Los Angeles Lawyer

JULY - AUGUST 1997

New Immigration Law Poses Major Obstacles for Aliens

Upcoming deadlines under 1996 legislation can lead to harsh results

By Alice M. Yardum-Hunter

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For all aliens living in the United States who are not citizens, two D-Days in September-specifically, September 27 and 30 are fast approaching. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (1996 Act) - the most extensive amendment of U.S. immigration law in more than 40 years - contains an effective date that will bar an alien's entry into the United States, and a prior statute may sunset with severe results for aliens seeking to regularize their status.

Many aspects of the 1996 Act have already taken effect, with the result that some previously held rights of aliens have been lost including access to judicial review for various steps in the immigration process and the denial of federal and state benefits - most notably, Social Security benefits to resident aliens who have worked for fewer than 40 calendar quarters.

Three related provisions of the 1996 Act raise immediate issues and problems for those aliens 1) overstaying a nonimmigrant visa; 2) present in the United States unlawfully for more than six months; or 3) entering the United States without inspection (EWI).

Entrants without inspection are those aliens who arrive at the United States without visa in hand at a place other than a port

of entry. The most common type of EWI is an alien arriving through the hills of Mexico to the wilderness of California, Arizona or Texas. As a result of the 1996 Act, the outcome of any client's entire immigration case may now be determined by behavior formerly rectifiable under the Immigration and Nationality Act (INA).

Many of the 1996 Act's provisions went into effect on April 1, 1997 and created havoc at that time. However, one important change became effective upon enactment, before anyone could be cognizant of it. Section 632 of the 1996 Act created section 222(g), "Elimination of Consulate Shopping for Visa Overstays" to stop forum shopping by visa applicants who overstay, including violation of their status. Consulate shopping refers to an alien from one country applying for a visa in another country, mostly to avoid inconvenience, and sometimes to increase the likelihood of visa issuance. The new law automatically voids any visa acquired by an overstayer - regardless of whether the visa was for multiple years and/or multiple entries - and prohibits aliens from obtaining visas at U.S. consulates except those located in the alien's country of nationality. The ban on consulate shopping applies to any overstays after September 30, 1996.

Under prior law, aliens overstaying their immigration status were able to depart the United States voluntarily and secure a new visa at any Consulate - frequently Mexican and Canadian consulates conveniently located for those seeking to return to the United States - willing to accept jurisdiction of the case. An alien who followed this practice could then reenter the United States legally.

Generally, the alien still needed to show qualification for the new status, and in most cases convince the consular officer of nonimmigrant intent. To qualify as a nonimmigrant, the visa applicant generally has the burden to prove to the consular Officer that the applicant will depart the United States upon expiration of his or her authorized stay; absent sufficient proof, the alien is presumed to be an intending immigrant. As an alien's unauthorized stay in the United States increases in time, it is less likely that a showing of nonimmigrant intent can be made. The alien appears more like an immigrant intending to remain indefinitely.

Now, as a result of 222(g), no alien who has ever overstayed, even by as little as one day will ever again have the option of

departing the United States and simply making a new entry on an existing visa. Also, aliens will no longer be able to obtain a new visa anywhere other than in the country of nationality, unless extraordinary circumstances exist. Nonimmigrant intent remains an important issue to be proven.

When visa applications are made at United States Consulates overseas, aliens will be scrutinized as to whether they departed the U.S. in a timely fashion, and if not, a visa may not be issued at all. There seems to be no rationale for forcing the visa applicant to return to the country of nationality other than giving the consular officer proximity to the alien's presumed prior residence. This proximity would allow for easier investigation or verification of facts stated in the application or orally by the applicant, including comments relating to nonimmigrant intent. Certainly consuls at an alien's country of nationality may be more stringent regarding the applicants' intention and this attitude could result in visa denial based upon impermissible immigrant intent.

