C. General Rules for U.S. Immigration and Visas for Noncitizens

If an individual relinquishes or loses his or her U.S. citizenship, he or she becomes a noncitizen subject to U.S. immigration laws should that individual decide to enter the United States. In general, a noncitizen who wishes to enter the United States must complete a two-step process. The first step involves issuance of a visa by a U.S. consular officer abroad. This step is followed by inspection and admission (or exclusion) by an INS inspector at the port or place of entry.

1. Role of the Department of State

Outside of the United States, noncitizens deal almost exclusively with the U.S. Consulate or Embassy in their home country.[200] The U.S. consular officer has, within the confines of the law, almost complete discretion as to whom and under what circumstances a visa to the United States will be granted.[201] Furthermore, there is no appeal from a denial of a visa by the U.S. consul other than for interpretations of law.[202]

2. Role of the INS

The INS handles immigration matters with respect to noncitizens who are already in the United States. Currently, this agency is a division of the U.S. Department of Justice and operates through various regional and sub-regional offices throughout the United States.[203] Regardless of how a noncitizen may have arrived in the United States, after entry he or she is under the jurisdiction of the INS.[204]

3. Acquisition and relinquishment of immigrant visas

An immigrant visa is issued to an individual who intends to relocate to the United States permanently. Stringent conditions apply to the admission of immigrants. Once admitted, however, immigrants are subject to few restrictions. They may accept and change employment, and may apply for U.S. citizenship through the naturalization process, generally after five years.

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[200] Ramon Carrion, *USA Immigration Guide* 11 (1998).

[201] Under the Homeland Security Act, consular officers will continue to issue visas, but they will do so under the general supervision of the Secretary of Homeland Security.

[202] Ramon Carrion, *USA Immigration Guide* 11 (1998).

[203] The Homeland Security Act transfers the functions of the INS to the Department of Homeland Security. The INS is abolished upon this transfer. Within the Department of Homeland Security, immigration enforcement functions and the immigration services functions are transferred to separate entities. By law, these functions cannot subsequently be combined administratively.

[204] *Id.*

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Application process

Petitions for immigrant, i.e., long-term permanent resident status, are first filed with the INS by the sponsoring relative or employer in the United States.[205] If the prospective immigrant is already residing in the United States, the INS handles the entire process, i.e., "adjustment of status."[206] If the prospective long-term permanent resident does not have legal residence in the United States, the petition is forwarded to Consular Affairs in their home country after the INS has reviewed it.[207] The Consular Affairs Officer (when the immigrant is coming from abroad) and the INS adjudicator (when the immigrant is adjusting status in the United States) must be satisfied that the individual is entitled to immigrant status.[208]

A personal interview is required for all prospective long-term permanent residents.[209] The burden of proof is on the applicant to establish eligibility for the type of visa for which the application is being made.[210] Consular Affairs Officers (when the immigrant is coming from abroad) and INS adjudicators (when the immigrant is adjusting status in the United States) must confirm that the immigrant is not ineligible for a visa under the so-called "grounds of inadmissibility" of the INA, which include criminal, terrorist, and public health grounds.[211]

Relinquishing permanent resident status

There are several ways in which permanent resident status can be relinquished. First, an individual who wishes to terminate his or her permanent residency may simply return his or her green card (or permanent resident card) to the INS. Second, an individual may be involuntarily deported from the United States (through a judicial or administrative proceeding) with the green card being canceled at that time. Third, a green card holder who leaves the United States and attempts to reenter more than a year later may have his or her green card taken away by the INS border examiner, although the individual may request a hearing before an immigration judge to have the green card reinstated. A green card holder may leave the United States permanently

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[205] *See* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] 22 C.F.R. sec. 42.62.

[210] *See* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[211] *Id.*

without relinquishing his or her green card, although the individual would continue to be taxed as a U.S. resident.[212]

Tracking long-term permanent residents

Historically, there has been no statutory requirement that the INS track the movement of long-term permanent residents in and out of the United States. However, in connection with the implementation of section 402 of the Enhanced Border Security and Visa Reform Act of 2002, the INS proposes that long-term permanent resident arrivals and departures be tracked at air and seaports beginning in January 1, 2003.[213] The Arrival and Departure Information System (AIDS) would be the repository and retrieval mechanism for the arrival and departure data on all immigrants, including long-term permanent residents.[214] The long-term permanent resident's Alien Registration Receipt Number would serve as the identifier for retrieving the record.[215]

