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# LADY LIBERTY BLOWS OUT HER TORCH: NEW IMMIGRATION LAW IS UNFORGIVING AND FAR MORE RESTRICTIVE

by The Honorable John F. Gossart, Jr.

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Inscribed on the Statue of Liberty are the words:

Give me your tired, your poor,  
your huddled masses yearning to be free.  
The wretched refuge of your teeming shore,  
Send these, the homeless, the tempest-tost to me,  
I lift my lamp beside the golden door.

Yet these words inscribed on Lady Liberty are no longer particularly true today and clearly have not been the rallying call in the last decade.<sup>1</sup>

On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-206 ("IIRAIRA"). This new statute creates sweeping changes to our immigration law and significantly reduces those "forgiveness" provisions that have long been a part of our statutes.

No longer will our immigration laws permit individuals to come to the United States as students or visitors and remain beyond the time permitted without significant consequences. No longer will persons invited to the United States who then commit crimes be given a "second" chance to stay. Furthermore, those who enter illegally, regardless of their long tenure in the United States, hard work, and contributions, will most likely be deported.

Perhaps IIRAIRA can best be described as a law that says if you want to live in the United States, to participate in the American dream, to prosper, you must obey, regard and respect the immigration law of the United States, and wait for your invitation to come. For many this law is long overdue. For others, however, this law is cruel, harsh, insensitive and inflexible. It is a law accused of harming United

States citizens who are the spouses, parents, and children of deportable aliens and who suffer the loss of a loved one.

IIRAIRA is not an abrupt change in our immigration policy and law. Rather, in the last decade Congress has repeatedly passed laws designed to rid the United States of illegal aliens, overstayed aliens, and criminal aliens.

## I. A DECADE OF CHANGE

After many years of disagreement Congress passed the Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 ("IRCA"). This law while granting amnesty to many illegal aliens, was designed to reduce, if not eliminate, illegal immigration. The statute also made employers accountable, imposing fines as well as criminal sanctions against U.S. citizens who knowingly employ unauthorized aliens.

That same year, the Marriage Fraud Act of 1986, Pub. L. 99-639, 100 Stat. 3537 was passed. This law presumed that any person who married a U.S. citizen after being placed in deportation proceedings entered into a fraudulent marriage to get a "green card" (lawful permanent residence). The law barred adjustment of status to lawful permanent residence requiring that the alien leave the United States for two years before returning as a resident based on marriage to a U.S. citizen.<sup>2</sup>

Next, in 1988, the Anti-Drug Abuse Act, Pub. L. 100-690, 102 Stat. 4181 was passed. Section 7344 of the act renders deportable any lawful or illegal residents, who have been convicted of an "aggravated

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<sup>1</sup>The views of the author are his own and do not necessarily represent the views of the Department of Justice.

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<sup>2</sup>Modified in the Immigration Act of 1990, Pub. L. No. 101-649, § 702, 104 Stat. 4978 (enacted November 29, 1990) (IMMACT, 1990).

felony” such as murder, drug trafficking, and firearms trafficking. The Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, broadened the aggravated felony definition to include crimes of violence, rape, sexual abuse of a minor, and other such offenses. The broadening of crimes deemed to be aggravated felonies was a direct result of the increased criminal alien problem in the United States.<sup>3</sup> The 1990 Act also substantially transformed the immigrant visa selection process for those invited to immigrate to the United States. In many ways the process was made more difficult and restrictive.

On April 24, 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act, Pub. L. 104-132, 110 Stat. 1214. As apparent from its name, this statute addresses terrorism and the criminal penalties for such offenses.

## II. THE NEW LAW (IIRAIRA)

In spite of IRCA, a law that was thought to clean the slate and stop illegal immigration, today it is estimated that there are approximately five million illegal or out of status aliens in the United States. In part, it is because of this number, the increased social costs, and the rise in the number of criminal aliens that IIRAIRA is now the law of the land.

