Comment

ADJUSTMENT OF STATUS UNDER SECTION 245 OF THE IMMIGRATION AND NATIONALITY ACT

Aliens who wish to immigrate to the United States generally must request a permanent visa from a consular office abroad. Sometimes, however, an alien in the United States under a temporary visa desires to immigrate. This often occurs in cases of visiting relatives and foreign students. To eliminate the inconvenience of leaving the United States to apply for a permanent visa, section 245 allows qualified aliens to remain within the United States and request an adjustment of status. Unfortunately, this procedure has been abused. This Comment discusses the problem of such abuse, and the solution recently proposed in the Simpson-Mazzoli bill.

INTRODUCTION

The Immigration and Nationality Act[1] authorizes two ways to obtain permanent resident status in the United States. The first is to enter the country as an immigrant under an appropriate visa.[2] The second is to enter the country on a temporary basis as

1. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). Interestingly, it was enacted over President Truman's veto. E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 307 (1981). For an in-depth look at the development of the Immigration and Nationality Act, see Fragomen & Del Rey, *The Immigration Selection System: A Proposal for Reform*, 17 SAN DIEGO L. REV. 1 (1979).

2. Immigration and Nationality Act § 201, 8 U.S.C. § 1151 (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1621. An "immigrant" is defined by the Act as "every alien except an alien who is within one of the . . . classes of nonimmigrant aliens."

a nonimmigrant and be granted an adjustment of status[3] after arriving to that of permanent resident. The major difference between these classifications is that the immigrant classifications are subject to strictly enforced quota restrictions, while the nonimmigrant classifications are not restricted in number.[4] The rationale for stricter regulation of immigrants is to prevent over-saturation of the labor market[5] and unnecessary strain on natural resources.

In contrast, the number of aliens who desire to enter only on a temporary basis does not require such rigorous supervision.[6] Many of the nonimmigrant classifications prohibit the alien from working while in the United States.[7] Other classifications may allow the alien to work, but only with approval of the Immigration and Naturalization Service (INS). Because these nonimmigrants remain only temporarily, the effect on the nation's labor force and resources is slight. Obtaining a nonimmigrant visa is easier than obtaining an immigrant visa, but frequently the alien decides to remain in the United States permanently and applies for an adjustment of status.

An alien who applies for an adjustment of status after arriving in the United States is generally subject to the same immigrant quota as the alien who initially applies for an immigrant visa in his native country.[8] The exception is the alien who applies for an

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§ 101(a)(15), 8 U.S.C. § 1101(a)(15) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1611. See *infra* note 7 for a list of nonimmigrant classes.

3. *Id.* § 245, 8 U.S.C. § 1255 (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1614.

4. 1 M. IVENER & S. BLALOCK, HANDBOOK OF IMMIGRATION LAW 197 (2d ed. 1982).

5. E. HUTCHINSON, *supra* note 1, at 492-94.

6. *Id.*

7. The nonimmigrant categories are: "A"—Diplomatic visa; "B"—Visitor ("B1"—Visitor for business; "B2"—Visitor for pleasure); "C"—Alien in transit; "D"—Crewman; "E"—Treaty alien ("E1"—Treaty trader; "E2"—Treaty investor); "F"—Academic Student; "G"—International Organization; "H"—Temporary worker ("H1"—Worker of distinguished merit and ability; "H2"—Temporary worker in short supply; "H3"—Alien trainee); "I"—Media correspondent; "J"—Exchange student; "K"—Finance; "L"—Intra-company transferee; "M"—vocational student. Immigration and Nationality Act § 201(a)(15), 8 U.S.C. § 1101(a)(15) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1611. Each category has its own requirements and limitations. For example, the visitor for pleasure classification prohibits an alien from obtaining any employment while in the United States. On the other hand, the student visa permits employment if it is authorized in advance by the Immigration and Naturalization Service (INS). Each nonimmigrant category specifies the time period for which the alien is authorized to remain in the United States.

8. Sections 245(a)(3) and 245(b) require that the number of visas available to the alien's country be reduced in accordance with the number awarded through the adjustment of status procedure. 8 U.S.C. § 1255(a)(3), (b) (1976).

adjustment of status by virtue of being an immediate relative of the United States citizen or a special immigrant as defined by the Act.[9] These are preference categories which are not subject to any quota restrictions. Similarly, the alien within the United States must be determined to be admissible for permanent residence by the same standards as the alien who applies in his native country.[10] Further, the adjustment of status is not in any way guaranteed because the alien is within the United States. The alien who meets the requirements is merely qualified to apply for status as a permanent resident, just as the alien in his native country applies for permanent resident status. Adjustment of status is purely within the discretion of the Attorney General.[11]

There are, however, several distinct advantages to the adjustment of status procedure as compared with the application procedure for permanent resident status in the alien's native country. The alien who applies while in the United States benefits from a higher standard of living while he awaits a decision. He has access to legal and support services to aid him in attaining permanent resident status. More importantly, this alien enjoys rights and protections afforded by United States law.[12] In particular,

9. For a listing of those who qualify as "special immigrants," see Immigration and Nationality Act § 201(a)(27), 8 U.S.C. § 1101(a)(27) (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1621.

10. Immigration and Nationality Act § 245(a)(2), 8 U.S.C. § 1255(a)(2) (1976). Admissibility is determined under 8 U.S.C. § 1182 (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1612.

11. The Attorney General has the power to vest such discretion in his subordinates. Thus, the INS has been vested with such discretion. Immigration and Nationality Act § 103, 8 U.S.C. § 1103 (1976); *see also* Bagamasbad v. INS, 531 F.2d 111 (3d Cir. 1976); Ameeriar v. INS, 438 F.2d 1028 (3d Cir.), *petition dismissed*, 404 U.S. 801 (1971). The Attorney General has exercised his power to vest such discretion in his subordinates pursuant to 8 C.F.R. § 3.1(d)(1) (1982). All further references in this Comment to the Attorney General will include the INS and any other proper delegates of the Attorney General's authority.

