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The Marriage Viability Requirement: Is It Viable?

Nancy K. Richins

THE MARRIAGE VIABILITY REQUIREMENT: IS IT VIABLE?

Many aliens take advantage of immigration laws giving them preferred status on the basis of marriage to a U.S. citizen or resident alien. Recent court decisions have rejected attempts by the INS to require that such marriages be viable. This Comment suggests that because the purpose of preferential treatment based on marriage is to unite the married couple, such treatment should be limited to those persons whose marriages are viable. The author suggests that Congress should give clear authority to the INS to act in this area while providing safeguards against interference with privacy rights.

INTRODUCTION

Throughout the Immigration and Nationality Act[1] (INA) are a number of sections which grant special status to immigrants who are members of the families of United States citizens and resident aliens.[2] Congress' purpose in enacting these statutes was to keep families together.[3] However, unlike other family relationships, marital relationships are often only temporary. Recognizing that the preferential treatment accorded spouses of United States citizens and resident aliens was meant to preserve family unity, the INS has attempted to place a requirement of viability on marriages.[4] Thus, the Service has taken the position that if the

1. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1557 (1976).

2. *See* 8 U.S.C. § 1151(a) (1978) (exclusion for immediate relatives); 8 U.S.C. § 1151(b) (Supp. II 1978) (immediate relative defined); 8 U.S.C. § 1153(a)(1) (Supp. II 1978) (unmarried sons and daughters of U.S. citizens); 8 U.S.C. § 1153(a)(2) (1976) (unmarried sons and daughters of permanent resident aliens); 8 U.S.C. § 1153(a)(4) (1976) (married sons and daughters of U.S. citizens); 8 U.S.C. § 1153(a)(5) (1976) (brothers and sisters of U.S. citizens); 8 U.S.C. § 1153(a)(9) (1976) (spouses and children of preference or nonpreference immigrants).

3. H.R. 1365, 82d Cong., 2d Sess. 37, 38 (1952).

4. The INS began applying the viability standard based on the premise that the special preference granted on the basis of marital relationships was solely for the purpose of uniting the family and therefore the benefits of preference status should be conferred only where that purpose would be served. *See In re* Lew, 11 I. & N. Dec. 148 (1965).

couple does not intend to remain married there is no reason to afford the benefit of statutes aimed at family unification to the alien spouse.[5]

The courts, in recent decisions, have reacted harshly to the viability requirement.[6] The decisions indicate that the investigation of marriages by the INS cannot properly focus upon the projected viability of a marriage.[7] Part of the problem in this area is that the courts are unable to find a statutory basis for a viability requirement. The problem goes deeper.[8] Courts are reluctant to approve the use of a viability requirement that would permit the INS to conduct searching investigations into the sensitive areas of a marital relationship.[9] The courts are generally concerned that such investigations may violate the right to privacy.[10] At least one court was also concerned with the problem of federal interference with family law traditionally governed by the laws of the individual states.[11]

This Comment will examine the Service's use of a viability requirement. The Comment will examine the court decisions that limit the use of marriage viability and the policies for such limitations. Finally, the Comment proposes that only carefully drafted legislation that defines and limits the viability requirement can resolve the problems presented by its use.

BACKGROUND

Marital status significantly affects the ability of an alien to immigrate to or remain in the United States.[12] For entry purposes immigrants are divided into two categories—preference and nonpreference.[13] The preference immigrants are further divided into several groups.[14] Spouses of aliens lawfully admitted to the United States for permanent residence are given second prefer-

5. *Id.*; *see also In re* Sosa, I.D. No. 2469 (1976).

6. *See* Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979); Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977); Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).

7. *See* cases cited note 6 *supra*.

8. In addition to the fact that there is no reference to "viability" in the statutes, recent cases demonstrate the courts' reluctance to find that the INS has any discretion in deciding whether or not to rescind adjustment of status. *See, e.g.*, Dabaghian v. Civiletti, 607 F.2d 868, 871 (9th Cir. 1979).

9. Chan v. Bell, 464 F. Supp. 125, 130 (D.D.C. 1978).

10. *Id.*

11. *Id.* at 131.

12. *See* 8 U.S.C. § 1151(a) (1976) (exclusion for immediate relatives); 8 U.S.C. § 1153(a)(9) (1976) (spouses of preference or nonpreference immigrants).

13. 8 U.S.C. § 1153 (1976).

