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## THE DEVELOPMENT OF THE UNITED STATES IMMIGRATION LAW SELECTION SYSTEM AND THE IMMIGRATION BAR

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### I. INTRODUCTION

The criteria for admission to lawful permanent residency have progressively evolved from a few limitations to a relatively complex selection system. As that system evolved, the legal profession developed to assist those who sought to qualify for residence status in the United States under the various statutory and regulatory provisions.

The legal profession is reactive in the sense that it responds to legal, political, and social developments. Before the adoption of a federal income tax, for example, there were few, if any, lawyers who specialized in tax law. Similarly, it was not until United States immigration law fashioned its present selection system for admission as permanent residents that the modern immigration bar developed. This article probes the development of United States immigration law, and its selection system, and the parallel development of an experienced immigration bar at a time of expanding immigration to our shores.

The thesis of this article is that the growth of the present immigration bar is directly attributable to the passage of the 1965 Amendments

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to the Immigration & Nationality Act of 1952 and the narrowing of its selection system at a time of unprecedented immigration to the United States.<sup>1</sup> The 1965 Amendments impacted aliens from Western Europe, Canada, and Latin America, who previously experienced little or no difficulty in applying for and obtaining permanent resident status in the United States.<sup>2</sup> When certain provisions of the 1965 Amendments became effective, on July 1, 1968, quotas were imposed for the first time on Canada, Mexico, and other countries of the Western Hemisphere; and long standing high quotas for certain Western European nations were reduced to the same level as the quota for every country in the world. Correspondingly, quotas for Eastern Europe, Asia, the Middle East, and Africa were substantially raised from an overall limitation of 100 per year for most countries to 20,000 per year, the same overall limitation set for Western European countries making it feasible for the first time for qualified applicants from such areas to immigrate to the United States.<sup>3</sup> Most importantly, except for certain close relatives of United States citizens and permanent residents, every applicant for permanent residency in the United States under the 1965 Amendments had the burden to show that he had a job offer available to him for which there were no qualified, available, or willing U.S. workers.<sup>4</sup> This was true for all potential immigrants save those coming on the basis of family reunification.

## II. DEVELOPMENT OF IMMIGRATION CRITERIA PRIOR TO 1952

Although the Constitution delegates the control of immigration as an exclusive function of Congress,<sup>5</sup> for the first hundred years of the

1. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

2. See Scully, *Is the Door Open Again?—A Survey of Our New Immigration Law*, 13 U.C.L.A. L. REV. 227 (1966) [hereinafter cited as *Scully*].

3. See Appleman, *The New Immigration Act*, 52 A.B.A. J. 717 (1966), Kennedy, *The Immigration Act of 1965*, 367 ANNALS 137 (1966).

4. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 10(a), 79 Stat. 911, 917-18 (1965).

5. Congress amended Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), in order to "require an affirmative finding by the Secretary of Labor that any alien seeking to enter the United States as a worker, skilled or otherwise, will not replace a worker in the United States nor will the employment of such alien adversely affect the wages and working conditions of individuals in the United States similarly employed." S. REP. NO. 748, 89th Cong., 1st Sess. reprinted in 1965 U.S. CODE CONG. & AD. NEWS 3328, 3342-43. See *infra* note 37.

5. U.S. CONST. art. I, § 8, cl. 3. Neither the Bill of Rights nor the Declaration of Independence differentiated between citizens and non-citizens. Indeed, not until the ratification of the Fourteenth Amendment in 1868 did the Constitution define citizenship though the term is used elsewhere in the document. The first sentence of the Fourteenth Amendment, inserted to erase any lingering effects of *Dred Scott* that black people were property not citizens, defines citizenship to include "all persons born or naturalized in the United States and subject to the jurisdiction thereof." U.S. CONST. amend. XIV, § 1, cl. 1. Hence

American Republic, there was virtually no attempt by Congress to control the quantity or the quality of immigration. To the contrary, the new republic keenly anticipated the entry of additional immigrants in order to pursue settlement and westward expansion.<sup>6</sup> The first immigration legislation adopted by Congress came in 1875 and sought only to exclude certain aliens on qualitative grounds, i.e., convicts and prostitutes.<sup>7</sup> The first comprehensive statute was adopted in 1882, setting up additional qualitative grounds to exclude idiots, lunatics, convicts, and individuals likely to become a public charge. With the adoption of

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arose the so-called "First Sentence Fourteenth Amendment" citizen. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1872).

It is worth noting that, among the litany of accusations lodged against King George III in the Declaration of Independence was the charge that the Crown had attempted to limit the growth of the colonial population by "obstructing the laws of Naturalization of Foreigners" and "refusing to pass others to encourage their migration hither." The Declaration of Independence para. 9 (U.S. 1776).

A colonist who kept his residence in America after the proclamation of the Declaration of Independence, having sworn allegiance to the new government, was deemed to have become a citizen of the United States. The American revolutionary position was that, from July 4, 1776 onward, such persons were no longer subjects of the British Crown. The British by contrast, dated loss of British citizenship, not from the Declaration of Independence, but as of the Treaty of Paris which ended the War for Independence in 1783. 3 AM. JUR. 2D *Aliens* § 116 (1962).

United States criteria for determining who may or may not enter are permissibly established by the power inherent in national sovereignty. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Fok Yung Yo v. United States*, 185 U.S. 296, 302 (1902); *Harisiades v. United States*, 342 U.S. 580, 587 (1952); and *Galvan v. Press*, 347 U.S. 522, 530 (1954).

6. J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1925-1960*, at 97 (1963) [hereinafter cited as HIGHAM #1]. There is and always has been a direct correlation between tension abroad and an upsurge in nativist sentiment within the United States. In 1798, a wave of anti-immigrant feeling swept the country, arising principally out of our undeclared naval warfare with France and the popular perception, especially in Federalist New England, that the bulk of the immigrants entertained pro-French sympathies. *Id.* at 19.

Concerned about the French revolutionary radicalism spreading to America, the Federalists enacted the infamous Alien and Sedition Acts. *Id.* at 8. The Alien Acts lengthened the residence requirements for citizenship from five to fourteen years, authorized President Adams to expel foreigners by executive order, and enhanced the degree of supervision and control that could be exerted over the enemy aliens (who were principally French) if the undeclared naval war developed into formal hostilities. *Id.* at 97. The Alien Acts never became fully operative; the Jeffersonians restored the previous five-year requirement in 1802. *Id.* The Alien Friends Act, one of the Alien Acts, expired according to its own terms in 1800. *Id.* The Alien Enemies Act was not used until President Wilson utilized it during World War I. *Id.* at 210. From 1800 to 1875, there was no federal law restricting the admission or sanctioning the expulsion of aliens. See E. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* § 4-5 (3d ed. 1975) [hereinafter cited as HARPER].

7. HARPER at § 5-6. Fueled by the economic downturn of the 1870's, the Act of March 3, 1875 is in many respects a prelude to the more general immigration restrictions enacted on August 3, 1882 which bars lunatics, idiots and aliens likely to become public charges. Act of August 3, 1882, ch. 376, 22 Stat. 214 (repealed 1966). Note that in 1876, the U.S. Supreme Court invalidated several state attempts to restrict immigration. See, e.g., *Henderson v. Mayor*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876). Only Congress, declared the Court, could deal with immigration as part of its constitutionally-based power to "regulate commerce with foreign nations, and among the several states and with Indian tribes." *Id.* (citing U.S. CONST. art. 1, § 8, cl. 3).

the 1882 Act, Congress took its first step towards establishing grounds of exclusion based primarily upon economics.<sup>8</sup> That same year, Congress also adopted the Chinese Exclusion Act, which was blatantly racial in its attempt to exclude all Chinese.<sup>9</sup>

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8. Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213, 218 (1956) [hereinafter cited as Higham #2]. While the Secretary of the Treasury was given executive authority over administration of immigration restrictions, actual inspection of the newcomers at port of entry remained with the state port authorities. In 1882, a head tax of fifty cents was imposed by the Federal Government for the first time. Funds collected were to become part of an immigrant welfare fund. *Id.* Prior to the 1882 act, the Federal Government considered the emerging problem of European immigration to be a responsibility for those seaboard states particularly affected. The Federal Government restricted its role to promulgating minimum standards for living conditions aboard ship, failing to fund effective enforcement means, and keeping statistics on the number of arriving immigrants. Congress was forced to act after the Supreme Court held that New York's attempt to collect a \$1.50 fee per entrant from shipowners impermissibly infringed on the scope of the federal commerce power. HIGHAM #1, *supra* note 6, at 43-44 (discussing *Henderson v. Mayor*, 92 U.S. 259 (1876)). The 1882 Act represented a congressional concession to the New York Board of Charities and the New York Board of Emigration Commissioners who had been lobbying in Washington, along with similar organizations and state agencies from other immigrant-laden Eastern states, to have the Federal government assume more responsibility. These groups generally wanted a tax on the aliens entering the country and exclusion of convicts and probable paupers. The tax was to help defer the cost of immigrant relief. *Id.*

9. Chinese Exclusion Act, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600. *See also* Higham #2, *supra* note 8, at 217 & n.15. Unlike European immigration, Chinese immigration was an affront to those with racial prejudices. The main legal obstacle to implementing racial chauvinism was the Burlingame Treaty of 1868. Under this Agreement, drafted by Secretary of State William Seward, the Chinese were guaranteed the right to come to the United States without restriction. *Id.* at 216-17, 216 n.12.

Initially, the prospect of unrestricted Chinese immigration was seen as a great boon to an industrializing nation seeking to populate its Western Territories. Seward himself was reported to have looked forward with pride and anticipation to a million Chinese per year pouring into the untamed lands stretching beyond the Mississippi to California. *See* H. SMITH, *VIRGIN LAND* 166-67 (1950).

The Burlingame Treaty tolerated enactment in 1875 of a law banning the importation of Chinese contract labor. Higham #2, *supra* note 8, at 217. However, in 1879, President Hayes vetoed a transparent attempt by Congress to undo the Burlingame Treaty. As an alternative, Hayes attempted to appease the restrictionist lobby by renegotiating the treaty. This renegotiation effort resulted in a new accord limited to Chinese manual laborers. The accord allowed the United States to restrict or suspend, but not prohibit, such immigration. Higham #2, *supra* note 8, at 217 & n.14.

The outcome of this diplomatic maneuvering was a statute which suspended the entry of Chinese laborers for the next decade. *Id.* at 217 (discussing the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600). The Chinese Exclusion Act did not satisfy the nativist critics of Oriental immigration. New laws continued to be passed to restrict immigration, each more biting than those preceding, over the remainder of the Nineteenth Century. In 1888, Chinese residents who were not then physically present in the United States, were prevented by federal law from returning. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (cited in Higham #2, *supra* note 8, at 217 & n.16). The statute was passed one month before the presidential election of 1888. Higham #2, *supra* note 8, at 217 & n.16. Four years later, the Chinese exclusion policy was renewed for another ten years. Act of May 5, 1892, ch. 60, 27 Stat. 25. Additionally, every Chinese person in the country had to have a white man testify as to the Chinese immigrant's right to remain. Higham #2, *supra* note 8, at 217 & n.17. In 1904, a statute was passed that *officially* placed a permanent ban on Chinese migration—a belated recognition of the existing policy. Even Chinese immigrants from Hawaii or the Philippines, the United State's newly-acquired pos-

In 1885, Congress imposed an additional economic restriction prohibiting the importation of cheap foreign labor under pre-existing employment contracts.<sup>10</sup> In 1891, additional classes of individuals sub-

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sessions, could not migrate to the mainland. *Id.* at 217. The "Yellow Peril," as the Chinese influx was called, was thought to be a subsiding menace due to the legislation's effect. *Id.* at 217 & n.19.

