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Classification Problems with Daily and Seasonal Commuters.

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STATUTE NOTE

ALIENS—Immigration And Nationality Act—Classification Problems With Daily And Seasonal Commuters

8 U.S.C. §§ 1101-1503 (1970).

Aliens who cross the border to work in the United States on either a daily or seasonal basis are referred to as "commuters." While there is no specific statutory classification of the commuter's status under the Immigration and Nationality Act,[1] he has been considered as falling into the category of an immigrant lawfully admitted for permanent residence or a "resident alien."[2] Every alien, commuter or not, who enters the United States for the first time must meet certain preliminary requirements in order to qualify as an immigrant. If these criteria are met, the alien is classified as a resident alien and an immigration visa is issued.[3] In order to retain that status, the statute requires the alien to establish a permanent residence within the United States boundaries as most resident aliens do.[4] But because a commuter's real home is across the border, the Immigration and Naturalization Service (INS) has created an "amiable fiction" of equating the commuter's place of employment with his residence.[5] The commuter, thus, makes a temporary visit abroad when he returns to his true home across the border. During his journey to work, he is treated by the INS as a resident alien "returning from a temporary visit abroad"[6] and is therefore not required to apply for a new immigration visa each time he crosses the border.[7]

1. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1970). *See In re* M—D—S—, 8 I. & N. Dec. 209, 213 (1958).
2. 8 U.S.C. § 1101(a)(20) (1970).
3. A border-crossing card is also issued to facilitate frequent travel across the border. 8 U.S.C. § 1101(a)(6) (1970).
4. 8 U.S.C. § 1101(a)(33) (1970).
5. *In re* Hoffman-Arvayo, 13 I. & N. Dec. 750, 752 (1971). Since the commuter status depends on continued employment in the United States, it has been declared that interruption of such employment for a period of 6 months will terminate that status. *In re* Burciaga-Salcedo, 11 I. & N. Dec. 665, 667 (1966). In addition, this amiable fiction has not been deemed to qualify a commuter for naturalization benefits, which depend on actual residence in the United States for prescribed periods following lawful admission for permanent residence. *In re* Barron, 26 F.2d 106, 108 (E.D. Mich. 1928): Petition of Correa, 79 F. Supp. 265, 268 (W.D. Tex. 1948).
6. 8 U.S.C. § 1101(a)(27)(B) (1970).
7. Because they have been previously admitted to lawful residence in this coun-

One of the basic reasons for creating the immigration acts is to protect American labor from foreign competition,[8] but there are intentional loopholes to allow for limited entry of aliens. The purposes of these loopholes are twofold: first, to allow for entry of persons such as visiting university professors and scientists,[9] and second, to help preserve friendly relations with foreign countries.[10] Mexican and Canadian nationals especially have enjoyed relatively unrestricted entry under this latter policy.

Recent efforts to organize farm laborers and industrial workers along the borders have brought charges from unoins that commuters are strikebreakers, and thus hinder unionization. These accusations have resulted in increased efforts by various labor groups to control or eliminate the supply of alien laborers in the western United States, causing the entire commuter system to come under close scrutiny. Not only has Congress been lobbied to legislate the commuter out of existence,[11] but suits have been brought in federal courts attacking the validity of the amiable fiction used by the INS to classify daily and seasonal commuters as returning resident liens.[12]

Since Congress has the authority to regulate the entry of aliens into this country, the critical inquiry at this point becomes one of determining the legislative intent of the various statutes that affect commuters. Because the Immigration and Nationality Act does not deal directly with the question of either daily or seasonal commuters and there is no specific statutory category defining them, an understanding of the commuter's peculiar status must be extrapolated from legislative history, administrative rulings and judicial decisions.

For generations, citizens of foreign contiguous territory have been able to travel to the United States to work free from all quota restrictions.[13] Prior to the passage of the Immigration Act of 1924,[14] these persons were admitted as visitors coming to the United States temporarily for business or

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try, returning resident aliens are relieved of many of the reentry documentation requirements demanded of other immigrants pursuant to 8 U.S.C. § 1181(b) (1970), which states in part that, "[returning resident aliens] who are otherwise admissible may be re-admitted to the United States by the Attorney General in his discretion without being required to obtain a passport, immigration visa, reentry permit or other documentation." 8 C.F.R. § 211.1(b)(1) (1972) executes this section of the statu e by proviiding for the use of Form I-151 ("green cards") in lieu of passports or other documents.