14. *Id.*

ence status.[15] In addition to the preference and nonpreference categories, all of which are subject to numerical limitations, there are exempt groups.[16] One exempt group includes aliens who have immediate relative status; spouses of United States citizens are included in this group.[17] Similarly, aliens already in the United States who desire to remain can adjust their status to that of a permanent resident on the basis of a marriage to a citizen or resident alien.[18] As a result of preferred or exempt status, thousands of aliens enter the United States each year using the special status confered upon them by reason of their marriage to a United States citizen or resident alien.[19] In 1978 alone, 78,057 aliens were permitted entry into the United States because they were married to United States citizens.[20] An additional 77,747 were granted second preference status because they were married to resident aliens.[21]

Spouses of United States citizens who wish to take advantage of their immediate relative status, and spouses of resident aliens who wish to gain preference status must comply with the following procedure.[22] If the alien is abroad the spouse must file a form I-130 with the INS in the United States.[23] This form may be filed directly with the United States consul in the country where the beneficiary will apply for a visa if both parties are in that country at the time.[24] The I-130 must be supported by documentation showing a record of the marriage, proof of termination of any prior marriages of either party, and proof of the United States citizenship or residence status of the petitioning spouse.[25] Upon receiving the petition and documentation the INS will launch an investigation into the marriage.[26] The INS will similarly investigate applications for adjustment of status, when for example, an alien in the United States with a nonimmigrant visa marries a citi-

15. 8 U.S.C. § 1153(a) (1976).
16. 8 U.S.C. § 1151(b) (1976).
17. 8 U.S.C. § 1151 (Supp. II 1978).
18. 8 U.S.C. § 1255(a) (1976).
19. 57 INTERPRETER RELEASES 298 (1980).
20. *Id.*
21. *Id.*
22. *See generally* J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 327 (3d ed. 1979).
23. *Id.* § 4.9.
24. *Id.*
25. *Id.* § 4.10(a).
26. *Id.* § 4.10(a)(1).

zen or resident alien and petitions for adjustment of status to that of a resident alien.[27] However, if the INS does not find a problem in the initial stages, it is not precluded from instigating a subsequent investigation should new evidence come to light.[28]

The INS investigates various aspects of the marriage.[29] Immigration officials are concerned with whether or not the marriage met the basic legal requirements of the jurisdiction in which it was performed.[30] When the petitioner presents documented evidence of the marriage at the time of application, the INS begins with a general presumption in favor of the legality of the marriage.[31] In most circumstances the INS determines the legality of a marriage by applying the law of the jurisdiction in which the marriage was performed.[32] There are, however, a few exceptions, the most notable being that of proxy marriages, which under the INA must be consummated before they are recognized for immigration purposes.[33] Additionally, immigration authorities have refused to recognize marriages that were viewed as being against the public policy of the United States.[34] Thus, the INS refuses to recognize incestuous or polygamous marriages for immigration purposes, even though such marriages may be perfectly valid in the foreign country where performed.[35] In general, the INS refuses to recognize marriages under circumstances in which cohabitation of the parties at the place of their proposed domicile within the United States would incur criminal punishment.[36]

MARRIAGE VALIDITY

After finding that the standard legal requirements of a marriage are fulfilled, the INS determines the "validity" of the marriage for immigration purposes.[37] The INS first looks to see whether the marriage was simply a fraudulent marriage performed to circum-

27. 8 U.S.C. § 1255 (1976).

28. If, for example, the alien and spouse were to divorce within two years following entry based on marital status the burden of proof would shift to the alien to prove that the marriage was not fraudulent. 8 U.S.C. § 1251(c) (1976).

29. *See generally* S. BLALOCK & M. IVENER, HANDBOOK OF IMMIGRATION LAW 33 (1980).

30. *See* Gee Chee On v. Brownell, 253 F.2d 814 (5th Cir. 1958); *In re* P., 4 I. & N. Dec. 610 (1952).

31. *See In re* M.D., 2 I. & N. Dec. 485 (1949).

32. *See* Roberts, *Marriage—Alien Style*, 52 INTERPRETER RELEASES 197, 198 (1975).

33. 8 U.S.C. § 1101(a)(35) (1976).

34. *See In re* Darwish, I.D. No. 2191 (1973).

35. *In re* H., 9 I. & N. Dec. 640 (1962) (polygamous marriage, valid where performed).

36. *In re* M., 2 I. & N. Dec. 465 (1948).