A nonimmigrant's entry into the United States following inspection by a U.S. immigration officer is documented by the issuance of an I-94 form. This form marks the date of the entry as well as the expiration date for the nonimmigrant's authorized stay. The I-94 is not a visa; a visa allows lawful entry into the United States as distinguished from the I-94, which simply documents the date of entry and required date of departure. Whether or not an alien has overstayed status is discernible from reading of the I-94 card.

Reliance on the I-94 brings inherent problems. For example, some entrants are not given a date certain by which their status expires, but are admitted on their I-94 for "duration of status." Duration of status draws a connection between the purpose of the alien's presence in the U.S. and the length of his/her stay without setting a particular deadline by which the alien is expected to depart. For example, a foreign student is expected to depart the U.S. upon completion of full-time studies, not by a particular date.

Section 222(g) only applies to aliens who enter the United States on visas or border crossing cards, and does not apply to those who enter on other programs without visas.

Some Canadians enter with I-94s and no visa. Some Canadians

and Mexicans have border crossing cards rather than I-94s, and sometimes Canadians are admitted without any travel document at all. Some nonimmigrant visitors from around the world come on the Visa Waiver Pilot Program without visas. However, all nonimmigrants who enter with visas should obtain an I-94. Thus, not all nonimmigrants come with visas and not all I-94 holders entered with visas. Neither of these groups fall within the scope of Section 222(g).

Immigration and Naturalization Service (INS) officials or airline personnel collect I-94 forms at the time of departure from the United States. The fact that tens of millions of aliens enter the United States annually has made this record-keeping method inaccurate. Section 110 of the 1996 Act requires the U.S. attorney general to create an automated entry and exit control system within two years of enactment. Aliens who remain in the United States beyond their authorized period of stay will be subject to on-line identification, with the result that the INS will be better informed of the status of aliens and better equipped to oversee enforcement of section 222(g).

Until September 1997 nonimmigrant aliens can easily become legal even when they are otherwise eligible. After September, they will be required to document the legality of their status in order to apply for visas at consulates other than their country of nationality, and maintain their status at all times to use unexpired visas in their passports for future entries. Nonimmigrant overstays may also have other problems created by the 1996 Act.

Grounds of Inadmissibility

The 1996 Act seeks to punish those who are unlawfully present in the U.S., remain for certain periods of time, depart the United States voluntarily before removal proceedings begin, and seek admission. The 1996 Act creates two grounds of inadmissibility for aliens who are unlawfully present. These sections of law became effective on April 1, 1997 and are prospective.

Aliens who are unlawfully present in the United States for a period of more than 180 days but less than one year after April 1, 1997, voluntarily depart before removal proceedings begin, and seek to re-enter the United States within three years face a bar to admissibility. The three years are tallied from the date of departure to the date of application for admission. Legislative

history and statutory construction suggest the bar was not meant to be cumulative. Any alien unlawfully present for more than 180 days on or after September 28, 1997 is subject to this bar.

Even more onerous is a second bar for aliens who, for one year or more effective on April 1, 1997, overstay or are otherwise present without INS authorization. These aliens will be barred admission for 10 years of the date of departure. The law did not specify whether the period is to be calculated as continuous or in the aggregate; however, INS interpretation is that the period is cumulative. It is critical that any alien in the United States regularize his or her status as soon as possible to avoid these drastic bar.

Section 301(b) of The 1996 Act defines “unlawful presence” as being in the United States after expiration of the period of stay authorized by the attorney general. INS interpretation includes other status violations such as unauthorized employment. For those who enter without inspection, the definition is being present without being admitted or “paroled.” “Admissibility” refers to whether an alien may lawfully enter the United States. “Parole” is INS permission for an alien to arrive and remain in the United States, short of being admitted.

Aliens who are excepted from the unlawful presence standard include:

- Aliens under 18 years old
- Bonafide asylum applicants, unless the alien was employed without authorization during the application process.
- Beneficiaries of U.S. citizen or resident family unity petitions.
- Aliens who are battered or subjected to extreme cruelty by a spouse parent, or member of the family, when a substantial connection between the battery and/or other types of cruelty and violation of nonimmigrant status.

