CHAPTER 2
Inadmissibility, Deportability, Waivers, and Relief from Removal

It is the spirit and not the form of law
that keeps justice alive.
—Chief Justice Earl Warren

OVERVIEW

The power to determine who is eligible for admission and who is permitted to remain in the United States is within Congress's authority and limited only by rules of statutory interpretation.[1] Who may enter or remain in a nation reflects, in part, how the nation sees itself; immigration rules represent what a nation will be in the future, and, hence, are the subject of much debate.[2] Participation in this debate requires a clear understanding of the existing admissibility and deportability categories and the provisions governing them. Admissibility refers to those persons who may be legally admitted to the country and deportability refers to those persons who, after admission or entry, may be removed. Even upon careful review, the reader will find it difficult to see a cohesive pattern in the statutes.

[1] As was noted earlier, the broad powers to control immigration law lie with the legislative and not the executive branch. Therefore, there are only two possible arguments that can be raised to challenge the action on the part of an immigration official—either Congress, in enacting the statute, was acting outside of its authority granted under the Constitution, or the agency was acting outside of the authority granted to it under the statute.

[2] One scholar has argued that the reason the United States has had great difficulty in developing a coherent immigration policy is because the choices in developing such a policy tug at the very moral fabric of the nation. *See* L. Fuchs, "Immigration Policy and the Rule of Law," 44 *U. Pitt. L. Rev.* 433, 433 (1983).

The law provides a long list of persons who are either prohibited from entering or are to be removed should their presence be discovered in the United States. The grounds of inadmissibility are laid out at Immigration and Nationality Act (INA)[3] §212(a), and the deportability grounds at INA §237. Each of the grounds was incorporated into the immigration laws as Congress thought of situations calling for the exclusion or removal of a particular group of people. At the same time that the law prohibits the admission and requires the removal of broad categories of persons, there are provisions allowing the waiver of these grounds of inadmissibility and deportability.[4]

The inadmissibility and deportability grounds can be described as falling into seven general categories: (1) health-related; (2) economic; (3) criminal; (4) security and foreign policy; (5) immigration violations; (6) quasi-criminal; and (7) miscellaneous. The deportability grounds nearly mirror the inadmissibility provisions and will be described under a separate section within each of the above six categories.[5] The descriptions later in this chapter give the statute more order and make it easier to understand. That section will explore the grounds of inadmissibility and deportability, as well as the criteria for obtaining waivers from those provisions.

APPLICATION OF THE INADMISSIBILITY AND DEPORTABILITY PROVISIONS

There is often a great deal of confusion between inadmissibility and deportability because of changes made to the immigration law by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[6] Current law provides for the "removal" of a wide range of individuals. In this context, removal means the ejection of a person from the United States. Included in the INA is a long list of "inadmissibility" and "deportability" provisions.[7] The deportability provisions are applied

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[3] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*) (INA).

[4] In addition to the ameliorative forms of relief that may be available, immigration authorities have considerable prosecutorial and other discretionary authority to allow a person to be admitted notwithstanding his or her inadmissibility or to remain even though he or she is deportable. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

[5] The grounds also are summarized in Charts 1 and 2 at the end of this chapter.

[6] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

[7] *See* 8 USC §§1182 and 1227, INA §§212 and 237.

to a person who has been formally admitted to the United States and the inadmissibility grounds are applied to those who have not been legally admitted to the country (or who seek a new status that is the equivalent to a request for "admission). The procedure for ejecting or removing any person, irrespective of whether they have been legally admitted is termed a "removal" hearing. Prior to 1996, the immigration statute provided that questions involving the application of the inadmissibility and deportability provisions were, as a general rule, governed by whether a person had gained entry into the United States.[8] The proceedings for those seeking admission were called "exclusion hearings," and for those who had managed to enter, "deportation hearings." In exclusion hearings, the immigration judge (IJ) determined the applicability of the inadmissibility provisions. In deportation hearings, the IJ would determine the application of the deportability provisions.