37. *See generally* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.140 (1978).

vent immigration requirements.[38] The Service has also developed a viability factor and has required that the marriage be viable in order to be valid for preference or exempt status.[39] The power of the INS to concern itself with sham marriages is still very much intact.[40] However, the authority of the INS to focus on the viability of the marriage is highly questionable.[41]

Fraudulent Marriages

In order to clearly understand the problems in the viability area, viability must be distinguished from fraudulent or sham marriages. A fraudulent marriage occurs when the parties, though legally married, have no intention of establishing or continuing a marital relationship.[42] In 1937, Congress, seeking to prevent entry and secure deportation of aliens involved in fraudulent marriages, passed the so-called "Gigolo" Act.[43] The purpose of the Act was to discourage marriage based solely on the desire to gain preferential treatment under immigration laws.[44] In the leading case in this area, *Lutwak v. United States*,[45] the United States Supreme Court interpreted congressional intent regarding the fraudulent marriage provisions as follows: "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship."[46] Since *Lutwak*, the INS has clearly had the power to disapprove petitions for preference or exempt status based on marriages which, though perfectly legal, are entered into solely for the purpose of circumventing immigration law.[47] As a result, where an agreement exists between the couples to terminate the marriage or to separate, or in some other way not to fulfill the marital agreement, the Attorney General has the power to refuse entry,[48] to re-

38. *See* 8 U.S.C. § 1182(a)(19) (1976) (exclusion on the basis of fraud).
39. *In re* Lew, 11 I. & N. Dec. 148 (1965).
40. 57 INTERPRETER RELEASES 280 (1980).
41. Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979).
42. Lutwak v. United States, 344 U.S. 604 (1953).
43. Act of May 14, 1937, ch. 182, § 3, 50 Stat. 165.
44. See E. HARPER, IMMIGRATION LAW OF THE UNITED STATES, (3d ed. 1975) for a discussion of the history behind the implementation of the "Gigolo" Act.
45. 344 U.S. 604 (1953).
46. *Id.* at 611.
47. *Id.*
48. 8 U.S.C. § 1182(1) (1976).

fuse adjustment of status,[49] to bring deportation proceedings based on fraudulent entry,[50] or to rescind adjustment of status.[51] Accordingly, whenever a couple's petition has been approved by the INS but their marriage has been annulled or terminated within two years the alien will have the burden of establishing that the marriage was not fraudulent.[52] The statutory language dealing with fraudulent marriages gives the INS clear authority in such situations.

Marriage Viability

In contrast to the requirement that a marriage be valid, the requirement of viability was never firmly grounded on statutory authority.[53] The INS simply took the position that such a requirement made sense in light of the congressional purpose of giving aliens preference on the basis of their marital relationships.[54] The purpose of granting preference to certain aliens was to unite families.[55] This policy was not effected by granting preference status to an alien who was no longer living with his spouse and was perhaps planning divorce at the time the INS acted on the petition. Thus, in the 1965 case of *In re Lew*,[56] the Board of Immigration Appeals (BIA) affirmed a denial of an application for adjustment of status to permanent resident by an alien married to a resident alien when an interlocutory decree of divorce had been entered. The BIA reasoned that legislative history clearly evidenced a congressional desire to unite families.[57] However, because the objective of Congress was the preservation of the family unit, Congress could only have intended to confer benefits when a bona fide relationship existed in fact as well as in law.[58] In applying the viability requirement to situations in which the couple has separated, the Service's decision to approve or disapprove a petition has turned on whether or not the partners could have a reasonable belief that reconciliation was possible.[59]

The viability requirement was first successfully challenged in

49. 8 U.S.C. § 1255 (1976).
50. 8 U.S.C. § 1251(c) (1976).
51. 8 U.S.C. § 1256 (1976).
52. 8 U.S.C. § 1251(c) (1976).
53. The word "viability" is not used in either the statutes defining the Attorney General's power to approve petitions or the statute outlining the Service's deportation power in the event of a marriage not valid under immigration law. *See* 8 U.S.C. § 1154 (1976); 8 U.S.C. § 1251(c) (1976).
54. *In re* Lew, 11 I. & N. Dec. 148 (1965).
55. H.R. 1365, 82d Cong., 2d Sess. 37, 38 (1952).
56. 11 I. & N. Dec. 148 (1965).
57. *Id.*
58. *Id.*
59. *See* D. UNGAR, THE CHANGING PICTURE OF IMMIGRATION LAW (1980).

the 1975 case of *Bark v. INS*.[60] In *Bark*, the Service alleged that the marriage upon which the petitioner sought to gain preferential treatment was a sham marriage, but the only evidence upon which the INS based this contention seemed to be that the couple had separated.[61] The Ninth Circuit Court of Appeals held that it was error to base the decision solely on the separation.[62] The court was concerned with possible constitutional problems raised by the Service's attempt to dictate how much time a couple must spend together in order to have a valid marriage.[63] The court suggested that the INS limit its inquiry to whether or not the couple intended to establish a life together at the time they were married.[64]

Subsequent to *Bark*, cases interpreting various sections of the INA have held that the Service could not properly use the viability of a marriage as a factor in denying petitions based on a marital relationship.

