The Immigration and Nationality Act Amendments of 1976: Implications for the Alien Professional

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THE IMMIGRATION AND NATIONALITY ACT AMENDMENTS OF 1976: IMPLICATIONS FOR THE ALIEN PROFESSIONAL

I. INTRODUCTION

T HE IMMIGRATION AND NATIONALITY ACT OF 1952 (Act of 1952)\(^1\) was the nation's first comprehensive immigration law. Prior legislation had been disjointed, and did not reflect a unified national objective. The Act of 1952 brought together the viable aspects of existing legislation, while adding new provisions which were intended to remedy apparent defects in the earlier laws.\(^2\) The Act has been amended numerous times since 1952, each amendment attempting to rectify what were considered to be significant problems with the immigration process.\(^3\) The Immigration and Nationality Act Amendments of 1976 (1976 Amendments)\(^4\) is a major attempt by Congress to establish a rational and just immigration policy. These amendments focus upon the inequities created or perpetuated by an earlier revision, the Immigration and Nationality Act Amendments of 1965 (1965 Amendments).\(^5\) Shortly after passage of the 1976 Amendments, Congress enacted the Health Professions Educational Assistance Act of 1976\(^6\) which limits the access of foreign medical school graduates, effectively changing the immigration pattern of health professionals who had previously accounted for twenty percent of the professionals receiving permanent resident status.

Although each major amendment since 1952 has had the positive effect of enhancing broad national policies, the position of the alien professional within the statutory framework has changed with each amendment. The result is that the professional must today comply with more requirements in order to enter the United States for the purpose of employment. The purpose of this Note is to analyze the changes in the immigration laws effected by the 1976 Amendments and the impact of these changes upon the alien professional. The discussion will begin

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2 For a concise summary of the history of immigration law prior to 1952, see S. KANSAS, IMMIGRATION AND NATIONALITY ACT ANNOTATED 1-21 (4th ed. 1953).

3 For a critique of prior immigration laws and some of the more pervasive problems they created or perpetuated, see Gordon, The Need to Modernize Our Immigration Laws, 13 SAN DIEGO L. REV. 1 (1975).


with an analysis of prior legislation, which despite the recent amendments will have continuing impact upon the requirements and procedures of the immigration process.

II. THE IMMIGRATION AND NATIONALITY ACTS — BACKGROUND

A. Immigration and Nationality Act of 1952

Prior to 1952 the entry of aliens from the Eastern Hemisphere was determined according to numerical quotas based upon countries of origin. A system of visa allocation was established in 1921 in which entry was determined by reference to the number of foreign-born persons residing in the United States in 1910. The effect of this provision was to create a numerical ceiling on immigration which controlled the influx of Eastern Hemisphere aliens generally, rather than preventing the entry of individual aliens because of undesirable characteristics as previous legislation had done. The Immigration Act of 1924 continued the basic concept of nationality limitations, though the computation of visa allocations was changed to reflect the number of foreign-born persons residing in the United States in 1920. These basic quota provisions were incorporated into the Immigration and Nationality Act of 1952, which refined the overall quota system for Eastern Hemi-

7 For an overview of the historical background of immigration, see 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDEURE, ch. 1, §§ 1.1-1.5 (1977).
8 Act of May 19, 1921, ch. 8, 42 Stat. 5 (1921) (repealed 1952).
9 Id. The number of visas issued in any given country was limited to three percent of the foreign-born persons of that nationality living in the United States in 1910.
11 There was a generalized fear during World War I that the United States would be inundated by foreigners seeking to relocate. This concern, coupled with economic difficulties in the United States, led to the passage of the Immigration Act of 1917. 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDEURE, ch. 1, § 1.2c (1977). See note 12 infra.
12 Under the Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1921), certain categories of aliens were excluded such as those who were illiterate or were chronic alcoholics. In addition, certain racial groups were excluded such as Indians or particular Chinese. Numerically, any number of aliens could come in as long as they did not fall within one of the exclusions.
13 Act of May 24, 1924, ch. 190, 43 Stat. 153 (repealed 1952). The first quota law was the Act of May 19, 1921, ch. 8, 42 Stat. 5. That Act expired in June, 1922, but was extended for two years by the Act of May 11, 1922, ch. 187, 42 Stat. 542 (repealed 1952).
14 A major concern of Congress was to preserve the existing racial and ethnic proportions of the population of the United States. Consequently, the base year was relatively more important than the determination being based on foreign birth or national origin. As proposed originally, the base year would have been 1890 instead of 1910. If this proposal had been accepted it would have reduced immigration from Southern and Eastern Europe from 44.6 to 15.3 percent. H. R. REP. No. 1365, 82d Cong., 2d Sess. 21, reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1668.
15 The annual quota for each country or quota area was calculated on the basis of a one-sixth of one percent ratio to the number of inhabitants in the United States having the same national origin. 1952 Immigration Act § 201 (current version at 8 U.S.C.A. § 1142 (West Supp. 1977)). The total number of immigrants permitted from each quota area could never be less than 100.
sphere aliens to include certain areas of preferential treatment.

Two major objectives were embodied in the Act of 1952: the admission of highly skilled persons who would contribute to the national economy, and the reunification of families.\textsuperscript{16} Implicit in the legislation was the congressional desire to limit and control the number of aliens entering the United States, while insuring that those aliens who were admitted would benefit the country. One unarticulated objective was an acceptance of an international responsibility for refugees.\textsuperscript{17} The preference categories contained in section 203(a) of the Act of 1952 reflected these goals. Priority was given to workers whose skills were urgently needed, and to other immediate relatives.\textsuperscript{18} Although the implicit and explicit goals were reflected in the preference system, the objectives did not receive equal weight inasmuch as larger percentages of available visas were allocated to some preference groups than to others.\textsuperscript{19}

The Act of 1952 further provided that aliens coming to the United States as non-preference immigrants intending to seek employment would be ineligible for visas if the Secretary of Labor had determined that there were sufficient American workers available, or that American wages and working conditions would be adversely affected by their admission.\textsuperscript{20}

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\textsuperscript{17} This goal has been evident throughout our history although it had never been expressly stated. On occasion, special legislation has been enacted to meet the needs of particular refugee groups. See, e.g., Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009. See generally Note, Refugees Under United States Immigration Law, 24 Cleve. St. L. Rev. 333 (1975). The fact that immigration laws exist indicates that the United States is committed to the admittance of foreign born persons.

\textsuperscript{18} The 1952 Immigration Act allotted visas to quota immigrants in the following proportions: 1) Immigrants whose technical or other skills were urgently needed and whose admission would benefit the United States — 50 percent; 2) Immigrants who were parents of United States citizens — 30 percent; 3) Immigrants who were spouses or children of lawful permanent residents of the United States — 20 percent. Unused visas in one of the above groups could be applied to the lower group(s). This process is referred to as falldown. Any visas remaining after the three preference groups were satisfied were allocated to non-preference immigrants. Within the non-preference group, the first 25 percent of available visas were reserved for brothers, sisters, and children of United States citizens. 1952 Immigration Act § 203(a) (current version at 8 U.S.C.A. § 1153 (West Supp. 1977)).

\textsuperscript{19} The quota percentages under section 203(a) have varied with each amendment. For example, under the 1952 Act, workers were eligible for 50 percent of the visas, while under the 1965 and 1976 Amendments, skilled workers could receive a maximum of 20 percent of the visas. Additionally, workers were subdivided into professional and nonprofessional categories with ten percent allocated to each group. For the current formulation of section 203(a), see note 33 infra. The percentage reduction wrought by the 1965 Amendments indicates that the professional should avail himself of an attorney in order to maximize his opportunities for entry. See notes 129-40 infra and accompanying text.

\textsuperscript{20} Non-preference aliens were subject to the labor certification procedure unless their skills were "needed urgently in the United States because of the high education, techni-
This process, known as labor certification, was applicable to aliens from either hemisphere if they were not included in the preference categories and intended to work in the United States. In practice, non-preference immigrant workers entered the job market without a pre-employment determination as to the effect of their presence on the American labor force. The burden was upon the Secretary of Labor to act affirmatively to exclude an alien, rather than upon the alien to demonstrate that his presence would not dilute American Labor conditions. In most instances alien workers were not affected by the certification provision because the Secretary of Labor had no actual knowledge of particular aliens entering the job market.