Even after the various Chinese exclusion laws were repealed, overt anti-Chinese classifications remained an integral part of our national immigration policy. Indeed, as late as 1970, so-called "coolies" could not be brought to the United States as servants, apprentices, domestics, or laborers. 8 U.S.C. §§ 331-339 (1970), *repealed by* Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387 (1974).

An explanation for the repeal of the "coolie trade" laws, originally enacted in 1862 and 1875 to prevent Chinese and Japanese workers from undercutting prevailing wages available to native born workers, is best expressed by the report of the Senate Committee on the Judiciary which accompanied the repeal legislation:

The circumstances which prompted the 'coolie trade' legislation have long since ceased to be prevalent in the fact [sic] of changes in the social, economic, and political conditions in the United States and abroad. The continued existence of the 'coolie trade' laws is also inconsistent with the later policies of the Congress under which other statutes singling out Oriental peoples have been repealed or modified by progressive amendments to the immigration laws.

The 'coolie trade' legislation currently serves no useful purpose in view of general civil rights legislation. It also presents an unnecessary and disparaging reminder of a past historical period which potentially could be the cause of misunderstanding as to the present relationships between the people of the United States and the people of the Oriental countries. S. REP. NO. 93-812, 93rd. Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5841, 5841-42.

As a postscript, it bears mentioning that the states functioned as junior partners in this legislative onslaught against Oriental immigration. In California, the economic collapse of several mines worked by Chinese laborers only fueled the rising nativist tide against the legitimacy of their presence. Even after the 1882 Chinese Exclusion Act, and in conjunction with the same, many states enacted laws to prevent Chinese from owning land. Vigilante outbreaks often were aimed at the Chinese. Not until 1952 would eligibility for U.S. citizenship be restored to aliens of Chinese ancestry. *See* IMMIGRATION PROJECT OF NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE §§ 2.2-2.3 (1982).

President Franklin D. Roosevelt may well have felt constrained to engineer the repeal of the Chinese Exclusion Act as a face saving gesture on behalf of embattled wartime ally Chiang Kai-Shek. Counting on Chiang's uncertain legions to maintain a semblance of initiative in order to divert Japanese troops that would otherwise be let loose against American forces, Roosevelt perhaps sensed the continuing embarrassment to Chiang flowing from the Exclusion Act. Indeed, when the suspension of Chinese immigration was officially made permanent by the 1904 Exclusion Act, Chinese anger led to a boycott of American goods in 25 cities from Peking to Canton. B. TUCHMAN, STILLWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-1945, at 34 (1971) [hereinafter cited as TUCHMAN]. Such racial resentment had fused with revolutionary fervor to aid Dr. Sun Yat-sen in toppling the Manchu dynasty. *See generally id.* at 35-41. It is somewhat ironic for the Chinese to have been incensed by a desire to maintain racial purity against foreign infection given their own history of pursuing precisely such exclusionist policies with the zeal born of centuries-old conviction in their innate superiority. Indeed, prior to 1898, the Manchu Empire had no foreign affairs ministry since China neither desired nor had any foreign relations worthy of the name. *Id.* at 26. Missionaries, traders, and other alien visitors came under the purview of the "Hall, for Governance of Barbarians." *Id.* at 26. To such a proud, indeed almost defiantly superior people, the Chinese Exclusion Act must have seemed infuriating beyond measure or description. From Chiang Kai-Shek's vantage point, the continued existence of the Chinese Exclusion Act was an impermissible infringement on Chinese sovereignty; he was grateful for its repeal. *Id.* at 498.

10. In an effort to curb militant unionism then taking hold in the coal fields of Pennsylvania, coal mine owners began importing Hungarian and Italian laborers in the 1870's.

ject to exclusion from the United States were added, including those suffering from contagious diseases, those convicted of a criminal offense involving moral turpitude, paupers and polygamists.<sup>11</sup> In 1903,

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HIGHAM #1, *supra* note 6, at 47-49. To the Pennsylvania miners, the contract workers became a hated symbol of the increasingly bitter economic warfare. Indeed, the use of contract labor immigrants as strike breakers often ignited riots and violent resistance leading to loss of life. For a discussion of the general reception of the immigrants in the coal regions, see generally P. ROBERTS, ANTHRACITE COAL COMMUNITIES 28-41 (1904).

The most influential workingman's organization of the 1880's, the Knights of Labor, led by Terrence V. Powderly, petitioned both major political parties to include a ban on contract labor in their national party platform; Democrats sought to amass some political capital on this issue by blaming Republicans for the scourge of contract labor, a charge hotly disputed. Hence, in 1885 (Act of February 26, 1885, ch. 164, 23 Stat. 332) and 1887 (Act of February 23, 1887, ch. 220, 24 Stat. 414) Congress honored these political promises by enacting laws outlawing the practice of importing aliens into the United States, transportation paid in return for a contractual promise to work. Artists, lecturers, domestics, and skilled aliens working in an industry not yet started in the United States were exempt from coverage. HARPER, *supra* note 6, at 6.

Hence, as a result of the success of the Knights of Labor in shepherding the contract labor laws through Congress, every potential entrant now faced a dilemma at the Ellis Island gates. On the one hand, he had to prove to the immigration inspector that his steamship passage to the United States had not been paid in response to an agreed-upon contract for a particular job. Yet, at the same time, the alien was required to demonstrate that he was not likely to become a public charge. Higham #2, *supra* note 8, at 218-19.

In 1887, a new type of federal official entered upon the immigration scene—the contract labor inspector who interrogated arriving newcomers on their job plans and prospects. V. SANFORD, IMMIGRATION PROBLEMS—PERSONAL EXPERIENCES OF AN OFFICIAL 213-14 (1925); T. POWDERLY, THIRTY YEARS OF LABOR 1859-1889, at 228-29 (1890). John Higham, noted historian of American nativist trends, aptly captured the thorny choice confronting the immigrant laborer: "To have a job before entering the country was becoming more reprehensible than to be unemployed afterward." HIGHAM #1, *supra* note 6, at 49.

An amendment to the contract labor laws in 1888 carried the penalty of deportation within one year of entry for any alien entering in violation. Act of October 19, 1888, ch. 1210, 25 Stat. 566. Thus, for the first time since 1798, the federal government made expulsion a statutory weapon against those immigrants deemed socially undesirable. HARPER, *supra* note 6, at 6. In 1893 the United States Supreme Court upheld the constitutionality of this Act in *Lees v. United States*, 150 U.S. 476 (1893). Mr. Justice Brewer made it clear, beyond any possible doubt, that the ban on the importation of aliens under contract to perform labor was wholly within Congress' plenary power to regulate immigration and the conditions of entry:

Given in Congress the absolute power to exclude aliens, it may exclude some and admit others, and the reasons for its discrimination are not open to challenge in the courts. Given the power to exclude, it has a right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition.

*Lees*, 150 U.S. at 480.

The 1885 law provided for a \$1000 penalty against an employer who imported contract laborers. Since Congress could exclude contract laborers, reasoned the *Lees* Court, it could inflict financial penalties on an employer who imported such a laborer. *Id.* at 480. Such penalties were not applicable to a situation involving a religious society's contract with an English cleric to assume a pastorate in the United States. *Church of the Holy Trinity v. United States*, 143 U.S. 451 (1892). Mr. Justice Brewer's opinion focused upon the intent of Congress to "stay the influx of cheap unskilled labor." *Id.* at 465.

11. Higham #2, *supra* note 8, at 220 & n.27. Act of March 3, 1891, ch. 551, 26 Stat. 1084 did not set a ceiling on immigrant entries. It did shift the burden of inspection and admission off of the states and onto the federal government; thus, the lingering uncertainty over division of administrative responsibility left by the 1882 law was finally clarified. The contract labor ban was extended to outlaw job advertisements by American employers

following the assassination of President McKinley, anarchists were also excluded from the United States. This constituted the earliest political ground of exclusion.<sup>12</sup> In response to massive immigration in the first decade of the twentieth century, primarily from Southern and Eastern Europe, Congress in 1917 required that immigrants pass a literacy test, and excluded illiterates.<sup>13</sup>

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abroad; any alien who journeyed to these shores in response to such an advertisement was *per se* excludable. Higham #2, *supra* note 8, at 220.

The 1891 Act did provide for mechanisms of enforcement. Any immigrants turned back by United States inspectors had to be shipped back to point of origin with the steamship lines bearing the cost of transportation. Aliens who entered illegally or could not sustain themselves and become the wards of private charity and public aid subjected themselves to the penalty of deportation within the year. *Id.*

For all this, the persistent but key issue of quantitative limitation was not dealt with by the 1891 law. Some nativists wanted to discourage immigration by raising the head tax. *Id.* Other restrictionists would have required good character certificates to be issued by American consuls prior to admission into the United States. In fact, legislation putting in place a skeletal scheme of consular inspection passed the House of Representatives in 1891 but died in the Democratic Senate where Southern senators, eager to increase the white population, resisted the notion of immigration restriction. *Id.*

Despite its "ducking" the intractable but insistent question of absolute numbers, the 1891 act did mark that point in the history of immigration law when the federal government made immigration a national rather than a state responsibility. Upset with the inefficiency of the New York Board of Emigration Commissions, the Harrison administration took over all immigration passing through New York Harbor and commenced the construction of the reception depot at Ellis Island, which would become the first glimpse and symbol of America for future generations of immigrants. HIGHAM #1, *supra* note 6, at 99.

Secondly, by making steamship companies bear the cost of returning those migrants deemed unsuitable or undesirable, the 1891 law turned private ticket agents in Europe into America's most zealous immigration inspectors. The steamship line taxed the ticket agent for the cost of the passenger's return trip to Europe. *Id.* at 99-100.

12. *Id.* at 110-111. McKinley's assassin, Leon Czolgosz, was American by birth but of obvious foreign parentage. The McKinley assassination led quickly to the introduction of a bill to exclude and deport anarchists. In addition, the 1903 law extended from one to three years the period within which an alien could be deported for indigency. Whether the root cause of such poverty preceded or followed the alien's entry was immaterial. Conspicuously absent was any provision for a literacy test, a deliberate omission designed to advance legislative prospects and to avoid an imbroglio over this controversial notion.

