Refugees under United States Immigration Law

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REFUGEES UNDER UNITED STATES IMMIGRATION LAW

I. INTRODUCTION

The recent influx into the United States of approximately 130,000 South Vietnamese refugees makes appropriate an examination of the legal aspects of refugee immigration. Even under more tranquil circumstances many refugees from different areas of the world come to this country every year. The process of entry into the United States and the refugees' subsequent status is determined by the provisions of the Immigration and Nationality Act of 1952, as subsequently amended. This note will examine those sections of the Act which allow an alien, based upon his refugee status to come to or to remain in the United States and acquire permanent residence.

The term refugee has been generically applied to persons who flee or are uprooted from their homes for a variety of reasons. More narrowly, those who leave because of persecution or threatened persecution on account of race, religion or political opinion have been defined as political refugees as distinguished from those displaced by natural or man-made calamity. While the latter type of refugee has received some recognition in United States immigration law, it has been primarily for the

1 N.Y. Times, Apr. 23, 1975, at 1, col. 6 (city ed.). As of May 9, 1975, “approximately 113,850 refugees from Indochina” were “under American protection” including those already in the continental United States, at restaging areas in the Pacific, and still aboard vessels. H.R. REP. No. 197, 94th Cong., 1st Sess. 3 (1975).

2 During 1974, 11,577 Cubans were paroled into the United States and 9,391 other refugees were granted a conditional entry. The meaning of these terms will be explained later. 1974 IMMIGRATION AND NATURALIZATION SERV. ANN. REP. 4, 9 [hereinafter cited as INS ANN. REP.].

3 Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq. (1970) [hereinafter cited as the Act] [subsequent references will be cited to section numbers of the Act, e.g., “Sec. 203(a)(7)”].

4 Discussion of other provisions affecting refugees, but which do not directly lead to attainment of immigrant status will be avoided unless they aid analysis. For example, certain exchange students and visitors are ineligible for an immigrant visa unless they return to their own countries for at least two years after completing the program for which they came to the United States. This requirement may be waived, however, for an alien who cannot return to his country “because he would be subject to persecution on account of race, religion, or political opinion. . . .” Sec. 212(e), 8 U.S.C. § 1182(e) (1970). Under Sec. 243(h), 8 U.S.C. § 1253(h) (1970), deportation may be withheld if the Attorney General makes the same determination. Neither of these provisions is the sole basis for a grant of immigrant status.


6 Sec. 203(a)(7)(B), 8 U.S.C. § 1153(a)(7)(B) (1970) provides an immigration preference to “persons uprooted by catastrophic natural calamity as defined by the President.” In the only reported case arising under this provision it was held that requisite to implementation of this provision is a presidential finding of such a calamity. To date no President has done so. See Matter of Pasarikovski, 12 Administrative Decisions
benefit of the political refugee that past and present statutes have been enacted and administered. It is this type of refugee that will be the focus of this discussion.

Though an emergency such as the present one focuses attention on the refugee, this type of immigrant has had a long tradition in American history. Although persons who left their countries solely for political or religious reasons represented only a minority of those aliens who came here during the era of free immigration, the economic and personal motives of the others were, nonetheless, often inseparably intertwined with the political and social conditions existent in their homelands.

When the United States was able to accommodate vast numbers of aliens, it was unnecessary to draw distinctions between political refugees and other immigrants; quantitative restrictions, however, eventually became necessary, compelling consideration of the motives of the entrants. Earlier prohibitions against those who had been convicted of a crime were not applicable if the conviction was for a political offense. Additionally, a special exception to the literacy requirement was made for those who could show they were fleeing from religious persecution. Aside from these two departures from general restrictions, the political refugee had to gain admission to the United States within the same framework as other immigrants. Beginning in 1945, however, through a succession of congressional and executive actions, the refugee was elevated to a preferred position under the immigration laws of the United States.

Since 1948 Congress has enacted a series of special measures pertaining to refugees outside the framework of general immigration laws. At the present time, this method of immigration control has fallen into desuetude, but it may be resorted to in the future at the discretion of Congress. In 1965 this ad hoc approach was abandoned by enactment of section 203(a)(7) as part of an extensive amendment to the Immigration and Nationality Act. Although the enactment of this provision did not effect a major change in refugee immigration policy or procedure.

Under the Immigration and Nationality Laws of the United States 526 (1967) [hereinafter cited as I. & N. Dec.].

7 Evans, supra note 5, at 204.
9 Sec. 212(b)(2), 8 U.S.C. § 1182(b)(2) (1970). For a history of these exemptions and how they were interpreted, see Evans, supra note 5, at 207-08.
10 A Presidential Directive of Dec. 22, 1945 had liberalized the issuance of immigrant visas to refugees within the framework of the existing law. See Evans, supra note 5, at 211-12.
13 The immediate predecessor of Sec. 203(a)(7) was the "Fair Share" Act, 74 Stat. 504 (1960). That statute incorporated the definition of "refugee-escapee" which had been
it signified a continuing commitment to accepting refugees as immigrants within the permanent framework of general immigration law. An alternative method of refugee immigration has developed through Executive initiative pursuant to section 212(d)(5) of the Act, and it is currently being administered in conjunction with section 203(a)(7).

II. THE STATUTORY BASIS OF REFUGEE IMMIGRATION

A. Conditional Entry and Adjustment of Status Under Section 203(a)(7)

Eligibility for refugee status requires the alien to prove that he departed from a Communist or Communist-dominated country or area or from a country within "the general area of the Middle East." It must be shown that his departure constituted a flight, that such a flight was caused by persecution or fear of persecution on account of race, religion or political opinion, and that he is unable or unwilling to return. In addition to the above statutory requirements, the alien must also prove that he has not permanently resettled in another country in the interval between his flight and application for classification as a refugee.

Aliens meeting these requirements are granted seventh preference within the annual Eastern Hemisphere immigration quota of 170,000. Within that annual quota, however, they are limited to only 6% of the total or 10,200. Despite this preferential treatment, the issuance of permits to come to the United States is subject to general availability of immigrant visas. A refugee who meets the criteria may apply for a conditional entry in certain specified countries, but the issuance of a conditional entry permit does not constitute an admission as defined in immigration law.

formulated in the Act of Sept. 11, 1957, and which is substantially similar to the one now found in Sec. 203(a)(7). Also, the procedure that was used in applying for immigration from abroad under the "Fair Share" Act is similar to the one now in use under Sec. 203(a)(7). See Bowser, The Refugee-Escapee Parole Program, 9 I. & N. REP. 49 (1961).


15 This area is defined as being "the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south." Sec. 203(a)(7), 8 U.S.C. § 1153(a)(7) (1970).


17 The 1965 amendment to the Act divided Eastern Hemisphere immigrants into preference and non-preference categories. The first six preferences are based on relationships to United States citizens and resident aliens, or on occupational skills. Any immigrant visa not used by preference immigrants are allocated to those who do not qualify for any of the preferences. Sec. 203(a)(1)-(7), 8 U.S.C. § 1153(a)(1)-(7) (1970). Nothing precludes a refugee from obtaining a higher preference if he is qualified. IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTION 235.12(a) (Feb. 5, 1975) [hereinafter cited as OI].

18 OI 235.12(e) (Feb. 5, 1975).

19 Although Sec. 203(a)(7) only requires that an application be made in a "non-Communist or non-Communist-dominated country," through regulation this has been further limited to Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon. The applicant must be physically present in one of the designated countries and may not be a national of the country in which the application is made. 8 C.F.R. § 235.9(a) (1974).
After two years in the United States, the conditional entrant may apply for admission, at which time he is inspected and possibly granted an adjustment of status to that of a permanent resident. It is important to note that during the two year interval between his arrival and formal admission, the conditional entrant is regarded under the law as not being within the United States, but rather as if he had been stopped at the border.

An alternative method of attaining immigrant status is reserved for those aliens who have already been admitted to the United States as non-immigrants and have been physically present here for two years. Under a proviso to section 203(a)(7), they may apply for classification as a refugee. If they meet the same requirements as the conditional entrant, they may adjust their status to that of permanent residents. Such adjustments are limited to one-half the total number allocated to refugees under section 203(a)(7). Although the number of aliens who make use of this proviso is small compared with the number of conditional entrants, virtually all reported cases arising under 203(a)(7) originate with members of this group.

### B. Parole Under Section 212(d)(5)

Although section 212(d)(5) does not authorize the immigration of refugees and its use for this purpose was not contemplated by the

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20 An admission has been defined as "the freeing of an alien from the legal restraints to which the immigration laws subject him." Matter of V-Q-, 9 I. & N. Dec. 78, 79 (1960). It is clear that a conditional entry does not constitute such an admission, since after two years in the United States the alien must "forthwith return or be returned to the custody" of the Immigration and Naturalization Service for inspection and examination for admission. Sec. 203(g), 8 U.S.C. § 1153(g) (1970).