8. *See* Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 243 (1929).

9. 8 U.S.C. § 1101(a)(15)(J) (1970).

10. *In re* L—, 4 I. & N. Dec. 454, 456 (1951) (Editor's note).

11. *See generally Hearings on H.R. 12667 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 72-73 (1969).

12. *E.g.*, Bustos v. Mitchell, 481 F.2d 479, 484 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 300); Gooch v. Clark, 433 F.2d 74, 78 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

13. Bustos v. Mitchell, 481 F.2d 479, 485 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 300).

14. Immigration Act of 1924, ch. 190, 43 Stat. 153 [hereinafter cited as 1924 Act].

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pleasure.[15] The 1924 Act classified all arriving aliens as immigrants unless they fell into one of several designated groups described as nonimmigrants, such as tourists and temporary business visitors.[16] This classification was designed to insure that all aliens would be subject to the quota restrictions imposed for their respective countries. Commuters, however, remained in the nonimmigrant category of temporary business visitor, and thus were not subject to the quota limitations which had been instituted by the 1924 Act.[17]

Aliens other than Mexican and Canadian nationals (who had no quota restrictions)[18] soon discovered that if they were excluded as immigrants from countries whose quotas were filled they could enter the United States as a commuter under the nonimmigrant, temporary business visitor category. Once inside the United States borders, these aliens simply disappeared into the American melting pot. In response to this problem, the Department of Labor in 1927 issued General Order 86 wherein it was administratively decided that under the 1924 Act a commuter must be considered an immigrant.[19] Each commuter was thereafter subject to the quota limitations established for his native country upon entering the United States for the first time. Once admitted as an immigrant, the commuter was considered a resident alien who was allowed temporary visits abroad under the nonquota immigrant category.[20] Though not subject to quota limitations, Mexican and Canadian nationals were nevertheless required to apply for immigrant status if they were commuters.[21] By transferring commuters from the temporary business visitor to the resident alien category, even though they had no intention of establishing permanent residence in the United States, General Order 86 provided a solution to the problem of quota evasion while not disturbing the commuter system which had evolved along the Mexican and Canadian borders.

General Order 86 remained the basis for the administrative handling of commuters even after the passage of the Immigration and Nationality Act,[22] the basic statute still in effect today. The new act was both a consolidation and comprehensive revision of previous immigration law. The sections in

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15. Immigration Act of 1921, ch. 8, § 2(a), 42 Stat. 5. Pursuant to the Immigration Act, May 1, 1917, ch. 29, §§ 3 and 23, 39 Stat. 875, identification cards were issued for the use of those who habitually crossed the border.

16. 1924 Act, § 3.

17. 1924 Act, § 4(b).

18. 1924 Act, § 4(c).

19. Department of Labor, General Order 86 (April 1, 1927), reprinted in (1927) 1 FOREIGN REL. UNITED STATES 494-95 (1942).

20. The legality of General Order 86 was challenged by some of the aliens involved, but the Supreme Court, in Karnuth v. United States *ex rel.* Albro, 279 U.S. 231 (1929), is considered to have sustained the government's contention that aliens coming to this country for employment cannot be considered temporary business visitors. *In re* M—D—S—, 8 I. & N. Dec. 209, 212 (1958).

21. *Id.* at 212.

22. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1970).

the 1924 Act which concerned commuters, however, underwent only minor changes.[23] During the formulation of the Immigration and Nationality Act, with the exception of a few comments in committee reports,[24] there was virtually no congressional discussion of commuters and their status as resident aliens. This congressional silence, coupled with the lack of any substantive changes in the statute, led the INS to conclude that its handling of commuters was unaffected by the Immigration and Nationality Act.[25]

The INS discussed the administrative handling of commuters in light of the Immigration and Nationality Act in the case of *In re H____O____.*[26] In that case a border officer attempted to deny entry to a commuter on the grounds that he did not qualify as a resident alien under the new statute. In holding that a commuter's status was not affected by the Immigration and Nationality Act, the Immigration Board of Appeals pointed out that the Act merely incorporated from previous immigration acts and administrative regulations that which was already in existence.[27] Therefore, the Board concluded that it could not be inferred, without clear statutory language to the contrary, that Congress intended a mandatory change in the commuter status.[28]

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23. The Immigration and Nationality Act originally stated: "The term 'non-quota immigrant' means—an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad . . . ." Ch. 477, § 101(a)(27)(B), 66 Stat. 183. A 1965 amendment substituted the term "special immigrant" for non-quota immigrant. 8 U.S.C. § 1101(a)(27)(B) (1970). The equivalent language of the 1924 Act, at section 4(b) was: "When used in this Act the term 'non-quota immigrant' means—an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad."