13. Higham #2, *supra* note 8, at 228. An effort to enact a literacy test restriction was mounted in 1906. *Id.* at 226. Literacy test advocates attempted to capitalize upon the outbreak of anti-Japanese sentiment that erupted in California and elsewhere, in the wake of Japan's stunning triumph in the 1905 Russo-Japanese war. *Id.* at 227. Theodore Roosevelt, realizing the potential strategic threat to America's Pacific Empire from an aroused Japan, attempted to calm the anti-Japanese hysteria. *Id.* In response to presidential pressure, San Francisco rescinded a municipal ordinance requiring all Chinese, Japanese, and Korean children to attend Oriental rather than racially integrated schools. *Id.* In return, having been authorized by Congress in 1907 to regulate Japanese immigration, President Roosevelt made an informal arrangement known as the "Gentlemen's Agreement" with Japan by which Japan promised to cease the granting of all passports for its nationals to come to the United States for the performance of work or services. *Id.* For a more complete discussion of this subject, see generally, T. BAILEY, THEODORE ROOSEVELT AND THE JAPANESE-AMERICAN CRISES (1934). The Immigration Act of 1907 authorized Roosevelt to exclude those persons whose entry he deemed harmful to employment conditions in the United States. There was a mounting concern along the Pacific coast over the increasing number of Japanese laborers. For its part, the Japanese government opposed Japanese migration to the continental United States and refused to provide travel documents for such emigration. However, it did issue passports for Hawaii, Mexico, and Canada that were later used by

Although Congress had periodically, since 1875, expanded the qualitative grounds for exclusion, there had been no effort to limit the overall number of immigrants by establishing quantitative quotas. Essentially, before 1921 anyone with sufficient financial resources to book passage to the United States with proof of ability to support himself could immigrate, unless he was excludable on criminal or moral grounds. However, in 1921, Congress, reflecting the staunchly isolationist mood of the country following the end of World War I, revamped our immigration policy when it adopted the Quota Law of 1921. For the first time, we now had a temporary numerical limitation on overall immigration.<sup>14</sup> In 1924, Congress adopted legislation to es-

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Japanese nationals to secure admission to the United States mainland. Pursuant to the 1907 law, Theodore Roosevelt on March 14, 1907, by presidential proclamation, banned the admission to the continental United States of "Japanese or Korean laborers, skilled or unskilled, who had received passports to go to Mexico, Canada, Hawaii and come therefrom." H.R. REP. No. 1365, 82nd Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653, 1669.

From 1911 until 1917, Congress constantly considered versions of a literacy test. During election years, Congress hesitated to arouse the electoral wrath of the foreign-born voter. In off-election years, literacy tests sailed through Congress with scant opposition. However, presidential vetoes prevented any enactments from going into immediate effect. President Taft exercised his veto over a literacy test enactment in 1913 and President Wilson twice vetoed similar enactments in 1915 and 1917. Higham #2, *supra* note 8, at 228.

In February 1917, on the eve of American entry into World War I, Congress overrode Wilson's second veto and the literacy test became law. Act of February 5, 1917, ch.29, 39 Stat. 874. Higham #2, *supra* note 8, at 228; *see also* R. GARIS, IMMIGRATION RESTRICTION 123-38 (1928). Three salient points bear mention relative to the 1917 literacy test. First, it excluded adults (over the age of 16) unable to read some language. This did little to cut down on immediate post-World War I immigration since many migrants from Southern and Eastern Europe had learned to read. Second, an Asiatic exclusion zone was created shutting out most Asiatic migration save Japanese and Chinese. Since the latter were already barred, only Japan remained in theory outside the Asiatic exclusion area. Third, drawing on the historic fear of foreign radicalism, the Act provides for the exclusion of any aliens belonging to so-called "revolutionary" organizations and sanctioned the deportation of any alien advocating "revolutionary" sabotage or syndicalist direct action at any juncture subsequent to their coming to this country. Higham #2, *supra* note 8, at 228. *See also* Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Colum. L. Rev. 309 (1956).

14. Higham #2, *supra* note 8, at 229. The 1921 law was avowedly only an interim solution while a permanent plan of restriction was being readied for Congressional consideration. The 1921 Act is significant for establishing the principle of national origin quotas based on the pre-existing racial and ethnic character of the national population. European immigration was limited to a maximum of 3% of the number of foreign born of each nationality physically present in the United States as of 1910, the year of the most recent census data. Hence, no more than 350,000 Europeans per year could enter and the lion's share of that was accorded to Northwestern Europeans. The Nordic purity so heralded by Madison Grant in his racist apologia, *The Passing of the Great Race*, first published in 1916, was enjoying new popularity amidst the resurgent nativism of the Harding era. *Id.* at 225.

Ethnic stock as of 1921 became the central standard by which eligibility for entry would thereafter be evaluated. Pocket vetoed by Woodrow Wilson during his last days in office, the 1921 law (offered by Senator William P. Dillingham of Vermont as an alternative to an even more draconian measure that would have suspended all immigration save immediate relatives of resident aliens for a two year period) was reintroduced when President Harding called a special session of Congress. The House passed it without a record vote, and the Senate by the lopsided margin of 78 to 1. HIGHAM #1, *supra* note 6, at 310-11.

The Dillingham bill did not win the approval of Southern and Western Senators who

establish a permanent quota with a national origins formula, which was tilted heavily in favor of Western Europe and remained so until July 1, 1968. Under the national origins formula, the quota for each nationality was based on the number of persons of that particular national origin in the United States as of the 1920 census with an overall ceiling of 150,000 per year. As a result, immigration from Southern and Eastern Europe plummeted and immigration from Asia and Africa virtually vanished. The quota restrictions, however, did not apply to natives of the Western Hemisphere countries.<sup>15</sup>

Under the 1924 legislation, aliens were also required to seek a visa through an American Consul overseas prior to departure. Previously, immigrants to the United States were first inspected at their original port of entry into the United States, primarily New York, often only to be found that they were excludable.<sup>16</sup> Following World War II, in light of the pervasive devastation in Europe, the United States adopted, on humanitarian grounds, the Displaced Persons Act of 1948 which enabled more than 400,000 refugees to enter the United States.<sup>17</sup> Trag-

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desired total suspension of immigration. *Id.* at 311. However, the effect of the bill was to severely limit European immigration in the future. *Id.* The House of Representatives had previously passed a bill that would have suspended immigration rather than limiting it. The vote to approve a one-year suspension was 296 to 42; all but one of the opposition votes came from the polyglot northeast and industrial midwest. *Id.* at 309.

Much of the 1921 rationale was based on overt anti-Semitism in response to 119,000 Jews coming to this country in 1919-1920 to escape a fresh wave of pogroms ravaging eastern and central Europe. The Dillingham proposal was a compromise between the ban on immigration favored by the House of Representatives and the industrial and agricultural desire for immigrant laborers. HIGHAM #1, *supra* note 6, at 310-11. Note that most Asiatic immigration was already barred and Dillingham's proposal would not have prevented Latin American "stoop labor" from aiding beet growers in Colorado or cotton growers in the Deep South. The unspoken hope of the architects of the 1921 law was that, within their lifetime, the foreign-born would no longer be challenging natives for power and prominence in their adopted home. *Id.* at 311.

15. Higham #2, *supra* note 8, at 230.

16. HARPER, *supra* note 6, at § 12(a). This requirement of a valid visa issued by a United States Consul overseas represented legislative approval of a war-time visa requirement instituted by the Department of State and Department of Labor on July 26, 1917. Prior to the inauguration of consular control, many immigrants arrived at Ellis Island only to be refused admission and sent back across the Atlantic for an absence of available quota numbers or an independent ground of inadmissibility. Despite consular control, the Immigration and Naturalization Service still had to find the alien admissible at port of entry even if a valid visa had been issued by an American Consul prior to departure.

17. Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 13-16 (1981). Due to arbitrary cut-off dates in the legislation, 90% of the displaced Jews from Germany, Austria and Italy could not get visas. The 1948 Displaced Persons Act was severely criticized by President Truman for adopting these cutoff dates. *Id.* at 13 n.15. The Act was intended to benefit displaced persons from states conquered by Germany, refugees from Nazi persecution, and exiles fleeing Stalinist terror. Eligibility standards were anything but open-ended.

The Displaced Persons Act arose out of the immediate problem of dealing with a million eastern European refugees who were hungry, homeless, and fearful of returning to homelands occupied by the dreaded Red Army. Frustrated in his desire to join in an international resettlement campaign by the arbitrary barriers of the national origin system, Presi-

ically, during the war, many Europeans who faced near-certain death at the hands of the Nazis, were unable to secure immigrant visas to the United States and were placed on waiting lists, to no avail, with other registrants of their particular national origin.

### III. IMMIGRATION & NATIONALITY ACT OF 1952: THE SELECTION SYSTEM

After a two year study by the Senate Judiciary Committee under Committee Chairman Pat McCarran, Congress overrode President Truman's veto to adopt the McCarran-Walter Act on June 27, 1952. The legislation was designed to codify, under one law, all of the separate pieces of immigration legislation that had been passed since 1875. The McCarran-Walter Act still remains the foundation for our present immigration law, although it has been frequently amended since its adoption.<sup>18</sup> The 1952 Act provided for both quota immigrants and nonquota immigrants. The latter category included spouses and children of United States citizens, returning lawful permanent residents, and natives of independent Western Hemisphere countries who, if otherwise qualified, could enter exempt from any quota limitation.<sup>19</sup>

Once a quota system was adopted in 1921, it was inevitable that, given the growing number of applicants for immigrant visas not otherwise barred under the expanding list of exclusionary grounds, a selection system or preferences would, of necessity, have to be established beyond a "first come, first serve" basis. The selection system established in 1952 has, with a few changes, remained the same. It established preference based on the twin themes of family reunification and the employment needs of American employers.

For quota immigrants, four preferences were established in 1952.

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dent Truman proposed that displaced persons be allowed to enter free of quota limitations. So great was the nativist fear of an alien invasion that the Displaced Persons Act as originally enacted did little to ameliorate the human tragedy whose existence had called the legislation into being.

In the presidential election of 1948, Truman and the presidential wing of the Democratic party, conscious of the voting clout of ethnic communities and the highly literate opposition of New Deal liberals, seized upon the parsimonious character of the Displaced Persons Act to garner badly needed votes. The political message was clear, even to the most ardent restrictionist zealot. Two years later, in 1950, a humane Displaced Persons bill became law but only as an interim measure expiring by its own terms in 1952. Higham, #2, *supra* note 8, at 234. See also Kulischer, *Displaced Persons in the Modern World*, 262 ANNALES 166 (1949).

18. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (current version as amended at 8 U.S.C. §§ 1101-1363 (1982)). For an excellent summary of the historical background to the 1952 Act, see H.R. REP. NO. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. CODE CONG. & AD. NEWS 1653-80.

19. Immigration and Nationality Act of 1952 § 201(b), (current version as amended at 8 U.S.C. § 1151(b) (1982)).

The First Preference (50% of the total quota) contained the following eligibility criteria:

[Only] qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States and to such qualified quota immigrants' immediate family.<sup>20</sup>

Under administrative regulations promulgated by the Department of Justice, an employer had to file a petition to demonstrate that the alien was needed as a skilled specialist. Moreover, the employer had to prove that the alien himself possessed such skill.<sup>21</sup> A Second Preference (30% of the quota for visas to be issued) was established for parents of adult American citizens.<sup>22</sup> By contrast, under the 1965 Amendments, parents of American citizens are now defined as immediate relatives and enter the United States quota-free.<sup>23</sup> The Third Preference (the remaining 20% of the quota) was made available to spouses and children of permanent resident aliens. Such preference was re-

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20. *Id.* at 203(a), (current version as amended at 8 U.S.C. § 1153(a)(3) (1982)). Fifty percent of the quota for the designated national area plus the unused portion of the quota for the other two preferences was allocated to the First Preference.

