* provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended *(8 U.S.C. 1182*(f) and 1185(a)(1)), and whereas:

"(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

"(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; *19 U.S.T. 6223)* to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

"(3) Proclamation No. 4865 [note to this section] suspends the entry of all undocumented aliens into the United States by the high seas; and

"(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally.

"I, GEORGE BUSH, President of the United States of America, hereby order as follows:

"Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

"Sec. 2.

(a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instruction to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

"(b) Those instructions shall apply to any of the following defined vessels:

"(1) Vessels of the United States, meaning any vessel documented or

numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; *13 U.S.T. 2312).*

"(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; *13 U.S.T. 2312).*

"(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

"(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

"(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

"(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

"(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

"(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

"Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order is construed to require any procedures to determine whether a person is a refugee.

"Sec. 4. Executive Order No. 12324 [former note to this section] is hereby revoked and replaced by this order.

"Sec. 5. This order shall be effective immediately.".

Automated visa lookout system. Act April 30, 1994, P.L. 103-236, Title I, Part B, § 140(b), 108 Stat. 399, provides: "Not later than 18 months after the date of the enactment of this Act, the Secretary of State shall implement an upgrade of all overseas visa lookout operations to computerized systems with automated multiple-name search capabilities.".

Processing of visas for admission to the United States. Act April 30, 1994, P.L. 103-236, Title I, Part B, § 140(c), 108 Stat. 399; Oct. 25, 1994, P.L. 103-415, § 1(d), 108 Stat. 4299, provides:

"(1)

(A) Beginning 24 months after the date of the enactment of this Act, whenever a United States consular officer issues a visa for admission to the United States, that official shall certify, in writing, that a check of the Automated Visa Lookout System, or any other system or list which maintains information about the excludability of aliens under the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification,

consult USCS Tables volumes], has been made and that there is no basis under such system for the exclusion of such alien.

"(B) If, at the time an alien applies for an immigrant or nonimmigrant visa, the alien's name is included in the Department of State's visa lookout system and the consular officer to whom the application is made fails to follow the procedures in processing the application required by the inclusion of the alien's name in such system, the consular officer's failure shall be made a matter of record and shall be considered as a serious negative factor in the officer's annual performance evaluation.

"(2) If an alien to whom a visa was issued as a result of a failure described in paragraph (1)(B) is admitted to the United States and there is thereafter probable cause to believe that the alien was a participant in a terrorist act causing serious injury, loss of life, or significant destruction of property in the United States, the Secretary of State shall convene an Accountability Review Board under the authority of title III of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 [*22 USCS §§ 4831* et seq.].".

Access to the Interstate Identification Index; fingerprint checks; report; termination. Act April 30, 1994, P.L. 103-236, Title I, Part B, § 140(d)-(g), 108 Stat. 400; Aug. 26, 1994, P.L. 103-317, Title V, § 505, 108 Stat. 1765; Sept. 30, 1996, P.L. 104-208, Div C, Title VI, Subtitle E, § 671(g)(2), 110 Stat. 3009-724; Nov. 26, 1997, P.L. 105-119, Title I, § 126, 111 Stat. 2471, provides:

"(d) Access to the Interstate Identification Index.

(1) Subject to paragraphs (2) and (3), the Department of State Consolidated Immigrant Visa Processing Center shall have on-line access, without payment of any fee or charge, to the Interstate Identification Index of the National Crime Information Center solely for the purpose of determining whether a visa applicant has a criminal history record indexed in such Index. Such access does not entitle the Department of State to obtain the full content of automated records through the Interstate Identification Index. To obtain the full content of a criminal history record, the Department shall submit a separate request to the Identification Records Section of the Federal Bureau of Investigation, and shall pay the appropriate fee as provided for in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Public Law 101-162) [Act Nov. 21, 1989, P.L. 101-162, 103 Stat. 988; for full classification, consult USCS Tables volumes].

"(2) The Department of State shall be responsible for all one-time start-up and recurring incremental non-personnel costs of establishing and maintaining the access authorized in paragraph (1).

"(3) The individual primarily responsible for the day-to-day implementation of paragraph (1) shall be an employee of the Federal Bureau of Investigation selected by the Department of State, and detailed to the Department on a fully reimbursable basis.".

"(e) Fingerprint checks.

(1) Effective not later than March 31, 1995, the Secretary of State shall in the ten countries with the highest volume of immigrant visa issuance for the most recent fiscal year for which data are available require the fingerprinting of applicants over sixteen years of age for immigrant visas. The Department of State shall submit records of such fingerprints to the Federal Bureau of Investigation in order to ascertain whether such applicants previously have been convicted of a felony under State or Federal law in the United States, and shall pay all appropriate fees.

"(2) The Secretary shall prescribe and publish such regulations as may be necessary to implement the requirements of this subsection, and to avoid undue

processing costs and delays for eligible immigrants and the United States Government.

"(f) Not later than December 31, 1996, the Secretary of State and the Director of the Federal Bureau of Investigation shall jointly submit to the Committee on Foreign Affairs and the Committee on the Judiciary of the House of Representatives, and the Committee on Foreign Relations and the Committee on the Judiciary of the Senate, a report on the effectiveness of the procedures authorized in subsections (d) and (e).

"(g) Subsections (d) and (e) shall cease to have effect after May 1, 1998.".

Effective date and termination of *8 USCS § 1182*(o); effective date of *8 USCS § 1255*(i). Act Aug. 26, 1994, P.L. 103-317, Title V, § 506(c), 108 Stat. 1766; Sept. 30, 1997, P.L. 105-46, § 123, 111 Stat. 1158; Nov. 14, 1997, P.L. 105-84, 111 Stat. 1628; Nov. 26, 1997, P.L. 105-119, Title I, § 111(b), 111 Stat. 2458, provides: "The amendment made by subsection (a) [adding subsec. (o) of this section] shall take effect on October 1, 1994, and shall cease to have effect on October 1, 1997. The amendment made by subsection (b) [adding *8 USCS § 1255*(i)] shall take effect on October 1, 1994.".

Application of amendments made by § 203 of Act Oct. 25, 1994. Act Oct. 25, 1994, P.L. 103-416, Title II, § 203(b), 108 Stat. 4311, provides: "The amendments made by this section [amending subsecs. (a)(2) and (h) of this section and *8 USCS § 1251*(a)] shall apply to convictions occurring before, on, or after the date of the enactment of this Act.".

Effective date of § 219(z) of Act Oct. 25, 1994. Act Oct. 25, 1994, P.L. 103-416, Title II, § 219(z), 108 Stat. 4318, provides that the amendments made by such § 219(z) (for full classification, consult USCS Tables volumes) are effective as if included in Act Dec. 12, 1991.

Application of amendments made by § 220 of Act Oct. 25, 1994. Act Oct. 25, 1994, P.L. 103-416, Title II, § 220(c), 108 Stat. 4320; Sept. 30, 1996, P.L. 104-208, Div C, Title VI, Subtitle B, § 622(a), 110 Stat. 3009-695, provides: "The amendments made by this section [amending subsec. (e) of this section and adding *8 USCS § 1184*(k)] shall apply to aliens admitted to the United States under section 101(a)(15)(J) of the Immigration and Nationality Act [*8 USCS § 1101*(a)(15)(J)], or acquiring such status after admission to the United States, before, on, or after the date of enactment of this Act and before June 1, 2002.".

Assistance to drug traffickers. Act Nov. 2, 1994, P.L. 103-447, Title I, § 107, 108 Stat. 4695, provides: "The President shall take all reasonable steps provided by law to ensure that the immediate relatives of any individual described in section 487(a) of the Foreign Assistance Act of 1961 *(22 U.S.C. 2291f*(a)), and the business partners of any such individual or of any entity described in such section, are not permitted entry into the United States, consistent with the provisions of the Immigration and Nationality Act *(8 U.S.C. 1101* et seq.).".

Deadline for issuance of regulations referred to in subsec. (f). Act Sept. 30, 1996, P.L. 104-208, Div C, Title I, Subtitle B, § 124(b)(2), 110 Stat. 3009-562, provides: "The Attorney General shall first issue, in proposed form, regulations referred to in the second sentence of section 212(f) of the Immigration and Nationality Act [*8 USCS § 1182*(f)], as added by the amendment made by paragraph (1), not later than 90 days after the date of the enactment of this Act.".

Application of subsec. (a)(9)(B). Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 301(b)(3), 110 Stat. 3009-578, provides: "In applying section 212(a)(9)(B) of the Immigration and Nationality Act [subsec. (a)(9)(B) of this section], as inserted by paragraph (1), no period before the title III-A

effective date [see § 309(a) of Act Sept. 30, 1996, P.L. 104-208, which appears as *8 USCS 1101* note] shall be included in a period of unlawful presence in the United States.".

Applicability of subsec. (a)(6)(A)(ii)(II) and (III). Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 301(c)(2), 110 Stat. 3009-579, provides: "The requirements of subclauses (II) and (III) of section 212(a)(6)(A)(ii) of the Immigration and Nationality Act [subsec. (a)(6)(A)(ii)(II), (III) of this section], as inserted by paragraph (1), shall not apply to an alien who demonstrates that the alien first arrived in the United States before the title III-A effective date (described in section 309(a) of this division [*8 USCS § 1101* note]).".

Effective date of amendments made by § 306(d) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 306(d), 110 Stat. 3009-612, provides that the amendments made to subsecs. (a), (c), (d), (g), and (h) of § 440 of P.L. 104-132 [amending *8 USCS §§ 1105a*(a)(10), 1182(c), 1252(a)(2), (c)(2), and 1252a(a)(1)] are effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 [enacted April 24, 1996].".

Conforming references to reorganized sections. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 308(g)(1), 110 Stat. 3009-622, provides: "References to sections 232, 234, 238, 239, 240, 241, 242a, and 244a. Any reference in law in effect on the day before the date of the enactment of this Act to section 232, 234, 238, 239, 240, 241, 242A, or 244A of the Immigration and Nationality Act (or a subdivision of such section) is deemed, as of the title III-A effective date [see § 309(a) of Act Sept. 30, 1996, P.L. 104-208, which appears as *8 USCS 1101* note], to refer to section 232(a), 232(b), 233, 234, 234A [240C], 237, 238, or 244 of such Act [*8 USCS §§ 1222*(a), 1222(b), 1223, 1224, 1230, 1227, 1228, or 1254a] (or the corresponding subdivision of such section), as redesignated by this subtitle. Any reference in law to section 241 [former *8 USCS § 1251]* (or a subdivision of such section) of the Immigration and Nationality Act in an amendment made by a subsequent subtitle of this title is deemed a reference (as of the title III-A effective date [see § 309(a) of Act Sept. 30, 1996, P.L. 104-208, which appears as *8 USCS 1101* note]) to section 237 [*8 USCS § 1227]* (or the corresponding subdivision of such section), as redesignated by this subtitle.".

Applicability of amendments made by § 341 of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 341(c), 110 Stat. 3009-636, provides: "The amendments made by this section [amending subsecs. (a)(1)(A) and (g) of this section] shall apply with respect to applications for immigrant visas or for adjustment of status filed after September 30, 1996.".

Effective date of amendments made by § 342(a) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 342(b), 110 Stat. 3009-636, provides: "The amendments made by subsection (a) [amending subsec. (a)(3)(B) of this section] shall take effect on the date of the enactment of this Act and shall apply to incitement regardless of when it occurs.".

Applicability of amendments made by § 344 of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 344(c), 110 Stat. 3009-637, provides: "The amendments made by this section [amending *8 USCS §§ 1182*(a)(6)(C) and 1251(a)(3)(D)] shall apply to representations made on or after the date of the enactment of this Act.".

Applicability of amendments made by § 346(a) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 346(b), 110 Stat. 3009-638, provides: "The amendment made by subsection (a) [adding subsec. (a)(6)(G) of this section] shall apply to aliens who obtain the status of a

nonimmigrant under section 101(a)(15)(F) of the Immigration and Nationality [*8 USCS § 1101*(a)(15)(F)] Act after the end of the 60-day period beginning on the date of the enactment of this Act, including aliens whose status as such a nonimmigrant is extended after the end of such period.".

Applicability of amendments made by § 347 of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 347(c), 110 Stat. 3009-639, provides: "The amendments made by this section [adding *8 USCS §§ 1182*(a)(10)(D) and 1251(a)(6)] shall apply to voting occurring before, on, or after the date of the enactment of this Act.".

Effective date and applicability of amendment made by § 348(a) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 348(b), 110 Stat. 3009-639, provides: "The amendment made by subsection (a) [amending subsec. (h) of this section] shall be effective on the date of the enactment of this Act and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date.".

Applicability of amendments made by § 351 of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 351(c), 110 Stat. 3009-640, provides: "The amendments made by this section [amending *8 USCS §§ 1182*(d)(11) and 1251(a)(1)(E)(iii)] shall apply to applications for waivers filed before, on, or after the date of the enactment of this Act, but shall not apply to such an application for which a final determination has been made as of the date of the enactment of this Act.".

Applicability of amendments made by § 352(a) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle C, § 352(b), 110 Stat. 3009-641, provides: "The amendment made by subsection (a) [adding subsec. (a)(10)(E) of this section] shall apply to individuals who renounce United States citizenship on and after the date of the enactment of this Act.".

Applicability of amendments made by Subtitle D of Title III of Div C of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle D, § 358, 110 Stat. 3009-644, provides: "The amendments made by this subtitle [amending *8 USCS §§ 1182,* 1189, 1531, 1532, 1534, and 1535] shall be effective as if included in the enactment of subtitle A of title IV of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) [enacted April 24, 1996].".

Applicability of amendment made by § 531(a) of Act Sept. 30, 1996. Act Sept. 30, 1996, P.L. 104-208, Div C, Title V, Subtitle B, § 531(b), 110 Stat. 3009-675, provides: "The amendment made by subsection (a) [amending subsec. (a)(4) of this section] shall apply to applications submitted on or after such date, not earlier than 30 days and not later than 60 days after the date the Attorney General promulgates under section 551(c)(2) of this division [*8 USCS § 1183a* note] a standard form for an affidavit of support, as the Attorney General shall specify, but subparagraphs (C) and (D) of section 212(a)(4) of the Immigration and Nationality Act [subparas. (C) and (D) of subsec. (a)(4) of this section], as so amended, shall not apply to applications with respect to which an official interview with an immigration officer was conducted before such effective date.".

Report on number and categories of aliens paroled into United States under subsec. (d)(5). Act Sept. 30, 1996, P.L. 104-208, Div C, Title VI, Subtitle A, § 602(b), 110 Stat. 3009-689, provides: "Not later than 90 days after the end of each fiscal year, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the number and categories of aliens paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act

[subsec. (d)(5) of this section]. Each such report shall provide the total number of aliens paroled into and residing in the United States and shall contain information and data for each country of origin concerning the number and categories of aliens paroled, the duration of parole, the current status of aliens paroled, and the number and categories of aliens returned to the custody from which they were paroled during the preceding fiscal year.".

Extension of authorized period of stay for certain nurses. Act Oct. 11, 1996, P.L. 104-302, § 1, 110 Stat. 3656, provides:

"(a) Aliens who previously entered the United States pursuant to an H-1A visa.

(1) In general. Notwithstanding any other provision of law, the authorized period of stay in the United States of any nonimmigrant described in paragraph (2) is hereby extended through September 30, 1997.

"(2) Nonimmigrant described. A nonimmigrant described in this paragraph is a nonimmigrant--

"(A) who entered the United States as a nonimmigrant described in section 101(a)(15)(H)(i)(a) of the Immigration and Nationality Act [*8 USCS § 1101*(a)(15)(H)(i)(a)];

"(B) who was within the United States on or after September 1, 1995, and who is within the United States on the date of the enactment of this Act; and

"(C) whose period of authorized stay has expired or would expire before September 30, 1997 but for the provisions of this section.

"(3) Limitations. Nothing in this section may be construed to extend the validity of any visa issued to a nonimmigrant described in section 101(a)(15)(H)(i)(a) of the Immigration and Nationality Act [*8 USCS § 1101*(a)(15)(H)(i)(a)] or to authorize the re-entry of any person outside the United States on the date of the enactment of this Act.

"(b) Change of employment. A nonimmigrant whose authorized period of stay is extended by operation of this section shall not be eligible to change employers in accordance with section 214.2(h)(2)(i)(D) of title 8, Code of Federal Regulations (as in effect on the day before the date of the enactment of the Act).

"(c) Regulations. Not later than 30 days after the date of the enactment of this Act, the Attorney General shall issue regulations to carry out the provisions of this section.

"(d) Interim treatment. A nonimmigrant whose authorized period of stay is extended by operation of this section, and the spouse and child of such nonimmigrant, shall be considered as having continued to maintain lawful status as a nonimmigrant through September 30, 1997.".

Effective date and application amendments made by § 412 of Division C of Act Oct. 21, 1998. Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, § 412(d), 112 Stat. 2681-645, provides: "The amendments made by subsection (a) [amending subsec. (n)(1) of this section] apply to applications filed under section 212(n)(1) of the Immigration and Nationality Act [subsec. (n)(1) of this section] on or after the date final regulations are issued to carry out such amendments, and the amendments made by subsections (b) and (c) [amending para. (1) and adding paras. (3) and (4) of subsec. (n) of this section] take effect on the date of the enactment of this Act.".

Reduction of public comment period with respect to regulations implementing Oct. 21, 1998 amendments of subsec. (n). Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, § 412(e), 112 Stat. 2681-645, provides: "In first promulgating regulations to implement the amendments made by this section [amending subsec. (n) of this section] in a timely manner, the Secretary of

Labor and the Attorney General may reduce to not less than 30 days the period of public comment on proposed regulations.".

Termination of Oct. 21, 1998 amendment adding subsec. (n)(2)(G). Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, § 413(e)(2), 112 Stat. 2681-651; Oct. 17, 2000, P.L. 106-313, Title I, § 107(b), 114 Stat. 1255, provides: "The amendment made by paragraph (1) [adding subsec. (n)(2)(G) of this section] shall cease to be effective on September 30, 2003.".

Effective date of subsec. (p). Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle A, § 415(b), 112 Stat. 2681-655, provides:

"The amendment made by subsection (a) [adding subsec. (p) of this section] applies to prevailing wage computations made--

"(1) for applications filed on or after the date of the enactment of this Act; and

"(2) for applications filed before such date, but only to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.".

Effective date of subsec. (q). Act Oct. 21, 1998, P.L. 105-277, Div C, Title IV, Subtitle C, § 431(b), 112 Stat. 2681-658, provides: "The amendment made by subsection (a) [adding subsec. (q) of this section] shall apply to activities occurring on or after the date of the enactment of this Act.".

Application of Oct. 21, 1998 amendment of subsec. (a)(10)(C)(ii). Act Oct. 21, 1998, P.L. 105-277, Div G, Subdiv B, Title XXII, Ch 2, § 2226(b), 112 Stat 2681-821, provides: "The amendment made by subsection (a) [amending subsec. (a)(10)(C)(ii) of this section] shall apply to aliens seeking admission to the United States on or after the date of enactment of this Act.".

Application of Oct. 27, 1998 amendment. Act Oct. 27, 1998, P.L. 105-292, Title VI, § 604(b), 112 Stat. 2814, provides: "The amendment made by subsection (a) [adding subsec. (a)(2)(G) of this section] shall apply to aliens seeking to enter the United States on or after the date of the enactment of this Act.".

Delegation of authority under sections 212(f) and 215(a)(1) of the Immigration and Nationality Act. Pres. Mem. of Sept. 24, 1999, *64 Fed. Reg. 55809,* provides:

"Memorandum for the Attorney General

"By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended *(8 U.S.C. 1182*(f) and 1185(a)(1)), and in light of Proclamation 4865 of September 29, 1981 [note to this section], I hereby delegate to the Attorney General the authority to:

"(a) Maintain custody, at any location she deems appropriate, and conduct any screening she deems appropriate in her unreviewable discretion, of any undocumented person she has reason to believe is seeking to enter the United States and who is encountered in a vessel interdicted on the high seas through December 31, 2000; and

"(b) Undertake any other appropriate actions with respect to such aliens permitted by law.

"With respect to the functions delegated by this order, all actions taken after April 16, 1999, for or on behalf of the President that would have been valid if taken pursuant to this memorandum are ratified.

"This memorandum is not intended to create, and should not be construed to create, any right or benefit, substantive or procedural, legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person, or to require any procedures to determine whether a person is a refugee.

"You are authorized and directed to publish this memorandum in the Federal

Register.".

Nov. 12, 1999 amendment of subsec. (m); implementing regulations. Act Nov. 12, 1999, P.L. 106-95, § 2(d), 113 Stat. 1316, provides: "Not later than 90 days after the date of the enactment of this Act, the Secretary of Labor (in consultation, to the extent required, with the Secretary of Health and Human Services) and the Attorney General shall promulgate final or interim final regulations to carry out section 212(m) of the Immigration and Nationality Act [*8 USCS § 1182*(m)] (as amended by subsection (b)).".

Applicability of Nov. 12, 1999 amendments to *8 USCS §§ 1101*(a)(15)(H)(i) and 1182(m). Act Nov. 12, 1999, P.L. 106-95, § 2(e), 113 Stat. 1317, provides: "The amendments made by this section [amending *8 USCS §§ 1101*(a)(15)(H)(i) and 1182(m)] shall apply to classification petitions filed for nonimmigrant status only during the 4-year period beginning on the date that interim or final regulations are first promulgated under subsection (d).".

Recommendations for alternative remedy for nursing shortage. Act Nov. 12, 1999, P.L. 106-95, § 3, 113 Stat. 1317, provides:

"Not later than the last day of the 4-year period described in section 2(e) [note to this section], the Secretary of Health and Human Services and the Secretary of Labor shall jointly submit to the Congress recommendations (including legislative specifications) with respect to the following:

"(1) A program to eliminate the dependence of facilities described in section 212(m)(6) of the Immigration and Nationality Act [*8 USCS § 1182*(m)(6)] (as amended by section 2(b)) on nonimmigrant registered nurses by providing for a permanent solution to the shortage of registered nurses who are United States citizens or aliens lawfully admitted for permanent residence.

"(2) A method of enforcing the requirements imposed on facilities under sections 101(a)(15)(H)(i)(c) and 212(m) of the Immigration and Nationality Act [*8 USCS §§ 1101*(a)(15)(H)(i)(c) and 1182(m)] (as amended by section 2) that would be more effective than the process described in section 212(m)(2)(E) of such Act [*8 USCS § 1182*(m)(2)(E)] (as so amended).

Effective date of amendments made by § 4(a) of Act Nov. 12, 1999. Act Nov. 12, 1999, P.L. 106-95, § 4(b), 113 Stat. 1318, provides: "The amendments made by subsection (a) [amending subsec. (a)(5)(C) and adding subsec. (r) of this section] shall take effect on the date of the enactment of this Act, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.".

Issuance of certified statements with respect to certain alien nurses. Act Nov. 12, 1999, P.L. 106-95, § 4(c), 113 Stat. 1317, provides: "The Commission on Graduates of Foreign Nursing Schools, or any approved equivalent independent credentialing organization, shall issue certified statements pursuant to the amendment under subsection (a) [amending subsec. (a)(5)(C) and adding subsec. (r) of this section] not more than 35 days after the receipt of a complete application for such a statement.".

Effective date and applicability of Oct. 30, 2000 amendments of subsecs. (a)(6)(C)(ii) and (a)(10)(D). Act Oct. 30, 2000, P.L. 106-395, Title II, § 201(b)(3), 114 Stat. 1634, provides: "The amendment made by paragraph (1) [amending subsec. (a)(10)(D) of this section] shall be effective as if included in the enactment of section 347 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; 110 Stat. 3009-638) and shall apply to voting occurring before, on, or after September 30, 1996. The amendment made by paragraph (2) [amending subsec. (a)(6)(C)(ii) of this section] shall be effective as if included in the enactment of section 344 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208; 110 Stat. 3009-637) and shall apply to representations made on or after

September 30, 1996. Such amendments shall apply to individuals in proceedings under the Immigration and Nationality Act [*8 USCS §§ 1101* et seq. generally; for full classification, consult USCS Tables volumes] on or after September 30, 1996.".

Effective date of Oct. 26, 2001 amendments; retroactive applicability; special rules; statutory construction. Act Oct. 26, 2001, P.L. 107-56, Title IV, Subtitle B, § 411(c), 115 Stat. 348, provides:

"(1) In general. Except as otherwise provided in this subsection, the amendments made by this section [amending *8 USCS §§ 1158*(b)(2)(A)(v), 1182(a)(3), and 1227(a)(4)(B)] shall take effect on the date of the enactment of this Act and shall apply to--

"(A) actions taken by an alien before, on, or after such date; and

"(B) all aliens, without regard to the date of entry or attempted entry into the United States--

"(i) in removal proceedings on or after such date (except for proceedings in which there has been a final administrative decision before such date); or

"(ii) seeking admission to the United States on or after such date.

"(2) Special rule for aliens in exclusion or deportation proceedings. Notwithstanding any other provision of law, sections 212(a)(3)(B) and 237(a)(4)(B) of the Immigration and Nationality Act [*8 USCS 1182*(a)(3)(B) and 1227(a)(4)(B)], as amended by this Act, shall apply to all aliens in exclusion or deportation proceedings on or after the date of the enactment of this Act (except for proceedings in which there has been a final administrative decision before such date) as if such proceedings were removal proceedings.

"(3) Special rule for section 219 organizations and organizations designated under section 212(a)(3)(B)(vi)(II) [*8 USCS 1182*(a)(3)(B)(vi)(II)].

(A) In general. Notwithstanding paragraphs (1) and (2), no alien shall be considered inadmissible under section 212(a)(3) of the Immigration and Nationality Act *(8 U.S.C. 1182*(a)(3)), or deportable under section 237(a)(4)(B) of such Act *(8 U.S.C. 1227*(a)(4)(B)), by reason of the amendments made by subsection (a) [amending *8 USCS § 1182*(a)(3)], on the ground that the alien engaged in a terrorist activity described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act [*8 USCS 1182*(a)(3)(B)(iv)] (as so amended) with respect to a group at any time when the group was not a terrorist organization designated by the Secretary of State under section 219 of such Act *(8 U.S.C. 1189)* or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act [*8 USCS 1182*(a)(3)(B)(vi)(II)] (as so amended).

"(B) Statutory construction. Subparagraph (A) shall not be construed to prevent an alien from being considered inadmissible or deportable for having engaged in a terrorist activity--

"(i) described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act [*8 USCS 1182*(a)(3)(B)(iv)] (as so amended) with respect to a terrorist organization at any time when such organization was designated by the Secretary of State under section 219 of such Act [*8 USCS 1189]* or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act [*8 USCS 1182*(a)(3)(B)(vi)(II)] (as so amended); or

"(ii) described in subclause (IV)(cc), (V)(cc), or (VI)(dd) of section 212(a)(3)(B)(iv) of such Act [*8 USCS 1182*(a)(3)(B)(iv)] (as so amended) with respect to a terrorist organization described in section 212(a)(3)(B)(vi)(III) of such Act [*8 USCS 1182*(a)(3)(B)(vi)(III)] (as so amended).

"(4) Exception. The Secretary of State, in consultation with the Attorney General, may determine that the amendments made by this section [amending *8 USCS §§ 1158*(b)(2)(A)(v), 1182(a)(3), and 1227(a)(4)(B)] shall not apply with respect

to actions by an alien taken outside the United States before the date of the enactment of this Act upon the recommendation of a consular officer who has concluded that there is not reasonable ground to believe that the alien knew or reasonably should have known that the actions would further a terrorist activity.".

Money laundering watchlist. Act Oct. 26, 2001, P.L. 107-56, Title X, § 1006(b), 115 Stat. 394, provides: "Not later than 90 days after the date of the enactment of this Act, the Secretary of State shall develop, implement, and certify to the Congress that there has been established a money laundering watchlist, which identifies individuals worldwide who are known or suspected of money laundering, which is readily accessible to, and shall be checked by, a consular or other Federal official prior to the issuance of a visa or admission to the United States. The Secretary of State shall develop and continually update the watchlist in cooperation with the Attorney General, the Secretary of the Treasury, and the Director of Central Intelligence.".

Application of March 13, 2002 amendments. Act March 13, 2002, P.L. 107-150, § 2(b), 116 Stat. 75, provides:

"The amendments made by subsection (a) [amending *8 USCS §§ 1182*(a) and 1183a(f)] shall apply with respect to deaths occurring before, on, or after the date of the enactment of this Act, except that, in the case of a death occurring before such date, such amendments shall apply only if--

"(1) the sponsored alien--

"(A) requests the Attorney General to reinstate the classification petition that was filed with respect to the alien by the deceased and approved under section 204 of the Immigration and Nationality Act *(8 U.S.C. 1154)* before such death; and

"(B) demonstrates that he or she is able to satisfy the requirement of section 212(a)(4)(C)(ii) of such Act *(8 U.S.C. 1182*(a)(4)(C)(ii)) by reason of such amendments; and

"(2) the Attorney General reinstates such petition after making the determination described in section 213A(f)(5)(B)(ii) of such Act [*8 USCS § 1183a*(f)(5)(B)(ii)] (as amended by subsection (a)(1) of this Act).".

NOTES:

CODE OF FEDERAL REGULATIONS

Immigration and Naturalization Service, Department of Justice--Immigrant petitions, 8 CFR Part 204.

Immigration and Naturalization Service, Department of Justice--Revocation of approval of petitions, 8 CFR Part 205.

Immigration and Naturalization Service, Department of Justice--Admission of refugees, 8 CFR Part 207.

Immigration and Naturalization Service, Department of Justice--Documentary requirements: Immigrants; waivers, 8 CFR Part 211.

Immigration and Naturalization Service, Department of Justice--Documentary requirements: Nonimmigrants; waivers; admission of certain inadmissible aliens; parole, 8 CFR Part 212.

Immigration and Naturalization Service, Department of Justice--Nonimmigrant classes, 8 CFR Part 214.

Immigration and Naturalization Service, Department of Justice--Reentry permits, refugee travel documents, and advance parole documents, 8 CFR Part 223.

Immigration and Naturalization Service, Department of Justice--Arrival-departure manifests and lists; supporting documents, 8 CFR Part 231.

Immigration and Naturalization Service, Department of Justice--Inspection of persons applying for admission, 8 CFR Part 235.

Immigration and Naturalization Service, Department of Justice--Exclusion of aliens, 8 CFR Part 236.

Immigration and Naturalization Service, Department of Justice--Proceedings to determine deportability of aliens in the United States: Apprehension, custody, hearing, and appeal, 8 CFR Part 242.

Immigration and Naturalization Service, Department of Justice--Adjustment of status to that of person admitted for permanent residence, 8 CFR Part 245.

Immigration and Naturalization Service, Department of Justice--Creation of records of lawful admission for permanent residence, 8 CFR Part 249.

Immigration and Naturalization Service, Department of Justice--Arrival manifests and lists:Supporting documents, 8 CFR Part 251.

Immigration and Naturalization Service, Department of Justice--Parole of alien crewman, 8 CFR Part 253.

Immigration and Naturalization Service, Department of Justice--Field officers; powers and duties, 8 CFR Part 287.

Immigration and Naturalization Service, Department of Justice--General requirements for naturalization, 8 CFR Part 316.

Employment and Training Administration, Department of Labor--Temporary employment of aliens in the United States, 20 CFR Part 655.

Employment and Training Administration, Department of Labor--Labor certification process for permanent employment of aliens in the United States, 20 CFR Part 656.

Schedule of fees for consular services--Department of State and Foreign Service, 22 CFR Part 22.

Department of State--Visas: Documentation of immigrants under the Immigration and Nationality Act, as amended, 22 CFR Part 42.

United States Information Agency--Exchange Visitor Program, 22 CFR Part 514.

Wage and Hour Division, Department of Labor--Attestations by facilities using nonimmigrant aliens as registered nurses, 29 CFR Part 504.

Wage and Hour Division, Department of Labor--Labor condition applications and requirements for employers using nonimmigrants on H-1B specialty occupations and as fashion models, 29 CFR Part 507.

Public Health Service, Department of Health and Human Services--Medical examination of aliens, 42 CFR Part 34.

Department of Health and Human Services, General Administration--U.S. exchange visitor program--request for waiver of the two-year foreign residence requirement, 45 CFR Part 50.

Department of Health and Human Services, General Administration--Criteria for evaluating comprehensive plan to reduce reliance on alien physicians, 45 CFR Part 51.

CROSS REFERENCES

Alien defined, *8 USCS § 1101*(a)(3).

Application for admission defined, *8 USCS § 1101*(a)(4).

Attorney General defined, *8 USCS § 1101*(a)(5).

Border crossing identification card defined, *8 USCS § 1101*(a)(6).

Consular officer defined, *8 USCS § 1101*(a)(9).

Doctrine defined, *8 USCS § 1101*(a)(12).

Entry defined, *8 USCS § 1101*(a)(13).

Foreign state defined, *8 USCS § 1101*(a)(14).

Immigrant defined, *8 USCS § 1101*(a)(15).

Nonimmigrant alien defined, *8 USCS § 1101*(a)(15).

Immigrant visa, *8 USCS § 1101*(a)(16).
Immigration officer defined, *8 USCS § 1101*(a)(18).
Ineligible to citizenship defined, *8 USCS § 1101*(a)(19).
Lawfully admitted for permanent residence defined, *8 USCS § 1101*(a)(20).
National defined, *8 USCS § 1101*(a)(21).
Nonimmigrant visa defined, *8 USCS § 1101*(a)(26).
Special immigrant defined, *8 USCS § 1101*(a)(27).
Organization defined, *8 USCS § 1101*(a)(28).
Passport defined, *8 USCS § 1101*(a)(30).
Permanent defined, *8 USCS § 1101*(a)(31).
Profession defined, *8 USCS § 1101*(a)(32).
Residence defined, *8 USCS § 1101*(a)(33).
Spouse, wife, husband, defined, *8 USCS § 1101*(a)(35).
Totalitarian party and totalitarian dictatorship defined, *8 USCS § 1101*(a)(37).
United States defined, *8 USCS § 1101*(a)(38).
World communism defined, *8 USCS § 1101*(a)(40).
Child, as used in Subchapter I and Subchapter II of Chapter 12, defined, *8 USCS § 1101*(b)(1).
Parent, as used in Subchapter I and Subchapter II of Chapter 12, defined, *8 USCS § 1101*(b)(2).
Adjacent islands defined, *8 USCS § 1101*(b)(5).
Child, as used in Subchapter III of Chapter 12, defined, *8 USCS § 1101*(c)(1).
Parent, as used in Subchapter III of Chapter 12, defined, *8 USCS § 1101*(c)(2).
Advocating a doctrine defined, *8 USCS § 1101*(e)(1).
Affiliation defined, *8 USCS § 1101*(e)(2).
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Eligibility, for discretionary admission under § 212(c) of Immigration and Nationality Act of 1952 *(8 USCS § 1182*(c)), of alien returning to unrelinquished domicile after trip abroad. *80 ALR Fed 8.*

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(8 USCS § 1182(a)(31)) or for deportation under § 241(a)(13) of Immigration and Nationality Act *(8 USCS § 1251*(a)(13)). *83 ALR Fed 350.*

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I. IN GENERAL

1. Generally

Every sovereign nation has power to forbid entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. *Nishimura Ekiu v United States (1892) 142 US 651, 35 L Ed 1146, 12 S Ct 336.*

Congress has plenary power to make rules for admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. *Boutilier v Immigration & Naturalization Service (1967) 387 US 118, 18 L Ed 2d 661, 87 S Ct 1563.*

8 USCS § 1182 does not confer authority upon Department of Labor to determine job qualification of sixth preference alien applicant; such authority rests with Immigration and Naturalization Service under other provisions of Immigration and Naturalization Act *(8 USCS §§ 1101* et seq). *Stewart Infra-Red Commissary, Inc. v Coomey (1981, CA1 Mass) 661 F2d 1.*

Immigration and Naturalization Service has broad statutory discretion to parole into United States foreign nationals even when they might otherwise be

excludable; failure of INS to deport excludable alien falls within discretionary function exemption to Federal Tort Claims Act *(28 USCS § 2680). Flammia v United States (1984, CA5 Tex) 739 F2d 202, 78 ALR Fed 677.*

Excludable aliens seeking admission to United States are legally considered detained at border, even if physically present in country, and neither parole nor detention has any effect on their status; excludable aliens have fewer rights than deportable aliens and must be content to accept whatever statutory rights and privileges granted by Congress; courts should ordinarily abstain from placing limits on government discretion where excludable aliens are concerned as primary decision making authority is squarely in hands of political branches. *Garcia-Mir v Smith (1985, CA11 Ga) 766 F2d 1478,* cert den *(1986) 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213.*

Aliens who have committed serious crimes in this country may be detained in custody for prolonged periods when country of origin refuses to allow alien's return, and such detention is constitutional if government provides individualized periodic review of alien's eligibility for release on parole. *Chi Thon Ngo v INS (1999, CA3 Pa) 192 F3d 390.*

8 USCS § 1182(a)(3)(A)(i) is not unconstitutionally vague. *Beslic v INS (2001, CA7) 265 F3d 568.*

If alien is inadmissible for having committed offenses specified in *8 USCS § 1182*(a), he is removable as well. *Balogun v Ashcroft (2001, CA5) 270 F3d 274.*

An alien convicted for use of a firearm during a drug trafficking crime was statutorily ineligible for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] as such a waiver of inadmissibility is only available to aliens in deportation proceedings who are being deported on grounds for which a comparable exclusion grounds exist, and there is no exclusion ground for a firearms violation. *In re K.L. (1993, BIA) 20 I & N Dec 654.*

H-1B employer is bound to pay for all work performed during entire period of authorized employment. Administrator v Native Technologies, Inc. (1999) ARB Case No. 98-034.

2. Applicability

Attorney General has authority to indefinitely detain excludable aliens, and such indefinite detention does not violate due process. *Guzman v Tippy (1997, CA2 NY) 130 F3d 64.*

Immigration and Naturalization Act does not apply to outer Continental Shelf. *Piledrivers' Local Union v Smith (1982, CD Cal) 541 F Supp 460,* affd (1982, CA9 Cal) *695 F2d 390.*

Alien with 2 felony drug convictions is entitled to hearing to determine whether he should receive waiver from deportation on account of humanitarian factors, where he enjoyed right to request "hardship" waiver at time he was convicted, because new law eliminating that right should not be applied retroactively. *Billett v Reno (1998, WD NY) 2 F Supp 2d 368.*

8 USCS § 1182(c) did not apply retroactively to alien whose application for waiver of deportation was already pending when statute was enacted. *Homayun v Cravener (1999, SD Tex) 39 F Supp 2d 837.*

3. Alien's right to entry or admission

Unadmitted and nonresident alien has no constitutional right of entry to United States as nonimmigrant or otherwise. *Kleindienst v Mandel (1972) 408 US 753, 33 L Ed 2d 683, 92 S Ct 2576.*

Although United States Consular officers are given broad discretionary authority in ruling on visa applications, even where visa is issued by American consul to immigrant, visa still represents only prima facie evidence of

eligibility and does not assure holder of admission into United States. *Reid v Immigration & Naturalization Service (1974, CA2) 492 F2d 251,* affd *(1975) 420 US 619, 43 L Ed 2d 501, 95 S Ct 1164* (superseded by statute on other grounds as stated in *Rodriguez-Barajas v INS (1993, CA7) 992 F2d 94).*

In exclusion hearing, substantial evidence supported BIA's finding alien was not born in United States where no record of California birth certificate could be found, and alien did possess Mexican birth certificate. *De Brown v Department of Justice (1994, CA9 Ariz) 18 F3d 774, 94 CDOS 1740, 94* Daily Journal DAR 3133.

Alien has no constitutional right to enter or remain in United States, and he may be denied entrance on grounds which would be constitutionally suspect or impermissible in context of domestic policy, namely, race, physical condition, political beliefs, sexual proclivities, age, and national origin. *Fiallo v Levi (1975, ED NY) 406 F Supp 162,* affd *(1977) 430 US 787, 52 L Ed 2d 50, 97 S Ct 1473.*

Alien's admission into U.S. is privilege, and he is entitled only to those protections Congress has specifically enacted. *Justiz-Cepero v Thornburgh (1995, DC Kan) 882 F Supp 1572.*

4. Prevention of entry

Executive Order 12324 *(8 USCS § 1182* note), which requires Transportation Secretary to instruct Coast Guard to enforce suspension of entry of undocumented aliens and interdiction of any defined vessels carrying such aliens, does not give rise to private cause of action. *Haitian Refugee Ctr. v Baker (1992, CA11 Fla) 953 F2d 1498, 6* FLW Fed C 69.

President had power under *8 USCS §§ 1182*(f) and 1185(a)(1) and under Article II of Constitution to authorize interdiction of certain vessels containing undocumented aliens on high seas, and to enter into agreement with Haiti authorizing United States to board Haitian vessels to inquire regarding status of those on board and to return vessel and passengers to Haiti if violation of United States law discovered. *Haitian Refugee Center, Inc. v Gracey (1985, DC Dist Col) 600 F Supp 1396,* affd (1987, App DC) *257 US App DC 367, 809 F2d 794.*

5. Exclusion of United States citizens

Fact that individual improperly used passport which was wrongfully taken from office of consul general in Naples, and that he may have committed perjury in his endeavor to gain admission to United States might afford grounds for criminal prosecution, but would not afford grounds for exclusion of one born in United States who had never renounced his allegiance thereto. *United States ex rel. Baglivo v Day (1928, DC NY) 28 F2d 44.*

Individual may not be excluded as alien when he has established his birth and citizenship in United States on prima facie basis and *8 USCS § 1182* was not applicable to exclude individual who established fact of his birth in United States but refused to answer any questions concerning reasons for his departure to Mexico and his avoidance of service in Armed Forces of United States. *Bean v Barber (1958, DC Cal) 163 F Supp 111.*

Person who has intentionally and voluntarily renounced United States citizenship must obtain proper visa certification to enter and remain in United States. *Davis v District Director, Immigration & Naturalization Service (1979, DC Dist Col) 481 F Supp 1178.*

II. CLASSES OF EXCLUDABLE ALIENS [*8 USCS § 1182*(a)]

A. Exclusions Involving Personal Characteristics

6. Physical or mental disorder

Alien who became insane within 5 years from causes not shown to have arisen subsequent to landing could have been deported (decided under former version of § 1182). *United States ex rel. Casimano v Commission of Immigration (1926, CA2 NY) 15 F2d 555.*

Special inquiry board properly refused admittance of mongoloid child and her mother based solely upon medical certificate (decided under former version of § 1182). *United States ex rel. Saclarides v Shaughnessy (1950, CA2 NY) 180 F2d 687.*

Examinations of alien more than five years after her entry, which showed her to be mentally deficient, did not sustain deportation order where there was no such finding at time of her entry (decided under former version of § 1182). *Foley ex rel. Schenk v Ward (1936, DC Mass) 13 F Supp 915.*

Executive officers of government had no discretion to admit imbecile against decision of board of special inquiry based on medical certificate (decided under former version of § 1182). *United States ex rel. Patton v Tod (1923, 2 NY) 297 F 385.*

7. Contagious disease

Certificate of public health service of freedom from loathsome or dangerous contagious disease was not conclusive on board of special inquiry (decided under former version of § 1182). *Gee Shew Hong v Nagle (1927, CA9 Cal) 18 F2d 248.*

Aliens excludable under former *8 USCS § 1182*(a)(6) because of affliction with particular disease or infection who are cured as result of treatment received after arriving in United States may be admitted (decided under former version of § 1182). *Klapholz v Esperdy (1961, SD NY) 201 F Supp 294,* affd on other grounds (1962, CA2 NY) *302 F2d 928,* cert den *(1962) 371 US 891, 9 L Ed 2d 124, 83 S Ct 183.*

Clonorchiasis, parasitic disease of liver, prevalent in Asia, but not in this country, which on evidence of physicians, was termed "dangerous contagious disease," warranted exclusion of one having disease (decided under former version of § 1182). *Hee Fuk Yuen v White (1921, 9 Cal) 273 F 10,* cert den *(1921) 257 US 639, 66 L Ed 411, 42 S Ct 51.*

8. Likelihood of becoming public charge

Finding that school children, seeking entry into United States, were likely to become public charges, was unwarranted where record showed that relatives in this country competent to do so, declared their willingness to take the children into their homes, care for and support them, and send them to school until they were self-sustaining, and to give bond to that end. *Untied States ex rel. Berman v Curran (1926, CA3 NJ) 13 F2d 96.*

Italian woman, 70 years old, with $ 100 on hand and additional $ 1,000 in Italy with no one in this country obligated to support her, was properly disallowed re-entry as likely to become public charge. *United States ex rel. Minuto v Reimer (1936, CA2 NY) 83 F2d 166.*

For purposes of admissibility, "person likely to become a public charge" is one who for some cause or reason is about to become charge on public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty, or, it might be, by reason of crime which on conviction would be followed by imprisonment. *Ex parte Mitchell (1919, DC NY) 256 F 229.*

One who had conspired to violate laws of United States was deemed person who was likely to become public charge, though he was not strictly pauper. *Ex parte Horn (1923, DC Wash) 292 F 455.*

Where, when alien entered, there was no apparent likelihood that he would commit bigamy, his subsequent commission of that offense was no ground for his deportation for reason that he was likely to become public charge. *Ex parte Costarelli (1924, DC Mass) 295 F 217.*

Wife and children separated from husband were not necessarily subject to exclusion as likely to become public charges. *In re Keshishian (1924, DC NY) 299 F 804.*

Moral and mental deficiency supported deportation as "public charge." *Ex parte Fragoso (1926, DC Cal) 11 F2d 988.*

Female alien and her minor son were not excludable under former *8 USCS § 1182*(a)(15) as aliens likely to become public charges on basis that their husband and father was inadmissible and that spouse and minor child would be without financial support, where female was 30 years old, in good physical condition, and had had gainful employment, and where minor son was 13 years old and in good physical and mental condition. *In re B---- A---- (1955, BIA) 6 I & N Dec 584.*

For purposes of admission, deaf mute was not person likely to become public charge, where he was capable of making living as tailor and his relatives, who were prosperous businessmen, had expressed determination to look after him and put his child through college. *United States ex rel. Engel v Tod (1923, 2 NY) 294 F 820.*

Test applied by INS to determine whether alien is likely to become public charge is prediction based on totality of alien's circumstances, and although test is generally prospective in nature, receipt of public assistance in past may be considered; other factors include alien's age, capacity to earn a living, health, family situation, work history, and affidavits of support, and although factors should be considered in totality, alien's physical and mental condition, as it affects ability to earn a living, is of major significance. *In re A- (1988, Comr) 19 I & N Dec 867.*

Mother's absence from work force to care for her children is not by itself sufficient basis to find mother likely to become public charge, and circumstances beyond alien's control which temporarily prevent alien from joining work force, such as residence in area where jobs are scarce, should be considered when making public charge determination; thus, 33-year-old mother of 3 children whose family had received public assistance for 4 years prior to submission of application for temporary resident status but who had recently joined work force and had no physical or mental defects that might affect earning capacity was determined not likely to become public charge and was granted temporary resident status under INA § 245A [*8 USCS § 1255a]. In re A- (1988, Comr) 19 I & N Dec 867.*

Under former *8 USCS § 1182*(a)(15), alien husband and wife will not become public charges, and thus may be eligible for status as permanent residents under *8 USCS § 1255,* where (1) their daughter and son-in-law submit affidavit of support accompanied by acceptable evidence of affiants' ability to provide aliens with promised care and support, (2) record shows they have provided support for number of years, and (3) aliens have never sought public assistance; even though affidavits of support are not legal obligations, since 8 CFR § 103.2(b)(1) requires evidence to be submitted in support of such affidavits, Service must give affidavits due consideration consistent with deponents' ability to provide promised support. *In re Kohama (1978, Associate Comr) 17 I & N Dec 257.*

B. Exclusions Involving Misconduct

1. Criminal Misconduct

a. Conviction or Admission of Crime Involving Moral Turpitude

(1). In General

9. Constitutionality

Phrase "crime involving moral turpitude" has sufficiently definite meaning to afford constitutional standard for deportation. *Tseung Chu v Cornell (1957, CA9 Cal) 247 F2d 929,* cert den *(1957) 355 US 892, 2 L Ed 2d 190, 78 S Ct 265.*

Aliens who have committed serious crimes in this country may be detained in custody for prolonged periods when country of origin refuses to allow alien's return, and such detention is constitutional if government provides individualized periodic review of alien's eligibility for release on parole. *Chi Thon Ngo v INS (1999, CA3 Pa) 192 F3d 390.*

Immigration laws, excluding from United States persons who have committed crimes involving moral turpitude, are not, where they operate to exclude wife of citizen of United States, unconstitutional as depriving such citizen and his wife of liberty and property without due process of law. *United States ex rel. Ulrich v Kellogg (1929) 58 App DC 360, 30 F2d 984, 71 ALR 1210,* cert den *(1929) 279 US 868, 73 L Ed 1005, 49 S Ct 482.*

Application of *8 USCS § 1182*(c) to aliens convicted of drug offenses did not violate due process rights of alien, whose drug conviction predated amendment, where deportation proceedings and his discretionary relief application postdated enactment of amendment, since statute acted only prospectively toward alien. *Then v INS (1999, DC NJ) 58 F Supp 2d 422.*

Distinction between aliens in deportation proceedings and those in exclusion proceedings in eliminating eligibility for discretionary waiver of deportation under *8 USCS § 1182*(c) was rationally related to legitimate governmental purpose and did not violate Equal Protection Clause, where convicted aliens who have not yet entered country do not pose same public safety risk as those who are already here. *Asad v Reno (1999, MD Tenn) 67 F Supp 2d 886.*

10. Crime involving moral turpitude

Moral turpitude is more than civic deficiency manifested by breaking known law; it is serious delinquency measured by general moral standards of time and country, of sort or nature that would be regarded as such, independently of there being any law against it. *Skrmetta v Coykendall (1927, DC Ga) 16 F2d 783,* affd (1927, CA5 Ga) *22 F2d 120.*

For purposes of exclusion under former *8 USCS § 1182*(a)(9) alien convicted of offense which is not malum in se or which does not include as essential element of offense specific state of mind properly equated with common law concept of mens rea as opposed to intent to do act which itself has been proscribed and rendered malum prohibitum, does not stand convicted of crime which involves moral turpitude as matter of law, even though facts present in given case might disclose conduct which involved moral turpitude, it being improper for court to inquire into particular offense. *Forbes v Brownell (1957, DC Dist Col) 149 F Supp 848.*

In determining whether wrongful acts constitute commission of crimes of moral turpitude, court may examine age of offender, circumstances surrounding offense, and viewpoint of community with regard to offenses committed by juvenile; theft of food by hungry child or theft of garments of ill-clothed child do not constitute crimes of moral turpitude. *Diaz v Haig (1981, DC Wyo) 594 F Supp 1.*

11. --Relevance of name or label of offense

Crime of moral turpitude is involved where one carries away property knowing it belongs to another, regardless of nuances of state larceny laws. *Chiaramonte v Immigration & Naturalization Service (1980, CA2) 626 F2d 1093.*

When inquiring into nature of statutory crime, definitive name or label attached to proscribed conduct is not criterion for determining whether such offense involves moral turpitude, rather impact upon moral turpitude, inherent in conviction under criminal statute, must be measured by language delineating offense, for therein is found elements of the crime, and determination of whether or not moral turpitude is involved must be made from elements of offense. *Forbes v Brownell (1957, DC Dist Col) 149 F Supp 848.*

12. --Governing legal standard

Moral turpitude within scope of immigration laws is determined without reference to laws of foreign jurisdiction; determination that conviction in British West Indies for crimes of forgery, uttering and stealing constituted conviction for crimes involving moral turpitude was correct since under United States standards these crimes are so regarded. *United States ex rel. McKenzie v Savoretti (1952, CA5 Fla) 200 F2d 546.*

Even where alien has been convicted of particularly serious crime such that he must demonstrate unusual or outstanding equities to obtain discretionary relief from deportation, BIA must consider seriousness of alien's particular conduct and not automatically deny alien's request for relief. *Elramly v INS (1995, CA9) 73 F3d 220, 96 CDOS 24, 96* Daily Journal DAR 27.

Whether particular crime committed in foreign jurisdiction involves moral turpitude must be determined by standards prevailing in United States. *In re M-- (1960, BIA) 9 I & N Dec 132.*

To determine whether given act is to be considered as crime, or only delinquency, by United States standards, Board of Immigration Appeals will look to the provisions of Federal Juvenile Delinquency Act *(18 USCS § 5031). In re Ramirez-Rivero (1981, BIA) 18 I & N Dec 135.*

13. --Conspiracy and attempt

Alien who was convicted, prior to entry, on plea of guilty to general conspiracy to commit crimes involving moral turpitude was inadmissible. *In re S-- (1962, BIA) 9 I & N Dec 688.*

There is no distinction for immigration purposes in respect to moral turpitude between commission of substantive crime and attempt to commit it. *In re Awaijane (1972, BIA) 14 I & N Dec 117.*

14. Conviction of crime

Alien is not deemed to have been "convicted" of crime for purposes of former *8 USCS § 1182*(a)(9) until his conviction has attained substantial degree of finality, and such finality does not occur unless and until direct appellate review of conviction has been exhausted or waived. *Marino v Immigration & Naturalization Service, United States Dep't of Justice (1976, CA2) 537 F2d 686.*

Although a nonfinal conviction for which procedures for a direct appeal have not been exhausted or waived does not constitute a "conviction" within meaning of [INA § 212(a)(9) former *8 USCS § 1182*(a)(9)] and may not be used to support a deportation order, it was harmless error for Immigration Judge to have considered alien's conviction for purposes of denying discretionary relief of voluntary departure while an appeal was pending of alien's convictions. *Kabongo v Immigration & Naturalization Service (1988, CA6) 837 F2d 753,* cert den *(1988) 488 US 982, 102 L Ed 2d 564, 109 S Ct 533.*

Where immigration judge denied alien's request for voluntary departure on ground that he was ineligible pursuant to former *8 USCS § 1182*(a)(12) due to his having been convicted of prostitution, but where conviction was dismissed during pendency of judicial appeal before Circuit Court of Appeals, absence of a conviction and alien's denial before immigration judge of being guilty of prostitution required that case be remanded to the Board of Immigration Appeals for further consideration of whether to grant discretionary relief of voluntary departure in lieu of deportation. *Ouedraogo v INS (1989, CA5) 864 F2d 376.*

Offense that constitutes felony under state, but not federal, law does not qualify as "aggravated felony" and thus does not preclude alien convicted of such offense from consideration for waiver of deportation; with agreement of panel that had ruled otherwise in *Jenkins v INS (1994, CA2) 32 F3d 11,* Second Circuit rejected that precedent in interest of nationwide uniformity in treatment of similarly situated aliens. *Aguirre v INS (1996, CA2) 79 F3d 315.*

An order granting Government's motion for summary judgment and denying an alien's petition for a writ of coram nobis and audita querela under All Writs Act, *28 USCS § 1651,* by which he sought to vacate his 1979 conviction for conspiracy to possess cocaine with intent to distribute, was affirmed on ground that there was no evidence to establish that Government withheld exculpatory evidence from defendant; alien had conceded deportability and been denied a waiver of deportation on basis of his criminal history, which included two other convictions. *Jimenez v Trominski (1996, CA5 Tex) 91 F3d 767.*

Lawful permanent resident alien's petition for writ of habeas corpus is granted, he is eligible for waiver under *8 USCS § 1182*(c), and his deportation is stayed pending consideration of his waiver application by immigration judge, where Bureau of Immigration Appeals' interpretation and application of elimination of waiver discretion violate his equal protection rights, because there is no rational basis for affording aliens who leave country after their conviction opportunity to apply for discretionary relief but denying same opportunity to other aliens merely because they failed to travel abroad and remained in *U.S. Cruz v Reno (1998, ND Ill) 6 F Supp 2d 744,* revd sub nom *LaGuerre v Reno (1998, CA7 Ill) 164 F3d 1035* (criticized in *Sandoval v Reno (1999, CA3 Pa) 166 F3d 225)* and (criticized in *Calderon v Reno (1999, ND Ill) 1999 US Dist LEXIS 2552).*

Lawful permanent resident alien's petition for writ of habeas corpus is granted and case is remanded to Bureau of Immigration Appeals to review denial of his waiver on its merits, where he was denied equal protection when Bureau dismissed his appeal without deciding merits of his waiver and yet allowed excludable aliens waivers, because repeal of *8 USCS § 1182*(c) corrects any constitutional problems for cases filed after April 1, 1997, but this alien's petition requires merits review. *Musto v Perryman (1998, ND Ill) 6 F Supp 2d 758.*

State judge's order specifically decreeing alien guilty of attempted grand larceny is sufficient to evidence deportability although sentencing was deferred pursuant to state statute which permits placing criminal defendant on probation following guilty plea, where such deferred sentence is subject to appeal and result of such appeal would be res judicata as to any subsequent appeal on merits, and where, even if charges against defendant are dismissed after probation has been successfully concluded, prior guilty finding can be used for other state purposes. *In re Westman (1979, BIA) 17 I & N Dec 50.*

15. Admission of offense or essential elements

An alien's sham marriage to a U.S. citizen, while still married to his first wife, did not render the alien excludable under former INA § 212(a)(9) [former *8*

USCS § 1182(a)(9)] as having admitted committing acts constituting the essential elements of a crime involving moral turpitude, where the alien thought his first marriage was invalid and thus did not intend to marry two spouses, as implicitly required by Arizona's bigamy statute. *Braun v INS (1993, CA9) 992 F2d 1016, 93 CDOS 3481, 93* Daily Journal DAR 5983.

With exception of fact that alien need no longer admit legal conclusion that he has committed specific crime, rules laid down in *Re J---- (1945, BIA) 2 I & N Dec 285* for determining validity of admission to committing crime still prevail, which rules are: (1) it must be clear that conduct in question constitutes crime or misdemeanor under law where it is alleged to have occurred, (2) alien must be advised in clear manner of essential elements of alleged crime or misdemeanor, (3) alien must clearly admit conduct constituting essential elements of crime or misdemeanor, (4) it must appear that crime or misdemeanor admitted actually involves moral turpitude, although it is not required that alien himself concede element of moral turpitude, (5) admissions must be free and voluntary. *In re G---- M---- (1955, BIA) 7 I & N Dec 40.*

Plea to indictment or complaint is so much integral part of entire criminal proceeding that it cannot be isolated from final result of that proceeding and given more force or finality than that result and alien's plea of guilty in criminal proceedings, which proceedings did not result in conviction, did not constitute "admission" of crime involving moral turpitude rendering alien excludable under former *8 USCS § 1182*(a)(9). *In re Winter (1967, BIA) 12 I & N Dec 638.*

16. Effect of pardon

Pardon forecloses basing charge of inadmissibility under former *8 USCS § 1182*(a)(9) upon subsequent admission of same offense which constituted basis for pardoned conviction. *In re E---- V---- (1953, BIA) 5 I & N Dec 194.*

(2). Particular Crimes

17. Adultery

Adultery involves moral turpitude. *United States ex rel. Tourny v Reimer (1934, DC NY) 8 F Supp 91.*

18. Bigamy

Bigamy is crime which involves moral turpitude. *Whitty v Weedin (1933, CA9 Wash) 68 F2d 127.*

Bigamy as defined by Canadian statute does not require mens rea and is not offense inherently involving moral turpitude. *Forbes v Brownell (1957, DC Dist Col) 149 F Supp 848.*

19. Burglary

Alien is statutorily ineligible for withholding of deportation because of his conviction for burglary in first degree, such conviction requiring finding that alien accomplished his crime by aggravating circumstances which involved physical injury or potentially life-threatening acts; crime was particularly serious where conviction of alien demonstrated his propensity for violent, anti-social behavior and total disregard for inherent potential risk of extreme violence and physical harm to others; application for asylum could be refused in exercise of discretion where alien was convicted of particularly serious crime. *In re Garcia-Garrocho (1986, BIA) 19 I & N Dec 423.*

20. Counterfeiting

Counterfeiting obligations of United States was crime involving moral turpitude, and commission of such crime during permitted residence in this country was ground for deportation following return of alien from visit to foreign country. *United States ex rel. Volpe v Smith (1933) 289 US 422, 77 L Ed 1298, 53 S Ct 665.*

21. Fraud and related offenses

Alien who was convicted of having obtained goods upon false representations was properly refused admission to United States although sentence had been suspended. *Bermann v Reimer (1941, CA2 NY) 123 F2d 331.*

Alien is excludable under former *8 USCS § 1182* for having been convicted of crime involving moral turpitude, where he was convicted by Canadian court of conspiracy to affect public market price of stock by deceit, falsehood, or other fraudulent means with intent to defraud. *McNaughton v Immigration & Naturalization Service (1980, CA9) 612 F2d 457.*

Canadian citizen, convicted before entering United States, of Canadian crime of "false pretenses" and given suspended sentence of 6 months for passing bad check with knowledge of insufficient funds to cover it, is excludable alien under former *8 USCS § 1182*(a)(9) and subject to deportation under § 1251(a)(1), since offense for which he was convicted, although having no Federal counterpart, is analogous to District of Columbia offense of passing bad check, upgraded from misdemeanor to felony prior to alien's entry into United States, even though it was only misdemeanor at time of alien's conviction of Canadian offense, and provisions of law at time of entry govern, rather than provisions at time of conviction. *Squires v Immigration & Naturalization Service (1982, CA6) 689 F2d 1276,* cert den *(1983) 461 US 905, 76 L Ed 2d 806, 103 S Ct 1874.*

Conspiracy, mail fraud, and wire fraud, in violation of *18 USCS §§ 371,* 1341, and 1343 are considered crimes of moral turpitude within the meaning of INA § 212 [former *8 USCS § 1182]. United States v Kamer (1986, CA9 Cal) 781 F2d 1380,* cert den *(1986) 479 US 819, 93 L Ed 2d 35, 107 S Ct 80.*

Convictions for making false statements in violation of *18 USCS § 1001* and for obtaining student loans by fraud and false statements in violation of *20 USCS § 1097*(a) constituted crimes of moral turpitude for purposes of former *8 USCS § 1182*(a)(9)]; further, alien could be considered as lacking good moral character where he acknowledged his false statements and statements made to defraud the United States Government. *Kabongo v Immigration & Naturalization Service (1988, CA6) 837 F2d 753,* cert den *(1988) 488 US 982, 102 L Ed 2d 564, 109 S Ct 533.*

For purposes of registry statute *(8 USCS § 1259),* alien's convictions under *18 USCS § 1546*(b)(3), for making false attestation on employment verification form, and *42 USCS § 408*(a)(7)(B), for using false Social Security number, do not constitute crimes of moral turpitude within meaning of *8 USCS § 1182*(a)(2)(A). *Beltran-Tirado v INS (2000, CA9) 213 F3d 1179, 2000 CDOS 4186, 2000* Daily Journal DAR 5641.

