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Immigration: New Consequences of Illegal Presence

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Summary

The 104th Congress passed major legislation to combat illegal migration to the U.S. One purpose of this law, enacted as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (Division C of P.L. 104-208), is to establish new legal disincentives to reside in the U.S. illegally.

The Immigration and Naturalization Service has estimated that 5 million aliens were residing here unlawfully as of October 1996. Of this estimated population, about three-fifths entered surreptitiously (called EWIs, for ***e***ntered ***w***ithout ***i***nspection), and about two-fifths overstayed nonimmigrant visas (*e.g.*, tourist visas). Employment appears to be the primary magnet, but there also are other motives for illegal residency. For example, spouses and children of legal immigrants, and certain relatives of citizens, may establish illegal residence to bypass long waiting lists for immigrant visas.

The following are among the disabilities IIRIRA attaches to illegal presence. Some of these target both EWIs and visa overstayers, some target EWIs only:

EWIs as *inadmissible* aliens. Until the 104th Congress, an alien who entered surreptitiously was removable through deportation proceedings. However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (P.L. 104-132) made EWIs removable through exclusion proceedings, which are less favorable to the alien with respect to burden of proof and possible relief from removal. The AEDPA also potentially made EWIs subject to removal under new expedited exclusion proceedings, in which an alien's rights were even more circumscribed. IIRIRA continued the changes made in the AEDPA by making EWIs *inadmissible* aliens, the Act's term that corresponds to *excludable* under earlier law. IIRIRA further authorized the Attorney General to apply expedited removal procedures to EWIs who cannot show that they have been continuously present here for 2 years. Nevertheless, the Attorney General has declined to exercise this authority under proposed regulations.

Inadmissibility of illegal residents who left without having been subject to removal proceedings. IIRIRA makes an alien who is unlawfully present in the U.S. for longer than 180 days (beginning after 4/1/97) but less than a year inadmissible for 3 years after the alien's departure. An alien who is unlawfully present (beginning after 4/1/97) for at least a year is inadmissible for 10 years after the alien's departure.

Not counted under these rules are periods during which the alien (1) is a minor, (2) has a pending claim for asylum (unless the alien is working without authorization), (3) is a battered wife or child, or (4) qualifies under family unity provisions of the Immigration Act of 1990 as a long-term (generally pre-1989) spouse or unmarried child of an alien who legalized under the Immigration Reform and Control Act of 1986. Also not counted is a period of up to 120 days in the case of a previously paroled or lawfully admitted alien whose authorized stay has expired but who before expiration of authorized status filed a nonfrivolous application for a change or extension of status (unless the alien works without authorization). Additionally, the Attorney General may waive inadmissibility for a spouse or a son or daughter of a citizen or permanent resident if refusal of admission would result in extreme hardship to the citizen or permanent resident.

Inadmissibility of removed or long-term illegal residents who enter or attempt to reenter illegally. IIRIRA makes indefinitely inadmissible an alien who (1) has been ordered removed or has been unlawfully present for an aggregate period of longer than a year and (2) enters or attempts to reenter without being formally admitted. There is no express exception under this rule for acts occurring prior to April 1997. The sole exception to this bar is a discretionary waiver by the Attorney General for an alien who has been outside the U.S. for at least 10 years.

Increased disabilities for previously removed aliens. IIRIRA increases from 1 year to 5 years the period during which an alien who was previously removed on arrival is inadmissible. (This disability period also apparently applies to EWIs who are removed after arrival under expedited removal proceedings.) IIRIRA sets a 20-year period of inadmissibility for aliens who have been removed on arrival more than once and an indefinite period of inadmissibility for aliens convicted of an aggravated felony. Apparently, these increased disabilities apply only with respect to removals occurring after April 1, 1997. Separately, the inadmissibility period for aliens ordered removed under other provisions (*i.e.*, ordered removed after arrival other than under expedited removal provisions) is increased to 10 years, with a 20-year period set for aliens removed more than once and an indefinite period of inadmissibility set for aliens who have been convicted of an aggravated felony. Inadmissibility under the foregoing rules may be waived by the Attorney General.

IIRIRA and adjustment of status under § 245(i) of the INA. Section 245(i) of the Immigration and Nationality Act permits an EWI to adjust to legal resident status without leaving the U.S. once a visa becomes available as an immediate relative or under a visa preference category. IIRIRA increases the application fee for § 245(i) adjustments to $1,000 and earmarks at least $800 of this amount for a new Immigration Detention Account. Authority to adjust under § 245(i) sunsets September 30, 1997. While § 245(i) generates a significant amount of fees, some view it as an incentive for family members to reside here unlawfully until a visa becomes available to them.