

INTRODUCTION

WHAT IS IMMIGRATION LAW ABOUT?

Immigration law regulates which non-U.S. citizens may enter the U.S., for how long, and for what purposes; which non-citizens may work in the U.S.; which non-citizens may become U.S. citizens, and how; and which non-citizens must leave the U.S. In this introductory chapter, we will introduce some of the key concepts in immigration law, including the different types of immigration statuses in the U.S.; the different types of immigration laws – who creates them, and how they fit together; and the roles of the different federal agencies responsible for carrying out U.S. immigration laws.

I. WHO'S WHO IN THE IMMIGRATION LAW UNIVERSE

When considering different types of immigration statuses, the first and broadest distinction to draw is between U.S. citizens (USCs) and non-citizens. The technical term for non-citizens under U.S. immigration law is “aliens” (which applies equally to those here in lawful status and those without lawful status), but because of the negative connotations of this term, we will use “non-citizen” throughout this manual.

All non-U.S. citizens who want to enter the U.S., and who are in the U.S., are subject to U.S. immigration laws. U.S. citizens are not subject to immigration laws, in the sense that citizens may come and go from the U.S. without immigration restrictions; are not subject to immigration scrutiny or enforcement either in the U.S. or at U.S. borders; and may not be deported from the U.S. U.S. citizens also enjoy a number of rights and privileges not available to non-citizens, such as voting in U.S. elections. Chapter Eight of this manual discusses the benefits of citizenship in greater detail.

A. CATEGORIES OF NON-CITIZENS

There are several categories of non-citizens, each with different immigration statuses. We will examine each category, beginning with Lawful Permanent Residents (LPRs), who have the greatest array of benefits, then considering other types of lawful immigration status, and ending with the undocumented, who have no lawful immigration status.

B. LAWFUL PERMANENT RESIDENTS

Lawful Permanent Residents, or LPRs – often referred to as “green card holders” – have more immigration benefits than other non-citizens. The term in immigration law for LPRs is “immigrants,” but we will refer to them throughout the manual as LPRs. LPRs have the right to live and work indefinitely in the U.S. LPRs may sponsor certain close family members – their spouses and unmarried sons and daughters – for lawful permanent residence. LPRs may generally travel in and out of the U.S. without advance permission, and in many circumstances are not subject to immigration-related scrutiny when returning to the U.S. from abroad. LPRs may also apply for U.S. citizenship – in a process called “naturalization” – after spending a

prescribed period of time in the U.S. as LPRs; Chapter Eight explains the eligibility requirements for naturalization.

LPRs have many benefits, but not as many as USCs. Despite its name, lawful permanent residence is not necessarily permanent. LPRs are potentially subject to deportation. Chapter Three describes the kinds of conduct that could lead to deportation for LPRs, including certain criminal convictions. LPRs may also lose their status if they reside outside the U.S. – this is known as “abandonment” of LPR status.

In order to become an LPR, a non-citizen must qualify to use one of the pathways to LPR status that are laid out in the immigration laws. The three largest pathways are through certain family relationships; through certain types of employment; and through certain types of humanitarian protection: asylum and refugee status, and U and T status for victims of serious crimes or human trafficking. Together, these pathways account for more than 95% of all non-citizens who become LPRs each year.

The remaining pathways account for far fewer LPRs. These pathways include the Diversity Visa Lottery (known as the “green card lottery”), which each year awards LPR status to about 50,000 non-citizens from countries of low rates of immigration to the U.S.; Cuban Adjustment for natives of Cuba; Special Immigrant Juvenile status for children who have been abused or neglected by their parents; and cancellation of removal, which is available to certain non-citizens in removal proceedings in front of an Immigration Judge, who have been in the U.S. for at least 10 years and have close USC or LPR relatives.

Non-citizens who do not qualify to use one of the pathways to LPR status cannot become LPRs. Even those non-citizens who do qualify to get on one of these pathways will not necessarily become LPRs. There are obstacles to lawful permanent residence that prevent some non-citizens from becoming LPRs; we will examine those obstacles – known as “grounds of inadmissibility” in Chapter Three of this manual.

C. ASYLEES AND REFUGEES

The U.S. grants protection to individuals who, in their home countries, have been persecuted, or fear persecution in the future, based on their race, religion, nationality, political opinion, or membership in a particular social group. This protection is labeled either “asylum” or “refugee status,” depending on where the determination about this persecution is made. Those granted refugee status are identified and interviewed outside the U.S. by the Departments of State and Homeland Security; they then enter the U.S. in refugee status. Individuals who come to the U.S. on their own (whether as tourists, students, entry without inspection, or in any other way) and seek protection once they are here are granted asylum.

Both asylum and refugee status are granted indefinitely. Refugees and asylees may work in the U.S. and may apply for their spouses and minor children to join them as refugees or asylees in the U.S. Asylees and refugees also have their own special pathway to LPR status – a pathway that allows forgiveness of many of the obstacles to LPR status – grounds of inadmissibility – outlined in Chapter Seven.

