SUSPENSION OF DEPORTATION: ILLUSORY RELIEF

INTRODUCTION

Deportation is a drastic measure which results in an alien's banishment from the United States.[1] An alien may be deported for any of a multitude of reasons contained within the Immigration and Nationality Act.[2] Deportation tears an alien from roots he has established in this country, depriving him of residence, livelihood, and family.[3]

Recognizing the cruelty of deportation, Congress has enacted

1. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

2. Eighteen grounds for deportation are enumerated in the Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.]. *E.g., id.* § 241(a) (1), 8 U.S.C. § 1251(a)(1) (excludable at time of entry); *id.* § 241(a)(3), 8 U.S.C. § 1251(a)(3) (deportable if institutionalized at government expense because of mental disease within five years after entry, unless the alien can affirmatively show that such disease did not exist prior to entry); *id.* § 241(a)(4), 8 U.S.C. § 1251(a)(4) (convicted of a crime involving moral turpitude within five years after entry); *id.* § 241(a)(6)(A), 8 U.S.C. § 1251 (a)(6)(A) (alien who at any time after entry has been an anarchist); *id.* § 241(a)(6)(C), 8 U.S.C. § 1251(a)(6)(C) (deportable because of affiliation with Communist Party); *id.* § 241(a)(8), 8 U.S.C. § 1251(a)(8) (having become a public charge); *id.* § 241(a)(11), 8 U.S.C. § 1251(a)(11) (deportable for being or having been any time after entry a narcotic drug addict).

The interrelationship between deportation and exclusionary provisions increases the actual number of grounds for deportation to above 700. *Hearings on Dep't of Justice Appropriations for 1954 Before the Senate Appropriations Comm.*, 83d Cong., 1st Sess. 250 (1953). *Compare* I. & N. Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970) (excludable at time of entry), *with id.* § 212(a), 8 U.S.C. § 1182(a) (grounds for exclusion). For a discussion of the grounds and procedures relating to deportation, see Wasserman, *Grounds and Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125 (1975). For a discussion of representation strategies, see Wasserman, *Practical Asepcts of Representing an Alien at a Deportation Hearing*, 14 SAN DIEGO L. REV. 111 (1976).

An alien may be deported at any time, for no statute of limitations is applicable to deportation. Further, a deportable alien is retroactively subject to expulsion. I. & N. Act § 241(d), 8 U.S.C. § 1251(d) (1970).

3. Lieggi v. INS, 389 F. Supp. 12, 17 (N.D. Ill. 1975), *rev'd*, 529 F.2d 530 (7th Cir. 1976).

measures for relief.[4] Suspension of deportation[5] was one of the first ameliorative provisions adopted in an otherwise inflexible Immigration and Nationality Act.[6] Under section 244 of the Immigration and Nationality Act, the Attorney General[7] has discretion to suspend the deportation of any alien who meets certain statutory prerequisites. Although simple in appearance, these requirements are difficult to fulfill. Additionally, even if an alien has met the statutory requirements, suspension may be denied by exercise of the Attorney General's discretion.[8] Thus, because of the difficulty of establishing statutory eligibility and obtaining a favorable exercise of the Attorney General's discretion, the relief afforded by the suspension of deportation provision is often illusory. Although it appears to alleviate hardship, suspension of deportation is "deliberately hedged about with restrictions that destroy most of its usefulness."[9]

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4. The major discretionary relief provisions are: I. & N. Act § 241(f), 8 U.S.C. § 1251(f) (1970) (waiver of deportation for aliens with family ties who procured entry by fraud); *id.* § 245, 8 U.S.C. § 1255 (adjustment of status to permanent residence status for aliens whose original entry was lawful and who are otherwise admissible to the United States); *id.* § 249, 8 U.S.C. § 1259 (registry, which authorizes the grant of permanent residence to certain aliens who have resided in the United States since 1948); *id.* § 243(h), 8 U.S.C. § 1253(h) (withholding deportation to any country in which the alien would be subject to persecution because of race, religion, or political opinion); *id.* § 242(b), 8 U.S.C. § 1252(b) (allowing voluntary departure at alien's expense).

5. *Id.* § 244, 8 U.S.C. § 1254.

6. Immigration and Nationality Act of 1952, 66 Stat. 163, *amending* Alien Registration Act of 1940, ch. 439, tit. II, 54 Stat. 670.

7. The Attorney General is charged with the administration and enforcement of the Immigration and Nationality Act. He is also authorized to delegate any of his power or duties to any officer or employee of the Immigration and Naturalization Service (INS) or of the Department of Justice. I. & N. Act § 103(a), 8 U.S.C. § 1103(a) (1970). The Attorney General discharges his responsibilities primarily through the INS, a division of the Department of Justice. The Commissioner of Immigration and Naturalization is the head of the INS. He is charged with any responsibilities conferred upon him by the Attorney General. Virtually all statutory authority has been delegated to the Commissioner, but the Attorney General reserves concurrent authority for himself. *Id.* § 103(b), 8 U.S.C. § 1103(b); 8 C.F.R. § 2.1 (1976).