By 1965, it was clear that the Act of 1952 was not functioning as desired. Although special legislation had been enacted between 1952 and 1965 to promote the unification of families and to mitigate the harshness of the quota system, the system itself did not provide the flexibility needed to permit the entry of relatives who did not qualify as preference immigrants. Non-preference aliens were eligible to receive only those visas which were not used in any of the 1952 Act's three preference categories. Due to the fact that in some countries only a minimum of 100 visas were available each year, the supply was often exhausted before reaching non-preference applicants. This provision...
was particularly inequitable when an intending alien resided in a country in which visas were available, but could not receive one because he was chargeable to the country of his birth in which there were no remaining visas, many times for years to come. 26

Concomitantly, in the period 1957 to 1965 only fifty-six aliens were excluded on grounds that their entry would have an adverse affect upon the American labor force. 27 The inescapable conclusion which must be drawn, then, is that the labor certification procedure was also deficient to the extent that it was not protecting American workers. An alien who could obtain a preference visa under section 203(a) was reasonably assured of entry, regardless of potential competition in the American labor market. Although aliens from the Western Hemisphere were subject to the labor certification procedure, they generally benefitted under the Act by the ineffectiveness of the certification program, and by exclusion from the quota restrictions applicable only to the Eastern Hemisphere. 28 Eastern Hemisphere aliens, conversely, were disadvantaged by the quota restrictions and the problems with the preference group. 29 In general, it can be said that aliens from both Hemispheres entered the United States in large numbers during this period, though not in relation to the objectives of immigration policy. 30

from higher groups. Falldown has been restricted to the categories concerned with family relationships and not with workers. See notes 129-40 infra and accompanying text.

26 S. KANSAS, IMMIGRATION AND NATIONALITY ACT ANNOTATED 47 (1953). Visas were made available in chronological order according to the date a petition was granted. Often a spouse or child of a lawfully admitted alien could not enter because the 20 percent quota allotment had been used. Senator Eastland argued in the minority report on the 1965 Amendments that there was no reason to overthrow the whole system when only 24 countries had oversubscribed lists. Senators Eastland and McClellan questioned the basic assumptions behind the immigration laws, arguing that the United States should look after its own interests and be less concerned with the equities of the situation. S. REP. No. 748, 89th Cong., 1st Sess. 53-54, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 3328.

27 Rodino, The Impact of Immigration on the American Labor Market, 27 Rutgers L. Rev. 245, 252-253 (1974). Labor certifications under the 1952 Immigration Act were issued for the purpose of exclusion, while under the 1965 and 1976 Amendments they were issued for inclusion. An alien cannot enter the United States today for the purpose of performing labor without a labor certification, while prior to 1965 an alien could not enter with one.

28 The ineffectiveness of the labor certification procedure in the Eastern Hemisphere did not hinder immigration though the legislative intent was frustrated. However, the quota limits on Eastern Hemisphere countries forced many immigrants to wait for a visa through falldown from the preference list.

29 S. REP. No. 748, 89th Cong., 1st Sess. 12-13, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 3330-32. The 1952 Immigration Act did not differentiate the professional from other workers with regard to meeting entry requirements, though subsequent amendments did make a distinction. For the most part, aliens entering under section 203(a)(1) would have been professionals but they did not have to be. Aliens possessing technical skills urgently needed were granted preferred status and did not have to meet professional standards.

30 See Gordon, The Need to Modernize our Immigration Laws, 13 San Diego L. Rev. 1 (1975). The imbalance created between Eastern and Western Hemisphere aliens has been the subject of much discussion and criticism. The 1965 Amendments and the 1976 Amendments have attempted different solutions to this problem. The difficulty has been in obtaining a congressional resolution of the competing interests in favoring our immediate neighbors, Canada and Mexico, and dispensing immigration opportunities equitably throughout the world. The 1952 Immigration Act opted for unlimited im-
B. Immigration and Nationality Act Amendments of 1965

The restrictiveness of the Act of 1952 resulted in the passage of the Immigration and Nationality Act Amendments of 1965. The stated purpose of the Amendments was to place emphasis upon the personal qualities of the immigrants, rather than upon their numbers. This purpose was to be accomplished by the institution of seven preference categories, applicable only to Eastern Hemisphere aliens. These categories were designed to facilitate the previously articulated objectives of immigration policy, the reunification of families and the entry of skilled and unskilled workers whose services were needed. Four of these categories pertained to family relationships, two related to professionals and laborers, and one to refugees. Remaining visas were made available to all other immigrants in the order in which they had applied. Each preference category was restricted to a percentage of immigration from the West, the 1965 Amendments opted for numerical limits but no preferences, while the 1976 Amendments opted for preferences with numerical limits. Gordon is in favor of one world-wide quota with preferences but with higher individual country limits for Canada and Mexico. At this time there is no data available to ascertain whether the provisions of the 1976 Amendments establishing preferences will remove the inequalities which formerly affected the Western Hemisphere. In all likelihood, these difficulties will continue in the Western Hemisphere. In fiscal year 1975, the total number of persons entering from Mexico greatly exceeded the present country limitations. There undoubtedly will be pressure to increase the number of aliens allowed to enter as a goodwill gesture.

The Senate Judiciary Committee noted that more immigrants wanted to enter than could be accepted. The amendment was intended to provide a humane policy of visa allocation which would preserve the individual country allotments and one which would serve the national interest. See notes 34-37 infra and accompanying text. A third purpose was promoted — the acceptance of refugees. Although it received little or no discussion, the creation of the seventh preference group codified the unarticulated goal of American acceptance of responsibility for aliens who have neither family relationships nor labor skills but who may suffer persecution unless permitted to enter. Strictly speaking, this category is not a preference, as it is within the Attorney General's discretion whether to admit the alien.

1965 Immigration Act Amendments § 3 (amending 1952 Immigration Act § 203(a) (current version at 8 U.S.C.A. § 1153(a) (West Supp. 1977))) provided the following visa allocations for Eastern hemisphere immigrants: 1) the unmarried sons or daughters of citizens of the United States — 20 percent; 2) the spouse and unmarried sons or daughters of an alien lawfully admitted for permanent residence — 20 percent; 3) immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States — 10 percent; 4) the married sons or the married daughters of citizens of the United States — 10 percent plus falldown from higher preference groups; 5) the brothers or sisters of citizens of the United States — 24 percent plus falldown from higher preference groups; 6) immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States — 10 percent; 7) persons fleeing religious, racial or political persecution of communist regimes and Middle Eastern nations, and/or victims of natural disasters who are unable to remain
the total number of aliens to be admitted under the total Hemispheric quota. Professionals under the third preference group, for example, were limited to ten percent of the available visas for their hemisphere, rather than to a percentage of the country's quota. For the preference groups which pertained to family relationships, however, any unused visas were to be applied to the next lower preference groups, with remaining visas applied to non-preference immigrants. An annual numerical limit of 170,000 was placed on Eastern Hemisphere immigrants, with a ceiling of 20,000 per country.

Western Hemisphere aliens were not included in the seven preference categories. Section 101(a)(27)(A) as amended in 1965 defined Western Hemisphere aliens as special immigrants who were exempt from the statutory provisions establishing the priority system for visa allocation. The Senate Committee on the Judiciary voiced concern that the Western Hemisphere immigrants would, in effect, receive preferential treatment by virtue of their exclusion from the numerical limitations and preference categories which applied to Eastern Hemisphere aliens, and a Select Commission on Western Hemisphere Immigration was established to study and report to Congress on this problem. Section 21(e) of

in their homeland to rebuild — 6 percent. Visas remaining after the seven preference groups have been satisfied were made available to other qualified immigrants in the chronological order in which they applied. Non-preference immigrants were subject to the labor certification procedure.

For the purposes of this Note, the professional will be discussed as if he were entering the country for the first time. An alien here temporarily may seek to have his status adjusted to that of a permanent resident. Many of the procedures are the same.

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the amending act provided, however, that if Congress took no action by July 1, 1968, the total number of Western Hemisphere immigrants could not exceed 120,000 in any one year. 40 Congress in fact took no action, and the resulting numerical ceiling generated new problems for Western Hemisphere immigrants. 41

To qualify as a professional under the 1965 Amendments, an alien had to establish that he was a member of a profession or that he had exceptional ability in the arts or sciences. 42 This new requirement enhanced the opportunities of the alien professional, 43 and was more in keeping with the legislative intent to benefit "the national economy, cultural interests, or welfare of the United States." 44 Under prior immigration legislation, the alien's professional background was immaterial unless his services were urgently needed. If the professional could not establish this need, he entered as a nonpreference immigrant subject to the availability of sufficient visas for his country. By 1965 the alien professional was recognized as a potential asset to the United States who should be allowed to enter with relative ease. The recognition of professional status was diluted to some extent in that labor certification was required for all aliens intending to perform skilled or unskilled labor. This requirement applied to all third preference professionals and sixth preference skilled and unskilled laborers from the Eastern Hemisphere, as well as to Western Hemisphere aliens who entered seeking employment. 45


41 For a discussion of some of the problems, see notes 48-51 infra and accompanying text.

42 1965 Immigration Act Amendments § 3 (amending 1952 Immigration Act § 203 (a)(3) (current version at 8 U.S.C.A. § 1153(a)(3) (West Supp. 1977))). For an enumeration of the provisions, see note 33 supra. 1952 Immigration Act § 101(a)(32) (codified at 8 U.S.C. § 1101(a)(32) (1970)) defines the term professional "[t]o include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If an alien could not prove his professional qualifications, he could reapply under the sixth preference.