21 See Sec. 203(g), (h), 8 U.S.C. § 1153(g), (h) (1970).

22 The statute requires continuous physical presence, but it need not be immediately preceding the application for an adjustment of status. An applicant who had been in the United States for over three years and had briefly left the country and returned was found to be eligible. Matter of Kozielczk, 11 I. & N. Dec. 785 (1966). The two year period, however, cannot have been meaningfully interrupted. An innocent, casual, and brief absence from the United States does not constitute such a meaningful interruption. See Matter of Kukla, Interim Decision # 2284 (1974) [hereinafter cited as I.D.] (adopting the test laid down by the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449 (1963)).

23 Sec. 245, 8 U.S.C. § 1255 (1970) [hereinafter referred to as the proviso], excludes crewmen and natives of the Western Hemisphere from eligibility. An alien must have been legally admitted or paroled into the United States; those who entered illegally are ineligible for an adjustment of status. See Matter of Tom, 11 I. & N. Dec. 795 (1966) (alien originally admitted on a false claim of United States citizenship found to be ineligible for the benefits of Sec. 245).

24 In 1974 there were only 793 adjustments of status under the proviso to Sec. 203(a)(7) as compared with 9,391 conditional entries. 1974 INS Ann. Rep. 3, 9.

25 Sec. 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970), provides in part: The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien.

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authors of the Act,\textsuperscript{26} it has come to occupy a very important role in refugee immigration. Parole has a long history as an administrative device and was recognized by the courts even prior to enactment of the section in 1952.\textsuperscript{27} Parole may be granted for a wide variety of reasons to aliens who otherwise would not be admitted as either non-immigrants or immigrants and it has been used in lieu of detention, pending a determination under section 203(a)(7).\textsuperscript{28} A paroled alien's physical presence in the United States does not constitute an entry or an admission;\textsuperscript{29} consequently, such an alien remains excludable rather than deportable.

Unlike section 203(a)(7), this section does not prescribe any eligibility requirements. Rather, the imposition of conditions is left to the discretion of the Attorney General, who has delegated that authority to District Directors\textsuperscript{30} of the Immigration and Naturalization Service. Refugees seeking asylum may be granted parole on an individual basis\textsuperscript{31} or within large classes under such conditions as the Government may choose to prescribe.

Even though there had been prior isolated instances in which immigration authorities had utilized a procedure similar to parole in dealing with refugees,\textsuperscript{32} large scale implementation did not occur until the aftermath of the Hungarian revolt in 1956. The law then in effect did not permit a large number of Hungarians to be admitted to the United States. Consequently, the Executive branch invoked section 212(d)(5) admitting

\begin{footnotesize}
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\textsuperscript{26} At the hearings on H.R.J. Res. 397 which was subsequently enacted as Pub. L. No. 86-648, 74 Stat. 504 (1960) (the "Fair Share" Act) and which authorized the parole of refugees into the United States, Representative Feighan stated that the drafters had visualized its use solely for emergencies such as a ship disaster at sea and that it was believed that at any one time no more than 4,000 persons would be permitted to enter the United States pursuant to this provision. Hearings on H.J. Res. 397 before Subcomm. No. 1 of the House Comm. on the Judiciary, 86th Cong., 2d Sess. 45 (1960) [hereinafter cited as 1960 Hearings].

\textsuperscript{27} For a discussion of the background of Sec. 212(d)(5) and cases which arose before its enactment, see 27 Geo. Wash. L. Rev. 373 (1959).

\textsuperscript{28} C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.54 (rev. ed. 1974).

\textsuperscript{29} To constitute an entry there must be physical presence on United States territory plus an inspection and admission, or an actual and intentional evasion of inspection coupled with freedom from restraint. Matter of Pierre, I.D. # 2238 (1973) (citing numerous cases). Since parole by the very terms of the statute does not constitute an admission and is regarded as a form of legal restraint, it is not an entry into the United States.

\textsuperscript{30} 8 C.F.R. 212.5(a) (1975). This authority has been subdelegated to officers or inspectors in charge of a port of entry with careful limitations on its exercise. OI 212.5(a) (July 26, 1972).

\textsuperscript{31} OI 212.5(b) (July 26, 1972). The procedure for granting asylum is set out in OI 108.1 (b), (c) (Dec. 18, 1974).

\textsuperscript{32} In 1940 a group of European refugees who had been refused entry to Mexico were permitted to come ashore in the United States, even though most of them could not qualify for either immigrant or non-immigrant visas under the stringent law at that time. A group of refugees from Italy was brought to the United States in 1944 and kept in semi-confinement at a camp near Oswego, New York, without ever having been formally admitted to this country. They were later permitted to go to Canada to obtain United States immigrant visas which became available as a result of the Presidential Directive of Dec. 22, 1945. For a discussion of these early episodes, see L. Whure, 300,000 New Americans 61-71 (1957).
\end{footnotesize}
the Hungarians as parolees notwithstanding the unavailability of immigrant visas. This situation is illustrative of the parole provision's flexibility and usefulness in meeting emergency situations, however, it also demonstrates the shortcomings inherent in its use for large scale immigration. Unlike earlier refugees who had come as quota or non-quota immigrants, the Hungarian parolees were not considered to have been admitted to the United States and as section 245 was interpreted, they would have been unable to adjust their status to permanent

33 The Refugee Relief Act of 1953 was then due to expire; 6,130 non-quota immigrant visas which had been authorized by that measure, but which had gone unused, were issued to Hungarian refugees. Swing, Hungarian Escapee Program, 6 I. & N. REP. 43 (1958). The legal status of those who had obtained immigrant visas and were formally admitted to the United States was totally different from that of the other Hungarians who arrived as parolees. This episode introduced an aberration into refugee immigration policy which persists to this day — people who leave the same country at the same time for the same reasons may come to occupy different legal postures depending upon which provision of the law is used to bring them to the United States.

Unavailability of visas has been the chief reason for using parole but given the broad scope of the parole authority, there is nothing to prevent its use to allow into the United States aliens who are inadmissible for other reasons. Since refugees are paroled with the expectation that they will eventually become permanent residents, it is highly unlikely, however, that serious grounds for inadmissibility would be bypassed in this manner. The grounds for inadmissibility which have been waived in the case of the South Vietnamese parolees are the lack of a labor certification under Sec. 212(a) (14), the likelihood of becoming a public charge under Sec. 212(a)(15), and the documentary requirements of Sec. 212(a)(20); 8 U.S.C. § 1182(a)(14), (15), (20) (1970). H.R. REP. No. 197, 94th Cong., 1st Sess. 7 (1975).

34 The broad eligibility requirements for the Hungarians consisted of flight from Hungary after October 23, 1956 and qualification under the regular provisions of the immigration law. The parole program was initially limited to those refugees who were in Austria, but in 1957 it was extended to those who had fled to Yugoslavia or had gone from Austria to "countries of second asylum." From among those meeting the general requirements, certain refugees were granted parole based on subjective criteria. Swing, supra note 33, at 43-44.

The granting of parole to Chinese refugees in Hong Kong in 1962 was, in contrast, far more restrictive. Eligibility was limited to relatives of United States citizens and resident aliens, those with special skills, and those who had applied for admission under former refugee laws and had not been accepted due only to numerical limitations. Matter of Chai, 12 I. & N. Dec. 81, 82 (1967), citing Annual Report of the Attorney General for 1964.

Parole of Cuban refugees, however, appears to be without regard to specific numerical restrictions or eligibility requirements. This was a direct result of severance of diplomatic relations in 1961, precluding the issuance of immigrant or non-immigrant visas. Woytich, The Cuban Refugee, 16 I. & N. REP. 15 (1967). In 1965, agreement with the Cuban government established a refugee airlift which functioned until 1973; the United States undertook to accept all Cubans who wished to live here, after those who had relatives in this country were removed. Memorandum of Understanding with Cuba Concerning Movement to the United States of Cubans Wishing to Live in the United States, Nov. 6, 1965, para. 8 [1966] 17 U.S.T., T.I.A.S. No. 6063. Since that time parole has also been granted to Cubans living in third countries who wish to join relatives in the United States. 1974 INS ANN. REP. 3.

35 Under the Displaced Persons Act of 1948, the immigrant visas granted to those who were eligible were deducted from future quotas allocated to the recipients' country of nationality under the national origin system then in effect. Displaced Persons Act of 1946, § 3(b), 62 Stat. 1010. These quota deductions were expunged by the Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639. Beginning with the Refugee Relief Act of 1953, immigrant visas were not deducted from the recipients' national quotas.

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residents no matter how long they remained in the United States.\textsuperscript{36} The presence of large numbers of parolees who had every expectation of being allowed to remain permanently in the United States raised troublesome questions concerning how their parole could be revoked and how their status differed from parolees temporarily in this country in accordance with the original purpose of section 212(d)(5).

Despite the shortcomings in this use of parole, Congress in 1960 adopted it as the continuing method of refugee immigration notwithstanding any emergency.\textsuperscript{37} This has been highly criticized as not in consonance with congressional intent,\textsuperscript{38} and consideration of the 1965 amendments to the Immigration and Nationality Act rekindled the debate. Congress intended by enactment of section 203(a)(7) to obviate the necessity for the aberrant use of section 212(d)(5).\textsuperscript{39} This is evident in the committee reports which accompanied the bill:

In as much as definite provision has now been made for refugees, it is the express intent of the committee that the parole provisions of the Immigration and Nationality Act, which remain unchanged by this bill, be administered in accordance with the original intention of the drafters of that legislation. The parole provisions were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law.\textsuperscript{40}

It is clear that Congress has failed in its attempt to return parole to its originally intended function, and it appears that absent a revision of section 203(a)(7) or other congressional action, parole will continue to be used as an alternate and supplementary method of refugee immigration.

