

Fordham International Law Journal

Volume 14, Issue 1

1990

Article 14

Highlights of the U.S. Immigration Act of 1990

Warren R. Leiden*

David L. Neal†

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Warren R. Leiden and David L. Neal

Abstract

The Act is a comprehensive package that institutes a substantial number of new provisions to the Immigration and Nationality Act, with significant modifications made to such divergent topics as family immigration, business immigration, naturalization, and exclusion and deportation grounds and procedures. This Article surveys the changes and highlights those most likely to have a substantial impact on U.S. immigration law, policy, and practice.

RECENT DEVELOPMENT

HIGHLIGHTS OF THE U.S. IMMIGRATION ACT OF 1990

*Warren R. Leiden**

*David L. Neal***

INTRODUCTION

On October 27, 1990, the U.S. Congress passed legislation that institutes the most sweeping reform in U.S. legal immigration law in the past sixty-six years. President Bush signed the Immigration Act of 1990 (the "Act") into law on November 29, 1990.¹

The Act is a comprehensive package that institutes a substantial number of new provisions to the Immigration and Nationality Act, with significant modifications made to such divergent topics as family immigration, business immigration, naturalization, and exclusion and deportation grounds and procedures. From the point of view of an advocate of immigrants' rights, certain portions of the new law bring welcome changes, while others raise considerable concern. This Article

* Executive Director, American Immigration Lawyers Association; J.D., 1974, Boston University; B.A., 1971, Johns Hopkins University.

** Senior Policy Analyst, American Immigration Lawyers Association; J.D., 1989, Columbia University; A.B., 1981, Wabash College.

1. Pub. L. No. 101-649, 104 Stat. 4978 (1990). On the occasion of signing the Immigration Act of 1990 (the "Act") into law, President Bush stated that

it will promote a more competitive economy, respect for the family unit, and swift punishment for drugs and crime. Immigration is not just a link to America's past, it's also a link to America's future. This bill provides for vital increases for entry on the basis of skills—infusing the ranks of our scientists and engineers and educators with new blood and new ideas. And it also boosts our war on drugs and crime, allowing us to send back alien offenders who threaten our streets and who make up nearly a fourth of our federal prison populations. It will help secure our borders—the front lines of the drug war. It also revises the exclusion grounds for the first time since enactment in 1952, putting an end to the kind of political litmus test that might have excluded even some of the heroes of the Eastern Europe's—the Eastern European revolution of 1989. This bill is good for families, good for business, good for crime fighting, and good for America.

Remarks of President Bush at the Signing of the Immigration Act of 1990, The White House, Federal News Service, Nov. 29, 1990.

surveys the changes and highlights those most likely to have a substantial impact on U.S. immigration law, policy, and practice.

I. TITLE I: IMMIGRANTS

The Act introduces for the first time an overall cap² on worldwide immigration that includes the immediate relatives (spouses, minor children, and parents) of U.S. citizens. The Act provides 700,000 visas annually in fiscal years 1992 through 1994 and 675,000 annually thereafter, a considerably higher number than the 530,000 immigrant admissions under current law. The division of immigrant visas into three areas—family-based, employment-based, and diversity—reflects the different interests behind U.S. immigration policy.³

Family-based immigration is comprised of immediate relatives of U.S. citizens plus four preferences that track the family preferences existing under current law.⁴ For the first three fiscal years, 465,000 visas are reserved for family-based immigration, supplemented by an additional 55,000 immigrant visas for the spouses and minor children of aliens legalized under the provisions of the Immigration Reform and Control Act of 1986 (“IRCA”).⁵ Beginning in fiscal year 1995, 480,000 family-based visas are available per year. In each year, the number of immigrant visas available for family preference immigration will be computed by subtracting from the family-based visas total (465,000 or 480,000) the number of immediate relatives of U.S. citizens admitted in the prior year or 226,000, whichever is greater. These figures represent a modest but important increase in family-based immigration and hopefully will expedite the reunion of immigrant families in the United States.

2. This cap is “pierceable” in that it will automatically increase when the growth in immediate relatives of U.S. citizens reduces family preference immigration to 226,000.