4. Nonimmigrant visas

Types of nonimmigrant visas

Various types of nonimmigrant visas are issued to individuals who come to the United States on a temporary basis and intend to return home after a certain period of time.[216] The type of nonimmigrant visa issued to such individuals is dependent upon the purpose of the visit and its duration.[217] Nonimmigrants must demonstrate that they are coming for a limited period and for a

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[212] Section 7701(b)(6)(B) provides that an individual who has obtained the status of residing permanently in the United States as an immigrant (i.e., an individual who has obtained a green card) will continue to be taxed as a lawful permanent resident of the United States until such status is revoked or is administratively or judicially determined to have been abandoned.

[213] *See* A-143 (October 8, 2002, letter from the INS).

[214] *Id.*

[215] *Id.*

[216] *See* A-284, Congressional Research Service, RL31381: *U.S. Immigration Policy on Temporary Admissions* (May 8, 2002). During fiscal year 1999 (the most recent year for which INS data are published), 31.4 million nonimmigrants entered the United States, of which 76.7 percent were tourists. Of that number, over 16 million nonimmigrants entered as visitors through the Visa Waiver Program.

[217] *See* sec. 101(a)(15) of the INA. There are 24 major nonimmigrant visa categories, and 70 specific types of nonimmigrant visas.

specific purpose.[218] An individual holding a nonimmigrant visa is prohibited from engaging in activities that are inconsistent with the purpose of the visa (for example, an individual holding a tourist visa is not permitted to obtain employment in the United States). A nonimmigrant is required to leave the country at the end of the time allotted his or her visa.

Nonimmigrant visas are available to the following categories of individuals: foreign diplomats ("A"); temporary business visitors ("B-1"); tourists ("B-2"); travelers in transit through the United States to another destination ("C"); crew members of foreign airlines or ships ("D"); treaty traders ("E-1"); treaty investors ("E-2"); students ("F"); representatives of international organizations ("G"); nurses, professionals in specialty occupations, temporary workers performing services unavailable in the United States, and participants in job training programs ("H"); employees of foreign media organizations ("I"); exchange visitors ("J"); fiances/fiancees of U.S. citizens ("K"); intracompany transferees ("L"); vocational and other nonacademic students ("M"); certain present or former employees of international organizations, their parents and siblings ("N"); representatives of NATO member states ("NATO" visas); individuals with extraordinary abilities in sciences, arts, education, business or athletics ("O"); internationally recognized athletes and entertainers ("P"); participants in international cultural exchange programs ("Q"); religious workers ("R"), informants or witnesses against a criminal or terrorist organization or enterprise ("S"), NAFTA professionals or their immediate families ("TN" or "TD"), victims of human trafficking or their immediate family ("T-1" or "T-2"), victims or informants of criminal activity or their spouse or child ("U-1" or "U-2"), and the spouse of a long-term permanent resident who has a petition pending for three years or longer or a child of a long-term permanent resident ("V-1" or "V-2" or "V-3"). For most of these categories, a qualifying individual and his or her spouse and minor children are eligible for the category of visa involved.

Foreign business people and investors often obtain "E" visas to come into the United States. Generally, an "E" visa is initially granted for a two-year period, but it can be routinely extended for additional two-year periods. There is no overall limit on the amount of time an individual may retain an "E" visa. There are two types of "E" visas: an "E-1" visa, for "treaty traders" and an "E-2" visa, for "treaty investors." To qualify for an "E-1" visa, an individual must be a national of a country that has a treaty of trade with the United States, and must be coming to the United States solely to engage in substantial trade principally between the United States and that country. Trade includes the import and export of goods or services. Nationals of that country must own at least 50 percent of the foreign-based company, and at least 50 percent of the shareholders must have an "E-1" or "E-2" visa and live in the United States (thus, an individual holding a green card would not be counted, or if they live outside the United States, could be classified as "E-1" or "E-2"). Over 50 percent of the individual's business must be between the United States and the foreign company. To qualify for an "E-2" visa, an individual (or a company of which he or she is an executive, manager, or essential employee) must be a national of a country that has a treaty investor agreement with the United States, and must be coming to the United States solely to develop and direct the operations of an enterprise in which he has invested, or is actively in the process of investing, a substantial amount of capital.