43 Under the 1965 Amendments, an alien could enter the United States, if his professional skills would not impinge on the American market, just because he was a professional. He was given separate, higher status distinct from other workers.


45 1965 Immigration Act Amendments § 10 (amending 1952 Immigration Act § 212(a)(14) (current version at 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977))). The 1965 Amendments excluded aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless labor certification was obtained prior to entry. Labor certification was granted on a finding that there were not sufficient able, willing, qualified workers available at the time of application and in the place to which the alien was destined, and that the employment of such aliens would not adversely affect the wages and working conditions of the workers similarly employed. The labor certification requirements applied to Western Hemisphere immigrants other than family members who were entering the United States to be reunited and to both preference and non-preference immigrant aliens from the Eastern Hemisphere.
The labor certification process was also revised by the 1965 Amendments. The Secretary of Labor was required to certify all workers prior to entry, based on a finding that no American workers were qualified or willing to assume the job and that wages would not be adversely affected. Unlike the worker under the sixth preference, however, the alien professional under the third preference was not required to demonstrate that he was in possession of a job offer to receive certification.

C. Immigration and Nationality Act Amendments of 1976

One of the primary reasons for enactment of the 1976 Amendments was concern over the effect of the lack of preference categories for aliens from the Western Hemisphere. Prior to 1976 these persons received no priority, and were permitted to enter in the order in which their petitions were filed. If no numerical limitations had been applied, the procedure would have worked well. As a compromise measure in the 1965 Amendments, however, an annual quota for Western Hemisphere aliens was instituted in return for the abolition of the national origin system for the Eastern Hemisphere. Many members of Congress had been concerned with the inequitable results flowing from the national origin system in the Eastern Hemisphere, and were willing to allow as a compromise a limitation on Western Hemisphere immigration in order to achieve a new system of preference categories for the East. The effect of this compromise was to create a backlog of applicants from Western Hemisphere countries, since petitions were granted in the order of filing, with no preference or priority given, and there were always more aliens seeking entry than there were available visas. The goal of giving preference to relatives and needed workers was defeated by the absence of a mechanism which would permit their entry out of order. The 1976 Amendments remedy this problem by applying to the Western Hemisphere the seven preference categories established for Eastern Hemisphere aliens under the 1965 Amendments.

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47 29 C.F.R. § 60.5(f)-(g) (1976).

48 The Judiciary Committee of the House of Representatives noted that the ceiling on Western Hemisphere immigration was accepted in return for abolishing the national origins quota system. H.R. REP. No. 94-1553, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6073-74.

49 See note 40 supra and accompanying text.

50 Senator Eastland was against removal of the national origin system. He felt that instead of facilitating immigration, the United States should make it more difficult to enter. S. REP. No. 748, 89th Cong., 1st Sess. 53-54, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 3347-49.

51 By July 1, 1968 there was a waiting period of up to two and one half years for visas in the Western Hemisphere. For example, a daughter of a permanent resident alien from the Western Hemisphere would have to wait her turn in line, while the daughter of a permanent resident alien from the Eastern Hemisphere would receive priority. American Council for Nationalities Service, Interpreter Releases 377-78 (Nov. 15, 1978).

52 1976 Immigration Act Amendments § 2 (amending 1952 Immigration Act § 201
Also included in the 1976 Amendments is a provision requiring all professionals qualifying for third preference status under section 203(a)(3) to have received an offer of employment prior to entry. The labor certification provision now specifies that the job offer requirement is applicable even though an alien is determined to be a professional by the Immigration and Naturalization Service and is eligible for priority.\(^5\) Though under the 1965 Amendments all aliens entering for the purpose of employment had been subjected to certification by the Secretary of Labor based upon a finding that American workers would not be adversely affected, third preference professionals had been distinguished from sixth preference skilled and unskilled workers in that only the latter were subjected to the job offer requirement. This distinction has been abolished by the 1976 Amendments.

The imposition of the job offer requirement upon all intending workers under the 1976 Amendments was a response to the depressed employment situation in the United States.\(^4\) The effect upon the alien professional will be far reaching, however, and will influence the way in which he will approach the immigration process.

III. PROFESSIONS AND PROFESSIONALS

A. Third Preference Classification

To qualify for a visa as a third preference alien under the 1976 Amendments,\(^5\) a professional from either hemisphere must comply with two independent requirements: establishment of professional credentials, and a job offer with labor certification.\(^6\) Although both de-
terminations must be made independently, they are usually made concurrently.\textsuperscript{57} The Immigration and Naturalization Service, with the advice of the Secretary of Labor, must ascertain the alien's professional standing, while the Secretary of Labor must determine the alien's eligibility for labor certification.\textsuperscript{58} When these separate determinations are made, a visa will be issued by the United States consulate in the alien's native country.

The definition of "professional" in the Act is illustrative rather than descriptive, and the 1976 Amendments provide no further clarification of qualitative standards to guide in the determination of professional status. Under section 204(a) the procedure to be followed involves the filing of a petition with the Attorney General, who must then investigate the facts and determine eligibility in consultation, if necessary, with the Secretary of Labor.\textsuperscript{59} The 1976 Amendments do not specify how this determination is to be made. A close reading of section 204(a) reveals that the Attorney General may require whatever documentation he deems necessary. Further, he is granted discretion under section 204(b)\textsuperscript{60} to "de-
termine that the facts stated in the case are true and that the alien . . . is eligible for a preference status." The exercise of this discretion by the Attorney General in the absence of statutory standards has necessitated the development of criteria outside the explicit language of the Act to aid in the assessment of facts in individual cases. These criteria include educational and work experience, and the qualification of the occupation as a profession.

To aid in the determination of eligibility, an intending immigrant must provide documentary evidence of his qualifications in addition to those documents required by the consular office. The alien must submit school records, a license or other official permission to practice his profession, affidavits supporting his work experience claims, and copies of material published. In the event such documentation is unavailable, the requirement may be waived. The burden is upon the alien, however, to show through any other supporting documents that he is nonetheless eligible for preference as a member of a profession. Petitions for preference are processed immediately upon receipt of documentation.

B. Establishment and Application of Administrative Criteria

The Immigration and Naturalization Service in concert with the Attorney General has, over time, formulated various criteria for determination of third preference eligibility, though no formal guidelines have been established. The Immigration and Naturalization Service has chosen not to exercise its rulemaking authority in this area. It has, instead, relied on a case by case approach to determine professional standing. Although this administrative practice may reduce the predictability of obtaining professional status for any one individual alien, there is more flexibility possible, in general, in that allowances can be made for the unique attributes of an alien, particularly in situations in which an alien's credentials are unusual. Each reviewing officer in the Immigration and Naturalization Service must rely on his own discretion

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61 See notes 68-96 infra and accompanying text.
62 See 1965 Immigration Act Amendments § 11(c) (amending 1952 Immigration Act § 222(b) (codified as amended at 8 U.S.C. § 1202 (1970))). Subsection (b) of this section has remained the same since the Act of 1952. Documentation to be provided to the consular office includes a valid passport, a certificate from the police department showing its records, military and birth records. The documentation requirements are codified at 22 C.F.R. § 42.111 (1976).
63 8 C.F.R. § 204.2 (1976) and Immigration and Naturalization Service Form I-140 (Rev. 1-10-77).
64 If possession of a college degree was the sole factor in the determination, there would be few problems. The area, however, cannot be so easily categorized. A college degree can be dispensed with in certain circumstances. See notes 73-79 infra and accompanying text.
65 An aggrieved party may challenge the reviewing officer's decision. The Immigration
buttressed by previous administrative decisions. The administrative case law that has developed clearly indicates some of the criteria which have emerged. The principal factors in the determination are whether the alien's occupation qualifies as a profession, and whether the alien's educational background is commensurate with that required for the pursuit of a profession in this country.

In the case of In re Shin, the District Director decided that Shin's petition for third preference classification should be approved on the basis of his education and the categorization of his occupation as a profession. Shin, a thirty-one year old Korean citizen, held a Master's degree from the University of Illinois and had been employed in Illinois as a financial economist. The Department of Labor had issued a labor certification which indicated that there was an insufficient number of financial economists in the United States, and that wages and conditions of American workers similarly employed would not be affected.