A second enforcement official is the Secretary of State. He acts through the Department of State's Visa Office and the United States Consuls. I. & N. Act § 104, 8 U.S.C. § 1104 (1970). A consul first determines an alien's admissibility to the United States and then issues a visa. However, this issuance may be vetoed by the immigration officer at the port of entry. 1 C. GORDON & H. ROSENFIELD, IMMIRGATION LAW AND PROCEDURE § 1.6(a) (rev. ed. 1975). *See generally Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 661 (1953).

8. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1956).

9. Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 341 (1956). *See* Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 25 (1975).

The rigorous requirements of section 244 have defeated the congressional purpose of ameliorating hardship.[10] An analysis of statutory requirements and judicial interpretation reveals that relief from deportation may be a myth and in need of legislative reform.

SUSPENSION OF DEPORTATION: AN OVERVIEW

Suspension of deportation is an important defense available to certain aliens who meet specified requirements. Its use arises when an alien has been charged deportable.[11] To be eligible the alien must have resided in the United States for a specified length of time depending upon the deportable offense with which he is charged.[12] He must possess good moral character[13] and demonstrate "extreme hardship"[14] or "exceptional and extremely unusual hardship,"[15] depending again upon his deportable offense.

The alien must submit his application[16] for suspension during deportation proceedings.[17] The Attorney General or his delegate[18] will then hear evidence presented by the alien and by the Immigration and Naturalization Service. The applicant for suspension has the burden of proving he meets the statutory prerequisites.[19] Once

10. *See* note 35 *infra*.

11. The alien is charged as deportable pursuant to a ground listed in I. & N. Act § 241(a), 8 U.S.C. § 1251(a) (1970). *See generally* Comment, *Suspension of Deportation—A Look at the Benevolent Aspect of the McCarran-Walter Act*, 61 MICH. L. REV. 352, 352-55 (1962).

12. Under I. & N. Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1970), the alien must have resided in the United States for seven years. Section 244 (a)(2) requires a ten-year residence period for offenders in aggravated violation cases.

13. *Id.* § 244(a)(1), 8 U.S.C. § 1254(a)(1).

14. *Id.*

15. *Id.* § 244(a)(2), 8 U.S.C. § 1254(a)(2).

16. The suspension of deportation application must be filed during the deportation hearing on forms I-256A and G-325A and be accompanied by a $50.00 fee. 8 C.F.R. §§ 103.7, 242.17, & 244 (1976).

17. Deportation proceedings are governed by I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1970). The application for suspension must be brought during a section 242(b) proceeding. Yick Chin v. INS, 386 F.2d 935 (9th Cir. 1967). *See generally* Wasserman, *Grounds & Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125, 140-43 (1975).

18. The Attorney General exercises his power through the Immigration and Naturalization Service and in particular through the special inquiry officer (also known as the immigration judge). I. & N. Act § 103(a), 8 U.S.C. § 1103(a) (1970); 8 C.F.R. §§ 103.1, 242.8 (1976). *Special inquiry officer* is defined in I. & N. Act § 101(b)(4), 8 U.S.C. § 1101(b)(4) (1970).

19. Kimm v. Rosenberg, 363 U.S. 405 (1960). *See* Comment, *Application*

he does so, he has a right to have his application for suspension considered on its merits.[20]

If the petition for suspension of deportation is denied,[21] the alien may appeal to the Board of Immigration Appeals, a quasi-judicial body that exists by the grace of the Attorney General.[22] The Attorney General cannot, however, dictate the actions of the Board; he must permit it to exercise independent discretion.[23] If the Board denies the appeal, the alien may either seek reversal by the Attorney General,[24] have a private immigration bill passed in Congress,[25] or seek judicial review.[26] Review is limited to determining whether there was an abuse of discretion.[27]

If the petition for suspension of deportation is granted, final approval must be given by Congress.[28] Congressional approval is au-

for Suspension of Deportation Denied on Alien's Invocation of Fifth Amendment When Questioned About Communist Affiliation, 36 N.Y.U. L. REV. 1027 (1961) (according to the rules of statutory construction, the burden of proof is upon the alien to prove an exception, and the burden is upon the Immigration and Naturalization Service to prove that the alien does not qualify within a proviso).

20. McLeod v. Peterson, 283 F.2d 180, 184 (3d Cir. 1960).

21. A determination may be predicated on confidential information which is not disclosed to the applicant. Jay v. Boyd, 351 U.S. 345 (1956); 8 C.F.R. § 244.3 (1972).

22. The Board of Immigration Appeals exists without statutory authority, and the Attorney General retains power to review its decisions. 8 C.F.R. § 3.1 (1976). *See* Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 27 (1975) (urging the enactment of legislation to make the Board of Immigration Appeals a statutory body).

23. United States *ex rel.* Accardi v. Shaughnessy, 349 U.S. 280 (1955); H.R. REP. No. 1365, 82d Cong., 2d Sess. 35-36 (1952).

24. *See* 8 C.F.R. § 3.1(d)(2) (1976); Comment, *Suspension of Deportation—A Look at the Benevolent Aspect of the McCarran-Walter Act*, 61 MICH. L. REV. 352, 354 (1962).

