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Suspension of Deportation - Toward a New Hardship Standard

Jonathon P. Foerstel

SUSPENSION OF DEPORTATION—TOWARD A NEW HARDSHIP STANDARD

In order to obtain suspension of deportation, a deportable alien must demonstrate that he will face extreme hardship if ordered to leave the United States. The Supreme Court's latest decision interpreting the "extreme hardship" standard, INS v. Wang, *unfortunately raises more questions then it answers. This Comment traces the development of the "extreme hardship" standard in congressional legislation and recent judicial decisions. The Comment concludes with several recommendations for amendment of the existing suspension of deportation statute.*

INTRODUCTION

For an estimated four to five million undocumented aliens in the United States,[1] suspension of deportation is one of the few procedures available to become a lawful permanent resident.[2] Suspension of deportation has been heralded as a landmark of amelioration in immigration law.[3] This provision affords relief to undocumented aliens who are long time residents of the United States with close ties to the nation.[4] By means of suspension of deportation, tragic hardships that often accompany deportation can be avoided.

There exists, however, an almost insurmountable barrier to ob-

1. AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, ILLEGAL ALIENS: PROBLEMS AND POLICIES 1 (1978). Since 1920 nearly ten million undocumented aliens have been apprehended by the Immigration and Naturalization Service (INS). The number of undocumented aliens in the U.S. are estimated to be as high as ten million. *Id.*

2. The Immigration and Nationality Act, § 244, 8 U.S.C. § 1254 (1976) [hereinafter cited as I. & N. Act].

3. Gordon, *Discretionary Relief from Deportation*, DECALOGUE J., Sept.-Oct., 1960, at 6.

4. S. REP. NO. 1515, 81st Cong., 2d Sess. 596 (1950). *See generally* Comment, *Suspension of Deportation—A Look at the Benevolent Aspects of the McCarran-Walter Act*, 61 MICH. L. REV. 352 (1962).

taining suspension;[5] an alien must prove that his deportation would be an "extreme hardship" to himself or to his United States citizen or permanent resident spouse, parent or child.[6] Strict application of the extreme hardship standard has led to harsh and inequitable results.[7] This Comment will trace the development of the extreme hardship standard, analyze recent judicial decisions on the standard, and offer legislative proposals for a new, more appropriate hardship standard.

EXTREME HARDSHIP: A LEGISLATIVE HISTORY

Prior to 1940, no provision for suspension of deportation existed.[8] All undocumented aliens apprehended had to be deported.[9] The severe hardships resulting from the inflexibility of the law prompted the INS to press for new legislation. Although

5. *Bills to Revise the Laws Relating to Immigration, Naturalization, and Nationality: Joint Hearings Before the Subcomm.'s of the Comm. on the Judiciary Congress of the United States*, 82d Cong., 1st Sess. 589 (1951) (statement of Simon H. Rifkind). For a discussion of the difficulties in obtaining suspension of deportation relief in general, see Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229 (1976).

6. I. & N. Act, § 244(a), 8 U.S.C. § 1254(a) (1976). Under § 244(a) there are two different hardship standards. Section 244(a)(2) requires a showing of "exceptional and extremely unusual hardship" for aliens deportable on the following grounds: I. & N. Act, § 241(1)(4), 8 U.S.C. § 1251(a)(4) (1976) (convicted of a crime involving moral turpitude); *id.* § 241(a)(5), 8 U.S.C. § 1251(a)(5) (failure to notify Attorney General of current address); *id.* § 241(a)(6), 8 U.S.C. § 1251(a)(6) (anarchists); *id.* § 241(a)(7), 8 U.S.C. § 1251(a)(7) (aliens involved in espionage, sabotage or other activities prejudicial to public interest); *id.* § 241(a)(11), 8 U.S.C. § 1251(a)(11) (drug addicts and alcoholics); *id.* § 241(a)(12), 8 U.S.C. § 1251(a)(12) (aliens involved in prostitution); *id.* § 241(a)(14), 8 U.S.C. § 1251(a)(14) (convicted of possession of an illegal weapon); *id.* § 241(a)(15), 8 U.S.C. § 1251(a)(15) (convicted of violating Title I of the Alien Registration Act of 1940 within five years of entry); *id.* § 241(a)(16), 8 U.S.C. § 1251(a)(16) (convicted more than once of violating Title I of the Alien Registration Act of 1940); *id.* § 241(a)(17), 8 U.S.C. § 1251(a)(17) (an alien the Attorney General finds to be an undesirable resident for violation of certain federal laws); or *id.* § 241(a)(18), 8 U.S.C. § 1251(a)(18) (importing an alien into the United States for an immoral purpose). Aliens deportable under any other grounds need "only" show "extreme hardship."

Except where otherwise specified, "extreme hardship" will be used to refer to both hardship standards. An alien's "spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent resident," I. & N. Act, § 244(a), 8 U.S.C. § 1254(a) (1976), will be referred to hereinafter as an immediate relative.

7. *See, e.g.*, Chokloikaew v. INS, 601 F.2d 216 (5th Cir. 1979) (suspension denied despite loss in liquidating business investments and possible prison term on return); Banks v. INS, 594 F.2d 760 (9th Cir. 1979) (hardship to ten year old citizen if mother deported not extreme); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960) (alien with 17 years residency denied suspension).

8. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.1a, at 7-5 (rev. ed. 1980).

9. *Id.* The INS, however, stayed the deportation of many apprehended aliens notwithstanding its lack of statutory authority. Gordon, *Discretionary Relief From Deportation*, DECALOGUE J., September-October, 1960, at 6.

suggestions for legislative change had been made as early as 1934, it was not until six years later that Congress acted.[10]

The Alien Registration Act of 1940[11] allowed for suspension of deportation where an alien or his family would suffer "serious economic detriment" if the alien were deported.[12] The Act met with widespread approval.[13] By an amendment in 1948,[14] aliens with seven years residence in the United States became eligible for suspension regardless of family ties. Congress clearly intended to assuage the heavy personal burdens in a wide range of deportation cases.[15]

The Board of Immigration Appeals (BIA) liberally interpreted the "serious economic detriment" standard.[16] The BIA found that "[s]erious economic detriment exists if the effect of deportation would be substantially to lower the standard of living of the dependent relative."[17] Thus, an alien could often receive suspension by showing deportation would significantly reduce his future earning capacity.[18] Unfortunately, the generous provisions of the

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10. S. REP. No. 1515, 81st Cong., 2d Sess. 596 (1950).

