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### A Beginner's Guide to Business-Related Aspects of United States Immigration Law, 5 Nw. J. Int'l L. & Bus. 844 (1983)

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# A Beginner's Guide to Business-Related Aspects of United States Immigration Law

*Paul T. Wangerin\**

## I. INTRODUCTION

Recent media references to various aspects of United States immigration law—important legislative changes recently suggested by introduction of the Simpson-Mazzoli “Immigration Reform and Control Act”;<sup>1</sup> the crisis involving refugees arriving in the United States from Cuba, Haiti and Southeast Asia; massive investments in domestic companies by citizens or residents of Middle Eastern oil-producing countries; potential reaction by European business people to President Reagan’s changing stance regarding investments in the Soviet Union; the economic policies of France’s socialist government; and the United States’ deteriorating relation with certain Central and South American countries—have drawn renewed attention to the legal barriers that foreign individuals or corporations may encounter if they wish to enter the United States to visit, live, work, or invest. Furthermore, as numerous United States and foreign-based corporations have reflected upon the events generating such media references they have begun to re-examine their own plans regarding present or potential employment of foreign people within the United States.

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<sup>1</sup> Immigration Reform and Control Act of 1983, S. 529, 98th Cong., 1st Sess. (Simpson Bill); H.R. 1510, 98th Cong., 1st Sess. (1983) (Mazzoli Bill) [hereinafter cited as Immigration Act]. A select commission on immigration issues wrote a massive report, and numerous appendices, in preparation for hearings on this Act. SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTERESTS (1981); STAFF ON SELECT COMM’N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981).

Media references have not been the sole cause of increased interest in immigration issues. International business or financial transactions often involve travel to the United States by foreign individuals, and thus potential immigration problems. In recent years, many business people have realized that careful planning for international transactions involving United States interests ought to include at least token consideration of United States immigration laws.

Finally, because international trade and business have increased, foreign and domestic business people have increasingly had to cope directly or indirectly with the United States government's Immigration and Naturalization Service ("INS").<sup>2</sup> As a result of their experiences with INS, many business people have not only concluded that United States immigration law is itself an extraordinarily complex maze, but also that some INS bureaucrats do everything possible to make that maze impenetrable.<sup>3</sup>

This article provides a brief introduction to some major business-related aspects of current United States immigration law.<sup>4</sup> It is only an introduction, however, and should be treated only as such.

Two important caveats must preface what follows. First, both the law itself and many secondary authorities define countless exceptions and

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<sup>2</sup> The INS is a division of the Department of Justice, REORG. PLAN NO. V OF 1940, 3 C.F.R. § 1304 (1938-1943 compilation), *codified at* 8 U.S.C. § 1551 (1982). Although the INS is the federal department principally responsible for immigration matters, no less than ten federal agencies have responsibilities in that area. See J. WASSERMAN, IMMIGRATION LAW & PRACTICE 12-38 (3rd ed. 1979) [hereinafter cited as IMMIGRATION L. & PRAC.].

<sup>3</sup> See generally U.S. COMM'N ON CIVIL RIGHTS, TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 34-40, 57-78, 117-29 (1980); SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, at 238; STAFF OF SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, app. H, at 298-301; Flores, *Misconduct by Immigration Officers: Exclusion of Evidence in Deportation Hearings*, 5 HOUS. J. OF INT'L L. 287 (1983); Comment, *Selective Enforcement of Immigration Laws on the Basis of Nationality as an Instrument of Foreign Policy*, 56 NOTRE DAME LAW. 704 (1981); 5 IMMIGRATION & NATIONALITY L. REV. 327 (1982); Comment, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 NOTRE DAME LAW. 731 (1981); Gotcher, *Review of Consular Visa Determinations*, 60 INT'L REL. 247, 247 n.2 (1983); Comment, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1133 (1980); Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.L. REV. OF L. & SOC. CHANGE 107, 124-26 (1978). Some informed observers consider that the INS serves people worse than any other federal agency. See U.S. COMM'N ON CIVIL RIGHTS, CALIF. ADVISORY COMM., A STUDY OF FEDERAL IMMIGRATION POLICIES AND PRACTICES IN SOUTHERN CALIFORNIA 39 (1980).

<sup>4</sup> There are many restrictions regarding the type of investments that foreign persons can make in the United States, for example, restrictions regarding the acquisition of land. See, e.g., Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 AM. J. OF COMP. L. 39 (1980), *reprinted in* 4 IMMIGRATION AND NATIONALITY L. REV. 1 (1981). See generally 1 ALIEN UNDER AMERICAN LAW, *infra* note 5, ch. 5. These restrictions lie beyond the scope of this article.

variations for the rules and laws described herein.<sup>5</sup> Any actual practice

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<sup>5</sup> Administrative decisions of the Immigration and Naturalization Service are collected in a multi-volume Reporter. U.S. DEP'T OF JUST., ADMINISTRATIVE DECISIONS UNDER THE IMMIGRATION AND NATIONALITY LAW. Recently decided cases circulate in loose-leaf fashion in a periodical entitled INTERIM DECISIONS. See generally P. PATEL, PATEL'S DIGEST OF ADMINISTRATIVE DECISIONS UNDER THE IMMIGRATION AND NATIONALITY LAWS (1982); D. DANILOR, UNITED STATES IMMIGRATION LAW CITATOR (1982); P. PATEL, PATEL'S CITATIONS OF ADMINISTRATIVE DECISIONS UNDER IMMIGRATION AND NATIONALITY LAWS (1982).

Legislative documents relating to immigration issues have been collected in O. TRELIS, J. BAILEY, W. JOHNTING & M. WHITEMAN, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS.

Numerous administrative regulations and related documents also affect immigration issues. Many of these materials—including, for example, regulations of the INS, the Departments of State and Labor, the Department of Labor's TECHNICAL ASSISTANCE GUIDE, INS OPERATIONS INSTRUCTIONS and the State Department's FOREIGN AFFAIRS MANUAL—are reproduced in a multi-volume immigration law treatise, C. GORDON & H. ROSENFELD, IMMIGRATION LAW & PROCEDURE (1982) [hereinafter cited as IMMIGRATION L. & PROCEDURE]. The treatise also contains extensive discussions of many of the ideas briefly developed in this article. Another treatise also deals in two volumes in a more general fashion with some of the immigration issues discussed herein. A. MATHARIKA, THE ALIEN UNDER AMERICAN LAW (1980) [hereinafter cited as ALIEN UNDER AMERICAN LAW]. In 1984, the INS released, under the Freedom of Information Act, THE INS EXAMINATIONS HANDBOOK. This is an extremely important tool for lawyers preparing petitions. See generally THE INS EXAMINATIONS HANDBOOK, 3 IMMIGRATION L. REP. 65 (1984).

A multi-volume loose-leaf immigration law service has recently been published and is continually updated. FED. IMMIGRATION L. REP. (CCH). This work collects statutory provisions; regulations, including the TECHNICAL ASSISTANCE GUIDE, INS OPERATIONS INSTRUCTIONS, and FOREIGN AFFAIRS MANUAL; and digests of cases under specific topic headings.

Important book length secondary resources extensively addressing business-related aspects of United States immigration law include: F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (3rd ed. 1975); A. FRAGOMAN, A. DEL REY JR. & S. BERNSEN, IMMIGRATION LAW & BUSINESS (1983) [hereinafter cited as IMMIGRATION LAW & BUSINESS]; A. GELLMAN, K. COHEN, J. GRASNICK, UNITED STATES IMMIGRATION FOR BUSINESS, INVESTORS AND WORKERS (1981) [hereinafter cited as IMMIGRATION FOR BUSINESSES]; IMMIGRATION L. & PRAC., *supra* note 2; 15 P.L.I. IMMIGRATION & NATURALIZATION INST. (1982); 16 P.L.I. IMMIGRATION & NATURALIZATION INST. (1983); 17 P.L.I. IMMIGRATION & NATURALIZATION INST. (1984). HAMLINE UNIVERSITY SCHOOL OF LAW, IMMIGRATION LAW INST. (1982) [hereinafter cited as HAMLINE INST.]; AMERICAN IMMIGRATION LAWYERS ASS'N 37TH ANNUAL SYMPOSIUM (1983) [hereinafter cited as A.I.L.A. SYMPOSIUM]. Although these books might become somewhat dated should Congress pass the Simpson-Mazzoli Act, they contain much information that remains applicable.

An extensive bibliography of immigration materials is collected in E. SCHANDER, IMMIGRATION LAW & PRACTICE IN THE UNITED STATES: A SELECTIVE BIBLIOGRAPHY (1979). Another extensive bibliography is included in IMMIGRATION L. & PRAC., *supra* note 2, at 585-607.

Additional treatments of business-related issues include Cox, *Planning for Immigration: A Business Perspective*, CENTER FOR IMMIGRATION POLICY & REFUGEE ASSISTANCE, GEORGETOWN UNIVERSITY, A NEW IMMIGRATION POLICY FOR THE UNITED STATES (H. Bailey, S.J. ed. 1982); Weiss, *Immigration by Foreign Businessmen and Investors*, 56 FLA. B.J. 421 (1982); Barbary, *Immigration Law Concern for Business and Corporation Lawyers*, 46 TEX. B.J. 309 (1983); Danilov, *Gaining Admission to the United States for Businessmen & Workers*, 15 TRIAL 41 (1979); Schmitz, *Immigration Possibilities for Foreign Investors*, 25 PRAC. LAW. 73 (1979); Cambell & Taggart, *The International Business Client and Immigrant Visas*, 11 COLO. LAW. 2545 (1982).