With the enactment of IIRAIRA, a different framework was established, at least insofar as the hearing was concerned. Exclusion and deportation hearings are no longer separate and distinct, but are unified as one procedure—a "removal hearing"—for all persons, irrespective of whether the person seeks admission or the government tries to eject him or her following admission. Whether the inadmissibility or deportability provisions are applicable in a given situation will depend on whether an individual has been admitted to the United States or is seeking admission. A person who *has been admitted* faces the deportability grounds, and a person *seeking admission* must overcome the inadmissibility grounds.[9]

In addition to creating a unified procedure for removal, IIRAIRA limited a person's ability to avail him- or herself of constitutional protections by placing persons physically present in the United States in the posture of an applicant for admission.[10] The question of whether a person has made an entry or has been admitted is significant in terms

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[8] In situations where a person is allowed to physically enter under parole, he or she would be confronted with having to overcome grounds of inadmissibility. Parole is discussed later in this chapter.

[9] The definition of admission is contained in the statute at 8 USC §1101(a)(13), INA §101(a)(13), and will be explored further in this section.

[10] As is explored in greater detail, *infra*, the statute also authorizes the application of expedited removal to certain persons who are unable to prove that they have been in the United States for a certain period of time. *See* 67 Fed. Reg. 68924 (2002); 69 Fed. Reg. 48877 (2004). Under 8 USC §1101(a)(13)(A), INA §101(a)(13)(A), a person not yet "admitted," by definition, remains an applicant for admission.

of constitutional protections. Persons coming into the United States were governed by INA §101(a)(13), which had constitutional protections adhering to them following their "entry." "Entry" has been replaced by "admission"; importantly, "entry" did not carry with it the legal hurdles of the current term "admission." Thus, the substitution of terms attempts to make unavailable certain protections that were previously available to some noncitizens.

Persons seeking admission may not avail themselves of protections of the Constitution. However, once a person is admitted into the United States, the person is considered a "person within the United States" subject to the Constitution, and is entitled to its various protections such as equal protection under the Fourteenth Amendment.[11] The Supreme Court has held on numerous occasions that the Due Process Clause is applicable to "all persons within the United States including aliens, whether their presence is unlawful, temporary or permanent."[12]

Placing a person already present in the United States in the posture of one seeking admission raises a constitutional question—does this person truly seek admission or does he or she fall under the deportability grounds, which are governed by the "person within the United States"-based constitutional protections? Congress, via the 1996 amendments,[13] distinguished between physical and legal presence and, since then, only legal "admission" triggers the constitutionally-subjected deportability grounds (which offer more protection against removal). Moreover, the statute contains provisions that place the burden of proof on the applicant or respondent to show by clear and convincing evidence that he or she is lawfully present based on a prior admission; otherwise, the person must prove that he or she is clearly and beyond a doubt entitled to ad-

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[11] *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding municipal regulation as violative of the Fourteenth Amendment's equal protection clause).

[12] *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Wing Wong v. U.S.*, 163 U.S. 228, 238 (1896) (finding the Fifth Amendment's due process clause applicable to the federal government); *Hampton v. Wong*, 426 U.S. 88, 103 (1976) ("When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.").

[13] The 1996 amendments are the combined ramifications of IIRAIRA and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

mission.[14] Prior to IIRAIRA, the government had the burden of proof in cases where a person was arrested *within* the United States.[15]

When are the inadmissibility provisions triggered? The issue of inadmissibility arises initially when a person appears before a U.S. consul overseas seeking permission to come to the United States—usually a request for an immigrant or nonimmigrant visa or a parole document (see discussion, *infra*).[16] It arises again when the person arrives at the port of entry (airport, sea port, or land port) seeking admission. At this point, the person is subject to "inspection," whereby a U.S. Customs and Border Protection (CBP) officer considers whether the person is admissible. There are a number of different outcomes to the inspection process—the person can be detained; returned quickly under "expedited removal"; granted "deferred inspection"; paroled; or admitted. Where the person arrives under the Visa Waiver Program, he or she can be summarily denied admission, paroled, or admitted.[17] As long as a person has not been formally admitted into the country, he or she remains subject to the inadmissibility grounds.