At this point it is appropriate to distinguish between the use of parole as part of legislative enactment and its use by the Executive with con-

\textsuperscript{36} Prior to its amendment in 1960, Sec. 245(a) required an alien to have been “admitted to the United States as a bona fide non-immigrant” in order to be eligible for an adjustment of status. 8 U.S.C. § 1255 (1970), \textit{historical note}, at 280. As parolees, the Hungarians were ineligible to become permanent residents until permitted to do so by the Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419. A similar problem occurred with the next large group of parolees, the Cubans, who as Western Hemisphere natives remained ineligible for an adjustment of status even under the amended version of Sec. 245. They were permitted to adjust their status by the Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161.


\textsuperscript{38} See note 26 supra.

\textsuperscript{39} It is clear that Congress did not intend any substantive change by substituting the term “conditional entry” for “parole”. “The conditional entry of refugees as proposed in this bill is not unlike the parole procedure utilized during the existence of the so-called Fair Share Act (Sec. 212(d)(5)) and it is intended that the procedure remain the same.” Since the term “parole” had connotations unfavorable to the alien, the term “conditional entry” was used. H.R. REP. No. 745, 89th Cong., 1st Sess. 15 (1965); S. REP. No. 748, 89th Cong., 1st Sess. 3335 (1965).

\textsuperscript{40} S. REP. No. 748, 89th Cong., 1st Sess. 3335 (1965).
gressional acquiescence. An example of the former occurred in 1960 when Congress selected parole as the method of refugee immigration, manifested today in section 203(a)(7) as conditional entry. In such a case Congress prescribes the conditions of eligibility and determines the number of refugees to be accepted, however, beginning with the Hungarians, the latter use has become increasingly common and is now being employed to bring South Vietnamese refugees to the United States. In the present situation in South Vietnam, eligibility appears to have been determined by the individual's relationship to Americans, his connection with the United States government, or sheer chance. Further illustrating parole's flexibility is that the number of persons eligible may be increased at the option of the government and additional conditions or restrictions on eligibility may be imposed. The continued use of section 212(d)(5) by the executive branch with congressional acquiescence has been made necessary by the inflexible and restrictive nature of section 203(a)(7). Parole has been used to accept those refugees who are ineligible for conditional entry, but whose rescue is in the national interest either for humanitarian or foreign policy reasons.

C. The Legal Status of the Parolee and Conditional Entrant

Once the refugee has arrived in the United States as either a conditional entrant under section 203(a)(7) or as a parolee under section 212(d)(5), he occupies an ambiguous position until such time as he adjusts

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41 The original plan had been to extend parole to those South Vietnamese who were relatives of United States citizens and resident aliens and to some 50,000 who were considered to be in the “high risk” category because of their close association with the United States Government. Letter from L. F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, to Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, April 22, 1975, reproduced in Cong. Rec. H 3123-24 (daily ed. April 22, 1975). Many South Vietnamese belonging to neither category, however, succeeded in escaping the Communist takeover by their own efforts and parole has also been extended to this group. H.R. Rep. No. 197, 94th Cong., 1st Sess. 7 (1975).

42 On September 30, 1972, it was decided that 1,000 Ugandan Asians would be paroled into the United States. This figure was raised by an additional 500 on April 3, 1973. 1973 INS Ann. Rep. 5.

43 In December 1972, the Government decided to deny parole to Cubans who had arrived here from third countries illegally or without proper documentation. Conceiro v. Marks, 360 F. Supp. 454, 458 (S.D.N.Y. 1973). As an added condition, the South Vietnamese parolees are required to sign a sworn statement that they have “not participated in the persecution of any person because of race, religion or political opinion. . . .” Any person who fails to sign such a statement will not be eligible for parole. H.R. Rep. No. 197, 94th Cong., 1st Sess. 7 (1975).

44 A recent example is the extension of parole to 1,500 Asians expelled from Uganda in 1972. Clearly they would have been ineligible under Sec. 203(a)(7) since Uganda is neither Communist nor within the general area of the Middle East. Additionally, parole has been employed to bypass numerical restrictions. 1973 INS Ann. Rep. 5 (200 Soviet Jews who succeeded in leaving the U.S.S.R.). In Matter of Harutunian, I.D. # 2263 (1974), the alien was eligible under Sec. 203(a)(7) but was paroled because conditional entries were not available. Under Sec. 203(h) the conditional entrant's adjustment of status to permanent resident is retroactive to the date of arrival in the United States, whereas the parolee's adjustment of status takes place under Sec. 245 and becomes effective only as of the date of approval. This is another illustration of the distinction referred to in note 33 supra.
his status to that of a permanent resident. The parolee's mere physical presence on American soil does not constitute an admission or even an entry into this country. When Congress fashioned the designation "conditional entrant" it was made clear that no change was intended, and that such an alien would occupy the same status in immigration law as the parolee.

Although both types of refugees enjoy some attributes of the resident alien such as the right to employment and subjection to taxation, they are denied others. A conditional entrant may not petition for the admission of his relatives as immigrants on the basis of the same preferential classification available to relatives of resident aliens. It is also questionable whether recent decisions extending the rights of resident aliens have any effect on parolees and conditional entrants. Until an adjustment of status they remain subject to exclusion rather than deportation, and though an exclusion proceeding is not without procedural safeguards, they are a matter of legislative grace rather than a constitutional right.

The grounds for exclusion and deportation are similar, but they are given broader application in exclusion proceedings, thus while identical grounds may be alleged, the outcome may hinge on which type of proceeding is involved. If a parolee or conditional entrant is found to be excludable, he may not invoke section 243(h) to have his deportation

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withheld. Though the refugee has had to prove a fear of persecution to be allowed into the United States, he may not assert the same reason in order to remain. An anomalous result is thereby created in which an alien who has entered this country illegally and who is subject to deportation enjoys greater rights than one whose presence has been facilitated by the United States on a preferential basis. Whereas a refugee who has arrived under section 203(a)(7) is entitled to a hearing before his conditional entry is terminated, no hearing is required for the revocation of parole. The absence of such a hearing has been repeatedly challenged as denial of due process, however, the courts have continued to hold that the parolee is one who is “outside” the United States and is not entitled to assert rights under the Constitution.

Nevertheless, the courts have granted limited recognition to the fact that a refugee paroled into the United States enjoys rights superior to those of aliens whose presence rests on the same legal basis. In 1957 the Government revoked the parole of a Hungarian refugee because he had misrepresented facts about his membership in the Communist Party. A subsequent exclusion hearing, however, was limited to the sole issue of whether or not he had an immigrant visa, the unavailability of which was the precise reason it had originally been necessary to parole him and thousands of other Hungarians. The absence of such a visa resulted in a finding that he was excludable. The refugee challenged the order on the grounds that the revocation of parole without a hearing, and an exclusion hearing to determine an already obvious fact unrelated with the true reasons for his exclusion, were a denial of due process. The district court held that since parolees were “outside the full reach of the Fifth Amendment,” he was not entitled to a hearing on revocation and the subsequent exclusion hearing was upheld. The court of appeals, however,

54 In Leng May Ma v. Barber, 357 U.S. 185 (1958), the Supreme Court held that a parolee is not “within” the United States for the purpose of invoking Sec. 243(h) (withholding deportation at discretion of Attorney General; see note 4 supra). Noted in 27 Geo. Wash. L. Rev. 373 (1959). The most recent application of this view is found in Matter of Pierre, I.D. # 2238 (1973).

55 The refugees presence in this country rests on the same legal basis as that of other types of parolees and conditional entrants. The term “conditional entrant” is also sometimes applied to alien crewmen who enter the United States on a conditional landing permit issued under Sec. 252(a)(1), 8 U.S.C. § 1282(a)(1) (1970). See United States ex rel. Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967). There is an obvious distinction between an alien allowed into the United States for a limited time and a limited purpose and one who comes with every reasonable expectation of being permitted to remain permanently and of eventually acquiring citizenship. Yet, in terms of their legal status both groups appear to be in the same position.

56 8 C.F.R. § 235.9(f) (1975).

57 8 C.F.R. § 212.5(a) (1975) provides: “... when in the opinion of the district director . . . neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole . . . .” At that point if the alien is found to be inadmissible, exclusion proceedings are conducted.

58 “The Fifth Amendment does not affect, in any degree, Congrass' plenary power over exclusion procedures.” Wong Hing Fun v. Esperdy, 335 F.2d 656, 657 (2d Cir. 1964).

reversed and held that under the special circumstances of this case, "parole may not be revoked without a hearing at which the basis for the discretionary ruling of revocation may be contested on the merits." 60 The factors distinguishing this alien from other parolees and entitling him to due process were the circumstances under which he and the other Hungarian refugees had come to the United States.