Alien applicant's conviction in Mexico of offense of fraud (fabrication of property transfer in unsuccessful attempt to reduce wife's potential settlement in divorce action) was not conviction of crime involving moral turpitude within meaning of former *8 USCS § 1182*(a)(9). *In re Delagadillo (1975, BIA) 15 I & N Dec 395.*

Alien convicted of crime of issuing worthless checks is not convicted of crime involving moral turpitude since intent to defraud is not essential element of crime. *In re Zangwill (1981, BIA) 18 I & N Dec 22* (ovrld in part on other grounds by *In re Ozkok (1988, BIA) 19 I & N Dec 546).*

22. Larceny and theft

Crime of larceny is one which involves moral turpitude within meaning of former *8 USCS § 1182*(a)(9). *Quilodran-Brau v Holland (1956, CA3 Pa) 232 F2d 183.*

Alien who had been convicted of 2 petty theft offenses involving moral turpitude is precluded from establishing good moral character under *8 USCS §§ 101*(f)(3) and 1182(a)(9), and is therefore not eligible for relief under *8 USCS § 1254*(e). *Khalaf v Immigration & Naturalization Service (1966, CA7) 361 F2d 208.*

Theft involves moral turpitude. *United States ex rel. Ulrich v Kellogg (1929) 58 App DC 360, 30 F2d 984, 71 ALR 1210,* cert den *(1929) 279 US 868, 73 L Ed 1005, 49 S Ct 482.*

Petit larceny is crime involving moral turpitude. *United States ex rel. Fracassi v Karnuth (1937, DC NY) 19 F Supp 581.*

Where alien who sought admission into United States to live had formerly been convicted in England of stealing fur piece, he was guilty of crime involving moral turpitude and his admittance into this country was properly denied by immigration board. *United States ex rel. Teper v Miller (1949, DC NY) 87 F Supp 285.*

Alien convicted of robbery with deadly weapon and assault with deadly weapon was not denied effective assistance of counsel during his exclusion hearing even though his attorney failed to procure documents and records from his home country which would have proved his claim for political asylum and withholding of deportation where such evidence would have had no effect at administrative hearing because alien was statutorily ineligible for withholding of deportation relief because of his commission of various crimes of violence. *Perez-Olbera v Immigration & Naturalization Service (1987, DC Nev) 662 F Supp 910, 92 ALR Fed 649.*

Alien is deportable as having committed offenses involving moral turpitude where he has been convicted of possession of stolen goods under Canadian statute which specifically requires knowledge of stolen nature of goods; Board will not in essence retry case, because alien now contends there was no knowledge on his part, where record of conviction amply shows necessary elements of possession and knowledge of stolen nature of goods were alleged and found to have been proven. *In re Salvail (1979, BIA) 17 I & N Dec 19.*

Convictions for armed robbery and attempted armed robbery render alien statutorily ineligible for withholding of deportation such being particularly serious crimes constituting danger to community of U.S.; for same reasons request for asylum is properly denied in exercise of discretion. Re Carballe (BIA) Interim Dec No 3007.

23. Perjury

Willful perjury by alien who sought admission, made on his examination before board of special inquiry, involved moral turpitude. *Ex parte Chin Chan On (1929, DC Wash) 32 F2d 828.*

Where, upon his examination before board of special inquiry, alien swore falsely and afterwards admitted falsehood, board was justified in excluding him as one who admitted that he had committed perjury, crime involving moral turpitude. *Kaneda v United States (1922, 9 Hawaii) 278 F 694,* cert den *(1922) 259 US 583, 66 L Ed 1075, 42 S Ct 586.*

24. Miscellaneous

Criminal acts involving intentional dishonesty for purpose of personal gain are acts involving moral turpitude; alien who had pleaded nolo contendere to and

been convicted under indictment charging crime of willfully attempting to defeat or evade federal income tax had been convicted of crime involving moral turpitude. *Tseung Chu v Cornell (1957, CA9 Cal) 247 F2d 929,* cert den *(1957) 355 US 892, 2 L Ed 2d 190, 78 S Ct 265.*

BIA did not abuse its discretion in denying alien waiver of deportation where it properly concluded that alien's two convictions for child molestation amounted to particularly serious crimes, and in refusing to examine circumstances surrounding alien's convictions where alien claimed he did not commit these acts and only pled guilty to receive lighter sentence; BIA has no authority to examine validity of state criminal conviction. *Pablo v INS (1995, CA9) 72 F3d 110, 95 CDOS 9857, 95* Daily Journal DAR 17161.

For purposes of registry statute *(8 USCS § 1259),* alien's convictions under *18 USCS § 1546*(b)(3), for making false attestation on employment verification form, and *42 USCS § 408*(a)(7)(B), for using false Social Security number, do not constitute crimes of moral turpitude within meaning of *8 USCS § 1182*(a)(2)(A). *Beltran-Tirado v INS (2000, CA9) 213 F3d 1179, 2000 CDOS 4186, 2000* Daily Journal DAR 5641.

Making wine in 1920 was not offense which involved moral turpitude. *Skrmetta v Coykendall (1927, DC Ga) 16 F2d 783,* affd (1927, CA5 Ga) *22 F2d 120.*

Alien convicted of robbery with deadly weapon and assault with deadly weapon was not denied effective assistance of counsel during his exclusion hearing even though his attorney failed to procure documents and records from his home country which would have proved his claim for political asylum and withholding of deportation where such evidence would have had no effect at administrative hearing because alien was statutorily ineligible for withholding of deportation relief because of his commission of various crimes of violence. *Perez-Olbera v Immigration & Naturalization Service (1987, DC Nev) 662 F Supp 910, 92 ALR Fed 649.*

Application for entry into U.S. as refugee was properly denied to alien residing outside United States, since alien had been convicted of murder which rendered him ineligible for waiver of exclusion. *Reznik v United States Dep't of Justice, INS (1995, ED Pa) 901 F Supp 188.*

Violations of Israeli Criminal Act of 1936, involving engagement in sexual misconduct with three 16-year-old girls, are crimes involving moral turpitude and render male alien excludable under former *8 USCS § 1182*(a)(9). *In re Imber (1977, BIA) 16 I & N Dec 256.*

Aggravated assault against peace officer which results in bodily harm to victim and involves knowledge by offender that force is directed to officer performing official duty constitutes crime involving moral turpitude. *In re Danesh (1988, BIA) 19 I & N Dec 669.*

An alien's conviction under California law for willful infliction of corporal injury upon mother of his child is a crime of moral turpitude even though conviction was for a misdemeanor and resulted in only a 30-day jail sentence since violence committed against someone with whom a person shares a trusting and familial-like relationship is considered contrary to accepted moral standards. In re Tran (1996, BIA) I & N Interim Dec No 3271.

b. Petty Offense Exception

25. Generally

Standards to be applied in determining whether offense committed in foreign country is "misdemeanor" within petty offense exception of former *8 USCS § 1182* are those of United States law (decided under former version of § 1182). *Giammario v Hurney (1962, CA3) 311 F2d 285.*

Alien who was convicted in Netherlands of offense which, under United States standards, was equivalent of grand larceny and punishable by imprisonment from one to ten years, could not call on "petty offense" exception to *8 USCS § 1182*(a)(9), notwithstanding actual punishment imposed, since offense was classifiable as felony (decided under former version of § 1182). *Soetarto v Immigration & Naturalization Service (1975, CA7) 516 F2d 778.*

Simple assault charges are misdemeanors not involving moral turpitude and do not count against visa holder under petit offense exception (decided under former version of § 1182). *Knoetze v United States (1979, SD Fla) 472 F Supp 201,* affd (1981, CA5 Fla) *634 F2d 207,* cert den *(1981) 454 US 823, 70 L Ed 2d 95, 102 S Ct 109.*

Assuming that alien admitted commission of crime of statutory rape which, under applicable state law, could have been punished as either felony or misdemeanor, alien, who had been arrested for rape but not formally charged, was entitled to benefit of "petty offense" exception, since, in view of fact that there was no conviction and no punishment, alien was guilty only of misdemeanor (decided under former version of § 1182). *In re E---- N---- (1956, BIA) 7 I & N Dec 153.*

Classification of petty offense for purposes of former *8 USCS § 1182* is limited by *18 USCS § 1*(1) and (2) to offenses which are misdemeanors punishable by imprisonment not exceeding one year (decided under former version of § 1182). *In re C----O---- (1959, BIA) 8 I & N Dec 488.*

Classification of crime committed in foreign country as misdemeanor or felony is made according to United States standards; that is, offense is examined in light of maximum punishment impossible for equivalent crime described in Title 18, United States Code, or, if equivalent offense is not found there, Title 22 of District of Columbia Code (decided under former version of § 1182). *In re Katsanis (1973, BIA) 14 I & N Dec 266.*

26. Punishment actually imposed

"Actual punishment" for purposes of *8 USCS § 1182*(a)(9) is not reduced period of confinement in fact which alien's behavior, either prior or subsequent to conviction, may indicate as appropriate; it is period of confinement to which he is sentenced and which under certain circumstances he may serve in fact; thus "petty offense" exception was not available to alien convicted of crime of receiving stolen property who was sentenced to "imprisonment. . . for the term provided by law," which term was ten years, with execution of sentence suspended and alien placed on probation, condition of which was that he be confined in county jail for six months, since "actual punishment" was ten years rather than six months (decided under former version of § 1182). *Patel v Immigration & Naturalization Service (1976, CA9) 542 F2d 796.*

The petty offense exception did not apply to an alien convicted of disposing of stolen goods where the "sentence actually imposed" was one to five years, notwithstanding that all but 365 days of the sentence was suspended and that the alien spent only 107 days in jail before voluntarily submitting to deportation (decided under former version of § 1182). *Solis-Muela v INS (1993, CA10) 13 F3d 372.*

Term "punishment" as used in predecessor version of "petty offense" exception of *8 USCS § 1182*(a)(9) is not equivalent to "sentence"; alien was entitled to benefit of "petty offense" exception where he was sentenced to one year in prison but was given equivalent of suspended sentence, since no punishment was actually imposed (decided under former version of § 1182). *In re T---- (1956, BIA) 8 I & N Dec 4.*

Classification of petty offense for purposes of *8 USCS § 1182* is limited by

18 USCS § 1(1) and (2) to persons convicted for offenses which are misdemeanors punishable by imprisonment which does not exceed one year; thus, in cases where offense is committed in United States and maximum statutory penalty exceeds one year, alien cannot qualify as "petty offender" regardless of fact that offense is designated as misdemeanor and that "penalty imposed" in particular case does not exceed imprisonment for period of six months or fine of not more than $ 500, or both (decided under former version of § 1182). *In re C----O---- (1959, BIA) 8 I & N Dec 488.*

27. Single offense limitation

For purposes of limitation of petty offense exception of *8 USCS § 1182*(a)(9) to situations where only single offense is involved, test is not whether alien has been convicted of more than one misdemeanor classifiable as petty offense or whether he admits legal conclusion of having committed more than one such misdemeanor, but rather whether there is preponderance of evidence which establishes that alien has in fact committed more than one misdemeanor classifiable as petty offense; alien who was convicted of second degree burglary in 1945 and of petty theft in 1950 was excludable under *8 USCS § 1182*(a)(9) notwithstanding that 1945 conviction was expunged pursuant to California law (decided under former version of § 1182). *In re S---- R---- (1957, BIA) 7 I & N Dec 495.*

Since 8 USCS § 1182(a)(9) deals only with conduct which will result in excludability, restriction of petty offense exemption to "only one such offense" of necessity relates to conduct which would result in excludability, that is, crime involving moral turpitude, of which alien has been convicted, or which he admits having committed, or of which he admits having committed acts constituting its essential elements; alien who admitted single conviction of crime involving moral turpitude, which was properly classifiable as petty offense, and conviction for illegal peddling which did not involve moral turpitude, and who did not admit conviction or commission of any other crime of any sort would not be excludable under § 1182(a)(9) (decided under former version of § 1182). *In re Piraino (1967, BIA) 12 I & N Dec 508.*

Alien who has been convicted of single petit offense involving moral turpitude is not precluded from establishing good moral character under *8 USCS §§ 1101*(f)(3) and 1182(a)(9), and may be found eligible for voluntary departure under *8 USCS § 1254*(e) (decided under former version of § 1182). *In re Urpi-Sancho (1970, BIA) 13 I & N Dec 641.*

c. Conviction of Two or More Offenses

28. Length of sentence

Under INA § 212(a)(10) [former *8 USCS § 1182*(a)(10)], the actual time spent in confinement is irrelevant, and where the alien was sentenced to two consecutive 3-year periods of confinement, 6 years was the aggregate sentences to confinement actually opposed, and the fact that a portion of the 6 years was suspended, did not change the essential and basic fact that the alien was subjected to a prison sentence in excess of 5 years on his two offenses, in spite of the fact that he was actually confined for just over two years. *Fonseca-Leite v INS (1992, CA5) 961 F2d 60.*

The Second Circuit has noted the existence of a conflict of authority as to whether a suspended sentence is "actually imposed" within the meaning of INA § 212(a)(2)(B) [*8 USCS § 1182*(a)(2)(B)] (in *Castro, 19 I & N Dec 692,* the BIA held that it is, while in 22 CFR § 40.22(b), the State Department stated that it is not), and has vacated and remanded a decision dismissing an alien's appeal from

an order denying the alien's motion to reopen and reconsider an order of deportation to the BIA with directions that it determine whether a suspended sentence of 5 years imprisonment which the alien received upon conviction of unlawful possession of a sawed-off shotgun was "actually imposed" within the meaning of INA § 212(a)(2)(B), as the first step in determining whether the alien is eligible to apply for relief from deportation under § 212(c). *Esposito v INS (1993, CA2) 987 F2d 108.*

The denial of an alien's request to reopen his deportation proceeding for consideration of his application for adjustment of status under INA § 245(a)(2) [*8 USCS § 1255*(a)(2)] was vacated and the case was remanded for further proceedings where the alien was not excludable under INA § 212(a)(2)(B) [*8 USCS § 1182*(a)(2)(B)] as an alien convicted of 2 or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more, because the alien (1) was convicted in 1986 of assault with intent to rob and was originally sentenced to 10 years in prison, but that sentence was subsequently reduced to time served (1709 days), and (2) was subsequently of unlicensed possession of a firearm and sentenced to 30 days, and thus the total of the 2 sentences (1739 days) did not equal 5 years (1826 days); although the resentencing order regarding the first offense referred to the 1709 days as a "term of 10 years," simply calling it a 10-year term could not make it one. *Rodrigues v INS (1993, CA1) 994 F2d 32.*

Alien who was convicted on two counts of transporting forged securities and was sentenced to concurrent 3-year term of imprisonment on each count, although excludable under former *8 USCS § 1182*(a)(9), was not excludable under former *8 USCS § 1182*(a)(10) authorizing exclusion of alien convicted of 2 or more offenses for which aggregate sentences to confinement actually imposed were 5 years or more, since aggregate sentence actually imposed, for purposes of § 1182(a)(10), was three years. *In re Fernandez (1972, BIA) 14 I & N Dec 24.*

2. Prostitution and Commercialized Vice

29. Prostitution

Phrase "any other immoral purpose" in predecessor of former *8 USCS § 1182*(a)(12) excluding aliens who are prostitutes or persons coming to United States for any other immoral purpose, is limited to purposes of like character with prostitution and does not include extramarital relations, short of concubinage. *Hansen v Haff (1934) 291 US 559, 78 L Ed 968, 54 S Ct 494.*

Deportable alien who has engaged in prostitution prior to her entry into United States is not person of good moral character under *8 USCS §§ 1101*(f)(3) and 1182(a)(12) and therefore may not voluntarily depart under *8 USCS § 1254*(e). *In re G---- (1953, BIA) 5 I & N Dec 559.*

Alien who admitted practicing prostitution in Mexico was not excludable under former *8 USCS § 1182*(a)(12) where persons to whom she was indebted, through use of wrongful, oppressive threats, or unlawful means, had reduced her to such state of mind that she was actually prevented from exercising her free will. *In re M---- (1956, BIA) 7 I & N Dec 251.*

Alien whose employment as nurse in Mexican house of prostitution was not for purpose of encouraging or furthering practice of prostitution but was preventive measure designed by Mexican health authorities in cooperation with United States Army authorities was not excludable under former *8 USCS § 1182*(a)(12) as recipient of proceeds of prostitution. *In re C---- (1957, BIA) 7 I & N Dec 432.*

Intended concubinage is ground of exclusion within provision of § 2 of Immigration Act of 1917, naming among excluded classes, "persons who procure or attempt to bring in prostitutes or women or girls for the purpose of

prostitution or for any other immoral purpose." *United States ex rel. Bauder v Uhl (1914, 2 NY) 211 F 628.*

3. Involvement with Narcotic Drugs

30. Generally

Term "marihuana" as used in former *8 USCS § 1182*(a)(23) governing exclusion of aliens involved with narcotic drugs or marihuana, is sufficiently general in scope to include hashish since both are derivatives of common source. *Hamid v U. S. Immigration & Naturalization Service (1976, CA9) 538 F2d 1389.*

Court refused to issue writ of audita querela vacating alien's conviction of importing marijuana into customs territory of U.S. in order to permit alien to avoid bar posed by INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)] to alien's obtaining permanent resident status based on subsequent marriage to U.S. citizen, where Government's interest in maintaining criminal record, including general deterrent effect of its consequences, and in efficient enforcement of immigration laws, outweighed alien's interest in circumventing legal requirements for permanent resident status. *United States v Holder (1991, CA1 Puerto Rico) 936 F2d 1, 105 ALR Fed 871.*

"Outstanding equities" in the alien's favor were outweighed by serious crimes committed, which included being caught with 229 grams of cocaine and 14.5 pounds of marijuana, which the alien had been distributing, as well as other considerations. *Chavez-Arreaga v INS (1991, CA7) 952 F2d 952.*

Alien who has been convicted of serious drug offense will usually be required to make showing of unusual or outstanding equities in his favor to be considered for § 212(c) *(8 USCS § 1182)* relief. *Tipu v INS (1994, CA3) 20 F3d 580.*

INS requires alien who has been convicted of serious drug offense to demonstrate outstanding equities in her favor to be considered for waiver of deportation under INA § 212 (former *8 USCS § 1182*(c)). *Kahn v INS (1994, CA9) 20 F3d 960, 94 CDOS 2071, 94 Daily Journal DAR 3902, amd (1994, CA9) 36 F3d 1412, 94 CDOS 7392, 94* Daily Journal DAR 13593.

Fact that alien who is lawful permanent resident can be removed following conviction for violation of federal law relating to controlled substance *(8 USCS § 1182*(a)(2)(A)), does not violate equal protection, despite fact that other provisions of federal law may afford greater protections to criminal defendants, illegal aliens, and other lawful permanent residents. *Chavez-Murillo v INS (1999, CA9) 181 F3d 997,* request gr, ordered published (1999, BAP9 Cal) *99 CDOS 4884, 99* Daily Journal DAR 6291, withdrawn by publisher (1999, CA9) *99 CDOS 7690, 99* Daily Journal DAR 9730.

Double Jeopardy Clause is not violated when lawful permanent resident alien is removed following conviction for violation of federal law relating to controlled substance *(8 USCS § 1182*(a)(2)(A)). *Chavez-Murillo v INS (1999, CA9) 181 F3d 997,* request gr, ordered published (1999, BAP9 Cal) *99 CDOS 4884, 99* Daily Journal DAR 6291, withdrawn by publisher (1999, CA9) *99 CDOS 7690, 99* Daily Journal DAR 9730.

Alien's right to equal protection is violated if, in course of removal proceedings, INS refuses to recognize effects of foreign country's expungement statute on simple drug possession offense that would have qualified for federal first offender treatment *(18 USCS § 3607)* had it occurred in *United States. Dillingham v INS (2001, CA9) 267 F3d 996, 2001 CDOS 8111, 2001* Daily Journal DAR 10027.

Alien who entered guilty plea to narcotics charge was denied constitutional right to effective assistance of counsel where his attorney failed to advise him at time of entering guilty plea of probable consequence of deportation under

circumstances where going to trial would have created a delay in alien's conviction that would have enabled him to seek a discretionary waiver of deportation under former *8 USCS § 1182*(c) by meeting requirement of seven consecutive years of lawful, unrelinquished domicile in U.S. *United States v George (1988, ND Ill) 676 F Supp 863, 90 ALR Fed 733.*

Challenge to denial of alien's legalization application must fail, even if she did qualify to be member of class in this lawsuit, and she was never convicted of crime, because applicant may be denied under *8 USCS § 1182*(a)(2)(C) without being convicted of drug-related crime, so long as immigration officer has reason to believe she is or has been illicit trafficker in any controlled substances or has been knowing assister, abettor, conspirator, or colluder with others. *Proyecto San Pablo v INS (1997, DC Ariz) 4 F Supp 2d 881.*

Alien is excludable under former *8 USCS § 1182*(23) on basis of arrest and conviction for violation of *18 USCS § 542,* for entry of goods by means of false statements, where immigration officer could reasonably believe that applicant was illicit trafficker in marijuana, notwithstanding possible expungement of conviction under *18 USCS § 5021,* since reasonable belief, rather than actual conviction, is basis of charge of deportability. *In re Favela (1979, BIA) 16 I & N Dec 753.*

An IJ properly concluded that an alien's felony conviction in a Minnesota state court for sale of marijuana which resulted in a suspended sentence of 1 year and 1 day imprisonment was an aggravated felony even if conviction could be reduced to a misdemeanor as a form of post-conviction relief after alien's completion of his term of probation since alien's conviction is analogous to a federal felony conviction for distribution of a controlled substance under Controlled Substance act which is punishable by a term of imprisonment greater than one year. In re Ponce de Leon-Ruiz (1996, BIA) I & N Interim Dec No 3261.

Fact that individual convicted of delivery of controlled substance is married to U.S. citizen does not bar deportation; attorney's advice to alien criminal defendant that conviction as result of guilty plea would not affect immigration status constitutes ineffective assistance of counsel. *People v Correa (1984, 1st Dist) 124 Ill App 3d 668, 80 Ill Dec 395, 465 NE2d 507,* affd *(1985) 108 Ill 2d 541, 92 Ill Dec 496, 485 NE2d 307.*

31. Illicit possession

Alien was not excludable under former *8 USCS § 1182*(a)(23) as one who has been convicted of violating law relating to illicit possession of marijuana when such alien was convicted under foreign law that made guilty knowledge irrelevant. *Lennon v Immigration & Naturalization Service (1975, CA2) 527 F2d 187, 32 ALR Fed 521.*

Wording of former *8 USCS § 1182*(a)(23) is so broad as to require conclusion that violations of foreign as well as domestic marijuana laws fall within its ambit; Bahamian statute which prohibited possession of marijuana, but permitted defendant to prove that same was deposited there without his knowledge or consent, was law relating to illicit possession of marijuana within contemplations of former § 1182(a)(23); foreign conviction need not comport with U.S. notions of proper conduct of criminal trials, and former § 1182(a)(23) does not contemplate court's examination of foreign conviction to determine whether they conform to domestic constitutional standards. *Pasquini v United States Immigration & Naturalization Service (1977, CA5) 557 F2d 536.*

Fact that alien was excludable under INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)] because of conviction for possession of controlled substance constituted facially legitimate and bona fide reason to deny alien temporary admission to U.S. under § 212(d)(5) for purpose of filing naturalization

petition with clerk of naturalization court, as required by § 334(a) [§ 1445(a)] and 8 CFR § 334.13; § 329(b) [§ 1440(b)] does not purport to override exclusionary provisions of § 212, but clarifies that aliens who qualify because of military service in U.S. Armed Forces in Vietnam must show that they are eligible for naturalization in all other respects. *Mason v Brooks (1988, CA9 Wash) 862 F2d 190.*

Application of *8 USCS § 1182*(c) to alien, whose conviction predated statute but whose deportation proceeding and discretionary relief application postdated enactment of statute, did not constitute retroactive application of statute. *Ceballos de Leon v Reno (1999, DC NJ) 58 F Supp 2d 463.*

Alien convicted in Hong Kong of possession of dangerous drug in violation of statute is excludable under *8 USCS § 1182* where statute under which he was convicted, as interpreted by Hong Kong courts, requires conscious knowledge of possession of illegal drug and, although it permits such knowledge to be presumed from fact of possession unless defendant proves lack of knowledge, nevertheless places burden of proof on prosecution to establish all elements of crime beyond reasonable doubt. *In re Poon (1980, BIA) 17 I & N Dec 350.*

32. Illicit trafficking

Immigration officer need not know that individual is or has been trafficker in order to exclude that person, rather officer is justified in acting if he has "reason to believe" that individual is so engaged; petitioner's conduct in asking embassy employee to carry hashish from Pakistan to United States, whether or not such conduct actually constituted "trafficking," provided sound basis for believing that petitioner was "trafficker," and justified his exclusion. *Hamid v U. S. Immigration & Naturalization Service (1976, CA9) 538 F2d 1389.*

Immigration Judge properly refused suspension of deportation relief where alien's arrest and probation for transporting marijuana precluded him from proving good moral character; provision under INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)] respecting exclusion based upon immigration officer's reasonable belief that alien has been drug trafficker is distinct from that part of INA § 212(a)(23) requiring conviction; IJ had reason to believe that alien was drug trafficker even though incident did not amount to conviction under Texas law; IJ did not have to consider positive evidence of good moral character produced by alien at his hearing where alien is precluded by statute from proving good moral character. *Nunez-Payan v Immigration & Naturalization Service (1987, CA5) 811 F2d 264,* reh den (1987, CA5) *815 F2d 384.*

Alien found to be in possession of one pound of marijuana at border traffic point who admits that he was transporting marijuana for use of others gives immigration judge sufficient basis to believe that alien is illicit trafficker of drugs, despite fact that admission is not conviction under Texas law. *Nunez-Payan v Immigration & Naturalization Service (1987, CA5) 815 F2d 384.*

The facts underlying an expunged conviction may properly provide the basis for the denial of admission to an alien under former INA § 212(a)(23)(B) [former *8 USCS § 1182*(a)(23)(B)] as one known or reasonably believed to be a trafficker in narcotics. *Castano v INS (1992, CA11) 956 F2d 236, 6* FLW Fed C 253.

Because crime of drug trafficking has element of intent, in order for immigration officer to have had reasonable belief that alien was drug trafficker, officer must have had reasonable belief that alien possessed requisite intent. *Pichardo v INS (1999, CA9) 188 F3d 1079, 99 CDOS 7340, 99* Daily Journal DAR 9427.

It is not required that there be continuous and organized trade in particular type of merchandise to bring person within meaning of word "trafficker"; alien who on single occasion purchased heroin and attempted to sell it in United

States was "trafficker" in drugs within meaning of former *8 USCS § 1182*(a)(23) and thus was subject to exclusion. *In re P---- (1953, BIA) 5 I & N Dec 190.*

Alien who knowingly and consciously acted as conduit in transfer of marijuana between dealer and customers of dealer was excludable under former *8 USCS § 1182*(a)(23) as "illicit trafficker" in narcotic drugs, even though he derived no personal gain or profit from transactions. *In re R---- H---- (1958, BIA) 7 I & N Dec 675.*

Conviction of violation of *21 USCS § 843*(b), unlawful use of communication facility to facilitate commission of felony of conspiracy to import quantity of cocaine from Peru into United States, was conviction of crime relating to illicit traffic in narcotic drugs as described in former *8 USCS § 1182*(a)(23). *In re Chang (1977, BIA) 16 I & N Dec 90.*

Alien is excludable under former *8 USCS § 1182*(a)(23) despite subsequent dismissal of criminal complaint against him because that section provides that alien may be excluded if immigration officer knows or has reason to believe that alien is or has been illicit trafficker in drugs, and conviction of particular offense or violation would not be necessary to establish ground of excludability under section where alien had been stopped at border driving vehicle found to contain 162 pounds of marijuana. In re *Rico (1977, BIA) 16* I & N Dec 181.

Trial court erred in terminating plaintiff's workmens compensation benefits as discovery sanction for plaintiff's failure to appear at depositions where plaintiff was excludable alien under INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)], that any grant of parole would only be for purpose of prosecution and, even if parole were possible, any denial of such would be unappealable, and it was impossible for plaintiff to comply with discovery order; court should have admitted and considered plaintiff's argument that his medical condition prohibited him from coming to deposition; plaintiff's fear of arrest if he attended deposition hearing is faulty foundation on which to argue against deposition sanction; trial court erred in denying plaintiff's motion for alternative means of discovery where plaintiff consented to either deposition in Mexico or written interrogatories and consented to any physical examinations in Mexico. *Sandoval v United Nuclear Corp. (1986, App) 105 NM 105, 729 P2d 503.*

4. Fraud and Misrepresentation in Procuring Documents or Seeking Entry

a. In General

33. Generally

Former 8 USCS § 1182(a)(6)(C)(i) requires the government prove by clear and convincing evidence four things: (1) the person misrepresented or concealed some fact; (2) the person did so willfully; (3) the fact was material; and (4) the misrepresentation resulted in the person obtaining a visa, documentation, or entry into the United States. *Kalejs v INS (1993, CA7) 10 F3d 441,* reh den (1993, CA7) *1993 US App LEXIS 34102* and cert den *(1994) 510 US 1196, 127 L Ed 2d 656, 114 S Ct 1305.*

A false statement is material if it had a natural tendency to influence the decisions of the INS. *Kalejs v INS (1993, CA7) 10 F3d 441,* reh den (1993, CA7) *1993 US App LEXIS 34102* and cert den *(1994) 510 US 1196, 127 L Ed 2d 656, 114 S Ct 1305.*

Once materiality is proved by clear and convincing evidence, the government is deemed to have established a rebuttable presumption that the person got his or her visa because of the misrepresentation; the accused may rebut the presumption by showing through a preponderance of the evidence that the statutory requirement for admission was met regardless of the falsehood. *Kalejs*

v INS (1993, CA7) 10 F3d 441, reh den (1993, CA7) *1993 US App LEXIS 34102* and cert den *(1994) 510 US 1196, 127 L Ed 2d 656, 114 S Ct 1305.*

An alien's lies on his immigration documents were material and resulted in his obtaining a visa and admission to the United States, and he was thus deportable, where had the alien told the truth about his war service, it would certainly have prompted further inquiry, and would probably have tipped the scales entirely against admitting him. *Kalejs v INS (1993, CA7) 10 F3d 441,* reh den (1993, CA7) *1993 US App LEXIS 34102* and cert den *(1994) 510 US 1196, 127 L Ed 2d 656, 114 S Ct 1305.*

In determining whether alien has willfully misrepresented material fact in attempt to obtain permanent residency, test is whether alien had subjective intent to provide false information. *Garcia v INS (1994, CA7) 31 F3d 441.*

INS is not required to show intent to deceive in order to satisfy statute regarding obtaining of visa by fraud. *Mwongera v INS (1999, CA3) 187 F3d 323.*

Using fraudulent documents to obtain passport is conduct that is clearly covered under *8 USCS § 1182*(a)(6)(C)(i). *Cervantes-Gonzales v INS (2000, CA9 Cal) 244 F3d 1001, 2001* Daily Journal DAR 3389, amd (2001, CA9 Cal) *2001 CDOS 2721, 2001* Daily Journal DAR 3389.

Production of visa application forms is not essential to Government's case seeking to establish violation of former *8 USCS § 1182*(a)(19), nor is Government prohibited from showing not only that aliens fraudulently procured tourist visas but that their subsequent entry by means of those visas was fraudulent. *United States v Mt. Fuji Japanese Steak House, Inc. (1977, ED NY) 435 F Supp 1194.*

Illegal alien lacked standing to compel State Department to appoint General Counsel of Visa Office to maintain liaison with INS in order to secure uniform interpretations of INA, as required by INA § 104(e) [*8 USCS § 1104*(e). *Garcia v Baker (1990, ND Ill) 765 F Supp 426.*

That part of former *8 USCS § 1182*(a)(19) referring to procuring visa or other documentation by fraud contains words in past tense as well as words in present tense and is retrospective as well as prospective in application, second part of former *8 USCS § 1182*(a)(19) referring to seeking to enter United States by fraud does not contain any words in past tense and should be only prospective in application. *In re M---- (1954, BIA) 6 I & N Dec 149.*

General rule is that misrepresentation of fact whether willful or innocent, made in applying for visa, will not invalidate visa if alien would have been eligible to secure visa had true facts been known. *In re S---- C---- (1956, BIA) 7 I & N Dec 76.*

Purchase of document does not amount to procurement by fraud or willfully misrepresenting material fact within meaning of former *8 USCS § 1182*(a)(19) because alien who acquires possession by purchase does so by tender of something of value and not by practice of fraud; as condition precedent to procurement of documentation by fraud or willfully misrepresenting material fact within meaning of § 1182(a)(19), there must be issuance to alien of said documentation by authorized official of United States Government. *In re L--L-- (1961, BIA) 9 I & N Dec 324.*

Misrepresentation in procuring visa is material if (1) alien is excludable on true facts or (2) misrepresentation tends to shut off line of inquiry which might have resulted in decision to exclude alien. *In re Gilikevorkian (1973, BIA) 14 I & N Dec 454.*

It is not necessary that notice to applicant for admission detained for hearing contain charge, under former *8 USCS § 1182,* of fraud in procuring immigration documents in order for such charge to be considered by immigration judge; if, in course of exclusion hearing, possible ground of excludibility develops, it is proper for ground to be ruled upon by immigration judge, as long

as applicant is informed of issues confronting him at some time in hearing and is given reasonable opportunity to meet them. *In re Salazar (1979, BIA) 17 I & N Dec 167.*

Alien who is found excludable for seeking to procure entry by fraud or willful misrepresentation of material fact is forever barred from admission to United States unless waiver is obtained; consequently, factual basis for possible finding of excludability under former *8 USCS § 1182*(a)(6)(C)(i) will be closely scrutinized, since such finding may perpetually bar applicant from admission. *In re Y-G- (1994, BIA) 20 I & N Dec 794.*

34. Knowing and intentional misrepresentation

Although Government may not have to prove intent to deceive in order to establish alien's deportability for willfully misrepresenting material fact, pursuant to former *8 USCS § 1182*(a)(19), it must at least show that alien knowingly and intentionally supplied incorrect material facts. *Castaneda-Gonzalez v Immigration & Naturalization Service (1977) 183 US App DC 396, 564 F2d 417.*

For purposes of former *8 USCS § 1182*(a)(19) allowing exclusion of alien procuring immigration documents or entry by fraud or willful misrepresentation of material fact, requirement of fraud or willful misrepresentation of material fact is satisfied by finding that misrepresentation was deliberate and voluntary. *Espinoza-Espinoza v Immigration & Naturalization Service (1977, CA9) 554 F2d 921.*

"Willful" for purposes of former *8 USCS § 1182*(a)(19) entails voluntary and deliberate activity, and knowledge of falsity of representation is sufficient to satisfy scienter element of that section. *Suite v Immigration & Naturalization Service (1979, CA3) 594 F2d 972.*

Individual who knowingly enters U.S. on false passport has engaged in willful fraud and misrepresentation of material fact. *Esposito v INS (1991, CA7) 936 F2d 911,* reh den (1991, CA7) *1991 US App LEXIS 17976.*

For purposes of *8 USCS § 1182*(a)(6)(C)(i), element of willfulness is satisfied by finding that misrepresentation was deliberate and voluntary. *Mwongera v INS (1999, CA3) 187 F3d 323.*

b. Particular Misrepresentations

35. Marital data

Immigration judge did not err in concluding that petitioner deliberately and willfully lied on his visa application where petitioner purportedly married U.S. citizen either knowing that he was still married to first wife, or, at best, without determining whether she had divorced him and where he then obtained visa on basis of spurious marriage without disclosing fact that he had previously been married. *Espinoza-Espinoza v Immigration & Naturalization Service (1977, CA9) 554 F2d 921.*

Alien violates *8 USCS § 1192*(a)(19) by obtaining immigrant visa to United States on basis of his marriage to United States citizen without disclosing that divorce action is pending, where finding of fact by Immigration Judge indicated that misrepresentation, rather than alleged reconciliation, was alien's reason for not revealing that divorce action had been filed. *Vasquez-Mondragon v Immigration & Naturalization Service (1977, CA5) 560 F2d 1225.*

It is within authority of INS to make inquiry into marriage to extent necessary to determine if it was entered for purpose of evading immigration laws, and conduct and lifestyles before and after marriage is relevant to extent it aids in determining intent of parties at time they were married; substantial

evidence that marriage was sham is supplied by fact that former wife testified alien approached her and offered to pay her $ 200 to marry him and help arrange for resident passport, telling her they would not have to live together and he would later get divorce, and by testimony that she lived with roommate both before and after marriage. *Garcia-Jaramillo v Immigration & Naturalization Service (1979, CA9) 604 F2d 1236,* cert den *(1980) 449 US 828, 66 L Ed 2d 32, 101 S Ct 94,* reh den *(1980) 449 US 1026, 66 L Ed 2d 487, 101 S Ct 594.*

Immigration judge erroneously found Filipino alien to be deportable under *8 USCS § 1251*(a)(2), (c) for having entered United States with immigration visa procured on basis of a fraudulent marriage, in violation of former § 1182(a)(19), where determination that marriage was fraudulent was based on unsupported affidavit of alien's former wife, taken more than year prior to deportation hearing, since admission of such out-of-court statement by nonparty offered for truth of matter asserted deprived alien of fundamental fairness. *Baliza v Immigration & Naturalization Service (1983, CA9) 709 F2d 1231, 12 Fed Rules Evid Serv 759.*

BIA finding that alien deportable for obtaining immigration visa by fraud or willful misrepresentation of material fact, upheld upon review where court determines (1) there is reasonable, substantial, and probative evidence in record to support decision; and (2) evidence shows, clearly and convincingly that alien completed application for permanent residence after dissolution of his marriage, and when alien claimed he was married to a U. S. citizen he understood that he was in fact divorced. *Hernandez-Robledo v Immigration & Naturalization Service (1985, CA9) 777 F2d 536.*

District Court's denial of alien's petition for writ of habeas corpus was reversed and case was remanded to IJ for new hearing in which alien would bear burden of proving that marriage was void under Filipino law because marriage ceremony occurred before marriage license was issued, and thus alien's statement on application for second preference visa that she was unmarried was truthful, and she should not be excluded under former *8 USCS § 1182*(a)(19) for procuring visa by means of material misrepresentation or under former § 1182(a)(20) for failure to be in possession of valid visa; District Court erred in ignoring BIA's rationale for affirming IJ's order of exclusion, based solely on ground that alien was married, and substituting its own rationale, that alien falsely represented that she had no children; although ordinary remedy would be remand to District Court to review ground of exclusion cited by INS, case was remanded to IJ for new hearing because: (1) alien had difficulty communicating in English; (2) alien was not represented by counsel until appearance before BIA; (3) INS violated 8 CFR § 3.30 by failing to serve alien with investigator's report and marital documents until final hearing before IJ, thus depriving alien of fair opportunity to rebut evidence therein; and (4) of severe consequences of exclusion. *Mayo v Schiltgen (1990, CA8 Minn) 921 F2d 177.*

Alien is deportable where she represented she was not married in her application for permanent residency as unmarried daughter of permanent resident when in fact she had been married in civil ceremony in Philippines, even though alien obtained annulment from Philippines while her deportation proceeding was underway which rendered marriage void ab initio. *Garcia v INS (1994, CA7) 31 F3d 441.*

Retroactive effect will not be given to alien's annulment of her marriage where to do so would undermine intent and purpose of immigration law; thus, where alien willfully misrepresented that she was unmarried in order to obtain permanent residency in U.S., court will not give her annulment retroactive effect. *Garcia v INS (1994, CA7) 31 F3d 441.*

Alien who had become permanent resident as result of fraudulent marriage to

United States citizen, and who attempted to reenter United States following trip abroad, was excludable pursuant to former *8 USCS § 1182*(a)(19). *Biggs v INS (1995, CA9) 55 F3d 1398, 95 CDOS 3847, 95* Daily Journal DAR 6626.

Alien who was already married to Mexican wife at time of marriage to United States citizen, and who entered United States as United States citizen's husband, will be held deportable as one who procured immigrant visa through fraud or misrepresentation notwithstanding fact that Mexican marriage has subsequently been annulled, and, under Mexican law, is considered void ab initio. *In re Magana (1979, BIA) 17 I & N Dec 111.*

Alien who has been denied immigrant visa under former *8 USCS § 1182*(a)(19) for his fraudulent conduct in obtaining fiancee visa and entering into marriage solely for purpose of obtaining visa may receive waiver of ground of excludability under *8 USCS § 1182*(i), where marriage between alien and United States citizen appears to be viable, spouses are living great distance apart, and are undergoing both hardship of separation and economic hardship of maintaining 2 separate residences; in determining propriety of granting visa, questionable factor should either not be considered, or resolved in favor of applicant. *In re Da Silva (1979, Comr) 17 I & N Dec 288* (superseded by statute on other grounds as stated in *Salas-Velazquez v INS (1994, CA8) 34 F3d 705).*

36. Purpose of visit

Alien who adopts transit-without-entry device solely to reach border of United States without intention of pursuing journey violates transit-without-visa program and commits fraud on United States. *United States v Kavazanjian (1980, CA1 Mass) 623 F2d 730.*

Alien in transit without visa (TWOV) who seeks asylum upon landing in U.S. is excludable alien as defined at *8 USCS § 1182*(a)(6)(C)(i), since alien willfully misrepresented his intentions to seek asylum when he was granted TWOV status. *Linea Area Nacional de Chile, S.A. v Meissner (1995, CA2 NY) 65 F3d 1034.*

Alien is not inadmissible under *8 USCS § 1182* as having procured visa by fraud or by willfully misrepresenting material fact, by reason of having indicated purpose of trip to United States was "to visit America" and intended time of stay was "one month", when alien was in fact coming to study in United States for 9 month period, where it is not unlikely that alien considered declared purpose to visit America, to be accurate statement of intent, in that he believed he was ineligible for student visa because school was not approved educational institution, and thought, as consequence, that he could properly apply for tourist visa; rather, such alien is excludable as immigrant without requisite travel or entry documents. *In re Healy (1979, BIA) 17 I & N Dec 22.*

37. Status or classification of person

Alien making entry into United States who falsely represents himself to be citizen, is not only excludable, if detected at time of entry, under § 212(a)(19) of Immigration and Nationality Act (former *8 USCS § 1182*(a)(19))--which provides for the exclusion of any alien who seeks to enter the United States by fraud or misrepresentation--but also has so significantly frustrated process for inspecting incoming aliens that he is also deportable under § 241(a)(2) *(8 USCS § 1251*(a)(2)) as one who has entered United States without inspection. *Reid v INS (1975) 420 US 619, 43 L Ed 2d 501, 95 S Ct 1164* (superseded by statute on other grounds as stated in *Rodriguez-Barajas v INS (1993, CA7) 992 F2d 94).*

Order to Show Cause charging alien with entry without valid document in violation of *8 USCS § 1182,* in that alien entered United States as second preference immigrant when not entitled to that classification, is sufficient

although it does not allege alien was ineligible for any other numerical classification, since such allegation is unnecessary to charge. *In re Raqueno (1979, BIA) 17 I & N Dec 10.*

38. Other particular misrepresentations

Alien who entered United States from Mexico in 1955 on visa issued by United States consul there, and who in his application stated that he had resided in United States two months during period from 1950 to 1951, but failed to disclose fact that he had previously resided in United States about six months in 1943 and most of the period between September, 1948, and November, 1953, did not procure visa by willful misrepresentation of material fact. *Calvillo v Robinson (1959, CA7 Ill) 271 F2d 249.*

Submission by applicant for immigrant visa of forged letter and forged employment certification, which he knew were forged, and presentation of false papers to counsel, constituted willful misrepresentation in visa proceedings. *Suite v Immigration & Naturalization Service (1979, CA3) 594 F2d 972.*

In forfeiture action under INA § 274(b) [*8 USCS § 1324*(b)], as it existed prior to November 6,1986 amendment, predicated on use of aircraft in unlawful entry, government need not establish that but for misrepresentations, crew members would have been ineligible to receive visas; essential feature of material misrepresentation is that it misleads government officials with respect to area of potential significance and decision to grant or deny visa; crew members hiding of their past association with Cuba Airlines, their lifetime residence in Cuba, and their prior visa applications as Cuban citizens deprived United States officials of chance to assess international implications raised by their visa applications. *United States v One Lear Jet Aircraft (1987, CA11 Fla) 808 F2d 765, 22 Fed Rules Evid Serv 672,* reh den, en banc (1987, CA11 Fla) *814 F2d 662,* vacated without opinion, en banc (1987, CA11 Fla) *831 F2d 221,* app dismd (1988, CA11 Fla) *836 F2d 1571, 10 FR Serv 3d 885,* reh den, en banc (1988, CA11 Fla) *842 F2d 339* and cert den *(1988) 487 US 1204, 101 L Ed 2d 881, 108 S Ct 2844.*

Alternative and independent ground for deporting alien was his excludability at time of entry based on alien's lies on immigration papers claiming that he had spent World War II in German Army rather than SS because he believed his SS service would bar him from obtaining visa; such misrepresentation concerned material fact because alien's service at Gross-Rosen concentration camp closed off relevant line of inquiry which would have designated alien as excludable. *Kulle v Immigration & Naturalization Service (1987, CA7) 825 F2d 1188,* cert den *(1988) 484 US 1042, 98 L Ed 2d 860, 108 S Ct 773.*

An alien was excludable under INA § 212(a)(19) [former *8 USCS § 1182*(a)(19)] based on his procurement of an immigrant visa by misrepresentation of a material fact where although the alien acknowledged that he had been arrested and imprisoned, he did not disclose his conviction or the nature of that conviction (which involved moral turpitude), and had the consular officer known of the alien's conviction and sentence, the alien would have been found excludable under INA § 212(a)(9) [former *8 USCS § 1182*(a)(9)]. *Solis-Muela v INS (1993, CA10) 13 F3d 372.*

Using fraudulent documents to obtain passport is conduct that is clearly covered under *8 USCS § 1182*(a)(6)(C)(i). *Cervantes-Gonzales v INS (2000, CA9 Cal) 232 F3d 684, 2000 CDOS 9115, 2000* Daily Journal DAR 12114.

Misrepresentations by crew members in their visa applications is material, where, had accurate response been given in visa application, United States customs officials may have made further investigations; where material misrepresentations are made in visa applications INA § 212(a)(19) [former *8 USCS*

§ 1182(a)(19)] is applicable; violation of INA § 212(a)(19) [*8 USCS § 1182*(a)(19)] occurred where Customs Inspector relied on fraudulent visas presented by crew members, even though inspector inadvertently admitted them as B-2 instead of B-1 immigrants. *United States v One Lear Jet Aircraft (1985, SD Fla) 617 F Supp 769,* affd (1987, CA11 Fla) *808 F2d 765, 22 Fed Rules Evid Serv 672,* reh den, en banc (1987, CA11 Fla) *814 F2d 662,* vacated without opinion, en banc (1987, CA11 Fla) *831 F2d 221,* app dismd (1988, CA11 Fla) *836 F2d 1571, 10 FR Serv 3d 885,* reh den, en banc (1988, CA11 Fla) *842 F2d 339* and cert den *(1988) 487 US 1204, 101 L Ed 2d 881, 108 S Ct 2844.*

District Director had substantial evidence to conclude that alien was excludable under *8 USCS § 1182*(a)(6)(C)(i), where alien had purchased counterfeit alien registration card and presented it to U.S. border agents in attempt to enter *U.S. Sharma v Reno (1995, ND Cal) 902 F Supp 1130, 95* Daily Journal DAR 15049.

Mexican alien who paid money to have record of Mexican arrests and convictions suppressed procured his immigrant visa by acts of fraud and willful misrepresentation, intentionally and purposely designed to cut off inquiry concerning his identity and eligibility to receive immigrant visa, and was therefore inadmissible under former *8 USCS § 1182*(a)(19). *In re B---- A---- (1955, BIA) 6 I & N Dec 584.*

Where alien secures visa by posing as another, rule is that misrepresentation which cuts off all inquiry will invalidate visa even though alien could have secured visa had he given true identity, but misrepresentation which cuts off some inquiry will not invalidate visa unless it concealed ground of inadmissibility to United States. *In re S---- C---- (1956, BIA) 7 I & N Dec 76.*

Alien may be found deportable under INA 212(a)(19) [former *8 USCS § 1182*(a)(19)] where he misrepresented his wartime military service to immigration authorities by claiming to have served in German Army instead of division of Waffen SS, thus concealing his concentration camp guard duty. Re Kulle (1985, BIA) I & N Interim Dec. No. 3002.

Evidence did not establish applicant's excludability under *8 USCS § 1182*(a)(6)(C)(i) as alien who seeks or has sought to procure entry into United States by fraud or willful misrepresentation of material fact where applicant testified that when he came to United States, he did not lie, but instead gave his real name, stated that documents he possessed were not his own, and gave address of family members who would help him. *In re Y-G- (1994, BIA) 20 I & N Dec 794.*

Alien parents who are excludable under former *8 USCS § 1182*(a)(19) for fraudulently procuring nonimmigrant visas may be granted waiver of excludability under § 1182(i) on basis of birth of their United States citizen child, whether or not born during lawful stay of parents in United States, since such birth is favorable factor and must be accorded considerable weight in adjudication of application for relief of waiver of grounds of excludability, and there is neither statutory requirement that extreme hardship be shown, nor should fraudulent procurement of visas be considered as adverse factor, where such fraud is factor for which aliens seek to be forgiven in their petition for waiver of excludability. *In re Alonzo (1979, Comr) 17 I & N Dec 292.*

C. Exclusion of Laborers and Certification of Exemptions

1. In General

39. Generally

Continuing regulation of aliens after admission to United States by Attorney

General or Secretary of Labor is not supported by either former *8 USCS § 1182*(a)(14) or its legislative history. *Sam Andrews' Sons v Mitchell (1972, CA9 Cal) 457 F2d 745.*

Aliens seeking work in United States should be apprised of information which supports refusal to certify that workers are not available in United States, and aliens should also be afforded reasonable opportunity to respond to such information made available to them. *Secretary of Labor v Farino (1973, CA7 Ill) 490 F2d 885.*

Test for determining applicability of labor certification requirement is that alien's purpose in coming to United States will not immediately require employment and will not necessitate competition in labor market. *In re Hoeft (1966, BIA) 12 I & N Dec 182.*

40. Purpose

Purpose of provisions of former *8 USCS § 1182*(a)(14) regarding alien laborers who can be admitted, is to limit new admissions of alien laborers, not to prejudice status of aliens who, whether daily or seasonal commuters to places of employment in United States from Canada or Mexico, had acquired permanent residence in United States and were returning to existing jobs. *Saxbe v Bustos (1974) 419 US 65, 42 L Ed 2d 231, 95 S Ct 272, 8* CCH EPD P 9815.

Purpose of former *8 USCS § 1182*(a)(14) governing exclusion of certain alien laborers is to assure that immigrant alien seeking to enter United States with view to obtaining job will not displace United States workers. *Heitland v Immigration & Naturalization Service (1977, CA2) 551 F2d 495,* cert den *(1977) 434 US 819, 54 L Ed 2d 75, 98 S Ct 59.*

There is no indication that INA § 212(a)(5)(A) [*8 USCS § 1182*(a)(5)(A)] was intended to protect the interest of foreign, self-employed entrepreneurs; the regulatory scheme promulgated thereunder is reasonably related to the achievement of the purposes outlined in the statute. *Bulk Farms, Inc. v Martin (1992, CA9 Cal) 963 F2d 1286, 92 CDOS 3947, 92* Daily Journal DAR 6246.

Where the reliance by the employing corporation on the skill, energy, talent, and resources of its only employee is so great that without him the corporation would cease to exist, such employee also being the president and sole shareholder of the corporation, no genuine employment relationship exists between the corporation and the alien employee, and labor certification is properly denied. *Bulk Farms, Inc. v Martin (1992, CA9 Cal) 963 F2d 1286, 92 CDOS 3947, 92* Daily Journal DAR 6246.

Labor certification is appropriate only where the employing corporation is not a sham and is separable from the alien employee seeking a particular position. *Hall v McLaughlin (1989, App DC) 275 US App DC 46, 864 F2d 868; Bulk Farms, Inc. v Martin (1992, CA9 Cal) 963 F2d 1286, 92 CDOS 3947, 92* Daily Journal DAR 6246.

former *8 USCS § 1182*(a)14 is meant to increase quality of immigration, rather than to diminish such immigration below levels authorized by law. *Ozbirman v Regional Manpower Admr., United States Dep't of Labor (1971, SD NY) 335 F Supp 467.*

41. Presumptions

Former 8 USCS § 1182(a)(14) creates presumption against admission of alien laborers. *Silva v Secretary of Labor (1975, CA1 Mass) 518 F2d 301.*

Former 8 USCS § 1182(a)(14) governing exclusion of certain aliens entering country to perform labor creates presumption that aliens should not be permitted to enter United States for purpose of performing labor because of possible harmful impact which they may have on American workers. *Jadeszko v Brennan*

(1976, ED Pa) 418 F Supp 92.

There is presumption that applicant for adjustment of status to permanent resident as nonpreference immigrant under *8 USCS § 1254* will engage in employment after adjustment, where applicant is of age or physical condition which would not preclude working, and therefore applicant who claims exemption from labor certification requirement of former *8 USCS § 1182*(a)(14), on ground that he will not engage in employment, has burden of establishing that he does not intend to enter labor market in United States and will not have to seek employment in foreseeable future. *In re Eisen (1979, Comr) 17 I & N Dec 299.*

42. Private right of action

Under former *8 USCS § 1182*(a)(14), governing exclusion of certain alien laborers, slaughterhouse workers who were on strike against their employers had no private remedy and no private right of action against their employers based on alleged employment of Mexican nationals who illegally entered United States. *Flores v George Braun Packing Co., Div. of Leonard & Harral Packing Co. (1973, CA5 Tex) 482 F2d 279,* reh den (1973, CA5 Tex) *485 F2d 687.*

Former 8 USCS § 1182(a)(14), governing exclusion of certain alien laborers, does not authorize private cause of action against those persons who employ aliens who are in United States in violation of provision. *Chavez v Freshpict Foods, Inc. (1971, DC Colo) 322 F Supp 146,* affd (1972, CA10 Colo) *456 F2d 890,* cert den *(1972) 409 US 1042, 34 L Ed 2d 492, 93 S Ct 535.*

Immigration and Nationality Act does not create right of action based upon alleged violations of either definition of "immigrant" in *8 USCS § 101,* or restriction of foreign labor in *8 USCS § 1182. Collyard v Washington Capitals (1979, DC Minn) 477 F Supp 1247.*

43. Findings as to impact on American workers

Refusal by Secretary of Labor to certify that aliens' entry into domestic labor market will not adversely affect American labor, under *8 USCS § 1182,* must not be arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law, and court should find (1) whether Secretary acted within scope of his authority, (2) whether Secretary's decision was based on consideration of relevant factors and whether there has been clear error of judgment, (3) and whether Secretary's action followed necessary procedural requirements. *Secretary of Labor v Farino (1973, CA7 Ill) 490 F2d 885.*

Finding under former *8 USCS § 1182*(a)(14) that secretarial employment of alien will not adversely affect working conditions of workers in U.S. similarly employed is supported by evidence of unique nature of employment with corporation--including temporary work assignments, variety of offices assigned, and varying weekly work hours--which precludes comparison of fringe benefits with those of more conventional secretarial employers. *First Girl, Inc. v Regional Manpower Adm'r of United States Dep't of Labor (1974, CA7 Ill) 499 F2d 122.*

Regulation promulgated by Secretary of Labor under former *8 USCS § 1182*(a)(14), prohibiting sex discrimination in issuance of immigration visa is clearly authorized by Secretary's authority under *8 USCS § 1182*(a)(14) to deny labor certifications which adversely affect "working conditions" of American workers. *Witt v Secretary of Labor (1975, DC Me) 397 F Supp 673, 10* CCH EPD P 10286.

