Alien Commuters: A Privileged Class

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ALIEN COMMUTERS: A PRIVILEGED CLASS

During the past few years in California, many attempts have been made to eliminate the economic advantages enjoyed by farm labor employers by organizing unskilled farm workers into effective collective bargaining units. While the problems inherent in organizing any transient labor force have severely hampered organizing efforts, unions have also had to contend with competition from alien farm laborers who live in Mexico and commute to jobs in the United States. Because these "alien commuters" are generally willing to work at reduced wages and readily cross union organized picket lines, farm labor employers have often utilized this source of labor and, thereby, have largely negated bargaining efforts of American unions.

The Immigration and Nationality Act was enacted in 1952 to protect jobs for American labor and contains many provisions controlling the types and numbers of immigrants admitted each year into the United States. Recent amendments to the act in 1965 were aimed at further restricting the influx of competing foreign labor. The act is a complex piece of legislation because it has been developed in piecemeal fashion over a number of years to deal with a variety of problems. Although perhaps an oversimplification of a complex subject, the treatment and status accorded an alien under the act depends on whether the alien has entered the United States for temporary purposes or whether his entry is ostensibly for the purpose of establishing permanent residence.

In spite of its complexity, and perhaps because of it, the act does not accurately categorize every alien entering the country. For example, alien commuters who regularly enter the United States and compete with domestic labor for jobs are subject to the provisions of the act but are not accurately described by any of the formal classifications of the act. Because the alien commuters come to the United States seeking permanent employment, and at the same time maintain a foreign residence, they form a hybrid classification falling somewhere between the two general classifications—those who seek permanent resi-


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idence and those who seek temporary status. In practice, the alien commuters obtain informal border crossing identification cards known as "green cards," and commute regularly from their homes in Mexico and Canada to jobs in this country.2

Historically, the Immigration and Naturalization Service has classified the alien commuters as immigrants "lawfully admitted for permanent residence."3 As will be subsequently discussed, this status subjects commuters to certain quota restrictions, while at the same time it also confers certain benefits upon the commuter and his family that were designed primarily for resident aliens. The administrative practice of thus classifying the alien commuter was challenged recently in Gooch v. Clark.4 The suit was initiated by Gooch on behalf of resident farm workers employed in southern California, but the AFL-CIO intervened as plaintiffs claiming to represent a larger class of workers affected by the commuter practice.5 The joint plaintiffs sought an order directing the attorney general to have government officials deny admission to alien commuters, who were competing for jobs with the individuals represented by the plaintiffs, principally on the grounds that Congress did not intend that commuters be classified as immigrants lawfully admitted for permanent residence. Plaintiffs contended that, by living across the border, commuters were not bona fide permanent residents and had lost their immigrant status. They argued that allowing commuters to re-enter the United States at the discretion of the attorney general circumvented the labor certification requirement—a prerequisite for entry into the country.6 The district court denied relief.

On appeal to the Court of Appeals for the Ninth Circuit, the plaintiffs contended that commuters were (1) "nonimmigrants," (2) not "lawfully admitted for permanent residence," and (3) not "returning

3. This practice began in 1927. For its chronology see Note on Commuters, supra note 2, at 1754-61.
5. An earlier case, Texas State AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir.), cert. denied, 379 U.S. 826 (1964), held that plaintiffs such as those in Gooch had no standing to challenge the practice. The district court in Gooch held that the plaintiffs did have standing. Because of two recent Supreme Court cases, Association of Data Processing Serv. Organ. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970), this issue was not contested on appeal in Gooch. 433 F.2d at 76. Cf. Giumarra Vineyards Corp. v. Farrell, 431 F.2d 923 (9th Cir. 1970) (concerning standing of employers and employees).
6. See Note on Commuters, supra note 2, at 1758-59. The labor certification requirement is discussed in the text accompanying notes 18-20, 25 & 31 infra.
from a temporary visit abroad." The government successfully countered all three contentions, and in a 2-1 decision, the court of appeals affirmed the lower court judgment sustaining the service's classification of the 30,000 to 40,0007 alien farm labor commuters as immigrants "lawfully admitted for permanent residence." This note will compare the majority and dissenting opinions in Gooch with the applicable legislative history and will give the decision some perspective in light of the provisions of the act and pertinent case law concerning the alien commuters.8

Alien Commuters: A Nonstatutory Category

The main issue in Gooch was the classification of alien commuters under the act—purely a problem of statutory construction. There were essentially three possible categories available to the court under which commuters could have been classified. The first of these was the category known as "temporary workers." Aliens are admitted into the United States under this category as nonimmigrants during periods of labor shortage, but only for a particular type of employment and only for a limited period of time. The second category consists of immigrants "lawfully admitted for permanent residence." This category is the one most people use to conceptualize immigrants because it is the one which ultimately leads to citizenship through naturalization. The last possibility was to classify commuters as immigrants not "lawfully admitted for permanent residence."9 This category must be implied from the act as a whole and, although it grants admission on a permanent or semipermanent basis, it would not confer on commuters the beneficial treatment that is accorded immigrants that are admitted for permanent residence. While no attempt is made here to exhaustively analyze these three categories, the following sections discuss the generic qualities of the classifications with respect to commuters.

Nonimmigrants

In general, aliens are defined in the act as all persons who are not

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8. The term "commuter" is a broad term, but as used herein it will take on the definition given to it in Gooch as "an alien who has been admitted into the United States for permanent residence, but who chooses to keep a home in Canada or Mexico and to cross daily or seasonally into this country to work." Id. at 76. In addition to natives of Mexico and Canada, the class includes aliens from other foreign countries who move to Canada or Mexico and commute to this country. Commuters may seek entry for a variety of purposes, but as used in this note, the term is restricted to the context of aliens who enter to perform farm labor. The arguments presented, however, can be made analogous to commuters who enter for other types of work.
9. There is actually a fourth possibility—temporary visitors for business. See note 27 infra.
citizens or nationals\textsuperscript{10} of the United States.\textsuperscript{11} Aliens are further divided into mutually exclusive categories, immigrants and nonimmigrants.\textsuperscript{12} The first of these two subcategories, "immigrants," is defined as all aliens that cannot be classified under one of the specific definitions of nonimmigrants contained in the act.\textsuperscript{13} The importance of thus defining "immigrants" is developed more fully in the next two sections. This section will discuss the various categories of nonimmigrants which are specifically defined in the act.