12. This protection is afforded by virtue of the fourteenth amendment to the United States Constitution, which reads in pertinent part, "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to *any person within its jurisdiction* the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). A recent decision by the Supreme Court of the United States reaffirmed the application of this language to aliens within the country. In the landmark case of Plyler v. Doe, 102 S. Ct. 2382 (1982), a Texas school district attempted to deny enrollment in their public schools to children who were not legally admitted into the United States. The school district asserted that *illegal* or *undocumented* aliens were not entitled to equal protection of the laws because, as a result of their illegal status, they were not "persons within the

rights of due process and judicial review are advantages not available to the alien who applies for permanent resident status from within his own country.[13]

The advantages to the adjustment of status procedure have resulted in many cases of abuse. An alien may determine that he wishes to immigrate prior to arrival in the United States, but does not wish to risk being denied an immigrant visa. In such a case, he obtains a nonimmigrant visa, fully aware that he will apply for an adjustment of status after his arrival. This type of conduct has resulted in a continuing conflict between the alien and the INS, whose function is to enforce the system.[14] To prevent such abuse, the INS must determine the intent of each alien who enters the United States.

Legislation has recently been proposed that would make it more difficult for aliens to abuse the adjustment of status procedure. This legislation, commonly known as the Simpson-Mazzoli bill,[15] would drastically affect all aliens who wish to adjust their status. The bill was proposed to Congress for the first time in March 1982. The Senate passed the bill, with some revisions, in August 1982. While the bill is directed at a legitimate problem, the solution proposed will not resolve the dilemma. In fact, the actual effect of the bill will be to penalize those aliens who genuinely encounter circumstances *after* their arrival in the United States that cause them to seek an adjustment of status. Therefore, the bill will not resolve the conflict surrounding those who determine prior to arrival that they wish to immigrate. It will not discourage aliens from attempting to manipulate the system nor will it ease the frustrations of the INS in locating such aliens during the screening process. Furthermore, the bill will penalize those whom the provisions of section 245 were designed to aid.

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jurisdiction" of the state of Texas. The Court rejected this argument: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* at 4652.

13. *See infra* text accompanying notes 89-111.

14. 8 U.S.C. § 1551 (1976) (creates the Immigration and Naturalization Service). Immigration and Nationality Act § 103, 8 U.S.C. § 1103 (1976) charges the Attorney General with the enforcement of immigration and naturalization laws and gives him the power to delegate to the INS any of the powers and duties imposed upon him. *See supra* note 11.

15. S. 2222, 97th Cong., 2d Sess. (1982) (proposed by Sen. Alan Simpson (R-Wyo.)); H.R. 5872, 97th Cong., 2d Sess. (1982) (proposed by Rep. Romano Mazzoli (D-Ky.)). The House bill was renumbered as H.R. 6514. The bills actually affect the entire Immigration and Nationality Act, not just the section regarding adjustment of status.

The bill would reject those aliens who enter the United States with the sincere intent to stay only temporarily.

This Comment will examine the legislative development of section 245 and will show how the adjustment of status procedure has been slowly liberalized to allow virtually any alien present in the United States to qualify to apply for adjustment. The Comment will discuss the problem of aliens with the preconceived intent to permanently remain in the United States. These aliens manipulate the immigration system and the adjustment of status procedure in order to obtain advantages over the aliens who apply for permanent resident status at a consular office in their native country. The alien who applies for an adjustment of status while in the United States is afforded rights of due process and judicial review. The alien who applies for an immigration visa while in his native country is not entitled to such protections, placing him at a significant disadvantage in seeking permanent resident status. This Comment will show that the Simpson-Mazzoli bill will not prevent such manipulation of the immigration system and the adjustment of status procedure, but will instead penalize those aliens who require the aid of section 245.

LEGISLATIVE DEVELOPMENT

Adjustment of Status Under the Immigration and Nationality Act

Prior to the enactment of section 245, an alien could acquire permanent resident status if he was in the United States even though there was no record of his lawful admission for permanent residence.[16] The alien was required to show that he had resided in the United States for a relatively long period of time. Hence, on approval by the INS, a permanent record would be created.[17] Also, an alien who was found to be deportable could apply for and receive adjustment of status to that of a permanent resident.[18]

16. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 139 (1968). The alien may lack a record of lawful admission for permanent residence due to illegal entry or because unidentifiable in the immigration records. Without such records, the alien cannot be naturalized. *See* E. HUTCHINSON, *supra* note 1, at 563.

17. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 139 (1968).

18. *Id.*; Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620. This procedure was available only to an alien who was *lawfully admitted* for permanent residence (in contrast to the prior procedure, which

The alien had to establish that he had resided in the United States for a certain number of years, and/or that he possessed a certain degree of relationship to a United States citizen or other lawful permanent resident.[19] If the alien did not meet these criteria, he was required to depart the United States and apply for an immigrant visa at an American consular office abroad.[20]

The purpose behind the enactment of section 245 was to eliminate the requirement that certain aliens, lawfully within the United States on a temporary visa, leave the country in order to apply for permanent resident status.[21] The section gave the Attorney General the discretion to adjust the status of an alien who applied for an adjustment of status if (1) the alien had been lawfully admitted to the United States; (2) the alien had continued to maintain that status; (3) an immigrant visa[22] was immediately available to him at the time his application for adjustment was filed; and (4) an immigrant visa was also available at the time the application was approved.[23] However, this procedure was only available to a quota immigrant,[24] or an alien who was classified as a non-quota[25] immigrant by being a spouse or child of a United States citizen and who had been in the United States at least one year *before* acquiring that status.[26] As a result, many aliens were still required to leave the country to obtain an immigrant visa. Nevertheless, this measure eased the immigration of many aliens and fostered the equalization of rights of aliens lawfully within the country as compared to those aliens who either had no record of lawful entry or were found to be deportable.

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was also available to an alien who may have entered illegally) but who was found to be deportable.

19. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 139 (1968).

20. *Id.*; E. HUTCHINSON, *supra* note 1, at 564.

21. *See* SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 140 (1968).

22. An "immigrant visa" is a visa properly issued by a consular officer outside of the United States to an eligible immigrant under the provisions of the Act. § 101(a)(16), 8 U.S.C. § 1101(a)(16) (1976).

23. Immigration and Nationality Act, ch. 477, § 245(a), 66 Stat. 163, 217 (1952).

24. A "quota" immigrant is any immigrant who is subject to the numerical limitations placed upon his native country.

25. A "non-quota" immigrant is an immigrant who is classified as a special immigrant under 8 U.S.C. § 1101(a)(27) (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1614, or an immediate relative under 8 U.S.C. § 1151(b) (1976), which are not subject to numerical limitations. Immigration and Nationality Act § 201, 8 U.S.C. § 1151(a) (1976 & Supp. IV 1980), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1621. However, a numerical limitation has been placed upon some special immigrants under section 1101(a)(27). 8 U.S.C. § 1151a (1976) (natives of Western Hemisphere or Canal Zone limited to 120,000 per fiscal year).

