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Significant Developments in the Immigration Laws of the United States 1981-1982

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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES 1981-1982

INTRODUCTION

This synopsis outlines significant developments in immigration law from October 1981, through July 1982.[1] The Supreme Court ruled on the following issues: public education for illegal aliens; alien ineligibility to become peace officers; deportation of alien eyewitnesses; the Freedom of Information Act; and applicability of Title VII to foreign companies in the United States.

The lower courts continued to divide on such issues as collateral attacks on deportation orders, estoppel, and the degree of discretion exercised by the Board of Immigration Appeals (BIA). The courts reviewed cases involving the statutory requirements for suspension of deportation, adjustment of status, entry and exclusion, and naturalization.

Congress passed legislation designed to expedite administrative action. Proposed legislation has been introduced by both the Reagan administration and individual representatives.

1. The October 1981 starting date corresponds to the commencement of the United States Supreme Court's 1981-82 term. This date also coincides with the ending of the previous synopsis article. *See* 19 SAN DIEGO L. REV. 195 (1981). The July 1982 ending date coincides with the adjournment of the Supreme Court's 1981-82 term. The final decisions of the Court were announced on July 2, 1982.

During the 1981-1982 Term, the Supreme Court decided five cases[2] in the area of immigration law and delayed one decision until the 1982-1983 Term.[3] The Court denied review in twelve other significant cases in various areas of immigration law.[4]

PLYLER V. DOE

In *Plyler v. Doe*[5] and *Texas v. Certain Named and Unnamed Undocumented Alien Children*,[6] the Court held that the equal protection clause of the fourteenth amendment extends to illegal aliens who may not be denied a public education.

In 1975, the Texas legislature authorized local school districts to deny enrollment in their public schools to children not legally admitted into the country.[7] The lower federal courts upheld the constitutional challenges to this statute based on the equal protection clause.[8]

The Court held that whatever his status under immigration laws, an alien is a "person" in the ordinary sense of the term as used in the fourteenth amendment,[9] which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws."[10] The Court found that "within its jurisdiction" was formulated in a broad sense to guarantee equal protection to all who are within the boundaries of a state and subject to its laws.[11]

The Court declined to classify undocumented alien children as a suspect class because their illegal status is not a "constitutional irrelevancy."[12] Because the Texas statute imposes a major hard-

2. Texas v. Certain Named and Unnamed Undocumented Alien Children, *rev'd sub nom.*, Plyler v. Doe, 102 S. Ct. 2382 (1982) (cases consolidated on appeal); United States Dep't of State v. Washington Post Co., 102 S. Ct. 1957 (1982); Sumitomo Shoji America, Inc. v. Avagliano, 102 S. Ct. 2374 (1982); Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982); United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982).

3. Chadha v. INS, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3211 (U.S. October 6, 1981) (No. 80-1832). *See infra* notes 104-39 and accompanying text.

4. For a discussion of these twelve cases, see *infra* notes 43-44.

5. 102 S. Ct. 2382 (1982).

6. *Id.* (cases consolidated on appeal).

7. TEX. EDUC. CODE ANN. § 21.031 (Vernon Cum. Supp. 1981).

8. For additional background on these decisions, see Synopsis, *Significant Developments in the Immigration Laws of the United States: 1980-1981*, 19 SAN DIEGO L. REV. 195, 202-05 (1981).

9. 102 S. Ct. at 2391.

10. U.S. CONST. amend. XIV.

11. 102 S. Ct. at 2393.

12. *Id.* at 2398. An example of constitutional irrelevancy is race. The illegal presence of the aliens is relevant to a determination of their rights under the Con-

ship on a discrete class of children not accountable for their disabling status, the Court held that the statute must be justified by a showing that it furthers some substantial state interest.[13] The Court refused to grant the Texas legislation deference when it rejected the three colorable state interests proposed by the state.[14]

CABELL V. CHAVEZ-SALIDO

In *Cabell v. Chavez-Salido*,[15] the Court held that lawfully admitted permanent resident aliens have no constitutional right to become peace officers in California. The opinion sustained the state's statutory citizenship requirement mandating United States citizenship as a prerequisite to occupying any state, county, or local governmental position.[16] The alien plaintiffs who were denied jobs as deputy probation officers had successfully challenged the constitutionality of the statute on equal protection grounds in the

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stitution. An example is the "citizen" and "person" characterization in the fourteenth amendment.

13. 102 S. Ct. at 2402. Although the Court continued its refusal to view education as a fundamental right guaranteed by the Constitution, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973), the Court reaffirmed the pivotal role of education in our society, Brown v. Board of Education, 347 U.S. 483, 493 (1954).

14. 102 S. Ct. at 2400-02. The three state interests proposed by Texas and the reasons for rejection by the Supreme Court were:

1. Texas sought to protect the state from an influx of illegal aliens which it asserted would result from the irresistable lure of free education. The Court found no evidence that illegal aliens imposed a burden on Texas' economy and established that there were less restrictive alternatives available to stop the influx of illegal aliens such as prohibiting their employment.
2. Texas claimed educating illegal aliens decreased the quality of education which the schools can provide. The Court found children illegally present to be indistinguishable from legal resident alien children in terms of costs and needs. In addition, Texas supplied no evidence to support its claim.
3. Texas contended singling out illegal aliens to deny them public schooling was appropriate because the group is less likely to use its education within the state. The Court found the budgetary savings slight when compared to the burden eventually imposed on the state by the creation of a subclass of illiterates who would substantially increase costs resulting from unemployment, crime and welfare.

Id.

15. 102 S. Ct. 735 (1982).

16. CAL. GOV'T CODE § 1031(a) (West 1980) requires "public officers or employees declared by law to be peace officers" to be citizens of the United States; CAL. PENAL CODE § 830.5 (West 1980) provides that probation officers and deputy probation officers are "peace officers."

district court.[17]

The Court distinguished the standard of review applied to economic functions from that applied to political or governmental functions. While the Court retained heightened judicial scrutiny for restrictions on lawful resident aliens that affect an economic interest, it concluded that strict scrutiny is inappropriate when the restriction primarily serves a political function.[18]

The Court applied the two-step process under *Sugarman v. Dougall*[19] to determine which function a particular restriction serves. First, specificity of the classification must be examined, as a classification that is substantially over- or underinclusive tends to undercut the government's claim that the classification serves legitimate political ends. The Court found California's statute sufficiently tailored to withstand a facial challenge. Justification arose from the general law enforcement characteristics that all peace officers can make arrests and are trained to use firearms.

Second, even if the classification is sufficiently tailored under the *Sugarman* test, it may be applied only to persons holding state elective or important nonelective executive, legislative, or judicial positions. The Court found that the functions of California probation officers "sufficiently partake of the sovereign power to exercise coercive force over the individual that they may be limited to citizens."[20] The Court concluded that the citizenship requirement was "an appropriate limitation on those who would exercise and, therefore, symbolize this power of the political community."[21]

The Court held: "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. . . . Aliens are by definition those outside of this community."[22]

UNITED STATES V. VALENZUELA-BERNAL

In *United States v. Valenzuela-Bernal*,[23] the Supreme Court ruled that prompt deportation of illegal aliens did not violate fifth and sixth amendment rights[24] of a criminal defendant charged

17. Chavez-Salido v. Cabell, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982).
18. 102 S. Ct. at 739-40.
19. 413 U.S. 634 (1973).
20. 102 S. Ct. at 743.
21. *Id.*
22. *Id.* at 740.
23. 102 S. Ct. 3440 (1982).
24. The defendant's fifth amendment right in question was the right to due

with illegal transportation of aliens.[25] The Court reversed the Ninth Circuit's application of the "conceivable benefit" test which required that deportable illegal aliens be available to the defendant whenever they are eyewitnesses or active participants to the crime.[26]

Valenzuela-Bernal was apprehended after failing to stop at a Border Patrol checkpoint. Three of his five passengers were arrested along with Valenzuela-Bernal.[27] The three passengers admitted illegal entry and identified Valenzuela-Bernal as the driver of the car. "An Assistant United States Attorney concluded that the passengers possessed no evidence material to the prosecution or defense"[28] and thus two of the passengers were deported. The third passenger was detained to enable the government to provide a non-hearsay basis for the violation of section 274(a)(2) of the Immigration and Nationality Act.

Valenzuela-Bernal was denied the opportunity of interviewing the deported aliens to determine whether they had evidence that could assist his defense. The Court held that the defendant must make a showing of how the absent testimony would have been both material and favorable to his defense.[29] Only after some plausible explanation would the lower court have to entertain claims of fifth or sixth amendment right violations.

The Court justified its decision by the effectiveness prompt deportation had on curbing the constant flow of illegal aliens into the United States.[30] The budgetary limitations and lack of ade-

process, while the sixth amendment right was the right to compulsory process for obtaining witnesses.

25. Immigration and Nationality Act § 274(a)(2), 8 U.S.C. § 1324(a)(2) (1976). This section makes it a crime for "any person who transports, or moves, or attempts to transport or move, any alien knowing that [the alien] is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior . . . ." *Id.*

26. 647 F.2d 72, 75 (9th Cir. 1981), *rev'd*, 102 S. Ct. 2382 (1982). For a discussion of possible applications of the "conceivable benefit" test, see 102 S. Ct. at 3444.

27. The remaining two passengers fled on foot and were not apprehended. 102 S. Ct. at 3443.

28. 102 S. Ct. at 3442.

29. *Id.* at 3450. The Court relaxed the specificity required when showing materiality because of the unique situation of not being able to interview the potential witness. *Id.* at 3452.

30. *Id.* at 3445. The majority of the illegal aliens apprehended are offered voluntary departure. *See* Immigration and Nationality Act § 242(b), 8 U.S.C. § 1252(b) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

quate detention facilities were cited as support for the government's determination of the value of the alien's testimony. Consequently, the alien needs to be more than a mere eyewitness or participant to the crime to overcome the congressional policy of prompt deportation.[31]

UNITED STATES DEPARTMENT OF STATE V. THE WASHINGTON POST COMPANY

The Court unanimously upheld the State Department's refusal to disclose citizenship information to a newspaper in *United States Department of State v. The Washington Post Company*.[32] The Washington Post had requested information under the Freedom of Information Act[33] (FOIA) regarding the citizenship of two Iranians who were prominent figures in Iran's revolutionary government. The Court supported the State Department's denial of the request on the ground that the information was protected from disclosure under the sixth exemption of the FOIA. This exemption provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[34]

The Court concluded that it was Congress' intent to assign a broad meaning to "similar files" in order to "protect individuals from the injury and embarrassment that can result from unnecessary disclosure of personal information."[35] The Court found that the information sought by the Washington Post satisfied the similar files requirement.[36]

SUMITOMO SHOJI AMERICA, INC. V. AVAGLIANO

In *Sumitomo Shoji America, Inc. v. Avagliano*,[37] the Court held that a treaty between the United States and Japan[38] enabling

31. There are variations in the materiality test of the witness. Recently, the Sixth Circuit decided in the defendant's favor in United States v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982). The court of appeals did require a minimal showing of prejudice to defendant's defense caused by the illegal aliens' deportation. *See* United States v. Rose, 669 F.2d 23 (1st Cir. 1982).