44. --Wages

Secretary's denial of labor certification for live-in maid under former *8 USCS § 1182*(a)(14) is proper because wages and working conditions of American

maids would be adversely affected if Americans seeking domestic help could import, at prevailing wage for live-out daily maids, aliens to work as live-in maids. *Pesikoff v Secretary of Labor (1974) 163 US App DC 197, 501 F2d 757,* cert den *(1974) 419 US 1038, 42 L Ed 2d 315, 95 S Ct 525.*

Finding that wage offered to alien would adversely affect wages of United States workers based upon prevailing wage for civil engineers was improper where alien was to be employed as mechanical engineer. *Reddy, Inc. v United States Dep't of Labor (1974, CA5 Tex) 492 F2d 538,* reh den (1974, CA5 Tex) *495 F2d 1372.*

In determining whether employment of alien will adversely affect wages of United States workers, Secretary must compare proposed wage offer with prevailing wage scale of other employees who perform specific job applied for by alien; denial of labor certification to alien seeking employment as Montessori teacher on basis that wage offer was below prevailing wage was improper where prevailing wage was derived from starting salary of B.A. degreed public school teachers rather than for other Montessori teachers conducting classes for pre-school age children in area of employment. *Ratnayake v Mack (1974, CA8 Minn) 499 F2d 1207.*

Wage paid to alien pursuant to negotiated collective bargaining agreement cannot, in absence of evidence impugning the agreement, be said to "adversely affect" wages and working conditions of American laborers in area, notwithstanding that wage may be below Secretary of Labor's computation of "prevailing wage"; once having determined that alien is subject to collective bargaining agreement and receives not less than nonalien colleagues, Secretary has no discretion to exercise and must grant statutory certification. *Naporano Metal & Iron Co. v Secretary of Labor (1976, CA3 NJ) 529 F2d 537, 41 ALR Fed 597.*

Labor certification requires determination that employment of alien would not adversely affect wages and working conditions of similarly employed Americans, and if employer wishes to hire alien for work in United States, employer is first required to recruit among American workers, offering prevailing wage and prevailing working conditions; employer may be required to advertise position, both in-house and outside firm, at prevailing wage, and Secretary of Labor may not grant labor certification where wage advertised is less than prevailing wage; Secretary of Labor's determination of substantially higher prevailing wage than wage offered by employer may be based upon survey of similar employers; employer's failure to advertise position in-house after revising advertisement to reflect prevailing wage supports refusal of labor certification. *Industrial Holographics, Inc. v Donovan (1983, CA7 Ill) 722 F2d 1362.*

Denial of labor certification under former *8 USCS § 1182*(a)(14) on sole ground that pay of proposed job was below "prevailing wage" would be remanded for reconsideration where (1) in considering only per hour pay, Secretary failed to recognize or consider that all forms of compensation do not take form of money, and (2) wage offered to alien was one reached by union negotiation and was equivalent of coworkers' salary. *Ozbirman v Regional Manpower Admr., United States Dep't of Labor (1971, SD NY) 335 F Supp 467.*

45. Validity of labor certification

Labor certification based on skill which alien did not possess was invalid. *In re La Pietra (1968, BIA) 13 I & N Dec 11.*

Labor certification was invalid where alien represented in his application that he was to be paid $ 1.50 per hour, but agreement with prospective employer was actually at rate of $ 3.00 per hour, at which rate local workers would be available; post facto declaration by alien that he was willing to work for $

1.50 an hour would not alter fact that actual agreement rendered labor certification invalid. *In re Gonzalez-Becerra (1969, BIA) 13 I & N Dec 387* (superseded by statute on other grounds as stated in *In re Patel (1978, BIA) 16 I & N Dec 444).*

In absence of valid labor certification, former *8 USCS § 1182*(a)(14) provides for exclusion of immigrant aliens described as skilled workers under former § 1153(a)(6); labor certification is valid only for particular job opportunity and for area of intended employment stated on application for labor certification, and where alien is not employed at location stated on application, certificate is invalid and will not support petition for preference status. *In re Sunoco Energy Dev. Co. (1979, Regional Comr) 17 I & N Dec 283.*

46. Effect of lack of required certification

Visa is not valid if there is no certification by Secretary of Labor under former *8 USCS § 1182*(a)(14), where alien gains admittance to United States for purpose of performing unskilled labor by entering into marriage with citizen of United States, such marriage being solely for purpose of acquiring benefit under immigration laws. *Godoy v Rosenberg (1969, CA9) 415 F2d 1266.*

Former 8 USCS § 1182(a)(14) may not be construed to prohibit all work contracts entered into by undocumented aliens, and court would allow employee to recover wages, based on theory of unjust enrichment, where, despite fact that both employer and employee had made agreement with obvious intention of circumventing and disobeying United States immigration law, employee's violation was overshadowed by employer's entire course of deceptive conduct, and therefore employee was entitled to payment under New York State Labor Law of minimum wage in effect for relevant period less fair and reasonable value for room and board provided by employer, payment received, and airfare to New York. *Nizamuddowlah v Bengal Cabaret, Inc. (1977) 92 Misc 2d 220, 399 NYS2d 854,* affd (1979, 2d Dept) *69 App Div 2d 875, 415 NYS2d 685.*

Although, under former *8 USCS § 1182*(a)(14), alien who entered country for purpose of performing labor or services without having received necessary certification was ineligible to receive visa and was excludable from admission into United States, provision did not make alien's employment contract void so as to preclude alien from recovering wages. *Gates v Rivers Constr. Co. (1973, Alaska) 515 P2d 1020.*

47. Accepting other than certified employment

Where petitioner obtained labor certification as gasoline station manager whether, under Department of Labor regulations, alien's employment at gasoline station other than that listed in labor certification constituted "specific job offer" and "particular job opportunity" were for Department of Labor to decide; thus, determination by Immigration and Naturalization Service denying sixth preference visa petition on ground that labor certification was no longer valid, since alien was not working at same gasoline station as that listed in certification, was beyond authority of INS. *Hassanali v Attorney Gen. (1984, DC Dist Col) 599 F Supp 189.*

Alien is excludable where she was never employed as maid or domestic for which employment she was issued labor certificate but instead obtained immediate employment as sewing machine operator. *In re Tucker (1967, BIA) 12 I & N Dec 328.*

Alien who reported to job for which he had obtained labor certification, but who became unsatisfied with job after few days and took other employment, was not deportable for lack of valid labor certification at entry where alien entered United States to take certified employment in good faith and there was

no evidence that alien took employment as part of scheme to obtain other employment. *In re Marcoux (1968, BIA) 12 I & N Dec 827.*

There is nothing in text of former *8 USCS § 1182*(a)(14) or in its legislative history to indicate that admission of alien with labor certification was designed by Congress as conditional entry, to be convertible into permanent residence only after stated probationary period, nor does § 1182(a)(14) or any other provision make such admission one on condition subsequent, subject to defeasance if alien does not take up and maintain for stated period of time employment he has contracted to perform with employer to whom he was destined; once alien has been admitted, destined to existing certified job with intention of taking up employment, he must be considered as having been lawfully admitted for permanent residence, and if he reports to work and accepts that employment, he may still quit because he does not like work or because he has received better offer elsewhere; thus, alien who reported to employer to which his labor certification showed that he was destined, but who decided not to take job available to him, and instead decided to take other employment, was not inadmissible at time of his entry as one not in possession of valid labor certification. *In re Cardoso (1969, BIA) 13 I & N Dec 228.*

Alien whose labor certification showed that she was destined for certain employer, but who learned from "arranging" agent, subsequent to issuance of visa, that she would be working in same capacity for another, and who obtained labor certification for second employer after arrival in United States, was not excludable under former *8 USCS § 1182*(a)(14). *In re Morgan (1969, BIA) 13 I & N Dec 283.*

Alien who was admitted to practice of law in Phillipines, who followed her profession in that country for substantial period of time prior to coming to United States and who intended to engage in her profession in this country when she qualified, was admissible upon presentation of immigrant visa supported by labor certification for employment as legal aide, notwithstanding that she intended to work as general office clerk until she met licensing and other local requirements for practice of her profession; alien had bona fide intention of engaging in her specialized field of endeavor and reasonable prospects of doing so. *In re Ulanday (1971, BIA) 13 I & N Dec 729.*

48. --Intent to perform certified employment

Alien who enters United States with good faith intention to accept his employment, certified pursuant to *8 USCS § 1182,* is not deportable simply because it turns out that particular job is no longer available, or his employer suggests he look elsewhere, or even if he leaves certified job after only short time because of dissatisfaction with working conditions or wages. *Castaneda-Gonzalez v Immigration & Naturalization Service (1977) 183 US App DC 396, 564 F2d 417.*

Failure to report for certified job, when accompanied by immediate employment in uncertified work, gives rise to strong inference of lack of intent to take certified job; when alien learns that certified job is no longer available prior to entry, he enters without intent to take certified job. *Spyropoulos v Immigration & Naturalization Service (1978, CA1) 590 F2d 1.*

It is appropriate to require that alien intend to occupy certificated occupation for period of time that is reasonable in light both of interest served by statute and interest in freedom to change employment, but to hold that alien is not eligible for admission as preference immigrant when his intention at entry is to engage in certified employment unless and until he can complete educational and other requirements for advancement to another occupation, fails to recognize that both interest underlying grant of preference and interest in

freedom of opportunity for self-improvement would be substantially served by alien's admission; nothing in language of former *8 USCS § 1182*(a)(14) bears upon length of commitment required of beneficiary; construing statute to require that alien intend to remain in certified employment permanently would raise substantial constitutional problems. *Yui Sing Tse v Immigration & Naturalization Service (1979, CA9) 596 F2d 831.*

Pursuant to former *8 USCS §§ 1182*(a)(14) and 1251(a)(1), U.S. Attorney General may deport alien, who enters United States with labor certificate but fails to take job for which he was certified, only upon proof sufficient to support finding that he obtained certificate by fraud, meaning material misrepresentation, or that he did not intend to take certified employment upon entry, and when alien enters country under labor certificate which he does not intend to use, he willfully misrepresents material fact, but if he enters with requisite intention only to find certified job is no longer available, he commits no fraud and may not be deported merely for accepting other employment, and mere finding that alien in question failed to report for certified job is not sufficient to support deportation. *Jang Man Cho v Immigration & Naturalization Service (1982, CA4) 669 F2d 936, 62 ALR Fed 395.*

Notwithstanding that alien upon entry presented immigrant visa supported by certification from Secretary of Labor, reported to certified job and actually pursued it for short period of time, he was not in possession of valid labor certification at entry where it was his intention throughout to pursue other employment for which he did not have certification. *In re Poulin (1969, BIA) 13 I & N Dec 264.*

Alien is excludable under former *8 USCS § 1182*(a)(14) where he has not established bona fide intent to engage in profession for which he is certified. *In re Ortega (1970, BIA) 13 I & N Dec 606.*

49. --Employment offer terminated

When alien learns that certified job is no longer available prior to entry, he enters without intent to take certified job. *Spyropoulos v Immigration & Naturalization Service (1978, CA1) 590 F2d 1.*

If alien enters with intention only to find certified job is no longer available, he commits no fraud and may not be deported merely for accepting other employment, and mere finding that alien in question failed to report for certified job is not sufficient to support deportation. *Jang Man Cho v Immigration & Naturalization Service (1982, CA4) 669 F2d 936, 62 ALR Fed 395.*

Labor certification issued under former *8 USCS § 1182*(a)(14) to alien is invalid where employment offer is terminated prior to applicant's entry into country. *In re Paco (1968, BIA) 12 I & N Dec 599.*

Alien was excludable at entry under provisions of former *8 USCS § 1182*(a)(14) where destined employment specified in alien's labor certification became unavailable prior to her departure to United States and this fact was known to her at that time. *In re Welcome (1969, BIA) 13 I & N Dec 352.*

50. Review of certification decision

When Secretary of Labor's determination under former *8 USCS § 1182*(a)(14) is made prior to granting of visa by American Consul, aliens outside United States and seeking entry are given no access to courts through Immigration and Nationality Act *(8 USCS § 1101* et seq) other than habeas corpus petition following exclusion order; clear purpose of certification procedure commits such action to "agency discretion" and thus excludes it from coverage of Administrative Procedure Act *(5 USCS §§ 701* et seq). *Cobb v Murrell (1967, CA5 Tex) 386 F2d 947.*

Secretary of Labor's denial of certification that aliens' entry into domestic labor market will not adversely affect American labor, pursuant to former *8 USCS § 1182*(a)(14) is subject to judicial review under *5 USCS § 701*(a), and aliens' employers had standing to sue under *5 USCS § 702;* if procedure followed by Secretary of Labor in alien employment certification proceedings is not acceptable, District Court has power either to conduct trial de novo or remand for further agency proceedings, and it is question of judicial policy which course to follow; in alien employment certification proceedings, remand to agency is better practice. *Secretary of Labor v Farino (1973, CA7 Ill) 490 F2d 885.*

Review of Secretary of Labor's determination of eligibility for labor certification was available under administrative Procedure Act *(5 USCS § 701* et seq.) to alien lawfully resident in United States at time he sought certification. *Reddy, Inc. v United States Dep't of Labor (1974, CA5 Tex) 492 F2d 538,* reh den (1974, CA5 Tex) *495 F2d 1372.*

Former 8 USCS § 1182(a)(14) and regulations thereunder minimally require that administrative record, in whatever form agency selects, adequately reveal (1) foundation for original denial of certification, (2) substance of relevant documentary evidence and oral information presented by applicant in response, (3) transmittal of that information to reviewing officer who made decision, and (4) receipt and consideration of record by reviewing officer before result was reached. *Yong v Regional Manpower Admr., United States Dep't of Labor (1975, CA9 Cal) 509 F2d 243.*

Former 8 USCS § 1182(a)(14) and regulations thereunder imply that applicant must be given opportunity to challenge record upon which initial denial of employment certification is predicated. *Yong v Regional Manpower Admr., United States Dep't of Labor (1975, CA9 Cal) 509 F2d 243.*

Denial of labor certification under former *8 USCS § 1182*(a)(14) is improper and alien should be given opportunity to reapply for immigrant visa, where he is prevented from obtaining labor certification only because of unjustifiable delay by Immigration and Naturalization Service in recognizing that alien has given correct information in application. *Sun Il Yoo v Immigration & Naturalization Service (1976, CA9) 534 F2d 1325.*

Statutory provision regarding labor certification does not provide for administrative review, and hearings under regulations promulgated by Department of Labor are not adversary adjudications as defined under *5 USCS § 554;* as consequence, prevailing party is not entitled to fees under Equal Access to Justice Act *(5 USCS § 504). Smedberg Machine & Tool, Inc. v Donovan (1984, CA7 Ill) 730 F2d 1089.*

Regulations providing employer with expedited review of Labor Department's refusal to grant labor certification allowing employer to obtain visas for temporary workers does not violate union's right to due process despite fact that expedited administrative review does not require notice to union; expedited procedure is justified because certification decision may require rapid resolution because highly perishable crop awaits harvesting and requirement that review be deferred until sufficient notice has been given to all those who would possibly be affected by decision would frustrate the purpose of procedure. *Arizona Farmworkers Union v Buhl (1984, CA9 Ariz) 747 F2d 1269.*

Alien's appeal from denial of summary judgment order denying labor certification allows District and Circuit Courts to review evidence and inferences de novo in light most favorable to non-moving party; decision of INS will only be reversed if found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *Kwan v Donovan (1985, CA9 Cal) 777 F2d 479.*

Scope of review of denial of alien labor certification is limited to whether decision was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. *Pancho Villa Restaurant, Inc. v United States Dep't of Labor (1986, CA2 NY) 796 F2d 596.*

Although Department of Labor's (DOL) denial of application for employment certification can be reversed by federal court only if the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, denial of labor certification on basis that employer did not have legitimate, job-related basis for rejecting U.S. applicants was an abuse of discretion where certifying officer only considered the minimum experience requirement set forth in employer's petition for labor certification for mechanical design engineer, and failed to consider the job duties specified in the petition; DOL is required, pursuant to former *8 USCS § 1182*(a)(14), to consider all relevant information on the application for labor certification, in determining whether there are sufficient workers who are able, willing, qualified, and available for the position. *Ashbrook-Simon-Hartley v McLaughlin (1989, CA5 Tex) 863 F2d 410.*

Following denial of labor certification under former *8 USCS § 1182*(a)(14), court has jurisdiction to review findings of Secretary of Labor, but review is limited to determining whether Secretary abused his discretion or committed error of law. *Golabek v Regional Manpower Administration, etc. (1971, ED Pa) 329 F Supp 892.*

Following denial of labor certification under former *8 USCS § 1182*(a)(14), aliens' failure to pursue administrative review procedure authorized by Department of Labor precludes court's jurisdiction under exhaustion of administrative remedies doctrine. *Manny Industries v Secretary of Labor (1977, CD Cal) 432 F Supp 88,* affd (1979, CA9 Cal) *596 F2d 409.*

Grant of blanket labor certification to alien with lifelong devotion to religious and humanitarian practices of Camphill movement dedicated to working with mentally retarded children and adults is in harmony with purpose of statute where no adverse effect on American labor market would follow from alien's admission to United States, alien is not paid salary for his work but rather works instead as volunteer on subsistence basis, and were his services not available he would not be replaced by paid American worker. *Lindenberg v United States Dep't of Justice, Immigration & Naturalization Service (1987, DC Dist Col) 657 F Supp 154.*

Under 8 USCS § 1182(n), employees were not entitled to writ of mandamus requiring federal officials to deny all labor condition applications from employer on ground that its previous applications contained inaccurate information, where government's duty was purely within discretion of agency, and employees had administrative remedies available to challenge employer's actions, and had private causes of action against employer under federal and state laws used to redress discrimination and contract violations. *Shah v Wilco Sys. (2000, SD NY) 126 F Supp 2d 641, 143* CCH LC P 34223, request den (2000, SD NY) *2000 US Dist LEXIS 18426.*

51. Standing

Employment agency lacks standing to question propriety of action taken by Secretary of Labor under former *8 USCS § 1182*(a)(14), where employment agency alleges that regulation has been improperly promulgated in that no advance notice was given prior to temporary suspension of pre-certification list reflecting aspects of American labor market. *Intercontinental Placement Service, Inc. v Shultz (1972, CA3 Pa) 461 F2d 222.*

Secretary of Labor's denial of certification that aliens' entry into domestic

labor market will not adversely affect American labor, pursuant to former *8 USCS § 1182*(a)(14) is subject to judicial review under *5 USCS § 701*(a), and aliens' employers had standing to sue under *5 USCS § 702. Secretary of Labor v Farino (1973, CA7 Ill) 490 F2d 885.*

Corporation is "aggrieved" and may seek judicial review of Secretary of Labor's denial to alien of labor certification under former *8 USCS § 1182*(a)(14) where corporation has 2 options available to it following denial, either increase wage offered to alien or forgo alien's services. *Naporano Metal & Iron Co. v Secretary of Labor (1976, CA3 NJ) 529 F2d 537, 41 ALR Fed 597.*

Alien has standing to challenge denial of labor certification even if employer does not join alien's action. *De Jesus Ramirez v Reich (1998, App DC) 156 F3d 1273.*

Speculative nature of alien's claim that he should be certified under former *8 USCS § 1182*(a)(14) deprives him of adverseness required for standing, where alien is not resident of United States and does not have definite offer of employment in geographic area in which he seeks to relocate. *Rumahorbo v Secretary of Labor (1975, DC Dist Col) 390 F Supp 208.*

Alien has standing under former *8 USCS § 1182*(a)(14) to challenge denial of labor certification. *Yusuf v Regional Manpower Administration of United States Dep't of Labor (1975, WD Va) 390 F Supp 292.*

Wife of alien is sufficiently aggrieved to have standing under former *8 USCS § 1182*(a)(14) to challenge denial of labor certification exemption to her husband. *Pena v Kissinger (1976, SD NY) 409 F Supp 1182.*

Alien denied certification has standing for judicial review of denial; regulatory requirement that both alien and employer join in request for administrative and judicial review does not destroy standing of alien; failure of employer to join with alien employee in seeking administrative review suffices to uphold refusal to certify alien; regulation requiring employer to join employee in appeal of denial of certification is subject to standard of minimum rationality and, under that standard, is not invalid. *Sieminski v Donovan (1984, ND Ill) 589 F Supp 790.*

Alien has standing to seek review of denial of certification, even though employer fails to seek review; denial of certification based upon evidence which is challenged and shown not to be reliable constitutes abuse of discretion; it is not arbitrary for Secretary to deny certification where reasons of employer for rejecting American applicants was not explained with specificity. *Gladysz v Donovan (1984, ND Ill) 595 F Supp 50.*

52. Miscellaneous

Alien must receive notice and opportunity to comment prior to revocation of student exemption from requirement that alien seeking adjustment of status obtain labor certification under former *8 USCS § 1182*(a)(14). *Hou Ching Chow v Attorney Gen. (1973, DC Dist Col) 362 F Supp 1288.*

Ohio Bar Association rule preventing alien attorney from practicing in state without passing Ohio Bar examination does not impinge on federal government's right to control immigration and naturalization. *Bashir v Supreme Court of Ohio (1980, SD Ohio) 501 F Supp 288, 20 Ohio Ops 3d 294,* affd (1981, CA6 Ohio) *652 F2d 641, 23 Ohio Ops 3d 263.*

2. Labor Certification Requirement

53. Generally

In stating that immigrant aliens seeking entry to perform labor are to be excluded unless Secretary of Labor has determined and certified pursuant to

former *8 USCS § 1182*(a)(14), Congress did not provide, as it could have, that Attorney General should determine, after initial decision by Secretary of Labor, whether immigrant alien laborer satisfied substantive requirements of section, and court would not impose such gloss to its words in light of its express provision for such result where it was intended in other areas of immigration laws. *Castaneda-Gonzalez v Immigration & Naturalization Service (1977) 183 US App DC 396, 564 F2d 417.*

To avoid finding of disqualification by Immigration and Naturalization Service under former *8 USCS § 1182*(a)(14), alien need only show that Secretary of Labor has determined that no American workers are available for job he will accept and that his employment will not adversely affect wages or working conditions in United States; alien with labor certificate indicating that such determination had been made is not disqualified for entry because Service is dissatisfied with its factual basis or with merits of Secretary of Labor's decision. *Castaneda-Gonzalez v Immigration & Naturalization Service (1977) 183 US App DC 396, 564 F2d 417.*

Nonimmigrant alien required to comply with labor certification requirements will be denied opportunity to renew previous application if labor certification issued with original application is no longer valid because employment is terminated at time of application in deportation proceeding. *Pei-Chi Tien v Immigration & Naturalization Service (1981, CA5) 638 F2d 1324.*

By limiting class of nonimmigrant alien crewmen to foreign crewmen whose primary and substantial duties occur while ship is in navigation, Congressional purpose of protecting American jobs is advanced; if crewman's primary duties occur while ship is at sea, crewman's entry into U.S. could not be construed as for purpose of performing skilled or unskilled labor, in violation of INA § 212(a)(14) [former *8 USCS § 1182*(a)(14)]. *International Longshoremen's & Warehousemen's Union v Meese (1989, CA9 Wash) 891 F2d 1374, 1990 AMC 2197, 109 ALR Fed 795.*

Regulations promulgated pursuant to former *8 USCS § 1182*(a)(14) create "regulatory entitlement" in aliens who are interested in labor certifications "regulatory entitlement" is protected interest lasting for so long as regulation which created entitlement remains in effect, at least where regulation contains no indicia of permanency upon which alien might justifiably rely. *Veras-Mejia v Brennan (1976, SD NY) 418 F Supp 680.*

Administrative judge does not abuse discretion in denying application for labor certification for alien where employer fails to submit documentation of recruitment efforts in professional journal as required by regulations. *Trimble House Corp. v Marshall (1980, ND Ga) 497 F Supp 546.*

Alien is entitled to precertification under regulations promulgated pursuant to former *8 USCS § 1182*(a)(14). *In re Lau (1974, BIA) 14 I & N Dec 694.*

54. Relationship between Department of Labor and INS authority

Attorney General does not have authority to invalidate labor certificate issued by Secretary of Labor under former *8 USCS § 1182*(a)(14), but government can deport alien for inaccuracies of fact in labor certificate. *Castaneda-Gonzalez v Immigration & Naturalization Service (1977) 183 US App DC 396, 564 F2d 417.*

Although Secretary of Labor's discretion in regard to granting of certificates for alien employment is not lightly to be disregarded, this discretion should not be exercised on mere conclusory or possibly irrelevant statements. *Digilab, Inc. v Secretary of Labor (1974, CA1 Mass) 495 F2d 323,* cert den *(1974) 419 US 840, 42 L Ed 2d 67, 95 S Ct 70.*

District Court property declined to issue preliminary injunction enjoining

deportation of Argentine alien, with respect to whom Department of Labor had issued, pursuant to former *8 USCS § 1182*(a)(14), labor certification for alien as moldmaker, and whose prospective employer's petition for classification of alien as sixth preference immigrant with occupation of moldmaker, pursuant to § 1154, was denied by District Director after finding that alien did not possess necessary qualifications to perform job duties of moldmaker, since role of Department of Labor is limited to making findings about conditions in domestic labor market, while Immigration and Naturalization Service retains authority to determine whether alien is qualified for job for which he seeks sixth preference status. *K.R.K. Irvine, Inc. v Landon (1983, CA9 Cal) 699 F2d 1006.*

TAG Note 1 to 20 CFR § 656.30, which prohibits substitution of another alien on labor certification if more than six months have passed since original date of certification, upsets delicate interplay of administrative power established by INA § 212 [former *8 USCS § 1182]* by permitting DOL, rather than INS, to determine eligibility of particular aliens for labor certification, and does not accord with actual practices of either agency; nothing in INA § 212 suggests that DOL limit labor certification to alien on whose behalf it was granted, and 20 CFR § 656.30(a) provides that labor certification is valid indefinitely, and thus DOL's refusal to permit substitution of second alien where first alien declined job offer, because employer failed to submit substitution until 14 months after certification date, was not in accordance with law, and Secretary of Labor was ordered to permit substitution and to reissue labor certification. *Medellin v Bustos (1988, CA5 Tex) 854 F2d 795.*

Under 8 USCS § 1154(b) and implementing regulation (8 CFR § 2.1), Immigration and Naturalization Service has primary authority to review qualification of alien seeking third preference visa classification as nurse pursuant to *8 USCS § 1153*(a)(3), notwithstanding that Secretary of Labor issues labor certification pursuant to former § 1182(a)(14), since statutory scheme vests in Secretary of Labor limited function related to determining supply of United States workers having particular skill or job classification and effect on such workers of admitting foreign worker possessing same skill or job classification, while vesting in INS authority to determine whether particular alien possesses specific qualifications asserted in labor certification. *Madany v Smith (1983, App DC) 225 US App DC 53, 696 F2d 1008.*

Secretary of Labor has been given wide discretionary power with respect to labor certification, however Congress has not given him authority to say that one who wants to employ baker in morning must be content with candle stick maker who is willing to work in afternoon. *Jadeszko v Brennan (1976, ED Pa) 418 F Supp 92.*

Function of Department of Labor in relation to alien's application for sixth preference status is limited, in that once Department of Labor has certified that there are not sufficient American workers able, willing, qualified, and available, and that employment of alien will not adversely affect American labor, its primary role comes to end and Immigration and Naturalization Service must then rule on whether visa should be granted, which may include determination of whether alien is qualified for job certified; however, INS may not reject a sixth preference on basis that labor certification is no longer valid, since question of validity of labor certification rests exclusively with Department of Labor. *Hassanali v Attorney Gen. (1984, DC Dist Col) 599 F Supp 189.*

DOL's role in granting labor certification is limited, and INS has authority to investigate whether employer can realistically pay prevailing wage to alien. *Masonry Masters, Inc. v Thornburgh (1990, DC Dist Col) 742 F Supp 682,* amd (1990, DC Dist Col) *1990 US Dist LEXIS 9511.*

55. Regulations

Notice and opportunity for comment by public must first be provided, where Secretary of Labor seeks to change existing rights and obligations under former *8 USCS § 1182*(a)(14) of certain aliens by requiring such aliens to submit proof of specific job offers as well as statement of their qualifications, under *8 USCS § 1182*(a)(14). *Lewis--Mota v Secretary of Labor (1972, CA2 NY) 469 F2d 478.*

Regulation providing that labor certifications issued under former *8 USCS § 1182*(a)(14) will be valid for only one year following date certification is made after which revalidation will be required, may not be retroactively applied to alien whose labor certification has been granted prior to effective date of regulation. *Maceren v District Director, Immigration & Naturalization Service (1974, CA9 Cal) 509 F2d 934.*

There is abuse of discretion in attempting to establish new standard and apply it to alien by adjudicatory process; Board of Immigration Appeals improperly applied law to alien's application for adjustment of status where (1) Immigration and Naturalization Service had recently amended its investor regulation, setting forth seemingly objective criteria, which alien met, and (2) on date of alien's initial capital outlay there was no law or dictum that could have led her to conclude that more was required than objective criteria stated in regulation. *(8 USCS § 1184*(a)(14), 8 CFR § 212.8(b)(4)). *Ruangswang v Immigration & Naturalization Service (1978, CA9) 591 F2d 39.*

In consideration of case decided after significant change in INS interpretation of statute, applicant for labor certification exemption who applied prior to change of interpretation is entitled to rely on prior interpretation, or on present interpretation, whichever is more favorable to him. *Pistentis v Immigration & Naturalization Service (1979, CA3) 611 F2d 483.*

Denial of petition for labor certification by import/export corporation on behalf of its Pakistani founder and president was affirmed where 20 CFR § 656.50 defines "employment" as permanent full-time work by an employee for an employer other than oneself, and although alien had sold 490 of 500 shares of corporation to third party immediately prior to submission of petition, alien retained option to repurchase; although corporation was not sham developed solely to enable alien's certification, alien and corporation were inseparable in that corporation relied heavily upon alien's talent, skill, and personal business connections, and without alien as president, corporation would likely cease to exist. *Hall v McLaughlin (1989, App DC) 275 US App DC 46, 864 F2d 868.*

Alien is not denied due process of law when exemption under former *8 USCS § 1182*(a)(14) is not granted, even though alien has not been treated in same way as similarly situated aliens, if denial of application for adjustment of status represents reasoned change in interpretation of regulations. *In re Park (1974, BIA) 14 I & N Dec 734.*

Mere fact that alien, claiming to be investor entitled to exemption from labor certification requirement, may have filed adjustment application prior to October 7, 1976, does not result in his being thereafter entitled to have all subsequent investments reviewed under provisions of 8 C.F.R. 212.8(b)(4) as in effect prior to that date; an alien whose original investment in clothing business did not qualify him for exemption even under less restrictive standards in effect prior to October 7, 1976, because not adequate to insure his primary function was not that as worker, nor enough to expand job opportunities so as offset any adverse impact of his employment, cannot claim to have later investment entitled to be vested under provisions in effect prior to October 7, 1976. *In re Kumar (1980, BIA) 17 I & N Dec 315.*

56. Recertification

Alien commuter must comply with labor certification requirement of former *8 USCS § 1182*(a)(14) at time of initial entry into United States, but once lawfully admitted, commuter may thereafter make regular entrances into United States without recertification, as immigrant lawfully admitted for permanent residence who is returning from temporary visit abroad. *Gooch v Clark (1970, CA9 Cal) 433 F2d 74,* cert den *(1971) 402 US 995, 29 L Ed 2d 160, 91 S Ct 2170.*

Labor certification requirement of former *8 USCS § 1182*(a)(14) does not apply to aliens who qualify as returning resident immigrants under *8 USCS § 1101*(a)(27)(B) and who thus may be admitted under less stringent documentary requirements established for returning residents pursuant to *8 USCS § 1181*(b); applicant who has once successfully met requirements for admission as immigrant, and has not lost status as alien lawfully admitted for permanent residence, is not required to reestablish eligibility under § 1182(a)(14) upon each entry. *In re Galvan (1974, BIA) 14 I & N Dec 518.*

57. Effect of family circumstances

Alien does not affirmatively demonstrate that he is exempt under former *8 USCS § 1182*(a)(14), where alien's visa and supporting documents represent that he is farm worker who is entering country to join his wife rather than to do farm work, and where it is found that alien's marriage to American citizen is fraudulent, making alien deportable. *Espinoza Ojeda v United States Immigration & Naturalization Service (1969, CA9) 419 F2d 183.*

Alien's argument that she is validly married to US citizen and therefore is exempt from labor certification requirements is untimely since alien did not take appeal from original deportation order made by immigration judge, but rather attempted to assert invalidity of deportation charge for first time on appeal. *Skelly v Immigration & Naturalization Service (1980, CA10) 630 F2d 1375.*

Alien who, at time of admission for permanent residence, reasonably believed that he would be successful in reviving floundering marriage, was exempt from labor certification requirement of former *8 USCS § 1182*(a)(14); fact that after entry it is established that marriage did not survive has no retroactive effect with regard to labor certification exemption for alien spouse of United States citizen as of time he was admitted for permanent residence. *In re Gonzalez-Portillo (1969, BIA) 13 I & N Dec 309.*

Exemption under former *18 USCS § 1182*(a)(14) for immigrants who are children of aliens lawfully admitted to United States for permanent residence, where child is defined as unmarried person under 21 years of age, does not apply in favor of 23-year-old married male alien, even though written statement informing alien that he will be ineligible for admission to United States should he marry prior to entry is not attached to immigration visa by appropriate government official. *In re Polanco (1973, BIA) 14 I & N Dec 483.*

58. Claim of outside support

Although foreign source of income per se does not preclude exemption from labor certification, petitioner failed to carry burden of proving reasonably assured financial self-sufficiency where her support was provided by spouse abroad from whom she was separated, and there were numerous risk factors associated with such income, including whether husband would continue to abide by support agreement, whether agreement was practical to enforce, and how eventual death of 52-year-old husband might affect her support. *Wang v Immigration & Naturalization Service (1979, CA9) 602 F2d 211.*

Labor certification requirement of former *8 USCS § 1182*(a)(14) does not apply

to alien seeking to attend college in United States, where alien's application ostensibly shows her occupation to be that of secretary, but because of her parents' ability to support her and her desire for higher education, it is unlikely she will work as secretary. *In re Redekop-Rempening (1966, BIA) 11 I & N Dec 674.*

Labor certification is required under former *8 USCS § 1182*(a)(14) for alien to be eligible for immigrant visa, where alien lives in United States with 3 children and divorce decree from husband provides that husband will pay support for her and children and where alien takes part-time employment consisting of ironing about 12 hours per week, since statute does not condition obtaining of labor certification upon finding that alien enters primarily for purpose of performing labor. *In re Hoeft (1966, BIA) 12 I & N Dec 182.*

Exemption from labor certification requirement of former *8 USCS § 1182*(a)(14) on ground that alien would not be engaging in skilled or unskilled labor while in United States would be denied where (1) alien was middle aged and potentially employable for many years to come, (2) it was unlikely that she would depend upon her daughter and son-in-law for support while residing in United States, and (3) on this record, it had not been established that alien would not eventually obtain employment in United States and circumvent labor certification requirement. *In re Fulgencio (1977, BIA) 16 I & N Dec 230.*

Alien (non-immigrant visitor for pleasure who remained longer than authorized) did not establish that she was exempt from labor certification requirements of former *8 USCS § 1182*(a)(14) on basis of income from source in another country, when that income might stop at any time; moreover, unsecured assurance of support by nonresident relative does not even measure up to normal requirement for satisfying government that alien is not likely at any time to become public charge. *In re Wang (1978, BIA) 16 I & N Dec 528,* affd (1979, CA9) *602 F2d 211.*

59. Exemption for investors

Alien does not qualify under investor regulation (8 CFR § 212.8(b)(4)) where alien had bought ongoing one-man retail operation which barely supported him above poverty line, and employed none of existing domestic work force, so that alien's investment only succeeded in replacing resident laborer with immigrant worker--exactly result that Congress sought to avoid by enacting former *8 USCS § 1182*(a)(14). *Mehta v Immigration & Naturalization Service (1978, CA2) 574 F2d 701.*

Alien does not meet burden of proof of exemption from labor certification requirement under 8 CFR § 212.8(b)(4) as investor where, in order to show $ 10,000 investment in business, it is necessary for him to include loan of $ 8,000 which has not been shown to have been permanent investment in inventory; although mere fact $ 10,000 was not invested at date of application would not be determinative of alien's claim of investor status, alien is not entitled to exemption where he is not actively in process of investing necessary amount inasmuch as there is no evidence alien had any definite plan or actual intent to invest additional capital at time of application for exemption. *Sanghavi v Immigration & Naturalization Service (1980, CA5) 614 F2d 511.*

Exemption from numerical limitations applies to aliens in United States on or before June 1, 1978, who qualified as nonpreference immigrants, who had status as investors, and who applied for adjustment of status to that of aliens lawfully admitted for permanent residence. *Perwolf v Immigration & Naturalization Service (1984, CA8) 741 F2d 1109.*

Qualified investor who is deemed exempt from labor certification requirement of former *8 USCS § 1182*(a)(14) may manage his own investment without thereby

engaging in proscribed employment within contemplation of § 1182(a)(14), and investor would therefore not be precluded from adjusting his status under *8 USCS § 1255*(c)(2); however, if investor is unsuccessful in his application for investor exemption provided by 8 CFR § 212.8(b)(4), investor runs risk that work performed in connection with his investment may be considered unauthorized employment under *8 USCS § 1255*(c)(2), thereby precluding adjustment of status. *In re Lett (1980, BIA) 17 I & N Dec 312.*

Alien attempting to establish exemption from labor certification requirement as investor need not prove investment expands job opportunities in United States. *In re Patel (1980, BIA) 17 I & N Dec 597.*

60. --"Substantial investment" requirement

Alien is not exempt from certification requirement under former *8 USCS § 1182*(a)(14) in spite of regulation which exempts alien engaged in commercial or agricultural enterprise in which he has invested or is investing substantial amount of capital, where alien has made down payment of $ 250 on $ 1,000 industrial sweeper, past businesses have failed, and alien has no business and no customers. *Talanoa v Immigration & Naturalization Service (1970, CA9) 427 F2d 1143.*

Alien who fails to qualify as investor under 8 CFR § 212.8(b)(4) is not exempt from labor certification requirement under former *8 USCS § 1182*(a)(14), where alien has invested in vehicles for operation of 1-man delivery service, since investment is not substantial in that there is little likelihood that investment will create new jobs, and alien would be merely performing service that would otherwise have been rendered by competition. *Heitland v Immigration & Naturalization Service (1977, CA2) 551 F2d 495,* cert den *(1977) 434 US 819, 54 L Ed 2d 75, 98 S Ct 59.*

61. --Prior experience requirement

Alien's request for exemption from labor certification requirement under former *8 USCS § 1182*(a)(14) should be reconsidered where regulation defines exempt "investor" status as including 1 year's experience or training, qualifying alien to engage in enterprise, where, although alien fails to present prima facie case of eligibility, she has benefit of more than 6 months on-the-job practical experience as manager of restaurant in which she has invested. *Nai Cheng Chen v Immigration & Naturalization Service (1976, CA1) 537 F2d 566.*

Alien in business of selling new shoes should be exempt from labor certification requirement, where exemption applies to aliens who engage in commercial or agricultural enterprise in which they have invested or are in process of investing substantial amount of capital, and where alien has fulfilled regulatory requirement of 1 year's experience by previously operating grocery business in Argentina. *In re Ko (1973, Deputy Associate Comr) 14 I & N Dec 349.*

Alien may be able to establish that previous experience as entrepreneur or manager for at least one year meets experience requirements of regulation authorized under former *8 USCS § 1182*(a)(14), even though difference exists between nature of business in which alien was previously engaged and nature of business in which he is now investing. *In re Ko (1973, Deputy Associate Comr) 14 I & N Dec 349.*

62. --Particular businesses

Alien optometrist is not entitled to waiver of labor certification requirement as business investor. *Yiu Tsang Cheung v District Director,*

Immigration & Naturalization Service (1980, CA9 Cal) 641 F2d 666.

Alien who invests in import-export trading company and small grocery store is not exempt from labor certification requirement of former *8 USCS § 1182*(a)(14) and is not investor under 8 CFR § 212.8(b)(4) where he has one part-time employee, and performs virtually all of labor, skilled and unskilled, necessary to operation of business, and consequently does not meet standards set forth in *Re Heitland (1974, Bd Imm App) 14 I & N Dec 563;* opening of oriental foodstuffs and objects d'art import-export business does not exempt alien from labor certification requirements of § 1182, as it places alien in direct competition with American businessmen engaged in same activity. *In re Wang (1979, BIA) 16 I & N Dec 711.*

63. Particular occupations

Labor certification required under former *8 USCS § 1182*(a)(14) does not apply to aliens who seek entry for purposes of obtaining political asylum based upon well-founded fear of persecution in their homeland. *Pierre v United States (1976, CA5 Fla) 525 F2d 933.*

Spanish and Dutch crew members of Liberian owned heavy lift crane ship engaged in installation of oil drilling and production platform on outer continental shelf area, pursuant to *43 USCS § 1356*(c)(2), are exempt from labor certification requirement of former *8 USCS § 1182*(a)(14), although certification requirement applies to outer continental shelf, except as modified by *43 USCS § 1356. Piledrivers' Local Union No. 2375 v Smith (1982, CA9 Cal) 695 F2d 390.*

Denial of application for alien employment certification based on noncompliance with prohibition against unduly restrictive language requirement in 20 CFR § 656.21(b)(2)(C), and rejection of U.S. applicant for other than lawful job-related reasons, prohibited by 20 CFR § 656.21(b)(7), was affirmed because: (1) hotel and casino operator's requirement that applicant speak French, as well as English and Spanish, in order to choreograph French-style review, was not supported by business necessity, since job would be performed in Puerto Rico, and employer failed to show either that requirement was reasonable and tended to contribute to or enhance efficiency or quality of business, or that absent such ability, essence of business operation would be undermined; and (2) only posted requirement not met by U.S. applicant was ability to speak French, which requirement was not permissible; in certification process, issue is whether U.S. applicant is qualified for job, not whether U.S. applicant is more or less qualified than alien, and job requirements which are not listed in posting cannot be applied ex post facto by employer. *Posadas de Puerto Rico Associates, Inc. v Secretary of Labor (1988, DC Puerto Rico) 698 F Supp 396.*

Labor Department's regulation which suggests that 4 years of training is generally necessary for valid labor certification for machinist under former *8 USCS § 1182*(a)(14), is only guideline, and language used is not inflexible, so lesser or greater period may be accepted, and therefore substantial compliance with regulation may be sufficient. *In re Belmares-Carrillo (1969, BIA) 13 I & N Dec 195.*

Exemption from labor certification requirement applicable to members of Armed Forces, contained in regulations promulgated pursuant to former *8 USCS § 1182*(a)(14), does not apply where alien is only intending to become member of military in United States. *In re Park (1974, BIA) 14 I & N Dec 734.*

Labor certification provided in former *8 USCS § 1182*(a)(14) was required where alien, religious trainee at Buddhist Community, would be performing work related to maintenance and function of Community. *In re Friess (1976, BIA) 15 I & N Dec 668.*

Alien need not be considered businessman to qualify as business visitor, if

function he performs is necessary incident to international trade or commerce; Canadian truck driver who delivers automobiles from Quebec to various dealerships in New York and New Jersey, and then either repeats route or picks up load of automobiles to transport to Quebec, is eligible for entry into United States as business visitor. *In re Cote (1980, BIA) 17 I & N Dec 336.*

Alien physician need not take visa qualifying examination to qualify as beneficiary for labor certification where position does not require employee be physician or perform medical services; professor of environmental epidemiology is not occupation limited to physicians within meaning of former *8 USCS § 1182*(a)(32). *In re Sheikh (1980, Regional Comr) 17 I & N Dec 634.*

3. Findings As To Sufficiency of American Workers

64. Generally

Decision of Reviewing Officer denying labor certification to alien applicant for position of mechanical engineer, which decision referred only to "United States engineers" and "qualified United States workers," was patently insufficient to support finding that there were qualified United States workers ". . . at the place to which the alien is destined" as required by former *8 USCS § 1182*(a)(14). *Reddy, Inc. v United States Dep't of Labor (1974, CA5 Tex) 492 F2d 538,* reh den (1974, CA5 Tex) *495 F2d 1372.*

Where employer filed application for alien employment certification of Uruguayan under former *8 USCS § 1182*(a)(14), Secretary of Labor's conclusory statement that some 200 electrical engineers were listed in registry maintained in California did not adequately answer employer's detailed enumeration of job requirements and Uruguayan's qualifications to meet them; therefore, action would be remanded to district court for direction to Secretary of Labor and regional manpower administrator for more specific factual basis for their denial of application. *Digilab, Inc. v Secretary of Labor (1974, CA1 Mass) 495 F2d 323,* cert den *(1974) 419 US 840, 42 L Ed 2d 67, 95 S Ct 70.*

Secretary of Labor properly determined that no Puerto Rican workers were "available" within meaning of former *8 USCS § 1182*(a)(14)(A) where Puerto Rican law imposes conditions more onerous to employer than those set by Secretary of Labor and no Puerto Rican workers can come without permission of Puerto Rican Secretary of Labor, who insists on conditions of Puerto Rican law, since worker not willing and able to enter into contract of employment upon United States conditions is not "available" for purposes of certifying to Immigration and Naturalization Service insufficiency of United States workers and need for temporary foreign workers. *Hernandez Flecha v Quiros (1977, CA1 Puerto Rico) 567 F2d 1154,* cert den *(1978) 436 US 945, 56 L Ed 2d 786, 98 S Ct 2846.*

Aliens subject to numerical limitations may qualify for preferred status on basis of their ability to perform labor, not of temporary or seasonal nature, for which shortage of employable and willing persons exists in United States; Sixth Preference is so named because of five prior preferences for relatives of United States citizens and resident aliens and for certain members of professions, arts, or sciences, requires certification from Secretary of Labor that labor shortage exists and that employment of such aliens would not be detrimental to American workers under *8 USCS § 1182. Yang v Immigration & Naturalization Service (1978, CA3) 574 F2d 171.*

Denial of applications for permanent alien certifications by Department of Labor under former *8 USCS § 1182*(a)(14) for failure of applicants to comply with advertising requirements of implementing regulations (20 CFR §§ 656.21 et seq.), will be affirmed since regulations, including advertising requirement, are valid exercise of Secretary of Labor's inherent authority to promulgate rules

governing administration of § 1182(a)(14) and were properly adopted pursuant to notice and comment requirements of *5 USCS § 553. Production Tool Corp. v Employment & Training Admin., United States Dep't of Labor (1982, CA7 Ill) 688 F2d 1161.*

Fifty percent rule, by which Department of Labor requires employers who petition Immigration and Naturalization Service for seasonal alien laborers, to hire available domestic workers until 50 percent of foreign workers' contracts has elapsed does not conflict with INS authority or basic policy of providing viable means to obtain supplementary labor. *Virginia Agricultural Growers Asso. v U.S. Dep't of Labor (1985, CA4 Va) 756 F2d 1025, 81 ALR Fed 519.*

Former 8 USCS § 1182(a)(14) requires consideration of not only availability of nonalien workers, but also whether (1) they are sufficient in number, and (2) they are able, willing, qualified, and available at particular time and place, and each of these issues must be answered on basis of specific information. *Xytex Corp. v Schliemann (1974, DC Colo) 382 F Supp 50.*

Denial of labor certification is proper under former *8 USCS § 1182*(a)(14), where Secretary of Labor finds that there is potential class of American workers who are "able, willing, qualified and available" for position sought by alien, and alien fails to disprove Secretary's statistics by reliable objective data. *Hsing v Usery (1976, WD Pa) 419 F Supp 1066.*

Secretary of Labor properly refused labor certification to alien where U.S. company failed to prove there were no American workers able, willing and qualified to perform job offered and company failed to conduct systematic recruitment of available domestic workers; consideration of true prospective American workers is not active employee recruitment; alien acting in dual role as both candidate and recruiter causes court to question validity and impartiality of hiring procedures; company attempted to circumvent spirit of INA § 212(a)(14) by imposing unnecessarily rigid requirements and by tailoring certain job requirements to fit nonunique qualifications of prospective alien employee and to preclude prospective American workers from consideration. *Imperial Textiles, Inc. v Secretary of Labor (1986, ND Ill) 642 F Supp 1041.*

65. Burden of proof

Given presumption of *8 USCS § 1182* against admission of aliens, if Secretary of Labor's consultation of general labor market data readily available to him suggests that there is pool of potential workers, available to perform job which alien seeks, burden should be placed on alien or his putative employer to prove that it is not possible for employer to find qualified American worker. *Pesikoff v Secretary of Labor (1974) 163 US App DC 197, 501 F2d 757,* cert den *(1974) 419 US 1038, 42 L Ed 2d 315, 95 S Ct 525.*

Burden of demonstration under former *8 USCS § 1182*(a)(14) that there was insufficiency of American workers able, willing, qualified, and available rests on applicant for labor certification, not on Secretary of Labor. *Doraiswamy v Secretary of Labor (1976) 180 US App DC 360, 555 F2d 832.*

Under former *8 USCS § 1182*(a)(14), alien is excludable because statute provides that unless Secretary of Labor has made determination and certification regarding insufficiency of work force in area of United States in which alien intends to settle and work, alien will be excluded, and therefore burden is on alien to affirmatively show that he is exempted from class of excludable aliens. *Espinoza Ojeda v United States Immigration & Naturalization Service (1969, CA9) 419 F2d 183.*

In order to enable the Secretary of Labor to make an informed decision based on reliable evidence, the employer has the burden of producing documentation of its recruitment efforts by showing, among other things, that a good faith effort

has been made to recruit United States workers for the position and that no United States worker has been rejected for reasons unrelated to the job. *Warmtex Enterprises v Martin (1992, CA9 Cal) 953 F2d 1133, 92 CDOS 349.*

Secretary of Labor's burden under former *8 USCS § 1182*(a)(14) is met if generalized survey of labor market in applicant's area of expertise demonstrates availability of domestic workers who are apparently qualified to perform available jobs; upon such showing by Secretary, burden then shifts to alien applicant to demonstrate in fact that there are not sufficient domestic workers who are able, willing, qualified and available to perform the work he seeks and that his employment will not adversely affect the wages and working conditions of domestic workers. *Yusuf v Regional Manpower Administration of United States Dep't of Labor (1975, WD Va) 390 F Supp 292.*

As regards burden of proof on question of certification under former *8 USCS § 1182*(a)(14), Secretary of Labor must make initial showing of potential workers who are qualified to perform job alien seeks and who are available to work at locality where alien is destined to perform required skilled labor, and once this is done it is incumbent upon alien to rebut such showing before certification can be granted. *Montessori Children's House & School, Inc. v Secretary of Labor (1977, ND Tex) 443 F Supp 599.*

Alien seeking exemption from labor certification requirement bears burden of proving she will not enter United States labor market, and alien fails to establish eligibility where, although not previously employed, she is in good health and potentially employable for years to come, is not financially independent, and, while in United States, relying on son for total economic support, without which she would be forced either to work or rely on public assistance, and where there is at least some question whether son can continue to provide for her support. *In re Tausinga (1979, BIA) 16 I & N Dec 758.*

66. "At the place" requirement

Secretary of Labor did not abuse discretion in interpreting § 1182(a)(14) "at the place" requirement as obligating employers to consider United States workers willing to move to area before considering alien. *Morrison & Morrison, Inc. v Secretary of Labor (1980, CA10 Colo) 626 F2d 771.*

Denial of certification is proper under former *8 USCS § 1182*(a)(14), where there are sufficient workers in United States who are available at "place" where alien intended to perform labor. *Ozbirman v Regional Manpower Admr., United States Dep't of Labor (1971, SD NY) 335 F Supp 467.*

Nonresident alien was properly denied labor certification where in petition he stated intention to reside and teach in specific area of United States but had not been extended offer of employment in that area and there was surplus of teachers in that area. *Rumahorbo v Secretary of Labor (1975, DC Dist Col) 390 F Supp 208.*

Department of Labor violated terms of former *8 USCS § 1182*(a)(14) and regulations by manner in which it denied alien's application for certification where (1) certifying officer based his denial of certification on figures dealing with nation as whole instead of conditions of employment in Buffalo, New York, where alien intended to live, and (2) reviewing officer violated agency procedures by failing to distinguish between reconsideration of denial of certification, and appeal from denial although agency's own guidelines distinguish between two procedures. *Mukadam v U. S. Dep't of Labor, Employment & Training Administration, Region II (1978, SD NY) 458 F Supp 164.*

67. Employer specifications

It is well within Secretary of Labor's discretion to ignore those employer

specifications which he deems, in accordance with his labor market expertise, to be irrelevant to basic job which employer desires performed. *Pesikoff v Secretary of Labor (1974) 163 US App DC 197, 501 F2d 757,* cert den *(1974) 419 US 1038, 42 L Ed 2d 315, 95 S Ct 525.*

Where acupuncture center sought to employ alien as interpreter and where alien was familiar with acupuncture terminology and fluent in three Chinese dialects, so as to enable her to communicate with Chinese acupuncturists who were not fluent in English, denial of labor certification to alien, under former *8 USCS § 1182*(a)(14), on grounds that qualified Chinese interpreters generally proficient in 1 or 2 dialects were locally available, and that center's requirement of familiarity with acupuncture terminology and techniques was overly restrictive, did not constitute abuse of discretion. *Acupuncture Center of Washington v Dunlop (1976) 177 US App DC 367, 543 F2d 852,* cert den *(1976) 429 US 818, 50 L Ed 2d 78, 97 S Ct 62.*

Labor certification will be denied to alien hired as junior contract auditor by Amtrak, where job's minimum requirement is bachelor of science degree in accounting or finance, and job market information does not warrant certification of unavailability of such workers in United States, and Amtrak subsequently amends job requirements to include year's experience. *Doraiswamy v Secretary of Labor (1976) 180 US App DC 360, 555 F2d 832.*

In determining whether qualified United States workers are available, job requirements of employer are not to be set aside if they are shown to be reasonable and tend to contribute to or enhance efficiency and quality of the business. *Ratnayake v Mack (1974, CA8 Minn) 499 F2d 1207.*

District Court properly held that decision of Department of Labor denying employer alien labor certification pursuant to former *8 USCS § 1182*(a)(14) was not arbitrary, capricious, or abuse of discretion, and that it was based on proper application of Department regulations, where employer failed to carry burden of proof as to necessity of more restrictive requirements for position of buyer of oriental rugs than were established by Dictionary Of Occupational Titles, by showing that its requirements were based on business necessity rather than mere preference. *Oriental Rug Importers, Ltd. v Employment & Training Admin. (1982, CA6 Ohio) 696 F2d 47.*

Secretary of Labor properly refused labor certification, where employer specified job requirements on basis of preference or convenience rather than business necessity as prescribed by 20 CFR § 656.21(b)(2)(ii). *Kwan v Donovan (1985, CA9 Cal) 777 F2d 479.*

Secretary of Labor does not act arbitrarily and without rational basis in denying applications for alien labor certification where employer stated that one-year minimum experience was required for Mexican specialty cook but failed to show that inexperienced cooks could not be trained; Secretary acted rationally in concluding that one year's experience was not employer's actual minimum requirement. *Pancho Villa Restaurant, Inc. v United States Dep't of Labor (1986, CA2 NY) 796 F2d 596.*

In making determination on application for labor certification as to whether there are not sufficient United States workers who are qualified and available for position offered, Department of Labor (DOL) must not narrow its inquiry to whether U.S. worker applicant has requisite number of years of education, training or experience, but rather, DOL's certifying officer must inquire whether domestic applicant is able to perform the job duties specified by employer; while DOL may make determination whether specified job requirements are unduly restrictive or irrelevant to the position, such that only current, alien employee can meet job requirements, or whether specified requirements constitute skills which current alien employee did not possess when hired, or

which can be acquired during reasonable period of on-the-job training, DOL cannot ignore job duties specified by employer in determining whether employer has job-related reason for rejecting domestic applicant. *Ashbrook-Simon-Hartley v McLaughlin (1989, CA5 Tex) 863 F2d 410.*

Under former *8 USCS § 1182*(a)(14), family should be allowed to show why they wish to have live-in maid rather than live-out domestic, where Labor Department officer has found that employers do not need live-in maid. *Jadeszko v Brennan (1976, ED Pa) 418 F Supp 92.*

In order for employment qualifications to be challenged, Secretary of Labor, in denying issuance of employment certification under former *8 USCS § 1182*(a)(14), must be able to demonstrate from record (1) that prospective employer is attempting to tailor his requirements to exclude all but alien applicant, or (2) that employer's specific requirements are irrelevant to performance of basic job in question, or (3) that there is evidence of unreasonableness on employer's part in establishing particular requirements he has set-up for job in question; to require less would allow Department of Labor to dictate employment needs and qualifications to all businesses attempting to hire from outside domestic work force. *Montessori Children's House & School, Inc. v Secretary of Labor (1977, ND Tex) 443 F Supp 599.*

Denial of application for alien employment certification based on noncompliance with prohibition against unduly restrictive language requirement in 20 CFR § 656.21(b)(2)(C), and rejection of U.S. applicant for other than lawful job-related reasons, prohibited by 20 CFR § 656.21(b)(7), was affirmed because: (1) hotel and casino operator's requirement that applicant speak French, as well as English and Spanish, in order to choreograph French-style review, was not supported by business necessity, since job would be performed in Puerto Rico, and employer failed to show either that requirement was reasonable and tended to contribute to or enhance efficiency or quality of business, or that absent such ability, essence of business operation would be undermined; and (2) only posted requirement not met by U.S. applicant was ability to speak French, which requirement was not permissible; in certification process, issue is whether U.S. applicant is qualified for job, not whether U.S. applicant is more or less qualified than alien, and job requirements which are not listed in posting cannot be applied ex post facto by employer. *Posadas de Puerto Rico Associates, Inc. v Secretary of Labor (1988, DC Puerto Rico) 698 F Supp 396.*

Employment and Training Administration's use of term "business necessity" was not intended to limit application of 20 CFR § 656.21(b)(2)(iii) to commercial enterprises, and thus person seeking to employ alien as live-in domestic worker must also establish business necessity for live-in requirement; relevant "business" in "business necessity" is business of operating household or managing one's personal affairs, rather than employer's outside business activities. Re Graham (1990, BALCA) No. 88-INA-102, 1990 BALCA LEXIS 72.

68. State employment agency information

It was abuse of discretion to deny alien's labor certification application under former *8 USCS § 1182*(a)(14) based solely upon unverified conclusory information furnished by state employment service. *Shuk Yee Chan v Regional Manpower Adm'r of United States Dep't of Labor (1975, CA7 Ill) 521 F2d 592.*

Labor Department officer commits abuse of discretion when he denies labor certification under former *8 USCS § 1182*(a)(14) to aliens claiming professional status as accountants, accountant-auditors, and auditors, where sole basis in record for officer's determination that there are sufficient number of American workers in area who are able and willing to perform that particular type of work is communication from state employment service to officer that there are people

listed with service who are seeking employment in same occupation as aliens and where there is no showing that persons listed are within federal standards of "able," "qualified," or are still "available," and state employment service apparently accepts applicants' statements of qualification without verification. *Bitang v Regional Manpower Adm'r of United States Dep't of Labor (1972, ND Ill) 351 F Supp 1342, 5* CCH EPD P 8616.

For state agency employment listings to be adequate factual basis for finding that there are no able, willing, qualified, and available American workers, such listings must be credible, reliable, and pertinent. *Jadeszko v Brennan (1976, ED Pa) 418 F Supp 92.*

Denial of employment certification under former *8 USCS § 1182*(a)(14) was abuse of discretion and based on insufficient evidence where no finding that there was sufficient number of workers who were able, willing, qualified and available appeared in administrative record, Department of Labor improperly relying upon computerized statistics from state employment agencies, and where Department made no showing that denials of certification were based upon evidence of availability of permanent resident workers who were able, willing, qualified and available on dates in question. *Parikh v Regional Manpower Administrator of United States Dep't of Labor (1976, ND Ill) 431 F Supp 38.*

69. Particular occupations

Denial of certification for alien live-in maid was arbitrary and capricious where based upon fact that day workers were available in area and where requirement of live-in maid was supported by evidence of need for live-in maid as opposed to day worker. *Silva v Secretary of Labor (1975, CA1 Mass) 518 F2d 301.*

Regional manpower administrator abused authority in denying corporation's application for certification, pursuant to former *8 USCS § 1182*(a)(14), of aliens whom corporation intended to employ as secretaries in business offices, where evidence did not support Administrator's determinations (1) that there was no shortage of applicants for secretarial employment whose skills met corporation's requirements, and (2) that corporation did not provide its employees with fringe benefits comparable to those enjoyed by most secretaries similarly employed in area of employment. *First Girl, Inc. v Regional Manpower Adm'r of United States Dep't of Labor (1973, ND Ill) 361 F Supp 1339,* affd (1974, CA7 Ill) *499 F2d 122.*

Decision of Secretary of Labor denying application for alien employment certification pursuant to former *8 USCS § 1182*(a)(14) to male hairdresser was not arbitrary where, although there was shortage of male hairdressers and demand for them in area, there were unemployed female hairdressers in area. *Witt v Secretary of Labor (1975, DC Me) 397 F Supp 673, 10* CCH EPD P 10286.