Three important periodicals provide extensive information about general immigration law matters, including business-related issues. The most important of these is INTERPRETER RELEASES,

in the field of immigration law requires extensive reference to secondary materials and, almost always, retention of experienced immigration law counsel. To emphasize this point—that this article is not a practice guide, but only a starting point for understanding immigration issues<sup>6</sup>—the article provides authority by documenting general ideas rather than specific points. Readers should consult either the sources themselves or experienced counsel for details.

Second, immigration law essentially defies book-learning. Because both INS and consular officials may exercise an extraordinary degree of discretion, it is virtually impossible to predict any one official's reaction to a specific situation. The "law" or the "rules" may provide little practical help for dealing with the officials.<sup>7</sup> Furthermore, different regions of the INS or different consulates overseas may approach particular areas of the law with different interpretations.<sup>8</sup> Because of such INS idiosyncra-

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published by the American Council for Nationalities Service. Another regularly-published immigration periodical deals almost exclusively with business-related issues, IMMIGRATION L. REP., published by the immigration law firm of Fried, Fragomen, Del Rey & O'Rourke. The TRANSNAT'L IMMIGRATION L. REP., a short bulletin issued on a monthly basis by the International Common Law Exchange Society also regularly addresses business related immigration issues.

Several scholarly journals also publish immigration law materials. The SAN DIEGO L. REV. annually publishes an entire issue on the subject. The IMMIGRATION & NATIONALITY L. REV. annually publishes commissioned articles and numerous reprints of articles from other journals. Other journals publish immigration symposiums from time to time. See, e.g., Symposium, *Immigration and Refugee Law*, 56 NOTRE DAME LAW. 614 (1981).

The World Trade Institute regularly sponsors a two-day seminar that focuses almost entirely on business-related issues. This seminar is given several times a year in various parts of the country and the Institute distributes a large looseleaf collection of materials, IMMIGRATION AND THE EMPLOYMENT OF ALIENS: AVOIDING EXCESSIVE DELAYS AND UNDUE RESTRICTIONS. The American Bar Association has also begun recently to sponsor a seminar on business-related immigration issues. Materials from this seminar may be purchased from the ABA.

A massive student work examining the rights of aliens recently appeared in the HARV. L. REV.. Although this work does not generally address business-related immigration issues, it contains elaborate discussions of many of the broader topics described in this article. *Developments in the Law—Immigration Policy & the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983).

<sup>6</sup> See, e.g., ILL. INST. FOR CONTINUING LEGAL EDUC., IMMIGRATION & NATURALIZATION PRAC. (1981); MASS. CONTINUING LEGAL EDUC., NEW ENG. L. INST., INC., IMMIGRATION L. (1980).

<sup>7</sup> An excellent discussion outlining problems potentially encountered by inexperienced business people or lawyers attempting to do immigration work without consulting experienced counsel is Roberts, *The General Practitioner—Pitfalls in Counselling Aliens and Immigrants*, 58 INT'L REL. 725 (1981). A caveat similar to the one expressed herein introduces a much longer book on the subject of business-related immigration issues. IMMIGRATION FOR BUSINESSES, *supra* note 5, at vii.

<sup>8</sup> Kramer, *Regional Office Jurisdiction and Organization—An Overview*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 572-77; Kramer, Webber, Feiertag & Weiss, *Regional Variations in Processing Immigration Cases*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 578; Wildes, *Utilization of Nonimmigrant Visa Categories "E", "H", & "L"*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 65, 113 (1982); ILL. INST. FOR CONTINUING LEGAL EDUC., IMMIGRATION & NATURALIZATION PRAC., *supra* note

cies, and the way the officials apply them,<sup>9</sup> the experience of actually dealing with individual immigration and consular officials may be the only satisfactory way of learning immigration law.<sup>10</sup>

## II. NONIMMIGRANTS AND IMMIGRANTS

United States law establishes two categories for foreign people ("aliens") who wish to visit, work, live, or invest in the United States. One of those categories, "nonimmigrant," encompasses aliens who wish to enter and remain in, the United States for "temporary" periods of time.<sup>11</sup> In immigration law terminology, "temporary" can refer to stays as short as a few days to or as long as ten years. "Immigrant," the other category, includes any aliens who wish to remain in the United States indefinitely or "permanently".<sup>12</sup>

### A. Nonimmigrants

Most aliens who wish to come to the United States for temporary stays must obtain nonimmigrant "visas."<sup>13</sup> There is no limit to the

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6, at 7-5 (1981). The organizational and regional structure of the INS and other agencies administering immigration policies is detailed in IMMIGRATION L. & PRAC., *supra* note 2, at 11-37.

<sup>9</sup> A humorous short essay by a foreign-born immigration attorney catches some of the flavor of this problem. Cazorla, *The Art of Making Things Difficult*, 2 TRANSNAT'L IMMIGRATION L. REP. 1 (1980).

<sup>10</sup> For example, a certain amount of "forum shopping" may be available to take advantage of INS regional differences. Another example involves determination of an alien's "home country." See 8 U.S.C. § 1152(b) (1982).

About ten years ago, Judge Duniway of the Ninth Circuit Court of Appeals suggested that logic does not always control immigration law and practice. "[W]e are in the never-never land of the Immigration & Nationality Act, where plain words do not always mean what they say." *Yuen Sang Low v. Attorney General of United States*, 479 F.2d 820, 821 (9th Cir. 1973). Ten years have not lessened the accuracy of that comment.

<sup>11</sup> Immigration and Nationality (McCarran-Walters) Act of 1952, 8 U.S.C. § 1184 (a) (1982) [hereinafter cited as INA] empowers the Attorney General to issue regulations regarding the admission to the United States of nonimmigrants. See *Nonimmigrant Classes*, 8 C.F.R. §§ 214.1-5 (1984). A brief but excellent overview of the development of the immigration law is Roberts, *The U.S. Immigration System: An Introduction*, HAMLIN INST., *supra* note 5, at 1, 3-42 (1982). See also 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 1.1 *et seq.* An exhaustive treatment of the development of immigration law is E. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981) [hereinafter cited as IMMIGRATION POLICY].

<sup>12</sup> The INA defines nonimmigrants in § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982). All other aliens who enter the United States are considered immigrants. INA § 214(b), 8 U.S.C. § 1184(b) (1982). See generally 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.1b.

The Select Commission's final report contains an extensive discussion of immigrant and nonimmigrant issues. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, *supra* note 1, at 87-144 (immigrants); *Id.* at 201-32 (nonimmigrants).

<sup>13</sup> 22 C.F.R. §§ 41.1-145 (1984). See generally IMMIGRATION L. & PRAC., *supra* note 2, at 47; 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.31; 2 FED. IMMIGRATION L. REP. (CCH) ¶¶ 15,000-15,547 (1982).

number of available nonimmigrant visas. Aliens obtain visas by petitioning at a United States Department of State consulate in a foreign country. As will be described below, State Department consular officials have authority to approve certain types of visa petitions; for other types, however, they may not grant petitions until they receive permission from a United States office of the INS. Following consular approval, or INS approval in situations where required, consular officials stamp the appropriate visa into the alien's passport and write an "expiration date" beneath it. In many cases, consular officials set expiration dates many years in the future. Those visas are called "multiple entry" visas.

Although nonimmigrant visas allow aliens to travel to the United States, i.e. to board a plane or boat destined for the United States, they do not guarantee entry.<sup>14</sup> At United States ports-of-entry INS officials examine the pertinent visa stamps. Sometimes, they may interrogate an alien about the reason the alien gave the consular officials for wanting or needing the visa. The INS calls this process an "examination and inspection."<sup>15</sup> On occasion, INS officials refuse to admit an alien to the United States after inspection. They refuse if they believe that an alien does not in fact qualify for the visa stamped into his or her passport, or if they believe that the alien plans to act in the United States in a manner inconsistent with the visa. In INS terminology, the process of prohibiting aliens from entering the country is called "exclusion."<sup>16</sup>

After INS officials complete an inspection, they give the entering nonimmigrant a small white card, the "Arrival-Departure Record." It is usually stapled into the page of the passport where the visa is stamped. These records, or I-94 cards, are most important for their specification of

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<sup>14</sup> 8 U.S.C. § 1201(h) (1982).

<sup>15</sup> INA § 233(a), 8 U.S.C. § 1223(a) (1982); IMMIGRATION L. & PRAC., *supra* note 2, at 203; ILL. INST. OF CONTINUING LEGAL EDUC., IMMIGRATION & NATURALIZATION PRAC. § 2.55 (1981); 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at §§ 2.32 *et. seq.*, 3.14-16; Roberts, *The U.S. Immigration System: An Introduction*, HAMLIN INST., *supra* note 5, at 1, 23-4. Fragoman, *Entry Into the United States: Inspection, Deferred Inspection & Exclusion Proceedings*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 463 (1984).

<sup>16</sup> INA § 212, 8 U.S.C. § 1182 (1982). 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at §§ 3.17-24; Roberts, *The U.S. Immigration System: An Introduction*, HAMLIN INST., *supra* note 5, at 1, 23-24.