25. An alien wishing to have deportation proceedings against him dropped may seek to have a bill enacted in Congress. Private relief bills must be introduced by a member of the Senate or of the House of Representatives. Enactment of these bills is rare. For example, 6,266 private bills were introduced in the 91st Congress (1969-70), and only 113 were enacted. 1970 INS, ANNUAL REPORT, Table 56. *See generally* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.12(b) (rev. ed. 1975) (legislative procedure); *Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. 643 (1951).

26. For a discussion of jurisdiction in judicial review, see Kwok v. INS, 392 U.S. 210 (1968); Foti v. INS, 375 U.S. 217 (1963); Butterfield v. INS, 409 F.2d 170 (D.C. Cir. 1969); Marcello v. Attorney General, 347 F. Supp. 898 (D.D.C. 1972); Tai Mui v. Esperdy, 263 F. Supp. 901 (S.D.N.Y. 1966).

27. Penalosa v. INS, 468 F.2d 198 (9th Cir. 1972); Lam Chuen Ching v. INS, 467 F.2d 644 (3d Cir. 1972); Vassiliou v. District Director, 461 F.2d 1193 (10th Cir. 1972); Hamad v. INS, 420 F.2d 645 (D.C. Cir. 1969).

28. I. & N. Act § 244(c), 8 U.S.C. § 1254(c) (1970); *see* Kwai Chiu Yuen v. INS, 406 F.2d 499 (9th Cir. 1969).

tomatic for most deportable offenses unless either House passes a resolution disfavoring the grant.[29] However, for other deportable offenses, an affirmative concurrent resolution is necessary to grant suspension.[30] Absent congressional approval the alien will be deported.[31]

The effect of a grant of suspension of deportation is to extinguish the existing grounds for deportation; they may not be invoked subsequently to exclude or deport the alien.[32] The alien's status is adjusted from deportable to "lawfully admitted for permanent residence."[33] Nevertheless, suspension may be rescinded within five years if the Attorney General determines that the person was not in fact eligible for suspension.[34]

AN ANALYSIS OF THE REQUIREMENTS

The legislative history[35] of the provision reveals a congressional

29. I. & N. Act § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1970).
30. *Id.* § 244(c)(3), 8 U.S.C. § 1254(c)(3).
31. Kwai Chiu Yuen v. INS, 406 F.2d 499 (9th Cir. 1969). When the Attorney General has approved suspension of deportation, denial by Congress is rare. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(f) (rev. ed. 1975).
32. *In re* Paraskos, 10 I. & N. Dec. 491, 492-93 (BIA, 1964).
33. I. & N. Act § 244(a), 8 U.S.C. § 1254(a) (1970). The phrase "lawfully admitted for permanent residence" means that the alien has been accorded the privilege of residing permanently in the United States as an immigrant. *Id.* § 101(a)(20), 8 U.S.C. § 1101(a)(20).
34. *Id.* § 246(a), 8 U.S.C. § 1256(a).
35. Authorization for the Attorney General to suspend deportation for certain classes of aliens was first integrated into the Immigration and Nationality Act of 1917 with the enactment of the Alien Registration Act of 1940. Immigration Act of Feb. 5, 1917, § 19(c), 62 Stat. 1206, *as amended* Alien Registration Act of 1940, ch. 439, tit. II, 54 Stat. 670. This legislation was proposed to remedy the extreme hardship caused by compelling aliens to return abroad merely for the purpose of obtaining an immigration visa, particularly when in many cases the ground for deportation was a technical charge. COMM. ON THE JUDICIARY, REPORT PURSUANT TO S. RES. 137, S. REP. No. 1515, 81st Cong., 2d Sess. 596 (1950). The Immigration and Naturalization officials stated that the law was too stringent in the case of aliens who had established family ties and had had children.

In 1948, the law was amended by the Act of July 1, 1948, Pub. L. No. 863, 62 Stat. 1206, *amending* Immigration and Nationality Act of 1917, 62 Stat. 1206, to broaden the scope of suspension by increasing the availability of the defense to aliens without family ties. COMM. ON THE JUDICIARY, REPORT PURSUANT TO S. RES. 137, S. REP. No. 1515, 81st Cong., 2d Sess. 596 (1950).

In 1952, the Immigration and Nationality Act was substantially revised

intent to ameliorate the hardship caused by deportation.[36] Congress also sought to discourage prevalent abuses in the granting of suspension of deportation by imposing stricter statutory prerequisites.[37] Obtaining relief has been extremely difficult for the alien because courts have narrowly construed the statutory language. However, a strict construction is incompatible with the ameliorative purpose of the suspension of deportation provision.