The District Director determined that the definition of profession in section 101(a)(32) included occupations which had a common characteristic. "That common denominator is the fact that all require specialized training that is normally attained through high education of a type for which at least a Bachelor's degree can be obtained, or through equivalent specialized instruction and experience in lieu thereof." The District Director further noted that a degree or equivalent experience would not be sufficient if it did not provide access to the alien's intended profession. Relying upon the Dictionary of Occupational Titles, the Immigration and Naturalization Service provides internal checks on the officers to control the parameters of discretion. The degree of supervision is determined in part by the size of the immigration office. For example, an officer in New York may not be as closely supervised as one in Cleveland because of manpower constraints. Interview with Immigration Officer in Cleveland, Ohio (April 15, 1977).

The judiciary has limited itself in its review to situations in which the Immigration and Naturalization Service has clearly abused its discretion in reaching a conclusion in the case based on the facts presented. In Wong Wing Hang v. INS, 360 F.2d 715 (2d Cir. 1966), Judge Friendly stated that abuses of discretion fall into one of two groups: clear errors of judgment or unreasonable acts. In Guinto v. District Director, 303 F. Supp. 1094, 1097 (C.D. Cal. 1969), aff'd sub nom., Guinto v. Rosenberg, 446 F.2d 11 (9th Cir. 1971), Judge Hill applied the criteria established in Wong, finding that the Immigration and Naturalization Service had abused its discretion in both instances in denying petitioner Guinto's application for third preference status. Judge Hill noted that Guinto's documents indicated that he had an education equivalent to a baccalaureate degree and 18 years of experience as a teacher in the Philippine Islands. The Regional Commissioner had equated petitioner's educational level with that of a high school graduate. For an analysis of abuse of discretion, see generally Roberts, The Exercise of Administrative Discretion Under the Immigration Laws, 13 SAN DIEGO L. REV. 144 (1975). In Pizarro v. District Director, 415 F.2d 480, 482 (9th Cir. 1969), the court applied the administrative criteria to the relevant facts and determined that "there existed a rational basis for the order of the appellee and that the determination was supported by substantial evidence."

The Dictionary of Occupational Titles defines occupations and presents a general summary of the functions performed in the occupation. It also lists the minimum educational requirements for the occupation. The Immigration and Naturalization Service frequently utilizes it in making determinations for professional eligibility. For a summary of the use of the Dictionary, see Rubin & Mancini, An Overview of the Labor Certification Requirements for Intending Immigrants, 14 SAN DIEGO L. REV. 76, 89-91 (1976).
rector determined that the profession of “financial economy” required specialized knowledge, and education beyond a Bachelor’s degree, prior to entry into the field. Because the petitioner had already been employed as a financial economist and possessed a Master’s degree, he was granted third preference status as a professional.

The Director in Shin used a two-step determination: whether the occupation was a profession, and whether the petitioner met the qualifications established for that profession. A reading of section 101(a)(32) in conjunction with section 203(a)(3) indicates that these two separate evaluations must be made. Under the Shin analysis, an alien with a Bachelor’s degree in recognized profession may nonetheless be denied preference as a professional if the pursuit of the profession in this country is found to require a Master’s degree.

In re RaiagopalaMenon is illustrative of this point. Rajagopala-Menon had been granted Bachelor of Science and Master’s degrees in anthropology in India, and had taken advanced courses toward a Ph.D. in that country but received no further degree. He had also taken courses toward a Master’s degree in the United States, but no degree had been awarded. The District Director, in consultation with the Department of Health, Education, and Welfare, determined that the petitioner held the equivalent of a bachelor’s degree in anthropology. Though it was not disputed that anthropology is a profession in this country, the District Director denied petitioner’s request for professional preference because a Master’s degree is generally considered to be a minimum requirement for entry into that profession.

Both the Shin and RaiagopalaMenon decisions indicate that the Immigration and Nationalization Service will look to determine whether a professional’s training will result in his participation in a profession at a sophisticated level of competency. The Immigration and Naturalization Service has recognized that acquisition of a college degree is not the only route to qualification as a professional, however, since “congruence is also taken of the fact that an individual may be accorded recognition as a member of a particular profession where he may lack the requisite high education but has special training and extensive practical experience in such work.”

Experience in lieu of education requires a higher degree of discretion by the certifying officer than other criteria established for professional status. There are no minimum degree requirements. There are no well-defined work experiences which will translate into a substitution for a baccalaureate or master’s degree. Consequently, the certifying


72 Credit or degrees received from foreign universities must be evaluated to determine if the academic requirements meet standards which are comparable to the requirements of American universities. If the alien’s background is deficient by American standards, he will not be able to function adequately in his profession in the United States. The Immigration and Naturalization Service can and frequently does seek consultation with other government departments in assessing qualifications, though the final determination rests with the Immigration and Naturalization Service.

officer does not start his investigation with tools such as the *Dictionary of Occupational Titles* to assess the alien’s qualifications.  

In the case of *In re Bienkowski,* the petitioner applied for a third preference visa as a professional based on his employment experience. Although he had not earned a degree, the Immigration and Naturalization Service granted him professional status as a marketing economist based on the combination of his educational background and extensive experience. Petitioner had attended a university in Scotland for three years and had taken various work-related courses at other times. His work experiences were in the area of marketing, and, at the time of the petition, he held a position as chief economist for a Canadian corporation. In an advisory opinion the Secretary of Labor indicated that the petitioner was qualified as a member of the profession.

The clearly superior nature of the petitioner’s work experience was likewise found to overcome deficiencies in formal education in *In re Yaakov.* The petitioner in *Yaakov* had three and one-half years of higher education, and twelve years experience as a librarian. As in *Bienkowski,* this previous experience related directly to her intended profession in the United States. In approving the petition, the Regional Commissioner noted that “[i]t is fairly obvious that she has now, after twelve years of work experience, reached a level of competence which is at least equal to that which a person would acquire after the usual period of formal education.”

Application for professional status in the absence of formal education may not always meet with the success of *Bienkowski* and *Yaakov,* however. The decisions in both cases relied heavily upon the extensive experience of the petitioners at high levels in their respective fields, supported by documentary evidence from other professionals who had served as colleagues or supervisors of the petitioners. In the absence of such documentation, or in cases in which the petitioner’s educational level falls below the recognized minimum, the attitude of immigration officers may be more restrictive.

The determination of professional status through education or work experience, or both, was seen as sufficiently beneficial to the national

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75 1952 Immigration Act § 204(b) (codified at 8 U.S.C. § 1154(b) (1970)) authorizes the Attorney General to seek advice from the Secretary of Labor as to an alien’s qualifications. The Labor Department is more apt to be able to evaluate the quality of the experiences in light of how employers expect professionals to perform because it has more interaction with employers than the Immigration and Naturalization Service. This is particularly true when the decision calls for evaluation of the alien’s experience in lieu of formal education.


77 Id. at 205.

78 In *Yaakov,* the Regional Commissioner cited *Bienkowski* with approval indicating that the fact situations were analogous. *See also* Guinto v. District Director, 303 F. Supp. 1094 (C.D. Cal. 1969), aff’d *sub nom.* Guinto v. Rosenberg, 446 F.2d 11 (9th Cir. 1970). The court in Guinto found an abuse of discretion by the Immigration and Naturalization Service in failing to grant petitioner’s claim for third preference status as a member of the teaching profession. Petitioner had extensive academic credit, but no actual degree. He had worked for 18 years as a teacher in the Philippine Islands.
interest to be continued under the 1976 Amendments. The granting of petitions for preference on a case-by-case basis as reflected in the decisions may not fully implement the intended purpose of the professional preference, however, since aliens admitted under any standards may under-utilize their talents through the failure to obtain employment on a sophisticated professional level.

A more realistic appraisal of an alien's prospective contribution to the economy should result from the 1976 amendment to section 203(a)(3) which provides that as a prerequisite to obtaining preference status a professional's services are actively being sought by an employer. Since the job offer requirement is included in the preference section of the Act, rather than in the labor certification procedure, it is arguable that the Immigration and Naturalization Service must now determine that the alien's actual employment will in fact require a professional level of expertise. If the alien intends to be employed in a capacity in which he will under-utilize his professional knowledge, there is clear evidence that he will not act in a professional capacity, and consequently will not benefit the national economy.

The converse of this proposition is also valid. In Rajagopola Menon the petitioner was denied third preference status, though he possessed a bachelor's degree in a profession, because the Dictionary of Occupational Titles listed an advanced degree as a minimum prerequisite. If the petitioner had been able to demonstrate that an employer was seeking his professional services, as he would be required to do under the 1976 Amendments, he could have been granted preference despite the lack of an advanced degree. In such a situation it is more realistic to evaluate an alien's professional standing in terms of the functions he will perform, rather than using abstract criteria of education and experience which are sometimes difficult to apply.

Although the requirement of a job offer for the professional should eliminate the need to determine whether the alien intends to engage in his profession, the alien's ability to perform in the profession, regard-


81 It is arguable that if the job offer investigation was left to the Secretary of Labor, he could determine the state of the job market but would not be able to ascertain whether the job would be suitable for the professional. That decision would call for a determination of requisite professional qualifications which is the responsibility of the Attorney General.