Denial of application for alien employment certification based on noncompliance with prohibition against unduly restrictive language requirement in 20 CFR § 656.21(b)(2)(C), and rejection of U.S. applicant for other than lawful job-related reasons, prohibited by 20 CFR § 656.21(b)(7), was affirmed because: (1) hotel and casino operator's requirement that applicant speak French, as well as English and Spanish, in order to choreograph French-style review, was not supported by business necessity, since job would be performed in Puerto Rico, and employer failed to show either that requirement was reasonable and tended to contribute to or enhance efficiency or quality of business, or that absent such ability, essence of business operation would be undermined; and (2) only posted requirement not met by U.S. applicant was ability to speak French, which requirement was not permissible; in certification process, issue is whether U.S. applicant is qualified for job, not whether U.S. applicant is

more or less qualified than alien, and job requirements which are not listed in posting cannot be applied ex post facto by employer. *Posadas de Puerto Rico Associates, Inc. v Secretary of Labor (1988, DC Puerto Rico) 698 F Supp 396.*

70. --Education

Although Secretary of Labor properly concluded that Montessori school's requirement that applicants for teaching position have certification from Association Montessori Internationale was unreasonable and unduly restrictive, Secretary nevertheless failed to fulfill his duty under labor certification provisions of former *8 USCS § 1182*(a)(14) requiring Secretary to determine whether there are sufficient American workers for job alien applies for, where (1) although Secretary recognized need for Montessori teachers to have some degree of training, there was no showing that "available" American teachers had received any training at all, and (2) assuming that some "available" teachers were "qualified," there was no showing that any were "willing" to take the offered employment. *Ratnayake v Mack (1974, CA8 Minn) 499 F2d 1207.*

Nonresident alien was properly denied labor certification where in petition he stated intention to reside and teach in specific area of United States but had not been extended offer of employment in that area and there was surplus of teachers in that area. *Rumahorbo v Secretary of Labor (1975, DC Dist Col) 390 F Supp 208.*

Denial of certification lacked evidentiary basis and was abuse of discretion justifying judicial relief where Certifying Officer's decision was based on generalized survey of labor market which demonstrated that there was oversupply of applicants for occupation of "faculty member" but did not demonstrate that there was oversupply of applicants in plaintiff's particular area of expertise. *Yusuf v Regional Manpower Administration of United States Dep't of Labor (1975, WD Va) 390 F Supp 292.*

D. Other Exclusions

71. Stowaways

In habeas corpus proceeding for relator's release from custody under deportation order based on fact that relator was not in possession of unexpired consular immigration visa and because he was alien stowaway, district court had no discretion to grant release on ground that relator, citizen of Germany, would be court-martialed if returned to Germany, or captured by English or French on his way to port where he deserted from his own ship and became stowaway. *United States ex rel. Koentje v Reimer (1939, DC NY) 30 F Supp 440.*

Native citizens of Roumania and Poland who, neither possessing immigration visas or passports, were excluded from admission upon arrival in United States as stowaways, were not denied equal protection of laws guaranteed by Fourteenth Amendment although excluded under circumstances identical with those of other stowaways who had been admitted. *York ex rel. Davidescu v Nicolls (1946, DC Mass) 66 F Supp 747.*

Prosecution and imprisonment of alien for being stowaway did not change his status as excluded alien. *United States ex rel. Camezon v District Director of Immigration & Naturalization (1952, DC NY) 105 F Supp 32.*

Nonquota immigrant, who boarded ship as stowaway, could not object to finding by board that he should be excluded as stowaway. *Zacharias v McGrath (1952, DC Dist Col) 105 F Supp 421.*

Alien who arrives in United States as stowaway is not accorded additional rights by virtue of his subsequent parol into this country pending adjudication of his asylum application and parol does not alter status as stowaway; stowaway

is subject to exclusion from United States without exclusion hearing or right of appeal from such hearing; when applicant is stowaway and is not entitled to exclusion or deportation hearing, immigration judge is without authority to consider renewed application for asylum. *In re Waldei (1984, BIA) 19 I & N Dec 189.*

72. Immigrants not in possession of valid documents

Upon de novo review of deportation order of immigrant alien not in possession of valid unexpired immigrant visa, alien has burden of proof pursuant to INA § 291 [*8 USCS § 1361]* to show time, place, and manner of entry into U.S. where government's allegation is that alien entered country without valid visa, or other valid authorization; alien fails to carry burden imposed by INA § 291 where she presents no evidence as to legal entry into country. *Veneracion v Immigration & Naturalization Service (1986, CA9) 791 F2d 778.*

Alien who was admitted to United States as a nonimmigrant student after commuting between Mexico and a residence in Texas and who entered U.S. to resume studies did not rebut statutory presumption of intending immigrant status, and thus, alien was excludable at time of entry under former *8 USCS § 1182*(a)(20) because at time of his application for admission to the United States, he did not have a valid immigrant visa. *Kabongo v Immigration & Naturalization Service (1988, CA6) 837 F2d 753,* cert den *(1988) 488 US 982, 102 L Ed 2d 564, 109 S Ct 533.*

Passport issued by World Service Authority, organization formed to promote world citizenship, fails to qualify as one of documents required by *8 USCS § 1182. Davis v District Director, Immigration & Naturalization Service (1979, DC Dist Col) 481 F Supp 1178.*

Alien who never made entry into United States and who is not in possession of valid entry document is properly subject to exclusion, determined in exclusion hearing. *Edmond v Nelson (1983, ED La) 575 F Supp 532.*

Alien is excludable under former *8 USCS § 1182*(a)(20) as immigrant not in possession of valid documents, where consul's knowledge of true facts would have required finding that applicant was ineligible to receive visa and concealment of those facts from consul resulted in procurement of visa which was not valid. *In re Vivas (1977, BIA) 16 I & N Dec 68.*

73. --Departure and re-entry

Alien's brief departure and return to United States did not constitute entry so as to subject alien to exclusion proceedings where alien's grant of advance parole status to leave United States to visit sick child abroad was subsequently revoked; alien is entitled to deportation proceedings where departure was innocent, casual and brief. *Siverts v Craig (1985, DC Hawaii) 602 F Supp 50.*

Petition for writ of habeas corpus seeking judicial review of BIA decision affirming final order of exclusion under INA § 212(a)(20) [former *8 USCS § 1182*(a)(20)] for lack of valid entry document was denied on ground that substantial evidence supported findings that alien had relinquished permanent resident status, and that her annual 10-11 month visits to Philippines over 9-year span, to care for aged and ill parents, were not temporary absences abroad, since alien's visits to Philippines were not for relatively short periods of time fixed by some early event, and would not terminate upon occurrence of event having reasonable possibility of occurring within relatively short period of time. *Angeles v District Director, INS (1990, DC Md) 729 F Supp 479.*

Alien who, while absent from United States, traveled to Soviet Union and North Vietnam in violation of restrictions imposed by regulation was not

entitled to reenter United States on presentation of form I-151 and was properly excluded under former *8 USCS § 1182*(a)(20) as not being in possession of valid documentation. *In re Hemblen (1974, BIA) 14 I & N Dec 739.*

Immigrant child who does not possess valid unexpired visa required under former *8 USCS § 1182*(a)(20) may be excluded from United States, in that voluntary and intended abandonment of lawful permanent resident status by parent of such minor child who departs United States in custody and control of such parent will be imputed to child, who will also be deemed to have abandoned his lawful permanent resident status. *In re Zamora (1980, BIA) 17 I & N Dec 395.*

Aliens accorded status as lawful permanent residents, who left country and were subsequently convicted of re-entering without inspection and who later left again and re-entered for purpose of seeking readmission as lawful permanent residents, on presentation of alien registration receipt cards but without valid immigrant visas, are not deportable under former *8 USCS § 1251*(a)(1) as aliens excludable under former § 1182(a)(20) at time of entry, since status of lawful permanent resident who enters United States without inspection terminates only when adjudication of his deportability becomes final in administrative proceedings. *In re Gunaydin (1982, BIA) 18 I & N Dec 326.*

Canadian citizen admitted into United States as nonimmigrant intra-company transferee and who remained in such status until he began his own manufacturing business in United States and who went into Mexico on casual visit effected "entry" into United States upon re-entry into United States and is excludable entry for lack of valid immigrant visa since he intended to reside in United States permanently. *In re Mundell (1983, BIA) 18 I & N Dec 467.*

74. --Particular circumstances

Native-born American citizen lost his American citizenship by virtue of his service in Cuban armed forces and became alien in 1959 at time expatriation acts were committed, not at time his alienage was judicially determined, and, as immigrant, having entered United States without documentation required of alien immigrants, was, on that ground, subject to deportation under former *8 USCS §§ 1182*(a)(20) and 1251(a)(1). *United States ex rel. Marks v Esperdy (1963, CA2 NY) 315 F2d 673,* affd *(1964) 377 US 214, 12 L Ed 2d 292, 84 S Ct 1224,* reh den *(1964) 377 US 1010, 12 L Ed 2d 1059, 84 S Ct 1904.*

District Court's denial of alien's petition for writ of habeas corpus was reversed and case was remanded to IJ for new hearing in which alien would bear burden of proving that marriage was void under Filipino law because marriage ceremony occurred before marriage license was issued, and thus alien's statement on application for second preference visa that she was unmarried was truthful, and she should not be excluded under former *8 USCS § 1182*(a)(19) for procuring visa by means of material misrepresentation or under § 1182(a)(20) for failure to be in possession of valid visa; District Court erred in ignoring BIA's rationale for affirming IJ's order of exclusion, based solely on ground that alien was married, and substituting its own rationale, that alien falsely represented that she had no children; although ordinary remedy would be remand to District Court to review ground of exclusion cited by INS, case was remanded to IJ for new hearing because: (1) alien had difficulty communicating in English; (2) alien was not represented by counsel until appearance before BIA; (3) INS violated 8 CFR § 3.30 by failing to serve alien with investigator's report and marital documents until final hearing before IJ, thus depriving alien of fair opportunity to rebut evidence therein; and (4) of severe consequences of exclusion. *Mayo v Schiltgen (1990, CA8 Minn) 921 F2d 177.*

An alien was deportable under INA § 212(a)(7)(A)(i)(I) [former *8 USCS § 1182*(a)(7)(A)(i)(I)] for entering the U.S. without a valid immigration document

where the alien's status as a lawful permanent resident under INA § 101(a)(20) [*8 USCS § 1101*(a)(20)] had "changed" (i.e., terminated) upon entry of an administratively final order of deportation, and thus the alien's immigrant visa was invalid. *Perez-Rodriguez v INS (1993, CA7) 3 F3d 1074.*

Alien who, in 1954, procured judicial decree that he was United States citizen, which decree was annulled on ground of fraud in 1966, could not be deported as alien not in possession of valid visa with respect to entry made during period decree was still in effect. *In re Loo (1969, BIA) 13 I & N Dec 182.*

Misrepresentation to consular officer concerning alien's marriage to U.S. citizen had no bearing on deportability under former *8 USCS § 1182*(a)(20) as immigrant not in possession of valid documents where alien received his nonquota immigrant classification as native of Western Hemisphere, not as spouse of U.S. citizen, and alien's deportability on § 1182(a)(20) charge was not established. *In re Villagomez (1975, BIA) 15 I & N Dec 528.*

Alien, who had been admitted to United States for permanent residence in possession of immigrant visa issued on basis of marriage to U.S. citizen, did not have valid immigrant visa and was excludable under former *8 USCS § 1182*(a)(20) where he had ceased living with his wife shortly after marriage and was separated from her at time he obtained visa and was admitted to United States, since he did not have viable marriage at time of visa application. *In re Sosa (1976, BIA) 15 I & N Dec 572* (ovrld in part on other grounds by *In re Boromand (1980, BIA) 17 I & N Dec 450).*

Aliens who have failed to establish entitlement to status as F-1 students, because attending nonapproved school, or as B-2 visitors, because in United States for purpose of study, or as nonimmigrants under any other classification set forth in *8 USCS § 1101,* are properly excludable as immigrants without requisite travel or entry documents rather than as nonimmigrants not in possession of necessary documents; whenever right of alien to particular nonimmigrant classification is questioned by Service, *8 USCS §§ 1101* and 1184 may mandate finding that alien is immigrant. *In re Healy (1979, BIA) 17 I & N Dec 22.*

Immigration judge did not abuse discretion in finding alien was excludable under *8 USCS § 1182* as immigrant not in possession of valid documents, where alien, who entered United States on student visa to attend University of Tennessee, moved to California and accepted full time employment as machinist, even though alien allegedly only moved and became employed because no longer able to receive money from Iran to attend college; instruction by Commissioner of Immigration to field offices to give sympathetic consideration to Iranian students, due to changed conditions in that country, does not preclude immigration judge from disposing of exclusion case in manner which he feels is appropriate. *In re Niayesh (1980, BIA) 17 I & N Dec 231.*

Immigration judge properly found immigrant excludable under former *8 USCS § 1182*(a)(20), notwithstanding immigrant's claim that she had effected entry into United States and should be placed in deportation proceedings instead, where she established physical presence in country but not that she actually and intentionally evaded inspection and was free from restraint, as is required for "entry" within meaning of § 1101(a)(13). *In re Phelisna (1982, BIA) 18 I & N Dec 272.*

75. Nonimmigrants not in possession of documents

Those aliens who lack valid documentation which statute contemplates are subject to exclusion and once preliminarily determined to be excludable may be held in detention; detention for further inquiry is not tantamount to command

that aliens be held in quarantine pending ultimate resolution of debarment proceedings against them; detention is not inescapable corollary of exclusion proceedings; scope of Attorney General's parole authority is close to plenary policy embodied in 8 CFR §§ 235.3, 212.5 and calls for detention of undocumented and fraudulently documented aliens, and makes allowance for parole only under carefully circumscribed circumstances; parole regulations are valid on their face and rationally relate to accomplishment of INS's legitimate mission. *Amanullah v Nelson (1987, CA1 Mass) 811 F2d 1.*

It does not appear that determination of fraud is necessary in order to find that nonimmigrant visa is invalid under former *8 USCS § 1182*(a)(26), and refusal to grant change of nonimmigrant status under *8 USCS § 1258* would be upheld where (1) aliens' obtaining visas as tourists was pretext and their original intent was to become students, and (2) aliens were not properly documented as students at time of entry and thus were inadmissible under former *8 USCS § 1182*(a)(26). *Lun Kwai Tsui v Attorney Gen. of United States (1978, DC Dist Col) 445 F Supp 832.*

Passport which did not state alien's identity and correct nationality, in that alien had procured birth certificate in name of another and represented himself to be that other in obtaining passport, was not valid passport as defined in *8 USCS § 1101*(a)(30), and alien would be excludable under former *8 USCS § 1182*(a)(26) as nonimmigrant not in possession of valid passport. *In re Sarkissian (1962, BIA) 10 I & N Dec 109.*

Aliens who have failed to establish entitlement to status as F-1 students, because attending nonapproved school, or as B-2 visitors, because in United States for purpose of study, or as nonimmigrants under any other classification set forth in *8 USCS § 1101,* are properly excludable as immigrants without requisite travel or entry documents rather than as nonimmigrants not in possession of necessary documents; whenever right of alien to particular nonimmigrant classification is questioned by Service, *8 USCS §§ 1101* and 1184 may mandate finding that alien is immigrant. *In re Healy (1979, BIA) 17 I & N Dec 22.*

Application for admission into United States is continuing application, and alien's admissibility is determined on basis of law and facts existing at time application is finally considered; applicant is inadmissible as nonimmigrant student when at time application is considered applicant lacks passport valid for at least next 6 months as required by regulation. *In re Kazemi (1984, BIA) 19 I & N Dec 49.*

76. Previously removed aliens

Alien who was ordered deported for making entry without inspection and who, while appeal from deportation order was pending, was subsequently apprehended smuggling aliens across border, was excludable as alien previously "arrested and deported," notwithstanding pendency of appeal, since alien's departure from country resulted in both finalization of deportation order and its effectuation. *Solis-Davila v Immigration & Naturalization Service (1972, CA5) 456 F2d 424.*

Under former *8 USCS § 1182*(a)(17), alien is not excluded from admission into United States if deportation occurred more than 5 years prior to re-entry; *8 USCS § 1182* does not modify *8 USCS § 1326* which provides criminal penalty for illegal re-entry, and therefore previously deported alien who neither obtained visa nor received permission of attorney general to enter despite right to do so is properly convicted of violating *8 USCS § 1326. United States v Bernal-Gallegos (1984, CA5 Tex) 726 F2d 187.*

Alien, who has been arrested and deported and who is subsequently indicted in United States, and who does not seek application for admission to United States

to appear at indictment, is fugitive from justice and is not entitled to contest civil forfeiture proceeding while remaining fugitive. *United States v Forty-Five Thousand Nine Hundred Forty Dollars ($ 45,940) in United States Currency (1984, CA2 NY) 739 F2d 792.*

Compact of Free Association between United States and Palau (which appears as *48 USCS § 1931* note) does not immunize or exempt Palauans from complying with provisions of *8 USCS § 1326*(a) and former *8 USCS § 1182*(a)(16) and (17); thus, individual who is deported must obtain Attorney General's permission prior to reentry. *United States v Terrence (1997, CA9 Guam) 132 F3d 1291, 97 CDOS 9763, 97* Daily Journal DAR 15651.

Alien who was excluded at one port of entry on his return after temporary visit to Canada, and who thereupon re-entered Canada and entered United States at another port without disclosing what had occurred was properly excluded. *United States ex rel. Greifenhaun v Day (1931, DC NY) 49 F2d 805.*

Alien who applied for and was removed pursuant to provisions of Immigration Act of 1917 and who subsequently received nonquota immigrant visa without disclosing his prior removal and without obtaining permission of Attorney General was inadmissible under former *8 USCS § 1182*(a)(17) governing exclusion of previously deported or removed aliens. *In re Morcos (1966, BIA) 11 I & N Dec 740.*

Deportation after expulsion proceedings has different attributes and consequences from deportation after exclusion; deportation after expulsion proceedings erects lifelong bar to admissibility unless permission to reapply for admission is obtained from Attorney General, who may grant or deny such permission in his discretion, whereas deportation after exclusion creates temporary bar, lasting for year and then losing all effect automatically, without necessity for application or permission of any kind; thus express language of statute, authorizing reapplication for admission after one year, as well as intent that there then be reconsideration of handicaps which brought about original exclusion and deportation, taken in conjunction with statutory requirement of hearing in exclusion proceedings, rules out possibility that excludability can be summarily determined by mere introduction at hearing of prior decision finding applicants excludable. *In re Hinojosa-Pena (1967, BIA) 12 I & N Dec 462.*

Revocation of conditional landing permit and alien's removal from United States constitutes arrest and deportation pursuant to former *8 USCS § 1182*(a)(17); deportability is established by alien's subsequent admission as lawful permanent resident 8 years later without obtaining attorney general's consent to reapply. *In re Di Santillo (1983, BIA) 18 I & N Dec 407.*

Alien who was deported from United States under assumed name and who subsequently re-entered United States by presenting Alien Registration Receipt Card in her true name, without having applied for permission to reapply for admission after deportation, was excludable at entry because alien automatically lost her lawful permanent resident status when the final order of deportation was entered; therefore, order specifically rescinding alien's lawful permanent resident status was unnecessary. *In re Roman (1988, BIA) 19 I & N Dec 855.*

Application by alien under either former *8 USCS § 1182*(a)(16) or former § 1182(a)(17) for permission to reapply for admission into United States after deportation requires Attorney General to consider (1) alien's moral character, but record of immigration violations standing alone will not conclusively support finding of lack of good moral character, (2) recency of deportation, where there is finding of poor moral character based on moral turpitude in conduct and attitude of alien which evinces callous conscience, in which case there must be measurable reformation of character over period of time in order

to properly assess alien's ability to integrate into our society, however, in all other instances where cause for deportation has been removed and person now appears eligible for issuance of visa, time factor should not be considered, and (3) that former *8 USCS § 1182*(a)(16) and former § 1182(a)(17) should be interpreted as remedial relief for previously deported or excluded aliens, rather than as punitive provision of statute. *In re Lee (1978, Comr) 17 I & N Dec 275.*

77. --Consent to reapplication

Considering alien's long record of immigration violations, his irresponsible, if not bigamous, marital history, and his many false statements and misrepresentations, special inquiry officer did not abuse his discretion in denying application for permission to reapply for admission into United States nunc pro tunc. *Murillo-Aguilera v Rosenberg (1965, CA9 Cal) 351 F2d 289.*

In proceeding to deport alien as one excludable under provisions of former *8 USCS § 1182*(a)(17) at time of entry, burden was upon alien to show that he had received requisite permission to reapply, not upon government to show its absence. *Solis-Davila v Immigration & Naturalization Service (1972, CA5) 456 F2d 424.*

Approval by INS of alien's processed spouse preference petition (I-130) does not render alien eligible for adjustment of status within United States; he must first seek admission into United States by applying for visa at United States Consulate abroad, which could require waiver from Attorney General where order of deportation was already outstanding against alien (former *8 USCS § 1182*(a)(17)). *Der-Rong Chour v Immigration & Naturalization Service (1978, CA2 NY) 578 F2d 464,* cert den *(1979) 440 US 980, 60 L Ed 2d 239, 99 S Ct 1786.*

Alien who had been previously deported and was excludable at time of entry may not re-enter United States without consent of Attorney General; 8 CFR § 212.2(a) is not inconsistent with congressional intent expressed in INA § 212(a)(17) [former *8 USCS § 1182*(a)(17)], rather regulation at most adds requirement not present in statute that alien be absent from U.S. for 5 successive years before application, making it more difficult for previously deported alien to gain readjustment of status. *Valdez-Gaona v Immigration & Naturalization Service (1987, CA5) 817 F2d 1164.*

To obtain conviction under *8 USCS § 1326,* Government must show (1) that defendant is alien who was previously arrested and deported, (2) that alien reentered U.S. voluntarily, and (3) that alien failed to secure express permission of Attorney General to return; amendment to former *8 USCS § 1182*(a)(17) (presently *8 USCS § 1181*(a)(6)(B)) to establish only 5-year period following deportation during which alien is ineligible to receive visa without consent of Attorney General does not, by implication, amend § 1326 to require additional element of proof that Government show alien entered U.S. without visa, rather former § 1182(a)(17), presently § 1182(a)(6)(B), provides defense if alien can demonstrate issuance of visa in accordance with statute, but burden of establishing defense is on alien; thus, alien who was arrested and deported in 1983 and in 1989 was again arrested for illegally entering U.S. and who did not demonstrate possession of visa did not meet burden of establishing defense and evidence furnished by Government was sufficient to uphold conviction. *United States v Joya-Martinez (1991, CA4 Va) 947 F2d 1141.*

An immigration judge and the BIA lacked the authority to grant an alien retroactive permission to re-enter the U.S. following his deportation where there were 2 grounds of deportability and thus such a grant would not eliminate the only ground of deportability. *Perez-Rodriguez v INS (1993, CA7) 3 F3d 1074.*

Compact of Free Association between United States and Palau (which appears as

48 USCS § 1931 note) does not immunize or exempt Palauans from complying with provisions of *8 USCS § 1326*(a) and former *8 USCS § 1182*(a)(16) and (17); thus, individual who is deported must obtain Attorney General's permission prior to reentry. *United States v Terrence (1997, CA9 Guam) 132 F3d 1291, 97 CDOS 9763, 97* Daily Journal DAR 15651.

Alien seeking re-entry to United States after involuntary deportation must have remained outside United States for 5 successive years to avoid obtaining Attorney General's consent to re-enter; 8 CFR § 212.2 is a valid INS regulation consistent with INA § 212(a)(17) [former *8 USCS § 1182*(a)(17)]. *Estrada-Figueroa v Nelson (1985, SD Cal) 611 F Supp 576.*

Alien's application for permission from Attorney General to reapply for admission into United States pursuant to INA § 212(a)(17) [former *8 USCS § 1182*(a)(17)] properly denied where district director after considering alien's basis for deportation, recency of deportation, length of legal residence in U.S., moral character, respect for law and order, evidence of alien's reformation and rehabilitation, family responsibilities, hardship to alien and others, and need for alien's services in U.S. found that only factor in alien's favor was that alien was spouse of permanent resident; alien's continuing violation of immigration laws is a substantial adverse factor weighing against granting alien permission to reapply. *Garay v Immigration & Naturalization Service (1985, ND Cal) 620 F Supp 11.*

Alien would be granted nunc pro tunc permission to reapply for admission to United States prior to receipt of his immigration visa, as provided in former *8 USCS § 1182*(a)(17), where there appeared to be no adverse factors against applicant, other than failure to indicate whether or not he had previously been deported, he did not work in United States from 1950 until he was afforded immigrant visa, it did not appear that he entered United States at all from 1950 until he obtained border crossing card in 1959, and it had been in excess of 25 years since applicant was previously deported. *In re Martinez (1976, BIA) 15 I & N Dec 563.*

Retroactive permission to apply for admission to United States after prior deportation was properly denied where granting of such relief would not eliminate alien's other ground of deportability, not being in possession of valid immigrant visa or other entry document. *In re Roman (1988, BIA) 19 I & N Dec 855.*

Appeal of order of exclusion is not rendered moot by alien's departure from U.S. because resolution adverse to alien would still have legal consequences, since under INA § 212(a)(16) [former *8 USCS § 1182*(a)(16)], alien would have to have Attorney General's consent to reapply for admission within one year of exclusion and deportation. *In re Keyte (1990, BIA) 20 I & N Dec 158.*

Alien may reapply for admission under former *8 USCS § 1182*(a)(17), where alien is beneficiary of approved visa petition filed under *8 USCS § 1153*(a)(6) by United States employer who is in need of alien's service and is suffering hardship due to inability to fill job which was unlawfully offered alien, even though alien was unlawfully in United States several times previously and each time was granted privilege of voluntary departure under *8 USCS § 1254*(e), since finding of good moral character is required for permission to voluntarily depart, and record therefore will not sustain finding that these immigration violations rendered alien person of bad moral character. *In re Carbajal (1978, Comr) 17 I & N Dec 272.*

78. Aliens ineligible for citizenship

Alien who first entered United States in 1941, filed application for relief from military service in 1943, and was admitted as permanent resident in 1949,

was ineligible for citizenship and deportable irrespective of fact that, on presentation of his application for pre-examination in 1948, attorney general had found that he was not ineligible for citizenship or admission to permanent residence. *Mannerfrid v Brownell (1956) 99 US App DC 171, 238 F2d 32,* cert den *(1957) 352 US 1017, 1 L Ed 2d 550, 77 S Ct 560.*

Exclusionary provision of former *8 USCS § 1182*(a)(22) governing aliens ineligible to citizenship retroactive. *Barber v Rietmann (1957, CA9 Cal) 248 F2d 118,* cert den *(1958) 355 US 923, 2 L Ed 2d 353, 78 S Ct 365.*

Former 8 USCS § 1182(a)(22) governing exclusion of aliens ineligible to citizenship is applicable to conduct of American citizens who only subsequently lose their citizenship. *Jolley v Immigration & Naturalization Service (1971, CA5) 441 F2d 1245,* cert den *(1971) 404 US 946, 30 L Ed 2d 262, 92 S Ct 302.*

Alien who invokes treaty between U.S. and Argentina which renders him exempt from military service may not obtain U.S. citizenship despite claim he was not aware of consequences of seeking exemption. *Petition of Javkin (1980, ND Cal) 500 F Supp 711.*

Alien who applied for and was granted exemption from service in Armed Forces in 1954 was ineligible for citizenship and excludable under former *8 USCS § 1182*(a)(22), governing exclusion of persons ineligible to citizenship, notwithstanding that he subsequently requested induction in 1956 and served honorably for two years. *In re H-- (1960, BIA) 9 I & N Dec 106.*

Alien who applied for relief from military service pursuant to treaty, but who was continued in classification 1-A although processing of induction order was postponed indefinitely, received something less than permanent exemption which alone constitutes effective relief from military service, and alien was not ineligible to citizenship and not excludable under *8 USCS § 1182*(a)(22). *In re Mincheff (1970, BIA) 13 I & N Dec 715.*

79. Persons leaving U.S. to evade military service

Exclusionary provision of former *8 USCS § 1182*(a)(22) governing persons evading military service is retroactive. *Barber v Rietmann (1957, CA9 Cal) 248 F2d 118,* cert den *(1958) 355 US 923, 2 L Ed 2d 353, 78 S Ct 365.*

Immigrant with permanent residence who left United States briefly, after being ordered to report for induction into Armed Forces, and returned as nonimmigrant visitor, not subject to draft, was excludable under *8 USCS § 1182*(a)(22) as person who departed from United States in order to avoid or evade military service. *Riva v Mitchell (1972, CA3 NJ) 460 F2d 1121,* cert den *(1973) 411 US 932, 36 L Ed 2d 391, 93 S Ct 1898.*

Alien who departed from jurisdiction of United States for sole purpose of evading or avoiding military service in Armed Forces of United States was excludable under former *8 USCS § 1182*(a)(22), notwithstanding that at time he departed from United States his eligibility for induction had not been determined and induction was not imminent. *In re V---- (1954, BIA) 6 I & N Dec 186.*

Alien who presented himself for readmission to United States as returning lawful permanent resident on or before June 1, 1978, would be within terms of pardon contained in Proclamation of January 21, 1977, as implemented by Executive Order 11967, granting pardon to persons who had committed certain violations of Military Selective Service Act *(50 USCS App §§ 451* et seq.) between August 4, 1964, and March 28, 1973; alien would otherwise have been excludable under former *8 USCS § 1182*(a)(22) as having left United States to evade military service. *In re Rahman (1978, BIA) 16 I & N Dec 579.*

80. Aliens who are inimical to nation's security

Congress did not mean to employ term "affiliation" in broad, fluid sense which would visit hardship of deportation on alien for slight or insubstantial reasons, but it did desire to have country rid of those aliens who embraced political faith of force and violence; affiliation imports less than membership but more than sympathy; it includes those who contribute money or anything of value to organization which believes in, advises, advocates, or teaches overthrow of our government by force or violence; and it means something more than cooperation with subversive groups for attainment of wholly lawful objectives. *Bridges v Wixon (1945) 326 US 135, 89 L Ed 2103, 65 S Ct 1443.*

In proceedings where alien is excluded without hearing under INA § 235(c) [former *8 USCS § 1225*(c)], alien regarded as danger to security of United States is not entitled to substantive right of asylum and to asylum hearing; decision excluding alien regarded as danger to national security must specify that alien presents danger to security of United States. *Azzouka v Sava (1985, CA2 NY) 777 F2d 68,* cert den *(1986) 479 US 830, 93 L Ed 2d 62, 107 S Ct 115.*

Alien was properly rendered excludable from United States as danger to people and security based on confidential information, disclosure of which would be prejudicial to public interest, safety, and security of U. S. where public record revealed that alien was member of Palestinian Liberation Organization for at least 5 years, upon attempted entry into U. S. alien had 4 passports from 3 countries, 2 of which were fraudulent, and had fraudulent identity card; exclusion finding under INA § 235(c) [former *8 USCS § 1225*(c)] is subject to only limited review by District Court and under circumstances finding is sufficient to justify denial of withholding of deportation from alien regarded as danger to security of United States. *Azzouka v Meese (1987, CA2 NY) 820 F2d 585.*

Former 8 USCS § 1182(a)(28)(F) is not limited to anarchists, since such interpretation would make it redundant, in light of subparagraph (A). *Adams v Baker (1990, CA1 Mass) 909 F2d 643.*

Assistance in persecution is an independent basis for deportation, and assistance may be inferred from the general nature of the person's role in World War II; therefore, the atrocities committed by a unit may be attributed to the individual based on his or her membership and seeming participation. *Kalejs v INS (1993, CA7) 10 F3d 441,* reh den (1993, CA7) *1993 US App LEXIS 34102* and cert den *(1994) 510 US 1196, 127 L Ed 2d 656, 114 S Ct 1305.*

8 USCS § 1182(a)(3)(A)(i) is not unconstitutionally vague. *Beslic v INS (2001, CA7) 265 F3d 568.*

Congress intended foreign policy concerns to rank among national interests whose protection would justify exclusion of alien under INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)]; where record is inadequately developed court remanded question whether INA § 212(a)(27) allows exclusion on basis of alien's proposed activities in US, or on basis of entry or presence alone; and restrictions on INA § 212(a)(28) must not be read so as to rob INA § 212(a)(27) of its independent scope and meaning, therefore if alien is member of proscribed organization so that INA § 212(a)(28) applies government may bypass that provision and proceed under INA § 212(a)(27) only if reason for threat to public is independent of fact of membership in or affiliation with proscribed organization; if government could use INA § 212(a)(27) to exclude aliens whose entry might threaten foreign policy objectives simply because of their membership in Communist organizations, then INA § 212(a)(28) would be superfluous and *22 USCS § 2691* would be nullified. *Abourezk v Reagan (1986, App DC) 251 US App DC 355, 785 F2d 1043,* affd *(1987) 484 US 1, 98 L Ed 2d 1, 108 S Ct 252.*

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INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)] does not permit exclusion of alien based solely on determination by Department of State (DOS) that alien's mere entry or presence in U.S., rather than alien's anticipated activities after entry, would prejudice American interests, and thus: (1) nonimmigrant visa application of member of Federation of Cuban Women, which DOS found to be instrumentality of Communist Party of Cuba, was rendered moot by issuance of Presidential Proclamation suspending entry as nonimmigrants of officers or employees of Cuban Government or Communist Party of Cuba, which constitutes independent intervening cause for future exclusions; (2) nonimmigrant visa application of former member of Italian Senate who was participant in World Peace Council activities was not rendered moot by passage of Moynihan-Frank Amendment, which prohibits exclusion of aliens because of beliefs, statements, or associations which, if engaged in by U.S. citizen in U.S., would be protected by U.S. Constitution, since such Amendment does not bear on entry versus activity issue, and voluntary cessation of challenged practice by DOS does not in and of itself moot case since DOS could renew it; but (3) trial court exceeded its authority in ordering DOS to issue visas, since courts are without authority to displace consular officers in issuance of visas, and was ordered to recast injunction to provide that alien may not be denied entry under § 212(a)(27) on grounds inconsistent with judicial interpretation of statute, but DOS is not precluded from denying entry on grounds arising subsequent to time initial application was denied. *City of New York v Baker (1989, App DC) 278 US App DC 405, 878 F2d 507,* reh den (1989, App DC) *281 US App DC 121, 888 F2d 134.*

Exclusion under former *8 USCS § 1225*(c) of Libyan national seeking admission to continue his studies at private school of aeronautics as specialist in spare parts for aircraft pursuant to contract between school and Libyan National Airline, is justified on grounds of finding of inadmissibilty under § 1182(27), where Government shows by classified information that Libyan policies and objectives furthered by availability of aircraft are threat to public interest and welfare, if not safety or security of United States. *El-Werfalli v Smith (1982, SD NY) 547 F Supp 152.*

Alien excludable under INA § 212(a)(28) [former *8 USCS § 1182*(a)(28)] may not be excluded under INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)]; consequently membership in organization proscribed under subsection (28) is not, in itself, facially legitimate and bona fide reason for exclusion under subsection (27). *Allende v Shultz (1985, DC Mass) 605 F Supp 1220.*

In action for declaratory and injunctive relief challenging defendant's refusal to grant temporary visa to alien wife of slain Chilean president on basis of INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)] plaintiffs' petition is

not mooted by government's grant of limited visa, where there is reasonable expectation that government will again exclude alien on basis of INA § (a)(27) without proffering legitimate and bona fide reason. *De Allende v Shultz (1985, DC Mass) 624 F Supp 1063.*

Petitioner for whom immediate relative-spouse visa petition was approved was without standing to challenge denial of husband's immigrant visa application on basis of constitutionality of INA § 212(a)(27), (28)(F) [former *8 USCS § 1182*(a)(27), (28)(F)] as applied to plaintiffs; consular determinations are beyond review of court and constitutional rights of citizen spouse are not violated by consul's denial of husband's application for visa. *Ben-Issa v Reagan (1986, WD Mich) 645 F Supp 1556.*

Although language of former *8 USCS § 1182*(a)(27) governing exclusion of aliens seeking entry to United States to engage in activities prejudicial to public interest or dangerous to country is broad enough to include persons others than subversives, Congress did not intend to include pacifists within its confines. *In re M---- (1953, BIA) 5 I & N Dec 248.*

Procedural provisions of subparagraph (I) of former *8 USCS § 1182*(a)(28), governing admission of members or affiliates of subversive organizations where such association was involuntary or necessary to obtain essentials of life, are not applicable to deportation cases, that is, American consular officer's finding of involuntary membership is not prerequisite to determination in deportation proceedings that alien was, in fact, admissible at time of entry notwithstanding former membership in proscribed organization; however, substantive provisions of subparagraph (I) set forth criteria for determining whether membership was voluntary or involuntary. *In re V---- (1960, BIA) 8 I & N Dec 554.*

81. --Affiliation with totalitarian organizations

Alien's membership in Communist Party was not excused under provisions of former *8 USCS § 1182*(a)(28)(I) governing admission of members or affiliates of subversive organizations where such association was involuntary or necessary to obtain essentials of life, notwithstanding his claim that Party membership was solely for purpose of gaining medical education, where alien was member of three Communist controlled organizations in addition to Party itself, not only carried membership card and paid dues but served as officer of two different Party units in which capacities he organized meetings, arranged for speakers, maintained records and collected dues of others, and it did not appear that attendance at University required membership in those organizations. *Langhammer v Hamilton (1961, CA1 Mass) 295 F2d 642.*

To establish that alien was member of Communist Party within meaning of § 212 of Immigration and Nationality Act of 1952 *(8 USCS § 1182),* allowing exclusion of aliens who are members or affiliates of Communist Party, government has burden of establishing by substantial evidence that alien had consciously committed himself to Communist Party by entering into affiliation which had political implications. *Berdo v Immigration & Naturalization Service (1970, CA6) 432 F2d 824.*

Hungarian alien who became member of Communist party to avoid deprivation and to secure economic benefit, who subsequently fought in the 1956 Revolution, and who would be subject to political persecution if he returned to Hungary could not be deported. *Berdo v Immigration & Naturalization Service (1970, CA6) 432 F2d 824.*

Membership in Communist Party as that phrase is used in *8 USCS § 1182* means that alien must have had "meaningful association" with Communist Party, not merely nominal association. *Firestone v Howerton (1982, CA9 Cal) 671 F2d 317.*

Mere entry or presence of an alien does not constitute an activity prejudicial to the public interest within the meaning of INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)]; and therefore, the exclusion may not be applied on the basis of a visa applicant's membership in and attendance at conferences of an organization which the Department of State has determined to be international front for the Communist Party of the Soviet Union where the Government does not allege that the applicant will engage in activities prejudicial to the public interest after entry; any contrary construction of INA § 212(d)(27) would render duplicative the provisions of INA § 212(a)(28) [former *8 USCS § 1182*(a)(28)]; literal reading of INA § 212(a)(27) requires that the denial of a visa must reflect a reasonable belief on the part of the Government that the alien would engage in activity prejudicial to the public interest rather than mere speechmaking and the interchange of ideas. *Allende v Shultz (1988, CA1 Mass) 845 F2d 1111.*

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Applications for declaratory and injunctive relief against INS and State Department with regard to Socialist Workers Party (SWP) as proscribed organization is without basis where INS removed SWP from list of proscribed organizations and has made no change in non-proscribed status; where no case is pending and INS has not taken adverse action on basis of SWP membership there is no justiciable issue presented to court and declaration that SWP membership can never be relevant cannot be granted; there is no controversy of concrete sort justifying declaratory or injunctive relief against State Department where there is no evidence of SWP membership being used as basis for denial of visa to foreigner. *Socialist Workers Party v Attorney Gen. of United States (1986, SD NY) 642 F Supp 1357.*

Information contained in INS' National Automated Immigration Lookout System (NAILS) which identifies aliens who have been determined to be excludable, including persons who are excludable under INA § 212(a)(27)-(29) [former *8 USCS § 1182*(a)(27)-(29)], because they are suspected of being affiliated with subversive or terrorist organizations, is subject to limited disclosure under Freedom of Information Act, *5 USCS § 552* (FOIA); exemption 7(C) of FOIA, which applies to information compiled for law enforcement purposes does not completely bar disclosure of information contained in NAILS Lookout Book because *5 USCS § 552*(b)(7)(C) permits agency to withhold document only when revelation could reasonably be expected to constitute unwarranted invasion of personal privacy, and in applying balancing test to determine whether invasion of privacy is unwarranted, public interest warrants disclosure of information about manner in which Government agency decides to exclude aliens, particularly where ideological grounds are involved, and exclusion process affects citizens' constitutional rights of freedom of speech and association; however, to protect

privacy interests of individuals named in NAILS Lookout Book and to protect them against adverse consequences from disclosure of fact that American government suspects them of being affiliated with terrorist organizations, INS is ordered to identify individuals excluded under former *8 USCS § 1182*(a)(27)-(29), only by occupation and country. *Lawyers Committee for Human Rights v INS (1989, SD NY) 721 F Supp 552,* reh den (1990, SD NY) *1990 US Dist LEXIS 6191.*

Alien came within exculpatory provisions of former *8 USCS § 1182*(a)(28)(I)(i) where his passive and quiescent membership in Yugoslavian communist youth organizations commenced when he was under 16 years of age and was for purpose of obtaining grade school or high school education; alien's membership was voluntary only in sense that it was necessary concomitant of attendance at grade school and high school and there was no evidence of any active participation by alien in any political Communist activities of the organization. *In re Pust (1965, BIA) 11 I & N Dec 228.*

Actions of alien, who was former member of Italian Communist Youth Federation, in making full disclosure to American Consul concerning his former membership, in offering his services to United States Government to combat communism, in making frequent statements to his circle of friends as to his anti-communist sentiments, and in giving lengthy testimony at hearing, amounted to being "actively opposed" to Communism and was entitled to be classified as defector under former *8 USCS § 1182*(a)(28)(I)(ii), allowing admission of prior members or affiliates of subversive organizations. *In re Galtieri (1968, BIA) 12 I & N Dec 778.*

Applicant for adjustment of status is not barred from such relief by virtue of membership in proscribed organization within meaning of INA § 212(a)(28)(C) [former *8 USCS § 1182*(a)(28)(C)], if membership was involuntary or otherwise comes within exceptions set forth in INA § 212(a)(28)(I)(i) [former *8 USCS § 1182*(a)(28)(I)(i)]; alien's membership in ZSL--United Peasants' Party in Poland was involuntary and did not render her ineligible for adjustment of status where membership was required for alien to obtain and keep employment in her field, and her wages were necessary to help support her family. Re Rusin (1989, BIA) I & N Int Dec No 3123.

82. --Terrorist activities

Petition for writ of habeas corpus by alien who had committed terrorist activities, both inside and outside U.S., against Castro government of Cuba, whose application for asylum and withholding of deportation was denied and who was ordered by Attorney General to be summarily excluded under INA § 235(c) [former *8 USCS § 1225*(c)] on ground that he posed threat to national security under INA § 212(a)(27)-(29) [former *8 USCS § 1182*(a)(27)-(29)], was denied, notwithstanding fact that Regional Commissioner and Commissioner of INS had determined that alien was not security risk. *Avila v Rivkind (1989, SD Fla) 724 F Supp 945.*

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Indefinite detention of inadmissible alien did not violate *8 USCS §§ 1182*(a)(7)(A)(i)(I) and 1231(a)(6), where Immigration and Naturalization Service

was unable to find country that would accept alien, and Attorney General did not abuse her discretion when determining that alien, who had admitted to associating with dangerous terrorists and extremists and had been convicted in Egypt of various crimes, was dangerous and flight risk. *In re Soliman (2001, ND Ala) 134 F Supp 2d 1238.*

83. Aiding other aliens to enter country illegally

Deportable alien who has knowingly and for gain aided another alien to enter United States illegally is not person of good moral character under *8 USCS §§ 1101*(f)(3) and former 1182(a)(31), and is therefore ineligible for voluntary departure under *8 USCS § 1254*(e). *Pimental-Navarro v Del Guercio (1958, CA9 Cal) 256 F2d 877.*

Applicant was smuggling aliens for gain in violation of section where smuggled aliens gave $ 200 to get papers, in addition to money for gas, and applicant was making trip for his own reasons. *In re Arthur (1978, BIA) 16 I & N Dec 558.*

1991 amendment to *8 USCS § 1182*(d)(11), which allowed discretionary waiver of inadmissibility for alien seeking admission or adjustment of status as immediate relative or family-sponsored immigrant, did not alter existing requirement of statute that lawful permanent resident may receive this waiver only if person he attempted to smuggle into U.S. was his spouse, parent, son or daughter. In re Compean-Guevara (1995, BIA) I & N Interim Dec No 3249.

84. Miscellaneous

Congressional exclusion from eligibility for suspension of deportation of exchange visitors admitted for graduate medical education and training is based on rational desire to ensure that exchange visitor program not become means of lowering, rather than raising, standard of medical care overseas; foreign physician's failure to receive passing grade in visa qualifying examination required under *8 USCS § 1182* to become eligible for immigrant visa precludes remand of case for determination whether foreign physician could obtain waiver of foreign residency requirement based upon exceptional hardship deportation might visit upon American-born children. *Newton v Immigration & Naturalization Service (1984, CA6) 736 F2d 336.*

Government need not present evidence of personal involvement in specific atrocities under Holtzman Amendment *(8 USCS § 1182*(a)(3)(E)). *Hammer v INS (1999, CA6) 195 F3d 836, 1999 FED App 381P.*

Requirements of Holtzman Amendment *(8 USCS § 1182*(a)(3)(E)) may be satisfied even in absence of eyewitness testimony that alien personally engaged in acts of brutality. *Hammer v INS (1999, CA6) 195 F3d 836, 1999 FED App 381P.*

Holtzman Amendment *(8 USCS § 1182*(a)(3)(E)) does not violate constitutional prohibition against bills of attainder. *Hammer v INS (1999, CA6) 195 F3d 836, 1999 FED App 381P.*

III. EXCEPTIONS AND WAIVERS

A. Alien Returning to Lawful Unrelinquished Domicile [Former *8 USCS § 1182*(c), (repealed)]

1. In General

85. Generally

The Court of Appeals may not substitute its own construction of INA § 212(c) [former *8 USCS § 1182*(c)] unless the BIA's interpretation is an unreasonable

construction of the statute it is charged with enforcing. *De Osorio v United States INS (1993, CA4) 10 F3d 1034.*

In exercising his or her responsibility, an immigration judge must determine whether to grant INA § 212(c) [former *8 USCS § 1182*(c)] relief based on all the facts and circumstances of a particular case, taking into account the social and humane considerations presented in an applicant's favor and balancing them against the adverse factors that evidence the applicant's undesirability as a permanent resident. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

Favorable considerations in determining whether or not to grant an INA § 212(c) [former *8 USCS § 1182*(c)] petition include, (1) family ties within the United States; (2) residence of long duration in the United States (particularly when residence began at a young age); hardship to the petitioner or petitioner's family if relief is not granted; (4) service in the United States armed forces; (5) a history of employment; (6) the existence of business or property ties; (7) evidence of value and service to the community; (8) proof of rehabilitation if a criminal record exists; (9) other evidence attesting to good character. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

Consideration to be weighed against the granting of an INA § 212(c) [former *8 USCS § 1182*(c)] petition include, (1) the nature and underlying circumstances of the exclusion or deportation ground at issue; (2) additional violations of the immigration laws; (3) the existence, seriousness, and recency of any criminal record; (4) other evidence of bad character or the undesirability of the applicant as a permanent resident. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

Where an INA § 212(c) [former *8 USCS § 1182*(c)] petitioner has committed a particularly grave criminal offense, he or she must make a heightened showing that his or her case presents unusual or outstanding equities to warrant discretionary relief. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

An alien's unwed parent status cannot be used to support a finding of lack of rehabilitation, nor is it otherwise a permissible basis for establishing bad character or undesirability as a permanent resident, and thus, an immigration judge abused his discretion in relying on such factors in denying an alien's petition for relief under INA § 212(c) [former *8 USCS § 1182*(c)]. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

Private sexual conduct between consenting adults cannot be considered as a negative factor in an INS proceeding, at least absent specific congressional authorization. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

A family relationship is to be counted as a positive factor in determining whether to grant INA § 212(c) [former *8 USCS § 1182*(c)] relief, and under INA §

101(b) [*8 USCS § 1101*(b)], the relationship between parents and their "illegitimate" children is such a relationship; an immigration judge's decision to treat as an adverse factor the fact that an alien is a parent of "illegitimate" children was thus wholly inconsistent with Congressional and BIA policy. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

The fact that the mother of an alien's children was unwilling to enter into a formal state of matrimony with the alien was wholly irrelevant to any determination as to the alien's character and to any other matter pertinent to his application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)]. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

"Lawful domicile" under INA § 212(c) [*8 USCS § 1182*(c)] means at least the simultaneous existence of lawful physical presence in the U.S. and lawful intent to remain in the U.S. indefinitely; time spent in the U.S. on a B-2 visitor visa does not count toward the seven years of lawful domicile required for relief, and thus an alien who entered the U.S. on a B-2 visitor visa in 1978 and became a lawful permanent resident in 1982 was not eligible for § 212(c) relief from deportation where the order to show cause was issued in 1987 and the alien's lawful domicile in the U.S. did not begin until 1982. *Melian v INS (1993, CA11) 987 F2d 1521, 7* FLW Fed C 212.

In absence of express or implied Congressional intention to contrary, BIA's adoption of standard that conclusively defines family ties under INA § 212(c) (former *8 USCS § 1182*(c)) by reference to legal classifications that vary from state to state is not rationally related to Immigration and Naturalization Act's purpose and is not permissible interpretation of Act; consequently, BIA erred as matter of law in denying alien's petition for waiver of deportation on ground that alien had no substantial family ties to United States because man with whom she lived could not be considered her husband because California did not recognize common-law marriages. *Kahn v INS (1994, CA9) 20 F3d 960, 94 CDOS 2071, 94 Daily Journal DAR 3902, amd (1994, CA9) 36 F3d 1412, 94 CDOS 7392, 94* Daily Journal DAR 13593.

In determining whether to grant equitable relief of waiver of deportation, BIA must consider following positive factors alien may present: presence of family in U.S.; length of residence in U.S.; entry into U.S. at young age; hardship to alien or his family if deported; history of employment; service in U.S. military; property or business ties; community service; evidence of rehabilitation; and any other evidence demonstrating positive character. *Hajiani-Niroumand v INS (1994, CA8) 26 F3d 832.*

In determining whether to grant equitable relief of waiver of deportation, BIA must consider following negative factors alien may present: nature of crime which led to deportation proceeding, other immigration violations, other criminal history and any other evidence demonstrating negative character. *Hajiani-Niroumand v INS (1994, CA8) 26 F3d 832.*

Former 8 USCS § 1182(c), which provides that discretionary relief from deportation may be granted to aliens lawfully admitted for permanent residence who temporarily travel abroad and return to lawful unrelinquished domicile of seven consecutive years, is applicable to deportation proceedings as well as exclusion proceedings. *Raya-Ledesma v INS (1994, CA9) 55 F3d 418, 95* Daily Journal DAR 6086.

Lawful unrelinquished domicile may begin when alien is granted temporary residence status under *SAW Program of IRCA. White v INS (1996, CA5) 75 F3d 213.*

It is violation of alien's constitutional right to equal protection to allow alien who was convicted of crime and deported to apply to for waiver of excludability under *8 USCS § 1182*(h) upon his return to U.S. while not allowing alien similarly situated but who has not departed U.S. to apply for such waiver, since this distinction is not rationally related to any government purpose. *Yeung v INS (1996, CA11) 76 F3d 337.*

Relief provided in former *8 USCS § 1182*(c) continues to be available for deportable aliens whose requisite criminal convictions predated AEDPA if, and only if, alien actually and reasonably relied on availability of such relief when he pled guilty to or did not contest criminal charges. *Mattis v Reno (2000, CA1 Mass) 212 F3d 31.*

Congress intended that repeal of *8 USCS § 1182*(c) apply to all proceedings commenced after 4/1/97; as general rule, repeal is not impermissibly retroactive. *Richards-Diaz v Fasano (2000, CA9 Cal) 233 F3d 1160, 2000 CDOS 9244, 2000* Daily Journal DAR 12251.

Relief in form of waiver of deportation provided in former *8 USCS § 1182*(c) cannot be extended to alien deportable for entry without inspection; denial of eligibility for such relief does not violate alien's equal protection rights. *Farquharson v United States AG (2001, CA11 Fla) 246 F3d 1317, 14* FLW Fed C 584.

In exclusion cases in which returning alien has colorable claim to permanent resident status, burden of proof is on INS to show by clear, unequivocal, and convincing evidence that alien's lawful permanent resident status has changed, or that alien has abandoned such status. *Angeles v District Director, INS (1990, DC Md) 729 F Supp 479.*

If former *8 USCS § 1182*(c) is exercised to waive ground of inadmissibility based upon criminal conviction, deportation proceeding cannot thereafter be properly instituted based upon same criminal conviction unless Attorney General has revoked previous grant of relief. *In re G---- A---- (1956, BIA) 7 I & N Dec 274* (modified on other grounds in *In re Przygocki (1980, BIA) 17 I & N Dec 361).*

Under former *8 USCS § 1182*(c), waiver of inadmissibility may not be granted subject to conditions subsequent, but should be unconditionally granted where alien establishes that relief is warranted. *In re Przygocki (1980, BIA) 17 I & N Dec 361.*

Alien deportable under *8 USCS § 1251*(a)(5) is not eligible for waiver under former *8 USCS § 1182*(c) because no analogous ground of inadmissibility is enumerated in § 1182. *In re Wadud (1984, BIA) 19 I & N Dec 182.*

An immigration judge erred in finding an alien statutorily ineligible for relief under INA § 212(c) [former *8 USCS § 1182*(c)] on the basis of his having been sentenced to 15 years imprisonment as the plain language of § 212(c) bars relief to any alien who has been convicted of an aggravated felony or felonies and who has served, not merely been sentenced to, a term of imprisonment of at least five years for his or her aggravated felony or felonies. *In re Ramirez-Somera (1992, BIA) 20 I & N Dec 564.*

The provision in INA § 212(c) [former *8 USCS § 1182*(c)] barring relief to an alien convicted of one or more aggravated felonies who served a term of imprisonment of at least five years applies to all aggravated felony convictions, as defined in INA § 101(a)(43) [*8 USCS § 1101*(a)(43)], regardless of when the conviction occurred, with the exception of the crimes added to the aggravated felony definition by the Immigration Act of 1990, which are aggravated felonies only if committed on or after November 29, 1990. *In re A-A- (1992, BIA) 20 I & N Dec 492.*

In examining adverse factors present in applicant for former *8 USCS § 1182*(c)

waiver of inadmissibility, BIA will give very little weight to record of arrest of alien for allegedly transporting undocumented aliens into U.S. where alien admitted no wrongdoing and where government declined to criminally prosecute alien. In re Arreguin De Rodriguez (1995, BIA) I & N Interim Dec No 3247.

Incarcerated alien's inability to demonstrate that she has been rehabilitated following criminal conviction will not act as automatic bar to alien receiving former *8 USCS § 1182*(c) waiver of inadmissibility. In re Arreguin De Rodriguez (1995, BIA) I & N Interim Dec No 3247.

An alien now in possession of an immediate relative visa is not ineligible for further consideration of an INA § 212(c) [former *8 USCS § 1182*(c)] application simply because he had been denied this relief in past; nothing in applicable statute or regulations prohibits consecutive applications for this relief so long as alien alleges new or additional grounds upon which relief may be granted. In re Rodarte-Espinoza (1995, BIA) I & N Interim Dec No 3260.

A deportable alien cannot concurrently request nunc pro tunc permission to reapply for admission after deportation and a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] where a grant of nunc pro tunc permission would not completely dispose of case; while such permission would address issue of alien's excludability at time of reentry, he remains deportable on basis of a post-reentry drug conviction. In re Garcia-Linares (1996, BIA) I & N Interim Dec No 3268.

86. Requirement of foreign domicile

Domicile is not established unless individual intends to reside permanently or indefinitely in new location; since, in order to qualify for student visa, alien must enter United States temporarily and solely for purpose of course of study, and must maintain residence in foreign country which he has no intention of abandoning, alien student cannot establish lawful domicile in United States during period in which he holds student visa because, if he does not intend to abandon residence in foreign country, he is not domiciled in United States, and, if he does intend to make United States permanent home and domicile, he is not in United States lawfully under terms of student visa. *Anwo v Immigration & Naturalization Service (1979) 197 US App DC 121, 607 F2d 435.*

Re-entry for alien who originally entered under assumed name was not required since he did not thereby acquire "domicile" in this country. *Gabriel v Johnson (1928, CA1 Mass) 29 F2d 347.*

"Lawful domicile" under former *8 USCS § 1182*(c) includes domicile pending appeal of order of deportation; alien's continued presence in United States after challenge of deportability decision on petition to court for review is matter of entitlement, not grace, and alien is eligible to be considered for § 1182(c) relief. *Wall v Immigration & Naturalization Service (1984, CA9) 722 F2d 1442, 14 Fed Rules Evid Serv 1295.*

Decision of Director of USIA regarding recommendation to waive 2 year foreign residence requirement is subject to judicial review under abuse of discretion standard; scope of review of USIA's recommendation function is limited to whether USIA followed its own guidelines; court cannot say that USIA abused its discretion in not making favorable recommendation with respect to waiver request of foreign physician where although its statement was not very specific it did indicate that USIA reviewed policy, program, and foreign relations aspects of case; because exchange visitor cases necessarily implicate foreign policy concerns and involve agency exercising its discretionary powers in that respect, more particularized explanation by USIA is not required. *Chong v Director, United States Info. Agency (1987, CA3 Pa) 821 F2d 171.*

Alien cannot lawfully possess intent to be domiciled in U.S. while here on

student visa, since INA § 101(a)(15)(F)(i) [*8 USCS § 1101*(a)(15)(F)(i)] requires student to enter U.S. temporarily and solely for purpose of pursuing course of study, and to maintain residence in foreign country which alien has no intention of abandoning, and thus alien who entered U.S. on student visa in 1980 who was deportable under § 241(a)(11) [§ 1251(a)(11)] was ineligible for discretionary relief under § 212(c) [§ 1182(c)] because alien had not accumulated seven consecutive years of lawful, unrelinquished domicile in U.S. following 1982 adjustment of status to permanent resident. *Brown v United States Immigration & Naturalization Service (1988, CA5) 856 F2d 728.*

BIA erred in determining that alien's lawful unrelinquished domicile, for purposes of waiver of deportation, could not begin to accrue until alien became lawful permanent resident; alien established lawful unrelinquished domicile at time he made application for amnesty under IRCA and thus became lawful temporary resident. *Avelar-Cruz v INS (1995, CA7) 58 F3d 338.*

87. --7-year requirement

To be eligible for relief under *8 USCS § 1182,* aliens must accumulate 7 years of lawful unrelinquished domicile after their admission for permanent residence; permanent resident status is prerequisite for "lawful" domicile, since aliens in United States for temporary purpose can not establish domicile, and nonimmigrants, if they intend to stay, violate terms of their admission and are no longer in United States lawfully. *Castillo-Felix v INS (1979, CA9) 601 F2d 459.*

Eligibility for discretionary relief arising during pendency of appeal may be considered; lawful domicile does not end when board's decision becomes final, since alien who has conceded deportability may possess lawful intent to remain in country; elapse of required 7-year period during time of appeal makes alien eligible for discretionary relief. *Marti-Xiques v INS (1983, CA11) 713 F2d 1511,* reh gr, vacated without opinion (1984, CA11) *724 F2d 1463,* mod on other grounds (1984, CA11) *741 F2d 350.*

To be eligible for relief under former *8 USCS § 1182*(c), alien must have maintained lawful, uninterrupted domicile of 7 consecutive years in United States; date at which period of residence is measured is date upon which immigration and naturalization service commences deportation proceedings by issuance of order to show cause; court rejects suggested cutoff date of date upon which judicial review of administrative determination is completed. *Marti-Xiques v INS (1984, CA11) 741 F2d 350.*

Jamaican native admitted for lawful permanent residence does not establish threshold requirement of 7 consecutive years of domicile for purposes of discretionary relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] where less than 6 years elapsed from time alien became lawful permanent resident and time District Court denied petition for review of deportation order. *Reid v Immigration & Naturalization Service (1985, CA3) 756 F2d 7.*

Petition for review of BIA's denial of § 212(c) relief was denied because BIA's construction of statute was reasonable; BIA correctly determined that alien was legally ineligible for relief when it found that alien's lawful domicile ended at time BIA affirmed IJ's order of deportation, that being 11 days short of 7 years required for discretionary relief. *Variamparambil v INS (1987, CA7) 831 F2d 1362.*

In Eleventh Circuit, period of lawful domicile for purposes of determining alien's eligibility for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], ends at date of issuance of order to show cause, even though for purposes of 8 CFR § 242.1(a), deportation proceedings are deemed to commence only once order to show cause has been issued and served upon alien; amendment

to order to show cause which amendment is not material to substantive charge of deportability does not result in period of lawful domicile being deemed to end at date of amendment to order to show cause. *Ballbe v INS (1989, CA11) 886 F2d 306,* cert den *(1990) 495 US 929, 109 L Ed 2d 496, 110 S Ct 2166.*

The Eleventh Circuit has deferred to the BIA's decision that lawful permanent residence status ends, and thus the alien is no longer accruing lawful unrelinquished domicile time for purposes of obtaining relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], when the deportation order becomes administratively final--that is, when the BIA renders its decision on appeal or certification, when the appeal is waived, or when the time for appeal expires with none taken. The Eleventh Circuit thus overrules two prior opinions--*Marti-Xiques, 741 F2d 350* and *Ballbe, 886 F2d 306*--and aligns itself with the Fifth and Seventh Circuits on this issue. *Jaramillo v INS (1993, CA11) 1 F3d 1149, 7* FLW Fed C 791.

Because the INA expressly requires that B-2 visitors have a foreign residence which they have no intention of abandoning and be visiting the U.S. temporarily, or in other words, have no intention to seek domicile in the U.S., time spent in the U.S. on a B-2 visitor visa does not count toward the seven years of lawful domicile required for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)]. *Melian v INS (1993, CA11) 987 F2d 1521, 7* FLW Fed C 212.

The time an alien spent in the United States on a nonimmigrant temporary worker visa cannot be counted towards the 7 years of lawful domicile required to establish eligibility for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], because (1) if the alien complied with the terms of the temporary worker visa, he could not have had the intent necessary to establish a domicile in the United States (that is, the intent to remain in the United States), since the holder of such a visa must have a residence in a foreign country which he has no intention of abandoning, and (2) if the alien did plan to make the United States his domicile, he violated the conditions of the temporary worker visa and his intent was not lawful. *Graham v INS (1993, CA3) 998 F2d 194.*

A lawful permanent resident who is short of the 7-year legal residence requirement for INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation cannot meet that requirement by tacking on time previously spent in the U.S. as an illegal alien, because a person with no legal right to be in the U.S. cannot establish a lawful intent to remain therein. *Madrid-Tavarez v INS (1993, CA5) 999 F2d 111.*

A parent's lawful unrelinquished domicile should be imputed to a minor child seeking relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], provided the child obtains permanent resident status prior to reaching majority; although an adult's "lawful unrelinquished domicile" begins on the day he or she acquires permanent residence, both the common law definition of "domicile" and the policies underlying § 212(c) [§ 1182(c)] preclude the application of this rule to children. *Lepe-Guitron v INS (1994, CA9) 16 F3d 1021, 94 CDOS 1110, 94* Daily Journal DAR 1921.

Pursuant to INA § 212(c) (former *8 USCS § 1182*(c)), BIA may waive deportation of alien who has been lawful permanent resident for 7 years and who is being deported for certain specified reasons, including criminal conviction. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

While aliens are entitled to equal protection under law, alien's challenge to denial of former *8 USCS § 1182*(c) relief from deportation which was based on fact that he had not been lawful permanent resident (LPR) for 7 years, on basis that it is irrational to deny him this relief while it is available to aliens who have been LPR's for over seven years, must fail, since Congress' rationale

that aliens who have been LPR's for seven years have established strong relationship to U.S. is reasonable. *Raya-Ledesma v INS (1994, CA9) 55 F3d 418, 95* Daily Journal DAR 6086.

Alien's presence in U.S. is no longer "lawful" and may not be included in determining whether alien has acquired 7 years' lawful unrelinquished domicile in U.S. such that he is eligible for discretionary relief from deportation under former *8 USCS § 1182*(c) upon entry of final administrative order of deportation; time alien remains in U.S. while pursuing petition for review before Court of Appeals may not be included in this calculation. *Onwuneme v INS (1995, CA10) 67 F3d 273.*

8 USCS (1994 Ed.) § 1182(c) does not require 7 years of legal permanent residency, but, rather, relief is available to anyone with 7 years of lawful unrelinquished domicile who attained legal permanent resident status during that period. *Kolster v Ashcroft (2002, DC Mass) 188 F Supp 2d 60.*

Relief under former *8 USCS § 1182*(c) is available only to alien who has established local permanent residence and maintained it for seven consecutive years, and nothing in statutory language or legislative history indicates congressional intent to extend same benefit to one whose "domicile" here was accrued as nonimmigrant. *In re Anwo (1977, BIA) 16 I & N Dec 293.*

Former 8 USCS § 1182(c) is applicable to alien, admitted to United States for lawful permanent residence in 1966, who was arrested for possession of marijuana while returning from one week trip to Mexico and seeking readmission as returning resident, and who, after serving 6 month sentence, was placed on probation, had immigration parole status revoked, and was allowed to voluntarily return to Mexico, ostensibly for purpose of pursuing application for admission, inasmuch as, at time of application, more than 7 years had elapsed since applicant had been admitted to United States for lawful permanent residence; in absence of significant event fixing date of termination of lawful permanent resident status, status of alien who has slipped into excludable class subsequent to acquisition of resident status is deemed, for purpose of § 1182(c), to continue to exist at time of application for relief, and domicile short of 7 years may be perfected as to length during alien's temporary absence from United States. *In re Hinojosa (1979, BIA) 17 I & N Dec 34.*

Both language of present *8 USCS § 1182,* and clear legislative intent, support conclusion that relief to alien returning to lawful unrelinquished domicile was intended to be available only to aliens acquiring 7 years of domicile after entry for permanent residence. *In re Newton (1979, BIA) 17 I & N Dec 133.*

In *Ninth Circuit, Castillo-Felix v INS, 601 F2d 459,* is controlling upon INS, and requires that alien must accumulate 7 years of lawful unrelinquished domicile after his admission for permanent residence to be eligible for relief under *8 USCS § 1182* as alien returning to lawful unrelinquished domicile. *In re Kim (1979, BIA) 17 I & N Dec 144.*

Although alien who reentered United States after act or event rendering him excludable would thereby lose lawful status and become ineligible for waiver under *8 USCS § 1182,* alien who, instead of entering United States, was paroled into United States while excludable would not lose lawful status and may continue to accumulate time necessary to complete 7 years' lawful unrelinquished domicile in order to become eligible for waiver of excludibility. *In re Hinojosa (1980, BIA) 17 I & N Dec 322.*

Appeal from order denying alien's request for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] was sustained where alien satisfied requirement of seven-years of lawful unrelinquished domicile in U.S. because under § 1 of Cuban Refugee Adjustment Act of November 2, 1966, *8 USCS § 1255* note, alien acquired permanent resident status on February 23, 1977, 30 months

prior to filing date of application for adjustment of status, August 23, 1979, and Order to Show Cause why alien should not be deported, which terminated alien's permanent resident status, was not issued until March 21, 1984; on remand, alien bears burden of establishing that he deserves § 212(c) relief as matter of discretion. *In re Diaz-Chambrot (1988, BIA) 19 I & N Dec 674.*

Effective date of permanent resident alien's acquisition of lawful domicile in United States for purposes of determining whether alien is entitled to relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] based upon seven year's of continuous residence was retroactive date of adjustment of status to that of lawful permanent residence under Cuban Refugee Adjustment Act of 1966 [*8 USCS § 1255* note], rather than date of approval of application for adjustment of status under Cuban Refugee Act. *In re Rivera-Rioseco (1988, BIA) 19 I & N Dec 833.*

Because the grant of a waiver of deportability under former INA § 241(f) [*8 USCS § 1251*(f)] (present INA § 241(a)(1)(H) [*8 USCS § 1251*(a)(1)(H)]) waives not only the ground for exclusion but also the underlying fraud, and thus retroactively validates the alien's initial unlawful entry, an alien who had entered the U.S. as a lawful permanent resident in May of 1974 and had been convicted on a controlled substance violation in January of 1987, who was granted a waiver of deportability under former § 241(f) [§ 1251(f)], had acquired the 7 years of lawful unrelinquished domicile in the U.S. required for the grant of a waiver of inadmissibility under INA § 212(c) [former *8 USCS § 1182*(c)]. *In re Sosa-Hernandez (1993, BIA) 20 I & N Dec 758.*

An IJ erred in determining that an alien was no longer eligible for relief under INA § 212(c) [former *8 USCS § 1182*(c)] on ground that alien's lawful domicile was terminated when he received a final order of deportation; an alien who has acquired 7 years of lawful unrelinquished domicile prior to receiving a final order of deportation may seek to reopen his proceedings to apply for INA § 212(c) [*8 USCS § 1182*(c)] relief. In re Rodarte-Espinoza (1995, BIA) I & N Interim Dec No 3260.