Several students have recently published elaborate essays dealing with the constitutional power to exclude aliens. Although each deals primarily with the exclusion of Cuban refugees, and is highly critical of the exclusion of refugees, they contain extensive discussions of the entire exclusion process. 82 COLUM. L. REV. 957 (1982); 70 GEO. L.J. 1303 (1982); 62 B.U.L. REV. 553 (1982); 15 U.C.D. L. REV. 723 (1982).

The history of the development of the idea of exclusion is contained in IMMIGRATION POLICY, *supra* note 5, at 405-41. See also STAFF OF SELECT COMM'N ON IMMIGRATION AND NATURALIZATION POLICY, *supra* note 3, at app. G.

an alien's required "departure date." A departure date is a date before which the alien must leave the country. INS officials often assign an I-94 departure date far earlier than the visa expiration date. Because the visa date refers to entry, however, and the I-94 date refers to the duration of the stay, the I-94 date controls.

An alien who wishes to stay in the United States beyond his or her I-94 departure date must petition the INS before that departure date for an "Extension of Stay" or for a "Change of Nonimmigrant Classification."<sup>17</sup> INS will not grant such petitions for extensions or changes unless the alien's passport is valid for a period of at least six months beyond the date the alien requests as a new departure date. A nonimmigrant alien who remains in the United States after the departure date specified on his or her I-94 card without having petitioned for a visa extension or change generally becomes subject to deportation. The INS usually concludes, however, that an alien who has filed a timely extension or change petition and remains in the United States subsequent to his or her I-94 departure date while awaiting decision on the petition does not become subject to deportation.

### 1. *Important Business-Related Nonimmigrant Visas*

Certain nonimmigrant visas play particularly important roles in the context of international business and investment.<sup>18</sup> These visas, the "B," "E," "H," "B-1[H]," and "L," are described below. It is important to realize from the start that in some circumstances aliens may qualify for more than one type of non-immigrant visa. In those cases, the choice of visa may depend on which visa best serves both the alien and the alien's present or potential employer.

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<sup>17</sup> See generally IMMIGRATION L. & PRAC., *supra* note 2, at 3, 8, 26; 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 4.9; Hum, *Nonimmigrant Visas: Non Petition Classes: Tourists, Students, Exchange Visitors*, HAMLINE INST., *supra* note 5, at 43, 64-70.

Extension or "renewal" issues are discussed in Yelnick, *Renewal of Temporary Employment Visas*, 6 IMMIGRATION J. 1, 9 (1983). See also, ILL. INST. OF CONTINUING LEGAL EDUC., IMMIGRATION AND NATURALIZATION PRAC. §§ 2.60-63 (1981).

<sup>18</sup> See generally Bixby & Bonaparte, *Utilization of Nonimmigrant Visa Categories For Business, Employment or Investment*, 15 A.L.I. IMMIGRATION & NATURALIZATION INST. 141 (1982); *Making Active and Passive Investments in the United States: Appropriate Immigrant Status*, 1 IMMIGRATION L. REP. 25 (1982); Gordon, *Immigration Problems Confronting Foreign Personnel in the United States*, 7 N.C.J. INT'L L. & COMM. REG. 265 (1982); Goldstein, *U.S. Visas for Foreign Executives and Investors*, 2 TRANSNAT'L IMMIGRATION L. REP. 26 (1982); Fragomen, *Representing Multinational Corporations and Foreign Investors*, 14 P.L.I. IMMIGRATION & NATURALIZATION INST. 471 (1981); Cambell & Taggart, *The International Business Client and Immigration Visas*, 1 COLO. LAW. 2534 (1982).



## 2. Business ("B-1") and Tourist ("B-2") Visas

Consular officials give B-1 or B-2 visas to aliens who wish to travel to the United States for short—generally six months or less—business or pleasure trips.<sup>19</sup> These are convenient visas because consular officials often issue them on the very day the alien files an application. The alien who receives a B visa must retain residence in a foreign country and cannot work in the United States for an American employer. The alien granted a B-1 visa may, however, conduct business in the United States for short periods of time—but generally only on the condition that the alien be employed and paid by a foreign employer.<sup>20</sup>

## 3. Treaty Trader ("E-1") and Treaty Investor ("E-2") Visas

Many treaties between the United States and foreign countries provide for citizens of those countries to remain in the United States for extended periods of time. The purpose of the alien's visit must, however, be either to carry on substantial trade between his or her own country and the United States, or to manage substantial investment in the United States.<sup>21</sup>

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<sup>19</sup> INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B) (1982); 8 C.F.R. § 214.2(b) (1984); 22 C.F.R. § 41.25 (1984); 9 FOREIGN AFFAIRS MANUAL, *supra* note 5, at § 41.25. See generally Bell, *Issues in the Use of the B-1 Business Category*, 2 IMMIGRATION L. REP. 209-16 (1984); IMMIGRATION FOR BUSINESSES, *supra* note 5, at 3-5; 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.8; Hum, *Nonimmigrant Visas*, in HAMLINE INST., *supra* note 5, at 45-51; 2 FED. IMMIGRATION L. REP. ¶ 15,000 *et seq.* (1983).

<sup>20</sup> A particularly interesting case on the employment issue is *In re Martinez and Londono*, 13 I. & N. DEC. 483 (1970). Bonaparte, *Rights of the Foreign Investor Under the Immigration & Nationality Act*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 135 (1984); Fuller, *Representation of the Foreign Investors*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 105 (1984); Goldstein, *Representing the Foreign Investor*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 135 (1983); Shea, *Nonimmigrant Treaty Aliens: Treaty Traders (E-1) and Treaty Investors (E-2)*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 259 (1983); Applebaum and Yonemura, *Representing the Foreign Investor*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 315 (1983).

<sup>21</sup> INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E) (1982); 8 C.F.R. § 214.2(e) (1984); 22 C.F.R. §§ 41.40-41 (1984); 9 FOREIGN AFFAIRS MANUAL, *supra* note 5, at §§ 41.40-41. See generally Mailman, *Update on H, "L," & "E" Nonimmigrant Visas*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 315; IMMIGRATION FOR BUSINESSES, *supra* note 5, at 11-13; 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.11 *et seq.*; Myers, *Nonimmigrant Visas: Non Petition Classes Treaty Investors & Traders*, HAMLINE INST., *supra* note 5, at 77; *Issues in Qualifying for E-2 Treaty Investor Status*, 2 IMMIGRATION L. REP. 161 (1983); Wildes, *Utilization of Nonimmigrant Visa Categories "E," "H," & "L,"* 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 65 (1982); Bonaparte, *Rights of the Foreign Investor Under the Immigration & Nationality Act*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 135 (1984); Fuller, *Representation of the Foreign Investors*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 105 (1984); Goldstein, *Representing the Foreign Investor*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 185 (1983); Shea, *Nonimmigrant Treaty Aliens: Treaty Traders (E-1) and Treaty Investors (E-2)*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 259 (1983); Applebaum and Yonemura, *Representing the Foreign Investor*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 315 (1983); Goldstein, *U.S. Visas for Foreign Executives and Investors*, 2 TRANS-

Consular officials give E-1 (treaty trader) visas to those aliens who go to the United States solely for the purpose of conducting trade of a substantial nature and principally between the United States and the aliens' home countries. They grant E-2 (treaty investor) visas to those who enter the United States solely to develop and direct the operation of enterprises in which they have invested, or are actively in the process of investing, a substantial amount of capital.

Consular officials usually issue "treaty" visas within a day or two of when the application is received. The visas generally remain valid for four years. INS border officers usually admit nonimmigrants with E visas for one year stays. Nevertheless, those who hold E visas obtain extensions of stay rather easily. Moreover, they may remain in the United States as long as they qualify for the visas and retain the general intention of returning to their home country at some time in the future. They need not, however, retain residences in their home countries. It is not uncommon for treaty nonimmigrants to remain in the United States—or to enter and exit it—as temporary residents for many years. It should be noted, however, that spouses and children of treaty nonimmigrants must obtain permission from the INS in order to work in the United States.

Preparing to file an E visa application involves some of the most complex business-related issues of immigration law. Successful petitions for these visas require both extensive business and immigration planning. Although this article generally avoids the specifics of immigration law, discussion of the E visa presents a perfect opportunity to move a little deeper into the "never-never land of the Immigration & Naturalization Act."<sup>22</sup> Recently, the Bureau of Consular Affairs of the State Department issued an "explanation" of E visa issues<sup>23</sup> with regard to the E visa "develop and direct" requirement. The explanation states:

It is the Department's view, however, that given the particular realities of the corporate world, situations where the investor is a major foreign corporation call for a different analysis of the "develop and direct" criteria. Assuming that the nationality requirement is otherwise met for the invest-

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NAT'L IMMIGRATION L. REP. 26 (1982). See also IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 2.5.

In 1982, the State Department deviated from its normal practice of using the *Visa Bulletin* only for announcements of priority dates and published a lengthy informational article on E visas. This essay is reproduced as an Appendix in the April 19, 1982, issue of INTERPRETER RELEASES. *Visas: E Visas*—Section 101(a)(15)(E)(ii)—*Nonimmigrant Treaty Investors*, 59 INT. REL. 264 (1982).

<sup>22</sup> Yuen Sang Low v. Attorney General of United States, 479 F.2d 820, 821 (9th Cir. 1973).