In general terms, nonimmigrants are aliens who are allowed temporary admission to the United States under certain specified conditions. Nonimmigrants are admitted only for purposes beneficial to the interests of the United States, and while they may live in the United States for short periods of time, they continue to maintain their permanent residences in their native countries. There are twelve subclasses of nonimmigrants,\textsuperscript{14} and these subclasses specifically describe the aliens who will be allowed temporary admission by the federal government for special purposes. The number of such aliens to be admitted is controlled by the narrow classifications described in the act rather than by numerical limitations. Examples of these classifications are foreign officials, alien crewmen, and foreign students. The principal feature of the nonimmigrant classifications is that they are not subject to quota restrictions as are those for immigrants. For an alien to be admitted as a nonimmigrant, he must come within one of these twelve statutorily defined categories.\textsuperscript{15} Presently, only one of these categories—"temporary workers"\textsuperscript{16}—affects American farm workers.

The category of "temporary worker" nonimmigrants was incorporated into the act in 1952 and is designed to include aliens with permanent residence in a foreign country who desire to come temporarily to the United States to perform designated temporary services or labor.\textsuperscript{17} Such persons are allowed into the country only if there are not

\textsuperscript{10} A person owing permanent allegiance to a state. 8 U.S.C. § 1101(a)(21) (1970).
\textsuperscript{11} Id. § 1101(a)(3).
\textsuperscript{12} Id. § 1101(a)(15).
\textsuperscript{13} Id.
\textsuperscript{14} Foreign government officials; temporary visitors for business or pleasure; transits; alien crewmen; treaty traders; students; international organization officials; temporary workers; media members; professors fiancés or fiancés of citizens; and business executives. Id. § 1101(a)(15).
\textsuperscript{15} Id. § 1184(b).
\textsuperscript{16} Id. § 1101(a)(15)(H)(ii). Another category, temporary visitors for business, no longer applies. See note 27 infra.
\textsuperscript{17} House Comm. on the Judiciary, Revising the Laws Relating to Immigration, Naturalization, and Nationality, H.R. Rep. No. 1365, 82d Cong., 2d Sess. 44 (1952) [hereinafter cited as H.R. Rep. No. 1365].
sufficient workers already in the country to perform the services or labor which the immigrant will perform once here.\textsuperscript{18} Furthermore, in 1965 the act was amended to predicate admission of temporary workers only upon certification by the secretary of labor that a labor shortage exists, and that admission of the workers would not adversely affect wages and working conditions of domestic labor similarly employed.\textsuperscript{19} The stated congressional policy is to protect American labor by restricting admission of these temporary workers to such times when admittance would serve the national economy and the welfare of the United States.\textsuperscript{20} Classifying aliens as nonimmigrants emphasizes the temporary nature of their presence in this country and the advantage to the United States of allowing their entry. It is important to note at this point that nonimmigrants are not accorded the status "lawfully admitted for permanent residence."\textsuperscript{21}

There are at least three reasons which militate against classifying commuters as "temporary worker" nonimmigrants. First, the commuter system was an established administrative practice for approximately twenty-five years before Congress enacted the "temporary workers" provision into the current version of the act. Commuters had always been classified as immigrants, and the legislative history of the 1952 enactment made it clear that the category "temporary workers" envisioned a new group of nonimmigrants and no reference was made to the prevailing commuter practice.\textsuperscript{22} Secondly, commuters seek admission "permanently" as that term is used in the act. The term refers to "a relationship of continuing or lasting nature" and such a relationship may be "permanent" even though it "may be dissolved eventually" by the United States or by the alien.\textsuperscript{23} Alien commuters find the practice economically advantageous, and they obtain admission to enjoy the commuter practice as long as jobs in the United States are available.\textsuperscript{24} Thirdly, and most importantly, the definition of "tempo-
rary workers" under the act provides that they not be granted admission unless “unemployed persons capable of performing such service or labor cannot be found in this country.”25 Sufficient workers are presently available since the secretary of labor has not certified to the contrary. Since a labor shortage is part of the definition, classifying commuters as “temporary workers” would simultaneously declassify them because there is no labor shortage. This, of course, makes no sense whatsoever.26

Apparently, commuters do not come within the classification of “temporary workers.” Commuters might still be classified as nonimmigrants if they could be brought under one of the other eleven subclasses; however, a review of those classes yields a negative result.27 In summary, neither the legislation defining nonimmigrants nor the history behind the act indicates the likelihood that Congress intended commuters to be classified as nonimmigrants under the act.

Immigrants “Lawfully Admitted for Permanent Residence”

Under the act, “immigrants” is the classification given to all aliens who cannot be classified as nonimmigrants.28 As discussed in the preceding section, commuters cannot be fitted into any of the twelve subclasses of nonimmigrants under the act. Therefore, under the act, the commuters are immigrants by definition. The remaining question, then, is whether the commuters—even though correctly classified as immigrants—should be granted the status “lawfully admitted for permanent residence,” or whether they should be classified as immigrants not “lawfully admitted for permanent residence”? This section will consider the first of these alternatives—the commuters as immigrants “lawfully admitted for permanent residence.”