3. The Act does not address refugee admissions into the United States.

4. The new preferences are: 1st Preference—unmarried sons and daughters of U.S. citizens; 2nd Preference—(a) spouses and minor children and (b) unmarried sons and daughters of permanent U.S. residents; 3rd Preference—married sons and married daughters of U.S. citizens; and 4th Preference—brothers and sisters of adult U.S. citizens. Special provision is made so that over three-quarters of the second preference visas go to spouses and minor children of permanent U.S. residents.

5. Codified at scattered sections of 8 U.S.C. (1988).

Employment-based immigration is expanded to recognize the complexity of admitting persons based on different skills and economic contributions. With 140,000 immigrant visas provided annually, a new preference system divides those visas between five (instead of two) categories. The first category, "priority workers," includes (a) aliens with extraordinary ability in the arts, sciences, education, business or athletics, (b) outstanding professors and researchers, and (c) certain multinational executives and managers. The priority workers category is designed to support business and research in obtaining the highest-level professionals in any given endeavor and is not conditioned on a test of the U.S. labor market, *i.e.*, labor certification.⁶

The second category, roughly a grade below that of priority workers, is comprised of professionals holding "advanced degrees" and aliens of "exceptional ability." The third category includes skilled workers, professionals holding bachelor's degrees, and "other workers." This catch-all category includes much of the current third and sixth preferences in a more generic grouping that does not distinguish between professionals, high-skilled and low-skilled workers. The Act provides 40,000 visas annually to each of these three categories with "spillover" of unused visas from the higher categories to the lower. This spillover is limited, however, in that only 10,000 visas can be made available to immigrants for jobs that require less than two years training or experience, called "unskilled" in the Act.

The remaining two categories, certain special immigrants and investors, are distinct from the others in that they are not strictly employer-sponsored immigrants. The special immigrants category allows ministers and religious workers, among others, to immigrate based on established religious affiliation and the continuation of their profession in the United States. The investors category is specifically designed to generate U.S. employment by permitting the immigration of entrepreneurs who invest US\$1 million or more in a new commercial enterprise that creates employment for ten or more U.S. workers.⁷

6. See 8 U.S.C. § 1182(a)(14) (1988).

7. If the investment is made in a rural area or in an area of high unemployment,

The Act allocates 10,000 visas annually for special immigrants and 10,000 visas for job-creating investors.

The restructuring of employment-based categories is accompanied by significant changes in labor certification, the process by which the availability of qualified U.S. workers is tested. Labor certification will be required only for the second and third employment-based categories, exempting priority workers from the standard requirement. The Act revises the labor certification process itself by requiring an employer to provide notice of an application for certification to (a) any bargaining representative that exists for the "occupational classification" in that employer's area or (b) to the employees through the conspicuous posting of notice, if no such representative exists. This "notice" requirement is supplemented by a provision that allows "any person" to submit documentary evidence bearing on the certification, thereby providing a forum of challenge to the certification by employees, unions, or other organizations.

In response to inefficiencies in the labor certification process, this legislation introduces a pilot "labor attestation" program to be set up by the U.S. Secretary of Labor (the "Secretary") for fiscal years 1992 through 1994 that, if successful, will provide a model for further modification of the certification process. The pilot program consists of the designation and testing of ten occupational classifications for labor shortages or surpluses. If the Secretary determines there is a shortage, certifications will be automatically granted, similar to "Schedule A" under current law.⁸ If a surplus is found, the Secretary may still make a certification, but only if the employer submits evidence, based on extensive recruiting efforts, that all the certification requirements have been met.

"Diversity" immigration is the third area provided for by the Act and is designed to remedy historical changes in immigrant admissions patterns since 1965. The Act directs the U.S. Attorney General to determine which states and regions have, in recent years, been less represented in immigrant admissions. Beginning in fiscal year 1995, 55,000 diversity visas will

the required investment could be as low as one-half the amount otherwise required, *i.e.*, as low as US\$500,000.

8. See 20 C.F.R. § 656.10 (1990).

be made available to persons from those states who have either a high school education (or its equivalent) or two years of work experience in an occupation that requires at least two years training or experience. In fiscal years 1992 through 1994, 40,000 visas are made available to natives of those states "adversely affected" by the adoption of national origins quotas in 1965. The "adversely affected" are some thirty-five nations that enjoyed higher levels of immigration prior to 1965, when per-country limits were based on nationality percentages of the U.S. population early in the twentieth century. These "diversity transition" visas are further restricted by a provision requiring that forty percent of the visas go to nationals of the country that received the most visas under a similar section of IRCA,⁹ *i.e.*, Ireland.