11. Ch. 439, § 20, 54 Stat. 672 (1940) (amending the Immigration and Nationality Act of 1917, ch. 29, § 19(c), 39 Stat. 874 (1917)).

12. Specifically, the Act provided that:

> In the case of any alien . . . who is deportable under any law of the United States [except certain aggravated grounds] and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien . . . if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien . . . .

Id.

13. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.1a, at 7-6 (rev. ed. 1980).

14. Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948) (amending the Alien Registration Act, ch. 439, § 20, 54 Stat. 672 (1940)). The amendment was intended to expand eligibility for relief to aliens with no close family ties in the United States. These aliens were not eligible under the Alien Registration Act as originally drafted. S. REP. No. 1204, 80th Cong., 2d Sess. 3 (1948). The amendment also eliminated previous racial bars. S. REP. No. 1515, 81st Cong., 2d Sess. 596 (1950).

15. *See* Gagliano v. INS, 353 F.2d 922, 927 (2d Cir. 1965).

16. S. REP. No. 1515, 81st Cong., 2d Sess. 597 (1950).

17. *Id. See, e.g., In re* T, 3 I. & N. Dec. 707 (1949); *In re* L, 2 I. & N. Dec. 775 (1947); *In re* W, 2 I. & N. Dec. 679 (1946); *In re* B, 2 I. & N. Dec. 627 (1946).

18. *Contra* De Reynoso v. INS, 627 F.2d 958 (9th Cir. 1980); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968). The liberal interpretation of the standard is perhaps best demonstrated in a case involving an alien mother entirely dependent on public assistance. The BIA noted the care she provided to her children had an economic value. Suspension was granted on the basis that loss of her care would be a serious economic detriment to her children. BIA file 55930/355 (March 31, 1943).

Alien Registration Act were not long-lived.

Suspension of deportation came under heavy attack in the early fifties as Congress contemplated a major revision of the immigration and nationality laws.[19] Most criticism centered around two themes. First, it was claimed that suspension was being used to bypass normal immigration channels. Reports indicated aliens were entering the United States on temporary transit visas and obtaining suspension of deportation by claiming serious economic detriment to citizen children born shortly after the parents had arrived.[20] Second, it was argued that suspension was unfair to aliens attempting to immigrate by conventional means, since the number of visas available was reduced by each alien granted suspension.[21] Congress concluded that the "serious economic detriment" standard had to be changed to end the alleged "flouting" of the immigration system.[22]

In 1952, Congress passed the McCarran-Walter Act.[23] This legislation marked a complete overhaul of the existing immigration laws.[24] Eligibility for suspension of deportation was severely restricted.[25] Section 244(a) of the Act,[26] which outlined the new provisions for suspension, required that an alien show "exceptional and extremely unusual hardship" to himself or an immediate relative. This hardship standard was even more harsh than the "extreme and unusual" hardship standard recommended by the Senate Subcommittee on the Judiciary.[27] Section 244(a) left one with the impression that very few deportable aliens would receive suspension relief in the future.

The new suspension provisions incorporated a strange mixture of flexibility and rigidity. The standard for hardship was not to be

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19. S. REP. No. 1137, 82d Cong., 2d Sess. 25 (1952); S. REP. No. 1515, 81st Cong., 2d Sess. 600-01 (1950).

20. S. REP. No. 1515, 81st Cong., 2d Sess. 600-01 (1950).

21. S. REP. No. 1137, 82d Cong., 2d Sess. 25 (1952).

22. *Id.*

23. Ch. 477, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1-1557 (1976)). This act, with various amendments, remains the basis of United States Immigration and Nationality Law.

24. THE IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 2.5 (2d ed. 1979).

25. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(a), at 7-130 to 7-131, (rev. ed. 1980). *See* Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 342-43 (1956).

26. MCCARRAN-WALTER ACT, CH. 5, § 244(a), 66 STAT. 214 (1952) (current version at 8 U.S.C. § 1254(a) (1976)). In addition to the requisite hardship, an alien had to show "good moral character" and a continuous period of residency for either five, seven or ten years, depending on the seriousness of the deportation grounds. In the McCarran-Walter Act, the "exceptional and extremely unusual hardship" standard applied to all of the deportation grounds. *Id.*

27. S. REP. No. 1515, 81st Cong., 2d Sess. 610 (1950).

broadly interpreted.[28] The Attorney General's ability to grant relief was limited because he could only consider those aliens demonstrating sufficient hardship. His discretion to deny relief to an *eligible* alien, however, was expanded.[29] For the first time, the suspension statute provided that the Attorney General "may, in his discretion" suspend deportation.[30]

The "exceptional and extremely unusual" hardship standard drew severe criticism.[31] Commentators found section 244 to be complicated, confusing, and poorly drafted.[32] The suspension statute was described as "cruel and vindicative, heedless of the opinions or good will of our allies, and oblivious of the standards of decency and fair play that mark our criminal legislation."[33] Commenting on the "exceptional and extremely unusual" hard-

28. A Senate report explained:

> The committee is aware that in almost all cases of deportation, hardship and frequently unusual hardship is experienced by the alien or the members of his family who may be separated from the alien . . . . [U]nder the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable.

S. REP. No. 1137, 82d Cong., 2d Sess. (1952).

29. In theory, a hearing on suspension of deportation is a two step process. First eligibility for relief is determined, and then discretion is exercised in deciding if relief will be granted. In practice, both determinations tend to merge. For example, eligibility is often assumed and relief is denied for lack of equities favoring a grant of suspension.

30. McCarran-Walter Act, ch. 5, § 244(a), 66 Stat. 214 (1952) (current version at 8 U.S.C. § 1254(a) (1976)). The Attorney General has authority to administer and enforce the immigrations laws. However, he has delegated his authority to a variety of officers in the INS, e.g., immigration judges. C. GORDON & E. GORDON, IMMIGRATION LAW AND PROCEDURE § 1.5b, at 1-7, § 3.17b at 3-55 (desk ed. 1980). For the purposes of this article, "Attorney General" will be used to refer to anyone with delegated authority from the Attorney General.

31. Both President Truman and President Eisenhower were critical of the new hardship standard. President Truman, in his veto of the Act of 1952, expressed fear that section 244 "would narrow the circle of those who can obtain relief. . . ." This, he felt, would be unfortunate since other sections of the Act of 1952 would impose harsher restrictions and add to the number deserving relief. H.R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952). In a letter to Senator Arthur Watkins, President Eisenhower stated that there would be problems interpreting the exceptional and extremely unusual hardship standard, and therefore, "the laws should more clearly state the standards upon which this discretionary relief may be granted by the Attorney General." 99 CONG. REC. 4321 (1953).

