

# IMMIGRATION AND REFUGEES

## LEGALIZATION AND SPECIAL AGRICULTURAL WORKER PROVISIONS UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

*Martin D. Soblick\**

### INTRODUCTION

After many years of debate, revisions, and near-misses, the Immigration Reform and Control Act of 1986 (IRCA) became law on November 6, 1986. While not a panacea, it creates a balanced approach that promises a beginning for positive change in the area of immigration. IRCA will not only help secure our borders, but will also enable many aliens who are otherwise illegally in the United States to legalize their status. They can come out of the shadows and function as full members of our society.

IRCA has numerous provisions, its main components being legalization for certain aliens who entered the United States before 1982,<sup>1</sup> permanent residence for certain special agricultural workers,<sup>2</sup> increased funding for enforcement,<sup>3</sup> control of unlawful employment of aliens,<sup>4</sup> and unfair immigration-related employment practices.<sup>5</sup> This article will discuss legalization of status for certain aliens who have resided in the United States illegally since 1982, as

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\* District Counsel, Immigration and Naturalization Service, United States Department of Justice, San Diego, California. B.A., University of California, Los Angeles, 1973; J.D., University of New Mexico School of Law, 1976. Member of the California and New Mexico Bars.

This article is an expansion and elaboration upon remarks made by Mr. Soblick on February 6, 1987, as part of the conference on "Mexico and the United States: Strengthening the Relationship," held at the California Western School of Law. The views expressed in this article are Mr. Soblick's own and do not necessarily represent the official position of the INS, the Department of Justice, or any other government agency.

1. Immigration Reform and Control Act of 1986 § 201, 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.], Immigration and Nationality Act § 245A (1986) (amended 1986) [hereinafter I.N.A.].

2. I.R.C.A. § 302, I.N.A. § 210.

3. I.R.C.A. § 111.

4. I.R.C.A. § 101, I.N.A. § 274A.

5. IRCA § 102, INA § 274B.

well as permanent residence for certain special agricultural workers. It is not intended to be exhaustive on these topics, but hopes to provide an accurate overview. Final IRCA regulations were in place at the time this article was written but the reader should be alert to potential changes. The Immigration and Naturalization Service (INS) may fine-tune the regulations if necessary.

### I. LEGALIZATION OF STATUS

This section of the law<sup>6</sup> provides for the adjustment of certain entrants before January 1, 1982, to that of persons admitted for lawful residence. The application process is two-tiered. Initially aliens apply for temporary residence status<sup>7</sup> and later may adjust to permanent residence.<sup>8</sup>

For most aliens, there is a twelve-month application period for temporary residence. This period is from May 5, 1987 to May 4, 1988.<sup>9</sup> But those aliens apprehended by the INS on or after November 6, 1986, and prior to May 5, 1987, must have filed by June 3, 1987.<sup>10</sup> Aliens served with an order to show cause for the November 6, 1986-May 5, 1987, period must also have filed by that date.<sup>11</sup> (An order to show cause is the document used to commence all deportation proceedings.)<sup>12</sup> Those aliens served with an order to show cause between May 5, 1987, and May 4, 1988, must file within 30 days after the order to show cause is issued, but no later than May 4, 1988.<sup>13</sup> After being granted temporary residence, an alien must wait 18 months to apply for permanent residence; he then has a 12-month period in which to do so.<sup>14</sup>

To be eligible for temporary residence, an alien must establish that he entered the United States before January 1, 1982, and that he has resided in this country continuously since that date and through the date of application.<sup>15</sup> Nonimmigrants need to fulfill these requirements and must also show either that their period of authorized entry expired before January 1, 1982, or that their un-

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6. *See supra* note 1.

7. I.N.A. § 245A(a).

8. I.N.A. § 245A(b).

9. I.N.A. § 245A(a)(1)(A), 8 Code of Federal Regulations § 245a.2(a)(1)(Jan. 1987) [hereinafter C.F.R.].

10. 8 C.F.R. § 245a.2(a)(2)(i).

11. *Id.*, 8 C.F.R. § 245a.1(q).

12. 8 C.F.R. § 242.1(a).