<sup>23</sup> U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Visas: E Visas*—Section 101(a)(15)(E)(ii)—*Nonimmigrant Treaty Investors* (1982), reprinted in HAMLIN INST., *supra* note 5, at 83.

ment in the United States, the focus should be less on an arithmetical formula and more properly on corporate practice. In cases of foreign corporate investment in U.S.-based corporations, control of less than 50 percent of the stock nevertheless can sometimes give *de facto* control in the corporate world, because of the operation of stock proxies and other internal corporate control mechanisms (this again assumes "nationality" has been established for the enterprise invested in, perhaps by the fact that other foreign corporations or persons of the same nationality as the investing corporation hold enough stock so that the aggregate amount of stock held by those of the particular nationality exceeds 50 percent). A joint venture may, depending on the facts and circumstances of a particular case, meet this "develop and direct" requirement, provided that a foreign corporation can demonstrate that it has, in effect, operational control.<sup>24</sup>

It is probably accurate to say that despite the existence of that explanation, no one—certainly not the authors of that paragraph or the readers of this article, and probably not even the most experienced immigration lawyers—really understands what the "develop and direct" requirement means. And yet, countless international business and travel decisions cannot be made with any sense of certainty without understanding those criteria.

#### 4. *Temporary Worker ("H") Visas*

If potential employers want an alien to come to or stay in the United States temporarily—usually for a year or less—to work or train, they may sometimes obtain H visas on behalf of aliens.<sup>25</sup> Although the aliens still generally go to consular officials to have H visas into their passports, the employers who seek to employ such aliens must first petition INS offices in the United States for H visa approval. Generally, employers must file the applications for these visas in the INS Region where the alien will work. Once the employers have obtained INS approval, the aliens take the approvals to the consulates to obtain their visas. Unfortu-

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<sup>24</sup> *Id.* at 88.

<sup>25</sup> INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (1982); 8 C.F.R. § 214.2(h) (1984); 22 C.F.R. § 41.55 (1984). See generally *The INS Examinations Handbook: Nonimmigrant Categories*, 3 IMMIGRATION L. REP. 65 (1984); Bell, *New INS Regulations Regarding Nonimmigrant Categories*, 2 IMMIGRATION L. REP. 201 (1983); IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 2.5; Mailman, *Update on "H," "L," & "E" Nonimmigrant Visas*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 315; 1 IMMIGRATION LAW & PROCEDURE, *supra* note 5, at § 2.14 *et seq.*; Ingber, *Nonimmigrant Visas: Petition Classes: Work Visas*, HAMLIN INST., *supra* note 5, at 117; Bonaparte, *Rights of the Foreign Investor Under the Immigration & Nationality Act*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 135 (1984); Kaye, *The Representation of Professionals*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 345 (1983); Wilder, *Temporary Work Visas: The "H" Category*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 419 (1983).

See also *Obtaining Visas for Performers, Artists and Other Persons of "Exceptional" or "Distinguished" Ability*, 1 IMMIGRATION L. REP. 17 (1981); Fraade & Artran, 14 INTERNT'L LAW. 235 (1980).

nately, the process of petitioning for an H visa may take many months in some INS regions. Little can be done about these delays.

Several general rules apply to all H visa holders. First, H visas remain valid for two years, but may usually be renewed at least once. Second, like all nonimmigrants, H visa holders must at all times possess the general intent to remain only temporarily in the United States. Third, they must retain permanent residences abroad. And finally, H visa holders' spouses and children, who are classified as H-4 nonimmigrants, may not work in the United States without first obtaining INS permission.

There are three types of H visas. "Persons of distinguished merit or ability," a term generally defined to mean professionals, may qualify for H-1 visas.<sup>26</sup> Having received an H-1 visa, an alien may work temporarily in the United States for an American employer. The INS generally construes "professional" quite broadly in this context; many people who possess only college degrees may qualify.

People who do not qualify as being of distinguished merit and ability, but who nevertheless wish to work temporarily in the United States for American employers may qualify for H-2 visas.<sup>27</sup> To qualify, however, they must first undergo the process of obtaining temporary "Labor Certification," a process that purportedly demonstrates that no American workers are available to take the temporary position an alien seeks to fill.<sup>28</sup>

Finally, United States employers may obtain H-3 visas for those aliens they invite to the United States to participate in formal, organized, short-term training programs.<sup>29</sup> It is necessary to express an early word of caution about these visas. Because INS officials have come to believe that many "training programs" in fact involve substantial productive work and little actual training, they have recently begun to subject H-3 training program visa petitions to intense scrutiny.

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<sup>26</sup> INA § 101(a)(15)(H)(i), 8 U.S.C. § 1101(a)(15)(H)(i) (1982); 8 C.F.R. § 214.2(h) (1984); 22 C.F.R. § 41.55 (1984).

<sup>27</sup> INA § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii) (1982). See generally *The H-2 Category for Temporary Workers*, 3 IMMIGRATION L. REP. 1-8 (1984).

The H-2 issue—particularly as it relates to agricultural workers—has been one of the most widely discussed issues in the debate that surrounded the Simpson-Mazzoli legislation. See STAFF OF SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, at appendices D and F. See also E. REUBENS, *TEMPORARY ADMISSION OF FOREIGN WORKERS: DIMENSIONS & POLICIES* (1979).

<sup>28</sup> INA § 101(a)(15)(H)(iii), 8 U.S.C. § 1101(a)(15)(H)(iii) (1982). See also 22 C.F.R. § 41.55(c) (1984); 8 C.F.R. § 214.2(h)(4)(i) (1984).

<sup>29</sup> See notes 49-58 and accompanying text *infra*.

### 5. *Business Visitor/Temporary Worker ("B-1/[H]") Visas*

A little known provision in the United States Department of State *Foreign Affairs Manual* provides for an unusual hybrid visa that combines aspects of both the B-1 business visas and the H temporary worker visas.<sup>30</sup> This provision allows consular officials to grant B-1 visas to those aliens who want to enter the United States to work, but who could also obtain H-1 visas.

Aliens may obtain the hybrid visa by demonstrating that, other than reimbursement for expenses, they will receive neither salary nor remuneration from United States sources. The little known provision also allows consular officials to give B-1 visas to aliens already employed abroad who want to enter the United States to undertake training and who would also qualify for H-3 visas. These aliens must continue to receive their salaries from foreign employers and can receive only expenses from United States sources.

The importance of this hybrid visa should not be underestimated. Because consular officials can grant these visas directly, without obtaining prior INS approval, aliens and employers may avoid the normally lengthy H visa processing delays. A bold warning, however, must accompany any reference to this hybrid B-1 visa. Aliens attempting to enter the United States with these visas may encounter problems at inspections. Numerous INS officials apparently do not know these visas exist. They may simply refuse to allow entry on their basis.<sup>31</sup>

### 6. *Intracompany Transferee ("L") Visas*

The L visa ranks second only to the E visa in its ability to generate complicated business-related immigration problems. The literature on this visa is extensive.<sup>32</sup>

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<sup>30</sup> 9 FOREIGN AFFAIRS MANUAL, *supra* note 5, at 41.25, note 4.2; Fragoman, *Proper Utilization of the B-1 Visa*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 169 (1983).

<sup>31</sup> This writer encountered this problem on a number of occasions while practicing law in Chicago. The writer's conversations with other lawyers confirm the problem's existence.

<sup>32</sup> INA § 101(A)(15)(h), 8 U.S.C. § 1101(a)(15)(h) (1982); 8 C.F.R. § 214.2(l) (1984); 22 C.F.R. § 41.67 (1984); 9 FOREIGN AFFAIRS MANUAL, *supra* note 5, at § 41.67. See generally Mailman, *Update on "H," "L," & "E" Nonimmigrant Visas*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 315; Fragoman, *The Foreign Investor*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 105 (1984); Bonaparte, *Rights of the Foreign Investor Under the Immigration & Nationality Act*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 146 (1984); *The INS Examinations Handbook: Nonimmigrant Categories*, 3 IMMIGRATION L. REV. 65 (1984); IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 2.5. IMMIGRATION FOR BUSINESSES, *supra* note 5, at 6-10; 2 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.16B; 1 FED. IMMIGRATION L. REP. (CCH) *supra* note 5, at ¶ 13,585 *et seq.* (1983).

Stanely Mailman, an immigration law columnist and attorney, is the acknowledged expert on L

The L visa category encompasses aliens who have been continuously employed abroad for at least one year immediately preceding their application for admission into the United States, and who have been paid by firms, corporations, other legal entities or their affiliates and subsidiaries. Those aliens must fulfill three criteria. They must seek to enter the United States (1) temporarily; (2) in order to continue rendering their services to the same employers, or subsidiaries or affiliates of those employers; and (3) to hold positions characterized as managerial or executive or involving the specialized knowledge of key employees. The United States organization that intends to employ the aliens need not exist at the time of application. If it does not, however, aliens must show that formation of the organization is actively in process and that physical premises to house the new office exist.

An employers who seeks to obtain L visas for alien employees must petition for those visas at the United States INS offices in the Regions where the aliens will work. Employers should expect that INS processing delays will often require that they wait several months before obtaining L visas for aliens. Aliens who hold L visas may initially receive permission to stay in the United States for up to three years. The L visas do not require aliens to retain residences abroad. Like all other nonimmigrants, however, the L visa holders must possess the general intent to remain in the United States only temporarily. Nevertheless, while the aliens' stays must be temporary, the positions they fill need not be. Finally, members of the L nonimmigrant's family may not work in the United States without first obtaining INS permission.

