

Introduction to Immigration Law

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Upon arrival into the United States, non-citizens are categorized as either immigrants or non-immigrants. Immigrants come to the United States to reside legally, while non-immigrants come temporarily and for a particular purpose. Upon arrival, immigrants receive an “Alien (A) Number” as a form of identity. In order to work, they must obtain an Employment Authorization Document (EAD). Once they apply to become lawful permanent residents (LPRs), they may receive their lawful permanent resident cards, or “green cards,” which allows them to work and reside indefinitely in the United States. However, these individuals lack the complete political rights of citizens, such as the right to vote or sit on a jury, which may later be attained by naturalization. Generally, LPRs are eligible for naturalization after five years of LPR status, at which point they have the opportunity to become United States citizens. However, until they become citizens, immigrants are subject to removal proceedings (previously called deportation) if they violate the terms of their status.

The current immigration system supports four major categories of immigrants: family-based, employment-based, diversity, and refugees/asylees. The limit on the number of applicants admitted varies based on category, with the largest number of spaces allotted to family-sponsored applicants, followed by employment-based applicants, refugees, and lastly, diversity applicants.

Family-based immigration is divided into sub-categories, with the largest sub-category comprised of immediate relatives of U.S. citizens. Family reunification underlies this policy, as one third of all immigrants to the United States are immediate

relatives of U.S. citizens. After immediate relatives, preference is given in the following order: spouses and children of LPRs; unmarried children of U.S. citizens that are over 21; unmarried children of LPRs over 21; married children of U.S. citizens; brothers and sisters of U.S. citizens. However, there are backlogs in all of the categories, except for immediate relatives of U.S. citizens.

Employment-based immigration is broken down into five categories. The first group is Priority Workers, which is comprised of applicants with extraordinary ability in the arts, sciences, education, business or athletics; outstanding professors or researchers; and some executives or managers of affiliates of U.S. businesses. Professionals with advanced degrees make up the second category. In addition to holding an advanced degree, these professionals must also possess a significantly higher degree of expertise than is usually found in that field. The third group is composed of skilled workers, professionals holding baccalaureate degrees and other workers. Each of these three categories has its own requirements, but for the most part, the employer must petition on behalf of the employee. The final two groups, special immigrants and employment creation investors, allow the employee to self-petition and are limited to a smaller number of applicants than the first three groups.

The Diversity Visa Lottery enables individuals from countries with low rates of immigration to the United States to apply to become permanent legal residents. To be eligible, the applicant must have a high school education or its equivalent, or must have had two years of training, within the last five years, for a job that requires at least two years of training. Of the approximately 13.6 million applicants that enrolled in the sixty-

day application period set aside for the 2010 program, 50,000 permanent resident visas were made available.

Asylum is available to individuals who come to the United States and face persecution, or a well-founded fear of persecution, “on account of” race, religion, nationality, membership in a particular group or political opinion in their country of nationality. Individuals seeking to obtain legal permanent resident status in this manner, must petition within one year of entering the United States, except under ‘extraordinary circumstances’, such as the inability of the individual to file, or a change of conditions in their country of nationality.

Individuals seeking refugee status must meet the same criteria as asylum seekers. They must face “persecution or a well-founded fear of persecution” based on their race, religion, nationality, or membership in a particular group in their home country. The difference between the two categories is that refugees have their eligibility determined while they reside outside of the United States (often waiting in refugee camps for up to 12 years), while asylum seekers are already physically in the United States or at the United States border when they make their application.

Protection of Vulnerable Immigrants

Some vulnerable immigrants may be eligible to obtain legal permanent resident status through VAWA self-petitioning, T Visas, U Visas, I-751 Waivers, or Special Immigrant Juvenile Status.

VAWA self-petitioning is available to spouses or children that have been domestically abused. To prevail, the petitioner must demonstrate that he or she has been subjected to extreme cruelty or battery by his or her spouse or parent, and that the spouse

or parent is a United States citizen or Legal Permanent Resident. Additionally, the petitioner must show that he or she resided with the abuser, that the abuse took place during the marriage, that the marriage was entered into in good faith and that the petitioner has good moral character.

U Visas are granted to an individual who has suffered as a victim of certain crimes, including domestic violence. To qualify for the U Visa, the applicant must prove that he or she was a victim of a designated crime, has information that he or she will be willing to provide that will be useful to the investigation or prosecution, and has suffered substantial hardship as a result of the crime. The applicant must also obtain certification by law enforcement that he or she has been helpful in the investigation or prosecution of the crime.

The T Visa is also available to victims of sex or labor trafficking. To obtain a T Visa, the applicant must prove that he or she is the victim of a severe form of trafficking and has complied with reasonable requests for assistance in the investigation. A certification to that effect from law enforcement is also required.

The process underlying I-751 waivers is similar to that of the VAWA petition, except that applicants are already conditional permanent residents. Such status lasts for two years and applies to aliens that are married to U.S. citizens or LPR's. At the end of the two-year period, husband and wife jointly apply to have the conditional aspect removed, thus making the conditional permanent resident a LPR. Therefore, in this situation, the applicant's spouse has already begun the process of granting permanent residence to the applicant, but the applicant is not able to complete the two-year period as he or she has divorced his or her U.S. citizen or LPR spouse, or the spouse will not sign

the joint petition. As a conditional legal resident, the individual may then petition for permanent legal residence on her own behalf. To do so, she must show a good faith marriage to the abuser and battery or extreme cruelty to herself or her child. There are also I-751 waivers if (1) one is already divorced and can prove good faith marriage, or (2) one would suffer extreme hardship if removed from the U.S.