13. I.N.A. § 245A(a)(1)(B), 8 C.F.R. § 245a.2(a)(2)(ii)-(iii).

14. I.N.A. § 245A(b)(1)(A), 8 C.F.R. § 245a.3(a).

15. I.N.A. § 245A(a)(2)(A), 8 C.F.R. § 245a.2(b)(1).

lawful status was known to the INS as of January 1, 1982.<sup>16</sup>

"Resided continuously" is defined by regulation.<sup>17</sup> Single absences from the United States of up to 45 days are allowed, as are multiple absences totaling up to 180 days; longer absences may be allowed if there are emergent reasons.<sup>18</sup> The alien must have maintained residence in the United States,<sup>19</sup> and any departures must not have been based on an order of deportation.<sup>20</sup>

In addition to continuous residence since January 1, 1982, an alien must establish continuous physical presence since November 6, 1986.<sup>21</sup> Brief, casual, and innocent absences are excused.<sup>22</sup> These are defined as departures authorized by the INS (advance parole) after May 1, 1987, of not more than 30 days (unless extended by the INS) for legitimate emergency or humanitarian purposes, or departures beyond the alien's control.<sup>23</sup> Departures between November 6, 1986, and May 1, 1987, are scrutinized only for purposes of satisfying the "residence" requirement.

To be granted temporary residence status, an alien must, in addition to the residence and continuous physical presence requirements, show that he is admissible as an immigrant.<sup>24</sup> This means, *inter alia*, that he must not have been convicted of any felony or three or more misdemeanors committed in the United States.<sup>25</sup> "Felony" means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term served, if any.<sup>26</sup> "Misdemeanor" means a crime committed in the United States, punishable by imprisonment for a term of more than five days, but not over one year, regardless of the term served, if any.<sup>27</sup>

"Admissible as an immigrant" also means that the alien must not be subject to certain grounds of exclusion under INA section 212 (8 U.S.C. section 1181).<sup>28</sup> Certain grounds of exclusion under section 212 are not applicable, others apply but are waivable, and

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16. I.N.A. § 245A(a)(2)(B), 8 C.F.R. § 245a.2(b)(2)-(3), 8 C.F.R. § 245a.1(d).

17. 8 C.F.R. § 245a.1(c)(1).

18. 8 C.F.R. § 245a.1(c)(1)(i).

19. 8 C.F.R. § 245a.1(c)(1)(ii).

20. 8 C.F.R. § 245a.1(c)(1)(iii).

21. I.N.A. § 245(a)(3)(A).

22. I.N.A. § 245(a)(3)(B).

23. 8 C.F.R. § 245a.1(g).

24. I.N.A. § 245A(a)(4).

25. I.N.A. § 245A(a)(4)(B), 8 C.F.R. § 245a.2(c)(1).

26. 8 C.F.R. § 245a.1(f).

27. 8 C.F.R. § 245a.1(o).

28. I.N.A. § 245A(4)(A), 8 C.F.R. § 245a.2(c)(3).

some cannot be waived. The following grounds of exclusion are not applicable: aliens who intend to work but lack labor certification (section 212(a)(14)), immigrants without a valid entry document (section 212(a)(20)), improperly issued visas (section 212(a)(21)), illiterates (section 212(a)(25)), and graduates of non-accredited medical schools (section 212(a)(32)).<sup>29</sup> Other grounds cannot be waived: criminals (section 212(a)(9) and (10)), narcotics, except for a single offense of single possession of thirty grams or less of marijuana (section 212(a)(23)), prejudicial to the public interest (section 212(a)(27)), Communist (section 212(a)(28)), subversive (section 212(a)(29)), and participated in Nazi persecution (section 212(a)(33)).<sup>30</sup> The remaining grounds of exclusion may be waived by the INS for humanitarian purposes, to assure family unity, or when otherwise in the public interest.<sup>31</sup>

To be "admissible as an immigrant," an alien must also establish that he has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>32</sup> Additionally, males over the age of 17, and under 27, must have registered under the Military Selective Service Act, or present a completed signed Form SSS-1 at the time of filing for temporary residence.<sup>33</sup>

Aliens filing applications for temporary residency must submit documentation, including proof of residence.<sup>34</sup> Seventeen types of documents to prove residence are set forth by regulation,<sup>35</sup> with the additional allowance of "any other relevant document."<sup>36</sup> All information submitted is confidential and can be used only to make a determination on the legalization application, but, it may be used to prosecute or deport the alien if he has committed fraud.<sup>37</sup> Applications may be filed with an INS legalization office<sup>38</sup> or with a designated entity.<sup>39</sup> A "designated entity" means any state, local, church, community, farm labor organization, voluntary organization, association of agricultural employers or individual determined

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29. I.N.A. § 245A(d)(2)(A), 8 C.F.R. § 245.2(k)(1).