In the 1977 case of *Whetstone v. INS*,[65] the court refused to allow the INS to deny a petition under section 214(d) of the INA[66] solely on the lack of a viable marital relationship. Mrs. Whetstone had obtained a visa as a nonimmigrant fiancee of a United States citizen. She subsequently married the citizen within the time required but left him less than thirty days later. More than two months after the separation, Mrs. Whetstone applied for an adjustment of status to permanent resident. The INS denied the petition and ordered deportation.[67] The court of appeals reversed the decision of the immigration judge.[68]

In *Whetstone*, as in *Bark*, the Ninth Circuit emphasized that the

60. 511 F.2d 1200 (9th Cir. 1975).
61. *Id.* at 1201.
62. *Id.* at 1202.
63. *Id.* at 1201. The court in *Bark* observed:
> The concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions.

Id.
64. *Id.* at 1202.
65. 561 F.2d 1303 (9th Cir. 1977).
66. 8 U.S.C. § 1184(d) (1976).
67. 561 F.2d at 1305.
68. *Id.* at 1309.

INS should focus on the intent of the parties at the time of marriage and not on whether or not a lasting relationship existed at the time the INS questioned the validity of the marriage.[69] The court rejected the argument that the Service had the discretionary power to use viability as a factor in rejecting the petition.[70]

Another 1977 case, *Chan v. Bell*,[71] held that the Service could not use lack of viability in a marriage as a reason to deny an I-130 visa petition. In *Chan*, the INS refused to recognize a marriage that was legal in the state of Tennessee.[72] The Service did not allege that the marriage was fraudulent. Instead, the Service relied solely on the viability factor to deny the petition.[73] The couple in *Chan* had married in January of 1975, after a lengthy courtship. The wife was a United States citizen, the husband a nonimmigrant student. A month after their marriage, the wife filed a visa petition for her husband. Six months after the marriage, the couple separated because of marital difficulties. Based on the separation and the high probability that the couple would divorce, the INS denied the petition.[74] The couple's appeal to the BIA was dismissed on the basis of an earlier case which held that a viable marriage was a prerequisite to the granting of a visa petition.[75] The couple then filed an action for judicial review by the district court for the District of Columbia.[76]

The district court objected to the use of a viability factor on two grounds.[77] First, the court could not find any specific statutory authority allowing the INS to apply such a requirement.[78] Although the court noted the concern by the INS that the purpose of granting preferential treatment was the policy of family unification, the court remained critical of the use of a vague concept like viability not spelled out in the statutes.[79] Second, the court found that the INS had no authority to establish a concept of a valid marriage different from those concepts utilized by each of the fifty states.[80] The INS argued that a national standard of marriage under immigration law would be preferable to fifty separate state

69. *Id.*
70. *Id.*
71. 464 F. Supp. 125 (D.D.C. 1978).
72. *Id.* at 127.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 128-29.
78. *Id.* at 128. The court noted that 8 U.S.C. § 1154(b) directs the Attorney General to grant immediate relative status to the spouse of an American citizen without any reference to marriage viability.
79. 464 F. Supp. at 130.
80. *Id.* at 131.

standards.[81] The Service analogized a national marriage standard to the national standard of adultery for immigration purposes established in the 1975 case of *Moon Ho Kim v. INS*.[82] The court, however, rejected that argument because of substantial tenth amendment problems raised by the BIA's attempt to define the term "spouse" in terms of the viability of the marriage as distinguished from the official marital status defined by the law of the individual states.[83]