32. Comment, *Suspension of Deportation—A Look at the Benevolent Aspect of the McCarran-Walter Act*, 61 MICH. L. REV. 352, 355 (1962).

33. Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 309 (1956).

ship standard, Louis Jaffe, Professor of Administrative Law at Harvard, stated that "[r]arely has there been a balder statement of a national purpose to be cruel."[34]

In 1962, an amendment to section 244(a)(1) changed the wording "exceptional and extremely unusual" hardship to "extreme" hardship.[35] The old hardship standard was retained in section 244(a)(2) for suspension when aggravated grounds for deportation exist.[36] Reasons and justifications for the amendment were not elucidated.[37] The BIA interpreted the amendment as a congressional attempt to lessen the degree of hardship required for suspension.[38]

Legislators have considered the hardship standard at length. Congress has been responsive to criticism of section 244. Barring the changes in 1952, the suspension statute has followed a trend expanding eligibility for relief. But have these changes resulted

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34. *Staff of President's Commission on Immigration and Naturalization*, 82d. Cong., 2d Sess., *Hearings Before the President's Commission on Immigration and Naturalization* 1576 (Comm. Print 1952).

By far the harshest criticism of the new hardship standard came from Ben Touster, President of the Hebrew Sheltering and Immigrant Aid Society:

> [S]ection 244 [along with §§ 212(c), 245] . . . rob our immigration laws of every vestige of humaneness which has developed since 1917. The hardship attendant upon separating families is not enough to grant suspension. . . . One must measure degrees of suffering and torture, and only those who suffer the anxiety of mental and physical pain to the utmost may be relieved under this law. The rest must suffer exile, a dreadful punishment abandoned by the common consent of all civilized peoples.

Id. at 1789.

35. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247 (1962).

36. *Id. See* note 6 *supra*.

37. The bill, which included the amendment to the hardship standard, was simply described as one "to facilitate the entry of alien skilled specialists and certain relatives of U.S. citizens, and for other purposes. . . ." H.R. REP. NO. 2552, 87th Cong., 2d Sess. 1 (1962). A 1955 report by a special subcommittee of the Committee on the Judiciary provides a possible explanation for the 1962 amendment. The subcommittee concluded that section 244(a) did not realistically address the problems it was designed to handle. There had been a dramatic increase in private immigration bills, which were a heavy burden on Congress. The liberal attitude the BIA had taken in interpreting the exceptional and extremely unusual standard had not been adequate in reducing private legislation. In order to "eliminate sources of hardship which the Congress is being repeatedly called upon to alleviate through the enactment of private legislation," the subcommittee suggested that a new standard of hardship—extreme hardship—be adopted for suspension of deportation. SPECIAL SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, APPENDIX REPORT ON THE ADMINISTRATION OF THE IMMIGRATION AND NATIONALITY ACT, H.R. REP. NO. 1570, 84th Cong., 1st Sess. 32-35 (1955). Private immigration bills are a last ditch effort to stave off deportation when all administrative and judicial action have failed. Such a bill, if enacted by Congress, is a legislative mandate that must be followed by administrative authorities. C. GORDON & E. GORDON, IMMIGRATION AND NATIONALITY LAW § 7.10, at 7-32 to 7-33 (student ed. 1980).

38. *See In re* Hwang, 10 I. & N. Dec. 448 (1964); *In re* Louie, 10 I. & N. Dec. 223 (1963).

in a more liberal application of the law? The role of discretion is an unpredictable factor in suspension of deportation relief.

THE ROLE OF DISCRETION

The Attorney General has considerable discretion to determine when an applicant has satisfied the broad "extreme hardship" standard. The relationship between discretion and the hardship standard has been an important element in recent judicial decisions on eligibility for suspension.[39] Discretion plays a role in three areas of the suspension procedure: (1) in ruling on a motion to reopen a deportation hearing in order to apply for suspension;[40] (2) in determining whether an alien meets eligibility requirements for relief;[41] (3) in deciding whether an eligible alien should be granted suspension.[42]

If an alien has been found deportable, a motion to reopen deportation proceedings is appropriate when new circumstances arise affecting his eligibility for suspension. For example, assume an alien granted voluntary departure[43] has a child born in the United States before he leaves. In the past, if an alien demonstrated new material facts sufficient for a prima facie case of eligibility, the Attorney General had to grant the motion.[44] Denial of a motion to reopen when an alien had established a prima facie case of eligibility was considered an abuse of discretion.[45]

In *INS v. Wang*,[46] the Supreme Court held that the Code of Federal Regulations "does not affirmatively require the Board [of Immigration Appeals] to reopen the proceedings under any par-

39. INS v. Wang, 101 S. Ct. 1027 (1981); Tovar v. INS, 612 F.2d 794 (3d Cir. 1980); Bastidas v. INS, 609 F.2d 101 (3d Cir. 1979).

40. INS v. Wang, 101 S. Ct. 1027 (1981).

41. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.1b, at 7-10, § 8.14, at 8-124 (rev. ed. 1980).

42. *See* United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957); Jay v. Boyd, 351 U.S. 345, 353 (1956); Asimakopoulos v. INS, 445 F.2d 1362, 1365 (9th Cir. 1971).

43. Voluntary departure allows an alien to leave before a final order of expulsion is issued. This allows him to choose where he will go after leaving the United States and it avoids the bar to reentry that deported aliens face. C. GORDON & E. GORDON, IMMIGRATION LAW AND PROCEDURE § 7.2a, at 7-6 (desk ed. 1980).

44. Wang v. INS, 622 F.2d 1341, 1345 (9th Cir. 1980), *rev'd per curiam*, 101 S. Ct. 1027 (1981).

45. Jong Shik Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589, 593 (9th Cir. 1978).

46. 101 S. Ct. 1027 (1981).

ticular condition."[47] The *per curiam* decision in *Wang* leaves some questions unanswered regarding motions to reopen. Can denial of a motion to reopen be reviewed for abuse of discretion? The *Wang* decision implies that such a denial is not subject to review. Yet the Supreme Court had previously held in *Giova v. Rosenberg*[48] that the circuit courts have jurisdiction to review a motion to reopen.[49]

The confusion in *Wang* undoubtedly results from the Court's cursory treatment of the issues involved. The case was decided without oral argument or full legal briefs. It is difficult to predict what standard of review the circuit courts will apply for motions to reopen after *Wang*. Until the Supreme Court clarifies its stance, the circuit courts will presumably defer to the judgment of the BIA on motions to reopen.