21. Rules and Regulations Implementing the Immigration and Nationality Act § 204.4 reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2439, 2471. The petitioner would also have to attach a "clearance order" from the United States Employment Services that qualified persons were not available within the United States to perform the work and the labor or services unless the work or service came within the category of occupations and the groups or industries set forth in two separate lists. Part A of the List designated occupations for which the supply of available workers had been found inadequate. Part B of the List gave occupations for which it was not feasible for the United States Employment Service to attempt to determine availability. See generally 8 U.S.C. § 1154(a) (1953). W. Besterman, *Commentary on the Immigration and Nationality Act*, reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2799, 2823-26. Mr. Besterman was the legislative assistant to the House Judiciary Committee in the 83rd Congress, 1st Session. By virtue of the agreement between the INS and the U.S. Employment Service, the Employment Service First Preference on form I-129 petitions did not need to contain a clearance order if the occupation came within Part A. The U.S. Employment Service made an administrative determination that these talents were in short supply. Among the Part A occupations were chemists, college instructors, dentists, engineers, physicians, secondary school teachers, nurses, biologists, physicists, draftsmen and tool and die designers. Similarly, Part B contained occupations the character of which could not be expertly evaluated by the U.S. Employment Service; therefore, no clearance order was required for approval of a First Preference petition. Among the Part B occupations were artists, painters, musicians, composers, athletes, actors, circus performers and orchestra leaders. Also included on Part B was a Special Category of religious charitable organizations and beneficiaries of First Preference intending to work for such religious charities.

22. Immigration and Nationality Act of 1952 § 203(a)(2) (current version as amended at 8 U.S.C. § 1153(a)(2) (1982)).

23. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236 § 1, 79 Stat. 911, 911 (1965) reprinted in 1965 U.S. CODE CONG. & AD. NEWS 883, 883.

tained in the 1965 Amendments and reclassified as the Second Preference.<sup>24</sup> A Fourth Preference, available to siblings and children of United States citizens, was established comprised of up to 25% of any portion of the quota not used by the first three preferences.<sup>25</sup>

The preference system established in 1952 remains the foundation upon which qualified non-excludable immigrants are selected, although the 1965 Amendments provided different designations and percentages of the total quota for the various preferences.<sup>26</sup> Under the quota system, if all the visa numbers were not utilized in any fiscal year, they were available to otherwise qualified non-excludable aliens on a "first come, first serve" basis. Arguably, utilization of the preferences were not material until the adoption of the 1965 Amendments due to the disparity in the quota between Western Europe, for which non-preference numbers would readily be available, and non-Western European countries, for which the quota numbers were so few that it made little difference if the applicant could establish entitlement to a preference or not.

Under the annual quota for the Eastern Hemisphere for 1953 set by President Truman based upon the national origins formula,<sup>27</sup> the

24. *Id.* at § 3(2) (amending § 203(a)(3) of the 1952 Act) *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 883, 885-86.

25. At present, brothers and sisters of United States citizens come under the Fifth Preference. Immigration and Nationality Act of 1952 § 203(a)(5) (current version as amended at 8 U.S.C. § 1153(a)(5) (1982)). Unmarried sons and daughters over the age of 21 of United States citizens fall under the First Preference. *Id.* at § 203(a)(1) (current version as amended at 8 U.S.C. § 1153(a)(1) (1982)). Married children of United States citizens now come under the Fourth Preference. *Id.* at § 203 (a)(4) (current version as amended at 8 U.S.C. § 1153(a)(4) (1982)).

26. Immigration and Nationality Act Amendments of 1965 § 3 (amending § 203(a) of the 1952 Act) *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 883, 885-86. Under the 1965 amendments, unmarried sons and daughters of United States citizens (First Preference) received 20% of the annual non-Western Hemisphere quota of 170,000. Spouses, unmarried sons or daughters of lawful permanent resident aliens received 20% of the quota plus any unused visas from the First Preference. Members of the professions or those with exceptional ability in the sciences or arts, now Third Preference but part of the First Preference under the 1952 Act, received 10% of the quota without the benefit of any spill-over provision since this preference rested on job skills rather than family reunification, thereby receiving less generous treatment. Married sons or daughters of United States citizens (Fourth Preference) received 10% of the quota plus any unused visas from the first three preferences. Brothers or sisters of United States citizens, Fifth Preference, received 24% of the quota plus any unused visas from the first four preferences. Immigrants coming to perform skilled or unskilled labor, not of a temporary or seasonal character for which a shortage existed in the United States, received 10% of the quota without the benefit of any spill-over provision. Refugees from the Soviet bloc or Middle East, fleeing racial, religious, or political persecution, were awarded 6% of the quota as conditional entrants. No more than 20,000 visas could go to the natives of any single foreign country and only 200 to colonial possessions. As of July 1, 1968, a separate Western Hemisphere quota of 120,000 was instituted. *Id.* at § 2 (amending § 202 of the 1952 act).

27. Proclamation No. 2980, 17 Fed. Reg. 6019, 6021 (July 2, 1952) *reprinted in* Act of July 27, 1952, ch. 1, § 201, 66 Stat. 175.

quota for natives of Great Britain and North Ireland was 65,361 per year while the quota for natives of countries like China, Egypt, India, Iran, the Philippines, and South Africa was only 100 per year.<sup>28</sup> Accordingly, an applicant from Great Britain, Northern Ireland, Ireland, Germany, Sweden, Norway, or other countries with a generous quota could likely enter the United States even without a preference provided that he was not otherwise excludable. Conversely, for those applicants from less favored countries with a miniscule quota, it would be an exceedingly long wait even if the applicant could establish a preference.

Significantly, under Section 212(a)(14) of the 1952 Act, aliens seeking to enter the United States for the purposes of performing skilled or unskilled labor were excludable only

if the Secretary of Labor . . . determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who [were] able, willing and qualified or available at the time (of application for a visa and for admission to the United States and place to which the alien was destined) to perform such skilled or unskilled labor or (B) the employment of such aliens would adversely affect the wages and working conditions of the workers in the United States similarly employed.<sup>29</sup>

The burden of proof was not on the immigrant but entirely on the Secretary of Labor. If the Secretary of Labor did not act, Section 212(a)(14) remained inoperative.<sup>30</sup> Even then, under the 1952 Act, such ground of exclusion applied only to aliens who were seeking admission under the Fourth Preference as brothers, sisters, sons, or daughters of a citizen of the United States, Western Hemisphere immigrants, and certain former United States citizens.<sup>31</sup> An applicant from the preferred

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28. *Id.* Pursuant to the formula utilized under the 1952 Act, a quota immigrant was charged to the country of birth with no consideration for ethnic ancestry save for those putative immigrants who could trace at least 50% of their ancestry to the so-called "Asia-Pacific Triangle." This arbitrarily defined region spanned all of Asia and the Pacific littoral from India to Japan and all islands north of the Australian-New Zealand quadrant. Thus, a person born in England to parents of non-English blood would be charged to the English quota except if one parent were Japanese or Korean. Then the quota for Japan or Korea would be charged. This would be the case, for example, even if such parent and his/her family had lived in London for many years and acquired British citizenship. Scully, *supra* note 2, at 229 n. 11. The elimination of the quota provisions for the Asia-Pacific Triangle came with the 1965 Amendments. *Id.* at 229 n.17. Abolition of the Asia-Pacific Triangle had been proposed by President Kennedy in 1963. See 109 CONG. REC. 13144 (daily ed. July 23, 1963) (White House Press Release).

29. Immigration and Nationality Act of 1952, § 212(a)(14) (current version as amended at 8 U.S.C. § 1182(a)(14) (1982)).

30. 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 2.40a (1982) [hereinafter cited as GORDON & ROSENFELD].

31. The effect of such legislation was to subject only those applicants who sought preferences as a son, daughter, brother, or sister of a U.S. citizen under the Fourth Preference and

European countries would not normally require a preference in order to get a visa number under the quota and could immigrate irrespective of the labor certification process.<sup>32</sup> The Western Hemisphere applicant, as a non-quota immigrant, could immigrate if he could show he was seeking employment in his occupation, for which the Secretary of Labor had not certified that there were sufficient United States workers or provided that he could show that he had sufficient financial resources thereby making it unnecessary for him to seek employment in the United States. Therefore, Section 212(a)(14), in effect, only excluded those aliens from the Western Hemisphere in the lower economic strata who could not prove to the American Consul that they would be able to support themselves without obtaining employment in the United States, and then only where they sought employment in an occupation for which the Secretary of Labor had certified the availability of United States workers, which was normally in occupations requiring little or no training or experience.<sup>33</sup> The 1952 Act, by retaining the national origin formula, continued to thwart immigration from Southern and Eastern Europe and most Third World countries, other than Latin America.<sup>34</sup>

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those from the Western Hemisphere to the labor certification requirement. Even then, there still had to have been a prior determination by the U.S. Department of Labor as to the availability of U.S. workers. It is rather curious that labor certification should technically apply to a ground of exclusion to those who sought to come based upon family ties rather than to perform services or take up employment. For administrative regulations implementing labor certification, see Rules and Regulations Implementing the Immigration and Nationality Act, *reprinted in* 1953 U.S. CODE CONG. & AD. NEWS 2439, 2488 at § 212(a).

32. Ironically, although the British Isles and Northern Europe had the largest quota allotments, there was a low demand for these visa numbers in those countries, leaving large numbers of immigrant visas unused each year. Scully, *supra* note 2, at 229 n.13. Of the approximately yearly quota of 158,000 under the 1952 Act, nearly 118,000 quota numbers, or two thirds of the total, went to Great Britain, Northern Ireland, Germany and Ireland. *Id.* at 229 n.13. Moreover, Sections 201-203 of the 1952 Act prevented unused quota numbers from Northern Europe from being redistributed to those countries where there was a strong pressure for emigration to relieve economic pressures, such as China, India or Italy. *Id.* at 229.

The 1952 Act wasted precious visa numbers. In fiscal year 1964, for example, 271,030 immigrants entered the United States even though the overall annual ceiling was pegged at 158,561. The other immigrants who came in over this limitation were either from independent Western Hemisphere nations, ministers of religion and other such special immigrants, or spouses and unmarried minor children of United States citizens.

Although 271,030 immigrants came to the United States in 1964, given the malapportionment of visa numbers, there were 65,668 visa numbers squandered but not reassignable. Had the 1965 Act provisions been in operation during fiscal 1964, there would have been about 325,000 immigrants exclusive of any refugees. *Id.* at 241.

33. The shifting in the burden of proof from the 1952 Act to the 1965 Act served to persuade many legislators with conservative attitudes on immigration policy to endorse the abolition of the national origins system, a change strongly supported by the Johnson administration. Protection of the American labor market was the quid pro quo for the end to national origin quotas. 41 INTERPRETER RELEASES 368, 369 (Nov. 30, 1965).

