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Maria Zas

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CONSULAR ABSOLUTISM: THE NEED FOR JUDICIAL REVIEW IN THE ADJUDICATION OF IMMIGRANT VISAS FOR PERMANENT RESIDENCE

MARIA ZAS*

INTRODUCTION

Sarah Marie Caro, a nineteen-year-old daughter of an American citizen, is entitled to apply for permanent resident status in the United States.¹ Unfortunately, Sarah would have to leave the country for ten years before she could reunite with her family.² Although Sarah lived most of her life in the United States, she was born in Mexico and adopted when she was four years old.³ Sarah's adoptive parents mistakenly assumed that her legal status in the United States had been taken care of with the

*J.D., January 2004, The John Marshall Law School, *Magna Cum Laude*. J.D., 1986, University of Buenos Aires Law School. The author wishes to thank her family for their invaluable support and The John Marshall Law Review Board and Candidates for their editorial work.

* The functions performed by the Immigration and Naturalization Service, at the time this Comment was written, are now performed by a new Bureau within the Department of Homeland Security (DHS), which was created March 1, 2003. Not all functions have been assigned to the same Bureau. The DHS was structured in separate agencies. One of them is the Agency of Border and Transportation Security, which is divided into two Bureaus for its immigration related services. The Bureau of Immigration of Custom Enforcement is in charge of investigation and enforcement of the INA and other related federal laws. The U.S. Citizen and Immigration Services Bureau has primary responsibility for processing citizenship and permanent residency applications. See www.dhs.gov and www.uscis.gov.

1. *Compassion Please*, L.A. TIMES, Oct. 26, 2000, at B10. For a full recount of Sarah's situation, an explanation of her adoption, and the consequences of not extending the filing deadline of § 245(i) in her case, see Patrick J. McDonnell, *INS Rules-pose Catch-22 for Adoptee; Citizenship: A 10-year Ban From U.S. is Possible. The Dilemma is Common*, L.A. TIMES, Oct. 23, 2000, at A1.

2. *Compassion Please*, *supra* note 1, at B10. See also 8 U.S.C. § 1182(a)(9)(B) (2000) (providing that aliens who are unlawfully present in the United States for a period of more than 180 days or one year or more and voluntary leave the country are banned from seeking readmission for three years and ten years, respectively).

3. *Compassion Please*, *supra* note 1, at B10.

adoption.⁴ Sarah recently found out that she is an illegal immigrant.⁵ Instead of adjusting her status in the country Sarah would have to apply for an immigrant visa through consular processing abroad.⁶

But the ten-year bar is not the only problem Sarah would have to confront. Her future is in the hands of one person: the consular officer adjudicating her case.⁷ If the consular officer denied Sarah's visa, Sarah could not challenge his decision.⁸ The Immigration and Nationality Act (INA) does not provide for administrative review of consular officers' decisions.⁹ The doctrine of consular absolutism would also bar her claim from being heard in the federal court.¹⁰

Fortunately, for Sarah and other immigrants in similar situations, Congress extended the filing date for adjustment of status under INA § 245(i) to April 30 2001,¹¹ for immigrants present in the country at the time of enactment. Section 245(i) allowed immigrants living in the United States to obtain a green

4. *Id.*

5. *Id.*

6. *Id.* If Congress had not extended the deadline to file under § 245(i) of the INA Sarah could have not adjusted her status in the country because she was in unlawful immigration status at the date of filing. 8 U.S.C. § 1255(c) (2000).

7. See James R. Gotcher, *Review of Consular Visa Determinations*, 60 INTERPRETER RELEASES 247 (1983) (criticizing the absolute power of consular officers to issue or deny visas and the lack of administrative or judicial review).

8. *Ruston v. U.S. Dep't of State*, 29 F. Supp. 2d 518, 522 (D. Ark. 1998); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1156 (D.C. Cir. 1999).

9. *Ruston*, 29 F. Supp. 2d at 522; 8 U.S.C. § 1104(a) (2000) precludes the Secretary of State from administering or enforcing "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." *Id.*

10. Symposium, *Restructuring Federal Courts, Immigration: Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000). See *Saavedra Bruno*, 197 F.3d at 1156-57 (holding that an alien is not entitled to judicial review of a visa denial because Congress conferred upon consular officers "exclusive authority to review applications for visas, precluding even the Secretary of State from controlling their determinations"); *Ruston*, 29 F. Supp. 2d at 522 (holding that consular officers denials of visas are discretionary and not subject to administrative or judicial review).

11. Stanley Mailman & Stephen Yale-Loehr, *Congress Breathes Life into Immigration Bill*, N.Y. L.J., Dec. 21, 2000, at 3. Section 245(i) was enacted in 1994 to sunset on September 31, 1997. However, Congress extended the period for filing until November 26, 1997. *Id.* Later, Congress enacted a provision allowing the section to die but grandfathering indefinitely immigrants for whom a visa petition or application for labor certification was on file by January 14, 1998. *Id.* Finally the LIFE Act amendments extended the filing date to April 30, 2001, but required that immigrants filing after January 14, 1998, prove they were present in the United States on the date of the Act enactment. *Id.*

card without leaving the country,¹² and thus avoiding the three- or ten-year exile that INA § 212(a)(B) imposes on those illegal immigrants reentering United States after voluntary departure.¹³ Immigrants adjusting status under § 245(i) have a second benefit: they can challenge the INS officer's denial of adjustment of status both administratively¹⁴ and judicially.¹⁵

But the problem remains for those immigrants who could not file their adjustment of status petition under § 245(i) before April 30, 2001.¹⁶ Federal courts could put an end to part of this problem by carving an exception to the consular absolutism doctrine in cases of immigrant visa petitions for permanent residence of aliens not grandfathered by § 245(i).¹⁷

Part I of this Comment explores the statutory and common law rules applying to immigrants grandfathered by INA § 245(i), which adjusts their status to permanent residents; and, immigrants not grandfathered by § 245(i) filing immigrant visa petitions for permanent residence through consular processing. Part II explores the doctrine of consular absolutism and the arguments employed by federal courts attempting to justify the doctrine. Part II concentrates on the "political question argument."¹⁸ Part III proposes carving an exception to the doctrine in the context of immigrant visas for permanent residence for applications filed by immigrants living in the country but not grandfathered by INA § 245(i).

I. STATUTORY AND COMMON LAW RULES APPLICABLE TO ADJUDICATIONS OF PERMANENT RESIDENT STATUS UNDER INA SECTIONS 245(i) AND 204(a)

Immigrants living in the United States can obtain a green

12. 8 U.S.C. § 1255(i) (2000).

13. 8 U.S.C. § 1182(a)(9)(B) (2000).

14. CHARLES GORDON ET. AL., IMMIGRATION LAW AND PROCEDURE § 51.01 (2002), at 12. Although there is no appeal from the decision, the applicant can renew the petition for adjustment before an immigration judge (IJ) in the process of removal, and the applicant can appeal the IJ decision to the Board of Immigration Appeals (BIA). *Id.*

15. Although courts do not agree as to the extent of the review, the Supreme Court held that in the context of habeas corpus petitions courts can review the INS statutory interpretation of eligibility for discretionary relief. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

16. Barbara Hines, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J.L. & POL'Y 37, 43 (2002). Immigrants not grandfathered by INA § 245(i) must process their petitions for immigrant visa through consular processing and lose the benefits of judicial and administrative review. *Id.*

17. See generally Symposium, *supra* note 10.

18. Michael James Burt, *The D.C. Circuit Court Review August 1999-July 2000: Recent Decision of the United States Court of Appeals for the District of Columbia Circuit: Immigration Law*, 69 GEO. WASH. L. REV. 679, 681 (2001).

card only if a close relative who is an American citizen or permanent resident, or a current or future employer in the United States, files a petition on their behalf.¹⁹

The processing of such immigrants' green cards and the access to administrative and judicial review varies according to the petition filing date.²⁰ All other circumstances being identical, it is the filing deadline that determines whether an immigrant will have his case adjudicated in the United States or abroad.