IIRAIRA changes immigration court proceedings throughout the United States. Deportation proceedings (proceedings against persons who enter illegally or violate the law after legally entering) and exclusion proceedings (proceeding against persons who seek entry into the United State but are stopped at the port of entry) are merged. The new proceedings, Removal Proceedings, change the burden of proof and reduce the burden of the prosecuting agency, the Immigration and Naturalization Service (“INS”). Additionally, defenses and relief petitions are eliminated in some

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<sup>3</sup>Today it is estimated that over 25% of our prison population is comprised of aliens, as reported by Congressional Staffers before the Permanent Subcommittee on Investigations of the Senate Governmental Affairs Committee on November 10, 1993. See 70 Interpreter Releases 1543 (Nov. 22, 1993).

cases, restricted in others, and much more difficult to be granted.

## III. NEW GROUNDS OF REMOVAL

### A. Inadmissible Aliens

IIRAIRA adds more grounds of inadmissibility. In addition to the already existing health related grounds, criminal related grounds, and security related grounds, the new law bars those who make false claims to citizenship, obtain public benefits through fraud and misrepresentation, abuse student visas, or enter the country illegally.

Those who enter the United States without inspection now bear the burden of proof that they are “clearly and beyond doubt,” lawfully in the United States. Previously the INS was required to establish clear, convincing, and unequivocal evidence that the alien defendant had entered illegally.

Lawful permanent residents (green card holders) may be charged with abandonment of their resident status if they remain outside the United States continuously for a period in excess of 180 days. Permanent residents may also face exclusion on criminal grounds that have not been waived or canceled.

Persons refused admission and removed from the United States are now barred from returning for five years. This is an increase from the previous one year bar.

### B. Deportable Aliens

Similarly, IIRAIRA increases the grounds for which lawful residents, or overstays may be deported. New grounds include conviction of flight from an immigration checkpoint, conviction of domestic violence, stalking, child abuse, child neglect, and violations of court protective orders. Persons who falsely claim U.S. citizenship for any purpose or benefit, or vote unlawfully are now subject to deportation and loss of status. Persons deported will continue to be barred from returning for five years. Aggravated felons are barred for twenty years.

#### **IV. PERMANENT RESIDENCE (ADJUSTMENT OF STATUS)<sup>4</sup>**

**T**he law continues to permit persons who have a visa approved based upon marriage to a U.S. citizen or a permanent resident to receive adjustment of status to legal resident. Individuals who secure an employment based visa petition may also adjust status in the United States. Aliens who are not in lawful non-immigrant status, or who violate the terms and conditions of their visa or work without authorization, however, are barred from adjustment of status and must leave the United States and be processed for a visa at the American Consulate in their home country.<sup>5</sup>

#### **V. CANCELLATION OF REMOVAL A. For Non-Lawful Permanent Residents<sup>6</sup>**

Formerly called suspension of deportation, an alien granted this form of relief has their deportation canceled and is granted legal status. Eligibility requirements under the new law are far more restrictive than previous laws. The applicant must be physically present in the United States for ten years (up from seven years). Moreover, the physical presence time tolls when the alien defendant is served with a charging document, that is, a Notice to Appear for Removal Proceedings. Previously, the law permitted physical presence time to accrue despite service of a charging document. In addition, the applicant must establish good moral character for the ten years. Finally, the applicant must show that deportation will cause extreme unusual hardship to his or her U.S. citizen or lawful permanent resident spouse, parent, or child.

The hardship factor is the most far reaching and significant change. Previously, the standard of review

was extreme hardship and the hardship to the applicant was an important consideration in approving applications. Under the new law, the immigration judge can no longer consider the hardship to the applicant. If the applicant has no qualifying relatives, he or she cannot qualify and will be ordered removed from the United States. Thus, for example, a person who has spent many years in the United States, is of good moral character, and would suffer personal hardship is not eligible for cancellation of removal and will be removed.

Suspension of deportation has long been a remedy application granted to worthy applicants who have spent considerable time in the United States, are assimilated, and have proven their worthiness to have the opportunity to live here legally and share the American dream. No longer will this remedy be possible under IIRAIRA.

