Immigration and Nationality Law

Cases and Materials

Fifth Edition

2022 Supplement

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Introduction

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Immigration Reform and its Impediments

Very little in the way of "reform" has occurred in the field of immigration since the publication of the Fifth Edition. Since even before the Obama Administration there have been deep political divisions in nearly every aspect of governance making meaningful reforms elusive, leaving. In immigration law this has resulted in the Executive Branch attempting to resolve issues using policy guidance and rulemaking. The problem with this method is that these are more vulnerable to challenge. What this also means is that when a federal court decides a case based on a statutory interpretation there is likelihood for any corrective legislation since Congress is unable to act.[1] As a result it is not likely that reform will come until there is greater political consensus.

This is the backdrop within which the Trump Administration began its term in January 2017. At the outset it initiated a number of Presidential Proclamations beginning with the now infamous Travel Ban and then proceeded with far ranging initiatives from removing all prosecutorial discretion on immigration enforcement, restricting access to asylum, limiting refugee admissions, issuing restrictive interpretive rulings, increasing denaturalization efforts and anything that would send the message that U.S. immigration had changed. In response to these initiatives many legal challenges which were brought by individuals, organizations and states resulting in a patchwork of injunctions and court orders creating much uncertainty in the law. To the extent that the overall goal of the Trump Administration was to severely restrict immigration, the Pandemic offered a golden opportunity. The Pandemic brought on a closure of consular processing and a virtual shut down on the issuance of new visas. At the same time, the CDC shut down all nearly all entries at the Mexico-US border asserting authority under Title 42 of the US Code.[2]

Immediately following the presidential inauguration in January, 2021 the Biden Administration issued numerous policy and regulatory reversals from those initiated by its predecessor. Just as the Trump Administration found itself in court at nearly every turn, the current Administration's efforts to reverse previous policies have been routinely challenged in the federal courts. While it isn't clear that these legal actions will be permanently enjoined, they have slowed down the Biden Administration's effort to leave its imprint. These various and multi-faceted efforts will be explored further in this 2022 Supplement.

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[1] Statutory changes require passage in both chambers of the legislature and approval by the President or enough support to override the veto, which are enormous hurdles to passage. Rulemaking of course is severely hampered by the requirement that the agency is operating under Congressionally delegated powers, i.e. where the agency is filling in interpretive gaps permitted by the original legislation. In addition, rulemaking is extremely lengthy and requires both interagency and public consultation.

[2] Title 42 will be discussed further in this Supplement in Chapters 3 and 5 and is described in brief in the Glossary of Common Terms.

Glossary of Common Terms in Immigration Law

Adjustment of Status. The process of obtaining LAWFUL PERMANENT RESIDENT status in the United States without having to leave the United States to do so. Adjustment of status should be distinguished from "change of status," which generally applies to NONIMMIGRANTS changing from one nonimmigrant status to another. Adjustment of Status is unavailable to many (but not all) persons who entered the United States without INSPECTION, or who violated status while in the United States, or on whose behalf an application for LABOR CERTIFICATION or a PREFERENCE petition was not filed on or before April 30, 2001.[3]

Admission. The process of permitting a person to be physically and legally present in the United States. Admission is part of the INSPECTION process. A person may be inspected and admitted or PAROLED into the United States or, instead of being admitted, placed in REMOVAL proceedings or removed through EXPEDITED REMOVAL. Once a person is admitted to the United States, a number of legal rights and protections attach.

1. **Affidavit of Support**. A declaration given by a U.S. citizen or LAWFUL PERMANENT RESIDENT who resides in the United States and who will provide financial support to a foreign national who is seeking to enter the United States or ADJUST STATUS. The purpose of the declaration is to satisfy the public charge grounds of inadmissibility found at INA §212(a)(4).

Aggravated Felony. A crime specifically defined in INA §101(a)(43), that may make a person DEPORTABLE. Aggravated felon status creates numerous substantive and procedural disabilities with respect to, *e.g.*, ASYLUM, INADMISSIBILITY, REMOVAL, and judicial review.[4] An aggravated felon is ineligible for most forms of relief from removal, and following completion of the criminal sentence, will likely be placed in an expeditious process for REMOVAL.

Alien. Any person who is not a citizen or a national of the United States. Only "aliens" are subject to the immigration laws. Even LAWFUL PERMANENT RESIDENTS are considered "aliens" until they become U.S. citizens, and as such, are still subject to the immigration laws—including all of the grounds of REMOVAL.[5]

Arrival-Departure Record (I-94). A form issued to foreign nationals upon arrival at the time of INSPECTION. Information on the form indicates the person's ADMISSION status and the period of authorized stay. Formerly a handwritten document, since April 2003, the I-94 is issued in an electronic format for those arriving by sea or air, and is available to the traveler on the U.S. CUSTOMS AND BORDER PROTECTION (CBP) website.[6]

Asylum. A discretionary benefit accorded to certain persons in the United States who demonstrate that they are unable or unwilling to return to their country on account of persecution or a well-founded fear of persecution

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[3] *See* 8 U.S.C. § 1255, INA Sec. 245.

[4] 8 U.S.C. §§ 1158, 1182, 1227-52, INA Sec. 208, 212, 237–42.

[5] Scholars have written a great deal about use of the term "alien" and while it is prevalent throughout the INA it has been the subject of much criticism. See Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 264-66 (1997); Rachel Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1966-68 (2013). It is worth noting that President Biden's Exec. Order 14012 studiously avoided using the term "alien." See *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*," 86 FED. REG. 8,277 (2021).

[6] Arrival/Departure Forms: I-94 and I-94W | U.S. Customs and Border Protection (cbp.gov) (https://cbp.gov/travel/international-visitors/i-94

based on race, religion, nationality, membership in a particular social group, or political opinion.[7] One year after the receipt of asylum status, asylees may apply for LAWFUL PERMANENT RESIDENCE.

The REAL ID Act[8] altered the standards and evidentiary burdens governing asylum, WITHHOLDING OF REMOVAL, and other discretionary forms of RELIEF FROM REMOVAL. It requires asylum applicants to demonstrate that one of the enumerated grounds was or will be "at least one central reason" for their persecution, and allows immigration judges to require credible ASYLUM and WITHHOLDING applicants to obtain corroborating evidence "unless the applicant does not have the evidence and cannot reasonably obtain the evidence." [9]

Border Crossing Card (BCC). An identity card issued by a consular officer or an immigration officer to a foreign national who is a LAWFUL PERMANENT RESIDENT, or to a foreign national who is a resident in Mexico or Canada, for the purpose of crossing the border from Canada or Mexico.[10] The biometric BCC is a laminated, credit–card-style document with many security features, and has a validity period of 10 years. Called a "laser visa," the card is both a BCC and a B-1/B-2 visitor visa. Mexican visitors to the United States, whether traveling to the border region or beyond, receive a laser visa.

Cancellation of Removal. A discretionary remedy for a LAWFUL PERMANENT RESIDENT who has been a permanent resident for at least five years and has resided continuously in the United States for at least seven years after having been admitted in any status, who has not been convicted of an aggravated felony. Cancellation of removal is also available to persons who are not permanent residents and who have been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of their application or the date of a NOTICE TO APPEAR, if the person has been of good moral character during such period, has not been convicted of certain offenses, and establishes that REMOVAL would result in exceptional and extremely unusual hardship to their U.S. citizen or permanent resident spouse, parent, or child.[11] Applicants cannot be absent from the United States for more than 90 days in a single occurrence or a total of 180 days during the 10 years and continue to maintain "physical presence." [12]

2.**Chargeability**. In administering the annual immigrant QUOTA, restrictions are determined both by when the PREFERENCE PETITION was filed on behalf of the applicant and the person's country of origin. "Chargeability" refers to the country a person's visa is to be counted against in the administration of the immigrant QUOTA. The rules relating to chargeability are found at 8 U.S.C. 1152(b).

Citizenship and Immigration Services. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS).

Consular Processing. The process of applying for an IMMIGRANT VISA at a U.S. consular post outside the United States for prospective IMMIGRANTS who are not in the United States or who are ineligible for ADJUSTMENT OF STATUS.[13] The term may also be used in reference to the processing of non-immigrant visas. See also NON-IMMIGRANTS

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[7] 8 U.S.C. § 1158, INA Sec. 208. *See also* 8 U.S.C. § 1101(a)(42), INA Sec. 101(a)(42) (defining the term "refugee").

[8] Pub. L. No. 109–13, 119 Stat. 231 (May 11, 2005).

[9] 8 U.S.C. § 1158(b)(1)(B), INA Sec. 208(b)(1)(B).

[10] 8 U.S.C. § 1101(a)(6), INA Sec.101(a)(6).

[11] 8 U.S.C. § 1229b, INA Sec. 240A.

[12] 8 U.S.C. § 1229b, INA Sec. §240A(d)(2).

[13] *See* 22 C.F.R. Parts 40 and 42.

3.**Credible Fear Interview.** An interview conducted by an ASYLUM officer in the expedited REMOVAL process to determine whether an individual can be bound over to an IMMIGRATION JUDGE for a hearing on the merits of their ASYLUM claim.[14]

Crime Involving Moral Turpitude (CIMT or CMT). A particularly depraved offense that serves as a ground of inadmissibility.[15]

> A conviction for a statutory offense will involve moral turpitude if one or more of the elements of that offense have been determined to involve moral turpitude. The most common elements involving moral turpitude are: (1) Fraud; (2) Larceny; and (3) Intent to harm persons or thing[s].[16]

4.**"Crimmigration."** The growing field of immigration study and practice that encompasses the overlap between criminal and immigration law.[17]

[U.S.] Customs and Border Protection (CBP). The administrative agency under the U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) which has as its primary function, the inspection of persons seeking admission and goods brought into the United States.

5.**Dates for Filing**. A designation found in the U.S. DEPARTMENT OF STATE monthly *Visa Bulletin* that informs applicants for IMMIGRANT VISAS or ADJUSTMENT OF STATUS that the applications on that date will be given priority for adjudication. The Dates for Filing refers to the "priority" date and the specific visa category under which the applicant is proceeding, and does not mean that there are VISAS currently available for those persons. *See also* ADJUSTMENT OF STATUS, FINAL ACTION DATE, IMMIGRANT VISAS, PRIORITY DATES, and VISA BULLETIN).

Deferred Action. Extraordinary relief in the form of PROSECUTORIAL DISCRETION where the government takes no action to remove a person although the person may be technically INADMISSIBLE or DEPORTABLE. The relief may be granted in cases with compelling humanitarian factors. A person under deferred action is considered to be lawfully present in the United States for purposes of applying for certain public benefits.[18]

Deferred Action for Childhood Arrivals (DACA). A special form of DEFERRED ACTION created by the Obama administration in 2012 to permit certain persons who had come to the United States as children to apply for and receive deferred action consideration and certain benefits, including an EMPLOYMENT AUTHORIZATION DOCUMENT (EAD).

Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). A special form of DEFERRED ACTION established by the Obama administration in 2014 that would permit certain parents of U.S. citizens and LAWFUL PERMANENT RESIDENTS to remain in the United States. The program was expected to protect up to 4.4 million persons from removal. DAPA relief was enjoined by a federal judge in 2015, and that decision was revised by a federal appellate court and the stay remained in place. The appellate court decision remains in effect as a result of a deadlocked 2016 U.S. Supreme Court decision.[19]

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[14] *See* 8 U.S.C. § 1225(b)(1)(A)(ii), INA Sec. 235(b)(1)(A)(ii).

[15] 8 U.S.C. § 1182(a)(2)(A)(i)(I), INA Sec. 212(a)(2)(A)(i)(I).

[16] 9 *Foreign Affairs Manual* (FAM) 40.21(a) N2.2 (rev.)

[17] *See e.g.* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV 1457 (2013).

[18] 8 C.F.R. §102.12(a)(4)(v) (2022).

[19] *See Texas v. U.S.,* 86 F. Supp. 3d 591 (S.D. Tex. 2015), 809 F.3d 134 (5th Cir. 2015), *U.S. v. Texas*, 136 U.S. 2271 (2016), *reh'g denied* 137 U.S. 285 (2016).

Deferred Enforced Departure (DED). A nonstatutory form of RELIEF FROM REMOVAL granted to persons of certain nationalities present in the United States for compelling humanitarian reasons, usually involving natural disaster or civil unrest. (*See also* EXTENDED VOLUNTARY DEPARTURE).

Denaturalization. The procedure through which a person may be deprived of U.S. citizenship that was originally obtained by NATURALIZATION**.**

[U.S.] Department of Homeland Security (DHS). The agency into which the legacy Immigration and Naturalization Service (LEGACY INS) was folded, effective March 1, 2003. The benefits functions of legacy INS transferred to the U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), while the enforcement functions transferred to U.S. CUSTOMS AND BORDER PROTECTION (CBP) and U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE).

Deportability, Grounds of. Acts that when proven by the government, make a person subject to DEPORTATION.[20]

Deportation. The removal, ejectment, or transfer of a person from a country because his or her presence is deemed inconsistent with the public welfare. Prior to 1996, the term "deportation" was used to describe the ejectment of a person who had managed to gain "entry" into the United States either legally or illegally. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)[21] replaced the term "deportation" with "REMOVAL." Deportation is not considered a form of punishment. Grounds for deportation are set forth at 8 U.S.C. § 1227. LAWFUL PERMANENT RESIDENTS are subject to removal if any of the GROUNDS OF DEPORTABILITY apply to them.

Derivative Citizenship. Citizenship conveyed to children by virtue of their parent's US citizenship, whether through the NATURALIZATION of parents or, under certain circumstances, to foreign-born children adopted by U.S. citizen parents, provided certain conditions are met.[22]

Derivative Status (Generally). An immigration status or benefit that may be acquired through a relationship to another individual (usually referred to as the primary beneficiary). Derivative status or benefits are generally available to the spouse or minor unmarried children of the primary beneficiary.

Diversity Lottery. The generic name given to the immigrant visa lottery program established by the Immigration Act of 1990[23] that makes available up to 55,000 immigrant visas per federal fiscal year to persons from low-admission states and low-admission regions.[24] The Diversity Immigrant Visa Lottery (DV) program is administered by the U.S. DEPARTMENT OF STATE (DOS), which establishes the rules for the lottery and tracks the available visa numbers.

Dual Intent. The immigration statute presumes that all persons coming to the U.S. have the intention of becoming permanent residents. The statute further requires that nonimmigrants establish that they are coming for a defined period of time at which they will depart. The statute further permits certain persons in the nonimmigrant H-1B, L-1A and L-1B to have both a nonimmigrant and an immigrant, or "dual" intent and thereby not be precluded from retaining their nonimmigrant status.

Dual Nationality. The simultaneous possession of two citizenships. It results from the fact that there is no uniform rule of international law relating to the acquisition of nationality. Dual nationality can occur by birth in one country to citizens of another country, by marriage to a foreign national, or by foreign NATURALIZATION. Though dual nationality is not favored under U.S. law, and U.S. naturalization law

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1.[20] 8 U.S.C. § 1227(a), INA Sec. 237(a).

[21] Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996).

[22] 8 U.S.C. § 1431, INA Sec. 320; 8 C.F.R. § 320 (2022).

[23] Pub. L. No. 101–649, 104 Stat. 4978 (Nov. 29, 1990).