A. *Permanent Residence Adjudicated By the INS Under INA § 245(i) Adjustment Of Status*

1. *Who can file*

Immigrants living in the United States who want to benefit from adjusting their status without leaving the country must meet two requirements to file under § 245(i): 1) They must have been physically present in the country in December 2000, and 2) their relatives or U.S. employer must have filed a petition before the INS prior to or on April 30, 2001.²¹ Contrary to popular belief, § 245(i) not only benefits aliens entering the country without inspection, but also students violating their student status²² or a "mother who cannot be separated from her young U.S.-citizen children."²³

2. *Process*

The process is governed by INA § 245(i).²⁴ If a U.S. citizen or permanent resident relative sponsors the immigrant, the relative

19. Margaret H. McCormick, *Keep this Immigration Provision*, CHI. TRIB., Sept. 12, 1997, at N30.

20. 8 U.S.C. § 1255(i)(1) (2000). Petitions filed after January 14, 1998, but on or before April 30, 2001, if the immigrant was present in the U.S. on December 21, 2000, are processed in the country before INS. *Id.* Petitions filed after April 30, 2001, or filed on or before that date if the immigrant was not present in the U.S. on December 21, 2000, are processed abroad before an American consulate. *Id.*

21. *Id.* The INS enacted an interim rule providing that a qualifying petition is properly filed if postmarked on or before April 30, 2001. The rule provides a list of documents needed to prove the applicant was present in the United States on December 21, 2000, such as form I-94, income tax records, rental or utility bills. GORDON ET AL., *supra* note 14, at 5.

22. Michael D. Patrick, *Significant Changes to Take Place in April*, N.Y.L.J., Mar. 24, 1997 at 3.

23. McCormick, *supra* note 19, at N30. The author explains who would benefit from the extension of § 245(i), and why such an extension is a practical and reasonable way to deal with immigrants with strong connections with the United States. *Id.*

24. 8 U.S.C. § 1255(i) (2000). Note that this section was enacted in 1994 to allow immigrants otherwise excluded from the adjustment of status process by § 245(a) and (c) to adjust their status without having to leave the country. *Id.*

must have filed an immigrant visa petition on or before April 30, 2001, and the immigrant must comply with the “physically present” requirement.²⁵ If a current or prospective U.S. employer sponsors the immigrant, the employer must file an application for labor certification by the same date.²⁶ Once these petitions are approved the immigrant can file for adjustment of status under § 245(i) at any time in the future.²⁷ Applicants must submit \$1,000 with the application.²⁸

3. Eligibility

First, the immigrant must comply with eligibility and admissibility requirements.²⁹ In this respect, the applicant is in the same position as an applicant filing an immigrant visa.³⁰ The applicant has the burden of proving admissibility,³¹ but still the

25. Jo Anne C. Adlerstein, *New Immigration Law Makes Confusion Easy*, N.J. LAWYER, Jan. 22, 2001, at 7.

26. *Id.* Any alien seeking to enter the United States to work is inadmissible unless the alien obtains a labor certification. The Department of Labor certifies that there are no sufficient workers who are willing, qualified, and available to perform the job, and that such employment will not adversely affect the wages and working conditions for similar jobs. 8 U.S.C. § 1182 (a)(5)(A) (2000).

27. GORDON ET AL., *supra* note 14, at 5. When Congress let § 245(i) die it grandfathered indefinitely immigrants if the U.S. employers or close relatives sponsoring the immigrants file the petitions by the stated date. The important date is the filing date of an “approvable” certification application not the approval date. *Id.*

28. 8 U.S.C. § 1255(i)(1)(C) (2000). The law does not require payment from a child under the age of seventeen or an alien who is the spouse or unmarried child of an individual who obtained permanent or temporary resident status under § 210 or 245A of the INA or § 202 of the Immigration Reform and Control Act of 1986. *Id.*

29. 8 U.S.C. § 1255 (i)(2)(A)(ii) (2000). To obtain a visa for permanent residence the applicant must have the required family relationship or the labor certification approved indicating there are not qualified American workers to take the position. *Id.* The applicant is not eligible if any of the grounds listed in § 1182 make him excludable. *Id.* Congress listed ten general grounds for denials: 1) health related, 2) criminal related, 3) security related, 4) public charge, 5) labor certification, 6) illegal entrants and immigration violations, 7) lack of proper documentation, 8) permanent ineligibility for citizenship, 9) aliens previously removed or unlawfully present in the country, and 10) Miscellaneous, such as polygamists. 8 U.S.C. § 1182(a)(1-10) (2000).

30. Michael D. Patrick, *Update on Adjustment of Status*, N.Y.L.J., Sep. 1, 1995, at 3. If the immigrant is ineligible to receive an immigrant visa or excludable at the port of entry he or she will not obtain either an immigrant visa for permanent residence or adjustment of status to that of a permanent resident. *Id.*

31. GORDON ET AL., *supra* note 14, at 8. The applicant must answer all the questions in Form I-485 and file the form. If there are grounds for ineligibility the immigrant must seek a waiver or other benefits available together with the adjustment application. *Id.* “For example, inadmissibility under INA § 212(a)(6)(C) for fraud might be overcome by the simultaneous filing of a

INS officer can deny the adjustment of status as a matter of discretion.³²

Second, for immigrants not subject to numerical limitation, a visa number must be available for the immigrant priority date in the preference category.³³

4. *Administrative and Judicial Review*

Although INA does not provide for administrative appeal, after a denial of his or her adjustment of status the applicant may renew his or her petition in removal proceedings before an immigration judge (IJ),³⁴ and the applicant may appeal the IJ decision against adjudication to the Board of Immigration Appeals (BIA).³⁵ The applicant can have his or her attorney present in all these instances.³⁶

Whether the INA provides for judicial review for denials of adjustment of status outside the context of removal is a highly debated matter,³⁷ although most courts believe it does not.³⁸

In the context of removal proceedings, INA provides for

waiver application under § 212(i)." *Id.*

32. Patrick, *supra* note 30, at 4. Even if the applicant meets the requirements for adjustment, approval is not automatic because it is discretionary. *Id.* Applicants with poor records such as violations of the Immigration law or poor character might fail to adjust their status. *Id.*

33. GORDON ET AL., *supra* note 14, at 9. The State Department establishes the availability of visas for the priority date published in the monthly Visa Bulletin. *Id.* The priority date is the filing date of an approved preference petition in the case of family-based visas or the date the labor certification application was filed in the case of employment-based visas. *Id.*

34. 8 C.F.R. § 245.2(a)(5) (1997). The IJ reviews the denial de novo. *Ahmed v. INS*, No. 01 C 6542, 2002 U.S. Dist. LEXIS 39 at *10 (N.D. Ill. Jan. 3, 2002)

35. 8 C.F.R. § 240.15 (1997). Note that until recently the BIA reviewed the removal and denial of adjustment of status de novo. 79 No. 35 Interpreter Releases 1345. But the Department of Justice announced that since September 2002, the BIA will no longer review factual issues de novo. *Id.* However, BIA will continue reviewing questions of law and judgments de novo. *Id.*

36. GORDON ET AL., *supra* note 14, at 12.

37. *See generally* *Mart v. Beebe*, 94 F. Supp. 2d 1120 (D. Or. 2000) (holding that district courts have jurisdiction to review final INS denials of adjustment of status when there is no removal order). The court said that to hold otherwise would carry the constitutional problem of precluding the applicant from any judicial review. *Id.* at 1124. *But see generally* *Ahmed*, 2002 U.S. Dist. LEXIS 39 (denying jurisdiction outside the context of removal proceedings).