Under certain circumstances, companies that regularly transfer employees from overseas can short-circuit the normal L visa application process by filing a "blanket petition." Once such-a blanket petition is approved, companies can easily and quickly obtain permission for numerous employees transfers.<sup>33</sup>

#### 7. *Miscellaneous—"F," "M," & "J"—Nonimmigrant Visas*

Several other nonimmigrant visas deserve brief comment in this analysis. All have some impact on business and employment considerations.

First, many alien students obtain F or M visas to study in the

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visas. Mailman's recent analysis of L issues, *Three Articles on Business Visas*, 59 INTERPRETER RELEASES 738 (1982), contains material similar to that he gave at the A.I.L.A. SYMPOSIUM.

<sup>33</sup> See generally 48 FED. REG. 41142 (1983); Fragoman, *Transferring International Personnel: An Update*, 16 P.L.I. IMMIGRATION & NATURALIZATION INST. 121, 124-30 (1983).

United States.<sup>34</sup> United States consulates abroad, rather than INS offices in the United States, approve student visa applications. After arrival in the United States, students generally may not work off of their school's campus without prior approval from the INS. Because students may obtain F visas only after certifying that they have sufficient funds with which to stay in the United States they can obtain permission to work only if they can show that their economic situations changed subsequent to entry to the United States. Generally, even if students receive work permission, they may work only a maximum of twenty hours per week. Students with F visas are not permitted to work during their first year of study in the United States.

Upon completion of their studies, some alien students may petition the INS for permission to accept six months of "practical training" in their chosen career with a United States employer. Students who have received a six-month extension of their stay along with permission to work may thereafter petition for one, and only one, additional six-month practical training extension.

Second, substantial numbers of scholars, scientists and professional people enter the United States each year as "Exchange Visitors." These aliens receive J visas and may work temporarily in the United States in connection with scholarly, scientific, or professional academic programs.<sup>35</sup>

One very serious problem exists, however, for businesses or individuals who wish to use exchange visitors visas. Once aliens enter the United States with J visas, they must return to their home countries and remain there for at least two years before they may petition for either a different nonimmigrant visa or for permission to remain permanently in the United States. This "foreign residence requirement" is rarely waived.<sup>36</sup>

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<sup>34</sup> INA §§ 101(a)(15)(F), (M), 8 U.S.C. §§ 1101(a)(15)(F), (M) (1982); 8 C.F.R. § 214.2(f) (1984); 22 C.F.R. § 41.45(a) (1984); 9 FOREIGN AFFAIRS MANUAL, *supra* note 5, at 41.45. *See generally* 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.12; Hum, *Nonimmigrant Visas: NonPetition Classes: Tourists, Students, Exchange Visitors*, HAMLIN INST., *supra* note 5, at 43, 51-59; 2 FED. IMMIGRATION L. REP. (CCH) ¶¶ 15,075.6-15,181 (1983); *Qualifying for F-1 Student Status and Maintaining Status Under the Law*, 2 IMMIGRATION L. REP. 178 (1983).

<sup>35</sup> INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J) (1982); 22 C.F.R. § 41.65 (1984). *See generally* Cook, *An Overview of the Exchange Visitor Program*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 362; 2 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 6.8; Hum, *Nonimmigrant Visas: Non Petition Classes: Tourists, Students, Exchange Visitors*, HAMLIN INST., *supra* note 5, at 43, 59-65; 2 FED. IMMIGRATION L. REP. (CCH) ¶ 15,165 *et seq.* (1983); *Exchange Visitors and the Two-year Foreign Residence Requirement of Section 212(e) of the Act*, 1 IMMIGRATION L. REP. 89 (1982).

<sup>36</sup> *See* Lindover, *Waivers Based Upon Exceptional Hardship*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 369.

### 8. *Nonimmigrant "Intent"*

This article has repeatedly noted that aliens who want to enter the United States with nonimmigrant visas or to remain here with them must at all times possess the intent to remain only temporarily. Because the absence of that intent may cause INS officials to invoke what is informally called the "preconceived intent" rule, possession of the intent is crucial.<sup>37</sup> Whenever aliens seek nonimmigrant visas or file applications to renew or change their visas, they must swear that they intend to be in United States only temporarily periods of time.

Nevertheless, many aliens who petition to obtain, renew or change to nonimmigrant visas, do so while possessing the preconceived intent to remain in the United States permanently. They misrepresent the nature of their intent on the various nonimmigrant petitions they file. Such misrepresentations can haunt aliens for many years.<sup>38</sup> The crisis usually occurs, however, if they attempt to obtain immigrant visas while they are present in the United States as nonimmigrants. Earlier misrepresentation may lead to denial of immigrant visas.<sup>39</sup>

#### B. Immigrants

Although most aliens who enter the United States for business or investment want to stay for only short periods of time, others either initially enter with the intention of remaining permanently or form that intention some time after their arrival.<sup>40</sup> The law calls the latter group "immigrants." Aliens may not enter the United States with the intent to

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<sup>37</sup> See generally UNITED STATES INTERAGENCY TASK FORCE ON IMMIGRATION POLICY, STAFF REPORT 104-06 (1979) (lying about intent); Schwartz, *H's & L's—Drawing the "Temporary" Line*, 5 IMMIGRATION J. (No. 3) at 6 (1982); Fragomen, *The Permanent Residency Process*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 439, 466 (1982). But see Mailman, *Update on "H," "L," & "E" Nonimmigrant Visas*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 326 (nonimmigrant intent less crucial in connection with E visas); Foster, *Adjustment of Status*, 2 TRANSNAT'L IMMIGRATION L. REP. 5, 9 (1980); INS OPERATIONS INSTRUCTIONS, *supra* note 5, at 245.3(b).

A fairly recent decision of the United States Supreme Court on a completely unrelated matter may affect the intent issue. In *Vance v. Terrazas*, 444 U.S. 252 (1980), the Court suggested that an alien's intent to relinquish citizenship need not be demonstrated only by an explicit renunciation of that citizenship. Rather, the Court said, specific acts could be used to prove that intent by implication.

<sup>38</sup> Nonimmigrants constantly face the possibility of revocation of their visas or deportation because of fraud. See 1 FED. IMMIGRATION L. REP. (CCH) ¶ 11,225 (1983); 2 FED. IMMIGRATION L. REP. (CCH) ¶13,100 (1983).

<sup>39</sup> INA § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982); 22 C.F.R. §§ 42.91(a)(19)(i), (ii), (iii) (1984).

<sup>40</sup> An excellent introduction to the entire process for obtaining permanent residence is Fragomen, *The Permanent Residency Process*, 15TH P.L.I. IMMIGRATION & NATURALIZATION INST. 439 (1982). See generally IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 3.1 *et seq.*



remain permanently until they have obtained immigrant visas. Once they have obtained immigrant visas, they become "permanent residents" and receive identification cards called "green cards,"—which are in fact red, white and blue. Aliens who become permanent residents may remain in the United States as long as they do nothing legally inconsistent with retention of that status.<sup>41</sup>

### *I. Immigrant Visas*

Although unlimited numbers of visas may be granted for nonimmigrant categories, only a limited number of visas are available each year for most types of immigrants.<sup>42</sup> Most immigrants must qualify to obtain one of less than 270,000 immigrant visas available each year.<sup>43</sup> Furthermore, most immigrants must also qualify to obtain one of the mere 20,000 visas available to citizens of each foreign country for each year. An important exception exists to this rule. The number of "immediate relative" immigrants who may enter the United States each year is not limited.<sup>44</sup> Immediate relative immigrants include children less than twenty-one years old, spouses, and parents of United States citizens.

A hierarchial preference system provides for fair allocation of each year's available immigrant visas. Six preferences exist, "first" preference being the highest and most desired. The INS determines whether an alien qualifies for a preference. Each preference describes a different reason for allowing immigrants to come to this country and each obtains a certain percentage of the total immigrant visas available. Four preferences, first, second, fourth and fifth, involve different types of relatives of United States citizens or permanent residents. (These are relatives who

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<sup>41</sup> Maintaining status as a permanent resident may pose significant problems for aliens who plan to leave the country for extended periods of time. See *Perserving Country of Residence for Naturalization Purposes*, 3 IMMIGRATION L. REP. 41 (1984); *Maintaining Status and Reentry Documentation for Lawful Resident Aliens*, 1 IMMIGRATION L. REP. 137 (1982); Liebman, *Special Planning Considerations for the Resident Alien on Foreign Assignment*, 2 TRANSNAT'L IMMIGRATION L. REP. 30 (1982).

<sup>42</sup> INA § 201, 8 U.S.C. § 1201 (1982); Joe, *Immigrant Visas and Petitions*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 30; See also IMMIGRATION LAW & PROCEDURE, *supra* note 5, at § 2.18 *et seq.*; 1 FED. IMMIGRATION L. REP. (CCH) ¶ 10,000 *et seq.* (1984).

<sup>43</sup> INA § 201(b), 8 U.S.C. § 1151(b) (1982). See also 22 C.F.R. § 42.60 (1984). See generally Joe, *Immigrant Visas & Petitions*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 30.

