San Diego Law Review

Volume 19
Issue 1 *Immigration and Nationality VII*

Article 5

12-1-1981

In Defense of the Permanent Resident: Alleged Defects Relating to Alien Labor Certifications

Richard D. Steel

In Defense of the Permanent Resident: Alleged Defects Relating to Alien Labor Certifications

RICHARD D. STEEL*

This article addresses the defense of permanent resident aliens whose status is being challenged due to alleged defects or ineligibility surrounding the original labor certification process. These issues include such matters as not reporting to the sponsoring employer, terminating employment with the sponsoring employer shortly after immigrating, not having the claimed experience, not having the required experience, not being paid the required wage, or not having a validly issued alien labor certification. The analysis of these issues and the possible defenses available vary depending on the procedural context in which the issue was raised. The article discusses these various factual patterns and possible defenses available. The state of the law in the area is far from precise and has not been crystallized by the Board of Immigration Appeals. It would appear, however, that a good faith intention at the time of immigration is crucial. Tactically, these proceedings should be approached as any other litigation, requiring a thorough knowledge of the facts and the law and the application of the law to those facts. Equally important is the practice of preventive law to prevent the issues which are the subject of this article from arising.

A vast majority of cases confronting the immigration lawyer involve the desire of aliens in the United States with or without any visa, or aliens not in the United States, to obtain permanent resi-

* Member of the Pennsylvania Bar. B.A., Dickenson University 1963; LL.B. University of Pennsylvania 1966. Mr. Steel spent four years with the Judge Advocate General Corps of the United States Army and he is currently a partner with the firm of Wasserman, Orlow, Ginsberg & Rubin.

dent (immigrant) status in this country. In many of these cases relatives, employers or prospective employers of such aliens will attempt to attain immigrant status for them.[1] Of course other kinds of cases confront immigration attorneys ranging from questions involving naturalization,[2] citizenship,[3] deportation,[4] exclusion,[5] bail,[6] fine and any other matter that might arise under the Immigration and Nationality Act (INA).[7]

Occasionally, cases present themselves involving aliens of permanent resident status who are alleged to be deportable. Some of these cases involve allegations of deportability that arose after permanent resident status was granted, such as convictions for certain criminal offenses involving moral turpitude,[8] convictions of crimes involving drugs and marijuana,[9] becoming a public charge and other matters as listed in Title 8 of the United States Code at section 1251.

There is also a class of cases dealing with aliens who have obtained permanent resident status premised on the approval of an alien labor certification.[10] It is alleged in these cases that there was a defect involved in the labor certification or related proceedings either before or at the time of entry into the United States. These allegations are made most often in the context of deportation proceedings, when an alien who has resettled in the United States as a permanent resident faces, sometimes after many years of residence in the United States, the possibility of deportation premised on some alleged defect in the labor certification process. Also, such defects are sometimes alleged in rescission[11] and exclusion[12] proceedings.

---

1. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1557 (1976) (hereinafter referred to as the INA). The INA provides for immigrant and nonimmigrant visas. 8 U.S.C. § 1101(a)(15) (1976). Every alien is presumed to be an immigrant until established otherwise. 8 U.S.C. § 1184(b) (1976).
2. 8 U.S.C. § 1421 *et seq.* (1976).
3. 8 U.S.C. § 1401 *et seq.* (1976).
4. 8 U.S.C. §§ 1251-54 (1976).
5. 8 U.S.C. §§ 1225-27 (1976).
6. 8 U.S.C. § 1252(a) (1976).
7. 8 U.S.C. §§ 1101-1557 (1976).
8. 8 U.S.C. § 1251(a)(4) (1976).
9. 8 U.S.C. § 1251(a)(11) (1976).
10. 8 U.S.C. § 1251(a)(14) (1976); 20 C.F.R. § 656 (1980). A labor certification is a determination by the Department of Labor that there are not sufficient American workers qualified, willing, able and available at the place of employment and that the employment of the alien will not have an adverse effect on American workers similarly employed. *See generally* Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).
11. 8 U.S.C. § 1256 (1976).
12. 8 U.S.C. § 1226 (1976).

The purpose of this article is to explore the background, law and tactics involved in representing aliens charged with being in the United States illegally due to defects in the labor certification process. The article will first describe the statutory and regulatory background underlying the labor certification system. Next, the article will discuss the nature of the proceedings in which cases alleging labor certification defects arise. This will be followed by a discussion of the variety of cases that arise in this context and the case law that has developed. Finally, the article will discuss the legal defenses and tactics involved in defending this class of cases. It is hoped that as a result of this article practitioners will be more attuned to the problems that arise in the labor certification process and related areas, not only as a means to develop proper tactics in defending such cases, but also to generate greater awareness of the problems in this area to insure that preventive law will be practiced in an effort to prevent clients from ever having to face the dire consequences of deportation.

BACKGROUND

Quantitative and Qualitative Restrictions Imposed by the Immigration and Nationality Act

The INA contains an obtuse and rather complicated system regulating the flow of aliens into the United States.[13] This web is probably most inscrutable in the context of what persons and how many persons are able to obtain permanent resident visas.

In one view, the INA qualitatively imposes a positive and a negative system. To explain, a person must affirmatively show that he is eligible for an immigrant visa, and also is free from any ba-

13. As Judge Kaufman stated:

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress' ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the Immigration and Naturalization Service and courts to disentangle. The fate of the alien faced with imminent deportation often hinges upon narrow issues of statutory interpretation.

Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

sis of ineligibility, referred to as a ground of exclusion.[14] Generally, the bases of eligibility are: being a special immigrant,[15] an immediate relative,[16] a refugee or asylee,[17] or a preference or nonpreference alien under the preference system.[18]

Exclusive of special immigrants, immediate relatives and refugees and asylees, there is a limit of 270,000 immigrant visas that can be issued per year.[19] Out of this total number, there is a maximum of 20,000 from each country[20] and a maximum of 600 from each dependent territory as well as certain limits within the preference system as set forth in section 203 of the INA.[21] The INA also sets forth provisions to determine what country or dependent territory quota a person is subject to.[22]

In addition to a person having to meet the eligibility requirements as set forth above, and possessing either a nonquota or within the quota visa, a person must also satisfy section 212(a) of the INA, which currently establishes thirty-three grounds for exclusion of aliens.[23] Thus, a person could be eligible for an immigrant visa as the spouse of a United States citizen (nonquota visa—immediate relative) but be forever barred from receiving an immigrant visa if that person had been convicted of a crime involving the possession or use of drugs or marijuana.[24] There is one ground for exclusion which in the practice of immigration law is normally thought of more in the affirmative sense rather than in the negative sense. That ground is section 212(a)(14) of the INA, the "labor certification" provision, which reads as follows:

> 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

14. 8 U.S.C. § 1182(a) (1976).
15. 8 U.S.C. § 1101(a)(27) (1976).
16. 8 U.S.C. § 1151(b) (1976).
17. 8 U.S.C. §§ 1157-59 (1976).
18. 8 U.S.C. § 1153 (1976).
19. *E.g.*, 8 U.S.C. §§ 1254(a), 1259 (1976).
20. 8 U.S.C. § 1151(a) (1976).
21. 8 U.S.C. § 1152(a) (1976).
22. 8 U.S.C. § 1153(a) (1976); *see also* 8 U.S.C. § 1152(e) (1976).
23. 8 U.S.C. § 1152(b) (1976).
24. 8 U.S.C. § 1182(a) (1976).

to nonpreference immigrant aliens described in section 203(a)(7).[25]

The statement that this is considered more in the affirmative sense is in the context of an immigration practitioner interviewing a prospective client who is interested in obtaining permanent resident status. The attorney must normally determine whether that alien is eligible for a permanent visa based either on the familial relationships of that person with United States citizens or permanent residents or based on that person's occupation. The consideration of whether that person is eligible for permanent residence based on his profession, occupation or job normally will involve an analysis as to whether an alien labor certification is available, unless that person is exempt from the labor certification requirement as a person who is not going to be joining the labor market,[26] or is "precertified" on Schedule A of the Department of Labor regulations.[27]

Thus, because of the broad and stringent requirements of the INA as well as the nature of immigration practice generally, the labor certification provision is an integral, and in many cases crucial, part of the analysis of a prospective client's case and the successful execution of such a case.