D. NON-IMMIGRANTS

Many non-citizens enter the U.S. every year in temporary legal statuses. These statuses, some of which allow employment in the U.S., and some of which do not, are known as “non-immigrant” status. Non-immigrant statuses are categorized by letters of the alphabet, from A through V. Some of the most common are:

A = diplomats

B = tourists

D = crewpersons

F = students

H = employment

J = exchange visitors

K = fiancés of USCs

P = artists and entertainers

R = religious workers

T = victims of severe forms of human trafficking

U = victims of certain serious crimes who have helped law enforcement

Most non-immigrant statuses have no built-in pathway to lawful permanent residence. Those present in the U.S. in most non-immigrant statuses will need to qualify for the family, employment-based, or humanitarian pathways in order to become LPRs. The only non-immigrant categories that have built-in pathways to LPR status are T status for victims of human trafficking, and U status for victims of certain serious crimes who have cooperated with law enforcement.

You will often hear these statuses referred to as “visas.” What is the difference between an immigration status and a visa? A visa is a document issued by the Department of State at a U.S. consulate abroad, that gives the bearer of the visa the opportunity to come to a U.S. port of entry and request admission in a particular immigration category. An immigration status is a particular type of lawful status given to a non-citizen present in the U.S.

E. TEMPORARY HUMANITARIAN CATEGORIES

1. TPS

Along with asylum and refugee status, the U.S. also offers a more temporary form of protection to individuals who are residing in the U.S., and who are citizens of certain designated countries that have suffered severe natural disasters or ongoing armed conflicts: Temporary Protected Status, or TPS. TPS offers protection from removal, and work authorization, to those who qualify for it. DHS determines which countries are designated for TPS – currently El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. To qualify for TPS, nationals of these countries must have been physically present in the U.S. on a specific date, and must timely register for TPS. TPS does not have a built-in pathway to lawful permanent residence. Chapter Seven of this manual discusses TPS in greater detail.

2. DACA

The most recent humanitarian category is Deferred Action for Childhood Arrivals, known as DACA. “Deferred action” is not actually a lawful immigration status, but rather a determination by DHS that it will not currently seek to remove the non-citizen with deferred action. Another major benefit of DACA is that DHS may grant work authorization to those with deferred action. DACA is currently available to young people who came to the U.S. before they were 16, are attending or have attended school here, were in the U.S. on June 15, 2012, and have been living in the U.S. since at least June 15, 2007. DACA does not have its own pathway to lawful permanent residence. Chapter Seven of this manual discusses DACA in greater detail.

F. UNDOCUMENTED

There are millions of non-citizens in the U.S. who have no lawful immigration status. We will refer to these people throughout the manual as “undocumented” because they lack immigration documents. There are two ways for a non-citizen to become undocumented, and there are millions of non-citizens present in the U.S. in each of these categories. Many non-citizens enter the U.S. as non-immigrants, and then stay longer than their authorized periods of stay – tourists, students, exchange visitors, employees. These non-citizens were in lawful status at one time, but then became undocumented when they stayed past the expiration of their authorized stays.

The other way to become undocumented is to enter the U.S. other than at a port of entry, without being inspected by an immigration officer. We often refer to this as “Entry Without Inspection,” or EWI. Someone who enters without inspection is undocumented as soon as he or she enters the U.S.

Among the millions of undocumented people in the U.S., there are quite a few who may currently, or may in the future, qualify for a lawful immigration status. Being undocumented is not necessarily permanent.

II. SOURCES OF IMMIGRATION LAWS

There are numerous sources of immigration laws and rules, and they fit together in a hierarchy. We will examine each of the sources of laws, beginning with the highest in the hierarchy. All laws in the U.S. must conform to the U.S. Constitution, and so even the highest point in the immigration hierarchy, the Immigration and Nationality Act, may not violate the U.S. Constitution. Chapter Eleven of this manual explains each source of immigration law in greater detail.

A. THE IMMIGRATION AND NATIONALITY ACT

Immigration and nationality matters are reserved in the U.S. to the federal government. The U.S. Congress creates U.S. immigration laws. The main body of immigration law is the Immigration and Nationality Act, known as the INA. Immigration advocates often refer to the INA as “the Act” or “the statute.” Statute is another word for a law, and the INA is the

immigration statute. The INA forms part of the larger body of federal laws, known as the U.S. Code. The INA is found at volume 8 of the U.S. Code.

The INA sets out the framework of U.S. immigration laws: which non-citizens may enter the U.S., in what statuses; for how long; which non-citizens may work in the U.S.; pathways to permanent residence; naturalization; which non-citizens may be refused entry to the U.S.; and which non-citizens may be removed from the U.S., and how. The INA sets out the general structure of immigration law. All other immigration-related rules must conform to the INA.

The INA is not static; it changes every time Congress makes changes to the immigration laws. Even in the absence of major immigration reform, there are changes every year to the INA. For this reason, it is vitally important that every practitioner who handles immigration cases have access to an up-to-date copy of the INA.