#### **B. For Certain Lawful Permanent Residents<sup>7</sup>**

Formerly known as §212(c) relief or waiver of deportation, this relief from deportation has long been used by lawful permanent resident aliens who are convicted of a crime in the United States. Previously, upon balancing the social and humane considerations presented with those factors evidencing the undesirability of the alien, the immigration judge could exercise discretion and grant the waiver that allows the resident to remain in the United States. This application has often been considered a second chance application. Under the new law, however, all aggravated felons are now barred from consideration and will be deported.

While there exists little or no sympathy for aliens who are invited to the United States as residents to live and prosper and who then engage in crime, the problem is not that simple. The deportation of a long time permanent resident often will have a significant impact on many U.S. citizens, namely the spouses, children, parents, and siblings of the deportable alien. Moreover, there are many long term permanent

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<sup>4</sup>Immigration and Nationality Act (hereinafter INA) § 245.

<sup>5</sup>INA § 245(I) currently permits aliens physically present in the United States to adjust their status to lawful permanent residence, if otherwise qualified, upon payment of a penalty fee of \$1,000. This law expires September 30, 1997.

<sup>6</sup>INA § 240a(b)

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<sup>7</sup>INA § 240A(a)

residents who have spent the majority of their lives in the United States, have no ties to their country of birth, and literally face deportation to a foreign country.

The loss of the discretionary authority of the immigration judge to hear and decide the aggravated felony waiver is a significant and harsh change in the law.

## VI. CONSEQUENCES OF PLEA BARGAINS FOR CRIMINAL ALIENS

Often, guilty pleas are made as part of a plea bargain to avoid prison time. For aliens, however, plea bargains may help them avoid prison but will result in deportation. This fact is particularly true for those lawful residents who plead guilty to an aggravated felony. Clearly, this law places attorneys in the awkward position of advising a client to choose between prison or deportation.

Under the new law, it is also important that attorneys recognize that there is a specific definition of "conviction" under immigration law. Although the disposition of a case through a plea bargain may not be considered a "conviction" under state law, it is most likely a conviction under immigration law.

Under INA § 101(a)(48)(A), the term "conviction" is defined as a:

[F]ormal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be inspected.

Thus, case disposition under probation before judgment in Maryland<sup>8</sup> while not considered a conviction in Maryland, is a conviction under immigration

law and will result in the deportation of the alien.

## VII. VOLUNTARY DEPARTURE<sup>9</sup>

Voluntary departure, long an application to avoid an order of deportation is also restricted under IIRAIRA. Previously, a person could, if qualified (ready, willing and able to depart and of good moral character), be granted a lengthy period to depart the United States. This departure period could be for as long as one year. Under the new law, the time period for departure is restricted. At the initial hearing in removal proceedings, the alien can only receive a period of up to 120 days if qualified. At the conclusion of court proceedings, the departure period is limited to 60 days. In addition, when a case goes to full hearing, upon completion the alien must now: (1) post a departure bond (minimum \$500); and (2) produce a travel document required to enter another country. The applicant must also establish that he or she has been in the United States for at least one year and has been of good moral character for at least five years. Finally, for those who are granted voluntary departure and then fail to depart within the time permitted or fail to leave, there are civil penalties that can range from \$1,000 to \$5,000.

## VIII. CONCLUSION

IIRAIRA is a dramatic departure from our prior immigration laws. No longer is the INA replete with forgiveness provisions. Rather, the new law deals harshly with those who disregard and disrespect the immigration laws of the United States. Persons will not be permitted to stay indefinitely without significant consequences. Those who manage to remain in the United States without status for many years will not be able to use the equities built in this country as a defense from deportation. Those who are invited to live in the United States as residents and then commit crimes will lose their status and be expelled.

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<sup>8</sup>MD. ANN. CODE art. 27, § 641 (a) (1996).

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<sup>9</sup>INA § 240B

In effect, Lady Liberty now requires that those who wish to come and live in the United States and share in the American dream enter the "golden door" by invitation only.

**About the Author:** Please see the *Forum Faces* section for a biography of The Honorable John F. Gossart, Jr.

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