An IJ properly concluded that an alien who applied in 1993 for INA § 212(c) [former *8 USCS § 1182*(c)] relief was not eligible for this relief because he had only become a lawful permanent resident in 1991 and thus did not have 7 consecutive years of lawful permanent residence; time period during which an alien has acquired temporary residence status may not be included in 7 years requirement unless circuit court whose jurisdiction alien would be under has ruled to contrary. In re Ponce de Leon-Ruiz (1996, BIA) I & N Interim Dec No 3261.

In cases arising within jurisdiction of Ninth Circuit Court of Appeals, based on holding in *Ortega de Robles v. INS, 58 F3d 1355 (9th Cir. 1995),* BIA will include time after which a lawful permanent resident alien initially made his application for temporary resident status in determining whether alien has 7 years lawful unrelinquished domicile such that alien is eligible to apply for INA § 212(c) [former *8 USCS § 1182*(c)] relief. In re Cazares-Alvarez (1996, BIA) I & N Interim Dec No 3262.

An IJ properly exercised his discretion in denying an alien an INA § 212(h)(1)(B) [*8 USCS § 1182*(h)(1)(B)] waiver of inadmissibility where, although alien had resided in U.S. for over 7 years, was continuously employed during this time and had a U.S. citizen wife and 3 U.S. citizen children, alien's conviction for sexual assault in first degree for having sexual intercourse with a 13-year old and his failure to take responsibility for this act or show rehabilitation was extremely serious and outweighed equities in his favor. In re Mendez-Moralez (1996, BIA) I & N Interim Dec No 3272.

88. Continuity of residence

Absence for period of less than 6 months did not break continuity of seven years' domicile. *Navigazione Generale Italiana v Elting (1933, CA2 NY) 66 F2d 537,* cert den *(1933) 290 US 691, 78 L Ed 595, 54 S Ct 126.*

An alien may establish domicile in U.S. by being physically present in U.S. with a lawful intent to remain there indefinitely. *White v INS (1996, CA5) 75 F3d 213.*

Respondent who has no domicile in United States is statutorily ineligible for relief under former *8 USCS § 1182*(c) and appeal against deportation order would be dismissed where (1) alien had been admitted to United States for permanent residence in 1960, (2) in 1970 he moved to Mexico to reside with his wife in home he had purchased there, (3) he commuted from his home in Mexico to his employment in United States from 1970 until 1974, with exception of two six month periods, and (4) in 1974 he was incarcerated in United States following conviction of violation of *21 USCS § 952*(a) for importation of marijuana into United States, and was subsequently found deportable. *In re Carrasco (1977, BIA) 16 I & N Dec 195.*

Time after applicant for waiver of excludibility under *8 USCS § 1182* is paroled into United States will be considered part of period of lawful domicile for purpose of *8 USCS § 1182* waiver, since such 7 years' requirement can be perfected while alien is temporarily out of United States, and alien would lose such lawful status only if he entered United States while excludable, rather than being paroled into United States; alien who departed United States after serving prison term will not be held to have abandoned residence in United States where he was not notified that he had option either to leave United States and abandon right of residence, or to defend right of residence in exclusion proceeding, since failure of INS to notify applicant of option should not be used against him to find abandonment of residence where record indicates alien never intended to abandon lawful permanent residence. *In re Hinojosa (1980, BIA) 17 I & N Dec 322.*

89. --Temporary absence

Alien departing and remaining away nine years could not have claimed that his absence was temporary and that he returned only at request of his father. *MacKusick ex rel. Pattavina v Johnson (1924, CA1 Mass) 3 F2d 398.*

Denial of relief under former *8 USCS §§ 1181*(b) and 1182(c) on basis that alien's absence was not "temporary" was proper where alien, in 1943, left country to investigate whether certain person answering his mother's description in mental institution in Mexico was in fact his mother and, upon ascertaining that this was so, remained in Mexico until his mother's death in 1953, and did not reenter United States until 1961. *Gamero v Immigration & Naturalization Service (1966, CA9 Cal) 367 F2d 123.*

In motion to reopen deportation proceedings to apply for discretionary relief under INA § 212(c) [former *8 USCS § 1182*(c), entry of alien into United States as lawful permanent resident was not newly discovered evidence where such was part of record in IJ proceedings, and alien did not demonstrate that he was domiciled in U.S. for 7 consecutive years where time was accrued by filing frivolous appeals. *Torres-Hernandez v Immigration & Naturalization Service (1987, CA9) 812 F2d 1262.*

Absence for nine years and residence with wife and child in foreign land was not "temporary." *Ex parte Domenici (1925, DC Mass) 8 F2d 366,* affd (1926, CA1 Mass) *10 F2d 433.*

Petition for writ of habeas corpus seeking judicial review of BIA decision affirming final order of exclusion under INA § 212(a)(20) [former *8 USCS §*

1182(a)(20)] for lack of valid entry document was denied on ground that substantial evidence supported findings that alien had relinquished permanent resident status, and that her annual 10-11 month visits to Philippines over 9-year span, to care for aged and ill parents, were not temporary absences abroad, since alien's visits to Philippines were not for relatively short periods of time fixed by some early event, and would not terminate upon occurrence of event having reasonable possibility of occurring within relatively short period of time, and INA does not contemplate that immigrant will be afforded opportunity to establish permanent residence in U.S. at some indefinite time in possibly distant future. *Angeles v District Director, INS (1990, DC Md) 729 F Supp 479.*

Alien who, for 6 years, lived with family in Mexico, during which time he had no actual home in United States, did not establish 7 years' lawful unrelinquished domicile required under *8 USCS § 1182,* even though he entered United States almost daily as commuter, since stay in Mexico for 6 years was far from temporary in nature. *In re Sanchez (1980, BIA) 17 I & N Dec 218.*

90. Review

District Court has jurisdiction to review Board of Immigration Appeals' denial, during deportation proceedings, of waiver of deportability under former *8 USCS § 1182*(c). *Sotelo Mondragon v Ilchert (1980, CA9 Cal) 653 F2d 1254.*

Upon reconsideration, court vacates its decision in *Rivera v Immigration & Naturalization Service (1986, CA5) 791 F2d 1202,* holding that lawful permanent resident status of alien is terminated when deportation order becomes administratively final; applicable regulations do not require alien to admit deportability as condition to applying for INA § 212(c) relief; regulations allow alien to apply for INA § 212(c) relief and fully reserve all arguments of nondeportability. *Rivera v Immigration & Naturalization Service (1987, CA5) 810 F2d 540.*

Court of Appeals is without jurisdiction to entertain alien's claim that its criminal convictions are not deportable offenses where Appeals Court has previously considered alien's deportation order; Court of Appeals has jurisdiction to review BIA's denial of motion to reopen deportation proceeding to consider request for § 212(c) relief where motion for reopening presents grounds which could not have been presented in prior proceeding. *Variamparambil v INS (1987, CA7) 831 F2d 1362.*

Court of Appeals conducts limited review of BIA's denial of motion to reopen denial of waiver of deportation under former *8 USCS § 1182*(c), seeking only to determine whether decision was arbitrary or capricious, constituted abuse of discretion, or was otherwise not in accordance with law. *Vargas v INS (1991, CA2) 938 F2d 358.*

Where permanent resident argued in brief to BIA that non-violent possessory drug offense, together with minor traffic infractions, should not by themselves require alien to meet higher standard adopted by BIA requiring drug offenders to show unusual or outstanding equities to merit waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)], issue was adequately raised before BIA to confer review jurisdiction on Court of Appeals; Court of Appeals reviews BIA's balancing of equities for INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation for abuse of discretion, and may set aside denial of such relief only if BIA fails to support conclusions with reasoned explanation based upon legitimate concerns. *Ayala-Chavez v U.S. INS (1991, CA9) 944 F2d 638, 91 CDOS 7504, 91* Daily Journal DAR 11513.

The BIA's denial of an applicant's petition for relief under INA § 212(c) [former *8 USCS § 1182*(c)] is reviewed for abuse of discretion, and the denial

will be upheld unless it is arbitrary, irrational, or contrary to law; however, findings of fact supporting the Board's exercise of discretion are reviewed merely to determine whether they are supported by substantial evidence. *Ghassan v INS (1992, CA5) 972 F2d 631,* reh, en banc, den (1992, CA5) *977 F2d 576* and cert den *(1993) 507 US 971, 122 L Ed 2d 783, 113 S Ct 1412.*

The Court of Appeals reviews denials of relief from deportation for abuse of discretion standard. *Villarreal-San Miguel v INS (1992, CA5) 975 F2d 248.*

The Board of Immigration Appeals has the power to review the factual and legal basis of an immigration judge's INA § 212(c) [former *8 USCS § 1182*(c)] decision de novo. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

The Court of Appeals reviews agency fact-finding to see if it supported by substantial evidence, and the balancing of the equities underlying an INA § 212(c) [former *8 USCS § 1182*(c)] determination for an abuse of discretion; an agency abuses its discretion if it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

The harmless error rule and the principle that the power of reversal should not be used to punish prosecutorial misconduct apply in deportation, as well as criminal, cases. *Ortiz-Salas v INS (1993, CA7) 992 F2d 105.*

Although the BIA should explicitly state whether it reviews an IJ's decision for an abuse of discretion or de novo, its failure to do so in affirming the denial of an alien's application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] did not justify reversal where although purporting to apply the abuse of discretion standard, the BIA went beyond the IJ's decision, indicating that it would not have counted the alien's 5 years of illegal residence in the U.S. prior to his obtaining lawful resident status, in determining that the alien should be deported. *Ortiz-Salas v INS (1993, CA7) 992 F2d 105.*

Court of appeals' review of denial of application of waiver under former *8 USCS § 1182*(c) is limited to whether BIA's discretion was actually exercised and whether it was exercised in arbitrary and capricious way. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

Court of appeals will find that BIA acted arbitrarily or capriciously if it made decision regarding waiver of deportation without rational explanation, departed inexplicably from established policy, or discriminated invidiously against particular race or group. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

BIA properly reversed decision of immigration judge granting petitioner's application for relief from deportation where petitioner had been convicted of aggravated felony and had consequently been imprisoned for at least 5 years; BIA had independent power to decide case and to conduct de novo review of record and proceedings. *Leon-Davila v INS (1994, CA11) 19 F3d 1370, 8* FLW Fed C 156.

BIA's denial of alien's petition for waiver of deportation was vacated and matter remanded for reconsideration where BIA erroneously adopted definition of family ties that was unauthorized by INA § 212(c) (former *8 USCS § 1182*(c)) in that definition was based on state law; although BIA's evaluation of alien's family ties in this country was only one of several factors in considering petition, it was clearly significant one. *Kahn v INS (1994, CA9) 20 F3d 960, 94 CDOS 2071, 94 Daily Journal DAR 3902, amd (1994, CA9) 36 F3d 1412, 94 CDOS 7392, 94* Daily Journal DAR 13593.

In reviewing BIA decision, Court of Appeals will find abuse of discretion where BIA acted irrationally, departed from established policies, or discriminated against identified race or group. *Hajiani-Niroumand v INS (1994, CA8) 26 F3d 832.*

Although alien did not advance before Immigration Judge argument that his lawful unrelinquished domicile began to accrue at time he made application for amnesty under IRCA, alien did not fail to exhaust his administrative remedies as result because at time of hearing before Immigration Judge 7 years had not passed since he made his amnesty application and because alien did raise this issue before BIA, having by then achieved 7 years of lawful unrelinquished domicile since he became temporary resident pursuant to IRCA, and BIA considered this argument in its decision denying alien relief from deportation under INA § 212(c) (former *8 USCS § 1182*(c)). *Avelar-Cruz v INS (1995, CA7) 58 F3d 338.*

Federal courts have jurisdiction under *28 USCS § 2241* to grant writs of habeas corpus to aliens when those aliens are in custody in violation of Constitution or laws or treaties of *United States. Henderson v INS (1998, CA2) 157 F3d 106.*

1996 amendments to *8 USCS § 1182*(c), (h) and (i) preclude jurisdiction if, and only if, judicial review is sought of decision thereunder, and where such decision is based on matter committed to agency discretion. *Luis v INS (1999, CA1) 196 F3d 36.*

Proper remedy for equal protection violation caused by denial of discretionary hearing to deportable legal alien under *8 USCS § 1182*(c) who had been convicted of crimes was to grant alien discretionary hearing. *Almon v Reno (1998, DC Mass) 13 F Supp 2d 143.*

Board is bound by Circuit Court decisions under § 1182(c) regarding availability of relief to aliens who are deportable under § 1251(a)(11). *In re Bowe (1980, BIA) 17 I & N Dec 488.*

2. Discretionary Relief in Deportation Proceedings

91. Generally

In view of fact that section 212(c) of Immigration and Naturalization Act (former *8 USCS § 1182*(c)) had consistently been construed so as to permit application for discretionary relief in deportation proceedings, as well as in exclusion proceedings, requirement that alien have left country in order to be eligible for discretionary relief under that section created arbitrary and unreasonable classification between persons similarly circumstanced; thus, alien against whom deportation order had been entered was entitled to apply for discretionary relief from that order under that section, notwithstanding fact that he had never once left country since his admission as permanent resident some thirteen years earlier. *Francis v Immigration & Naturalization Service (1976, CA2) 532 F2d 268.*

An administratively final order of deportation renders an alien ineligible for INA § 212(c) [former *8 USCS § 1182*(c)] relief, even if the order of deportation comes after the date on which the alien completes the requisite seven-year period of lawful unrelinquished domicile; the requirement that the alien be lawfully admitted for permanent residence is a continuing one, and lawful permanent resident status, within the meaning of INA § 101(a)(20) [*8 USCS § 1101*(a)(20)], ends upon the alien's exhaustion of the appeal of the deportation order before the BIA; the alien's filing of a motion to reopen does not render the BIA's affirmance of the deportation order non-final and thus delay the termination of the alien's lawful permanent resident status. *Nwolise v United States INS (1993, CA4) 4 F3d 306,* cert den *(1994) 510 US 1075, 127 L Ed*

2d 82, 114 S Ct 888.

The INS may base a deportability determination in part on a crime used to support a previous deportability finding, but as to which deportability was waived under INA § 212(c) [former *8 USCS § 1182*(c)], because waiver does not expunge a prior conviction; this holding is not inconsistent with former 8 CFR § 212.3(b), which provided that a waiver was valid indefinitely, since giving consideration to the prior conviction does not constitute withdrawal of the waiver. *Molina-Amezcua v INS (1993, CA9) 6 F3d 646, 93 CDOS 7300, 93* Daily Journal DAR 12424.

The BIA's interpretation of INA § 101(a)(20) [*8 USCS § 1101*(a)(20)], which defines the term "lawfully admitted for permanent residence," and 8 CFR § 3.2, regarding motions to reopen and reconsider, to the effect that lawful permanent residence terminates upon entry of a final order of deportation, and that the alien can no longer submit a motion to reopen the case to present additional evidence regarding the denial of an application for a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] because the alien is no longer statutorily eligible for such relief, is unreasonable and need not be given deference. *Henry v INS (1993, CA7) 8 F3d 426.*

Section 511 of the Immigration Act of 1990 (IA90), which amended INA § 212(c) [former *8 USCS § 1182*(c)] to preclude an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least five years from seeking a waiver of deportation, and which states that it applies to "admissions occurring after the date of enactment" of IA90, applies retroactively to aliens convicted of an aggravated felony prior to the date of enactment of IA90; just as aliens are credited for time spent in the U.S. while an appeal is pending before the BIA so that such aliens may be eligible for § 212(c) relief, the court will also consider the time aliens spend in prison during the course of a deportation hearing for purposes of rendering them ineligible for such relief. *Giusto v INS (1993, CA2) 9 F3d 8.*

Inclusion of § 511 of the Immigration Act of 1990 (IA90), which amended INA § 212(c) [former *8 USCS § 1182*(c)] to preclude an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least five years from seeking a waiver of deportation, was plainly part of an effort to broaden the list of serious crimes, conviction of which results in various disabilities and preclusion of benefits under the INA, and the selection of five years' imprisonment as the line of demarcation for such "serious" crimes is consistent with Congress's selection of five years as the mandatory minimum prison term for certain serious crimes. *Giusto v INS (1993, CA2) 9 F3d 8.*

An alien's receipt of a sentence of less than five years' imprisonment, or his or her release on parole from a state sentence prior to serving five years, may well indicate circumstances suggesting that although convicted of a felony defined as "aggravated," the alien should receive relatively lenient treatment; thus, the classification of an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least five years as ineligible for a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] has a facially legitimate and rational basis. *Giusto v INS (1993, CA2) 9 F3d 8.*

The Board of Immigration Appeals' interpretation of the 1990 amendment to INA § 212(c) [former *8 USCS § 1182*(c)], which bars aliens convicted of aggravated felonies who have served a term of imprisonment of at least five years from seeking discretionary waiver of deportation, as applying to aliens whose convictions pre-date the enactment of the statutory definition of "aggravated felony" was reasonable and consistent with congressional intent, given the legislative history of the amendment. *De Osorio v United States INS (1993, CA4)*

10 F3d 1034.

Waiver of deportation pursuant to INA § 212(c) (former *8 USCS § 1182*(c)) is within BIA's discretion. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

While alien is generally entitled to equal protection under law, his right to remain in U.S. is not fundamental right and, thus, there need only be rational basis for requirement of former *8 USCS § 1182*(c) that alien have been lawful permanent resident for at least seven years to be eligible for relief from deportation under this statute. *Raya-Ledesma v INS (1994, CA9) 42 F3d 1263, 94 CDOS 9411, 94* Daily Journal DAR 17402, reprinted as amd on other grounds (1994, CA9) *55 F3d 418, 95* Daily Journal DAR 6086 and amd on other grounds (1994, CA9) *95 CDOS 3514.*

There is rational basis for Congress to require in *8 USCS § 1182*(c) that alien have been lawful permanent resident for at least seven years to be eligible for relief from deportation under this statute since it is reasonable to conclude that in seven-year period alien will have established strong relationship with U.S. such that there should be method by which deportation may be avoided. *Raya-Ledesma v INS (1994, CA9) 42 F3d 1263, 94 CDOS 9411, 94* Daily Journal DAR 17402, reprinted as amd on other grounds (1994, CA9) *55 F3d 418, 95* Daily Journal DAR 6086 and amd on other grounds (1994, CA9) *95 CDOS 3514.*

Fact that aliens who are in deportation proceedings are not entitled to discretionary waiver of deportation, but aliens who are in exclusion proceedings are entitled to such relief, does not violate equal protection. *Almon v Reno (1999, CA1 Mass) 192 F3d 28.*

Fact that aliens who are in deportation proceedings are not entitled to discretionary waiver of deportation, but aliens who are in exclusion proceedings are entitled to such relief, does not violate equal protection. *Almon v Reno (1999, CA1 Mass) 192 F3d 28.*

Congress intended that repeal of *8 USCS § 1182*(c) apply to all proceedings commenced after 4/1/97; as general rule, repeal is not impermissibly retroactive. *Richards-Diaz v Fasano (2000, CA9 Cal) 233 F3d 1160, 2000 CDOS 9244, 2000* Daily Journal DAR 12251.

Classification among aliens in deportation and exclusion proceedings provided in former *8 USCS § 1182*(c) does not violate equal protection. *Asad v Reno (2001, CA6 Tenn) 242 F3d 702, 2001 FED App 63P.*

Distinction between two classes of resident aliens who commit same crime, as provided in former *8 USCS § 1182*(c) and *8 USCS § 1182*(h), does not violate equal protection. *Domond v United States INS (2001, CA2 Conn) 244 F3d 81.*

Construing 8 USCS § 1182(c) to bar discretionary relief to aliens in deportation proceeding, but not to those in exclusion proceedings, violated Equal Protection Clause guaranteed by *Fifth Amendment. Wallace v Reno (1999, DC Mass) 39 F Supp 2d 101.*

Dominican man, who achieved status of lawful permanent resident prior to convictions that now make him subject to removal from U.S., successfully challenges constitutionality of *8 USCS § 1182*(h), where that statute eliminates possibility of discretionary waiver for him even though adjustment of status via discretionary waiver remains possibility for nonlegal permanent residents, because court finds this distinction completely devoid of any reason whatsoever, and it must be struck down. *Roman v Ashcroft (2002, ND Ohio) 181 F Supp 2d 808, 2002 US Dist LEXIS 237, 24* Immigr Cas Rep A3-68.

Relief may be granted nunc pro tunc in deportation proceedings where charge is based on grounds for exclusion existing at time of entry provided that exercise of discretion was then available. *In re K-- (1962, BIA) 9 I & N Dec 585.*

Waiver under former *8 USCS § 1182*(c) may be granted in deportation

proceedings regardless of whether alien made entry when eligible for relief or whether alien may adjust his status under *8 USCS § 1255,* and upon showing of eligibility for § 1182(c) relief, deportation proceedings may be reopened in order that alien be given opportunity to apply for benefits of § 1182(c). *In re Hom (1977, BIA) 16 I & N Dec 112.*

Waiver of inadmissibility due to criminal conduct of permanent resident alien under INA § 212(c) [former *8 USCS § 1182*(c)] cannot be withdrawn pursuant to motion by INS to reopen deportation proceedings based upon evidence of renewed criminal activity by alien because statute contains no provision for revocation or rescission of waiver of inadmissibility, and thus, waiver is not conditional, but fully restores alien to previous status of alien lawfully admitted for permanent residence; to permit reopening of deportation proceedings on basis of subsequent criminal conduct, rather than require INS to commence new deportation proceeding, would leave alien's immigrant status in tenuous state indefinitely without affording alien benefit of procedural safeguards which would be provided in new deportation hearing. *In re Gordon (1989, BIA) 20 I & N Dec 52.*

92. Applicability

Although on its face, former *8 USCS § 1182*(c), which grants Attorney General discretion to admit permanent residents who temporarily proceed abroad voluntarily, not under order of deportation, seeking to return to lawful unrelinquished domicile of 7 consecutive years, covers only aliens who have left U.S., resident aliens who have not left U.S. are also eligible for relief under such provision. *Vargas v INS (1991, CA2) 938 F2d 358.*

Although, on its face, INA § 212(c) [*8 USCS § 1182*(c)] seems to apply only to exclusion proceedings, it has uniformly been found applicable to deportation proceedings as well. *Nunez-Pena v INS (1992, CA10) 956 F2d 223.*

The Second Circuit, in what it calls a "modest" extension of its decision in *Francis, 532 F2d 268,* has held that INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation may be available to an alien charged with violating INA § 241(a)(1)(B) [*8 USCS § 1251*(a)(1)(B)], regarding entry without inspection, notwithstanding that there is no substantially equivalent ground for exclusion in INA § 212(a) [*8 USCS § 1182*(a)]. *Bedoya-Valencia v INS (1993, CA2) 6 F3d 891.*

The use of the word "admissions" in the 1990 amendment to INA § 212(c) [former *8 USCS § 1182*(c)], which states that it applies to admissions occurring after the date of its enactment and which bars aliens convicted of an aggravated felony who have served a term of imprisonment of at least five years from seeking discretionary waiver of deportation, does not limit the application of the aggravated felony bar to aliens seeking physical entry into the United States, as such an interpretation would require ignoring the administrative and judicial interpretations which have broadened the meaning of "admissions" in the § 212(c) [former *8 USCS § 1182*(c)] context and as it is not unreasonable for Congress to assume that its use of the term "admissions" in the amendment would be subject to prevailing judicial and administrative interpretation. *De Osorio v United States INS (1993, CA4) 10 F3d 1034.*

The sentence precluding the grant of INA § 212(c) [former *8 USCS § 1182*(c)] relief to certain aliens convicted of aggravated felonies, which was added by the Immigration Act of 1990, P.L. 101-649, in November, 1990, applies to a deportable alien convicted of a drug offense in October, 1984 and released in April, 1992 after serving seven years of his sentence; although only the effective date note applicable to INA § 106(a)(3) [*8 USCS § 1105a*(a)(3)] was amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, P.L. 102-232, to indicate that it applies to convictions

entered "before, on, or after" its effective date, Congress' failure to amend the effective date note of INA § 212(c) as well was merely an oversight. *Barreiro v INS (1993, CA1) 989 F2d 62.*

An alien who is deportable for entering the U.S. without inspection is not eligible for INA § 212(c) [former *8 USCS § 1182*(c)] relief, because there is no comparable ground for exclusion. *Leal-Rodriguez v INS (1993, CA7) 990 F2d 939.*

The BIA erred in applying the amended version of INA § 212(c) [former *8 USCS § 1182*(c)] and finding an alien who had been convicted of an aggravated felony (delivery of heroin) and had served over 5 years in prison statutorily ineligible for such relief from deportation, where the alien had submitted his application on July 13, 1983, and the amended version of § 212(c) [§ 1182(c)] applies only to applications submitted after November 29, 1990, the effective date of the Immigration Act of 1990. *Cortes-Castillo v INS (1993, CA7) 997 F2d 1199.*

Former 8 USCS § 1182(c), which provides that discretionary relief from deportation may be granted to aliens lawfully admitted for permanent residence who temporarily travel abroad and return to lawful unrelinquished domicile of seven consecutive years, is applicable to deportation proceedings as well as exclusion proceedings. *Raya-Ledesma v INS (1994, CA9) 55 F3d 418, 95* Daily Journal DAR 6086.

Because provision of Anti-Drug Abuse Act of 1988 which bars aliens convicted of aggravated felonies from applying for discretionary waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] is ambiguous as to whether it applies to aliens whose convictions predate effective date of Act, Court of Appeals will defer to INS's reasonable interpretation of statute that bar applies to convictions which occurred before Act was in effect. *Samaniego-Meraz v INS (1995, CA9) 53 F3d 254, 95 CDOS 2897, 95* Daily Journal DAR 5049.

Congress did not intend 1996 amendment to former *8 USCS § 1182*(c), which restricted availability of discretionary relief from deportation, to apply retroactively. *Goncalves v Reno (1998, CA1 Mass) 144 F3d 110.*

Relief in form of waiver of deportation provided in former *8 USCS § 1182*(c) cannot be extended to alien deportable for entry without inspection; denial of eligibility for such relief does not violate alien's equal protection rights. *Farquharson v United States AG (2001, CA11 Fla) 246 F3d 1317, 14* FLW Fed C 584.

Relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] is available only to aliens who have been found deportable under a ground of deportation for which there is a comparable ground of exclusion. *United States v Vieira-Candelario (1992, DC RI) 797 F Supp 117,* affd (1993, CA1 RI) *6 F3d 12.*

South Korean's case is remanded to Board of Immigration Appeals for further proceedings on his claim for relief under *8 USCS § 1182*(c), even though amendment to statute precludes such relief for aliens, like plaintiff, who have committed controlled substance violations, where he requested § 1182(c) waiver of deportation in 1995 before law was changed, because it was not intent of Congress to apply amendment retroactively. *Pak v Reno (1998, ND Ohio) 8 F Supp 2d 1001.*

Deportable alien is entitled to adjudication of his application for discretionary relief under *8 USCS § 1182*(c), even though subsequent statute precludes such relief, where (1) INS commenced deportation proceeding against him on February 5, 1996, (2) he claims to have filed application for § 1182(c) relief on March 15, 1996, and (3) limiting statute took effect on April 24, 1996, because Congress did not intend limiting statute to apply retroactively to permanent resident aliens in deportation proceedings at time of its enactment. *Gutierrez-Perez v Fasano (1999, SD Cal) 37 F Supp 2d 1166.*

Legal permanent resident alien is denied federal habeas relief from

deportation, where statute eliminating his opportunity to apply for discretionary waiver from deportation took effect after he committed crimes which make him deportable, but before deportation proceedings were initiated, because amended *8 USCS § 1182*(c) was properly applied to his case. *Mattis v Reno (1999, DC Mass) 44 F Supp 2d 379.*

Deportable alien must be allowed opportunity to apply for discretionary waiver of deportation due to his status as long-time lawful permanent resident, even though discretionary relief has now been eliminated for persons, like alien, convicted of certain felony offenses, where alien conceded deportability before law changed and in reliance on availability of discretionary relief, because Congress did not intend new provisions restricting discretionary relief to apply retroactively in this manner. *Cedillo-Gonzalez v Garcia (1999, WD Tex) 55 F Supp 2d 653.*

Deportable alien is entitled to consideration for discretionary relief, even though such relief is no longer available to alien convicted of possession and distribution of cocaine since amendment to *8 USCS § 1182* took effect April 24, 1996, where alien received order to show cause June 27, 1995, because fact that order was not filed with immigration judge until December 1996 is solely due to INS failure to fulfill its administrative duties in timely fashion. *Canela v United States DOJ (1999, ED Pa) 64 F Supp 2d 456.*

Under 8 USCS § 1182(c), immigration judge is required on own motion to consider whether person in deportation proceedings is eligible for relief from deportation, and failure to make such inquiry is grounds for remand to consider alien's eligibility for relief. *Maria v McElroy (1999, ED NY) 68 F Supp 2d 206.*

Retroactive application of Antiterrorism and Effective Death Penalty Act to make alien, who pled guilty to crime before Act's enactment date, ineligible for discretionary waiver of deportation under *8 USCS § 1182*(c) violated alien's due process rights, since Act's elimination of alien's eligibility for discretionary waiver attached new disability with respect to transactions or considerations already past, and offended principles of fair notice and respect for reasonable reliance and settled expectations. *Reverdes v Reno (2000, DC Mass) 95 F Supp 2d 22.*

Since alien pleaded not guilty and went to trial, and, thus, did not rely on then-existing state of law concerning discretionary relief from deportation, retroactive application of *8 USCS § 1182*(c) was not constitutionally impermissible. *Janvier v INS (2001, ED Va) 174 F Supp 2d 430.*

Board interprets *Arias--Uribe v INS, 466 F2d 1198* as holding that § 1182(c) relief is unavailable to alien who has not departed from United States since time of act rendering him excludable. *In re Bowe (1980, BIA) 17 I & N Dec 488.*

Lawful permanent resident who has been found deportable for entry without inspection is ineligible for waiver under INA § 212(c) [former *8 USCS § 1182*(c)] because there is no ground of exclusion which is comparable to that ground of deportation; BIA erred in holding that waiver of inadmissibility under INA § 212(c) [former *8 USCS § 1182*(c)] should be available to aliens deportable under any ground of deportation except those where there is comparable ground of exclusion which has been specifically exempted from § 212(c) [§ 1182(c)], as such ruling would take immigration practice even further from statutory text, which refers only to grounds for exclusion, and as guarantee of equal protection requires, at most, that alien subject to deportation must have same opportunity to seek discretionary relief as alien who has temporarily left country and, upon reentry, been subjected to exclusion, and under no plausible understanding of equal protection principles must discretionary relief be made available in deportation cases where ground for deportation could not be asserted in exclusion case. *In re Hernandez-Casillas (1990, BIA) 20 I & N Dec 262,* affd

without op (1993, CA5) *983 F2d 231.*

A waiver under INA § 212(c) [former *8 USCS § 1182*(c)] is available in deportation proceedings only to those aliens who have been found deportable under a charge of deportability for which there is a comparable ground of excludability. *In re Montenegro (1992, BIA) 20 I & N Dec 603.*

93. Factors considered

Rehabilitation, while not an absolute prerequisite for relief in INA § 212(c) [former *8 USCS § 1182*(c)] cases, is an important factor in the case of an applicant who has a criminal record; indeed, rehabilitation ordinarily will be required before relief will be granted. *Vergara-Molina v INS (1992, CA7) 956 F2d 682,* reh den (1992, CA7) *1992 US App LEXIS 3518.*

In considering an application for waiver of excludability under INA § 212(c) [former *8 USCS § 1182*(c)], the BIA considers equities and matters of fairness, and the fact that the alien's wife's hardship is diminished by the fact that she entered into the marriage with knowledge that the alien might possibly be deported is an adverse factor, as is failure to prove the crucial factor of rehabilitation, which is ordinarily required to be shown by an applicant with a criminal record; as negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Ghassan v INS (1992, CA5) 972 F2d 631,* reh, en banc, den (1992, CA5) *977 F2d 576* and cert den *(1993) 507 US 971, 122 L Ed 2d 783, 113 S Ct 1412.*

A serious deportable offense requires the introduction of additional offsetting evidence; an applicant with a criminal record will ordinarily be required to evidence rehabilitation before the legal leniency of INS § 212(c) [former *8 USCS § 1182*(c)] will be invoked. *Villarreal-San Miguel v INS (1992, CA5) 975 F2d 248.*

In exercising its discretion to waive deportation of alien, BIA considers following favorable factors: (1) family ties within United States (2) residence of long duration in this country, (3) evidence of hardship to respondent and her family if deportation occurs, (4) service in this country's armed forces, (5) history of employment, (6) existence of property or business ties, (7) evidence of value and service to community, (8) proof of genuine rehabilitation if criminal record exists, and (9) other evidence attesting to alien's good character; BIA also considers following adverse factors: (1) nature and underlying circumstances of deportation ground at issue, (2) any additional significant violations of United States immigration laws, (3) existence of criminal record and, if so, its nature, recency, and seriousness, and (4) other evidence of bad character or undesirability. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

If alien is being deported for committing serious crime, he may be required to introduce heightened level of favorable evidence, demonstrating unusual or outstanding equities to obtain waiver of deportation. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

In determining whether to grant discretionary relief from deportation, favorable consideration have been found to include such factors as (1) family ties within United States, (2) residence of long duration in this country, especially when inception of residence occurred at young age, (3) evidence of hardship to respondent and her family if deportation occurs, (4) service in this country's armed forces, (5) history of employment, (6) existence of property or business ties, (7) evidence of value and service to community, (8) proof of genuine rehabilitation if criminal record exists, and (9) other evidence attesting to respondent's good character. *Tipu v INS (1994, CA3) 20 F3d 580.*

In determining whether to grant applicant's petition for waiver of

deportation under INA § 212 (former *8 USCS § 1182*(c)), immigration judge must balance social and humane considerations presented on alien's behalf against adverse factors including alien's undesirability as permanent resident; among factors to be weighed in petitioner's favor is existence of family ties within *United States. Kahn v INS (1994, CA9) 20 F3d 960, 94 CDOS 2071, 94 Daily Journal DAR 3902, amd (1994, CA9) 36 F3d 1412, 94 CDOS 7392, 94* Daily Journal DAR 13593.

Positive equities are not automatically considered "unusual or outstanding" so as to offset negative factor of conviction for serious drug offense; instead, specific facts of case and record in its entirety must be examined to determine if equities are "unusual or outstanding." *Douglas v INS (1994, CA2) 28 F3d 241.*

Where IJ exercises his discretion in denying alien relief from deportation pursuant to former *8 USCS § 1182*(c), his decision must contain discussion of all of factors that militated in alien's favor. *Rarogal v INS (1994, CA9) 42 F3d 570, 94 CDOS 9488, 94* Daily Journal DAR 17595.

In determining application for discretionary relief from deportation pursuant to former *8 USCS § 1182*(c), IJ must balance alien's adverse factors, such as reason for deportation, any additional immigration law violations, any criminal record, and evidence of bad character or undesirability against such favorable factors as family ties within U.S., length of residence in U.S., hardship to alien or his family if deported, military service, business or property ties, rehabilitation following criminal conviction, and evidence of good character. *Lovell v INS (1995, CA2) 52 F3d 458.*

94. Procedure

Announcement by Immigration and Naturalization Service that it will observe interpretation of *8 USCS § 1182* established by Second Circuit, which it believes to be incorrect, within Second Circuit, but will adhere to its own interpretation outside Second Circuit is not violation of equal protection, since discriminatory effect arises entirely from independence of federal appellate courts and thus does not violate equal protection rights. *Castillo-Felix v INS (1979, CA9) 601 F2d 459.*

Nothing in nature of *8 USCS § 1182* relief suggest that Attorney General, as matter of policy, intended, by his regulations, to provide appeal to alien when relief had been denied, but not to Service when relief had been granted, and Attorney General's regulations will not be interpreted to give Board of Immigration Appeals jurisdiction over appeals by alien, but not by Service, from immigration judge's disposition of application for § 1182 relief. *Byus-Narvaez v Immigration & Naturalization Service (1979, CA5) 601 F2d 879.*

BIA order reversing grant of former *8 USCS § 1182*(c) waiver to alien convicted of conspiracy and possession with intention to distribute marijuana was vacated on grounds that BIA: (1) lacked authority to reinstate appeal which had been (allegedly inadvertently) withdrawn by INS after time for filing notice of appeal had expired; (2) lacked jurisdiction to certify case for appeal because under 8 CFR § 3.4, appeal, although subsequently withdrawn, had been "taken," and 8 CFR § 3.7 requires that case be certified before appeal is taken, in order to prevent abuse of repeated appeals; (3) could not reopen or reconsider case under 8 CFR § 3.2 because it had not rendered decision, since withdrawal of appeal need not be, and was not, made by motion; and (4) could not base its actions on 8 CFR § 3.1(d)(1), which authorizes BIA to exercise discretion only in cases before it, because appeal which is withdrawn is no longer before BIA. *Panchevre v United States Dep't of Justice-Immigration & Naturalization Service (1991, CA5) 922 F2d 1229.*

The BIA may on its own motion reopen or reconsider any case in which it has rendered a decision; 8 CFR § 3.2 does not require notice or extraordinary

circumstances before the Board may reopen a case, since no purpose is served by requiring the Board to render a decision solely to enable it to reopen the proceedings and supersede that decision. *Elnager v U.S. INS (1991, CA9) 930 F2d 784, 91 CDOS 2811, 91* Daily Journal DAR 4500; *Charlesworth v United States INS (1992, CA9) 966 F2d 1323, 92 CDOS 4925, 92* Daily Journal DAR 7920.

In reviewing a denial of waiver under INA § 212(c) [former *8 USCS § 1182*(c)], the Board's failure to consider additional evidence or to remand the case for further hearing is not an abuse of discretion if the evidence merely repeats testimony given at the hearing, which is cumulative and therefore not material, and which covers a short period of time. *Martinez v INS (1992, CA1) 970 F2d 973.*

The INS has no affirmative duty to search its files for any information pertaining to an alien's potential eligibility for a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] and to report such information to the IJ; similarly, the IJ is not required to engage in hypothesizing as to what theories, if any, may be available to find an alien eligible for discretionary relief from deportation. *United States v Mendoza-Lopez (1993, CA10 NM) 7 F3d 1483,* cert den *(1994) 511 US 1036, 128 L Ed 2d 201, 114 S Ct 1552.*

The BIA did not abuse its discretion in affirming an IJ's denial of an alien's request for a continuance to allow the alien to file an application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], where (1) a transcript of the proceedings before the IJ was not necessary for the BIA to review the IJ's decision, and (2) the BIA adequately explained its decision by adopting the reasoning set forth by the IJ in his decision; the alien's first attorney's failure to submit a § 212(c) application by the date specified by the IJ (his secretary mistakenly filed the wrong form, two days after the deadline) was a permissible basis for denying the request for a continuance. *Castaneda-Suarez v INS (1993, CA7) 993 F2d 142.*

BIA should recite in its decision all of factors it considered in determining whether to grant waiver of deportation; however, BIA does not abuse its discretion in failing to include in its decision particular factor deemed by BIA as "too insignificant to merit discussion" such as where applicant provided marginal evidence, at best, of his financial support of his two daughters. *Douglas v INS (1994, CA2) 28 F3d 241.*

Right to hearing on application for discretionary waiver of deportation is vested right when determining if statute affecting that right, *8 USCS (1994 Ed.) § 1182*(c), may be applied retroactively. *Drax v Ashcroft (2001, ED NY) 178 F Supp 2d 296.*

Alien who is applying for adjustment of status pursuant to *8 USCS § 1255* in connection with deportation proceedings is entitled to have special inquiry officer fully consider and adjudicate application for waiver of ground of excludability under former *8 USCS § 1182*(c) notwithstanding technicality that he is not returning to United States after voluntary departure. *In re Smith (1965, BIA) 11 I & N Dec 325.*

Under provisions of former *8 USCS § 1182*(c), waiver of ground of inadmissibility may be granted to permanent resident alien in deportation proceeding regardless of whether he departs United States following acts which render him deportable; constitutional requirements of due process and equal protection of laws mandate that no distinction shall be made between permanent resident aliens who proceed abroad and non-departing permanent resident aliens who apply for benefits of § 1182(c); permanent resident aliens similarly situated shall be treated equally with respect to applications for discretionary relief under § 1182(c). *In re Silva (1976, BIA) 16 I & N Dec 26.*

Procedure whereby INS invited application for § 1182(c) waiver, not as part

of deportation or exclusion proceeding and not in contemplation of alien's departure from United States and return, is unfair and unreasonable where letter of invitation threatened deportation proceedings within 30 days, and applicant was not made aware of her burden of proof. *In re Gordon (1980, BIA) 17 I & N Dec 389.*

Alien seeking waiver of deportation pursuant to former *8 USCS § 1182*(c) is not required to file second application upon return from lengthy visit to native country during pendency of deportation proceedings, since application for relief may properly be resumed upon his return to United States. *In re Brown (1982, BIA) 18 I & N Dec 324.*

In 1984 deportation proceeding under INA § 241(a)(2) [*8 USCS § 1251*(a)(2)], alien's motion to subpoena record of 1972 exclusion hearing was properly denied where alien failed to comply with requirements of 8 CFR § 287.4(a)(2)(ii)(B) by not stating with specificity what alien intended to prove by such evidence, and by failing to show that he made diligent effort to obtain record himself; even if alien could successfully challenge 1972 exclusion order on grounds that hearing resulted in gross miscarriage of justice because alien was not informed of rights, was not allowed representation by counsel, and was not given full hearing where government had burden of proof, alien's subsequent illegal re-entry in 1982 would serve as wholly independent ground for deportation; waiver of inadmissibility under § 212(c) [§ 1182(c)] is authorized in deportation proceedings only if ground of deportation sought to be waived is also ground of excludibility specified in that section, but § 275 [§ 1325] is not; alien failed to adequately identify reasons underlying appeal from denial of voluntary departure. Re Duran (1989, BIA) I & N Int Dec No 3101.

An IJ erred in denying an alien's motion to reopen for purposes of making a new application for INA § 212(c) [former *8 USCS § 1182*(c)] relief on ground that alien had little chance of succeeding on merits where alien alleged in his moving papers that since time he was first denied this relief he had married a U.S. citizen who had obtained an approved immediate relative visa petition on his behalf, he had received a certificate of rehabilitation for a California court after successfully completing a period of probation, he had one U.S. citizen child and his wife was currently pregnant with a second child, and he was sole support of his family. In re Rodarte-Espinoza (1995, BIA) I & N Interim Dec No 3260.

A deportable alien cannot concurrently request nunc pro tunc permission to reapply for admission after deportation and a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] where a grant of nunc pro tunc permission would not completely dispose of case; while such permission would address issue of alien's excludability at time of reentry, he remains deportable on basis of a post-reentry drug conviction. In re Garcia-Linares (1996, BIA) I & N Interim Dec No 3268.

95. --Burden of proof

On petition for waiver of deportation under INA § 212(c) (former *8 USCS § 1182*(c)), alien bears burden of establishing that his application merits favorable consideration. *Varela-Blanco v INS (1994, CA8) 18 F3d 584.*

Applicant bears burden of demonstrating that he merits relief from deportation under INA § 212 (former *8 USCS § 1182*(c)) *Tipu v INS (1994, CA3) 20 F3d 580.*

Alien bears burden of demonstrating that application for waiver under former *8 USCS § 1182*(c) warrants favorable consideration. *In re Edwards (1990, BIA) 20 I & N Dec 191.*

96. Discretion of Attorney General

Federal courts have jurisdiction under general federal habeas corpus statute *(28 USCS § 2241)* to entertain petition, by alien who is lawful permanent resident of United States and has pled guilty to and been convicted of crime (possession of controlled substance in violation of state law) that makes alien removable from United States, for writ of habeas corpus under § 2241, which petition alleges that alien is eligible for waiver of removal under repealed § 212(c) of Immigration and Nationality Act *(8 USCS § 1182*(c)), which granted United States Attorney General discretion to waive removal--where, between time when alien was convicted and time when removal proceedings against alien were commenced, § 212(c) was repealed and, in effect, was replaced by legislation, under Antiterrorism and Effective Death Penalty Act of 1996 (110 Stat 1214) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (110 Stat 3009-546), that, in Attorney General's view, does not give Attorney General discretion to waive alien's removal. *INS v St. Cyr (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271, 2001 CDOS 5235, 2001 Daily Journal DAR 6475, 2001 Colo J C A R 3473, 14* FLW Fed S 401.

Relief under § 212(c) of Immigration and Nationality Act *(8 USCS § 1182*(c))--which (1) granted United States Attorney General discretion to waive removal from United States of resident aliens who were convicted of crimes that made them removable, but (2) was repealed by § 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (110 Stat 3009-597) before removal proceedings were commenced against alien involved in instant case--remains available for aliens, such as alien in instant case, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at time of their plea under law then in effect. *INS v St. Cyr (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271, 2001 CDOS 5235, 2001 Daily Journal DAR 6475, 2001 Colo J C A R 3473, 14* FLW Fed S 401.

Application in federal court for writ of habeas corpus pursuant to *28 USCS § 2241,* by alien who is lawful permanent resident of United States and has pled guilty to and been convicted of crime that makes alien removable from United States--where application alleges that alien is eligible for waiver of removal under repealed § 212(c) of Immigration and Nationality Act *(8 USCS § 1182*(c)), which (1) granted United States Attorney General discretion to waive removal, and (2) was repealed between time when alien was convicted and time when removal proceedings against alien were commenced--raises pure question of law as to alien's statutory eligibility for discretionary relief, rather than objection to manner in which discretion was exercised. *INS v St. Cyr (2001) 533 US 289, 150 L Ed 2d 347, 121 S Ct 2271, 2001 CDOS 5235, 2001 Daily Journal DAR 6475, 2001 Colo J C A R 3473, 14* FLW Fed S 401.

Possibility that alien may obtain discretionary relief upon appeal to Attorney General under former *8 USCS § 1182*(c) may lead Immigration and Naturalization Service and courts to tolerate alien's presence, but it does not legalize alien's intent to remain for purpose of accumulating 7 consecutive years of unrelinquished domicile entitling alien to relief from deportation. *Lok v Immigration & Naturalization Service (1982, CA2) 681 F2d 107.*

Any requirement that the BIA remand a case in which the Immigration Judge has applied the wrong legal standard, would strip the Board of the discretion that 8 CFR § 3.1(d) provides; the Board has the discretionary power to remand a case, but cannot be required to do so. *Elnager v U.S. INS (1991, CA9) 930 F2d 784, 91 CDOS 2811, 91* Daily Journal DAR 4500; *Charlesworth v United States INS (1992, CA9) 966 F2d 1323, 92 CDOS 4925, 92* Daily Journal DAR 7920.

The exercise of discretion under INA § 212(c) [former *8 USC § 1182*(c)]

requires the Attorney General to balance the social and humane consideration in the alien's favor against any adverse factors that demonstrate his or her undesirability as a permanent resident in the United States. *Cordoba-Chaves v INS (1991, CA7) 946 F2d 1244; Akinyemi v INS (1992, CA7) 969 F2d 285.*

In reviewing grant of waiver of deportation under *8 USCS § 1182*(c), BIA may review entire record de novo, however, Court of Appeals may not review facts of case de novo and may only reverse findings of BIA for abuse of discretion; thus, decision of BIA reversing grant of waiver of deportation by IJ to Colombian permanent resident alien was affirmed, where, BIA properly balanced relevant factors, giving rational explanation for its decision, and agreed with IJ that factors such as U.S. citizen-parents' health problems, alien's long residence in U.S., close relationship with U.S. citizen-son, and rehabilitation constituted outstanding equities, but found they were not sufficient to overcome grave crimes of murder and aggravated battery together with controlled substance convictions. *Cordoba-Chaves v INS (1991, CA7) 946 F2d 1244.*

Due to its discretionary nature the Court of Appeals will only consider whether the BIA's denial of a waiver of excludability was arbitrary, capricious, or an abuse of discretion. *Thomas v Groose (1991, CA8 Mo) 951 F2d 173; McLean v INS (1990, CA1) 901 F2d 204.*

In the presence of serious adverse factors, the BIA may require a heightened showing of favorable evidence, which may have to involve unusual or outstanding equities; in determining whether the alien has shown unusual or outstanding equities, the BIA must conduct a full examination of an alien's equities and must consider all favorable factors, which include, inter alia, proof of a genuine rehabilitation if a criminal record exists, and failure of the BIA to consider rehabilitation constitutes error warranting remand to the Board for its consideration of such factor. *Akinyemi v INS (1992, CA7) 969 F2d 285.*

It is the Attorney General, not the federal courts, that is charged with making the decision whether to grant a petitioner relief from deportation or exclusion. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

The Seventh Circuit has held that: (1) an alien seeking INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation may not use the waiver hearing as a means of mounting a collateral attack on the judgment of conviction underlying the deportation order; (2) although rehabilitation is an important factor that will ordinarily be required before § 212(c) [§ 1182(c)] relief will be granted, it is not an absolute prerequisite to such relief and thus cannot be sole factor considered in assessing an alien's application for a waiver of deportation; and (3) although an acknowledgment of culpability as to a conviction underlying a deportation order is an important aspect of rehabilitation, it cannot be the exclusive indicator used by the BIA in determining whether an alien ought to be granted a favorable exercise of discretion under § 212(c) [§ 1182(c)]. *Guillen-Garcia v INS (1993, CA7) 999 F2d 199.*

BIA, acting on behalf of Attorney General, may establish standards to guide exercise of discretion in granting waivers of deportation under INA § 212(c) (former *8 USCS § 1182*(c)) as long as they are rationally related to statutory scheme; such standard must be based on permissible interpretation of statute, although it need not be only one agency could permissibly have adopted or even reading court would have reached if question had arisen in judicial proceeding. *Kahn v INS (1994, CA9) 20 F3d 960, 94 CDOS 2071, 94 Daily Journal DAR 3902, amd (1994, CA9) 36 F3d 1412, 94 CDOS 7392, 94* Daily Journal DAR 13593.

Classification among aliens in deportation and exclusion proceedings provided

in former *8 USCS § 1182*(c) does not violate equal protection. *Asad v Reno (2001, CA6 Tenn) 242 F3d 702, 2001 FED App 63P.*

Distinction between two classes of resident aliens who commit same crime, as provided in former *8 USCS § 1182*(c) and *8 USCS § 1182*(h), does not violate equal protection. *Domond v United States INS (2001, CA2 Conn) 244 F3d 81.*

District Director's denial to alien, excludable under *8 USCS § 1182*(a)(22), of blanket permission to depart and return to United States on unlimited basis without having to specify dates of departure and return was proper since such permission would be equivalent to unlimited waiver of alien's excludability and Attorney General's discretionary power under former *8 USCS § 1182*(c) does not encompass authority to grant unlimited waiver of excludability; however in view of nature and requirements of alien's business interests, authorization under § 1182(c) would be granted for three year period, after expiration of which applicant could make further petition for extension of similar discretionary relief. *In re Wolf (1968, BIA) 12 I & N Dec 736.*

Former 8 USCS § 1182(c) does not provide indiscriminate waiver for all who demonstrate statutory eligibility for such relief; instead, Attorney General or his delegate is required to determine as matter of discretion whether applicant warrants relief sought, and alien bears burden of demonstrating that his application merits favorable consideration. *In re Marin (1978, BIA) 16 I & N Dec 581.*

Lawful permanent resident's appeal from order of deportation based on *8 USCS § 1251*(a)(11) was dismissed where IJ did not abuse discretion in denying respondent's application for waiver under former *8 USCS § 1182*(c); respondent failed to demonstrate outstanding equities and genuine rehabilitation necessary to merit relief in face of serious criminal record where (1) fact that respondent committed armed robbery to support drug habit while on probation for attempted criminal sale of controlled substance outweighed his participation in rehabilitation programs while in prison, and (2) respondent's discomfort in returning to Italy and emotional hardship to family members in United States did not rise to level of outstanding equities. *In re Buscemi (1988, BIA) 19 I & N Dec 628.*

97. Drug offenses

Discretionary relief under former *8 USCS § 1182*(c) was not available to alien whose deportation was sought, not because he was excludable at time he last entered United States, but because he was convicted of narcotics offense after entering United States. *Arias-Uribe v Immigration & Naturalization Service (1972, CA9) 466 F2d 1198.*

Relief under former *8 USCS § 1182*(c) is unavailable to alien facing deportation for conviction of drug-related crime pursuant to *8 USCS § 1251*(a)(11). *Nicholas v Immigration & Naturalization Service (1979, CA9) 590 F2d 802* (superseded by statute on other grounds as stated in *Romeiro De Silva v Smith (1985, CA9 Ariz) 773 F2d 1021)* and (superseded by statute on other grounds as stated in *Mada-Luna v Fitzpatrick (1987, CA9 Ariz) 813 F2d 1006).*

BIA properly denied INA § 212(c) waiver of excludability to alien convicted of narcotics violation where alien failed to introduce any evidence indicating that his deportation to England would result in hardship to himself or members of his family, and failed to establish existence of familial ties with citizens of United States; finding based on 8 CFR § 242.7 constitutes finding on merits of request for INA § 212(c) relief. *Mantell v United States Dep't of Justice, Immigration & Naturalization Service (1986, CA5) 798 F2d 124.*

BIA did not act arbitrarily or capriciously in deciding that alien's crime was not outweighed by showing of unusual outstanding equities where there was

sufficient evidence to support BIA's interpretation; equities presented by alien's family ties and relatively long residence in U.S. are substantial but insufficient to overcome commission of serious drug crime, immigration laws reflect strong Congressional policy against lenient treatment of drug trafficking offenders and insufficient time had elapsed since alien's release from custody to persuade BIA that alien was genuinely rehabilitated. *Blackwood v Immigration & Naturalization Service (1986, CA11) 803 F2d 1165.*

The passage of the Anti-drug Act of 1988 and the Immigration Act of 1990, did not change the earlier established rule that INA § 212(c) [former *8 USCS § 1182*(c)] could not be utilized to waive all grounds of deportability, but only those grounds of deportability having a corresponding ground of excludability as specifically referenced in the statute. *Campos v INS (1992, CA1) 961 F2d 309.*

The BIA's application of a higher standard for drug offenders is rationally based upon the INA's manifest concern with drug activity by lawful permanent residents, such standard representing a permissible interpretation of the INA. *Charlesworth v United States INS (1992, CA9) 966 F2d 1323, 92 CDOS 4925, 92* Daily Journal DAR 7920.

The fact that an alien had married a United States citizen, that she and her husband had a child, that they had opened a business, and that her probation for Travel Act *(18 USCS § 1952*(a)) violation was terminated early, was insufficient to carry the heavy burden of demonstrating outstanding equities that would outweigh the serious controlled substance offense she committed. *Johnson v INS (1992, CA9) 971 F2d 340, 92 CDOS 6564, 92* Daily Journal DAR 10530, 92 Daily Journal DAR 10551.

Those who have been convicted of serious drug offenses must produce evidence of unusual or outstanding equities. *Villarreal-San Miguel v INS (1992, CA5) 975 F2d 248.*

In making a discretionary immigration decision, an agency must indicate how it weighed the factors involved and how it arrived at its conclusion; thus, an immigration judge did not properly evaluate the factors involved and failed to offer a reasoned explanation of why the only adverse factor, a single drug conviction, outweighed all of the equities in the alien's favor. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

It is the agency's responsibility to decide the proper weight to give the various factors involved in INA § 212(c) [*8 USCS § 1182*(c)] petitions involving narcotics offenses; what it may not do is categorically deny § 212(c) relief to drug offenders who have served less than five years incarceration. *Yepes-Prado v United States INS (1993, CA9) 10 F3d 1363, 93 CDOS 7535, 93* Daily Journal DAR 12830, reported in full (1993, CA9) *1993 US App LEXIS 29444* and amd on other grounds (1993, CA9 Cal) *93 CDOS 8406, 93* Daily Journal DAR 14372.

The BIA's refusal to grant an alien a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] was vacated and the case was remanded to the BIA for further proceedings where the alien and his counsel reasonably relied on the IJ's statement that evidence relating to the timing of his entry into a prison drug rehabilitation program was irrelevant, and the excluded evidence had the potential for affecting the ultimate outcome, where the BIA emphasized the fact that following his imprisonment, the alien had first enrolled in a college degree program in speculating that he had enrolled in the drug rehabilitation program only to avoid deportation; the court noted that in any event, the fact that the alien may have chosen to pursue a college degree before enrolling in the drug rehabilitation program was not an appropriate reason for denying him a waiver of deportation, where he successfully completed both programs. *Espinoza*

v INS (1993, CA7) 991 F2d 1294.

The BIA's reversal of a grant of an alien's application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] was affirmed where (1) the BIA could properly doubt whether the alien, who after having been charged with several drug offenses in one state, jumped bail and fled to another state, where he was convicted of another drug offense, could avoid criminal activity after his release from prison, (2) the alien had reestablished contact with his family in the U.S. only after his imprisonment, and (3) the alien does not support his daughter, whom he has not seen since her birth. *Bellido-Torres v INS (1993, CA7) 992 F2d 127.*

The BIA need not list every possible positive and negative factor in its decision, and thus the dismissal of an alien's appeal from the denial of relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] was affirmed where (1) the alien failed to establish that the BIA did not consider his remorsefulness and participation in drug counseling programs, and (2) there was ample evidence that the BIA thoughtfully considered the alien's appeal before concluding that the favorable equities were not sufficient to counterbalance the adverse factor of selling drugs. *Rodriguez-Rivera v INS (1993, CA8) 993 F2d 169.*

The BIA did not abuse its discretion in dismissing a convicted alien's appeal from a deportation order and the denial of discretionary relief under INA § 212(c) [former *8 USCS § 1182*(c)], where the BIA's unwillingness to find rehabilitation regarding the likelihood of criminal behavior or drug abuse was not arbitrary or capricious, and did not lack a rational basis; the alien's favorable factors, including his length of residence in the United States (lawful since 1975), steady employment history, and strong family ties in the United States (including 4 U.S. citizen children) amounted to the unusual and outstanding equities required for relief where the alien has been convicted of a serious drug offense, but were outweighed by the adverse factors of the alien's drug convictions (delivery of cocaine and heroin, and possession of cocaine), lack of acceptance of responsibility for his criminal behavior, and history of drug and alcohol abuse. *Palacios-Torres v INS (1993, CA7) 995 F2d 96.*

An immigration judge did not abuse his discretion in concluding that an alien convicted of an aggravated felony relating to drugs did not merit INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation because the adverse factors of a lengthy and serious criminal record, long-term involvement in the drug culture, a sporadic employment record, and failure to file taxes outweighed the favorable factors of drug and alcohol rehabilitation efforts, longtime residency in the U.S., close family ties, and hardship if deported to Columbia (due to the alien's HIV-positive status and lack of ties to that country). *Arango-Aradondo v INS (1994, CA2) 13 F3d 610, 27 FR Serv 3d 1549.*

The 1990 amendment to INA § 212(c) [*8 USCS § 1182*(c)] which bars discretionary relief in the case of an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years applies to a lawful permanent resident who was convicted of drug trafficking in 1985 and served nearly 6 years in prison; there is no constitutional violation because (1) no true question of retroactivity is presented, since a statute is not made retroactive merely because it draws upon antecedent facts for its operation, and (2) the ex post facto principle does not come into play in a civil context such as this. *Campos v INS (1994, CA6) 16 F3d 118, 1994 FED App 46P.*

The BIA did not abuse its discretion in determining that the adverse factors of a drug conviction, a spotty employment record, and a superficial attempt at rehabilitation made only after the alien faced deportation outweighed the

favorable factors of family ties to the U.S. (including the alien's marriage to a naturalized U.S. citizen and their U.S. citizen child); the BIA properly found letters of recommendation submitted on the alien's behalf to be weak evidence of his good character where they did not acknowledge his drug conviction, and noted that the alien had two siblings in Lebanon who should be able to help him readjust to living there. *Hazime v INS (1994, CA6) 17 F3d 136, 1994 FED App 54P,* reh, en banc, den (1994, CA6) *1994 US App LEXIS 6555* and cert den *(1994) 513 US 934, 130 L Ed 2d 289, 115 S Ct 331.*

Although the BIA erred in characterizing charges which had been "filed" under Massachusetts law as convictions, that error was harmless where in reviewing an application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)], the BIA may consider any evidence of an alien's bad character or undesirability as a permanent resident, and thus it could have considered the filed charges as some evidence weighing against a grant of such discretionary relief; given the evidence relating to the filed charges (the alien had pled guilty to the filed drug charge, and had been found guilty by a jury on one of the three filed firearms charges), as well as the number (four), seriousness (cocaine and heroin), and recency of the alien's unquestionably final drug convictions, it is unlikely that the BIA's mistake could have affected the balance of equities on which its denial of relief rested. *White v INS (1994, CA1) 17 F3d 475.*

Alien has made strong showing that he would have been granted waiver of deportation and thus received ineffective assistance of counsel when his attorney failed to apply on his behalf for this relief where alien, although convicted of aggravated felony involving controlled substance, had resided in U.S. since he was 9, had obtained Associate's Degree while incarcerated, and was eligible for release for good behavior before he served his full 5-year term, and where all alien's immediate relatives resided in *U.S. Rabiu v INS (1994, CA2) 41 F3d 879.*

Alien who has been convicted of serious drug offense must show outstanding positive equities in order to obtain former *8 USCS § 1182*(c) waiver of deportation. *Elramly v INS (1995, CA9) 49 F3d 535, 95 CDOS 1576, 95* Daily Journal DAR 2745, reprinted as amd on other grounds, remanded (1995, CA9) *73 F3d 220, 96 CDOS 24, 96* Daily Journal DAR 27 and vacated without opinion, remanded (1996, US) *135 L Ed 2d 1123, 117 S Ct 31, 96* Daily Journal DAR 11589.