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[218] *Id.*

Application process

The burden of proof is on the applicant to establish eligibility for nonimmigrant status and the type of nonimmigrant visa for which the application is being made. The Consular Affairs Officer, at the time of application for a visa, and INS inspectors, at the time of application for admission, must be satisfied that the applicant is entitled to nonimmigrant status.[219] An application for a nonimmigrant visa usually is made at the consular post abroad where the applicant resides.[220] Generally, the applicant is required to appear personally, although this requirement may be waived, especially for "B" visitor visas.[221] Application for a nonimmigrant visa is made on form DS-156 (or supplemental form DS-157 for certain applicants). This is a short form requiring information regarding the purpose of the applicant's trip. Photographs and such other documents as the consul may request are also required.[222]

Ordinarily, tourist visas are issued almost immediately, usually without the need for supporting documents.[223] A treaty trader visa, on the other hand, requires documentation to show that the substantive requirements have been met.[224] Other visas, such as the temporary worker and intracompany transferee visas require prior approval of a visa petition by the INS.[225]

The primary inquiry for a nonimmigrant visa centers on whether the applicant truly intends to enter the United States temporarily for the purposes contemplated by the visa category. If the applicant cannot satisfactorily prove this intent, the application is denied.[226] The application also is denied if the individual is inadmissible under the statutory grounds for inadmissibility, unless the disqualification can be waived. Waivers are discussed below.

The nonimmigrant visa is endorsed or inserted on a page of the passport or equivalent document.[227] The visa includes the date and place of issuance, the visa classification, the limited number of entries for which it is valid or the letter "M" for unlimited entries, and the period of

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[219] *See* 22 C.F.R. sec. 41.11(a). *See also* A-306, Congressional Research Service, CRS Report for Congress, RL31512: *Visa Issuances: Policy, Issues, and Legislation* (July 31, 2002).

[220] 22 C.F.R. sec. 41.101.

[221] 22 C.F.R. sec. 41.102.

[222] 22 C.F.R. sec. 41.103.

[223] Gordon, Mailman, & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.04, *Control of Entry*, at 8-8 (May 2002).

[224] *Id.*

[225] *Id.*

[226] 22 C.F.R. sec. 41.11.

[227] 22 C.F.R. sec. 41.113.

validity.[228] The length of time for which an individual is admitted to the United States does not necessarily correspond to the period of the validity of the visa.[229] The INS inspector sets the admission period at the time of admission.

5. U.S. port of entry inspection

Ports of entry are found along the United States land border and at international airports and seaports. Noncitizens make their application for admission at these ports of entry and undergo inspection. Alternatively, a noncitizen may undergo a pre-inspection (inspection before departure or en route) instead of an inspection upon arrival.[230] For example, individuals departing by airplane for New York from Montreal or Toronto, Canada, usually are pre-inspected by U.S. Government personnel.[231]

The primary inspection involves an examination of documents (usually a passport and a visa) and an interrogation. Usually the inspector asks about the applicant's purpose in coming, how long he or she intends to stay, and any other information bearing on admissibility.[232] The primary inspector also notes visually and by the applicant's answers whether there are any physical or mental afflictions that would render the applicant inadmissible and indicate the need for a Public Health Service examination.[233] The inspector might also consult the "lookout" book or computer to note whether there is negative information bearing on admissibility.[234] The thoroughness of the examination depends on the circumstances and the place.

An applicant who is not clearly admissible usually is referred for a "secondary inspection."[235] At this point, more probing questions are asked to determine whether the applicant intends to work or remain in the country indefinitely or whether there are other grounds for denying admission. The inspector also may conduct a search of the individual and of his or

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[228] 22 C.F.R. sec. 41.113(c).

[229] 22 C.F.R. sec. 41.112(a).

[230] 8 C.F.R. sec. 235.7. There are also automated or expedited systems of inspection at certain ports of entry that have an identifiable group of low-risk border crossers.

[231] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][b], *Manner of Inspection* at 8-12 (May 2002).

[232] *Id.*, at sec. 805[2][c] at 8-12.

[233] *Id.*

[234] The operation of the various lookout systems is described below.