32. 102 S. Ct. 1957 (1982).

33. 5 U.S.C. § 552 (1976).

34. *Id.* § 552(b)(6).

35. 102 S. Ct. at 1959.

36. The Court remanded to allow the court of appeals to balance the private interest against the public interest and to consider whether release of this information would constitute a clearly unwarranted invasion of personal privacy.

37. 102 S. Ct. 2374 (1982).

38. Friendship, Commerce and Navigation Treaty, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

companies from either country to hire executive employees of their choice[39] does not exempt Japanese companies doing business in the United States from title VII's ban on discrimination relating to sex and national origin. The Court found Sumitomo's alleged practice of hiring only male Japanese citizens violated title VII of the Civil Rights Act of 1964.[40]

In reversing the holding of the court of appeals, the Supreme Court adhered to the literal language of the treaty.[41] The Court found that under the treaty, local subsidiaries of the foreign company were companies of the country in which they are incorporated and were thereby regulated under the rights and responsibilities applying to other domestic companies.[42]

Certiorari Denied

The Court refused to grant certiorari in several notable cases in the immigration area. In seven cases the Court denied review of alleged constitutional and statutory violations.[43] The Court also

39. *Id.* at art. VIII (1), 4 U.S.T. 2070.

40. 102 S. Ct. 2376, 2382.

41. Article XXII (3) of the treaty provides: "the term 'companies' means corporations . . ." and "companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof . . . ." Treaty, *supra* note 38, at art. XXII, 4 U.S.T. 2079-80.

42. 102 S. Ct. at 2381.

43. The Court refused to review due process violations alleged by the alien plaintiff in Knoetze v. United States, 102 S. Ct. 109 (1982). Plaintiff's nonimmigrant visa had been revoked without notice due to his prior convictions involving moral turpitude.

The Court also declined to review plaintiff's due process claims in Roberts v. United States, 102 S. Ct. 568 (1981); Morgan v. United States, 102 S. Ct. 568 (1981); and Zavala Pizano v. United States, 102 S. Ct. 568 (1981). Plaintiffs appealed their convictions for transporting illegal aliens because potential alien witnesses were returned to Mexico prior to the plaintiffs being charged with the offense. These cases are related to United States v. Valenzuela-Bernal, 102 S. Ct. 3440 (1982). See *supra* notes 23-31 and accompanying text.

The Court refused to hear petitioner's fourth amendment claims in Petty v. United States, 102 S. Ct. 360 (1981). Petitioner based his appeal on the fact that evidence against him was obtained by border patrol agents who searched his car without the probable cause necessary to justify his detention.

The Court did not review the decision in Blackie's House of Beef v. Castillo, 102 S. Ct. 1432 (1982). For a discussion of the case, see *infra* notes 235-41 and accompanying text.

In Eain v. Wilkes, 102 S. Ct. 390 (1982), a denial of habeas corpus stood despite a defense of "political offense" in a proceeding for extradition of an alleged member of the Palestine Liberation Organization to Israel, where he was convicted of a violent crime.

refused to reconsider five decisions regarding deportation.[44]

CRIMINAL PROCEDURE

When an alien is prosecuted for illegal entry, one of the defenses that may be presented is an attack on the original deportation order. Currently the circuits are sharply divided on how to treat such a collateral attack. Lacking guidance from the Supreme Court,[45] the Third, Seventh, and Ninth Circuits allow collateral attacks while the Second, Fifth, and Tenth do not.[46]

In *United States v. De La Cruz-Sepulveda*,[47] the Fifth Circuit joined the Second and Tenth Circuits ruling that a deportation order cannot be attacked in a prosecution for violation of section 276 of the Immigration and Nationality Act.[48] The alien defendant plead nolo contendere to a charge of marijuana possession and was deported in 1974.[49] He was found in the United States in 1980 and charged with being unlawfully in the United States after having been deported. Defendant argued that his original deportation order was improperly based on a criminal conviction that was not final. The court held that in prosecution of an alien for unlawful reentry under section 276 of the Act, he may not collaterally

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44. In Alvarez-Romero v. INS, 102 S. Ct. 675 (1981), the Court refused to review the finding that petitioner was deportable and ineligible for discretionary relief because of an inability to show good moral character following a conviction for heroin distribution.

The Court upheld the ruling in INS v. Tejeda-Mata, 102 S. Ct. 2280 (1982), which found that although an immigration judge abused his discretion by refusing to permit simultaneous translation of testimony, the error was harmless because the testimony only confirmed the alien's own admission of alienage.

In Chiravachardhikul v. INS, 102 S. Ct. 389 (1981), the Court did not review the rule that to qualify for discretionary relief from exclusion under § 212(c) of the Immigration and Nationality Act, an alien must accumulate the seven-year period of unrelinquished lawful domicile after procuring permanent resident status.

The Court refused to reconsider the petitioner's conviction which was based on a nolo contendere plea in Bucio-Reyes v. United States, 102 S. Ct. 478 (1981), to a charge of unlawful reentry following deportation despite the fact that petitioner thought he was innocent.

The Court also declined to review a denial of a Federal Tort Claims Act claim by county officials who incurred the expense of providing health care to illegal aliens. In San Diego County v. Nelson, 102 S. Ct. 1713 (1982), local officials alleged damages due to the failure of the United States government to properly perform its duties in preventing the entry of aliens into the United States.

45. In United States v. Specter, 343 U.S. 169 (1952), the Supreme Court did not rule on whether judicial review of an administrative order of deportation is constitutionally mandated when a criminal trial is based upon that order.

46. For specific cites for each circuit see United States v. De La Cruz-Sepulveda, 656 F.2d 1129, 1132 n.3 (5th Cir. 1981).

47. 656 F.2d 1129 (5th Cir. 1981).

48. 8 U.S.C. § 1326 (1976). This section prohibits unauthorized reentry after deportation.

49. 656 F.2d at 1130.

attack the original deportation order.[50]

In *Garcia-Trigo v. United States*,[51] the Fifth Circuit ruled that lack of notification to the defendant of deportation consequences of his guilty plea did not entitle him to collaterally attack his criminal conviction. Petitioner, a lawful permanent resident, plead guilty and served his sentence for the petty offense of "unlawfully entering the United States by wading the river."[52] Only after pleading guilty did he learn that this subjected him to deportation. Garcia-Trigo sought to vacate his conviction through a writ of error coram nobis[53] contending that he was not informed of the nature of his offense and the consequences of his guilty plea.

The court found no exceptional circumstances to justify using the writ of error. There was no evidence that Garcia-Trigo's rights were fundamentally violated in the prior proceedings. The court held that the potential results of his guilty plea upon his immigration status was a "collateral consequence" that did not necessitate an explanation to defendant at the prior trial.[54]

In *United States v. Arambula-Alvarado*,[55] the Ninth Circuit reduced a conviction of illegal entry under section 275 of the Act from a felony to a misdemeanor. The defendant contested the felony conviction under section 275, which provides that the first violations are misdemeanors, while subsequent commissions are felonies. The court found ambiguity in the word "commissions," and read the statute narrowly to favor the accused.[56] Since the government did not prove there was a prior violation of section 275, the court remanded the felony conviction for redetermination as a misdemeanor.

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50. *Id.* at 1131.
51. 671 F.2d 147 (5th Cir. 1982).
52. *Id.* at 148.
53. "The common law writ of error coram nobis is [used] to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid." *See* United States v. Taylor, 648 F.2d 565, 590 n.14 (9th Cir. 1981). The function of writ of error coram nobis is to allow a court to review its own judgment because of an alleged fact which did not appear on the face of the record. *See* 28 U.S.C. § 1651 (1976).
54. 671 F.2d at 150.
55. 677 F.2d 51 (9th Cir. 1982).
56. *Id.* at 52.

In *Miranda v. INS*,[57] the Ninth Circuit held that the INS' unexplained eighteen-month delay in acting on a visa petition constituted affirmative misconduct warranting estoppel against the government. The Supreme Court had vacated[58] the Ninth Circuit's previous decision which granted estoppel[59] and remanded the ruling for further consideration in light of its companion case, *Schweiker v. Hansen*.[60]

Petitioner Miranda filed an application for adjustment of status and his wife, a United States citizen, filed an immediate relative visa petition on his behalf. During the following eighteen months in which the INS failed to act, petitioner's marriage was dissolved and his wife withdrew the visa petition. Two days later Miranda's adjustment application was denied, and he was found deportable by the immigration judge. The BIA found no evidence of affirmative misconduct by the INS. It dismissed petitioner's argument that the INS was estopped from denying the availability of a visa because of the INS' unexplained delay. The Ninth Circuit reversed, applying estoppel against the INS.[61]

Upon reconsideration in light of *Hansen*, the Ninth Circuit adhered to its original opinion, distinguishing *Hansen* on three significant grounds. First, in *Hansen* misinformation claimant received from the government resulted in her failure to apply for Social Security benefits to which she was eligible.[62] In *Miranda*, however, the petitioner was not seeking benefit payments.[63] Second, the *Hansen* court found no "affirmative misconduct" by government agents,[64] whereas *Miranda* was decided upon the existence of just such action.[65] Third, the court in *Hansen* also held that the petitioner had not sustained irrevocable damage from her reliance on the government's actions.[66] The Ninth Circuit found that the INS' conduct had inflicted irreparable harm on Miranda.[67]

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57. 673 F.2d 1105 (9th Cir. 1982).
58. INS v. Miranda, 102 S. Ct. 81 (1981).
59. 638 F.2d 83 (9th Cir. 1980), *vacated*, 102 S. Ct. 81 (1981).
60. 450 U.S. 785 (1981). In *Hansen*, the Supreme Court declined to apply estoppel against the government while failing to establish general guidelines for application of the doctrine.
61. 638 F.2d at 84.
62. 450 U.S. at 786. The Supreme Court reversed the Second Circuit's decision to estop the government from denying her benefits for the period during which she should have received payments.
63. 673 F.2d at 1106.
64. 450 U.S. at 788-89.
65. 638 F.2d at 84.
66. 450 U.S. at 789.
67. 673 F.2d at 1106.