24. SENATE COMMITTEE ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 1515, 81st Cong., 2d Sess.(1950) wherein it was mentioned that "[Nonresident alien border-crossing cards] will not be issued to . . . aliens who have been admitted into the United States for permanent residence. Aliens in the last category who cross the borders frequently are known as commuters and are not nonimmigrants and they must apply for resident alien's border-crossing cards . . . ." *Id.* at 616. Additional mention of commuters in the report included:

> A resident alien's border-crossing identification card is a document which may be issued to (1) a lawfully resident alien who wishes to visit Canada or Mexico . . . (2) an alien who has been admitted for lawful permanent residence but who resides in foreign contiguous territory and is employed in the United States, the so-called commuter.

Id. at 535.

25. As stated in *In re* H—O—, 5 I. & N. Dec. 716 (1954):

> It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the Act of 1952, but rather it has impliedly received congressional approval, since the legislative history of the act reveals a discusion [*sic*] without dissent. Without clear statutory language requiring a mandatory change in the commuter scheme, the law cannot be construed as prohibiting this procedure.

Id. at 718-19.

26. 5 I. & N. Dec. 716 (1954).

27. *Id.* at 717-18.

28. *Id.* at 718-19.

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In keeping with its protectionist policy of American labor, Congress added a new mechanism to the Immigration and Nationality Act—the labor certification procedure. This procedure enabled the Attorney General to exclude, under certain conditions, otherwise qualified aliens.[29] If the alien applied for immigration status, but the Secretary of Labor determined that there were sufficient workers in the applicant's field of work and that his admission would adversely affect the labor market, the statute declared that alien to be ineligible for entry and thus excluable by the Attorney General.[30]

In a 1960 decision, *Amalgamated Meat Cutters v. Rogers*,[31] a federal district court was confronted with the problem of whether a daily commuter was subject to the labor certification provision. The union was engaged in a strike at a meat packing plant in El Paso, Texas. In accordance with the requirements of the labor certification provision then in effect, the union sought and obtained from the Secretary of Labor a certification that admission of aliens would adversely affect the wages and working conditions at the meat packing plant. The union then brought suit to enjoin the INS from admitting commuters during the strike. The court held that since commuters did not actually reside in the United States, they could not be returning resident aliens, notwithstanding the "amiable fiction" used by the INS.[32] Therefore, the labor certification procedure was to be applied to commuters. Realizing that this decision jeopardized the existence of the commuter system, the INS distinguished *Rogers* in a subsequent ruling by limiting the decision only to situations where a labor certification had been issued.[33]

Like previous acts, the Immigration and Nationality Act does not directly approach the question of distinguishing daily and seasonal commuters. Until recently, however, the problem of the seasonal commuter was relatively nonexistent. The seasonal commuter was born in 1943 when, due to the unusual farm labor shortage caused by World War II, the United States and Mexico entered into an agreement calling for the temporary migration of Mexican workers for the purpose of providing needed agricultural laborers.[34] This came to be known as the Bracero program. After the war, Congress

29. Immigration and Nationality Act, ch. 477, § 212(a)(14), 66 Stat. 183, *as amended*, 8 U.S.C. § 1182(a)(14) (1970).

30. A later amendment now places the burden on the potential immigrant to show that he will not adversely affect local labor conditions as an entry requirement. Act of Oct. 3, 1965, Pub. L. 89-236, § 10(a), 79 Stat. 917.

31. 186 F. Supp. 114 (D.D.C. 1960).

32. *Id.* at 118, 119. The court agreed that the labor certification did not apply to resident aliens who permanently reside in the United States, but it found that commuters did not fall within that class. *Id.* at 119-20.

33. *In re* J—P—, 9 I. & N. Dec. 591 (1962).