[24] 8 U.S.C. § 1153, INA Sec. 203(c).

requires renunciation of allegiance to all other sovereigns, U.S. law does not require that the country to which a NATURALIZATION applicant is renouncing allegiance act in any way to withdraw or revoke the citizenship of the applicant upon successful NATURALIZATION in the United States. Certain countries do not accept dual citizenship, and require relinquishment of former citizenship upon NATURALIZATION to U.S. citizenship.

Employment Authorization Document (EAD). A USCIS document, Form I-766, evidencing the right of certain foreign nationals to accept employment while in the United States. *See also* WORK PERMIT.

Exchange Visitor. A foreign national coming temporarily to the United States as a participant in a program approved by the U.S. DEPARTMENT OF STATE (DOS) for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training.

Exclusion. The procedure existing prior to IIRAIRA for the ejectment of persons seeking admission to the United States. The term "exclusion" under current immigration law refers to the various bases under which a person could be found to be inadmissible to the United States. The grounds for exclusion (now known as INADMISSIBILITY) are set forth under 8 U.S.C. § 1182.

Expedited Removal. A procedure, established by IIRAIRA, authorizing U.S. Immigration and Customs Enforcement (ICE) to quickly remove certain INADMISSIBLE foreign nationals from the United States. The authority covers foreign nationals who are INADMISSIBLE because they have no entry documents or because they have used counterfeit, altered, or otherwise fraudulent or improper documents. The authority covers foreign nationals who arrive in, attempt to enter, or have entered the United States without having been ADMITTED or PAROLED by an immigration officer at A PORT OF ENTRY. ICE has the authority to order removal, and the foreign national will not be referred to an immigration judge except under certain circumstances if the foreign national makes a claim to legal status in the United States or demonstrates a CREDIBLE FEAR of persecution if returned to his or her home country.[25]

Extended Voluntary Departure. A non-statutory form of relief where individuals from a designated country were granted work authorization and temporary RELIEF FROM REMOVAL due to civil unrest, natural disaster or other compelling humanitarian factors. Compare with TEMPORARY PROTECTED STATUS (TPS), which is provided for under the IMMIGRATION AND NATIONALITY ACT (INA). This relief has also been termed "DEFERRED ENFORCED DEPARTURE."[26]

6. **Final Action Dates**. A designation in the monthly VISA BULLETIN that denotes that VISA numbers should be currently available for persons whose applications were filed (and have PRIORITY DATES) on or before that date.

Green Card. An expression that refers to the document carried by a LAWFUL PERMANENT RESIDENT that provides proof of his or her status. The document is officially referred to as an "I-551" (Alien Registration Receipt Card or Permanent Resident Card).

Humanitarian Asylum. The conferral of ASYLUM where a person has not established a well-founded fear of future persecution, but has suffered past persecution of a severe nature or there is a reasonable possibility that the person would experience other serious harm if returned to their home country.[27]

Immediate Relatives. A category of immigrants not subject to the annual QUOTAS, including spouses and minor unmarried children of U.S. citizens. Immediate relatives also include parents of U.S. citizens where the petitioning son or daughter is at least 21 years of age.[28]

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[25] 8 U.S.C. § 1225, INA Sec. 235; 8 C.F.R. § 235.3(b) (2022).

[26] *See e.g.*, 75 FED. REG. 15,715 (Mar. 30, 2010).

[27] 8 C.F.R. §§ 208.13(b)(1)(B)(iii), 1208.13(b)(1)(B)(iii); *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989).

[28] 8 U.S.C. § 1151, INA Sec. 201(b)(2)(A)(i).

Immigrant. A LAWFUL PERMANENT RESIDENT of the United States. Defined, in the negative, as "every alien except an alien who is within one of the ... classes of nonimmigrant aliens" under the INA.[29] This characterization of immigrants shifts the burden to the person seeking admission to establish his or her clear eligibility for such status. Accordingly, all "aliens" are (with some exceptions) presumed to be immigrants until they establish that they are entitled to NONIMMIGRANT status.[30]

Immigrant Visa. Permission obtained from an overseas U.S. consul for a foreign national to be admitted to the United States for permanent residence. A visa is issued subsequent to establishing eligibility for admission on a permanent basis under the INA. An immigrant visa has a six-month validity and the intending immigrant must apply for admission during this period. *See also* PREFERENCE CATEGORIES, LABOR CERTIFICATION, and VISA.

[U.S.] Immigration and Customs Enforcement (ICE). The administrative agency under DHS primarily responsible for the enforcement of the immigration laws within the United States. This is to be contrasted with the determination of whether a noncitizen is eligible for immigration benefits, for which authority is held by U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS).

Immigration and Nationality Act of 1965 (INA). The statute that forms the basic body of U.S. immigration law. Found at Title 8 of the U.S. Code, 8 USC §§1101, *et seq*., as amended.

Immigration Judge. Sometimes referred to as "Special Inquiry Officer," the person responsible for presiding over REMOVAL hearings.[31] Immigration judges are employed by the Executive Office for Immigration Review (EOIR), a division of the U.S. Department of Justice (DOJ).

Inadmissibility. Any one of numerous grounds listed in 8 U.S.C. § 1182(a), that make a person ineligible for lawful ADMISSION into the United States.

7.**Individual Calendar Hearing**. This term is used interchangeably with a "Merits" hearing, and refers to an evidentiary proceeding before an IMMIGRATION JUDGE on contested matters involving challenges to REMOVABILITY, and the determination of eligibility for RELIEF under the INA.[32] *See* Merits Hearing.

Inspection. The process that all persons must go through when they arrive at the border. A person is asked to present proof of his or her right to enter the country. At the end of the process of inspection, a person is either ADMITTED, REMOVED, or PAROLED into the country. *See also* PRIMARY INSPECTION.

Labor Certification. Certification by the U.S. Department of Labor (DOL) that there exists an insufficient number of U.S. workers able, willing, qualified, and available at the place of proposed employment, and that employment of the foreign national for whom certification is sought will not adversely affect the wages and working conditions of U.S. workers similarly employed. (The employer must, therefore, offer the job at the "prevailing wage" in the particular market).[33] A labor certification does not entitle the foreign national to ADMISSION; a VISA petition must still be filed on his or her behalf. The Program Electronic Record Management (PERM) regulations (effective March 28, 2005) established the current system for filing labor certifications.[34]

Labor Condition Application (LCA). An attestation by an employer seeking to hire an H-1B, H-1B1 or E-3 NONIMMIGRANT to four conditions of employment: (1) that the employer is paying the H-1B

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[29] 8 U.S.C. § 1101(a)(15), INA Sec. 101(a)(15).

[30] 8 U.S.C. § 1184(b), INA Sec. 214(b).

[31] 8 U.S.C. §§ 1101(b)(4), 1229a, INA Sec. 101(b)(4) and 240.

[32] Immigration Court Practice Manual § 4.16.

[33] 8 U.S.C. § 1182(a)(5), INA Sec. 212(a)(5).

[34] 69 FED. REG. 77325 (Dec. 27, 2004).

nonimmigrant at least the higher of the actual wage paid by the employer to others in the same occupation with similar experience and qualifications, or the prevailing wage for the occupation in the geographical area of the work site; (2) that the employment of the H-1B nonimmigrant will not adversely affect the working conditions of similarly employed workers; (3) that there is not a strike, lockout, or work stoppage in the occupation for which the H-1B nonimmigrant is being hired; and (4) that notice of the hiring of the H-1B nonimmigrant has been provided.

Laser Visa. *See* BORDER CROSSING CARD.

Lawful Permanent Resident (LPR). A person accorded the benefit of being able to reside in the United States on a permanent basis. Such a person may engage in employment but may not vote in U.S. elections. LPR status is the status gained by a person who is admitted to the United States with an IMMIGRANT VISA or who has been granted ADJUSTMENT OF STATUS. Lawful permanent residence also may be obtained after a person has been granted ASYLUM or was admitted to the United States as a REFUGEE. In addition, a person who has been in the United States for more than 10 years and is able to establish the requisite degree of hardship may be granted permanent residence following the "CANCELLATION" OF REMOVAL proceedings. LPR status may be taken away for the commission of certain acts that can result in DEPORTABILITY or INADMISSIBILITY, or lost through "abandonment." Also called "legal permanent resident" or "green card holder."

Legacy INS. A reference to the Immigration and Naturalization Service (*e.g.*, "a legacy INS memo") that acknowledges its status as the predecessor to the U.S. DEPARTMENT OF HOMELAND SECURITY (DHS).

Legalization. A program established by the Immigration Reform and Control Act of 1986 (IRCA)[35] that permitted the grant of temporary residence status to certain foreign nationals, who were later entitled to apply for permanent residence.[36] Also referred to as "temporary resident status" and "amnesty."

8. **Master Calendar Hearing**. Proceeding conducted before an IMMIGRATION JUDGE to determine how the applicant/respondent pleads to the NOTICE TO APPEAR. At this hearing the IMMIGRATION JUDGE will advise the applicant/respondent of the consequences of failing to appear at later hearings, deadlines for filing for relief, and setting the date for future appearances in the proceedings.[37]

9. **Merits Hearing**. Hearing held before an IMMIGRATION JUDGE to determine whether the applicant meets the requirements for the particular form of RELIEF FROM REMOVAL sought under the INA. *See* INDIVIDUAL CALENDAR HEARING.

10. **Metering**. Reference to a controversial policy instituted by U.S. CUSTOMS AND BORDER PROTECTION (CBP)of restricting the number of ASYLUM and other applicants for protection from harms from being adjudicated in any particular day. Metering is one of the tools of implementing the MIGRANT PROTECTION PROTOCOLS. It is not clear when the policy began, but it was first publicly reported in May 2018.[38] *See* Migration Protection Protocols.

11. **Migrant Protection Protocols (MPP)**. Often referred to as "REMAIN IN MEXICO." A policy requiring most individuals who arrive at the U.S.-Mexico border without proper documentation to wait in Mexico while their claims for ASYLUM or protection from harm are adjudicated. The policy was initiated on January 25, 2019, through a memorandum from the DHS Secretary.[39] In June, 2021 the Biden

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[35] Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986).

[36] 8 U.S.C. § 1255a, INA Sec. 245A.

[37] *See* Immigration Court Practice Manual § 4.15(a).

[38] *See* Savitri Arvey & Stephen Leutert, *The Conversation: Thousands of Asylum Seekers Left Waiting at the US-Mexico Border,* Public Radio International (Jun 17, 2019), at https://perma.cc/MV54-U8JK.

[39] *See* Memorandum from DHS Secretary Kirstjen Nielsen to USCIS Director L. Francis Cissna, et al., *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019).

Administration terminated the program and group of states initiated a legal action to enjoin the termination of the program. A district court in Texas enjoined the termination and the program remains in force pending review before the Supreme Court.[40] While the authority to institute the policy are stated as arising out of INA § 235(b)(2)(c), MPP remains controversial and is under federal court review. *See also* REMAIN IN MEXICO, METERING.

Naturalization. "[T]he conferring of nationality of a state upon a person after birth, by any means whatsoever." [41] Under U.S. law, persons may become naturalized after they have been LAWFUL PERMANENT RESIDENTS for a period prescribed by statute.

Nonimmigrant. A person who can establish that he or she has a residence abroad that he or she has no intention of abandoning, who is coming to the United States for a temporary period, and who fits into a specifically defined category under 8 U.S.C. § 1101(a)(15). Nonimmigrant categories include certain temporary employees, students, tourists, TREATY INVESTORS, and foreign government officials. *See also* IMMIGRANT and DUAL INTENT.

Nonimmigrant Visa. A document signifying that a consular officer believes that the noncitizen to whom the VISA was issued is eligible to apply for ADMISSION to the United States in a particular NONIMMIGRANT category. However, a VISA does not guarantee ADMISSION, and an immigration inspector can deny entry if he or she believes that the applicant for ADMISSION is not admissible under the category for which the visa was issued. The period of validity of a VISA establishes the time during which the noncitizen may apply for ADMISSION at a U.S. PORT OF ENTRY. VISAS may be valid for as few as 30 days or up to 10 years, and may be limited to a single entry, or may be valid for multiple entries during the period of validity. The VISA's period of validity is not the same as the authorized period of stay in the United States. The authorized period of stay, which is indicated on the ARRIVAL-DEPARTURE RECORD (I-94), may be less than the VISA's period of validity, or may be much longer (typically when single-entry visas are valid only for a limited period of time). It is important to understand that it is the decision made at the PORT OF ENTRY at the time of inspection and indicated on the I-94, and not the VISA, that determines a NONIMMIGRANT's status and its validity as to time and purpose. A noncitizen is not out of status if he or she was properly admitted pursuant to a valid VISA and the VISA has expired, provided the person is still within the authorized period of stay indicated on Form I-94.

12. **Notice to Appear (NTA)**. Document (otherwise referred to as an I-862) which, when properly served on the applicant/respondent, informs and requires that he or she present himself or herself to an IMMIGRATION JUDGE on a specific date, time, and place to answer to charges that he or she may be subject to REMOVAL from the US. Once properly served the document places jurisdiction of the proceedings with the immigration court.[42]

Parole. Permission granted by DHS allowing a person to physically enter the United States without being considered to have legally entered the country. Parole is a legal fiction. A person paroled into the United States is treated in a legal sense as if he or she were still at the border seeking permission to enter.[43] While parolees are not afforded any legal rights or benefits greater than those seeking admission, they are provided with legal documents that permit their presence in the United States. Examples include parole for humanitarian or family unification purposes, parole for DACA recipients, and parole to proceed with the process of ADJUSTMENT OF STATUS that would otherwise be considered to have been abandoned.

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[40] *See Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021), cert. granted 2022 WL 497412 (Feb. 22, 2022). The case is scheduled for argument in April, 2022.

[41] 8 U.S.C. § 1101(a)(23), INA Sec. 101(a)(23).

[42] *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110 (N.D. Ca. 2019) (issuance of nationwide injunction), 924 F.3d 503 (9th Cir. 2019) (stay of injunction entered by 9th Circuit panel).

[43] 8 U.S.C. § 1182(d)(5), INA Sec. 212(d)(5).

13. **Parole in Place (PIP)**. A special form of discretionary immigration relief granted to the immediate relatives of military personnel who had not previously been lawfully admitted or PAROLED into the country thereby making them eligible for ADJUSTMENT OF STATUS to that of LAWFUL PERMANENT RESIDENT. While currently only available to relatives of military personnel, Parole in Place could arguably be extended as a discretionary benefit to any person who has not been ADMITTED to the United States. The policy on behalf of military families, which had been under attack by the Trump administration, was recently codified in legislation signed into law.[44]

PERM (Program Electronic Review Management). A system established by the U.S. Department of Labor (DOL), effective March 28, 2005, for filing applications for LABOR CERTIFICATION. PERM uses an automated computer system for employers to electronically file attestation forms regarding their compliance with all regulatory requirements.[45]

Permanent Resident. *See* LAWFUL PERMANENT RESIDENT (LPR).

PORT OF ENTRY. Designated locations where all persons seeking lawful admission to the United States are required to present themselves for inspection.