26. Immigration and Nationality Act, ch. 477, § 245(a), 66 Stat. 163, 217 (1952).

The 1958 Amendment

In 1958, Congress recognized a continuing problem resulting from the number of nonimmigrant aliens who were still required to leave the country in order to apply for immigrant status.[27] To alleviate this problem, section 245 was amended[28] to allow *all* quota and non-quota immigrants to apply for permanent resident status without first leaving the country.[29] Also, the length of residence requirement was eliminated. Therefore, an alien claiming non-quota status by virtue of being a spouse or child of a United States citizen was eligible to apply, even if he had obtained that status less than a year after arriving in the United States.[30]

The most notable modification made by the 1958 amendment was the removal of the requirement that the alien have maintained the temporary status under which he was admitted.[31] This meant that aliens who had violated the terms of their visa, by overstay or otherwise, were now eligible to apply for adjustment of status to permanent resident. This procedural change enlarged the number of aliens qualified to apply for an adjustment of status while in the United States.

The amendment was not as far-reaching as it initially appeared to be. However, a new provision was added which specified that the benefits of this section were not available to any alien who was a native of any country contiguous to the United States or of any adjacent island.[32]

Despite restrictions on natives of contiguous countries and adjacent islands, the number of aliens who could apply for adjustment of status without leaving the country was increased substantially. Prior to the enactment of the amendment, a total of 3,991 aliens adjusted their status to that of permanent resident in

27. S. REP. No. 2133, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3698.

28. Act of Aug. 21, 1958, Pub. L. No. 85-700, § 245, 72 Stat. 699, 699.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* "Adjacent island" was, and still is, defined as Saint Pierre, Miquelon, Cuba, Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea. 8 U.S.C. § 1101(b)(5) (1976).

the year ending June 30, 1958.[33] After the enactment of the amendment, the number of aliens who adjusted their status to permanent resident more than doubled, to 9,796 in the following year ending June 30, 1959.[34]

The 1960 Amendment

In July 1960, an amendment made it even easier to apply for an adjustment of status.[35] The amendment deleted the requirement that an immigrant visa be available to the applicant at the time the application for adjustment is made.[36] Now, an immigrant visa need only be available to the applicant at the time the application is approved.

While facilitating application for qualifying aliens, this amendment also limited another particular group of aliens. The amendment provided that the benefits of adjustment of status under section 245 were not available to alien crewmen.[37] Congress believed it was necessary to enact such a restriction because of "frequent abuses of the immigration laws by deserting seamen."[38]

The 1965 Amendment

The 1965 amendment demonstrated further congressional concern with the rising number of abuses of the adjustment of status procedure.[39] Both the House and Senate Committees on the Judiciary noted: "The Immigration and Naturalization Service has been faced with a recurring problem in cases of natives of Central and South America who come to the United States as nonimmigrant visitors and promptly seek permanent resident status under section 245."[40] The 1965 amendment removed the language making the provisions inapplicable to natives of any contiguous country or adjacent island.[41] Instead, the new language made the provisions inapplicable to natives of *any* country of the Western

33. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 152 (1968).

34. *Id.*

35. *See* Act of July 14, 1960, Pub. L. No. 86-648, § 245(a), 74 Stat. 504, 505.

36. *Id.*

37. *Id.*

38. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 141 (1968).

39. *See* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 245, 79 Stat. 911, 918-19.

40. H.R. REP. No. 745; S. REP. No. 748, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3328, 3343. The total number of adjustments for the year ending June 30, 1965 was 18,355. Of that total, 5,136 were natives of South and Central America. SELECT COMMISSION ON WESTERN HEMISPHERE IMMIGRATION, REPORT TO CONGRESS 152 (1968).

41. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 245(c), 79 Stat. 911, 919.

Hemisphere, as well as any adjacent island.[42]

Whether the number of abuses of the system by these particular aliens was the only concern behind this amendment is uncertain. At that time, the population of these countries was growing rapidly,[43] and fear of overflow from these countries may have been a substantial factor.[44] This restriction remained in effect for over ten years.[45]

The 1976 Amendment

The initial effect of the 1976 amendment[46] was the removal of the restriction on natives of the Western Hemisphere and adjacent islands. Practically any alien within the United States could now apply for an adjustment of status to permanent resident. Only alien crewmen, aliens accepting unauthorized employment, or aliens admitted in transit without a visa were ineligible.[47]

The second modification made by the 1976 amendment affected the same procedural requirement as the 1960 amendment. The requirement that the immigrant visa be available to the alien at the time the application for adjustment was approved was changed to require that the visa be available at the time the application is *filed*.[48] This modification made it substantially easier to apply for adjustment. Because the alien can investigate the availability of immigrant visas, he can determine when to apply. Such a determination is not as possible when the visa must be available at the time of approval. Since the application is in the hands of the INS, there may be no indication of a forthcoming decision. Furthermore, since an alien could overstay his authorized time period and still be eligible to apply for adjustment of status, he could deliberately overstay his visa, then make his application for adjustment of status when he was certain that immigrant visas were available.

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42. *Id.*

43. Fragomen & Del Rey, *The Immigration Selection System: A Proposal for Reform*, 17 SAN DIEGO L. REV. 1, 8 (1979).

44. *Id.* at 8 n.42.

45. This requirement was removed by Pub. L. No. 94-571, 90 Stat. 2703 (1976).

46. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703.

47. *Id.* § 245(c), at 2706.

48. *Id.* § 245(a).

The 1981 Amendment

The effect of the 1981 amendment was to make another group of aliens eligible to receive the benefits of section 245.[49] As previously noted, aliens who accept unauthorized employment are not generally qualified to take advantage of section 245.[50] They may accept such employment, however, if they are immediate relatives of United States citizens.[51] The 1981 amendment provided that aliens who accept unauthorized employment may *also* apply for adjustment of status under section 245 if they are special immigrants as described in the Act.[52] Thus, under the current provisions *any* nonimmigrant alien within the United States may apply for adjustment of status to that of permanent resident *except* the following: an alien crewman,[53] an alien who has accepted unauthorized employment but who is not an immediate relative or special immigrant,[54] and an alien in transit without a visa.[55] The 1981 amendment excludes a very limited number of aliens from the adjustment of status process, thereby allowing the majority to qualify to apply for adjustment.