<sup>44</sup> A group of immigrants not mentioned in the text are called "special immigrants." 8 U.S.C. § 101(a)(27) (1982). Special immigrants are very specialized individuals, *e.g.*, lawfully permanent residents; government employees; former citizens. Special immigrants account for few entries into this country and inclusion of some of them in the overall ceiling should have little impact on the number of visas allowed. See *The Immigration Reform and Control Act of 1982: A Summary of the Proposed Legislation*, 1 IMMIGRATION L. REP. 81, 82-83 (1982). See generally 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 2.19; 1 FED. IMMIGRATION L. REP. (CCH) ¶¶ 10,063-10,095.4 (1983).

are not "immediate" relatives.) The other two preferences, third and sixth, involve immigrants who wish to come to this country to work. The third preference includes "professionals" and people of "exceptional ability." (Standards for determining whether immigrants qualify for third preference status are similar but not identical to standards for determining whether nonimmigrants qualify for H-1 visas.) The sixth preference encompasses all immigrants who want to work in this country but who do not qualify for higher preferences. The Senate recently proposed<sup>45</sup> revision of that system to establish a two-part standard. One part covers "Family Reunification" and the other covers "Independent Immigrants." This new preference system, if enacted, will differ in several ways from the old one.

There are up to 350,000 visas available to family reunification immigrants<sup>46</sup> each year in the Senate bill. The exact number, however, is computed by subtracting the number of visas given to "immediate relatives" during the previous fiscal year for each country. There are four preferences in the family reunification part of the preference system. Each of these preferences describes a class of relatives, though not "immediate" relatives, of a United States citizen or permanent resident. If there are unused visas from a higher preference, they "fall down" into the lower preferences.

This system allocates only 75,000 visas to independent immigrants.<sup>47</sup> Within this category, two preferences exist. The first includes

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<sup>45</sup> S. 529, 98th Cong., 1st Sess. (1983)(Simpson Bill); H.R. 1510, 98th Cong., 1st Sess. (1983) (Mazzoli Bill). See generally *The Simpson-Mazzoli Bill, A Comparison of the House & Senate Versions*, 3 IMMIGRATION L. REP. 57 (1984).

<sup>46</sup> For discussion of the family reunification idea, see Roberts, *Text and Discussion of Simpson-Mazzoli Bill*, 59 INTERPRETER RELEASES 865 (1982), reprinted in A.I.L.A. SYMPOSIUM, *supra* note 5, at 865. Primary source materials are collected in 1 FED. IMMIGRATION L. REP. (CCH) ¶¶ 10,001-10,167 (1983).

The historical development of the family reunification policy is traced in AMERICAN IMMIGRATION POLICY, *supra* note 5, at 505-20, and in papers presented to the Select Commission on Immigration. STAFF OF SELECT COMM'N. ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, at app. D.

Knowledgeable observers suggest that the reduction of the overall number of visas available for family reunification by the number of immediate relative visas issued during the previous year may generate one of the Immigration Reform Act's biggest changes. *The Immigration Reform & Control Act of 1982: A Summary of the Proposed Legislation*, 1 IMMIGRATION L. REP. 81 (1982). Immediate relatives presently use almost half of the number of visas that allocated to, family reunification. Prior to enactment of the Immigration Reform Act, visas obtained by immediate relatives did not count as part of the overall limitation. Thus, under the new law, even though the numerical ceiling is higher, the actual number of relatives given permission to become immigrants will probably decrease. *The Immigration Reform and Control Act of 1982: A Summary of the Proposed Legislation*, 1 IMMIGRATION L. REP. 81, 82-83 (1982).

<sup>47</sup> See generally Roberts, *Text and Discussion of Simpson-Mazzoli Bill*, 59 INTERPRETER RELEASES 865 (1982), reprinted in A.I.L.A. SYMPOSIUM, *supra* note 5, at 865.

aliens of exceptional ability and professionals with doctoral degrees. Aliens within the first preference may use up to the total of 75,000. As under the previous system, the INS determines who qualifies for the immigrant preference by using standards that are similar, but not identical, to the standards used for determining whether nonimmigrants qualify for H-1 visas.<sup>48</sup> If any visas are left over from the higher preference, the second preference provides for "skilled workers."

Because the yearly demand for immigrant visas generally exceeds the yearly supply aliens often must wait several years to obtain them.<sup>49</sup> Aliens receive their immigrant visas only when visas are available for their "priority dates," the dates on which the aliens initiate the process of seeking immigrant visas. They do that either by filing a petition seeking one of the family preferences or by filing a petition for "Labor Certification." Any alien who initiates the immigrant visa application process when the various numerically limited categories have been filled must wait until all eligible aliens with earlier priority dates have obtained visas. Depending on the preference an alien seeks, the waiting process can range from no time at all to upwards of ten years. Although the aliens' immigrant visa applications are "active," they remain dormant for the entire waiting period.

Several twists in the preference system are particularly noteworthy. First, aliens often qualify for more than one preference. For example, many immigrants who qualify for one of the independent immigrant preferences may also qualify for one of the relative preferences. In fact, it is quite common for highly educated aliens seeking to emigrate to the United States to have relatives who are already citizens or permanent residents. Secondly, some aliens are citizens or residents of more than one foreign country and may qualify for the visas allocated for each country of citizenship.

## 2. *Labor Certification*

United States law subjects most non-family immigrants to a "Labor Certification" requirement.<sup>50</sup> In order to obtain permanent labor certification, individual aliens and their potential employers must establish that

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<sup>48</sup> The relationship between the H-1 nonimmigrant visa and the immigrant visa for professionals is discussed in *Qualifying As a Professional Under the Third Preference and H-1 Categories*, 1 IMMIGRATION L. REP. 9 (1981), as well as in other secondary sources. See, e.g., Joe, *Immigrant Visas and Petitions*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 30, 42-44.

<sup>49</sup> See Fragomen, *The Permanent Residency Process*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 439, 449-50 (1982); see also 1A IMMIGRATION L. & PROCEDURE, *supra* note 5, at §§ 3, 4(a).

<sup>50</sup> INA § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982); 22 C.F.R. § 42.91(a)(14) (1984). The labor

each alien's intended employment in the United States will neither displace American workers nor adversely affect American wages. Generally, they filed applications in the Regions where the aliens will work. Labor certification applications are submitted, however, not to Immigrant officials, but to officials in labor departments of various states and in regional offices of the Federal Department of Labor. Regional Certifying Officers of the federal labor department make the final determinations.

Recently proposed changes<sup>51</sup> in the immigration law would authorize the INS to eliminate the individual aspect of the labor certification process. Labor Department officials have indicated they may change the system and certify types of jobs, rather than individual jobs, often on a national or regional basis.<sup>52</sup> As a result, the particular of an individual alien's situation might then play a relatively small role.

Such a change in the process would be a welcome one indeed. Currently, the process of obtaining permanent labor certification is, at best, complex, time-consuming, and fraught with uncertainty.<sup>53</sup> Moreover, labor certification will be automatically denied for some unskilled jobs. For those jobs not automatically denied, employers must file lengthy and detailed applications to describe each individual job and to describe the

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certification process is outlined in 20 C.F.R. §§ 656.1-62 (1984). See also 2 FED. IMMIGRATION L. REP. (CCH) ¶¶ 13,500-13,655 (1983).

Extensive discussions of the labor certification procedures are contained in all of the secondary sources. Several excellent treatments of the subject are, IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 4.1 *et seq.*; Leavitt, *Labor Certification*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 10; Kaye, *Experience Gained on the Job*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 435; Litwin, *Business Necessity Overview*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 430; *Labor Certification Procedures*, 1 IMMIGRATION L. REP. 1 (1981); Kaye & Roy, *Labor Certifications: A Review of Recent Administrative Changes & Business*, 17 P.L.I. IMMIGRATION AND NATURALIZATION INST. 209 (1984). Bastore, *Labor Certification Regulations: What they Say & What They Mean*, 15 P.L.I. IMMIGRATION AND NATURALIZATION INST. 245 (1982); Panati, *Labor Certification: Procedures and Problems*, 15 P.L.I. IMMIGRATION AND NATURALIZATION INST. 337. Furin, *Immigration Law: Alien Employment Certification*, 16 INTERNAT'L LAW. 111 (1982) (brief overview of labor certificate with some business planning ideas). *The INS Examinations Handbook: Immigrant Visa Petitions*, 3 IMMIGRATION L. REP. 74 (1984). Primary source material is collected at 2 FED. IMMIGRATION L. REP. (CCH) ¶¶ 13,500-13,655 (1983).

The history of the development of the labor market policy is traced in IMMIGRATION POLICY, *supra* note 12, at 492.

<sup>51</sup> S. 529, 98th Cong., 1st Sess. (1983)(Simpson Bill); H.R. 1510, 98th Cong., 1st Sess. (1983)(Mazzoli Bill).

<sup>52</sup> Testimony given by Labor Department officials in connection with hearings held on the Immigration Reform Act indicates that the Department will accept this authority and abolish individual labor certifications. *The Immigration Reform and Control Act of 1982: A Summary of the Proposed Legislation*, 1 IMMIGRATION L. REP. 81, 85 (1982).

<sup>53</sup> See generally STAFF OF SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, at 408-09 (1981).

individual alien's qualifications. Also, the employers must place advertisements in newspapers and magazines for seeking American workers to fill the position being offered to an alien. Frequently, the Labor Department requires that applications and advertisements be rewritten and re-submitted several times. The process regularly takes a year or more to complete.<sup>54</sup>

There is yet one other caveat about the present permanent labor certification process. Immigration service policy requires labor departments to notify the INS each time they grant labor certification. As a result, aliens who obtain labor certification but who have entered and remained in the United States illegally theoretically risk triggering deportation proceedings against themselves.