Preference Categories. Categories by which IMMIGRANT VISAS are allocated on the basis of an annual QUOTA. In order to qualify for ADMISSION, the intending IMMIGRANT must show that: (1) he or she is married to a LAWFUL PERMANENT RESIDENT or is the unmarried son or daughter of a lawful permanent resident; or (2) he or she is the son, daughter, or sibling of a U.S. citizen (irrespective of marital status); or (3) his or her employer has obtained a LABOR CERTIFICATION for eventual employment in the United States. Whether the person meets the QUOTA restriction will depend on his or her relationship with a U.S. citizen or lawful permanent resident, as described above, or whether the employment is of a skilled or unskilled nature. *See also* IMMIGRANT VISA.

Pre-inspection. A procedure where a person completes immigration INSPECTION prior to departing the foreign country, such that no further immigration INSPECTION is required upon arrival in the United States.[46] *See also* ARRIVAL-DEPARTURE RECORD.

Primary Inspection. The first or initial examination at a PORT OF ENTRY where a person arriving is subjected to questions to determine whether they may be ADMITTED.

Priority Date. The date on which a person submitted documentation establishing prima facie eligibility for an IMMIGRANT VISA. For family-based immigrants, the priority date is the date on which the family-based petition is filed.[47] If the noncitizen relative has a priority date on or before the date listed in the VISA BULLETIN, then he or she is eligible for an IMMIGRANT VISA. For employment-based cases, it is the date of the filing of the LABOR CERTIFICATION application, or if no labor certification is required, the date the IMMIGRANT VISA petition is filed.[48]

14. **Prosecutorial Discretion.** The authority exercised by every law enforcement agency, including ICE and other enforcement agencies within DHS, to set enforcement priorities and decide to what extent to pursue a particular case based on those priorities. The authority has been posited in support of programs such as DEFERRED ACTION, EXTENDED VOLUNTARY DEPARTURE, DEFERRED ENFORCED DEPARTURE, DACA, and DAPA.

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[44] National Defense Reauthorization Act of 2020, Pub. L. No. 116-92 (2019). C. DeChalus, *House Lawmakers Introduce Military Families Parole in Place Act*," CONGRESSIONAL QUARTERLY ROLL CALL (Dec. 6, 2019).

[45] 20 C.F.R. Parts 655 and 656.

[46] 8 U.S.C. § 1225a, INA Sec. 235A.

[47] 8 C.F.R. § 204.1(c) (2022).

[48] 8 C.F.R. §204.5(d).

Provisional Waiver. Sometimes referred to as a "provisional unlawful presence waiver," a WAIVER established in March 2013, allowing spouses, children, and parents of U.S. citizens who are IMMIGRANT VISA applicants and who are otherwise subject to the UNLAWFUL PRESENCE ground of INADMISSIBILITY at 8 U.S.C. § 1182(a)(9)(B)(i) to obtain a decision from USCIS on the WAIVER prior to being interviewed at a consulate abroad for their IMMIGRANT VISA.[49]

Public Charge Rule. A controversial regulatory modification, interpreting the statutory provision [8 U.S.C. § 1182(a)(4)] restricting the admission of persons who are "likely to become a public charge."[50] The rule–which has been challenged in federal court—would make it more difficult for noncitizens to come to the United States.[51]

Quotas. Annual numerical restrictions on many forms of immigration status. Certain NONIMMIGRANT categories are restricted to a set number of persons who may be ADMITTED in any given fiscal year. Similarly, the number of persons who may be granted PERMANENT RESIDENCE is also restricted and allocated between the family and employment categories. Strict attention is paid to the IMMIGRANT category, as well as ensuring that persons are issued VISAS in the order in which they applied and that no more than 25,620 (7 percent of the total) are issued to nationals of any one country in a given fiscal year. *See* PREFERENCE CATEGORIES.

15. **Reasonable Fear Interview.** Review conducted in the EXPEDITED REMOVAL process by an ASYLUM officer to determine whether the applicant has established a "reasonable possibility" of persecution (for an ASYLUM or WITHHOLDING OF REMOVAL claim) or torture (for relief under the Convention Against Torture) in the claimed country for REMOVAL, sufficient to allow him or her to pursue the claim before an IMMIGRATION JUDGE.

Reduction in Recruitment (RIR). An alternative method of LABOR CERTIFICATION under the system in place before March 28, 2005. Since that time, RIR and conventional labor certification were completely revamped by the DOL PERM rules.

Refugee. A person outside the United States who is unable or unwilling to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[52] Refugee admission to the United States is based on annual allocations as established between the executive and legislative branches. A refugee may apply for LAWFUL PERMANENT RESIDENT status one year after ADMISSION as a refugee. *See also* ASYLUM.

Relief from Removal. Any number of immigration benefits that allow a person otherwise subject to REMOVAL to avoid formal REMOVAL from the United States. Common forms of relief from removal include: CANCELLATION OF REMOVAL for non–permanent residents, ADJUSTMENT OF STATUS, and VOLUNTARY DEPARTURE.

16. **Remain in Mexico Program.** A highly controversial policy initiated by the Trump administration in 2019, requiring applicants who arrive at the southern border between the United States and Mexico to remain in that country while they await processing for ADMISSION to the United States. The policy effectively requires ASYLUM seekers and others to wait for their CREDIBLE FEAR INTERVIEWS and ultimate adjudication of any potential ASYLUM claim in Mexico. *See* MIGRANT PROTECTION PROTOCOLS.

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[49] 8 C.F.R. § 212.7.

[50] *Inadmissibility on Public Charge Grounds*, 84 FED. REG. 41,292 (2019); The regulation became effective on February 24, 2020. For additional discussion *see* 96 *INTERPRETER RELEASES* (Oct. 7, 2019).

[51] See *e.g.*, *City and County of San Francisco v. U.S. Citizenship and Immigration Services and State of California v. DHS*, 408 F. Supp.3d 1057 (N.D. Ca. 2019) (injunction of implementation of regulation), 944 F.3d 773 (9th Cir. 2019) (stay of injunction granted); *State of Washington v. DHS*, 408 F. Supp.3d 1191 (E.D. Wa. 2019), 944 F.3d 773 (9th Cir. 2019) (stay of injunction granted).

[52] 8 U.S.C. § 1101(a)(42), INA Sec. 101(a)(42).

Removal. The procedure used to eject persons who are seeking ADMISSION to the United States, as well as those who have been ADMITTED to the United States. Prior to the enactment of IIRAIRA in 1996, the terms "DEPORTATION" and "EXCLUSION" were used.

17. **Restriction on Removal.** *See* WITHHOLDING OF REMOVAL.

18. **Request for Evidence (RFE).** Request made by USCIS to a petitioner or applicant seeking an immigration benefit for additional evidence in support of a claim. Generally, an RFE is accompanied with a list of additional information that is needed to complete adjudication of the benefit.[53]

19. **Safe Third-Country Agreements.** Agreements between the U.S. and foreign governments in which the governments provide assurances that ASYLUM seekers will be provided with certain minimum levels of protection from harm. The first of such agreements was entered into with Canada in 2004. A series of additional agreements were entered into with Guatemala, El Salvador, and Honduras by the Trump administration in 2019. The last three of these agreements are currently being challenged in federal court.[54]

Secondary Inspection. The procedure beyond the initial screening by CBP to determine whether a person will be ADMITTED to the United States. At "secondary inspection," applicants for ADMISSION are subjected to more questioning.

Service Centers. USCIS offices established to handle the filing, data entry, and adjudication of certain applications for immigration services and benefits. The applications are mailed to USCIS service centers; service centers are not staffed to receive walk-in applications or questions.

SEVIS (Student and Exchange Visitor Information System). An Internet-based software application used to track and monitor NONIMMIGRANT students and EXCHANGE VISITORS and their dependents.

Temporary Protected Status (TPS). A status permitting residence and EMPLOYMENT AUTHORIZATION to nationals of foreign states for a period of not less than six months or no more than 18 months, when such states have been appropriately designated by the government because of extraordinary and temporary political or physical conditions in such state(s).[55] TPS status is granted by the DHS secretary following consultation with other "appropriate agencies." [56] The designation may be extended and the decision to confer the benefit is not subject to judicial review, however its revocation has been found to be subject to review when based on an improper basis.[57]

Title 42. A policy invoked by the Center for Disease Control (CDC) pursuant to 42 U.S.C. § 265 prohibiting the admission and requiring the immediate return of non-citizens coming across a land border in response to the COVID-19 pandemic – the ban was applied in March, 2020 and continues in force. The admission bar was enjoined as applied to unaccompanied minors. See *P.J.E.S. v. Wolf*, 108 F.Serv. 3d 451 (D.D.C. 2020); *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes*, 85 Fed. Reg. 16,559 (March 24, 2020). The Biden Administration acquiesced to the injunction but only as to its application to unaccompanied minors. News reports hinted that the Biden Administration would be

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[53] 8 C.F.R. § 103.2(b)(8)(iii).

[54] 8 U.S.C. § 1158, INA Sec. 208(a)(2)(A).

[55] 8 U.S.C. § 1254, INA Sec. 244; 8 C.F.R. §§ 244.2, 1244.2.

[56] 8 U.S.C. 1254(b)(1), INA Sec. 244(b)(1).

[57] 8 U.S.C. § 1254(b)(5), INA Sec. 244(b)(5). *See e.g.*, *Centro Presente v. DHS*, 332 F.Supp.3d 393, 415 (D. Mass. 2019); *Saget v. Trump*, 375 F.Supp.3d 280, 330 (E.D. N.Y. 2019).

rescinding the policy in the near future.[58]

Travel Ban. Description given to the broad ban on travel to the United States of a number of predominantly Muslim countries at the inception of the Trump administration by a series of Executive Orders. The travel ban was ultimately upheld by the Supreme Court in *Trump v. Hawaii*.[59]

Treaty Investor. A NONIMMIGRANT visa classification that permits a national of a country with which the United States maintains a treaty of commerce and navigation to be admitted to the United States when investing a substantial amount of capital in a U.S. business.

Unlawful Presence. Presence in the United States after the expiration of the authorized period of stay, or presence in the United States without having been ADMITTED or PAROLED. The period of authorized stay, usually noted on FORM I-94 or I-94W, must end on a date certain. Thus, for example, Canadians ADMITTED without being issued an I-94, and F, J, and M students and exchange visitors admitted for "duration of status" (D/S) who overstay, do not accrue unlawful presence until and unless an IMMIGRATION JUDGE or DHS official finds such person to be out of status. Violation of status (*e.g.*, the F-1 student who works without authorization) does not constitute unlawful presence. Depending on the period of unlawful presence, a person may be barred from re-admission for a period of three or 10 years.[60]

U.S. Citizenship and Immigration Services (USCIS) *(or, less frequently, CIS)*. Part of the U.S. DEPARTMENT OF HOMELAND SECURITY (DHS), USCIS is the administrative agency responsible for overseeing and adjudicating immigration benefits under the INA.

U.S. Department of State (DOS). The cabinet agency bearing the primary responsibility of all matters relating to foreign affairs, U.S. consular officers operate. In addition to agency officers making decisions on all visa, they make determinations on the issuance of U.S. passports.

US-VISIT (U.S. Visitor and Immigrant Status Indicator Technology Program). A program designed by DHS to collect and share information on foreign nationals traveling to the United States. This system allows the U.S. government to record the entry and exit of non–U.S. citizens and verify the identity of travelers coming in and out of the United States.

20.*Visa Bulletin*. A monthly bulletin issued by the U.S. DEPARTMENT OF STATE, Bureau of Consular Affairs, informing Consular Officers, USCIS officials, and IMMIGRATION JUDGES adjudicating ADJUSTMENT OF STATUS applications of current processing times for the issuance of IMMIGRANT VISAS. The bulletin is issued by the U.S. DEPARTMENT OF STATE; as the agency that monitors and controls the administration of the IMMIGRANT QUOTA system.[61]

Visas Viper. The "Visas Viper Terrorist Reporting Program" was a mechanism created in response to the deficiencies discovered in the aftermath of the 1993 World Trade Center bombing. The program was designed to provide a way "for routinely and consistently bringing suspected terrorists" to the consular section's attention for the purpose of entering names into the DOS "Consular Lookout and Support System" (CLASS) and into the CBP "Interagency Border Inspection System" (IBIS).[62]

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[58] Although the ban and expulsions were framed as a response to COVID-19 it had not been applied to other persons coming to the U.S. For a critique of the policy see Morgan Sandhu, *Unprecedented Expulsion of Immigrants at the Southern Border: The Title 42 Process,* COVID-19 and The Law: Law and Policy to Address Basic Needs and Marginalized Populations (Harvard Law School (Dec. 26, 2020) https://covidseries.law.harvard.edu/unprecedented-expulsion-of-immigrants-at-the-southern-border-the-title-42-process/ **https://perma.cc/78NR-2EGC;** Anita Kumar & Sabrina Rodriguez, *Biden Allies Brace for GOP Attacks When Southern Border Reopens* POLITICO, July 6, 2021

[59] 138 U.S. 2392 (2018).

[60] 8 U.S.C. § 1182(a)(9)(B), INA Sec. 212(a)(9)(B).

[61] The *Visa Bulletin*, including archives of past bulletins, can be found at https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html.

[62] 9 FAM 40.37 N1.1.

Visa. An official endorsement, obtained from an overseas U.S. consul, certifying that the bearer has been examined and is permitted to seek ADMISSION to the United States at a designated PORT OF ENTRY. There are both IMMIGRANT VISAS and NONIMMIGRANT VISAS. A visa does not grant the bearer the right to enter the United States; it merely allows one to seek ADMISSION at a PORT OF ENTRY.

Visa Waiver Program (VWP). A program under which nationals of certain countries with which the United States has an agreement can enter the United States for up to 90 days as visitors for business or pleasure without first obtaining a VISA from a U.S. consulate. No extension or change of status is permitted. The Visa Waiver pilot program became permanent October 30, 2000. This program has become more popularly referred to as ESTA which is the acronym for the Department of Homeland Security's "Electronic System Travel Authorization."[63]

Voluntary Departure. A procedure (immigration benefit) that permits an otherwise REMOVABLE person to leave the United States of his or her own accord. There is a limit of 120 days for prehearing voluntary departure and 60 days for post-hearing voluntary departure. Most forms of voluntary departure allow beneficiaries to avoid the consequences of having a REMOVAL order entered against them.[64] The failure to comply with voluntary departure may have severe immigration consequences.

Waivers. An immigration benefit that may be granted by USCIS, a consular officer, or an IMMIGRATION JUDGE that renders inapplicable a ground of INADMISSIBILITY or DEPORTABILITY. Each waiver has its unique substantive and procedural requirements.[65] Waivers may also be used to remove an impediment to obtaining a VISA or status. As a general proposition most grounds of INADMISSIBILITY and DEPORTABILITY are waivable.

21. **Withholding Only Proceedings**. Removal hearing where the only relief before the immigration court is the applicant's eligibility under either the Convention Against Torture or withholding of removal. *See* Convention Against Torture, Withholding of Removal.

Withholding of Removal. A remedy available to persons who establish that their lives or freedom would be threatened if deported to their home country on account of race, religion, nationality, membership in a particular social group, or political opinion.[66] Withholding of removal does not confer the right to stay in the United States; a person granted withholding of removal may be removed to any country, other than their home country, that is willing to accept them. Also known as "restriction on removal."