Moreover, the question of inadmissibility remains relevant, in certain circumstances, even if the person *initially* is admitted to the United States. For example, if the person later seeks lawful permanent resident (LPR) status, or leaves the United States and attempts to return, or is placed in removal proceedings because the government believes that he or she was inadmissible at the time of the last admission, the person must be prepared to establish admissibility.[18]

What immigration posture triggers deportability? If the person, after initial entry, remains in the United States, there is a presumption that his or her status is lawful, and the government will have the initial burden when challenging the person's status. That is, once admitted, a person can only be removed through the removal process upon a showing of

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[14] 8 USC §§1229a(c)(2)(A) and (B); INA §§240(c)(2)(A) and (B).

[15] *See, e.g.*, *Zhang v. Slattery*, 55 F.3d 732, 751 (2d Cir. 1995).

[16] *See* 8 USC §§1182(d)(5) and 1229b, INA §§212(d)(5) and 240A(b)(4)(A).

[17] A person who seeks admission under the Visa Waiver Program, who is found inadmissible, and who expresses a desire to apply for asylum will not be subject to expedited removal. *See Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); 8 CFR §235.3(b)(10).

[18] As will be seen later, "inadmissibility at entry" is a burden that the government must meet since it actually is a deportability provision. The charge means that the government believes that at the time of the person's last admission, the person, in fact, should not have been admitted.

deportability, which has the opposite burden of proof compared to inadmissibility and offers more constitutional protections. This rule is applicable unless on a previous visit to the United States, the person was ordered removed and he or she somehow managed to re-enter the United States.[19] Such an individual does not qualify as "admitted," and such a person may be removed even without the benefit of a full removal hearing;[20] this process is called reinstatement of removal.

Returning Lawful Permanent Residents

Pursuant to the 1996 amendments, a person who is a returning LPR will not be treated as if he or she is seeking a new admission if: (1) the person has not abandoned the permanent residency; (2) the person's absence did not exceed 180 days; (3) he or she was not engaged in illegal activity following departure; (4) his or her departure was not while under removal or extradition proceedings; and (5) the person is not inadmissible under one of the criminal grounds of inadmissibility, unless he or she was granted a waiver or cancellation relief.[21]

Prior to the 1996 amendments, some returning permanent residents were protected from the inadmissibility provision under the Supreme Court decision, *Rosenberg v. Fleuti*,[22] where the Court held that the grounds of inadmissibility were inapplicable to an LPR who was returning from an "innocent casual and brief" trip abroad.[23] The *Fleuti* or reentry doctrine, as it became known, protected LPRs from being subjected to the inadmissibility provisions that were different from the provisions for deportability.[24]

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[19] The statute provides that where a person was previously removed and re-entered illegally, the original removal order may be reinstated and the person again removed. This provision was found to be constitutional. *See Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1162–63 (10th Cir. 2003); *but see Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (invalidating reinstatement procedure as ultra vires in conflict with the INA where order was entered by immigration official and not an immigration judge). There is no administrative review of reinstatement order. *Matter of G–N–C–*, 22 I&N Dec. 281 (BIA 1998).

[20] 8 USC §1231(a)(5), INA §241(a)(5); 8 CFR §1241.8(a). In addition, under 8 USC §1326(a), INA §276(a), a person may be subject to criminal prosecution for a subsequent attempt to return without having first received permission to do so by the government.

[21] *See* 8 USC §1101(a)(13)(C), INA §101(a)(13)(C). Cancellation of removal is discussed in this chapter, *infra*.

[22] *Rosenberg v. Fleuti*, 374 U.S. 449 (1963).

[23] *Id.* at 461.

[24] Fleuti was homosexual, which was a ground for inadmissibility but not deportability at that time; thus, based on the Court's ruling, he did not need to satisfy an inadmissibility ground
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Whether one of the underlying principles of the *Fleuti* doctrine, that LPRs are entitled to greater protections upon their return to the United States, has survived IIRAIRA still may be in question.[25] While treating certain LPRs as persons seeking re-admission, courts also have acknowledged constitutional concerns, not normally recognized for other returning noncitizens.[26]

Parole

"Parole" is an important concept that allows the physical entry of a person into the United States without considering him or her to actually have been admitted to the country. Thus, parole is a "legal fiction." The use of parole also acts to preclude the person from asserting a legal right to admission even though he or she may be physically within the border of the United States. From its earliest usage in the 19th century, this device has been used as a convenient way to allow otherwise inadmissible persons to be free from detention while their formal admission was under consideration, or to permit them physically to gain admission.