The case was "remanded for consideration of Miranda's application for permanent resident status under the same conditions that would have existed had the INS acted within a reasonable time" following his original application.[68]

In *Akbarin v. INS*,[69] the First Circuit held that an immigration judge denied petitioner a fair hearing by failing to admit evidence of the alien's estoppel defense and committed an error of law by holding that evidence to be irrelevant. Akbarin entered the United States as a nonimmigrant student and accepted part-time employment without obtaining official INS employment authorization. Under the Immigration and Nationality Act, section 101(a)(15)(F)(1), a nonimmigrant student is not permitted to engage in off-campus employment unless he has specific authorization from the INS under section 214.2(f)(6).[70]

Akbarin claimed that prior to accepting employment, his prospective employer telephoned the INS to determine if petitioner was eligible to work. An unidentified INS official informed the employer that petitioner was authorized for part-time employment and that petitioner could begin work.[71] Petitioner claimed that in reliance on that conversation he accepted the job.

At Akbarin's deportation hearing, the immigration judge declared petitioner deportable and refused to allow him to testify as to the alleged telephone conversation. The judge found this evidence irrelevant as petitioner "could have obtained authorization for employment by submitting a form I-538 to the INS."[72] The BIA upheld the immigration judge's decision.

The First Circuit held that an estoppel claim must satisfy two elements: first, the government must commit an error which could reasonably be intended to, and did, induce reliance; and second, the government's misconduct must induce petitioner to undertake actions in which he would not otherwise engage.[73] The

68. *Id.*
69. 669 F.2d 839 (1st Cir. 1982).
70. *Id.* at 840. 8 C.F.R. § 214.2(f)(6)(v) does not permit employment in this situation unless "the student has submitted [form I-538] to an authorized official of a school approved by the Attorney General . . . , and this form has been certified by that official that all the . . . requirments [of this section] have been met . . . . The student has permission to accept employment when he/she receives the form . . . enclosed by the Service to that effect."
71. 669 F.2d at 841.
72. *Id.*
73. *Id.* at 843.

court concluded that it was error to exclude evidence that might estop the government from claiming violations of employment restrictions.[74] The court also found no compelling reasons to preclude estoppel. Such a ruling would not interfere with implementation of immigration employment regulations because they serve principally administrative purposes. Without making a final ruling on the validity of Akbarin's estoppel claim, the court vacated the deportation order and remanded to allow him to present his evidence.[75]

The Ninth Circuit applied collateral estoppel against the government in *Mendoza v. United States*.[76] It affirmed the district court's grant of naturalization to a seventy-three-year-old Filipino World War II veteran of the United States armed forces under the then expired Nationality Act of 1940.[77] The court held that the government was estopped by a decision on the same issues in *Matter of Naturalization of 68 Filipino War Veterans*[78] which granted naturalization to Filipino veterans under the expired Act.

Matter of Naturalization of 68 Filipino War Veterans held that the government's withdrawal of its naturalization examiner from the Philippines had deprived veterans, similar to Mendoza, of their due process rights under the equal protection component of the due process clause of the fifth amendment. The Ninth Circuit found no circumstances that warranted relitigation of these issues decided against the government.[79]

The court noted the conflicting decision of the Second Circuit in *Olegario v. United States*[80] which rejected the contention that the *68 Filipino War Veterans* judgment bound the government by collateral estoppel in other cases. The Ninth Circuit was unpersuaded by the Second Circuit's ruling that applying collateral estoppel in these cases violated the guidelines of fairness to the defendant established by *Parklane Hosiery Co. v. Shore*.[81] The Ninth Circuit found no abuse of discretion in applying collateral

74. *Id.* at 844.
75. *Id.* at 845.
76. 672 F.2d 1320 (9th Cir. 1982).
77. In 1942 Congress amended the Nationality Act of 1940, ch. 876, 54 Stat. 1137 to provide for naturalization of noncitizens who served honorably in the armed forces. *See* Second War Powers Act of 1942, ch. 199, 56 Stat. 176. However, due to international concerns, the United States failed to provide INS naturalization officials in the Philippines from 1945 to 1946 to implement the Act.
78. 406 F. Supp. 931 (N.D. Cal. 1975).
79. 672 F.2d at 1329.
80. 629 F.2d 204 (2d Cir. 1980).
81. 439 U.S. 322 (1979). In *Parklane Hosiery*, the Supreme Court observed that offensive collateral estoppel may be unfair to the defendant if one or more of the following situations is present:
1. if there is little incentive to defend the first suit vigorously because

estoppel against the government's denial of naturalization to Mendoza.[82]

In the *Matter of M/V "Solemn Judge,"*[83] the BIA ruled on the "affirmative misconduct" standard for collateral estoppel left undefined by the Supreme Court in *Schweiker v. Hansen*.[84] The vessel "Solemn Judge" was fined $190,000 for bringing one hundred ninety-one Cuban nationals without visas to the United States in violation of sections 273(a) and (b) of the Immigration and Nationality Act. These provisions impose fines for transportation of aliens unless the carrier did not know, and could not have reasonably ascertained that the individuals transported were without visas.

The BIA rejected all claims of "affirmative misconduct" alleged by the carrier in order to estop the government from imposing these fines. The BIA ruled that nothing in the statements of government personnel could reasonably have been construed as waiving visa requirements of the Immigration and Nationality Act or as authorizing the carrier to bring undocumented aliens to the United States. Nor did the United States Coast Guard or Customs Service have a legal duty to warn the carrier of potential fines.[85] Since "affirmative misconduct" had not been established, the BIA declined to decide whether estoppel could be applied against the government in this case or whether the BIA has the authority to implement the estoppel doctrine.[86]

. DEPORTATION PROCEDURE

Several significant cases were decided which further define the procedural aspects of deportation especially regarding abuse of

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either the damages sought are nominal or there are no foreseeable future suits;
2. if there are inconsistent judgments involving the defendant; or
3. if there are procedural opportunities available in the second suit, which were unavailable in the prior action.

Id. at 330-31.

82. 672 F.2d at 1330.

83. I. & N. Dec. 2894 (1982).

84. 450 U.S. 785 (1981). *See supra* note 60 and accompanying text. The BIA noted two nationality cases, INS v. Hibi, 414 U.S. 5 (1973), and Montana v. Kennedy, 366 U.S. 308 (1961), which stood for the possibility that estoppel could be applied against the government where affirmative misconduct by its agents is established.

85. I. & N. Dec. 2894 at 6.

86. *Id.*

discretion by the BIA. In *Reyes v. INS*,[87] the Ninth Circuit reversed the BIA denial of a motion to reopen suspension of deportation proceedings.[88] The BIA ruled that Reyes failed to establish a prima facie case because it disbelieved the facts stated in the submitted affidavits.[89] The court held that the Board should accept as true the facts presented on behalf of the petitioner during this preliminary proceeding.

The court distinguished the recent decision in *Hamid v. INS*[90] in which it sustained the BIA's decision to deny a motion to reopen. In *Hamid*, the Ninth Circuit found the Board did not abuse its discretion even though it denied the motion to reopen on the ground that the facts were "inherently unbelievable."[91]

The distinction between *Hamid* and *Reyes* is the credibility of the evidence. The evidence Reyes presented was consistent and therefore allowed the BIA to assume truthfulness. The evidence presented by Hamid was unsubstantiated to a degree that precluded resolution in favor of the petitioner. The *Hamid* decision follows the precedent established by the United States Supreme Court in *INS v. Wang*,[92] which allowed the BIA broad discretion so long as the discretion is not arbitrary, irrational or contrary to law.[93]

In *Chae Kim Ro v. INS*,[94] the Ninth Circuit reversed a denial by the BIA to reopen suspension of deportation proceedings when the petitioner filed a motion based on new evidence. The court concluded that discretionary relief should have been granted by the Board in view of the birth of a United States citizen to the petitioner.[95] The birth, which occurred after the hearing with the immigration judge and before the BIA appeal, constituted new evidence and justified the motion to reopen.

In *Sida v. INS*,[96] the Ninth Circuit continued to refine the dis-

87. 673 F.2d 1087 (9th Cir. 1982).

88. The motion to reopen is a preliminary proceeding that is not intended to replace a hearing but is a screening device with which the Board disposes of claims clearly lacking merit. For a discussion of the motion to reopen, see Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 SAN DIEGO L. REV. 79, 81-89 (1982). The function of the Board at the preliminary hearing is to determine whether or not the alien has presented a prima facie case; not to make a final decision based upon the merits of the evidence. 673 F.2d at 1089.

89. 673 F.2d at 1089.

90. 648 F.2d 635 (9th Cir. 1981).

91. *Id.* at 637.

92. 450 U.S. 139 (1981).

93. *See* 450 U.S. at 143 n.5.

94. 670 F.2d 114 (9th Cir. 1982).

95. *Id.* at 116.

96. 665 F.2d 851 (9th Cir. 1981). *Sida* is also notable because the Ninth Circuit ruled that a one-month absence from the United States was not a meaningful in-

cretion available to the BIA in light of new evidence favorable to the petitioner. Basing its decision on *Wang* and *Santana-Figueroa v. INS*,[97] the court ruled that the alien must have the opportunity to present favorable new evidence, and is entitled to a decision on the merits.[98]

In *Balani v. INS*,[99] the Sixth Circuit upheld a BIA denial of a motion to reopen following a previous denial of suspension of deportation. Following *Wang*, the court held that administrative discretion is unassailable on judicial review absent a clear showing of abuse by the Board.[100] A motion to reopen deportation proceedings can be successful if there are circumstances that have changed after a deportation order becomes final. Balani presented facts already known to the immigration judge. Therefore, "the Board did not abuse its discretion in concluding that the petitioner raised no material new facts in his motion."[101]

In *Dastmalshi v. INS*,[102] the Third Circuit held that it lacked the proper jurisdiction under section 106(a) of the Immigration and Nationality Act to review the validity of INS regulations that implemented President Carter's directives following the seizure of the American Embassy in Teheran, Iran. These Presidential directives led to final deportation orders of the Iranian petitioners. In taking this narrow view of section 106(a) jurisdiction, the court disagreed with *Chadha v. INS*,[103] now being reviewed by the Supreme Court.

SUSPENSION OF DEPORTATION

Several judicial and administrative decisions considered the procedure for suspension of deportation. These decisions are important because suspension of deportation[104] is one of the most common forms of relief for an alien faced with leaving the United

terruption of a continuous physical presence required for suspension of deportation. *See infra* notes 104-37 and accompanying text.

97. 644 F.2d 1354 (9th Cir. 1981).
98. 665 F.2d at 854.
99. 669 F.2d 1157 (6th Cir. 1982).
100. *Id.* at 1161.
101. *Id.*
102. 660 F.2d 880 (3d Cir. 1981).
103. 634 F.2d 408 (9th Cir. 1980).
104. Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1976).

States.[105] Once an alien has established statutory eligibility, the Attorney General has discretion to suspend deportation.[106] After the Attorney General has ruled in favor of the alien, congressional ratification must follow.[107] In *Chadha v. INS*,[108] the Ninth Circuit ruled the one-house legislative veto violates the separation of powers doctrine of the Constitution. *Chadha* is currently being reviewed by the Supreme Court, but a final decision was postponed until the 1982-1983 Term.