30. I.N.A. § 245A(d)(2)(B)(ii), 8 C.F.R. § 245.2(k)(3).

31. I.N.A. § 245A(d)(2)(B)(i), 8 C.F.R. § 245a.2(k)(2).

32. I.N.A. § 245A(a)(4)(C).

33. I.N.A. § 245A(a)(4)(D), 8 C.F.R. § 245a.2(g).

34. I.N.A. § 245A(g)(2)(D)(i), 8 C.F.R. § 245.2(d).

35. 8 C.F.R. § 245.2(d)(3).

36. 8 C.F.R. § 245.2(d)(3)(vi)(L).

37. I.N.A. § 245A(c)(5)(A), 8 C.F.R. § 245a.2(t).

38. I.N.A. § 245A(c)(1)(A), 8 C.F.R. § 245a.2(e).

39. I.N.A. § 245A(c)(1)(B), 8 C.F.R. § 245a.2(e).

by the INS to be qualified to assist aliens in the preparation of applications for legalization.<sup>40</sup> The alien's burden of proof for obtaining legalization is by a preponderance of the evidence.<sup>41</sup>

After being granted temporary residence status, and waiting the requisite 18 months, an alien may apply for permanent residence. As mentioned earlier, he has 12 months in which to apply. He also must have resided continuously in the United States since being granted temporary residence.<sup>42</sup> Brief, casual, and innocent departures are excepted; no single absence of over 30 days is allowed, or over 90 days of total absences, except for emergent reasons.<sup>43</sup>

In order to obtain permanent residence, the alien must also still be "admissible as an immigrant."<sup>44</sup> This means the same thing as it did for temporary residence status, with one notable exception. Aliens who are public charges, under INA section 212(a)(15), are not eligible for a waiver of this ground of exclusion.<sup>45</sup>

One final requirement is necessary for permanent resident status. The alien must demonstrate a minimal understanding of ordinary English, and a knowledge and understanding of the history and government of the United States, or be enrolled in a course of study recognized by the Attorney General for the English, history, and government requirements.<sup>46</sup> This requirement may be waived, in the discretion of the Attorney General, if the alien is 65 years of age or older.<sup>47</sup>

## II. PERMANENT RESIDENCE FOR CERTAIN SPECIAL AGRICULTURAL WORKERS

This portion of the law,<sup>48</sup> pertaining to certain special agricultural workers, provides an additional avenue for adjustment to lawful status for certain aliens otherwise without lawful status. There are similarities to the legalization arena, but there are a number of crucial differences as well. As in legalization, the Special Agricultural Worker (SAW) applicant has a two-step process, seeking first temporary residence<sup>49</sup> and later permanent residence.<sup>50</sup> The re-

40. I.N.A. § 245A(c)(2), 8 C.F.R. § 245a.1(l).

41. 8 C.F.R. § 245a.2(d)(5).

42. I.N.A. § 245A(b)(1)(B)(i), 8 C.F.R. § 245a.3(b)(2).

43. I.N.A. § 245A(b)(1)(B)(ii), 8 C.F.R. § 245a.3(b)(2).

44. I.N.A. § 245A(b)(1)(C), 8 C.F.R. § 245a.3(b)(3).

45. Compare 8 C.F.R. § 245a.3(g)(3) with 8 C.F.R. § 245a.2(k)(3).

46. I.N.A. § 245A(b)(1)(D), 8 C.F.R. § 245a.3(b)(4).

47. I.N.A. § 245A(b)(1)(D)(ii), 8 C.F.R. § 245a.3(b)(4)(iii).

48. I.R.C.A. § 302, I.N.A. § 210.

49. I.N.A. § 210(a)(1).

quirements for both temporary and permanent SAW status, however, differ significantly from legalization under INA section 245A.

