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# Chapter 2: Overview of Immigration Law and Relevant Agencies

## DISCLAIMER

This chapter is provided for informational purposes only, and does not constitute legal advice of any kind. Before proceeding with any legal matters under U.S. immigration law, please consult, as needed, both the primary source documents referenced in this chapter (statutes, regulations, cases, etc.) and your KIND pro bono coordinator.

## Introduction to immigration law

This introduction is designed to provide a brief overview of the various laws and regulations that govern immigration and naturalization, introduce the various federal administrative agencies responsible for administering these laws and regulations, and provide general information about the criteria and procedures for obtaining admission to the United States, as well the grounds and procedures for removal.

## What entity has authority in U.S. immigration law?

The U.S. Constitution does not expressly authorize the federal government to regulate immigration. Yet, there are several compelling arguments that the federal government's power to regulate immigration is constitutionally derived.

For example, Congress has the authority to regulate interstate commerce and commerce with foreign nations.<sup>1</sup> The Supreme Court has held that Congress can regulate activities that substantially affect interstate commerce. One argument is that immigration affects both commerce between states, and international commerce.

In addition, the Migration or Importation Clause provides Congress with the authority to prohibit migration and importation after 1808.<sup>2</sup> However, historical sources agree that this provision was to address the slave trade and not the migration of free persons.

The Naturalization Clause authorizes Congress to establish a uniform Rule of Naturalization<sup>3</sup> Admission and deportation are different from naturalization in some important ways. However, there are arguments that the necessary clause confers Congress authority over admission and deportation because Congress had decided to make lawful admission as a permanent resident a requirement to naturalize.<sup>4</sup>

### **Federal law governs**

While there are various arguments for where Congress derives its authority to regulate immigration, the Supreme Court has repeatedly held that immigration is federal and mostly a plenary power of the U.S. Congress.<sup>5</sup>

Federal law governs the categories of people who may enter the United States, the terms under which they are admitted, the conditions of their stay, and establishes the grounds and procedures for expelling individuals who violate these laws. It also sets the requirements for acquiring U.S. citizenship and when and how citizenship can be revoked.

### **Child Practice Pointer:**

Federal law recognizes that unaccompanied alien children (UAC) constitute a unique class and provides unique protections, treatment, and legal remedies for them.

Immigration law is civil and violations of immigration law are generally civil violations that are adjudicated by administrative agencies. This means that certain rights that attach to criminal defendants, most notably the right to government funded counsel for the indigent, does not apply to an individual the government is attempting to remove from the United States. Deportation is not viewed as criminal in part because any attempt to remove an individual is not punitive in nature,<sup>6</sup> but rather a political decision about who gets to remain in the United States.

Federal law also controls various employment-related issues concerning foreign workers, including wages, labor standards, and anti-discrimination protections. Under federal law, employers are required to verify that employees are authorized to work in the United States and subjects violators to fines or criminal penalties. Other federal laws restrict noncitizen access to specific forms of federally funded public assistance and services. The limits of federal control and extent of state authority over immigrants are being tested by the states and in the courts.

### **State interests**

State lawmakers have increasingly sought to regulate the treatment of non-U.S. citizens and even to criminalize their presence in their states.<sup>7</sup> State lawmakers can restrict the eligibility of noncitizens to

receive certain public benefits and driver's licenses. States may also restrict access to higher education. States may not restrict access to primary and secondary public education. States' authority to inquire into immigration status and to limit access to employment, housing, and other services is being tested. The precise boundaries between federal and state regulation of immigration are being litigated in the federal courts and working their way up to the U.S. Supreme Court.

State courts lack authority to determine a person's immigration status. However, state courts are routinely called upon to make decisions in cases involving immigrants and other noncitizens, and these decisions may affect an individual's immigration status. Unaccompanied alien children, for example, require state courts to make dependency and neglect findings that will enable them to obtain Special Immigrant Juvenile Status from USCIS. In addition, certain state criminal convictions make an individual ineligible for immigration benefits and can lead to deportation.