Processing for an Immigrant VISA

It is important to understand the procedures required to obtain an immigrant visa, because if a defect is later found or alleged in the labor certification process, what the procedural context is and what the available remedies are may be determined by the original procedure used to obtain the immigrant status.

If an alien is seeking immigrant status based on a job or job offer, the labor certification process (described at p.124 *et seq. infra*.) must be satisfied. Unless nonpreference visas are available,[28] a third and/or sixth preference petition must be approved.[29] The burden is on the petitioner to prove eligibility, including the existence of a labor certification, the availability of the

25. 8 U.S.C. § 1182(a)(23) (1976).

26. *See* 22 C.F.R. § 42.91(a)(14)(i) (1980); 8 C.F.R. § 212.8(b) (1981). It must be noted, however, that these regulations provide for visas only in the nonpreference category of § 203(a)(8). There have been no nonpreference numbers available on a world-wide basis since June 1977, and absent a change in the law it is unlikely that there will be nonpreference visas available in the future.

27. 20 C.F.R. § 656.10 (1981).

28. *See* note 26 *supra*.

29. 8 U.S.C. § 1153(a)(3) and (6) (1976); 8 C.F.R. § 204 (1976).

job described in the labor certification, the intent and ability of the employer to pay the prevailing and offered wage, and the possession by the prospective immigrant of the qualifications required by the labor certification.[30]

Some aliens are eligible to adjust status in the United States under section 245 of the INA.[31] In order to be eligible the alien must be inspected and admitted or paroled into the United States. Further, he must not enter as a crewman of a ship or in transit without visa, and he must not have engaged in unauthorized employment on or after January 1, 1977 prior to submitting an application for adjustment of status, unless adjusting as an immediate relative. This latter exemption from section 245(c) would, of course, be irrelevant in a labor certification case.

If an alien is not in the United States, or is in the United States but ineligible to adjust status or does not wish to apply to adjust status, then application for permanent residency must be made at a United States Consulate abroad.[32] Unlike adjustment of status, Consular processing is not "discretionary", at least in theory if not in practice.[33] Even if an alien is found eligible for an immigrant visa and is issued an immigrant visa by the United States Consulate, he is still subject to inspection by an Immigrant Inspector of the Immigration and Naturalization Service (INS). This procedure exposes the Consular applicant to a two-tier system of consideration and both tiers must be satisfied, even after approval of labor certification and preference petition.

Whether applying to adjust status or applying at a United States Consulate, the basic law involving the qualitative (affirmative and negative) and quantitative restrictions are exactly the same.

Labor Department Regulations

The processing of Alien Labor Certifications is within the jurisdiction of the Employment and Training Administration of the United States Department of Labor. Prior to February 1977, the implementing regulations[34] governing the labor certification process were brief, providing little guidance in terms of both procedure and substance. These regulations were the subject of severe criticism[35] and as a result they were superseded by regulations[36]

30. Matter of Wing's Teahouse, 16 I. & N. Dec. 158 (1977).
31. 8 U.S.C. § 1255 (1976).
32. *See generally* 22 C.F.R. § 42 (1980) and the Foreign Affairs Manual.
33. *But see Consular Discretion in the Immigrant Visa—Issuing Process*, 16 SAN DIEGO L. REV. 87 (1979).
34. 29 C.F.R. § 60 (1976).
35. *See generally* Rubin & Mancini, note 10 *supra*.

which were promulgated on February 18, 1977. These new regulations, which were amended in January 1981, currently provide a more detailed system for the processing, consideration and review of labor certification determinations. Many persons involved in this processing, including employers and petitioners, find the regulations unwieldy, unyielding and often not attuned to the realities of the business world. The amended regulations, however, have not been the subject of a lot of litigation, unlike the predecessor regulations.

Basically, the labor certification process involves an employer submitting a job offer on behalf of an alien who submits his statement of qualifications. The employer must show that certain recruitment efforts have been made and that, in the context of bona fide job requirements, qualified American workers are not available and that employment of the alien will not adversely affect American workers similarly employed.

Included in the labor certification regulations is a presumption of validity of the labor certification once it has been approved. The pre-1977 regulations, with some exceptions, provided that labor certifications remained valid indefinitely as long as no material misrepresentations had been made by the employer or by the applying alien in the application process.[37]

The current regulations provide that a labor certification is valid indefinitely with only one exception, that "labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification application."[38]

Nature of Proceedings

The issues concerning the validity of labor certifications and immigration pursuant to labor certifications can arise in a variety of immigration proceedings. This is significant because the burdens of proof and the available remedies vary depending on the procedural context.

Most of the reported cases involve aliens in deportation pro-

36. 20 C.F.R. § 656 (1981).
37. 29 C.F.R. § 60.5 (repealed 1977).
38. 20 C.F.R. § 656.30 (1981).

ceedings.[39] The facts in these cases consistently involve aliens in the United States who have been admitted for permanent residence. In deportation proceedings, the burden is on the Government to prove deportability by clear, convincing and unequivocal evidence.[40] If the alien is found deportable, other relief exists such as readjustment of status,[41] suspension of deportation,[42] voluntary departure[43] and application for asylum[44] or withholding of deportation.[45] There is no statute of limitations in deportation proceedings. If deportation proceedings are brought, challenging an alien's original permanent resident status, the charge normally alleges that the person was deportable as one who, at the time of entry, was excludable under section 212 of the INA.[46] In these types of cases, the charges of excludability normally are alleged under section 212(a)(14),[47] section 212(a)(19)[48] and section 212(a)(20)[49] of the INA.

If the alien obtained permanent residence pursuant to adjustment of status under section 245 of the INA[50] then rescission proceedings would lie if brought within five years of the adjustment of status.[51] The burden in rescission proceedings to prove ineligibility for adjustment of status is on the Government and must be by clear, convincing and unequivocal evidence.[52] Proof of fraud is not required in rescission proceedings, only ineligibility for the adjustment of status.[53] If permanent resident status is rescinded, the alien is remanded to the status prior to adjustment of status and thereby usually is subject to deportation proceedings.

The more difficult cases involve aliens who are in exclusion proceedings pursuant to section 236 of the INA.[54] This occurs when, at the time of inspection upon seeking entry, a question arises as

39. Deportation or expulsion proceedings are held in accordance with §§ 241-44 of the INA, 8 U.S.C. §§ 1251-54 (1976), and the corresponding provisions of 8 C.F.R. §§ 237, 241-44 (1981).
40. Woodby v. INS, 385 U.S. 276 (1966).
41. 8 U.S.C. § 1255 (1976).
42. 8 U.S.C. § 1254(a) (1976).
43. 8 U.S.C. § 1254(e) (1976).
44. 8 U.S.C. § 1158 (1976); *See* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as 8 U.S.C. §§ 1157-1159 (1980)).
45. 8 U.S.C. § 1253(h) (1976).
46. 8 U.S.C. § 1251(a)(1) (1976).
47. The labor certification provision.
48. Charging fraud or willful misrepresentation.
49. Charging no valid immigrant visas.
50. *See* note 31 *supra*.
51. *See* note 11 *supra*. If rescission is not brought within five years deportation proceedings will still lie. Matter of Belenzo, I.D. 2793 (1981); Oloteo v. INS, 643 F.2d 679 (9th Cir. 1981).
52. Rodrigues v. INS, 389 F.2d 129, 133 (3d Cir. 1968).
53. Matter of Samedi, 14 I. & N. Dec. 625 (1974).
54. *See* notes 6, 12 *supra*.

to the individual's admissibility. In these circumstances, rather than admitting the person in the status requested, the inspection is further deferred and the person is paroled into the United States for further determination.[55] If ultimately it is determined by the District Director of the INS that the person should not be admitted, then the case is referred to a special inquiry officer (immigration judge) for an exclusion hearing.[56] In this proceeding, the burden is on the alien to prove eligibility for admission,[57] unless the alien is a returning resident.[58] In exclusion proceedings, the only possible results are a finding of excludability, which results in exclusion and deportation,[59] a withdrawal of the application for admission,[60] asylum,[61] or a determination admitting the individual.