38. *See, e.g., Ahmed*, 2002 U.S. Dist. LEXIS 39 (holding that INA precludes the courts from reviewing denials of adjustment of status, but noting that judicial review is available when appealing a BIA denial in a removal proceeding); *Zheng v. McElroy*, No. 98 Civ. 1772 (LBS), 1998 U.S. Dist. LEXIS 15757, at *12 (S.D.N.Y. Oct. 7, 1998) (holding that Congress removed the adjustment of status decisions from the scope of judicial review).

review of a final order of removal,³⁹ however, INA precludes courts from reviewing the INS officer's discretionary decision to grant adjustment of status relief.⁴⁰ But courts may review an INS finding that an alien is not eligible for admission to the United States if such a decision is manifestly contrary to law.⁴¹ The courts can review the INS interpretation of the INA provisions for eligibility.⁴² This view is supported by a recent habeas corpus case in the Supreme Court.⁴³

*B. Permanent Residence Adjudicated by Consular Officer under
INA § 204*

1. Who can file

Immigrants living in the United States or abroad sponsored by a U.S. citizen, legal resident, close relative or U.S. employer may file a petition for an immigrant visa.⁴⁴ Aliens residing in the United States not grandfathered by § 245(i) must file under § 204.⁴⁵

2. Process

The sponsor must file the visa petition in the case of close relatives⁴⁶ and a petition for labor certification and a visa petition

39. See 8 U.S.C. § 1252(a) (2000) (“[J]udicial review of a final order of removal . . . is governed only by chapter 158 of title 28 of the United States Code [28 USCS §§ 2341 *et seq.*], except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.”).

40. 8 U.S.C. § 1252(a)(2)(B) (2000).

41. See 8 U.S.C. § 1252(b)(4)(C) (2000) (“Scope and standard of review. Except as provided in paragraph (5)(B) . . . (C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law.”).

42. *INS v. St. Cyr*, 533 U.S. 289, 297 (2001).

43. *Id.* at 293, 298, 306-07. *St. Cyr* filed a habeas corpus petition after INS ordered his removal. Petitioner, a legal resident since 1986, made himself deportable after pleading guilty to a charge of selling a controlled substance. *Id.* at 293. Petitioner argued he was eligible for a waiver and the Attorney General interpreted that under the new statute the Attorney General no longer had the discretion to grant the waiver. *Id.* at 297. The court—after holding that federal courts retain jurisdiction in habeas corpus cases—held that the scope of the review is not limited to the evidence supporting the order. *Id.* The court extended judicial review to questions of law brought by aliens challenging Executive interpretations of the immigration laws. *Id.*

44. INA 204(a)-(b) codified as 8 U.S.C. § 1154(a)-(b) (2000).

45. Hines, *supra* note 16, at 43-44. An immigrant entering the country without inspection or failing to maintain legal status because he or she worked without authorization or overstayed his or her visa cannot file for adjustment of status after April 30, 2001, and must resort to consular processing, as it was before Congress enacted § 245(i). *Id.*

46. William L. Pham, *Section 633 of IIRIRA: Immunizing Discrimination in*

in the case of employment visa.⁴⁷ In this regard the process is the same as under § 245(i).⁴⁸ The consul will consider the application only after receipt of the approved visa petitions.⁴⁹ The consul then sends the applicant a notice for final processing⁵⁰ and the Department of State assigns a visa number.⁵¹ The consular officer then interviews the applicant⁵² and determines admission and either issues or denies the visa.⁵³ Upon approval, the immigrant can travel to the United States and apply for admission at the port of entry before an immigration officer who makes the final decision regarding admissibility.⁵⁴

3. Eligibility

The applicant must be eligible for a visa and admissible to the United States.⁵⁵ Like the applicant under § 245(i), the applicant here has the burden of proving admissibility.⁵⁶ Unlike the INS officer, the consular officer has no discretionary power to deny the visa if the applicant is statutorily eligible.⁵⁷ Like the petitioner

Immigrant Visa Processing, 45 UCLA L. REV. 1461, 1465 (1998). The sponsor files the petition with the INS to establish the requisite family relationship. *Id.*

47. *Id.* The immigrant in this case must be sponsored by an actual or potential U.S. employer, who after acquiring labor certification, must file a petition with the INS to determine the appropriate work relationship. *Id.*

48. Patrick, *supra* note 30, at 3.

49. 2 AUSTIN T. FRAGOMEN, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 2:10.5 (4th ed. 1996). The INS approves the petition and sends the papers to the designated embassy or consulate abroad as a prerequisite of the visa application. *Id.*

50. *Id.* The consul's notice is known as packet III. Packet III contains a list of the documents that the immigrant must bring to the interview such as a passport, birth certificate, police clearance, photographs, etc. *Id.*

51. GORDON ET AL., *supra* note 14, at § 31.03. Once consul obtains an answer to packet 3 the consul requests the Department of State to assign a visa number and obtain security and police clearances. *Id.*

52. FRAGOMEN, *supra* note 49, § 2-172. After the Department of State assigns the visa the consul sends the applicant the application. The applicant must bring the application and all the documentation to the interview. *Id.*

53. James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 11 (1991). Note that the consular officer must evaluate the same grounds of inadmissibility than the INS officer when adjudicating an adjustment of status. If the consular officer denies the visa he must notified the applicant in writing the reasons for denial. GORDON ET AL., *supra* note 14, at 3.

54. GORDON ET AL., *supra* note 14, at 2. After approving the visa the consular officer issues the immigrant visa. *Id.* But the issuance of the visa is not a guarantee that the immigrant will be admitted in the United States. *Id.* The INS has the final decision regarding admissibility at the port of entry. *Id.* However, in practice the INS officer checks the identity of the immigrant and genuineness of the visa. *Id.*

55. Nafziger, *supra* note 53, at 11.

56. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 5:41 (2d ed. 1992).

57. Sam Bernsen, *Consular Absolutism in Visa Cases*, 63 INTERPRETER

under INA § 245(i), a visa must be available according to a quota except for immediate relatives.⁵⁸

4. Administrative and Judicial Review

There is no appeal from a consular officer's denial.⁵⁹ The applicant may petition the Visa Office in the Department of State to issue an advisory opinion,⁶⁰ but the Department of State can review only substantive, not procedural issues.⁶¹ After the Visa Office consults with the consular officer, the Visa Office issues an advisory opinion.⁶² This opinion is binding only on questions of legal interpretation.⁶³ This informal review is not the equivalent of the BIA review⁶⁴ because "[i]t lacks many of the formalities of bilateral due process"⁶⁵ such as notice⁶⁶ and counsel representation.⁶⁷ The legal basis for such unusual immunity to formal administrative review, is the interpretation of § 104(a) of the INA as precluding administrative appeal.⁶⁸ The norm precludes the Secretary of State from enforcing the powers of consular officers to grant or deny visas.⁶⁹ It is not clear whether Congress intended to insulate the consular decision from

RELEASES 388 (1986).