## What are the sources of immigration law?

### Immigration and Nationality Act

The McCarran-Walter Act of 1952<sup>8</sup>, also known as the Immigration and Nationality Act (INA), established the basic architecture of immigration law by establishing a system for immigration, criteria for exclusion, and procedures for deportation. The INA has been amended frequently since original enactment in 1952 and is now hundreds of pages long and remains the core of immigration law.

Congress has amended the INA since its original enactment by passing legislation to reform the immigration system.<sup>9</sup> Congress has also passed legislation to provide protection to certain vulnerable classes of immigrants including refugees fleeing persecution and victims of domestic violence and human trafficking.<sup>10</sup>

The INA is codified at Title 8 of the United States Code. The statute will often be referred to in two parallel cites, one referring to the INA and the other to the U.S. Code, (e.g., INA §101, 8 USC § 1101).

The INA and administrative regulations spell out the procedures by which noncitizens may enter the United States, and which of those noncitizens already here may stay. In addition to the INA and its implementing regulations, there are agency operating instructions, policy memoranda, and field guidance that interpret and implement the statutes, as well as precedential administration decisions, and federal case law. Some aspects of immigration law draw heavily from and, in many cases, are interpreted in accordance with, international law. Each of these sources of law is discussed in greater depth below.

The federal statutes are implemented in a large number of regulations. They are further interpreted and shaped by a growing body of agency interpretation, administrative decisions, and federal case law. Most regulations pertaining to provisions of Title 8 U.S. Code will be found in 8 CFR, as mentioned above, but important regulations are also within other titles.

### **Federal regulations**

Statutes are interpreted and implemented by regulations that are promulgated through formal rulemaking. Each federal government agency issues its own regulations. When several agencies must interpret the same provisions of law, as in the immigration context, there is a process to ensure they agree and have conforming provisions.

Most of the immigration-related regulations, including those governing the immigration courts, are published in Title 8 of the Code of Federal Regulations (CFR) . These regulations change more often than the INA.

Other relevant regulations are included within:

- Department of Health and Human Services - 45 CFR
- Department of State - 22 CFR
- Department of Labor - 20 CFR
- Department of Homeland Security - 6 CFR
- Department of Justice - 28 CFR

### **Agency memoranda and operating instructions**

The agencies also interpret their authority and clarify their internal procedures through policy memoranda. These memos may be relied upon to ensure that each government agency is in fact performing in accordance with its own standards.

Memoranda and policy guidance of particular interest to lawyers of unaccompanied minors include asylum officer guidelines, as well as training materials and memoranda to immigration judges.

### **Administrative and judicial decisions**

In addition to the statutes and regulations, immigration law is shaped by decisions of the U.S.

Supreme Court, the U.S. Circuit Court of Appeals, and the Board of Immigration Appeals (BIA). These decisions can be binding on future applications and immigration judge decisions.

### **Administration appeals office**

A separate administrative review board is responsible for reviewing approximately 46 different types of petitions, applications, and other benefits if they are denied by officers within the U.S. Citizenship and Immigration Services (USCIS). Denials of Special Immigrant Juvenile Visa petitions, VAWA self-petitions, applications for Temporary Protected Status (TPS), and orphan petitions are among those decisions that may be appealed to the Administrative Appeals Office (AAO) of USCIS.

The AAO may sustain or dismiss the appeal or remand the matter to a USCIS Service Center for additional action. In many cases, a litigant must exhaust AAO remedies prior to seeking judicial review.

## **What federal agencies have immigration responsibilities?**

### [U.S. Department of Homeland Security](#)

Prior to the establishment of the Department of Homeland Security (DHS), immigration benefits and enforcement were housed at Immigration and Naturalization Service (INS), an agency within the U.S. Department of Justice. In 2002, in the largest federal government restructuring since the Department of Defense was created, the Department of Homeland Security was established and with its creation it assumed the primary authority for administering and enforcing the nation's immigration laws.<sup>12</sup> Today, DHS's administrative, adjudicatory, and enforcement responsibilities are divided among three bureaus, although several other federal agencies continue to hold distinctive roles.

