

David H.E. Becker,
*Judicial Review of INS Adjudication: When May the Agency Make Sudden Changes in
Policy and Apply Its Decisions Retroactively?*

52 Admin. L. Rev. 219 (2000)

Abstract by Catherine Ng

David Becker examines the possibility of judicial review to overrule anomalous INS cases, namely, *In Re Izumii* and *In re New York State Department of Transportation*. In both cases, the INS made significant changes to policy and interpretation of rules and statutes in determining whether aliens will qualify for certain immigrant visas. The result is that the INS has drastically changed its rules without utilizing rulemaking procedures. Under judicial review, courts have several possible bases to overrule an administrative agency. First, although courts generally defer to administrative agencies' adjudication over rulemaking, the Supreme Court has ruled that agencies have a duty to follow their own procedures. Second, courts may substantively review administrative decisions in rulemaking or adjudication for abuse of discretion. Third, courts have stressed the importance in consistency in administrative decisions. Fourth, retroactivity is not favored in rulemaking. Regarding *In re Izumii* and *In re New York State Department of Transportation*, it is unlikely that a court would require the INS to proceed by rulemaking instead of adjudication. Neither case clearly exhibits abuse of discretion or lack of reasoned decision-making. However, *In re Izumii* would likely violate the court policy regarding change of direction. The INS change in treatment of foreign investors and the monetary requirements appears unexplained and arbitrary. Furthermore, *In re New York State Department of Transportation* may violate the retroactivity doctrine in revoking previous petitioner's visas obtained through the "national interest" standard. Retroactivity, however, would benefit certain, but not all petitioners. Thus, these two cases demonstrate that courts would likely find the INS's adjudication partially invalid.