58. Paul T. Wangerin, *A Beginner's Guide to Business-Related Aspects of United States Immigration Law*, 5 NW. J. INT'L L. & BUS. 844, 861 (1983).

59. Bernsen, *supra* note 57, at 388.

60. Angelo A. Paparelli & Mitchell C. Tilner, *A Proposal for Legislation Establishing a System of Review of Visa Refusal in Selected Cases*, 65 INTERPRETER RELEASES 1027-28 (1988). Not only the applicant but also the consular officer or an interested party in the United States can request an advisory opinion. *Id.*; Nafziger, *supra* note 53, at 22. The Department itself may request a consular officer to submit a report on a visa refusal. *Id.*

61. Nafziger, *supra* note 53, at 22.

62. *Id.* The first step the Visa Office in the Department of State takes is to consult with the consul in charge and only then renders an advisory opinion. *Id.*

63. Robert A. Free, *Advisory Opinions from the Visa Office* in THE VISA PROCESSING GUIDE: PROCESS AND PROCEDURE AT U.S. CONSULATES AND EMBASSIES 41-7 (American Immigration Lawyers Association 3d ed. 1995). Consular officers generally comply with the opinion but they may question the opinion. *Id.* When the decision entangles factual and law considerations "officers have the legal authority to ignore an advisory opinion." *Id.*

64. Nafziger, *supra* note 53, at 12. Although the advisory opinion process might look like a formal administrative review, it is not. *Id.*

65. *Id.*

66. *Id.* The visa applicant is not notified that the Department of State is reviewing his case.

67. Bernsen, *supra* note 57, at 388. Consuls have the discretion to allow or not allow a lawyer to assist his client during the visa interview. Nafziger, *supra* note 53, at 19-20. The author advocates for Department of State regulations ensuring attorneys' access to the entire visa process to enhance due process and an overall fair and efficient adjudication. *Id.*

68. Burt, *supra* note 18, at 681.

69. 8 U.S.C. § 1104(a) (2000).

administrative review.⁷⁰

Consular officers' decisions are not judicially reviewable.⁷¹ The INA is silent about judicial review.⁷² However, the federal courts have precluded themselves from exercising jurisdiction under the doctrine of consular absolutism.⁷³

The expiration of § 245(i) on April 30 2001, forces immigrants living in the United States illegally to process their green cards at a consulate abroad.⁷⁴ It is in this context that review of the doctrine becomes indispensable.

II. THE DOCTRINE OF CONSULAR ABSOLUTISM. ARGUMENTS IN SUPPORT

A. *Enunciation of the Doctrine*

The lower courts have consistently applied the common law doctrine of consular absolutism, also known as consular non-reviewability, for the last seventy years⁷⁵ since its enunciation in *United States ex rel. London v. Phelps*.⁷⁶

The doctrine establishes that consular officers' decisions to grant or deny visas are not subject to judicial review.⁷⁷ Although the doctrine is not absolute, the exceptions do not provide much

70. See Gotcher, *supra* note 7, at 247, 249 (contending that the legislative history of § 104 INA proves that the provision is limited to prohibiting administrative review by the Secretary of State); Nafziger, *supra* note 53, at 24 (contending that Congress did not intend to immunize consular officer's decisions from all administrative review).

71. GORDON ET AL., *supra* note 14, at 3; Symposium, *supra* note 10, at 1615; *Ruston*, 29 F. Supp. 2d at 522.

72. Gotcher, *supra* note 7, at 251. No section in the INA precludes judicial review of a consular denial of a visa. *Id.* INA precludes the Secretary of State from reviewing consular officers' decisions regarding the issuance of a visa. 8 U.S.C. § 1104(a) (2000).

73. Symposium, *supra* note 10, at 1615. "The lower courts, for reasons that remain cryptic, have strained to interpret the Immigration and Nationality Act to encompass the doctrine of consular absolutism, which bars judicial review of consular officers' decisions denying applications for visas." *Id.* These interpretations have endured for more than seventy years. Nafziger, *supra* note 53, at 30-34. Although there is no federal statute precluding judicial review of consular determinations, some courts have inferred such preclusion from INA § 104(a) which, in any case, precludes administrative review, but not judicial review. *Saavedra Bruno*, 197 F.3d at 1161-62. The court held that when Congress restored habeas corpus as the only means to challenge exclusion Congress, although not explicitly, precluded review of visa denials to aliens living abroad, since Congress could have not intended to provide greater remedies for those living abroad. *Id.*

74. McCormick, *supra* note 19, at 30.

75. Symposium, *supra* note 10, at 1620.

76. 22 F.2d 288 (2d Cir. 1927).

77. *Saavedra Bruno*, 197 F.3d at 1159.

relief.⁷⁸ First, the doctrine does not apply to non-discretionary regulatory duties.⁷⁹ However, the courts limited the regulatory duty of a consular officer to the mere adjudication of the case.⁸⁰ In other words, the court has jurisdiction solely to order the consul to either issue or deny the visa.⁸¹

Second, some courts seem to recognize an exception to the applicability of the doctrine when petitioners' constitutional rights are violated and the government fails to provide a legitimate good faith reason for denying the visa.⁸² The petitioner is the relative or U.S. employer, not the immigrant.⁸³ This exception is so narrow that no court has yet found an opportunity to apply the exception.⁸⁴

Finally, the application of the doctrine remains an open question in cases where the consular officer disregards the "procedural safeguards of due process"⁸⁵ or clearly disregards applicable regulations.⁸⁶ But the two courts raising the question declined to answer it since it was not an issue for determination in the cases before the court.⁸⁷

Other than these limited exceptions the doctrine applies even

78. The only exception the courts clearly recognize to the doctrine of consular absolutism is the court's power to order the consular officer to act; however, the court has no power to order the consular officer to issue the visa or review the reasons for denial. *Patel v. Reno*, 134 F.3d 929, 931 (9th Cir. 1997).

79. *See Patel*, 134 F.3d at 932-33 (ordering the consulate in Bombay to either issue or deny the visa because the consulate had failed to perform its duty to adjudicate the case).

80. *Id.* at 932.

81. *See Patel*, 134 F.3d 929 (recognizing plaintiff's right to request that the court issue a writ of mandamus to compel the consul in Bombay to act upon the visa application.)

82. *See Kleindienst v. Mandel*, 408 U.S. 753, 768 (1972) (denying review of the visa denial to a journalist professing communist ideas). The court held that courts lack jurisdiction to review denials of visas when the government provides a "facially legitimate and bona fide reason" for its conduct. *Id.* at 770. The court left open the question of reviewability as to decisions lacking such justification. *Id.* *But see Patel*, 134 F.3d at 932 (interpreting the *Mandel* decision as providing for judicial review in cases where the government does not provide for a good faith reason for the denial).

83. *See DePena v. Kissinger*, 409 F. Supp. 1182, 1184 (S.D.N.Y. 1976) (explaining that American employers and close relatives petitioning for the immigrant have standing to challenge an administrative act that injures them). Notwithstanding standing the court applied the doctrine of consular absolutism to deny plaintiff the right to judicial review. *Id.* at 1185.

