

INTRODUCTION

Aside from the federal tax code, immigration law probably is the most complicated and dynamic part of the American legal system. As the huddled masses have poured into the United States over the past 200 years, the country has had to grapple with deciding who among the new immigrants would be accepted and would be rejected as residents. From the mid-19th century to the present day, each new era in American history has brought a different wave of immigrants—from Irish Catholics to Chinese to Southern and Eastern Europeans, Latin Americans, Asians, Africans, and those from the Middle East. Each wave of immigrants has brought music, food, culture, and energy from which our cultural heritage has grown.

However, each wave has also brought individuals whom the country has decided to reject for a variety of reasons, such as crime, poverty, illiteracy, illness, security threats, and violations of immigration laws. With each new class of individuals found to be undesirable as entrants to the United States, the immigration laws have been amended to add new grounds of excludability, *i.e.*, bases for denying admission. And if an individual deemed unwelcome for any of the reasons cited above had made it past our borders already, new grounds of deportability, *i.e.*, bases for removing the person, were added to make removal possible.

As a result, the laws governing exclusion of aliens seeking to enter the United States, and removal of those already here, have grown from a few basic statutes in the 19th century to a complex and byzantine web in the present day. Since 1986, there have been at least a half-dozen major overhauls of the immigration laws, with another currently on the horizon. Unfortunately, like a contractor trying to build a new edifice without removing the remains of an old one, Congress adds new immigration laws on top of old laws with little effort to harmonize them. The results are often laws that are confusing and contradictory. New lawyers and others attempting to decipher our immigration laws are often perplexed and frustrated.

This book is an attempt to simplify the laws relating to immigration enforcement. It is geared toward those who are starting in this field trying to understand the basics of immigration court proceedings. Despite the complexities of immigration law, it boils down to a few basic questions: Whom do we permit to enter the country and whom do we keep out? Who do we permit to remain here after entry and whom do we remove/deport?

Whom We Keep Out

Those who are denied entry into the country are called “inadmissible.” The rules as to whom is deemed inadmissible are found at Immigration and Nationality Act

(INA) §212(a).¹ Although there are 10 different grounds with numerous sub-sections outlined, they can be narrowed down to five major areas, plus a few miscellaneous grounds of inadmissibility. The general bases for denying admission, *i.e.*, excluding an alien from admission at the land border, seaport, or airport are:

- health;
- crime;
- security concerns;
- immigration (violations); and
- public charge grounds.

Some of these individuals are turned away right at the border, or its functional equivalent, without a court hearing. This action is called “expedited removal.” Others are granted entry, or manage to enter the country surreptitiously, and are given a hearing before an immigration judge (IJ) before being deemed inadmissible and made to leave the country. For some individuals, despite a finding of inadmissibility, there are waivers or pardons that may permit them to overcome the basis for exclusion. These are found at INA §212.

Whom We Remove

Many non–American citizens gain entry to the country legally or illegally. Some come legally to the United States on temporary visas (*e.g.*, tourists) or permanent visas (*e.g.*, spouses of U.S. citizens).

If, after lawful entry, they take some action that violates their previously lawful status, such as allowing a visa to expire, working without authorization, or being convicted of a crime, they become “removable.” That is, they have gained admission lawfully but the government now wishes to “remove” them for violating the section of the INA that governs the reasons an individual may be removed—INA §237(a). These laws are in many ways similar to the grounds of exclusion or inadmissibility at INA §212, but are, of course, distinct in other ways. They include as reasons for removal:

- crime;
- immigration violations;
- security threats;
- lack of proper documentation or registration; and
- public charge grounds.

In addition to those who forfeit their lawful status based on an INA §237(a) ground, individuals who have managed to enter illegally, *i.e.*, without proper inspection or by fraud, are also “removable.” Just as with individuals who have entered le-

¹ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*)

gally and later fallen out of lawful status, these individuals have a right to a removal hearing before an IJ to determine whether they will be removed.