34. If Eastern European or Third World immigrants obtained entry by unlawful means, the 1952 Act provided for deportation after a fair hearing conducted before a special inquiry

## IV. THE 1965 AMENDMENTS

On July 23, 1963, President John Kennedy who had served on the Immigration Sub-Committee of the Judiciary Committee in the United States Senate and had long expressed an interest in immigration reform,<sup>35</sup> proposed the abolition of the national origin quota system and other discriminatory provisions.<sup>36</sup> The 1965 Amendments not only eliminated discrimination based on race or national origin, effective June 30, 1968, but significantly altered the burden of proving the unavailability of United States workers for applicants seeking admission based upon an offer of employment, and imposed the quota system on the Western Hemisphere.<sup>37</sup> Except for immediate relatives of United States citizens, an annual numerical ceiling for the Eastern Hemisphere was established at 170,000. As a further restriction, the nationals of any one single foreign State could not utilize, under such annual limitation, more than 20,000 immigrant visas in any single calendar year. There was a 100 person limit for any colonial possession, not an insignificant number in 1965, especially in Africa and the Caribbean. Effective July 1, 1968, the 1965 Amendments also established a numerical limitation of 120,000 annually for the Western Hemisphere, excluding

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officer, known today as an Immigration Judge. The alien also enjoyed a right to representation by counsel. For the procedure elements of deportation proceedings, see 1A GORDON & ROSENFELD, *supra* note 30, at §§ 5.5-13(f) (1982). The deportation statute, prior to the 1952 Act provided that deportation could occur upon warrant of the Attorney General. However, the Supreme Court had held, as far back as 1903, that prior to deportation from the United States, a due process hearing was required. *Id.* at § 5.5. In the famous Japanese Immigration Case, *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903), the Supreme Court held that section 19(a) of the Act of March 3, 1891, ch. 551, 26 Stat. 1084 which merely directed that aliens could be arrested and deported upon issuance of a warrant by the Attorney General, had to be interpreted in harmony with the due process clause of the Fifth Amendment. The challenged alien had to have the opportunity to attempt to justify his right to remain in the United States. An arbitrary denial of such an opportunity would be a deprivation of liberty without due process.

It should be remembered, however, that deportation is not punishment; the deportation process, despite draconian consequences, remains civil not criminal in character. This point was aptly expressed by Mr. Justice Holmes: "[D]eportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). See also Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566, 576-85 (1963).

35. J. KENNEDY, *A NATION OF IMMIGRANTS* (1964). In 1960, Senator John F. Kennedy advocated substantive revision of our immigration laws including a boost in the quota immigrant ceiling to 308,000 per year. H.R. Doc. No. 360, 86th Cong., 2d Sess. (1960).

36. GORDON & ROSENFELD, *supra* note 30, at 1.4(b). The legislative sponsors of the McCarran-Walter Act were both dead and the mood in Congress became more favorable to outright abolition of the national origins quota. *Id.* On October 3, 1965, President Lyndon Johnson symbolically signed the 1965 amendments at the Statue of Liberty, the symbol of welcome for millions of European immigrants. Scully, *supra* note 2, at 227.

37. Immigration and Nationality Act Amendments of 1965 § 10(a) (amending § 212(a)(14) of the 1952 Act) reprinted in 1965 U.S. CODE CONG. & AD. NEWS 883, 891. Basically, as indicated elsewhere, the 1965 Amendment shifted the burden of proof on the issue of labor certification from the Secretary of Labor and onto the alien or the petitioning employer. See *infra* n.39.

immediate relatives of American citizens.<sup>38</sup> Effective June 30, 1968, immigrants from the Eastern Hemisphere seeking to immigrate on an occupational preference or on a non-preference basis, or Western Hemisphere immigrants (except for those who were exempt as parents, spouse, or children of United States citizens or of aliens lawfully admitted to the United States for permanent resident status) could be admitted, if they were coming to perform skilled or unskilled labor, only if the Secretary of Labor first certified that there were no qualified, willing, and able American workers available, and that the employment of such respective immigrant would not adversely affect wages and working conditions in the United States.<sup>39</sup>

## V. SUBSEQUENT LEGISLATION

Under the 1970 Amendments, the non-immigrant classifications for individuals who sought temporary residence in the United States were amended and expanded so that temporary workers of distinguished merit and ability (H-1) no longer had to be coming to a posi-

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38. For a summary of the major elements of the 1965 Act, see GORDON & ROSENFELD, *supra* note 30, at § 1.4(c).

39. *Id.* at 2.40(a). The 1965 amendments shifted the burden of proving the absence of able, willing, qualified, and available American workers to the alien, thereby restructuring the way in which individual labor certification operated. "In effect, the 1952 Act permitted the immigrant to enter unless the Secretary of Labor closed the door; the 1965 amendments shut the door to the immigrant unless the Secretary of Labor open[ed] it." *Id.* For a searing critique of the restrictive consequences of the 1965 amendment on access to employment opportunities in the United States, see Wasserman, *The Twenty-Fourth Amendment to the McCarran-Walter Act*, 43 INTERPRETER RELEASES 1, 3 (1966). Wasserman sarcastically referred to the 1965 Act as the "Worker's Exclusion Act of 1965." *Id.* The elimination of the national origins system was counterbalanced by the restrictive approach toward working immigrants, which was "the 'sleeper' in the new immigration law which unsuspecting liberal Congressmen and Senators endorsed." *Id.* Wasserman felt that the new system of individual labor certification would neither be administratively practicable nor equitable:

Under the new law, workers without relatives here will find it almost impossible to come here. Neither the Administration nor the Secretary of Labor asked for these new labor controls but Congress saw fit to add them without any real discussion as to their necessity.

An alien who comes to the United States will now have to actively concern himself not only with the State Department, the Public Health Service and the Immigration Service, but also with the Department of Labor which is now establishing a new branch of immigration. Instead of combining agencies dealing with immigration as most students of administrative law advocate, the new law multiplies and diffuses them.

No worker without immediate relatives can come to the United States unless he has a certificate from the Department of Labor. . . . [T]he task of getting such a certificate will consume six months to a year if past experience is any guide. The alien or his representative will be compelled to seek out an area and an employer with labor shortages. He will be compelled to find a prospective employer willing and patient enough to pursue the involved procedure of labor clearances to be followed by the petitioning procedure and delays of the Immigration Service and then finally the visa processing of the alien abroad.

tion that was temporary in nature so long as the period of employment or service was temporary. In addition, Congress eliminated the word "industrial" in the trainee category (H-3) so that trainees in other fields could be admitted. Most important, a new intra-company (L-1) classification was approved for executives or managers or aliens possessing specialized knowledge who sought to be transferred after having worked abroad for at least one year in a similar capacity, to work in a United States subsidiary, branch, or affiliate corporation.<sup>40</sup> Such amendments were in part a reaction to the 1965 Amendments, whose impact was felt most acutely and directly by European and Canadian management and key employees of multi-national companies, who could no longer obtain United States immigration status virtually at will.

With the 1976 Amendments, the preference classification system was extended to the Western Hemisphere and the Western Hemisphere quota was incorporated into the Eastern Hemisphere quota,<sup>41</sup> with an annual limitation of 20,000 for each country and 600 for each colony or dependent area. All Third Preference applicants, be they professional or of exceptional ability, were now required to have a specific offer of employment.<sup>42</sup>

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40. GORDON & ROSENFELD, *supra* note 30, at § 1.4(d).

Creation of the L-1 was necessary, according to Congress, because the existing law "restrict[ed] and inhibit[ed] the ability of international companies to bring into the United States foreign nationals with management, professional and specialist skills and thereby enable American business to maintain and improve the management effectiveness of international companies to expand United States exports and to be competitive in overseas markets." H.R. REP. NO. 91-851, 91st Cong., 2d Sess. reprinted in 1970 U.S. CODE CONG. & AD. NEWS 2750, 2750-51.

41. In 1978, the separate Eastern and Western Hemisphere quotas were abolished and a single comprehensive global quota of 290,000 created. Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907. See also GORDON & ROSENFELD, *supra* note 30, at § 1.4(f).

42. Adjustment of Status and the preference system were also extended to Western Hemispheric nationals. Prior to the imposition of a quota, of course, there was no need to have a preference system for the Western Hemisphere. Prior to the 1976 Act, under the 1965 Act, there was an annual ceiling of 120,000 "special immigrant" visas for Western Hemisphere nationals but, unlike Eastern Hemispheric migrants, Western Hemispheric aliens were not affected by a preference system or restricted by the per country limit of 20,000. H.R. REP. NO. 94-1553, 94th Cong. 2d Sess. reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6073. Western Hemispheric aliens obtained immigrant visas entirely on a first-come, first-served basis, restricted only by individual labor certification. As a result of the 120,000 ceiling without a preference system, would-be immigrants from the Western Hemisphere, other than spouses, parents, and minor children of U.S. citizens or lawful resident aliens, were experiencing up to a two year wait with the backlog mounting steadily from 1968 until 1976. *Id.* at 6074. Imposition of a ceiling on Western Hemispheric migration was an implicit *quid pro quo* for the abolition of the national origins system in the 1965 legislation. *Id.* Western Hemispheric nationals were also compelled, unlike immigrants from the Eastern Hemisphere, to return to their home country for consular processing in order to obtain an immigrant visa. The lack of a preference system for those from the Western Hemisphere and the unavailability of adjustment of status under section 245 of the Act produced this result. *Id.* at 6076. See also Foster, *The Logic of Adjustment of Status to Permanent Residency*, 24 S. TEX. L.J. 37 (1983).

Under separate legislation, known as the Health Education Systems Act of 1976, severe constraints were also imposed upon the entry of foreign medical graduates, subjecting them to an arduous professional exam that only a small percentage would pass. Such exam, when combined with the requirement that Third Preference immigrants have a sponsoring employer, effectively removed doctors from their previously favored position whereby their entry into the United States was uncomplicated and even encouraged.<sup>43</sup>

Under the Refugee Act of 1980, restriction of refugee benefits to exiles from the Soviet bloc and certain Middle East countries was lifted. Prior to 1980, refugee status was primarily shaped by geopolitical concerns which reflected the intense Cold War ideology that permeated the McCarran-Walter Act. With the 1980 legislation, if the alien had not firmly resettled in a third country and could demonstrate a well-founded fear of persecution he could then petition for refugee status.<sup>44</sup> A separate annual quota for refugee entries was established to replace the old Seventh Preference for conditional entries under the 1952 Act. The 1980-82 quota was set at 50,000 annually, with authority given to the President, in consultation with Congress, to allow in additional refugees given an emergency situation. Hence, as the definition of "refugee" expanded, more aliens could seek such extraordinary relief and would increasingly turn to the well-developed and sophisticated immigration bar to take advantage of this remedy.<sup>45</sup>

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43. Act of Oct. 12, 1976, Pub. L. No. 94-484, 90 Stat. 2243. See GORDON & ROSENFELD, *supra* note 30, at § 1.4(e). Henceforth, if foreign medical graduates sought admission under the Third, Sixth or Non-Preference category, they would have to pass Parts I and II of the National Board of Medical Examiner's test or an equivalent test devised by the Department of Health, Education, and Welfare (now renamed as The Department of Health & Human Services). Note that this examination requirement only applied if the foreign medical graduate was coming principally to perform services as a physician. If he was coming on the basis of family reunification the qualifying medical examinations did not have to be taken. *Id.*

44. Act of March 17, 1980, Pub. L. No. 96-212, § 207, 94 Stat. 103, 107 amended by 8 U.S.C. § 1157 (Supp. V 1980). See also GORDON & ROSENFELD, *supra* note 30, at § 1.4(g).