Related to the diversity immigration program, an additional 1,000 immigrant visas have been set aside for Tibetans residing in India or Nepal before the enactment of this Act.

II. TITLE II: NONIMMIGRANTS

The Act modifies many of the existing nonimmigrant visa categories and creates new categories in the employment area. The Act extends and broadens the pilot program for visitors (B nonimmigrants) so that tourists may enter the United States for up to ninety days without first obtaining a visa. The Act also adds new restrictions for D nonimmigrants working aboard sea or air carriers or as longshore workers.

Perhaps the most significant changes have been made in the H nonimmigrant category, involving highly-skilled professionals and "prominent" nonimmigrant workers. The new law introduces a cap of 65,000 visas per year on H-1B skilled nonimmigrant workers (as well as a 66,000 cap on H-2B lesser-skilled workers). The H-1B category is also redefined to include only aliens employed in "specialty occupations" (occupations that require highly specialized knowledge and a bachelor's degree as a minimum for entry into the occupation). The H-1B category no longer includes nurses, entertainers, athletes, artists, or other professions of "preeminence."

Moreover, H-1B nonimmigrant applications are subject to

9. 8 U.S.C. § 1153 note (1988).

a form of "labor attestation." Employers will be required to document wages, working conditions, and the absence of a strike or lockout, and they are required to notify bargaining representatives (or make conspicuous posting of notice to employees) if they wish to file an application. A complaint procedure is provided for "any of these persons or organizations" to challenge the attestations. The utility of the new H-1B category, now critically depended on by many businesses, schools, and institutions, could depend on the regulation and implementation of the new attestation program.

The Act creates new nonimmigrant categories to reflect the diverse needs of U.S. employers. Similar to the new categories in employment-based immigration, the Act creates O and P nonimmigrant visas to accommodate U.S. need for aliens of "extraordinary ability" in the areas of science, the arts, education, business, and athletics.¹⁰ Their presence must also "substantially benefit" the United States, and consultation with peer groups and appropriate unions is required. Similarly, aliens who enter in order to assist a performer may enter on an O visa if they have critical skills or a special relationship that makes them an integral part of the performance. Their entrance likewise requires consultation with the appropriate unions. The P category is reserved for athletes and entertainers who are recognized at an international level or are participating in a special program. Like O visas, P visas require consultation with the appropriate union. The permissible length of stay for O and P nonimmigrants is limited to the period of the event, but for certain athletes can be extended up to five years (renewable for another five).

Other new nonimmigrant categories include Q—international cultural exchange visitors, and R—certain religious workers.

III. TITLE III: FAMILY UNITY AND TEMPORARY PROTECTED STATUS

Under IRCA, many aliens present in the United States before January 1, 1982 in unlawful status were given permis-

10. Extraordinary ability is demonstrated by an alien's possessing sustained national or international acclaim when he or she enters the United States.

sion to remain in the United States and seek legalized status.¹¹ IRCA failed, however, to address the situations of close family members of legalized aliens who missed the 1982 cut-off date. This Act compensates for that omission by providing a temporary stay of deportation and work authorization for spouses and unmarried children of legalized aliens present and residing in the United States since May 5, 1988, but disqualifies these family members from certain public assistance in the same manner and for the same period as their legalized family members. The Act declares as ineligible convicted aliens (aliens with a record of one felony or three misdemeanors in the United States) and persons who have engaged in persecution, public threats, or who are security threats to the United States.

The Act also establishes a "generic" safe haven program that allows nationals from states designated by the Attorney General to seek a special "temporary protected status." To qualify, the alien must have been continually physically present in the United States since the date of that country's designation and must be otherwise admissible. The designation must be based on on-going civil conflict, natural disaster, or other extraordinary or exceptional circumstances that make the alien's return unsafe,¹² and is limited to a maximum of eighteen months, which is renewable if conditions persist. Temporary protected status may not have any effect on other immigration status but should merely suspend deportation (and provide work authorization) for the period of temporary status. In the converse, an alien's current immigration status is not to affect the grant of temporary protected status, and the Act expressly prohibits any efforts to persuade an alien to relinquish other rights or status in order to obtain safe haven. Similarly, it prohibits detention of the alien while protected status is in effect.