In 1979, the Ninth Circuit Court of Appeals rejected the viability requirement in still another setting. In *Dabaghian v. Civiletti*,[84] Dabaghian, a citizen of Iran, entered the United States as a visitor in 1967, and later obtained student status. In September, 1971, Dabaghian married a United States citizen and in October, 1971, he applied for adjustment of status under section 245 of the INA.[85] On January 13, 1972, the petition was granted. There was evidence showing that he was separated from his wife at that time. On January 28, 1972, only two weeks after the approval of his petition to adjust status, Dabaghian filed for a divorce which was granted seven months later. He subsequently remarried an Iranian citizen. In August, 1974 the Attorney General moved to rescind the adjustment of status under section 246 of the INA. The basis for the motion was that Dabaghian was not eligible for adjusted status at the time it was granted. The Attorney General argued that the marriage, though legally alive, was "factually dead".[86] The immigration judge agreed with the Service's contention and revoked the permanent resident status previously granted.[87] The BIA dismissed Dabaghian's appeal, as did the district court.[88] The Ninth Circuit, however, reversed and ordered Dabaghian's reinstatement as a permanent resident.[89] The court

81. *Id.*
82. 514 F.2d 179 (D.C. Cir. 1975).
83. 464 F. Supp. at 131. The court noted that the viability concept is strictly a creation of the BIA and went on to conclude that whatever might be the power of Congress, notwithstanding the tenth amendment to the Constitution, to establish a definition of "spouse" apart from the official definition used by the individual states, the INS certainly has no such power. The court suggested in footnote 17 that such an enactment would subvert traditional modes of domestic relations law and would thus raise substantial constitutional problems. *Id.* at 131 n.17.
84. 607 F.2d 868 (9th Cir. 1979).
85. *Id.*
86. *Id.* at 869.
87. *Id.*
88. *Id.*
89. *Id.* at 871.

cited *Bark*, *Whetstone*, and *Chan*, noting that in each of those cases the court had rejected any attempt to look beyond the intent of the parties at the time of the marriage.[90]

Only one recent case has held that viability may be considered in making a determination as to the validity of a marriage. In *Menezes v. INS*,[91] the court held that in cases arising under section 245 of the INA,[92] involving an adjustment of status as opposed to the rescission of that status, the viability requirement may be applied. The Ninth Circuit Court of Appeals in *Menezes* agreed with the Service that the discretionary authority in section 245 permits the viability requirement to be applied in cases arising under that provision.[93]

The continued vitality of the marriage viability requirement is now questionable. The interpretation of the courts has been that the INS has no discretion to use viability as a factor when dealing with I-130 petitions,[94] fiancee petitions,[95] or rescission of status under section 246.[96] Only in considering adjustment of status under section 245 has the INS been successful in continuing to use viability as a factor.[97] The *Menezes* holding may lead to some bizarre results.[98] Consider, for example, an alien who is out of the country and wishes to enter as a resident alien on the basis of marriage. The alien would file an I-130 petition and, under *Chan*, the Service could not consider the viability of the marriage.[99] On the other hand, an alien already in the country with, for example, a nonimmigrant student visa, who married a citizen or resident alien and then wished to adjust his or her status to permanent resident would have to proceed under section 245.[100] Under section 245, the INS could use viability as a factor in its decision whether to adjust status.[101] The result is that an alien already in the country and involved in a marriage of questionable viability would be wise to leave the country and reenter under an I-130 pe-

90. *Id.* at 870.
91. 601 F.2d 1028 (9th Cir. 1979).
92. 8 U.S.C. § 1255 (1976).
93. 601 F.2d at 1032.
94. Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).
95. Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977).
96. Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979).
97. Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979).
98. As noted, *Menezes* does allow a viability factor to be used in determining eligibility for adjustment of status under 8 U.S.C. § 1255 (1976).
99. *See* Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).
100. As a result of the *Menezes* case, under § 245 of the INA the viability of the petitioner's marriage could be used as a factor in determining whether or not to grant status.
101. Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979).

tition rather than to attempt a section 245 adjustment of status which the Service could deny based on the marital problems.

THE FUTURE OF THE VIABILITY REQUIREMENT

Judicial rejection of marriage viability as a prerequisite to preferential treatment has severely limited the INS in its efforts to effectuate congressional policy.[102] In two 1980 proceedings the BIA acceded to the developing case law regarding viability.[103] In *In re Kondo*, the BIA held that the nonviability of a marriage at the time an adjustment of status is granted under section 245 of the INA[104] cannot be used as a basis for rescission of that status under section 246.[105] The Board's decision followed the *Dabaghian* case but was specifically limited to cases arising in the Ninth Circuit.[106] In *In re McKee*, the BIA accepted the decision of the district court in *Chan* and adopted the reasoning in that case for nationwide application.[107] The decision in *McKee* could also have an effect on whether *Kondo* will remain limited to the Ninth Circuit.[108]

Congressional Possibilities

The case law indicates that the Service's authority to require marriage viability before granting preferred status is quite limited.[109] The courts are concerned about the absence of clear statutory authority for a marriage viability requirement and the constitutional problems posed by the tenth amendment and the right to privacy. The right to privacy is especially important because a viability requirement might invite an intrusion into the most private areas of a marital relationship.[110] Whether Congress may prescribe a viability requirement depends upon the degree

102. *See* Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979); Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977); Bark v. INS, 511 F.2d (9th Cir. 1975); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).