What makes this case different from other exclusion cases . . . is that Paktorovics was invited here pursuant to the announced foreign policy of the United States as formulated by the President . . . . True it is that the President has no power to change the law by inviting Paktorovics and the other Hungarian refugees to come here, but this is not to say that the tender of such an invitation and its acceptance by him did not effect a change in the status of Paktorovics sufficient to entitle him to the protection of our Constitution. 61

Although the decision was limited to whether a hearing was required prior to revocation of parole, the court seemed to suggest that the standards of due process should also govern the subsequent exclusion hearing. 62 Presumably, the holding of Paktorovics is equally applicable to other refugees who have been paroled into the United States since that time by Executive initiative. It would seem analogous that those who have come to this country under section 203(a)(7) would also appear to have been "invited" by virtue of congressional enactment of that provision and ought to be entitled to due process during hearings to terminate their conditional entry. If this view were adopted, both groups would be entitled to constitutional safeguards during their subsequent exclusion hearings. Although speculative at best, it might also be contended that the status of "invitee" brings both types of refugees "within" the United States for the purpose of invoking other rights on the same basis as those aliens who have been admitted or have entered illegally. 63

The crucial factor setting the refugee apart from other parolees and conditional entrants appears to be whether he has been "invited here pursuant to the announced foreign policy of the United States." 64 In Ahrens v. Rojas, 65 the alien was a prominent Cuban politician under

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62 Speaking of the Hungarian parolees in general, the court said: "None of them have any visas and the only hearing to which any of these parolees will be entitled under the law, as thus interpreted, will be a hearing to determine the already obvious fact that they have no visas." Id. at 612.
63 For example, the right to invoke Sec. 243(h) to have deportation withheld. In Leng May Ma v. Barber, 357 U.S. 185 (1958), where the Supreme Court held that a parolee has no such right, the alien had not been paroled into the United States pursuant to any refugee program. She arrived claiming United States citizenship and was initially held in custody and then paroled pending a determination of her claim.
65 292 F.2d 496 (5th Cir. 1961).
the Batista regime who fled to Florida immediately after the Castro revolution. He was granted parole which was subsequently revoked without a hearing. Even though he had at least a colorable claim to being considered a political refugee, his attempt to challenge the revocation of his parole on the basis of *Paktorovics* was rebuffed. The court found that "[t]here are no similar distinctions in the present case," despite the alien's showing that at that time (1961) thousands of other Cubans were being paroled into the United States. This is apparent that his parole was granted on an individual basis and that at the time of his arrival on January 1, 1959, no such policy of granting parole en masse to Cubans existed. This suggests that only those refugees who were paroled into the United States pursuant to a decision by the Government invoking section 212(d)(5) on behalf of some group or class may be considered "invitees" within the meaning of *Paktorovics*. The alien who is granted asylum and paroled on an individual basis is apparently entitled to no greater rights than a non-refugee parolee.

Despite the temporary ambiguous legal position which a refugee occupies after his arrival, the advantages which attach to the status of refugee under United States immigration law lead many aliens to seek that classification. To ensure that only bona fide political refugees enjoy these advantages, several requirements have been established administratively and statutorily. While eligibility for parole depends upon whatever criteria the Executive chooses to establish in a given instance, the requirements which an alien must meet under section 203(a)(7) are partially evinced in the statute itself. They are the same for those seeking conditional entry from abroad and for those already within the United States who wish to be classified as refugees under the proviso.

### III. THE ESTABLISHMENT OF REFUGEE STATUS UNDER SECTION 203(a)(7)

The requirements for eligibility which are set out in this provision represent the culmination of an evolutionary process under prior enactments. The requirement that the refugee establish his origin in Com-
Communist territory is easily understood in light of the foreign policy of the United States, but the alternative requirement that he be "from any country within the general area of the Middle East," is difficult to explain. This language originated in the Act of September 11, 1957, and has been perpetuated as part of section 203(a)(7). The legislative history is silent as to why this one area of the world was singled out for special concern. When the bill was under debate in the House, Representative Feighan expressed his bewilderment:

What the Senate bill does is bring forth an absolutely new concept of a definition of a so-called refugee-escapee . . . . They will come from the general area of the Middle East. That area is far greater than that encompassed by the Eisenhower doctrine. There were never any hearings whatever on this new definition. We heard no testimony from the Eisenhower administration whether the President understands what this new definition means, whether it is consistent with our national policy in that critical area of the world and whether it is acceptable.

Some remarks made during the congressional debate suggest that the Middle East area was included to benefit a group of refugees who had been expelled from Egypt in the wake of the 1956 war and who were then being aided by the United States. If this was indeed the reason, it is unclear why the area was so broadly defined; nor is it clear why the same definition has been perpetuated in subsequent legislation, long

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72 This requirement can be traced back to the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, although the term "Communist" as such was not used in that measure. In Sec. 2(b), Congress adopted the definition of "refugee" and "displaced person" which had been formulated by the International Refugee Organization (IRO), and then in Sec. 2(c) Congress proceeded to limit that definition by adding additional requirements. In Sec. 2(d), 62 Stat. 1010, eligibility was extended to "a native of Czechoslovakia who has fled as a direct result of persecution or fear of persecution from that country since January 1, 1948...." The Communist Party had seized control of that nation's government in February of that year; furthermore, those persons who fell within the IRO definition because of their objection to returning to their homelands were mostly citizens of countries under Communist control. This policy of assisting fugitives from Communism was manifest in subsequent legislation. See Refugee Relief Act of 1953, ch. 336, § 2(b), 67 Stat. 400; Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15(c)(1)(A), 71 Stat. 639, 643.


74 Act of Sept. 11, 1957, Pub. L. No. 85-316, § 15(c)(1)(B), 71 Stat. 639, 643. The definition of the "general area of the Middle East" in Sec. 15(c)(2) is identical to the one now found in Sec. 203(a)(7). See note 15 supra.

75 The House Report omits any discussion of Sec. 15. H.R. REP. No. 1199, 85th Cong., 1st Sess. 2016 (1957). The Senate Report only expresses the committee's intention that the distribution of the immigrant visas allocated by Sec. 15 be done in a fair and equitable manner "according to the showing of hardship, persecution, and the welfare of the United States." S. REP. No. 1057, 85th Cong., 1st Sess. 6 (1957).

76 103 CONG. REC. 16302 (1957).

77 Id. at 15497-98, 16303, 16305, 16309. See 37 DEP'T STATE BULL. 239 for the assistance which the United States was then providing to these refugees. See also Matter of Shirinian, 12 I. & N. Dec. 392, 394 (1967), where the applicant unsuccessfully attempted to invoke these events in support of her claim to refugee status under Sec. 203(a)(7).
after the problem of the Egyptian refugees has been resolved. When the Middle East clause of the 1957 Act was incorporated by reference in House Joint Resolution 397 (the so-called "Fair Share Act" of 1960) and included in section 203(a)(7) in 1965, no inquiry was made into why it had originally been enacted or what factors, if any, justified its retention. In fact, comments on this provision in the hearings on the 1960 and 1965 measures centered on proposals to extend the definition of the Middle East area to include the countries of North Africa. Despite its obscure origin, the requirement that a refugee be from the general area of the Middle East remains an arbitrary boundary in determining eligibility under the current statute.

Section 203(a)(7) requires that the alien's departure from one of the defined areas constitute a flight caused by persecution or fear of persecution on account of race, religion, or political opinion. This language can also be traced back to the Displaced Persons Act of 1948. While the definition framed by the International Refugee Organization (IRO), which was adopted by Congress, did not use those terms, the requirement that the refugee must fear persecution can be found in that portion of the definition which limited IRO's mandate to those displaced persons who expressed valid objections to repatriation. Among those objections considered valid were, "[p]ersecution, or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions . . . ." In other parts of the 1948 Act where Congress chose to use its own language, and in later amendments to that Act and separate enactments, the term "persecution" has been used repeatedly as a requirement for establishing refugee status, and it has usually been specified that such persecution must occur on grounds of race, religion, or political opinion.

78 A belief that the Middle East was included in the 1957 Act, and retained in subsequent legislation for the benefit of Palestinian refugees, is not supported by analysis of United States refugee immigration statistics, although a true picture of Palestinian immigration is difficult to obtain because of the varying citizenship of these persons in other Arab countries. 1974 INS ANN. REP. 35, Table 6E. Resettlement of Palestinian refugees within the United States does not appear to have been an aim of refugee immigration policy when Sec. 203(a)(7) was enacted. Hearings Before the Subcomm. to Investigate Problems Connected With Refugees and Escapees of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. 202 (1966).

79 1960 Hearings, supra note 26, at 57. In 1965 the State Department had proposed that the western boundary of the general area of the Middle East be extended to include Morocco. Hearings on H.R. 2580 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 68 (1965).


82 Id. § C, 1(a)(i).


The requirement that the alien be unable or unwilling to return to the area from which he fled was expressed in the 1948 Act in language identical to that contained in section 203(a)(7). In another part of that Act and in later legislation, the term “cannot return” was used; whether there is any significance in this distinction is doubtful. As will be seen, this requirement is of only marginal importance in determining eligibility under section 203(a)(7).