82 This is not to say that the alien would not be providing a valuable service for the United States; it is merely recognizing that the purpose of the third preference category is to allow the United States to receive the benefits of the professional's contributions as a professional.


84 An alien qualified as a professional is not a professional for purposes of third preference status unless he actually utilizes his professional skill in his employment. Prior to the 1976 Amendments, the Immigration and Naturalization Service looked to
less of whether he meets the educational qualifications, is still important. In the case of In re Medina, the Regional Commissioner interpreted section 203(a)(3) to deny the petitioner’s claim for third preference classification, stating that “it is clear that Congress intended such members of the profession to be so qualified at the time the petition is filed.”

In interpreting this criterion, the Commissioner determined that Medina, who held a bachelor’s degree in accounting, was not eligible for third preference status because she had been employed as a personnel clerk not as a professional accountant. In Diaz v. District Director the Ninth Circuit Court of Appeals, noting the decision in Medina, implicitly agreed with this criterion. The Regional Commissioner had determined that Diaz, who had not practiced his profession since graduating with a Bachelor of Science degree in accounting, was not qualified as a professional. The court found that the Commissioner’s decision “was supported by substantial evidence.”

The rationale used in Medina and by implication in Diaz can lead to an incongruous result. Both cases seem to indicate that if a professional has recently graduated, but has no experience, his potential contribution will be preferred over a professional whose experience may not be directly related to his profession, or whose skills have been unused. A penalty is thus imposed for unrelated experience. This criterion can be valid if it is not applied dogmatically. While the third preference category for professionals was incorporated into the 1965 Amendments

the alien’s intent to engage in his profession as evidence of eligibility for third preference status. The intent was determined after the alien was in the United States for a period of time, thus taking into account the alien’s actual employment.

In the case of In re Ortega, the Immigration and Naturalization Service Board excluded the petitioner who had received third preference status because he was employed in a position that did not require his professional knowledge in animal husbandry. The Board stated that petitioner had no intention nor reasonable prospects of finding employment in his professional capacity. In the case of In re Ulanday, the petitioner, an attorney in the Philippines who was not engaged in her profession, was not excluded because she had evidenced her intent to practice law as soon as she was able to meet the licensing requirements. The fact that the petitioner had prior experience as a lawyer was taken as a manifestation of her intention to practice law in the United States. The petitioner in Ortega had never practiced his profession while in his native country. Although it is arguable that these decisions go to the issue of labor certification rather than professional standing, the 1976 Amendments requiring professionals to have a valid job offer have nullified their importance since they were based on the aliens’ activities after entry. Under the 1976 Amendments the Immigration and Naturalization Service will not have to resort to intent to practice because the professional must have a job. The determination as to professional status, however, must be made independently from the decision to grant labor certification. See Orcales v. District Director, 431 F.2d 817 (9th Cir. 1970).

86 Id. at 507 (emphasis in original). In the case of In re Katigbak, Interim Dec. No. 2125 (1971), the Regional Commissioner interpreted “at the time the petition is filed” to mean that an alien must have acquired his educational experience before seeking third preference status. Although the cases seem to be in conflict, both decisions hinge on the level of the alien’s credentials at the time petition is filed. The petitioning alien must be able to establish that he has the requisite education, and if he does, that he has utilized the skills he gained from his education.

87 468 F.2d 1207 (9th Cir. 1972).
88 See id. at 1208 (quoting Pizarro v. District Director, 415 F.2d 480, 482 (9th Cir. 1969)).
in order to benefit the American society and economy, a determination that an alien's professional skills have not been utilized in the past does not necessarily indicate that his skills would not be of benefit to the United States, nor does it indicate that his skills could not be used at the present time. Whether a professional's skills have become obsolete should be determined by reference to factors which emphasize a current ability to apply those skills, rather than upon whether the skills have been utilized in the past. While there is little likelihood that an alien who has not practiced his profession for some time will be able to demonstrate expertise, the alien should nonetheless be given an opportunity to demonstrate his qualifications. With the added requirement of a job offer under the 1976 Amendments, determinations of professional competence will sometimes have to be made in cases in which an employer is willing to hire an alien with no recent experience in his chosen field. Despite its probative value, the employer's opinion of the alien's competency should not determine conclusively whether an alien is a professional and able to function as a professional for purposes of the Act.

In Butterfield v. Attorney General, the district court refused to take into consideration the petitioner's previous business experience, thus reversing the Immigration and Naturalization Service. In her application for professional preference, Butterfield listed her occupation as "President-Director Educational and Cultural Organization," but she identified her profession as teaching. The basis of the Immigration and Naturalization Service's determination that appellant was not a qualified professional rested upon her testimony that she had previously been engaged in setting up cultural foundations in London and Rome which were financially unstable, and that she had never operated a school. In granting her a third preference visa, the district court held that "Congress did not intend that a third preference visa applicant needed to do more than to show a status as a qualified member of a profession — a status which the government concedes to appellant." The court equated professional status with educational qualification, ignoring the aspect of capability to perform as a professional. The court reached this conclusion by noting that it was not Congress' intent under the 1965 Amendments to require a third preference applicant to have received an offer of employment in order to qualify as a professional. Although


91 See notes 67-73 supra and accompanying text.

92 Id. at 879.

93 The Court quoted from To Amend the Immigration & Nationality Act: Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Judiciary Comm., 89th Cong., 1st Sess. 126 (1965) (statement of Kevin Butler). Butler pointed out that the lack of job offer
this analysis reflected an accurate application of the statutory provision in force at the time, the court’s focus upon the job offer requirement obfuscated the primary issue of whether the appellant’s past experience would influence her ability to function in a professional capacity.

The Medina and Butterfield decisions reflect differing focal points in the determination of professional status. The court in Butterfield found mere educational preparation to be sufficient and refused to look beyond the overt qualifications of the appellant. Educational background is the first factor which must be evaluated. Simply because an alien possesses the requisite skills, however, does not mean that he is guaranteed success in his profession. Unless the alien is able to gain access to the profession upon entry into the United States, his education will be under-utilized, and the purpose of third preference status thwarted.

The qualifications for professional status, then, must include the ability to perform in a professional capacity. This was the thrust of the Medina decision, which recognized that the deterioration of professional skills may have significant impact upon performance. The Medina decision applied too inflexible a standard, however, in that the absence of previous or recent employment in a profession may not always reflect an inability to perform.

A better approach to professional qualification, and one more closely consistent with the purposes of the Act, was that applied in Shin. The District Director in Shin looked to both educational prerequisites and past experience, with focus upon whether the alien’s professional qualifications would more likely than not result in his participation in a profession at a sophisticated level of competency. This approach, it is suggested, reflects the appropriate emphasis. If the alien can demonstrate that his skills are sufficient to meet the demands of his profession, preference status should be granted regardless of when those skills were

requirements for professionals was not a cause for concern on the part of Congress or organized labor. Under the 1965 Amendments it was sufficient to show that one had the status of a professional.

94 It is interesting to note that each decision was justified by reference to a different section of the 1965 Amendments. Medina interpreted section 203(a)(3), while Butterfield concentrated on section 212(a)(14). If both decisions had focused on section 203(a)(3), which was the relevant section for determination of professional status, the decision in Butterfield might well have been the same as Medina. In addition, the concept of qualification would probably have been more clearly delineated because the court could have focused on intent to practice one’s profession. See note 84 supra.

95 Success is defined in this context to mean that an alien will be able to compete with his peer group, other members of the profession, with an equal degree of proficiency.

96 Although not articulated in Medina, the decision reflected a determination of retrospective intent — whether or not the alien in not practicing his profession in the past ever intended to practice it in the future. If the decisions in future cases focus on potential for performance, the issue of intent will not arise. The amendment has not negated this approach; it has only negated the prospective intent of the alien after entry. However, whenever intent is brought into the decision, there is a danger that it will be erroneously applied so that the job offer becomes the issue rather than the professional status.
acquired. If the alien cannot demonstrate that his skills will be applied in a professional setting, however, preference status should be denied.

IV. LABOR CERTIFICATION

A. The Labor Certification Process

The 1976 Amendments were enacted primarily to bring the Western Hemisphere under the same preference system established earlier for the Eastern Hemisphere. An ancillary consideration was the labor certification procedure for professionals. Under amended section 203(a)(3), the services of the professional must be sought by an employer in the United States. In addition to the requirement of a job offer, the amendments provide that the Secretary of Labor must certify that there are not sufficient American workers who are able, qualified, and willing at the time of application and the place of intended employment.

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98 "The purpose of this bill is to eliminate the inequalities in existing law regarding the admission of immigrants from countries in the Western Hemisphere." H.R. Rep. No. 94-1553, 94th Cong., 2d Sess. 10, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 6514.