There are certain circumstances under which some non-family immigrants may currently cut short the lengthy permanent labor certification application process. One such shortcut is available to immigrants who can qualify for "Schedule A" labor certification.<sup>55</sup> Because INS, rather than various labor departments, grants or denies Schedule A certification, the lengthy delays normally encountered during the normal labor certification process are virtually eliminated. Unfortunately, however, Schedule A certification applies only to a few very special types of situations.

One of those situations has particular significance for foreign business people. Aliens who have been or could be admitted into the United States as managers or executives within the "Intracompany Transferee" nonimmigrant "L" visa can qualify for Schedule A labor certification if the United States business organizations seeking to employ them have existed for at least one year. Those nonimmigrants who could obtain L visas based only on specialized knowledge or skill do not, however, qualify for Schedule A certification.

Another possible permanent labor certification shortcut involves filing of requests for "Reduction of Recruitment Efforts."<sup>56</sup> Employers who believe that their own previously conducted recruitment efforts con-

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<sup>54</sup> EMPLOYMENT AND TRAINING ADMINISTRATION, DEPARTMENT OF LABOR, TECHNICAL ASSISTANCE GUIDE NO. 656, *codified at* 20 C.F.R. §§ 656.1-.62 (1984); 2 FED. IMMIGRATION L. REP. (CCH) ¶ 13,587a-mi (1983).

<sup>55</sup> Schedule A procedures are outlined at 20 C.F.R. §§ 656.10, .22 (1984). *See also* Levitt, *Labor Certification*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 121-24, *Labor Certification Procedures*, 1 FED. IMMIGRATION L. REP. (CCH) 1, 2-3 (1981), and many other secondary sources. *See, e.g.,* Myers, *Immigrant Visas, The Labor Certification Process: Schedule A Cases*, HAMLIN INST., *supra* note 5, at 285 *et seq.*; IMMIGRATION FOR BUSINESSES, *supra* note 5, at 24-25.

<sup>56</sup> 20 C.F.R. §§ 656.10, .22 (1984). *See generally* Levitt, *Labor Certification*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 16.

clusively demonstrate that no American workers can be found to fill positions for which they wish to hire aliens, may supplement their labor certification applications with such requests. If granted, these requests may reduce the processing time for permanent labor certification applications from more than a year to less than a month. Regional Certifying Officers of the Federal Department of Labor grant or deny requests for reduction of recruitment efforts. Consequently, the standards by which these requests are reviewed may vary from one federal labor department region to another.

The process of obtaining permanent labor certification must be clearly distinguished from the process of obtaining temporary labor certification. As was noted earlier in this article,<sup>57</sup> aliens who wish to obtain H-2, "temporary worker," nonimmigrant visas must obtain temporary labor certification.<sup>58</sup> Although aliens file both types of labor certification applications with the state and labor departments, it is not surprising that temporary certification is granted much more quickly than permanent certification. Permanent certification is almost always a prelude to requests for permanent residence. Temporary certification leads only to nonimmigrant visas.

### 3. *Petitioning for Permanent Resident Status*

Once immigrants visas have become available and, if necessary, labor certification has been granted, aliens may petition for immigrant visas and become permanent residents of the United States. They may petition either at a United States consulate overseas ("Consular Processing") or at an INS office in the United States ("Adjustment of Status").

Once again, there are often delays. Those delays incident to consular processing, for example, regularly subject prospective immigrants to waiting periods of a year or more.<sup>59</sup> There are several reasons for this.

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<sup>57</sup> See Bacon, *Workshop on "H" Temporary Labor Certification*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 562.

<sup>58</sup> INA § 214, 8 U.S.C. § 1184 (1982); 8 C.F.R. § 214.2(h)(3) (1984). See 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at §§ 2.14 and 3.8; Hum, *Adjustment of Status*, HAMLIN INST., *supra* note 5, at 571-92; 3 FED. IMMIGRATION L. REP. (CCH) ¶¶ 16,000-16,091 (1983).

See also Taffet, *Processing a Visa Application with a United States Consulate*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 47. Foster, *Adjustment of Status*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 102; Fragomen, *The Permanent Residency Process*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 439, 463-73 (1982).

The history of the adjustment of status procedure is traced in IMMIGRATION POLICY, *supra* note 12, at 563-68.

<sup>59</sup> Most of the secondary sources referred to above contain extensive discussions of this problem. See, e.g., ILL. INST. FOR CONTINUING LEGAL EDUC., IMMIGRATION & NATURALIZATION PRAC. 7-6 (1981). An "insider's" view is found in Goelz, *Current Overview of Developments at the Visa Office*, 60 INT. REL. 474 (1983). The incredible numbers of visas sought can be seen by statistics for "Ac-

First, consular delays occur in part because the overseas consulates must refer the preference petitions to INS offices located in the United States. The preference petitioning process alone often takes six months or more. Secondly, consular officials usually cannot conclude their processing until all pertinent investigations by the Federal Bureau of Investigation and police have been completed. Not only do their investigations take months to complete, but they usually are not initiated until the INS has informed the consulates of preference petition approvals. Thirdly, consular posts in many countries—and particularly in Third World countries—are often swamped with immigrant visa applications.

In addition to the delays, consular processing involves one additional major drawback. For all practical purposes, there is no appeal from negative decisions. This lack of review can be the most troubling hurdle immigrant aliens encounter.<sup>60</sup>

Difficulties and delays encountered in consular processing encourage many aliens present in the United States as nonimmigrants to attempt to become permanent residents without leaving the country by filing "Adjustment of Status" applications at local INS offices, generally in the Regions where they live.<sup>61</sup> If an alien's priority date makes him or her eligible for an available visa, and if the alien has labor certification when it is needed, adjustment of status application may receive "initial" approval in just one day.<sup>62</sup> This type of very quick approval is called "one-step" processing. Such quick action is possible because the INS officials adjudicate the preference petitions and immigrant visa petitions simultaneously.

Although adjustment applications generally do not receive "final" approval until months after initial approval—and the "green cards" are not issued until several months after that—initial approval carries two important benefits.<sup>63</sup> First, INS officials usually authorize aliens to begin

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tive Immigrant Visa Applicants" as of January 1, 1982. Mexico leads the way in these statistics with over 271,000 pending applications. *Recent Significant Developments*, 59 INTERPRETER RELEASES 343, 345-46 (1982). For a general discussion of consular processing, see IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 3.8.

<sup>60</sup> For an impressive attack on the lack of review from consular processing decisions, see Gotcher, *Review of Consular Visa Determinations*, 60 INTERPRETER RELEASES 247 (1983). See also Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137 (1977). Moreover, the fact that consular officials possess enormous amounts of discretion in these matters magnifies the problems generated by nonreview. *Consular Discretion in the Immigrant Visa-Leasing Process*, 16 S.D.L. REV. 87 (1978).

<sup>61</sup> INA § 245, 8 U.S.C. § 1255 (1982); 8 C.F.R. § 212.2(e) (1984).

<sup>62</sup> See INS OPERATIONS INSTRUCTIONS, *supra* note 5, at § 245.3(b). The "one-step" process is described in Fragomen, *The Permanent Residency Process*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST., 439, 468 (1982).

<sup>63</sup> See generally INS OPERATION INSTRUCTIONS, *supra* note 5, at § 212.5(c); 2 IMMIGRATION L.

working in the United States as soon as they receive initial permanent resident status approval. Secondly, whereas most immigrants who have received initial permanent resident status approval cannot leave and then re-enter the United States until they have obtained final approval, some immigrants with initial approval may travel in and out of the country on "Advance Parole" documents. Although these documents must be specifically requested for individual cases, they do allow some immigrants to re-enter the United States without having received final approval of their immigrant petitions and without having obtained valid nonimmigrant visas.

Four additional and extremely important aspects of the adjustment of status process must also be noted. First, any aliens who are not "immediate relatives" of United States citizens and who seek an adjustment of status must certify on the adjustment of status application that they have not worked in the United States except pursuant to provisions of a valid nonimmigrant visa.<sup>64</sup> For all practical purposes, illegal employment bars adjustment of status absolutely. Therefore, any alien who has worked illegally in the United States but still seeks permanent resident status must file at a consular office. This rule both precludes those many aliens whose illegal work in the United States is obvious from even seeking adjustment of status and encourages many others to commit perjury on their applications.

Secondly, if the INS determines that an alien misrepresented intent on a nonimmigrant visa petition—the alien's having stated, for example, an intention to enter the United States for a temporary visit while actually intending to remain in the United States permanently—it may deny an immigrant visa for the alien's having perpetrated fraud.<sup>65</sup>

Thirdly, the adjustment of status procedure is "discretionary."<sup>66</sup> Thus, if the facts of an individual situation suggest that discretionary approval may not be forthcoming—when, for example, a nonimmigrant enters the United States and obtains gainful employment shortly thereafter, or seeks labor certification or a preference classification—that alien should probably avoid the adjustment of status procedure and seek permanent residence through consular processing.

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& PROCEDURE, *supra* note 5, at § 6.14-19; IMMIGRATION LAW & BUSINESS, *supra* note 5, at § 3.9; Kaufman, *Adjustment of Status*, 14 P.L.I. IMMIGRATION & NATURALIZATION INST. 302, 303 (1981).

<sup>64</sup> INA § 245, 8 U.S.C. § 1255(c) (1982); 8 C.F.R. § 245.1(b)(4) (1984).

<sup>65</sup> INA § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982). *See also* *Armenian v. INS*, 438 F.2d 1028 (3rd Cir. 1971). *But see* *Matter of Cavasons*, I & N DEC. 2750 (BIA 1980); INS OPERATIONS INSTRUCTIONS, *supra* note 5, at § 245.3(b).