Work Permit. There is no single document in U.S. immigration law that is a "work permit." Citizens, nationals, and LAWFUL PERMANENT RESIDENTS are automatically authorized to be employed in the United States. Certain NONIMMIGRANT VISA categories include, as an incident of status, employment authorization either with or without limitation to a particular employer or after application and approval by USCIS. Virtually all EMPLOYMENT AUTHORIZATIONS for NONIMMIGRANTS or undocumented foreign nationals (where authorized) is limited as to time, and most are limited as to the nature of employer and employment. Other foreign nationals physically present in the United States may have the right to apply for an EMPLOYMENT AUTHORIZATION DOCUMENT (EAD).

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[63] https://esta.cbp.dhs.gov/

[64] *See* 8 U.S.C. § 1229c, INA Sec. 240B.

[65] Certain grounds of inadmissibility, as well as the two-year home residency requirement for exchange visitors, can be waived under specific circumstances. USCIS can also grant a waiver of the labor certification and job offer requirement to professionals with advanced degrees and foreign nationals of exceptional ability if it is deemed to be in the national interest.

[66] 8 U.S.C. § 1231(b)(3), INA Sec. 241(b)(3).

Chapter 2

Immigrant Rights in the Social Context

[Insert at pg. 102]

Prosecutorial Discretion and Emerging Conflicts with "State Interests"—DACA and DAPA and Beyond

A recurring theme that we will be seeing throughout this exploration of immigration law are the ways in which federal immigration priorities might come into conflict with perceived "state" interests.[1] There are a number of "flash-points" or conflicts. States which believe that immigration levels need to be lowered or enforcement needs to increase are generally opposed to different forms of immigration relief and are otherwise supportive of more restrictive policies. Other states which are more receptive to non-citizens might be opposed to federal policy changes when they become more restrictive. This is precisely the "seesaw" reaction that we have seen over many years. The important legal question here then becomes what is the proper role of the states vis a vis federal immigration policies? Another question is how easily can federal policies on immigration enforcement be changed by an incoming president?

There are several forms of immigration relief which have been the focal point of this conflict. One has been the Deferred Action for Childhood Arrival (DACA) which is covered at greater length in Chapter 10. [2] DACA is only a temporary form of relief from a non-citizens forced removal for certain people who entered the U.S. unlawfully as minors and met additional requirements under the policy. It provided its beneficiaries with work authorization in yearly increments which kept them out of the removal process. The second was the Obama Administration's expansion of DACA in 2014 to apply the same type of prosecutorial discretion relief to the qualifying parents of DACA recipients in a program called "Deferred Action for Parents of Americans and Lawful Permanent Residents" DAPA. The policies were challenged by states alleging among other things that the federal government, in creating the program had violated the Administrative Procedure Act and the "Take Care Clause" of the Constitution.[3] A district court in Texas found that the states had standing and were likely to succeed on the merits with respect to their APA claim.[4] The significance of an APA challenge goes not to whether the federal government had authority to create the programs, but whether the procedural requirements of notice and

[1] The term "perceived" state interests is used because states can have very different reactions to federal immigration policies. For example states like California, New York or Illinois might at times be favorable to federal policies while Texas, Alabama or Georgia might be opposed. As we have seen in the last decade federal policies and state responses have changed as well.

[2] Beneficiaries of DACA must have been under the age of 31in 2012, had continuously resided in the US since 2007, were currently in school or were honorably discharged from the military and had not been convicted of any serious crimes. 8 C.F.R. § 274a.12(c)(14)

[3] *Texas v. U.S.*, 86 F.Supp. 3d 591 (S.D. Tex. 2015) (granting injunctive relief preventing creation of DAPA), 809 F.3d 134 (5th Cir. 2015) (affirming injunctive relief), U.S. v. Texas,136 S. Ct. 2277 (2016) (summary affirmance by an equally divided court).

[4] *Texas v. United States,* 86 F.Supp.3d 591, 677 (S.D.Tex.2015).

comment in promulgating them had been properly followed.[5] As will be seen in our discussion of these forms of relief in Chapter 10, the DAPA program has since been abandoned and the even though the states were able to temporarily enjoin the Executive Branch's action.

> Arizona, Montana and Ohio filed suit seeking an injunction against the implementation of the Biden Administration's issuance of a revised set of guidelines on prosecutorial discretion issued in September, 2021. The states sought relief under among others that the Biden Administration had violated the Administrative Procedure Act and that one provision of the statute requires timely removal of certain categories of non-citizens in immigration proceedings. While the district court enjoined the guidelines in March, 2022 that decision was stayed by the in the following month.[6] A Sixth Circuit issued its final decision overturned the district court order on July 5, 2022.[7] In a separate action brought by Texas and Louisiana and decided by a district court in June 2022 the policy was enjoined.[8]
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> At this time it remains unclear how another court will consider this issue. However if the Fifth Circuit rules that the prosecutorial discretion guidelines issued by the Secretary are subject to review or otherwise not exercised properly, the matter may have to be resolved by the Supreme Courtin its next term.

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[5] The Fifth Circuit in its decision specifically noted that the plaintiffs were not challenging DHS' decision not to institute removal proceedings against the parents of the childhood arrivals. *See Texas v. U.S.*, 809 F.3d 134, 168 (5th Cir. 2015)

[6] *Arizona v. Biden*, --- F.Supp. 3d --- (S.D. Ohio 2022), 2022 WL 839672, *rev'd remanded*, 2022 WL 2437870 (10th Cir. 2022).

[7] Id.

[8] *Texas v. Biden*, --- F.Supp. 3d --- (S.D. Tex. 2022), 2022 WL 2109204 (Jun. 10, 2022).

Chapter 3

Admissibility and Removal

[pg. 157 in place of Note 3.]

3. 8 U.S.C. § 1182(f) confers broad powers on the President to suspend ". . . the entry of any aliens or of any class of aliens into the United States [whose admission] would be detrimental to the interests of the United States . . ." Historically, this power had only been used to suspend the admission of narrowly proscribed groups.[1] Until its invocation by President Trump in 2017 it's broadest application was used to interdict boats on the high seas bringing Haitian asylum seekers in 1992.[2] In January, March and September of 2017 the President signed a series of Executive Orders which have become known as the "Travel Bans."[3] These Executive Orders were part of an effort to ban the admission of refugees and nationals from a number of predominantly Muslim countries in the region of the Middle East. Each version of the ban resulted in a lower federal court's imposition of a restraining order to all or significant parts of the ban, with a federal appellate court's modification of the order and then the government's appeal to the Supreme Court.[4] In a legal action brought by a number of states against President Trump's invocation of the ban upheld the ban.[5]

The case was decided at the end of 2018 in an opinion by Chief Justice Roberts in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) [6] where the Court held that

> By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall

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[1] *See e.g*. Exec. Order No. 13,664, *Blocking Property of Certain Persons With Respect to South Sudan*, 79 Fed. Reg. 19,283 (Apr. 7, 2014); Exec. Order No. 13,660, *Blocking Property of Certain Persons Contributing to the Situation in Ukraine*, 79 Fed. Reg. 13,493 (Mar. 10, 2014) (suspending the admission of certain persons undermining the democratic process in the Ukraine; Exec. Order No. 13,628, *Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran*, 77 Fed. Reg. 62,139 (Oct. 12, 2012) (suspending entry to certain human rights abusers or those engaging in free speech censorship in Iran); Proclamation No. 5377, *Suspension of Entry as Nonimmigrants by Officers or Employees of the Government of Cuba or the Communist Party of Cuba*, 50 Fed. Reg. 41,329 (Oct. 10, 1985).

[2] Exec. Order No. 12,807, *Interdiction of Illegal Aliens*, 57 Fed. Reg. 23,133 (May 24, 1992). The challenge to the policy is discussed more broadly in *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) in Chapter 5.

[3] Exec. Order No. 13,769, *Protecting the Nation from Foreign Terrorist Entry into the United States,* 82 Fed. Reg. 8977 (Jan. 27, 2017); Executive Order No.13,780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 82 Fed. Reg. 45161 (Sept. 24, 2017).

[4] See *State of Hawaii v. Trump*, 245 F.Supp 3d 1227 (D. Hawaii 2017), 859 F.3d 741 (9th Cir. 2017) (aff'd in part vacating in part, remanding); *Int'l Refugee Assistance v. Trump,* 857 F.3d 554 (4th Cir. 2017), 137 S. Ct. 2080 (2017)

[5] David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017)

[6] Justices Kennedy and Thomas joined the majority in separate concurrences.

> deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that § 1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale,* 509 U.S., at 187 (finding it "perfectly clear" that the President could "establish a naval blockade" to prevent illegal migrants from entering the United States); see also *Abourezk v. Reagan,* 785 F.2d 1043, 1049, n. 2 (D.C. Cir. 1986) (describing the "sweeping proclamation power" in § 1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).
>
> The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." Proclamation § 1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] ... country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur." *Ibid.*

138 S. Ct. at 2408-09.

The Court went on to reject claims of religious animus reasoning that statements made during the heat of a political campaign and reasoned that its review was more circumscribed stating that

> For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell,* 430 U.S. 787, 792 (1977); see *Harisiades v. Shaughnessy,* 342 U.S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive." *Mathews v. Diaz,* 426 U.S. 67, 81 (1976).
>
> Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In *Kleindienst v. Mandel,* the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U.S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. *Id.,* at 764–765. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. *Id.,* at 769. Given the authority of the political branches over admission, we held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look

> behind the exercise of that discretion, nor test it by balancing its justification" against the asserted constitutional interests of U.S. citizens. *Id.,* at 770.
>
> * * *
>
> The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U.S.C. § 1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as "countr[ies] or area[s] of concern" for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah,* 544 F.3d, at 433, n. 3 (describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry–Exit Registration System).

138 S. Ct. at 2418-22.

Justice Breyer was joined by Justice Kagan, dissented with a separate dissent by Justice Sotomayor and Ginsburg. Justice Breyer's dissent highlighted the irregularities in the so-called waiver process and would remand the case to the district court for such an inquiry

> The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. See 8 U.S.C. § 1182(f) (requiring "find[ings]" that persons denied entry "would be detrimental to the interests of the United States"); *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993) (First Amendment); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S.Ct. 1719 (2018) (same); *post,* at —— – —— (SOTOMAYOR, J., dissenting). If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, *i.e.,* about whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content.
>
> * * *
>
> Declarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a "Muslim ban," and the assistance in deciding the issue that answers to the "exemption and waiver" questions may provide, I would send this case back to the District Court for further proceedings. And, I would leave the injunction in effect while the matter is litigated. Regardless, the Court's decision today leaves the District Court free to explore these issues on remand.
>
> If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the

> Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

138 S. Ct. at 2429 and 2433.

Justice Sotomayor, with Justice Ginsburg dissented arguing that

> In light of the Government's suggestion "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order," the majority rightly declines to apply *Mandel* 's "narrow standard of review" and "assume [s] that we may look behind the face of the Proclamation." In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. *Ibid.* That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. See, *e.g., McCreary,* 545 U.S., at 860–863, 125 S.Ct. 2722; *Larson,* 456 U.S., at 246; *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449–452, 89 S.Ct. 601 (1969); see also *Colorado Christian Univ. v. Weaver,* 534 F.3d 1245, 1266 (C.A.10 2008) (McConnell, J.) (noting that, under Supreme Court precedent, laws "involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)). As explained above, the Proclamation is plainly unconstitutional under that heightened standard. See *supra,* at ——— – ———.
>
> But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is " 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it' " that the policy is " 'inexplicable by anything but animus.' " *Ante,* at ——— (quoting *Romer v. Evans,* 517 U.S. 620, 632, 635, (1996)); see also *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group). The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis. *IRAP II,* 883 F.3d, at 352 (Harris, J., concurring) (explaining that the Proclamation contravenes the bedrock principle "that the government may not act on the basis of *animus* toward a disfavored religious minority" (emphasis in original)).
>
> The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." *Ante,* at ———. But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." *Ibid.*. Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a " 'religious gerrymander.' " *Lukumi,* 508 U.S., at 535.
>
> * * *
>
> In sum, none of the features of the Proclamation highlighted by the majority supports

> the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

138 S. Ct at 2441 and 2445.

Pre and Post-Pandemic Border Restrictions

Prior to the onset of the COVID-19 pandemic in the Spring of 2020 the Trump Administration instituted a policy, commonly referred to as "Remain in Mexico," or the "Migration Protection Protocols" (MPP).[7] The term was used because the procedures required applicants at the US-Mexico border to wait on the Mexican side until such time that CBP was ready to review their application for admission.[8] Other policies had been instituted on a less wide-spread basis one of which was known as "metering" or the slowing down of the admission process. "Metering" was effectively another asylum turnback policy first instituted by CBP in approximately February 2016.[9] Following the onset of the Pandemic, in the Spring of 2020 the Trump Administration invoked another rule referred to as "Title 42," so named as it relates to Title 42 of the U.S. Code which governs matters relating to public health.[10] The invocation of Title 42 was broader than any previous assertion of power at the border as it allowed CBP to prohibit the admission of any non-citizen or permanent resident arriving at the southern border regardless of their claims of persecution or other harm.[11] Each of the policies previously described were challenged in a series of actions brought in federal courts in different parts of country. with restraining orders or injunctions being ordered, set aside and reinstated, thereby creating a complicated picture of what an applicant for admission might face when arriving.

These policies were highly controversial because they conflicted with a number of other longstanding legal requirements involving unaccompanied minors and those fleeing various forms of persecution. Broadly stated some unaccompanied minors are arguably covered under prior settlement agreements from earlier litigation. Those fleeing persecution and other forms of harm are seen as legally

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[7] These terms are described in the Glossary of Common Terms which appear in the Chapter 1 of this Supplement. MPP was put into place in January, 2019.

[8] The language of the statute was interpreted as permitting the Secretary to return persons arriving by land while their proceedings were pending. 8 U.S.C. § 1252(b)(2)(C).

[9] See *Fact Sheet: Metering and Asylum Turnbacks* 2 (American Immigration Council Mar. 8, 2021), https://perma.cc/95HC-VGKB. Metering effectively

[10] 85 FED. REG. 17,060, 17,061 (Mar. 26, 2020). 8 U.S.C. § 265 provides that

> [w]henever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

[11] By its terms, the order did not encompass permanent residents. Through the Center for Disease Control and Prevention (CDC) all migration at the Southern border was cut off. See *What was Title 42's effect on border encounters and people seeking asylum in the US?* USA Facts, Jun. 2, 2022 https://perma.cc/AV9T-7BN7; A Guide to Title 42 Expulsions at the Border (American Immigration Council May 25, 2022) https://perma.cc/HCV7-MJKH

protected under various statutes and international treaties to which the U.S. is signatory. The concern from advocates was that these vulnerable individuals if forced to remain in Mexico or were otherwise forcibly returned without regard to the persecution or harm they might experience would violate existing statutory protections.