34. Agreement with Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, August 4, 1942, 56 Stat. 1759 (English summary at 56 Stat. 1763).

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continued the Bracero program under the Agricultural Act of 1949[35] by giving the Secretary of Labor the authority to supply agricultural workers from Mexico "for the purpose of assisting in such production of agricultural products as the Secretary of Labor deems necessary."[36] When the Immigration and Nationality Act went into effect, the Bracero was classified in the new category of nonimmigrant coming to the United States to perform temporary services or labor.[37] The program was allowed to lapse in 1964, however, apparently due to pressure from American labor.[38]

Further action by Congress, which points to its recognition of the seasonal commuter problem, came the very next year when a substantial change was made in the labor certification procedure. The present provision establishes a status quo that requires the Attorney General to *exclude* all aliens as immigrants unless the Secretary of Labor finds there are not sufficient American workers and that their admission would not adversely affect the labor market.[39] In addition, the new procedure specifically requires that persons born in the Western Hemisphere obtain a labor certification before becoming eligible to be classified as resident aliens even though such persons are not subject to quota restrictions.[40] The reason given for this change is found in the Senate report which explained the bill before it was passed:

> The bill specifically provides that skilled or unskilled labor of the temporary or seasonal nature is not to be entitled to any preference under the selection system for the allocation of immigration visas.[41]

It is clear that the seasonal commuter status under the Bracero program,

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35. Agricultural Act of 1949, ch. 792, title V, §§ 501-510, 63 Stat. 1051, *as added* July 12, 1951, ch. 223, 65 Stat. 119.

36. *Id.* § 501.

37. THE SENATE COMMITTEE ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. No. 1515, 81st Cong., 2d Sess. (1950) recommended "that provision should be made in permanent legislation which would permit the admission of temporary agricultural labor in a nonimmigrant classification when like labor cannot be found in this country." *Id.* at 586. In explaining the new category, the House Report stated, "These provisions of the bill grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, for the purpose of alleviating labor shortages as they exist or may develop in certain areas . . . ." HOUSE COMMITTEE ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION ACT, H.R. REP. No. 1365, 82d Cong., 2d Sess. 44-45 (1952).

38. *See* Agricultural Act of 1949, ch. 792, Title V, § 510, 63 Stat. 1051, *as added* July 12, 1951, ch. 223, 65 Stat. 119, *as amended* Act of Dec. 13, 1963, Pub. L. No. 88-203, 77 Stat. 363 (1964).

39. 8 U.S.C. § 1182(a)(14) (1970), *formerly* ch. 477, § 212(a)(14), 66 Stat. 183. The prior statute provided for *admission* of all immigrant laborers unless detriment to American labor was shown.

40. *Id.* An alien born in the Western Hemisphere must now obtain a labor certification before receiving resident alien status. However, those commuters who received resident alien status before 1965 are unaffected, having already been admitted.

41. SENATE COMMITTEE ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION ACT, S. REP. No. 748, 89th Cong., 1st Sess. 16 (1965).

once a necessary aspect of American agricultural economic health, was deliberately terminated and that safeguards were then instituted to protect American labor from foreign job competition.[42]

The difference between daily and seasonal commuters did not come to the attention of the courts until *Gooch v. Clark*[43] when for the first time the entire commuter system was attacked.[44] The distinction between daily and seasonal commuters, however, was not dealt with in depth and both types were treated as one class. In *Gooch*, farm workers brought suit seeking an order directing the INS to deny admission to all alien commuters. The plaintiffs contended that commuters, not bona fide residents of the United States, lost their status as resident aliens and hence, were no longer entitled to reenter the United States as returning resident aliens.[45] The Court of Appeals for the Ninth Circuit held that the INS policy of admitting all commuters as resident aliens was valid even though the commuter did not actually reside in the United States.[46] Relying on the definition of resident alien, the court said that the "definition refers not to the actuality of one's residence but to one's *status* under the immigration laws."[47] Thus, having been accorded the privilege of permanently residing in the United States, it mattered not whether the commuter chose to exercise that privilege.[48] Because the decision was based on the conclusion that all commuters are lawfully resident aliens returning from a temporary visit abroad,[49] the possibility that the *granting* of resident alien status to seasonal commuters

42. It was only after the termination of the Bracero program that the INS began treating seasonal commuters as resident aliens. *See* Statement by James S. Hennessy, Executive Assistant to the Commissioner of the Immigration and Naturalization Service, *Hearings on H.R. 12667, Employment of "Green Card" Aliens During Labor Disputes Before the Special Subcommittee on Labor of the House Committee on Education and Labor*, 91st Cong., 1st Sess. 73 (1969).