84. *Mandel*, 408 U.S. at 753. Even though petitioners' constitutional rights were violated the court held that as long as the government provides a bona fide reason to deny the visa the court would not look beyond that good faith reason. *Id.*

85. *Id.* at 766.

86. *Mansur v. Albright*, 130 F. Supp. 2d 59, 61 (D.D.C. 2001)

87. *Id.*

if the consul acts capriciously, arbitrarily or maliciously,⁸⁸ and even if the decision relies on erroneous information or erroneous interpretation of the law.⁸⁹

The courts have applied the doctrine evenly to denials of non-immigrant and immigrant visas.⁹⁰ The courts failure to distinguish among types of visas and immigrants does not encompass congressional amendments to the INA in recent years distinguishing between immigrants living in the United States legalizing their status and those residing abroad applying for a visa.⁹¹

The doctrine, as announced, completely immunizes consular officers' decisions from any review.⁹² The effect of the non-judicial review is compounded with the lack of administrative review.⁹³

Such an absolute power seems even more disturbing in the face of the lack of preparation and experience of consular officers to handle these important decisions.⁹⁴

Absolute power in the hands of inexperienced administrative agents before September 11 raised concerns regarding possible errors and lack of uniformity,⁹⁵ but arbitrariness was not a big concern because the consular officers tend to issue, rather than deny visas.⁹⁶ But when those in charge of such power are called to exercise it to defend the country from terrorist attacks,⁹⁷ the

88. *DePena*, 409 F. Supp. at 1185.

89. *Garcia v. Baker*, 765 F. Supp. 426, 428 (N.D. Ill. 1990).

90. For non-immigrant visa denials see, e.g., *Mandel*, 408 U.S. 753, 770 (denying judicial review of a visa denial for a Belgium journalist invited by U.S. universities to participate in a conference); *Mansur*, 130 F. Supp. 2d at 61 (denying judicial review of a revocation of a non-immigrant visa). For immigrant visa denials see, e.g., *DePena*, 409 F. Supp. 1182, 1185 (denying judicial review of an immigrant visa denial for petitioner's spouse); *Patel*, 134 F.3d at 931 (denying judicial review of an immigrant visa denial for petitioner's spouse and children).

91. In 1994, Congress enacted § 245(i) providing for adjustment of status to illegal immigrants so long as the immigrants pay a fine and comply with admissibility requirements. By this enactment, Congress separated from the lot of aliens coming to United States those who were already living in the country and had a close relative or American employer petitioning on their behalf. 8 U.S.C. § 1152(i). Congress recognized that these immigrants needed a special process to avoid unnecessary separation from their families and jobs.

92. Symposium, *supra* note 10, at 1619-20.

93. The courts have interpreted § 1104 as precluding administrative review. *Saavendra Bruno*, 197 F.3d at 1156.

94. Immigration Symposium: *Immigration in the Post 9-11 Era*, 40 BRANDEIS L.J. 851, 853 (2002). Doris Meissner, Commissioner of the Immigration and Naturalization Service from 1993 to 2000, pointed out that visa issuance is left to the most inexperienced administrative officers within the Department of State. *Id.* Meissner also remarked that "the best and brightest" do not aspire to work issuing visas. *Id.* at 854.

95. Paparelli & Tilner, *supra* note 60, at 1028, 1033.

96. Nafzinger, *supra* note 53, at 17.

97. See Immigration Symposium, *supra* note 94, at 853 (explaining the

potential for abuse is increased.⁹⁸ This is an extra criteria for consular officers to decide in the granting and denials of visas that might negatively influence their decisions.⁹⁹

Without formal external administrative or judicial review, low ranking administrative officers with more incentives to deny, rather than issue a visa, will decide the future of immigrants with strong ties with the United States.¹⁰⁰

B. Arguments in support of the doctrine

Although not all the courts applying the doctrine elaborate legal reasons for its adoption,¹⁰¹ those who do, focus mainly on three arguments: 1) The Administrative Procedural Act (APA) does not apply to consular officers' decisions,¹⁰² 2) Congress has plenary power to regulate immigration,¹⁰³ 3) the issuance or denial of a visa is a discretionary act in the realm of non-justiciable political questions.¹⁰⁴

1. The Inapplicability of the APA

The APA creates a presumption in favor of judicial review of administrative acts that adversely affect, aggrieve, or injure a person.¹⁰⁵ The act recognizes two exceptions to the reviewability of an administrative act: when a statute precludes review of the particular administrative act¹⁰⁶ or when the law commits the

changes in immigration policies after September 11).

98. Justice Jackson admonished of the dangers of decisions made in the heat of a war atmosphere because patriotic fervor makes moderation unpopular. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-47 (1948) (Jackson J., concurring).

99. See generally Immigration Symposium, *supra* note 94 (explaining the new role of immigration agents, specifically consular officers in the post September 11 idea of immigration as an "element of our national defense and security").

100. *Id.*

101. Some courts simply enunciate the doctrine. See *United States ex. rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927) (enunciating the doctrine but without offering a detailed legal argument in support); *Kudina v. INS*, No. 99 C 6689, 2001 U.S. Dist. LEXIS 14283, at *11 (N.D. Ill. Sep. 6, 2001) (denying judicial review of an immigrant visa denial to the children of a Romanian immigrant who successfully adjusted her status to that of permanent resident).

102. *Saavedra Bruno*, 197 F.3d at 1157-60 (explaining that the doctrine of consular absolutism is one of the exceptions to the APA). The court read a third exception into the APA interpreting the words of § 702, "any other appropriate legal or equitable ground" as referring to the consular absolutism doctrine. *Id.* at 1158.

103. *Mandel*, 408 U.S. at 766; *Mansur*, 130 F. Supp. 2d at 62; *Ruston*, 29 F. Supp. 2d at 523.

104. *Saavedra Bruno*, 197 F.3d at 1158.

105. 5 U.S.C. § 701 (2000).

106. *Id.*

action to the discretion of the agency.¹⁰⁷

The INA does not preclude judicial review of consular officers' decisions.¹⁰⁸ The Supreme Court made clear that inferences or implications from legislative history are not enough to preclude reviewability.¹⁰⁹ Congress must explicitly preclude review of the particular administrative act to overcome the strong presumption.¹¹⁰

The second exception, an "act committed to agency discretion,"¹¹¹ has been argued in at least one decision where the Secretary of State revoked a visa.¹¹² However, the appellate court in that case did not hold that revocation of visas was committed to consular officers' discretion.¹¹³ The court distinguished the discretionary character of the decision when reached by a Secretary of State versus the regulated character of the same decision when reached by a consular officer.¹¹⁴

Neither Congress nor the State Department's own regulations commit the issuance or denial of a visa to the sole discretion of the consular officer.¹¹⁵

In sum, there are no arguments to justify excepting consular officer's decisions from the strong presumption of reviewability of administrative acts.¹¹⁶

2. *Plenary Congressional Power*

The Supreme Court has always recognized Congress' plenary power to regulate immigration.¹¹⁷ Congress can determine the

107. *Id.*

108. The INA only precludes administrative review. 8 U.S.C. § 1104 (2000).

109. *St. Cyr*, 533 U.S. at 298-99. The court held that the INS had to overcome the strong presumption in favor of judicial review of agency acts by showing "a clear statement of congressional intent to repeal habeas jurisdiction". *Id.* at 298. Note that the court did not find such clear statement even though Congress enacted AEDPA § 401(5) which title reads "Elimination of custody review by habeas corpus." *Id.* at 308.