Because provision of Anti-Drug Abuse Act of 1988 which bars aliens convicted of aggravated felonies from applying for discretionary waiver of deportation under former *8 USCS § 1182*(c) is ambiguous as to whether it applies to aliens whose convictions predate effective date of Act, Court of Appeals will defer to INS' reasonable interpretation of statute that bar applies to convictions which occurred before Act was in effect. *Samaniego-Meraz v INS (1995, CA9) 53 F3d 254, 95 CDOS 2897, 95* Daily Journal DAR 5049.

Amendment to *8 USCS § 1182*(c), which added drug offenses to list of deportable offenses that rendered aliens ineligible for discretionary relief, was not meant to be applied to pending cases. *Sandoval v Reno (1999, CA3 Pa) 166 F3d 225.*

Post-trial proceedings to vacate guilty plea to narcotics charge on claim of ineffective assistance of counsel in which alien contended that trial would have resulted in a delay of conviction of alien and enable him to seek a discretionary waiver of deportation under former *8 USCS § 1182*(c), as person with seven consecutive years of lawful, unrelinquished domicile in U.S. were stayed to determine whether a discretionary waiver of deportation would be granted because a denial of waiver of deportation would render issue moot. *United States v George (1988, ND Ill) 676 F Supp 863, 90 ALR Fed 733.*

Conviction of drug offense constitutes permanent bar to becoming lawful permanent resident, and there is no waiver for such ground of excludability; IRCA did not provide new avenue or abolish former obstacle to becoming citizen for aliens with felony drug convictions. *United States v Holder (1990, DC Puerto Rico) 741 F Supp 27,* affd (1991, CA1 Puerto Rico) *936 F2d 1, 105 ALR Fed 871.*

Alien was statutorily eligible for relief from deportation pursuant to former *8 USCS § 1182*(c) where he had been lawfully admitted for permanent residence, his deportability resulted from conviction of marijuana violation which occurred prior to his departure from United States, evidence established that his departure was voluntary and temporary and not under order of deportation, and there was no evidence in record to controvert fact that at time of his last entry respondent was returning to unrelinquished domicile of seven consecutive years; record was remanded in order to give immigration judge opportunity to consider alien's application for nunc pro tunc waiver under *8 USCS § 1182*(c) where alien was permanent resident alien for more than nine consecutive years, had close family ties in United States, and there was no evidence of misconduct apart from conviction of marijuana violation. *In re Tanori (1976, BIA) 15 I & N Dec 566.*

Alien who was deportable under *8 USCS § 1251*(a)(11) based upon conviction for marijuana-related offense, but who had maintained domicile in United States for seven consecutive years subsequent to his acquisition of lawful permanent resident status and prior to issuance of order to show cause, was eligible for discretionary relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)]. *In re Rivera-Rioseco (1988, BIA) 19 I & N Dec 833.*

Lawful permanent resident's appeal from order of deportation based on *8 USCS § 1251*(a)(11) was dismissed where IJ did not abuse discretion in denying respondent's application for waiver under former *8 USCS § 1182*(c); respondent failed to demonstrate outstanding equities and genuine rehabilitation necessary to merit relief in face of serious criminal record where (1) fact that respondent committed armed robbery to support drug habit while on probation for attempted criminal sale of controlled substance outweighed his participation in rehabilitation programs while in prison, and (2) respondent's discomfort in returning to Italy and emotional hardship to family members in United States did not rise to level of outstanding equities. *In re Buscemi (1988, BIA) 19 I & N Dec 628.*

Alien deportable for conviction of drug-related aggravated felony which could also form basis for excludability is not precluded from establishing eligibility for waiver under INA § 212(c) [former *8 USCS § 1182*(c)], as such waiver is available in deportation proceedings to aliens who have been found deportable under ground for which there is comparable ground of excludability, and language of statute implies that some aliens who have been convicted of aggravated felonies are eligible for waiver, although not alien who has been convicted of aggravated felony and has served term of imprisonment of at least 5 years. *In re Meza (1991, BIA) 20 I & N Dec 257.*

98. --Importation

INA § 212(c) [former *8 USCS § 1182*(c)] relief was properly denied where at time of claim, determination of deportability on charge of having been convicted of importing cocaine was final and there was no longer any authority to reopen denial of INA § 212(c) relief because alien clearly was no longer in lawful admitted permanent residence. *Garcia-Hernandez v INS (1987, CA5) 821 F2d 222.*

BIA correctly denied alien's motion to remand and reopen exclusion proceedings where 7 years of lawful permanent residence was acquired during

pendency of meritless appeal by alien, and where equities were not sufficiently outstanding to offset serious nature of crime, importation of kilogram of cocaine into U.S., as required for waiver of excludability. *Correa v Thornburgh (1990, CA2 NY) 901 F2d 1166.*

BIA will reverse determination of IJ and grant *8 USCS § 1182*(c) waiver of inadmissibility to alien who, despite her conviction for importing marijuana, was able to demonstrate numerous positive equities including acknowledgment of seriousness of her criminal actions, pursuit of GED and prison ministry during her present incarceration, five U.S. citizen children in U.S., 20 years of lawful permanent residence prior to her conviction, offer of full-time employment upon her release and history of being able to support herself. In re Arreguin De Rodriguez (1995, BIA) I & N Interim Dec No 3247.

99. --Possession

BIA's application of higher standard requiring drug offenders to show unusual or outstanding equities to merit waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] is rationally based upon INA's manifest concern with drug activity by permanent residents and represents permissible interpretation of statute, and permanent resident's criminal record, including conviction of possession of cocaine and numerous traffic infractions, showed pattern of criminal activity serious enough to justify application of such standard; BIA did not abuse discretion in finding that permanent resident's 18-year period of residence in U.S., together with facts that most of alien's family resided legally in U.S. and that alien was primary support of minor daughter who was U.S. citizen, were equities substantially in alien's favor but not sufficiently outstanding to merit relief. *Ayala-Chavez v U.S. INS (1991, CA9) 944 F2d 638, 91 CDOS 7504, 91* Daily Journal DAR 11513.

The denial of an alien's request for INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation was affirmed on the ground that the BIA's conclusion that the adverse factors outweighed the outstanding and unusual equities established by the alien was rational and did not depart from established policies or rest on an impermissible basis; the favorable factors included the facts that the alien had come to the United States as a 3-year-old and had lived in the United States for over 30 years, the alien's mother is a lawful permanent resident and her siblings are U.S. citizens, and the alien is married to a U.S. citizen, while the adverse factors included her 3 drug convictions (2 for possession and one for conspiracy to manufacture), her history of drug abuse (including heroin), and her lack of responsibility for the care of her children. *Craddock v INS (1993, CA6) 997 F2d 1176.*

100. --Possession with intent to distribute

Alien convicted of possession of marijuana for sale in Denmark prior to successfully adjusting status to permanent resident of U.S., which conviction if known would have precluded alien from obtaining permanent resident status, does not have benefit of INA § 212(c) [former *8 USCS § 1182*(c)] relief as eligibility under § 1182(e) requires lawful admission; alien is not entitled to § 1182(c) relief until such time as formal adjudication of unlawful procurement of status is made; 5-year statute of limitations found in INA § 246 [*8 USCS § 1256]* does not apply to bar deportation proceedings against alien regardless of method of alien's admission. *Monet v Immigration & Naturalization Service (1986, CA9) 791 F2d 752.*

BIA did not abuse its discretion in denying waiver of deportation to alien who was previously granted waiver of deportation after 1975 conviction of possession with intent to distribute controlled substance and demonstrated

failure to rehabilitate self by being convicted of similar charge in 1983. *Vargas v U.S. Dep't of Immigration & Naturalization (1987, CA9) 831 F2d 906.*

An IJ's ruling that an alien was ineligible for INA § 212(c) [former *8 USCS § 1182*(c)] relief because he had been convicted of an aggravated felony (possession of heroin with intent to deliver) for which there was no corresponding ground of excludability under § 212(a) [§ 1182(a)], although erroneous, did not effectively deprive the alien of the right to review where the alien, who was at all times represented by counsel, filed a notice of appeal with the BIA, but subsequently voluntarily withdrew that appeal. *United States v Vieira-Candelario (1993, CA1 RI) 6 F3d 12.*

The BIA did not abuse its discretion in reversing an IJ's grant of relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] to an alien who had been convicted of possession with intent to distribute 50 kilograms of marijuana, and while out on bail, was arrested (and later convicted) for possession of cocaine, where the BIA concluded that the seriousness of the alien's drug convictions outweighed the militating effect of the fact that the alien took courses in prison and expressed remorse for his criminal acts. *Soto-Tapia v INS (1993, CA5) 8 F3d 1.*

A denial of INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation was affirmed where the BIA did not abuse its discretion in determining that a lawful permanent resident's serious drug conviction and lack of rehabilitation outweighed the favorable factors in her case, including her lawful residence since 1981, 3 U.S. citizen children, employment, and community service; the adverse factors included her convictions of conspiracy to possess with intent to distribute 500 grams or more of cocaine, and of possession with intent to distribute 2 kilograms of cocaine, and the inconsistencies between her position that her codefendants were engaged in criminal activity, but her insistence that she was unaware of it. *De Gonzalez v INS (1993, CA6) 996 F2d 804.*

28 USCS § 2241 did not apply retroactively to permanent resident alien convicted of controlled substance crime who was in deportation proceedings at time of statute's enactment. *Ranglin v Reno (1998, DC Mass) 27 F Supp 2d 262.*

Mexican citizen admitted as lawful permanent resident who returned to Mexico and regularly commuted to work in United States until convicted of entering United States with large quantity of marijuana in his possession with intent to distribute, and who, while on probation in Mexico, traveled back and forth to United States several times, re-entering without inspection each time, remains lawful permanent resident whose final order of exclusion or deportation has not been entered, but is not entitled to discretionary relief under former *8 USCS § 1182*(c) in view of seriousness of drug offense for which he was convicted and absence of other substantial equities or mitigating factors. *In re Duarte (1982, BIA) 18 I & N Dec 329.*

101. --Sale or distribution

BIA's denial of permanent resident's request under INA § 212(c) [former *8 USCS § 1182*(c)] for discretionary waiver of deportation based on alien's alleged rehabilitation and family considerations was affirmed on ground that alien had shown some rehabilitation, but not enough to outweigh long history of criminal violations, including convictions for larceny and for distributing marijuana. *McLean v INS (1990, CA1) 901 F2d 204.*

An alien who took part in an elaborate criminal conspiracy to import and distribute heroin, despite the obvious consequences if he should be discovered and despite the pernicious activity in which he was engaged, has not shown rehabilitation where his good behavior failed to persuade the BIA that he would not succumb again to his family's pressures in this regard and the temptation of

the large profits to be had in such activities. *Ghassan v INS (1992, CA5) 972 F2d 631,* reh, en banc, den (1992, CA5) *977 F2d 576* and cert den *(1993) 507 US 971, 122 L Ed 2d 783, 113 S Ct 1412.*

Section 511 of the Immigration Act of 1990 (IA90), which amended INA § 212(c) [former *8 USCS § 1182*(c)] to preclude an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least five years from seeking a waiver of deportation, and which states that it applies to "admissions occurring after the date of an accident" of IA90, applies retroactively to aliens convicted of an aggravated felony prior to the date of enactment of IA90; just as aliens are credited for time spent in the U.S. while an appeal is pending before the BIA so that such aliens may be eligible for § 212(c) relief, the court will also consider the time aliens spend in prison during the course of a deportation hearing for purposes of rendering them ineligible for such relief. Thus, an alien who had been convicted of conspiring to distribute cocaine and of aiding and abetting the distribution of cocaine on July 3, 1986 and was sentenced to concurrent terms of 20 and 15 years became ineligible for § 212(c) relief on July 3, 1991, notwithstanding that he had applied for § 212(c) relief in June of 1991. *Buitrago-Cuesta v INS (1993, CA2) 7 F3d 291.*

The BIA did not abuse its discretion in requiring an alien who had been convicted of distribution of cocaine, subsequently violated his probation by being charged with possession with intent to deliver cocaine, and was found in possession of a vial of cocaine for his personal use when the INS took him into custody, to show unusual or outstanding equities to obtain a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)], or in finding that the alien failed to do so; even if the BIA had not required the alien to establish unusual or outstanding equities, it is unlikely that the BIA would have exercised its discretion in the alien's favor, given the strong evidence of his lack of rehabilitation. *Henry v INS (1993, CA7) 8 F3d 426.*

A lawful permanent resident who conceded deportability based on a conviction for distributing cocaine, who alleged that his failure to submit a timely application for relief under INA § 212(c) [former *8 USCS § 1182*(c)] was due to ineffective assistance of counsel, failed to establish that he was prejudiced by such failure where in his appeal to the BIA, the alien failed to allege any favorable factors that would have merited a grant of such relief; the Court of Appeals (1) could not consider such evidence on appeal, because its review was limited to the administrative record, and (2) declined to exercise its authority under *28 USCS § 2347*(c) to remand the case to the BIA, where the alien offered no explanation for his failure to present such evidence to the BIA. *Miranda-Lores v INS (1994, CA5) 17 F3d 84.*

BIA improperly considered alien's conviction, for sale of $ 100 worth of hashish, very serious crime such that it required alien to demonstrate outstanding positive equities in order to obtain former *8 USCS § 1182*(c) waiver of deportation; thus, matter is remanded to BIA to reconsider alien's positive equities, including 3 children, ex-wife, and steady employment, in determining whether to grant waiver. *Elramly v INS (1995, CA9) 49 F3d 535, 95 CDOS 1576, 95* Daily Journal DAR 2745, reprinted as amd on other grounds, remanded (1995, CA9) *73 F3d 220, 96 CDOS 24, 96* Daily Journal DAR 27 and vacated without opinion, remanded (1996, US) *135 L Ed 2d 1123, 117 S Ct 31, 96* Daily Journal DAR 11589.

BIA did not err in denying alien discretionary waiver of deportation where it found that alien's two convictions for drug sales presented serious adverse factor and that presence of mother, spouse and some siblings, as well as some evidence of good character, did not amount to unusual or outstanding equity sufficient to overcome it. *Lovell v INS (1995, CA2) 52 F3d 458.*

Permanent resident's application for relief from deportation under former *8 USCS § 1182*(c) was denied since extensive criminal record compiled over 10-year period, with controlled substance distribution offenses included therein, outweighed claimed unusual or outstanding equities. *In re S---- (1951, BIA) 4 I & N Dec 314.*

In deportation proceeding under *8 USCS § 1251*(a)(11) of alien convicted for unlawfully selling marijuana, where alien seeks waiver of conviction under former *8 USCS § 1182*(c) which would permit him to return to his lawful unrelinquished domicile, waiver may not be granted subject to condition subsequent that alien not violate state or federal criminal laws for 5 years, but such relief must be either denied or unconditionally granted. *In re Przygocki (1980, BIA) 17 I & N Dec 361.*

In case involving alien facing deportation on ground of conviction of selling cocaine, BIA: (1) rejected INS' contention that applicant for waiver of inadmissibility under INA § 212(c) [former *8 USCS § 1182*(c)] who is convicted of aggravated felony is required to meet heightened discretionary test beyond requirements set forth in earlier BIA decisions, as present balancing test set forth in those decisions, which requires heightened showing of offsetting equities when alien has been convicted of serious crime, but does not compel grant of relief, adequately allows for determining appropriate strength of equities necessary to overcome alien's crimes, in view of their nature and seriousness; (2) ruled that in exercising discretion to grant relief under INA § 212(c) [former *8 USCS § 1182*(c)], IJ may not consider evidence of entrapment after introduction of alien's conviction record, because such theory directly relates to issue of alien's ultimate guilt or innocence, and IJ must look to judicial records to determine whether alien has been convicted of crime, and may not determine own alien's guilt or innocence on his or her own; and (3) held that favorable exercise of IJ's discretion in granting relief under INA § 212(c) [former *8 USCS § 1182*(c)] was not warranted, as sale of cocaine constituted extremely serious offense and facts that alien had resided in U.S. for more than 12 years, was sporadically employed, and was estranged from and did not support his family, did not demonstrate unusual or outstanding equities which offset serious adverse factors. *In re Roberts (1991, BIA) 20 I & N Dec 294.*

102. Firearms offenses

Alien who was deportable under *8 USCS § 1251*(a)(14) for possession of sawed-off shotgun was not entitled to discretionary relief under former *8 USCS § 1182*(c), the discretionary relief provision of the exclusion statute, because Congress may have decided not to accord same discretion as applies in exclusion cases because it found a public policy advantage in deporting entire class of aliens convicted of sawed-off shotgun and machine gun offenses; Congress' withholding discretion from INS to grant relief from deportation for firearms offenses involving machine guns and sawed-off shotguns does not violate equal protection component of due process rights under Fifth Amendment because deportation for firearms offenses is a rational means to achieve legitimate purpose of deterring possession of forbidden weapons by aliens. *Cabasug v Immigration & Naturalization Service (1988, CA9) 837 F2d 880,* amd on other grounds, reh den, en banc (1988, CA9) *847 F2d 1321.*

Distinguishing between aliens deportable for mere possession of a firearm, and aliens deportable for trafficking in firearms or the use of a firearm in committing armed robbery, assault and battery or murder, for purposes of determining INA § 212(c) [former *8 USCS § 1182*(c)] relief eligibility, does not violate the Constitution's guaranty of equal protection of the law. *Campos v INS (1992, CA1) 961 F2d 309.*

An alien ordered deported on the basis of possession of a prohibited weapon was ineligible for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] because his conviction was not also a waivable ground for exclusion under INA § 212(a) [*8 USCS § 1182*(a)]; the alien's separate convictions for drug offenses for which discretionary relief is available did not mandate a different result. *Rodriguez v INS (1993, CA5) 9 F3d 408.*

An alien convicted of a firearms violation was not eligible for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] because there is no corresponding exclusion provision in INA § 212(a) [*8 USCS § 1182*(a)]. *Chow v INS (1993, CA5) 12 F3d 34.*

A decision dismissing an alien's appeal from an order denying the alien's motion to reopen and reconsider an order of deportation was vacated and remanded to the BIA for consideration of the issue of whether the alien should be deemed eligible for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] because he would be excludable under § 212(a)(2)(B) as a result of multiple criminal convictions that include a conviction for unlawful possession of a sawed-off shotgun, or whether the alien is ineligible for such relief because his conviction for weapons possession, standing alone, results in a ground for deportation under INA § 241(a)(2)(C) [*8 USCS § 1251*(a)(2)(C)] that has no counterpart in § 212. *Esposito v INS (1993, CA2) 987 F2d 108.*

The Eleventh Circuit has joined the First, Fifth, Seventh, and Ninth Circuits in holding that a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] is not available to an alien deportable on the basis of a firearms offense, because there is no analogous ground for exclusion. *Rodriguez-Padron v INS (1994, CA11) 13 F3d 1455, 7* FLW Fed C 1215.

Alien who is deportable under INA § 241(a)(2)(C) [*8 USCS § 1251*(a)(2)(C)] based on conviction of firearms offense is ineligible for relief under INA § 212(c) [former *8 USCS § 1182*(c)] because there is no counterpart to firearms provision in grounds for exclusion set forth in INA § 212(a). *Hamama v INS (1996, CA6) 78 F3d 233, 1996 FED App 78P.*

Because conviction of possession of a firearm is not a ground for exclusion, an alien convicted of that offense is not eligible for a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)]; the firearms conviction cannot be considered a constituent of a § 212(a)(2)(B) [§ 1182(a)(2)(B)] ground of excludability (multiple criminal convictions) when combined with convictions for manufacture of a controlled substance and malicious mischief, which could be waived under § 212(c) [§ 1182(c)]. *In re Gabryelsky (1993, BIA) 20 I & N Dec 750.*

An alien deportable under INA § 241(a)(2)(C) [former *8 USCS § 1251*(a)(2)(C)] on the basis of a conviction for a firearms offense is ineligible for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] because there is no exclusion ground corresponding to the deportation ground for conviction of a firearms offense. *In re Chow (1993, BIA) 20 I & N Dec 647,* affd without op (1993, CA5 La) *9 F3d 1547,* reported in full (1993, CA5) *12 F3d 34.*

Although an alien's conviction of possession of a firearm establishes deportability under INA § 241(a)(2)(C) [*8 USCS § 1251*(a)(2)(C)], it does not render the alien ineligible for adjustment of status under INA § 245(a) [*8 USCS § 1255*(a)], because it is not a ground of excludability; there is no requirement under 8 CFR § 245.1(e) that INA § 212(c) [former *8 USCS § 1182*(c)] separately and independently waive all grounds of deportability in order for an applicant for adjustment of status to concurrently apply for relief under INA §§ 245(a) and 212(c) [*8 USCS §§ 1255*(a) and former 1182(c)], and thus an alien with both a firearms conviction and a controlled substance conviction may apply for a waiver of deportation in conjunction with an application for adjustment of status,

notwithstanding the fact that no waiver of deportation is available for the firearms conviction because there is no corresponding ground for exclusion. *In re Gabryelsky (1993, BIA) 20 I & N Dec 750.*

103. Other particular circumstances

Alien who was deportable under *8 USCS § 1251*(a)(11) which provides for deportation of aliens convicted of criminal laws dealing with drug offenses, could not obtain waiver of deportability under former *8 USCS § 1182*(c). *Bowe v Immigration & Naturalization Service (1979, CA9) 597 F2d 1158.*

Board of Immigration Appeals did not abuse its discretion in denying Tunisian native's motion to reopen deportation proceedings to permit him to apply for discretionary relief under former *8 USCS § 1182*(c), where Board had previously refused suspension of deportation under § 1254(a)(2) based on lack of good moral character, criminal record, gambling activities, imprisonment, and lack of character reformation, and alien shows no change in circumstances other than mere passage of time. *Marcello v Immigration & Naturalization Service (1983, CA5) 694 F2d 1033,* cert den *(1983) 462 US 1132, 77 L Ed 2d 1367, 103 S Ct 3112.*

BIA's denial of waiver of deportability under INA § 212(c) [former *8 USCS § 1182*(c)] was properly denied where all adverse factors including alien's criminal record and lack of evidence of rehabilitation were weighed against favorable factors including alien's family ties. *Cobourne v Immigration & Naturalization Service (1986, CA11) 779 F2d 1564, 80 ALR Fed 1.*

BIA properly refused to grant alien's motion to reopen deportation proceedings based on (1) counsel's ineffectiveness in failing to produce evidence of alien's family ties to U.S. citizens where court is unable to determine whether counsel's failure to supply missing documentation was result of attorney error or nonexistence of any such documentation; (2) counsel's ineffectiveness in failing to inform immigration judge of alien's prior military service where notwithstanding counsel's neglect in alerting IJ of alien's prior military service, BIA balanced equities of alien's military service against seriousness of narcotics violation and thus alien was not prejudiced by counsel's oversight; (3) counsel's ineffectiveness in failing both to file application for naturalization and to move for termination of deportation during pendency of application where BIA considered merits of this request and found that termination was not warranted; (4) INS violation of its operating procedures in failing to inform IJ of alien's military service and in failing to inform alien that his military service made him eligible to be naturalized where alien was not prejudiced because BIA gave full consideration to his military service, and finding based on 8 CFR § 242.7 constitutes finding on merits of request for termination of deportation proceedings. *Mantell v United States Dep't of Justice, Immigration & Naturalization Service (1986, CA5) 798 F2d 124.*

In motion to reopen deportation proceedings to apply for discretionary relief under INA § 212(c) [former *8 USCS § 1182*(c), entry of alien into United States as lawful permanent resident was not newly discovered evidence where such was part of record in IJ proceedings, and alien did not demonstrate that he was domiciled in U.S. for 7 consecutive years where time was accrued by filing frivolous appeals. *Torres-Hernandez v Immigration & Naturalization Service (1987, CA9) 812 F2d 1262.*

IJ did not err in failing to inform alien in deportation proceeding of possibility of waiver of excludability under INA § 212(c) [former *8 USCS § 1182*(c)], because 8 CFR § 242.17(a) only requires IJ to inform alien of forms of discretionary relief for which alien has demonstrated apparent eligibility, and alien had not been lawfully admitted for permanent residence, which is essential element for waiver of excludibility. *Michelson v INS (1990, CA10) 897 F2d 465.*

BIA's denial of permanent resident's request under INA § 212(c) [former *8 USCS § 1182*(c)] for discretionary waiver of deportation based on alien's alleged rehabilitation and family considerations was affirmed on ground that alien had shown some rehabilitation, but not enough to outweigh long history of criminal violations, including convictions for larceny and for distributing marijuana. *McLean v INS (1990, CA1) 901 F2d 204.*

BIA did not abuse its discretion in denying relief from deportation under § 1182(c) to Haitian who had extensive criminal record in U.S., including convictions for assault and battery with deadly weapon, breaking and entering, and armed robbery, which outweighed factors in alien's favor. *Joseph v INS (1990, CA1) 909 F2d 605.*

The BIA is not required to defer to the Immigration Judge's findings and conclusions because the BIA has the power to conduct a de novo review of the record, to make its own findings, and independently to determine the legal sufficiency of the evidence. *Elnager v U.S. INS (1991, CA9) 930 F2d 784, 91 CDOS 2811, 91* Daily Journal DAR 4500; *Charlesworth v United States INS (1992, CA9) 966 F2d 1323, 92 CDOS 4925, 92* Daily Journal DAR 7920.

BIA's denial of motion to reopen denial of application for relief under former *8 USCS § 1182*(c) was vacated on grounds that: (1) denial was supported solely by unjustified extension of *Re Lok, 18 I & N 101,* to stand for proposition that permanent resident status of alien who was eligible for § 1182(c) relief at time deportation proceedings began was terminated when BIA's order became "administratively final" upon BIA's dismissal of appeal from IJ's denial of § 1182(c) relief, and that alien was thus no longer eligible for such relief, where Second Circuit had previously intimated that once established, eligibility for § 1182(c) relief survives finding of deportability; (2) BIA's decision effectively amended 8 CFR § 3.2 without notice or opportunity for comment, rendering such decision arbitrary and capricious, where as written, regulation bars making of motion to reopen only if alien has departed U.S., but BIA extended prohibition to cases in which BIA's order had become "administratively final," thus preventing large group of persons (aliens subject to deportation orders issued by BIA) from making very motions contemplated by regulation; (3) BIA's application of Lok rule to motions to reconsider applications for former § 1182(c) relief had been erratic, and BIA had heard motions to reopen despite existence of final deportation orders; (4) BIA dismissed motion to reopen as if it were new request for former § 1182(c) relief, rather than request that BIA reevaluate original decision; (5) to extent that BIA's termination of alien's already-established eligibility for § 1182(c) relief can be seen as statutory interpretation, it runs afoul of rule that ambiguities in deportation statutes must be resolved in favor of alien; and (6) Second Circuit disagrees with Ninth Circuit's conclusion in @ If *Gonzalez, 921 F2d 236,* that alien cannot move to reopen denial of application for § 1182(c) relief after entry of administratively final deportation order, because although eligibility for § 1182(c) relief is not permanent and may be waived if alien fails to request such relief until after issuance of final deportation order, motion to reopen does not request new relief, but simply asks BIA to reevaluate prior action. *Vargas v INS (1991, CA2) 938 F2d 358.*

former *8 USCS § 1182*(c) vests Attorney General with discretionary authority to admit or suspend deportation of permanent resident who has resided in U.S. for at least 7 years; accordingly, IJ's who refused to allow girlfriend of Polish resident alien to testify at deportation hearing, because relationship was not "status" recognized under INA, but who accepted offer of proof to effect that girlfriend would testify to being pregnant with alien's child, committed clear error in referring to possibility of pregnancy as being irrelevant to IJ's

decision, since existence of U.S. citizen child would have provided very strong equities in alien's favor under § 1182. *Drobny v INS (1991, CA7) 947 F2d 241,* reh den (1992, CA7) *1992 US App LEXIS 203.*

Where the alien has been able to achieve the required 7-year residence period through the filing of frivolous appeals, the BIA acts within its discretion in denying a motion to reopen a denial of exclusion from deportation. *Borokinni v United States INS (1992, CA4) 974 F2d 442.*

The denial of the opportunity to present evidence in support of an application for relief from deportation under INA § 212(c) [former *8 USCS § 1182*(c)] did not violate an alien's constitutional right to due process where the alien was not eligible to apply for relief because the conviction upon which his deportation was based was not also a waivable ground for exclusion under INS § 212(a) [*8 USCS § 1182*(a)]. *Rodriguez v INS (1993, CA5) 9 F3d 408.*

The "fugitive from justice" doctrine is invoked at the court's discretion, and the Second Circuit found no sufficient reason to apply it in the case of an appeal by an alien who, although he failed to comply with a notice of surrender for deportation, believed his attorney was contesting that order and the underlying order of deportation in court, had not escaped from custody, and never concealed his whereabouts from the INS, particularly where the INS had not requested a bench warrant for the alien's arrest. *Esposito v INS (1993, CA2) 987 F2d 108.*

A petition for review of a BIA decision dismissing a permanent resident's motion to reopen the denial of his application for a waiver of deportation under INA § 212(c) [former *8 USCS § 1182*(c)] was granted and the case was remanded to the BIA for consideration of the issues raised by the alien, where the deportation order did not become administratively final when the alien's appeal was summarily dismissed by the BIA based on his failure to file a written brief or statement indicating the basis of his appeal, and thus the alien did not lose his permanent resident status at that point and become statutorily ineligible for INA § 212(c) relief; under 8 CFR § 3.2, the BIA may on its own motion reopen or reconsider any case in which it has entered a decision, and the alien's right to move to reopen or reconsider is not limited by any reference to the administrative finality of the BIA's initial decision; *Gonzales, 921 F2d 236,* is overruled. *Butros v United States INS (1993, CA9) 990 F2d 1142, 93 CDOS 2613, 93* Daily Journal DAR 4499.

The denial of an alien's motion to reopen his deportation proceeding to obtain INA § 212(c) [former *8 USCS § 1182*(c)] relief was affirmed on the ground that the BIA's interpretation of the definition of "lawfully admitted for permanent residence" in INA § 101(a)(20) [*8 USCS § 1101*(a)(20)] in the context of § 212(c) [§ 1182(c)] relief to mean that an alien's status as a lawful permanent resident changes when the alien becomes subject to an administratively final deportation order (that is, when the BIA renders its decision upon appeal or certification, or if no appeal to the BIA is taken, when the appeal is waived or the time allotted for appeal expires), and that an alien is thus statutorily ineligible for § 212(c) [§ 1182(c)] relief if a motion to reopen is not filed until after the alien becomes subject to a final deportation order, because the alien is no longer a lawful permanent resident, was reasonable; however, the change in status is nullified where reversible error is found in the BIA's determination that the alien is deportable and is undeserving of § 212(c) [§ 1182(c)] relief. *Katsis v INS (1993, CA3) 997 F2d 1067,* reh den (1993, CA3) *1993 US App LEXIS 20647* and cert den *(1994) 510 US 1081, 127 L Ed 2d 93, 114 S Ct 902,* reh den *(1994) 511 US 1118, 128 L Ed 2d 681, 114 S Ct 2125.*

The BIA did not abuse its discretion in denying an alien's request for INA § 212(c) [former *8 USCS § 1182*(c)] relief from deportation where the adverse

factors in the case (the alien's convictions of burglary, and of solicitation of the crime of murder - the alien had paid someone to kill a third person to whom the alien owed $ 22,000 to $ 33,000 for drugs) outweighed the unusual or outstanding equities (including the alien's willingness to donate a kidney to his ailing father). *Molenda v INS (1993, CA5) 998 F2d 291.*

BIA did not abuse its discretion in denying waiver of deportation although alien had resided in U.S. for over 20 years where alien had extensive criminal record, neither visited nor supported his son or his sister who resided in U.S., and had no significant business or property ties to *U.S. Hajiani-Niroumand v INS (1994, CA8) 26 F3d 832.*

IJ erred in failing to include in his decision denying relief from deportation pursuant to former *8 USCS § 1182*(c) discussion of issue of rehabilitation where counsel for INS acknowledged at hearing that alien had in fact been rehabilitated following his convictions for petit larceny and assault, and stated that it would not oppose alien's application for relief. *Rarogal v INS (1994, CA9) 42 F3d 570, 94 CDOS 9488, 94* Daily Journal DAR 17595.

Where counsel for INS acknowledged at deportation hearing that alien had been rehabilitated and thus did not oppose alien's application for relief from deportation pursuant to former *8 USCS § 1182*(c), BIA erred in affirming IJ's decision which denied this relief without considering issue of rehabilitation on basis that burden was on alien, not INS, to prove eligibility for relief from deportation; BIA should have treated INS acknowledgment as stipulation and considered this as factor in determining whether alien's application should have been granted. *Rarogal v INS (1994, CA9) 42 F3d 570, 94 CDOS 9488, 94* Daily Journal DAR 17595.

BIA did not abuse its discretion in denying alien former *8 USCS § 1182*(c) relief from deportation, despite presence in U.S. of many of alien's relatives, where alien had been convicted, on two separate occasions, of lewd assault and attempted lewd assault. *Ramsey v INS (1995, CA11) 55 F3d 580, 9* FLW Fed C 195.

BIA erred in refusing to consider alien's application for former *8 USCS § 1182*(c) waiver of deportation brought because alien had newly discovered evidence that his father was very ill on ground that alien's lawful permanent residence ended once alien was subject to order of deportation by BIA; once alien acquired 7 years of lawful permanent residence, alien remained eligible to seek discretionary relief from deportation. *Acosta-Montero v INS (1995, CA11) 62 F3d 1347, 9* FLW Fed C 463.

Relief in form of waiver of deportation provided in former *8 USCS § 1182*(c) cannot be extended to alien deportable for entry without inspection; denial of eligibility for such relief does not violate alien's equal protection rights. *Farquharson v United States AG (2001, CA11 Fla) 246 F3d 1317, 14* FLW Fed C 584.

District Director's determination that alien was not eligible for waiver of excludability was supported by substantial evidence where alien did not apply for such waiver at time he applied for adjustment of status, as required by 8 CFR § 212.7(a)(1)(ii), and where alien's earlier application for waiver had been denied with no appeal taken. *Sharma v Reno (1995, ND Cal) 902 F Supp 1130, 95* Daily Journal DAR 15049.

Dominican citizen is denied preliminary injunction enjoining his deportation, even though he pleaded guilty to drug crime before law was changed eliminating opportunity to apply for waiver of deportation under *8 USCS § 1182*(c), where deportation proceedings commenced well after enactment of that change, because any deprivation resulting from retroactive application of law to bar relief pursuant to § 1182(c) is not of constitutional proportions. *Then v INS (1998, DC NJ) 37 F Supp 2d 346.*

In view of uncertainties about state of outcome of application to Board of

Immigration Appeals by habeas petitioner, District Court would refrain from making decision on merits of habeas petition raising due process challenge to immigration judge's decision, determining that petitioner was deportable and that he was ineligible for discretionary waiver under *8 USCS § 1182*(c), and allow petitioner time to exhaust his administrative remedies before *Board. Cortorreal-Castellanos v Reno (2000, DC Mass) 81 F Supp 2d 199.*

Long-time lawful permanent resident is entitled to pursue discretionary waiver of deportation under *8 USCS § 1182*(c), even though she was convicted of bank fraud in 1998 and deportation proceedings against her were filed in 1999, where conduct constituting bank fraud occurred in 1992, because there is no clear congressional intent to apply elimination of § 1182(c) relief retroactively and rights at issue are significant. *Zgombic v Farquharson (2000, DC Conn) 89 F Supp 2d 220.*

Motion to reopen deportation proceedings, on ground that petitioner is alien returning to lawful unrelinquished domicile, will be denied where requested relief would surely be denied by Attorney General or delegate in exercise of discretion granted under *8 USCS § 1182,* inasmuch as alien has committed felony offense of murder. *In re Rodriguez-Vera (1979, BIA) 17 I & N Dec 105.*

While acknowledging that confined aliens and those who have recently committed criminal acts will have a more difficult task in demonstrating rehabilitation than aliens who have committed the same offenses in the more distant past, the Board of Immigration Appeals nonetheless ruled that an immigration judge did not act with good cause by granting a 1-year continuance to allow the respondent more time to establish rehabilitation in furtherance of his application for a waiver of inadmissibility under INA § 212(c) [former *8 USCS § 1182*(c)]. *In re Silva-Rodriguez (1992, BIA) 20 I & N Dec 448.*

Alien's vague and unsubstantiated claim that he supported his 2 children in Cuba was of minimal weight at best and did not merit grant of relief from deportation under former *8 USCS § 1182*(c), where alien had been convicted of aggravated felony involving controlled substance. *In re D (1994, BIA) 20 I & N Dec 915.*

Because application for former *8 USCS § 1182*(c) relief from deportation is not appropriate application in which to advance well-founded fear of persecution claim, IJ acted properly in refusing to consider affidavits alien had submitted in support of his application for asylum in determining alien's eligibility for waiver of inadmissibility under § 1182(c); while IJ may consider general conditions in alien's homeland in determining eligibility for this relief, fear of persecution may only be considered in applications for asylum or withholding of deportation. *In re D (1994, BIA) 20 I & N Dec 915.*

B. Nonimmigrants and Temporary Admissions [*8 USCS § 1182*(d)]

1. Temporary Admission of Ineligible Nonimmigrants

104. Generally

Attorney General has authority to indefinitely detain excludable aliens, and such indefinite detention does not violate due process. *Guzman v Tippy (1997, CA2 NY) 130 F3d 64.*

Government has implied statutory authority to detain for indefinite period excludable aliens who cannot be returned to country of origin; failure of Congress to place express limit on detention of excludable aliens, while imposing specific 6-month limitation on detention of aliens apprehended in United States and subject to expulsion proceedings, is not mere oversight but reflects intent to permit greater restrictions on excluded aliens than on

resident aliens. *Fernandez-Roque v Smith (1983, ND Ga) 567 F Supp 1115,* revd on other grounds (1984, CA11 Ga) *734 F2d 576.*

Waiver under *8 USCS § 1182*(d)(3)(A), governing temporary admission of nonimmigrants, is, by specific terms of that provision, applicable only to admission as nonimmigrant and fact that alien had been granted such waiver does not affect his inadmissibility under former *8 USCS § 1182*(a)(9) for purposes of entry as immigrant. *In re Awaijane (1972, BIA) 14 I & N Dec 117.*

105. Waiver

Denial of waiver authorized by *8 USCS § 1182*(d)(3) to Marxist scholar and writer who had been invited to speak at various American colleges, on stated ground that alien had flagrantly abused opportunities afforded him on recent trip to United States, was valid exercise of plenary power delegated to Executive under former *8 USCS §§ 1182*(a)(28) and *8 USCS §§ 1182*(d)(3); since Attorney General exercised this power negatively on basis of facially legitimate and bona fide reason, courts would neither look behind exercise of that discretion, nor test it by balancing its justification against First Amendment interests of American professors who seek personal communication with alien. *Kleindienst v Mandel (1972) 408 US 753, 33 L Ed 2d 683, 92 S Ct 2576.*

Court will not grant government summary judgment in challenge of denial of INA § 212(d)(3) [*8 USCS § 1182*(d)(3)] waiver to widow of former Chilean president where government's unclassified affidavits failed to establish facially legitimate and bona fide reason for denial of waiver; classified material submitted to court in camera, to which petitioner is denied access, may not form basis of summary judgment. *Allende v Shultz (1985, DC Mass) 605 F Supp 1220.*

An alien was not eligible for waiver of nonimmigrant visa and passport requirements under INA § 212(d)(4) [*8 USCS § 1182*(d)(4)] where the alien was a citizen of Guyana who attempted to enter the U.S. from Canada after being denied asylum by the Canadian government, and where he expressed an intent to reside in New York City, as he did not qualify for nonimmigrant status under any of the provisions of INA § 101(a)(15) [*8 USCS § 1101*(a)(15)]. *United States v Darsan (1993, WD NY) 811 F Supp 119.*

Alien's claim seeking order directing Secretary of State to forward his request for entry waiver under *8 USCS § 1182*(d)(3) to Attorney General was rendered moot when Attorney General acted officially on that request, and challenged action was not saved from mootness as being capable of repetition yet evading review, in that alien did not challenge policy or regulation of State Department, and individualized decision in his case was not capable of repetition. *Saavedra Bruno v Albright (1998, DC Dist Col) 20 F Supp 2d 51.*

106. --Validity of prescribed conditions

In issuing preliminary injunction to enjoin Secretary of State from refusing travel permit to Palestine Liberation Organization member to participate in political debate, District Court refused to dismiss on basis that restrictive travel conditions imposed by Secretary were nonjusticiable political question as federal courts have some role in enforcing constitutional restraints of executive's implementation of statutory scheme governing excludability of aliens. *Harvard Law School Forum v Shultz (1986, DC Mass) 633 F Supp 525,* vacated without op (1986, CA1 Mass) *852 F2d 563.*

2. Parole

107. Generally

Suspension of deportation under *8 USCS § 1254*(a)(1) is not applicable to excludable aliens who have been paroled into United States pursuant to *8 USCS § 1182*(d)(5), pending final determination of their excludability, and who are therefore merely "on threshold of initial entry." *Yuen Sang Low v Attorney Gen. (1973, CA9 Cal) 479 F2d 820,* cert den *(1973) 414 US 1039, 38 L Ed 2d 330, 94 S Ct 539.*

Alien paroled into country under *8 USCS § 1182*(d)(5) is allowed physically to enter country even though he has not yet been admitted in legal sense as immigrant; by admitting alien children Immigration and Naturalization Service did not acquire further duty to require children's removal from Michigan and ensure reunification with their relatives; decisions made by Attorney General pursuant to immigration laws, even if they have indirect effect of allowing family separation to be prolonged, do not provide valid basis for statutory claim. *Huynh Thi Anh v Levi (1978, CA6 Mich) 586 F2d 625.*

Parole of aliens seeking admission is simply device to avoid needless confinement while administrative proceedings are conducted. *United States v Kavazanjian (1980, CA1 Mass) 623 F2d 730.*

United States allows for temporary harborage in country of otherwise inadmissible alien, but does not grant alien legal residence in United States. *Moret v Karn (1984, CA3 Pa) 746 F2d 989.*

There is no intended presumption sufficient by itself to justify the denial of parole. *Marczak v Greene (1992, CA10 Colo) 971 F2d 510.*

Parole decisions under *8 USCS § 1182* should be based on consideration of whether alien has medical condition, is pregnant or is juvenile, has eligible parent, spouse, child, or sibling who has filed visa petition on alien's behalf, whether alien will be witness in judicial, administrative, or legislative proceeding, or is subject to prosecution, or where continued detention is against public interest. *Abu Laban v Sava (1982, SD NY) 564 F Supp 30.*

Government has implied statutory authority to detain for indefinite period excludable aliens who cannot be returned to country of origin; failure of Congress to place express limit on detention of excludable aliens, while imposing specific 6-month limitation on detention of aliens apprehended in United States and subject to expulsion proceedings, is not mere oversight but reflects intent to permit greater restrictions on excluded aliens than on resident aliens. *Fernandez-Roque v Smith (1983, ND Ga) 567 F Supp 1115,* revd on other grounds (1984, CA11 Ga) *734 F2d 576.*

Although indefinite detention of Cuban members of class without periodic hearing establishing continued detention of each class member appears to violate customary international law, international law is not controlling where court finds Attorney General's involvement in class member's detention to be a controlling executive act which precludes application of customary international law. *Fernandez-Roque v Smith (1985, ND Ga) 622 F Supp 887.*

In habeas corpus proceedings where IJ found alien excludable because upon entry to U.S. he would be deportable having entered United States without inspection, alien's application for release pending administrative appeal before BIA must be measured by terms and conditions of bail, and not by parole conditions applicable in exclusion proceedings; statute does not indicate stricter standard for release for those whose deportability is being determined in exclusion proceedings; alien is distinguishable from one in deportation proceedings only because of fortuitous circumstance that he was detained while attempting to re-enter U.S. *Appah v Sava (1986, SD NY) 636 F Supp 207.*

Mexican national's petition for writ of habeas corpus was granted where District Director failed to supply facially legitimate and bona fide reason for denying alien's application for parole pending exclusion proceeding; alien had

worked in U.S. for 9 years and alien's wife and 2 U.S. citizen children resided in U.S., and thus alien's use of fraudulent documents to attempt entry did not preclude legalization because waiver for humanitarian reasons and to assure family unity would be appropriate under INA § 245A(d)(2)(B)(i) [*8 USCS § 1255a*(d)(2)(B)(i)], and continuous physical presence requirement did not bar legalization where alien's 3-week absence to visit sick mother in Mexico fell within "brief, casual and innocent" exception; alien's use of counterfeit alien registration card and alleged misrepresentations regarding manner in which it was obtained did not support finding that alien presented high risk of absconding where fact that alien attempted to enter U.S. fraudulently had little or no bearing on risk of flight, and in any event did not support conclusion that alien would abandon family and possibility of legalization to escape authorities. *Gutierrez v Ilchert (1988, ND Cal) 702 F Supp 787.*

Decision to grant parole under INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] involves 2-step analysis: (1) Would alien's release be in public interest? (2) If so, does alien present security or flight risk?; neither statute nor its legislative history supports view that parole is exception and detention the rule. *Gutierrez v Ilchert (1988, ND Cal) 702 F Supp 787.*

If alien apprehended upon entry applies for legalization under IRCA, parole decision should include assessment of likelihood of success on application; INA § 245A(e)(2) [*8 USCS § 1255a*(e)(2)], which requires that alien who makes prima facie showing of eligibility for legalization not be deported and receive work authorization, is strong indication, if not mandate, that alien who makes such showing be paroled. *Gutierrez v Ilchert (1988, ND Cal) 702 F Supp 787.*

Legislative history of INA demonstrates that parole of unadmitted alien was meant to be exception rather than rule. *Barrios v Thornburgh (1990, WD Okla) 754 F Supp 1536.*

Notice of releasibility does not purport to, and cannot be construed to, supersede or negate regulation [8 CFR § 212.13(h)] stating that no Mariel Cuban detainee may be released on parole until suitable sponsor or placement is found; notice confers on alien neither unqualified right to unconditional release nor right to particular timetable for release. *Cruz v Kindt (1991, SD Ind) 764 F Supp 126.*

As parole is part of the admissions process, its denial does not rise to the level of a constitutional infringement. *Bruce v Slattery (1991, SD NY) 781 F Supp 963.*

Parole decisions made by the Attorney General or his or her designees pursuant to *8 USCS § 1182*(d)(5) must be based on a facially legitimate and bona fide reason. *Micovic v McElroy (1992, SD NY) 790 F Supp 75.*

Because permanent resident aliens detained upon seeking re-entry have only a single opportunity to make their case for release, they should be permitted to use that opportunity in the meaningful manner that only an evidentiary hearing allows. *Hamaya v McElroy (1992, ED NY) 797 F Supp 186.*

To regard the fact of apparent excludability, a fact necessarily common to every detained alien seeking parole under INA § 212 [*8 USCS § 1182],* as a reason for denying release because the alien presents a risk of absconding is to turn logic on its head, as such a reading would deprive the regulation of all meaning, creating an administrative Catch-22 in which no release could ever qualify as strictly in the public interest. *Hamaya v McElroy (1992, ED NY) 797 F Supp 186.*

While the government undoubtedly has an interest in proceeding by way of written submission and decision, that interest does not rise to a level sufficient to overcome a detainee's interest in a full hearing, particularly considering the fact that relatively few of the many aliens detained at the U.S.

border are resident aliens entitled to full due process protection. *Hamaya v McElroy (1992, ED NY) 797 F Supp 186.*

The risks associated with the denial of a full hearing on the issue of parole of a permanent resident alien seeking re-entry are substantial as, (1) in-person testimony by, and on behalf of, the detainee promises to make the district director better informed both as to the detainee's character and as to the reliability of those willing to vouch for him, and (2) unlike a written application process, a hearing offers the director an opportunity to question the detainee directly, as well as providing a forum in which the director's concerns may be aired and addressed immediately by the detainee or his counsel. *Hamaya v McElroy (1992, ED NY) 797 F Supp 186.*

"Applying for admission," as used in the parole statute, INA § 212(d)(5)(A) [*8 USCS § 1182*(d)(5)(A)], is a term of art referring to an alien's presence at the U.S. border, rather than the alien's subjective desire to make a formal application for entry. *Wang Zong Xiao v Reno (1993, ND Cal) 837 F Supp 1506,* affd (1996, CA9 Cal) *81 F3d 808, 96 CDOS 2570, 96* Daily Journal DAR 4282.

Alien who is paroled into U.S. has not been lawfully admitted for permanent residence and is thus ineligible for withholding of deportation under INA § 212(c) [*8 USCS § 1182*(c)]. *Hernandez-Gonzalez v Moyer (1995, ND Ill) 907 F Supp 1224.*

108. Constitutional questions

In action by undocumented and unadmitted Haitian aliens, alleging in part that they have been detained without parole on basis of race and national origin, in violation of equal protection guarantee of Fifth Amendment, Court of Appeals should not reach and decide parole question on constitutional grounds, where applicable immigration statute *(8 USCS § 1182)* and regulations (8 CFR § 212.5) are facially neutral and where parole discretion thereunder, while exceedingly broad, does not extend to considerations of race or national origin. *Jean v Nelson (1985) 472 US 846, 86 L Ed 2d 664, 105 S Ct 2992.*

Discretion of Attorney General to deny parole to all or to certain groups of unadmitted aliens on ground that he finds no emergent or public interest reasons justifying release may not be exercised to discriminate invidiously against particular race or group or to depart without rational explanation from established policies. *Bertrand v Sava (1982, CA2 NY) 684 F2d 204.*

Excludable aliens cannot challenge either admission or parol decisions under claim of constitutional right; denial or revocation of parol does not rise to level of constitutional infringement; court refuses to reach question whether Attorney General's plan satisfies due process since aliens lack constitutional liberty interest. *Fernandez-Roque v Smith (1984, CA11 Ga) 734 F2d 576.*

Upon appeal of government from order to prepare and implement plan to provide individual parole revocation hearings for unadmitted aliens known as "Marielitos" court determined there is no nonconstitutionally-based liberty interest in parole as President cannot create actionable liberty interests through oral public statements alone and official discretion has not been limited by any special legislation or agency regulation; no liberty interest exists for Marielitos whose initial grant of parole was revoked as such alien's interest in liberty is not derived from Due Process Clause as alien has mere expectancy rather than right of liberty; principles of international law which forbid prolonged arbitrary detention may be disregarded by President or his delegate where decision is in service of domestic needs. *Garcia-Mir v Meese (1986, CA11 Ga) 788 F2d 1446,* cert den *(1986) 479 US 889, 93 L Ed 2d 263, 107 S Ct 289.*

Exluded aliens have no constitutional right to be paroled into this country.

Marczak v Greene (1992, CA10 Colo) 971 F2d 510.

Attorney General's plan to facilitate parole determinations regarding Cuban refugees must comply with procedural due process requirements; at minimum, aliens are entitled to written notice and disclosure of evidence, right to present evidence, confrontation and cross-examination, neutral decision maker, and written statement of reasons supporting decision; detainee's failure to testify about facts relevant to crimes allegedly committed in United States may not be used in reaching adverse inference, while matters not related to possible criminal liability may validly support adverse inference; detainees are entitled to counsel; once excludable alien's detention can no longer be justified as aid to effecting alien's exclusion, then alien acquires constitutionally protected interest in being free, unless some new justification for continuing detention is established. *Fernandez-Roque v Smith (1983, ND Ga) 567 F Supp 1115,* revd on other grounds (1984, CA11 Ga) *734 F2d 576.*

Mariel Cuban's commission of criminal offenses in U.S. while on immigration parole formed rational basis for Attorney General's decision to revoke such parole and detain alien pending deportation; such detention is not indefinite, since alien's case has been and will continue to be reviewed annually under Cuban Review Plan, and thus does not constitute punishment, because it protects paramount interests of public, and therefore alien may not invoke Fifth Amendment protections of due process; if public interest is not furthered by parole of alien, Attorney General has authority to return alien to custody, and statute creates no due process interest entitling alien to any particular procedures prior to decision to revoke parole; because parole is merely incident of admissions process, and alien has no constitutional right to admission, denial or revocation of parole does not effect deprivation of liberty interest; circumstances of detention warrant finding that alien is not being punished by indefinite detention, and therefore, protections of Fifth and Sixth Amendments do not apply to alien. *Barrios v Thornburgh (1990, WD Okla) 754 F Supp 1536.*

Aliens who have not gained entry to U.S. have no constitutional right to liberty under Fifth Amendment, and have no claim for violation of due process where Attorney General acted under powers conferred by Congress; furthermore, because excludable aliens unable to enter U.S. are not entitled to any degree of liberty, Government's refusal to grant liberty to Mariel Cubans does not constitute punishment, and thus, detention of such aliens does not violate Sixth Amendment right to jury trial. *Tartabull v Thornburgh (1990, ED La) 755 F Supp 145.*

INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] grants complete discretion over parole to Attorney General and does not create any substantive rights to parole, and Parole Review Plan prescribes manner in which Attorney General's discretion is to be exercised with regard to Mariel Cubans, but creates no more of a guarantee of liberty than do general parole provisions; significant constraints on paroled Mariel Cuban's activities and fact that parole may be revoked serve as evidence that parole does not create guaranty of freedom for Mariel Cuban seeking review of conditional grant of parole. *Fragedela v Thornburgh (1991, WD La) 761 F Supp 1252; Ramos v Thornburgh (1991, WD La) 761 F Supp 1258,* affd, dismd, in part (1993, CA5 La) *988 F2d 1437,* amd (1993, CA5 La) *997 F2d 1122; Gonzalo v Thornburgh (1991, WD La) 761 F Supp 1264.*

While the government undoubtedly has an interest in proceeding by way of written submission and decision, that interest does not rise to a level sufficient to overcome a detainee's interest in a full hearing, particularly considering the fact that relatively few of the many aliens detained at the U.S. border are resident aliens entitled to full due process protection. *Hamaya v McElroy (1992, ED NY) 797 F Supp 186.*

Because District Courts may consider the merits of a nonresident alien's constitutional claims against U.S. Government officials only if such claims do not implicate the Government's authority to control immigration, in an action by a PRC citizen who had been brought to the U.S. to testify on behalf of the prosecution in a criminal trial against a Hong Kong resident who was the alleged mastermind of a plan to smuggle heroin into the U.S., who because he revealed that his testimony implicating the alleged mastermind had been coerced by PRC officials, faced probable execution in the PRC, the District Court lacked jurisdiction to consider the plaintiff's claim that because he did not consent to travel to the U.S., the application of the parole statute, INA § 212(d)(5)(A) [*8 USCS § 1182*(d)(5)(A)], to him violated procedural due process, since that claim directly implicated the structure and administration of the immigration laws. *Wang Zong Xiao v Reno (1993, ND Cal) 837 F Supp 1506,* affd (1996, CA9 Cal) *81 F3d 808, 96 CDOS 2570, 96* Daily Journal DAR 4282.

Alien detained by INS pending its appeal to BIA of IJ's grant of asylum has no constitutional right to be free from detention nor may such detention be considered cruel and unusual punishment; it is within authority of Executive Branch of government to control immigration as it sees fit. *Justiz-Cepero v Thornburgh (1995, DC Kan) 882 F Supp 1572.*

109. Discretion of Attorney General

Discretion of Attorney General to deny parole to all or to certain groups of unadmitted aliens on ground that he finds no urgent or public interest reasons justifying release may not be exercised to discriminate invidiously against particular race or group or to depart without rational explanation from established policies; burden of proving that discretion is not exercised or is exercised irrationally or in bad faith is heavy one and rests at all times on unadmitted alien challenging denial of parole. *Bertrand v Sava (1982, CA2 NY) 684 F2d 204.*

Pending deportation of excludable alien, Attorney General has discretion to temporarily parole alien under such conditions as he may prescribe. *Fernandez-Roque v Smith (1984, CA11 Ga) 734 F2d 576.*

In each parole case, a District Director must determine whether a particular person is likely to flee, and whether that person's continued detention would be in the public interest; the District Director must articulate some individualized facially legitimate and bona fide reason for denying parole, and some factual basis for that decision in each individual case. *Marczak v Greene (1992, CA10 Colo) 971 F2d 510.*

Inasmuch as excluded aliens have no constitutional right to be paroled into the United states, Court of Appeals review of the INS's parole decision is unrelated to the review which the Court would undertake if a convicted criminal were claiming a violation of constitutional rights. *Marczak v Greene (1992, CA10 Colo) 971 F2d 510.*

Attorney General has authority to indefinitely detain excludable aliens, and such indefinite detention does not violate due process. *Guzman v Tippy (1997, CA2 NY) 130 F3d 64.*

Attorney General has discretion to parole excluded aliens for emergent reasons or reasons deemed in public interest, but otherwise there is no provision for release of excluded alien. *Chin Ming Mow v Dulles (1953, DC NY) 117 F Supp 108.*

Upon habeas corpus review of petitioners detained pending exclusion proceeding to determine their admissibility (1) detention regulations 8 CFR §§ 212.5(a), 235.3(b), (c) do not impermissibly restrict Attorney General's discretion under INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] to parole into United

States any alien applying for admission; (2) detention of aliens pending process of asylum application is not inconsistent with right to apply for asylum; (3) continued incarceration pursuant to regulations without any showing that detention is necessary to effect deportation or to protect society does not violate Fifth Amendment's due process clause; (4) lengthy period of detention does not violate Article 31(1) of United Nations Convention Relating to Status of Refugees; and (5) detention does not violate customary international law. *Singh v Nelson (1985, SD NY) 623 F Supp 545.*

District director, not court, will evaluate seriousness of detainee's medical condition and determine if parole is warranted; inaction of district director may amount to failure to exercise discretion and raise question of good faith in denying parole. *Bedredin v Sava (1986, SD NY) 627 F Supp 629.*

Alien scheduled to appear before INS legalization officer regarding amnesty application is arguably prospective witness at administrative proceeding within meaning of 8 CFR § 212.5(a)(2), generally coming within category of aliens for whom granting of parole would be "strictly in the public interest" within meaning of *8 USCS § 1182*(d)(5)(A). *Gutierrez v Ilchert (1988, ND Cal) 682 F Supp 467.*

Attorney General must be afforded statutory authority to detain excludable aliens indefinitely, because alternative is to force Attorney General to parole aliens, which Congress did not intend; because U.S. laws permits continued detention of excludable aliens, Mariel Cubans cannot obtain relief from detention based on purported violation of international law principles prohibiting prolonged or arbitrary detention. *Tartabull v Thornburgh (1990, ED La) 755 F Supp 145.*

Congress vested in the Attorney General broad discretionary power to parole unadmitted aliens pending a final determination on their application for admission and, accordingly, the Attorney General's decision may not be challenged on the grounds that his or her discretion was not exercised fairly in the view of a reviewing court or that too much weight was given to certain factors relevant to the risk of abscondence and too little to others; that decision may be overturned only if the Attorney General has acted irrationally or in bad faith, and it is the alien's heavy burden at all times to so establish. *Bruce v Slattery (1991, SD NY) 781 F Supp 963.*

The Attorney General and his or her designees have broad discretion to determine whether unadmitted aliens may be paroled into the United States pending a final decision on their application for admission, which discretion does not vary depending on the type of admission application presented. *Loncarevic v McElroy (1992, SD NY) 791 F Supp 87.*

The Attorney General's exercise of his or her broad discretionary power to grant parole must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary; the burden of proving that discretion was not exercised or was exercised irrationally or in bad faith is a heavy one and rests at all times on the unadmitted alien challenging denial of parole. *Pierre v United States INS (1992, ED NY) 793 F Supp 440.*

Parole provisions of *8 USCS § 1182*(d)(5) do not restrict Attorney General's authority only to those who are applicants for admission; rather those provisions were enacted in compliance with recommendation by Attorney General that he be given necessary authority to parole aliens for purposes which are in public interest; among latter are "purposes of prosecution." *In re Accardi (1973, BIA) 14 I & N Dec 367.*

110. --Exclusivity of authority

Where alien who held valid passport and visa was detained by immigration

officers upon landing in United States on ground that his visa had been revoked by Secretary of State, and where Attorney General, exercising discretion granted him by *8 USCS § 1182*(d)(5), denied alien's application for bail or parole pending hearing before Immigration and Naturalization Service, Court of Appeals lacked authority to grant such parole or bail. *Petition of Cahill (1971, CA2 NY) 447 F2d 1343.*

Because Attorney General has delegated no parole discretion to Board of Immigration Appeals, Board has no power to grant alien parole status under *8 USCS § 1182*(d)(5). *Conceiro v Marks (1973, SD NY) 360 F Supp 454.*

Pursuant to 8 C. F. R. § 212.5, District Director has exclusive jurisdiction to parole alien into United States, and both immigration judge and Board of Immigration Appeals lack jurisdiction to exercise parole power; American Consul has exclusive authority to review asylum request made by alien seeking entry at land border port, and, consequently, immigration judge in exclusion proceeding at such location has no authority to review applicant's asylum claim, whether or not applicant is in the possession of visa. *In re Niayesh (1980, BIA) 17 I & N Dec 231.*

111. Effect of parole

Alien paroled into United States is not "within the United States" in meaning of *8 USCS § 1253*(h), and such alien's excluded status under section was not altered. *Leng May Ma v Barber (1958) 357 US 185, 2 L Ed 2d 1246, 78 S Ct 1072* (superseded by statute on other grounds as stated in *Amanullah v Nelson (1987, CA1 Mass) 811 F2d 1).*

For purposes of Immigration and Nationality Act *(8 USCS §§ 1101* et seq.), alien seamen paroled temporarily into United States never made entries into United States and were subject to exclusion rather than expulsion provisions of Act. *Wong Hing Fun v Esperdy (1964, CA2 NY) 335 F2d 656,* cert den *(1965) 379 US 970, 13 L Ed 2d 562, 85 S Ct 667.*

Parole did not constitute "entry" into United States within meaning of Immigration and Nationality Act *(8 USCS § 1101* et seq) so as to make alien eligible for expulsion rather than exclusion proceedings. *Siu Fung Luk v Rosenberg (1969, CA9 Cal) 409 F2d 555,* cert dismd *(1969) 396 US 801, 24 L Ed 2d 58, 89 S Ct 2151.*

Parole of aliens does not change legal status, and paroled aliens who are classified as excludable aliens remain subject to deportation. *Fernandez-Roque v Smith (1984, CA11 Ga) 734 F2d 576.*

Parole alien has not been "admitted" into United States and stands in same shoes as alien resident outside United States. *Tran Qui Than v Blumenthal (1979, ND Cal) 469 F Supp 1202,* affd in part and remanded in part on other grounds (1981, CA9 Cal) *658 F2d 1296,* cert den *(1982) 459 US 1069, 74 L Ed 2d 630, 103 S Ct 487.*

Upon rescission of alien's asylum status and application for withholding of deportation, alien temporarily paroled into United States and placed in exclusion proceedings is ineligible for either suspension or stay of deportation, as such relief is only available to deportable aliens. *Mansoor v Montgomery (1985, ED Mich) 620 F Supp 708.*

In an action by a PRC citizen who had been brought to the U.S. to testify on behalf of the prosecution in a criminal trial against a Hong Kong resident who was the alleged mastermind of a plan to smuggle heroin into the U.S., who because he revealed that his testimony implicating the alleged mastermind had been coerced by PRC officials, faced probable execution in the PRC, the court noted that *18 USCS § 3508* is not the exclusive means by which a person in foreign custody may be brought to the U.S. to testify in a criminal proceeding,

and held that the fact that the plaintiff had been brought to the U.S. pursuant to the parole statute, INA § 212(d)(5)(A) [*8 USCS § 1182*(d)(5)(A)], supported the U.S. Government's motion for judgment on the plaintiff's claims that (1) the Government violated *18 USCS § 3508*(c) by failing to obtain the plaintiff's consent to travel to the U.S., (2) as applied to him, *18 USCS § 3508*(c) violated procedural due process because he did not consent to travel to the U.S., and (3) *18 USCS § 3508*(c) was facially invalid as applied to any witness coming from the PRC because there are no procedural safeguards that can adequately guarantee that the witness gave his or her informed consent to travel to the U.S. *Wang Zong Xiao v Reno (1993, ND Cal) 837 F Supp 1506,* affd (1996, CA9 Cal) *81 F3d 808, 96 CDOS 2570, 96* Daily Journal DAR 4282.