Questions concerning the validity of the labor certification and the individual's eligibility for permanent residence pursuant to the labor certification can also arise in adjustment of status proceedings pursuant to section 245 of the INA.[62] In this action, the alien is remanded to the position of a person seeking entry, and therefore, the burden is on the alien to prove admissibility and warranting of a favorable exercise of discretion.[63] These issues may also arise in proceedings to revoke an approved third or sixth preference petition.[64] Here, the petition may be revoked only for "good and sufficient cause."[65]

FACTUAL PATTERNS: THE ALLEGATIONS AND THE LAW

Failure to Work For Employer

The basic concept of the labor certification process is that the person is being admitted into the United States to work at a job

55. *See* 8 C.F.R. §§ 235.2, 235.7 (1981).
56. *See* 8 C.F.R. § 235.6 and 8 C.F.R. § 236 (1981).
57. 8 U.S.C. § 1361 (1976).
58. Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975); Matter of Salazar, I.D. 2731 (1979).
59. 8 U.S.C. § 1227 (1976).
60. Matter of Lepofsky, 14 I. & N. Dec. 718 (1974); Matter of Vargas-Molina, 13 I. & N. Dec. 651 (1971); Matter of LeFosch, 13 I. & N. Dec. 251 (1969).
61. *See* Refugee Act of 1980 and 8 C.F.R. § 208 (1981).
62. *See* note 31 *supra*.
63. GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.7(e).
64. 8 U.S.C. § 1155 (1976); 8 C.F.R. § 205 (1981).
65. 8 U.S.C. § 1155 (1976); U.S. *ex rel* Stellas v. Esperdy, 250 F. Supp. 85 (S.D.N.Y. 1966).

for which there are no American workers available. The integrity of the system is therefore violated if the individual does not work in the certified job at all or for a short period of time. This is particularly harmful if the person engaged in employment which is unrelated in type or geographic area to the certified position. Accordingly, when it becomes known that a person may not, in fact, work in the certified job, or has entered as a permanent resident and has not worked in the certified job or worked for only a short period of time, investigation is normally conducted to determine the circumstances and effect of the unavailability of the job or the short period of employment.

In such cases, it was common for the INS to charge that the individual was deportable as excludable under section 212(a)(14) of the INA on the theory that it was not a valid labor certification if the person did not or will not work in the certified job. All of this changed in 1977 with the case of *Castaneda-Gonzales v. INS*.[66] In that case, the United States Court of Appeals for the District of Columbia held that if the Department of Labor has issued an Alien Labor Certification then a charge of deportable as excludable under section 212(a)(14) does not lie. The court stated that:

> The Attorney General has broad power to inquire into the admissibility and deportability of aliens. This includes the authority to decide whether they are within one of the 31 excludable classes of Section 212(a), but insofar as section 212(a)(14) is concerned the Attorney General's inquiry is limited to whether the Secretary of Labor has determined that the substantive requirements of that subsection are satisfied. Once an alien shows that the Secretary of Labor has made such a determination in his favor, the statutorily delegated enforcement power of the Attorney General is exhausted. There is nothing in subsection 212(a)(14) itself that permits the Attorney General to ignore the Secretary's determination because he finds it factually defective and to decide for himself that under the correct facts a labor certificate should not have been granted. Subsection 212(a)(14) delegates that substantive determination only to the Secretary of Labor and simply directs the Attorney General to ensure that the Secretary has certified the alien. An alien so certified is not excludable under section 212(a)(14).[67]

The court determined that if a labor certification exists the Attorney General must rely on another provision, such as one involving fraud[68], to obtain deportability. The Board of Immigration Appeals (BIA) has recognized that *Castaneda-Gonzales* disapproved of its own previous interpretations[69] and in an unreported decision stated that the INS had applied *Castaneda-Gonzales* nationwide.[70] A change in the labor regulations in 1977, however,

66. 564 F.2d 417 (D.C. Cir. 1977).
67. *Id.* at 424-25.
68. *Id.* at 425.
69. Matter of Patel, 16 I. & N. Dec. 444 (1978).
70. Matter of Kim, A34151009 (BIA April 25, 1978).

delegated authority to the INS and to United States Consulates to invalidate labor certifications.[71] Nevertheless, such invalidation must be based on fraud or willful misrepresentation which also would be a basis for a charge of deportable as excludable under section 212(a)(19) of the INA.[72]

Over the years, the BIA in particular, and the judiciary have decided a series of cases involving varying factual patterns all concerned with the consequences of the failure of an alien to work for the petitioning employer. These cases have variously charged aliens with being deportable as excludable under sections 212(a)(14), (19), and/or (20). Apparently, the BIA has never synthesized its approach to this issue. An analysis of the cases, however, leads one to the conclusion that the crucial factor is whether the alien acted in good faith regardless of which INA section the action is brought under. Although the BIA has never crystallized the good faith standard, other authorities have. A detailed discussion of the cases that articulate the question of good faith ignored by the BIA was made by one commentator.[73] The court in *Castaneda-Gonzales* also reached this conclusion stating:

> In those cases where the Board of Immigration Appeals has ordered the deportation of an alien who moved from the job for which he was certified, it has either found outright fraud or at least concluded that the alien never really intended to take up the certified employment or was always aware that he could not perform the duties of that job.[74]

Thus, findings of deportability, excludability or ineligibility for permanent residence have been upheld where the alien knew or should have known that he was not going to be able to work in the certified job.[75] A significant case in this regard is the opinion of the United States Court of Appeals for the First Circuit in *Spyropoulos v. INS*.[76] In this case an alien obtained an immigrant visa based on a job offer as a cabinet maker in Washington, D.C. The visa was issued despite the fact that, contrary to the

71. 20 C.F.R. § 656.30(d) (1981).

72. *See* notes 47-48 and accompanying text *supra*.

73. Mancini, *Excludability for Lack of Valid Labor Certifications as Species of Fraud*, 2 IMMIGRATION AND NATIONALITY L. REV. 387 (1978-79).

74. 564 F.2d at 433.

75. Matter of Tucker, 12 I. & N. Dec. 328 (1967); Matter of Stevens, 12 I. & N. Dec. 694 (1968); Matter of Poulin, 13 I. & N. Dec. 264 (1969); Matter of Santana, 13 I. & N. Dec. 362 (1969); Matter of Welcome, 13 I. & N. Dec. 352 (1969); Matter of Ortega, 13 I. & N. Dec. 847 (1971 & 1972); Matter of Tamayo, I. D. 2421 (1975); Matter of Dunguah, 16 I. & N. Dec. (1977).