103. In re Kondo, I.D. No. 2781 (1980); In re McKee, I.D. No. 2782 (1980).

104. 8 U.S.C. § 1255 (1976).

105. 8 U.S.C. § 1256 (1976).

106. I.D. No. 2781 at 2 (1980).

107. I.D. No. 2782 at 4 (1980).

108. 57 INTERPRETER RELEASES 281 (1980).

109. In fact, it appears that the INS is presently limited to using a viability requirement only in exercising its discretionary power under § 245 of the INA. *See* Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979).

110. *See* Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1975).

to which such a requirement would infringe upon both constitutionally protected privacy and those interests of the states protected by the tenth amendment.

The Right to Privacy and Due Process Problems

Since no statutory viability requirement exists courts have not been faced with the question of whether such a requirement would violate the due process clause of the fifth amendment. However, the courts are clearly concerned that the application of such a requirement would allow the INS to investigate very personal areas of the marital relationship.[111]

The courts have focused on the procedures which might be used by the INS in investigating the viability of a marriage.[112] The investigation of marriages by the INS is not new. The INS regularly examines marriages when aliens seek preference or exempt status based on their marital status.[113] While it is during these investigations that the issue of viability has arisen, the thrust of the investigations is normally directed towards ascertaining whether or not the marriage was fraudulent.[114]

When the INS investigates a marriage it calls the couple in for an interview.[115] Typically, the interview begins with questions directed to the couple together.[116] Later, husband and wife are separated and each is questioned individually.[117]

Questions can concern practically anything; the decor of the couple's home, what the couple ate for breakfast, even whether or not the marriage has been consummated.[118] The purpose of such questioning is to determine if the couples are in fact living together in a marital relationship.[119] If the investigator finds that the couple's answers to these questions are suspect, or that one or both spouses are unable to answer, the investigation is continued to determine whether, in fact, the couple ever intended to establish a marital relationship.[120] This further investigation might require interviews with neighbors, friends, or family or perhaps

111. *See* Chan v. Bell, 464 F. Supp. 125, 130 (D.D.C. 1978).
112. *Id.*
113. Interview with Patrick McDermott, trial attorney for the INS in San Diego, California (August 15, 1980).
114. *Id.*
115. *See* NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 4.10 (2d ed. 1979).
116. *Id.*
117. *Id.*
118. *See* D. DANILOV, RELATIVE VISA PETITIONS 28 (1979).
119. *Id.* at 20.
120. *See* NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 4.10 (2d ed. 1979).

even a subpoena of bank records to determine if money had been paid for the marriage.[121] The type of investigation described above is a source of concern for the courts. In *Chan*, for example, the district court outlined some of the problems that could arise if the INS continued to conduct marriage viability investigations.[122] The court was particularly concerned that investigations would involve such matters as sexual compatibility, financial security, family relationships and the emotional attitudes of the spouses.[123] *Chan* noted that these are areas which are avoided by even the boldest governmental agencies.[124]

The concern for privacy problems expressed by the district court in *Chan* seems reasonable. An analysis of privacy cases, however, suggests that a viability requirement would not necessarily violate the constitutional right to privacy. Further, it is difficult to understand why an investigation into a marriage's viability should be off limits when the very similar investigation of a fraudulent marriage is permissible.

The court in *Chan* cited *Griswold v. Connecticut*[125] and *Roe v. Wade*[126] as authority for the kind of privacy problems which might be raised by a viability statute. *Griswold* and its progeny involved governmental intrusions into decisions regarding marriage and child bearing.[127] In *Griswold*, appellants were arrested for giving information, instructions, and medical advice regarding contraception to married persons. The statute under which they were prosecuted provided that the use or assistance in using any contraceptive device was a crime. The United States Supreme Court found the statute to be an unconstitutional invasion of privacy.[128] Justice Douglas' majority opinion was clearly most concerned with the fact that the statute could be enforced only by intrusion into areas of protected freedoms.[129] Part of the concern of courts dealing with the viability question has been that enforcement of such a statute might require similar intrusion into