The result is that the burden is placed upon the INS to screen the applicants and determine whether the case for adjustment of status is "worthy."[56] "Worthy" often means genuine, for the statute was designed to aid those aliens who found it necessary to seek adjustment to permanent resident status due to circumstances encountered *after* their arrival. The status was not intended to benefit those who sought to obtain permanent residence status by circumventing the immigration system.

The intent of the legislature in 1952 was to allow a limited group of aliens to adjust their status who were not previously able to do so. The section has slowly been liberalized over the years until, under the present section, virtually any alien who is within the United States may apply for an adjustment. This has led to many aliens seeking entry into the United States by *any* visa to take advantage of the adjustment of status procedure. The most recently proposed amendment to section 245, contained in the Simpson-

49. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 245(c)(2), 95 Stat. 1611, 1614.

50. *Id.*

51. *Id.*

52. *Id.*

53. 8 U.S.C. § 1255(c)(1) (1976).

54. *Id.* § 1255(c)(2).

55. *Id.* § 1255(c)(3), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1614.

56. S. REP. No. 2133, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3698 (purpose of bill was to allow Attorney General to adjust status of certain aliens "in worthy cases").

Mazzoli bill, is partly a reaction against this manipulation of the system. The amendment would restrict benefits of section 245 in a manner reminiscent of the 1952 enactment.

PRECONCEIVED INTENT

After the alien shows he has met the statutory requirements and is eligible to apply for an adjustment to permanent resident status, the decision to adjust lies within the broad discretion of the Attorney General.[57] An adverse decision is appealable. However, the Attorney General's decision will be upheld unless it can be shown that there was an abuse of discretion.[58] An abuse of discretion results when the Attorney General has exercised his discretion in an "arbitrary, capricious, or illegal"[59] manner.

A major concern of the Attorney General in screening adjustment of status applicants is determining whether the alien entered the United States under a temporary visa with the intent to *permanently* remain. A finding of such preconceived intent has consistently been a basis to deny adjustment of status.[60] The alien who enters under a temporary visa without disclosing his intent to permanently remain violates the law and forfeits any opportunity to adjust his status.[61] Also, by attempting to circumvent the immigration system,[62] these aliens interfere with the rights of aliens who report their intentions honestly and await their turn to lawfully enter.[63] Such subterfuge threatens the integrity of the immigration process.[64]

57. Adjustment of status from nonimmigrant to permanent resident is purely discretionary and not an entitlement upon meeting the statutory prerequisites. United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Ameeriar v. INS, 438 F.2d 1028 (3d Cir.), *petition dismissed*, 404 U.S. 801 (1971), Faddah v. INS, 580 F.2d 132 (5th Cir. 1978).

58. Thomaidis v. INS, 431 F.2d 711 (9th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Tuan v. INS, 531 F.2d 1337 (5th Cir. 1976); *see also* Jain v. INS, 612 F.2d 683 (2d Cir. 1979), *cert. denied*, 446 U.S. 937 (1980).

59. Astudillo v. INS, 443 F.2d 525, 527 (9th Cir. 1971).

60. Tuan v. INS, 521 F.2d 1337 (5th Cir. 1976); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968).

61. *See* H. REP. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 1653, 1718.

62. *Id.*

63. *Id.*

64. *Id.*

Considerations in Determining Preconceived Intent

There are many factors which the Attorney General considers to prove an alien's preconceived intent to remain permanently within the United States. These factors include the length of time the alien is in the United States before applying for an adjustment of status,[65] the existence of family ties within the United States,[66] and activities prior to leaving his homeland.[67]

The alien often claims that he desires an adjustment of status because he is an immediate relative of a United States citizen. Such a claim is preferred due to the immigration policy of family unification and the lack of quota restrictions on immediate relatives.[68] Therefore, the Attorney General must scrutinize this claim to ensure that the relationship is genuine and not merely a ruse to obtain permanent resident status.

The Attorney General views the marriage of an alien to a United States citizen with particular suspicion.[69] Very often, a "sham" marriage takes place; the alien marries a United States citizen solely for the purpose of gaining permanent resident status. The Attorney General has the authority to investigate a claimed marital relationship.[70] The Attorney General will consider the point in time at which the marriage took place,[71] whether the alien marries after having received orders of deportation,[72] and the length of the relationship prior to marriage. A

65. Matter of Ro, 16 I. & N. Dec. 93 (1977) (found that natives of South Korea entered with preconceived intent based on the fact that they applied for adjustment of status only 16 days after arriving).

66. Matter of Cavazos, 17 I. & N. Dec. 215 (1980) (existence of alien's United States citizen wife and child justified granting adjustment of status). However, *lack* of family ties has been held sufficient reason for denial of adjustment. Santos v. INS, 375 F.2d 262 (9th Cir. 1967); Jarecha v. INS, 417 F.2d 220 (5th Cir. 1969); Soo Yuen v. INS, 456 F.2d 1107 (9th Cir. 1972).

67. Von Perrieux v. INS, 572 F.2d 114 (3d Cir. 1978); Matter of Lasike, 17 I. & N. Dec. 445 (1980).

68. A. FRAGOMEN, ADVANCED IMMIGRATION 14 (1978); *see also supra* text accompanying notes 28-30. Note, however, that this would be changed under the provisions of the Simpson-Mazzoli proposal. The bill would subject immediate relatives to quota restrictions for the first time in history. S. 2222, 97th Cong., 2d Sess. § 202 (1982).

69. In many cases a "sham" marriage is conducted; that is, an alien marries a United States citizen solely to obtain immediate relative status. For discussion of this tactic, see Comment, *Family Unity Doctrine v. Sham Marriage Doctrine*, 1 CAL. W. INT'L L.J. 80 (1970); Comment, *The Marriage Viability Requirement: Is it Viable?*, 18 SAN DIEGO L. REV. 89 (1980).

70. Manarolakis v. Coomey, 416 F. Supp. 532 (D. Mass. 1976).

71. Astudillo v. INS, 443 F.2d 525, 527 (9th Cir. 1971) (fact that petitioner "belatedly married a resident alien while he was under an order of deportation . . . would not give him any persuasive equities under the circumstances").