99 Former Secretary of Labor Willard Wirtz, testifying before the Senate Subcommittee on Immigration and Nationality in 1965, stated: "I think we are going to find that there will be about 11,000 professional and technical people coming into this country... we are playing with small numbers as far as the present bill is concerned." Proposed Amendments to the Immigration & Nationality Act: Hearings on S. 500 Before the Subcomm. on Immigration and Naturalization of the Senate Judiciary Comm., 89th Cong., 1st Sess. 101 (1965) (statement of Willard Wirtz). Kevin Butler of the AFL-CIO, testifying before the same committee, stated that "[s]o far as professionals are concerned, scientists, teachers, we find little problem [in the fact that they are not required to have a job offer]." Id. at 644 (statement of Kevin Butler). By the time the 1976 Amendments were passed, Congress had begun to react to the depressed state of the economy and to the high unemployment rate of professionals. Its response was to tighten the restrictions on alien professionals to protect the jobs of American workers. According to the Immigration and Naturalization Service, 8,363 professionals received third preference status in 1975. [1975] IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REP. 45. In the Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 2(c), 90 Stat. 2243 (codified at 8 U.S.C.A. § 1101 (West Supp. 1977)), enacted shortly before the Immigration and Nationality Act Amendments of 1976, Congress stated that there was no longer a shortage of physicians in the United States. The legislative history of this Act indicates that Congress determined that there were too many foreign medical graduates practicing in the United States whose only contribution was to a "deterioration in the quality of care that Americans receive". H.R. Rep. No. 94-226, 94th Cong., 2d Sess. 47, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 4989. The passage of this Act with its specific amendment of the Immigration and Nationality Act may reflect the mood of Congress in dealing with alien professionals. In 1975 there were 2,270 physicians granted third preference status, 27 percent of all professionals in general. [1975] IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REP. 45. It is easy to see that this amendment will have a significant impact on the immigration patterns of professionals.


101 1976 Immigration Act Amendments § 5 (amending 1952 Immigration Act § 212(a)(14) (codified at 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977))). See note 53 supra. As indicated in the text of section 212(a)(14), in the case of members of the teaching profession or those with exceptional ability in the arts and sciences, the Secretary must certify that there are not other Americans equally qualified. This is a different standard designed to increase the number of such persons entering. H.R. Rep. No. 94-1553, 94th Cong. 11, reprinted in [1985] U.S. CODE CONG. & AD. NEWS 6515.
An alien attempting to enter as a professional under the 1965 Amendments was confronted with an array of decisions, all of which had direct bearing on the likelihood of success. He would have had to consider not only whether his credentials as a professional were adequate to qualify for preference, but also in which geographic location he wished to reside. Labor certificates for professionals were issued by the Secretary of Labor. To aid in the processing of certifications, the Department of Labor issued two schedules. Schedule A listed those occupations in short supply. Schedule B listed those occupations which were over-supplied and he was automatically excluded. A professional whose occupation was included in Schedule A would receive certification. If his occupation was not listed on either schedule, however, he would have to proceed with the certification process. The professional, in applying for certification, was required to specify the geographic location in which he intended to locate. If his occupation did not appear on either schedule, the Secretary of Labor would have to determine whether there were sufficient American workers and whether wages would be adversely affected in that profession in the designated geographic location.

Because the alien professional did not have to demonstrate that he had received a valid job offer, he was afforded a degree of flexibility not available to a sixth preference skilled or unskilled worker whose preference was predicated upon an employer seeking his services. A professional could choose to locate at least temporarily in an area of the country in which he would be assured of labor certification due to the high

102 An alien professional faced with the decision of how to approach the entry procedure would be well-advised to first consider whether he is eligible for admission on another basis such as an immediate relative. Only twelve to fifteen percent of the immigrants entering annually receive labor certification which is required under section 203(a)(3) and (b). Western Hemisphere Immigration: Hearings on H.R. 981 Before the Subcomm. on Immigration of the House Comm. of the Judiciary, 94th Cong., 1st Sess. 231 (1973) (statement of Robert Brown). The determination of alternatives in terms of preference previously applied only to Eastern Hemisphere aliens although labor certification requirements applied to aliens from either hemisphere who were entering for the purpose of employment.

103 The Secretary of Labor delegated his responsibility for the certification program to the Assistant Secretary of Labor for Manpower. This responsibility was further delegated to the Regional Manpower Administrators in each of the ten labor department districts.

104 29 C.F.R. § 60.7 (1976). The scope of this paper is limited to the process of immigration as applied to the professional. For analysis of the labor certification program, see Rodino, The Impact of Immigration on the American Labor Market, 27 RUTGERS L. REV. 245 (1974); Rubin & Mancini, An Overview of the Labor Certification Requirement for Intending Immigrants, 14 SAN DIEGO L. REV. 76 (1976); Zengerle, REPORT IN SUPPORT OF RECOMMENDATION 73-2 PROCEDURAL DEFICIENCIES IN LABOR CERTIFICATION OF IMMIGRANT ALIENS, ADMIN. CONF. OF THE UNITED STATES 129 (1973). For a synopsis of recent decision on labor certification, see American Council for Nationalities Services, Interpreter Releases 44 (Feb. 9, 1976).

105 29 C.F.R. § 60.7 (1976) listed Schedule A exempted professions. The Schedule is revised periodically in response to the changing labor situation. Those professions on Schedule A have generally been in the health professions and religious professions. See notes 115-119 infra and accompanying text.

106 29 C.F.R. § 60.3(b)-(c) (1976).

107 Western Hemisphere Immigration: Hearings on H.R. 981 Before the Subcomm. on Immigration of the House Comm. of the Judiciary, 94th Cong., 1st Sess. 189 (1973)
demand for professionals with his skills. The alien was then free to relocate anywhere in the country, at least partially defeating the goal of the labor certification process — protection of American workers.

Under the 1976 Amendments, the professional's options have been limited in that he is required to have obtained an offer of employment in order to qualify for preference status, in a geographic location in which his skills are needed. This will place a burden upon alien professionals similar to that encountered by skilled or unskilled workers, who have been subject to the job offer requirement since the 1965 Amendments. According to the Immigration and Naturalization Service, sixth preference aliens have most often obtained job offers through friends or relatives, business associates, or advertisements in trade journals. Professionals, in comparison, have, in the past, placed little reliance upon public or private sources, commonly contacting potential employers after entry into the country. Due to the ease of entry under prior law, it is been posited, alien professionals have not developed the structure or “ethnic grapevine” relied upon by other workers. It may be assumed that this structure will develop over time, but initially, at least, the professional may be at a disadvantage.

The job offer requirement will also reduce the professional's flexibility in choosing a geographic location in which insufficient American workers are available. Potential employers may be unwilling to extend the necessary job offers sight unseen, even to professionals with high levels of skills. They may be reluctant to hold a job open while an alien complies with state licensing requirements. Most important for the professional, an

(statement of Jack Wasserman). For example, an alien would be advised not to locate in the Boston area since labor certificates were rarely issued there.

10 For example, a chemical engineer would be most successful if he were to locate in the southwest or southeast regions since a substantial number of the oil and chemical industries are located there.


The Act did not provide any mechanism for control of aliens after entry either in terms of occupation or employment. The 1976 Amendments have not changed this. See Western Hemisphere Immigration: Hearings on H.R. 981 Before the Subcomm. on Immigration of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. 160-161 (1975) (statement of Kenneth Meiklejohn): Immigrants and the American Labor Market, 21 MANPOWER RESEARCH MONOGRAPH 39-40, 74-76 (1974). If there were restrictions on mobility of aliens after entry, constitutional issues of indentured servitude would be raised.


114 The term “ethnic grapevine” refers to the informal but pervasive communications network by which permanent resident aliens assist other aliens by giving them leads on jobs. Previously, professionals did not need this help to the same extent as non-professionals because they had the opportunity to recruit personally after they had been admitted.

115 The converse of this proposition is also true. Where there is a shortage of qualified
opportunity may exist in a labor market in which his skills are in short supply. In this respect, an alien would be well advised to differentiate his skills from others in his profession in order to expand his range of opportunities.\textsuperscript{115}

To implement the provisions of the 1976 Amendments, the Department of Labor has issued new regulations which place the burden on employers to document their inability to obtain qualified American workers.\textsuperscript{116} The employer must specify the job requirements and the efforts made to secure domestic workers. If attempts to employ a citizen or permanent resident are unsuccessful, the employer must then recruit through the state employment service system. If no qualified worker is found within thirty days, the information will be forwarded to the regional certifying officer\textsuperscript{117} who will certify the alien.