Upon taking office in 2021, while litigation challenging the policy were pending, the Biden Administration announced that MPP would be suspended and in June, 2021 formal action was taken to do the same by the Secretary of DHS. In April, 2022 the CDC announced its intention to rescind its invocation of Title 42 in part due to the broad availability of rapid testing and vaccination against COVID-19.[12] Both of these actions were challenged by several states in federal court resulting in injunctions. At the end of its term in 2022, the Supreme Court held that MPP could be rescinded, holding that the statute permitted but did not require the Secretary to force those seeking admission to wait in Mexico.[13] With respect to Title 42, one court has held that it is unlawful to expel migrant families under Title 42 without regard to their possible persecution and another has enjoined its termination.[14]

[Insert at pg. 160]

D. Determining Admissibility for Detention or Removal

As we have seen previously, depending on a person's procedural posture, bail (or bond) may be available while proceedings are pending and following a final decision. The opportunity to seek release while the case is pending will vary based on whether they are seeking admission at the border or have been previously admitted. Changes made to the immigration laws in 1996 merging all non-citizens into one unified "removal" proceeding added to the already difficult statutory interpretation issues. In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) the Court held that the INA could not be interpreted as implicitly placing a 6 month limit on detention, thereby requiring periodic bond hearings. The issue that was raised in Jennings involved the period from a person's arrest by ICE and the final determination on their case. You will recall that in two previous cases the Court has held that a person who had a final removal order could not be held beyond a 6 month period if there was no prospect of imminent removal. *See Zadvydas v. Davis*, 532 U.S. 678. 682 (2001). Below are excerpts from the *Jennings* decision.

> Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens. Aliens covered by § 1225(b)(1) are normally ordered removed "without further hearing or review" pursuant to an expedited removal process. § 1225(b)(1)(A)(i). But if a § 1225(b)(1) alien "indicates either an intention to apply for asylum ... or a fear of persecution," then that alien is referred for an asylum interview. § 1225(b)(1)(A)(ii). If an immigration officer determines after that interview that the alien has a credible fear of persecution, "the alien shall be detained for further consideration of the application for asylum." § 1225(b)(1)(B)(ii). Aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process. Those aliens "shall be detained for a [removal] proceeding" if an immigration officer "determines that [they are] not clearly and beyond a doubt entitled to be admitted" into the country. § 1225(b)(2)(A).

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[12] Rochelle P. Walensky, U.S. Dept. of Health & Human Serv., Ctr. for Disease Control & Prevention, *Public Health Determination and Order Regarding the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (Apr. 1, 2022).

[13] *Biden v. Texas*. --- S. Ct. --- (2022), 2022 WL 234721.

[14] *See Huisha-Huisha v. Mayorkas*, 560 F.Supp. 3d 146, (D. D.C. 2021), 27 F.4th 718 (D.C. Cir. 2022) aff'd in part & remanding; *Arizona v. C.D.C.*, 2022 WL 1276141 (W.D. La. 2022). In *Huisha-Huisha* the circuit court acknowledged the validity of Title 42 but required that consideration be given to prevent the forcible return of people to where they would face harms. 27 F.4th at 732.

> Regardless of which of those two sections authorizes their detention, applicants for admission may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A); see also 8 C.F.R §§ 212.5(b), 235.3 (2017). Such parole, however, "shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A). Instead, when the purpose of the parole has been served, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." Ibid.
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> * * *
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> In sum, U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c). The primary issue is the proper interpretation of §§ 1225(b), 1226(a), and 1226(c).

138 S. Ct. at 837-38. The Court remanded the case to consider the constitutional questions avoided by the lower court under the canon of constitutional avoidance. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). Justices Breyer, Ginsburg and Sotomayor dissented noting the extended periods of detention involved in the cases where the respondents were asylum seekers, or otherwise had legitimate claims to ultimately being able to meet the criteria for admission focused heavily on the constitutional implications of the case.[15] With respect to the statutory interpretation it considered the statute's language of "shall be detained" as not precluding bond or bail in lieu of a strict custodial confinement.

> The relevant provision governing the first class of noncitizens, the asylum seekers, is § 1225(b)(1)(B)(ii). It says that, if an immigration "officer determines at the time" of an initial interview with an alien seeking to enter the United States "that [the] alien has a credible fear of persecution ..., the alien shall be detained for further consideration of the application for asylum." See Appendix A–1, infra. I have emphasized the three key words, namely, "shall be detained." Do those words mean that the asylum seeker must be detained without bail ?
>
> They do not. First, in ordinary English and in light of the history of bail, the word "detain" is ambiguous in respect to the relevant point. The Oxford English Dictionary (OED), surveying the history of the word, notes that Edward Hall, a famous 16th-century legal scholar and author of Hall's Chronicle, wrote: "A traytor ... is apprehended and deteigned in prisone for his offence," a use of the word, as we know from Blackstone, that is consistent with bail. See supra, at 863 – 864 OED (3d ed., Dec. 2012), http://www.oed.com/view/Entry/51176 (annot. to def. 1). David Hume, the famous 18th-century historian and philosopher, writes of being "detained in strict confinement," thereby implying the existence of detention without strict confinement. Ibid. A 19th-century novelist writes, " 'Beg your pardon, sir,' said the constable, ... 'I shall be obliged to detain you till this business is settled' "—again a use of "detain" that we know (from Blackstone) is consistent with bail. Ibid. And the OED concludes that the primary meaning of "detain" is "[t]o keep in confinement or under restraint ; to keep prisoner." Ibid. (emphasis added). To grant bail, we know, is not to grant unrestrained freedom. Rather, where the Act elsewhere expressly permits bail, it requires "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General." 8 U.S.C. § 1226(a)(2)(A). Similarly in the criminal context, bail imposes

[15] Justice Kagan did not participate in the case.

> numerous restraints, ranging from the provision of a bond, to restrictions on residences and travel, to the imposition of a curfew, to a requirement to obtain medical treatment, to report at regular intervals, or even to return to custody at specified hours. See 18 U.S.C. § 3142(c)(1)(B) (listing possible conditions for the pretrial release of federal criminal defendants).
>
> At the very least, because the word "detain" in this context refers to a comparatively long period of time, it can readily coexist with a word such as "bail" that refers to a shorter period of conditional release. For instance, there is nothing inconsistent in saying: During his exile, he was permitted to pay short visits to his home country; during the period of active hostilities, the soldiers would lay down their arms and fraternize on Christmas Day; during his overseas detention, he was allowed home to see his sick mother; or during his detention pending proceedings, he was permitted bail.

138 S.Ct. at 871.

[pg. 171 – to Supplement the discussion under the heading "The Application of Expedited Removal"]

In March, 2022 the Biden Administration formally rescinded the previous Trump Administration notice regarding the expansion of expedited removal. The rescission process was part of a review initiated by the President when he issued one of his first set of Executive Orders in February, 2021.[16] The rescission was implemented through the issuance of an interim final rule on procedures for credible fear screening. which was set to go into effect on May 31, 2022.

Previously in July, 2019 DHS announced that it was planning to expand expedited removal to individuals found anywhere in the U.S. who have been here less than two years.[17] Given the critiques against expedited removal and little evidence of improvement, its expansion is a matter of concern, and litigation was brought to challenge it. In September 2019, the District Court for the District of Colombia in *Make the Road New York v. McAleenan,* 405 F.Supp.3d 1 (D.D.C. 2019) issued a preliminary injunction enjoining its expansion, pending the outcome of litigation on the issue. In June, 2020 the federal appeals court lifted the injunction finding that the expansion of expedited removal was a matter solely "committed to agency discretion." *Make the Road New York v. McAleenan*, 962 F.3d 612 (D.C. Cir. 2020). The Biden Administration

Limitations on Judicial Review of Expedited Removal/Credible Fear Proceedings.

At the end of its 2020 term, the Supreme Court issued a decision in *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020), which held that the Constitution's Suspension Clause does not provide the right to habeas review of an adverse credible fear determination. The Sri Lankan asylum seeker, Vijayakumar Thuraissigiam, had been abducted and beaten in his home country. He fled to the U.S. and was apprehended a very short distance from the southern border after entering. After a negative credible fear determination by an asylum officer, which was affirmed by an Immigration Judge (IJ), he sought habeas

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[16] *Executive Order on Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, Exec. Order 14,010 Sec. 4(b)(ii) (2021)

[17] *Designating Aliens for Expedited Removal*, 84 FED. REG. 35,409 (2019)

review, arguing that an improper standard was applied to his credible fear determination. The U.S. District Court for the Southern District of California found that it lacked jurisdiction; on appeal the Ninth Circuit ruled that the Immigration and Nationality Act's (INA) limit on the scope of habeas review violated the Constitution's Suspension Clause, a ruling which the Supreme Court rejected in its decision. The Court held that:

> This principle dooms respondent's Suspension Clause argument, because neither respondent nor his *amici* have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release. . .
>
> * * *
>
> In this case, however, respondent did not ask to be released. Instead, he sought entirely different relief: vacatur of his "removal order" and "an order directing [the Department] to provide him with a new . . . opportunity to apply for asylum and other relief from removal.

140 S.Ct. at 1969-70.

Note

1. For an excellent discussion of expedited removal in light of Thuraissigiam *see* Diana G. Li, *Due Process in Removal After Thuraissigiam*, 74 STAN. L. REV. 793 (2022).

2. For an excellent exploration of the "entry fiction" doctrine and it broader application see Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565 (2022)

Changes to the Credible Fear Process Under an Interim Final Rule.[18]

In addition to replacing the changes which were made to the asylum process by the Trump Administration the Biden Administration ordered the Secretary of DHS and the Attorney General to re-examine the procedures for determining credible fear and deciding asylum applications. The focus on the credible fear process appears to primarily on expediting it, by creating internal deadlines as well as giving some role to the asylum officer in matters outside of asylum such as withholding/restriction and Convention Against Torture relief. The highlights of the changes are described below.

First, the new rule provides that USCIS may, in its discretion, reconsider a negative credible fear finding with which an IJ has concurred, provided that the reconsideration is requested by the applicant or initiated by USCIS no more than 7 days after the concurrence by the IJ, or prior to the noncitizen's removal, whichever date comes first. USCIS, will not accept more than one such request for reconsideration of a negative credible fear finding.

Second, the rule provides that noncitizens whose asylum applications are retained by USCIS for further consideration following a positive credible fear determination may amend or correct the biographic or credible fear information in the Form I-870, Record of Determination/Credible Fear

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18 For the full text of the Interim Final Rule see *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers*, 87 FED. REG. 18,078 (Mar. 29, 2022)

Worksheet, or supplement the information collected during the process that concluded with a positive credible fear determination, provided that the information is submitted directly to the asylum office no later than 7 days prior to the scheduled asylum interview, or for documents submitted by mail, postmarked no later than 10 days prior to the interview. The rule further provides that, the asylum officer, upon a finding of "good cause" in an exercise of discretion may consider amendments or supplements submitted after the 7- or 10-day submission deadline or may grant the applicant an extension of time during which they may submit additional evidence, subject to some limitations. The rule would limit these extensions in the absence of exigent circumstances, if they would delay a decision in the case. (Cases are contemplated as being decided within 60 days of service of the positive credible fear determination.)

Third, the rule provides in that USCIS may consider the asylum application of an applicant if an immigration judge has determined that the person has met the requirements for credible fear. This would be where the asylum officer initially determined that there was no credible fear and the IJ finds to the contrary.

Fourth, the rule provides that an asylum officer will also elicit all relevant and useful information bearing on the applicant's eligibility for statutory withholding of removal and CAT protection. This means that if the asylum application is not granted, the asylum officer should determine whether the applicant is eligible for withholding (restriction) of removal or Convention Against Torture (CAT) relief and refer the case to IJ for a hearing. If the asylum application includes a dependent (spouse or child who is in the United States and is included in the principal applicant's application as such and the principal applicant is determined to not to be eligible for asylum, the asylum officer should elicit sufficient information to determine whether there is a significant possibility that the dependent has experienced or fears harm that would be an independent basis for protection prior to referring the family to the IJ for a hearing. If the asylum officer determines that there is a significant possibility that the dependent has experienced or fears harm that would be an independent basis for asylum, statutory withholding of removal, or protection under the CAT, the asylum officer will inform the dependent of that determination. The rules also contemplate that USCIS will inform dependents that they may request their own credible fear determination and can separately file an asylum application. If a spouse or child who was included in the principal's request for asylum does not separately file an asylum application that is adjudicated by USCIS, the principal's asylum application will be deemed to be included in the principals.

Fifth, the rule provides that an Asylum Merits interview may not be set less 21 days following the credible fear determination and service of the decision. But it must set within 45 days of the date that the positive credible fear determination is served on the noncitizen, subject to the need to reschedule an interview due to exigent circumstances.

Seventh, the rule provides that the interview will be recorded and a verbatim transcript of the interview shall be included in the record.

Eighth, this rule clarifies that if a USCIS interpreter is unavailable, USCIS will attribute any resulting delay to USCIS (and not the applicant) for the purposes of employment authorization pursuant to The rule continues to provide that, for asylum applications retained by USCIS for further consideration, if the applicant is unable to proceed effectively in English, the asylum officer shall arrange for the assistance of an interpreter in conducting the Asylum Merits interview.

Ninth, failure of an applicant to appear at an Asylum Merit Interview may result in referral of the case to an IJ for dismissal of the asylum application.

The Credible Fear Standard

The Trump Administration repeatedly complained about the credible fear standard being too low,

leading to abuse of the system. In *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), Judge Sullivan of the U.S. District Court for the District of Columbia affirmed that "Congress intended the credible fear determinations to be governed by a low screening standard." The decision in *Grace v. Whitaker* (renamed *Grace v. Barr*) was appealed to the Court of Appeals for the District of Colombia Circuit, which issued a decision in July, 2020 holding that two of the standards imposed (the heightening of the burden for proving the government is unable or unwilling to protect in non-state persecutor cases, and a new rule on choice of law to be applied in CFIs) were arbitrary and capricious and were to continue to be enjoined.[19]

USCIS had made the credible fear process more difficult in at least four respects. First, on April 30, 2019 it released a revised Lesson Plan for asylum officers. The revised Plan deleted a paragraph in the prior training that instructed asylum officers to take into consideration that asylum seekers may not have all the evidence to establish their credible fear of persecution immediately upon arrival to the U.S. The revised plan can be found here. Second, in July 2019, USCIS issued a new directive speeding up the timing of the credible fear interview. Previously, asylum officers had to wait 48 hours after an immigrant's apprehension and detention to carry out the credible fear interview. The new directive allowed the interviews to take place after 24 hours. Third, in July 2019, CBP entered into a Memorandum of Agreement with USCIS to allow CBP officers – who are trained in law enforcement, rather than in asylum law and best practices for interviewing asylum seekers, as Asylum Officers are – to adjudicate CFIs.

[19] *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). The Court found, based on the government's concessions, that there was no categorical bar to domestic violence or fear of gang claims, or to particular social group claims including the descriptive language "unable to leave." Because the Court found there was no bar, it vacated the District Court's injunction as applied to those two issues.