72. Manneh v. Morris, 449 F. Supp. 77, 80 n.4 (E.D. Pa. 1978) (denial of adjustment not abuse of discretion; alien only married United States citizen after alien had been ordered deported).

shorter relationship, according to the Attorney General, indicates the possibility of a "marriage of convenience" in order to obtain an immigrant visa.[73] The length of the marriage itself is considered as well.[74]

Finally, the relationship of the parties during the course of the marriage is evaluated. In *Menezes v. Immigration and Naturalization Service*,[75] the alien from India originally entered as a visitor for pleasure. He later married a United States citizen and applied to adjust his status to permanent resident. The Attorney General's investigation showed, however, that the parties had undergone at least six separations during their marriage.[76] They were in fact separated at the time that the application for adjustment was under consideration.[77] Therefore, notwithstanding that the alien legally married a United States citizen, the Attorney General used the instability of the relationship[78] to find preconceived intent and deny the adjustment of status.

The relationship of the parties can be used to favor the alien as well. In *Matter of Cavazos*,[79] the Attorney General initially found that the alien, a twenty-six-year-old native of Mexico, entered the country with the preconceived intent to permanently remain.[80] The Board of Immigration Appeals (BIA) reversed the decision, pointing out that the alien had married a United States citizen whom he had previously known for some time prior to entering the United States.[81] Furthermore, the alien had maintained a stable relationship since the marriage and had fathered a child.[82] As a result, the BIA stated that while there may have been some evidence in the record to support a finding of preconceived intent, the record was "ambiguous at best," and adjustment of status was

73. United States v. Rubenstein, 151 F.2d 915 (2d Cir.), *cert. denied*, 326 U.S. 766 (1945) (marriage found to be one "of convenience" for purposes of obtaining immigrant visa when alien met and married United States citizen in same month).

74. If the couple were to divorce within two years *after* the alien has been admitted based upon marital status, the alien would be required to prove that the marriage was not fraudulent. 8 U.S.C. § 1251(c) (1976).

75. 601 F.2d 1028 (9th Cir. 1979).

76. *Id.* at 1030.

77. *Id.*

78. *Id.* at 1035.

79. 17 I. & N. Dec. 215 (1980).

80. *Id.* at 216.

81. *Id.*

82. *Id.*

warranted.[83]

Very often the alien's activities prior to departing his own country for the United States are viewed as indications of a preconceived intent to remain. In *Von Pervieux v. Immigration and Naturalization Service*,[84] aliens from Argentina and their children entered the United States as visitors for pleasure, and subsequently overstayed their authorized time. The family was discovered only when the INS inspected the factory where Mr. Von Pervieux worked. The INS then learned that Mrs. Von Pervieux had also obtained employment, acquired a home and furnishings, and had established credit. The finding of preconceived intent to remain was based, however, on the disclosure that prior to leaving Argentina on their *visitor's* visa, the family had sold their home and belongings.[85] This negated any claim that circumstances encountered *after* their arrival in the United States had fostered a desire to remain permanently.

Other prior actions by the alien in his native country can be viewed as indications of an intent to remain permanently within the United States. In *Matter of Lasike*,[86] the Attorney General denied adjustment of status to a forty-eight-year-old native of Tonga. The Attorney General found preconceived intent based upon a letter written prior to the alien's departure from Tonga.[87] The letter recommended the alien as a candidate for the ministry of the alien's religion overseas. The alien entered the United States as a visitor for pleasure, but eleven days after arriving in the United States he applied for an adjustment of status as a permanent resident by virtue of being a special immigrant seeking "ministerial recognition."[88] The Attorney General discovered the letter of recommendation written prior to his departure from his homeland and thereby found a preconceived intent to remain permanently in the United States.

In sum, the screening process employed *after* the alien meets the statutory requirements for application for adjustment to permanent resident status encompasses the alien's actions prior to leaving his own country, as well as his actions after arriving in the United States. The burden is on the Attorney General to determine whether the request for adjustment of status is legitimate or whether the alien is attempting to circumvent the immigration

83. *Id.*
84. 572 F.2d 114 (3d Cir. 1978).
85. *Id.* at 115.
86. 17 I. & N. Dec. 445 (1980).
87. *Id.* at 449.
88. *Id.* Ministers are among the classifications of "special immigrants." *See supra* note 12.

system. It may not appear advantageous for the alien to risk undergoing such a thorough analysis of his actions to be physically present in the United States when applying for immigrant status. A closer look, however, reveals that the advantages obtained as a result of physical presence within the United States are more than sufficient to risk a thorough investigation.

DUE PROCESS AND JUDICIAL REVIEW

There is a marked contrast between the rights of due process and judicial review rights afforded an alien applying for permanent residence status while in the United States and the alien applying to an American consular office within his own country. In short, the alien who applies while in the United States is entitled to specific procedures of due process and to judicial review of an adverse decision, whereas the alien who applies within his own country is entitled to neither.

Availability to Aliens Present within the United States

The alien who applies for adjustment of status while in this country has considerable advantages in comparison to the alien who applies for permanent residence status while still in his own country. He has the protections afforded by strict procedures regarding the initial review of the alien's application for adjustment. There are also strict rules of due process designed to ensure fair treatment throughout the application and hearing process. Additionally, the alien present within the United States has several opportunities for administrative and judicial review of a denial of adjustment.

The decision to initially grant or deny adjustment to permanent resident status of an alien already present in the United States is made by an immigration judge.[89] If the judge decides that the application for adjustment should be denied, the alien remains subject to the restrictions of his temporary visa,[90] if still valid. If at any time the alien violates the terms of his visa, he becomes subject to deportation.[91] The alien may apply for a stay of deporta-

89. 1 M. IVENER & S. BLALOCK, *supra* note 4, at 270.

90. If the temporary visa has expired, and the alien does not leave the United States after the denial of adjustment, the alien then becomes subject to deportation. *Id.* at 291.

91. *Id.* at 197.

tion, pending an appeal to the BIA.[92]

It is in the context of the review of the deportation order that the alien obtains review of the denial of the application for adjustment of status.[93] If the BIA upholds the denial and the order of deportation, the alien may file a petition for review in the United States Court of Appeals for the circuit where the deportation proceedings were conducted.[94] The petition may be filed up to six months after the final order of deportation by the BIA.[95] Once the petition is filed, deportation is automatically stayed until the court hands down its decision.[96]

The scope of judicial review is limited. The court of appeals is restricted to the following issues:

1. Whether there was an abuse of discretion, in that the immigration judge exercised his discretion in an illegal, arbitrary, or capricious manner;
2. Whether the hearing(s) were conducted with unfair procedures which violated procedural due process to which the alien is entitled under the fourteenth amendment;
3. Whether there is an error in the interpretation of law which substantially affects the outcome of the case;
4. Whether there is a lack of evidence able to support the Immigration Service's burden of clear and convincing proof.[97]

The court must review the petition solely upon the administrative record and the agency's findings of fact.[98] The court then will uphold the agency's decision if it is supported by reasonable and

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92. *Id.* at 291.