The statutory requirements necessary for suspension of deportation mandate: one, the alien's physical presence in the United States for a continuous period of not less than seven years; two, the alien's good moral character; and three, the resulting deportation would result in extreme hardship to the alien or to his spouse, parent, or child who is a citizen or legal resident of the United States.[109]

Continuous Physical Presence

The seven-year continuous physical presence requirement must immediately precede the alien's application for suspension of deportation.[110] The controlling word in the statute is "continuous." In *Phinpathya v. INS*,[111] the Ninth Circuit ruled that the proper test when evaluating breaks in continuous presence is to view the circumstances in their totality. Adhering to the principles developed in *Rosenberg v. Fleuti*[112] and redefined in *Kamheangpatiyooth v. INS*,[113] the court observed the *Fleuti* factors were

105. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9 (rev. ed. 1981).

106. Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620.

107. *Id.*

108. 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 50 U.S.L.W. 3211 (U.S. October 6, 1981) (No. 80-1832).

109. Immigration and Nationality Act § 244(a), 8 U.S.C. § 1254(a) (1976), *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620; *cf.* Tovar v. INS, 612 F.2d 794 (3d Cir. 1980). In *Tovar*, the Third Circuit extended the third requirement to encompass extreme hardship to the alien's grandchildren if they are either United States citizens or legal residents.

110. Tovar v. INS, 612 F.2d 794 (3d Cir. 1980).

111. 673 F.2d 1013 (9th Cir. 1981).

112. 374 U.S. 449 (1963). In *Fleuti*, the Supreme Court suggested three factors which may cause the alien's absence to be a meaningful interruption of permanent residence. The three factors are: (1) the length of absence; (2) whether the purpose was opposed to the immigration law policy; and (3) whether travel documents had to be obtained for the trip. *Id.* at 461-62.

113. 597 F.2d 1253 (9th Cir. 1979). In *Kamheangpatiyooth*, the Ninth Circuit ruled that while the *Fleuti* factors were relevant, the factors themselves were not conclusive on the issue of continuous physical presence. *Id.* at 1257.

evidentiary in nature and not determinative of breaks in the alien's physical presence.[114]

In *Phinpathya*, the court emphasized that events must be viewed in their totality and in light of the underlying congressional purpose.[115] Mrs. Phinpathya was physically present in the United States for eight years immediately preceding her application for suspension of deportation with the exception of a three-month trip to Thailand. The purpose of the trip was to visit her sick mother. Mrs. Phinpathya traveled with her two children while her husband remained in the United States. She intended to return and live permanently in the United States.

The Ninth Circuit disapproved of the strictness with which the BIA applied the factors from *Kamheangpatiyooth*.[116] In *Kamheangpatiyooth*, the court held that an absence cannot be meaningfully interruptive if two factors are present: one, the hardships would be as severe if the absence had not occurred; and two, there would be no increase in the risk of deportation as a result of the absence.[117] The court held the BIA committed reversible error by isolating a factor and treating it as determinative of whether the absence is meaningfully interruptive. The isolated factor was the increased risk of deportation that Mrs. Phinpathya faced because of her absence.[118] This was sufficient ground for remand to the BIA.

In *Men Keng Chang v. Juigni*,[119] the Fifth Circuit ruled that it was not an abuse of discretion on the part of the BIA to consider how the continuous physical presence requirement was satisfied.[120] The applicant, who had not satisfied the seven-year requirement at the time of his initial application, disappeared after the deportation order. Because of this evasion, the seven-year requirement was completed after the initial deportation proceeding but prior to a subsequent application for suspension of deportation. The court followed *Faddah v. INS*[121] which established that evasion of deportation to achieve the seven-year period was a

114. 673 F.2d at 1017.
115. *Id.*
116. *Id.* at 1018.
117. 597 F.2d at 1257.
118. 673 F.2d at 1018.
119. 669 F.2d 275 (5th Cir. 1982).
120. *Id.* at 278.
121. 553 F.2d 491 (5th Cir. 1977).

proper factor for BIA consideration.[122]

Good Moral Character

In addition to clarifying the Ninth Circuit's stand on continuous physical presence, the *Phinpathya* court also ruled that the BIA had erred when concluding Mrs. Phinpathya was not of good moral character because she allegedly gave false statements in order to obtain a visa to return to the United States.[123] The court considered whether statements made to the American consulate in Bangkok constituted testimony that could jeopardize the statutory good moral character requirement.[124] The court believed that had Congress intended all statements to be used in the evaluation, it would have changed the statutory language.[125]

In *Okabe v. INS*,[126] the Fifth Circuit held that offering a bribe to an immigration officer is a crime involving moral turpitude. In upholding the deportation order, the court noted that "whether a crime involves moral turpitude depends upon the inherent nature of the crime, as defined by the statute, rather than the circumstances [of the alien's] particular transgression."[127] Because under the statute "a corrupt mind is an essential element of the offense,"[128] the immigration judge was correct in evaluating Okabe's moral character in light of his bribery conviction.

Following the enactment of Immigration and Nationality Act Amendments of 1981,[129] which repeal adultery as a mandatory bar to good moral character, the INS issued instructions to field offices that "the service will continue to recommend denial of petitions for naturalization when the adultery practiced has adverse public effects."[130]

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122. *Id.* at 496.

123. 673 F.2d at 1018.

124. Immigration and Nationality Act § 101(f)(6), 8 U.S.C. § 1101(f)(6) (1976). In this section the word "testimony" is used when evaluating falsifications made in an effort to obtain the benefits of suspension of deportation.

125. 673 F.2d at 1019.

126. 671 F.2d 863 (5th Cir. 1982).

127. *Id.* at 865.

128. 18 U.S.C. § 201(b) (1976). Under this section one is guilty of bribery of a public official whenever one "directly or indirectly, corruptly gives, offers, or promises anything of value . . . with the intent to . . . induce such public official . . . to do or omit to do any act in violation of his lawful duty . . . ."

129. *See infra* notes 270-75 and accompanying text.

130. 59 INTERPRETER RELEASES 4-5 (1982). Adverse public effects result when the adultery breaks up an existing marriage, involves minors, is incestuous in nature, involves fraud or the taking of money, and where it is considered open and notorious.

Extreme Hardship

In *Phinpathya*, the Ninth Circuit also discussed the third factor in suspension of deportation: extreme hardship. The BIA had rejected Phinpathya's claim that his deportation would cause extreme hardship to his epileptic child. The court reversed the BIA because the BIA concentrated on whether there was adequate medical care available in Thailand but did not consider the hardship that travel and uprooting would impose on the child.[131] The BIA's failure to consider any hardship beyond the lack of proof regarding available medical services was an abuse of discretion and the court remanded the case for reconsideration.[132]

The Ninth Circuit adopted the Supreme Court's opinion in *INS v. Wang*[133] that the BIA has broad discretion in determining what constitutes extreme hardship. In *He Yung Ahn v. INS*,[134] the Ninth Circuit sustained the BIA denial of suspension of deportation even though the alien argued the BIA had committed procedural errors in an attempt to evade *Wang*. The importance of *He Yung Ahn* is the extent to which the Ninth Circuit is willing to allow the BIA to define extreme hardship. In *He Yung Ahn*, the BIA refused to consider Mr. Ahn's claims that his political acts would cause him extreme hardship if returned to his homeland.[135] Exercising the latitude provided by *Wang*, the BIA denied the alien's appeal, holding it inappropriate to consider political claims under extreme hardship.

In the *Matter of Cabral*,[136] the BIA ruled that extreme hardship does not have a fixed meaning but is dependent on the facts and circumstances of each individual case. A history of violations of immigration laws does not necessarily preclude the reopening of deportation proceedings where a prima facie showing of extreme hardship is established. The Board held that the respondent should have the chance to develop his case fully before an immigration judge and is entitled to receive a decision on the merits.[137]

131. 673 F.2d at 1016.
132. *Id.* at 1016-17.
133. 450 U.S. 139 (1981).
134. 651 F.2d 1285 (9th Cir. 1981).
135. *Id.* at 1288.
136. Matter of Cabral, A21 327 982, A23 076 872, A23 076 874 (BIA October 8, 1981).
137. *Id.*

The Attorney General has the sole discretion to adjust the status of a temporary nonimmigrant to a permanent resident of the United States.[138] The alien must apply for adjustment, be eligible for the change under the immigration laws, and have an immigrant visa available at the time of the application.[139] Adjustment of status does not waive the Attorney General's ability to deport the alien, if applicable, due to changing factors within five years of status adjustment.[140]

In *Matter of Onal*,[141] the BIA mandated rescission of an alien's adjustment of status to a nonpreference immigrant when the Department of Labor invalidated the labor certification upon which adjustment was based. The Board also ruled that since the INS "instituted proceedings against the respondent within the statutory five-year period[142] after his adjustment of status occurred, the INS' subsequent delay in holding the rescission hearing was not shown to be unreasonable or prejudicial."[143] Nor could the respondent invoke the doctrine of estoppel by laches for this type of delay.

Respondent originally entered the United States as a nonimmigrant visitor who obtained a labor certification for employment as a foreign food specialty cook. Upon this certification, his status was adjusted to lawful permanent resident as a nonpreference immigrant.[144] Five months later, however, the Department of Labor notified the INS that respondent worked as a dishwasher rather than as a specialty cook. Based on respondent's material misrepresentations, the Department of Labor found him ineligible and invalidated his labor certificate.[145]

The Board found that since respondent had been ineligible for the labor certificate at the time it was originally granted, the certification had no effect at any time. Consequently, the entire basis upon which respondent's status adjustment was granted did not exist, and he was never eligible for the adjustment. Section 246 of the Immigration and Nationality Act mandates rescission of an adjustment of status granted under these circumstances.[146]

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138. Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1976).
139. *Id.* In practice, most aliens claim exempt status as immediate relatives of American citizens, usually by marriage. This avoids the preference categories.
140. Immigration and Nationality Act § 246(a), 8 U.S.C. § 1256(a) (1976).
141. I. & N. Dec. 2886 (1981).
142. Immigration and Nationality Act § 246(a), 8 U.S.C. § 1256(a) (1976).
143. I. & N. Dec. 2886 at 2.
144. Immigration and Nationality Act § 245(b), 8 U.S.C. § 1255(b) (1976).
145. I. & N. Dec. 2886 at 4.
146. *Id.*

Although the rescission hearing took place three years after service of the notice of intent to rescind, the Board found no evidence to support preclusion of rescission under the affirmative defense of estoppel by laches. Respondent did not show that he was prejudiced, misled or changed his position in any way due to the delay in commencing proceedings.