Chapter 4

Removal after Admission

[Insert at pg. 206]

1. Detention or Release

Earlier in this Supplement we discussed the implications of a case involving a non-citizen's right to release on bond while their case was pending an immigration judge. (See discussion in this Supplement at Chapter 3. At the end of its 2022 term the Supreme Court decided *Johnson v. Arteaga-Martinez*, 142 S.Ct. 1827 (2022) holding that a person who had returned to the US under a prior removal order which had been reinstated was not entitled to a bond hearing. In *Arteaga-Martinez* the non-citizen had his original removal order in 2012 and departed the US returning only a few months later. Facing a reinstatement of removal Arteaga-Martinez sought withholding of removal and Convention Against Torture (CAT) relief.[1] As part of this process he was interviewed by an asylum officer and was found to have a "reasonable fear" of persecution and a district court applying existing circuit law held that he was entitled to a bond hearing. The Court in interpreting 8 U.S.C. § 1231(a)(6) held that he was not entitled to a bond hearing before an immigration judge pending the immigration judge's disposition of his case.[2] It bears noting that the Court never reached the constitutional question and remanded the case based on its interpretation of the statute. The constitutional question is whether a person such as Arteaga-Martinez had a constitutional right to be considered for release on bond during the pendency of his case. As has been noted previously in this text, pursuant to *Clark v. Martinez*, 543 U.S. 371 (2005) and *Zadvydas v. Davis*, 533 U.S. 678 (2001) the government's power to detain post-removal order is more constrained by the immigration statute itself.[3]

2. The Removal Hearing

In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021) the Court held that a Notice to Appear, in order to be effective in triggering the stop-time rule must meet all of the requirements contained in the statute and include a "written notice . . . specifying" certain information, such as the charges against the non-citizen and the time and place at which the removal proceedings will be held. 8 U.S.C. § 1229(a)(1). The Court was expanding on an earlier decision in *Pereira v. Sessions,* 138 S. Ct. 2105 (2018) where it had reached a similar conclusion. In *Niz-Chavez* the government had issued an initial charging document which did not include all of the information and then proceeded to send additional notices which collectively would satisfy the statute's requirement. The unresolved issue raised by *Niz-Chavez* is whether the government's failure is jurisdictional requiring a termination of the proceeding. On July 20, 2021 the Board of Immigration Appeals invited *amicus curiae* briefs addressing the issue of whether *Niz-Chavez* impacts the jurisdiction of an immigration court. See Board of Immigration Appeals, *Amicus Invitation*

[1] These forms of relief will be explored in Chapter 5.

[2] The standard applied had been applied in the Third Circuit was that he should be released unless the government could establish by clear and convincing evidence, that the noncitizen poses a risk of flight or a danger to the community.

[3] See discussion in the Casebook at pp. 161 and 205.

No. 21-20-07 (Jul. 20, 2021).[4]

Immigration Courts have been severely backlogged for many years. While backlogs preceded the election of Donald Trump, one of the causes of the dramatic backlog increase was the Administration's so-called "zero tolerance" policy where removal proceedings were commenced for any type of immigration violation. With that policy, the relevant agencies also sought to diminish the authority previously accorded immigration judges to manage their own cases. One such device is called "administrative closure." In a 2012 decision, the BIA had held that where a set of factors warranted the closing of a removal proceeding such as when a person facing removal had a pending application for permanent residency, the immigration judge had authority to allow the person to pursue those remedies by closing the case.[5] The Attorney General in *Matter of Castro-Tum*, 27 I.&N. Dec. 271 (AG 2018) held that neither the BIA nor immigration judges had authority to use this docket control device. In July, 2021 the new Attorney General issued a decision reversing *Castro-Tum* and reinstating the immigration judge's authority to close cases in appropriate circumstances.[6] In announcing his decision the Attorney General noted that the agency was engaged in the process of reconsidering a rule which the previous Attorney General had finalized on January 15, 2021 and which had been enjoined by a federal court in March in a class action case.[7]

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[4] https://www.justice.gov/eoir/page/file/1413376/download, https://perma.cc/B6T2-BEXX (last visited Jul. 20, 2021)

[5] *Matter of Avetisyan*, 25 I.&N. Dec. 688 (BIA 2012). In *Avetisyan* during the course of the removal proceedings the the respondent had married a US citizen and had a US citizen child which therefore becoming eligible for adjustment of her status to that of a lawful permanent resident. The factors listed were

[6] *Matter of Cruz-Valdez*, 28 I.&N. Dec. 326 (AG 2021).

[7] The regulation was enjoined *Centro Legal de La Raza v. EOIR*, No. 21-cv-463, 2021 WL 916804 (N.D. Cal. 2021). The enjoined rule can be found at *Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 FED. REG. 81,588 (Dec. 16, 2020).

Chapter 5

Protections from Harm

[Insert at pg. 292]

The Asylum Procedure

The Trump administration lowered the FY2018 refugee allocation to 45,000. Each year the administration further slashed the refugee numbers, reducing to 30,000 for FY2019, to 18,000 in FY2020, and to 15,000 in FY2021. The Trump administration also issued an executive order in 2019 limiting refugee resettlement to only jurisdictions in which state and local governments have consented in writing to receive refugees. See Executive Order 13888, Enhancing State and Local Involvement in Refugee Resettlement, 84 Fed. Reg. 52,355 (Oct. 1, 2019). In a February 4 Executive Order, President Biden revoked EO 13888. See Executive Order 14013, Rebuilding and Enhancing Programs To Resettle Refugees and Planning for the Impact of Climate Change on Migration, 86 Fed. Reg. 8,839, § 2(a), (Feb. 4, 2021).

As a candidate, Joe Biden committed to admitting 125,000 refugees. Once elected, on April 16, 2021, he announced he would leave the current admissions at 15,000 (the Trump administration's number) for the current fiscal year. This prompted an immediate and harsh backlash, which led to him announcing that he was adjusting the current fiscal year number up to 62,500. In October, 2021 President Biden again set the number at 125,000 for fiscal year 2022.

The Trump Administration had engaged in a wide range of practices in an attempt to prevent asylum seekers from accessing the U.S. to apply for asylum. Each of the practices was more extreme in its goal to limit or prevent access and/or the relief of asylum. Following the inauguration of the new President, the Biden Administration has reversed or terminated many, but not all, of them.

In May 2018, the Trump administration first attempted to limit access to the United States through "metering," which permitted only a limited number of asylum seekers to enter at ports of entry for the purpose of seeking asylum, turning back others to wait in Mexico. *See* Todd Owen, U.S. Customs and Border Protection**,** *Metering Guidance Memorandum* (Apr. 27, 2018) (currently enjoined). Then, in November 2018, the administration imposed "Asylum Ban 1.0," on asylum for individuals who entered between, rather than at, U.S. ports of entry. *See Aliens Subject to a Bar on Entry Under Certain Proclamations; Procedures for Protection Claims*, 83 FED. REG. 55,934 (Nov. 9, 2018) (was to be codified at 8 C.F.R. § 208, 1003, 1208, currently enjoined). That was followed in January 2019 by the Migrant Protection Protocols (MPP)**,** which allowed migrants to request asylum, but forced all non-Mexican asylum seekers, with few exceptions, to wait in Mexico until their cases could be heard in U.S. Immigration Courts. *See* Kirstjen Nielsen, U.S. Homeland Security, *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019). In July 2019, the Trump administration issued a second ban on asylum – "Asylum Ban 2.0" – for individuals who could not show they applied for and were denied asylum in countries of transit. *See Asylum Eligibility and Procedural Modifications*, 84 FED. REG. 33,829 (July 16, 2019) (was to be codified at 8 C.F.R. § 208, 1003, 1208, currently enjoined). Then, in July – September 2019, the Trump administration entered into third country cooperative agreements with El Salvador, Guatemala and Honduras, allowing the United States to "outsource" its asylum obligations to these countries by sending asylum seekers there to have their cases adjudicated (revoked, see section on "Safe Country Agreements"). In October 2019, the Trump administration created two more

programs, "Humanitarian Asylum Review Process" **(**HARP**)** and "Prompt Asylum Claim Review" **(**PACR**)**, that fast-track asylum seekers through their initial credible fear screenings in a matter of days, without meaningful access to an attorney, and keep them in U.S. Customs and Border Patrol (CBP) custody rather than in U.S. Immigration and Customs Enforcement (ICE) detention centers. The most draconian of all these measures was the March 20, 2020 issuance of an order that used the COVID-19 pandemic as a pretext to effectively close the border to asylum seekers. The Centers for Disease Control (CDC) order was accompanied by an implementing regulation. *See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists*, 85 FED. REG. 17,060 (Mar. 20, 2020). The regulation bars the entry of and requires the expulsion of all persons entering by land without valid documents. The border closure was carried out under the authority of the 1944 Public Health Act, and was ordered by the CDC rather than by DHS or DOJ. The following is a brief overview of the aforementioned practices and their current status under the Biden administration:

Metering

The practice of metering effectively began in 2016. *See Al Otro Lado v. Nielsen*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal. Oct. 12, 2018) (amended complaint). CBP told asylum seekers who arrived at ports of entry to wait, stating that they only had capacity to accept a certain number of asylum seekers a day. Metering became less important to the Trump administration's strategy of keeping non-Mexican asylum seekers in Mexico once the administration implemented MPP.

The "Turnback Policy," an early version of metering, was challenged in a class action by Al Otro Lado and other legal nonprofits in 2017. *See Al Otro Lado v. Kelly*, No. 2:17-cv-5111 (S.D. Cal. July 12, 2017) (initial complaint). Plaintiffs alleged that this policy violated the Immigration and Nationality Act, the Administrative Procedure Act, the Fifth Amendment, and the doctrine of *non-refoulement*. *Id.* In 2020, the Southern District Court of California granted class certification to all noncitizens denied access to the U.S. asylum process as a result of the metering policy. *See Al Otro Lado v. Wolf,* No. 17-cv-02366-BAS-KSC (S.D. Cal. Aug. 6, 2020) (order granting class certification).

While metering was in effect, the Trump administration implemented an additional bar to asylum, the Transit Ban, referred to above as "Asylum Ban 2.0." Al Otro Lado brought a lawsuit challenging, among other things, whether the class of individuals who had come to the border prior to the Transit Ban, but were forced to wait in Mexico because of metering, should be subject to the Transit Ban. The U.S. District Court for the Southern District of California enjoined the government from applying the Transit Ban to that class and ruled that the government had to apply pre-Transit Ban practices to the class members. *Al Otro Lado v. McAleenan*, No. 17-cv-02366-BAS-KSC (S.D. Cal. Nov. 19, 2019) (order granting preliminary injunction).

While this litigation was ongoing, the DHS Office of the Inspector General issued a report on the practice of metering, and developed three recommendations "aimed at bringing CBP operations in line with long-established practices." One of these recommendations effectively suggested that CBP end the metering practice. CBP disagreed with this recommendation on the basis of "operational capacity" needs.

The government appealed the decision of the district court in *Al Otro Lado v. McAleenan* which addressed application of the Transit Ban to individuals who had been subject to metering prior to the Ban, but the Ninth Circuit Court of Appeals decided to hold the appellate proceedings in abeyance pending issuance of the mandates in *EBSC v. Barr*, 964 F.3d 832 (9th Cir. 2020) and CAIR *v. Trump*, No. 20-5273 (D.C. Cir. Filed Oct. 1, 2020) which challenged the Transit Ban itself. *Al Otro Lado v. Wolf*, No. 19-56417

(9th Cir. 2020) (order). A preliminary injunction against the Transit Ban was issued in EBSC v. Barr, and the D.C. District Court vacated the rule imposing it.

A temporary restraining order blocking the application of the Transit Ban to individuals subject to metering prior to the ban's implementation continues in force. *Al Otro Lado v. Gaynor,* No. 17-cv-02366-BAS-KSC (S.D. Cal. 2021) (TRO). The practice of metering itself remained in effect through March 2020, became then became mostly irrelevant once the border was closed as a result of the CDC order.

Attempts to Prohibit Asylum to Individuals Who Do Not Enter the U.S. at Ports of Entry (Asylum Ban 1.0).

In November 2018, the Trump administration issued an interim final rule and a proclamation seeking to prohibit asylum to all individuals who do not enter the United States at a port of entry. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 FED. REG. 55,934 (Nov. 9, 2018); A*ddressing Mass Migration Through the Southern Border of the United States*, 83 FED. REG. 57,661 (Nov. 15, 2018).

The rule was challenged in *East Bay Sanctuary Covenant v. Trump*, and Judge Tigar, U.S. District Court for the Northern District of California, issued a temporary restraining order (TRO) against the policy. No. 18-cv-06810-JST (N.D. Cal. 2018) (TRO). The Ninth Circuit Court of Appeals, and then the Supreme Court, denied the government's requests for stays of the preliminary injunction pending appeal. In February 2020, the Ninth Circuit Court of Appeals affirmed the grant of a nationwide preliminary injunction. *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 18-17436 (9th Cir. 2020).

President Biden revoked the proclamation upon which the rule was based, EOIR rescinded the rule's implementing policy memo on May 14, 2021, and the Unified Regulatory Agenda indicates that DHS and DOJ are "modifying or rescinding" the rule. However, the Ninth Circuit Court of Appeals held in an amended opinion on March 24, 2021 that the case is not moot.

Migrant Protection Protocols (MPP), known as "Remain in Mexico"

MPP forced individuals arriving without documentation, with few exceptions, to wait in Mexico for the duration of their pending asylum case (as opposed to metering, which required asylum seekers to wait in Mexico prior to presenting at a port of entry ("POE") and asking for asylum). The government's justification for the policy is INA 235(b)(2)(C), which allows DHS to return individuals to the "contiguous country" from which they arrived by land, and to require them to await their proceedings in that country. MPP was gradually implemented at an expanding number of POEs throughout 2019 and 2020, and is now in effect at seven different POEs:

1) San Diego, CA / Tijuana, Baja California, MX (January 2019);
2) Calexico, CA / Mexicali, Baja California, MX (March 2019);
3) El Paso, TX / Ciudad Juarez, Chihuahua, MX (March 2019);
4) Laredo, TX / Nuevo Laredo, Tamaulipas, MX (July 2019);
5) Brownsville, TX / Matamoros, Tamaulipas, MX (July 2019);
6) Eagle Pass, TX / Piedras Negras, Coahuila, MX (October 2019); and
7) Nogales, AZ / Nogales, Sonora, MX (January 2020).

MPP has been a human rights disaster. The Mexican border cities in which the asylum seekers have been forced to wait are some of the most dangerous cities in Mexico, with U.S. State Department danger

advisory levels for some at 4 – the same level assigned to countries such as Afghanistan, Iraq, and Syria. As of April 2021, over 70,000 asylum seekers had been sent back to Mexico to await their court proceedings. Human Rights First (HRF) issued multiple reports on the implementation of MPP, from its first in August 2019 to its latest in December 2020. As of February 19, 2021, HRF had recorded at least 1,544 public reported cases of murder, rape, kidnapping, and other forms of violence against asylum seekers returned to Mexico, including 341 cases where children were kidnapped or nearly kidnapped. In addition, during the first few months of the Biden administration, HRF recorded at least 492 attacks and kidnappings suffered by asylum-seekers forced to wait in Mexico. Although individuals who fear persecution or torture in Mexico are supposed to be exempted from return, there has been extensive documentation of the failure of DHS to abide by that requirement. Hamed Aleaziz, *US Border Officials Pressured Asylum Officers To Deny Entry To Immigrants Seeking Protection*, BUZZFEED NEWS (Nov. 15, 2019).[1]

MPP was challenged in *Innovation Law Lab v. Nielsen* (renamed *Innovation Law Lab v. Wolf*), and Judge Seeborg, U.S. District Court for the Northern District of California, issued a nationwide injunction on April 8, 2019. The Ninth Circuit stayed the injunction. On February 28, 2020, the Ninth Circuit affirmed the district court's grant of a nationwide preliminary injunction setting aside the MPP policy. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020*)*. The Ninth Circuit temporarily stayed its own ruling. Then, in an order issued on March 4, 2020, the Ninth Circuit limited the geographic scope of the injunction to the Ninth Circuit. On March 11, 2020, the Supreme Court granted a stay of the injunction pending "timely filing and disposition of the filing of a petition for a writ of certiorari." The Supreme Court took *cert* and the challenge to the preliminary injunction was scheduled for oral argument this term. After Biden was elected, the government asked the court to hold briefing in abeyance and to remove the case from the argument calendar, which the Court did.