93. *Id.* at 292-93. Technically, the alien does not have the right to a direct review of a denial of adjustment of status. However, if the alien remains within the country after his visa expires, he is subject to deportation. When the INS initiates deportation proceedings, the alien may reapply for adjustment of status. If the adjustment is again denied and he is ordered deported, the alien has a right to a review of the deportation order, *including* the denial of adjustment of status. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620; *see also* Massignani v. INS, 313 F. Supp. 251, 252 (E.D. Wis. 1970), *aff'd*, 438 F.2d 1276 (1971).

94. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

95. *Id.*

96. 1 M. IVENER & S. BLALOCK, *supra* note 4, at 293. An excellent discussion of the development of judicial review in immigration cases and the policies behind the development may be found in Gordon, *Recent Developments in Judicial Review of Immigration Cases*, 15 SAN DIEGO L. REV. 9 (1977); *see also* Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

97. 1 M. IVENER & S. BLALOCK, *supra* note 4, at 293.

98. *Id.*; Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968) (court of appeals limited to record to ascertain abuse of discretion).

substantial evidence in the record.[99]

Finally, if the court of appeals sustains the denial of adjustment of status and the order of deportation, the alien may resort to the United States Supreme Court.[100] Within ninety days of the final decision by the court of appeals, the alien may petition the Supreme Court for certiorari.[101] The alien is entitled to these procedures and protections *solely* because he is in the United States,[102] regardless of his preconceived intent to permanently remain.

Availability to Aliens Present Outside the United States

Considerably fewer rights are afforded the alien applying for entry as permanent resident while still in his own country. The alien must apply to a consular office abroad,[103] which determines whether the alien will be granted or denied permanent resident status.[104] The decision is discretionary, yet absolute.[105] There is no appellate administrative agency or any other appeal procedure available.[106]

99. 1 M. IVENER & S. BLALOCK, *supra* note 4, at 294.
100. *Id.* at 293.
101. *Id.* at 294.
102. U.S. CONST. amend. XIV, § 1; *see supra* note 15.
103. *See* 1 M. IVENER & S. BLALOCK, *supra* note 4, at 198; *see also* E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 345 (3d ed. 1975).
104. J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 48 (3d ed. 1979).
105. *Id.*
106. *Id.* at 395. It has been consistently held that the judicial system has no jurisdiction to review a consular decision. Ventura-Escamilla v. INS, 647 F.2d 28 (9th Cir. 1981) (neither immigration judge, Board of Immigration Appeals nor court of appeals had jurisdiction to review decision of American consul denying aliens application for visa); United States *ex rel.* Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929) (refusal to issue immigrant visa not reviewable); Ubiera v. Bell, 463 F. Supp. 181 (S.D.N.Y. 1978) (no jurisdictional basis existed for court to review action of American consul in denying issuance of immigration visa); Hermina Sague v. United States, 416 F. Supp. 217 (D.C. P.R. 1976) (consular officer's decision to issue or withhold a visa not subject to either administrative or judicial review); Licia-Gomez v. Pilliod, 193 F. Supp. 577 (D.C. Ill. 1960) (a consul's decision to withhold a visa is not reviewable and is not a denial of due process). This practice has been heartily criticized. *See* Study, *Consular Discretion in the Immigrant Visa Issuing Process*, 16 SAN DIEGO L. REV. 87 (1978). This article presents the results of a study performed by students at the University of San Diego School of Law. Under a grant from the National Science Foundation, the students analyzed the decisions of consular officers issuing visas. Among other factors, the students considered the effect of the officer's personal background, attitudes toward the applicants, and attitudes toward immigration policy in general, on the officer's decisions. In its recommendations, the study strongly proposes a system of administrative appeals for the review of consular decision. *See also*

Although the alien cannot appeal the decision of the consulate per se, he may seek an advisory opinion from the visa office of the State Department in response to an adverse decision.[107] The consular office is under the control and supervision of the State Department.[108] The alien may submit a written request to the visa office of the State Department questioning the ruling of the consulate.[109] Should the visa office find the ruling erroneous, it may then provide the alien with an advisory opinion to present to the consulate.[110] The opinion may include the State Department's conclusions in the matter, as well as a recommendation that the consular office reverse its decision. Unfortunately, this opinion is strictly a recommendation, and the consular office is not bound by any conclusions or recommendations of the visa office.[111]

Therefore, the alien who is present within the United States is afforded greater protections against arbitrary decisions, and is accorded a better opportunity for successfully obtaining permanent residence status. Given this opportunity, it is understandable that an alien who wishes to immigrate will seek any available visa, so that he may later apply for an adjustment of status.

Coping With The Conflict: The Simpson-Mazzoli Proposal

It is not difficult to understand the frustrations of the Immigration and Naturalization Service in attempting to control this manipulative behavior. The conflict has been recognized for many years, and Congress has at different times taken steps to discourage such activity.[112] One recent proposal, the Simpson-Mazzoli bill,[113] addresses the adjustment of status of aliens temporarily within the United States to permanent residents.[114] The bill changes the requirements to qualify to apply for adjustment, making it more difficult to apply. As a result, the bill would immediately eliminate many aliens who would be eligible under the present provisions. The bill would also make ineligible another entire group of aliens by restricting foreign students from applying for adjustment of status. Finally, by making changes in proce-

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Note, *Judicial Review of Visa Denials: Re-Examining Consular Non-reviewability*, 52 N.Y.U. L. Rev. 1137 (1977).

107. 1 M. Ivener & S. Blalock, *supra* note 4, at 301.

108. *See* J. Wasserman, *supra* note 104, at 12.

109. 1 M. Ivener & S. Blalock, *supra* note 4, at 301.

110. *Id.*

111. *Id.*

112. *See supra* notes 16-56.

113. *See supra* note 6. The bill was passed with revisions by the Senate on August 17, 1982, by a vote of 80 to 19, with one abstention. 128 Cong. Rec. S10619 (daily ed. Aug. 12, 1982).