[235] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][b], *Manner of Inspection* at 8-13 (May 2002).

her personal effects if the officer reasonably suspects that such a search would disclose grounds for inadmissibility.[236]

If the inspector remains uncertain, or there is a likelihood that a ground for inadmissibility would be waived by a district director, the applicant may be subject to a "deferred inspection," also known as "deferred inspection parole." A deferred inspection is conducted at the local INS office having jurisdiction. At some time during that process, a disposition is made. The applicant can be:

(1) admitted (either by being found admissible, or if possible, having the ground of inadmissibility waived);

(2) allowed to withdraw the application for admission and depart;

(3) paroled into the United States;

(4) temporarily removed for decision by the regional commissioner as to further action;

(5) summarily removed under the expedited removal procedure; or

(6) held or paroled for a removal hearing.[237]

6. Grounds of inadmissibility

The concept of inadmissibility can arise when noncitizens appear at the U.S. consulate and apply for a visa, or at a port of entry (e.g., airport, seaport, or other entry point). Noncitizens must satisfy the consular officers abroad and the INS inspectors upon entry to the United States that they are eligible for visas, or admission, and not subject to the "grounds of inadmissibility" of the INA. Thus, a U.S. consular office may deny a visa petition because the consular office believes that one or more grounds of inadmissibility may apply. If a noncitizen has a visa, the INS inspector at the border may deny them entry to the United States on the basis that one or more grounds of inadmissibility might apply.

The grounds of inadmissibility include: criminal history, security and terrorist concerns, health-related grounds, seeking to work without proper labor certification, illegal entrants and immigration law violations, ineligibility for citizenship, previous removal, the likelihood of becoming a public charge (e.g., indigence), and violations of documentary requirements.[238] In addition, individuals are inadmissible if they are former U.S. citizens who renounce their

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[236] 8 U.S.C. sec. 1357(c).

[237] Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure*, sec. 8.05[2][d], *Secondary or Deferred Inspection* at 8-13 (May 2002). The concepts of parole and waiver are discussed below.

[238] 8 U.S.C. sec. 1182(a).

citizenship for purposes of tax avoidance as determined by the Attorney General.[239] This latter ground of inadmissibility is discussed in more detail below.

7. Detecting inadmissibility: Department of State and INS lookout systems

(a) Department of State

The Department of State uses a computer database, the Consular Lookout Security System ("CLASS"), to screen and deny visas to individuals who are inadmissible to the United States.[240] CLASS is used to screen overseas visa applicants for criminal and terrorist backgrounds. CLASS is essentially a "watch list" that contains names of suspected terrorists. Through an information exchange program between the Departments of State and Justice, noncitizens who have been deported or who are known to be inadmissible are placed in CLASS.[241] Also placed in CLASS are the names of individuals known to have engaged in acts that may indicate a loss of U.S. nationality and thus ineligibility.[242]

Similarly, the Department of State uses the "TIPOFF" system, which includes a "watch list" of suspected terrorists.[243] TIPOFF provides information on suspected terrorists who should be watched closely. TIPOFF is unique in that it gathers its information directly from the intelligence community as well as law enforcement agencies.

(b) INS

INS utilizes a computer database called the InterBorder Agency Inspection System ("IBIS"), which includes components of CLASS.[244] At the port of entry, the inspector accomplishes an IBIS inquiry by entering an individual's passport number into the system.[245] IBIS is a broad system that interfaces with various FBI databases, Department of Treasury databases, and the Department of State's CLASS and TIPOFF databases. Due to this interface capability, the IBIS is able to obtain such information as whether a noncitizen is admissible, any criminal information, and whether a noncitizen is wanted by law enforcement.

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[239] 8 U.S.C. sec. 1182(a)(10)(E).

[240] Congressional Research Service, CRS Report for Congress, RL31019: *Terrorism: Automated Lookout Systems and Border Security Options and Issues* (June 18, 2001). *See* A-14, (March 31, 2000, Memorandum from the CRS to the Joint Committee staff).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* Machine-readable passports for countries in the visa waiver program are not required until October 1, 2003.

The INS also utilizes a computer database called the National Automated Immigration Lookout System ("NAILS"), which is a "watch list" of noncitizens who are inadmissible for entry to the United States. NAILS is a text-based system that feeds into IBIS and is used by INS inspectors during primary inspections. NAILS contains limited information about questionable noncitizens such as biographical data and some criminal history. NAILS interfaces with IBIS and CLASS.