In April 2020, MPP's expansion to Tamaulipas, Mexico was challenged in the federal district court in D.C. *Nora v. Wolf*, 2020 WL 3469670 (D.D.C. 2020). This challenge focuses on the specific conditions which exist in the Tamaulipas border area, which is an extremely dangerous area, so much so that it has been under a State Department "Do Not Travel" Advisory since at least 2018.

On January 20, 2021, the Biden administration announced that, as of Jan. 21, 2021, it would stop placing new asylum seekers in MPP. In a February 2, 2021 Executive Order, entitled "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the US Border" (hereinafter "Regional Framework EO"), President Biden directed the DHS to "review and determine whether to terminate or modify" MPP. See Executive Order 14010, 86 Fed. Reg. 8,267, § 4(a)(ii)(B) (Feb. 2, 2021). The EO also directed DHS, in coordination with the Secretary of State, Attorney General, and CDC director to "consider a phased strategy for the safe and orderly entry" into the United States of those who had been subjected to MPP. Id. On Feb. 11, 2021 the administration announced a phased process to allow individuals in MPP with pending cases to enter the United States so that they could pursue their claims from within the United States. Then, on June 22, the administration expanded the categories of individuals who would be permitted to enter the United States to apply for asylum, expanding it to those who had their cases terminated or were ordered removed in absentia under the MPP.

On June 1, 2021, DHS formally announced the termination of MPP, and the government asked the Supreme Court to vacate as moot the preliminary injunction in Innovation Law Lab. The Supreme

[1] https://perma.cc/4SL4-AXWG.

Court granted that motion and remanded the case to the Ninth Circuit with instructions to direct the District Court to vacate its April 2019 order granting a preliminary injunction. *Mayorkas v. Innovation Law Lab*, No. 19-1212, 2021 WL 2520313 (U.S. June 21, 2021). The Supreme Court in July, 2022 held that the President had authority to rescind the policy.[2]

Asylum Bar for Failure to Apply for Protection in Countries of Transit (Transit Ban or Asylum Ban 2.0)

In July 2019 the Administration published a joint interim final rule, *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (Jul. 16, 2019), known as the *Transit Ban* or *Asylum Ban 2.0*, known as the Transit Ban or Asylum Ban 2.0, which is mentioned above in the metering section. It issued a final version of the rule on December 17, 2020. The rule sought to categorically deny asylum to all non-Mexican nationals entering the United States at the southern border, leaving them with only the opportunity to pursue withholding of removal and protection under the Convention Against Torture. It did this by barring asylum to anyone who transited a third country *en route* to the southern border of the United States unless they (a) applied for protection from persecution or torture in a third country and received a final judgment denying such protection; or (b) qualified under the regulatory definition as a "victim[] of a severe form of trafficking." 85 Fed. Reg. 82,260 (Dec. 17, 2020) (to be codified at 8 C.F.R. § 208.13 and 8 C.F.R. § 1208.13).[3]

In his Regional Framework EO, Pres. Biden directed the Attorney General and Secretary of Homeland Security to review and determine whether to rescind the Transit Ban, and the Unified Regulatory Agenda indicates that the review process is underway. See Executive Order 14010, 86 FED. REG. 8,267, § 4(a)(ii)(C) (Feb. 2, 2021). In addition, on May 14, 2021, EOIR revoked the rule's implementing memorandum.

There have been two challenges to the Transit Rule, beginning during the Trump administration, and continuing into that of Biden. First, *East Bay Sanctuary Covenant v. Barr*, 385 F.Supp.3d 922 (N.D. Cal. 2019) brought in the Northern District of California, resulted in a nationwide preliminary injunction against the interim rule, and a more limited injunction against the final rule.[4] The parties filed a joint motion to stay proceedings until DHS and DOJ complete their review, which was granted by the court. The second set of challenges were through two cases, *I.A. v. Barr*, 2019 WL 4305504 (D.D.C. 2019) and *Capital Area Immigrants' Rights (CAIR) Coalition v. Trump*, 471 F.Supp.3d 25 (D.D.C. 2020) brought in the District of Columbia. On June 30, 2020, Judge Kelly granted Plaintiffs' motions for summary judgment and vacated the rule.

"Safe Third Country Agreements" with Guatemala, El Salvador, and Honduras

As discussed previously in this chapter, U.S. law enacted in 1996 allows the preclusion of asylum claims from individuals who could be "removed, pursuant to a bilateral or multilateral agreement"

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[2] *Biden v. Texas*. --- S. Ct. --- (2022), 2022 WL 234721. See previous discussion in this Supplement at Chapter 3.

[3] A third exception exists for individuals who did not transit through any country which is a party to the 1951 Refugee Convention, the 1967 Protocol, or the Convention Against Torture (CAT). However, given that Mexico and all seven countries in Central America are parties to the Refugee Convention and 1967 Protocol, as well as the CAT, this exception does not apply to any individual transiting Central America.

[4] *See East Bay Sanctuary Covenant v. Barr*, 964 F.3d 832 (9th Cir. 2020).

to a country where their life or freedom would not be threatened on account of a protected ground, and they would have access to a "full and fair procedure for determining a claim to asylum[.]" Until July 2019, the only country with which the U.S. had such an agreement was Canada. Between July and September 2019, the U.S. entered into similar agreements, with Guatemala, El Salvador, and Honduras, calling them "Asylum Cooperative Agreements" (ACAs). The U.S. has used the threat of tariffs as well as cutting off foreign aid to pressure all three countries to agree to these ACAs. In November 2019, the Trump Administration published an interim final rule in the Federal Register, *Implementing Bilateral and Multilateral Asylum Cooperative Agreements Under the Immigration and Nationality Act*, 84 FED. REG. 63,994 (Nov. 19, 2019). This rule put in place procedures for removing individuals pursuant to these and future ACAs. Although the contours of the U.S.'s implementation of these agreements remain quite vague, it appears that, with few exceptions, the rule and the ACAs would allow the U.S. to remove to Guatemala, El Salvador, and Honduras any individual who seeks asylum in the U.S. The agreements have been roundly criticized given the dire human rights situation in these countries, and their lack of any meaningful infrastructure for deciding asylum claims.

In his February 2, 2021, Regional Framework EO, President Biden asked the Attorney General and Secretary of Homeland Security to review and determine whether to rescind the rule. See Executive Order 14010, 86 Fed. Reg. 8,267, § 4(a)(ii)(D) (Feb. 2, 2021). On February 6, the State Department announced that the United States had suspended and initiated the process to terminate the ACAs with all three countries. Although the interim final rule remains in effect, EOIR rescinded the implementing policy memorandum for the rule on May 14, 2021, stating that it was "unnecessary" when the ACAs with El Salvador, Guatemalan and Honduras had been terminated.

To date, the U.S.-Guatemala ACA is the only ACA being implemented. On November 20, 2020, the Trump Administration published the U.S.-Guatemala ACA in the Federal Register at 84 FED. REG. 64,095 (2020); it released guidance to Asylum Officers on implementation and screening. From November 2019 to March 16, 2020, Guatemala received a total of 939 Hondurans and Salvadorans from the U.S. under the ACA. Both press and NGO interviews report that, upon arriving in Guatemala, the Hondurans and Salvadorans are told to either apply for asylum in Guatemala or leave the country within 72 hours under "voluntary return." Only 20 people – 2% percent of the aforementioned 939 people – officially applied for asylum in Guatemala. For a detailed report on how the ACA process is being carried out on the ground in Guatemala, see Human Rights Watch and Refugees International's, *Deportation without a Layover: Failure of Protection under the US-Guatemala Asylum Cooperative Agreement* (May 19, 2019).

The interim final rule, guidance by U.S. Citizenship & Immigration Services (USCIS) Asylum Officers on its implementation with Guatemala, and the United States' categorical designation of Guatemala as a "safe" third country were challenged in *U.T. v. Barr*, which was filed in the D.C. District Court in January 2020. On March 15, 2021, the court ordered the case stayed in light of the government's review of the polices. In May, 2021, the parties made arrangements for the six plaintiffs in the case to return to the United States to apply for asylum, so any future litigation would be limited to addressing the prospective application of the rule and its associated guidance. See *U.T. v. Garland*, No. 1:20-cv-00116-EGS (D.D.C. May 24, 2021) (joint status report).

"*Humanitarian Asylum Review Process" (HARP) and "Prompt Asylum Claim Review" (PACR)*

Pursuant to expedited removal (discussed below), asylum seekers must pass a screening interview before even being permitted to apply for asylum. HARP, which applied to Mexican nationals, and PACR, which applied to everyone else, were implemented by the Trump administration, with the purpose of further expediting these screening interviews for asylum seekers. Section 4(ii)(E) of Biden's Regional

Framework EO terminated both HARP and PACR and requested that the Secretary of DHS "consider rescinding any orders, rules, regulations, guidelines or policies" implementing them. *See* Executive Order 14010, 86 FED. REG. 8,267, § 4(a)(ii)(E) (Feb. 2, 2021).

Border Closure Under the Pretext of the COVID-19 Pandemic

The most draconian of the Trump administration's policies was the closure of the border under the pretext of COVID-19 health concerns. On March 20, 2020, the CDC, under the purported authority of public health provisions in 42 U.S.C. § 265, issued an unprecedented and sweeping regulation in an interim final rule published at *Control of Communicable Diseases; Foreign Quarantine: Suspension of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes,* 85 FED. REG. 16,559 (2020). This regulation added a new provision to an existing rule, 42 C.F.R. § 71.40, which provides that the CDC may prohibit the "introduction into the United States of persons" from foreign countries. On March 26, 2020, the CDC issued a 30-day order, which was subsequently extended indefinitely, for the "immediate suspension of the introduction of certain persons." This order authorized CBP and other border enforcement agencies to forcibly return any noncitizens arriving at the border without valid documents back to the country from which they entered (which in most cases was Mexico), their country of origin, or another location. For more details on the CDC order, and an analysis of how the CDC Order overstepped the CDC's authority as a public health agency. *See* Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors's*, JUST SECURITY (Apr. 13, 2020).[5]

It is important to underscore that the Title 42 border closure was never about public health; top CDC officials resisted issuing it, and they did so only under pressure from the Trump White House. The closing of the border only excludes those individuals without valid documents (i.e. asylum seekers), while allowing the continued entry of tens of thousands of other individuals. And, notably, leading public health and medical experts have stated that the policy is not necessary to protect the public health.

During his candidacy, Joe Biden made commitments to end a number of Trump era immigration policies, but Title 42 was not one of them. The February 2 Regional Framework EO directs the Secretaries of HHS, and DHS, along with the CDC Director to "promptly review and determine whether termination, rescission, or modification" of the Title 42 order is "necessary and appropriate." *See* Executive Order 14010, 86 FED. REG. 8,267, § 4(a)(ii)(A) (Feb. 2, 2021). In April of 2022 the CDC announced that it intended to revoke the Title 42 ban to be effective at the end of May, 2022.[6] The status of the ban is not yet clear.

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[5] https://perma.cc/S3RA-X5F3.

[6] There were a number of lawsuits against the Title 42 border closure; several of them were brought on behalf of unaccompanied children, who are now exempt from the order. *Huisha-Huisha v. Gaynor,* which is currently pending in district court in the District of Columbia, challenges the application of Title 42 to families. The case has been stayed while the government and the plaintiffs engage in negotiations. As a result of negotiations, the government agreed to allow a number of families to enter; as of May 18, 2021, the number was set at 250 asylum seekers daily.

[Insert at pg. 415]

TPS and Eligibility for Adjustment of Status

As will be discussed in Chapter 9, certain persons who become eligible for permanent residency may be able to do so under a procedure called "adjustment of status."[7] Adjustment of status permits the person to transition from whatever status they had or have into that of a lawful permanent resident without ever having to depart the country. One requirement for qualifying for adjustment is that the person has either been admitted or paroled into the U.S. Many persons who have been granted TPS entered the country without ever having been inspected by an immigration officer, and only received their TPS following a decision by the Secretary to grant them this form of protection. Due to a conflict in the circuits, the Court reviewed a case involving a beneficiary of TPS who later became eligible for an immigrant visa, and was seeking adjustment arguing that the grant of TPS was the equivalent of an admission. The Court in rejecting the claim reasoned that the grant of TPS status was not an admission within the meaning of the adjustment of status provision in the INA. *Sanchez v. Mayorkas*, 141 S.Ct. 1809, 1811 (2021). The Secretary established a new parole status for certain TPS holders which would allow them to adjust their status in the event that they became eligible for the benefit. *See* USCIS Policy Memorandum PM-602-0188 (Jul. 1, 2022).

Updated List of Temporary and Other Protected Status Designations

Country	Designation	Expiration
Afghanistan	5/20/2022	11/20/2023
Burma (Myanmar)	5/25/2021	11/25/2022
Cameroon	6/7/2022	12/7/2023
El Salvador	3/9/2001	(Termination will not take effect until further notice)[8]
Haiti	1/21/2010	(DHS, Sect'y announced extension to 2/2/2023)[9]
Honduras	1/5/1999	(Termination will not take effect until further notice)[10]
Nepal	6/24/2015	(Termination will not take effect until further notice)[11]
Nicaragua	1/5/1999	(Termination will not take effect until further notice)[12]
Somalia	9/16/1991	3/17/2023

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[7] Adjustment of status is provided for in the statute at 8 U.S.C. § 1255, [Sec 245 of the INA] and is explored in greater detail in Chapter 9.

[8] See *Ramos v. Nielsen*, 336 F.Supp.3d 1075, 1081 (N.D. Ca. 2018) (injunction entered against termination), *vacated and remanded, sub. nom. Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020). *See Notice of Continuation of Temporary Protected Status and Related Documentation for Certain TPS beneficiaries*, 86 FED. REG. 50,725 (2021)

[9] *Notice of Temporary Protected Status Designation*, 86 FED. REG. 41,863 (2021).

[10] *Notice of Continuation of Temporary Protected Status and Related Documentation for Certain TPS beneficiaries*, 86 FED. REG. 50,725 (2021).

[11] *Id.*

[12] *Id.*

South Sudan	11/3/2011	11/3/2023[13]
Sudan	11/4/1997	(Termination will not take effect until further notice)[14]
Syria	3/29/2012	9/30/2022
Ukraine	4/19/2022	10/19/2023[15]
Venezuela	3/9/2021	9/9/2022
Yemen	3/3/2015	3/3/2023[16]

[13] *Extension of Designation of South Sudan for TPS*, 87 FED. REG. 12,190 (2022)

[14] *Notice of Continuation of Temporary Protected Status and Related Documentation for Certain TPS beneficiaries*, 86 FED. REG. 50,725 (2021).