Suspension of deportation is available to certain aliens who meet the requirements specified in section 244 of the Immigration and Nationality Act.[38] The alien must prove continuous physical presence, good moral character, and hardship. Two general eligibility

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by the McCarran-Walter Act. *Joint Hearings on S. 716, H.R. 2379, H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. (1951). In response to the abuses perpetrated under the liberal provisions of the 1917 Act, the suspension of deportation process was greatly restricted. Gagliano v. INS, 353 F.2d 922, 927 (2d Cir. 1965). Aliens were required to prove exceptional and extremely unusual hardship instead of the prior serious economic detriment. It was believed that the exceptional and extremely unusual revision would result in the disappearance of suspension of deportation grants except by private immigration bills. *Joint Hearings on S. 716, H.R. 2379, H.R. 2816 Before the Subcomms. of the Comms. on the Judiciary*, 82d Cong., 1st Sess. 589 (1951) (statement of Justice Simon H. Rifkind). Indeed, in the years immediately following the 1952 amendment, the number of private bills increased while the number of aliens granted suspension under the statute decreased. Comment, *Suspension of Deportation—A Look at the Benevolent Aspect of the McCarran-Walter Act* 61 MICH. L. REV. 352, 369 (1962). Further, the clause which authorized the Attorney General to suspend deportation was amended to read: "The Attorney General may, in his discretion." The purpose of this amendment was to show that the grant is entirely discretionary. Jay v. Boyd, 351 U.S. 345, 353 (1956) (citing draft legislation which lead to the 1952 Act, and which was prepared by the Immigration and Naturalization Service for the assistance of congressional committees). The Attorney General was granted these broad powers in order to ameliorate hardship and injustice caused by deportation. Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964). However, the Attorney General's discretionary power is limited; he may not capriciously deport an alien solely on the basis of "inconsequential, unwitting infraction of the law." H.R. REP. No. 2096, 82d Cong., 2d Sess. 127 (1952) (statement of the Managers on the part of the House). This limitation stresses the ameliorative purpose of suspension of deportation. The Immigration and Nationality Act was again amended in 1962. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, *amending* 8 U.S.C. § 101 *et seq.* (1970). The amendment reduced the number of categories of eligible aliens from five to two. The hardship requirement was also modified. Aliens who committed ordinary deportable offenses were to show extreme hardship; aliens who committed aggravated offenses were to show exceptional and extremely unusual hardship.

36. *See* note 35 *supra*.

37. H.R. 5678, 82d Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 1682 (1952).

38. I. & N. Act § 244, 8 U.S.C. § 1254 (1970).

categories determine the precise nature of these requirements. The two eligibility categories will be discussed with respect to each of the three statutory prerequisites.

General Eligibility Categories

Section 244 sets out two categories of aliens eligible for relief. Section 244(a)(1) provides relief for aliens deportable for a violation of any law of the United States, except for those violations enumerated in section 244(a)(2).[39] Section 244(a)(2) provides relief for aliens deportable for aggravated offenses,[40] such as conviction of a crime involving moral turpitude,[41] participation in subversive activities,[42] connection with prostitution,[43] or conviction of a narcotics violation.[44] The Act distinguishes the requirements for the two categories of eligible aliens, imposing more stringent requirements upon the latter category.

If an alien is charged with a second-category offense,[45] he must meet the requirements of that category even if he has also been charged with a first-category offense.[46] The deportation charge[47] is all-important in establishing the appropriate eligibility category. Thus, if an alien commits a second-category offense but is *charged*

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39. The enumerated grounds are contained within *id.* § 244(a)(2), 8 U.S.C. § 1254(a)(2).

40. Section 244(a) provides:

> As hereinafter prescribed in this section the Attorney General may, in his discretion, suspend deportation and adjust status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
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> . . . .
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> (2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) . . . .

41. *Id.* § 241(a)(4), 8 U.S.C. § 1251(a)(4).

42. *Id.* § 241(a)(6), 8 U.S.C. § 1251(a)(6).

43. *Id.* § 241(a)(12), 8 U.S.C. § 1251(a)(12).

44. *Id.* § 241(a)(11), 8 U.S.C. § 1251(a)(11).

45. For convenience and clarity, the two categories will be referred to hereinafter as the first category—244(a)(1)—and the second category—244(a)(2).

46. Gagliano v. INS, 353 F.2d 922 (2d Cir. 1965), *cert. denied*, 384 U.S. 945 (1966); Patsis v. INS, 337 F.2d 733 (8th Cir. 1964), *cert. denied*, 380 U.S. 952 (1965).

47. The Immigration and Naturalization Service brings deportation charges against the alien.

deportable for a first-category offense,[48] he must fulfill the first-category requirements.

Although section 244(a)(2) is intended to cover the more aggravated offenses, many in fact are trivial. An alien who fails to comply with section 265,[49] which requires him to register his current address annually with the Attorney General,[50] is subject to deportation. To obtain suspension of deportation, he must meet the same stringent requirements as must criminals and subversives.[51] If suspension is denied, the alien is deported.

That result contradicts the congressional mandate that an alien shall not be deported on the basis of an "inconsequential infraction of the law."[52] Deportation is clearly not proportionate to the offense. As one court has stated:

> We resolve the doubts in favor of the alien. . . . It is a forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe the statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[53]

Continuous Physical Presence

Each category requires continuous physical presence in the United States. Under section 244(a)(1), the alien must prove seven years continuous physical presence. Under section 244(a)(2), he must prove ten years continuous physical presence. The first category measures the residence period from seven years immediately

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48. *In re* Ching, 12 I. & N. Dec. 710, 710 (BIA, 1968):
Since the phrase "is deportable," as used in section 244(a)(2) of the Immigration and Nationality Act, as amended, relates to an alien who has been charged and found deportable under one or more of the paragraphs of section 241(a) of the Act enumerated in section 244(a)(2), respondent, who has been convicted of a narcotics violation but is not charged nor found deportable under section 241(a)(11), is statutorily eligible for suspension of deportation under section 244(a)(1), as amended, where he is charged deportable on grounds encompassed within section 244(a)(1).