The precise role of discretion in determining eligibility for suspension is unclear. The process of determining eligibility for suspension has been alternately described as a question of fact[50] and as a discretionary decision.[51] In *Wong Wing Hang v. INS*,[52] the landmark case on discretion and suspension of deportation, the court stated:

> [A]dministrative findings of fact made in determining an alien's eligibility for suspension must meet the statutory test of support by 'reasonable, substantial, and probative evidence on the record considered as a whole [the substantial evidence standard]' . . . [and] that a determination of ineligibility is subject to judicial scrutiny for proper application of the conditions prescribed in § 244.[53]

Yet in *Banks v. INS*,[54] the court states that "[i]n reviewing the finding that *Banks* has failed to establish extreme hardship, this court may overturn the administrative determination only if we find that there has been an abuse of discretion."[55]

The majority of decisions follow *Wong Wing Hang*.[56] "[N]either the Service [INS] nor the Attorney General has any

47. *Id.* at 1031 n.5. The Attorney General has delegated power to review decisions by immigration judges under § 244 to the Board of Immigration Appeals. *See* note 30 *supra*.

48. 379 U.S. 18 (1964) (*per curiam*).

49. *See* Note, 42 N.Y.U. L. REV. 1155, 1162 (1967).

50. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.1b, at 7-10, § 8.14, at 8-124 (rev. ed. 1980).

51. Banks v. INS, 594 F.2d 760 (9th Cir. 1979).

52. 360 F.2d 715 (2d Cir. 1966).

53. *Id.* at 717. *See* I. & N. Act, § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1976).

54. 594 F.2d 760 (9th Cir. 1979).

55. *Id.* at 762.

56. *See* Foti v. INS, 375 U.S. 217, 228-29 (1963); Chadha v. INS, 634 F.2d 408, 429 (9th Cir. 1980); Tovar v. INS, 612 F.2d 794, 797 (3d Cir. 1980); Yui Sing Tse v. INS, 596 F.2d 831, 834 n.4 (9th Cir. 1979); Lee v. INS, 541 F.2d 1383, 1384-85 (9th Cir. 1976); Kasravi v. INS, 400 F.2d 675, 677 n.3 (9th Cir. 1968). *But see* Davidson v. INS, 558 F.2d 1361, 1362-63 (9th Cir. 1977).

discretion to exercise until the applicant clears the eligibility hurdle. Accordingly, the abuse of discretion standard is not appropriate in reviewing eligibility; the proper test is the substantial evidence standard."[57] Chief Justice Earl Warren, writing for a unanimous court in *Foti v. INS*,[58] stated that "[s]ince a special inquiry officer cannot exercise his discretion to suspend deportation until he finds the alien statutorily eligible for suspension, a finding of eligibility and an exercise of (or refusal to exercise) discretion may properly be considered as distinct and separate matters."[59] If the determination of extreme hardship is discretionary, the exercise of discretion in the second step becomes meaningless. There may be some overlap in the two step process.[60] A finding of no extreme hardship may reflect a belief that the alien, even if eligible, does not merit discretionary relief. Such a short cut in the two step process makes it difficult to determine whether discretion has been exercised. What was in reality a discretionary decision may be treated as a finding of fact on review.

Appellate review is further complicated by the practice of pretermitting eligibility in a discretionary denial of suspension.[61] The Code of Federal Regulations requires "a discussion [written or oral] of the evidence pertinent to any application made by respondent . . . and the reasons for granting or denying the request" for suspension.[62] The immigration judge is not required to discuss the alien's eligibility for suspension.[63] Section 244 should be amended to require a full hearing on eligibility for suspension. A written report should also be required discussing findings on

57. Lee v. INS, 541 F.2d 1383, 1384-85 (9th Cir. 1976).

58. 375 U.S. 217 (1963).

59. *Id.* at 229 n.15.

60. C. GORDON & E. GORDON, IMMIGRATION LAW AND PROCEDURE § 7.9e, at 7-34 (desk ed. 1980).

61. It has been suggested that "[b]ecause the determination of his [the alien's] *statutory eligibility for relief* is a matter of right, it seems likely that the applicant has a corollary right to a full and fair hearing on the statutory prerequisites." 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.1b, at 7-12 (rev. ed. 1980). *See* Jay v. Boyd, 351 U.S. 345, 353 (1956); Silva v. Carter, 326 F.2d 315, 320 (9th Cir. 1963), *cert. denied*, 377 U.S. 917 (1964). Yet the Supreme Court has approved the practice of pretermitting eligibility when denying suspension. *See* INS v. Bagamasbad, 429 U.S. 24 (1976) (reversing Third Circuit holding that there must be a specific ruling on an applicant's eligibility).

62. 8 C.F.R. § 242.18(a) (1980).

63. *See* INS v. Bagamasbad, 429 U.S. 24, 26 (1976).

eligibility and reasons for granting or denying relief.[64] This change will assure an adequate record for review.

The *Wang* decision will not necessarily affect the standard of review for administrative findings on suspension eligibility. In *Foti* the Supreme Court held that the circuit courts have exclusive jurisdiction to review a finding of ineligibility for suspension. The Court noted that Congress had placed jurisdiction for review in the circuit courts because "the setting aside of an administrative determination on the ground of arbitrariness involves disputed eligibility questions and matters of statutory construction."[65] Yet the *Wang* decision states that "the [Immigration and Nationality] Act commits . . . definition [of the words "extreme hardship"] in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."[66] There is no indication that the Supreme Court intended to overrule *Foti* in *Wang*.[67] Therefore, the language in *Wang* can be reasonably interpreted as limited to the particular fact situation in that case: the Ninth Circuit Court had reversed a denial of a motion to reopen, even though the deportable alien had not supported his claim of hardship with affidavits or other evidentiary materials.[68] If the circuit courts must defer to the Attorney General's interpretation of the suspension statute, it is difficult to imagine what function review of his decision would serve.

In addition to establishing eligibility, an alien must demonstrate significant equities justifying a favorable exercise of discre-

64. *See* the "Recommendations for Legislative Change" section of this Comment. The Code of Federal Regulations has in the past required such a written decision. 8 C.F.R. § 242.61(a) (1952).