76. 590 F.2d 1 (1st Cir. 1978).

prior request of the United States Consulate in Montreal, a current letter from the prospective employer was not presented at the time of the visa interview. The petitioning alien entered the United States and proceeded directly to Massachusetts. Two or three days after arriving, the alien's cousin wrote to the petitioning employer in Washington to advise that the petitioner was ready, willing and able to begin work. Nine days after entry the alien began working as a wood worker in Massachusetts, and despite a subsequent letter nothing was heard from the petitioning employer. In the month subsequent to entry the petitioner began working as a machinist in Massachusetts. The court upheld a finding of deportable as excludable under section 212(a)(14), finding *Castaneda-Gonzales* was not applicable and upholding the finding that the alien did not intend to take the certified job, as evidenced in large part by his failure to even report to the employer. The court stated that:

> In all cases where failure to take a certified job has not supported a finding of deportability, however, the alien has at least reported for work. In the case at bar, the alien not only failed to take the certified job and immediately took up other employment but also ignored indications that there were problems with the job opening before entry and made what the Board could reasonably conclude were at best half-hearted attempts to find out about the job after entry. We think that this is substantial evidence to support a finding of lack of intent to take the certified job.[77]

The analysis of the court in *Spyropoulos* in finding *Castaneda-Gonzales* inapplicable is curious and, indeed, questionable. The court distinguished the case on the basis that the charge in *Castaneda-Gonzales* was that the alien was not qualified for the job. The court found that the distinction in the bases of the charges, in *Spyropoulos* that the alien did not report to the job, was sufficient to distinguish *Castaneda-Gonzales*. It is completely unclear, however, why the Attorney General or the INS or the BIA under the old regulations could "invalidate" a labor certification by finding an alien deportable for a lack of a labor certification under section 212(a)(14) if the alien did not report for work, but could not do so if the alien was not qualified for work. The court attempted to justify this distinction on the alleged basis that "[a]n immigrant's qualifications for a job may well be the exclusive concern of the Secretary of Labor." This is perverse; the mandate of the Labor Department does not include an examination of the alien's qualifications, but rather is to determine only whether there are American workers qualified, willing, able and available and whether the proposed employment of the alien will have an adverse effect on United States workers similarly employed.[78] The Labor Depart-

77. *Id.* at 4.
78. 20 C.F.R. § 656.21(a)(3)(iii) (1977).

ment has consistently followed its mandate. It would, therefore, seem that *Spyropoulos* is generally contrary to *Castaneda-Gonzales* and to that extent, a finding of deportability, excludability or ineligibility could be upheld based on a preconceived intent of the alien not to take the job or otherwise not acting in good faith based on a charge under section 212(a)(14) without the more stringent fraud or willful misrepresentation proof requirements under section 212(a)(19). Conversely, the cases generally have held, either implicitly or explicitly, that the absence of bad faith and specific presence of a good faith intention to take the certified job precludes a finding adverse to the alien.

In *Matter of Klein*,[79] the BIA upheld a decision of an immigration judge terminating deportation proceedings where the alien entered the United States to work as an automobile mechanic for Harbor Motors, Incorporated. Upon entering the United States he reported for work but was advised that there was none for him, and that the employer would call him if there was work in the future. In upholding the termination of the deportation proceedings, the BIA noted that, despite the fact that Mr. Klein took up uncertified employment, he remained ready, willing and able to work for Harbor Motors, he was, in fact, a qualified automobile mechanic, and there was no evidence or allegation of fraud. The import of *Klein* is evident in *Matter of Welcome*,[80] where the BIA in distinguishing *Klein*, stated that:

> The respondent's case is clearly distinguishable on the facts from *Matter of Klein*, A17092396, BIA, July 30, 1968, 12 I. & N. Dec. 819, in which she seeks support. Therein, there was no job available at the time of the respondent's entry, which is the situation as to the respondent. However, in *Matter of Klein* there is no showing that the unavailability of employment was known to the alien until he had entered the United States and reported to the prospective employer, whereas in this case the destined employment was unavailable prior to the respondent's departure for the United States and this fact was known to her at that time. We think this distinction is of extreme importance, and we hold that it is dispositive of the problem. In other words, it is our view that this respondent is deportable because she had actual knowledge of the lack of availability of the employment to which she was destined at the time of her entry.[81]

Other cases following the *Klein* rationale have been decided by the BIA.[82] As the court in *Castaneda-Gonzales* stated:

---

79. 12 I. & N. Dec. 819 (1968).
80. 13 I. & N. Dec. 352 (1969).
81. *Id.* at 357.
82. Matter of Marcoux, 12 I. & N. Dec. 827 (1968); Matter of Thompson, 13 I. & N. Dec. 1 (1968); Matter of Pfahler, 12 I. & N. Dec. 114 (1967); Matter of Cardoso, 13 I. &

> Nevertheless, an alien who enters the United States with the good faith intention to accept his certified employment is not deportable simply because it turns out that the particular job is no longer available, or his employer suggests he look elsewhere, or even if he leaves the certified job after only a short time because of dissatisfaction with working conditions or wages.[83]

A closely related and very troublesome situation is where the alien takes up the certified employment after receiving permanent residence, but leaves the employment after a relatively short period of time. In *Matter of Marcoux*[84] the alien left the certified employment after five days and obtained nonrelated employment. Deportation proceedings were terminated on the basis that Marcoux entered the United States with the good faith intention to take certified employment, but left this employment because the working conditions were unsatisfactory and the wages low. Despite the short period of time that Marcoux worked for the certified employer, termination was upheld by the BIA which stated:

> There was no requirement in the law that an alien who took a job for which he has a labor certification must remain on the job any particular length of time. There is no evidence that respondent took employment in the United States as part of a scheme to obtain other employment. The record reveals that he entered the United States to take the certified employment in good faith.[85]

The United States Court of Appeals for the Ninth Circuit confronted a similar issue in the case of *Tse v. INS*.[86] In that case, the alien was in the United States on a student visa and was about to enter dental school. He had a labor certification as a Chinese specialty cook. He applied for adjustment of status which was denied on the ground that he planned to become a dentist rather than to continue to work as a cook. The denial was ultimately upheld by the BIA, because of the alien's intention to change employment in the future. The court of appeals reversed the holding that the BIA's standard was too narrow and rigid. The court stated:

> It is appropriate to require that the alien intend to occupy the certified occupation for a period of time that is reasonable in light both of the interest served by the statute and the interest in freedom to change employment. But to hold, as the Board did in this case, that an alien is not eligible for admission as a preference immigrant when his intention at entry is to engage in the certified employment unless and until he can complete the educational and other requirements for advancement to the profession of dentistry, a period of four years, fails to recognize that both the interest underlying the grant of preference and the interest in freedom

---

N. Dec. 228 (1969); Matter of Morgan, 13 I. & N. Dec. 283 (1969); Matter of Ulanday, 13 I. & N. Dec. 729 (1971).

83. 564 F.2d at 433.

84. 12 I. & N. Dec. 827 (1968).

85. *Id.* at 828; see further discussion in Mancini, at note 73 *supra*, particularly at pp. 389 *et seq.*

86. 596 F.2d 831 (9th Cir. 1979).

> of opportunity for self-improvement would be substantially served by petitioner's admission.[87]

A significant but unreported[88] case of the BIA was the rescission case of *Matter of Lourenco*.[89] The alien had adjusted status based on a job offer as a live-in maid to work for Frank Tryska. Lourenco never took that job. Rather, at all times beginning in July 1970 through rescission proceedings, Lourenco worked for a company called Packaging Products and Design by whom Mr. Tryska was also employed. The company attempted to obtain a labor certification for Lourenco but was unsuccessful. Subsequent to those efforts the Tryska labor certification was obtained and adjustment of status based on the certification was granted. Lourenco testified that she did not begin work with Tryska immediately upon adjustment of status because she was making a trip to Portugal. Upon her return she obtained a further deferment of the commencement of the employment because her child had diarrhea. Subsequently, she did not take up employment with Tryska because she learned that Tryska was in danger of losing his job, which he subsequently did. Tryska's testimony supported her statement of the facts. The BIA noted that the intentions of the parties governed, and "the alien must have the bona fide intention at the time of entry to take up the employment. . . ." The BIA also stated that failure to take up the certified employment creates a suspicion that the requisite intention was lacking. The BIA reversed the immigration judge's determination that the respondent lacked the intention to pursue the certified employment. The BIA held that the Government had to prove its case by clear, convincing and unequivocal evidence, which included proving a state of mind, a difficult proposition. Significant in considering the *Lourenco* case is that this was not a decision by the BIA upholding a determination by an immigration judge, but rather a reversal of the factual determination with respect to intention under what might be considered questionable circumstances. Given the decision in *Lourenco* the INS has a heavy burden to prove a lack of good faith or requisite intention to take up em-

87. *Id.* at 834-35.