Aliens subject to exclusion proceedings having submitted applications for adjustment of status and returning to U.S. under advanced parole may not be placed in deportation proceedings and therefor may not submit applications for suspension of deportation; aliens paroled into U.S. pursuant to INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] remain subject to exclusion proceedings pursuant to INA §§ 235, 236 [*8 USCS §§ 1225,* 1226]. *In re Torres (1986, BIA) 19 I & N Dec 371.*

112. Parole in particular cases

Under 8 USCS § 1182(d)(5), which authorizes Attorney General to parole aliens, otherwise excludable under § 1182, into United States for reasons in public interest, alien who allegedly stabbed fellow crew member aboard Liberian flag vessel which had come into United States waters was properly removed by FBI agent and detained in United States for purposes of his physical protection and for potential extradition where his removal was based on his own request and that of captain that he be removed from vessel for his own safety. *In re Chan Kam-Shu (1973, CA5 Fla) 477 F2d 333,* cert den *(1973) 414 US 847, 38 L Ed 2d 94, 94 S Ct 112.*

Attorney General advanced "facially legitimate and bona fide reason" for temporarily suspending release of excludable aliens on parole under Status Review Plan pursuant to INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] based on agreement of alien's government to accept aliens in home country and increased likelihood that aliens would abscond if released, where Plan to allow aliens parole was adopted on premise that home country would continue to refuse to allow their return. *Garcia-Mir v Smith (1985, CA11 Ga) 766 F2d 1478,* cert den *(1986) 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213.*

Bearing in mind extraordinarily high standard of review of motions for emergency stays, trial court's order to prepare plan for individualized parole hearings will not be stayed where preparation of such plan does not cause government irreparable injury, injury to aliens in detention is incalculable, and there is little evidence that public will suffer irreparable injury; however, showing of substantial probability of success on appeal justifies issuance of stay of District Court's order directing implementation of hearing plan until such time as court determines existence of nonconstitutionally based liberty interest, where equities show implementation of plan causes government irreparable injury, and poses risk to general public, despite showing of substantial injury to aliens. *Garcia-Mir v Meese (1986, CA11 Ga) 781 F2d 1450.*

Entitlement to asylum, or opportunity to solicit asylum, is wholly separate from and independent of Attorney Generals' statutory authority to afford or refuse parole; absent emergent reasons or the like, nothing in law mandates aliens release on parole pending final resolution of asylum requests; incarceration of aliens is not violation of United Nations 1967 Protocol Relating to Status of Refugees as Protocol was not intended to prevent

government from detaining one who attempted to enter illegally, appending final decision as to whether to admit or exclude that person. *Amanullah v Nelson (1987, CA1 Mass) 811 F2d 1.*

Fact that alien was excludable under INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)] because of conviction for possession of controlled substance constituted facially legitimate and bona fide reason to deny alien temporary admission to U.S. under § 212(d)(5) for purpose of filing naturalization petition with clerk of naturalization court, as required by § 334(a) [§ 1445(a)] and 8 CFR § 334.13; § 329(b) [§ 1440(b)] does not purport to override exclusionary provisions of § 212, but clarifies that aliens who qualify because of military service in U.S. Armed Forces in Vietnam must show that they are eligible for naturalization in all other respects. *Mason v Brooks (1988, CA9 Wash) 862 F2d 190.*

The continued detention of Mariel Cubans who were ordered excluded and, following the revocation of immigration parole upon their commission of various crimes, were detained in INS custody pending Cuba's acceptance of their return, although indefinite in duration, (1) is not unconstitutional as a violation of either substantive or procedural due process, since it does not constitute punishment, and the parole review procedures of 8 CFR §§ 212.12, 212.13 are constitutionally sufficient, and (2) is within the statutory and discretionary authority of the Attorney General, since the INA authorizes the Attorney General to continue to detain the Mariel Cubans, whether or not they have been convicted of aggravated felonies, until the U.S. is able to deport them (to the extent that *Rodriguez-Fernandez, 654 F2d 1382* is not distinguishable from this case, the Fifth Circuit declines to agree with the Eleventh Circuit's reasoning in that case); the release of the Mariel Cubans is not required by public international law because the immigration statutes, the Attorney General's actions, and the U.S. Supreme Court's decision in *Mezei, 97 L Ed 2d 956* (the continued detention of an excluded alien whom no other country would receive did not deprive him of any constitutional or statutory right), supersede the applications of principles of public international law that prohibit prolonged arbitrary detention. *Gisbert v United States Attorney Gen. (1993, CA5 La) 988 F2d 1437,* amd on other grounds (1993, CA5 La) *997 F2d 1122.*

District Director abuses his discretion when he refuses to parole aliens under appropriate bond from custody under *8 USCS § 1182* where several of aliens are willing to waive their rights to exclusionary hearing and will accept order excluding them for one year and one alien is willing to accept order excluding him for life. *Gilroy v Ferro (1982, WD NY) 534 F Supp 321.*

Iraqi nationals seeking political asylum are not entitled to writ of habeas corpus, based upon denial of parole to petitioners under *8 USCS § 1182*(d)(5) pending appeals of their application for asylum, where (1) District Director affirmatively acted to deny each petitioner's parole application, (2) stated criteria used in deciding upon those denials although he was not required to give petitioners detailed explanation as to reasons for parole denials or factors upon which he relied, and (3) showed that petitioners failed to qualify for parole under terms of Immigration and Naturalization Service guidelines setting forth considerations for parole decisions or under other criteria used in making determination, since Director's discretion was not exercised either irrationally or in bad faith. *Tobia v Sava (1982, SD NY) 556 F Supp 325.*

Acting district director did not abuse discretion in denying parole to aliens who attempted to enter country, apparently enroute to Mexico, but with little indication that they intended to go there, where father of aliens allegedly suffered heart attack but was released from hospital several hours later, where aliens refused to respond to agency request for detailed medical report on their

father, and where aliens later filed political asylum applications. *Abu Laban v Sava (1982, SD NY) 564 F Supp 30.*

In class action challenging continued detention of Marielitos, class members continuously detained as mental incompetents or serious criminals have no liberty interest in parole; as long as official decision maker has unfettered discretion to accord or deny benefit, no protected interest exists; no liberty interest is created where Attorney General's discretion of parole is remarkably broad. *Fernandez-Roque v Smith (1985, ND Ga) 622 F Supp 887.*

Regardless of whether appropriate standard of review is "abuse of discretion" or more deferential "facially legitimate and bona fide reason" standard, District Director's denial of request for parole by alien apprehended upon re-entry into United States, where he had resided for 9 years, following 3 week visit with seriously ill mother in Mexico, could not be sustained and alien's petition for writ of habeas corpus was conditionally granted where denial of parole rested largely on invalid regulations; statutory origin of 8 CFR § 212.5(b) and (d)(2)(ii) was suspect in light of inconsistency with congressional intent that amnesty provisions of IRCA be liberally and generously applied, and 8 CFR § 245a.1(g) violated spirit and purpose of IRCA by effectively emasculating "brief, casual, and innocent" provision of *8 USCS § 1255a*(3)(B). *Gutierrez v Ilchert (1988, ND Cal) 682 F Supp 467.*

Attorney General has implicit statutory authority to detain excludable Mariel Cuban based upon finding that parole is not in public interest, as in case at bar, given alien's commission of criminal offenses in U.S. while under previous grant of parole, and acted within his discretion in determining that alien's immediate deportation was not practicable or proper and that alien was not suitable for parole, given alien's criminal convictions and fact that alien was not on list of persons Cuban Government had agreed to accept for repatriation, and met burden of establishing that detention was not incarceration as alternative to departure. *Barrios v Thornburgh (1990, WD Okla) 754 F Supp 1536.*

Where sufficient grounds existed in federal law supporting Attorney General's authority and decision to revoke parole and detain Mariel Cuban who had committed criminal offenses in U.S. while under previous grant of parole, court did not need to look to international law for customary international practices regarding detention of excludable aliens; even assuming that international law principle that human beings should be free from arbitrary imprisonment applied, Attorney General demonstrated that detention, based on alien's criminal record, was not arbitrary, but rather was necessary element of exclusion proceeding. *Barrios v Thornburgh (1990, WD Okla) 754 F Supp 1536.*

Attorney General was justified in not releasing Mariel Cuban and in imposing transition programming as condition to actual release after issuance of notice of releasibility, where alien's record showed violent background, felony conviction, poor institutional adjustment, and significant mental and behavioral disorders. *Cruz v Kindt (1991, SD Ind) 764 F Supp 126.*

District Director was ordered to reconsider denial of parole to excludable aliens where letters denying parole contained conclusions that release of aliens was not in public interest without explaining why, failed to indicate that District Director considered such factors as aliens' backgrounds and desire of local Chinese-American community to offer financial and emotional support upon release of aliens, and did not explain why such support was not functional equivalent of family support under 8 CFR § 212.5(a)(2)(ii). *Li v Greene (1991, DC Colo) 767 F Supp 1087,* affd (1992, CA10) *1992 US App LEXIS 22373.*

Although parole of excludable alien is authorized by INA § 212(d)(5)(A) [*8 USCS § 1182*(d)(5)(A)], INS has power to detain excludable alien indefinitely pending deportation, and because detention pending deportation is not punitive

but rather administrative in nature, there is no right to hearing pending revocation of immigration parole; since annual review of each Mariel Cuban in custody is required, detention is transformed from indefinite to "temporary," and Mariel Cuban failed to show that Attorney General did not set forth bona fide and facially legitimate reason for denial of parole, where alien's criminal history and disciplinary record in prison provided evidence that alien was likely to violate conditions of parole; personal interview under 8 CFR § 212.12(d)(4)(ii) and scheduled review of case under 8 CFR § 212.12(g)(1) provide all due process to which Mariel Cuban detainee not recommended for parole is entitled, application of international law is preempted by Congressional enactments, and Mariel Cuban did not establish constitutional or other liberty interests mandating release. *Pena v Thornburgh (1991, ED Tex) 770 F Supp 1153.*

Although INA § 212(d)(5) [*8 USCS § 1182*(d)(5)], the statute authorizing parole of aliens for emergent reasons or for reasons deemed strictly in the public interest, may not be used to circumvent the processes of INA §§ 207 or 208 [*8 USCS §§ 1157* or 1158], it permits the temporary release from detention of aliens with serious medical conditions, and the government's obstinate refusal to parole Haitians with HIV out of detention constitutes an abuse of the Attorney General's discretion. *Haitian Ctrs. Council v Sale (1993, ED NY) 823 F Supp 1028.*

Alien refugees from Vietnam would be paroled pursuant to *8 USCS § 1182*(b)(5) where (1) procedure employed in bringing them to United States apparently was no different from procedure used to bring aliens to United States who concededly were paroled, (2) Congress, in defining "refugee" used definition broad enough to include applicants who, although they were not natives of Vietnam, had Vietnamese spouses and had Vietnamese children, (3) they were "persons" who had lived in Vietnam, (4) majority of them had been employed at one time or another by United States Government Contractors, and (5) they were removed from Vietnam with express consent of United States Government. *In re O (1977, BIA) 16 I & N Dec 344.*

Alien infant paroled into United States under *8 USCS § 1182*(d)(5) for humanitarian reasons is ineligible for immediate relative classification as orphan under *8 USCS § 1101*(b)(1)(F), where (1) alien child has been adopted in United States, in that alien must have been either adopted abroad by United States citizen or alien must be coming to United States for adoption by such citizen, and (2) granting of parole is no assurance that application for immediate relative status will be approved. *In re Handley (1978, Regional Comr) 17 I & N Dec 269.*

Trial court erred in terminating plaintiff's workmens compensation benefits as discovery sanction for plaintiff's failure to appear at depositions where plaintiff was excludable alien under INA § 212(a)(23) [former *8 USCS § 1182*(a)(23)], that any grant of parole would only be for purpose of prosecution and, even if parole were possible, any denial of such would be unappealable, and it was impossible for plaintiff to comply with discovery order; court should have admitted and considered plaintiff's argument that his medical condition prohibited him from coming to deposition; plaintiff's fear of arrest if he attended deposition hearing is faulty foundation on which to argue against deposition sanction; trial court erred in denying plaintiff's motion for alternative means of discovery where plaintiff consented to either deposition in Mexico or written interrogatories and consented to any physical examinations in Mexico. *Sandoval v United Nuclear Corp. (1986, App) 105 NM 105, 729 P2d 503.*

113. --Misrepresentations or false documents

Jurisdiction of court to review parole decision of district director of INS

is properly invoked by habeas corpus petition; district director exercised discretion to deny parole rationally, where (1) alien sought admission to United States with fraudulent endorsement on passport; (2) alien absconded from detention center, and (3) alien's marriage to United States citizen did not reduce risk of alien absconding again where alien had left former wife and two children in Haiti at time of entering United States. *St. Fleur v Sava (1985, SD NY) 617 F Supp 403.*

Mexican national's petition for writ of habeas corpus was granted where District Director failed to supply facially legitimate and bona fide reason for denying alien's application for parole pending exclusion proceeding; alien had worked in U.S. for 9 years and alien's wife and 2 U.S. citizen children resided in U.S., and thus alien's use of fraudulent documents to attempt entry did not preclude legalization because waiver for humanitarian reasons and to assure family unity would be appropriate under INA § 245A(d)(2)(B)(i) [*8 USCS § 1255a*(d)(2)(B)(i)], and continuous physical presence requirement did not bar legalization where alien's 3-week absence to visit sick mother in Mexico fell within "brief, casual and innocent" exception; alien's use of counterfeit alien registration card and alleged misrepresentations regarding manner in which it was obtained did not support finding that alien presented high risk of absconding where fact that alien attempted to enter U.S. fraudulently had little or no bearing on risk of flight, and in any event did not support conclusion that alien would abandon family and possibility of legalization to escape authorities. *Gutierrez v Ilchert (1988, ND Cal) 702 F Supp 787.*

Given a detained alien's repeated misrepresentations of his identity and nationality, it was not unreasonable for the INS to conclude that he might abscond, and thus the INS did not abuse its discretion when it denied him parole. *Bruce v Slattery (1991, SD NY) 781 F Supp 963.*

An INS District Director did not abuse his discretion in finding that the public interest required the continuation of detention of an alien subject to a final order of exclusion because the INS had been unable to determine the alien's true identity or nationality, the alien's incentive to abscond was greater when he became subject to the final order of exclusion, and, given the alien's demonstrated resistance to the INS's efforts to return him to Nigeria, his potential deportation to that country presents another reason for him to abscond. *Bruce v Slattery (1991, SD NY) 781 F Supp 963.*

It was not irrational for an Assistant District Director to conclude that an alien's attempt to enter the United States with false documents and the timing of her request for asylum, first asserted only after the false green card failed to do the trick and the alien was detained, presented a risk that the petitioner would abscond if her application for asylum was denied while she was paroled into the United States. *Micovic v McElroy (1992, SD NY) 790 F Supp 75.*

An Assistant District Director's belief that an alien who attempted to enter the United States by means of a fraudulent "green card" and who was in detention pending a hearing on her asylum application posed a risk of flight was a facially legitimate and bona fide reason for denying the alien's request for parole. *Micovic v McElroy (1992, SD NY) 790 F Supp 75.*

An Assistant District Director's finding that an alien who attempted to enter the United States using an altered Yugoslavian passport, for which he had paid $ 7,000, was a risk to abscond or cause harm did not constitute either an abuse of discretion or bad faith, as the alien's claim that he was unaware that the passport was fraudulent and did not realize that he was going to enter the United States was not credible, particularly as the passport contained the alien's photograph, but someone else's name. *Loncarevic v McElroy (1992, SD NY) 791 F Supp 87.*

114. Revocation

Hearing was required prior to revocation of parole of Hungarian refugee. *United States ex rel. Paktorovics v Murff (1958, CA2 NY) 260 F2d 610.*

Alien paroled into United States pursuant to provisions of *8 USCS § 1182*(d)(5) was not entitled to hearing on revocation of parole. *Ahrens v Masferrer Rojas (1961, CA5 Fla) 292 F2d 406.*

Fifth Amendment does not affect Congress' plenary power over exclusion procedures and no hearing is provided by statute in cases of revocation of parole. *Wong Hing Fun v Esperdy (1964, CA2 NY) 335 F2d 656,* cert den *(1965) 379 US 970, 13 L Ed 2d 562, 85 S Ct 667.*

In prosecution under *8 USCS § 1326* for illegal entry after deportation, alien who has been deported and then paroled into United States under *8 USCS § 1182*(d)(5), cannot be prosecuted under *8 USCS § 1326* or expelled if alien has not been given written notice of parol termination as required by 8 CFR § 212.5(b). *United States v Lagarda-Aguilar (1980, CA9 Ariz) 617 F2d 527.*

Agency failure to comply with its own regulations and procedures for revoking parole is arbitrary and capricious. *Moret v Karn (1984, CA3 Pa) 746 F2d 989.*

Under 8 USCS § 1182(d)(5)(A), alien who has been paroled into U.S. is treated same as one who has only just arrived, and Mariel Cuban alien who was convicted of aggravated felonies had no right to hearing before parole was revoked. *Alvarez-Mendez v Stock (1991, CA9 Cal) 941 F2d 956, 91 CDOS 6409, 91* Daily Journal DAR 9816, cert den *(1992) 506 US 842, 121 L Ed 2d 82, 113 S Ct 127.*

In class action challenging parole revocation policies applicable only to Mariel Cubans, although there is no federally created liberty interest in parole, those Marielitos who were not mental incompetents and had not committed serious crimes in Cuba have protected liberty interest in continued parole that cannot be impaired without due process of law, such liberty interests being created by Presidential invitation of Marielitos to United States; because of this liberty interest, each class member may be detained only if finding is made that person is likely to abscond, pose risk to national security, or pose serious and significant threat to persons or property within United States. *Fernandez-Roque v Smith (1985, ND Ga) 622 F Supp 887.*

Petition for writ of habeas corpus by Mariel Cuban who had been paroled into U.S. but whose parole had been revoked upon expiration of sentence received following conviction of several felonies committed in U.S. was denied on grounds that: (1) *8 USCS § 1182*(d)(5)(A) authorizes indefinite detention of excludable aliens, and in any event, alien's detention was not indefinite because case was reviewed annually by Cuban Review Panel; (2) no liberty interest in freedom from detention arose from Due Process Clause of Fifth Amendment, Cuban Review Plan, unextinguished right to bodily freedom, promises extended by U.S. as it received members of Freedom Flotilla, INS policy (embodied in 8 CFR § 212.5) of granting parole to Mariel Cubans despite excludability, claims to political asylum, or other sources of interest in freedom from restraint; detention was merely incidental to Government's authority to prevent unauthorized entry into U.S. and did not constitute punishment, and therefore neither triggered nor offended due process; (3) serious criminal convictions, misconduct while in prison, and legitimate concern for whether alien would remain nonviolent following release from custody constituted facially legitimate and bona fide reasons to deny parole; and (4) existence of executive authorities, legislative directions, and judicial decisions on issue of detention in lieu of parole rendered resort to international law, which allegedly guaranteed freedom from unreasonable restraint, unnecessary and inappropriate. *Sanchez v Kindt (1990, SD Ind) 752 F Supp 1419.*

Where the lawful permanent residence status of an Egyptian cleric who had

been granted an adjustment to such status as a "minister of religion" was rescinded on the basis of the alien's terrorist activities in Egypt, the District Director did not err in terminating the alien's parole pursuant to 8 CFR § 212.5(d)(2)(i) on the ground that continued parole was not warranted by emergency or public interest, without a pre-termination hearing, where neither the INA nor 8 CFR § 212.5 requires such a hearing. *Ali v Reno (1993, SD NY) 829 F Supp 1415,* affd (1994, CA2 NY) *22 F3d 442.*

Following the revocation of parole granted under INA § 212(d)(5)(A) [*8 USCS § 1182*(d)(5)(A)] and the institution of exclusion proceedings against a PRC citizen who had been brought to the U.S. to testify on behalf of the prosecution in a criminal trial against a Hong Kong resident who was the alleged mastermind of a plan to smuggle heroin into the U.S., the U.S. Government was permanently enjoined from taking any action in furtherance of the plaintiff's removal from the U.S. or returning him to the custody of the PRC or any of its representatives, on the grounds that: (1) the prosecution and the INS engaged in actions that violated the plaintiff's right to substantive due process by (a) failing to follow up on indications that the plaintiff's testimony implicating the alleged mastermind had been coerced by PRC officials, as he subsequently told the court, and (b) attempting to ensure the denial of the plaintiff's request for asylum by, among other things, "immigration judge-shopping;" and (2) the Government breached its duty to protect its witness, having acted with gross negligence and/or deliberate indifference to the risk to the plaintiff from his testifying in a U.S. courtroom (i.e., his probable execution upon return to the PRC). *Wang Zong Xiao v Reno (1993, ND Cal) 837 F Supp 1506,* affd (1996, CA9 Cal) *81 F3d 808, 96 CDOS 2570, 96* Daily Journal DAR 4282.

An alien's petition for a writ of habeas corpus was granted where the alien was improperly placed in exclusion, rather than deportation, proceedings following the denial of his application for registry and the revocation of advance parole granted while the application for registry was pending; the INS District Director cannot use the grant of advance parole to change the alien's status as a deportable alien to that of an excludable alien and eliminate the alien's right to deportation proceedings. *Navarro-Aispura v INS (1993, ND Cal) 842 F Supp 1225, 94* Daily Journal DAR 2464, reported at (1993, ND Cal) *842 F Supp 392* and affd (1995, CA9 Cal) *53 F3d 233, 95 CDOS 2027, 95* Daily Journal DAR 3457.

Alien is not entitled to new exclusion proceeding where she entered INS custody in 1993, following her incarceration for federal offense; INS was authorized to continue and complete deportation proceedings commenced against alien in 1987 where alien was in deportation proceedings prior to parole in 1989, and was restored to status she had prior to such grant upon termination of her parole. *United States v Ortiz-Diaz (1994, ED Cal) 849 F Supp 734.*

Parole automatically expired and written notice to alien of its termination was not required where INS granted parole to alien specifically to allow her to apply for legalization under *8 USCS § 1254*(a) and alien withdrew her appeal of denial of her application for legalization. *United States v Ortiz-Diaz (1994, ED Cal) 849 F Supp 734.*

Alien paroled into United States does not automatically become applicant for admission upon termination of parole, but rather, once purpose of parole has been served and parole has been terminated, alien must be given fair and reasonable opportunity to depart, unless there is evidence that alien is applicant for admission; parolee who cannot or will not depart United States will at some point become subject to exclusion proceedings as applicant for admission, but that point does not arise until after parolee has been given fair and reasonable opportunity to depart. *In re Badalamenti (1988, BIA) 19 I & N*

Dec 623.

Time allotted by INS for alien to depart United States is not dispositive of issue of whether an alien has been given fair and reasonable opportunity to depart following revocation of parole, and alien's efforts to depart and any particular difficulties that alien may have in departing are also relevant; evidence that INS impeded alien's efforts to depart weigh against finding that alien was given fair and reasonable opportunity to depart, and if IJ determines that alien was not given fair and reasonable opportunity to depart, exclusion proceedings should be terminated as premature. *In re Badalamenti (1988, BIA) 19 I & N Dec 623.*

115. Judicial review

Upon judicial review of petition for habeas corpus review of Attorney General's refusal to parole excludable aliens, case will be dismissed unless administrative remedies have been exhausted before case was brought to District Court, if Attorney General advances facially legitimate and bona fide reason for denying parole; past criminal convictions of alien petitioners is facially legitimate and bona fide reason for denying parole. *Perez-Perez v Hanberry (1986, CA11 Ga) 781 F2d 1477, 82 ALR Fed 613.*

Facially legitimate and bona fide reason standard will be applied by court to discretionary action in exclusion proceedings; district director meets both standards in denying parole requests where he concluded that public interest would not be served by parole, especially since aliens had flouted established immigration procedures, represented substantial risk of elopement, and freeing aliens from detention would create ever-increasing law enforcement problem for INS; in addition, district director properly assessed that aliens prospects for eventual admission by way of asylum were dim, aliens had no close family ties in U.S. and true identity of aliens had not be established by independent means District Court's habeas review of detentions undertaken incident to exclusion proceedings does not require as matter of custom and practice an evidentiary hearing where aliens do not show that their detention is in violation of law or that they were denied impartial hearings on agency level. *Amanullah v Nelson (1987, CA1 Mass) 811 F2d 1.*

It is abuse of discretion to deny parole in absence of showing that aliens are security risks or are likely to abscond. *Diaz v Haig (1981, DC Wyo) 594 F Supp 1.*

Federal court has jurisdiction under *5 USCS § 702* and *8 USCS § 1329* to review parole determinations of Attorney General, with respect to excludable aliens, notwithstanding that parole determinations by Attorney General under *8 USCS § 1182* are permitted rather than required, since need for and feasibility of judicial review outweigh potential disruption of administrative process. *Louis v Nelson (1982, SD Fla) 544 F Supp 973.*

Excludable aliens cannot challenge parole decision under claim of constitutional right; Attorney General had facially legitimate and bona fide reason for revoking alien's parole where alien was convicted of narcotics offense. *Ordaz-Machado v Rivkind (1987, SD Fla) 669 F Supp 1068.*

Board of Immigration Appeals does not have authority to review District Director's exercise of parole power. *In re Castellon (1981, BIA) 17 I & N Dec 616.*

116. --Scope and standard of review

Attorney General has broad discretion to grant or deny parole; parole-related decisions may be reviewed under judicial review provisions of Administrative Procedures Act *(5 USCS § 706);* appropriate standard of review of parole-related

decisions is whether agency decision is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. *Moret v Karn (1984, CA3 Pa) 746 F2d 989.*

Federal court's scope of review of Attorney General's parole decision is limited to ascertaining whether "a facially legitimate and bona fide reason" for decision is advanced; such standard of review applies to all Attorney General's parole decisions, whether made under INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] or under Plan issued pursuant to such statutory authority. *Garcia-Mir v Smith (1985, CA11 Ga) 766 F2d 1478,* cert den *(1986) 475 US 1022, 89 L Ed 2d 325, 106 S Ct 1213.*

As to the question whether a District Court that grants an evidentiary hearing on denial of immigration parole has overstepped its bound, the Court of Appeals will not forbid the District Court from conducting an evidentiary hearing, nor will the Court disregard the evidence adduced at such hearing. *Marczak v Greene (1992, CA10 Colo) 971 F2d 510.*

Attorney General has broad discretion to grant or deny parole to alien pending decision on application for admission and decision will only be reversed if arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law; denial based upon alien's lack of family ties, and fact petitioner possessed and used false identification upon arrival in United States is not abuse of discretion. *In re Application of Pierre (1985, ED Pa) 605 F Supp 265.*

INS District Director's exercise of discretionary authority to parole aliens into United States under INA § 212(d)(5) [*8 USCS § 1182*(d)(5)] and 8 CFR § 212.5 is subject to habeas corpus review to determine whether abuse of discretion has occurred; thus, District Director abused discretion in refusing to parole alien into United States where alien sought readmission from Canada after what was intended to be an overnight visit occurring approximately 3 weeks prior to enactment of IRCA under circumstances where alien's absence was "innocent, casual, and brief" within meaning of INA § 245A(a)(3)(D) [*8 USCS § 1255a*(a)(3)(B)] such that alien would have been prima facie eligible to apply for adjustment of status under IRCA. *Bailey v Brooks (1986, WD Wash) 688 F Supp 575.*

Regardless of whether appropriate standard of review is "abuse of discretion" or more deferential "facially legitimate and bona fide reason" standard, District Director's denial of request for parole by alien apprehended upon re-entry into United States, where he had resided for 9 years, following 3 week visit with seriously ill mother in Mexico, could not be sustained and alien's petition for writ of habeas corpus was conditionally granted where denial of parole rested largely on invalid regulations; statutory origin of 8 CFR § 212.5(b) and (d)(2)(ii) was suspect in light of inconsistency with congressional intent that amnesty provisions of IRCA be liberally and generously applied, and 8 CFR § 245a.1(g) violated spirit and purpose of IRCA by effectively emasculating "brief, casual, and innocent" provision of *8 USCS § 1255a*(3)(B). *Gutierrez v Ilchert (1988, ND Cal) 682 F Supp 467.*

INA § 242(a) [*8 USCS § 1252*(a)] may not preclude review under *28 USCS § 2241* of denial of parole to alien in exclusion proceeding, if term "deportability" in § 242 [§ 1252] is used in nontechnical sense of return of excluded alien; appropriate standard for review of denial of parole is facially legitimate and bona fide reason standard. *Gutierrez v Ilchert (1988, ND Cal) 702 F Supp 787.*

Decision to detain excludable alien or grant parole is reviewable under narrow standard; court is limited to ascertaining whether Attorney General has advanced facially legitimate and bona fide reason for decision. *Sanchez v Kindt (1990, SD Ind) 752 F Supp 1419.*

Attorney General's discretion to deny parole, under INA § 212(d)(5)(A) [*8*

USCS § 1182(d)(5)(A)] and 8 CFR § 212.5(a)(2)(v), to alien applying for admission to U.S. is subject to two-part test on judicial review as to whether District Director (1) stated facially legitimate reasons for conclusion that continued detention would serve public interest and (2) made bona fide decision, on individual basis, that continued detention would serve public interest. *Li v Greene (1991, DC Colo) 767 F Supp 1087,* affd (1992, CA10) *1992 US App LEXIS 22373.*

The Attorney General's decision to deny parole pursuant to *8 USCS § 1182*(d)(5) may not be challenged on the grounds that the discretion was not exercised fairly in the view of a reviewing court or that it gave too much weight to certain factors relevant to the risk of abscondence and too little to others; the petitioner has the heavy burden of proving that the Attorney General's broad statutory discretion was not exercised or was exercised irrationally or in bad faith. *Micovic v McElroy (1992, SD NY) 790 F Supp 75.*

The Attorney General's exercise of discretion regarding parole must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary. *Loncarevic v McElroy (1992, SD NY) 791 F Supp 87.*

A decision to deny parole may not be challenged on the grounds that the discretion was not exercised fairly in the view of a reviewing court or that it gave too much weight to certain factors and too little to others, but rather *8 USCS § 1182*(d)(5) permits the Attorney General to deny parole to aliens on the ground that he or she finds no emergent or public interest reasons justifying their parole, and thus, if there is a facially legitimate and bona fide reason for the denial of parole, and if the discretion was not exercised to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies, the determination of the district director may not be disturbed by a reviewing court. *Pierre v United States INS (1992, ED NY) 793 F Supp 440.*

A denial of parole is not necessarily an abuse of discretion simply because a magistrate judge has set a bond in a criminal case, as different factors are considered by the judicial officer than by the district director. *Pierre v United States INS (1992, ED NY) 793 F Supp 440.*

117. Miscellaneous

Attorney General has authority to indefinitely detain excludable aliens, and such indefinite detention does not violate due process. *Guzman v Tippy (1997, CA2 NY) 130 F3d 64.*

In proceedings denying alien's petition for parole, INS 15 month delay in apprehending and detaining petitioner fails to establish affirmative misconduct by INS sufficient to raise question whether INS is estopped from denying petition of parole. *St. Fleur v Sava (1985, SD NY) 617 F Supp 403.*

3. Entry from Territories

118. Generally

Only purpose of *8 USCS § 1182*(d)(7), governing entries into United States by aliens from Guam, Puerto Rico, or Virgin Islands, is to prevent excludable aliens from using entry into and residence in territorial possessions as means of entry into United States. *United States ex rel. Alcantra v Boyd (1955, CA9 Wash) 222 F2d 445.*

Preliminary inspection of persons attempting to board domestic flights between Puerto Rico and continental United States pursuant to INA § 212(d)(7) [*8 USCS § 1182*(d)(7)] and 8 CFR § 235.5 does not violate due process under the void for vagueness doctrine because both the statute and the regulation clearly

afford notice to persons of ordinary intelligence that they may be subjected to pre-boarding examinations in order to ascertain their status within the United States. *Lopez Lopez v Aran (1988, CA1 Puerto Rico) 844 F2d 898.*

To obtain waiver of inadmissibility based on extreme hardship pursuant to *8 USCS § 1182*(h)(1)(B), burden is on alien to demonstrate that there will be extreme impact on his U. S. citizen or permanent resident family members if he is deported. *Shooshtary v INS (1994, CA9 Cal) 39 F3d 1049, 94 CDOS 8530, 94* Daily Journal DAR 15766.

INA § 212(d)(7) [*8 USCS § 1182*(d)(7)] is not void for vagueness under Fifth Amendment as statute in effect establishes secondary border for purposes of exclusion of certain defined classes of aliens leaving Puerto Rico, Guam, or the U.S. Virgin Islands and seeking to enter continental U.S. or any other place under jurisdiction of U.S.; power of immigration authorities to inspect all persons, whether citizens or aliens, seeking to enter U.S. is clear; statute gives adequate notice to all persons affected by statutory provision. *Lopez v Aran (1986, DC Puerto Rico) 649 F Supp 853,* affd in part and revd in part on other grounds, remanded (1988, CA1 Puerto Rico) *844 F2d 898.*

C. Waiver of Excludability for Marijuana Possession [*8 USCS § 1182*(h)]

119. Applicability

Alien who, because of previous conviction for violating and conspiring to violate United States statute prohibiting sale of heroin, would be excludable under former *8 USCS § 1182*(a)(23) would not be among those entitled to discretionary relief under *8 USCS § 1182*(h), providing for waiver of excludability of alien excludable under former *8 USCS § 1182*(a)(9), (10), or (12). *United States ex rel. Dentico v Esperdy (1960, CA2 NY) 280 F2d 71.*

Although INA § 212(h) [*8 USCS § 1182*(h)] ameliorates some of harshness of provisions governing deportation, it does not provide relief in every circumstance where petitioner has permanent resident or citizen spouse or child; alien who procured immigrant visa through fraudulent marriage to U.S. citizen was never legally admissible and may not build claim of admissibility on status of second wife, who was permanent resident, and their U.S. citizen child, because their status was obtained as direct result of alien's fraudulent acts; alien was not entitled to relief from deportation because he was not "otherwise admissible" under INA § 212(h) [*8 USCS § 1182*(h)] since, in addition to conviction under *18 USCS § 371* of conspiracy to violate *18 USCS § 1546* by accepting and receiving immigration entry documents by means of false statement, which is within scope of INA § 212(a)(9) [former *8 USCS § 1182*(a)(9)], fact that alien had previously obtained immigrant visa by means of sham marriage was ground for exclusion under INA § 212(a)(19) [former *8 USCS § 1182*(a)(19)]. *Melhi v U.S. INS (1989, CA4) 884 F2d 759.*

8 USCS § 1182(h)(2), as interpreted by BIA to bar consideration for relief for lawful permanent resident aliens who have been convicted of aggravated felonies but allowing consideration for such relief for aliens convicted of same offenses who have never been admitted as lawful permanent residents, does not violate equal protection. *Lara-Ruiz v INS (2001, CA7) 241 F3d 934.*

Fact that under *8 USCS § 1182*(h), lawful permanent resident convicted of aggravated felony cannot obtain discretionary relief based on family hardship, while alien who enters United States illegally and then commits aggravated felony would at least theoretically be eligible for such relief, does not violate equal protection component of *Due Process Clause of Fifth Amendment. Moore v Ashcroft (2001, CA11) 251 F3d 919, 14* FLW Fed C 704.

8 USCS § 1182(h) does not violate Equal Protection Clause of Fifth Amendment

by providing discretionary relief to otherwise-barred aliens seeking entry or adjustment of status and not affording such relief to removable lawful permanent residents of *United States. Finau v INS (2001, CA9 Cal) 270 F3d 859, 2001 CDOS 9307, 2001* Daily Journal DAR 11669.

8 USCS § 1182(h) does not violate Equal Protection Clause of Fifth Amendment because it provides discretionary relief to otherwise barred aliens seeking entry or adjustment of status, but does not afford such relief to removable lawful permanent residents of *United States. Finau v INS (2001, CA9) 277 F3d 1146,* amd (2002, CA9 Cal) *2002 CDOS 497, 2002* Daily Journal DAR 679 and op withdrawn, dismd, motion gr (2002, CA9) *2002 CDOS 1687.*

8 USCS § 1182(h), which limits waiver of admissibility relief to aliens who did not achieve lawful permanent resident status before their convictions for aggravated felonies, does not violate equal protection guarantees of Fifth Amendment's due process clause. *Lukowski v INS (2002, CA8) 279 F3d 644.*

Jamaican deportable by reason of his pleading guilty to attempted robbery in first degree is denied reopening of proceedings, even though he claims eligibility to adjust his status as beneficiary of approved visa petition filed by his mother, who is U.S. citizen, because, even if court had jurisdiction to review claim, it would be denied on merits since he clearly is not eligible to adjust his status because he is convicted aggravated felony offender, under *8 USCS §§ 1182*(h) and 1252(a)(2)(C). *United States ex rel. Morgan v McElroy (1997, SD NY) 981 F Supp 873* (criticized in *Wozcina v United States INS (1997, DC Conn) 1997 US Dist LEXIS 21114).*

For purposes of equal protection challenge to *8 USCS § 1182*(h), lawful permanent alien was similarly situated to nonlawful permanent alien convicted of same crime. *Jankowski v INS (2001, DC Conn) 138 F Supp 2d 269.*

To bring Immigration and Naturalization Act into compliance with international law requirements, *8 USCS § 1182*(h) would be construed to confer eligibility for relief upon those aliens who met stringent requirements of 7 years' residence and "extreme hardship" to family and had been convicted of "aggravated felony," as defined after they committed their crime, but was not so categorized when they committed their crime. *Beharry v Reno (2002, ED NY) 183 F Supp 2d 584.*

120. Requisites; family relationship

In motion to reopen deportation proceedings to apply for adjustment of status based on marriage to United States citizen where alien deportable for conviction of two crimes involving moral turpitude, BIA abused its discretion in refusing motion to reopen by failing (1) to address evidence presented or to articulate reasons for its negative conclusions; and (2) to accept truth of factual assertions in affidavits supporting motion to reopen which were specific and not conclusory, and not inherently incredible. *Mattis v United States Immigration & Naturalization Service (1985, CA9) 774 F2d 965.*

Although INA § 212(h) [*8 USCS § 1182*(h)] ameliorates some of harshness of provisions governing deportation, it does not provide relief in every circumstance where petitioner has permanent resident or citizen spouse or child; alien who procured immigrant visa through fraudulent marriage to U.S. citizen was never legally admissible and may not build claim of admissibility on status of second wife, who was permanent resident, and their U.S. citizen child, because their status was obtained as direct result of alien's fraudulent acts; alien was not entitled to relief from deportation because he was not "otherwise admissible" under INA § 212(h) [*8 USCS § 1182*(h)] since, in addition to conviction under *18 USCS § 371* of conspiracy to violate *18 USCS § 1546* by accepting and receiving immigration entry documents by means of false statement,

which is within scope of INA § 212(a)(9) [former *8 USCS § 1182*(a)(9)], fact that alien had previously obtained immigrant visa by means of sham marriage was ground for exclusion under INA § 212(a)(19) [former *8 USCS § 1182*(a)(19)]. *Melhi v U.S. INS (1989, CA4) 884 F2d 759.*

In proceeding to deport alien on ground that he was inadmissible at time of entry, nunc pro tunc waiver of inadmissibility under *8 USCS § 1182*(h) was not available where alien, at time of entry, was not married to his present spouse and thus had no relation to citizen or permanent resident as specified in § 1182(h). *In re Bernabella (1968, BIA) 13 I & N Dec 42.*

Fact that alien's father, mother, brother and sister are all citizens and residents of United States is not, in itself, sufficient to outweigh serious adverse factor that alien has been convicted of felony murder, militating against grant of relief under *8 USCS § 1182. In re Rodriguez-Vera (1979, BIA) 17 I & N Dec 105.*

Alien who is father of United States citizen child may be eligible for waiver under *8 USCS § 1182,* although child was born out of wedlock and alien never married child's mother, where, under applicable state law, legitimation of child can be accomplished by methods other than marriage of child's natural parents; where issue of child's possible legitimation was not raised at deportation proceeding, case will be remanded to give alien opportunity to establish that child has been legitimated under state law and thus qualifies as his child under immigration laws. *In re Sanchez (1980, BIA) 17 I & N Dec 218.*

Alien's convictions for breaking and entering, grand theft and possession of criminal tools does not make alien ineligible for waiver of inadmissibility and immigration judge may not ignore fact that alien has United States citizen spouse. *In re Battista (1987, BIA) 19 I & N Dec 484.*

121. --Extreme hardship

Alien with U.S. citizen spouse and children who was never authorized to work in U.S. and whose wife had supported family failed to establish extreme hardship based on financial strain for purposes of waiver of grounds of excludability under *8 USCS § 1182*(h). *Hassan v INS (1991, CA9) 927 F2d 465, 91 CDOS 1687, 91* Daily Journal DAR 2492.

The BIA did not abuse its discretion in concluding that a Canadian citizen who (1) was excluded from the U.S. in 1951 on the basis of a Canadian conviction for fraud and failure to obtain a visa, (2) returned to the U.S. a few days later and has resided in the U.S. continuously since that time, (3) married (and 23 years later, divorced) a U.S. citizen, and has four U.S. citizen children, (4) pled guilty in 1986 to a misdemeanor charge of contributing to the sexual delinquency of a minor, and (5) was found deportable under former INA §§ 212(a)(16), (20), 241(a)(1) [former *8 USCS §§ 1182*(a)(16), (20), 1251(a)(1)] for re-entry following exclusion without the Attorney General's permission, entry without a valid immigrant visa, and being excludable at the time of entry, was not statutorily eligible for waiver of inadmissibility under INA § 212(h) [*8 USCS § 1182*(h)], because he failed to establish "extreme hardship" since his children were self-sufficient adults; if the financial burden on the children of caring for an aging parent living in Canada becomes significant, the alien may file a motion to reopen based on new evidence or changed circumstances. *Palmer v INS (1993, CA7) 4 F3d 482.*

BIA did not abuse its discretion in finding that alien who was native of Iran but citizen of England had not established extreme hardship where alien alleged without providing supporting details that if he were deported, his wife would be unable to support their two children, that he would be unable to find employment in England, and that his children would be traumatized if he was separated from

them, and where alien provided no reason why his family could not accompany him to England in order to mitigate hardship of his being deported there. *Shooshtary v INS (1994, CA9 Cal) 39 F3d 1049, 94 CDOS 8530, 94* Daily Journal DAR 15766.

BIA need not consider evidence of rehabilitation in determining whether alien is eligible for waiver of inadmissibility based on extreme hardship pursuant to *8 USCS § 1182*(h)(1)(B); rehabilitation must be considered only in cases where alien is eligible for adjustment of status and issue is whether change of status should be granted. *Shooshtary v INS (1994, CA9 Cal) 39 F3d 1049, 94 CDOS 8530, 94* Daily Journal DAR 15766.

Fact that under *8 USCS § 1182*(h), lawful permanent resident convicted of aggravated felony cannot obtain discretionary relief based on family hardship, while alien who enters United States illegally and then commits aggravated felony would at least theoretically be eligible for such relief, does not violate equal protection component of *Due Process Clause of Fifth Amendment. Moore v Ashcroft (2001, CA11) 251 F3d 919, 14* FLW Fed C 704.

Voluntarily entering into marriage with alien who thereafter sought permanent resident status is not basis for preventing finding of "exceptional hardship." *Yu v Marshall (1970, SD Tex) 312 F Supp 229.*

Facts and circumstances peculiar to each case should control when interpreting what amounts to "extreme hardship" within meaning of *8 USCS § 1182*(h) authorizing waiver of exclusion for alien with requisite family relationship to citizen in cases of extreme hardship; § 1182(h) makes no provision for hardship which inures to alien by reason of his exclusion and such hardship is not factor which may be considered; facts and circumstances did not support finding of eligibility for waiver under § 1182(h) where there was no showing of either present hardship or any hardship that would result in foreseeable future to respondent's parents by reason of their alleged physical defects in event respondent was excluded. *In re Shaughnessy (1968, BIA) 12 I & N Dec 810.*

Waiver of excludability under INA § 212(h) [*8 USCS § 1182*(h)] is dependent in part upon showing of extreme hardship, amounting to great actual or prospective injury to qualifying party and common results of bar such as separation, financial difficulties, etc. in themselves are insufficient unless combined with more extreme impact; applicant has burden of proof and fails to carry burden where evidence shows applicant to be self supporting rather than supported by permanent resident husband, applicant and husband have been voluntarily separated over 28 years and have no plans to reunite if application granted, and applicant's son, although retarded, is able to care for self and do simple industrial work. *In re Ngai (1984, Comr) 19 I & N Dec 245.*

122. --Lack of danger to country

Denial of waiver under *8 USCS § 1182*(h) to alien who had been in United States for more than seven years and had United States citizen wife and five minor children was not abuse of discretion in light of alien's conviction for particularly serious crime of violence, which criminal history outweighed his family situation. *United States ex rel. Martin-Gardoqui v Esperdy (1966, CA2 NY) 367 F2d 861.*

BIA did not abuse its discretion, in denying alien waiver of excludability, in determining that alien's conviction for armed robbery followed by 3 disciplinary infractions while in prison outweighed alien's social and humane factors including entry into U.S. at age 12, close family ties in U.S. and completion of educational and drug rehabilitation programs in prison. *Liu v Waters (1995, CA9 Cal) 55 F3d 421, 95 CDOS 3465, 95* Daily Journal DAR 6016.

Alien convicted of murder is ineligible for waiver of excludability pursuant

to *8 USCS § 1182*(h) even if conviction is later expunged or alien is later pardoned for this crime. *Reznik v United States Dep't of Justice, INS (1995, ED Pa) 901 F Supp 188.*

There should be reasonable showing of rehabilitation before there can be finding that admission of alien who has been convicted of aggravated felonies would not be contrary to national welfare, safety or security of United States as required by *8 USCS § 1182*(h) for waiver of exclusion. *In re Shaughnessy (1968, BIA) 12 I & N Dec 810.*

123. Discretion of Attorney General

In proceeding to obtain record of lawful admission for permanent residence pursuant to *8 USCS § 1259,* Regional Commissioner did not err in denying request for *8 USCS § 1182*(h) waiver on discretionary ground without first making express ruling on element of statutory eligibility where there was nothing in Regional Commissioner's decision to indicate that he assumed alien did not meet eligibility criteria. *Silva v Carter (1963, CA9 Cal) 326 F2d 315,* cert den *(1964) 377 US 917, 12 L Ed 2d 186, 84 S Ct 1181.*

8 USCS § 1182 does not authorize conditional waiver of excludability that may be revoked if alien commits crime in future. *Hassan v INS (1991, CA9) 927 F2d 465, 91 CDOS 1687, 91* Daily Journal DAR 2492.

In reviewing application for waiver of deportation, BIA will consider whether alien's family ties, long residence, employment, business or property ties in U.S., service in military or community, rehabilitation if convicted of crime, or other proof of good character outweighs such unfavorable factors as circumstances surrounding his deportation or exclusion, other immigration law violations, criminal record or other evidence of bad character. *Pablo v INS (1995, CA9) 72 F3d 110, 95 CDOS 9857, 95* Daily Journal DAR 17161.

Distinction between two classes of resident aliens who commit same crime, as provided in former *8 USCS § 1182*(c) and *8 USCS § 1182*(h), does not violate equal protection. *Domond v United States INS (2001, CA2 Conn) 244 F3d 81.*

Fact that under *8 USCS § 1182*(h), lawful permanent resident convicted of aggravated felony cannot obtain discretionary relief based on family hardship, while alien who enters United States illegally and then commits aggravated felony would at least theoretically be eligible for such relief, does not violate equal protection component of *Due Process Clause of Fifth Amendment. Moore v Ashcroft (2001, CA11) 251 F3d 919, 14* FLW Fed C 704.

8 USCS § 1182(h) does not violate Equal Protection Clause of Fifth Amendment by providing discretionary relief to otherwise-barred aliens seeking entry or adjustment of status and not affording such relief to removable lawful permanent residents of *United States. Finau v INS (2001, CA9 Cal) 270 F3d 859, 2001 CDOS 9307, 2001* Daily Journal DAR 11669.

8 USCS § 1182(h) does not violate Equal Protection Clause of Fifth Amendment because it provides discretionary relief to otherwise barred aliens seeking entry or adjustment of status, but does not afford such relief to removable lawful permanent residents of *United States. Finau v INS (2001, CA9) 277 F3d 1146,* amd (2002, CA9 Cal) *2002 CDOS 497, 2002* Daily Journal DAR 679 and op withdrawn, dismd, motion gr (2002, CA9) *2002 CDOS 1687.*

IJ did not err in refusing to consider extreme hardship to alien's U.S. citizen spouse in ordering alien excluded based on alien's convictions for crimes of moral turpitude since alien cannot demonstrate that Attorney General consented to alien applying for a visa, admission to U.S. or adjustment of status, as required by *8 USCS § 1182*(h). *Hernandez-Gonzalez v Moyer (1995, ND Ill) 907 F Supp 1224.*

Motion to reopen deportation proceedings, on ground that petitioner is alien

returning to lawful unrelinquished domicile, will be denied where requested relief would surely be denied by Attorney General or delegate in exercise of discretion granted under *8 USCS § 1182,* inasmuch as alien has committed felony offense of murder. *In re Rodriguez-Vera (1979, BIA) 17 I & N Dec 105.*

124. Administrative review

In identifying "social and humane" factors present to determine whether waiver of excludability is warranted, BIA did not err in failing to take administrative notice of conditions in China, particularly where BIA noted alien had no close family ties in China and where alien failed to provide BIA with any information about conditions in *China. Liu v Waters (1995, CA9 Cal) 55 F3d 421, 95 CDOS 3465, 95* Daily Journal DAR 6016.

125. Effect of waiver

Waiver of inadmissibility based on criminal conviction granted alien in 1959 did not protect him from future charge of deportability based on conviction of two crimes involving moral turpitude when he was convicted of additional crime. *In re Mascorro-Perales (1967, BIA) 12 I & N Dec 228.*

126. Deportation proceedings

Alien admitted to United States, who was convicted of crime involving moral turpitude and sentenced to one year imprisonment and ordered deported, was not entitled to benefits of provisions for admission of family members in hardship cases. *United States ex rel. Campos De Jerez v Esperdy (1960, CA2 NY) 281 F2d 182,* cert den *(1961) 366 US 905, 6 L Ed 2d 204, 81 S Ct 1049.*

Although BIA has broad discretion in ruling on motions to reopen, its failure to address any evidence submitted by petitioner in support of motion to reopen deportation proceedings for consideration of claim for hardship waiver of excludability under INA § 212(h) [*8 USCS § 1182*(h)], and to articulate reasons for denial of waiver, constitutes abuse of discretion. *Mattis v United States Immigration & Naturalization Service (1985, CA9) 756 F2d 748.*

Upon judicial review of denial of continuance in deportation proceeding to allow application for adjustment of status on basis of spouses' petition for immediate relative visa, IJ and BIA abused discretion by denying continuance on ground that immigrant visa had not been approved at time of continuance request and by not considering alien statutorily ineligible for adjustment of status could fall within exception of INA 212(h) [*8 USCS § 1182*(h)] because deportation would result in hardship to his wife. *Bull v INS (1986, CA11) 790 F2d 869.*

Immigration judge has duty under 8 CFR § 242.17(a) to inform alien of his or her apparent eligibility to apply for any relief from deportation, including waiver of excludability for conviction of crime of moral turpitude pursuant to INA § 212(h) [*8 USCS § 1182*(h)], particularly where review of record by Immigration Judge raises reasonable possibility that alien may be eligible for relief; hence, where alien was found deportable under INA § 241(a)(4) [*8 USCS § 1251*(a)(4)], based upon two convictions for sexual abuse, Immigration Judge should have been on notice that alien might have immediate relative who was U.S. citizen, and thus might be eligible for waiver of excludability under *8 USCS § 1182*(h), where record disclosed that alien had been admitted to United States under IR-1 visa, meaning that at time of entry, he had immediate relative who was U.S. citizen, and where directing few additional questions to alien would have revealed that alien was still married to United States citizen, and that he had children of marriage who were also U.S. citizens. *Moran-Enriquez v Immigration & Naturalization Service (1989, CA9) 884 F2d 420.*

1996 amendments to *8 USCS § 1182*(c), (h) and (i) preclude jurisdiction if,

and only if, judicial review is sought of decision thereunder, and where such decision is based on matter committed to agency discretion. *Luis v INS (1999, CA1) 196 F3d 36.*

Distinction between two classes of resident aliens who commit same crime, as provided in former *8 USCS § 1182*(c) and *8 USCS § 1182*(h), does not violate equal protection. *Domond v United States INS (2001, CA2 Conn) 244 F3d 81.*

Provisions for admission of family members in hardship cases being confined to exclusion cases, did not grant power to attorney general in exercise of his discretion to grant relief against deportation. *Puig y Garcia v Murff (1958, DC NY) 168 F Supp 890.*

Benefits of *8 USCS § 1182*(h) governing waivers of inadmissibility are not available in deportation proceedings unless granted in conjunction with adjustment of status under § 245 of Immigration and Nationality Act *(8 USCS § 1255)* or under § 249 *(8 USCS § 1259). In re Bernabella (1968, BIA) 13 I & N Dec 42.*

D. Waiver of Excludability for Fraud or Perjury [*8 USCS § 1182*(i)]

127. Applicability

In determining whether to waive deportation of alien who fraudulently entered U.S. pursuant to INA § 212(i) [*8 USCS § 1182*(i)], BIA may consider evidence of criminal activity by alien, including in absentia convictions entered, and charges pending, against alien in foreign country; although convictions obtained in foreign in absentia proceedings ought not to be treated as evidence of guilt, burden is on alien to point to exceptional procedural infirmities in foreign proceedings to rebut presumption that such convictions constitute probable cause to believe alien is guilty of crimes of which convicted; BIA's exercise of discretion under to waive deportation of alien who fraudulently entered U.S. will be upheld unless it is without rational explanation, inexplicably departs from established policies, or rests on impermissible basis, such as invidious discrimination against particular race or group. *Esposito v INS (1991, CA7) 936 F2d 911,* reh den (1991, CA7) *1991 US App LEXIS 17976.*

Because 8 USCS § 1182(i) is ambiguous whether appropriate standard of proof is extreme hardship or showing of unusual, even outstanding, equities, Court will defer to BIA's use of extreme hardship since BIA, through Attorney General, has broad discretion in administering this statute. *Opie v INS (1995, CA5) 66 F3d 737.*

8 USCS § 1182(i), as amended in 1996, may be applied retroactively to cases that were pending at time of amendment. *Cervantes-Gonzales v INS (2000, CA9 Cal) 232 F3d 684, 2000 CDOS 9115, 2000* Daily Journal DAR 12114.

Application of amended *8 USCS § 1182*(i) to pending case does not violate *Ex Post Facto Clause, Due Process Clause, or Equal Protection Clause. Okpa v INS (2001, CA4) 266 F3d 313.*

Waiver of inadmissibility provided in *8 USCS § 1182*(i) is parallel in language and purpose to *8 USCS § 1251*(f) and can waive only grounds of inadmissibility set forth in former *8 USCS § 1182*(a)(19); applicant for relief under *8 USCS § 1182*(i) was ineligible for waiver of excludability where she was inadmissible to United States under § 1182(a)(14) and (20), in addition to § 1182(a)(19). *In re Diaz (1975, BIA) 15 I & N Dec 488.*

128. Particular circumstances

BIA in denying adjustment of status application abused its discretion by attributing misconduct of alien's father to alien himself and then characterizing that misconduct as unfavorable factor on BIA scale of

discretionary relief; in motion to reopen adjustment of status application predicated on approval of alien's application for waiver of excludability and INA § 212(i) [*8 USCS § 1182*(i)] BIA improperly neglected to consider relevant factors of alien's gainful employment and financial responsibility and improperly characterized as unfavorable factor alien's failure to depart in accordance with grant of voluntary departure when failure to depart was occasioned by pendency of appeal that made out case of prima facie statutory eligibility. *Jen Hung Ng v Immigration & Naturalization Service (1986, CA9) 804 F2d 534.*

BIA did not abuse discretion in relying upon evidence of in absentia convictions entered against alien in Italy for criminal association, forgery, and unlawful possession of firearms, as well as fact that alien had been indicted in Italy on 12 counts of murder, in denying alien's request for waiver of deportation, where although alien was married to U.S. citizen and had four children, and asserted that he had never been charged with crime in U.S., was religious man, and had been upstanding, hard-working businessman since arrival in U.S., and thus deportation may work significant hardship upon alien and family, there was probable cause to believe that alien had engaged in violent criminal activity abroad, and BIA did not act irrationally or arbitrarily in finding that such evidence outweighed factors in alien's favor. *Esposito v INS (1991, CA7) 936 F2d 911,* reh den (1991, CA7) *1991 US App LEXIS 17976.*

BIA did not abuse its discretion in denying alien waivers of inadmissibility under *8 USCS § 1182*(h) and (i), where BIA determined that alien's false statements to INS to enter U.S. on business visa, his intent to overstay expiration date of visa, and his conviction for unauthorized use of credit card outweighed alien's marriage to U.S. citizen, stepchildren in U.S., employment history and tax payments to *U.S. Government. Opie v INS (1995, CA5) 66 F3d 737.*

1996 amendments to *8 USCS § 1182*(c), (h) and (i) preclude jurisdiction if, and only if, judicial review is sought of decision thereunder, and where such decision is based on matter committed to agency discretion. *Luis v INS (1999, CA1) 196 F3d 36.*

Alien was not eligible for waiver of excludability under *8 USCS § 1182*(i) for his arrival in U.S. without valid visa or other entry document since alien was found by BIA to be excludable because of his conviction for particularly serious crime rather than for visa fraud. *Abascal-Montalvo v INS (1995, DC Kan) 901 F Supp 309.*

Where alien had timely appealed from IJ's decision finding alien deportable as charged and statutorily ineligible for waiver of inadmissibility under former *8 USCS § 1182*(c) and adjustment of status under "registry" provisions of § 1259, and principal issue on appeal was whether alien could invoke salutary provisions of § 1182(c) to waive his deportability under *8 USCS § 1251*(a)(3)(B)(iii), BIA found that IJ properly answered this query in negative; alien convicted under *18 USCS § 1546*(a) of document fraud or misuse offense described therein cannot invoke § 1182(c) to waive his deportability under § 1251(a)(3)(B)(iii) because there is no comparable statutory counterpart to § 1251(a)(3)(B)(iii) among various grounds for exclusion enumerated in § 1182(a). In re Jimenez-Santillano (1996, BIA) I & N Interim Dec No 3291.

An IJ erred in granting a waiver of inadmissibility under INA § 212(i) [*8 USCS § 1182*(i)] to an alien who committed document fraud pursuant to INA § 274C [*8 USCS § 1324*(c)] by providing false documentation for purposes of obtaining employment; fact that a waiver of inadmissibility could be granted for this same conduct under INA § 212(a)(6)(C) [*8 USCS § 1182*(a)(6)(C)] does not affect statutory bar to this waiver of inadmissibility under § 212(a)(6)(F) [*8 USCS § 1182*(a)(6)(F)]. In re Lazarte-Valverde (1996, BIA) I & N Interim Dec No 3264.