65. Foti v. INS, 375 U.S. 217, 230 (1963).

66. INS v. Jong Ha Wang 101 S. Ct. 1027, 1031 (1981).

67. In fact, *Foti* is cited as authority in *Wang*. INS v. Wang, 101 S. Ct. 1027 n.1 (1981).

68. *Id.* at 1030. In the short *Wang* opinion, the Court refers eighteen times to motions to reopen. Not once does the Court refer to appellate review of a discretionary denial of suspension. The Court quotes with approval Circuit Judge Wallace's dissent in Villena v. INS, 622 F.2d 1352, 1362 (9th Cir. 1980) (en banc):

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.

INS v. Wang, 101 S. Ct. 1027, 1031 n.5 (1981). The Supreme Court was particularly concerned about use of the motion to reopen merely to delay deportation. The Wangs' deportation hearing had been reopened twice. INS v. Wang, 101 S. Ct. 1027 (1981). Review of a denial of suspension does not pose the same danger of needless delay. Denial of suspension relief may only be reviewed once. *See* Foti v. INS, 375 U.S. 217 (1963).

tion.[69] Congress provided no guidelines for determining who among eligible aliens should be granted relief. The Attorney General is not necessarily bound by previous cases involving aliens with similar hardships, even though typically each "precedent" will be given weight.[70] When appealing denial of suspension to an eligible alien, the following discussion in *Wong Wing Hang* should be emphasized:

> Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other 'considerations that Congress could not have intended to make relevant.'[71]

Discretion has been a central concern in recent circuit court decisions expanding eligibility for suspension of deportation. These decisions have increased the Attorney General's authority as to who may be considered for relief, while his discretion to deny relief has been limited. The Supreme Court's recent *Wang* ruling places these circuit court decisions in question. Nevertheless, *Wang* appears to be limited to motions to reopen involving claims of economic hardship. Recent circuit court decisions expanding the range of emotional hardships considered on review may yet survive *Wang*.

JUDICIAL INTERPRETATION OF "EXTREME HARDSHIP"

There are no statutory guidelines for determining when extreme hardship has been established. Therefore, the courts themselves have developed a number of factors to consider in determining extreme hardship. These factors involve both emotional and economic hardship, although rarely does any factor fall neatly into either category.[72]

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69. Asikese v. Brownell, 230 F.2d 34, 35 (D.C. Cir. 1956); Comment, *Suspension of Deportation—A Look at the Benevolent Aspect of the McCarran-Walter Act*, 61 MICH. L. REV. 352, 355 (1962).

70. Smith *ex rel.* Leung Sing v. Nicolls, 113 F. Supp. 790 (D. Mass. 1953) (decided under the Alien Registration Act).

71. 360 F.2d 715, 719 (2d Cir. 1965).

72. For example, the BIA used the following criteria for "exceptional and extremely unusual" hardship: "(a) length of residence in the United States. . . . , (b) family ties. . . . , (c) possibility of obtaining a visa abroad. . . . , (d) financial burden on alien having to go abroad to obtain a visa. . . . , and (e) the health and age of the alien." *In re* S, 5 I. & N. Dec. 409, 410-11 (1953). The Ninth Circuit, in the past, has considered a variety of factors in determining extreme hardship; e.g.,

After adoption of the Immigration and Nationality Act,[73] economic hardship, even in the extreme, was no longer by itself sufficient for suspension.[74] Economic hardship, however, remained an element to be considered along with other factors.[75] One economic hardship in particular has been shown to carry weight with the courts. If it is probable that an alien would not find any employment if deported, the extreme hardship requirement may be satisfied.[76] Courts give little consideration, however, to the hardship of being deported to a country with a lower standard of living.[77] Such hardship is often insubstantial. Nevertheless, where the differential in living standards is dramatic, the well-being of an alien or his family may be seriously threatened. Hardship of this magnitude should not be ignored by labeling it "economic."

The Supreme Court's *Wang* decision ended a trend toward allowing serious economic hardship as a basis by itself for suspension eligibility.[78] The Ninth Circuit Court had stated:

> We need not hold that either the Wangs' showing regarding their children or the Wangs' anticipated economic setback alone constitutes a prima facie case of extreme hardship. . . . We do not preclude the possibility that upon further examination the Board, in the sound exercise of its discretion, may find that either hardship alone is extreme and warrants relief or that both combined are hardships sufficient to warrant relief.[79]

In reversing the Ninth Circuit decision, the Supreme Court commented "that a mere showing of economic detriment is not suffi-

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medical problems, *see* Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979); age of United States citizen child and the effect of deportation on the child's education, *see* Jong Shik Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589, 595 n.5 (9th Cir. 1978); separation of family members, *see* Jong Shik Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589, 593-95 (9th Cir. 1978); Yong v. INS, 459 F.2d 1004, 1005 (9th Cir. 1972); and the emotional and economic impact of moving to another country, *see* Jong Shik Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589, 595 (9th Cir. 1978). Many of these factors may be accorded far less weight in the future because of the *Wang* decision.

73. Section 244, 8 U.S.C. § 1254 (1976).

74. *See In re* S, 5 I. & N. Dec. 409 (1953).

75. *See* Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968); *In re* Ching, 12 I. & N. Dec. 710 (1968); *In re* Louie, 10 I. & N. Dec. 223 (1963) is particularly interesting since the BIA relied almost exclusively on economic factors in granting suspension.

76. Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968); M. IVENER & S. BLALOCK, HANDBOOK OF IMMIGRATION LAW 256 (1980). In INS v. Wang, 101 S. Ct. 1027 (1981) the Court noted that "there [was] nothing to suggest that the college-educated male respondent could not find suitable employment in Korea." *Id.* at 1030.

77. *See* Carnalla-Munoz v. INS, 627 F.2d 1004 (9th Cir. 1980); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968).

78. Even if *Wang* applies only to motions to reopen, the Court's attitude toward economic hardships is clear. Such hardships are to be given little weight in the future.

79. Wang v. INS, 622 F.2d 1341, 1349 (9th Cir. 1980), *rev'd per curiam*, 101 S. Ct. 1027 (1981).

cient to establish extreme hardship under the Act."[80] This holding ignores the fact that economic hardship often leads to emotional hardship. The inability to afford health care or higher education may have an emotional impact on aliens who are accustomed to life in America. Immigration lawyers should attempt to express economic hardships in terms of their emotional impact. An emotional impact analysis may be a means to circumvent the Court's skepticism toward economic hardship.