88. All decisions of the BIA, unless modified or overruled by the Attorney General, are binding on all Service officers and employees, but only some of the decisions are "published" as precedent decisions. 8 C.F.R. § 3.1(g) (1981). Therefore, the unpublished decisions are applicable in theory, but in fact only to the extent that persons affected know of them.

89. A20059534 (BIA Feb. 27, 1978).

ployment in a case where both the employer and the employee present a plausible explanation as to why the individual did not commence employment or did not continue in employment for more than a short period of time.[90]

Among the factors to be considered are: what was the employer's intention; what was the alien's intention; specifically at the time that permanent residence is granted, did the alien know or have reason to believe that the job did not exist; was the job offer bona fide; was there fraud; did the alien have the necessary qualifications; what kind of work had the alien been doing; what kind of work did the alien do after becoming a permanent resident other than in the certified job and specifically, did the alien do the same type of work, in the same geographic area and for the same or similar wages as set forth in the labor certification or if not, did the alien undertake employment that was or could have been the subject of an alien labor certification; and if the alien did not work for the employer, or terminated employment shortly after entry, were there bona fide reasons not known or knowable to the alien prior to the grant of permanent residence?

In addition to the substantial case law, an immigration practitioner regularly is asked by clients—how long must they stay in the certified job? Sometimes this is asked even before permanent residence is granted, and even more often after permanent residence is granted. As can be seen from the case law, there is no specific answer. The ultimate question seems to be one of a good faith intention, on the part of the employer and the employee, existing at the time that the individual becomes a permanent resident, that the alien will work at the certified job for an indefinite period of time. The question, of course, then becomes: as a factual matter does good faith exist? This normally is proven—or disproven—by all the facts and circumstances but primarily by what the parties say and by what their actions indicate. Thus, if a person obtains permanent residence based on an approved alien labor certification, reports to the job, but works for only a short period of time and then takes up other and prearranged employment, a good faith defense as a matter of fact may not exist. On the other hand, the cases are clear that if an alien becomes a permanent resident, fully expecting and intending to work in the cer-

90. A similar statutory good faith element has recently been enacted by Congress. 8 U.S.C. § 1182(k) (1981). This provision mandates that that an alien excludable under §§ 212(a)(14), (20) or (21), if in possession of an immigrant visa, may be admitted in the discretion of the Attorney General if the exclusion was "not known to and could not have been ascertained by the exercise of reasonable diligence . . ." before the time of departure of the vessel or aircraft from outside the United States.

tified job, only to find either prior to commencement that the job does not exist, or after commencement that valid reasons exist to terminate the employment, deportation or exclusion proceedings should not be brought. If deportation or exclusion proceedings are brought the alien would have a defense. Nevertheless, it becomes important for the practitioner to counsel prospective and present employers and individual clients as to the implications of obtaining permanent residence based on an alien labor certification, and specifically that such a process requires the intention of all parties that the job offer is bona fide and will be filled by the alien for an indefinite period of time upon a grant of permanent residence. The immigration process is long enough and complicated enough and, in some cases, expensive enough that when an alien obtains permanent residence, he wants to be sure that nothing will be done to jeopardize it. Therefore, all efforts should be undertaken to ensure that the alien works in the certified job for a sufficient period of time to prevent even an investigation, let alone proceedings. Sometimes, however, we cannot control what happens. A case may come to us in which the facts are already a *fait accompli*, in which case it becomes important to analyze the substantial body of law in this area in an effort to best plan a defense to whatever charge is brought.

Allegations Concerning an Alien's Previous Experience

At various stages of the proceedings previously discussed, questions concerning an alien's previous work experience can be raised. This is significant since the labor certification application specifies the minimum requirements for employment and the alien must prove that he possesses those requirements. It is in the course of the visa petition proceedings that the question of previous experience is most often raised, a topic not included within the ambit of this article. It is important at this point, however, to realize that the best way of avoiding any question with respect to an alien's previous experience during any stage of the visa petition proceedings is for an attorney not to take a case unless it is determined that the alien possesses the necessary qualifications and that the alien's possession of these qualifications can be adequately documented.[91] Not accepting a case will not pre-

91. 8 C.F.R. § 204.2(e) (1981) and instructions to form I-140 which are incorporated by reference into the regulations pursuant to 8 C.F.R. § 103.2(a) (1981).

vent a new client from entering the office stating that he is a permanent resident but is currently, or about to be, in proceedings because the Government claims that the experience relied upon by the alien in obtaining permanent residence never existed or was based on forged documentation, or was otherwise different from that represented. Again, we are faced with the issue of what charges are to be brought. It might seem that this issue is much less significant since fraud or willful misrepresentation would be the gravamen of the Government's charges, whether brought under section 212(a)(14), section 212(a)(19) or section 212(a)(20) of the INA. Because of certain defenses discussed below,[92] however, it remains significant to attempt to limit the charge to section 212(a)(19), or at worst to sections 212(a)(19) and 212(a)(20). This not only narrowly defines the scope of the charge and pinpoints the Government's burden to prove fraud or willful misrepresentation, but also preserves the section 241(f) defense where appropriate.[93] *Castaneda-Gonzales* would seem to govern the appropriate charge to be brought since the alleged basis of deportation in that case was the fact that the alien did not have the qualifications required and alleged to be possessed.[94]

The cases involving the question of whether the alien had the work experience required for labor certification tend to be much more cut and dry than the cases involving the numerous factual variations concerned with whether the alien intends to or did work for the petitioning employer or if the alien did not work, the reasons why he did not work. The fact that the alien did not have the experience claimed, however, does not necessarily mean that the Government will be able to prove its case, particularly in deportation proceedings or rescission proceedings, given the standard of proof.

Assuming a deportation or rescission proceeding, and given *Castaneda-Gonzales*, the burden would be on the INS to prove fraud or willful misrepresentation by clear, convincing and unequivocal evidence.[95] If the Government proves by the requisite

92. *See* text accompanying note 111 *et seq. infra*.

93. *Id.*

94. *See* text accompanying notes 66-78 *supra*.

95. This article assumes such a proceeding, rather than "invalidation" of a labor certification. Otherwise as discussed at notes 36-37 and accompanying text *supra*, the pre-1977 regulations did not provide for invalidation by the INS or the United States Department of State and its Consuls, but only by the Department of Labor. This has been changed under the current regulations and could affect the analysis of *Castaneda-Gonzales*. This author, however, is unaware of any case seeking to "invalidate" a labor certification. What forum would exist for this, other than deportation, rescission, or revocation proceedings, and what the burden of proof would be, would have to be developed. Also, if such invalidation can be brought under a charge of deportable as excludable under section 212(a)(14)

quantum of proof that the alien did not have the required experience, then absent evidence to the contrary, the Government would have proven its case.[96] It should be noted that the burden on the INS is to both charge and prove the allegations supporting the finding adverse to the alien based on the lack of qualifications. Sometimes the INS fails to do this.[97]

In addition, it may be possible to show that, even if the alien did not have the experience claimed, the alien may have had other work experience satisfying the demands of the labor certification. An important case in this context is *Matter of Belmares-Carrillo*.[98] In that case, the alien had submitted an untrue letter of work experience but in fact had other work experience which the BIA found to be sufficient to support the labor certification. The BIA held that in order for the alien to be excludable as having made a material misrepresentation, either the alien must be excludable on the true facts or the misrepresentation must tend to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded. The BIA concluded that since the alien had the requisite experience he was not excludable on the true facts. Also, a relevant line of inquiry likely to result in exclusion was not shut off by the misrepresentation since he possessed the req-

---

rather than section 212(a)(19), it might be that fraud or willful misrepresentation would not be required to be proven, so that, for instance, an innocent misrepresentation with respect to an individual's experience could support an invalidation of the labor certification. However, it is hard to imagine such a case, unless the misrepresentation was made by another party without the knowledge or complicity of the alien. In Matter of Patel, 16 I. & N. Dec. 444 (1978), a rescission case, the BIA remanded for further proceedings, apparently rescission proceedings, based on the authority of the INS in the amended labor regulations to invalidate a labor certification.