49. I. & N. Act § 241(a)(5), 8 U.S.C. § 1251(a)(5) (1970) (failure to comply with *id.* § 265, 8 U.S.C. § 1305).

50. The alien must furnish additional miscellaneous information as required. *Id.* § 265, 8 U.S.C. § 1305. The appropriate forms are available at the post offices and at offices of the Immigration and Naturalization Service in the United States. 8 C.F.R. § 265.1 (1976).

51. Patsis v. INS, 337 F.2d 733, 742 (8th Cir. 1964).

52. H.R. Rep. No. 2096, 82d Cong., 2d Sess. 127 (1952) (statement of the Managers on the part of the House).

53. Fong v. INS, 308 F.2d 191, 195-96 (9th Cir. 1962), *quoting* Douglas, J., in Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

preceding the date of application. Thus, calculation of the seven-year period is relatively simple. Calculation of the ten-year period, however, is more difficult.

Section 244(a)(2) states that the alien must establish residence for ten years "immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." The language is ambiguous concerning the commencement of the ten-year period.[54] It is unclear whether the time period runs from the commission of any deportable offense or from the last offense committed.[55]

54. Gagliano v. INS, 353 F.2d 922, 929 (2d Cir. 1965).

55. One court construed the ten-year period as beginning after the alien ceased participating in the aggravated violation which placed him in the second category. *In re* P—, 6 I. & N. Dec. 795, 799-800 (BIA, 1955). When the deportation charge is predicated on criminal charges, the period runs from the time of conviction. *Id.* Another court concluded that the ten-year period applied to the period immediately preceding the date of the application for suspension. Rassano v. INS, 492 F.2d 220, 225 (7th Cir. 1974).

A focus upon the language of the clause, "an act or the assumption of a status," reveals that the ten-year residence requirement is open to two possible constructions. Gagliano v. INS, 353 F.2d 922, 929 (2d Cir. 1965). The first is a literal one. Thus, the period runs from the time that the alien committed *an* act or assumed *a* status making him deportable, regardless of the ground upon which the deportation order was based. The second construction construes precisely the same words to read *the* act or *the* status. In that case the period runs from the commission of the act or the assumption of the status that actually formed the basis for the deportation order.

That minor language change creates an entirely different calculation of the time period. Under the former construction, an alien who has committed two or more deportable offenses would be able to begin his physical presence at the time the *first* offense was committed. Under the latter construction, the period would run from the time the offense charged in the deportation order was committed.

The courts of appeals are split on the issue. The Ninth Circuit favors a literal reading as more compatible with the congressional purpose to ameliorate hardship. Fong v. INS, 308 F.2d 191, 195 (9th Cir. 1962). The Eighth and Second Circuits follow the expansive construction, considering the ten years a probationary period. Gagliano v. INS, 353 F.2d 922, 929 (2d Cir. 1965); Patsis v. INS, 337 F.2d 733, 742 (9th Cir. 1964); *accord, In re* Wong, 13 I. & N. Dec. 427, 430 (BIA, 1969). Under the latter interpretation an alien would be unable to apply for suspension if he has committed any other offenses within the ten-year period. As a practical matter these considerations may be moot because rarely will the Immigration and Naturalization Service wait ten years to deport an alien who has been convicted

The issue frequently arises as to what constitutes physical presence. Mere maintenance of a domicile or place of abode is insufficient to establish the residence qualifications.[56] The statute requires that the alien, with certain exceptions pertaining to veterans, must have been "physically present in the United States for a continuous period. . . ."[57]

Interpretation of the continuous-physical-presence clause has been troublesome for the courts. The clause requires two elements, physical presence and continuity. As a factual matter, physical presence is easily determined. The alien cannot simply establish a residence and depart from the country.[58] He must actually live in the United States.

Difficulty arises in the proper construction of "continuous." The Immigration and Naturalization Service has argued that a two-hour

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of a criminal offense. *But see* United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975):

> In view of the time which has passed since he committed the deportable offense, we hardly think the INS would be remiss in its duty if it were to wait the few months necessary to afford Santelises an opportunity to apply pursuant to section 1254.

The alien had been in the United States nine years, had served concurrent one year probation sentences without incident, worked, and established strong ties (wife and children who are citizens of the United States).

56. *See* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(d) (rev. ed. 1975).

57. Both section 244(a)(1) and section 244(a)(2) contain this clause. An exception to the continuous-physical-presence requirement is contained in I. & N. Act § 244(b), 8 U.S.C. § 1254(b) (1970), which provides that the requirement of continuous physical presence is inapplicable to an alien who has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States. Further, at the time of enlistment or induction, the alien must have been in the United States and his separation from the service must have been under honorable conditions. *E.g.*, Git Foo Wong v. INS, 358 F.2d 151, 152 (9th Cir. 1966) (active service in the Army for one year, eleven months, and twenty-three days was held insufficient under section 244(b)); *In re* Leong, 10 I. & N. Dec. 274, 276 (BIA, 1963) (continuous physical presence requirement not applicable to veteran); *In re* Peralta, 10 I. & N. Dec. 300, 301 (BIA, 1963) (The exemption can be read in two ways: 1) as waiving "continuous" or 2) as waiving the physical presence requirement. This court opts for the second interpretation, concluding that it comports with congressional intent to deal generously with veterans.); *In re* Woo, 10 I. & N. Dec. 347, 349 (BIA, 1963) (waives good moral character during the time period, but it must be shown between the date the application is filed and the date it is finally adjudicated).