- [U.S. Customs and Border Protection \(CBP\)](#) patrols 6,000 miles of border with Canada and Mexico, inspects people and goods at the nation's ports of entry, and regulates their admission into the United States. CBP is the largest law enforcement organization in the nation.
- [Immigration and Customs Enforcement \(ICE\)](#) enforces immigration laws within the interior of the U.S., including overseeing detention and removal matters. It is the principal investigative arm of DHS and the largest of the three main components.
- [U.S. Citizenship and Immigration Services \(USCIS\)](#) processes applications for immigration benefits, including for lawful permanent residence (green cards), asylum and refugee status, naturalization, and the benefits that may be particularly relevant for children, such as special

immigrant juvenile status, and visas for victims of domestic abuse, trafficking, and other crimes.

- Other components of DHS, such as the [Coast Guard](#), [Office of Civil Rights and Civil Liberties](#), and [U.S.-Visit](#), also have distinctive immigration responsibilities.

#### [U.S. Department of Justice](#)

The Executive Office for Immigration Review (EOIR) at the U.S. Department of Justice houses both the immigration court system and the Board of Immigration Appeals (BIA), which is the administrative appeals body. Immigration judges and the Board of Immigration Appeals exercise their functions and duties under the power of the Attorney General. With more than 260 immigration judges sitting in 59 courtrooms spread out across the United States, the Office of the Chief Immigration Judge establishes policies and priorities and manages the immigration court functions from its headquarters in Falls Church, Virginia.

In addition to EOIR, the Civil Division of the U.S. Department of Justice houses the Office of Immigration Litigation (OIL). OIL represents the U.S. government on most immigration appeals before federal courts.

#### [U.S. Department of Health and Human Services](#)

The Department of Health and Human Services (HHS) houses the [Office of Refugee Resettlement \(ORR\)](#), which provides funds to states, public and private entities, and nonprofit voluntary agencies to assist refugees and asylees with the resettlement process in the United States. ORR is also tasked with overseeing the care, custody, and placement of unaccompanied minors, specifically under the [Division of Children's Services \(DCS\)](#).<sup>13</sup>

#### [U.S. Department of State](#)

The [Bureau of Population, Refugees, and Migration \(PRM\)](#) is housed within the U.S. Department of State. PRM is responsible for formulating policies on population, refugees, and migration, as well as administrating U.S. refugee assistance and admissions programs.

The [Bureau of Democracy, Human Rights, and Labor](#) supports democratic governments and organizations abroad and submits annual reports to Congress on the human rights practices and conditions around the world. These country reports on human rights practices are utilized in making refugee determinations and asylum decisions.

In addition, consular officers located in U.S. embassies and consulates around the world review and process visa applications.

## Admissibility and inadmissibility: Who can enter the United States?

The U.S. government has the power to decide who is allowed to enter the United States and who is barred from entry. Generally speaking, a noncitizen seeking admission must show she is not inadmissible to the United States to be granted a visa, to apply for permanent resident status, or any other immigration benefit. INA § 212(a) describes the 10 broad grounds of inadmissibility for a person seeking entry into the United States. If an individual is subject to these grounds of inadmissibility, the person will generally be deemed "inadmissible" and not allowed to enter the United States.

### Child Practice Pointer:

Some of the grounds of inadmissibility may not apply to unaccompanied children, or in other instances certain grounds of inadmissibility can be waived by DHS or an immigration judge at the request of the child.

## What makes a child inadmissible?

The following is a list of the general classes of inadmissibility for children and some select examples. This is not an exhaustive list. You should consult the INA to assess if your client may be inadmissible. Note that some grounds of inadmissibility may be waived. (See section below on waivers.)