110. *Id.* at 298-99.

111. 5 U.S.C. § 701(a)(2) (2000).

112. *Mansur*, 130 F. Supp. 2d at 61.

113. *Id.* The court explained that an administrative act is committed to agency discretion when the court has no standard to judge the agent's act because the statute is broad or vague. *Id.*

114. *Id.* at 62.

115. Symposium, *supra* note 10, at 1621-22.

116. *Id.* at 1615.

117. *Mandel*, 408 U.S. at 766-67; *Lem Moon Sing v. United States*, 158 U.S. 538, 543-44 (1895). The Court reasoned that Congress has the power inherent in sovereignty to exclude aliens or prescribe the conditions to admit them. *Id.* Congress may entrust the execution of immigration laws and its final determination to the complete discretion of the executive branch. *Id.* To this extent the administrative officer is the "sole and exclusive judge" of the adjudication without interference from any tribunal to reexamine the question, unless Congress expressly authorize the courts to do so. *Id.*

terms and conditions to admit or exclude immigrants in the United States.¹¹⁸ Under this power, Congress can delegate enforcement of immigration laws to the executive branch and set out procedural rules under which such agents will operate.¹¹⁹ But courts have extended such power to encompass the doctrine of consular absolutism, resorting to obscure interpretations of the INA.¹²⁰ The rationale is that Congress has empowered consular officers to enforce the INA as Congress sees fit, and courts should not interfere with such a delegation of power.¹²¹ However, this is a distorting interpretation of § 104 INA that only precludes the Secretary of State from reviewing consular officers decisions regarding the issuance or denial of visas.¹²² If anything, § 104 supports the preclusion of administrative review but has no relation to judicial review.¹²³

The plenary power doctrine does not explain consular officers' immunity.¹²⁴ The Supreme Court in *Kleindienst v. Mandel*¹²⁵ distinguished both concepts by upholding congress' plenary power in immigration matters, but at the same time enunciating a limited right to judicial review of consular decisions.¹²⁶

3. *The Political Question Doctrine*

Almost all the courts upholding the consular absolutism doctrine argue that consular officers' decisions are political, and as such, are immune from judicial review.¹²⁷

The rationale is that immigration issues touch elements of foreign relations that need consistency and uniformity to avoid embarrassing the country in its conduct of foreign affairs.¹²⁸ But

118. *Lem Moon Sing*, 158 U.S. at 543.

119. *Id.*

120. Symposium, *supra* note 10, at 1619-20.

121. *Saavedra Bruno*, 197 F.3d at 1156-59.

122. 8 U.S.C. § 1104 (a)(2000).

123. Symposium, *supra* note 10, at 1622.

124. *Id.* at 1619-20.

125. 408 U.S. 753 (1972).

126. *Id.* at 768-69.

127. See *Mandel*, 408 U.S. at 765 (explaining that the power to exclude or admit aliens is the exclusive right of the political branch); *Saavedra Bruno*, 197 F.3d at 1158 (explaining that the consular power to exclude aliens or admit them is "inherent in sovereignty" and political in nature, which precludes judicial review); *Mansur*, 130 F. Supp. 2d at 62 (holding that no court can review the determination of the political branch to exclude an alien); *Ruston*, 29 F. Supp. 2d at 523 (explaining that the political branches have the responsibility to regulate the relationship between the country and aliens); *DePena*, 409 F. Supp. at 1186 (applying Supreme Court standard of *Mandel* restricting reviewability).

128. Nafziger, *supra* note 53, at 47-48; *Baker v. Carr*, 369 U.S. 186 (1962). Many times foreign relation issues are left to the discretion of the political branch because they demand a "single-voiced statement of the Government's views". *Baker*, 369 U.S. at 211.

as Justice Brennan admonished in *Baker v Carr*¹²⁹ "it is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹³⁰ In *Baker*, the court explained the difference between the political character of the executive and legislative branches' decisions in foreign relation matters—like signing an international treaty, which courts cannot question, and the courts' power to construe or interpret the treaty, which becomes the law of the country through the political branches decision.¹³¹ The decision to sign a treaty is a political question, but the interpretation of the treaty is a legal question.¹³²

If the federal courts have jurisdiction to construe a treaty,¹³³ the courts should have jurisdiction to interpret the Immigration and Nationality Act even when the administrative officer adjudicating the case is stationed abroad.¹³⁴

The Supreme Court and inferior courts argue that Congress has delegated the exclusive execution of immigration laws to the executive branch.¹³⁵ The question is not whether the courts can interpret the INA, which courts do in removal procedures,¹³⁶ but rather whether Congress conferred consular officers complete immunity even in the face of legal misinterpretation.¹³⁷ The courts interpreted that Congress conferred consular officers such immunity because the law conferred consular officers complete discretionary authority to issue or deny visas, without the interference of the judicial branch.¹³⁸

But this argument fails to recognize the courts' power to review questions of law even in the context of discretionary decisions.¹³⁹ Applying Justice Marshall's concept in *Marbury v. Madison*,¹⁴⁰ consular officers when issuing a visa are not executing the will of the Secretary of State in its discretionary power, in fact, consular officers are executing a specific duty created by law that

129. *Id.*

130. *Id.*

131. *Id.* at 212. The court explained that a court would not question the political branch decision to terminate a treaty but if the political branch does not terminate it then the court has the power to interpret the treaty and find the answer within the treaty. *Id.*

132. *Id.* at 209.

133. *Id.* at 211.

134. *Garcia v. Baker*, 765 Supp. 426, 427 (N.D. Ill 1990).

135. *Lem Moon Sing*, 158 U.S. at 547. The Court explained that Congress has the power to delegate the enforcement of the immigration policy to the executive officers without intervention of the judicial branch. *Mandel*, 408 U.S. 766; *Mansur*, 130 F. Supp. 2d at 62.

136. *St. Cyr*, 533 U.S. at 308.

137. Symposium, *supra* note 10, at 1615.

138. *Id.*

139. *St. Cyr*, 533 U.S. at 307-08.

140. 5 U.S. 137 (1803).

affects individual rights.¹⁴¹ As such, when the agent violates the law his acts are justiciable.¹⁴²

The threshold issue then is a determination of the extent of the duty the INA creates on consular officers.¹⁴³ If we were to accept the courts' interpretation that the only duty created is the duty to act,¹⁴⁴ then courts would not have jurisdiction to judge consular officers' visa denials.¹⁴⁵ But if we were to interpret the consular officer's duty to adjudicate the case in conformity with the provisions of the INA,¹⁴⁶ then the consular officers' acts become justiciable.

The two provisions applying to the issue support this second interpretation.¹⁴⁷ The INA gives consular officers the authority to grant or deny visas without intervention from the Secretary of State or the INS.¹⁴⁸ This provision taken alone would support the courts' interpretation.¹⁴⁹ However, consular officers must exercise their authority to issue or deny visas "subject to the eligibility requirements in the statute and corresponding regulations."¹⁵⁰ Therefore, the duty the INA creates in a consular officer is the duty to act in conformity with the lengthy and detailed INA provisions¹⁵¹ when denying a visa. Whether the agent violated this

141. *Id.* at 139. Justice Marshall distinguished the political power conferred upon the President of the United States, which the President can delegate to executive officers, from the legal duties created by law and which administrative officers must follow. *Id.* Marshall recognized the discretionary character of the political power, and held that such discretion is not justiciable regardless of the opinion the courts may have as to the manner in which the executive should exercise that power. *Id.* But Marshall also pointed out that when the law assigns a duty to an administrative officer the manner in which the officer executes the duty is subject to the control of the courts. *Id.* at 141.