58. Yuen Sang Low v. Attorney General, 479 F.2d 820 (9th Cir. 1973). Parolees are not eligible for suspension of deportation, for they have not "entered" the country. Because of their rather metaphysical presence, they are excludable, not deportable. *See* I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

trip to Mexico interrupts an alien's residence period even though the alien had lived in the United States for fifteen years.[59] The Ninth Circuit rejected the Service's argument, reasoning that a narrow construction would be inconsistent with the policies "underlying this statute not to construe it in a manner which would restrict the ease with which applications for suspension of deportation could be made."[60] The court relied upon the test enunciated in *Wadman v. Immigration and Naturalization Service*:[61] whether the interruption, viewed in balance with its consequences, is meaningfully interruptive of the alien's residence.[62]

If the alien's departure from the United States was involuntary, the continuity of physical presence is broken.[63] The departure is not voluntary if an alien leaves the country while under an order of deportation. Upon his departure the outstanding order of deportation is executed. Thus, the alien is considered to have been deported pursuant to that order. This policy applies despite the brevity and purpose of the exit.[64]

Although the language appears explicit, the continuous physical presence requirement remains subject to confusion and judicial vagaries.

Good Moral Character

In addition to establishing the required continuous physical presence the alien must prove that during the residence period he was and continues to be a person of good moral character.[65] Proving

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59. Git Foo Wong v. INS, 358 F.2d 151, 152 (9th Cir. 1966).
60. *Id.* at 153-54.
61. 329 F.2d 812, 816 (9th Cir. 1964).
62. This test was based on the Supreme Court's ruling in Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). The guideline set forth in *Fleuti* is whether the departure from the United States can be said to be "meaningfully interruptive" of the alien's residence. *Id.* In order to determine intent, such factors as length of time gone, purpose of the visit, and procurement of travel documents are relevant. Innocent, casual, and brief excursions outside this country are not meaningfully interruptive. Under this test, even a six-month absence was held not to bar relief as a matter of law. Toon-Ming Wong v. INS, 363 F.2d 234, 236 (9th Cir. 1966). *See also In re* Silva, I.D. No. 2457 (BIA, Dec. 4, 1975) (following *Fleuti*).
63. Barragan-Sanchez v. Rosenberg, 471 F.2d 758, 760 (9th Cir. 1972).
64. *In re* Palma, I.D. No. 2242 (BIA, Nov. 9, 1973).
65. I. & N. Act § 244(a)(1)(2), 8 U.S.C. § 1254(a)(1)(2) (1970).

good moral character may be difficult for the alien because the conduct which constitutes good moral character is unclear. The Act[66] lists the activities[67] which, if engaged in, would preclude a finding of good moral character. However, the listed activities are not explicitly defined[68] and thus pose additional problems. The combination of imprecise definition and the alien's burden of proving good moral character[69] operates as a barrier to establishing statutory eligibility.

Although it is unclear what good moral character is, the courts have enunciated what it is not. Conviction of crimes involving moral turpitude,[70] confinement in jail for more than 180 days,[71] procuring an abortion,[72] testifying falsely to avoid deportation,[73] petty larceny,[74] sex offenses,[75] adultery,[76] and burning personal prop-

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66. *Id.* § 101(f), 8 U.S.C. § 1101(f).

67. Activities and conditions listed in section 101(f) are:
1) Habitual drunkard;
2) Adultery;
3) Member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 212(a) of this Act; or paragraphs (9), (10), and (23) therein;
4) Principal income is from illegal gambling activities;
5) Convicted of two or more gambling offenses;
6) Given false testimony for the purpose of obtaining benefits under this Act;
7) Confined in a penal institution 180 days or more;
8) Convicted of the crime of murder.

Congress believed that by providing who shall not be considered of good moral character a greater degree of uniformity would be obtained in the application of "good-moral-character" tests. S. REP. No. 1137, 82d Cong., 2d Sess. 6 (1952).

68. *See* note 67 *supra.*

69. Kimm v. Rosenberg, 363 U.S. 405 (1959).

70. Giaimo v. Pederson, 193 F. Supp. 527 (N.D. Ohio 1960) (burglary, receiving stolen property).

71. United States *ex rel.* Martin-Gardoqui, 367 F.2d 861 (2d Cir. 1966).

72. Diric v. INS, 400 F.2d 658 (9th Cir. 1968). For the change in approach that has occurred since the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), see *In re* Morales & Salinas, files A-10721162 & A.-1304267 (BIA, 1973 & 1974).

73. Bufalino v. Holland, 277 F.2d 270 (3d Cir. 1960). In spite of testimonials and affidavits from others attesting to his good moral character, the alien was found not to possess good moral character because he had testified falsely in orde rto avoid deportation. *See also In re* Namio, I.D. No. 2221 (BIA, Aug. 17, 1973).