Immigrants generally seek entry to establish permanent residence and many of them eventually become naturalized American citizens. In fact, the act provides that aliens are not to be admitted as immi-

25. 433 F.2d at 78.
26. Id. at 81 n.25. The certifications are issued by occupation or type of employment. See GORDON, supra note 1, at § 3.6b. Here, again, the reference is to farm laborers.
27. See note 14 supra. After commuters were classified as immigrants in 1927, they tried to classify themselves as “temporary visitors for business,” but the Supreme Court, in Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929), determined that the term “business” did not include “labor for hire.” This decision relegated commuters to entry as immigrants. The act has been changed and amended since Karnuth, but the majority in Gooch considered Karnuth as still valid authority. 433 F.2d at 78 n.14. Cf. Amalgamated Meat Cutters & Butcher Workmen v. Rogers, 186 F. Supp. 114, 117 (D.D.C. 1960), discussed in text accompanying notes 49-54 infra; Note on Commuters, supra note 2, at 1753-54.
grants unless they are eligible for citizenship at the time of admission.29 In addition, because of the basic protectionist policy embodied in the act by Congress, immigrants are subject to the same labor certification requirements as are nonimmigrants. If an immigrant comes to the United States for the sole purpose of working, he is not to be admitted unless the secretary of labor certifies that his entry is to fill a labor shortage, and that such entry will not adversely affect wages and working conditions.30

Under the act, all aliens are presumed to be immigrants for purposes of admission unless they qualify themselves under one of the nonimmigrant classifications.31 As a practical matter, the presumption operates restrictively because immigrants are subject to annual quotas for their respective countries.32 Prior to June 30, 1968, immigrants from foreign countries in the Western Hemisphere were not subject to quota limitations. Since that date, however, an annual limitation of 120,000 has also been placed on immigrants from the Western Hemisphere.33 Quota limitations notwithstanding, there are still special classes of immigrants, such as close relatives of citizens or resident immigrants, which are not subject to quotas. These special exemptions apply to all immigrants regardless of their country of origin.34

One of the more important consequences of admission as an immigrant is the ability to acquire the status "lawfully admitted for permanent residence." The quoted phrase is a term of art under the act and means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."35 The phrase is of special importance because it appears in numerous sections of the act.36 For example, one such section employing this

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29. Id. § 1182(a)(22) (alien excludable unless he is eligible for citizenship).
30. See note 19 supra.
32. Id. §§ 1151, 1152 (170,000 for all countries outside of the Western Hemisphere).
33. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 911 (1965) (this 120,000 is in addition to the 170,000 mentioned in note 32 supra). This act, in conjunction with 8 U.S.C. §§ 1151, 1152 (1970), makes all immigrants subject to quota restrictions. Attempts have been made to reduce or abolish the 120,000 figure, but none have been successful. See Gordon, supra note 1, at § 2.20.
34. 8 U.S.C. § 1151(a) (1970) excludes special immigrants and immediate relatives of citizens from quota restrictions. Special immigrants are defined in section 1101(a)(27) and include immigrants from the Western Hemisphere (which have been subject to a quota since 1968—see note 33 supra); immigrants admitted for permanent residence who are returning from temporary trips abroad; former citizens reapplying for citizenship; ministers; and aliens employed abroad by the federal government. The immediate relatives of citizens are their children, spouses, and parents. Id. § 1151(b).
35. Id. § 1101(a)(20).
36. H.R. REP. No. 1365, supra note 17, at 32.
phrase allows the attorney general discretion to readmit resident immigrants who are returning from temporary visits abroad without requiring formal documentation. Generally, immigrants must present valid unexpired visas and other required documents to immigration officials upon each entry into the country. Upon initial admission, immigrants who qualify as "lawfully admitted for permanent residence" are issued alien registration receipt cards (form I-151), commonly called "green cards," which the attorney general allows to be used in lieu of visas and other formal documentation to gain re-entry into the United States if the immigrant is returning to an unrelinquished lawful permanent residence. The "green card" procedure is largely justified on the basis that it facilitates the administrative processing task necessary for re-entry of such immigrants.

One of the basic problems in the act centers around this discretionary "green card" procedure. The discretion granted to the attorney general concerns "returning resident immigrants, defined in section 1101 (a)(27)(B)" of the act, which in turn refers to "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." As has been discussed, the phrase "lawfully admitted for permanent residence" has a special meaning under the act; however, the phrase makes no distinction on the basis of the immigrant's actual place of residence and merely refers to the alien's status under the act. Because the act lumps together "resident immigrants" and immigrants "lawfully admitted for permanent residence," for purposes of the discretionary readmittance by the attorney general, the net result is that both classes of immigrants are allowed entry under the informal documentation procedure. That is, the discretionary power to informally readmit immigrants which has been given to the attorney general is not limited to only those immigrants who actually reside here. Not only is the alien immigrant, who has been "lawfully admitted for permanent residence," accorded the special re-entry procedures, but other provisions of the act allow the attorney general the discretion to grant special treatment to close relatives of such aliens. For example, one such provision grants the attorney general discretion

38. Id. § 1181(a) (1970); 8 C.F.R. § 211.1(a) (1971).
39. These cards are issued to immigrants only after they have established lawful admission for permanent residence. 8 C.F.R. §§ 101.3, 211.1(b)(1) (1971). Lawful admission for permanent residence can be obtained in ways other than initial entry into the country. See note 87 infra.
to waive the ban against entry of an alien convicted of a crime if the individual is the spouse, child, or parent of an alien "lawfully admitted for permanent residence."\(^{41}\) Also, if the relative of an alien "lawfully admitted for permanent residence" obtains entry documents by fraud, the attorney general may waive such disability and allow entry of the relative;\(^{42}\) furthermore, if the fraud is not discovered until after entry, the relative cannot be deported.\(^{43}\) In addition, the Department of Labor certification of labor shortages is not required for admission of the spouse, child, or parent of an alien "lawfully admitted for permanent residence" if such relative was born in the Western Hemisphere.\(^{44}\) Finally, the spouse, unmarried sons and unmarried daughters of aliens "lawfully admitted for permanent residence" are entitled to second preference visas, thus speeding their process of entry.\(^{45}\)

Of course, the special privileges that accompany the status of an immigrant "lawfully admitted for permanent residence" are certainly reasonable and justifiable when granted to an individual who is permanently residing in the United States because they minimize hardships which might otherwise occur. They also advance an underlying con-

\(41\). 8 U.S.C. § 1182(h) (1970) (only in cases of extreme hardship and in no case contrary to the national welfare).