The last requirement which the alien must meet is that he did not become permanently resettled in another country in the interval between his flight and his claim of refugee status. This prerequisite was clearly stated in earlier statutes, but was omitted for unexplained reasons from the 1957 Act and was not enacted as a part of section 203(a)(7). Its absence has generated much litigation; since, however, the Supreme Court has held that such a requirement is valid, it is currently being imposed. The purpose of all these requirements is to limit the number of aliens who may make use of section 203(a)(7) and to assure that those who receive its benefits are bona fide political refugees.

A. Place of Origin

Since section 203(a)(7) is applicable only to persons subject to the Eastern Hemisphere quota, Western Hemisphere natives are automatically excluded from eligibility. Having established general eligibility
under the section, the applicant must then show that he departed from a country or area which is Communist or Communist-dominated or a country within the general area of the Middle East as defined in the statute. That definition is narrowly interpreted, thus, persons from adjoining countries are excluded from eligibility. The statute does not contain a definition of what constitutes a Communist country or area, leaving unclear what distinction, if any, there is between one that is Communist and one that is Communist-dominated. Also noticeably absent is a definition of what constitutes such domination or at what point in a nation's political life it is deemed to occur. Presumably such a determination is governed by the official position of the State Department.

A person who has fled from a Communist to a non-Communist part of the same country is eligible for refugee status, even though, strictly speaking, he has never left the country of his nationality. Unless the applicant succeeds in establishing his origin in one of the prescribed areas, the merits of his claim to refugee status will not be considered. The place of origin requirement thus severely limits the number of refugees who can take advantage of section 203(a)(7).

B. Flight

Once establishing geographic eligibility, the applicant must then show that his departure from one of the above areas constituted a flight caused by persecution or fear of persecution on account of race, religion, or political opinion. Of course, a clandestine and hazardous departure by

whether such a distinction between people who left the same country for the same reasons can be justified on any ground except the long standing dichotomy between the two hemispheres which exists in United States immigration law.


This redundant language is derived from earlier legislation; apparently it was used to distinguish between the Soviet Union and its satellites. It may have been felt that the use of the term "Communist-dominated" implied a more transitory status.

In a proceeding under Sec. 243(h), the alien alleged that a Communist form of government was then in power in Chile. Since the political coloration of a regime is not a preliminary requirement for establishing eligibility for relief under Sec. 243(h), the Board did not pass on the validity of this assertion and decided the case on other grounds. Matter of Bohmwald, I.D. # 2219 (1973).

See Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970) and Matter of Sun, 12 I. & N. Dec. 36 (1966). In both cases the applicants fled from the Chinese mainland to Taiwan. The question of whether they met the statutory requirement of flight from a Communist country or area was not raised even though it was the position of both Chinese governments and the United States that Taiwan was an integral part of China. Such a view would appear to be applicable to other cases of intra-national flight in similarly divided countries. The ambiguous legal status of persons from one zone in the other, however, makes refugees of this type peculiarly susceptible to being considered resettled. For this reason both Shen's and Sun's applications were denied. An interesting feature of these cases is that they appear to give recognition to the concept of anticipatory flight. Shen left the mainland in 1948 and Sun left in May 1949. Since the area from which they fled was not Communist-dominated at the time of their departure but became so only after they left, technically they would appear not to have met the requirement of Sec. 203(a)(7). In light of the broad interpretation which flight has been given, however, such a view would be erroneous.

the alien from his homeland will not in itself establish persecution, however, combined with other factors it may support his claim. On the other hand, there is a recognition that a legal and open departure may constitute a flight from persecution if additional elements are present. As the Board of Immigration Appeals stated in a case arising under section 243(h): eligibility is not restricted to “persons who climbed under fences or swam rivers at night.” This reasoning would appear to be applicable to cases involving section 203(a)(7).

The length of time which elapses between an alien's lawful departure and his claim of refugee status is one factor to be considered. In *Matter of Adamska*, the applicant legally left Poland and entered the United States as a visitor for pleasure. Within one month after arrival she demonstrated by several actions her intention of not returning. This, together with a showing of past persecution at home, was held to constitute a flight establishing eligibility under section 203(a)(7). In *Matter of Frisch*, the applicant had resided in the United States for five years as a non-immigrant student before applying for refugee status during the course of deportation proceedings. It was held that she had not established flight at the time of her departure from her homeland and her application was denied.

The length of time is, of course, not controlling, but serves only as one indication of the person's intent at the time he left his country. Closely related is his conduct and relationship with his government after his legal departure, which may indicate at what point the intent to become a refugee objectively manifested itself. In *Adamska*, the applicant sent back her return ticket upon arrival and did not register with her embassy as required. In the *Frisch* case, on the other hand, the applicant continued to obtain extensions of her passport and re-entry visa long after her arrival in the United States. Similar factors in other cases have led to the applicants' failure to establish flight.

The purpose of requiring the establishment of flight is aimed at the question of whether intent to become a refugee existed at the time of departure and was not formed after an exposure to the “good life” in the United States. In certain situations, however, an alien can establish that

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94 This is particularly relevant when a refugee departs with the official consent of his home government, difficult as that consent may be to secure. A current example of this type of “legal” flight is the departure of Jews from the Soviet Union.

95 *Matter of Janus and Janek*, 12 I. & N. Dec. 866, 876 (1968). This case involved three aliens, two of whom were brothers. Both brothers applied for an adjustment of status under Sec. 245. The application of one was granted, but that of the other denied. The second brother and the third alien then petitioned for withholding of deportation under Sec. 243(h). Although the case was decided on that issue, the opinion contains many comments concerning Sec. 203(a)(7) and its relationship to Sec. 243(h).


he constructively fled his homeland, even though he departed legally and formed his intention to remain during his presence in this country. A political change at home which would make it dangerous for the alien to return has been held sufficient to establish such a flight for the purpose of satisfying the statutory requirement.\textsuperscript{99} If, however, return to the homeland becomes risky solely as a consequence of the alien's acts while in the United States, constructive flight will not be established.\textsuperscript{100} The concept of constructive flight thus appears to be limited to those aliens who left their homelands freely with the intention of returning and who face a risk of persecution on their return as a result of external events not occasioned by their own conduct.

The most crucial factor in establishing flight is a showing of persecution. The mechanics of departure and subsequent conduct are at most only peripheral points. It is interesting to note that in the cases where the applicants have succeeded in establishing flight, even though their departure may have been legal and the intent to remain away had been formed later, they also succeeded in showing that they had been persecuted or would face persecution upon their return. Whereas in those instances where flight was not established, the applicants had also failed to show either past persecution or its future likelihood.\textsuperscript{101}

Two cases with similar factual settings are illustrative of the importance of persecution in establishing flight. In \textit{Matter of Zedkova},\textsuperscript{102} the applicant had entered the United States as a visitor for pleasure intending to return to Czechoslovakia. During her absence, her country was invaded by the Soviet Union. She chose to remain abroad disobeying an order from her embassy to return. The Board felt that in light of the circumstances prevailing in Czechoslovakia and her own allegations, she had made a sufficient showing of the likelihood of persecution upon her return. It was felt that it would be inequitable to draw a distinction between those who fled their country and those who later chose to remain outside of it for the same reasons. In \textit{Shubash v. District Direc-


\textsuperscript{100} In Matter of Taheri, I.D. # 2124 (1972), the applicant had engaged in violent demonstrations against his government's consulate and had been convicted of false imprisonment and resisting arrest by United States courts. He claimed that he would be persecuted for political reasons if he went home and attempted to show that he had constructively fled from his country so as to qualify under Sec. 203(a)(7). The Board found that there had been no political change in his homeland and that any danger he might face upon his return would be as a consequence of his own actions in the United States. In other situations, however, the risks which an alien may face upon his return as a result of his conduct while here may be helpful factors in determining eligibility under Sec. 203(a)(7). See Matter of Kukla, I.D. # 2284 (1974), where the alien's cooperation with United States government agencies during his stay here as an exchange visitor rendered his claim of anticipated persecution more credible. In this case, though, the applicant was not attempting to establish constructive flight.

\textsuperscript{101} In Matter of Taheri, I.D. # 2124 (1972), the applicant was not permitted to show the future likelihood of any persecution because he had failed to establish that he had constructively fled his country.

The applicant was an Arab Christian who was in the United States as a non-immigrant visitor at the time his home in Jerusalem became occupied by Israel. The applicant apparently made no other allegations in support of his claim, other than his religion and nationality. The court denied his application for refugee status, holding that "Shubash [had] not proved that he would be persecuted or hampered in any way if he returned."104

Thus, on the basis of the reported cases, it appears that if an applicant has left his homeland illegally, at least the technical requirement of flight will be satisfied and further inquiry will be made into his motives to ascertain whether such a flight was due to persecution or fear of persecution. In some situations, flight will be interpreted as encompassing not only legal departure, but even a departure with intent to return, if the applicant establishes either past persecution or its future likelihood. Absent a showing of persecution, even the most perilous and dramatic flight will be irrelevant in determining eligibility.