To Whom We Grant Relief

Despite being inadmissible or removable, U.S. laws sometimes grant individuals waivers or the right to seek relief from removal. This relief is sought from the Department of Homeland Security (DHS) or, if the person is in removal proceedings (*i.e.*, has a hearing before an IJ), the Department of Justice (DOJ). There are numerous waivers of inadmissibility (most found at INA §212(d)–(1)) as well as forms of relief from removal. Many of these waivers and forms of relief depend on close U.S. citizen or lawful permanent resident family ties and/or a showing of hardship to these family members if the immigration laws are enforced. Other relief forms and waivers depend on a variety of factors, including evidence of persecution, a lengthy period of physical presence, or residence in the United States.

How All This Is Decided

In the immigration enforcement arena, there are two sources of authority—DHS and DOJ. The former Immigration and Naturalization Service is gone, replaced in 2002 with DHS. Within DHS, there are two enforcement agencies—U.S. Customs and Border Protection (CBP), which is entrusted with securing the border and keeping out individuals deemed inadmissible, and U.S. Immigration and Customs Enforcement (ICE), which works in the interior of the country and is responsible for finding, detaining, and removing those deemed to be removable.

Individuals stopped by CBP at the airport, seaport, or border are often summarily removed in expedited removal proceedings without going before an IJ. Those arrested and detained in the interior of the country are generally brought before an IJ for a removal hearing. The IJs are employees of DOJ and are under the jurisdiction of the Attorney General. Within removal hearings, there are two central questions:

- (1) Is the person in proceedings removable for violating an immigration law; and
- (2) If so, is the person eligible for some form of relief that will permit him or her to remain in the United States?

An ICE attorney represents the government in seeking removal of the alien, while the alien has the right to an attorney (at no expense to the government). If the IJ finds that the person is not removable, proceedings are terminated and the person is not removed. If the IJ finds the person removable but grants relief, the individual is not removed. If the IJ finds the person removable and cannot grant relief, the person is ordered removed or told that he or she may leave “voluntarily” or be ordered removed if he or she refuses this voluntary departure. Either side can appeal the decision of the IJ to an appellate body, the Board of Immigration Appeals (BIA). Depending on the type of case and the basis for the decision, judicial review of the BIA decision may be available.

Moving Forward

Immigration laws, in spite of some modern media claims to the contrary, have become exceedingly strict. While the bases for excluding and removing aliens have expanded, the possibilities of relief have been limited and, in some cases, eliminated. Obtaining relief is extremely difficult. Most present-day immigrants—Latin-Americans and Asians being the most abundant—differ very little from their Irish and European forerunners. Most are hard-working, have limited education, and are seeking better lives for themselves and their children. Like their predecessors of the late-19th and early-20th centuries, they often come with no documentation. The only difference is that the laws have become much harsher and the number of grounds for exclusion and removal has greatly increased.

Lawyers who go into immigration court to diligently defend immigrants, even with the deck stacked against them, share a kindred spirit and gain a sense of respect among practitioners. Although there is very little in immigration—or any other area of law, for that matter—that is more difficult than, for example, gaining asylum in immigration court for an immigrant before a tough IJ, there is also very little in the practice of law that is more rewarding or makes more of a difference than saving someone's freedom, well-being, or life.

The following chapters are meant to be a primer, a helpful guide to new lawyers, pro bono lawyers, law students, or experienced veterans who may need a reminder on representing immigrants facing removal from the United States. Chapter 1 summarizes a history and background of U.S. immigration law. Chapters 2 and 3 analyze grounds of deportability/removability and inadmissibility, respectively. Chapter 4 is a discussion of DHS and DOJ procedures, starting with the government arrest powers, through DHS “processing” of an alien, and finally detailing immigration court procedures. Chapter 5 covers asylum, withholding of removal, and Convention Against Torture relief. Chapter 6 examines other forms of relief from removal. Finally, Chapter 7 considers post-immigration court hearing procedures including motions and administrative and judicial appeals. Tips for practitioners are included throughout the book to aide those representing immigrants and refugees before the immigration courts and DHS.