\(42\). Id. § 1182(i) (if alien is otherwise admissible).

\(43\). Id. § 1251(f) (if alien is otherwise admissible).

\(44\). Compare id. § 1182(a)(14) with id. § 1101(a)(27)(A).

\(45\). Within the applicable quota limitations, a certain percentage of various classifications of aliens applying for immigrant visas are given preference in considering and granting those visas. Id. § 1153. For example, 20 percent of the total quota allocation for a country is set aside for unmarried children of citizens of the United States and their applications will be processed first within any given year; that is, they receive "first preference" visas. Thus, the application for an immigrant visa made by an alien who is an unmarried child of a United States citizen may be approved before the application of an alien without any statutory priority even though the alien without any priority may have applied months before the alien child of the United States citizen. When there are no applications for "first preference" visas or the statutory percentage has been filled, visas are made available to the spouses and unmarried children of aliens "lawfully admitted for permanent residence." These visas are called "second preference" visas and are granted to 20 percent of the country's quota. In descending order, the other categories are as follows: (1) members of professions (10%); (2) married children of citizens of the United States (10%); (3) brothers and sisters of citizens of the United States (24%); (4) permanent skilled and unskilled workers (10%); (5) certain refugees (6%); and (6) all others in chronological order. Id. Visa preferences contained in section 1153 apply only to those aliens entering under quotas outlined in section 1151(a). Immigrants from Western Hemispheres are exempt from the provisions of section 1151(a) and therefore the preferential treatment of section 1153 does not apply to them. The provision limiting the annual number of immigrants from Western Hemisphere countries to 120,000 also makes no provisions for priority treatment regarding issuance of visas. See notes 33-34 supra. Therefore, immigrants from countries in the Western Hemisphere cannot obtain preferential treatment for visas and must apply for them on a first-come-first-served basis. See GORDON, supra note 1, at § 2.20.
gressional policy of maintaining family unity. It is equally obvious that
this special treatment would not be justified for nonresidents who come
to this country only temporarily. If such privileges were granted to the
relatives of nonresidents, large loopholes would be created in the act
which would defeat the overall policy of restricting and controlling the
quantity and quality of aliens admitted across our borders.

Alien commuters, though not specifically mentioned in the act,
have been classified as immigrants "lawfully admitted for permanent
residence" for almost fifty years.46 As discussed in the preceding sec-
46. See GORDON, supra note 1, at § 2.1b; Note on Commuters, supra note 2,
at 1752-61.

tion,47 alien commuters do not fit the specifications contained in the
act for nonimmigrants. However, even though it is correct to classify
the commuters as immigrants, it may not be beneficial to classify such
commuters as immigrants "lawfully admitted for permanent residence."
At the present time, all of the benefits discussed above that accompany
the status of "lawfully admitted for permanent residence" are, as a mat-
ter of practice, accorded to commuters. There appears to be little justi-
fication for the practice in terms of the congressional policy of main-
taining family unity because the commuters maintain their permanent
family residence in Canada or Mexico. Furthermore, granting this
privileged status to commuters appears to defeat the policy of protect-
ing American labor by allowing entry to the commuter's immediate
relatives where such entry might not have been granted had they not
been related to an immigrant "lawfully admitted for permanent resi-
dence." At the present time relatives of commuters may enter without
regard to the labor certification requirement because of the commuter's
status as an immigrant "lawfully admitted for permanent residence."

Immigrants Not Admitted for Permanent Residence

One possible category for "commuters" merits discussion before
analyzing the court's decision in Gooch—classifying commuters as im-
migrants not "lawfully admitted for permanent residence." Although
this suggested classification would best describe the commuter practice,
it can only be inferred from a mechanical application of the definition
of immigrant in the act. Under the act, immigrants are the residual
category of aliens that cannot be designated as nonimmigrants. The
definition thus embraces, as immigrants, all aliens who come for per-
manent residence and any other purpose not specifically covered by
one of the twelve categories of nonimmigrants. Thus, under the act
aliens may be theoretically admitted as immigrants even though they
do not intend to establish permanent residence.48

47. See text accompanying notes 10-27 supra.
48. See AUERBACH, supra note 1, at 68; GORDON, supra note 1, at § 2.5b.
There is one district court case that lends support to this proposition, *Amalgamated Meat Cutters and Butcher Workmen v. Rogers.* This case and *Gooch* are the only two cases which have considered the issue of whether commuters should be accorded the status "lawfully admitted for permanent residence." *Amalgamated* reached a result directly opposite to the result reached in *Gooch.*

In *Amalgamated* commuters had been crossing picket lines during a strike at the Peyton Packing Company in El Paso, Texas. At the time of the suit, the act provided that commuters were to be admitted until such time as the secretary of labor certified that their admission would adversely affect wages and working conditions. The secretary of labor had prepared the certification during the time the strike was in progress at the plant, but the attorney general had allowed commuters to cross the borders anyway. The attorney general reasoned, on the assumption that commuters were "lawfully admitted for permanent residence," that they were exempt under the act from the secretary of labor's certification. The district court disagreed:

[I]t is clear that Mexican commuters do not reside in the United States, and that it therefore is not possible for them to be aliens lawfully admitted for permanent residence.

District Judge Youngdahl, who wrote the opinion, placed emphasis on the word *residing* rather than the word *status* when he interpreted the definition of the term "lawfully admitted for permanent residence." As has been previously discussed, the term refers to an alien's status and does not deal with the issues of residence or intent to reside. To this extent, the judge appears to have erred in that he should have focused on whether commuters should be granted the status, rather than on the definition of the status. The court did not attempt to determine whether commuters should be classified as immigrants, and the opinion was limited to the meaning of the phrase "lawfully admitted for permanent residence." Nevertheless, Judge Youngdahl did note that commuters had been classified as immigrants by the service. Of major significance was the statement by the court that the decision did not invalidate the commuter practice—only that it could not be used to evade the secretary of labor's certification.