This heavy burden on prospective employers of aliens was foreseen in \textit{Pesikoff v. Secretary of Labor},\textsuperscript{118} in which the court upheld the denial of a labor certificate for an alien applying as a live-in maid on the grounds that there were sufficient American domestic workers available. The putative employer, Pesikoff, argued that the Labor Department did not present sufficient evidence to permit the court to reach this conclusion. In its interpretation of the 1965 legislation, the court stressed that the statute had established a presumption against aliens entering for the purpose of employment. Because of the presumption, once the Secretary of Labor determined that American live-in maids were available the burden shifted to the alien to overcome this assertion.

In \textit{Digilab, Inc. v. Secretary of Labor},\textsuperscript{119} however, the court chose not to follow the approach of the \textit{Pesikoff} court. In light of the fact that the Department of Labor was the group which would most likely have the available information,\textsuperscript{120} the court felt that it was unreason-

\textsuperscript{115} For a discussion of employer job requirements, see Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974) (employer could specify that an employee possesses particular skills which cannot be disregarded by the Secretary of Labor); Yusuf v. Regional Manpower Adm'n, 390 F. Supp. 292 (W.D. Va. 1975) (the Secretary of Labor must be able to demonstrate that there are available workers that could perform the job petitioner was seeking).

\textsuperscript{116} 41 Fed. Reg. 48,938 (1976) (to be codified at 20 C.F.R. § 656). The Department of Labor noted that Congress intended that employers detail the efforts used to recruit American workers, and specifically stated that this was not an unreasonable burden. It is clear that Congress' extension of the job offer requirement to professionals was intended to control the influx of third preference professionals. What is not clear is how much of this burden should be borne by the employer and how much by the Department of Labor. See notes 118-21 infra and accompanying text.


\textsuperscript{119} 495 F.2d 323 (1st Cir. 1974), cert. denied, 419 U.S. 840 (1975).

\textsuperscript{120} There is a split between those courts following \textit{Pesikoff} and Yusuf v. Regional Manpower Adm'n, 390 F. Supp. 292 (W.D. Va. 1975), and those following \textit{Digilab} and Bitang v. Regional Manpower Adm'n, 351 F. Supp. 1342 (N.D. Ill. 1972), with the \textit{Digilab} rationale in the probable majority.
able to require the alien or the employer to document the need for the alien's services. Digilab, Inc. had filed an application for a labor certificate on behalf of Ferla, a recently graduated electrical engineer, who had worked as a summer employee for the company. The application was denied by the Labor Department on the grounds that there were sufficient electrical engineers available, even though documentation had been submitted indicating the highly specific skills of Ferla and the requirements of Digilab, Inc. The court stated that once the company had documented its specific needs, the burden shifted to the Secretary of Labor to show that workers with the proper background were in fact available.121

The effect of current Labor Department regulations is to place the burden upon the employer and the alien, precisely where the Pesikoff court determined it should be. By the terms of the regulations, the Department of Labor has placed most of the responsibility for determining the sufficiency of American workers on the employer. The regulations force the employer to document his efforts extensively; he must at each step justify the reasons why particular American workers will not meet his requirements.122

This method of determining the availability of American workers, though more burdensome to the employer, has the effect of providing a more accurate indication of the status of the labor market and the need for alien professionals. Under this approach, it is unlikely that a decision by the Labor Department not to issue a certificate would ever be challenged. If the employer complies with the procedure established by the Department of Labor, and an American worker is found, there would exist concrete justification for the withholding of the labor certificate, and the employer in the typical situation would be satisfied because his vacant position had been filled. The purpose behind the labor certification requirement would thus have been accomplished. If a suitable American worker cannot be found, it is unlikely that the Labor Department would refuse certification of the potential alien employee except in circumstances in which it was challenging the employer's rejection of American workers.123

The burden placed on the employer may prove to be too great, however. Unless an employer is committed to a practice of hiring alien professionals, he may be reluctant to extend a job offer to an alien be-

121 Circuit Judge MacKinnon, dissenting in Pesikoff, argued for this interpretation because he felt that Congress was concerned with the actual employment situation not just the theoretical problem. If the Secretary had estimated figures for workers who were available and the employer is unable to find actual workers, the burden should be on the government. The employer's only concern is with actual workers — theoretical ones will not fill the position.

122 The procedure established by the Department of Labor will tend to diffuse criticism of the Department concerning its sources of information, particularly where specialized skills are needed. See Hearings on S. 3074 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. 148 (1976) (statement of Kenneth Meiklejohn).

123 See note 115 supra.
cause the time consuming and expensive procedure involved would not necessarily equal the potential benefits. Although the American labor force has been protected, it is not clear that Congress intended to have the third preference priority restricted to those professionals whose talents are truly exceptional.

B. Labor Certification Determinations

The administrator of the United States Employment Service has predetermined that insufficient Americans are available to fill certain occupations, and that the wages and working conditions of Americans employed in these fields will not be adversely affected by immigration. These occupations are listed in Schedule A of the Labor Department regulations. Those aliens whose occupations appear on Schedule A receive automatic labor certification. Schedule A occupations have primarily been in the health and religious fields. Schedule B is the converse of Schedule A. The occupations listed on Schedule B, typically those requiring little or no skill, have been found to have an oversupply of available workers. The Schedules are revised periodically to reflect changes in the labor force.

Fewer professional occupations are now listed on Schedule A than in the past. In fiscal 1975, 8,363 aliens from the Eastern Hemisphere were beneficiaries of third preference status. Of this number, approximately sixty-two percent received Schedule A blanket certification. With the removal of physicians from the Schedule pursuant to the Health Professions Educational Assistance Act of 1976, twenty percent of those eligible for immediate certification in 1975 would be ineligible at the present time. Under the current even more restrictive Schedule A occupations, only three percent of the professionals eligible for automatic certification in 1975 would receive blanket certification today.

The range of possible permutations in this area is endless. For example, if an employer needed to fill a position, he might advertise. If he has already carried out the procedure established by the Department of Labor, he might be willing to continue by documenting his efforts. On the other hand, if the alien's credentials are excellent but he is not uniquely qualified for the position, the employer might not be willing to assume the task of documentation even though the alien might have been an asset to the business.

The schedules are revised periodically to reflect changes in the labor force.

Schedule A occupations as of January, 1977 are dietetics if the alien has an advanced degree, physical therapy if the person has a bachelor's degree, and religious workers. By way of comparison, of the 7,763 professionals admitted in 1974, approximately two percent would have blanket certification under the current regulations. Between 1971 and 1975 the number of aliens securing third preference status remained relatively stable, with 1972 as the peak year. The 1976 Amendments have extended coverage to Western Hemisphere immigrants who, though subject to labor certification, were previously ineligible for professional third preference status. Consequently, the number of aliens receiving...
At the time that Congress signaled that professionals would be required to have job offers in order to receive preference status, the professions which accounted for more than half of the automatic certifications were removed from Schedule A. The effect of the legislation and regulations will be to reduce significantly the number of alien professionals entering the United States. Under the job offer and labor certification requirements, the number of professionals receiving third preference status will relate directly to the employment situation in the United States. Assuming an expanding labor market, as the unemployment rate for American professionals decreases, the rate of immigration for alien professionals should increase. Employers, who in addition to offering employment must assume the responsibility of documenting the need for hiring aliens, are likely to seek out the alien professional only in times of low unemployment.

V. Options Available for the Professional

A. Third or Sixth Preference

Because the Department of Labor has severely limited the occupations, and thus the number of aliens, which qualify for blanket certification, most intending professionals will have to demonstrate in cooperation with their future employers that their employment will not displace a qualified American. It is appropriate at this point to question whether an intending immigrant professional should consider third preference status. Regardless of whether the alien enters the United States as a third preference professional or as a sixth preference skilled or unskilled worker, he will, in the usual situation, be required to receive an individual labor certification from the Department of Labor as well as an offer of employment.

The requirements for third preference status are more involved than those applied to skilled and unskilled workers in that the professional must also meet the educational and work experience criteria established for his profession. Under the 1965 Amendments, an alien who was in doubt with respect to his professional qualifications would nonetheless seek third preference status due to exemption from the job offer requirement. The difficulties in establishing professional credentials were in many cases more than outweighed by the advantage of not having to secure an offer of employment. With imposition of the job offer requirement, labor certification will not change significantly. The number of professionals being certified individually may not change either despite the fact that Western Hemisphere aliens are now eligible for preference and the reduction of Schedule A professions. This may occur because of the job offer requirement and increased employer responsibility.

It is conceivable that the overall number of professionals entering will not change but the number of professionals within a particular profession will change. Since the Department of Labor does not publish unemployment statistics for individual professions, it is difficult to make a correlation with the number of aliens entering in that profession.

See text accompanying note 135 infra.