The Ninth and Third Circuits have split over one question relating to economic hardship. The disagreement concerns whether an alien's dependence on welfare should be a negative factor in determining if suspension should be granted.[81] In a Ninth Circuit case, *Nee Hao Wong v. INS*,[82] an alien was denied suspension in part because he was a "charge on the people of the State of California while he was hospitalized . . . [and] his complete dependency on welfare assistance which was anticipated to continue into the indefinite future . . . ."[83]

In *So Chun Chung v. INS*,[84] the Third Circuit took the opposite approach:

> When reviewing a § 244 petition the Immigration and Naturalization Service may consider several factors in adjudging the hardship claimed by a petitioner. The financial position of a family—including the sources of its income—is obviously relevant in this regard. It is important, however, only insofar as it bears on the hardship that deportation would work on either the alien or the family. If, on the other hand, the alien's former dependence on public assistance is relied upon in denying a § 244 petition on

80. INS v. Wang, 101 S. Ct. 1027, 1030-31 (1981). It is unfortunate that the Ninth Circuit chose the fact situation in *Wang* to develop a new approach to economic hardship. The Wangs owned a business valued at $75,000 which provided a weekly income of $650. They also had $24,000 saved and miscellaneous assets worth $20,000. The adult members of the Wang family were well educated. The Wangs' ability to support themselves if deported to Korea cannot be seriously questioned. The Ninth Circuit should have waited for a case such as Santana-Figueroa v. INS, No. 79-7691, (9th Cir. May 11, 1981). In *Santana-Figueroa*, an uneducated and unskilled 70 year-old citizen of Mexico faced deportation. The court noted that the alien faced malnutrition or starvation if deported. *Id.* It is unlikely that a finding of extreme hardship, even though purely economic, would be reversed in such a case.

81. The *Wang* decision did not address this issue. The Wangs were not on welfare.

82. 550 F.2d 521 (9th Cir. 1977). This case is also an excellent example of how an alien may satisfy all the eligibility requirements for suspension and still not be granted relief.

83. *Id.* at 524.

84. 602 F.2d 608 (3d Cir. 1979).

> the theory that those who have received public assistance are in some way less desirable than other aliens, we believe it is improper.[85]

So Chun Chung is the better reasoned decision, considering the requirements of section 244. Nowhere in the text or legislative history of section 244 is hardship to a state mentioned. The emphasis is entirely on hardship to the alien or his immediate relatives.[86] It has been stated that "[t]he absence of additional equities militates against the grant of suspension of deportation."[87] But dependence on welfare does not preclude substantial equities favoring suspension. An alien may be on welfare due to lack of job skills. He is even more likely to suffer extreme hardship on deportation than an alien who has learned a successful trade while working here.

One recent Third Circuit decision, *Bastidas v. INS*,[88] offers great potential for extending the range of emotional hardships considered in determining "extreme hardship." Here a deportable alien father faced permanent separation from his son. The Third Circuit court reversed a finding of ineligibility for suspension. The immigration judge's failure to consider the "foreseeable emotional impact" of the separation was cited as error.[89] Since the *Wang* decision is silent on the question of emotional hardships, *Bastidas* is presumably still viable precedent.[90] Immigration defense lawyers can utilize *Bastidas* to add a new dimension to a client's potential hardship if deported. Separation from a lifelong friend or loss of a position in a community organization may be hardship with a foreseeable emotional impact.

Hardship, both economic and emotional, to an alien's immediate family is of crucial importance in obtaining suspension. The absence of immediate relatives in the United States may indicate a lack of roots in this country and a lower degree of hardship if deported.[91] The existence of immediate relatives in an alien's home country may decrease his chances for suspension.[92] This is

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85. *Id.* at 611. *Cf.* Graham v. Richardson, 403 U.S. 365 (1971) (barring discrimination against aliens in allotting public welfare benefits).

86. *See* I. & N. Act, § 244, 8 U.S.C. § 1254 (1976).

87. Asikese v. Brownell, 230 F.2d 34, 35 (D.C. Cir. 1956).

88. 609 F.2d 101 (3d Cir. 1979).

89. *Id.* at 104.

90. In fact, *Bastidas* is cited as authority in INS v. Jong Ha Wang, 101 S. Ct. 1027, 1029 n.2 (1981). Furthermore, *Bastidas* was an appeal from a finding of ineligibility, not a motion to reopen.

91. Melachrinos v. Brownell, 230 F.2d 42, 44 (D.C. Cir. 1956). *See, e.g.*, Nee Hao Wong v. INS, 550 F.2d 521 (9th Cir. 1977); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960); *In re* S, 5 I. & N. Dec. 695 (1954).

92. *See, e.g.*, Vichos v. Brownell, 230 F.2d 45 (D.C. Cir. 1956); Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956); Leontis v. Esperdy, 175 F. Supp. 21 (S.D.N.Y. 1959).

true even if an alien uses his earnings here to support his family abroad.[93]

The court's focus on immediate relatives in the United States has led to inequitable consequences. In *Kam Ng v. Pilliod*,[94] an alien with seventeen years residence was denied suspension because he lacked family ties in this country. In decisions like *Kam Ng*, the courts overlook the fact that section 244(a) places equal emphasis on the hardship to the alien himself. Under section 244(a), hardship "to the alien or to his spouse, parent, or child" is disjunctive. An alien need only establish extreme hardship to one of the persons mentioned.[95]

Among the family hardships traditionally recognized, hardship to United States citizen children of aliens is the most important factor in obtaining suspension. United States citizen children are normally forced to leave the country when their alien parents are deported. Yet courts have rejected the claim that deportation of alien parents amounts to an unconstitutional de facto deportation of their citizen children.[96] *Banks v. INS*,[97] is an excellent example of indifference to hardships of citizen children. In *Banks*, a ten year old United States citizen child faced the prospect of moving to Germany with her deportable alien mother. The child, who suffered from a hearing problem, required medical attention not easily available in Germany. In addition, the child could not speak German. The court found that the hardship to the child did not warrant a grant of suspension to the mother.[98]

A United States citizen child may face serious problems in his

93. *See* Vichos v. Brownell, 230 F.2d 45 (D.C. Cir. 1956).

94. 279 F.2d 207 (7th Cir. 1960).

95. The fact aliens with no immediate relatives in the United States may experience great hardships if deported has long been accepted. This was why the Alien Registration Act, ch. 439, § 20(c), 54 Stat. 672 (1940) was amended in 1948 to allow suspension for aliens without regard to immediate relatives. Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948). *See* S. REP. NO. 1204, 80th Cong., 2d Sess. 3 (1948); 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9a, at 7-130 (rev. ed. 1980). The reasoning behind the 1948 amendment probably influenced Congress to adopt the disjunctive wording in the present statute.