If it is true that commuters cannot be subsumed under one of the definitions of nonimmigrants, and there is no hint in *Amalgamated* to the contrary, then this case has the effect of recognizing the category

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50. *Id.* at 114-16.
51. *Id.* at 118-19.
52. *Id.*
53. *Id.* at 117.
54. *Id.* at 119.
of immigrants not "lawfully admitted for permanent residence." Unlike immigrants "lawfully admitted for permanent residence," including the commuters in this category would be wholly consistent with congressional policies embodied in the act. The policy of protecting labor would be advanced because the entry of the commuter would be charged against the quota for his native country, thus limiting the number of aliens admitted to work. Also, since the commuter maintains his permanent residence outside the country, he would have no need to bring his family here and there would be no need for preferential treatment for the commuter's relatives. Of course, this would also preclude any possible misuse of privileges by the commuter's relatives to gain entry to the United States when not otherwise warranted under the act. The only problem with this hybrid classification is whether Congress intended that it be used to classify commuters.

In summary, since commuters are not nonimmigrants under the act, they must be classified either as immigrants "lawfully admitted for permanent residence" or immigrants not "lawfully admitted for permanent residence." The primary task faced by the Court of Appeals for the Ninth Circuit, in Gooch was to determine which of these two categories was intended by Congress to apply to commuters. Other issues in the case were peripheral to this primary issue and merely followed from its resolution.

Practical Considerations

When considering Gooch, it is instructive to bear in mind some extrinsic considerations that give the decision perspective. On its facts Gooch is limited to alien farm workers, but its impact reaches all commuters regardless of type of employment. It is primarily significant to farm workers since they comprise the most significant subgroup of commuters.

On its face, the decision is significant only to commuters who had been admitted to the United States prior to 196555 because, with certain exceptions, no alien has gained admission since 1965 solely for the purpose of working. In that year the act was changed to exclude all aliens coming to the United States to work unless the secretary of labor certified that there was a labor shortage.56 Since 1965, no certification beneficial to the alien commuters who seek farm labor employment has been granted.57 However, aliens who have entered the United States since 1965 under an immigrant classification exempt from the labor certification requirement, such as close relatives of

55. 433 F.2d at 81 n.25.
56. See note 19 supra.
57. See note 26 supra.
United States citizens or aliens "lawfully admitted . . . for permanent residence," and who subsequently become commuters must also be included in the group affected by the decision in Gooch. How much these aliens will expand the commuter class is uncertain, but it appears that the class of farm labor commuters is a reasonably stabilized class of 30,000 to 40,000 persons and will not expand appreciably until the secretary of labor makes the applicable certification.

Even if commuters, that is immigrants, receive certification by the secretary of labor, they are chargeable against the quota from their native country on their initial entry to the United States. The numerical limitations established by Congress restrict the number of immigrants admitted each year to compete for jobs in this country whether or not those immigrants reside in the United States. These same limitations apply to the relatives of commuters. Although the relatives of commuters receive preferential treatment in that they are exempted from labor certification requirements, they still enter as immigrants and, as such, are subject to the quotas for their home country just like all other immigrants. In addition, the provisions which allow entry of relatives of commuters even though they have been convicted of crimes are applicable only when it can be shown that exclusion would impose extreme hardship. In the case of a relative who obtains entry by fraud, waiver of his exclusion is a discretionary matter and is applicable only if the alien is otherwise qualified for admission. In such cases of fraudulent entry, it would be reasonable to assume that the Immigration and Naturalization Service would take a long, hard look at the many admission requirements in determining whether to allow the entry of the alien even though he was the relative of a commuter.

A recent case in California, Sam Andrews' Sons v. Mitchell, has held that commuters are excludable as strike breakers, regardless of any status they may have acquired under the act. The immigration regulations refuse admission to green card commuters when the secretary of labor has certified that there is a bona fide "labor dispute" in

59. Cf. REPORT OF THE SELECT COMM’N ON WESTERN HEMISPHERE IMMIGRATION 101 (1968) [hereinafter cited as SELECT COMMISSION REPORT]. The statistics available in this report, which were taken from one-day samples, show that the total number of alien commuters in the United States has increased from 34,000 in 1963 to 44,000 in 1966. Ninety percent of this 44,000, or approximately 42,000, commute across the United States-Mexico border. Forty percent of these 42,000 alien commuters, approximately 17,000, are agricultural workers. These figures for alien commuters are exclusive of approximately 18,000 United States citizens who live in Mexico or Canada and commute to work in this country. Id. at 101, 114, 115, 130.
60. See notes 41-45 supra.
the area where the commuters intend to work. In *Mitchell* a strike was in progress at a produce farm in California and the secretary of labor had made the required certification. The government thus had excluded commuters under the "strike breaker" regulation. The plaintiffs were farm owners who relied heavily on commuters for labor. They sought a declaratory judgment that the regulation, as enforced against commuters, was an unconstitutional abuse of discretion; an injunction was also sought against enforcement of the regulation. The court first discussed the coincidence of status held by resident and nonresident aliens, and then held that because nonresident commuters had no "presence" in this country, they had no constitutional standing to contest the government's action. The court concluded that the attorney general could rationally differentiate between resident immigrants and nonresident immigrants in more stringently controlling the use of green cards.

**Gooch v. Clark**

It will be remembered that Gooch and the AFL-CIO sought to enjoin the attorney general from admitting alien commuters. The government was persuasive in arguing that Congress intended that a commuter be classified as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad," and therefore, that commuters be exempt from the secretary of labor's certification requirement on re-entry to the United States. Plaintiffs were

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62. 8 C.F.R. § 211.1(b) (1971).