The term "refugee" is defined in the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. § 1157 (Supp. V, 1980). The well-founded fear of persecution may relate to race, religion, nationality, political opinion or membership in a particular special group. No longer is a refugee inextricably linked to the Soviet bloc or the Middle East. Note also that a "refugee" cannot be one who himself participated in the persecution that he is seeking to escape.

45. Commenting on the 1980 Refugee Act during House debate on this measure, Congresswoman Shirley Chisholm pointed out that "[O]f the 1.4 to 1.5 million refugees that have entered this country since World War II, . . . fewer than 2,000 have been from Latin America and Africa." Anker & Posner, *The Forty Year Crisis—A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 63 (1981). The Carter Administration's first Annual Report to Congress on April 15, 1980 showed that of 114,284 refugees admitted during the first six months of fiscal 1980, only 120 came from Africa and only sixty-four from all of Latin America outside of Cuba. Administration estimates were that in the sec-

## VI. CORRESPONDING DEVELOPMENT OF THE LEGAL PROFESSION

Few lawyers were required to represent and advise immigrants during the first 100 years of our country's history. For all practical purposes, we had unlimited and unrestrained immigration. Even with the adoption by Congress of an expanding number of grounds of exclusion, relatively few individuals were affected, except for convicted felons, the insane, the destitute, and other undesirables. As Asiatics were statutorily excluded, most of their representation involved the determination of whether or not the Asian claimant was a United States citizen and therefore not subject to the racial grounds of exclusion.<sup>46</sup>

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ond half of the year, despite the Refugee Act of 1980, only 946 non-Cuban refugees would be admitted from Latin America and only 1,380 from Africa. *Id.* at 69-70.

In the second consultation with Congress in September, 1980, the geographic imbalance of the refugees admissions policy continued. Of 217,000 contemplated admissions for fiscal year 1981, only 4,000 were from Latin America, 2,500 of whom were Cubans, and 3,000 from Africa. By comparison, the Office of the United States Coordinator for Refugee Affairs recommended admitting 168,000 from Indochina and 33,000 from the Soviet Union. *Id.* at 70.

Congress felt that the 50,000 refugee allotment would, in the absence of an international emergency, be adequate. Yet, within weeks of the new law's passage, 130,000 Cubans and Haitians arrived in the United States without documents. Bypassing the elaborate procedures inserted in the legislation to cope with such situations, President Carter created a special immigration category, Cuban/Haitian Entrants (status pending). This allowed them to stay in the United States under indefinite parole, leaving final determination of their status to Congress. While deriving his parole authority from the 1952 Act, President Carter's response to the "Freedom Flotilla" did go against the clear preference expressed in the 1980 Refugee Act for restricting parole authority to individual cases. Klement, *Carter Helps Refugee Law Flunk 1st Test*, NAT'L L.J., July 7, 1980 at 3, 8, col. 7.

The Refugee Act of 1980, for all its imperfections and inadequacies, has witnessed large numbers of refugees coming in under its provisions. In fiscal year 1980 (April 1980), the Administration proposed and Congress accepted a refugee ceiling of 231,700 while actual arrivals totaled 212,000. In fiscal year 1981 (Sept. 1980), the Administration proposed and Congress accepted a ceiling of 217,000 while actual arrivals totalled 159,000. In fiscal year 1982 (Sept. 1981), the Administration proposed a ceiling of 173,000 while the Senate wanted only 125,000 and the House adopted a 140,000 limit which was ultimately the projection agreed upon. Yet actual projected arrivals came to 100,000. For fiscal year 1983, the Administration proposed a level of refugee admissions of about 100,000; a 28% drop from the 1982 ceiling. Despite such reduction, over the past decade the United States accepted an estimated 100,000 refugees per year. See 3 REFUGEES REP. 3 (Aug. 13, 1982).

46. In the celebrated *Chinese Exclusion Case* (Choe Chan Ping vs. United States), 130 U.S. 581 (1889), the Supreme Court found that the power of the federal government to regulate immigration was inherent in national sovereignty. In *Perkins v. Elg.*, 307 U.S. 325 (1939), the Supreme Court sanctioned the use of declaratory judgment actions as a constitutionally permissible way of obtaining a judicial determination of citizenship status. This remedy was embodied in statutory form in § 503 of the Nationality Act of 1940. As a result, thousands of declaratory judgment actions were filed by Chinese claimants, often barred from entry into this country. In order to cut down on the scope of this caseload, Congress enacted § 360(a) as part of the 1952 Act under which declaratory judgments to test citizenship entitlement could only be filed by those aliens not in an exclusion proceeding. See 2 GORDON & ROSENFELD, *supra* note 30, at § 8.30a.

As a postscript, as far back as *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court held that the refusal of Congress to allow the naturalization of Chinese aliens or sanction their admission as immigrants did not condone the exclusion of a child born in the United States to parents who remained subjects of the Emperor of China. A

Until July 1, 1968, there was no numerical straitjacket on immigration from Latin America. Provided that one did not fall into any of the grounds of exclusion due to moral, medical, or criminal reasons, most Latin American applicants, save those living in dependent colonial possessions and subject to the 100 person annual quota,<sup>47</sup> could freely immigrate to the United States if they had proof that they would not become a "public charge"<sup>48</sup> or if, under the 1952 Act, they were not seeking employment in one of the occupations for which the Secretary of Labor had certified the availability of United States workers. In order to overcome the "public charge" obstacle, many potential applicants who did not have an immediate offer of United States employment sought an affidavit of support from a United States relative or friend. Thus the concept of finding a "sponsor" developed. Its heritage still exists today and immigration lawyers and Immigration and Naturalization Service (INS) officials continue to receive inquiries from United States citizens who explain they wish to "sponsor" some friend or distant relative in order that he might immigrate to the United States.<sup>49</sup>

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Chinese person born in the U.S. was an American citizen protected against arbitrary exclusion by the Due Process Clause.

47. The quota for colonial dependencies was raised to 600 in the 1976 legislation. Under existing law, the Western Hemispheric dependencies of Eastern Hemispheric countries are limited to 10% of the 20,000 maximum allotment of the mother country or 200 visas. The Immigration & Nationality Act of 1952 § 5202(c) (current version as amended at 8 U.S.C. § 1152(c) (1982)) was amended to boost the colonial quota to 600 per year. The visas made available to the colony were charged against the quota of the mother country and the hemispheric quota where the colony was located. The visa waiting list for Eastern Hemisphere dependencies located in the Western Hemisphere had a backlog of 23,510 as of Jan. 1, 1976. See H.R. REP. No. 94-1553, 94th Cong., 2d Sess. reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6073, 6081.

Discrimination against persons born in colonies stemmed from the 1952 Act and was grounded on the racist motive of limiting the influx of black immigrants from Western Hemispheric colonies. While the 1965 law increased the colonial quota to 200 per year, the quota's retention testified to the virulent persistence of racial animus as a subterranean factor in shaping national immigration policy. Wasserman, *The Twenty-Fourth Amendment to the McCarran-Walter Act*, 43 INTERPRETER RELEASES 1, 2 (1966).

48. The Immigration and Nationality Act of 1952 § 212(a)(15) (current version as amended at 8 U.S.C. § 1182(a)(15) (1982)). If the consular officer overseas or the I.N.S. official within the United States considered it probable that the alien at any time subsequent to entry would become a "public charge," then, as a matter of discretion, the alien could be excluded. If rendered by the consul abroad, such a subjective assessment of future economic prospects was final and beyond review. The recognition of the importance of sponsors has found its way into law. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 504, 94 Stat. 441, 471 (codified at 42 U.S.C. § 1382c (Supp. V 1981)) provides for attribution to the alien of the sponsor's income and other financial equities for purposes of determining whether the alien would be eligible for benefits under the Supplemental Security Income program and the level of such assistance.

The "public charge" exclusionary mechanism provided under § 212(a)(15) of the 1952 Act was only infrequently invoked to keep out aspiring newcomers. Thirty-three persons were excluded as likely to become public charges in 1953, 16 in 1954, 9 in 1955, 14 in 1956, and only 2 in 1957. 35 INTERPRETER RELEASES 123, 132 (1958).

49. There is no inflexible or absolute criteria for evaluating whether the alien is likely to

The growth of the immigration bar to its present number, an estimated 1500 lawyers to date based on records of active members of the American Immigration Lawyers Association (AILA), and level of sophistication dates back to 1946. Until that time, the practice of immigration and nationality law had been the exclusive and unchallenged domain of a few lawyers previously retained, not to help aliens seek entry into the United States, but primarily to represent aliens who had already entered and currently faced deportation. Fueled by national security concerns over the large number of aliens in the United States, the Immigration & Naturalization Service had expanded during World War II. At the cessation of hostilities, many attorneys who had entered Government service in 1941-42 were terminated under the Reduction in Force Edict. Following the reduction in the number of lawyers within the INS, a collection of concerned individuals, including former INS lawyers who had served as naturalization officers in the New York district and some practicing attorneys, decided in 1946 to establish the Association of Immigration and Nationality Lawyers. This organization is now known as the American Immigration Lawyers Association.<sup>50</sup> Of the nineteen lawyers who attended that inaugural conference, twelve had been recently discharged by the INS.<sup>51</sup> Never-

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become a public charge. Relevant factors are the alien's age, intellect, medical condition, job skills, existence of friends or relatives in the United States and willingness to find a job. Factors that should not be taken into account are possible liability to criminal prosecution, possible death, or subsequent deportation of the alien's parents. Offers of employment can be considered and while there is no formal system of sponsors as such, offers of financial aid from friends and family can be factored into the equation. However, such generosity, unless legally compelled, will not be controlling. GORDON & ROSENFELD, *supra* note 30, at § 2.39(e). Under § 213 of the 1952 Act, the Attorney General has discretionary authority to admit an alien deemed likely to become a public charge if a public charge bond is posted that will indemnify the United States, the state of intended residence and affected municipalities. The public charge bond posted for the indigent or potentially indigent alien is \$1,000 at a minimum and furnished on Form I-352. Violation of the public charge bond results in \$200 of liquidated damages taken out of the face amount of the bond. *Id.* at § 239(f).

50. Schapira, *In the Beginning*, 4 IMMIGRATION J. 1, 6-7 (1981) [hereinafter cited as Schapira]. Prior to the founding of the Association of Immigration and Nationality Lawyers, "[t]he psychology of the executive and supervisory staff at the District level of the Immigration Service was that lawyers served no useful purpose as counsel to the alien and that the alien's rights were adequately protected by the Service." *Id.* at 1. Hence, the alien did not have the benefit of independent legal representation that he had selected and in which he could repose trust and confidence. *Id.*

At a meeting of the Board of Governors held in Houston, Texas on August 7, 1981, the Association voted to change its organizational name to the American Immigration Lawyers Association (AILA), by which it is now known.