- **Public health grounds:** including alcoholism, drug abuse, and communicable diseases that endanger the public health, such as tuberculosis, are bars to admission.

- **Crimes:** the certain commission of crimes and criminal convictions including felonies, crimes involving moral turpitude, and drug offenses are bars to admission.
- **National security concerns:** supporting a terrorist group, being a member of a terrorist organization, or being involved in terrorist activity is a bar to admission.
- **Past immigration violations:** including unlawful presence in the United States, returning to the United States without authorization after being removed, failure to depart the United States after a grant of voluntary departure or issuance of a removal order, and smuggling other illegal immigrants to the United States are bars to admission.
- **Public charge:** proving that an individual will not become a public charge if admitted into the United States. If a person will not be able to support herself financially and is likely to become dependent on the U.S. government for assistance, the individual will generally be barred from admission.
- **Document violations:** fraud or misrepresentation when using documents, including a passport or visa, as well as lacking proper documentation when entering the United States are bars to admission.

## When do the grounds of inadmissibility come into play?

- **Upon entry into the United States.** When noncitizens enter the United States at a border or airport, the person must be admissible at the time of entry or may be refused admission at the border even if the person is in possession of a visa.
- **Removal proceedings.** A person who entered without inspection (EWI) or committed fraud to enter will be charged as inadmissible and subject to removal if the person is not eligible for any immigration relief.
- **Adjustment of status.** When a noncitizen applies to "adjust" her status to that of lawful permanent resident (LPR), the person is treated as an applicant for admission and must prove that she is not inadmissible in addition to proving eligibility for benefit sought.

## Removability: Who can remain in the United States?

Removal<sup>14</sup> is expulsion from the United States after the noncitizen is provided an opportunity to contest removal or pursue any eligible immigration benefit. There are a number of different administrative processes that may result in a final removal order, depending predominantly on an individual's status in the United States, whether or not she entered legally after inspection, and the violations of immigration or criminal law charged.

**Child Practice Pointer:**

Some unaccompanied children enter the United States without government permission, or have entered with authorization and failed to maintain legal immigration status. As discussed above, the lack of legal status in the United States may subject an unaccompanied child to removal proceedings.

## What makes a person deportable?

It is important to note the acts that make a person deportable are not the same as the acts that make a person inadmissible.

Common grounds of deportability/removability include:

- **Certain criminal convictions:** various types of crimes can render an individual removable, including crimes involving moral turpitude or an aggravated felony in immigration law.
- **Immigration status violations:** a person in violation of the INA or any other U.S. law is deportable.
- **Inadmissible at time of entry or adjustment of status:** this incorporates all grounds of inadmissibility to deportability. If your client was admitted but should not have been, your client can now be subject to deportation.
- **National security grounds:** a person is deportable if she has engaged in an activity that endangers public safety or national security, or any activity that violates U.S. law relating to espionage, sabotage, or law prohibiting the export of goods, technology, or sensitive information.

- **Failure to register and falsification of documents:** a person will be deportable if the individual fails to notify DHS of a change in address, fails to register with DHS as required by law, commits document fraud, or falsely claims to be a U.S. citizen.
- **Public charge:** an individual must prove that she will not become a public charge if admitted into the United States. If a person will not be able to support herself financially and is likely to become dependent on the U.S. government for assistance, the individual will generally be barred from admission.
- **Unlawful voting:** a person who is not a U.S. citizen is ineligible to vote. Any person who votes in violation of any federal, state or local law, ordinance, statute or regulation is deportable. A conviction is not required.

**Practice Pointer:**

An individual cannot be charged under the grounds of removability/deportability under INA § 237a unless she was first inspected and admitted. Individuals who were never legally admitted to the United States are charged with being inadmissible under INA § 212(a), discussed above. The type of charge determines the legal procedures that will be followed and the standards applied.