The Board noted that "laches only protects against prejudice caused by unreasonable delay in bringing an action, not against problems created by the pendency of the action after it is instituted."[147] Proceedings against the respondent were initiated well within the statutory five-year period following grant of adjustment. Nor did the Board find that the mere inaction of not going forward with the hearing amounted to the "affirmative misconduct" by the government required to invoke estoppel.[148]

ENTRY AND EXCLUSION

In *Garcia v. Smith*,[149] the Eleventh Circuit reversed the district court's dismissal of plaintiff's suit for lack of subject matter jurisdiction. Garcia arrived in the United States as a stowaway and, due to the situation in his homeland of Cuba, immediately applied for political asylum. The INS denied his request and began deportation proceedings.[150] The district court granted a temporary restraining order barring deportation, but later found a lack of subject matter jurisdiction and dissolved the order.[151]

The Eleventh Circuit held that while the district court relied upon section 273(d) of the Act to deny Garcia a hearing, Congress clearly intends that stowaways be entitled to apply for asylum.[152] The court concluded that, irrespective of petitioner's request for review of the INS denial under the stowaway provision of the law, there remained jurisdiction over Garcia's petition for asylum.[153]

147. *Id.*
148. *See supra* notes 57-86 and accompanying text.
149. 674 F.2d 838 (11th Cir. 1982).
150. *Id.* at 839.
151. *Id.* The district court relied on 8 U.S.C. § 1323(d) (1976) in ruling it lacked subject matter jurisdiction. The court strictly applied the language of the statute which states "that stowaways will be excluded from the United States with neither the hearing nor the right to appeal that . . . usually are available to individuals seeking entry into this country." 674 F.2d at 839. This statute was considered, on its face, to deny subject matter jurisdiction to the court.
152. 674 F.2d at 840. *See* S. REP. No. 256, 96th Cong., 2d Sess. 19 (1980).
153. 674 F.2d at 840. In addition to the asylum issue, the Eleventh Circuit em-

In *Palma v. Verdeyen*,[154] the Fourth Circuit held that the Attorney General has the inherent power to detain an excluded alien indefinitely if the alien cannot be returned to his own country and the circumstances do not warrant a grant of parole.[155] The petitioner relied on the Tenth Circuit's ruling in *Rodriquez-Fernandez v. Wilkinson*[156] in which a similarly situated alien was found suitable for parole by the Attorney General.[157] The Fourth Circuit distinguished *Palma* because there had been an individual determination showing deportation was proper. Therefore, while immediate deportation was impracticable, there had been a finding that Palma was not suitable for parole.[158]

In *Firestone v. Howerton*,[159] the Ninth Circuit held that former membership in the Communist Party, a proscribed organization, cannot render an alien inadmissible without additional factors.[160] The petitioner argued that a meaningful association standard should be applied in evaluating admission of aliens just as that standard had been codified for deportation cases.[161] The petitioner's deportation proceedings were dismissed in 1964 when he was found not to be a meaningful member of the Communist Party. The court agreed with the petitioner that congressional intent allowed the meaningful association standard to be applied to exclusion proceedings as well as deportation hearings.[162]

In the *Matter of Carl Hill*,[163] the United States District Court ruled that a self-admitted homosexual can be excluded from the United States only when the exclusion is based upon a class "A" certification from the Public Health Service.[164]

EMPLOYMENT

Nonimmigrant aliens may change their status to lawfully admitted permanent residents under section 245 of the Immigration and

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phasized that the Supreme Court has never questioned the availability of a petition for habeas corpus even with the limited nature of the rights due illegal aliens. *Id.*

154. 676 F.2d 100 (4th Cir. 1982).

155. *Id.* at 104.

156. 654 F.2d 1382 (10th Cir. 1981).

157. 676 F.2d at 104-05. Petitioners in both cases had been imprisoned in Cuba for theft when they were allowed to join the Freedom Flotilla to the United States.

158. 676 F.2d at 105.

159. 671 F.2d 317 (9th Cir. 1982).

160. *Id.* at 321.

161. Immigration and Nationality Act § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1976).

162. 671 F.2d at 320.

163. Matter of Carl Hill, No. C-81-4055 RPA (N.D. Cal. Apr. 22, 1982).

164. *Id.*; *see* Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1976).

Nationality Act.[165] However, the Act's unauthorized employment provision[166] specifically bars applicants, other than immediate relatives or certain medical doctors, from adjusting their status if they accept unauthorized employment prior to filing an application.

In *Bhakta v. INS*,[167] the Ninth Circuit held that although an alien is denied investor status by the INS if he acts more as an investor than as a laborer, his business activities do not constitute unauthorized employment within the meaning of section 245(c)[168] to bar adjustment of eligibility. Without concluding whether Bhakta's enterprise satisfied the nonpreference investor regulation,[169] the court compared the petitioner to an investor entrepreneur. His owning and operating a motel did not "adversely affect employment opportunities for legitimate aspirants in the labor pool" and therefore did not cause the harm section 245(c) seeks to prevent.[170]

In *Johnson-Laird, Inc. v. INS*,[171] the United States district court considered whether section 101(a)(15)(L) of the Act allows a sole proprietorship to request nonimmigrant status for employees transferred to positions in the United States.

Petitioner founded a business in Canada and opened a branch in Oregon. He entered the United States as a nonimmigrant visitor and listed himself as an employee of his sole proprietorship in his application for classification as an intracompany transferee. The INS denied his petition, which under section 101(a)(15)(L) would grant him a three-year renewable stay. The INS held that because a sole proprietorship lacked a separate legal existence, petitioner was not employed by a business eligible to make such

165. 8 U.S.C. § 1255 (1976). The procedure for changing status is outlined *supra* in the text accompanying notes 138-48.

166. Immigration and Nationality Act § 245(c), 8 U.S.C. § 1255(c) (1976). "The provisions of this section shall not be applicable to . . . an alien . . . who hereafter continues in or accepts unauthorized employment prior to filing an adjustment of status . . . ." *Id.*

167. 667 F.2d 771 (9th Cir. 1982).

168. 8 U.S.C. § 1255(c) (1976), *amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1614.

169. 8 C.F.R. § 212.8(b)(4) (1977). The regulation outlines the requirements an alien must meet to avoid obtaining labor certification. The main requirement is investing $40,000 in an enterprise of which the alien will be the principal manager. *Id.*

170. 667 F.2d at 773.

171. 537 F. Supp. 52 (D. Or. 1981).

transfers.[172]

The district court reversed, finding the INS interpretation to be inconsistent with the language and purpose of the statute. Legislative history indicated an anticipation "that the words 'firm' and 'legal entity' [would] be interpreted in the broad sense to include all bona fide forms of business organizations including partnerships, sole proprietorships and labor organizations."[173] The court concluded that "Congress intended that the legal status of the petitioning business not be a dispositive consideration in immigration proceedings."[174]

In *Stewart Infra-Red Commissary of Massachusetts v. Coomey*,[175] the First Circuit concluded that while it was the responsibility of the Department of Labor to determine "the availability of suitable American workers for the job and the impact of alien employment upon the domestic labor market," the INS had the authority to determine the qualifications of an alien for the visa preference status sought.[176]

Barbara Zadroga entered the United States as a nonimmigrant visitor and began unauthorized employment for Stewart Infra-Red, which later submitted an application for labor certification on her behalf. After certification was granted, Stewart Infra-Red filed a petition with the INS for sixth preference[177] visa status for Zadroga. The INS denied the petition on the ground that Zadroga lacked the necessary experience. The district court vacated the INS decision, holding that the INS exceeded its discretionary authority because Congress had committed the question of qualification to the Secretary of Labor.[178]

The First Circuit reversed, finding statutory authority for INS determinations of eligibility,[179] with the Secretary of Labor providing advisory opinions concerning the qualifications of the beneficiary.[180] The case was remanded to determine whether

172. *Id.* at 53.
173. *Id.* at 54.
174. *Id.*
175. 661 F.2d 1 (1st Cir. 1981).
176. *Id.* at 6.
177. Immigration and Nationality Act § 203(a)(6), 8 U.S.C. § 1153(a)(6) (Supp. IV 1980). The sixth preference is available to "qualified immigrants who are capable of performing specified skilled or unskilled labor . . . for which a shortage of employable and willing persons exists in the United States." *Id.*
178. 661 F.2d at 2.
179. Immigration and Nationality Act § 203(a)(6), 8 U.S.C. § 1153(a)(6) (Supp. IV 1980). Section 1154(b) grants the authority to the Attorney General to "determine if the facts stated in the petition are true . . . ." 8 U.S.C. § 1154(b) (1976).
180. Immigration and Nationality Act § 204(b), 8 U.S.C. § 1154(b) (1976). This section allows the Secretary of Labor to consult with the Attorney General after an investigation of the facts.

"sufficient evidence [existed] to support the INS' determination that Zadroga was unqualified for the position for which she sought sixth preference visa status."[181]

In *National Labor Relations Board v. Sure-Tan, Inc.*,[182] the Seventh Circuit held that illegal aliens who lost their jobs and left the United States as a result of unfair labor practices by their employers were entitled to reinstatement if they were legally present when they sought relief.[183] They would be entitled to back pay only if they had been lawfully available for employment in the United States prior to the offers of reinstatement.

The National Labor Relations Board found Sure-Tan had violated section 8(a)(3) of the National Labor Relations Act[184] by constructively discharging five of its employees for union activities. Following certification of a union in the business, Sure-Tan notified the INS that it employed illegal aliens. The aliens were then arrested and granted voluntary departure.

The court found that conventional remedies of back pay and reinstatement did not contravene immigration laws, as it is

> unlikely that [an illegal worker] would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his illegal alien status . . . . It would be anomalous [to provide illegal alien workers] the rights of employees under the Act, but then, when violations occur, to deny them sure rights by refusing effective remedies.[185]

In *Peterson v. Neme*,[186] the Supreme Court of Virginia held that illegal aliens working without authorization from the INS have standing to sue for lost wages as an element of tort damages. Plaintiff, a nonimmigrant visitor for pleasure who overstayed, missed two hundred and thirty days of her unauthorized employment as a housekeeper when she was struck by defendant's car. The court believed that the damage award did not violate immigration policy because allowing a claim for lost wages would hardly encourage other illegal aliens to seek employment in the

181. 661 F.2d at 6.

182. 672 F.2d 592 (7th Cir.), *petition for reh'g denied*, 677 F.2d 584 (7th Cir. 1982). *Sure-Tan* was originally litigated to determine whether illegal aliens were "employees" under the National Labor Relations Act. *See* 583 F.2d 355 (7th Cir. 1978).

183. 672 F.2d at 605.

184. 29 U.S.C. § 158(a)(3) (1976). This section states that it "shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

185. 672 F.2d at 604.