63. *Mitchell* reached the same result as *Amalgamated* with respect to commuters breaking strike lines, even though their holdings regarding the status of commuters were contrary. *Amalgamated* was decided when the law freely admitted aliens until the secretary of labor certified that their entry would be detrimental to wages and working conditions. 186 F. Supp. at 114 n.1 (Citing the pre-1965 version of the code). In that case the court held that commuters were subject to a strike certification because they were not "lawfully admitted." Subsequent to *Amalgamated*, and prior to *Mitchell*, the law changed to exclude all aliens unless the secretary of labor certified that their entry was not detrimental to American labor. (See discussion note 19 supra.) In addition to this change, the service provided for exclusion of commuters if the secretary determined that a strike was in progress. *Mitchell* held that even though commuters were "lawfully admitted" under *Gooch* and could circumvent the labor certification requirement, they could not circumvent the secretary's strike certification because of their nonresidence. 326 F. Supp. at 39.

64. "Resident aliens . . . have established a presence in this country; they acquire economic, social and familial ties here, they establish an involvement and concern with governmental policies here . . . . [T]he commuter alien too can acquire a presence by exercising his right and privilege to reside in this country." 326 F. Supp. at 39.


66. 433 F.2d at 76. See text accompanying notes 4-7 supra.
unsuccessful in their appeal from a summary judgment granted to the government.

Judge Hufstedler, writing for the majority, began by defining a commuter as "an alien who has been admitted into the United States for permanent residence, but who chooses to keep a home in Canada or Mexico and to cross daily or seasonally into this country to work." The court concluded that, within the meaning of the act, commuters were (1) "immigrants," (2) "lawfully admitted for permanent residence" and (3) were "returning from temporary visits abroad." Resolution of the first contention was definitional; the majority demonstrated that commuters could not be classified under any of the classifications of nonimmigrant under the act and were therefore immigrants. In rejecting the plaintiffs' second contention—that commuters were not "lawfully admitted for permanent residence"—the majority relied on the definition of the phrase "lawfully admitted for permanent residence" under the act and concluded that it referred to the commuters' status under the immigration laws and did not pertain to the actual place of residence. The court further noted that this status was properly accorded commuters because each commuter had at one time received a valid immigration visa. Citing the longstanding administrative practice adopted by the service and the lack of positive evidence that Congress intended to alter the prior status of the commuter by revisions to the act, the court concluded that a commuter was in fact properly to be considered as "returning from a temporary visit abroad" even though on a frequent basis. The court frankly disagreed with the holding in Amalgamated in which commuters had been held to be not "lawfully admitted for permanent residence." Inherent in the Gooch opinion was the conclusion that commuters were within the class of immigrants exempt from labor certification requirements after initial entry into the country.

Judge Wright dissented from the majority opinion insofar as the propriety of according commuters the status of "lawfully admitted for permanent residence." He found it unnecessary to discuss the first contention—whether commuters were immigrants or nonimmigrants—and acquiesced with the majority that commuters could properly be considered as returning from a temporary trip abroad when they sought re-entry. In his dissent, Judge Wright concluded that commuters were not "lawfully admitted for permanent residence" and that the plaintiffs should have been granted relief on that basis. The judge reasoned that it had not been the intent of Congress to extend any of the benefits granted under the act to aliens actually resident in the United

67. Id. at 76.
68. Id. at 83 n.3, 82 n.1.
States to the "commuters, who by definition neither reside here nor intend to do so, and who are ineligible to citizenship." 69

Elementary principles of statutory construction were cited as compelling either actual residence, or intent to establish one in construing the term "lawfully admitted for permanent residence." The preferential treatment which was accorded to immediate relatives of aliens admitted for permanent residence was cited as further evidence that, while the preferential treatment of resident aliens was in consonance with congressional policy, ascribing such a policy to the treatment of nonresidents was nonsense. The judge could find nothing in the history of the act to impute an intent on the part of Congress to grant commuters the status of having been "lawfully admitted for permanent residence." Judge Wright thought that the decision in Amalgamated—that commuters were not "lawfully admitted for permanent residence"—properly interpreted the intent of Congress. He reasoned that since Amalgamated had been decided before the act was amended in 1965, and since Congress had not attempted to counteract the decision in the amendments to the act, the view in Amalgamated properly expressed Congress's intent regarding the treatment of commuters. Judge Wright also noted in support of his position that the term itself, "lawfully admitted for permanent residence," had been developed in two Supreme Court cases dealing with resident aliens. Finally, inconsistencies in the interpretation of the status of commuters by the Immigration and Naturalization Service were noted to negate the argument that the longstanding practice with respect to commuters should be given deference by the court. 70

The Status of Commuters Under The Act

At the outset, it should be pointed out that the court in Gooch devoted considerable effort to a determination of congressional intent because congressional power over immigration laws is plenary. This was not a case where the court had to consider the interests of commuters, for as nonresident aliens, they had no constitutional or statutory interest at stake other than that which is contained in the act. In addition, the court recognized that a viable immigration policy requires a balancing of domestic interests against foreign policy considerations. If the interests of our labor force outweigh the policy of maintaining friendly relations with foreign countries, shifts in congressional policy

69. Id. at 82. The last phrase is incorrect. Regardless of the correctness of the result, commuters have been admitted in the past as immigrants. One of the prerequisites for entry as an immigrant is eligibility for citizenship. 8 U.S.C. § 1182(a) (22) (1970).
70. 433 F.2d at 83-89.
are amenable to change by the normal political processes of this country.

The essence of the majority holding in Gooch is summed up in one statement by the court which, unfortunately, was made without comment or explanation: "Commuters have been accorded the privilege of residing permanently in the United States, for each one of them at one time received a valid immigrant visa." This statement assumes two fundamental propositions which require further analysis: (1) do commuters have the status of immigrants "lawfully admitted for permanent residence"; and (2) if so, when is that status acquired?

Are Commuters "Lawfully Admitted for Permanent Residence"?