The Act designates El Salvador as a country whose nationals are eligible for temporary protected status for a limited pe-

11. 8 U.S.C. § 1255a (1988). Significantly, the Act extends the deadline for "second stage" applications for adjustment of status by newly legalized aliens for another year.

12. The manager's report on the bill recommends temporary protected status for nationals of Kuwait, Lebanon, and Liberia. H.R. CONF. REP. NO. 955, 101st Cong., 2d Sess., 127 (1990).

riod. While the Act allows Salvadorans to remain in the United States, it specifically provides that their failure to depart or their failure to appear at a deportation hearing at the expiration of protected status will result in an *in absentia* finding of deportability and ineligibility for most forms of discretionary relief.

IV. TITLE IV: ADMINISTRATIVE NATURALIZATION

The Act completely changes the naturalization process by replacing current court-granted naturalization with administrative naturalization. It confers sole authority to naturalize on the Attorney General, and while it allows courts to administer ceremonial oaths at an applicant's election, the Act otherwise removes federal and state courts from the routine naturalization procedure. It also provides a number of important safeguards to protect the interests of naturalization applicants. For instance, if an application is denied, the examiner is required to inform the applicant and to disclose to the applicant what remedies are available. Additionally, the Act provides administrative review of application denials and subsequent *de novo* judicial review in federal court.

The Act makes a number of welcome changes in application requirements. It permits applications based on continuous residence or marriage to a citizen to be filed up to three months in advance of eligibility. It also changes the residence requirement from six months in one state to three months in one Immigration and Naturalization Service ("INS") district and loosens the English language requirement for elderly permanent residents. Such changes will expedite the naturalization process in some areas and will encourage eligible permanent residents to seek citizenship.

V. TITLE V: CRIMINAL ALIENS AND DEPORTATION PROCEDURES

Perhaps the most troubling provisions in the Act appear under the topic of criminal aliens and deportation procedures. With many of the provisions taking effect on the date of enactment, there is a threat that the due process protections of aliens subject to deportation for crimes committed in the United States will be seriously curtailed. Many of the provi-

sions in this section are designed to expedite the removal of such aliens by cutting back on safeguards that currently exist.¹³

The expedited excludability or deportability of an alien convicted of a crime in the United States is contingent upon the definition of "aggravated felony." The Act redefines aggravated felony to include drug trafficking (of any amount), money laundering, and crimes of violence for which a term of five years imprisonment was imposed (whether or not it was served). This definition includes both federal and state offenses, as well as foreign offenses for which imprisonment was completed in the last fifteen years.

The Act takes steps to enhance INS enforcement authority, expressly authorizing INS personnel to carry firearms, execute warrants, and make arrests for any federal offense committed in the officer's presence or any federal felony which the officer has reasonable grounds to believe has been or will be committed. INS officers will be authorized to use force, including deadly force, after regulations have been promulgated and officers have been properly trained and certified in arrest procedures. As part of that enhancement, the Act permits the apprehension of potentially deportable aggravated felons upon their release from incarceration, regardless of the terms of their release. Similarly, the Act permits the apprehension of potentially excludable aggravated felons upon the completion of their sentence.

The Act markedly restricts procedural protections for convicted aliens. It eliminates all judicial recommendations against deportation ("JRADs"), which have, until now, served as a procedural safeguard to prevent the unwarranted deportation of a convicted alien. Without JRADs, sentencing courts can no longer prevent the deportation of an alien who has fully cooperated with the prosecution or who has substantial equities that weigh against deportation. The Act restricts discretionary relief from deportation in a variety of other ways. Under section 212(c) of the Immigration and Nationality Act,¹⁴ permanent residents returning from abroad who have ever

13. Courts have long recognized that all persons, regardless of alienage status, are entitled to due process protections in proceedings in U.S. courts. *See, e.g., United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1068 (1990) (Kennedy, J., concurring).

14. 8 U.S.C. § 1182(e) (1988).

been convicted of an aggravated felony will be ineligible to re-enter if they served five years imprisonment for that felony. The U.S. Attorney General no longer has the discretion to admit (or not to deport) permanent residents returning from a voluntary departure to their unrelinquished home of seven or more years. The Act further limits relief by precluding an alien convicted of an aggravated felony from seeking adjustment of status, voluntary departure in lieu of deportation, or asylum.