186. 222 Va. 477, 281 S.E.2d 869 (1981).

United States.[187]

In *Matter of Frigon*,[188] the INS Central Office added a significant new element to the test for granting H-3 alien trainee classification. By regulation,[189] the trainee is not permitted to undertake productive employment if doing so would preclude a United States resident from working.

The potential beneficiary of the H-3 classification in *Matter of Frigon* was a trainee on an oil rig driller who spent only five percent of his time in classes, received substantial pay, and was unaccompanied by any United States workers. The Commissioner found the alien was involved in productive employment and prescribed a balancing test to determine eligibility for the H-3 classification: "The effect of productive employment upon United States workers should be balanced with employer's need or purpose in training the alien beneficiary."[190] Classification would be denied when alien workers pose a potential threat to jobs available to United States workers at both entry and advanced levels.

In the *Matter of Crystal Shamrock, Inc.*,[191] an administrative law judge took issue with the long-standing view of the "business necessity" required for labor certification.[192] While not specifically defined by statute, it was defined in *Diaz v. Pan American World Airways, Inc.*,[193] which held that an employee must be of such importance to the business that without him the essence of the business would be undermined. The court in *Crystal Shamrock* observed that *Diaz*'s narrow reading of "business necessity" resulted from its focus on the Civil Rights Act under which it was decided.[194]

The *Crystal Shamrock* court rejected the view that business necessity is to be as restricted under the Immigration and Nationality Act as it was under the Civil Rights Act. In determining the business necessity of *Crystal Shamrock*'s requirement that its flight instructors speak Swedish and Finnish, the court adopted the business necessity test established in *Ratnayake v. Mack*.[195] Under this rule, job requirements of an employer need only be shown to be reasonable and tending to contribute to the quality of

187. *Id.* at 480, 281 S.E.2d at 872.
188. I. & N. Dec. 2888 (1981).
189. 8 C.F.R. § 214(h)(4) (1976). "A trainee shall not be permitted to engage in productive employment if such employment will displace a United States resident." *Id.*
190. I. & N. Dec. 2888 (1981).
191. 3 ILCR (MB) 1-347, 1-350 (Jul. 20, 1982).
192. 20 C.F.R. § 656.21(b)(2) (1981).
193. 311 F. Supp. 559 (S.D. Fla. 1970), *cert. denied*, 404 U.S. 950 (1972).
194. 3 ILCR at 1-352.
195. 499 F.2d 1207 (8th Cir. 1974).

its business. The *Crystal Shamrock* language requirement was justified because it improved the efficiency of flight instruction and cultivated a market of Scandinavian students.[196]

NATURALIZATION

In *United States v. Dercacz*,[197] the United States district court revoked Dercacz's citizenship by granting the government's motion for summary judgment. Dercacz entered the United States under the Displaced Persons Act (DPA).[198] He procured citizenship based on a naturalization petition in which he stated he had never committed a crime involving moral turpitude. He had, however, persecuted Jews in his homeland.[199]

The court concluded that Dercacz had illegally obtained naturalization based on section 2 of the DPA, which makes aliens who aid the enemy in persecution of civilians ineligible for admission to this country.[200] The court found no triable issues existed regarding Dercacz's inability to qualify for a displaced person visa because of the exemption of section 2 of the DPA. The court concluded the defendant illegally entered the United States because he did not possess the required "valid unexpired immigrant visa."[201] Dercacz's later naturalization had to be revoked as illegally obtained[202] pursuant to the Immigration and Nationality Act's requirement that an alien be lawfully admitted for permanent residence five years prior to applying for naturalization.[203]

The court further found the defendant ineligible for a visa under section 10 of the DPA, which precludes granting visas to persons who wilfully misrepresent their past to enter the United States.[204] The court concluded defendant's misrepresentations were material under the Supreme Court standard established in *Fedorenko v. United States*,[205] which classifies facts as material when their disclosure would result in visa ineligibility.[206]

196. 3 ILCR at 1-353.
197. 530 F. Supp. 1348 (E.D.N.Y. 1982).
198. Ch. 647, 62 Stat. 1009 (1948).
199. 530 F. Supp. at 1351.
200. *Id.*
201. Immigration and Nationality Act § 211(a), 8 U.S.C. § 1181(a) (1976).
202. *Id.* § 340(a), 8 U.S.C. § 1451(a).
203. *Id.* § 316(a)(1), 8 U.S.C. § 1427(a)(1).
204. 530 F. Supp. at 1351.
205. 449 U.S. 490 (1981).
206. 530 F. Supp. at 1352. The INS amended the naturalization regulations of 8

The trend of recent regulations has been to restrict aliens' eligibility for public benefits. A Social Security Administration regulation, effective October 1, 1981, complies with provisions of the Omnibus Budget Reconciliation Act of 1981.[207] This regulation limits eligibility of applicants for Aid to Families with Dependent Children (AFDC) to United States citizens, lawful permanent residents, and aliens residing here under color of law.[208] Additionally, states determining eligibility and benefit levels must attribute the income and resources of their United States sponsors to alien families applying for AFDC for three years following entry.[209] Aliens excluded from these requirements are those paroled into the United States as refugees, those granted political asylum, and those admitted as Cuban or Haitian entrants who are dependent children of the sponsor or the sponsor's spouse.[210]

The Agriculture and Food Act of 1981[211] also requires that a portion of the income and resources of a person sponsoring entry of a permanent resident alien be attributed to that alien when he applies for food stamps. Refugees and aliens seeking political asylum are exempted from these restrictions.

The Department of Health and Human Services published proposed regulations[212] governing supplemental security income benefits (SSI) that also attribute the income and resources of sponsors to aliens in order to conform to amendments[213] of the Social Security Act.[214]

Refugee Resettlement Program (RRP) regulations[215] have also been amended by the Department of Health and Human Services.[216] New policies have been established concerning the cash and medical assistance available to refugees, as well as Cuban and Haitian entrants who are ineligible for AFDC, SSI, and Medi-

C.F.R. parts 316(a), 328, 332, 332(a), 334, 335, 335(b), 336, 339 and 344 to conform to the naturalization provisions of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611. *See infra* notes 270-75 and accompanying text.

207. 47 Fed. Reg. 5648 (1982); *see* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

208. 45 C.F.R. § 233.50 (1981). The eligibility limitations of this regulation apply after September 30, 1980.

209. *Id.* §§ 233.51-.52 (1981).

210. 47 Fed. Reg. 5680 (1982).

211. Pub. L. No. 97-98, 95 Stat. 1213.

212. 46 Fed. Reg. 60,470 (1981).

213. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 471.

214. 20 C.F.R. § 416 (1982).

215. 45 C.F.R. § 400 (1982).

216. 47 Fed. Reg. 10,841 (1982).

caid. These regulations permit one hundred percent federal reimbursement to states providing benefits to eligible refugees during their first eighteen months in the United States. Benefits for refugees who have been in the United States between eighteen and thirty-six months may also be reimbursed at the state's request.[217]

In *Cabral v. State Board of Control*,[218] undocumented aliens were held to be eligible for public benefits from California's Victim of Violent Crimes Act. Petitioner, an illegal alien who was injured by street gangs, was awarded compensation for his injuries. The court rejected the government's argument that undocumented aliens do not qualify as residents under the Act.[219]

PERSECUTION

In *McMullen v. INS*,[220] the Ninth Circuit reversed a BIA decision that McMullen had failed to establish the likelihood of persecution. The court held that the decision was not supported by substantial evidence.[221] Petitioner admitted deportability unless protected by the Refugee Act of 1980.[222] Therefore, proper application of the Act was critical.

Under the Refugee Act, if the petitioner establishes all the necessary elements of the statute, relief should be mandatory. McMullen argued that following enactment of the statute, absolute discretion of the BIA was inappropriate.[223] The Ninth Circuit

217. *Id.*
218. 112 Cal. App. 3d 1012, 169 Cal. Rptr. 604 (1981).
219. *Id.* at 1017, 169 Cal. Rptr. at 607.
220. 658 F.2d 1312 (9th Cir. 1981).
221. The Ninth Circuit used *McMullen* to establish the appropriate standard of review applicable to BIA findings that no likelihood of persecution exists under the Refugee Act of 1980. Prior to the enactment of the Refugee Act the BIA exercised broad powers of discretion and the Ninth Circuit accorded deference to the BIA decisions. 658 F.2d at 1316.
222. 8 U.S.C. § 1253(h)(1) (Supp. IV 1980). Section 1253(h)(1) states "[t]he Attorney General shall not deport or return any alien to a country if . . . such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."
223. The changes in the statute require the immigration judge to find the following elements before the alien is protected from deportation:

1) A likelihood of persecution; . . . .
2) Persecution by the government or by a group which the government is unable to control.
3) Persecution resulting from the petitioner's political beliefs.
4) The petitioner is not a danger or a security risk to the United States.

658 F.2d at 1315 (footnotes omitted).

agreed, ruling that because factual determinations by the BIA are now required, judicial review of the Board's findings is appropriate.[224] However, the reviewing court will limit its inquiry to whether the Board's determination is supported by substantial evidence.[225]

The court concluded McMullen had met his burden of proof by presenting extensive evidence of his past association with a faction of the Provisional Irish Republican Army (PIRA), and that the PIRA consistently tortured or killed traitors. McMullen was clearly perceived to be a traitor because he helped the United States government combat the flow of guns to the PIRA. McMullen also presented evidence that the government of the Republic of Ireland is unable to control the PIRA. Following the substantial evidence rule, the court reversed the BIA decision and granted McMullen's petition.[226]

HAITIAN REFUGEES

In *Louis v. Meissner*,[227] the INS was temporarily enjoined from administering its exclusion and deportation procedures against the class of undocumented Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1980. These aliens are applying for entry and are presently in detention pending exclusion proceedings, although no orders of exclusion have been entered against them. The district court found that the plaintiffs' claims were likely to succeed and that they would suffer irreparable harm if the injunctive relief was not granted.

Class members challenged INS exclusion policies regarding Haitians who are seeking asylum. These challenged policies include: the denial generally of the right to file for asylum, the denial of the right to have an attorney present at primary inspection, and the mass scheduling of hearings on asylum claims.[228] Class members also claim that form I-122, which informs an alien of exclusion proceedings against him and of his rights during those proceedings, is generally unacceptably trans-

224. 658 F.2d at 1316.

225. *Id.* at 1317. Deference to an extent will still exist due to the expertise required in this type of ruling.

226. *Id.* at 1319.

227. 530 F. Supp. 924 (S.D. Fla. 1981).