An example will illustrate this point. In 1975, 161 chemical engineers received third preference status, but 60 were beneficiaries of sixth preference status for skilled or
ment upon professionals under the 1976 amendments, however, an alien who expects difficulty in establishing his professional qualifications may be well-advised to seek sixth preference status as a skilled worker. The various factors which may be involved in this are examined in depth in the following sections.

B. Availability of Visa Numbers

Under the 1965 Amendments, a total of 170,000 immigrant visas could be granted to intending immigrants from countries in the Eastern Hemisphere. While each country within the hemisphere was allotted a maximum of 20,000 visas, the visas did not have to be distributed according to the percentages established under the preference categories of section 203(a). Consequently, if there was a high demand for third preference visas within a country, there would be no visas available for the lower preference groups.

The alien professional benefited under this system through priority in visa application over the fourth through seventh preferences. A substantial waiting list for the lower preference groups often developed in countries encountering a high demand for third preference status.

The decision to enter as a third or sixth preference alien under the 1965 Amendments entailed weighing many of the same factors that an alien would evaluate today.

There is no indication that alien professionals under the third preference received any special treatment not accorded to workers under the sixth preference. In addition, if an alien who applies for third preference status and is rejected because he is not able to meet the requirements for a professional, he may file a petition as a sixth preference alien. It is also possible to refile a petition which was withdrawn before it was acted upon. Depending on the circumstances at the time of refileing, the alien may be at a disadvantage in that his chronological standing for a visa number will be determined from the date the petition for sixth preference is filed, not from the date the petition for third preference was filed. The alien may, therefore, have increased his waiting time.

A country is defined as any independent self-governing state. 1965 Immigration Act Amendments § 2 (amending 1952 Immigration Act § 202(b) (codified as amended at 8 U.S.C. § 1152(b) (1970))).

Under the 1965 Amendments a colony of a foreign state was granted one percent of the 20,000 visa limit for its mother country, or 200 visas, chargeable to the hemisphere in which the mother country was located. The 1976 Amendments change this to a maximum of 600 visas which will be chargeable to the hemisphere in which the colony is located and to the mother country. Although it appears that the same colony could account for visas in two hemispheres, the application will not reach this result. The hemisphere in which the colony is located must reduce the number of visas available to it by the number of visas used by the colony. The annual quota for the mother country will be reduced by the amount used by the colony, but the quota for the hemisphere in which the mother country is located will not be reduced by the amount used by the colony. Compare 1965 Immigration Act Amendments § 2 (amending 1952 Immigration Act § 202(c) (codified as amended at 8 U.S.C. § 1152(c) (1970))), with 1976 Immigration Act Amendments § 3 (amending 1952 Immigration Act § 202(c) (codified as amended at 8 U.S.C.A. § 1152(c) (West Supp. 1977))).

In the Philippine Islands, the first and second preference groups are current, the third has a waiting list which dates to May 1, 1970. As a result, there are no visas available for the remaining preference categories or for non-preference immigrants. American Council for Nationalities Service, Interpreter Releases 395 (Dec. 2, 1976). An alien changing preference status should be aware that when he moves from one preference group to another he must refile his petition, reapply for labor certification and establish a new position on the waiting list.

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As a result, the alien professional would consider entry as a skilled worker only in those limited situations in which few applications had been made in the first five preference groups, or after the ten percent Hemisphere quota for professionals had been exhausted. Even then the possibility of qualification under the sixth preference would appear less desirable due to the required offer of employment.

This situation has changed significantly for Eastern Hemisphere aliens with the passage of the 1976 Amendments. Earlier legislation had established a quota of 170,000 for immigrants from the Eastern Hemisphere generally and a ceiling of ten percent of this figure for professionals. In addition, each country was allowed a maximum of 20,000 visas, though no restriction was placed upon the percentage which could be allotted to each preference group. The 1976 Amendments provide that if the total 20,000 visas allotted to one country are used during a fiscal year, then visas may be issued to applicants in each preference group during the succeeding fiscal year only up to the maximum percentage applicable to the Hemisphere, or, for example, ten percent for professionals. The purpose of this provision is to provide for a more equitable distribution of visa numbers to all inhabitants of a country, irrespective of preference classification.

This procedure approaches the original national origin quota system discarded in 1965, with additional preference groups, in that more emphasis is placed upon the accommodation of all priority groups to prevent one or two groups from accounting for all of the immigrants. The results may not be as harsh as under the national origin system of the 1952 Act because there are more categories, but the potential exists for some close family members to be unable to obtain visas, defeating to an extent one of the purposes of the amendments. For example, if a country has granted 4,000 visas or twenty percent of its total

136 See note 33 supra.

137 1976 Immigration Act Amendments § 3 (amending 1952 Immigration Act § 202(e) (codified as amended at 8 U.S.C.A. § 1152(e) (West Supp. 1977))) states that if the yearly maximum number of visas have been made available in any country then in the next year visas shall be allocated as follows: 1) unmarried sons or daughters of citizens of the United States — 20 percent; 2) spouses, unmarried sons or daughters of aliens lawfully admitted for permanent residence — 20 percent plus falldown; 3) members of the professions, or immigrants who, because of their exceptional ability in the sciences or the arts will substantially benefit the national economy, cultural interests, or welfare of the United States, and who have a professional-level job offer from an employer in the United States — 10 percent; 4) the married sons or the married daughters of citizens of the United States — 10 percent plus falldown from the three higher preferences; 5) the brothers or sisters of citizens of the United States — 24 percent plus falldown from higher preferences; 6) immigrants capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States — 10 percent; 7) persons fleeing religious, racial, or political persecution of communist regimes and Middle Eastern nations and/or victims of natural disasters who are unable to remain in their homeland to rebuild — 6 percent. Visas remaining after the seven preference groups are satisfied are made available to other qualified immigrants in the chronological order in which they apply.

138 In the example given in note 134 supra, the effect would be to give the fourth through seventh preference groups an opportunity to receive visa numbers.

139 See notes 15-26 supra and accompanying text.
number to unmarried sons or daughters of United States citizens, it cannot issue additional visas to that group during the fiscal year even though such aliens have first preference status.

If the individual country limitations have not gone into effect, alien professionals need only be concerned with the number of third preference visas granted within the hemisphere, and the total number of visas made available in their country. Until the country limitations go into effect, an alien professional will usually be wise to enter as a professional in third preference to obtain priority over the lower four categories. If preferences one through five are undersubscribed, however, he may well consider sixth preference, particularly if his professional credentials are subject to question.

When country limitations go into effect because the maximum number of visas have been issued in the previous year, the alien professional has the option of applying for either category, depending on the number of visas issued for that preference group. In effect, professionals have a possibility of twenty percent of the visas for their country. Again, if the alien's credentials are in doubt, he would seek sixth preference since he now needs a job offer in either category.

Although the country preference limitations were instituted to permit a more equitable distribution of visas, the alien professional will benefit at the expense of the skilled or unskilled worker. Whenever possible, the professional will determine which preference group offers the greater opportunity for entry because the requirements for third preference status involve more determinations than for sixth preference entry. The mandatory job offer for professionals has made this result possible.

V. Conclusion

The intent of Congress to protect the American job market has been furthered by the 1976 Amendments to the Immigration and Nationality Act. The alien professional will have to comply with more requirements in order to establish his eligibility for third preference status. In addition to documenting that he is a professional, he now must demonstrate that he has received a valid offer of employment. The new amendments, by insuring that the professional's services are needed and will be utilized, have created a tension between the interests of third and sixth preference aliens. Whenever it is expedient, a professional will consider entering as a sixth preference immigrant. Although this opportunity has always been available to the professional, the changes

140 1976 Immigration Act Amendments § 2 (amending 1952 Immigration Act § 201(a) (codified as amended at 8 U.S.C.A. § 1151(a) (West Supp. 1977))) provides for the allocation of visas on a quarterly basis, with the number not to exceed 45,000 in any one quarter in the Eastern Hemisphere or 32,000 in the Western Hemisphere. Thus, if the sixth preference group had reached its maximum in the last quarter of the fiscal year, depending on the waiting list for the group, it might be feasible to apply for third preference standing. The intending alien would have to balance the disadvantages of waiting against the disadvantages of filing as a third preference professional.
brought about by the 1976 Amendments have eliminated many of the incentives for seeking third preference status. The sixth preference worker, in consequence, will be significantly affected by the choice made by the professional.

Aliens from both the third and sixth preference groups will encounter increasing difficulty in securing employment. The regulations issued by the Department of Labor, with which an employer must comply before he may hire an immigrant, will have the effect of contracting the domestic job market for the alien. As a result, professionals of potential benefit to the United States may be prevented from demonstrating their talents because of the added burden placed upon the employer. The total number of alien professionals entering the United States for the purpose of employment will in all likelihood decrease. Whether this pattern will have noticeable repercussions on American labor, however, is a question which remains for the future.

Beverly F. Harris