To be eligible for temporary SAW residence, an alien must establish that he has resided in the United States and performed seasonal agricultural services in the United States for at least 90 man-days during the 12-month period ending on May 1, 1986.<sup>51</sup> There are two groups of SAW applicants, the significance of them going to the attainment of *permanent* residence only. Both groups are entitled to temporary residence. Group 1 applicants not only have the 90 man-days of qualifying agricultural work during the 12-month period ending on May 1, 1986, but additionally have 90 man-days of qualifying agricultural work for both of the 12-month periods ending on May 1, 1984, and May 1, 1985.<sup>52</sup> They also have resided in the United States for at least six months in the aggregate in each of the three twelve-month periods.<sup>53</sup> Finally, there can be no more than 350,000 Group 1 aliens.<sup>54</sup> Group 2 applicants simply are those SAW applicants not in Group 1.<sup>55</sup>

Certain terms of art need to be explained within the SAW context. "Residence" for Group 1 applicants has already been set forth. "Residence" for Group 2 applicants is a non-requirement since it is proved by showing the required 90 man-days of seasonal agricultural services (the threshold requirement for SAW consideration).<sup>56</sup>

"Seasonal agricultural services" means field work related to planting, cultural practices, cultivating, growing, and harvesting of fruits, vegetables, and other perishable commodities as defined by the Secretary of Agriculture.<sup>57</sup> The Secretary of Agriculture has included the following as his exclusive list of perishable commodities:<sup>58</sup> Christmas trees, cut flowers, herbs, hops, horticultural specialties, spanish reeds (*arundo donax*), spices, sugar beets, and tobacco. Other perishable commodities are not included. The following are examples of excluded items: animal aquacultural products, birds, cotton, dairy products, earthworms, fish, (including

50. I.N.A. § 210(a)(2).

51. I.N.A. § 210(a)(1)(B), 8 C.F.R. § 210.3(a), (c)(4), (d); *see infra* notes 56-59 and accompanying text.

52. I.N.A. § 210(a)(2)(1), 8 C.F.R. § 210.1(f).

53. 8 C.F.R. § 210.1(f).

54. I.N.A. § 210(a)(2)(C), 8 C.F.R. § 210.2(a)(3).

55. I.N.A. § 210(a)(2)(B), 8 C.F.R. § 210.1(g).

56. 8 C.F.R. § 210.3(c)(4).

57. I.N.A. § 210(h), 8 C.F.R. § 210.1(n).

58. 7 C.F.R. § 1d.7.

oysters and shellfish), forest products, fur bearing animals and rabbits, hay and other forage and silage, honey, horses and other equines, livestock of all kinds, (including animal specialties), poultry and poultry products, sugar cane, wildlife, and wool.<sup>59</sup> Remember that perishable commodities are a class in *addition* to fruits and vegetables.

“Man-day” means the performance during any day of not less than one hour of qualifying agricultural employment for wages paid. If employment records of an alien applicant show only piece rate units completed, then any day in which piece rate work was performed is counted as a man-day. Work for more than one employer in a single day is counted as no more than one man-day.<sup>60</sup>

In addition to showing residence and performance of the requisite seasonal agricultural services, an applicant for temporary SAW status must establish that he is admissible as an immigrant.<sup>61</sup> This differs, in part, from “admissible” for the purposes of legalization status. Unlike the legalization applicant, the SAW applicant will not be automatically disqualified for any felony or three misdemeanors. Nor is there a *per se* disqualification for participating in persecution or for failing to register under the Military Selective Service Act. There are, however, virtually identical requirements relating to certain grounds of exclusion under INA section 212 (8 U.S.C. section 1161).<sup>62</sup> With one exception, the same grounds of exclusion that are either inapplicable, waivable, or non-waivable for legalization applicants apply to SAW applicants. That difference is that aliens who are public charges under INA section 212(a)(15) are not eligible for a waiver for SAW status, even for temporary status.<sup>63</sup>

Most applicants for temporary residency must file their applications between June 1, 1987, and November 30, 1988.<sup>64</sup> To file in the United States, an alien must have been physically present in this country before June 26, 1987.<sup>65</sup> Applications, as in the case of legalization applications, may be filed with an INS legalization office<sup>66</sup> or with a designated entity.<sup>67</sup> Unlike legalization applicants,

59. *Id.*

60. 8 C.F.R. § 210.1(i).