Is actual departure required before the admissibility bars come into effect? According to the historical view of the theory of admission, the bar occurs at the time of actual entry, as well as when an alien obtains permanent residence (known as the “green card”) through the process of adjustment of status. Adjustment of status takes place within the United States

without a departure. The plain interpretation of the statute supports the conclusion that actual departure is required, because the word “departure” is specified. The current INS position supports this interpretation, contrary to the historical theory of admission.

The difference in interpretation is particularly critical to processing of adjustment of status cases. INA section 245(i) currently allows unlawfully present aliens who are otherwise admissible to adjust status. A fine of $1,000, raised from $650 by the 1996 Act, is required for the privilege of applying for adjustment under section 245(i). Before The 1996 Act, INA 245(c) barred adjustment for overstays and status violators. Immediate relatives were exempt from this bar, but all other applicants who engaged in unauthorized employment, or were otherwise in violation of status, could only adjust their status through the penalty mechanisms of 245(i).

Section 245(i) became effective in 1994 and will sunset on September 30, 1997. Before the enactment of 245(i), unauthorized aliens were required to go abroad to their home country to acquire permanent residence through application at U.S. consulate. If Congress does not extend 245(I) beyond September 30, unlawfully present aliens will be required to depart the United States to secure permanent resident status. Upon departure, as a result of The 1996 Act, the 3- and 10-year bars will be triggered, with the result that these applicants will have to remain outside of the United States for either 3 or 10 years before being able to secure permanent resident status. If Congress does not act, immigration lawyers will be unable to obtain benefits for clients who will soon be barred. These changes will affect countless aliens. Further, if the INS changes its position that adjustment under Section 245(I) is not an admission, then the bars would trigger even without a departure.

The INS seems to favor extension of section 245(i). By raising the filing-fee penalty from $650 to $1,000, it appears that Congress was not only planning to generate increased revenues for INS, clearly intended that adjustment would continue to be available for aliens.

The bars are tolled for nonimmigrants who change or extend their status during the first 120 days the application is pending. It is presumed that the applications are nonfrivolous and are made prior to expiration of stay, with the alien not currently or

previously engaged in unauthorized employment. Good cause but whether it must be separately established, or is assumed if the other elements of admission, nonfrivolity and timeliness are met is not clear. The INS is not required to adjudicate applications within 120 days. It does not seem reasonable to bar aliens who make timely applications to change or extend their status when the INS simply does not adjudicate their cases within 120 days. This section o the 1996 Act will likely invite mandamus litigation.

Waiver Availability

Limited waivers are available to these bars for immigrants. At the attorney general's discretion, inadmissibility may be waived for an immigrant who is the spouse or child of a U.S. citizen or permanent resident who would experience extreme hardship if the waiver is not granted. Under various parts of the former INA, aliens who were parents of U.S. citizens or permanent residents, or who made a showing of the alien's own hardship, were granted waivers. Under the 1996 Act hardship for the alien is no longer a recognized ground, and the waiver is not available to parents of U.S. citizens or permanent resident aliens. Thus Congress has limited the advantage previously gained by aliens entering the United States to bear their children. While the children are U.S. citizens at birth, they are unable to assist their parents in obtaining waivers under the immigration laws of the United States. However, when the children reach age 21, they may petition for the permanent residence of a parent.

The definition of "extreme hardship" in case law can be found in the context of suspension of deportation. Various factors taken in their totality determine whether hardship exists beyond the usual economic and social affects of deportation. The denial of a waiver under 212(a)(9)(B)(v) is not subject to judicial review.

The 3- and 10-year bars radically change the treatment of aliens who could otherwise qualify for immigration benefits. All aliens are cautioned to maintain status if possible, or seek to fall within one of the exceptions or waivers of their applicability.

Extreme Consequences

Under prior law, EWIs were not precluded by the manner of

their arrival (i.e., crossing the border illegally) from obtaining legal immigration status in the United States. Under The 1996 Act they are.