Under 8 USCS § 1182(i), eligibility for waiver of grounds of excludibility specified in former *8 USCS § 1182*(a)(19) is limited to aliens who are spouses, parents, or children of either United States citizens or lawful permanent residents of United States, and purpose of § 1182(i) is to provide for unification of families and avoid hardship of separation; alien mother is not eligible for relief under *8 USCS § 1182*(i), where (1) United States citizen child upon whom eligibility is based does not live in United States, (2) child's father who lives in Guatemala has custody of child, (3) there is no evidence that alien has legal custody or could obtain legal custody of child if required to do so, (4) there is no persuasive evidence that alien intends to bring child with her or live with child in United States, and (5) granting of waiver would not unite or reunite family. *In re Lopez-Monzon (1979, Comr) 17 I & N Dec 280.*

Alien parents who are excludable under former *8 USCS § 1182*(a)(19) for fraudulently procuring nonimmigrant visas may be granted waiver of excludability under § 1182(i) on basis of birth of their United States citizen child, whether or not born during lawful stay of parents in United States, since such birth is favorable factor and must be accorded considerable weight in adjudication of application for relief of waiver of grounds of excludability, and there is neither statutory requirement that extreme hardship be shown, nor should fraudulent procurement of visas be considered as adverse factor, where such fraud is factor for which aliens seek to be forgiven in their petition for waiver of excludability. *In re Alonzo (1979, Comr) 17 I & N Dec 292.*

E. Exclusion not Known or Ascertainable by Immigrant Visa Holder [*8 USCS § 1182*(k)]

129. Exercise of reasonable diligence

Initial adjudication of INA 212(k) waiver application may be by immigration judge or district director; IJ properly denied waiver request of alien whose fourth preference visa petition was revoked upon death of her petitioning father where applicant was educated, knew she was immigrating on basis of her father's petition, and should have ascertained in exercise of reasonable diligence impact of her father's death on her eligibility for immigrant visa; reasonable person would have realized that death of petitioning father would have some effect on beneficiary's visa eligibility. Matter of Aurelio (BIA, 1987) Interim Dec No. 3031.

IV. EXCHANGE VISITORS [*8 USCS § 1182*(e)]

A. In General

130. Generally

Announced purpose of Cultural Exchange Act, in support of which *8 USCS § 1182*(e) was enacted, is to afford aliens opportunity to visit United States and acquire skills that will be useful in their homelands; to extent that visiting exchangee does not return to his native land, major policy of Act is undercut. *Secretary of Defense v Bong (1969) 133 US App DC 264, 410 F2d 252.*

Intent of both House and Senate versions of 1961 proviso now in *8 USCS § 1182*(e), was same, namely, to include Secretary of State in hardship waiver process by giving Secretary veto over hardship waiver applications. *Silverman v Rogers (1970, CA1 Mass) 437 F2d 102,* cert den *(1971) 402 US 983, 29 L Ed 2d 149, 91 S Ct 1667.*

Congress did not intend lenient waiver of exchange alien requirements since it would be detrimental to purposes of program and to national interests of

countries concerned to apply lenient policy in adjudication of waivers including cases where marriage occurring in United States, or birth of child or children, is used to support contention that exchange alien's departure from United States would cause personal hardship *(8 USCS § 1182). Nayak v Vance (1978, DC SC) 463 F Supp 244, 48 ALR Fed 497.*

131. Program financed by government

Alien's participation in exchange program was not financed in whole or in part, directly or indirectly, by agency of United States Government within contemplation of *8 USCS § 1182*(e) where alien received Fulbright Travel Grant prior to entry into United States as student under *8 USCS § 1101*(a)(15)(F)(i) and subsequently changed his status to exchange visitor under § 1101(a)(15)(J) but received no government financing after his arrival in United States. *In re Oum (1973, BIA) 14 I & N Dec 340.*

Case involving alien who was found ineligible for temporary resident status under INA § 245A(a)(2)(C) [*8 USCS § 1255a*(a)(2)(C)] and 8 CFR § 245a.2(b)(4) for failure to meet requirements of § 212(e) [§ 1182(e)], who claimed that she was not subject to 2-year foreign residence requirement because she did not receive any financing from either U.S. or own government, and because under 1972 Skills List for Philippines, applicable at time of alien's entry into U.S., only registered nurse in recognized nursing specialty was subject to requirement, in contrast to 1984 Skills List, which simply lists "nursing" as designated field of knowledge or skill, was reopened sua sponte by LAU and remanded to Director of Regional Processing Facility for determination of whether program was government-financed and for indication as to which Skills List Director used in making finding of ineligibility. *In re O- (1989, Comr) 19 I & N Dec 871.*

Although 8 CFR § 103.5(b) does not permit filing of motion to reopen or reconsider decision rendered in proceeding under INA § 245A [*8 USCS § 1255a],* LAU may sua sponte reopen proceedings conducted by that Unit if it determines that manifest injustice would result if prior decision were permitted to stand. *In re O- (1989, Comr) 19 I & N Dec 871.*

Applicant for legalization who was J exchange visitor bears burden of establishing that he or she is not subject to 2-year foreign residence requirement, and is otherwise eligible for temporary resident status; alien who participated in program financed in whole or in part, directly or indirectly, by agency of U.S. or own government is subject to requirement, regardless of whether alien's occupation appeared on Skills List. *In re O- (1989, Comr) 19 I & N Dec 871.*

132. Two-year foreign residence requirement

Immigration judge has authority to make independent determination as to whether alien is subject to foreign residence requirement of *8 USCS § 1182*(e) and is not bound by prior determination of District Director. *In re Baterina (1977, BIA) 16 I & N Dec 127.*

Exchange visitor who is no longer subject to two-year foreign residence requirement because of 1970 and 1976 amendments to *8 USCS § 1182*(e) should not be held barred from suspension of deportation by *28 USCS § 1254*(e). *In re Pereyra (1978, BIA) 16 I & N Dec 590* (superseded by statute on other grounds as stated in *In re Mangaser (1983, BIA) 19 I & N Dec 28).*

133. --Persons subject to requirement

Fact that nurse who entered United States as exchange visitor on program of professional training never received training and was employed merely in her already existing professional capacity does not constitute such fraud as to

alter her status as exchange visitor for purposes of foreign residence requirement of *8 USCS § 1182*(e). *Alonzo v Immigration & Naturalization Service (1969, CA7) 408 F2d 667.*

Department of State Regulation 22 CFR § 41.66 and its interpretation in FAM Note 6 to § 41.66 validly construe INA §§ 1101(a)(15)(K), 212(e) [*8 USCS § 1101*(a)(15)(K), 1182(e)] to require former exchange visitors to fulfill 2-year foreign residency requirement before being eligible for issuance of K visa. *Friedberger v Schultz (1985, ED Pa) 616 F Supp 1315.*

Alien who was admitted to United States under *8 USCS § 1101*(a)(15)(J) as alien spouse of exchange visitor was subject to two-year foreign residence requirement of *8 USCS § 1182*(e). *In re Gatilao (1966, BIA) 11 I & N Dec 893.*

Fact that exchange visitor was stateless at time he received his exchange visitor visa is insufficient to exempt him from foreign residence requirements of *8 USCS § 1182*(e). *In re Koryzma (1969, BIA) 13 I & N Dec 358.*

Alien's fraud in obtaining exchange visitor visa does not prevent alien from being considered true exchange visitor for purposes of foreign residence requirement of *8 USCS § 1182*(e). *In re Park (1975, BIA) 15 I & N Dec 436.*

Statutory ineligibility for suspension of deportation under INA § 244(f)(2) [*8 USCS § 1254*(f)(2)] should not be taken to apply to aliens subject only to provisions of INA §§ 244(f)(3) [*8 USCS § 1254*(f)(3)]; exchange alien admitted under INA § 101(a)(15)(J) [*8 USCS § 1101*(a)(15)(J)] to whom 2 year residence requirement is not applicable would not be barred from applying for suspension of deportation if admitted for other than graduate medical educational training; alien's reinstatement to J-1 status after admission to United States subjects alien to 2-year foreign residence requirement. Re Tuakoi (1985, BIA) I & N Interim Dec. No. 3004.

Although 8 CFR § 103.5(b) does not permit filing of motion to reopen or reconsider decision rendered in proceeding under INA § 245A [*8 USCS § 1255a],* LAU may sua sponte reopen proceedings conducted by that Unit if it determines that manifest injustice would result if prior decision were permitted to stand. *In re O- (1989, Comr) 19 I & N Dec 871.*

Provisions of *8 USCS § 1182*(e) includes student visa in its restrictions on eligibility for certain forms of visa for entry into United States during alien's enforced foreign residence notwithstanding fact that student visa is not specifically mentioned in statute. *In re Encarnado (1963, Regional Comr) 10 I & N Dec 620.*

One who is not actual participant in government-financed program but merely spouse of participant is subject to 2-year foreign residence requirement. *In re Tabcum (1972, Regional Comr) 14 I & N Dec 113.*

134. Waiver of residence requirement

Liberal attitude toward waiver provisions of *8 USCS § 1182*(e) is contrary to views of Congress as expressed in 1961 revision of Immigration and Nationality Act; prior to 1961 Department of State had been liberal in granting waivers and Congressional Committee Report stated that such policy was detrimental to purposes of exchange program and to national interests of countries concerned. *Silverman v Rogers (1970, CA1 Mass) 437 F2d 102,* cert den *(1971) 402 US 983, 29 L Ed 2d 149, 91 S Ct 1667.*

"No objection" letter from Pakistani embassy, which country was respondent's last place of residence, does not constitute "waiver" within meaning of § 1182(e). *In re Musharraf (1980, BIA) 17 I & N Dec 462.*

Rather than seeking to reopen deportation proceedings to allow exchange visitor subject to 2 year foreign residency requirement to apply for suspension of deportation relief and to overcome INA § 244(f)(3) [*8 USCS § 1254*(f)(3)] bar

to such relief, such an alien's remedy is to apply for waiver of 2 year foreign residency requirement. *In re Tuakoi (1985, BIA) 19 I & N Dec 341.*

Although Congress contemplated that aliens would employ in their own countries knowledge and skills acquired in United States under Mutual Educational and Cultural Exchange Act of 1961, exceptions to foreign residence requirement of *8 USCS § 1182*(e) will be made for exchange visitors whose skills are especially required in United States. *In re Ikemiya (1964, Dist Director) 10 I & N Dec 787.*

135. --Discretionary nature of waiver

Prerequisites to waiver of foreign residence requirement under *8 USCS § 1182*(e) include 3 separate levels of discretionary action: initial request for waiver, either by interested United States governmental agency or commissioner of immigration and naturalization; recommendation of Secretary of State; and actual grant of waiver by attorney general. *Nguyen Kin Lan Khanh v Marks (1972, SD NY) 357 F Supp 1248.*

Both Secretary of State and Attorney General have veto power over request for waiver of foreign residence requirements of *8 USCS § 1182*(e) and neither have affirmative duty to act in dealing with such request. *Nwankpa v Kissinger (1974, MD Ala) 376 F Supp 122,* affd without op (1975, CA5 Ala) *506 F2d 1054.*

INS acts within its discretion in giving less consideration to those elements of hardship arising as result of actions taken by alien and his spouse after arriving in U.S. *Al-Khayyal v United States Immigration & Naturalization Service (1986, ND Ga) 630 F Supp 1162,* affd (1987, CA11 Ga) *818 F2d 827.*

136. --Recommendations and approvals

In order for nonimmigrant exchange physician to obtain waiver of 2 year foreign residence requirement there must be (1) a hardship determination by INS; (2) favorable recommendation by USIA; and (3) determination by Attorney General that admission of alien to United States is in public interest. *Abdelhamid v Ilchert (1985, CA9 Cal) 774 F2d 1447.*

District director's denial of waiver of 2-year foreign residency requirement of J-1 visa holder is proper where USIA does not make favorable recommendation on waiver; without positive recommendation of USIA, district director has no power to grant waiver. *Dina v Attorney Gen. of United States (1986, CA2 NY) 793 F2d 473.*

Decision of Director of USIA regarding recommendation to waive 2 year foreign residence requirement is subject to judicial review under abuse of discretion standard; scope of review of USIA's recommendation function is limited to whether USIA followed its own guidelines; court cannot say that USIA abused its discretion in not making favorable recommendation with respect to waiver request of foreign physician where although its statement was not very specific it did indicate that USIA reviewed policy, program, and foreign relations aspects of case; because exchange visitor cases necessarily implicate foreign policy concerns and involve agency exercising its discretionary powers in that respect, more particularized explanation by USIA is not required. *Chong v Director, United States Info. Agency (1987, CA3 Pa) 821 F2d 171.*

Attorney General may only grant hardship waiver under INA § 212(e) [*8 USCS § 1182*(e)] if INS recommends waiver after finding exceptional hardship USIA recommends waiver. *Dina v Attorney Gen. of United States (1985, ND NY) 616 F Supp 718,* affd (1986, CA2 NY) *793 F2d 473.*

INS is without statutory authority to grant waiver of 2 year foreign residence requirement of J-1 exchange student where USIA does not favorably recommend waiver. *El-Omrani v Director, United States Information Agency (1986,*

WD Pa) 638 F Supp 430.

INS cannot grant waiver of 2-year foreign residence requirement unless USIA recommends such waiver; INS has no obligation to forward alien's motion for reconsideration to USIA after INS initial denial of alien's waiver request when USIA does not recommend waiver. *Singh v Moyer (1987, ND Ill) 674 F Supp 20,* affd (1989, CA7 Ill) *867 F2d 1035.*

In proceedings to rescind alien's adjustment of status from J-1 exchange visitor status to permanent resident status, BIA ruled that 2 year foreign residence requirement may only be waived when both the Secretary of State and Commissioner of INS approve waiver application. *In re Tayabji (1985, BIA) 19 I & N Dec 264.*

Refusal of Immigration Service to recommend waiver of foreign residence requirement of *8 USCS § 1182*(e) is abuse of discretion where visitor came to United States not only to obtain training and information, but also to impart it. *In re Duchneskie (1966, Dist Director) 11 I & N Dec 583.*

137. --Review

Application of J-1 nonimmigrant exchange doctor to waive 2 year foreign residence requirement does not fall within judicial review power of District Court, as failure of USIA to recommend waiver is an agency action committed to agency discretion by law as limited by *5 USCS § 701*(a)(2). *Abdelhamid v Ilchert (1985, CA9 Cal) 774 F2d 1447.*

Jurisdiction to review decision of USIA for abuse of discretion is limited where statute and its accompanying regulations governing agency action in foreign policy area provide no constraint on agency action. *Dina v Attorney Gen. of United States (1986, CA2 NY) 793 F2d 473.*

INS decision to deny application by J-1 visa recipient for waiver of 2-year foreign residence requirement is subject to restrictive standard of review as statute commits definition of extraordinary hardship to INS; INS construction and application of standard should not be overturned by reviewing court simply because it may prefer another interpretation of this statute. *Al-Khayyal v United States Immigration & Naturalization Service (1987, CA11 Ga) 818 F2d 827.*

Decision of Director of USIA regarding recommendation to waive 2 year foreign residence requirement is subject to judicial review under abuse of discretion standard; scope of review of USIA's recommendation function is limited to whether USIA followed its own guidelines; court cannot say that USIA abused its discretion in not making favorable recommendation with respect to waiver request of foreign physician where although its statement was not very specific it did indicate that USIA reviewed policy, program, and foreign relations aspects of case; because exchange visitor cases necessarily implicate foreign policy concerns and involve agency exercising its discretionary powers in that respect, more particularized explanation by USIA is not required. *Chong v Director, United States Info. Agency (1987, CA3 Pa) 821 F2d 171.*

Denial of waiver of two-year foreign residence requirement of *8 USCS § 1182*(e) by United States Information Agency (USIA), which agency action precludes foreign exchange medical student from being granted adjustment of status to permanent residence, is not subject to judicial review under Administrative Procedure Act *(5 USCS § 706*(2)(A)) because *8 USCS § 1182*(e) sets forth no criteria to guide exercise of discretion, and because federal courts lack necessary expertise to assess USIA's review of foreign exchange visitor program, policy, and foreign relations aspects of case as agency is required to do under 22 CFR § 514.32; thus, there is no meaningful standard upon which to base judicial review. *Singh v Moyer (1989, CA7 Ill) 867 F2d 1035.*

Congress' broad delegation of discretionary authority to USIA regarding

recommendation of wavier of 2-year residency requirement contains no standard or criterion upon which Director is to base decision making or withholding favorable recommendation, such being clear and convincing evidence of congressional intent to restrict judicial review; statute vests USIA with mandate so broad and vague that District Court has no law to apply and lacks subject matter jurisdiction to review USIA Director's failure to make favorable recommendation. *Slyper v Attorney Gen. (1987, App DC) 264 US App DC 170, 827 F2d 821,* cert den *(1988) 485 US 941, 99 L Ed 2d 281, 108 S Ct 1121.*

Upon review of Attorney General's refusal to waive exchange visitors 2 year foreign residence requirement, court may only overturn immigration agencies determination not to grant waiver if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; there is no abuse of discretion where United States Information Agency considered alien's file, weighed hardship to alien's family against foreign policy considerations, and gave alien reasons for its recommendation. *Dina v Attorney Gen. of United States (1985, ND NY) 616 F Supp 718,* affd (1986, CA2 NY) *793 F2d 473.*

Decision of Director of USIA denying waiver of 2 year foreign residency requirement for J-1 student on basis of hardship to U. S. citizen spouse is outside review power of District Court as waiver decision is committed to agency discretion by law. *El-Omrani v Director, United States Information Agency (1986, WD Pa) 638 F Supp 430.*

Court has no jurisdiction to review USIA's exercise of discretion against recommending waiver of 2-year foreign residence requirement where USIA has adhered to its own guidelines. *Singh v Moyer (1987, ND Ill) 674 F Supp 20,* affd (1989, CA7 Ill) *867 F2d 1035.*

Neither immigration judge nor Board has authority to grant or to review denial of waiver of two-year foreign residence requirement of *8 USCS § 1182*(e). *In re Mombo (1974, BIA) 15 I & N Dec 1.*

B. Grounds for Waiver

138. Lack of knowledge of requirement

Mere fact that alien doctor and his wife who entered United States as exchange visitors could have entered as immigrants under another provision of Immigration and Nationality Act and were not informed of this possibility by any United States official does not justify waiver of 2-year requirement of *8 USCS § 1182*(e). *Mendez v Major (1965, CA8 Mo) 340 F2d 128.*

Misleading advice from immigration official which caused alien to obtain status requiring 2-year foreign residence when alien was entitled to status not subject to such requirement justifies relief from that requirement. *Hetzer v Immigration & Naturalization Service (1970, CA9) 420 F2d 357.*

Vice Consul's apparent mistaken belief that J-1 visa holder was exempt from 2-year foreign residence requirement, resulting in such advice to alien and indication of same on application form, constitutes negligence but does not reach level of misconduct required to estop INS from refusing alien's application for waiver of foreign residence requirement. *Mukherjee v Immigration & Naturalization Service (1986, CA9 Or) 793 F2d 1006.*

INS properly refused waiver of 2 year foreign residence requirement where alien did not suffer exceptional hardship; INS considered all relative factors including possibility that residence of spouse in U.S. would require maintenance of 2 households creating financial and emotional strain upon marriage; INS is not required to apply more lenient standard of hardship to visa holder who is teacher and not student; fact that alien did not pay sufficient attention to application of 2 year residence requirement to him at time he was issued with

visa does not mean that any hardship caused by imposition of residence requirement was due to affirmative misinformation being given to alien by U.S. Consul. *Al-Khayyal v United States Immigration & Naturalization Service (1987, CA11 Ga) 818 F2d 827.*

Court will consider fact that State Department official advised alien, prior to marriage, that alien would not be subject to requirement. *Slyper v Attorney Gen. (1983, DC Dist Col) 576 F Supp 559,* affd (1987, App DC) *264 US App DC 170, 827 F2d 821,* cert den *(1988) 485 US 941, 99 L Ed 2d 281, 108 S Ct 1121.*

Despite claim that he did not know he was subject to 2-year foreign residence requirement, alien should have known because of his signature on form showing that he would accept any determination as to 2-year requirement. *Al-Khayyal v United States Immigration & Naturalization Service (1986, ND Ga) 630 F Supp 1162,* affd (1987, CA11 Ga) *818 F2d 827.*

Alien's situation does not involve type of unforeseeable hardship envisioned by regulations implementing *8 USCS § 1182*(e) where alien and his wife were aware at time of marriage that they would have to choose either 2 years' separation or that wife would have to spend 2 years in Vietnam in order to be with her husband. *In re Nghiem (1966, BIA) 11 I & N Dec 541.*

Alien who entered United States as nonimmigrant for pleasure but who subsequently received change of status to that of exchange visitor plus series of extensions of stay in that status, is subject to 2-year foreign residence requirement of *8 USCS § 1182*(e) notwithstanding her contention that she had not understood consequence of status change where application she completed for exchange visitor program contained clear instructions as to immigration consequences. *In re Wojcik (1966, BIA) 11 I & N Dec 603.*

139. Separation from spouse or children

Mere separation of Turkish exchange visitor from her American citizen spouse is not exceptional hardship within meaning of *8 USCS § 1182*(e) since in refusing waiver government does not attack validity of marriage but merely prevents one marriage partner from living in United States. *Silverman v Rogers (1971) 402 US 983, 29 L Ed 2d 149, 91 S Ct 1667.*

INS properly refused waiver of 2 year foreign residence requirement where alien did not suffer exceptional hardship; INS considered all relative factors including possibility that residence of spouse in U.S. would require maintenance of 2 households creating financial and emotional strain upon marriage; INS is not required to apply more lenient standard of hardship to visa holder who is teacher and not student; fact that alien did not pay sufficient attention to application of 2 year residence requirement to him at time he was issued with visa does not mean that any hardship caused by imposition of residence requirement was due to affirmative misinformation being given to alien by U.S. Consul. *Al-Khayyal v United States Immigration & Naturalization Service (1987, CA11 Ga) 818 F2d 827.*

In considering waiver of *8 USCS § 1182*(e) attempt must be made to balance interests of resident alien spouse or citizen children against those of government which instituted program bringing exchange visitor alien to country in first place; while possible physical harm to citizen children would be exceptional within meaning of statute, mere fact of separation, is of sufficiently lower order of hardship to take it out of standards set up by Congress. *Gras v Beechie (1963, SD Tex) 221 F Supp 422.*

INS refusal to waive student's 2-year foreign residence requirement was arbitrary, capricious, and lacking in evidentiary support where INS officials incorrectly advised couple that their marriage would nullify 2-year residence requirements, INS failed to give proper weight to evidence of citizen spouses'

history of medical and emotional problems which would be exacerbated by prolonged period of family separation, and INS failed to consider "totality of circumstances" germane to waiver determination. *Huck v Attorney Gen. of United States (1987, DC Dist Col) 676 F Supp 10.*

Waiver of foreign residence requirement of *8 USCS § 1182*(e) is justified by child's possible loss of affection, emotional security, and direction of its father in event that child were to accompany exchange visitor alien mother abroad during her enforced foreign residence. *In re Savetamal (1969, Regional Comr) 13 I & N Dec 249.*

140. Effect on children

Personal hardship and inconvenience to citizen son is not of such degree as to constitute exceptional hardship in order to justify waiver of *8 USCS § 1182*(e) despite fact that son was born in United States, understands only English, will have to begin elementary education in school in foreign land, and has 9-year-old brother who will be accepted as native. *Mendez v Major (1965, CA8 Mo) 340 F2d 128.*

Hardship caused to children of aliens, one and two years old and born in United States, is not sort of hardship intended by Congress to call for exercise of waiver provision of *8 USCS § 1182*(e) requiring two years outside United States following departure before eligibility for permanent residence. *Perdido v Immigration & Naturalization Service (1969, CA5) 420 F2d 1179.*

Foreign physician's failure to pass visa qualifying examination renders remand for determination of whether physician could obtain waiver of foreign residence requirement based upon exceptional hardship deportation might visit upon American-born children unavailing; were court to hold otherwise, court would create substantial loophole in immigration laws allowing all deportable aliens to remain in country if they bear children in United States. *Newton v Immigration & Naturalization Service (1984, CA6) 736 F2d 336.*

Application by temporary exchange visitor for waiver of two-years' foreign residence requirement under *8 USCS § 1182*(e) on basis of alleged "exceptional hardship" for his United States citizen son would be denied where district immigration director correctly interpreted standard to be applied in determining degree of "exceptional hardship" required for making favorable recommendation to secretary of state, and his application of it to facts submitted by plaintiffs was neither arbitrary, capricious, nor abuse of discretion. *Mendez v Major (1963, ED Mo) 226 F Supp 364,* affd (1965, CA8 Mo) *340 F2d 128.*

Two-year foreign residence requirement of *8 USCS § 1182*(e) is not waivable in case of exchange visit doctor required to return to native land for 2 years before becoming eligible to apply for permanent residence in United States, on ground of compelling hardship upon spouse and child, where child was citizen of United States; deportation order against parents of citizen child does not deprive child of constitutional right *(8 USCS § 1182). Nayak v Vance (1978, DC SC) 463 F Supp 244, 48 ALR Fed 497.*

Regional Commissioner's failure to demonstrate explicit consideration of evidence in record relative to "exceptional hardship" claim as to infant son of nonimmigrant exchange visitor in denying application for waiver of 2-year foreign residence requirement of *8 USCS § 1182*(e), and to set forth specific findings in support of his conclusion of no exceptional hardship was arbitrary, capricious and abuse of discretion. *Keh Tong Chen v Attorney Gen. of United States (1982, DC Dist Col) 546 F Supp 1060.*

Waiver of *8 USCS § 1182*(e) is granted to Philippine exchange visitor who, while in United States, married another Philippine citizen who is serving in United States Navy; their children, U.S. citizens, are too young to be separated

from their mother and, if taken by the mother, would seriously handicap if not eliminate entirely her opportunities for employment in Philippines. *In re Vicedo (1968, Dist Director) 13 I & N Dec 33.*

141. Effect on spouse

Denial by District Director of waiver of foreign residence requirement of *8 USCS § 1182*(e) was not abuse of discretion where (1) petitioner married her spouse on same day she applied for waiver, (2) most of matters which petitioner's affidavit claimed would result in exceptional hardship were conjectural, and were known to petitioner at time of marriage, and (3) notwithstanding probability that marriage relationship would not be normal relationship between parties for two-year involved, situation did not meet stringent test of exceptional hardship required by statute. *Talavera v Pederson (1964, CA6) 334 F2d 52.*

Hardship on United States citizen spouse of alien exchange visitor, caused by alien's deportation pursuant to foreign residence requirement of *8 USCS § 1182*(e) is insufficient to justify waiver of that requirement; exceptional hardship within meaning of statute contemplates more than normal personal hardship. *Talavera v Pederson (1964, CA6) 334 F2d 52.*

Attorney General may waive requirement that exchange visitor return to native land for 2 years before becoming eligible to apply for permanent residence if it is demonstrated that departure from United States would impose "exceptional hardship" on alien's spouse or child; district director abused discretion in determining that each of relevant factors, in isolation, would not qualify as extraordinary hardship where district director never gave consideration to question whether review of all factors made out case of exceptional hardship; exceptional hardship exists where alien's spouse would be required to interrupt professional career and suffer unemployment and separation from family; court also considers as additional factor fact that state department official advised alien, prior to marriage, that alien would not be subject to 2 year residence requirement. *Slyper v Attorney Gen. (1983, DC Dist Col) 576 F Supp 559,* affd (1987, App DC) *264 US App DC 170, 827 F2d 821,* cert den *(1988) 485 US 941, 99 L Ed 2d 281, 108 S Ct 1121.*

142. Disruption of career

Waiver of foreign residence requirement of *8 USCS § 1182*(e) due to exceptional hardship is granted where spouse of exchange alien seeking waiver is employed as structural design engineer, practice he would have to give up should he accompany his wife since there is no demand for such specialty in her country, and spouses combined salaries would thus amount to only tiny percentage of what they could make in United States. *Yu v Marshall (1970, SD Tex) 312 F Supp 229.*

Exceptional hardship exists where alien's spouse would be required to interrupt professional career and suffer unemployment. *Slyper v Attorney Gen. (1983, DC Dist Col) 576 F Supp 559,* affd (1987, App DC) *264 US App DC 170, 827 F2d 821,* cert den *(1988) 485 US 941, 99 L Ed 2d 281, 108 S Ct 1121.*

143. Disruption of education

Waiver of *8 USCS § 1182*(e) is granted due to exceptional hardship to citizen whose medical studies would be adversely affected by departure of his alien wife and whose career would be set back if he were to either interrupt his education or attempt to continue his studies in his wife's country. *In re Hersh (1965, Dist Director) 11 I & N Dec 142.*

Threatened disruption of education of exchange visitor's United States

citizen spouse constitutes sufficient hardship to justify granting of waiver of *8 USCS § 1182*(e). *In re Chong (1968, Dist Director) 12 I & N Dec 793.*

Desire of exchange visitor's United States citizen spouse to attend college under "G.I. Bill" involves hardship sufficient to invoke exceptional hardship provisions for waiver of *8 USCS § 1182*(e). *In re Gross (1969, Regional Comr) 13 I & N Dec 322.*

144. Economic hardship

Economic hardship to United States citizen child of exchange visitor and his alien wife is not sufficient to justify waiver of foreign residence requirement of *8 USCS § 1182*(e) where father claims that his specialty, psychiatry for institutionalized, chronic mental cases, has scarcely started in Mexico and is limited to few government hospitals to which he has applied without success. *Mendez v Major (1965, CA8 Mo) 340 F2d 128.*

Waiver of *8 USCS § 1182*(e) is granted to Lebanese doctor who, after marrying United States citizen during his exchange visit, returned to Lebanon with her, but was unable to find suitable employment due to crowded conditions in medical profession there, was unable to enter private practice due to lack of funds, and had insufficient funds to maintain separate households in United States and abroad in order to allow wife to return to United States to reside separately from her husband until completion of his required foreign residence. *In re Davoudlarian (1965, Dist Director) 11 I & N Dec 300.*

Waiver of *8 USCS § 1182*(e) is granted where alien, during enforced foreign residence, could not support family in United States and citizen wife could not accept employment because she had to care for child. *In re Nassiri (1968, Deputy Associate Comr) 12 I & N Dec 756.*

Economic hardship to United States citizen child is not sufficient to justify waiver of foreign residence requirement of *8 USCS § 1182*(e) despite fact that alien father, who had recently received doctoral degree from American University alleged that, should he return to Taiwan, his salary would be only one-tenth of what he was presently earning in United States where, previous to coming to United States, he had been able to support 5 other children in Taiwan without undue hardship and without advantage of doctoral degree. *In re Lai (1969, Regional Comr) 13 I & N Dec 188.*

145. Physical health

Requirements of *8 USCS § 1182*(e) will not be waived where alien exchange visitor whose United States citizen children require expert medical attention available only in United States will be able to earn enough abroad to allow wife and children to remain behind; hardship alleged in such case is merely enforced separation of family rather than enforcement of circumstances threatening permanent physical harm to children. *Gras v Beechie (1963, SD Tex) 221 F Supp 422.*

Requirement of *8 USCS § 1182*(e) is waived on basis of exceptional hardship for citizen child with congenital physical defect requiring extensive medical care and surgery where alien father has been offered good position in United States which will provide adequate salary and medical facilities to secure whatever medical treatment is required. *In re Petuoglu (1964, Dist Director) 11 I & N Dec 1.*

Journey to Phillipines would impose exceptional hardship on child sufficient to invoke waiver provisions of *8 USCS § 1182*(e) where child suffers from allergies and must undergo hyposensitization treatments. *In re De Perio (1968, Deputy Associate Comr) 13 I & N Dec 273.*

Health problems of citizen wife of exchange visitor are sufficient to justify

waiver of *8 USCS § 1182*(e) where wife, should she accompany husband abroad, would suffer medical problems stemming from allergic reactions to insect life and hot weather conditions of husband's country as shown on previous visit. *In re Ibarra (1968, Regional Comr) 13 I & N Dec 277.*

146. Fear of prejudice or persecution

Regional commissioner erred in applying "clear probability" burden of proof to Filipino educational exchange visitor's application for waiver of 2-year foreign residency requirement of *8 USCS § 1182*(e) on ground of fear of persecution if he returned to Philippines, since proper burden of proof in cases under § 1182(e) is "well-founded fear" of persecution. *Almirol v Immigration & Naturalization Service (1982, ND Cal) 550 F Supp 253.*

Waiver of *8 USCS § 1182*(e) is not justified by exchange visitor alien's fears that his long expatriation from Viet Nam and his acquisition of American family would subject him to persecution upon his return due to jealousy of his countrymen. *In re Nghiem (1966, BIA) 11 I & N Dec 541.*

Fact that differences in faiths would preclude normal assimilation of Christian United States citizens into Moslem country does not justify waiver of *8 USCS § 1182*(e) where such difference would not subject citizen to actual persecution. *In re Mansour (1965, Dist Director) 11 I & N Dec 306.*

Threat of religious persecution against Moslem exchange visitor's United States citizen spouse and child should entire family travel to alien's home country of Afghanistan justifies waiver of *8 USCS § 1182*(e). *In re Cruikshank (1966, Dist Director) 11 I & N Dec 558.*

Showing of prejudice in United Arab Republic against persons of Greek origin is sufficient to justify waiver of foreign residence requirement of *8 USCS § 1182*(e) for married exchange visitor doctors both of whom are natives of United Arab Republic but of Greek descent. *In re Courpas (1966, Dist Director) 11 I & N Dec 647.*

147. Mental and emotional hardship

Decision not to waive two year foreign residency requirement of *8 USCS § 1182*(e) with regard to citizen of Taiwan who entered U. S. under student visa and who was seeking permanent resident status, was abuse of discretion, arbitrary, capricious, and not supported by substantial evidence, where alien's husband was Chinese native and permanent resident, and if husband returned to Taiwan, he would have to give up practice of structural engineering, skill for which there was no demand in Taiwan, he would be two years behind in knowledge of developments in field on his return, husband and wife would have to live at subsistence level in Taiwan, husband's efforts to become American citizen would be hampered by such absence, and if husband were to remain while his wife went abroad, his mental health would be placed in jeopardy. *Yu v Marshall (1970, SD Tex) 312 F Supp 229.*

INS refusal to waive student's 2-year foreign residence requirement was arbitrary, capricious, and lacking in evidentiary support where INS officials incorrectly advised couple that their marriage would nullify 2-year residence requirements, INS failed to give proper weight to evidence of citizen spouses' history of medical and emotional problems which would be exacerbated by prolonged period of family separation, and INS failed to consider "totality of circumstances" germane to waiver determination. *Huck v Attorney Gen. of United States (1987, DC Dist Col) 676 F Supp 10.*

Waiver of *8 USCS § 1182*(e) is justifiable in case of exceptional emotional hardship to spouse where, if she remained in United States she would suffer undue mental anguish from being deprived of companionship of her husband

immediately following death of child and if she accompanied husband to Egypt she would be precluded by her Christian faith from being assimilated into predominantly Moslem country. *In re Mansour (1965, Dist Director) 11 I & N Dec 306.*

Waiver of foreign residence requirement of *8 USCS § 1182*(e) is justified where United States citizen members of family would suffer exceptional emotional hardship should husband return to country which does not permit young citizens who have been abroad as nonimmigrant students or exchange visitors to again leave and where, if United States citizen family members were to accompany alien abroad, they would not be able to adjust to new customs, food, language, and other difficulties. *In re Habib (1965, Dist Director) 11 I & N Dec 464.*

148. Other particular circumstances

Alien exchange visitor is granted hardship waiver of foreign residence requirement of *8 USCS § 1182*(e) where she had already returned to her own country and would have completed one year and 11 months of residence there by time of her return to United States under requested waiver; for practical purposes any possible obligation to that country resulting from period of exchange would be fulfilled. *In re Coffman (1969, Deputy Associate Comr) 13 I & N Dec 206.*

V. PRACTICE AND PROCEDURE

149. Generally

Exclusion order may not be attacked at subsequent hearing unless there was gross miscarriage of justice at prior proceedings, and valid exclusion order based upon final judgment is not disturbed by post conviction attack on that judgment; executed order of exclusion under former *8 USCS § 1182*(a)(23) based upon alien's conviction for possession of marijuana could not subsequently be attacked on basis that alien had secured nunc pro tunc order from state court vacating his guilty plea and conviction where alien did not appeal order of exclusion and had not initiated proceedings to vacate his conviction prior to execution of exclusion order. *Hernandez-Almanza v United States Dep't of Justice, Immigration & Naturalization Service (1976, CA9) 547 F2d 100.*

Applicants for adjustment of alien status to permanent residence were properly ordered deported where they failed to include their documentation in initial or amended I-526 Form and never offered it to INS investigator, notwithstanding it was available and offered to immigration judge. *Yung Tsang Chiu v United States Dep't of Justice (1983, CA6) 706 F2d 774.*

At exclusion proceeding, alien is not entitled to seek suspension of deportation. *Castillo-Magallon v Immigration & Naturalization Service (1984, CA9) 729 F2d 1227.*

In motion to reopen deportation proceedings to apply for adjustment of status based on marriage to United States citizen where alien was deportable for conviction of two crimes involving moral turpitude, BIA abused its discretion in refusing motion to reopen by failing (1) to address evidence presented or to articulate reasons for its negative conclusions; and (2) to accept truth of factual assertions in affidavits supporting motion to reopen which were specific and not conclusory, and not inherently incredible. *Mattis v United States Immigration & Naturalization Service (1985, CA9) 774 F2d 965.*

Executive Order 12324 *(8 USCS § 1182* note), which requires Transportation Secretary to instruct Coast Guard to enforce suspension of entry of undocumented aliens and interdiction of any defined vessels carrying such aliens, does not give rise to private cause of action. *Haitian Refugee Ctr. v Baker (1992, CA11*

Fla) 953 F2d 1498, 6 FLW Fed C 69.

In a case denying discretionary relief under INA § 212(c) (former *8 USCS § 1182*(c)], the BIA abused its discretion by improperly weighing the equities in the alien's favor, ignoring its inconsistent treatment of the alien when compared to earlier BIA decisions involving far lesser equities, failing to consider positive factors in favor of the alien, and failing to give sufficient weight to evidence of the alien's rehabilitation. *Diaz-Resendez v INS (1992, CA5) 960 F2d 493.*

While BIA may not determine constitutionality of immigration laws, it may address alleged procedural errors such as incompetent counsel in many circumstances; thus, proper practice for alien alleging this error is to raise this issue in motion to reopen before BIA and, if unsuccessful, pursue review of this denial in federal courts. *Liu v Waters (1995, CA9 Cal) 55 F3d 421, 95 CDOS 3465, 95* Daily Journal DAR 6016.

IJ erred in failing to advise alien facing deportation as result of robbery conviction of his right to apply for relief from deportation under *8 USCS § 1182*(h), since IJ should have inferred from fact that alien had entered U.S. at age 16 that he had relation in U.S. thus rendering him apparently eligible for this relief. *Bui v INS (1996, CA9) 76 F3d 268, 96 CDOS 747, 96* Daily Journal DAR 1172.

Compact of Free Association between United States and Palau (which appears as *48 USCS § 1931* note) does not immunize or exempt Palauans from complying with provisions of *8 USCS § 1326*(a) and former *8 USCS § 1182*(a)(16) and (17); thus, individual who is deported must obtain Attorney General's permission prior to reentry. *United States v Terrence (1997, CA9 Guam) 132 F3d 1291, 97 CDOS 9763, 97* Daily Journal DAR 15651.

Because crime of drug trafficking has element of intent, in order for immigration officer to have had reasonable belief that alien was drug trafficker, officer must have had reasonable belief that alien possessed requisite intent. *Pichardo v INS (1999, CA9) 188 F3d 1079, 99 CDOS 7340, 99* Daily Journal DAR 9427.

Aliens who have committed serious crimes in this country may be detained in custody for prolonged periods when country of origin refuses to allow alien's return, and such detention is constitutional if government provides individualized periodic review of alien's eligibility for release on parole. *Chi Thon Ngo v INS (1999, CA3 Pa) 192 F3d 390.*

Government need not present evidence of personal involvement in specific atrocities under Holtzman Amendment *(8 USCS § 1182*(a)(3)(E)). *Hammer v INS (1999, CA6) 195 F3d 836, 1999 FED App 381P.*

Requirements of Holtzman Amendment *(8 USCS § 1182*(a)(3)(E)) may be satisfied even in absence of eyewitness testimony that alien personally engaged in acts of brutality. *Hammer v INS (1999, CA6) 195 F3d 836, 1999 FED App 381P.*

Alien's right to equal protection is violated if, in course of removal proceedings, INS refuses to recognize effects of foreign country's expungement statute on simple drug possession offense that would have qualified for federal first offender treatment *(18 USCS § 3607)* had it occurred in *United States. Dillingham v INS (2001, CA9) 267 F3d 996, 2001 CDOS 8111, 2001* Daily Journal DAR 10027.

If alien is inadmissible for having committed offenses specified in *8 USCS § 1182*(a), he is removable as well. *Balogun v Ashcroft (2001, CA5) 270 F3d 274.*

In habeas corpus proceedings by Afghan and Iranian nationals detained pending determination of applications for asylum and conclusion of exclusion proceedings, regulations promulgated by INS (8 CFR §§ 212.5, 235.3) are valid as (1) an opportunity to comment was given; (2) they are not ultra vires INA § 235

[*8 USCS § 1225];* (3) they are not arbitrary or capricious where they deter and prevent unlawful entry and INS addresses its statement of basis and purpose for regulations; (4) INS shows good cause for publishing regulations as an immediate effective interim rule; and (5) aliens have no standing to attack regulations intended only to improve internal management of federal government; detention of aliens is not violative of constitutional right to petition for asylum, as such right is limited by Attorney General's discretion to parole detainees; detention is not violative of United Nations Protocol relating to status of refugees or of customary international law as neither gives aliens rights beyond those existing in domestic law. *Ishtyaq v Nelson (1983, ED NY) 627 F Supp 13.*

Although immigration issues are generally province of executive and legislative branches and Attorney General under INA has broad discretion to determine immigration issues, federal courts have jurisdiction over challenges regarding whether INS has overstepped its statutory authority to regulate areas such as parole policies for Cuban immigrants since this issue does not present nonjusticiable political question. *Federation for Am. Immigration Reform v Reno (1995, DC Dist Col) 897 F Supp 595,* affd (1996, App DC) *320 US App DC 234, 93 F3d 897.*

Alien lawfully admitted for permanent residence who was seeking to return from 3-day visit to Mexico, was to have his status assimilated to that of resident alien who had not left United States and was entitled to hearing at which government bore burden of proof. *In re Becerra-Miranda (1967, BIA) 12 I & N Dec 358.*

Aliens who were previously excluded in 1955 as aliens who had procured documents by fraud were entitled, upon application for entry in 1967, to hearing de novo on issue of their present inadmissibility on that ground, and could not be excluded solely by virtue of fact that in earlier proceedings aliens were found excludable. *In re Hinojosa-Pena (1967, BIA) 12 I & N Dec 462.*

Alien, found excludable under former *8 USCS § 1182*(a)(19), could not, without leave and as matter of right, withdraw his application for admission; request for permission to withdraw application for admission, made following entry of exclusion order and during pendency of appeal to Board, would be denied. *In re Manalo (1974, BIA) 15 I & N Dec 4.*

Burden is on applicant for admission to establish that he is not inadmissible where there is reason to believe that he has been convicted of crime involving moral turpitude. *In re Doural (1981, BIA) 18 I & N Dec 37.*

Alien effectively waived his right to counsel in application for asylum and withholding of exclusion and deportation where after having been informed of his right to counsel and given list of attorneys who represented aliens at little or no cost, applicant appeared before immigration judge on three occasions without counsel, and although he requested, and was granted, continuance so that family members could attend his asylum hearing, he did not request another continuance to obtain counsel; waiver of right to counsel need not always be express, but may be inferred from acts of applicant. *In re Y-G- (1994, BIA) 20 I & N Dec 794.*

An alien seeking a waiver of inadmissibility under INA § 212(h)(1)(B) [*8 USCS § 1182*(h)(1)(B)] has burden of proof to establish that he merits this discretionary relief. In re Mendez-Moralez (1996, BIA) I & N Interim Dec No 3272.

Although 8 CFR § 103.5(b) does not permit filing of motion to reopen or reconsider decision rendered in proceeding under INA § 245A [*8 USCS § 1255a],* LAU may sua sponte reopen proceedings conducted by that Unit if it determines that manifest injustice would result if prior decision were permitted to stand. *In re O- (1989, Comr) 19 I & N Dec 871.*

Case involving alien who was found ineligible for temporary resident status

under INA § 245A(a)(2)(C) [*8 USCS § 1255a*(a)(2)(C)] and 8 CFR § 245a.2(b)(4) for failure to meet requirements of § 212(e) [§ 1182(e)], who claimed that she was not subject to 2-year foreign residence requirement because she did not receive any financing from either U.S. or own government, and because under 1972 Skills List for Philippines, applicable at time of alien's entry into U.S., only registered nurse in recognized nursing specialty was subject to requirement, in contrast to 1984 Skills List, which simply lists "nursing" as designated field of knowledge or skill, was reopened sua sponte by LAU and remanded to Director of Regional Processing Facility for determination of whether program was government-financed and for indication as to which Skills List Director used in making finding of ineligibility. *In re O- (1989, Comr) 19 I & N Dec 871.*

Applicant for legalization who was J exchange visitor bears burden of establishing that he or she is not subject to 2-year foreign residence requirement, and is otherwise eligible for temporary resident status; alien who participated in program financed in whole or in part, directly or indirectly, by agency of U.S. or own government is subject to requirement, regardless of whether alien's occupation appeared on Skills List. *In re O- (1989, Comr) 19 I & N Dec 871.*

Exclusion statute *(8 USCS § 1182)* does not make any provision (analogous to deportation statute--*8 USCS § 1251*(b)(2))--for judicial recommendation against exclusion. *Mariam v United States (1978, Dist Col App) 385 A2d 776.*

150. Judicial review

Alien who seeks to reapply nunc pro tunc for admission into United States has burden of establishing that he or she merits favorable exercise of discretion; court reviews denial of application for permission to reapply only for abuse of discretion; board, in determining whether to grant other forms of discretionary relief, as required to weigh all factors present, and stated reasons for denying relief must reflect board's consideration of all relevant factors. *Dragon v Immigration & Naturalization Service (1984, CA9) 748 F2d 1304.*

Decision of Director of USIA regarding recommendation to waive 2 year foreign residence requirement is subject to judicial review under abuse of discretion standard; scope of review of USIA's recommendation function is limited to whether USIA followed its own guidelines; court cannot say that USIA abused its discretion in not making favorable recommendation with respect to waiver request of foreign physician where although its statement was not very specific it did indicate that USIA reviewed policy, program, and foreign relations aspects of case; because exchange visitor cases necessarily implicate foreign policy concerns and involve agency exercising its discretionary powers in that respect, more particularized explanation by USIA is not required. *Chong v Director, United States Info. Agency (1987, CA3 Pa) 821 F2d 171.*

Court of Appeals has no jurisdiction to review administrative order denying alien's application for waiver of 2 year foreign residence requirement as such action is separate and distinct from deportation proceedings; judicial review provisions of INA § 106 [former *8 USCS § 1105a]* include only those determinations made during deportation proceedings conducted under INA § 242(b) [*8 USCS § 1252*(b)]. *Ibrahim v U.S. Immigration & Naturalization Service (1987, CA11) 821 F2d 1547.*

Although § 901 of P.L. 100-204 [*8 USCS § 1182* note] authorizes judicial review over question of whether there was facially legitimate and bona fide reason for alien's exclusion, in light of doctrine of consular nonreviewability, such review is limited to determination of whether there was sufficient evidence to form reasonable ground to believe that alien had engaged in terrorist activity. *Adams v Baker (1990, CA1 Mass) 909 F2d 643.*

The Court of Appeals' review of the BIA's denial of a motion to reopen is limited to whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Vargas v INS (1991, CA2) 938 F2d 358; Vlassis v INS (1992, CA2) 963 F2d 547.*

Although equities such as marriage to an American citizen and the impending birth of their child are not without significance, they do not as a matter of law entitle en alien to the reopening of a deportation hearing. *Vlassis v INS (1992, CA2) 963 F2d 547.*

In reviewing a denial of waiver under INA § 212(c) [former *8 USCS § 1182*(c)], the Board may review the administrative record de novo and make its own findings of fact and law, including findings relating to a petitioner's credibility. *Martinez v INS (1992, CA1) 970 F2d 973.*

The Court of Appeals will uphold a decision of the BIA denying an INA § 212(c) [former *8 USCS § 1182*(c)] waiver unless it was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis; to the extent that the court reviews the Board's fact findings, it does so under the substantial evidence standard, that is, if the facts found by the Board are supported by such relevant evidence as a reasonable mind might accept to support such a conclusion, they will be upheld on review. *Martinez v INS (1992, CA1) 970 F2d 973.*

Court of Appeals will not disturb finding by BIA that alien has not demonstrated extreme hardship unless it finds that BIA abused its discretion in reaching that conclusion. *Shooshtary v INS (1994, CA9 Cal) 39 F3d 1049, 94 CDOS 8530, 94* Daily Journal DAR 15766.

Court of Appeals will not disturb determination of BIA to deny alien waiver of excludability so long as BIA provides reasonable explanation for its decision. *Liu v Waters (1995, CA9 Cal) 55 F3d 421, 95 CDOS 3465, 95* Daily Journal DAR 6016.

Court of Appeals will review de novo District Court denial of alien's habeas corpus petition for relief from order of exclusion. *Singh v Ilchert (1995, CA9 Cal) 69 F3d 375, 95 CDOS 8480, 95* Daily Journal DAR 14627.

Federal courts have jurisdiction to review habeas corpus petitions which raise questions of pure law filed by immigrants imprisoned under final order of deportation. *Bowrin v United States INS (1999, CA4) 194 F3d 483.*

Because of plenary power of Congress over aliens, court of appeals reviews classification provided in *8 USCS § 1182*(h) under rational basis standard of review. *Moore v Ashcroft (2001, CA11) 251 F3d 919, 14* FLW Fed C 704.

Order dismissing complaint seeking judicial review of administrative denial of petition for adjustment of status by former U.S. citizen was affirmed where petitioner's appeal of IJ's decision was still pending before BIA; dismissal was without prejudice to renewal of claims that Attorney General, INS Commissioner, and District Director arbitrarily refused petition to adjust status, and that INA § 212(a)(28)(C) and (G) [former *8 USCS § 1182*(a)(28)(C) and (G)], which prior to 1988 precluded adjustment of status for persons who were Communists or who advocated Communist doctrines, were unconstitutional, in proper circuit at conclusion of administrative deportation process. *Randall v Meese (1988, App DC) 272 US App DC 63, 854 F2d 472,* cert den *(1989) 491 US 904, 105 L Ed 2d 694, 109 S Ct 3186.*

Haitian refugees adversely affected by action of Immigration and Naturalization Service's action in establishing new criteria for parole and ensuing detention policy, under authority of *8 USCS § 1182,* are entitled to judicial review of agency action under *5 USCS § 702,* since (1) action results in injury-in-fact, (2) interests invaded are within zone of interests which *8 USCS § 1182* is intended to protect or regulate, and (3) no statutory bar to judicial

review exists. *Louis v Nelson (1982, SD Fla) 544 F Supp 973.*

Abuse of agency discretion is standard of judicial review to be applied to administrative determination of alien's application for leave to reapply for admission to United States after being involuntarily deported; agency's denial of application is not abuse of discretion, where all relevant facts are weighed, including fact of alien's wife and child residing in United States, where agency finds this positive fact outweighed by negative facts of aliens repeated disregard for immigration laws. *Estrada-Figueroa v Nelson (1985, SD Cal) 611 F Supp 576.*

INS refusal to waive student's 2-year foreign residence requirement was arbitrary, capricious, and lacking in evidentiary support where INS officials incorrectly advised couple that their marriage would nullify 2-year residence requirements, INS failed to give proper weight to evidence of citizen spouses' history of medical and emotional problems which would be exacerbated by prolonged period of family separation, and INS failed to consider "totality of circumstances" germane to waiver determination. *Huck v Attorney Gen. of United States (1987, DC Dist Col) 676 F Supp 10.*

Scope of judicial review by District Court on habeas corpus petition brought by alien challenging BIA determination that alien was excludable and ineligible for asylum and withholding of deportation is limited, and Court will give deference to BIA determination so long as it is supported by substantial evidence. *Abascal-Montalvo v INS (1995, DC Kan) 901 F Supp 309.*

District Court will review BIA order of exclusion under abuse of discretion standard, limiting itself to review of administrative record. *Eskite v District Director (1995, ED NY) 901 F Supp 530.*

Citizen of Philippines, facing exclusion under *8 USCS § 1182,* is not entitled to writ of habeas corpus under *28 USCS § 2241,* even though he had unusual equities of lawful permanent residence in U.S., wife who is lawful permanent resident, 3 young children who are U.S. citizens, being working taxpayer, and having served 3 years in Army and earned 2 medals, because Bureau of Immigration Affairs nonetheless determined, after full consideration, that equities were overcome by his drug use, possession of fraudulent green card, and particularly Japanese conviction for possession of *LSD. Sabino v Reno (1998, SD Tex) 8 F Supp 2d 622.*

151. --Jurisdiction

Court of Appeals is without jurisdiction to review final order of exclusion despite immigration judge's refusal to consider application for suspension of deportation. *Castillo-Magallon v Immigration & Naturalization Service (1984, CA9) 729 F2d 1227.*

District Courts are without jurisdiction to review INS's denial of waiver of 2-year foreign residency requirement for foreign exchange student found at *8 USCS § 1182*(e), since statute provides no meaningful standard for determining whether waiver should be granted such that, pursuant to *5 USCS § 701*(a)(2), agency is fully free to exercise its discretion without court review. *Korvah v Brown (1995, CA6 Ohio) 66 F3d 809, 1995 FED App 300P.*

1996 amendments to *8 USCS § 1182*(c), (h) and (i) preclude jurisdiction if, and only if, judicial review is sought of decision thereunder, and where such decision is based on matter committed to agency discretion. *Luis v INS (1999, CA1) 196 F3d 36.*

In consolidated action of US citizens challenging denial of visas to aliens invited to speak at meetings in U.S., District Court has subject matter jurisdiction pursuant to INA § 279 [*8 USCS § 1329];* Administrative Procedure Act, *5 USCS §§ 701* et seq. authorizes suit by citizens who have been aggrieved

by State Department's application of INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)] to exclude aliens invited by plaintiffs to U.S. as speakers and meeting participants; case is not moot as alien's interest in entering U.S. continues, plaintiffs still wish to invite aliens to speak in this country, and reasons for visa denials indicate that prospect of future denials of applications by these aliens is genuine and not merely a theoretical possibility. *Abourezk v Reagan (1986, App DC) 251 US App DC 355, 785 F2d 1043,* affd *(1987) 484 US 1, 98 L Ed 2d 1, 108 S Ct 252.*

District Court has jurisdiction to review whether INS District Director abused his or her discretion in denying alien parole into U.S. pending exclusion proceeding. *Mersereau v Ingham (1995, WD NY) 875 F Supp 148.*

Habeas petitioner under *8 USCS § 1182*(h) failed to exhaust administrative remedies, thereby depriving court of subject- matter jurisdiction to consider petitioner's claim that he was entitled to discretionary review of his deportation after serving his sentence for conspiracy to distribute cocaine, and although it would have been futile to raise such claim under then- prevailing Immigration and Naturalization Service interpretations, petitioner was not excused from failure to preserve issue for judicial review by raising it below. *De Los Santos De La Cruz v Ashcroft (2001, SD NY) 146 F Supp 2d 294.*

152. --Standing

Alien residing outside United States has standing to seek judicial review of decision of Regional Director of Immigration and Naturalization Service denying his application for permission to reapply for admission to United States following deportation or removal, where alien had been in this country and voluntarily left to pursue his request for readmission; moreover, Congress specifically provided procedure by which deported aliens could seek permission to reapply for readmission in *8 USCS § 1182. Jaimez-Revolla v Bell (1979) 194 US App DC 324, 598 F2d 243.*

Unadmitted, nonresident alien has no right, constitutional or otherwise, to enter U.S., and no standing to seek either administrative or judicial review of denial of nonimmigrant visa, and only issue which court may address is possibility of impairment of First Amendment rights of U.S. citizens through exclusion of alien. *Adams v Baker (1990, CA1 Mass) 909 F2d 643.*

Administrative Procedures Act, *5 USCS §§ 701* et seq. authorizes suit by citizens who have been aggrieved by State Department's application of INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)] to exclude aliens invited by plaintiff to U.S. as speakers and meeting participants. *Abourezk v Reagan (1986, App DC) 251 US App DC 355, 785 F2d 1043,* affd *(1987) 484 US 1, 98 L Ed 2d 1, 108 S Ct 252.*

Haitian Refugee Center (HRC) lacks standing to challenge U.S. program of interdiction on high seas of vessels carrying undocumented aliens attempting to enter U.S.; party cannot have standing on basis of right of association with Haitian refugees turned back to Haiti where no First Amendment violation is alleged; HRC lacks standing as interdiction program is not aimed at preventing Haitian refugees from dealing with its organization; HRC lacks third party standing to assert rights of interdicted Haitians because none of laws interdiction program is alleged to violate are substantive protections of relationship between Haitian aliens and appellants and program was not designed to interfere with that consultation; HRC's interest in counseling, and its members' interest in associating with interdicted Haitians were not intended to be protected by Refugee Act and other laws under which interdiction program is challenged. *Haitian Refugee Ctr. v Gracey (1987, App DC) 257 US App DC 367, 809 F2d 794.*

Alien has standing to challenge denial of labor certification even if employer does not join alien's action. *De Jesus Ramirez v Reich (1998, App DC) 156 F3d 1273.*

Employer has standing to challenge denial of certification of alien employee, and court would reverse decision of Regional Manpower Administrator of United States Department of Labor and would remand case for further administrative proceedings in accordance with statutory requirements of former *8 USCS § 1182*(a)(14) where action of Regional Manpower Administrator constituted abuse of discretion inasmuch as it was not based upon reliable evidence that there were sufficient workers in United States who were able, willing, qualified and available to perform position sought by alien. *Sherwin-Williams Co. v Regional Manpower Adm'r of United States Dep't of Labor (1976, ND Ill) 439 F Supp 272.*

American citizens have standing to challenge denial of visa application where First Amendment rights are implicated in Government's refusal under INA § 212(a)(27) [former *8 USCS § 1182*(a)(27)] to grant visa to alien with whom American citizens wish to speak. *Allende v Shultz (1985, DC Mass) 605 F Supp 1220.*

American scholars, politicians and religious leaders have standing to challenge, on First Amendment grounds, denial of nonimmigrant visa to widow of former Chilean president, who is member in alleged Communist organizations, and court has jurisdiction over action. *Allende v Shultz (1985, DC Mass) 605 F Supp 1220.*

Petitioner for whom immediate relative-spouse visa petition was approved was without standing to challenge denial of husband's immigrant visa application on basis of constitutionality of INA § 212(a)(27), (28)(F) [former *8 USCS § 1182*(a)(27), (28)(F)] as applied to plaintiffs; consular determinations are beyond review of court and constitutional rights of citizen spouse are not violated by consul's denial of husband's application for visa. *Ben-Issa v Reagan (1986, WD Mich) 645 F Supp 1556.*

District Court will dismiss for lack of standing claim brought on behalf of residents of Miami by Federation for American Immigration Reform (FAIR) that Joint Communique between U.S. and Cuba regulating immigration of Cubans to U.S. violates various provision of INA (specifically *8 USCS §§ 1182*(d)(5)(A), 1254a(g) and 1152(a)(1)) and will result in injury to residents of Miami, since FAIR cannot demonstrate that alleged injuries are redressable by *Federal Court. Federation for Am. Immigration Reform v Reno (1995, DC Dist Col) 897 F Supp 595,* affd (1996, App DC) *320 US App DC 234, 93 F3d 897.*

District Court will dismiss for lack of standing claim brought on behalf of residents of Miami by Federation for American Immigration Reform (FAIR) that Joint Communique between U.S. and Cuba will cause and has caused such injuries as school and hospital overcrowding and jeopardized safety of residents, since FAIR cannot demonstrate that injuries it alleges are directly caused by INS policy, particularly since paroled Cuban refugees are not required to settle in *Miami area. Federation for Am. Immigration Reform v Reno (1995, DC Dist Col) 897 F Supp 595,* affd (1996, App DC) *320 US App DC 234, 93 F3d 897.*

153. Attorney's fees

District Court abused its discretion in awarding attorneys' fees to representative of alien who had been denied nonimmigrant visa under § 1182(a)(27) where government's position was substantially justified under state of law at time visa was denied and during time lawsuit occurred; government's position was reasonable both in law and fact where it had not yet been held that alien's mere entry or presence in U.S. did not constitute activities. *De Allende v Baker (1989, CA1 Mass) 891 F2d 7.*

Alien who prevails in litigation over State Department's decision to deny nonimmigrant visa under former *8 USCS § 1182*(a)(27) may recover attorney's fees under Equal Access to Justice Act *(28 USCS § 2412*(1)(A), where: (1) Government's position that alien's presence in United States would be prejudicial to security of United States had no basis in fact; (2) Government's legal contentions were not substantially justified because its interpretation of former *8 USCS § 1182*(a)(27) contravened plain meaning of statute, constituted attempt to circumvent McGovern Amendment *(22 USCS § 2691*(a)) pertaining to waiver of excludability of aliens by reason of membership or affiliation with proscribed organizations, and contradicted State Department's own Foreign Affairs Manual; and (3) there were no special circumstances that would make award of attorney's fees unjust. *De Allende v Shultz (1989, DC Mass) 709 F Supp 18, 96 ALR Fed 255.*