142. *Id.*

143. *See generally Marbury*, 5 U.S.(1 Cranch) at 137.

144. *Ruston*, 29 F. Supp. 2d at 523. The court explained the scope of the judicial decision in *Patel* as an order to act, because that is the only legal duty created upon consular officers. *Patel*, 134 F.3d at 931. The court held that "when the suits challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion, jurisdiction exists." *Id.*

145. *Id.*

146. Symposium, *supra* note 10, at 1622. A consular officer is not free to deny a visa based on his sole discretion. The state department regulations require consular officers to inform the applicant under what provision in the law the consul grounds his decision to deny the visa. 22 C.F.R. § 42.81(b) (1999); *Saavedra Bruno*, 197 F.3d at 1156.

147. 8 U.S.C. §§ 1104(a), 1201(a) (2000) and 22 C.F.R. § 42.81(b) (1999).

148. 8 U.S.C. §§ 1104(a), 1201(a).

149. *Id.* None of these sections require that the consular officer comply with the eligibility requirements of the INA, when issuing or denying a visa.

150. *Saavedra Bruno*, 197 F.3d at 1156.

151. *See* 8 U.S.C.S § 1182 (2003) (describing the conditions and terms under which aliens are ineligible for visa or admission into the United States). Note that Congress classified the ineligibility provisions according to the different

duty is justiciable.¹⁵²

III. THE NEED FOR AN EXCEPTION TO THE DOCTRINE OF CONSULAR ABSOLUTISM IN LIMITED CASES

A. *Limited Judicial Review is Better than None*

Between the extreme positions of subjecting all consular decisions to judicial review on one hand¹⁵³ and conferring complete immunity to consular officers' decisions on the other,¹⁵⁴ there is a useful middle ground: allowing judicial review of consular officers' decisions in limited cases.¹⁵⁵ This proposal suggests that courts carve an exception to the consular absolutism doctrine and review consular officers' denials of immigrant visas in limited cases.

The approach to review all consular officers' determinations is impractical. It presents time and cost constraints and the potential of swamping the federal courts with non-meritorious claims.¹⁵⁶ First, American consulates abroad handle a huge volume of non-immigrant visa applications each year.¹⁵⁷ That volume represents ninety-five percent of the total of visa

grounds for denial. In each of the categories Congress precisely detailed the requirements, circumstances and exceptions to find an alien ineligible. Most of these provisions leave no room for discretion. See, e.g., § 1182(a)(1) (excluding aliens with a contagious disease according to regulations prescribed by the Secretary of Health and Human Services); § 1182(a)(2) (excluding aliens convicted of the commission of certain crimes such as those involving moral turpitude). Only a few of these provisions admit discretionary exercise. See, e.g., § 1182(a)(4) (excluding those aliens who "in the opinion of the consular officer" could become a public charge). Note, however, that the same section lists the factors that consular officers must consider at a minimum before excluding the immigrant on the grounds of public charge.

152. See generally *Marbury*, 5 U.S. (1Cranch) at 137.

153. This is the approach of some scholars. Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887 (1989). Wildes recognizes that reviewing all visa denials could overload the federal courts but he advocates for administrative review in all cases to curtail consular officers' absolute power and limited judicial review in areas where there is substantial interest in admitting the alien. *Id.* at 906. This proposal includes immigrants and non-immigrant visa denials. *Id.* at 906-07; Stephen H. Legomsky advocates for judicial review of all consular officers' decision. Symposium, *supra* note 10, at 1630-31.

154. This is the approach of the doctrine of consular absolutism as it stands today. Symposium, *supra* note 10, at 1619.

155. See Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137, 1164 (1977) (advocating for judicial review limited to immigrant visa denials to avoid burdening federal courts); Paparelli & Tilner, *supra* note 60, at 391 (advocating for judicial review of immigrant visa denials and non-immigrant visa denials excluding only refusals to crewmen, tourist and in transit visas).

156. Nafziger, *supra* note 53, at 57; Wildes, *supra* note 153, at 906.

157. Nafziger, *supra* note 53, at 4.

applications.¹⁵⁸ Keeping an adequate record of the proceedings and the factual and legal determinations supporting each visa denial, specifically non-immigrant visas, would require an increase in personnel and budget.¹⁵⁹ Without the adequacy of the record, the utility and fairness of judicial review would be seriously undermined.¹⁶⁰ Second, the volume of non-immigrant visa denials (more than 1,000,000 per year) could prompt an avalanche of appeals overburdening the federal courts.¹⁶¹ Third and most importantly, consular denials of non-immigrant visas rarely affect U.S. citizens, permanent legal residents or U.S. companies' rights or interests.¹⁶² Overall the difficulty and cost of reviewing in federal courts non-immigrant visa denials outweighs the limited interest the government may have in furthering such review.¹⁶³

But the answer to the inconvenience of swamping the federal courts with non-meritorious claims cannot lead to an absolute immunity of consular officers' conduct.¹⁶⁴ The appropriate approach is to grant judicial review in those cases where an important interest affecting a U.S. citizen, legal resident or U.S. company is at stake¹⁶⁵ and the immigrant has strong ties with the country arising out of his residence in the United States.¹⁶⁶ Immigrants living in the United States applying for an immigrant visa, but who cannot adjust their status in the United States because their sponsors did not file the petition on or before April 30, 2001, meet the standard.¹⁶⁷

B. Immigrants not grandfathered by § 245(i) have a meritorious claim for judicial review

Immigrants not grandfathered by § 245(i)INA¹⁶⁸ are in

158. *Id.*

159. *Id.*

160. Paparelli & Tilner, *supra* note 60, at 1032-33.

161. Wildes, *supra* note 153, at 906.

162. Note, *supra* note 155, at 1154.

163. *Id.* at 1154-55.

164. Symposium, *supra* note 10, at 1628-31.

165. Note, *supra* note 155, at 1154-55. The difference in terms of standing to bring suit does not flow from the type of visa the alien is applying for but from his relation to an American citizen or legal resident whose interest is affected. *Id.*; Pham, *supra* note 46, at 1483.

166. McCormick, *supra* note 19, at N30; *An Inhumane Immigration 'Solution'*, CHI. TRIB., Sept. 26, 1997, at N28.

167. The denials of immigrant visas to aliens living in the country but not grandfathered by § 245(i) affects a U.S. citizen, legal resident or U.S. company, and these immigrants usually have family with strong ties in the country. McCormick, *supra* note 19, at N30. It explains that only close family members of American citizens and legal resident relatives or workers sponsored by U.S. employer, living in the United States are eligible to adjust their status.