C. Persecution

The term persecution appears in varying contexts both in prior statutes and in current immigration law;105 it is the chief element in establishing an alien's status as a refugee. Unfortunately, its definition lacks more definitive guidelines, other than that it must occur on account of race, religion, or political opinion. Since amendment in 1965, the wording of section 243(h) has been similar to section 203(a)(7) and a number of cases decided thereunder have attempted to delineate the elements of persecution.106 The applicants under these sections, however, are not "in the same legal posture,"107 creating basic distinctions which preclude analysis of one section based on cases arising under the other. The purposes of the two sections are entirely different; section 203(a)(7) extends a preference in being able to achieve immigrant status, whereas section 243(h) only withholds deportation without granting such status. A denial of a section 203(a)(7) application does not deprive the alien of an opportunity to become an immigrant in some other way,108 but merely denies him a preferential position. On the other hand, a denial of relief under section 243(h) may entail tragic and irreversible consequences. It is conceivable that future developments may lead to a more liberal construc-

103 450 F.2d 345 (9th Cir. 1971).
104 Id. at 346.
105 See note 84 supra.
106 For an extensive discussion of Sec. 243(h) and cases arising under it, see Evans, supra note 5, at 225-48. See also Evans, Political Refugees and the United States Immigration Laws: Further Developments, 66 Am. J. Int'l L. 571 (1972).
108 Although the applicant met all the requirements of Sec. 203(a)(7), his application for an adjustment of status under its proviso was denied because he lacked two years of physical presence in the United States. He was found, however, to be eligible for a sixth preference immigrant visa and thus an adjustment of status was granted. Matter of Kukla, I.D. # 8284 (1974).
tion of persecution under section 243(h), whereas a growing number of applicants who otherwise qualify under section 203(a)(7) may lead to a more restrictive interpretation. Moreover, the denial of an application under the proviso to section 203(a)(7) of an alien already in the United States is without prejudice to any claim he may raise under section 243(h). It is possible that different results may be reached on the same set of facts depending on which section is invoked. This occurred in Matter of Adamska, where the applicant's petition under the old and more stringent version of section 243(h) was denied, yet she succeeded under section 203(a)(7). Thus, only cases arising under the latter section will be discussed in determining what constitutes persecution, unless reference to a section 243(h) case is useful for clarification.

Generally, cases arising under section 203(a)(7) "must be decided individually, on all of their facts." This is especially true in determining what constitutes persecution. Of the various elements discernible from the cases no single one appears to be controlling, but taken together and combined with such intangible factors as the sincerity of the applicant's claim and the immigration officers' assessment of the situation in his homeland, certain recurrent fact situations seem to support an allegation of persecution. Of course, the existence of laws or governmental policies which are openly discriminatory against the alien's racial or religious group would appear to create a prima facie case of persecution. In the section of the Immigration and Nationality Act which exempts persons fleeing religious persecution from the literacy requirement, it is provided that such persecution may be evidenced "by overt acts or by laws or governmental regulations that discriminate against such alien or any group to which he belongs because of his religious faith." By analogy, persecution on grounds of race could be evidenced in the same manner. In this era of image-consciousness, however, even the most repressive regimes usually shy away from enacting flagrantly discriminatory laws or regulations, leaving establishment of persecution on these grounds to circumstances of individual fact situations. The applicant's record of political activity and actions directed against him for obviously political reasons would also clearly establish persecution. The applicants under section 203(a)(7) have usually been politically inactive, however, and the alleged persecution has taken the form of generally applicable criminal sanctions, economic reprisals, or other vaguely defined actions.

It appears that the activity which is directed against the alien must at least emanate from official or quasi-governmental sources. Allegations

109 Matter of Taheri, I.D. # 2124 (1972).
111 Prior to its amendment by the Act of Oct. 3, 1965, Sec. 243(h) required the alien to establish the likelihood of "physical persecution." For a discussion of the change effected by the amendment, see Evans, supra note 5, at 225-48. See also Evans, Political Refugees and the United States Immigration Laws: Further Developments, 66 AM. J. INT'L L. 571 (1972).
that the applicant was ridiculed for his religious beliefs or practices by private individuals are insufficient to support a claim of persecution. Membership in a minority group is not in itself sufficient, however, actions or policies directed against the group to which the applicant belongs may support his claim. In an unreported decision dealing with a Palestinian's claim of refugee status, it was held that

[t]he persistent action of the Israelis in controlling activities of Palestinian Arabs has placed the applicant in a position where he would be subject to social and economic restrictions and hardship if he returned to the Gaza Strip. The predicament in which he would find himself amounts to persecution.

But if the applicant does not belong to an identifiable group subjected to such restrictions, the persecution must be directed against him personally. Allegations that relatives have been persecuted in the past is not sufficient. The fact that family members have not been persecuted as a result of the applicant's actions would in contrast seem to undermine his claim. The general situation in the alien's homeland in itself does not appear to be sufficient, although in conjunction with other facts it may support the applicant's claim. Furthermore, difficulty in obtaining employment or a lack of economic opportunity unconnected with other fac-

116 Unreported Decision #A17 648 866 (1973) (Regional Commissioner reversing District Director's denial of refugee classification) [hereinafter cited as U.D.]. The unreported decisions cited herein represent cases arising in the Cleveland area which have been decided by the District Director and certified by the Regional Commissioner in Richmond, Virginia. Copies of the decisions are on file with the Cleveland office of the Immigration and Naturalization Service.
117 Matter of Frisch, 12 I. & N. Dec. 40 (1967) (applicant's father imprisoned for crimes against the state when she was a small child); U.D. # A19 590 791 (1973) (applicant's parents, brother, and other relatives imprisoned for political reasons prior to 1960 and the family temporarily removed from the area where they lived. "The applicant himself was young at the time, and except for losing a year of school when the family was transported, he did not suffer directly."); But see Matter of Zedkova, 13 I. & N. Dec. 626, 627 (1970) (past persecution was directed against the applicant's father but not at her). Here, however, the applicant was not trying to show that she had fled because of past persecution but that she would face persecution upon her return. Past persecution of her father together with her disobedience of an official order to return and the general situation in her homeland were held to have established that likelihood.
118 Matter of Taheri, I.D. # 2124 (1972) ("No allegations have been made that the applicant or his parents have been persecuted at any time . . . ."); Matter of Shirinian, 12 I. & N. Dec. 392, 395 (1967) (applicant's husband "has been allowed to continue his business . . . even to the extent of performing secret work for the government.").
tors is not considered evidence of persecution.\textsuperscript{121} If, however, such economic deprivation occurs for political reasons, it may support a claim of persecution. In \textit{Yee Chien Woo v. Rosenberg},\textsuperscript{122} the alien’s business had been confiscated by the Communist regime in China and thus he entered Hong Kong penniless. The Immigration and Naturalization Service rejected his claim to refugee status arguing that he had left China for economic reasons. The district court found, however, that such a contention ignored the realities of Communist ideology. “Both capitalist and anticommunist are enemies of the state,”\textsuperscript{123} and as a former capitalist, the alien had good reason to fear persecution.

The former political activity of the alien and his awareness of the reasons for his departure are important elements in evaluating the merits of his claim. In \textit{Matter of Ugricic},\textsuperscript{124} the applicant was an eighteen-year-old laborer and farm worker with eight years of education. In his application he stated that he did not like the political system of Yugoslavia and wished to emigrate to a democratic country. In the course of his interview by an immigration officer, it was shown that “he had little or no knowledge of the workings of the Communist Party of Yugoslavia or what it advocates, nor of the political, economic or other operations of the Government of Yugoslavia.”\textsuperscript{125} It is questionable whether any person of similar background in any country would be able to offer an adequate explanation of his nation’s political system. It is dubious whether this case suggests that to qualify, all applicants for refugee status have to pass some type of political science examination. It is probable that in view of the ease with which Yugoslavs may leave their country and the considerable amount of economically motivated emigration, such an inquiry into the applicant’s political awareness is properly used to screen out bona fide refugees from those leaving for other reasons.

Although an applicant’s lack of past political activity is one factor which may undermine his claim,\textsuperscript{126} this factor does not appear to be

\textsuperscript{121} Matter of Lalian, 12 I. & N. Dec. 124, 125 (1967) (“indignities” forced applicant’s husband to sell his business); U.D. \# A17 633 904 (1973) (“nearly impossible to regain employment” if applicant returned to her country); U.D. \# A19 590 791 (1973) (“applicant does not expect that he could obtain suitable employment if he returns . . . .”).

\textsuperscript{122} 295 F. Supp. 1370 (S.D. Cal. 1968), \textit{aff’d}, 419 F.2d 252 (9th Cir. 1969), \textit{rev’d and remanded}, 402 U.S. 49, 445 F.2d 277 (1971). This case was ultimately decided on the issue of whether the applicant had become firmly resettled in Hong Kong so as to disqualify him from refugee status; the district court’s initial finding of persecution was never challenged.