61. I.N.A. § 210(a)(1)(C).

62. I.N.A. § 210(c)(2), 8 C.F.R. § 210.3(e).

63. I.N.A. § 210(c)(2)(B)(ii)(II), 8 C.F.R. § 210.3(e)(3).

64. I.N.A. § 210(a)(1)(A), 8 C.F.R. § 210.2(b)(1).

65. 8 C.F.R. § 210.2(c)(1).

66. I.N.A. § 210(b)(1)(A)(i), 8 C.F.R. § 210.2(c)(1).

67. I.N.A. § 210(b)(1)(A)(ii), 8 C.F.R. § 210.2(c)(1).

SAW applicants outside the United States may file. This is done at an overseas processing office,<sup>68</sup> or a port of entry on the United States-Mexico border designated by the Commissioner of the INS.<sup>69</sup>

Aliens apprehended by INS on or after November 6, 1986, and prior to June 1, 1987, who wish to file their applications in the United States, must have done so between June 1, 1987, and June 30, 1987.<sup>70</sup> This limitation does not apply to aliens who file overseas.<sup>71</sup>

As is the case for a legalization applicant, a SAW applicant has the burden of proving his cases by a preponderance of the evidence.<sup>72</sup> Likewise, documents are required.<sup>73</sup> Furthermore, SAW applicants have the same guarantees of confidentiality as their legalization counterparts.<sup>74</sup>

After obtaining temporary residence, the SAW applicant has a relatively easy path to permanent residence. Unlike a legalization applicant, a SAW applicant does not need to file a separate written application for *permanent* residence. Group 1 aliens who obtain temporary residence before November 30, 1988, are adjusted to lawful permanent residence as of December 1, 1989. All other Group 1 aliens obtain permanent residence one year after they have secured temporary status.<sup>75</sup> Group 2 aliens who obtain temporary residence before November 30, 1988, are adjusted to lawful permanent residence as of December 1, 1990. All other Group 2 aliens obtain permanent status two years after they have secured temporary status.<sup>76</sup> Both Group 1 and Group 2 applicants must also have maintained their temporary residence status and must appear at a legalization office, or other office designated by INS, to be

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68. I.N.A. § 210(b)(1)(B), 8 C.F.R. § 210.2(c), 8 C.F.R. § 210.1(k).

69. 8 C.F.R. § 210.6(b). At the time this article was written, the port of entry at Calexico, California was the only port so designated. Such ports of entry may be added or closed at the Commissioner's discretion. They are only for residents of the six Mexican states which border the United States, i.e., Baja California Norte, Sonora, Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas. Relaxed "transitional admission standards" are employed, allowing aliens to present certain documentation within 90 days after being admitted to the United States. This 90-day period may be extended by a district director, for good cause. 8 C.F.R. § 210.6(c)(3). The foregoing procedures are scheduled to end on November 1, 1987, under the explicit language of 8 C.F.R. § 210.6.

70. I.N.A. § 210(d), 8 C.F.R. § 210.2(b)(2).

71. *Id.*

72. 8 C.F.R. § 210.3(b).

73. I.N.A. § 210(b)(3), 8 C.F.R. § 210.3(c).

74. I.N.A. § 210(b)(6), 8 C.F.R. § 210.2(e).

75. I.N.A. § 210(a)(2)(A), 8 C.F.R. § 210.5(a)(1).

76. I.N.A. § 210(a)(2)(B), 8 C.F.R. § 210.5(a)(2).

processed for issuance of an Alien Registration Receipt Card (Form I-551, commonly referred to as a "green card").<sup>77</sup> Unlike legalization applicants, SAW applicants need not demonstrate English skills, United States history, and government knowledge to obtain permanent residence.

I have attempted to outline the basic components of the legalization and SAW provisions of the Immigration Reform and Control Act of 1986. Woodrow Wilson said that "[t]he highest and best form of efficiency is the spontaneous cooperation of a free people."<sup>78</sup> The challenge of IRCA, in legalization, the SAW program, and the rest of this statute's components, is achieving such cooperation. There may be some setbacks along the path of success, as can be expected with any undertaking as comprehensive as IRCA. But success can be ours if we in government, education, industry, labor, and agriculture cooperate to make a new beginning for immigration reform.

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77. 8 C.F.R. § 210.5(b).

78. B. BARUCH, AMERICAN INDUSTRY AT WAR: A REPORT ON THE WAR INDUSTRIES BOARD (1921).