74. Carbonell v. INS, 460 F.2d 240 (2d Cir. 1972).

75. Tovar v. INS, 368 F.2d 1007 (9th Cir. 1966). For a discussion of the extent to which sex offenses preclude a finding of good moral character, see Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9, 25-40 (1976).

76. One enumerated activity which precludes a finding of good moral

erty[77] have been recognized as acts which warrant a determination of bad moral character. However, receiving stolen property with-

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character is adultery.

> For the purposes of this Act, no person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is or was one who during such period has committed adultery.

I. & N. Act § 101(f)(2), 8 U.S.C. § 1101(f)(2) (1970). That term has been subjected to many different interpretations. Early cases in the area held that even a technical adultery would bar a finding of good moral character. Dickhoff v. Shaughnessy, 142 F. Supp. 535, 540 (S.D.N.Y. 1956). A technical adultery is committed when the alien lives with a person he in good faith considers his spouse, but who legally is not because of a technicality. *E.g.*, in one case plaintiff obtained a Mexican divorce and subsequently remarried. Because the Mexican divorce was void, his second marriage was also void. Thus, cohabitation with his second wife amounted to adultery. *Id.* at 538. Definitions of adultery have been developed through case law. Under the 1917 Act, one who willfully and openly commenced and continued an adulterous relationship without extenuating circumstances was guilty of adultery. Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951). But if extenuating circumstances existed, and the adulterous relationship resulted in a "faithful, stable and long-continuing relationship," the parties, although guilty of adultery, were not denied a finding of good moral character. Petitions of Rudder, 159 F.2d 695, 697 (2d Cir. 1947).

The definitions of adultery have since become more liberal. Isolated incidents of sexual intercourse between a married person and another not his or her spouse will not constitute adultery. Rather, the conduct must amount to cohabitation. Wadman v. INS, 329 F.2d 812, 816 (9th Cir. 1964). That interpretation was recently expanded, and as a consequence a married man's cohabitation with an unmarried woman in his wife's absence was not adultery which would preclude a finding of good moral character. Kim v. INS, 514 F.2d 179, 181 (D.C. Cir. 1975). The court reasoned that adultery within the meaning of the Immigration and Nationality Act was "extramarital intercourse which tends to destroy an existing viable marriage, and which would represent a threat to public morality." *Id.* at 181. This case might be restricted to its facts. The husband and wife were living in different countries when the cohabitation occurred. However, it does represent a change in emphasis. The courts are looking less to the act itself, and more to its consequences and circumstances. Although this ruling represents a liberal attitude toward adultery, the prevailing standard remains the *Wadman* cohabitation test.

While the definition of adultery reflects liberal moral standards, good moral character remains difficult for the alien to prove. The burden of proof rests upon the alien to show he did *not* commit adultery. *See generally* 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940). That burden effectively undercuts any grant of definitional liberality. For example, even when an alien was not cohabiting adulterously, the court found she had not overcome the adulterous implications of the fact she had three children born out of wedlock. Aalund v. Marshall, 461 F.2d 710, 713 (5th Cir. 1972).

77. Tadashi Miyaki v. Robinson, 257 F.2d 806 (7th Cir. 1958) (his own automobile).

out knowledge that it is stolen does not involve moral turpitude.[78] Thus, good moral character has defied consistent definition.

The alien may be denied a finding of good moral character for other reasons. An examination of the alien's current sources of income, tax returns, activities, friends, and associates may influence denial.[79] If an alien invokes the fifth amendment, suspension is denied on the ground that he failed to prove good moral character.[80] Justice Douglas vigorously criticized this ruling, stating that the function of the fifth amendment is to protect "innocent men that might be ensnared by ambiguous circumstances."[81]

Determinations of good moral character have become complex and unpredictable, subject to prejudices, ambiguities, and changing mores. Courts have forgotten the guidelines set forth in the legislative history.[82] The alien's life is scrutinized, and the slightest flaw is taken as representative of his moral state. The alien is expected to rise above the common mass and required to be nothing less than perfect during the physical-presence period.

Hardship

The final affirmative requirement the alien must satisfy is that deportation would result in hardship to the alien or to his spouse, parent, or child[83] who is a citizen of the United States or an alien lawfully admitted for permanent residence. The degree of hardship which must be demonstrated depends upon the alien's eligibility category. Section 244(a)(1) requires that the alien show "extreme

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78. *In re* Patel, I.D. No. 2356 (BIA, Mar. 20, 1975). Moral turpitude has been defined as "an act of baseness and depravity which is *per se* morally reprehensible and intrinsically wrong or *malum in se.*" *In re* P—, 6 I. & N. Dec. 795, 798 (BIA, 1955).

79. Gambino v. INS, 419 F.2d 1355, 1358 (2d Cir. 1970).

80. Kimm v. Rosenberg, 363 U.S. 405 (1960) (asked if he was a Communist); *In re* Marquez, I.D. No. 2352 (BIA, Mar. 11, 1975) (In 1972 the alien was stopped for a traffic violation and had $54,000 in his possession. When asked about this occurrence during the deportation proceeding, he invoked the fifth amendment.).