Special Immigrant Juvenile Status (SIJS) is available to certain unmarried children under the age of twenty-one. To qualify, there must be a juvenile court order for the child to be a dependent of the court or in the custody of the state and that the child is deemed eligible for long term foster care due to abuse, neglect or abandonment. The court must also make findings that reunification with the parents is not a viable option and that it is not in the child's best interest to return to his or her country of origin may.

Two final classes of individuals seeking protection are non-immigrants and undocumented/illegal immigrants. Non-immigrants are permitted to visit the United States for a limited time and purpose. Those that stay past that limited time have overstayed their visas, and though they arrived legally, they are no longer lawfully in the United States. Undocumented immigrants who enter the United States illegally, without inspection by an immigration officer, are referred to as entry without inspection (EWI). Though both groups reside in the United States "illegally," there are many more remedies for non-immigrants who have overstayed their visas than for undocumented immigrants. For example, visa overstays may obtain lawful permanent resident status though marriage to a U.S. citizen unless they first return to their country of origin.

Rights of Undocumented Migrant Workers

Undocumented migrant workers have certain protections from **ICE enforcement**. Though ICE may be present in public areas, it needs a warrant or consent to enter private areas, such as a person's place of work or home. Additionally, ICE has a policy that it will not enter a church during religious activities, or a school, for enforcement purposes. For ICE officers to legally enter a residence or orchards/fields, they must have a warrant based on probable cause or the owner's consent. Thus, if ICE officers attempt to enter a migrant worker's home, the worker must give consent; if the officers want to enter a field or orchard where migrant workers are farming, the owner of the orchard must give consent. Without this consent, the ICE officers must get a warrant based on probable cause – sufficient evidence that would make a reasonable person believe something is true – which has been found in instances where workers flee after seeing ICE officers. Moreover, consent may not be coerced through force or threats of force.

If granted access to the residence or workplace, ICE officers may freely ask questions about the workers' status. However, workers may refuse to answer questions, and they also have the right to consult with a lawyer. On the street, ICE officers may question anyone that appears to be a foreigner. However, again, anyone who is questioned may refuse to answer. ICE officers may ask to see an individual's "green card," which legal permanent residents are required to carry; failure to do so is a misdemeanor. Nevertheless, ICE cannot force a person to produce his or her card unless the officer has reason to believe that he or she will be unable to do so, in accordance with the Fourth Amendment requirement that government officers must have a reasonable suspicion of illegal activity before detaining a person.

Thus, reasonable suspicion is required for ICE to detain an individual. This standard is less stringent than probable cause and is based on a combination of factors such as: attempts to avoid agents, proximity to the border, tips that undocumented workers are in the area or prior presence of such workers there, and use of vehicles commonly used for smuggling. Although reasonable suspicion may not be based solely on ethnic appearance or name, factors such as speech and manner of dress may be considered.

With respect to stopping an individual in his or her car, **police officers** must have a reasonable suspicion that the individual is undocumented in order to detain him or her. However, at border stops, **customs agents** are authorized to search any vehicle and interrogate any alien absent either a warrant or reasonable suspicion. In Vermont, local law enforcement has the authority to detain individuals under 24 V.S.A. § 1983 if they violate a law or municipal ordinance, and they do not present a valid ID. Individuals have the right to refuse to answer questions and the right to consult a lawyer.

Helping Transports/Harbors

Transporting and harboring illegal aliens is controlled by 8 U.S.C. § 1324. The language of the statute imposes criminal penalties on anyone that attempts to bring an individual into the United States with the knowledge that he or she is an alien; anyone that transports an alien with such knowledge; anyone who harbors or shields a known alien from detection; or anyone who encourages an alien to enter knowing that his or her residence will violate the law. Attempting to bring an alien in to the United States is punishable by up to ten years, while the other offenses are only punishable for up to ten years if done for commercial advantage; otherwise, the penalty is up to five years. In

addition, anyone who conspires or aids/abets another in completing one of the four aforementioned crimes may face criminal charges.

Based on *U.S. v. Kim*, 193 F.3d 567 (2d Cir. 1999), the definition of harboring as contemplated by § 1324, “encompasses conduct tending substantially to facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence.” Viewing § 1324 in the context of the Immigration Reform and Control Act, the *Kim* court determined that § 1324 applied to employers, such as the defendant. Moreover, the court found that the defendant possessed a list of known illegal workers, and though he dismissed some, he merely changed the names of others to enable them to continue working for him. The court accordingly found that the defendant’s reckless disregard of his employee’s illegal status coupled with the efforts he made to help that employee remain in her job indicated a harboring violation. However, of the three aliens the defendant was charged with harboring, he was only convicted of harboring one of them.

Conduct that is prosecutable usually pertains to active involvement in making living arrangements and finding jobs for people known to be in the United States illegally, such as in *Kim* and *U.S. v. Lopez*, 521 F.2d 437 (2d Cir. 1975). The defendant in *Lopez* was found to have provided a refuge for illegal aliens to reside at while he found them work or arranged sham marriages, in exchange for a fee. The *Lopez* court found that actions such as arranging sham marriages, providing shelter or transportation, and helping aliens obtain employment all fell within the harboring statute. Similarly, defendants met with illegal aliens and prepared work papers for them in exchange for

cash in *United States v. Sanchez*, 927 F.2d 376 (8th Cir. 1991). The court found that their actions constituted a violation of § 1324.

Accordingly, an individual who gives an undocumented person a ride or allows him or her to stay in a spare bedroom, is probably not committing an offense under §1324. Such conduct is only prosecutable if it is knowingly done “in furtherance” of the alien’s illegal status, as prohibited by the statute. Furthermore, prosecutions for harboring aliens have been very rare, but the potential penalties are very harsh.