168. These category includes immigrants living in the United States falling within § 1255(c), if the sponsors did not file the petition on or before April 30,

identical situations, except for the filing date of their petitions, to immigrants grandfathered by that section.¹⁶⁹ Both types of immigrants are living in the United States¹⁷⁰ and have either a close family relationship with a U.S citizen or legal resident,¹⁷¹ or an employment relationship with a U.S. employer.¹⁷² Whether these immigrants are eligible to obtain their green cards turns upon the same eligibility requirements¹⁷³ and the same excludability reasons.¹⁷⁴ The difference between both adjudications is not one of substance but rather one of procedure.¹⁷⁵ Congress afforded immigrants adjusting their status administrative and judicial review of the INS officer's denial.¹⁷⁶ There is no legal reason to give a different treatment to consular officers' immigrant visa denials.¹⁷⁷ First, courts reviewing consular officers' denials would not affect Congress's political power to set immigration policy more than courts reviewing INS officers' denials of adjustment of status would.¹⁷⁸ Second, both INS officers and consular officers apply INA provisions to determine eligibility.¹⁷⁹ The only difference in their determination is that the consular officer must issue the visa if the immigrant is eligible,¹⁸⁰ while the granting of relief in the case of adjustment is discretionary.¹⁸¹ If courts can review INS officers' interpretation of INA provisions, there is no reason not to review consular officers' interpretation of the same provisions. Third, in both cases the courts answer a question of law: did the administrative officer correctly interpret and apply the INA?¹⁸² Both adjudications are justiciable.¹⁸³

2001. 8 U.S.C. §§ 1255(c) and 1255(i).

169. Immigrants living in the United States fall into one of the § 1255(c) categories, if the sponsors filed the petition on or before April 30, 2001. 8 U.S.C. §§ 1255(C), 1255(i) (1997 & Supp. 2002).

170. 8 U.S.C. § 1255(i).

171. 8 U.S.C. § 1255(i)(B)(i) (2000).

172. 8 U.S.C. § 1255(i)(B)(ii) (2000).

173. 8 U.S.C. § 1255(a); Patrick, *supra* note 30, at 3.

174. 8 U.S.C. § 1182; Patrick, *supra* note 30, at 3.

175. Patrick, *supra* note 30, at 3; GORDON ET AL., *supra* note 14, at 1.

176. 8 C.F.R. § 245.2(a)(5) (2003); 8 U.S.C. §§ 1252(a)(1) and 1252(b)(4)(C) (2000).

177. If the courts can interpret the INA provisions regarding eligibility and excludability requirements in removal proceedings there is no reason to preclude courts from reviewing the same provisions in visa denials. Note, *supra* note 155, at 1162-63.

178. Wildes, *supra* note 153, at 908; Note, *supra* note 155, at 1158.

179. Note, *supra* note 155, at 1162-64.

180. Bernsen, *supra* note 57, at 388.

181. GORDON ET AL., *supra* note 14, at 11.

182. See Gotcher, *supra* note 7, at 247 (explaining that administrative officers at consulates and INS and Labor Department officers interpret the INA provisions and apply them to the facts, but that only the latest are subject to judicial review).

183. See generally *Marbury*, 5 U.S. (1 Cranch) at 166 (explaining that once

Although the scope of review in both adjudications would be the same,¹⁸⁴ the requirement of standing and statutory basis for review would differ.¹⁸⁵

1. *Petitioners have standing under INA and APA provisions.*

Immigrants adjusting status have standing to challenge INS officers' denials because those immigrants live in the United States and the INA confers them standing.¹⁸⁶ Unlike immigrants adjusting their status, immigrants applying for an immigrant visa must leave the United States for their visa processing abroad¹⁸⁷ and thus are not residing in the United States at the time the consular officer denies the visa. To challenge the consular officer's decision the immigrant must first have standing.¹⁸⁸ But federal courts have traditionally denied standing to aliens living abroad.¹⁸⁹ Who would have standing then to challenge the consular officer's decision? The APA requires injury in fact to an interest protected by the statute subject of the litigation.¹⁹⁰ The INA protects the interests of the petitioners, in these cases the U.S. or legal resident relative¹⁹¹ or the U.S. company sponsoring the immigrant.¹⁹² They have standing to protect their interest in having their families reunited¹⁹³ or their need for qualified workers satisfied.¹⁹⁴ The immigrant standing in these cases would be more difficult to sustain although some scholars believe the Supreme Court conceded that much in *Mandel*.¹⁹⁵

the officer has a duty to act created by law his acts are justiciable).

184. Note, *supra* note 155, at 1162-64.

185. Standing to sue in immigrant visa cases turns on the relationship of the immigrant with a U.S. citizen, legal resident or U.S. company. *Id.* at 1150-55. Standing to sue in adjustment of status cases turns on the presence of the immigrant in the United States who has right to question his detention in a writ of habeas corpus. See generally *St. Cyr*, 533 U.S. 289. The INA also confers aliens standing. 8 U.S.C. 1252 (b)(C) (2000).

186. See generally *St. Cyr*, 533 U.S. at 289; 8 U.S.C. § 1252 (2000).

187. Hines, *supra* note 16, at 43-44.

188. Note, *supra* note 155, at 1150.

189. *Id.* at 1151.

190. 5 U.S.C. § 702 (2000).

191. The INA protects the interest of American citizens and legal residents to petition for their families and live with them. 8 U.S.C. §§ 1151(b)(2), 1153(a).

192. The INA protects the U.S. employers' interest in having a worker admitted when American workers cannot satisfy his needs. 8 U.S.C. § 1182(a)(5) (2000).

193. Note, *supra* note 155, at 1154. See *DePena*, 409 F. Supp. at 1184 (holding that plaintiff had standing to challenge her husband immigrant visa denial because the denial injured her protected right to avoid family breakup); Wildes, *supra* note 153, at 900-01.

194. Note, *supra* note 155, at 1154.

195. Nafzinger, *supra* note 53, at 3.

2. Courts have standards to apply

The INA and federal courts' decisions in adjustment of status cases provide vast standards to judge the consular officer's interpretation of the INA and the application of the law to the facts.¹⁹⁶ First, the INA contains detailed provisions regarding aliens' eligibility,¹⁹⁷ which consular officers must apply when denying a visa.¹⁹⁸ In fact, few of the INA provisions leave the decision entirely to the discretion of the administrative officer adjudicating the case.¹⁹⁹ Even in those cases, the pertinent regulation offers guidelines that consular officers must follow in forming their decisions.²⁰⁰ Second, federal courts can resort to other federal court decisions interpreting those eligibility requirements in adjustment of status denials.²⁰¹

IV. CONCLUSION

Federal courts review INS officers' interpretations of INA provisions in adjustment of status denials. However, federal courts decline to review consular officers' interpretations of INA provisions in immigrant visa denials under the doctrine of consular absolutism. Neither the plenary power doctrine nor the political question doctrine provides valid arguments to sustain such disparity in treatment. There is no statutory provision or policy consideration requiring federal courts to decline jurisdiction in these matters. Courts should review immigrant visa denials when the applicant would have been eligible for adjustment of status but could not comply with the filing deadline.

196. The INA provides a comprehensive statutory scheme to determine when an immigrant is eligible to receive a visa and to come to the United States. 8 U.S.C. § 1182 (2000); Wildes, *supra* note 153, at 900.

197. 8 U.S.C. § 1182 (2000).

198. *Saavedra Bruno*, 197 F.3d at 1156-57; GORDON ET AL., *supra* note 14, at 3; Bernsen, *supra* note 57, at 388; Gotcher, *supra* note 7, at 251.

199. 8 U.S.C. § 1182(a)(4).

200. Gotcher, *supra* note 7, at 251; Symposium, *supra* note 10, at 1622.

201. Wildes, *supra* note 153, at 908.