96. Matter of Hernandez-Uriarte, 13 I. & N. Dec. 199 (1969).

97. The author of this article has won a number of cases on this basis. For instance, in Matter of Garvin, A31035119 (BIA 1979), the BIA reversed a finding of deportability. The Order to Show Cause alleged lack of employment of the alien by the petitioning employer. The INS simply failed to meet its burden concerning this:

> Despite several continuances granted to enable the Service to come forward with evidence to prove its charges, the Service was unable to produce such evidence. The evidence of record does not clearly, convincingly and unequivocally prove the charges set forth in the Order to Show Cause. Accordingly, the appeal will be sustained, and the proceedings terminated.

See also Matter of Yu, note 109 and accompanying text *infra*. The same reasoning would, of course, apply to an issue of proof of lack of experience.

98. 13 I. & N. Dec. 195 (1969).

uisite experience. In short, if it is determined that an alien has the requisite experience, then the fact that untrue documentation of experience was presented is irrelevant. This is so either under the "would have been issued had the true facts been known" test or under the "tended to shut off a line of inquiry" test, since that test likewise requires a determination that the relevant inquiry would have resulted in a proper determination that the alien was excludable.[99]

In addition, even if the alien did not have the exact qualifications required for the labor certification it may be that the alien had enough experience to substantially comply with the required experience. In *Belmares-Carrillo* the court held that where the alien labor certification specified that four years experience was "generally necessary" this requirement was satisfied by three years and nine months of experience.[100]

Where there is a fraud or similar charge involving allegations that the alien did not have the experience claimed and the Government can easily prove its case, as discussed later in this article, it becomes important to put the Government to the test of meeting its burden. This allows the attorney to defend the case on the theories of *Belmares-Carrillo* and *Chan*, and if necessary, to consider the other remedies discussed below, which include section 241(f) if the charge is grounded in fraud.

Issues Concerning Wages

In processing to obtain an alien labor certification, the major problem normally is to show the lack of American workers who are qualified, willing, able and available. In addition, most of the post-labor certification cases involved in this article deal with matters involving the alien's experience or the failure to work for the employer.

An alien labor certification, however, also involves a determination that the employment of the alien will not have an adverse effect on American workers similarly employed. Under the Labor Department regulations, this normally involves a determination as to whether the job offer involves a wage which is not less than the prevailing wage.[101] This aspect of labor certifications can in-

99. Matter of Belmares-Carrillo, 13 I. & N. Dec. 195 (1969); Madrid-Peraza v. INS, 492 F.2d 1297 (9th Cir. 1974); Matter of S, 9 I. & N. Dec. 430, 447, 449 (1961); *See generally*, Mancini, *Fraud Under the Immigration and Nationality Act*, 56 NOTRE DAME LAW. 668, 674 (April 1981) and notes 56-58 and accompanying text *supra*.

100. 13 I. & N. Dec. 195 at 198.

101. 20 C.F.R. §§ 656.21(b)(3), 656.40 (1980). The propriety of equating adverse effect with prevailing wage has been questioned but never determined. Naporano Metal and Iron Co. v. Secretary of Labor, 529 F.2d 537, 540 n.9 (3d Cir. 1976).

volve various questions, such as: what is the prevailing wage; is it being offered; does the employer have the intention and the ability to pay the wage; and after the fact, has the wage in fact been paid? Once again, these are matters which should be considered by all persons involved in preparing the labor certification, prior to, and at the time the labor certification is submitted.

There have been occasional cases, however, in which the validity of the alien's permanent residence has been questioned on the wage issue. In one case, it was held that the labor certification was invalid because it was based on false information as to wages.[102] The wage in fact paid was twice that offered in the labor certification. The BIA held that this rendered the labor certification invalid since there were or might have been qualified workers available at the actual wage.

In another case, the alien immigrated based on a labor certification to work at an opera club. The alien did not receive the required salary because the club was not in a position to pay it. The alien contributed money to the club which then paid him a salary, although the salary was less than that required by the labor certification. The BIA held that this was improper as "respondent's purported 'salary' from the club was nothing more than a ruse . . . . The respondent's labor certification was issued on the basis of material misrepresentation."[103]

In the case of *La Madrid-Peraza v. INS*,[104] however, the alien had been found deportable for having made a material misrepresentation concerning the wages which she was to receive pursuant to her labor certification. The court stated that a fact is not material unless the true facts would have resulted in loss of eligibility; consequently the alien was not deportable since the Government did not prove that the wages were below the prevailing wage rate to the extent it would have led to a denial of the labor certification.

Apparently there are no other cases within the context of this article involving an issue arising out of the question of wages or other matters involving adverse effect. Again, it is important in these cases to put the Government to the test of meeting its burden to prove the alleged ineligibility.

102. Matter of Gonzalez-Becerra, 13 I. & N. Dec. 387 (1969).
103. Matter of Lin, 15 I. & N. Dec. 421 (1975).
104. 492 F.2d 1297 (9th Cir. 1974).

Charge of No Alien Labor Certification

Literally, a charge that the alien is deportable as excludable under section 212(a)(14) of the INA would raise the question as to whether, in fact, an alien labor certification exists. As discussed previously,[105] prior to *Castaneda-Gonzales* many other issues have been raised under this section. This may continue to be the case, at least to a certain extent, given the *Spyropoulos* case[106] and the changes in the Labor Department regulations that give the INS and the United States Consulates authority to invalidate labor certifications.[107]

There are cases where the charge literally is that the alien is not in possession of a labor certification issued by the Department of Labor. The threshhold issue in these cases would be whether the labor certification provision is applicable to the individual. If the individual entered on the basis of a labor certification as the means of satisfying section 212(a)(14) then normally that section would be applicable. Conversely, it is hard to imagine a Consulate issuing an immigrant visa or the INS adjusting status in a case based on a labor certification unless such a labor certification is presented. Consequently, there is not likely to be a case where the gravamen of the Government's case literally is that there was no alien labor certification presented. One such case, however, would be where a labor certification was presented but it is alleged that the labor certification was a counterfeit, that is, not issued by the Department of Labor.

In *Matter of Yu*[108] it was alleged that the labor certification was a counterfeit. The Government did present an affidavit from the certifying officer which tended to show, but did not show unequivocally, that the labor certification had not been issued by the Department of Labor. Deportability was found and an appeal was taken to the BIA. The BIA reversed, finding that the INS had not proven the lack of an alien labor certification by clear, convincing and unequivocal evidence. The BIA stated:

> We note that the Service could have offered proof of a highly material nature, specifically, evidence reflecting whether official Department of Labor records show that a labor certification had, in fact, been issued to the respondent. The Service failed to do so. We agree with counsel that the evidence of record does not meet the clear, convincing, unequivocal standard of proof set forth in *Woodby v. INS*, *supra*. Accordingly, the appeal will be sustained.[109]

105. *See* note 99 and accompanying text *supra*.
106. *See* note 65 and accompanying text *supra*.
107. *See* note 75 and accompanying text *supra*.
108. *See* notes 36-37 and accompanying text *supra*.
109. Matter of Yu, A34225223 (BIA 1978).