<sup>66</sup> H.R. 1510, 98th Cong., 1st Sess. § 131 (1983).



Fourth, proposed legislation, if enacted, will dramatically narrow the availability of the adjustment process and limit it to aliens who have maintained a legal status continuously since entry to the United States.<sup>67</sup> The law's proposed restriction could dramatically impact upon the INS' actual day-to-day practice. Historically, aliens often fail to maintain legal status during an entire stay in the United States. Many aliens, for example, await action on labor certification requests but cannot obtain extensions of their nonimmigrant visas in the interim. Formerly, such aliens could obtain adjustment of status benefits. If the law is changed, they cannot.<sup>68</sup>

### III. EMPLOYMENT OF ALIENS

Many aliens, both immigrants and nonimmigrants, work legally in the United States in various capacities. Many, however, work illegally in the United States. It is important that both the U.S. employers and the alien employees recognize the consequences of illegal employment.<sup>69</sup>

Nonimmigrant aliens who work, illegally in the United States may encounter serious problems.<sup>70</sup> For example, "illegally working aliens" may become subject to deportation. In addition, illegal employment may bar them from using the adjustment of status procedure to obtain permanent resident status.

The foregoing paragraph refers to "illegally working aliens." The words "illegally working" illustrate an important point. Most people think of illegal aliens only as individuals who slip across borders at night or who secretly overstay their authorized stays. Although those individuals may indeed be illegal aliens, aliens in other contexts may be illegal working aliens. For example, any corporate executive who enters the United States as a temporary B-1 business visitor, accepts new employment in the United States, and then begins working without waiting to obtain INS clearance, engages in illegal employment. Also, students who work without INS permission work illegally. Spouses of E, H, or L non-

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<sup>67</sup> This aspect of the proposed law, and the anticipated problems were addressed in *Text and Discussion of Simpson-Mazzoli Bill*, 59 INTERPRETER RELEASES 248, 251-52.

<sup>68</sup> INA § 245(a), 8 U.S.C. § 1255(a) (1982). See generally 1 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 7.7(d). A particularly interesting case on this point is *In re Tonga*, 12 I. & N. Dec. 212 (BIA 1967).

<sup>69</sup> Casad, *Alienage & Public Employment: The Need for an Intermediate Standard in Equal Protection*, 5 IMMIGRATION & NATIONALITY L. REV. 505; Horwitch, *Aliens-Labor Relations—National Labor Relations Act—Protection of Illegal Aliens*, 5 IMMIGRATION & NATIONALITY L. REV. 543. See also Richards, *Public Employment Rights of Aliens*, 34 BAYLOR L. REV. 371 (1982); *Equal Protection for Aliens in Employment and Benefit Programs*, 2 IMMIGRATION L. REP. 170 (1983).

<sup>70</sup> *Earle v. United States*, 254 F.2d 384 (2d Cir. 1958); *In re Wong*, 11 I. & N. Dec. 704 (BIA 1966).

immigrant visa-holders engage in illegal work if they accept part or full-time employment without first obtaining specific permission for it from the INS. Finally, E, H or L nonimmigrants engage in illegal work if they do any work other than the type specifically described in the petitions originally submitted to obtain their visas or if they work for any employers other than their original petitioning employer.

Those who employ illegally working aliens may also encounter problems. Although at the present time, no sanctions exist against employees who hire illegally working aliens, the Immigration Reform Act<sup>71</sup> proposes a series of increasingly severe penalties for knowingly employing aliens not authorized to work. Because this change in the law aroused some of the most controversial immigration reform debate, this author expects there to be extensive discussion of the penalty system in both lay and professional periodicals. This article will not discuss the penalties further.

There is yet one other subtle but important employment issue to discuss. Many immigration lawyers and INS officers recognize that a substantial number of wealthy American business and professional people employ illegal aliens or illegally working aliens as live-in domestic servants. Many of those aliens first entered the United States as visitors for pleasure, then overstayed their visas, and now live and work illegally in the United States.<sup>72</sup> Because of the extreme difficulty of obtaining permission from the INS for these aliens to work legally as live-in domestics, many employers encourage these aliens to conceal their illegal status and advise them, for example not to file tax returns or to apply for social security numbers.<sup>73</sup>

Naturally, illegal aliens risk serious consequences for such conduct. More important for the purposes of this article, however, are the possible consequences to employers. United States immigration law makes it a criminal offense to "harbor" an illegal alien.<sup>74</sup> The term "harboring" has

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<sup>71</sup> H.R. 1510, 98th Cong., 1st Sess. § 101 (1983). Until the law was recently changed, only farm labor contractors suffered penalties under federal law for employing illegal aliens. 29 U.S.C. § 1816(a) (1982). On the issue of employer sanctions, see generally U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 57-78 (1980); STAFF OF SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, *supra* note 1, at app. E.

<sup>72</sup> See Mailman, *'Au Pair'—Valid Visitor or Unauthorized Worker*, 188 N.Y.L.J. 1 (8/4/82).

<sup>73</sup> The difficult procedure for obtaining immigrant status for household domestic servants is described in Klasko, *Household Domestic Service Workers*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 443.

<sup>74</sup> INA § 274(a)(3), 8 U.S.C. § 1324 (1982); INS OPERATIONS INSTRUCTIONS, *supra* note 5, at § 103.1(a)(4). Harboring issues are discussed in many of the secondary sources. See, e.g., 2 IMMIGRATION L. & PROCEDURE, *supra* note 5, at § 9.23 *et seq.*; 1 FED. IMMIGRATION L. REP. (CCH) ¶¶ 11,505-11,515.

been interpreted to include the act of housing an illegal alien with the intent to conceal that alien's presence in the United States. Although the INS has prosecuted principally employers who have hired and concealed either prostitutes or large numbers of migrant laborers for harboring, the possible future application of the harboring provision to live-in domestic servant situations ought not be overlooked.

#### IV. TAX CONSEQUENCES

The tax consequences of various immigrant and nonimmigrant will be addressed here in only the most general way. The law is extremely complex.<sup>75</sup> With this important caveat in mind, however, the basic rule can be simply stated. For resident aliens, the United States taxes all income earned worldwide. It simply grants them tax credits for taxes already paid overseas. For nonresident aliens, however, the United States taxes only income earned within the United States or income effectively connected with United States trade or business. To determine whether an alien is a resident or nonresident, the Internal Revenue Service may, but need not, accept INS rulings and classifications of immigrants and nonimmigrants.

Even from the extreme simplification of the tax rule just stated, it should be clear that tax considerations may sometimes dramatically affect an individual alien's decision about whether to seek immigrant or nonimmigrant status in the United States. Consequently, every situation involving a business-related aspect of immigration law should include examination of tax consequences.

#### V. CONCLUSION

Without doubt, foreign and domestic business people and companies that wish to engage in international business transactions between the United States and foreign countries encounter formidable obstacles in the United States Immigration laws. Those obstacles arise in two categories.

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<sup>75</sup> Tax issues are discussed in 2 IMMIGRATION LAW & BUSINESS, *supra* note 5, at 9-1. See also Grunblatt, *United States Taxation of Foreign Persons*, A.I.L.A. SYMPOSIUM, *supra* note 5, at 217-26 (1983); Gornall & Copenhaver, *A Practitioner's Guide to United States Employment Taxation of Nonresident Aliens Working in the United States*, 9 GA. J. OF INT'L & COMP. L. 21 (1979), reprinted in 4 IMMIGRATION & NATIONALITY L. REV. 639 (1981); Kirios, *Taxation of the Foreign National*, 17 P.L.I. IMMIGRATION & NATURALIZATION INST. 181, 208 (1984). Creed, *Tax Ramifications of Immigration Status*, 15 P.L.I. IMMIGRATION & NATURALIZATION INST. 477 (1982); Comment, *To Be or Not to Be A Resident—Tax is the Question*, 17 SAN DIEGO L. REV. 149 (1979); Dwyer, *U.S. Income Tax Planning with Respect to U.S. Investments by Nonresident Aliens and Foreign Corporations*, 59 INT. REL. 825 (1982); Fisher, *Federal Income Taxation of United States Citizens and Resident Aliens Who Reside Abroad*, 3 TRANSNAT'L IMMIGRATION L. REP. 1 (1982); 2 ALIENS UNDER AMERICAN LAW, *supra* note 2, ch. 6; IMMIGRATION L. & PRAC., *supra* note 2, at 519-30.

First, United States immigration law creates substantive legal obstacles for people who wish to enter the United States. Rightly or wrongly, the United States government has decided not to welcome the large numbers of foreign people who wish either to live permanently or to work temporarily in the United States. Only relatively few people can gain permanent residence status each year, and only under certain specifically defined and relatively limited circumstances can people obtain permission to work in the United States even temporarily. Furthermore, in theory, the law applies whether the foreigners be homeless boat people or wealthy business people. Little can be done to overcome substantive immigration law obstacles.

Secondly, both the extraordinary complexity of the immigration law itself and the unfortunate inability of the various INS Regions, offices and officials to implement the law in a consistent, fair and timely fashion, have created many non-substantive obstacles. Those obstacles may be overcome only through study, careful planning, perserverance and creativity. To surmount the obstacles, those who engage in international business must themselves gain general familiarity with the United States immigration law and must turn to specialists for assistance.