43. 433 F.2d 74 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

44. Actually, the first attack on the commuter system took place in Texas State AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir. 1964), but the case was dismissed for lack of standing. Due to the later Supreme Court decisions in Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970) standing was no longer an obstacle for Unions.

45. This contention is buttressed by 8 C.F.R. 211.1(b)(1) (1972) which states that a border crossing identification card may be issued to "an immigrant alien returning to an unrelinquished lawful permanent residence in the United States . . . ."

46. Gooch v. Clark, 433 F.2d 74, 79 (9th Cir. 1970) *cert. denied*, 402 U.S. 955 (1971).

47. *Id.* at 79. This same argument was used by the INS in *In re* H—O—, 5 I. & N. Dec. 716, 718 (1954).

48. Gooch v. Clark, 433 F.2d 74, 79 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971). The court's conclusion conflicted with the result reached in Amalgamated Meat Cutters v. Rogers, 186 F. Supp. 114 (D.D.C. 1960). Noting this conflict, the court expressly disapproved of the holding in *Rogers*. Gooch v. Clark, 433 F.2d 74, 82 (9th Cir. 1970), *cert. denied*, 402 U.S. 995 (1971).

49. *Id.* at 79. Basing its decision on *Gooch*, the INS held in *In re* Hoffman-Arvayo, 13 I. & N. Dec. 750 (1971), that the term commuter encompasses the seasonal commuter who enters to perform seasonal work for extended periods. *Id.* at 753.

by the INS may have been initially unlawful was not considered by the court.[50] The *Gooch* decision allowed the commuter system to remain undisturbed and the special treatment of commuters by the INS continued.[51]

The commuter system was again challenged in the case of *Bustos v. Mitchell*,[52] decided by the Court of Appeals for the District of Columbia. California and Texas farm workers brought suit challenging the legality of the commuter system. Here, for the first time, a court drew a sharp distinction between seasonal and daily commuters.[53] The court concluded that the INS practice of classifying *seasonal* commuters as returning resident al-

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50. Gooch v. Clark, 433 F.2d 74, 78 (9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971). Since seasonal and daily commuters had already been admitted, the court concluded that they did not fall within the nonimmigrant category which excludes admission if "unemployed persons capable of performing such service or labor cannot be found in this country . . . ." *Id.* at 78, *quoting* 8 U.S.C. § 1101(a)(15)(H)(ii) (1970). Using logic which was not as clear as might be desired, the court insisted that commuters could not be classified as nonimmigrants since "the same section would classify commuters as nonimmigrants and simultaneously declassify them . . . ." Gooch v. Clark, 433 F.2d 74, 78(9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971). INS's failure to properly classify an alien does not pro tanto make his admission lawful. *See* Bustos v. Mitchell, 481 F.2d 479, 484 n.14 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 300).

51. For instance, though a true resident alien may lose his status if absent longer than 1 year, commuters are held to have conclusively abandoned their status if their absence is longer than 6 months. *In re* Burciaga-Salcedo, 11 I. & N. Dec. 665 (1966); *In re* M—D—S—, 8 I. & N. Dec. 209 (1958). Another such practice was found in 8 C.F.R. 211.1(b) (1972). It concerned the labor certification procedure which precluded commuters from entering the United States if there was a labor dispute at their place of employment. The practice was struck down in San Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972). The court reasoned that the INS could not place any legal significance on the fact that the commuter chose not to live in the United States. The INS has, however, rteated commuters differently and this will undoubtedly cause conflicts in the future. Consider the following: In *In re* Moore, 13 I. & N. Dec. 711 (1971), the INS stated that the commuter status was merely an administratively created category established for the convenience of aliens living in Mexico or Canada but working in the United States whose every departure is a meaningful one. *Id.* at 712-13. The commuter thereby subjects himself to possible exclusion upon his return to the United States. In Rosenberg v. Fleuti, 374 U.S. 449, 463 (1963), the Supreme Court held that an innocent, casual, and brief excursion by a resident alien outside the United States may not have been intended as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of the entry as if it were a first entry. In *In re* Hoffman-Arvayo, 13 I. & N. Dec. 750 (1971), the INS reiterated the contention that every departure of a commuter is a meaningful one and cited *Gooch*. However, the court in *Gooch* stated:

> At the time of a commuter's initial entrance into the United States, he would have to comply with Section 1182(a)(14). But once such a lawful admittance occurred, the commuter could thereafter make regular entrances into the United States as an immigrant "lawfully admitted for permanent residence, who is returning from a temporary visit abroad."