\textsuperscript{124} I.D. \# 2211 (1972). This is perhaps the only reported case involving an applicant for a conditional entry from outside the United States, rather than an adjustment of status under the proviso to Sec. 203(a)(7). It is interesting to note that the Italian government refused to consider Ugricic as a political refugee when he entered that country. This suggests that a determination by a foreign government is not conclusive and that each application will be decided on its own merits by United States authorities.

\textsuperscript{125} Id.

\textsuperscript{126} U.D. \# A19 590 791 (1973). This appears, however, to have been merely an incidental factor since the sincerity of the applicant’s motives was questionable. The alien had married a United States resident while here as a visitor. They were later separated and
significant, especially in view of the dire consequences such activity may create in certain countries. In a case arising under section 243(h), the Board has stated that a person who has not expressed opposition to the political regime of his nation is not automatically excluded from relief, and this view would also appear to be justifiable under section 203(a)(7). As with the other factors previously discussed, political inactivity is merely another fact, though not conclusive in itself, which is used in combination with others to determine the merits of the applicant's assertion.

A claim frequently raised is that the alien would be subjected to imprisonment or other punishment upon his return for violation of travel restrictions or staying abroad longer than permitted, and that such punishment is tantamount to persecution. The Board has held that generally "[s]uch imprisonment may not be considered on account of race, religion, or political opinion, but rather is a criminal sanction that is reconcilable with generally recognized concepts of justice." In a case arising under section 243(h), however, the Board recognized that not every statute "imposing criminal sanctions for unauthorized travel outside a particular country must be devoid of political implications. That will depend upon the provisions of the particular statute and the manner in which it is administered." Any possible punishment the alien may face upon his return is therefore just one more element to be considered.

**D. Inability or Unwillingness to Return**

Once an applicant has established that he has fled from the appropriate area because of persecution as required by section 203(a)(7)(A)(i), he must also show that he is "unable or unwilling to return" as prescribed in (ii). The statutory conditions of having fled and being "unable or unwilling" to return are in the conjunctive; both must be met. This requirement, however, is less formidable than would at first appear. "The alien is not required to substantiate that he would in fact be subjected to persecution if he returned there." In effect this interpreta-

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his wife withdrew a petition for his immigrant visa. It was at this point, some three years after his arrival, that the applicant sought classification as a refugee in an effort to remain in the United States.


132 Shubash v. District Director, 450 F.2d 345, 346 (9th Cir. 1971).

133 Matter of Moy, 12 I. & N. Dec. 121, 123 (1967); accord, Matter of Frisch, 12 I. & N. Dec. 40, 42 (1967). Where, however, the applicant did not originally flee because of persecution but wishes to remain in the United States because of a changed political atmosphere at home, the likelihood of future persecution must be substantiated. See Shubash v. District Director, 450 F.2d 345 (9th Cir. 1971); Matter of Zedkova, 13 I. & N. Dec. 626 (1970).
tion creates a purely subjective test in which the alien’s assertion can only be questioned if unreasonable.\textsuperscript{134} To date there have been no reported cases in which an alien has established eligibility under (i) and yet failed to do so under (ii). The weight given the applicant’s subjective opinion under this clause represents a great contrast with the requirement for establishing constructive flight where future likelihood of persecution must be proved.

E. The Requirement of Not Being Firmly Resettled

Unlike earlier enactments, section 203(a)(7) does not require that the applicant show that he has not become firmly resettled in some other area before becoming eligible to claim refugee status.\textsuperscript{135} It has been held that the applicant’s status in an intervening country is not a relevant factor in determining eligibility,\textsuperscript{136} however, the opposite conclusion has been reached on essentially the same facts.\textsuperscript{137} This conflict was resolved by the Supreme Court in \textit{Rosenberg v. Yee Chien Woo};\textsuperscript{138} in a 5-4 decision the majority held valid the requirement of not being firmly resettled despite its absence from the statute. In a footnote, however, the majority pointed out that such a condition did not exclude a refugee who had made his flight in successive stages.\textsuperscript{139} The operative factor appears to be what the alien’s status in the intervening countries was at the various junctures.

The effect of \textit{Rosenberg} has been to firmly re-establish this requirement.\textsuperscript{140} Resettlement is determined by the alien’s legal status in the intervening country,\textsuperscript{141} and indicative of this may be the exercise of any rights and privileges in that country which are inconsistent with refugee

\textsuperscript{134} This could occur only in those situations where there has been such a drastic change in his homeland since his flight that refusal to return would be patently unreasonable. For example, in a case arising under Sec. 243(h) where the alien alleged threatened persecution by the regime then in power in Chile if she were deported, a change of government took place while the case was pending which made her claim patently without merit. Matter of Mladineo, I.D. \# 2264 (1974).

\textsuperscript{135} The only reference to such a possible requirement occurs in Sec. 203(g) which provides for a subsequent adjustment of status by conditional entrants. In addition to the other prerequisites prescribed therein, the alien must not have acquired permanent residence.

\textsuperscript{136} Yee Chien Woo v. Rosenberg, 419 F.2d 252 (9th Cir. 1969).

\textsuperscript{137} Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970).


\textsuperscript{139} Rosenberg v. Yee Chien Woo, 402 U.S. 49, 57 n.6 (1971).

\textsuperscript{140} It had never in fact actually been abandoned, as the court pointed out in Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970). The Immigration and Naturalization Service had always imposed this requirement despite its absence from the statute. See Evans, \textit{supra} note 138, for the criteria.

\textsuperscript{141} Such a change of status may occur even without the alien’s wish. A Chinese refugee who had entered Hong Kong illegally was held to have become permanently resettled when a subsequent ordinance conferred permanent resident status on all illegal aliens who had been in the city for seven years. Matter of Kwan, I.D. \# 2247 (1973).
status.\textsuperscript{142} The duration of stay is not, in itself, controlling. Rather, "[i]t is . . . left to the discretion of the Immigration Service to determine what amount of time of intervening residence in a third country is sufficient to terminate the applicant's flight."\textsuperscript{143} Where an alien had been in Colombia for only two years but had acquired business interests in that locale, there was deemed to have been a resettlement.\textsuperscript{144} In contrast, a Palestinian Arab who had left his refugee camp and worked in Qatar for seven years before coming to the United States, was not even confronted with the issue of resettlement.\textsuperscript{145}

Moreover, the resettlement of a minor applicant's parents may be imputed to him after coming of age;\textsuperscript{146} and the converse may also be true. A married applicant born in Hong Kong of refugee parents was eligible even though she was a British subject. An important consideration in this case may have been her inability to join her husband in Canada and the presence of her immediate family in the United States as parolees.\textsuperscript{147}

The requirement that the alien not be firmly resettled operates as another limiting device on the number of persons who can utilize section 203(a)(7). It appears that Chinese refugees are most susceptible to this requirement, which can perhaps be explained by the fact that many Chinese have been present for long periods of time in areas of first refuge such as Hong Kong and Taiwan. Under the restrictive features of prior refugee enactments and the national origin quota system which existed until 1965, very few Chinese were able to enter the United States, resulting in a build up of a large body of eligible applicants. Interestingly, in these cases there usually appears to be little inquiry into the validity of their claims that they have fled because of persecution. Perhaps the nature of the regime on mainland China makes such inquiry impolitic.\textsuperscript{148}

The requirement of not being firmly resettled operates, in that event, as a screening device, much like the persecution requirement, to separate bona fide political refugees from those merely seeking to enter the United States for economic and personal motives.


\textsuperscript{144} Matter of Moy, 12 I. & N. Dec. 117 (1967).

\textsuperscript{145} U.D. # A17 648 866 (1973).

\textsuperscript{146} Matter of Ng, 12 I. & N. Dec. 411 (1967).

\textsuperscript{147} Matter of Hung, 12 I. & N. Dec. 178 (1967).

\textsuperscript{148} It is interesting to note that there are no reported cases involving Soviet nationals although 1,670 of them have been admitted to permanent residence in the United States under the provisions of Sec. 203(a)(7). Table 6E, 1974 INS ANN. REP. 35. This may suggest that the depth and scope of inquiry into an applicant's motives and the quantum of proof required may be partially governed by the general impression of the political situation in the alien's homeland.
F. Summary

No further requirements may be imposed on an alien who seeks to qualify under section 203(a)(7), although there have been attempts to do so. In *Shubash v. District Director*, the court suggested that the alien's ability to return to an area other than the one from which he actually or constructively fled is a relevant factor. In *Matter of Moy*, the application of a Chinese for classification as a refugee was denied for failure to prove that he would be subjected to persecution if he returned to Hong Kong or proceeded to Taiwan. This view, however, appears to be at variance with the Board's determination, the Board stated that "[t]he ability of the applicant to proceed to some other country is of no consequence, provided he has not firmly resettled in such country ...." It was held in another case involving a Spanish citizen who had been residing in Cuba that "[t]he ability of the applicant to return to the country of her birth and/or nationality, or to some other foreign country is of no consequence provided . . . the alien fits the statutory description of a refugee set forth in section 203(a)(7) . . . ." This interpretation may seem unfair since it places the refugee who has nowhere else to go on the same footing with one who could easily return to the country of his nationality. In some instances, however, the ties to the original country are remote in time and the alien may have valid political objections to returning. There is also no assurance that he would be accepted if he did return. This interpretation thus obviates the necessity for the alien to prove both that he meets the eligibility requirements of the statute in all respects, and that he cannot or will not go elsewhere for equally valid reasons.