The INS maintains a Computer Linked Application Information Management System ("CLAIMS"), which indicates whether an individual has been granted a waiver of inadmissibility in the course of pursuing an immigration benefit, such as admission or adjustment status. For non-criminal waivers, the INS does not currently maintain statistics regarding the number of waivers of inadmissibility granted by type.[246]

The INS also maintains a computer database called the Central Index System ("CIS"), which contains records long-term permanent residents whose status has been revoked or has been administratively or judicially determined to have been abandoned.[247] The records are retrieved using the long-term permanent resident's alien registration number. The information contained in the CIS is not shared with the IRS, nor is the CIS accessible by the IRS. The CIS contains the immigrant's date of birth, the country of origin, and the date that the INS determines that the long-term permanent resident abandoned residence, Form I-94 control number, and a social security number in some instances.

The INS's Nonimmigrant Information System ("NIIS") provides limited data on the arrival and departures of nonimmigrants admitted for short visits, as well as a nonimmigrant's stated destination in the United States. The NIIS is primarily accessed by a combined name, date of birth, or country of birth, and Form I-94 control number. The NIIS interfaces with IBIS, NAILS, and CIS.

INS computer systems are generally based on alien registration numbers, arrival/departure dates, or application or petition receipt numbers.

8. Waivers of inadmissibility

The INS has not implemented a system that maintains statistics regarding the number of waivers of inadmissibility granted by type in the context of non-criminal waivers.[248] The INS

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[246] *See* A-143 (October 8, 2002, letter from the INS to the Joint Committee staff). As part of a larger project, the INS is consolidating many of the forms currently used to apply for various criminal and non-criminal waivers under new Form I-724 series. Each form in the series would address separate grounds of inadmissibility and as a result, the INS would be able to compile more accurate statistics on the number of waivers sought for each ground of inadmissibility, as well as the number of approval and denials.

[247] *Id.*

[248] *Id.*

also does not maintain statistics on the number of waivers sought for each ground of inadmissibility, including the number of approval and denials.[249] The following represents the total number of waivers granted for all grounds of inadmissibility.[250]

Type of Waiver	FY 00	FY 01	FY 02 (through May 02)
Visa/Passport	20, 688	21,181	5,761
Non-Criminal	6,718	8,819	5,874
Criminal	4,415	4,864	3,968
Total	31,821	34,864	15,603

Nonimmigrant documentary waivers – in general

As a general rule, to be eligible for a nonimmigrant visa, a noncitizen must have a passport valid for six months beyond the dates of travel. For admission as a nonimmigrant, the passport and either a valid nonimmigrant visa or nonimmigrant border crossing identification card must be provided.[251] There are exemptions from this rule by statute and international agreement; there also is authority to waive either or both of the documentary requirements.[252] The law grants to the Attorney General and the Secretary of State, acting jointly, power to waive the visa or the passport requirements,[253] or both, on the basis of:

(1) unforeseen emergency in individual cases;

(2) reciprocity for nationals of foreign contiguous territories (Canada and Mexico) or adjacent islands; or

(3) immediate and continuous transit through the United States as passengers of carriers that have executed certain contracts.

By regulation, a blanket waiver of the need for a visa, the passport requirements, or both, applies to certain groups of nonimmigrants. Although covered by the waiver, a nonimmigrant

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[249] *Id.*

[250] *Id.*

[251] 8 U.S.C. sec. 1182(a)(7)(B)(i).

[252] 8 U.S.C. sec. 1182(d)(4).

[253] The Homeland Security Act transfers immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security.

may still apply for and receive a visa. The following identifies the groups for which a blanket waiver of part or all of the documentary requirements has been made by regulation:[254]

(1) Canadian nationals;

(2) Residents in Canada or Bermuda having a common nationality with Canadians or with British subjects in Bermuda;[255]

(3) A resident of the Cayman Islands or the Turks or Caicos Islands who is a British subject and arrives directly from one of these places with a current certificate from its Clerk of the Court indicating no criminal record;

(4) Bahamian nationals or British subjects residing in the Bahamas if the U.S. immigration officer at Freeport or Nassau finds the individual admissible "clearly and beyond a doubt in all other respects;"

(5) British, French, or Netherlands nationals who reside in the respective insular possessions of those countries in the Caribbean area;

(6) Nationals of Jamaica, Barbados, Grenada, or Trinidad and Tobago proceeding to the United States as an agricultural worker or going to the U.S. Virgin Islands on a valid labor certification;

(7) Nationals and residents of the British Virgin Islands under certain conditions;

(8) Mexican nationals if: (a) they possess a border crossing card; (b) they are applying for temporary admission for business or pleasure and are coming from a contiguous territory; (c) they are crewmen on a Mexican commercial aircraft; (d) they are entering solely to apply for a Mexican passport or other documents at a

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[254] *See* generally, 8 C.F.R. sec. 212.1; 22 C.F.R. sec. 41.2. *See* Department of State, 9 Foreign Affairs Manual, sec. 41.2.

