

## THE CHANGING SIGNIFICANCE OF NATIONALITY UNDER NEW U.S. IMMIGRATION LAWS

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Nationality is the most fundamental legal conclusion. Nationality determinations remind us that each person is a citizen of the world as well as a resident of an individual state. Each state relates to its native inhabitants and to others both inside and outside of its borders through law, tradition, and necessity. These relationships are of such an imperative character that war and peace hang in the balance. When an individual manifests the desire to change nationality the world order is tested.

Under the Immigration Reform and Control Act of 1986 (IRCA),<sup>1</sup> enacted on November 6, 1986, certain requirements for becoming a U.S. citizen have been incorporated into the standard aliens must meet when seeking the benefits of the legalization program. Until the enactment of IRCA, an alien who was granted lawful permanent resident status was not required to become naturalized as a U.S. citizen. Aliens who met the minimum requirement of literacy in some language were not required to pass the English literacy, U.S. government, and history tests which are included in the naturalization process, to become a lawful permanent resident.<sup>2</sup>

Section 201 of IRCA adds Section 245A to the Immigration and Nationality Act of 1952 (INA). It sets forth the requirements of legalization of certain aliens who have resided continuously in the United States in an unauthorized status since before January 1, 1982. In doing so, the naturalization standards of section 312 of INA are incorporated into the legislation requirements.<sup>3</sup>

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1. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. (1986)) [hereinafter I.R.C.A.].

2. 8 U.S.C. § 1255, Immigration and Nationality Act § 245 (1952) (amended 1986) [hereinafter I.N.A.].

3. (D) BASIC CITIZENSHIP SKILLS.—

(i) IN GENERAL.—The alien must demonstrate that he either—(I) meets the requirements of section 312 (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or (II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an under-

The regulations for the legalization program are still in the interim stage.<sup>4</sup> However, the provisions seem to state that an unauthorized alien who applies for legalization and meets section 312 naturalization standards would only need to complete the required residence period after becoming a lawful permanent resident and demonstrate good moral character to become eligible to naturalize as a U.S. citizen.<sup>5</sup>

Of course, no one will be forced to become naturalized and naturalization should not be confused with legalization. However, the fact that an alien has already passed the difficult tests for U.S. citizenship in order to establish eligibility for legalization might encourage him to complete the naturalization process. On the other hand, it is possible that a significant number of unauthorized aliens may not pass the section 312 tests and risk becoming deportable aliens, thereby recreating the group of unauthorized aliens that IRCA was intended to eliminate.

Another provision of IRCA may bar certain aliens from ever becoming U.S. citizens unless additional requirements are met in a timely manner. Section 302 of IRCA adds section 210A (d)(5) to the INA. This section sets forth the requirements for aliens who were legalized as Seasonal Agricultural Workers (SAWs)<sup>6</sup> to main-

standing of English and such a knowledge and understanding of the history and government of the United States.

(ii) EXCEPTION FOR ELDERLY INDIVIDUALS—The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years of age or older.—

(iii) RELATION TO NATURALIZATION EXAMINATION.—In accordance with regulations of the Attorney General, an alien who has demonstrated under clause (i) (I) that the alien meets the requirements of section 312 may be considered to have satisfied the requirement of that section for purposes of becoming naturalized as a citizen of the United States under title III, I.R.C.A., Title, II, § 201 which sets forth new 8 U.S.C. § 1255a(b)(1)d, I.N.A. § 245A.

4. 52 Fed. Reg. 2115 (1987) 8 Code of Federal Regulations § 245 (1987) [hereinafter C.F.R.].

5. No person except as otherwise provided in this title shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate—

(1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language: Provided, That this requirement shall not apply to any person physically unable to comply therewith, if otherwise qualified to be naturalized, or to any person who, on the date of the filing of his petition for naturalization as provided in section 334 of this Act, is over fifty years of age and has been living in the United States for periods totaling at least twenty years subsequent to a lawful admission for permanent residence: Provided further, That the requirements of this section relating to ability to read and write shall be met if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable conditions shall be imposed upon the applicant; and

(2) a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States.