51. *Id.* at 1. As former naturalization examiners who had gone to work for the Immigration Service in 1941-42, these lawyers agreed with Joshua Koenigsberg, one of the few practitioners in the field of immigration law and the guiding force behind the creation of the Association, that there was a clear and present need for a bar association steeped in the subtle complexities of immigration jurisprudence. Koenigsberg and his colleagues doubted whether the Immigration Service could function as prosecutor, judge and advocate for the

theless, the number of lawyers practicing in the area of immigration law was relatively small and such representation revolved around large numbers of displaced persons who sought to enter the United States after the war in 1945 and who were found to be excludable due to charges of criminal, moral, or political wrongdoing.<sup>52</sup> Initially the adoption of the 1952 Act did not fundamentally alter the character of the practice of immigration law although due process rights of aliens were expanded and codified. However, after the mid-1950's, as international trade and multinational corporations began to grow, new emphasis was placed on qualifying aliens who could not otherwise enter under restrictive quota provisions, either under the First Preference as a skilled alien whose services were urgently needed in the United States or as one of the few applicable non-immigrant classifications available, such as treaty investors, where the United States had entered into appropriate treaties with the country of which the alien was a national.<sup>53</sup>

It was the adoption of the 1965 Amendment, however, and its key provision abolishing the national origin system, on June 30, 1968, which was the major catalyst for the development of a diverse and sophisticated immigration bar.<sup>54</sup> Dynamic factors of enormous volatility

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alien all at the same time and still serve the best interests of the alien with zeal and unswerving fidelity.

52. Even though the Displaced Persons Act enabled over 400,000 immigrants to immigrate to the United States within a three and one-half year span, such refugees were chargeable to their respective national quotas which, as a result, were backlogged for several years. GORDON & ROSENFELD, *supra* note 30, at § 1.2(d).

53. Nine classes of nonimmigrants were created by the 1952 Act. However, the most pertinent nonimmigrant classifications for businessmen and their immediate families were E-1 treaty trader and E-2 treaty investor. Treaty traders had to be conducting trade of a substantial amount, international in scope between the United States and the home country of the treaty trader. A Treaty investor had to be one intending to enter the United States to develop or direct the operations of an ongoing enterprise. The investment had to be in existence rather than in the planning stage. The only other feasible category for an applicant who sought to work in the United States was the H classification for (1) aliens of distinguished merit and ability or (2) aliens coming to work temporarily if unemployed American workers could not be found or (3) individual trainees. The former two categories were not often utilized due to the restriction that the position itself must be temporary. For a discussion of the nonimmigrant classifications established by virtue of the 1952 Act, see Besterman, *Commentary on the Immigration and Nationality Act of 1952*, 8 U.S.C. 34-45 (1950) included as a preface to the 1953 edition of Title 8 of the United States Code. It is the most perceptive legislative history of the Act written by the then legislative assistant for the House Judiciary Committee. See also 8 U.S.C. § 1101(a)(15) (1953). Under the 1965 Act, aliens are either immediate relatives, special immigrants or simply immigrants; the law abjured usage of the term "quota immigrant". Western Hemispheric nationals were reclassified as "special" immigrants—although it was said that "[t]he only thing special about them is that they become ineligible for adjustment under section 245." Wasserman, *supra* note 39, at 1.

54. Under the national origins quotas, the annual allotment for any quota area was set at 1/6 of 1% of the number of such national group in the United States in 1920 with a minimum guarantee of 100 per year to each quota area. Prior to the national origins quotas set out in the Immigration Act of 1924, national quotas were put into operation under the Quota Act of 1921 with the quota for each country determined to be equal to 3% of that

complicated the enforcement of existing laws. Adoption of the 1965 legislation came at a time of growing economic, social, and political problems in Third World countries. Added to these ingredients was a ready supply of jobs in the United States, a magnetic attraction beckoning those in search of a future. Improvements in transportation, cheaper travel costs, and the explosion of knowledge through the media publicizing the disparity in living standards between the United States and other countries of the world, all helped to boost the total number of applicants who sought to enter the United States. Immigration, both legal and illegal, reached levels unparalleled since the turn of the century and the new impositions of the first quota restrictions.<sup>55</sup>

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country's representation in the U.S. as measured by the 1910 census. As an interim measure, between 1924 and the final development of national origin quotas at the end of the decade, the per-country quota was fixed at 2% of that ethnic group in the U.S. as of 1890. National origins quotas from the 1920's were based on that ethnic group's strength as of 1920 in proportion to the total American population. This percentage then translated into an equivalent slice of the overall 150,000 limitation. The 1952 Act slightly revised the national origins formula into a more precise mathematical ratio of 1/6 of 1% of that nationality's representation as of 1920, with a minimum annual entry of 100 per year. S. REP. NO. 748, 89th Cong. 1st Sess. reprinted in 1965 U.S. CODE CONG. & AD NEWS 3328, 3331.

A telling semantic change found itself embodied in the 1965 legislation. Nowhere in the law do we find mention of the pejorative term "quota" weighed down with historic connotations of inequality and arbitrary selection. Rather, the less objectionable phrase "numerical limitation" is consistently employed although, in terms of practical impact, this often turned out to be a distinction with only barely a shade of difference.

In the interests of clarity, the national origins formula would have this rough effect: in the foundation year 1920, of the total population in the continental United States, approximately 44% were of English origin; 4% of Italian ancestry, .002% of Greek stock and 17% of Germanic origin. Using the fixed percentage of 50,000, the overall annual allotment, we would arrive at these ethnic yearly quotas: Great Britain 65,721; Italy 5,677; Greece 310; and Germany 25,957. As indicated previously, each nationality was guaranteed at least 100 admissions per year so the total ceiling was in fact 154,000 rather than the statutorily prescribed 150,000. In calculating the total American population in the foundation year 1920, Western Hemispheric nationals and their progeny were not counted nor were aliens who could not become naturalized citizens or descendants of American Indians. See Lazarus, *Understanding Our Immigration Laws*, 19 QUEENS BAR BULLETIN 84, 89-90 (Jan. 1956).

55. The Asian population in Houston, Texas, for example has swelled dramatically from only 2,500 in 1965 to over 100,000 by mid-February 1983. Helliker, *Chinatown Sprout In and Near Houston With a Texas Flavor*, Wall St. J., Feb. 18, 1983, at 18, col. 3. Although the 1965 Act established an annual ceiling of 120,000 for the Western Hemisphere and a cap of 170,000 for everywhere else, the ability of immediate relatives of U.S. citizens to enter free of any quota restrictions has resulted in an upsurge of Latino-based immigration in excess of stipulated regional quotas. It is put forward by the Immigration Service that from 1968 to 1977, approximately 35% of all legal immigrants to the United States came from Hispanic home countries. If this legal migration is combined with the illegal entries from the Caribbean, Central and South America, and Mexico, some scholarly observers claim that over half of the total immigration to the United States over the past decade, both legal and illegal, can be traced to Spanish-speaking peoples. Hence, while doing away with the overtly racist trappings of the 1920's national origins system, the 1965 Act has promoted national diversity but linguistic uniformity. M. Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21, 26 (Fall 1980) [hereinafter cited as Teitelbaum]. To get some idea of the enormous social dimensions of the immigration question, sheer numbers tell part of the story. In 1978, when the last official set of statistics was compiled, over 600,000 legal immigrants and refugees entered the United States. In 1980, the year of the Cuban and Haitian boatlifts, 808,000 people were admitted legally into the

As a result of the increased difficulties for applicants who had never before confronted legal obstacles in obtaining permanent resident status in the United States, it was inevitable that they and their employers would turn to corporate and outside counsel for legal assistance. As more attorneys were called upon for advice regarding the intricacies of obtaining lawful permanent resident status in the United States, such attorneys had to develop a mastery of the complex mix of statutes, regulations, and operating instructions of not one, but three major federal agencies: the Department of Justice, within which is found the United States Immigration & Naturalization Service, the United States Department of Labor, and the United States Department of State.

The membership of the American Immigration Lawyers Association soared dramatically from 1968 to 1983. Illustrative of this national surge is the membership of the Texas Chapter of the American Immigration Lawyers Association. In 1968 it was composed of two lawyers, compared to a current membership of approximately 130. In response to a growing need for immigration advice, the American Immigration Lawyers Association developed regular presidential mailings for the primary purpose of distributing and exchanging key and often unpublished cases, internal operating instructions, and policy memoranda. Moreover, the American Immigration Lawyers Association expanded its annual conference to include in-depth presentations on various aspects of the practice and commenced its own house publication entitled the *Immigration Journal*. Rather than continuing to present speakers primarily from the United States Immigration & Naturalization Service at its annual conference, as had been prior custom and practice, the American Immigration Lawyers Association gradually shifted its emphasis to experienced attorneys within the Association, reflecting the conviction that immigration law was not a product of fiat handed down by the INS offices. Rather, it was an organic body of law developed through interpretations by United States courts and administrative

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United States. The 1978 level of admissions, excluding all illegal immigration, was twice as many immigrants as admitted by all other nations combined. *Id.* at 24. If illegal migrants are factored in, based on conservative 1978 figures, perhaps a minimum of one million persons *each year* enter this country. Compare this to the previous all-time high migration of 880,000 per year in the 1901-1910 decade. Given the low fertility rate of the United States population, international migration may account for as much as 40-50% of the annual population increase. *Id.* at 25.

The immigration issue will be the domestic issue for the remainder of the century because the levels of migration are increasing while the economic dominance of the United States is decreasing due to new challenges from Japan, the Common Market, and the Persian Gulf. Note the comparison with the 1950's level of an average of 250,000 legal immigrants per year constituting approximately a 10% population increase. These were times of low inflation and sustained prosperity. *Id.* at 33.

tribunals, expanded regularly by Congressional statutory amendments and augmented by federal regulations subject to public comment.<sup>56</sup> The composite of the membership of the Association also dramatically shifted as immigration became an issue of national rather than regional interest. The Association changed from being a predominantly East Coast organization to a truly national entity with twenty-three chapters throughout the burgeoning South and West.<sup>57</sup>

Similarly, ABA committees dealing with immigration and nationality laws have grown. The International Law, Administrative Law, Criminal Law, and the Individual Rights sections of the American Bar Association have maintained sub-committees on immigration and nationality law. In the July 1982 meeting of the American Bar Association in San Francisco, the section on General Practice also added a committee on immigration law.<sup>58</sup>

Immigration law, in effect, has always been a *de facto* specialty; yet, it was not until the adoption of formal standards for specialization and the corresponding development of certification programs by states such as California and Texas that an opportunity arose to develop verifiable criteria for specialization in the field of immigration and nationality law. Today, only the State of Texas has formally adopted standards for board certification in the field of immigration and nationality law as a test of professional competence.<sup>59</sup> In December, 1979, seventeen Texas lawyers became the first lawyers in the nation to be certified in the field of immigration and nationality law. Since that date, an additional thirteen lawyers have been certified in the field, for

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56. Illustrative of the diversification of that corpus of knowledge presented to the Association members is the fact that at the 1978 conference in Hawaii, government speakers occupied 90% of the substantive agenda. Compare this to 25% of the topics discussed by government speakers at the San Antonio conference in 1982.