## Are waivers available?

Yes. The law provides for "waivers" of some grounds of inadmissibility and removability. The requirements and process for obtaining a waiver depend on the ground of inadmissibility involved and the status sought. Obtaining a waiver often involves filing a separate application (and fee) and demonstrating statutory eligibility at an interview or hearing. Many waivers are discretionary. Some waivers are available only to individuals with specified U.S. citizen or LPR family members and involve proving that the family member would suffer some degree of hardship if the noncitizen was removed from the United States. If the applicant is granted a waiver, she is allowed to enter or remain in the United States, or receive an immigration benefit, despite being otherwise inadmissible or removable.

You should consult the INA to assess if there are waivers available for the specific grounds of inadmissibility.

## How does a person gain permanent status to live in the United

## States?

U.S. immigration law distinguishes between citizens and noncitizens. Foreign-born individuals who are not U.S. citizens are collectively referred to as "aliens." Noncitizens, or aliens, are further divided into numerous categories and sub-categories, each with specific eligibility criteria, application procedures, and conditions for maintenance of status. The term "immigrant," for example, is a term of art used exclusively in the INA to refer to a "lawful permanent resident."

It is not uncommon for children to arrive in the United States with a temporary status, or with no legal status, and to obtain another temporary status or even permanent resident status. The immigration system recognizes that people will acquire and change status over time, and there are procedures in place for doing so. For example, an individual who enters the United States legally on a tourist or student visa but continues to stay beyond the visa's time limit is now without legal status. This is also referred to as a visa "overstay."

Even people who enter the United States without authorization may later obtain permanent residence and naturalize to U.S. citizenship. It is not unusual for a child to be completely unaware of her immigration status, or that of her parents, or to live in the United States for years under the incorrect assumption that she is legally present. It's best not to make any assumptions about the child or any of her relatives.

Many U.S. families are "mixed immigration status" families in which some members are U.S. citizens while others are legal residents, in temporary status, or undocumented. Many unaccompanied children may be members of mixed-status families, although they have no legal immigration status themselves. In some cases, an unaccompanied child may be able to secure legal status through one of the legal or U.S. citizen family members.

A person who remains in the United States during an unauthorized period is said to be accruing "unlawful presence." Unlawful presence for six months or longer can have far-reaching consequences under U.S. immigration law and will likely bar or severely delay acquisition of lawful permanent residence in the future even if the person is otherwise eligible.

### **Child Practice Pointer:**

Juveniles under the age of 18 do not accumulate any unlawful presence,<sup>15</sup> but unlawful presence begins to accrue on a youth's eighteenth birthday. Fortunately, there may be legal remedies for some of these children. In other cases, however, immigration law will bar a child from acquiring permanent status or subject her to removal.

## What are the benefits and responsibilities of permanent resident status?

In addition to the benefit of living permanently in the United States, lawful permanent residents may hold most jobs, attend state universities as in-state residents, change jobs without permission, travel in and out of the United States, purchase homes and businesses, and may be able to sponsor their spouses and children. Like U.S. citizens, permanent residents must pay income taxes, register for selective service, and obey all U.S. laws. They are also eligible for some services (housing and tuition assistance, legal services, driver's licenses). After a specified number of years, a permanent resident may apply for citizenship, which involves establishing good moral character, demonstrating knowledge of English, U.S. government, and history, and having attachment to the United States and U.S. Constitution. Unlike U.S. citizens, permanent residents are subject to removal if they violate immigration or criminal laws.

## Citations

<sup>1</sup>U.S. Const. art. I, § 8, cl. 3.

<sup>2</sup>U.S. Const., art. I, § 9, cl. 1.

<sup>3</sup>U.S. Const., art. I, § 8, cl.

<sup>4</sup>INA § 316.

