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COMMENT

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THE ALIEN COMMUTER'S STATUS is a device of convenience, designed to cope with an anomalous situation under the immigration laws. Since 1924 those laws have classified entrant aliens as nonimmigrants (who enter for temporary stay) and immigrants (who enter for permanent residence).[1] Soon after the enactment of the 1924 Immigration Act[2] it was discovered that those classifications did not adequately deal with the situation of aliens in adjacent countries who commuted daily across the border to jobs in the United States, usually returning to their "foreign" homes each night.

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In 1927 the Supreme Court ruled that a nonimmigrant could not accept employment in the United States.[3] The impact of this ruling threatened the jobs of thousands of commuting aliens, with anticipated dislocation in the economy of many border communities and in our friendly, reciprocal intercourse with adjacent countries. To avert this potential embarrassment and disruption, the special commuter status was established by administrative regulation.[4] Aliens residing in adjacent countries who had stable jobs in this country

* The views expressed in this article are the author's and do not necessarily represent the views of the Department of Justice.

[1] Immigration and Nationality Act, § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1964).

[2] Act of May 26, 1924, ch. 190, 43 Stat. 153.

[3] Karnuth v. Albro, 279 U.S. 231 (1929).

[4] The history and development of the commuter practice, including a description of the regulation inaugurating it, is discussed in Matter of L., 4 I. & N. Dec. 454 (1951); Matter of M.D.S., 8 I. & N. Dec. 209 (1958); HOUSE JUDICIARY COMM., SUBCOMM. NO. 1, 88TH CONG., 1ST SESS., STUDY OF POPULATION AND IMMIGRATION PROBLEMS, Special Series No. 11 (G.P.O. 1963). The commuter concept is not now recited in the administrative regulations. *See* note 8 *infra.*

were admitted as immigrants, ostensibly for permanent residence. They were thus able to continue their employment in this country and to return to their foreign homes each night by exhibiting a border crossing card attesting their immigrant status.[5] In recent years the identifying document has been the Alien Registration Receipt Card (Form I-151), popularly referred to as the "green card," which recognizes the bearer's lawful admission to the United States and is acceptable as a reentry document for lawful residents returning from a temporary absence abroad not exceeding 1 year.[6] Consequently the alien commuters are often known as "green carders," but this designation is misleading, since Form I-151 is issued to all aliens who have been lawfully admitted to the United States for permanent residence[7] — the majority of whom actually reside in the United States.

Although the commuter status has never specifically been authorized by statute, it has been sanctioned by administrative interpretation and practice in the ensuing 41 years.[8] Moreover, this status was noted with apparent approval in the comprehensive report of the Senate Judiciary Committee which preceded enactment of the basic 1952 recodification of the immigration laws.[9] The 1952 Act defines lawful admission for permanent residence as "the status of having been lawfully accorded the *privilege* of residing permanently in the United States as an immigrant."[10] Under the administrative reading of this language, an alien commuter is recog-

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[5] Since the commuter status depends on continued employment in the United States, it has been decreed that interruption of such employment for a period of 6 months will terminate the status, unless the interruption was caused by uncontrollable circumstances, such as serious illness, pregnancy, or disabling injury. Matter of M.D.S., 8 I. & N. Dec. 209 (1958). *Cf.* Matter of L., 8 I. & N. Dec. 643 (1960) (never obtained job in United States before pregnancy); Matter of Gerhard, 12 I. & N. Dec. ____ (Int. Dec. No. 1823, 1967) (gave up job, but was reemployed within 6 months).

[6] *See* 8 C.F.R. § 211.1(b) (1968). An amusing sidelight is that in recent years the Form I-151 has been blue and not green. Yet the popular usage is hard to change, and the holders are generally still called "green carders."

[7] 8 C.F.R. § 264.1(b) (1968).

[8] Indeed, the commuter concept has not been explicitly recited in the administrative regulations for many years, but has been supported by administrative practice and adjudications. *See* Matter of L., 4 I. & N. Dec. 454 (1951); Matter of M.D.S., 8 I. & N. Dec. 209 (1958).

[9] S. REP. NO. 1515, 81st Cong., 2d Sess. 535 (1950) (A resident alien's border crossing card may be issued to "an alien who has been admitted for lawful permanent residence but who resides in foreign contiguous territory and is employed in the United States, the so-called commuter."). *See also* S. REP. NO. 1137, 82d Cong., 2d Sess. 4 (1952); H.R. REP. NO. 1365, 82d Cong., 2d Sess. 32 (1952).

[10] Immigration and Nationality Act, § 101(a)(2), 8 U.S.C. § 1101(a)(20) (1964) (emphasis added).

nized as having that privilege even if he has not actually established residence in the United States. The administrative authorities have found that Congress recognized and approved the commuter practice, at least implicitly, in the 1952 Act.[11] They have found nothing in the far-reaching revision of the statute in 1965[12] to indicate that Congress was dissatisfied with the administrative practice or wished to change it.