The purpose of all section 203(a)(7) requirements is to limit the number of aliens who can utilize this provision. Although most of the requirements may be justified as restricting the section's benefits to bona fide political refugees, the limitation to persons from Communist areas and the Middle East does not logically seem to serve such a purpose. It is untenable that the possibility of persecution on account of one's race, religion, or political opinion can be circumscribed to one geographical region or to one ideology. Nonetheless, this is the precise effect of current law. If an alien can bring himself within the categories defined by section 203(a)(7), even the most spurious claim will receive consideration, whereas, a good faith claim of persecution will not be heard if

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149 450 F.2d 345 (9th Cir. 1971).

150 The court found not only that appellee Shubash had failed to prove the likelihood of any persecution if he returned to Israeli-occupied Jerusalem, but also that he had failed to prove he would be persecuted if he went to unoccupied Jordan. *Id.* at 346.


152 *Id.* at 123.


154 In *U.D. # A17 633 904* (1973), the applicant had come to the United States to marry a friend of her uncle. After the marriage plan fell through she overstayed her visitor's
the nation from which the alien has fled is not within these arbitrary
guidelines.\textsuperscript{155} Although the results often engendered by such provisions
may seem inequitable, they are nonetheless necessitated by the practical
impossibility of making the United States a haven for all the worlds’ ill-
begotten children.

\textbf{IV. Conclusion}

The utility and effectiveness of the present system of refugee immi-
gration under section 203(a)(7) is considerably limited in emergency
situations. The needed flexibility to cope with such problems is provided
by the parole provision of section 212(d)(5). The use of parole by the
executive branch, however, was not intended by Congress as a surrender-
ing of control over immigration policy.\textsuperscript{156} This has created an anom-
alous situation in which aliens are subject to two separate provisions
which often lead to diametrically opposite results.

Whereas the system under section 203(a)(7) employs carefully pre-
scribed requirements and numerical ceilings based on our ability to ab-
sorb large numbers of immigrants, executive extension of parole is based
entirely on political considerations devoid of personal or economic fac-
tors.\textsuperscript{157} Certain shortcomings inherent in the congressional approach
permit it to be used by only small numbers of those meeting the require-

\textsuperscript{155} Matter of Patel, 13 I. & N. Dec. 113 (1968). Whether the applicant’s claim had any
merit is not known; because her native country, Kenya, was not Communist nor within
“the general area of the Middle East,” the Board concluded that “no purpose would be
served in considering whether the applicant fled from Kenya because of persecution
...” within the meaning of Sec. 203(a)(7). \textit{Id.} at 115. This is not to suggest that
bona fide political refugees from other areas are without any remedy under United
States immigration law. Sec. 243(h) imposes no geographic or political limits and may
be invoked by any alien who is within the United States. Asylum and parole may be
granted on an individual basis in appropriate cases.

\textsuperscript{156} In the House and Senate committee reports accompanying the bill which contained
Sec. 203(a)(7), it is stated: “The Congress, charged with the constitutional responsibility
for the regulation of immigration, reserves the power to review the case history of
every refugee conditionally entered into the United States to determine whether the
interests of this country are subject to outside pressures.” H.R. Rep. No. 745, 89th
Sec. 203(f), 8 U.S.C. § 1153(f) (1970), requires the Attorney General to submit to Con-
grress a “complete and detailed statement of facts in the case of each alien who condi-
tionally entered” under Sec. 203(a)(7).

\textsuperscript{157} Matter of Janus and Janek, 12 I. & N. Dec. 866 (1968); Evans, \textit{supra} note 5, at
583-84.
ments. Hence, the need to assimilate large numbers in certain situations has compelled Congress to acquiesce in the continued use of parole.\footnote{This acquiescence has taken the form of an approval by the appropriate congressional committees of the Executive's decision to invoke Sec. 212(d)(5) on behalf of a particular group. C. Gordon & H. Rosenfield, Immigration Law and Procedure 119 (1974 Supp.). In the recent decision to parole up to 130,000 South Vietnamese refugees, the approval came from the Senate Judiciary Committee. N.Y. Times, Apr. 23, 1975, at 1, col. 6 (city ed.). Congress as a whole has ratified such decisions at a later time. In the case of the Hungarians and Cubans this ratification took the form of special legislation to permit them to adjust their status to that of permanent residents. Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419, and Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161. Under the present version of Sec. 245, such special legislation is no longer necessary at least for natives of the Eastern Hemisphere. Because there is an annual limit of 20,000 on the number of immigrant visas which can be issued to natives of any one Eastern Hemisphere country, and because a parolee's adjustment of status is not retroactive to the date of his arrival in the United States, it appears, however, that some special legislation may be necessary to permit South Vietnamese parolees to acquire permanent residence and to become eligible for U.S. citizenship within a reasonable time.}

Curtailment of the Executive's use of parole and placing refugee immigration solely under congressional control may not be a viable alternative. Congress' record in this area in the past has not been entirely laudatory. During the 1930's as the threat of totalitarianism and potential genocide became increasingly apparent, legislators resisted all efforts toward even minor liberalizations in the immigration law which might have saved many lives.\footnote{R. Divine, American Immigration Policy, 1924-1952, at 93-94 (1957).} Attempts to deal with refugee situations on an ad hoc basis during the period between 1948 and 1965 were blemished at times by displays of ethnic favoritism\footnote{For example, the 1950 Amendment to the Displaced Persons Act of 1948 limited eligibility to "persons of European national origin . . . ." Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, as amended, ch. 262, § 4, 64 Stat. 219, 221 (1950) (adding § 3(c)). The Refugee Relief Act of 1953 allocated 132,000 immigrant visas to German, Italian, and Dutch refugees but only 5,000 to Chinese and other Asians. The Refugee Relief Act of 1953, ch. 336, § 4(a)(1), (5), (6), (9), (10), (12), (13), 67 Stat. 400, 401-02.} and by bureaucratic delays.\footnote{The Presidential Directive of Dec. 22, 1945, took cognizance of the magnitude of the post-war refugee problem in Europe, but the bill which became the Displaced Persons Act of 1948 was not introduced until April 1, 1947, and the measure itself was not enacted until June 25, 1948. R. Divine, supra note 167, at 128. The amendment which liberalized that Act and enabled many persons to utilize it was not passed until June 16, 1950. More recently the measure which permitted Cuban parolees to adjust their status was not enacted until Nov. 2, 1966, more than five years after large numbers of Cubans began to be paroled into the United States.} For Cubans and South Vietnamese the United States has become an area of first refuge, making prolonged debate a luxury they certainly can ill afford.

Perhaps the best solution would be to create new statutory authority combining flexibility and executive discretion within clearly stated limitations prescribed by Congress. Before a comprehensive effort to establish new refugee immigration policy can be essayed, however, it will be necessary to determine what the underlying purpose of such a policy should be. In the past most refugees have been members of ethnic groups representing a significantly large community already present in the United States.
Their acceptance was prompted by foreign policy and humanitarian considerations which enjoyed domestic political support. There is growing evidence, however, that in the future these three motivating factors may diverge. The most compelling humanitarian situations may arise in areas where American foreign policy interests are marginal and are in reference to ethnic groups having insubstantial domestic support. On the other hand, refugee situations can arise in areas where there may be substantial support for their resolution among large groups of Americans, but where any involvement would run counter to United States foreign policy. The recent decision to accept South Vietnamese refugees appears to have been prompted by foreign policy and humanitarian considerations, but it is questionable whether there is significant public or political support. A single motive cannot be articulated as a basis for preferred treatment of refugees, and none will be attempted here. This must be the starting point, however, in any move toward changing existing law.

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Based on their country of birth, the largest groups have come from Cuba, Poland, Germany, Yugoslavia, Hungary, and Italy, in that order. Of the 1,030,193 refugees admitted between 1945 and 1974, 749,703 have come from Europe. Table 6E, 1974 INS ANN. REP. 35. Even some of the refugees born in Asian countries have been persons of European ethnic origin.

A current example is Northern Ireland. The proposed Northern Irish Relief Act of 1973, which was introduced in the 93d Congress and is now pending in the 94th Congress, would admit up to 25,000 persons who are seeking "to avoid the consequences of war, armed conflict, or civil disorder, or persecution ...." Northern Irish Relief Act of 1973, § 3, H.R. 2789 and H.R. 4195, 93d Cong., 1st Sess. (1973); H.R. 220, 94th Cong., 1st Sess. (1975). While such a measure might enjoy considerable political support among the American people, it could prove diplomatically embarrassing to admit refugees from persecution by a government which is a close ally. In the case of those applicants who had been convicted of various crimes by British authorities, it would be necessary to determine whether such convictions were for political offenses, so as to avoid the general prohibition against immigrants with criminal records. This, too, might prove to be an embarrassing inquiry.