Related to the changes in the "criminal alien" provisions, deportation procedures have been significantly modified. The Act trims procedural protections in a variety of ways. If an alien fails to appear at a deportation hearing after written notice has been sent to the address of record, an *in absentia* hearing will be conducted and the alien found deportable. The *in absentia* order can be rescinded only upon a showing of either "exceptional circumstances" (defined as the serious illness or the death of an immediate family member, but nothing "less compelling") or the inability of the alien to attend on account of unreceived notice or detention. The burden of proof is on the alien if notice was sent to the last address in INS records. The Act goes further to bar aliens from most forms of discretionary relief for a period of five years if the alien is ordered deported *in absentia*, overstays a departure date, or fails to appear at an asylum hearing despite proper notice.

The Act leaves open many issues that could be recast by the Attorney General in ways that further limit due process protection for aliens. The Attorney General is directed to promulgate regulations that would define "frivolous" attorney behavior warranting serious financial sanctions and possible suspension or disbarment. The Attorney General is also required to investigate and report to Congress about abuses associated with attorney failures to consolidate requests for discretionary relief at the first hearing on the merits. This delegation of power and examination could allow the Attorney General to take additional steps toward limiting due process protections.

VI. TITLE VI: EXCLUSION AND DEPORTATION

The grounds for exclusion and deportation have been shuffled and rewritten to better reflect current social and political interests. The health-related grounds for exclusion have

been revised to complement modern medical knowledge and social awareness. Aliens excludable for health reasons now include those who (a) "have a communicable disease of public health significance," (b) have a physical or mental disorder and exhibit behavior that could be or has been a threat to others, or (c) have a history of drug abuse or an addiction to drugs. This provision would allow the U.S. Department of Health and Human Services to reclassify HIV to allow persons infected with HIV to enter the United States.¹⁵

The Act goes to great lengths to cover "security" grounds comprehensively, revamping previous exclusions but maintaining a few dated ones. For instance, mere membership in or affiliation with "a Communist or any other totalitarian party" remains a ground for exclusion, in addition to a completely separate ground for violent overthrow of the government. The Act excludes aliens who have ever engaged in "terrorist" activities and who are likely to engage in such activities after entering the United States. "Terrorist activity" is defined to include violations of foreign law and acts that, if committed here, would have violated domestic law.¹⁶ The Act also excludes any alien whose entry or proposed activities in the United States would have "potentially serious adverse foreign policy consequences" according to the U.S. Secretary of State.

The Act makes several expansions to current exclusions, adding: smugglers, whether or not they smuggle for gain;¹⁷ draft-dodgers, whether or not they are immigrants; persons who become public charges within five years of entry; and persons who violate nonimmigrant status or conditions set by the Secretary of Health and Human Services.

15. HIV was expressly added by the U.S. Congress in 1987 to the list of contagious diseases that render an alien excludable from the United States. *See* 8 U.S.C. § 1182(a)(6) (1988); 42 C.F.R. § 34.2(b)(4) (1990). Restrictions on the movement of HIV-infected aliens across borders have been criticized by a number of health organizations. *See, e.g.*, WORLD HEALTH ORGANIZATION, LEGISLATIVE RESPONSES TO AIDS 274.77 (1989).

16. The U.S. Congress, in a related resolution, deems officials, officers, representatives, and spokespersons for the Palestine Liberation Organization to be involved in terrorist activities. H.R. CON. RES. 394, 101st Cong., 2d Sess., 136 CONG. REC. H12,321 (daily ed. Oct. 27, 1990).

17. This provision could apply to aliens assisting in the "sanctuary movement."

CONCLUSION

The Immigration Act of 1990 represents both welcome and unwelcome changes to U.S. immigration law. Modifications in family immigration and employment-based immigration will serve U.S. interests in reuniting families and encouraging U.S. economic growth. Alterations in the due process protections for aliens and changes in the grounds and procedures for exclusion and deportation raise concerns that will need to be addressed in the regulations and litigation to come. With the passage of this landmark legislation, comprehensive legal immigration reform has just begun.