8 U.S.C. § 1423, I.N.A. § 312.

6. (5) EMPLOYMENT IN SEASONAL AGRICULTURAL SERVICES REQUIRED—

tain temporary resident status and eventually obtain lawful permanent resident status. Any alien who obtained temporary and permanent resident status through the SAWs legalization provisions must meet additional agricultural employment requirements in order to become eligible for naturalization as a U.S. citizen. If an alien fails to satisfy the agricultural employment requirement, then he may be permanently ineligible to be naturalized as a U.S. citizen.

Another aspect of IRCA sets forth the controversial discrimination prohibitions, which are confusing at best.<sup>7</sup> These provisions

(A) **FOR 3 YEARS TO AVOID DEPORTATION**—In order to meet the requirement of this paragraph (for purposes of this subsection and section 241(a)(20)), an alien, who has obtained the status of an alien lawfully admitted for temporary residence under this section must establish to the Attorney General that the alien has performed 90 man-days of seasonal agricultural services-

- (i) during the one-year period beginning on the date the alien obtained such status.
- (ii) during the one-year period beginning one year after the date the alien obtained such status, and
- (iii) during the one-year period beginning two years after the date the alien obtained such status.

(B) **FOR 5 YEARS FOR NATURALIZATION**.—Notwithstanding any provision in title III, an alien admitted under this section may not be naturalized as a citizen of the United States under that title unless the alien has performed 90 man-days of seasonal agricultural service in each of 5 fiscal years (not including any fiscal year before the fiscal year in which the alien was admitted under this section).

(C) **PROOF**—In meeting the requirements of subparagraphs (A) and (B), an alien may submit such documentation as may be submitted under section 210(b)(3).

I.R.C.A., Title III, § 303, which sets forth new 8 U.S.C. § 1161 (d) (5), I.N.A. § 210A (d)(5).

7. **UNFAIR IMMIGRATION RELATED EMPLOYMENT PRACTICES SEC. 274B. (A) PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.**—

(1) **GENERAL RULE**—It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment—

- (A) because of such individual's national origin, or
- (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

(2) **EXCEPTIONS**.—Paragraph (1) shall not apply to—

- (A) a person or other entity that employs three or fewer employees,
- (B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964, or
- (C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State or local government.

(3) **DEFINITION OF CITIZEN OR INTENDING CITIZEN**.—As used in paragraph (1), the term "citizen or intending citizen" means an individual who—

- (A) is a citizen or national of the United States, or
- (B) is an alien who—

- (i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 245A(a)(1), is admitted as a refugee under section 207, or is granted asylum under section 208, and
- (ii) evidences an intention to become a citizen of the United States through completing a

raise serious questions concerning actual implementation of the statute. Part (1) of section 274B(a)<sup>8</sup> seems to indicate that discrimination against unauthorized aliens is lawful. However, later in part (3),<sup>9</sup> the implication is that any lawful permanent resident or other alien referenced in part (3)(B)(i) who fails to apply for naturalization within six months of becoming eligible, or the enactment of IRCA if already eligible to apply for retroactive naturalization, would lose the IRCA protection against discrimination. In fact, discrimination against non-intending citizens may even be considered legally permissible. This in turn leads to serious concerns about the constitutionality of this section and apparent conflicts with the Civil Rights Act of 1964.<sup>10</sup>

Migration creates changes in nationality. The new immigration law mandates close attention to the significance of changes in nationality.

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declaration of intention to become a citizen; but does not include (I) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if the latter, within six months after the date of the enactment of this section and (II) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

(4) **ADDITIONAL EXCEPTION PROVIDING RIGHT TO PREFER EQUALLY QUALIFIED CITIZENS.**—Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States or another individual who is an alien if the two individuals are equally qualified.

I.R.C.A., Title I § 102 which sets forth new I.N.A. § 274B(a), 8 U.S.C. 1342b(a) (1987).

8. See *supra* note 7.

9. See *supra* note 7.

10. 42 U.S.C. § 1981 (1981).