121. *Id.*
122. Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).
123. *Id.* at 130 n.13.
124. *Id.* at 130.
125. 381 U.S. 479 (1965).
126. 410 U.S. 113 (1973).
127. 381 U.S. at 485.
128. *Id.*
129. *Id.*

protected areas.[130] The problem centers around just how evidence regarding viability could be gathered by the Service without intruding on a couple's privacy. But, while the statute in *Griswold* could only be enforced by intrusion into intimate areas of a relationship, a viability test could be narrowed and defined in such a way as not to intrude into those areas. A statute could be written defining viability only in terms of the intent of the parties. Further, appropriate guidelines could be written into the statute which could narrow the focus of investigation so as to exclude details regarding such matters as sexual compatibility.

The differences between the statute in *Griswold* and a viability statute are even more apparent if *Griswold* is analyzed in light of subsequent cases in the privacy area. These cases suggest that the real concern in *Griswold* was the fact that the statute itself interfered with a personal decision such as whether or not to have a family.[131] Professor Tribe suggests, in his analysis of *Griswold*, that the enforcement of the statute would have been constitutional if the underlying statute itself had no relation to intimate personal choices.[132] Tribe suggests that the problem of enforcement was secondary to the issues raised by the statute itself.[133] If this reasoning is applied to the analysis of a viability statute it becomes clear that since such a statute would in no way interfere with personal choices regarding childbearing it would really not present the kind of problem at which *Griswold* and its progeny were aimed.[134]

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130. *See* Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978). In *Chan* the court asked: "How . . . would the service go about collecting evidence on these various subjects? What issues would be tried before the INS hearing officer and upon what standards?" *Id.* at 130 n.13.

131. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). Both cases struck down governmental regulations that interfered with the personal choice of childbearing.

132. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 922 (1978).

133. *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 198. Professor Posner, in an analysis of *Eisenstadt*, makes the following observation:

> The Court in *Griswold* had at least attempted to relate the right to use contraceptives to familiar notions of privacy by speculating on the intrusive methods by which a statute banning the use of contraceptives might be enforced. This ground was unavailable in *Baird* because the statute there forbade not the use, but only the distribution of contraceptives. *Eisenstadt* is thus a pure essay in substantive due process. It unmasks *Griswold* as based on the idea of sexual liberty rather than privacy.

Id.

134. Both the investigation of fraudulent marriages and the investigation of marriage viability involve the use of essentially the same type of evidence, *i.e.*, whether or not the couple are living together, financial information, relationship with spouse's family and possibly information from neighbors and friends. The real difference is that regarding possible fraudulent marriages the information is used to determine the intent of the parties at the time of their marriage, while in

Additionally, since procedures used in investigating fraudulent marriages and those used in investigating marriage viability are quite similar, it seems logical to conclude that if the fraudulent marriage statutes are permissible, a viability statute should also be permissible.

Perhaps the difference in the courts' reactions to these areas is, in part, tied to the fact that viability has not been statutorily defined so as to enable a precise set of procedural guidelines to be established. The INS itself has never shaped clear guidelines for defining viability.[135] If Congress strictly defined the incidents of viability, bona fide established marriages which were simply out of the ordinary might be construed as nonviable. For example, if Congress defined viability as determinable by whether or not the couple were living together, spouses with legitimate career reasons for living apart would find themselves in difficulty. On the other hand, if Congress were to loosely define viability there would be the danger of placing an unwarranted amount of discretion in the hands of INS investigators, which is exactly one of the problems with which the courts are deeply concerned.[136]

Although these concerns are valid, the possibility of drafting a statute similar to those dealing with the fraudulent marriage area should be examined. Congress could narrowly define a marriage as "viable" if the spouses at the time of the investigation intend to remain together permanently. Intent could be established in much the same way as it is established in the fraudulent marriage cases. Similarly, the possibility of shifting the burden of proof to the government under the statute and setting up procedural safeguards similar to those applied to fraudulent marriage investigations in *Stokes v. United States*[137] should be explored.

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the viability situation the information would be used to determine the spouses' intent to remain married at the time the evidence is presented.

135. In contrast, the fraudulent marriage statutes limit the inquiry to the intent of the parties at the time of the marriage. 8 U.S.C. § 1154(c) (Supp. II 1978); 8 U.S.C. § 1251(c) (1976).

136. *See* Chan v. Bell, 464 F. Supp. 125, 130 (D.D.C. 1978).