[255] This waiver includes citizens of all commonwealth countries and citizens of Ireland. The commonwealth countries are: Antigua, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Ireland, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, St. Kitts and Nevis, St. Lucia, St. Vincent, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom (including colonies, territories, and dependencies), Vanuatu, Western Samoa, Zambia, and Zimbabwe. A passport is not required for these individuals except after a visit outside the Western Hemisphere. Citizenship, as opposed to residency, is required. A resident who is the bearer of a certificate of identity or other stateless individual's document issued by the government of one of these countries may not benefit from the waiver. *See* A-274, Department of State, 9 Foreign Affairs Manual sec. 41.2 N1.1, Exhibit I.

Mexican consular office in the United States; (e) they are Mexican Federal Government officials on a temporary assignment and accompanying family bearing a diplomatic passport; or (f) entering pursuant to the International Boundary and Water Commission Treaty.

(9) Citizens of the Republic of the Marshall Islands and the Federated States of Micronesia;

(10) Citizens of certain Pacific Rim countries under certain conditions;

(11) Noncitizens in immediate and continuous transit through the United States, except for nationals of certain countries;

(12) Unforeseen emergencies; and

(13) Nonimmigrant fiancée spouses and children of U.S. citizens.

Special rules for Canada and Mexico

Citizens of Canada, Mexico, and certain islands in close proximity to the United States do not need visas to enter the United States, although other types of travel documents may be required. A non-resident border crossing identification card can be issued by either a consular or immigration officer to a resident in a foreign contiguous territory.[256] This provision facilitates the entry of pre-screened residents of Canada and Mexico who enter the United States frequently. Under the INS regulations, a Canadian border-crossing card may be issued to and used by a citizen of Canada or a British subject residing in Canada.[257] The Mexican border-crossing card is only issued to residents of Mexico who are also citizens of that country.[258]

Returning lawful permanent residents

Lawful permanent residents returning from a temporary visit abroad generally do not need a visa to reenter the United States. The lawful permanent resident must be returning to an unrelinquished permanent residence in the United States on a green card within a year of departure, or a reentry permit within two years.

Waiver of nonimmigrant documents in individual cases

A nonimmigrant not qualifying for the blanket waiver may make an application to the INS district director in charge of the port of entry showing that the failure to comply with the

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[256] 8 U.S.C. sec. 1101(a)(6).

[257] 8 C.F.R. sec. 212.6.

[258] *Id.*

documentary requirements was due to unforeseen emergency.[259] The process also may be initiated by a consular officer or officer of the visa office by transmitting the pertinent information to the appropriate immigration officer, requesting concurrence.[260]

Visa Waiver Program

The Visa Waiver Program was established as a temporary program by the Immigration Reform and Control Act of 1986.[261] Congress periodically enacted legislation to extend the program's authorization, and the program was made permanent in 2000.

On October 30, 2000, the Visa Waiver Permanent Program Act was signed into law.[262] To qualify for the Visa Waiver Program, a country must: (1) offer reciprocal privileges to the United States; (2) have had a nonimmigrant refusal rate of less than 3 percent for the previous year or an average of no more than 2 percent over the past 2 fiscal years with neither year going above 2.5 percent; (3) certify that the country issues, or will issue by October 1, 2003, machine-readable passports; and (4) be determined, by the Attorney General, in consultation with the Secretary of State, not to compromise the law enforcement or security interest of the United States by its inclusion in the program.[263]

Under this program, nonimmigrants from certain countries are admitted to the United States without a visa.[264] Temporary visitors for business or pleasure (tourists) from participating countries simply complete an admission form before their arrival and are admitted for up to 90 days. No background checks are done prior to arrival. At the port of entry, INS inspectors observe and question applicants, examine applicants, examine passports, and conduct checks

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[259] 8 U.S.C. sec. 1182(d)(4)(A). Emergency circumstances are discussed at 22 C.F.R. sec. 41.3(d) and 8 C.F.R. sec. 212.1(g).

[260] 8 C.F.R. sec. 212.1(j) and 22 C.F.R. sec. 41.3.

[261] Pub. L. No. 99-603.

[262] Pub. L. No. 106-396.