Throughout most of its 40-year history the alien commuter program has encountered little dissent. However, opposition has developed in recent years, particularly from labor organizations operating in the regions adjacent to the Mexican border. Opponents of the program contend that alien commuters from Mexico, living in a country with lower living standards than the United States, unfairly depreciate wages and working conditions in this country. Moreover, it has been contended that such commuters impede the unionization efforts of American workers.[13] It should be noted that in recent years there have been no criticisms of the operation of the commuter program along the Canadian border, since the standards of living on both sides of the Canadian border are reasonably comparable and the affected industries on the American side are generally unionized.

In its inception the commuter program dealt with the so-called "daily" commuter, who usually returned to his home across the border each night. In the past few years there has been a large influx of "seasonal" workers who come to this country for agricultural work, follow the crops during the growing and harvesting seasons, and then return to their homes in Mexico after a stay of several months in the United States. The major rise in number and importance of the seasonal commuters occurred after the termination in 1964 of the "bracero" program, under which many thousands of Mexican nationals were imported each year for temporary employment in the United States.[14] In January 1966 there were 53,329

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[11] Matter of H.O., 5 I. & N. Dec. 716 (1954); Matter of M.D.S., 8 I. & N. Dec. 209 (1958).

[12] Act of Oct. 3, 1965, 79 Stat. 911.

[13] SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, COMMUTERS, S. REP. NO. 1006, 90th Cong., 2d Sess. 99-109, 111-30 (1968).

[14] *See* 1 GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 6.9 (rev. ed. 1966), which points out that the bracero program operated for a number of years pursuant to specific statutory and treaty arrangements for the importation of temporary agricultural workers from Mexico. The bracero differed from the commuter in that he was admitted temporarily, while the commuter has attained a lawful admission for permanent residence.

daily commuters, of whom 42,641 entered from Mexico, and the balance from Canada.[15] The number of seasonal commuters has never been definitely ascertained, and it is currently being tabulated by the Immigration and Naturalization Service.

In an effort to deal with some of the alleged abuses in the alien commuter program, the Department of Justice in 1967 promulgated a regulation prohibiting the entry of alien commuters coming to accept employment at a plant where the Secretary of Labor has certified that a labor dispute exists.[16] Labor spokesmen have urged that further measures be taken, including the imposition of a requirement that alien commuters be subject to the present statutory mandates[17] which preclude the entry of most immigrants unless they obtain a certification from the Secretary of Labor that their prospective employment will not adversely affect American labor interests.[18] However, under explicit terms the "labor certification" requirements of the statute are inapplicable to returning lawful residents,[19] and it has been the administrative view that since alien commuters are regarded as returning lawful residents the labor certification requirements cannot be applied to them unless the statute is changed.[20] A bill which would require alien commuters to obtain labor certifications every 6 months has been introduced by Senator Edward F. Kennedy and Representative Michael A. Feighan, but has not yet been enacted.[21]

There have been a number of court challenges to various aspects of the commuter program, none of which arrived at a definitive resolution. The first of these was *Amalgamated Meat Cutters v. Rogers*,[22] which considered the effect of a labor certification issued during a strike at the Peyton Packing Co. of El Paso, Texas. The court declined to regard alien commuters as returning lawful permanent residents and found them barred from reentry under the terms of the Secretary of Labor's certification. The government

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[15] Survey by Immigration and Naturalization Service, reproduced in SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, COMMUTERS, *supra* note 13, at 114-15.

[16] 8 C.F.R. § 211.1(b)(1), *as amended*, 32 Fed. Reg. 8378 (1967).

[17] Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1964).

[18] *See* Gooch v. Clark, Civ. No. 49500 (N.D. Cal. 1968).

[19] *Id.*

[20] *See id.* and Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114 (D.D.C. 1960).

[21] S. 1694 and H.R. 9505, 91st Cong., 1st Sess. (1969).

[22] 186 F. Supp. 114 (D.D.C. 1960).

was prepared to challenge this ruling on appeal, but the strike was settled and the case became moot.

A broader challenge to the legality of the entire commuter program, brought by a union and a number of individuals, was unsuccessful in *Texas State AFL-CIO v. Kennedy*.[23] However, the court's ruling was premised on the narrow ground that plaintiffs lacked legal standing to sue and did not adjudicate the merits. While limiting its holding to this technical ground, a lack of sympathy with the litigation seems manifest in the following excerpt from the court's opinion:

> The present case involves the rights of many thousands of human beings to continued employment in this country. Those persons are entitled to have their status and their rights adjudicated on the particular facts of their own cases, the circumstances of their entry, the representations made to them, and the nature of their own conduct, and any other factors which might reasonably be urged on their behalf. . . . Certainly it would be most unjust to allow a labor organization and its members to attack the status of many thousands of aliens — not even naming them as individual defendants — with the aim of dislodging them from their jobs, so that those jobs might then perhaps be obtained for union members.[24]

In 1968 another lawsuit, arising out of a strike by agricultural workers in California, was brought to challenge the validity of the regulation precluding the entry of "green card" commuters for employment at an establishment where a labor dispute had been certified.[25] In effect, this lawsuit entailed an attempt to assert that the alien commuter had an unassailable right to entry, which could not be restricted by the Attorney General's regulation. Again the merits were not resolved, and the suit was dismissed on the ground that plaintiffs (a grower and some individuals against whom deportation proceedings were pending) lacked legal standing to bring the litigation.[26] Finally, another lawsuit, brought by two individual plaintiffs on behalf of all similarly affected, once more challenges the legality of the entire commuter program.[27] The government is again contending that the plaintiffs lack legal standing to sue and the court has not yet announced its decision. Of course, a dismissal on this ground would leave the merits still unresolved.