Parole has been used over the years to deal with humanitarian situations, both on a large scale and in individual cases. Since the enactment of the Refugee Act of 1980,[27] the use of parole has been significantly curtailed. That is, one of the reasons for passage of the Refugee Act of 1980 was to regularize the admission process for refugees, which included using refugee visas instead of parole as the preferred way of dealing with a humanitarian crisis.

Pre-Hearing Detention

Beginning in 1988, Congress began to focus a great deal of attention on dealing with noncitizens in the United States who had been convicted of crimes. The Omnibus Anti-Drug Abuse Act of 1988 called for mandatory

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that would have otherwise rendered him inadmissible.

[25] In *Matter of Collado-Muñoz*, 21 I&N Dec. 1061 (BIA 1997), the Board of Immigration Appeals (BIA) held that the *Fleuti* doctrine was no longer applicable. *See also Tineo v. Ashcroft*, 350 F.3d 382, 397 (3d Cir. 2003) (BIA's interpretation of 8 USC §1101(a)(13)(C), INA §101(a)(13)(C) was entitled to *Chevron* deference).

[26] In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court, while allowing the application of inadmissibility provisions to a returning LPR, noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." *See also Ferraras v. Ashcroft*, 160 F. Supp. 2d 617, 627 (S.D. N.Y. 2001).

[27] Pub. L. No. 96-212, 94 Stat. 107.

detention of noncitizens, including LPRs, who had been convicted of aggravated felonies.[28] The law, which limited federal court review of mandatory detention, was successfully challenged in litigation following its passage.[29] Laws enacted in 1990 and 1991 restored the right to pre-hearing release under bond for permanent residents and persons lawfully admitted to the United States who were able to show that they were not likely to abscond.[30] In April 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[31] which barred all noncitizens with aggravated felonies or other criminal convictions from pre-hearing release. This resulted in court challenges that found many of the provisions unconstitutional.[32] Congressional bills passed one year later as part of IIRAIRA, however, reinforced the mandatory detention statute and eliminated the possible release of lawfully admitted noncitizens with aggravated felony convictions.[33]

In *Demore v. Kim*,[34] the Supreme Court heard a challenge to the mandatory detention statute by an LPR who had been in custody for six months without the benefit of a bond hearing. The Court held that Kim had not been deprived of his constitutional rights. It distinguished Kim's case from its decisions involving long-term detention of persons who already had their hearing and were awaiting removal (post-hearing detention). In contrast to those cases, Kim had not had his removal hearing and the Court held that the government had a legitimate interest in holding him during the pendency. While there was clear recognition by the Court that an LPR was entitled to constitutional protection, it held that the balance of interests weighed in favor of the government.[35]

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[28] *See* Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, sub. J, 102 Stat. 4181 (1988); 1988 *U.S. Code Cong. & Admin. News* 5937. Aggravated felonies—which are an immigration term of art—are discussed later in this chapter, at the section on criminal grounds; they are defined at 8 USC §1101(a)(43), INA §101(a)(43).

[29] *See, e.g.*, *Kellman v. Dist. Dir.*, 750 F. Supp 625 (S.D. N.Y. 1990); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990); *Morrobel v. Thornburgh*, 744 F. Supp. 725 (E.D. Wa. 1990).

[30] *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (IMMACT90); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991) (MTINA).

[31] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[32] *See Grodzki v. Reno*, 950 F. Supp. 339 (N.D. Ga. 1996); *Montero v. Cobb*, 937 F. Supp. 88 (D. Mass. 1996).

[33] *See* 8 USC §1226(c), INA §236(c). The pre-hearing mandatory detention statute was upheld as constitutional by the Supreme Court in *Demore v. Kim*, 538 U.S. 510, 529 (2003).

[34] 538 U.S. 510 (2003).

[35] *Id.* at 522–23. The claim in *Kim* was distinguishable from that made in *Zadvydas v. Davis*, 533
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