The first of these two propositions—whether commuters are "lawfully admitted for permanent residence"—required a balancing of at least three factors by the court insofar as determining congressional intent regarding commuters: First, whether the commuter practice was consistent with the overall policies of the act; second, whether the legislative history of the act disclosed that Congress was aware of the commuter practice when it enacted the act in 1952 and whether Congress intended the act to affect the commuter practice; third, whether there was any other evidence subsequent to adoption of the act which would affect the prior two factors.

As has been discussed, there are two general policies permeating the act which affect the alien commuters. These policies protect American labor from unwanted competition, but enhance family unity for those aliens who are allowed entry on a permanent basis. The alien commuter practice does not circumvent policies protecting domestic labor because the alien commuters, as immigrants, are subject to the secretary of labor's certification requirement and congressionally determined numerical limitations. The commuter practice is not entirely consistent, however, with the congressional policy of maintaining the unity of a resident alien's family. Since the alien commuter is a non-resident, preferential treatment for admission to the United States accorded to the commuter's immediate family becomes unnecessary. In his dissenting opinion, Judge Wright reasoned that because of this inconsistency, Congress did not intend to grant commuters the status of having been admitted for permanent residence. Going beyond the dissent's analysis, the majority affirmatively answered the question whether, in spite of these inconsistencies, Congress intended to treat commuters as having been "lawfully admitted for permanent residence." An appraisal of the sparse evidence that is available supports this contention.

71. Id. at 79.
72. H.R. REP. No. 1365, supra note 17, at 29, 50-51.
Initially, it must be emphasized that the alien commuter practice is not a novel phenomenon. It has existed in essentially its present form since the early part of this century, and there is evidence that Congress has been aware of the commuter practice for at least a quarter of a century. A lengthy, thorough report preceded enactment of the current version of the act,\textsuperscript{73} and at least two sections in the report refer to the status of commuters in much the same language as the court does in \textit{Gooch}.\textsuperscript{74} These two sections refer to the issuance of border crossing cards, and provide that commuters are to be issued the same type of cards as resident immigrants as opposed to cards for non-resident immigrants. Of course, the language contained in these sections was prefaced by the background of a twenty-five year administrative practice of classifying commuters as immigrants "lawfully admitted for permanent residence." Of major significance is the fact that the report flatly equates the concept of immigrants with the concept of lawful admission for permanent residence.\textsuperscript{75} The House bill recommending adoption of the act also equated immigrants with lawful admission for permanent residence.\textsuperscript{76} Thus, the term "immigrant," although a term of art in the act, does not appear to have been designed to create the legal nicety of a class of aliens admitted as immigrants but not for permanent residence. Furthermore, the report noted that once an immigrant had been admitted to the United States, there were to be no restrictions as to his place of residence.\textsuperscript{77}

After the current version of the act was passed in 1952, the Immigration and Naturalization Service took the position that the act had not affected the prevailing commuter practice.\textsuperscript{78} The status of commuters remained unchallenged until 1960 when \textit{Amalgamated} determined that commuters were not to be considered "lawfully admitted for permanent residence." Subsequent to the decision in \textit{Amalgamated}, and prior to adoption of a variety of amendments to the act in 1965, the service notified Congress of its disagreement with the decision.\textsuperscript{79} In addition, before the amendments were passed a congressional report concerning commuter workers was made.\textsuperscript{80} The 1965 amendments


\textsuperscript{74} \textit{Id.} at 535, 616.

\textsuperscript{75} \textit{Id.} at 612, 614.

\textsuperscript{76} H.R. Rep. No. 1365, \textit{supra} note 17, at 36-37.

\textsuperscript{77} S. Rep. No. 1515, \textit{supra} note 73, at 618.


\textsuperscript{79} \textit{See} \textit{Gooch} v. Clark, 433 F.2d 74, 81 & n.26 (9th Cir. 1970), \textit{cert. denied}, 402 U.S. 995 (1971).

\textsuperscript{80} \textit{Subcomm. No. 1 of the House Comm. on the Judiciary, Admission of Aliens into the United States for Temporary Employment and Commuter
passed by Congress placed further restrictions on the influx of aliens, especially those entering to work, and at the same time expanded preferential treatment to relatives of permanent resident aliens.\textsuperscript{81} Paradoxically, however, the legislative history of the amendments made no reference to the commuters or the commuter practice. Subsequent to the 1965 amendments, but before \textit{Gooch} was decided, there were still more reports concerning commuters which were made to Congress,\textsuperscript{82} but there has still been no overt action by Congress to either acknowledge or revise the prevailing practice.

This chronology of events, though it tends to support the majority in \textit{Gooch}, is at best circumstantial evidence upon which to base a finding of congressional intent regarding commuters. On the other hand, the only evidence to the contrary is the alleged frustration of general policies of the act. The weight which should be given to the policy issue is somewhat lessened, however, by the fact that Congress viewed the labor certification requirement as sufficient protection for the American work force.\textsuperscript{83} As previously noted, the 1965 amendments further strengthened that provision by changing the prior language in the act allowing admission \textit{until} domestic workers were adversely affected, to excluding admission \textit{unless} American labor would not be affected.\textsuperscript{84}

As a practical matter, classifying commuters as immigrants not "lawfully admitted for permanent residence" would require the creation and recognition of an entirely new classification under the act. While a literal reading of the act would infer such a classification, and although such a classification best advances the underlying policies of the act, there is nothing in the general language or history of the act to indicate that Congress intended such a classification to be inferred from the language which equates immigrants with persons admitted for permanent residence. Nor would such an interpretation of the act as a basis of establishing an entirely new classification appear justified in the absence of any substantial change in the prevailing commuter practice and without a clear mandate from the legislature. This conclusion is further supported by the fact that Congress has been notified repeatedly of problems with the commuter system and has consistently failed to take any action to alter the current status of the commuter.

\textsuperscript{81} S. Rep. No. 748, supra note 19, at 10, 13, 15.
\textsuperscript{83} H.R. Rep. No. 1365, supra note 17, at 51.
\textsuperscript{84} See note 19 supra.
Domestic labor, however, is not without a remedy. Large labor unions have been active in efforts to organize farm labor and those unions are certainly able to exercise their influence on Congress to change existing law. Legislative policy regarding immigration from western hemisphere countries is greatly influenced by considerations of maintaining friendly relations with our neighbors. Since any viable solution to immigration policies should take into account all relevant considerations, any changes in the current commuter practice should be sought through legislative action rather than through the courts.