The new law further diminishes EWI rights by considering EWIs as applicants for admission rather than as candidates for deportation. They may thus be summarily removed and barred for re-entry for 5 years. If an succeeds in appearing in removal proceedings before an immigration judge, the alien will bear the burden to establish admissibility at a higher standard of proof than previous law. Also, EWIs may be subject to the 3- and 10- year bars, permanently inadmissible, unable to adjust their status, and fined for illegal entry. The 1996 Act may diminish the flow of illegal entrants as a result of the extreme consequences of halting a common means of entry for many aliens unable to enter legally. However, the flip side of this coin is that the number of aliens who are illegally present in the United States will grow dramatically. Those who are already here are unlikely to leave just because they cannot become legal.

In the future, nonimmigrants who enter the United States will most likely become more sophisticated in their knowledge of immigration law to comply with it. Without appropriate preparation, Section 222(g) will result in aliens being denied the use of their visas as well as determining the place where they may apply for visas.

At press time, the INS has not published regulations, and Congress had not yet decided on the fate of INA 245(i). For now, those illegally present for more than 180 days after April 1, 1997 may need to leave the U.S. by September 27, 1997, in order to avoid the 3-year bar, and should have left by April 1, 1997* to avoid the 10- year bar.

The most likely scenario for these matters is that the INS will decide just before the deadline whether aliens who do not depart the United States physically will be subject to the bars, although it is possible that regulations may not be promulgated by September 27, 1997, which would leave immigration attorneys in a vacuum as to how to advise their clients. U.S. airports may be clogged during September 1997 as aliens who are unsure of their futures take the option of waiting out their immigration processing overseas rather than risk application of the bar if they stay too long.

There are other States admissibility hurdles that aliens will need to meet to stay in the United legally under the 1996 Act. Even if nonimmigrants do not overstay their status, or those illegally present get around the bars, the 1996 Act created many other potential obstacles.

In the mind's of some lawyers immigration law is not "really" the practice of law. However, in light of the draconian effects of the 1996 Act, immigration practitioners will need to advocate with the best of attorneys to ensure the rights of our clients.

***Clarification on Immigration**

My article "New Immigration Law Poses Major Obstacles for Aliens" (Practice Tips, *LAL*, July-August 1997) includes information that requires correction. As the article correctly states, the 3- and 10-year bars to admissibility for prior periods of unauthorized stay, followed by departure and admission, are prospective. However, as far as the 10-year bar is concerned, the article further states that aliens who remained in the U.S. for one year or more should have departed by April 1, 1997. The correct date of departure is April 1, 1998.

While this is no great reprieve, the consequences are not so immediate. There is still time.

This addendum was a letter to the editor in the October 1997 issue of *Los Angeles Lawyer.*

By Alice M. Yardum-Hunter

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For all aliens living in the United States who are not citizens, two D-Days in September—specifically, September 27 and 30—are fast approaching. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the 1996 Act)[1]—the most extensive amendment of U.S. immigration law in more than 40 years—contains an effective date that will bar an alien's entry into the United States, and a prior statute may sunset with severe results for aliens seeking to regularize their status.

Many aspects of the 1996 Act have already taken effect, with the result that some previously held rights of aliens have been lost, including access to judicial review for various steps in the immigration process and the denial of federal and state benefits—most notably, Social Security benefits to resident aliens who have worked for fewer than 40 calendar quarters.