<sup>5</sup>See *Ping v. U.S.*, 130 U.S. 581 (1889) (holding that the authority of the federal government to exclude noncitizens was tantamount to its sovereignty); see also *Shaughnessy v. U.S. ex. rel. Mezei*, 345 U.S. 206 (1952) (holding that government's decision to detain a noncitizen on Ellis Island without a hearing did not violate due process because Congress has the authority to decide what process is due to noncitizen).

<sup>6</sup>Yet, the U.S. Supreme Court ruled that deportation is simply not a collateral consequence to a criminal conviction, and therefore is not outside Sixth Amendment review. Rather, deportation is a unique consequence that is closely connected to the criminal process. As a result, failure to advise a criminal defendant that deportation could result from a criminal plea is not outside of Sixth Amendment right to counsel claim. See *Padilla v. Kentucky*, No. 08-651, slip op. at 8-9 (U.S. March 31, 2010).Normal

<sup>7</sup>The National Conference of State Legislatures tracks state immigration legislation. See <http://www.ncsl.org/default.aspx?tabid=19897>

<sup>8</sup>Public Law Number 82-414

<sup>9</sup>The 1986 Immigration Reform and Control Act, which created the first major legalization program for undocumented immigrants and established sanctions against employers who knowingly hire undocumented workers; the Immigration Act of 1990, which significantly expanded the legal immigration system and provided for Temporary Protected Status for victims of natural disasters and civil conflicts; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which drastically reduced many forms of relief, as well as expanded the grounds of inadmissibility and deportability; the Uniting and Strengthening America by Providing Appropriate Tools Required to

Intercept and Obstruct Terrorism Act of 2001 (USA-PATRIOT Act), which abolished the Immigration and Naturalization Service (INS) and created the U.S. Department of Homeland Security (DHS); and the Homeland Security Act of 2002, which transferred care, custody, and placement responsibilities for unaccompanied alien children to the Department of Health and Human Services/Office of Refugee Resettlement.

<sup>10</sup>The 1980 Refugee Act, the first comprehensive refugee legislation in U.S. history, brings the U.S. into compliance with international treaty law relating to the protection of refugees. Pub. L. No. 96-212 (1980); The Violence Against Women Act (VAWA) of 1994 provided protection for battered spouses and children of U.S. citizens and legal permanent residents. The Trafficking Victims Protection Act created immigration status for victims of human trafficking and its subsequent 2008 reauthorization made substantial changes in the law to protect unaccompanied alien children, The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L. No. 109-13.

<sup>11</sup>An understanding of administrative law principles may be helpful in understanding the regulatory process. Most agency regulations are subject to the "notice and comment" procedures under the Administrative Procedure Act (APA). When this procedure is used, an agency wishing to change its regulations must first publish the proposed change in the Federal Register. The public is allotted a time period in which to comment on the proposed rule. After the comment period and consideration of the comments, the agency must publish the regulation again in the Federal Register as a "final rule."

<sup>12</sup>The Homeland Security Act of 2002. Public Law 107-296

<sup>13</sup>The division was called the Division of Unaccompanied Children's Services (DUCS) until November 2011. Federal Register Vol. 76, No. 218

<sup>14</sup>It is common to refer to immigrants who are forcibly expelled from the United States as being "deported." This is not always technically correct. Statutory changes in 1996 introduced the new terminology of "removal," "removable," and "removability." Before 1996, noncitizens who were present in the United States were charged with being deportable and their expulsion was termed "deportation." In 1996, Congress amended the INA, revising the grounds for removal and renaming the deportation process "removal." The removal grounds are found at INA § 237. The removal process is laid out at INA § 240. However, because the title of INA § 237 remains "General Classes of Deportable Aliens," it is not uncommon to see the terms "deportation" and "deportability" interchanged with "removal" and "removability." If an individual falls under one of these grounds of deportability, she is considered "removable." An individual charged with inadmissibility has the burden of establishing her admissibility "clearly and beyond doubt" once the government establishes that she is an "alien."

<sup>15</sup>See INA § 212(a)(9)(B)(iii)(1)