In summary, the Ninth Circuit held in *Gooch* that Congress intended for commuters to be classified and treated as immigrants "lawfully admitted for permanent residence." The legislative history of the act supports the court's holding. Further, it is clear that Congress did not intend to alter the prevailing commuter practice by the 1965 amendments to the act—or at any time before *Gooch* was decided—even though fully aware that there were problems with commuters. Indeed, one looks in vain for any direct evidence in the legislative history which would tend to show that Congress intended that commuters be classified as not "lawfully admitted for permanent residence," unless the general policy of protecting American labor can be viewed as evidenced such intent. Even this policy argument can be considered tenuous at best because Congress provided that the certification requirement of the secretary of labor would insure sufficient protection for domestic workers against possible encroachment of available jobs by immigrants. Congress apparently intended all immigrants to be treated similarly regardless of the frequency of their "temporary visits abroad." Once an alien is admitted to the United States as an immigrant, his subsequent lawful conduct does not affect his status; commuting is simply one manifestation of such lawful conduct and does not yet require separate statutory treatment.

**When Is the Status "Lawfully Admitted for Permanent Residence" Acquired?**

In the majority opinion in *Gooch*, the court stated that commuters acquired the status "lawfully admitted for permanent residence" by virtue of the fact that at one time the commuters had received immigration visas, implying that the status followed the issuance of such visas. There is nothing either in the method of issuance or content of a visa which would appear to confer such a status upon an immigrant. The legislative history of the act is devoid of any reference equating issuance of a visa to lawful admission for permanent residence. Aliens normally apply for immigration visas with a consular officer in their native countries. In issuing such a visa to an alien, the con-

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sul certifies that he believes the immigrant to be qualified for admission to the United States. Issuance of a visa, however, does not guarantee the alien that he will be admitted. At the port of entry, the alien presents his visa and is subject to further examination by immigration officials to insure that he still qualifies for admission. Immigration officials have the power to exclude the alien at the port of entry and not until the alien has passed this inspection is his passport stamped to indicate his status. If he has applied for immigrant status, the passport is stamped to show that the alien has been “lawfully admitted for permanent residence.”

Additionally, the very wording of the status “lawfully admitted for permanent residence” presupposes actual entry to the country. Visas only certify that the alien’s passport and other papers are in order and that the consular officer believes that the alien is eligible for admission. The only references made in the act to consular officers concern their power to issue visas. The definitions of visas in the act refer only to visas issued under the act. None of the documents that comprise visas are recognized by the service as evidence of having been “lawfully admitted for permanent residence.” To equate the issuance of visas with acquisition of the status of lawful admission for permanent residence as was done by the court in Gooch reads new law into the act. Furthermore, if the majority’s view is correct, then immigrants would not even have to enter the United States in order to acquire such status. Of course, once the status “lawfully admitted for permanent residence” has been acquired, all the provisions in the act applicable to such status come into effect. For example, the preferential treatment granted to relatives of aliens “lawfully admitted for permanent residence” are applicable. Such a result is anomalous since these provisions are designed to relieve the administrative burden for re-entry of immigrants and to facilitate reunification of the immigrant’s family and appear inapplicable to the immigrant who does not enter the country.

87. 8 U.S.C. § 1101(a)(20) (1970). See also Gordon, supra note 1, at § 7.4b(1). The status may be acquired in other ways. An alien may obtain the status of “lawfully admitted for permanent residence” by obtaining suspension of deportation, 8 U.S.C. § 1254(a) (1970); adjusting his status, id. §§ 1255, 1184(d); registry, id. § 1259; or waiver, id. §§ 1182(a)(9), (c), (g)-(i), 1251(a).
91. 8 C.F.R. § 204.2(b) (1971) (evidence of lawful admission for permanent residence); 22 C.F.R. § 42.124(b) (1971) (documents comprising visa).
The court’s conclusion that the status "lawfully admitted for permanent residence" is acquired by the immigrant merely because he has received a visa does not appear to be well-founded since both the immigration process itself and the language contained in the act indicate that such status should be acquired only after admission at the port of entry. Although the dicta in Gooch concerning the time at which the status is acquired was not crucial to the result,93 the broad language used by the court is significant because it concerns all aliens who have received immigration visas, regardless of any actual entry into the United States.94 Reserving the status "lawful admission for permanent residence" to those immigrants who have been actually admitted to the United States appears to find more support in the act and its policies.

Conclusion

The commuter system is unique because of the peculiarities indigenous to communities that exist near international borders. The Immigration and Nationality Act does not deal directly with the system; the administrative practice that has countenanced the system for almost fifty years results in consequences that are not entirely consonant with the overall purposes of the act. In light of the international relations involved, the decision not to exclude commuters without a clear mandate from Congress appears sound. What little evidence there is concerning congressional intent supports the result. However, the dicta granting aliens the status of "lawfully admitted for permanent residence" at the time of issuance of their visas is an unfortunate use of language. There is nothing in the act which compels the result and there is evidence indicating that it should be granted at a later time, probably after actual, initial admission at the alien’s port of entry. The commuter practice has been a particularly thorny problem for American labor for almost half a century. Giving recognition to commuters as a special classification under the act would certainly lead to a more viable and realistic immigration system.

James P. Barber*

93. It is immaterial whether commuters were granted the status "lawfully admitted for permanent residence" before, at, or after actual admission to the United States because commuters, under the administrative practice at the time of the suit, had at one time been actually admitted to the United States. It is unclear whether this will become law in a subsequent suit litigating the issue of the time at which commuters actually acquire the status "lawfully admitted for permanent residence."

94. The dissenting judge in Gooch took this position. 433 F.2d at 84 (Wright, J., dissenting).

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