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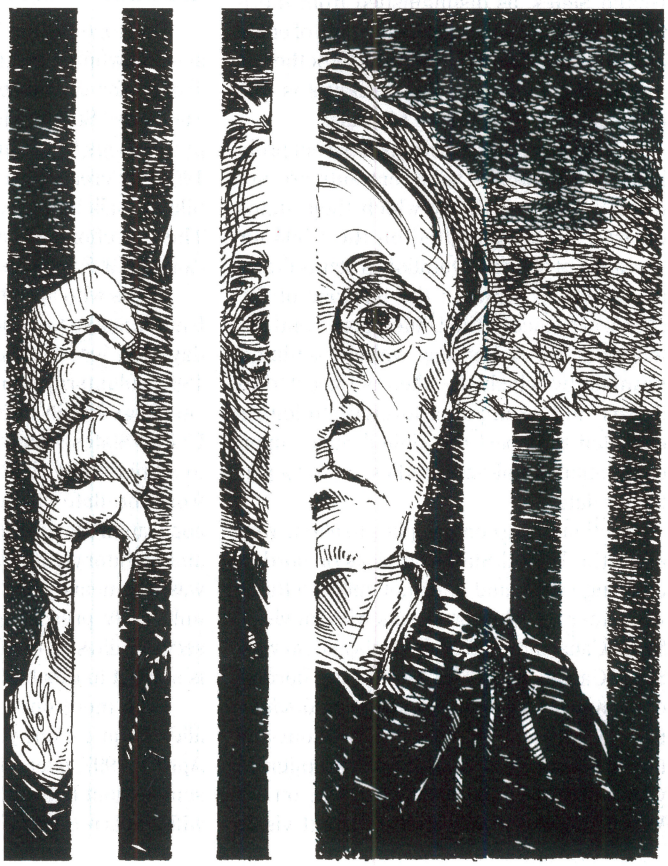
Many of the 1996 Act's provisions went into effect on April 1, 1997, and created havoc at that time. However, one important change became effective upon enactment, before anyone could be cognizant of it. Section 632 of the 1996 Act created INA Section 222(g), "Elimination of Consulate Shopping for Visa Overstays," to stop forum shopping by visa applicants who overstay, including violation of, their status.[2] Consulate shopping refers to an alien from one country applying for a visa in another country, mostly to avoid inconvenience, and sometimes to increase the likelihood of visa issuance. The new law automatically voids any visa acquired by an overstayer—regardless of whether the visa was for multiple years and/or multiple entries—and prohibits aliens from obtaining visas at U.S. consulates except those located in the alien's country of nationality. The ban on consulate shopping applies to any overstays after September 30, 1996.

Under prior law, aliens overstaying their legal immigration status were able to depart the United States voluntarily and secure a new visa at any consulate—frequently Mexican and Canadian consulates conveniently located for those seeking to return to the United States—willing to accept jurisdiction of the case. Aliens who followed this practice could then reenter the United States legally.

Generally, an alien still needed to show qualification for the new status and, in most cases, convince the consular officer of nonimmigrant intent. To qualify as a nonimmigrant, the visa applicant has the burden to prove to the consular officer that the applicant will depart the United States upon the expiration of his or her authorized stay; absent sufficient proof, the alien is presumed to be an intending immigrant.[3] As an alien's unauthorized stay in the United States increases in time, it is less likely that a showing of nonimmigrant intent can be made. The alien appears more like an immi-



Alice M. Yardum-Hunter has been exclusively practicing immigration law for 17 years. She is a former commissioner to the State Bar of California Board of Legal Specialization, and a certified specialist in immigration and nationality law.

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grant intending to remain indefinitely.

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Reliance on the I-94 brings inherent problems. For example, some entrants are not given a date certain by which their status expires but are admitted on their I-94 for "duration of status."[5] Duration of status draws a connection between the purpose of the alien's presence in the United States and the length of his or her stay without setting a deadline by which the alien is expected to depart. For example, a foreign student is expected to depart the United States upon completion of full-time studies, not by a particular date.

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Even more onerous is a second bar for aliens who, for one year or more effective on April 1, 1997, overstay or are otherwise present without INS authorization. These aliens will be barred admission for 10 years of the date of departure.[9] The law did not specify whether the period is to be calculated as continuous or in the aggregate;[10] however, INS interpretation is that the period is cumulative. It is critical that any alien in the United States regularize his or her status as soon as possible to avoid these drastic bars.

Section 301(b) of the 1996 Act defines "unlawful presence" as being in the United States after expiration of the period of stay authorized by the attorney general. INS interpretation includes other status violations such as unauthorized employment. For those who enter without inspection, the definition is being present without being admitted or "paroled."[11] "Admissibility" refers to whether an alien may lawfully enter the United States. "Parole" is INS permission for an alien to arrive and remain in the United States, short of being admitted.