[263] *See* A-274, Department of State, 9 Foreign Affairs Manual, sec. 41.2, Exhibit II.

[264] *See* A-278, Congressional Research Service, RS21205: *Immigration: Visa Waiver Program* (April 22, 2002). As of April 2002, 28 countries were eligible to participate in the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Lichtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay. Argentina was removed from the Visa Waiver Program in February 2002 because of a recent economic collapse causing Argentine nationals to remain illegally past the 90-day period of admission.

against a computerized system to determine whether the applicant is admissible to the United States.[265] This is the only opportunity to identify inadmissible noncitizens.

However, there are several important restrictions, namely, noncitizens entering through the Visa Waiver Program are not permitted to extend their stays except for emergency reasons and then for only 30 days.[266] Additionally, with some limited exceptions, noncitizens entering through the Visa Waiver Program are not permitted to adjust status.[267] Noncitizens entering through the Visa Waiver Program who violate the terms of admission become deportable without any judicial recourse or review (except in asylum cases).[268]

Waiver of substantive inadmissibility for nonimmigrants

The provisions of the INA[269] that render certain noncitizens ineligible to receive visas apply to nonimmigrants as well as to immigrants.[270] The Attorney General, however, is given discretionary power to waive these substantive grounds of inadmissibility with respect to nonimmigrants, except for certain security and related grounds.[271] Applications are evaluated on a case-by-case basis. Factors considered in determining whether to approve a waiver include:

(1) The effect on U.S. public interests if the applicant is admitted;

(2) The seriousness of the actions or conditions causing inadmissibility; and

(3) The reasons for wishing to enter the United States.[272] (There is no need to show a compelling reason for the visit.)

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[265] *Id.* Although nonimmigrants who enter under the Visa Waiver Program do not need a visa, all visa waiver program applicants are issued nonimmigrant visa waiver arrival/departure forms (Form I-94W).

[266] *Id.* This provision was amended by P.L. No. 106-406, to provide extended voluntary departure to nonimmigrants who enter under the Visa Waiver Program and require medical treatment. Normally, nonimmigrants entering with a "B" visa may petition to extend their length of stay in the United States or may petition to change to another nonimmigrant or immigrant status.

[267] *Id.*

[268] *Id.*

[269] Sec. 212(a).

[270] 8 U.S.C. sec. 1182(a).

[271] 8 U.S.C. sec. 1182(d)(3).

[272] *See* Department of State, 9 Foreign Affairs Manual, sec. 40.301 n.3.

When applying for a visa

In connection with a visa application, the Attorney General can grant a waiver only upon recommendation of the Secretary of State or the consular officer.[273] The recommendation for waiver must furnish detailed information concerning the grounds of inadmissibility, the date of intended arrival and length of stay in the United States, the purpose of such stay, the number of intended entries, and the justification for the waiver.[274] The consular officer or other Department of State official is notified of the decision on the recommendation. No appeal from an adverse decision is allowed.[275] If the Attorney General grants the waiver, the consular office may proceed with the issuance of the visa, subject to the conditions imposed by the Attorney General.[276]

At the port of entry

If a noncitizen does not require a visa, the procedure differs. The application for exercise of the waiver authority is submitted to the INS district director in charge of the intended port of entry prior to arrival in the United States.[277] The application details the ground for inadmissibility and the basis for the requested waiver. If the application is not made until arrival, the applicant must establish that he or she was not aware of the ground for inadmissibility and could not have learned of it by reasonable diligence.[278]

The applicant receives notice of the INS district director's decision and, if the application is denied, of the reasons and of the right to appeal within 15 days.[279] The denial of the application is without prejudice to its renewal in exclusion proceedings.[280]

Each waiver authorization specifies the sections of law under which the individual is inadmissible, the intended date of each arrival and the length and purposes of each authorized stay, the number of entries and length of time for which the authorization is valid, and the basis

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[273] *See* sec. 212(d)(3)(A) of the INA, 8 U.S.C. sec. 1182(d)(3)(A). The Homeland Security Act transfers immigration functions of both the Attorney General and the Secretary of State to the Department of Homeland Security.

[274] 8 C.F.R. sec. 212.4(a).

[275] *Id.*

[276] 22 C.F.R. sec. 40.301(c).

[277] 8 C.F.R. sec. 212.4(b).