96. Rubio de Cachu v. INS, 568 F.2d 625 (9th Cir. 1977); Davidson v. INS, 558 F.2d 1361 (9th Cir. 1977); Lee v. INS, 550 F.2d 554 (9th Cir. 1977); Gonzalez-Cuevas v. INS, 515 F.2d 1222 (5th Cir. 1975).

97. 594 F.2d 760 (9th Cir. 1979).

98. The *Banks* court reasoned: "We believe that this case falls with the general rule which does not allow an alien, illegally within this country, to gain a favored status on the coattails of his (or her) child who happens to have been born in this country." Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979). Such reasoning often accompanied the classic "floodgate" argument.

deported parent's home country. Dissenting in *In re Kim*,[99] Maurice Roberts (then Chairman of the BIA) stated: "Depending on the circumstances prevailing in the foreign country, the child may be deprived of the educational and economic opportunities, the health services and other benefits readily available to him in this country. He may be deprived of the great democratic freedoms which are ours."[100] The difficulties continue if the child eventually decides to return to the United States. He may be separated permanently from his parents if they are unable to return for economic or legal reasons.[101] Having grown up with a different culture and language, he may be treated as a foreigner here in the country of his birth.[102]

The hardship a child experiences in moving to another country obviously increases with age. The single most important factor in this increasing hardship is the child's dependence on English. Once a child has reached school age, changing languages may seriously retard his scholastic progress.[103] Inability to freely converse with his classmates may alienate him socially. Of course, some consideration must be given to the hardship of preschool children. Loss of the advantages of living in America will be a hardship to children of any age. But there is a hidden danger in the courts giving great weight to hardships of younger children. Legislators may become fearful that aliens will have children in order to obtain suspension.[104] New restrictive amendments to section 244 could put an end to any possibility of liberalizing suspension relief. By placing greater emphasis on hardship to school age children, there is less cause for concern that suspension will be abused. Little immediate advantage is obtained in giving birth to a child. Children become an important factor in obtaining suspension only upon entering school. It is highly un-

99. 15 I. & N. Dec. 88 (1974).

100. *Id.* at 92.

101. Deported aliens are permanently prohibited from reentering the United States unless the Attorney General grants special permission to return. C. GORDON & E. GORDON, IMMIGRATION LAW AND PROCEDURE § 4.6c, at 4-15 (desk ed. 1980).

102. *See In re* Kim, 15 I. & N. Dec. 88, 91-94 (1974) (Roberts, Chairman of BIA, dissenting).

103. In *Jong Ha Wang* the Court stated that "the Board [of Immigration Appeals] could not believe that the two 'young children of affluent, educated parents' would be subject to such educational deprivations in Korea as to amount to extreme hardship. In making these determinations, the Board was acting within its authority." *INS v. Wang*, 101 S. Ct. 1027, 1031 (1981). The Wangs had two children, ages ten and seven at the time of trial in the court of appeals. Neither child could speak Korean. The Supreme Court focused solely on the parents ability to pay for education in Korea and completely ignored the potential emotional hardships.

104. This was one of the concerns that led to adoption of the restrictive McCarran-Walter Act. *See* S. REP. No. 1515, 81st Cong., 2d Sess. 601 (1950).

likely that an undocumented alien will plan five or six years in advance to have a child in order to fulfill the extreme hardship requirement for suspension.

Hardships to relatives not mentioned in section 244(a) have been considered recently. The Third Circuit has adopted an analysis which broadens the classes of relatives covered under section 244(a). In *Tovar v. INS*,[105] a deportation order was reversed because hardship to an alien's grandchild, a United States citizen, had not been considered. A grandchild is not a statutorily defined relative in section 244. Normally, hardship to a grandchild would be irrelevant. The *Tovar* court, however, found that the grandmother had acted as a surrogate mother since the grandchild's infancy. Because "[t]he language of the suspension provision evinces a legislative purpose to protect immediate members of an alien's family from the hardship attending her deportation," the hardship to the grandchild must be considered.[106] Future cases involving "surrogate" relationships may be able to utilize language in *Tovar* that the grandchild was "emotionally attached and financially dependent" on the grandmother.[107] For example, uncles, aunts, cousins or guardians of citizens may be able to meet the emotionally attached-financially dependent criteria.[108]

There is an alternative approach that can be used to expand the classes of relatives considered under section 244(a). The hardship to non-immediate relatives can be expressed in terms of hardship to the deportable alien himself. This approach is consistent with the wording of section 244. The Third Circuit's reinterpretation of the words "spouse," "parent" and "child" is more of an intrusion on the statutory language. The *Tovar* approach

105. 612 F.2d 794 (3d Cir. 1980).

106. *Id.* at 797. *Cf.* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (grandmother included in statutory definition of "family"); INS v. Errico, 385 U.S. 214, 220 n.9 (1966) (statutory intent to unite families of aliens deportable because of fraud in obtaining visa); H.R. REP. No. 1199, 85th Cong., 1st Sess. 7 (1957).

107. *See* Bastidas v. INS, 609 F.2d 101 (3d Cir. 1979) where the court stated that "the existing case law uniformly emphasizes the importance of the question of the separation of family members from each other for the purposes of a § 244(a)(1) extreme hardship determination." *Id.* at 105. *Cf.* Vergel v. INS, 536 F.2d 755 (8th Cir. 1976) (child's separation from life-long nurse).

108. *But see In re* Ali, File A22164629 (filed May 30, 1978), where the BIA held that hardship to an alien's paramour and illegitimate daughter could not be considered in determining the alien's eligibility for relief. They did not qualify as spouse and child under section 244.

should not be discounted, but it is vulnerable to reversal by the Supreme Court.

Decisions such as *Tovar* and *Bastidas* offer new opportunities for suspension of deportation relief. Nevertheless, the Supreme Court's *Wang* decision will undoubtedly have a chilling effect on the liberalization of suspension relief by the courts. Furthermore, the extent to which the courts may further develop the law is limited by their role as judicial, not legislative, entities. The judiciary will not be able to address many of the weaknesses in section 244(a).

Recommendations for Legislative Change

There are compelling reasons for legislative amendment of section 244(a). The widespread criticism and call for change of section 244(a) was best summarized in a 1953 report by the President's Commission on Immigration and Naturalization which stated:

> [T]he authorities administering the law should have sufficient discretion to enable them to take humanitarian considerations into account. These resident aliens about whom we are talking may have lived in this country for years, may have married spouses who are American citizens, and may have children who are American citizens. Deportation of the alien may mean intolerable hardship for the family. The officials enforcing the laws should therefore have authority to look at the whole picture. . . .[109]

The Attorney General's authority must be expanded to allow for greater consideration of economic and emotional hardships. Discretion to withhold relief, however, must be limited to prevent denial of suspension in deserving cases.[110] These goals can be accomplished by liberalizing the hardship standard and adopting guidelines for determining eligibility and granting relief under section 244(a).