114. S. 2222, 97th Cong., 2d Sess. § 131 (1982).

dures in related matters, such as deportation hearings and appeal processes, the bill would also affect the rights of the alien applying for adjustment of status. The overall effect of the bill would be to significantly reduce the number of aliens who would be eligible to apply even for adjustment to permanent resident status.

Qualifications to Apply for Adjustment of Status

The Simpson-Mazzoli bill reintroduces a requirement which was originally included in section 245 but eliminated by the 1958 amendment.[115] The new provision would require that an alien maintain his temporary status in order to be eligible to apply for adjustment of status.[116] Thus, any alien who fails to maintain his status by violating the terms of his visa for any reason is no longer eligible to apply for an adjustment of status to permanent resident. This includes an alien who overstays his authorized time, accepts unauthorized employment, or otherwise fails to comply with the conditions of his visa. This section would also make ineligible any alien who, because a visa is not available to him during his authorized time, plans to overstay his temporary visa and hopes to obtain a permanent visa when one becomes available. Moreover, this section would apply to *all* aliens, regardless of whether they submitted their applications for adjustment before or after the date of the enactment of this section.[117] Therefore, an alien who has already filed for adjustment but has also violated the terms of his visa would be disqualified automatically. The alien is disqualified even though he applied for adjustment under the provisions currently in effect.

This section will have the immediate effect of reducing the number of aliens who apply for adjustment of status. The initial effect may be to relieve the burden of the INS in processing applications. It is questionable whether the long term effect of the change in the requirements will be in accordance with the overall purpose of section 245.

115. Act of Aug. 21, 1958, Pub. L. No. 85-700, § 245, 72 Stat. 699, 699.

116. S. 2222, 97th Cong., 2d Sess. § 131(a) (1982). The general intent that has so far been stated by the authors is to stem the tide of both illegal and legal immigration. This includes the manipulation of the immigration system and adjustment of status procedure. "Immigration to the United States is out of control . . . [and] uncontrolled immigration is one of the greatest threats to the future of this country." 128 CONG. REC. S2216 (daily ed. Mar. 17, 1982) (statement of Sen. Simpson).

117. S. 2222, 97th Cong., 2d Sess. § 131(b) (1982).

The proposal seeks in part to address the problem of aliens who enter the United States on a temporary visa with the preconceived intent to permanently remain. This objective is compatible with the goal of section 245 to aid the alien who did not intend to remain at the time he entered the United States and who presents a genuine and worthy case for adjustment to permanent resident status.[118]

Under this provision of the bill, the alien who truly needs the assistance of section 245 is likely to be automatically disqualified, while the alien who seeks to manipulate the system will be certain to qualify to apply for adjustment of status. The alien who enters with the preconceived intent to remain in the United States forms that intent *before* he leaves his native country. He is likely to investigate the necessary procedures in advance and plan accordingly. He will then be aware of the requirement that he must maintain his temporary status to apply for permanent resident status. Aliens acting in bad faith will thus meet the requirements and will continue to make their applications for adjustment under the proposed section as easily as under the current section.

On the other hand, the alien who does not intend to remain in the United States before he enters will not have knowledge of the requirements necessary for adjustment of status. He will only investigate the procedure after he encounters the circumstances that cause him to seek adjustment. It may then be too late to apply for adjustment of status. The circumstances may have caused him to violate the terms of his visa. Hence, he is automatically disqualified, regardless of the extenuating circumstances. He may have failed to maintain his temporary status by overstaying his authorized time, either intentionally or unintentionally. Regardless of whether he overstays the limit by one year or one hour, the alien is automatically denied the opportunity to *apply* for an adjustment of status. He will not even have the opportunity to submit his case to the discretion of the Attorney General. The alien who discloses his true intent upon entering the United States, thereby complying with the immigration laws, will *not* benefit by the section that was designed to aid him.

In essence, the Simpson-Mazzoli proposal places the burden of determining whether an alien is eligible for permanent residence in the United States upon the consular offices in foreign countries. The bill is designed to force greater disclosure of intent to permanently remain upon applying for a visa to enter the United

118. *See supra* note 56 and accompanying text.

States. The underlying rationale is to make adjustment of status within the United States more difficult and less attractive as an alternative to the standard immigration procedure. By making the adjustment of status procedure less attractive, the provisions will encourage the alien to apply for permanent resident status through the consular office in his own country. Therefore, the first and perhaps final decision on the matter will be made at the consular office in the alien's native country. As previously discussed,[119] this procedure lacks the safeguards available under the current adjustment of status provisions in section 245.

Adjustment of Status of Foreign Students

The Simpson-Mazzoli bill further affects the adjustment of status procedure as it applies to foreign students. The provision as initially proposed would have completely excluded *all* aliens who entered the United States under a student visa from applying for an adjustment of status to that of a permanent resident.[120] This provision was, however, slightly modified by the Senate in the passing of the bill.

There are currently two types of student visas. The first is made available to aliens planning to attend an academic institution within the United States, such as a university, college, high school, or seminary.[121] The second is available to aliens planning to pursue a course of study at a non-academic institution, such as a vocational school.[122] According to the original proposal, neither of these groups of aliens would be eligible to apply for an adjustment to permanent resident status. Instead, the students would be required to leave the United States after graduation and remain abroad for two years before applying for permanent resident status through a consular office.[123] The rationale offered for this provision is that "[t]he student visa program [has been] long subject to abuse."[124] Furthermore, this restriction would apply to

119. *See supra* text accompanying notes 89-111.
120. S. 2222, 97th Cong., 2d Sess. § 212(b) (1982).
121. Immigration and Nationality Act § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1611.
122. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 101(a)(15)(M), 95 Stat. 1611, 1611.
123. S. 2222, 97th Cong., 2d Sess. § 212(b) (1982).
124. 128 CONG. REC. S10311 (daily ed. Aug. 12, 1982) (statement of Sen. Thurmond, co-sponsor of the bill). There were no statistics or other forms of support

all aliens who hold a student visa regardless of the date they entered the United States.[125]

It would seem that the immigration of intelligent and aspiring students would be encouraged in the national interest. But, it may be very beneficial to the students' native country to require that the student leave the United States and remain in his own country while applying for permanent resident status. Therefore, the students would use their new education and skills in their native country, at least for a short time.[126] Both of these arguments were brought out in the Senate debate of the bill. Senator Edward M. Kennedy expressed concern for the effect of the provision upon the national interest. He contended that the "provision is too restrictive, especially in areas such as engineering, computer sciences, and other areas of high technology, where the United States is facing critical shortages."[127] The Senator asserted that such students do not return to their homeland as desired. Instead, by requiring these students to leave the United States after graduation rather than allowing them to adjust their status, the United States will lose talented individuals to foreign powers.[128]

As a consequence of this debate, the Simpson-Mazzoli proposal was passed by the Senate in a slightly modified form. The provisions excluding students from adjusting their status now contain an exception. The Attorney General would be allowed to waive the two-year foreign residence requirement if he deems it "to be in the public interest."[129] Even so, the waiver provision is only available to academic students; no similar consideration is af-

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offered to indicate the extent of abuse of the process by students as opposed to other temporary visa holders.