137. 393 F. Supp. 24 (S.D.N.Y. 1975). In *Stokes* the district court recognized that the INS may indeed violate the rights of those subjected to a marital fraud investigation. Although the court in that case denied a class action suit against the INS, it did so because the problem lay not with the statutes attacked but with the regulations adopted by the Attorney General via those statutes. The court noted that the investigatory means used by the INS raised substantial constitutional questions. Accordingly, a consent judgement was entered that ordered specific proce-

In answering the question of whether or not the tenth amendment would stand as a bar to a congressionally mandated viability requirement two conflicting policies are apparent. Under the tenth amendment, various powers are deemed vested with the individual states.[138] One of the areas of power most stubbornly reserved to the states is that of domestic relations, a fact which has clearly been recognized by the federal courts.[139] On the other hand, there is the policy of federal supremacy in matters such as immigration law.[140]

The *Chan* court recognized this conflict as presenting a serious constitutional problem, particularly since no statutory viability requirement exists.[141] The Supreme Court has held that in order for federal law to preempt state family law, the preemption must either be required by a specific statute or be the clear purpose of Congress.[142] The court in *Chan* was correct insofar as it noted that without the support of clear congressional policy or a statute the INS does not have the power to preempt a state's definition of a valid marriage. However, where the policy is clear or the statute specific the conflict must be resolved in favor of federal law.[143] Since Congress has the power to establish standard requirements different from those of the state in which the marriage was performed, the tenth amendment would not be violated should Congress see fit to further limit the marriages deemed sufficient for immigration purposes.[144] If Congress were to establish a requirement of viability and set standards by which viability could be assessed, the statute would be constitutional even if in direct conflict with state domestic relations law.[145]

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dural safeguards in the New York INS district. For the specific procedural safeguards ordered see 54 INTERPRETER RELEASES 80 (1977).

138. *See* U.S. CONST. amend. X.

139. *See* Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968).

140. *See* U.S. CONST. art. VI, cl. 2.

141. Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).

142. Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

143. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

144. *See* 8 U.S.C. § 1101(a)(35) (1976) (for immigration purposes a proxy marriage must be consummated in order to be sufficient).

145. *See* Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980). *Adams* illustrates this conflict between state and federal power. In *Adams*, the court examined the Service's refusal to recognize a homosexual marriage performed in the state of Colorado. The court noted that the state itself did not recognize such a marriage. However, the court went on to state that even if the marriage had been recognized under Colorado law, the INS would still have the authority to refuse to recognize it for purposes of immigration law. The court noted that while cases generally hold that the INS will apply the law of the jurisdiction where the marriage is performed, Congress is not compelled to do so and may expressly provide otherwise in its immigration statutes. Further, the court suggested that if the

CONCLUSION

There are aliens seeking to immigrate into the United States who gain immediate relative or second preference status, but who are not the proper subjects of preferential treatment, because their marital relationships are tenuous and fall apart before or soon after their preferred status has been granted. It is inequitable that these people should be given preference over others who have been waiting, sometimes for years, to enter the United States.

The Immigration and Naturalization Service's efforts to deal with this inequity through the application of a viability requirement has been severely curtailed by recent court decisions.[146] The courts, through narrow interpretations of the Service's discretionary power have frustrated the Service's attempts to carry out the purpose of the Immigration and Nationality Act—to give preferential treatment in situations where family unity is a reality. Thus, the Service is now forced to grant preferential treatment even to aliens who are separated from their spouses with no intention of reuniting.[147]

A solution to this problem can only come from legislation that would clearly give the INS the power to require marriage viability prior to granting preferential treatment. Under the present statutory and case law certain aliens receive preferential treatment even though they are not within the class Congress intended to prefer. However, a viability statute might raise serious constitutional problems. Only a carefully drafted statute that provides for due process safeguards and sufficiently limits the scope of the viability requirement can avoid constitutional problems while al-

state law offends federal public policy, Congress is deemed to have intended federal public policy to prevail. The court concluded that Congress never intended the word spouses to mean two persons of the same sex. Thus, the marriage was not recognized and would not have been recognized even if valid under state law. An analysis of *Adams* suggests that Congress has the power to preempt a state's domestic relations law where that law is in direct conflict with congressional mandates in the immigration area.

146. *See* Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979); Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977); Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).

147. *See In re* McKee, I.D. No. 2781 (1980); *In re* Kondo, I.D. No. 2782 (1980).

lowing the INS to fulfill the congressional purpose behind preferential treatment on the basis of marriage.

NANCY K. RICHINS