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[23] 330 F.2d 217 (D.C. Cir.), *cert. denied*, 379 U.S. 826 (1964).

[24] 330 F.2d at 219. The court also found that the *Amalgamated Meat Cutters* case, *supra* note 20, "is not persuasive authority for the maintenance of suits of the present sort."

[25] Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (C.D. Cal. 1968).

[26] *Id.* at 530. The corporate plaintiff has appealed from the dismissal of its suit.

[27] Gooch v. Clark, Civ. No. 49500 (N.D. Cal. 1968).

At the present juncture, the legality of the commuter program has not been definitively passed upon by any court.

The status of the alien commuter has been described as an "amiable fiction."[28] It has been a useful administrative device, continuing for more than 40 years with apparent congressional approval, to cope with a practical situation which does not fit precisely into conventional molds. Changing needs and problems have generated discussion of the desirability of continuing this program in its present form.[29] Any consideration of possible changes would necessarily have to take into account the interests of the many thousands of aliens who have been employed in reliance on this program, often for many years;[30] the need to safeguard American labor; the effect on our friendly relations with neighboring countries;[31] and the effect on the industry and commerce of the border communities in the United States. The assessment and resolution of these competing interests is a matter of national policy, to be decided by Congress. It is unlikely that there will be any significant changes in the administrative approach to the commuter problem. As I have noted, proposals to end or modify the program have been rejected by the administrators on the ground that they have been enforcing the will of Congress. Consequently, it may be anticipated that unless changes are enacted by Congress or required by the courts, the alien commuter program will continue to operate as it has for the past 40 years. Thus, if changes are to be made, they apparently will have to be accomplished by new legislation. Since we are dealing essentially with legislative purpose, it seems desirable that this purpose be clearly articulated. . . .

There are several possible alternatives Congress might pursue. The first is to enact no new legislation, which would leave the

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[28] 1 GORDON & ROSENFIELD, *supra* note 14, § 2.8b; Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114, 119 (D.D.C. 1960). However, this fiction has not been deemed to qualify a commuter for naturalization benefits, which depend on actual residence in the United States for prescribed periods, following lawful admission for permanent residence. *In re* Barron, 26 F.2d 106 (E.D. Mich. 1928); Petition of Wright, 42 F. Supp. 306 (E.D. Mich. 1941). *See also* Immigration and Nationality Act, §§ 101(a)(33), 316(a), 8 U.S.C. §§ 1101(a), 1427(a) (1964).

[29] *See, e.g.*, SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, COMMUTERS, *supra* note 13, at 99-109, 111-30; Rummel, *Current Developments in Farm Labor Law*, 19 HASTINGS L.J. 371 (1968).

[30] *See* note 24 *supra* & accompanying text.

[31] In affidavits submitted to the court in Texas State AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir.), *cert. denied*, 379 U.S. 826 (1964), and in Gooch v. Clark Civ. No. 49500 (N.D. Cal. 1968), the Secretary of State asserted that termination of the alien commuter program would have an adverse effect on the foreign relations of the United States.

commuter program untouched. The second is to terminate the program forthwith — a prospect not favored by many, in the light of its patently disruptive effect on border communities and on the affected individuals. The third alternative is to require the commuters to obtain periodic labor certifications, a solution proposed in Senator Kennedy's bill[32] and favored by labor organizations and by the Department of Labor. Finally, there is a proposal by two members of the Select Commission on Western Hemisphere Immigration[33] that the present commuter program be phased out within a specified period of years, that thereafter lawful admission for permanent residence include a commitment to establish a residence in the United States, and that special work permits be issued to nonresidents under appropriate safeguards protecting American labor to satisfy the needs of the border communities. This final proposal has a number of desirable features. First, it deals fairly and humanely with the many thousands of commuters who have relied on the present practice and gives them a reasonable period of time to make other employment arrangements or to establish residence in the United States, if they are so disposed. Second, it takes into account the needs of the border communities and avoids disruption of their economies and of friendly relations with neighboring countries. Finally, it makes adequate provision for safeguarding American labor interests. This proposal may well suggest a sound and enlightened solution for the commuter problem.

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[32] *See* S. 2790, 90th Cong., 2d Sess. (1968), now co-sponsored in the 91st Congress by Representative Feighan and others. *See* note 21 *supra.*

[33] The report of this Commission (*see* note 13 *supra*) made no specific recommendations. After publication of the report, a letter dated July 22, 1968, and signed by Richard M. Scammon, Chairman, and Stanley H. Ruttenberg, a Commission member, was addressed to President Johnson, and presented the recommendations discussed in the text.

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