125. S. 2222, 97th Cong., 2d Sess. § 212(c)(2) (1982).

126. Perhaps part of the theory behind this provision is similar to that expressed by Congress regarding exchange visitors in 1956. By the Act of June 4, 1956, Congress imposed a requirement that persons who had entered the United States under the provisions of the United States Information and Educational Exchange Act of 1948 must reside abroad for two years before they would be eligible to receive an immigrant visa or a nonimmigrant visa as a temporary worker. "The purpose of this requirement . . . was to prevent exchange visitors from defeating the objectives of the exchange program by accepting permanent or temporary employment in the United States at the end of their visit, rather than making their newly acquired knowledge and skills available to their own country." E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 27 (3d ed. 1975).

127. 128 CONG. REC. S10314 (daily ed. Aug. 12, 1982) (statement of Sen. Kennedy).

128. *Id.* The bill "ignores the current reality that exceptionally qualified students do not return to their homes in the Third World or elsewhere; they simply move to Japan or Europe and use their skills to help those nations compete against the United States."

129. S. 2222, 97th Cong., 2d Sess. § 212(a)(4), 128 CONG. REC. S10627 (daily ed. Aug. 17, 1982).

forded vocational students. Furthermore, the Attorney General may grant a waiver to academic students only if the student has a degree in natural science, mathematics, computer science or engineering, and has been offered either a teaching position in that field, or a research or technical position in that field with a United States employer.[130] Alternatively, the Attorney General may grant a waiver to a student who has obtained a degree in natural science, computer science, or a field of engineering or business, and will recieve no more than four years of training by a United States employer which will enable the student to return to his native country and be employed by the same employer.[131] While this eases the impact, the new provision still does not recognize that a student may encounter compelling circumstances necessitating a change of status *other* than those listed in the exceptions. The provision still does not allow an Attorney General to exercise true discretion for humanitarian reasons.

Related Procedural Changes Affecting Adjustment of Status

The Simpson-Mazzoli bill would make two more revisions which would affect adjustment of status even though the revisions actually affect other sections. The proposal would reduce the amount of time in which the alien who is denied an adjustment may appeal the decision to the court of appeals.[132] Also, the proposal would change the burden of proof necessary to find an alien deportable.[133]

The change in the time limit in which to appeal an adverse decision affects the alien who has been denied an adjustment of status and ordered deported.[134] It is only in the context of a deportation order that an alien has a right to judicial review of a denial of adjustment of status.[135] The current appeal procedure allows the alien up to six months to file an appeal.[136] The Simpson-Mazzoli proposal would reduce this time limit to thirty

130. *Id.* § 212(a)(4)(A).
131. *Id.* § 212(a)(4)(B).
132. S. 2222, 97th Cong., 2d Sess. § 123(e) (1982).
133. *Id.* § 122.
134. Appeal is only available after an order of deportation. *See supra* note 93. Therefore, the alien who has been denied an adjustment of status but has not violated the terms of his visa or has not been subjected to deportation proceedings for any reason is not affected by this measure.
135. *See supra* note 93.
136. Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a(a) (1976), *as*

days.[137] This reduction is not likely to allocate the time necessary for ensuring proper filing and effective assistance of counsel.

If an alien is denied an adjustment of status and subjected to deportation proceedings, the Simpson-Mazzoli proposal would facilitate a finding of deportability. The present provisions require that the INS show that the alien is deportable by "reasonable, substantial and probative" evidence.[138] The Simpson-Mazzoli bill would require only "substantial" evidence, and would reduce the burden of proof to a mere preponderance of the evidence.[139] Also, because the federal judicial system is restricted in its review to the evidence in the record, this lower standard of proof will adversely affect the alien's case on appeal.

CONCLUSION

The present system of immigration laws and procedures may have its conflicts and frustrations, but it is a system that has been built slowly and carefully over decades. It is difficult at best to strike the proper balance between protection of individuals' immigration rights and maintenance of an effective immigration system.

It is true that there is great disparity between the rights and remedies afforded those aliens within the United States as opposed to those aliens outside the country who seek permanent resident status. This disparity should not be countered by reducing the rights of those who are present within the United States. Instead, to remove the incentive to manipulate the system, more rights and alternatives should be made available to those aliens applying for permanent resident status through the consular office. Those aliens who comply with the immigration laws should be afforded some relief from an adverse decision. Because there is the potential for an arbitrary consular decision, there should be some means of administrative review. The body vested with this power should have the authority to reverse a consular decision rather than merely suggest a modification.

Additionally, the removal of discretion in determining worthy cases may be devastating. Restricting adjustment of status procedures to those aliens who maintain their temporary status in the United States will reduce the burden of the INS in screening applicants. Nevertheless, the proposal creates a marked distinction

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amended by Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

137. S. 2222, 97th Cong., 2d Sess. § 123(e) (1982).

138. Immigration and Nationality Act § 242(b)(4), 8 U.S.C. § 1252(b)(4) (1976).

139. S. 2222, 97th Cong., 2d Sess. § 122 (1982).

between qualified and unqualified applicants. This result is clearly contrary to the original intent behind section 245 — aiding the alien within the United States who is worthy of an adjustment of status. The use of discretion is necessary to determine the worthiness of any given case. Requiring the alien to continue to maintain his temporary status while in the United States, coupled with disqualifying those who fail to do so regardless of their reason, ignores the aliens who may be deserving of an adjustment of status. Although many undeserving aliens may benefit under the current system, which itself depends mainly upon the discretion of the INS, the solution proposed by the Simpson-Mazzoli bill is far too overbroad.

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