228. *Id.* at 926. Plaintiffs seek relief against several alleged practices of the INS. Specifically challenged are: the continued detention of excludable Haitians by the INS and the lack of access to attorneys. Included are those aliens held in Miami facilities in whose behalf notices of appearance have been filed, those who have not specifically engaged attorneys from the center, and those who were sent from Miami to detention camps in Fort Allen, Puerto Rico, Morgantown, West Virginia, Lexington, Kentucky, Otisville, New York, and Big Springs, Texas. *Id.*

lated, if at all. Moreover, the Haitians claim the INS does not inform them of their right to apply for asylum.[229]

Following the issuance of the preliminary injunction, the INS filed a motion to dismiss.[230] The district court dismissed several of the plaintiffs' causes of action when the court ruled it had no jurisdiction to hear those issues under section 106(c) of the Immigration and Nationality Act.[231] The court, however, retained jurisdiction over claims alleging INS violations of the rulemaking provisions of the Administrative Procedure Act (APA),[232] claims regarding the Haitians' first amendment rights of access to counsel and counsel's access to the detainees, and claims involving discriminatory INS detention policies.[233]

CONSTITUTIONAL ISSUES

The Supreme Court denied certiorari[234] in *Blackie's House of Beef, Inc. v. Castillo*,[235] in which the circuit court of appeals for the District of Columbia had clarified the law regarding the INS' authority to issue search warrants for undocumented aliens in commercial establishments. The INS found deportable alien employees when it searched Blackie's House of Beef pursuant to a warrant that specified the place, time, and scope of the search but failed to describe each suspected illegal alien.[236] Blackie's claimed a violation of the fourth amendment which requires the naming of the specific person to be seized.[237]

The court held that the INS' right to enter a commercial establishment to seek violators of immigration laws was implied by its general statutory power to seek out and question undocumented aliens. Rather than applying the more stringent criminal probable cause standard, the court held that the appropriate standard for issuing warrants to the INS is the requirement of specificity sufficient to prevent unbridled discretion by enforcement offi-

229. *Id.* at 928.
230. Louis v. Meissner, 532 F. Supp. 881 (S.D. Fla. 1982).
231. 8 U.S.C. § 1105a(c) (1976). This statute limits judicial review of an alien's final order of exclusion to a habeas corpus proceeding once he has exhausted his administrative remedies.
232. 5 U.S.C. § 553 (1976).
233. *Id.*
234. 102 S. Ct. 1432 (1982).
235. 659 F.2d 1211 (D.C. Cir. 1981).
236. *Id.* at 1216.
237. U.S. CONST. amend. IV.

cials.[238] Therefore, prior specification of names or descriptions of aliens sought is not mandated.

Fourth amendment rights differ when the search shifts from a commercial establishment to a home. In *Illinois Migrant Council v. Pilliod*,[239] the Northern District Court of Illinois refused to extend the relaxed probable cause standard established in *Blackie's* to searches of dwellings. The required warrants must be based on the stringent probable cause standard for the search of a home.[240] The court held that the use of administrative warrants is limited to the search and seizure of property, not persons, stating:

> However, administrative warrants may not be used by the INS to justify the seizure of persons. Assuming *arguendo* that *Blackie's* was correctly decided and that the INS may utilize an administrative warrant to enter and search a given commercial location, such a warrant does not authorize the search or seizure of persons found on the premises.[241]

In *Dellums v. Smith*,[242] a temporary restraining order was issued directing that a minimum of five members of the general public be admitted to any deportation hearings held in the INS detention facility in El Centro, California. The court ruled that it is in the public interest to allow the general public to attend these hearings in accordance with section 242.16(a) of title 8 of the Code of Federal Regulations. The court further found that closed hearings may result in irreparable injury to any of the two hundred Salvadoran members of the class action suit presently detained in the El Centro facility.

In *Adams v. Howerton*,[243] the Ninth Circuit held that the INS' refusal to recognize a homosexual marriage and to classify a male alien as a "spouse" of a male citizen, does not violate the equal protection component of the fifth amendment's due process clause. The court found that Congress' decision to confer spousal status only upon parties of heterosexual marriages is rationally based and does not offend the due process clause and its equal protection requirements. Therefore the court declined to enlarge the meaning of "spouse" for immigration purposes.[244]

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238. 659 F.2d at 1225.

239. 531 F. Supp. 1011 (N.D. Ill. 1982).

240. *Id.* at 1017.

241. *Id.* at 1020.

242. Civ. No. 82-0040-6(M) (S.D. Cal. Jan. 19, 1982).

243. 673 F.2d 1036 (9th Cir. 1982).

244. *Id.* at 1042. Section 201(a) and 201(b) of the Immigration and Nationality Act establish preferential admissions based on close family relationships, exempting immediate relatives such as spouses of United States citizens from quota limitations. The court found no evidence that Congress, which governs the conferral of spousal status, intended the exemptions to include homosexual relationships.

FOREIGN INVESTORS

Section 212(a)(14) of the Immigration and Nationality Act[245] was enacted in 1952 to provide strong safeguards for American labor. The statute prevents aliens seeking entry into the United States from taking jobs for which the Secretary of Labor has determined there are sufficient workers, either United States citizens or resident aliens.[246] The statute allows an alien worker to enter the United States unless the Secretary of Labor acted specifically to exclude him by denying certification pursuant to a section 212(a)(14) application.[247]

Although the present labor certification procedure does not contain any exceptions, INS regulations provide an investor exemption. The original exemption covered "an alien who will engage in commercial or agricultural enterprise in which he invested or is actively in the process of investing a substantial amount of capital . . . ."[248]

The use of investor exemptions has been severely restricted since June 1, 1978, when nonpreference visa numbers became available. As a result, there has been a heightened interest in treaty investor status and an increased need for a broader analytic framework under which to assess the classification of potential investors.

The Visa Services Office recently summarized existing guidelines and precedential materials for the adjudication of applications for nonimmigrant E-2 treaty investor visas. Eligibility for E-2 status requires: nationality of a treaty country, substantial investment in an operating commercial enterprise directed by the investor, and the investor's intention to depart when his investment concludes or his status otherwise ends.[249]

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245. 8 U.S.C. § 1182(a)(14) (Supp. IV 1980).

246. S. REP. No. 1137, 82d Cong., 2d Sess. 11 (1952).

247. 8 U.S.C. § 1182(a)(14) (Supp. IV 1980). In 1965, section 212(a)(14) was amended to require that every potential alien laborer obtain certification from the Secretary of Labor. *See* Mehta v. INS, 574 F.2d 701, 703 n.3 (2d Cir. 1978).

248. 8 C.F.R. § 212.8(b)(4) (1967). In 1973 the original investor regulation was amended to exempt any alien investor investing at least $10,000 in a commercial or agricultural enterprise. The alien investor was also required to establish that he has had at least one year's experience or training qualifying him in his chosen field of investment. 8 C.F.R. § 212.8(b)(4) (1974). In 1976 the minimum investment was raised to $40,000. 8 C.F.R. § 212.8(b)(4) (1977).

249. 5 VISA SERVICES OFFICE, E-2 TREATY INVESTOR VISAS No. 20, 264, 265 (1982).

In *Gill v. INS*,[250] the Ninth Circuit held that the BIA had incorrectly defined "actively in the process of investing,"[251] when it declined to grant petitioner discretionary relief from deportation based on his application for investor status. The court established that the pursuit of an ongoing systematic plan to invest is the crucial criterion, and concluded that the BIA's impermissibly narrow construction rendered the "actively in the process of investing" clause ineffective.[252]

Although the petitioner had not invested the required amount at the time he applied for investor status, he continued to make subsequent expenditures, indicating a continuing investment pattern. The court found that where probative evidence of such a pattern is present, the plain language of section 212.8(b)(4) requires a consideration of post-application investments in determining whether the necessary amount has been invested.

In *Konishi v. INS*,[253] the Ninth Circuit reversed the BIA's denial of permanent resident status under the investor exemption to the 1973 version of labor certification requirement.[254] The BIA was ordered to consider whether petitioner, an artist, could claim the investor exemption based on his investment in an art gallery which sold his own work.

In *Yui Tsang Cheung v. INS*,[255] the Ninth Circuit established that the 1973 version of the investor exemption is not available to professionals[256] who compete as skilled laborers and invest only in tools of their trade and auxiliary personnel. The court distinguished an entrepreneur's activities, which are generally unique to their own enterprise and do not compete with skilled laborers. In *Konishi*, the Ninth Circuit suggested its ruling in *Yui Tsang Cheung* may not apply to the artist petitioner who it held was more of an entrepreneur than a professional.[257]

In the Eleventh Circuit's decision of *Patel v. Minnix*,[258] the court found no abuse in the INS' discretionary denial of petitioner's application to change his status from visitor-for-pleasure to treaty investor. The court declined to substitute its judgment for that of the INS when substantial evidence supports the administrative ruling.

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250. 666 F.2d 390 (9th Cir. 1982).
251. 8 C.F.R. § 212.8(b)(4) (1974).
252. 666 F.2d at 393; *see* Sanghavi v. INS, 614 F.2d 511, 514 (5th Cir. 1980).
253. 661 F.2d 818 (9th Cir. 1981).
254. *See supra* note 248 and accompanying text.
255. 641 F.2d 666 (9th Cir. 1981).
256. Professionals in this context include dentists and doctors.
257. 661 F.2d at 820.
258. 663 F.2d 1042 (11th Cir. 1981).

Petitioner entered the United States for a one-month visit. During this stay he made a substantial real estate investment. The INS concluded that petitioner had entered with the intent to transact business and thereby circumvent normal visa procedures. The court ruled that the petitioner has the burden of proof to establish his status as a treaty investor. Inferences reasonably drawn from the circumstances of petitioner's investing, and his production of mere conclusory allegations, provided evidence sufficient to support the INS decision.[259]

In *Roa v. INS*,[260] the Fifth Circuit held that the evidence presented sustained the INS' decision that petitioner failed to prove his entitlement to the investor exemption from labor certification. The court relied on *INS v. Wang*,[261] which ruled that the alien's proof must be unambiguous and any doubts should be resolved against him.

Roa entered the United States as a nonimmigrant student and completed his education. He then entered a business partnership from which he was free to withdraw at any time and in which he invested only after his original request for permanent status was denied. The court upheld the INS' inference that the investment was a sham designed to circumvent immigration laws and Roa was ruled more of an employee than an investor.[262]

In *Mawji v. INS*,[263] the Ninth Circuit held that a petition for investor status based on an investment different from that identified in a prior application does not, as a matter of law, constitute a new petition. The court reasoned that as long as the petitioner exhibited an intent to comply with investor regulations, he should be allowed to reasonably improve and change his original investment.[264]

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259. *Id.* at 1044.

260. 671 F.2d 116 (5th Cir. 1982).

261. 450 U.S. 139 (1981).

262. 671 F.2d at 118.

263. 671 F.2d 342 (9th Cir. 1982).