This is another example of a "stonewall" approach to defending, in particular, deportation or rescission proceedings. There would seem to be no excuse for the failure to present adequate proof of the absence of a validly issued alien labor certification. Nevertheless, the experience of the author of this article, as counsel in such cases as *Yu*, *Garvin*[110] and other cases is that the INS simply is unable to prove the basic allegations. This, of course, raises obvious implications in developing a defense strategy which is discussed more fully below.

NON-RESPONSIVE DEFENSES

This article has discussed the nature of the charges and what the INS must prove to establish them or what the alien must prove in those proceedings in which the burden is on the alien. Many of these cases can be defended by a stonewall type of approach that forces the INS to prove its case. This section will discuss other remedies that may be available to prevent deportation where deportability is otherwise established.

Section 241(f) of the INA

A detailed discussion of the case law and complexities of this section is beyond the scope of this article. An understanding of the nature and availability of this defense, however, can be crucial in appropriate cases where permanent residents are involved in deportation proceedings. Section 241(f) states as follows:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.[111]

One anomaly of the availability of this relief is that it is only available to persons who committed fraud or willful misrepresentation. There have been two significant United States Supreme Court decisions interpreting the availability of section 241(f). The reasonable liberal interpretation of the first case, *INS v. Errico*,[112]

110. *See* note 97 *supra*.
111. INA § 241(f), 8 U.S.C. § 1251(f) (1976).
112. INS v. Errico, 385 U.S. 214 (1966).

was limited by the subsequent case of *Reid v. INS*.[113] In *Reid* the Supreme Court held that section 241(f) relief was not available to an alien who was charged with being deportable under section 241(a)(2)[114] when the alien falsely misrepresented that he was a citizen of the United States upon entry to the United States. In dictum, the Court stated policy beyond that which was required by the facts of the case, specifying that although *Errico* was still good law, section 241(f) was limited to aliens charged as being deportable as excludable under section 212(a)(19) of the INA, that is, having committed fraud or willfully misrepresented a material fact.

This resulted in interpretations that greatly restricted the availability of section 241(f), but subsequent cases have held that it is applicable if the alien is charged with being deportable under section 241(c) of the INA[115] or deportable as excludable on a visa charge under section 212(a)(20) of the INA if the gravamen of the case was fraud.[116] It has been held, however, that to qualify as "otherwise admissable" for purpose of section 241(f), the applicant must not have been excludable under section 212(a)(14) of the INA. Following this judicial lead, Congress has recently enacted legislation providing that the section 241(f) defense is available to the applicant regardless of whether that person was excludable at the time of entry under sections 212(a)(14) and (20) in addition to section 212(a)(19). The legislation further provides that availability of the section 241(f) defense rests within the discretion of the Attorney General, it is no longer mandatory.[117] Regardless of whether the alien has been charged with being deportable as excludable under that provision, to qualify for section 241(f) the alien must carry the burden of showing that he did not enter the United States for the purpose of engaging in employment, or if that was the purpose, that an alien labor certification had, in fact, been issued.[118] The propriety of these cases is highly questionable since it permits the INS, by a choice of charges, to eliminate an ameliorative provision from the INA. Thus, in defending an alien in deportation proceedings, where

113. Reid v. INS, 420 U.S. 619 (1975).

114. 8 U.S.C. § 1251(a)(2) (1976).

115. 8 U.S.C. § 1251(c) (1976).

116. Cacho v. INS, 547 F.2d 1057 (9th Cir. 1966); Persaud v. INS, 537 F.2d 776 (3d Cir. 1976); Matter of DaLomba, 16 I. & N. Dec. 616 (1978).

117. Chow v. INS, 641 F.2d 1384 (9th Cir. 1981); Matter of Gonzales, 16 I. & N. Dec. 564 (1978). The *Chow* case established that if the alien could prove that he was not entering the United States for the purpose of engaging in employment, then he would be "otherwise admissible" for purposes of section 241(f).

118. 8 U.S.C. § 1251(f) (1952), *as amended by* the Immigration and Nationality Amendments of 1981, Pub. L. No. 97-116, § 8 (1981).

section 241(f) is in issue, these considerations are crucial. If section 241(f) can be satisfied, then deportation is precluded.

Application for Adjustment of Status

The INA provides that certain aliens in the United States can apply to adjust to permanent resident status.[119] This procedure is normally invoked by certain individuals in the United States on nonimmigrant visas who are adjusting from nonimmigrant status to permanent resident status. Adjustment of status is also available to a person who already is a permanent resident when that permanent resident status has been lost or is being successfully challenged.[120] Thus, if an individual is found deportable because of a defect in the original basis of admission such as in the alien labor certification, and that individual or his or her spouse has developed alternative eligibility for permanent residence for which a visa is available within the quota system, an application for readjustment of status would lie. It is far beyond the scope of this article to discuss in detail the law of the discretionary remedy of adjustment of status. Suffice it to say that such a remedy has to be considered in the types of cases which are the subject of this article. If the case involves an individual who committed fraud and who does not have any familial relationships to support a waiver[121] then readjustment of status should be attempted based on the spouse. If such status is granted, then the otherwise fraud-excludable individual would be eligible for waiver.[122]

The only significant loss or drawback to this procedure, if otherwise obtainable, is that the individual will have a new entry date and, therefore, the residence requirement for naturalization would begin anew.[123] All things considered, this is normally a small price that an alien would willingly pay if it meant the difference between remaining in the United States as a permanent resident or having to depart.

Suspension of Deportation

The INA provides that certain individuals, regardless of the na-

119. 8 U.S.C. § 1255 (1976).
120. Tibki v. INS, 335 F.2d 42 (2d Cir. 1964); Matter of Krastman, 11 I. & N. Dec. 720 (1966).
121. 8 U.S.C. § 1182(i) (1976).
122. *Id.*
123. 8 U.S.C. § 1427 (1976).

ture of their entry or present status, who have been in the United States for certain periods of time (seven or ten years depending on ground of deportability), who for the requisite period of time have been persons of good moral character, and who, themselves or certain specified relatives, would suffer extreme hardship if they were deported, can have their deportation suspended and their status adjusted to permanent resident status.[124] A substantial body of law exists with respect to numerous issues that can arise in applications for suspension of deportation. Again, the purpose of this article is not to discuss them, but rather to alert the practitioner to the existence of this remedy in certain appropriate cases where deportability is established.