B. REGULATIONS

There are several federal agencies charged with carrying out immigration laws, and they write rules called “regulations” that flesh out the framework of the INA, providing more detail about exactly how the immigration laws are to be carried out. The main body of immigration regulations are found at Volume 8 of the Code of Federal Regulations, referred to as 8 CFR. The regulations provide far more detail than the statute, including specific definitions of terms; filing procedures and fees; and greater detail about eligibility for specific benefits and other terms in the INA. The regulations, like the INA, change as the agency updates them, and so it is also necessary for practitioners have access to an up-to-date copy of the regulations.

C. AGENCY POLICY GUIDANCE

Although the immigration regulations are very detailed, and much longer than the INA, they do not address every question in immigration law. USCIS has not issued regulations on every aspect of immigration law; and even the regulations themselves sometimes have gaps. The agency handles this by issuing internal policy guidance for its adjudicators, in the form of policy memoranda, many of which are consolidated into a book called the Adjudicator’s Field Manual. None of these are sources of law themselves, but they provide useful guidance to practitioners seeking to understand how the agency interprets the law. The Adjudicator’s Field Manual and many of the policy memoranda are available on the USCIS website.

The Department of State also issues internal guidance to its consular officers, in the form of a book called the Foreign Affairs Manual (FAM). Volume 9 of the FAM deals with immigration matters. For practitioners working with non-citizens applying for benefits at U.S. consulates overseas, this is a very important resource. The FAM is available on the Department of State website.

D. CASE LAW

When disagreements occur between the government and immigrants over the meaning of specific sections of immigration laws, courts must make decisions about how the immigration laws should be interpreted. There are several types of courts involved in interpreting immigration

laws: the Board of Immigration Appeals (discussed below), which is part of the Department of Justice and hears appeals on many immigration cases; and federal courts, including federal district and circuit courts, and even on occasion the U.S. Supreme Court.

Case law sets precedents that other courts and federal agencies must follow. Immigration advocates must therefore keep abreast of court decisions, and have access to books that describe and locate important court decisions. Chapter ____ explains in greater detail how this works.

III. FEDERAL AGENCIES THAT CARRY OUT IMMIGRATION LAWS

Because immigration law is federal, federal agencies carry out U.S. immigration law. There are several different federal agencies involved in carrying out immigration laws, and we will examine each of them, and their different functions.

A. DEPARTMENT OF HOMELAND SECURITY

The Department of Homeland Security (DHS) has the largest role in carrying out U.S. immigration laws. DHS adjudicates immigration benefits; enforces immigration laws inside the U.S.; and enforces immigration laws at U.S. borders. There are three sub-agencies within DHS that carry out these functions: USCIS, ICE, and CBP.

1. U.S. Citizenship and Immigration Services (USCIS)

USCIS, www.uscis.gov, adjudicates immigration benefits inside the U.S. USCIS adjudicators make decisions on a wide range of applications for many kinds of immigration benefits, including adjustment of status to lawful permanent resident; naturalization; waivers of inadmissibility; asylum applications; TPS applications; applications to change or extend non-immigrant status; DACA applications; and many more. USCIS has field offices in many states at which adjudicators interview applicants in person; four Service Centers at which adjudicators adjudicate paper applications; and eight Asylum Offices at which Asylum Officers interview applicants for asylum.

2. Immigration and Customs Enforcement (ICE)

ICE, www.ice.gov, enforces immigration laws inside the U.S. ICE agents are responsible for finding removable non-citizens and instituting removal proceedings against them. ICE attorneys represent the government in removal hearings before Immigration Judges. ICE is also responsible for detaining non-citizens who are subject to immigration detention.

3. Customs and Border Protection (CBP)

CBP, www.cbp.gov, enforces immigration laws at the U.S. border and ports-of-entry. Ports-of-entry are found at both land borders and inside airports. CBP officers inspect non-citizens, and decide whether or not to admit them to the U.S. CBP also carries out border patrol at U.S. borders.

B. DEPARTMENT OF JUSTICE

The Department of Justice houses the administrative courts that review many decisions by USCIS. The immigration court system is in a part of the Department of Justice called the Executive Office for Immigration Review (EOIR), www.justice.gov/eoir. EOIR has two sub-parts: the Immigration Courts, the trial-level courts for immigration cases; and the Board of Immigration Appeals (BIA), which hears appeals of many Immigration Judge decisions. Immigration Judges in the 26 (check) Immigration Courts around the country hear testimony, consider evidence, and make decisions in cases for individual non-citizens charged with being removable from the U.S. Appeals from many of these decisions are decided by the BIA.

C. DEPARTMENT OF STATE

Many non-citizens apply for immigration benefits -- whether tourist, student, or other non-immigrant visas, or lawful permanent resident status -- at U.S. consulates overseas. Consular officers in the Department of State interview visa applicants and adjudicate these applications. The Department of State also plays a central role in the family and employment-based immigration process, maintaining the waiting lists (known as the Visa Bulletin) that determine which non-citizens are eligible to apply for permanent residence at any given time. Chapter One of this manual explains this system in greater detail.

D. DEPARTMENT OF LABOR

The Department of Labor plays an important role in employment-based immigration cases. It must provide certifications about the unavailability of U.S. workers in many employment-based applications for lawful permanent residence.