264. *Id.* at 345. The court reversed the BIA decision which ruled that Mawji's purchase of a grocery store with the proceeds from the sale of his restaurant resulted in an automatic loss of his priority number and necessitated filing a new application. Nonpreference visa numbers were available when petitioner originally filed his application. However, while the INS investigated his case and he reinvested, nonpreference visa numbers became unavailable and investor regulations were amended to require a minimum investment of $40,000. (*See supra* note 248 and accompanying text.) The court's decision to reverse and remand rested on

The *Matter of VEA*[265] dealt with the guidelines of imposing delivery bonds and their no-work riders on aliens detained for deportation proceedings.[266] The BIA reversed the immigration judge's custody determination, which imposed a bond of $2,500 with a condition against unauthorized employment when respondent overstayed his nonimmigrant-for-pleasure visa. The BIA released the alien on his own recognizance and cancelled the bond condition against unauthorized employment.[267]

The Board ruled that in deportation proceedings, an alien should be detained or required to post a bond only when there is a finding that he is a threat to national security or a poor bail risk. Respondent was found to be neither, as he had applied for a sixth preference immigrant visa at a United States embassy abroad and would be unlikely to harm his chances of gaining readmission as a permanent resident by failing to depart voluntarily.[268]

The Board also held that the no-work rider was inappropriate. Section 103.6(a)(2)(iii) of title 8 of the Code of Federal Regulations cites the impact of the alien's employment upon the American labor market as a principal factor in imposing the no-work rider bond. Respondent had previously obtained a labor certification as a precondition to filing his sixth preference visa petition.[269] Therefore, the Secretary of Labor had already specifically determined that respondent's employment was not harmful to the United States labor market.

LEGISLATION

Efficiency Package

The major immigration legislation to emerge from the first session of the 97th Congress was the Immigration and Nationality Act Amendments of 1981.[270] This legislation, known as the "Effi-

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the fact that petitioner's first application had not been adjudicated at the time the changes in investor status qualifications occurred. 671 F.2d at 344.

265. I. & N. Dec. 2890 (1981).

266. Delivery bonds are imposed to ensure that an alien will personally appear as required by the INS. 8 C.F.R. § 103.6 (1982). The addition of the no-work rider bond against unauthorized employment is strictly regulated because of the burden it places on an individual in requiring him to pay the delivery bond while being barred from employment until his deportation hearing. *Id.* § 103.6(a)(2)(iii) (1982).

267. I. & N. Dec. 2890 at 6.

268. *Id.* at 5-6.

269. 8 C.F.R. § 204.1(c)(1) (1982). For a discussion of sixth preference status see *supra* note 177.

270. Pub. L. No. 97-116, 95 Stat. 1611.

ciency Package," provides measures designed to expedite administrative action and reduce governmental expenditures.

Significant statutory changes resulting from these amendments include:

Section 2: Raises from fourteen to sixteen years the age by which the adoption of an alien child must take place to qualify for immigration benefits.

Section 3: Removes adultery as an absolute bar to finding good moral character. Conviction of a single offense of possession of thirty grams or less of marijuana is also no longer an absolute bar.

Section 5: Eliminates the need for a deported alien to apply for permission to reapply once five years have elapsed since the deportation.

Section 7: Empowers the Attorney General to waive inadmissibility for a single offense of simple possession of thirty grams or less of marijuana.

Section 9: Permits issuance of reentry permits for a nonrenewable period up to two years.

Section 10: Permits deportation of an excluded alien to countries other than the one from which he came.

Section 11: Makes fraud waiver discretionary rather than mandatory. This relief is restricted to aliens in possession of an immigrant visa or its equivalent and is unavailable to undocumented and nonimmigrant entrants.

Section 12: Also provides for a discretionary hardship waiver of deportability for an alien convicted of a single offense of simple possession of thirty grams or less of marijuana if the alien has a spouse, parent or child who is a United States citizen or permanent resident alien who would suffer extreme hardship from the alien's deportation.

Section 15: Eliminates the present annual reporting requirement of registered aliens, requiring only a notice of change of address within ten days.

Section 16: Strengthens the power of the INS in seizing and forfeiting conveyances used in smuggling aliens.

Section 18: Provides the spouse and children of a permanent resident alien required by employment to be abroad with the same treatment as the principal alien for the purpose of preventing a break in the continuous residence required for naturalization.

Section 19: Abolishes the requirement of two character witnesses

in naturalization proceedings. It also eliminates the thirty-day waiting period between filing a naturalization petition and issuance of the naturalization certificate.

Section 21: Requires a showing of compelling reasons demonstrating that the alien is unable to return to his country of accreditation and that the adjustment would be in the national interest.

Proposed Legislation

Two major bills affecting immigration have been introduced this year. The Reagan administration proposal and the Simpson-Mazzoli bills would, if passed by Congress, make substantial changes to the present INA.

The administration's bill, cited as the Omnibus Immigration Control Act,[271] contains both provisions for permanent amendments and temporary changes not incorporated into general immigration legislation.[272] The ten major sections of this bill follow.

Title One: Temporary Resident Status for Illegal Aliens

Permits legalization of the status of undocumented aliens who entered the United States before January 1, 1980.

Title Two: Unlawful Employment of Aliens Act of 1981

Restricts employment opportunities for aliens not lawfully entitled to employment by imposing sanctions on employers.

Title Three: Cuban/Haitian Temporary Resident Status

This Title, which does not amend the Immigration and Nationality Act itself, grants temporary resident status to Cuban and Haitian nationals.

Title Four: Fair and Expeditious Appeal, Asylum and Exclusion Act of 1981

Revises provisions relating to exclusion procedure, judicial review and asylum.

Title Five: Immigrant Visas for Canada and Mexico Act

Creates separate numerical limits of 40,000 each on immigration from Canada and Mexico.

Title Six: Temporary Mexican Workers Act

Establishes a two-year program for temporary admission of up to 50,000 Mexican nationals per year to work in jobs for which there is a shortage of United States workers.

Title Seven: Immigration Emergency Act

271. Introduced in the Senate October 22, 1981, as S. 1765, 97th Cong., 2d Sess. (1982), by Senator Strom Thurmond and in the House on the same day as H.R. 4832, 97th Cong., 2d Sess. (1982), by Representative Peter W. Rodino.

272. 58 INTERPRETER RELEASES 550-60 (1981).

Enables the government to cope with emergencies such as the 1980 Cuban Flotilla.

Title Eight: Unauthorized Entry and Transportation Act

Designed to prevent surreptitious entry of undocumented aliens.

Title Nine: Labor Certification Act

Allows the Secretary of Labor to use labor market information without reference to the specific job opportunity for which labor certification is sought.

Title Ten: Emergency Interdiction Act

Authorizes the President and Attorney General to take actions on the high seas to prevent illegal immigration to the United States. When admissibility determinations are made before aliens have landed in the United States, the aliens are not entitled to such protections as judicial review of decisions by immigration judges.

The Simpson-Mazzoli bill[273] also proposes major changes in the present law.[274] Highlights of the bill follow.

Employer Sanctions: Provides more severe penalties than the administration's bill for knowingly hiring even one unauthorized alien.

Hearing and Adjudication: Proposes establishment of a six-member United States Immigration Board within the Department of Justice to replace the BIA.

Asylum: Reduces the period in which asylum must be applied for to within fourteen days of notification of the start of exclusion or deportation proceedings.

Judicial Review: Limits the time to petition for review in the court of appeals from six months to thirty days. Asylum decisions are not subject to judicial review except as permitted by habeas corpus under the Constitution.

Adjustment of Status: Eliminates the availability of adjustment of status to an alien who has failed to maintain a continuous legal status since entry into the United States.

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273. Introduced in the Senate on March 17, 1982, as S. 2222, 97th Cong., 2d Sess. (1982), by Senator Alan K. Simpson and in the House on the same day as H.R. 5872, 97th Cong., 2d Sess. (1982), by Representative Romano L. Mazzoli. The House bill was renumbered as H.R. 6514 after being reported out by the House Subcommittee on Immigration, Refugees, and International Law.

274. 59 INTERPRETER RELEASES 207-47, 248-58 (1982).

Legal Immigration: Establishes the annual ceiling at 425,000 and creates two categories:
1. Family reunification: 325,000
2. Independents: 100,000

Amerasian Children: Provides two thousand special immigration visas per year for five years for children fathered by United States servicemen in Korea, Laos, Vietnam, and Kampuchea.

Nonimmigrants: Revises the current temporary worker (H-2) program to create a streamlined program for agriculture.

Legalization: Creates a one-time opportunity for adjustment of status for both unlawful aliens and lawful temporary residents.

Numerous other bills with less impact in the immigration area have been introduced into the second session of the 97th Congress.[275]

Silva Letter

A final order was entered in the *Silva*[276] case on December 18, 1981, ending the program. The order reinstated *Silva* class members to the status they held when the permanent injunction was entered on March 10, 1977.[277] The final order insured those with voluntary departure status continuance of at least thirty days following notice of the program's termination. The order also ensured continued employment authorization pending receipt of written notice of the revocation of such authorization.

The final order does not jeopardize the claims of denial of rights under the Silva program, but does limit INS action in expelling *Silva* class members. The number of undocumented Mexican aliens who will lose their *Silva* protection against deportation may run into the tens of thousands.[278] Many may be eligible for suspension of deportation due to their long stay and American-born children.[279]

Conclusion

The past year was extremely active at all levels pertaining to the field of immigration law. The Supreme Court ruled in favor of illegal aliens receiving a free public education. However, this

275. For a general discussion, see 59 Interpreter Releases 77-78 (1982).
276. *See* 56 Interpreter Releases 418 (1979).
277. *Id.*
278. 59 Interpreter Releases 5 (1982).
279. *See supra* notes 270-75 and accompanying text. The Reagan administration's immigration proposals in S. 1765 and H.R. 4832, *supra* note 271, could also provide relief for most of the affected Mexican aliens through the amnesty and Mexican visa provisions.

trend in favor of aliens was not consistent as the Court upheld a California statute which bars aliens from becoming peace officers. In the criminal procedure area, the Court decided that the INS policy of quick deportation outweighs the criminal defendant's witness requirements if the government has determined the deportable alien has no material evidence. The Court delayed until the next Term addressing the constitutionality of the one-house congressional veto of suspension of deportation.

In response to budgetary constraints, Congress passed the "efficiency package," streamlining INS procedures, saving both time and money. The Reagan administration proposed major changes in the immigration laws, including amnesty for illegal aliens currently in the United States. In addition, there was a major bill sponsored by members of Congress, some aspects of which were more liberal to aliens than the President's proposal.

Circuit courts continue to hear an increasing number of immigration cases. This trend may further divide authority in the respective circuits on a number of issues. This, in turn, may prompt the Supreme Court to grant certiorari in a higher proportion of immigration cases. Estoppel is one particular area in need of Supreme Court guidance.

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