Section 212(c) of the INA

An additional remedy exists for permanent residents who have had an unrelinquished domicile of seven consecutive years in the United States.[125] Despite the terms of the statute, this remedy is available in deportation proceedings even to aliens who have not departed the United States.[126] As with other remedies discussed above, reference to the judicial and administrative determinations is, of course, necessary to analyze the availability and viability of a section 212(c) application.[127]

Asylum

An alien in the United States who has a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion can apply for asylum in the United States.[128] Such an application can be filed before an immigration judge in deportation proceedings.[129] If asylum is granted then an application for adjustment of status on that basis can be filed one year after the grant.[130]

Naturalization

A little used provision of the regulations, but important to know

124. 8 U.S.C. § 1254(a) (1976).
125. 8 U.S.C. § 1182(c) (1976).
126. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).
127. *Compare* Lok v. INS, 548 F.2d 37 (2d Cir. 1977) *with* Chiravacharadhikul v. INS, 645 F.2d 248 (4th Cir. 1981) *and* Anwo v. INS, 607 F.2d 435 (D.C. Cir. 1979) *and* Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979); *see generally* Matter of Salmon, 16 I. & N. Dec. 734 (1978); Matter of Marin, 16 I. & N. Dec. 581 (1978).
128. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; 8 U.S.C. § 207 (1976) *et seq.*
129. 8 C.F.R. §§ 208.1 and 208.10 (1981).
130. 8 C.F.R. § 209 (1981).

about in cases involving permanent residents, impowers an immigration judge to "terminate deportation proceedings to permit respondent to proceed to a final hearing on a pending application or petition for naturalization when the respondent has established prima facia eligibility for naturalization and the case involves exceptionally appealing or humanitarian factors. . . ."[131]

Voluntary Departure

Probably the least desirable remedy is voluntary departure. This remedy is available to an alien in deportation proceedings who can establish that he has been a person of good moral character for at least five years prior to the application for voluntary departure.[132] It is a viable remedy since it avoids both the stigma of deportation and the prohibition against a person who has been deported from reentering the United States without having obtained a waiver.[133] Even though voluntary departure is a viable remedy, it is clearly the least desirable of the remedies discussed above because, absent the availability of a subsequent motion to reopen or reconsider the deportation proceedings,[134] voluntary departure requires departure from the United States.

TACTICS

It is crucial in defending a deportation or exclusion proceeding to view it substantially as judicial litigation. There are, of course, differences, such as the admissibility of hearsay evidence. Nevertheless, the basic considerations with respect to preparation and defense apply exactly, and as long as that is kept in mind the specific tactics to be applied in an individual case require only a knowledge of the law such as that set forth above.

The best tactic is, of course, to prevent the case from ever reaching adjudication, and as noted above, this can be accomplished through the exercise of preventive law. Proper counseling of clients, both employers and employees, and proper screening of cases, normally should preclude the necessity of later having to defend a deportation or exclusion ground on the basis of a defect in the labor certification.

131. 8 C.F.R. § 242.7 (1981).
132. 8 U.S.C. § 1254(e) (1976).
133. 8 U.S.C. § 1182(a)(17) (1976).
134. 8 U.S.C. § 242.22 (1976).

Once a case goes to formal hearing, three things must be done immediately, as in all litigation: obtain a thorough knowledge of the facts, obtain an understanding of the law, and develop a strategy and decide on implementing tactics. An initial question that often has to be faced is whether to permit the client to give a statement. This, of course, depends on all other facts and circumstances.

Subsumed within the matter of having a thorough knowledge of the facts is attempting to find out what evidence the Government has. Discovery rules *per se* do not apply, but requests under the Freedom of Information Act or the Privacy Act can produce information or copies of documents in the Government file.

In certain cases it is appropriate to obtain knowledge of the particular theory or approach to the case that the Government has chosen. It is also prudent to attempt to limit the Government, in the proceedings, to the particular approach it has chosen and disclosed. Often the allegations are general and can involve a number of factual and legal possibilities. For instance, a charge that a person is deportable as excludable under section 212(a)(14) of the INA could be premised on the alleged nonexistence of a labor certification, or the alleged existence of a counterfeit labor certification, or the failure to work for the employer, or other matters. Similarly, a charge of fraud often will not specify what the fraud is. It is obviously easier and more desirable to defend a case based on disclosed and limited theories. A motion in the nature of a bill of particulars is generally accepted as available in deportation and exclusion proceedings. Also available are pretrial and trial motions, as well as matters submitted after the hearing such as proposed findings of fact, conclusions of law and proposed orders.

Defending only that which is charged is important. In one case, there was a clear question of fraud and indeed the immigration judge found the alien deportable as excludable for having obtained his visa by fraud in violation of section 212(a)(19) of the INA. No charge, however, had ever been brought under that provision, and therefore, the finding of deportability was reversed.[135] The Government did not prove that which it charged, and did not charge that which it might have proven. It thus can be crucial to define, at the outset, the Government's approach to the case, and to defend only against that approach.

A crucial matter to be faced is whether to have the respondent testify or remain silent in the deportation proceedings. Often INS

135. Matter of Garvin, note 97 *supra*.

trial attorneys will successfully cross-examine the respondents to prove the Government's case. Proper measures should be undertaken to attempt to prevent this. Even in exclusion proceedings, where the burden is normally on the alien, if the respondent is a returning lawful resident the burden is on the Government.[136]

The law has become fairly well established that a respondent in a deportation proceeding does *not* have a fundamental right to remain silent.[137] As in any civil proceeding there is no right not to testify, unless there is a fifth amendment self-incrimination ground. This is often the case, however, particularly in any case in which fraud is either charged or possibly involved since criminal sanctions may also be involved.[138] Generally, the best tactic is to have the respondent remain silent, and to put the INS to the burden of attempting to prove its case, which it sometimes is unable to do.

A contrary consideration exists to the extent that, in accordance with the discussion above, a good faith defense is being asserted. In such a case, the testimony of the respondent normally would be required to establish good faith. Again, strategic and tactical benefits of such a defense must be thoroughly considered in the context of the facts, the Government's case and the law.

Consciousness of the record is, of course, paramount. The record is what the immigration judge will base his decision on, and what the BIA and reviewing federal courts will have before them. Insuring a proper record is required not only in determining the question of deportability or excludability, but also in establishing eligibility for relief such as under section 241(f). Counsel should not assume that the immigration judge will insure a proper record. This consideration is but one example of the proposition set forth earlier that the trial of an administrative matter, particularly a record hearing such as deportation, rescission, or exclusion, should be approached in the same manner as any civil litigation. Application of civil litigation analysis and tactics, in the context of

136. Matter of Salazar, I.D. 2741 (BIA 1979). Indeed, if the permanent resident is returning from a trip not deemed to be an "entry" under the doctrine of Fleuti v. Rosenberg, 374 U.S. 499 (1963), deportation proceedings would lie. Maldonado-Sandoval v. INS, 518 F.2d 278 (9th Cir. 1975); Plasencia v. Sureck, 637 F.2d 1286 (9th Cir. 1980), *petition for cert. filed*, 50 U.S.L.W. 3018 (U.S. Aug. 4, 1981) (No. 81-129).

137. Matter of Carrillo, I.D. 2717 (BIA 1979); Smith v. INS, 585 F.2d 600 (3d Cir. 1978).

138. GORDON AND ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.10(f); *See* 8 U.S.C. §§ 1101, 1546 (1976).

a knowledge of the immigration law in general and the law in the specific areas involved, is the best way to attempt to insure a successful defense.

Summary

Persons who are seeking or who have obtained permanent resident status on the basis of alien labor certifications must, at various times, face the question of the security of their status as a function of the validity of the labor certification. This issue can best be avoided by insuring that an alien obtaining permanent residence on this basis is doing so properly, based on a real job offer, real and documentable experience, and with the intention of the parties to comply with the law in all respects.

When one of these underlying prerequisites of a labor certification is questioned, particularly in the context of this article, after obtaining permanent resident status, careful analysis of the facts and the law is necessary in the presentation and defense of a client. The burden of proof and the defenses available can be determined both by the procedural context of the obtaining of permanent resident status and the proceedings in which that status is being questioned. A thorough knowledge of the facts and applicable law will then dictate the selection of one or more possible strategies: to defend directly, to confess and avoid, to seek discretionary relief, or to seek new immigrant status. These strategic and tactical decisions and the implementation of them in administrative litigation, should be approached in the same manner as any civil litigation. Accepting the above advice should take much of the mystery of immigration law and procedure out of these cases, although a knowledge of them is fundamental.

Proper counseling of employers and alien employees hopefully will avoid the discussed issues from arising. But if they do arise, as they do on occasion, the foregoing discussion and analysis should be helpful in ascertaining the substantive law, the procedures involved, the defenses, the relief available, as well as the strategies and tactics needed to implement a plan that will best serve your client's needs.