The legislative amendments to be proposed in this article may appear to be a step backward toward the Alien Registration Act of 1940.[111] To a degree, this is correct. Yet forty years of experience have shown that the "serious economic detriment" standard of the Act, without any requirement of residency, was overly broad. A compromise between the 1940 and 1952 Acts would avoid the drawbacks of both extremes.

A new hardship standard—"unusual economic *or* emotional hardship"—should be adopted. This standard would apply to all grounds of deportation. The continuous physical presence re-

109. President's Commission on Immigration and Naturalization, Whom We Shall Welcome 213 (1953).

110. *See* Note, 60 Yale L. Rev. 152, 155 (1951).

111. Ch. 439, § 20, 54 Stat. 672 (1940) (current version at 8 U.S.C. § 1254 (1976)).

quirement for both subsections of section 244 would be retained, and would be sufficient to distinguish deportable misconduct from severe deportable misconduct. A new subsection should be added with the following provisions:

> (1) Any one of the following factors constitutes a prima facie showing of unusual economic or emotional hardship: (a) existence of a United States citizen child over six years of age residing with the deportable alien; (b) probability of long-term separation from spouse, parent or child as the result of deportation; (c) demonstrated inability to obtain employment in native country adequate to support the alien or his family; (d) continuous physical presence for a period substantially longer than the statutory requirement in section 244(a); (e) loss of substantial business investment or inability to practice a learned profession as the result of deportation; and (f) any additional humanitarian considerations the Attorney General finds, in his discretion, to be unusual economic or emotional hardship; (2) Aliens establishing a prima facie case of hardship and meeting the other requirements of this section shall be entitled to a full hearing on eligibility and equities for relief; (3) The above factors shall also serve as a guideline in determining whether relief should be granted. A written opinion discussing these guidelines and any other relevant considerations for granting or denying relief shall be issued after each full hearing.

The "unusual economic or emotional hardship" standard in the proposed statute was selected for several reasons. The adjective "unusual" connotes a lower degree than "extreme";[112] more aliens will be eligible for relief. The phrase is disjunctive allowing aliens with solely economic hardship to be eligible for suspension. The new hardship standard would not be a complete return to the liberality of the Alien Registration Act, because the continuous physical presence requirements of the Immigration and Nationality Act are retained. The unusual economic or emotional hardship standard would require more than mere inconvenience when an alien is deported. The hardship must threaten the reasonable well-being of an alien or his family. Thus, cases of doubtful merit will not justify a grant of suspension under the proposed standard.

The proposed guidelines serve several functions and cover a range of serious hardships deserving special consideration. Incorporation of the guidelines into federal law would ensure that significant hardships are treated uniformly throughout the nation. The guidelines would also serve to limit discretion in several ways. They provide certain contingencies where the Attorney General must grant a full hearing on statutory eligibility and issue an opinion discussing his findings on specific guidelines.

112. *See* H.R. REP. No. 94-506, 94th Cong., 1st Sess. 17 (1975).

Under the present law, the Attorney General can issue a cursory opinion ignoring salient hardships. Professor Kenneth Culp Davis has stated that "[a] main way to structure discretion is through stating findings and reasons and following precedents. . . . When findings, reasons, and precedents are open to the public, including present and potential parties, the agency's discretion may be largely controlled by the pressure for establishing a system and adhering to it."[113]

During a full hearing on eligibility requirements, the Attorney General must examine the alien's history and determine how many of the factors in the guideline are met. An alien who satisfies one or more elements of the guideline may still be denied relief. The hearing and the opinion are the only provisions of the proposed statute that are mandatory. With a detailed opinion from the Attorney General, however, an alien denied suspension will have the opportunity for a meaningful review of the decision. The BIA and the circuit courts will be able to judge if proper consideration was given to each requirement for suspension. Effective review will undoubtedly discourage arbitrary decisions by the Attorney General.

One common objection to liberalization of suspension of deportation relief must be addressed. Some legislators and judges have expressed a fear that expanding suspension relief will result in a veritable flood of undocumented aliens receiving suspension.[114] This very fear led to the adoption of the harsh "exceptional and extremely unusual" hardship standard in 1952.[115] The floodgate argument is often invoked to reject summarily any consideration of economic hardship. Such hardship, it is argued, is encountered by all aliens who are deported to countries with lower standards of living.

The legislative amendments proposed here will not lead to a deluge of alien immigration. Regardless of any change in the hardship standard, section 244(a) would still require that an alien have at least seven years continuous physical presence in the United States. This substantially limits an illegal alien's ability to avoid the immigration laws. In *Wadman v. INS*,[116] the court commented that a "liberal construction [of section 244(a)] would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney

113. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.4, at 169 (2d ed. 1979).

114. *See, e.g.*, Wang, 622 F.2d 1341, 1351-52 (9th Cir. 1980) (en banc) (Goodwin, Circuit Judge, dissenting), *rev'd per curiam*, 101 S. Ct. 1027 (1981); S. REP. No. 1137 82d Cong., 2d Sess. 25 (1952); S. REP. No. 1515, 81st Cong. 2d Sess. 600-01 (1950).

115. S. REP. No. 1515, 81st Cong., 2d Sess. 600-01 (1950).

116. 329 F.2d 812 (9th Cir. 1964).

General's review and thus his power to act in amelioration of hardship."[117] The same reasoning applies to the proposed legislative amendments. The "unusual economic or emotional " hardship standard would significantly expand the classes of aliens eligible for relief, and the proposed guidelines would only limit the Attorney General's discretion in circumstances strongly meriting relief.

CONCLUSIONS

The Supreme Court's recent *Wang* decision will have a chilling effect on expansion of suspension relief. Any liberalization of the widely criticized extreme hardship standard will have to come from Congress. The proposed "unusual economic or emotional hardship" standard is a more equitable approach to suspension of deportation relief. This new standard in combination with guidelines for determining eligibility and granting relief provide a reasonable means to review the Attorney General's exercise of discretion. The time has arrived when aliens who face something less than extreme hardship should be allowed to make their home in the United States.

JONATHON P. FOERSTEL

117. *Id.* at 817.