[278] *Id.*

[279] *Id.*

[280] *Id.*

for the waiver approval.[281] An authorization issued in connection with border crossing cards is valid for multiple entries during the period of validity of the card. Multiple entry authorizations (except for crewman and border crossing cards) are valid for one year, except that a longer period of validity may be permitted upon recommendation of the Department of State.[282] A single entry authorization is valid for a maximum of six months.[283] All admissions under such waivers are subject to the terms and conditions set forth in the authorization. Each authorization specifies that it is subject to revocation at any time.[284]

9. Parole

The INS may parole individuals "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[285] A grant of parole is temporary permission to be present in the United States and requires parolees to leave when the conditions supporting their parole cease to exist. Parole does not constitute a formal admission into the country.

In general, the parole authority allows the INS to respond to individual cases that present problems for which no remedies, such as waiver, are available elsewhere in the Immigration and Nationality Act. Since fiscal year 1992, the INS has used six categories of parole:[286]

(1) Port of entry parole.–This category is used most often. It applies to a wide variety of situations and is used at the discretion of the supervisory inspector, usually to allow short periods of entry. Examples include allowing otherwise inadmissible individuals to attend a funeral and permitting the entry of emergency workers, such as fire fighters, to assist with an emergency.

(2) Advance parole.–Advance parole may be issued to individuals legally residing in the United States other than as lawful permanent residents, who need to travel abroad and return, and whose conditions of stay do not allow for routine reentry. The most common example is an individual whose application for adjustment to lawful permanent resident status is in process.

(3) Deferred inspection parole.–This type of parole may be conferred by an INS inspector when noncitizens appear at a port of entry with documentation, but after preliminary examination, some question remains about their admissibility that can

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[281] 8 C.F.R. sec. 212.4(c).

[282] 8 C.F.R. sec. 212.4(c)(7).

[283] *Id.*

[284] 8 C.F.R. sec. 212.4(c)(7) and (h).

[285] 8 U.S.C. sec. 1182(d)(5).

[286] Immigration and Naturalization Service, *Report to Congress: Use of the Attorney General's Parole Authority Under the Immigration and Nationality Act* (September 3, 2002).

best be answered at their point of destination.[287] In the case of deferred inspection, the inspecting officer at the port of entry cannot make a final determination because necessary information is not available. Instead an appointment is made for the noncitizen to appear at a local INS office, where more information is available and the inspection can be completed.

(4) Humanitarian parole.–This category is reserved for individuals who need specialized medical care in the United States or because a severe medical condition makes detention or deportation of an otherwise inadmissible individual inappropriate.

(5) Public interest parole.–Public interest parole is intended for use with noncitizens who enter to take part in legal proceedings, either as witnesses or defendants.

(6) Overseas parole.–Some noncitizens are issued parole overseas after their applications for refugee status have been denied. This is the only category that is designed to constitute long-term admission to the United States. In recent years, most of the individuals INS has processed through overseas parole have arrived under special legislation or international migration agreements.

10. Admission to the United States: arrival and departure records

Form I-94 is an arrival and departure record that serves as evidence of lawful admission and noncitizen registration. If a noncitizen is admitted, one part of Form I-94 is issued to that individual, endorsed with the date and place of admission, the nonimmigrant classification, and the period for which admission is authorized.[288] The other part of Form I-94 is retained for the records of the INS.

The part of Form I-94 designated as "Departure Record" is surrendered to a representative of the transportation company when the individual leaves the United States. The document is then returned to the INS as part of its departure manifest. This record confirms the fact and date of departure.[289]

The requirement that a completed Form I-94 be issued applies to every admitted nonimmigrant with certain exceptions. These exceptions include entries by Canadian citizens and British subjects residing in Canada or Bermuda who are entering the United States as visitors

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[287] From January 1, 2000, through April 30, 2002, 25,114 individuals were paroled for deferred inspection. *See* A-143 (October 8, 2002, letter from the INS).

[288] The period of admission need not correspond to the length of the visa's validity. The passport is also stamped with the word "Admitted" and the date and place of admission.

[289] A nonimmigrant who will be making frequent entries into the United States over its land borders may be issued a Form I-94 valid for multiple entries during a six-month period.

for business or pleasure for less than six months.[290] Under certain circumstances, the exceptions also include Mexican visitors and government officials, and residents of the British Virgin Islands admitted only for a visit to the U.S. Virgin Islands.[291]

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[290] 8 C.F.R. sec. 235.1(f)(i).

[291] *Id.*