Aliens who are excepted from the unlawful presence standard include:

- Aliens younger than 18 years old.
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The INS seems to favor extension of Section 245(i).[13] By raising the filing-fee penalty from $650 to $1,000, it appears that Congress was not only planning to generate increased revenue for the INS but also clearly intended that the adjustment of status would continue to be available for aliens.[14]

The bars are tolled for nonimmigrants who change or extend their status during the first 120 days the application is pending.[15] It is presumed these applications are nonfrivolous and are made prior to expiration of stay, with the alien not currently or previously engaged in unauthorized employment. Good cause is an element, but whether it must be separately established, or is assumed if the other elements of admission, nonfrivolity, and timeliness are met, is not clear. The INS is not required to adjudicate applications within 120 days. It does not seem reasonable to bar aliens who make timely applications to change or extend their status when the INS simply does not adjudicate their cases within 120 days. This section of the 1996 Act will likely invite mandamus litigation.

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Under various parts of the former INA, aliens who were parents of U.S. citizens or permanent residents, or who made a showing of the alien's own hardship, were granted

waivers. Under the 1996 Act, hardship for the alien is no longer a recognized ground, and the waiver is not available to parents of U.S. citizens or permanent residents. Thus Congress has limited the advantage previously gained by aliens entering the United States to bear their children. While the children are U.S. citizens at birth, they are unable to assist their parents in obtaining waivers under the immigration laws of the United States. However, when the children reach age 21, they may petition for the permanent residence of a parent.

The definition of "extreme hardship" in case law can be found in the context of the suspension of deportation.[16] Various factors taken in their totality determine whether hardship exists beyond the usual economic and social effects of deportation. The denial of a waiver under Section 212(a)(9)(B)(v) is not subject to judicial review.

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visas may be accepted.

At press time, the INS had not published regulations, and Congress had not yet decided on the fate of INA Section 245(i). For now, those illegally present for more than 180 days after April 1, 1997, may need to leave the United States by September 27, 1997, in order to avoid the 3-year bar, and should have left by April 1, 1997, to avoid the 10-year bar.

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[1] Congress enacted The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 on Sept. 30, 1996. Pub. L. No. 104-208 [hereinafter 1996 Act].

[2] 1996 Act §632(g), Immigration and Nationality Act (INA) §222(g), 8 U.S.C. §1202(g).

[3] INA §214(b), 8 U.S.C. §1184(b), 22 C.F.R §41.11.

[4] 1996 Act §632(g), INA §222(g), 8 U.S.C. §1202(g)(2)(B).

[5] Duration of status also applies to vocational students and exchange visitors, among others. *See* 8 C.F.R. §214.2(f)(5).

[6] 1996 Act §110.

[7] 1996 Act §301(a)(9)(B)(i)(I) and (II), INA §212(a)(9)(B)(i)(I) and (II), 8 U.S.C. §1182(a)(9)(B)(i)(I) and (II). New INA §212(a)(9)(C) also adds a third ground of inadmissibility for aliens unlawfully present who had been removed and entered (or attempted to enter) without being admitted.

[8] The language of the law is "a period of 180 days." Senator Spencer Abraham (R-Mich.) urged that the 180 days be "continuous." *See* CONG.REC. S4598 (May 2, 1996).

[9] 1996 Act §301(b)(1)(B)(i)(II), INA §212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II).

[10] Introduction to the 1996 Act, at 16.

[11] 1996 Act §301(a)(9)(B)(ii), INA §212(a)(9)(B)(ii), 8 U.S.C. §1182(a)(9)(B)(ii).

[12] 1996 Act §376(a)(1), INA §245(i), 8 U.S.C. §1255(i).

[13] AILA MONTHLY MAILING, vol. 16, no. 3, at 220 (Mar. 1997).

[14] 1996 Act §376.

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

[16] Matter of Anderson, 16 I&N Dec. 596 (BIA 1978).