Gooch v. Clark, 433 F.2d 74, 81 (9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971). In light of *Gooch* and *Sam Andrews' Sons*, is the INS reasoning concerning meaningful departure faulty?

52. 481 F.2d 479 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 300).

53. *Id.* at 481-82.

ens had no statutory warrant and was thus illegal,[54] citing as support the lapse of the Bracero program and the tightening of controls by the labor certification procedure changes in 1965.[55] It was determined that *seasonal* commuters should instead be classified as nonimmigrants coming temporarily to the United States to perform temporary services.[56] *Daily* commuters, on the other hand, do not perform temporary, but permanent, services and thus do not come within the ambit of the nonimmigrant class.[57] In support of its conclusion that the INS was *not* wrong in classifying *daily* commuters as returning resident aliens, the court noted that this administrative practice was known by Congress and had been utilized for over 45 years through many different immigration statutes. The court felt that such a practice should not be disturbed by the courts, but left to Congress.[58] Notice was also taken of an affidavit filed by the Secretary of State[59] to the effect that an abrupt change in the daily commuter system would create hardships for many people who have relied on the system for many years and a termination of such a longstanding administrative practice might strain relations between the United States, Canada and Mexico.[60]

The significance of the *Bustos* decision is that the court acknowledged the competing considerations inherent in any determination of the commuter issue.[61] On the one hand, the immigration laws were promulgated to protect American labor from foreign job competition and on the other hand, it is in the best interests of the United States to preserve amicable relations with Mexico and Canada. In order to make a proper interpretation of the stattue, these factors must be recognized. Congress, and not the courts, however, must strike the balance between the two competing interests.

Congress has made its decision in a somewhat obtuse manner. Because the Immigration and Nationality Act is not a paragon of clarity with respect to commuters, the intention of Congress is not readily apparent. The analysis of the entire history of the commuter problem, however, reveals two factors. First, it is clear that Congress has known of the existence of the daily commuter system since General Order 86. The legislative history is virtually silent—an "eloquent silence," in view of possible national and international repercussions that would follow from a termination of commuting.[62] It is also unlikely that Congress meant to end the daily commuter system in the Immigration and Nationality Act by employing terminology similar to that used by the INS prior to its enactment under which the com-

54. *Id.* at 484.
55. *Id.* at 482.
56. *Id.* at 483.
57. *Id.* at 484 & n.13.
58. *Id.* at 486.
59. *Id.* at 487 n.26.
60. *Id.* at 487 n.26.
61. *Id.* at 487.

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muter system flourished.[63] Second, it is equally clear that Congress intended, by the lapse of the Bracero program and the change in the labor certification procedure, to end the favored treatment accorded the seasonal commuter.[64] It is only fair that the American farm worker be afforded the same protection as other groups now have under present immigration law.

One cannot gainsay that the actions of Congress have been deliberate. As easily as the labor certification procedure was changed, legislation could have been enacted to alter the definition of resident alien in such a way as to eliminate commuters. It was not. In the final analysis, then, it would seem that the *Bustos* decision, by upholding the administrative categorization of daily commuters as resident aliens and declaring that seasonal commuters must be classified as nonimmigrants coming temporarily to the United States to perform temporary services, most closely follows the intent of Congress.

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62. Gooch v. Clark, 433 F.2d 74, 80 (9th Cir. 1970), *cert. denied*, 402 U.S. 955 (1971).
63. *In re* H—O—, 5 I. & N. Dec. 716, 718 (1954).
64. Bustos v. Mitchell, 481 F.2d 479, 482 (D.C. Cir. 1973), *cert. granted*, 42 U.S.L.W. 3400 (U.S. Jan. 14, 1974) (No. 300).

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