[15] *Notice of Continuation of Temporary Protected Status,* 87 FED. REG. 23,211 (2022).

[16] *Notice of Temporary Protected Status extension and Redesignation*, 86 FED. REG. 36,295 (2021)

Chapter 9

Permanent Residency for Persons Already in the United States

[Insert at pg. 632]

Jose Santos Sanchez, et. al. Petitioners
v.
Alejandro N. Mayorkas, DHS Sect'y
141 S. Ct. 1809 (2021)*

KAGAN, J., delivered the opinion for the Court.

Petitioner Jose Santos Sanchez entered this country unlawfully from El Salvador. Years later, because of unsafe living conditions in that country, the Government granted him Temporary Protected Status (TPS), entitling him to stay and work in the United States for as long as those conditions persist. Sanchez now wishes to become a lawful permanent resident (LPR) of the United States. The question here is whether the conferral of TPS enables him to obtain LPR status despite his unlawful entry. We hold that it does not.

I

Section 1255 of the immigration laws provides a way for a "nonimmigrant"—a foreign national lawfully present in this country on a designated, temporary basis—to obtain an "[a]djustment of status" making him an LPR. 8 U.S.C. § 1255 (boldface deleted); see § 1101(a)(15) (listing classes of nonimmigrants, such as students and tourists). Under that section, a nonimmigrant's eligibility for such an adjustment to permanent status depends (with exceptions not relevant here) on an "admission" into this country. And an "admission" is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." § 1101(a)(13)(A). The admission—or, to use the definitional phrase, "lawful entry"—requirement appears in two pertinent provisions of § 1255. One states that a nonimmigrant may become an LPR only if he has been "inspected and admitted or paroled into the United States." § 1255(a). And another states that a nonimmigrant who has previously worked without authorization in the United States may become an LPR only if his presence here is "pursuant to a lawful admission." § 1255(k)(1); see § 1255(c)(2).[1]

A separate provision of immigration law establishes the TPS program, which provides humanitarian relief to foreign nationals in the United States who come from specified countries. See § 1254a. The Government may designate a country for the program when it is beset by especially bad or dangerous conditions, such as arise from natural disasters or armed conflicts. The country's citizens, if already present in the United States, may then obtain TPS. That status protects them from removal and authorizes them to work here for as long as the TPS designation lasts. A person's unlawful entry into the United States will usually not preclude granting him TPS. See § 1254a(c)(2)(A)(ii); 8 C.F.R. § 244.3

* Some footnotes have been omitted

[1] Section 1255(k)'s requirement of a lawful admission, unlike § 1255(a)'s, applies even if the nonimmigrant has been paroled into the United States—that is, received temporary permission to enter the country "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). So a nonimmigrant who has worked without authorization cannot rely on his parolee status (if any) to become an LPR.

(2020). And relevant here, the TPS provision states: "[F]or purposes of adjustment of status under section 1255," a person given TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." § 1254a(f)(4).

Jose Santos Sanchez is a citizen of El Salvador who has lived in the United States for more than two decades. He entered this country unlawfully in 1997—without "inspection and authorization by an immigration officer." § 1101(a)(13)(A). Once here, he worked without legal authorization. In 2001, the Government designated El Salvador under the TPS program after a series of devastating earthquakes. Sanchez obtained TPS that year, and has held it ever since. In 2014, he applied under § 1255 for an adjustment to LPR status.

The United States Citizenship and Immigration Services denied Sanchez's LPR application. Under § 1255, the agency stated, Sanchez was ineligible for LPR status because he had not been lawfully admitted to the United States. See App. to Pet. for Cert. 40a. And in the agency's view, his TPS provided no way around that bar. "Recipients of TPS," the agency reasoned, "must still meet the threshold requirement" of a lawful entry. Id., at 46a. Or said otherwise: "A grant of TPS does not cure a foreign national's entry without inspection or constitute an inspection and admission of the foreign national," as demanded by § 1255. Ibid.

Sanchez challenged the decision. The District Court granted summary judgment in his favor, relying on the statutory mandate that a TPS recipient "shall be considered as" having "lawful status as a nonimmigrant" for purposes of applying to become an LPR. *See Santos Sanchez v. Johnson*, 2018 WL 6427894, *4 (D NJ, Dec. 7, 2018) (citing § 1254a(f)(4); emphasis deleted). According to the court, that provision requires treating TPS recipients "as though [they] had been 'inspected and admitted.'" *Ibid*. But the Court of Appeals for the Third Circuit reversed, holding that "a grant of TPS does not constitute an 'admission' into the United States." *Sanchez v. Secretary U. S. Dept. of Homeland Security*, 967 F.3d 242, 252 (2020). The court observed that "admission" and "status" are separate concepts in immigration law. *Id.*, at 246. So, the court concluded, providing a person with nonimmigrant status (as the TPS provision does) does not mean admitting him (as § 1255 requires). *See ibid.*

We granted certiorari, 141 S.Ct. 973 (2021), to resolve a Circuit split over whether a TPS recipient who entered the country unlawfully can still become an LPR. We now affirm the Third Circuit's decision that he cannot. The TPS program gives foreign nationals nonimmigrant status, but it does not admit them. So the conferral of TPS does not make an unlawful entrant (like Sanchez) eligible under § 1255 for adjustment to LPR status.

II

Section 1255, applied according to its plain terms, prevents Sanchez from becoming an LPR. There is no dispute that Sanchez "entered the United States in the late 1990s unlawfully, without inspection." Brief for Petitioners 13. But as earlier described, § 1255 requires an LPR applicant like Sanchez to have entered the country "lawful[ly]," with "inspection"—that is, to have been admitted. § 1101(a)(13)(A). Indeed, § 1255 imposes an admission requirement twice over. Its principal provision states that an applicant for LPR status must have been "inspected and admitted or paroled into the United States." § 1255(a). And another provision says that a person who has worked without authorization in the country—as Sanchez did for several years—may become an LPR only if his presence in the United States is "pursuant to a lawful admission." § 1255(k). Sanchez has never claimed that he can, without aid from the TPS provision, satisfy those demands for admission. A straightforward application of § 1255 thus supports the Government's decision to deny him LPR status.

And nothing in the conferral of TPS changes that result. As noted earlier, a TPS recipient is "considered as being in, and maintaining, lawful status as a nonimmigrant" for the purpose of becoming an LPR. § 1254a(f)(4). That provision ensures that, in applying for permanent residency, a TPS recipient will be treated as having nonimmigrant status—even if, like Sanchez, he really does not. See § 1101(a)

(15) (not including TPS recipients among the designated classes of "nonimmigrants"). It thus guarantees that every TPS recipient has the status traditionally and generally needed to invoke § 1255's adjustment process. See § 1255 (titled "[a]djustment of status of nonimmigrant to that of person admitted for permanent residence" (boldface deleted)). But the provision does not aid the TPS recipient in meeting §1255's independent legal-entry requirement. Lawful status and admission, as the court below recognized, are distinct concepts in immigration law: Establishing one does not necessarily establish the other. See supra, at —— – ——. On the one hand, a foreign national can be admitted but not in lawful status—think of someone who legally entered the United States on a student visa, but stayed in the country long past graduation. On the other hand, a foreign national can be in lawful status but not admitted—think of someone who entered the country unlawfully, but then received asylum. The latter is the situation Sanchez is in, except that he received a different kind of lawful status. The TPS statute permits him to remain in the country; and it deems him in nonimmigrant status for purposes of applying to become an LPR. But the statute does not constructively "admit" a TPS recipient—that is, "consider[ ]" him as having entered the country "after inspection and authorization." § 1254a(f)(4); § 1101(a)(13)(A). And because a grant of TPS does not come with a ticket of admission, it does not eliminate the disqualifying effect of an unlawful entry.

Sanchez resists this conclusion by asserting an "indissoluble relationship between admission and nonimmigrant status." Reply Brief 2 (emphasis in original). While conceding that some forms of status (e.g., asylum) do not require admission, Sanchez contends that nonimmigrant status always does: "One cannot obtain lawful nonimmigrant status without admission." *Ibid*. In support of that claim, Sanchez points to § 1184 of the immigration laws, entitled "[a]dmission of nonimmigrants." And he asserts that it is impossible to "identif[y] any category of individuals who are lawful nonimmigrants but are not admitted—because no such category exists." Brief for Petitioners 20. So (Sanchez concludes) when the law provides that a TPS recipient shall be "considered ... as a nonimmigrant" for purposes of § 1255, it is necessarily saying that he shall also be considered as admitted.

But to begin with, § 1184 does not (as Sanchez contends) require admission for nonimmigrant status. That provision states that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary of Homeland Security] may by regulations prescribe." § 1184(a)(1). The section also provides that a foreign national is "presumed to be an immigrant until" he establishes "at the time of application for admission" that "he is entitled to a nonimmigrant status." § 1184(b). Section 1184 thus regulates the process for admitting foreign nationals as nonimmigrants. Suppose a foreign national wants to be admitted to the United States as a university student—a kind of nonimmigrant. He should look to § 1184 (among other provisions) to find out what that will entail—what he must show and what that showing will entitle him to. Why, though, does that matter? No one denies that most foreign nationals obtain nonimmigrant status through an admission. So there is naturally a section in the immigration laws that specifies how that process works. But nothing in § 1184 (or any other section) states that admission is a prerequisite of nonimmigrant status—or otherwise said, that the former is a necessary incident of the latter. And that is what Sanchez needs. For without such an "indissoluble" link, Reply Brief 2, there is no reason to view the TPS provision's conferral of nonimmigrant status as also a conferral of admission.

In fact, individuals in two immigration categories have what Sanchez says does not exist: nonimmigrant status without admission. The first category is for "alien crewmen"—foreign nationals who serve on board a vessel or aircraft. § 1101(a)(10). They receive nonimmigrant status when their vessel or aircraft "land[s]" in the United States. § 1101(a)(15)(D)(i). But still the law provides that they are not "considered to have been admitted." § 1101(a)(13)(B). The second category is for foreign nationals who have been the victim of a serious crime in the United States and can assist with the investigation. Those individuals may receive nonimmigrant status even if they entered the country unlawfully—so even if they were not admitted. See §§ 1101(a)(15)(U), 1182(d)(14). And § 1255 specifically recognizes that possibility. That section makes these so-called "U" nonimmigrants eligible for LPR status if they were either "admitted into the United States" or "otherwise provided nonimmigrant status." § 1255(m)(1).

There could scarcely be a plainer statement of the daylight between nonimmigrant status and admission (except maybe for the alien crewmen provision). And that plain statement comes in a provision expressly enabling some unlawful entrants to adjust to LPR status. So when Congress does not speak in that manner —when it confers status, but says nothing about admission, for purposes of § 1255—we have no basis for ruling an unlawful entrant eligible to become an LPR.

Sanchez objects that if the TPS provision confers only nonimmigrant status for § 1255, it accomplishes precious little. See Reply Brief 11–13; Tr. of Oral Arg. 27. Less than he would like, of course: It would not make him, or other TPS recipients who entered the country unlawfully, LPR-eligible. But some TPS recipients will benefit from the TPS provision's conferral of nonimmigrant status for purposes of § 1255. Recall that the provision gives all TPS recipients the status typically required to invoke § 1255—that is, nonimmigrant status. Some TPS recipients need exactly that assistance—without needing a constructive admission. Consider, for example, a foreign national who entered the country legally on a tourist visa, but stayed on for several months after the visa's expiration. He can satisfy § 1255's requirement of admission, but he founders in showing nonimmigrant status. The TPS provision relieves that difficulty and enables him to become an LPR. Congress, of course, could have gone further, by deeming TPS recipients to have not only nonimmigrant status but also a lawful admission. Legislation pending in Congress would do just that. See American Dream and Promise Act of 2021, H. R. 6, 117th Cong., 1st Sess., § 203, p. 29 (introduced Mar. 3, 2021) (amending § 1254a(f)(4) so that a TPS recipient shall be considered "as having been inspected and admitted into the United States, and" as being in, and maintaining, lawful status as a nonimmigrant" (emphasis added)). But even without that amendment, the statute does something—and this Court does not get to say that the something it does is not enough.

III

Section 1255 generally requires a lawful admission before a person can obtain LPR status. Sanchez was not lawfully admitted, and his TPS does not alter that fact. He therefore cannot become a permanent resident of this country. We affirm the judgment below.

It is so ordered.

Notes

1. What if any implications might there be on eligibility for adjustment of status for a recipient of DACA who has traveled and returned to the US under advance parole and then seeks adjustment of status based upon their marriage to a US citizen?

2. On July 1, 2022 USCIS issued a policy memorandum which rescinded a prior decision by the Administrative Appeals Office (AAO) which had interpreted the effect of authorized travel and reentry of persons holding Temporary Protected Status (TPS). In the memorandum the agency states that it will no longer use advance parole but instead will provide the TPS holder with "a new TPS travel authorization document." The return of the person under this document is intended to make them eligible for adjustment of status should they be able to otherwise qualify. *See* USCIS Policy Memorandum PM-602-0188 (Jul. 1, 2022). Only TPS holders are eligible for this new travel authorization document. Does the issuance of this new document for TPS holders make them eligible for adjustment of status?

Chapter 10

Relief from and Amelioration of Grounds for Removal

[Insert at pg. 680]

The "Stop-time" Rule

The INA provides that in counting the applicant's "physical presence" that the period of time "stops" either when the crime is committed or when DHS *serves* the Notice to Appear (NTA). There has been much controversy in this regard due to the agency's casual way of handling these NTA's. The Supreme Court in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) held that according to the statute a NTA must include "[t]he time and place at which the [removal] proceedings will be held." See 8 U.S.C. § 1229(a)(1)(G)(i). Therefore a notice which failed to include this information was defective and did not "stop" the time on the cancellation clock. 138 S. Ct. at 2110. In Pereira's case the initial NTA which was provided to him did not include any information about his hearing. More than a year later DHS mailed the NTA to a street address rather than a P.O. Box which he had provided (that notice was returned as "undeliverable"). As a result he never showed up for his hearing and was ordered removed *in absentia*. He was later arrested by DHS on a minor traffic violation and placed in proceedings. His lawyer was successful in reopening his case arguing that he had never received the second NTA. The BIA following its own precedent in *Matter of Camarillo*, 25 I.&N. Dec. 644 (BIA 2011) rejected the challenge to the initial NTA. The First Circuit deferred to the BIA, citing to *Chevron*. The Supreme Court rejected this interpretation citing the plain meaning of the statute as requiring specificity in the NTA. In a later case, *Matter of Mendoza-Hernandez & Capula-Cortes*, 27 I.&N. Dec. 520 (BIA 2019) the BIA held that a subsequent notice which included all of the information satisfies the notice requirement of the statute. *Id*. at 529. This view was rejected by the Supreme Court in a more recent opinion in *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). In *Niz-Chavez* the Court held that only with the proper service of a full and complete NTA can it satisfy the requirements of the statute. Id. at 1479.