57. Foster, *Toward A Truly National Association in the 80's*, 4 IMMIGRATION J. 1, 3 (1981). In 1981, the author became the first person not from the Northeast to be elected president of the American Immigration Lawyers Association.

58. IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE (2d ed. 1982). The National Lawyers Guild's immigration project primarily deals with civil liberties and the due process aspects of immigration. It contains a treatise which is regularly updated.

The American Immigration Lawyers Association (AILA) is a distinct organization from the National Lawyers Guild. The AILA is now an affiliated organization of the American Bar Association (ABA). At the 106th annual meeting of the ABA, the 380 member House of Delegates amended the ABA constitution to allow the AILA a vote in the House of Delegates. See 60 INTERPRETER RELEASES 710, 710-11 (1983).

59. Proposals for establishing specialization standards in immigration and nationality law were first presented by the author to the Board of Directors of the State Bar of Texas at its 1978 meeting following the State Bar convention in Fort Worth. Similar presentations were made to the Texas Board of Legal Specialization in 1977, 1978 and 1979. The Supreme Court of Texas adopted standards for specialization in immigration and nationality law in May 1979 following a favorable recommendation by the Board of Directors of the State Bar of Texas. Texas was the first and remains the only state to adopt such standards.

a total of thirty.<sup>60</sup>

Another significant development is the general recognition by corporate and international lawyers that the practice of immigration law is not an arcane specialty confined to the representation of the destitute facing deportation, but that it also significantly affects the ability of multinational corporations to function. Foreign investors and skilled personnel in highly technical fields of scientific research and energy exploration who, prior to the 1965 Amendments had little difficulty in seeking entry into the United States now find themselves in dire need of competent legal representation.<sup>61</sup>

Substantial foreign investors from Western Europe, under the national origins formula, and Latin America in the pre-1968 era, could immigrate and manage their United States investment simply by showing that they did not intend to enter the labor market. By so doing, they became exempt from the labor certification requirement. However, once the 1965 Amendments put all applicants worldwide (except for colonies) on an equal footing, the preference applicants soon monopolized all visa numbers, thus making it virtually impossible for non-preference applicants to immigrate based upon an investment. Foreign investors, upon inquiry at the United States Consulate, frequently left with disbelief when they learned that the only bases for immigration to the United States in a timely fashion would be through an immediate or other close relative who was a United States citizen or permanent resident or based upon a job offer for which there was a shortage of

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60. For further discussion, see Foster, *An Idea Whose Time Has Come*, 5 IMMIGRATION J. 2 (1982).

61. In September 1977, when the International Law Section of the State Bar of Texas conducted its first seminar on representation of the foreign investor in Houston, immigration law was included as a topic.

Had it been passed by the 97th Congress, the Simpson-Mazzoli bill would have established a new independent preference for investors who invested at least \$250,000 in a new enterprise. This investment would, in addition, have to be in a high unemployment area and result in the creation of at least 10 jobs for American workers. Given the disinclination of the House of Representatives to put Simpson-Mazzoli to a floor vote during the lame-duck session of the 97th Congress, investors remain nonpreference immigrants regardless of the size of their potential investment. The only current benefit from being qualified as an investor by the Service is an exception from the rigors of individual labor certification in applicable instances. For the textual provisions of this proposed independent immigrant category for investors, consult S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S.2215, S.2219 (daily ed. March 17, 1982) and H.R. 5872, 97th Cong., 2d Sess., 128 CONG. REC. H940, H942 (daily ed. March 17, 1982). Senator Simpson reintroduced virtually the same bill in the Senate on February 21, 1983. Ultimately, the independent preference for investors was not kept in the Senate version. No mention of investors can be found in the preference allocation systems in the bill passed by the Senate on May 19, 1983. See S. 529, 98th Cong., 1st Sess., 129 CONG. REC. S6970 - 86 (daily ed. May 18, 1983). See also 60 INTERPRETER RELEASES 417, 417-19, 421-37 (1983). The House of Representatives will most likely not vote on Simpson-Mazzoli during the 98th Congress. See Wiessler, *House Puts Immigration Bill on Hold*, Houston Chronicle, Oct. 4, 1983, at 1, col. 1.

United States workers as certified by the United States Department of Labor.<sup>62</sup> As an alternative, the American Consul informed the alien applicant that he could establish a priority date and in effect go on a waiting list after proving that he had made a substantial investment.<sup>63</sup> For all practical purposes, however, by 1975, being registered as an investor on such a list was meaningless. The total number of applicants eligible for preferences so greatly exceeded visa numbers available under the quota that one would have to make certain unlikely assumptions regarding the demand for visa numbers. This included forecasting a substantial decline in applications for immigration to the United States before a non-preference visa number would be available to an investor during his lifetime or the lifetime of his children.<sup>64</sup>

Similarly, with the rise of the Organization of Petroleum Exporting Countries, the increased economic strength of foreign markets, and the heightened importance of exports to the American balance of trade, United States companies that traditionally had been domestic in nature, quickly made the transition to conducting business on an international scope. Such developments inevitably necessitated not only the transfer of United States employees abroad, but the employment of foreign nationals in the United States in order to interface with overseas

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62. Immigration and Nationality Act of 1952 § 101(a)(15)(E) (current version as amended at 8 U.S.C. § 1011(a)(15)(E) (1982)). Note the option, given the existence of a treaty of commerce between the United States and the foreign state of which the businessman is a national, of entering as a nonimmigrant E-1 treaty trader or an E-2 treaty investor. The treaty trader comes solely to conduct trade of a substantial nature between the United States and his home nation. The treaty investor comes solely to manage and organize an enterprise in which he has already made or is imminently about to make a substantial investment. As a nonimmigrant, the treaty trader or investor must intend to return to his home country after the termination of treaty status. However, so long as the trader or investment continues at an appropriate level, he will usually be permitted to stay in the United States for an extended term. Unlike other nonimmigrants, such as tourists or students, there is no statutory requirement that the treaty trader or investor maintain a permanent foreign residence and offer proof of intent not to abandon same.

63. 8 C.F.R. § 212.8(b)(4) (1982). Obtaining Immigration & Naturalization Service approval as a qualified investor gains exemption from the individual labor certification requirement. The alien must be coming to actively manage a business or agricultural venture in which he has invested or is in the process of investing at least \$40,000. The enterprise must employ a person or persons in the United States who are United States citizens or lawful permanent residents, other than the alien and his family. Similar exemption on labor certification for qualified investors is found in 22 C.F.R. § 42.91(a)(14)(ii)(d) (1982).

64. Non-preference immigrant visas only become available if there are any visa numbers available from the preference categories. There have not been any such numbers left over since 1976. Under the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 19, 95 Stat. 1611 (1981), those immigrant investors who qualified for non-preference visas prior to June 1, 1978, became eligible for lawful permanent residence status. Many investors who applied for permanent residency while they were eligible have been unable to complete their cases simply because non-preference numbers ran out. The 1981 Efficiency Amendments will enable the INS to close out cases and approve these applicants for permanent residence status without the need for non-preference visa numbers, unavailable since 1978. Since 1978, exemption from individual labor certification is the only benefit given for qualification as an approved investor.

United States operations. Multinational corporations had to be able to transfer employees internationally in a short time as job opportunities developed in different company locations, much as a few decades ago, individuals were transferred from one state to the other as better opportunities developed for them or business necessities developed within the company.<sup>65</sup> Corporate counsel and international personnel officers discovered, often to their embarrassment, that what appeared to be an internal business decision as to the employment or transfer of foreign personnel came directly into conflict with United States immigration laws.

## VII. CONCLUSION

It was, therefore, the interaction of diverse but interrelated factors that shaped the development of the contemporary immigration bar. The enactment of the 1965 Amendments, combined with the growth of international trade and, most importantly, an enhanced yearning for and awareness of the liberties and economic plenty available in the United States attracted unprecedented numbers of aliens to our shores. Whether they attempted to immigrate lawfully or wanted to remain in the United States after transgressing United States immigration law, such persons sought out competent legal advice.

Acting in his traditional role as a zealous advocate for his client, the immigration lawyer fashioned new solutions for intractable

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65. Immigration and Nationality of 1952 § 101(a)(15)(L) *amended by* Act of April 7, 1970, Pub. L. No. 91-225, § 1(b), 84 Stat. 116 (current version as amended at 8 U.S.C. § 1011(a)(15)(L) (1982)). Under the Act of April 7, 1970, a new L-1 intracompany transferee category was created for such multinational corporate executives or managers. Prior to 1970, such business executives had to apply for an immigrant visa despite retaining a permanent residence abroad which they had no intention of abandoning. They were ineligible for a nonimmigrant visa since, while the tour of duty was only for a finite period, the job itself was an integral element of the company's ongoing business operations.

This was not a real problem until the imposition of a separate Western Hemispheric quota in 1968 as a result of the 1965 Amendments. Prior to 1968, most such affected business executives, managers, or those possessing specialized knowledge either came from Canada and entered free of quota limits or were British or Northern European nationals whose national quota allotments were always current. Hence, it was the imposition of separate hemispheric quotas that created the hardship which led Congress to create the L-1 classification for intracompany transferees in 1970.

Note that the alien need not be a resident of the United States or working for an American corporation. He must have been employed abroad continuously for one year by the firm or corporation, or an affiliate or subsidiary of such corporation that now wants him to transfer to the United States in order to continue such services in a capacity that is executive, managerial, or involves specialized knowledge. The nonimmigrant can be coming in order to establish an office or base of operations for a foreign corporation. There need not be a pre-existing office or base of operations for a foreign corporation. Also, a foreign employee of a United States company can be granted an L-1 classification even if the United States employer does not presently maintain an office or affiliate in the home country of the alien applicant. *See* Gordon & Rosenfield, *supra* note 30, at § 2.16B (1982).

problems to establish the right for his client to remain in the United States, often while the alien was establishing a preference under the quota system. With the cooperation of sympathetic courts, the immigration lawyer expanded the parameters of the law in a creative and conscientious fashion, benefiting enormously from the generous assistance of his colleagues both on an individual basis and through organized efforts of the American Immigration Lawyers Association.<sup>66</sup>

It should also be remembered that the provisions of the 1924 and 1952 statutes, such as the national origins system, that we today rightfully view as arbitrary and capricious did not appear entirely without merit to decent proponents at the time who, after all, did not enjoy the luxury of hindsight. Our projected solutions may be no less futile than the stratagems we now scornfully dismiss as the discredited wisdom of an unenlightened age. It is, in the final sense, the central mission of the immigration bar, a mission worthy of our most strenuous endeavor, to harmonize protection of the American labor market with our national heritage of cultural diversity and to do so in a spirit of national reconciliation that enriches both those protected and those welcomed. How we as a profession respond to this challenge will do much to determine what kind of a nation we are and what manner of people we shall become.

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66. The informational contribution of Maurice Roberts through the publication he so ably edits, *INTERPRETER RELEASES*, has been and remains absolutely essential to an alert and informed immigration bar.