81. Kimm v. Rosenberg, 363 U.S. 405, 410 (1960) (dissenting opinion):

> What the case comes down to is simply this: invocation of the fifth amendment creates suspicion and doubts that cloud the alien's claim of good moral character.

82. The legislative history indicates Congress did not intend that the alien possess moral excellence. Rather, good moral character was equated with that demonstrated by the average person. COMM. ON THE JUDICIARY, REPORT PURSUANT TO S. RES. 137, S. REP. No. 1515, 81st Cong., 2d Sess. 596 (1950).

83. The term *child* is restrictively defined in the Act. I. & N. Act § 101 (b)(1), 8 U.S.C. § 1101(b)(1) (1970).

hardship."[84] Section 244(a)(2) mandates "exceptional and extremely unusual hardship" be shown.[85]

Generally, economic hardship alone is insufficient to compel a finding of hardship as required by the statute.[86] Thus, hardship is often impossible for the alien to demonstrate because economic detriment or deprivation of a life in the United States is not enough to qualify. Frequently those are the major considerations for the alien.[87] The Board of Immigration Appeals has considered the following criteria in determining hardship: length of residence, the manner and purpose of entry into this country, the possibility of obtaining a visa abroad, the financial burden of going abroad to obtain a visa, and the health and age of the alien.[88] Although none of

84. *Id.* § 244(a)(1), 8 U.S.C. § 1254(a)(1):

> [A]nd is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child . . . .

85. *Id.* § 244(a)(2), 8 U.S.C. § 1254(a)(2):

> [A]nd is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship . . . .

The 1952 Act originally required exceptional and extremely unusual hardship for all eligible aliens. This requirement was aimed at preventing aliens from "deliberately flouting" immigration laws in order to have access to an administrative remedy. This practice was unfair to those aliens who waited abroad for quota numbers and who were deprived of their quota numbers in favor of aliens who abused the liberal system. Further, "[t]his practice is threatening our entire immigration system and the incentive for the practice must be removed." 2 U.S. CODE CONG. & AD. NEWS, 82d Cong., 2d Sess. 1718 (1952). However, this requirement was criticized as being too stringent for

> [r]arely has there been a balder statement of a national purpose to be cruel. It is bad administration to require the Attorney General to make a distinction so intellectually imponderable, so obnoxious to normal impulses of sympathy, and so ruthlessly regardless of the reasonable expectations of the alien resident family.

Hearings Before the President's Comm. on Immigration & Naturalization, 82d Cong., 2d Sess. 1576 (1952) (statement of Professor Louis J. Jaffe, Professor of Administrative Law, Harvard Law School).

86. Pelaez v. INS, 513 F.2d 303 (5th Cir. 1975); Nishikage v. INS, 443 F.2d 904 (9th Cir. 1971); Yeung Ying Cheung v. INS, 422 F.2d 43 (3d Cir. 1970).

87. *See, e.g.*, Pelaez v. INS, 513 F.2d 303, 304 (5th Cir. 1975); Yong v. INS, 459 F.2d 1004 (9th Cir. 1972); Soo Yuen v. INS, 456 F.2d 1107 (9th Cir. 1972); Nishikage v. INS, 443 F.2d 904 (9th Cir. 1971); Fong Choi Yu v. INS, 439 F.2d 719 (9th Cir. 1971); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968); *In re* Uy, 11 I. & N. Dec. 159 (BIA, 1965).

88. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9 (rev. ed. 1975).

these elements alone is conclusive proof, the existence of several may compel a finding of hardship.

Additional factors which influence a finding of hardship are the amount and quality of education the alien has received,[89] his business enterprises,[90] and his family ties.[91] Although the statute does not specify the existence of family ties as a prerequisite to establishing hardship, the lack of ties weighs heavily in the determination. A claim of political persecution may be hardship to the alien, but it is accorded no importance.[92]

The test formulated by Congress to determine exceptional and extremely unusual hardship prohibits deportation of an alien if it would be "unconscionable."[93] However, courts have denied relief in numerous "unconscionable" situations. A striking example occurs when an educated alien is forced to return to his native country where he will be unable to use his talents.[94] Such a result is considered merely an economic disadvantage. Clearly, the evaluation of an individual's talents runs deeper than economics. A further example of an unconscionable situation occurs when the parent of a citizen-child is deported. The deportation of a parent of a United States citizen-child often compels the child to leave the country with his parent.[95] The consequences to the child are that he may be disadvantaged economically, educationally, socially, and physically.[96] Yet, those disadvantages are not considered extreme hardships.[97]

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89. *In re* Sangster, 11 I. & N. Dec. 309 (BIA, 1965) (being well-educated works to the alien's disadvantage).

90. *In re* Lum, 11 I. & N. Dec. 295 (BIA, 1965) (worked to the alien's advantage in this case, but usually business enterprises would be considered "economic" detriment, not hardship).

91. *E.g.*, Soo Yuen v. INS, 456 F.2d 1107 (9th Cir. 1972); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960); Pimental-Navarro v. Del Guercio, 256 F.2d 877 (9th Cir. 1958); *In re* Uy, 11 I. & N. Dec. 159 (BIA, 1965); *In re* Sangster, 11 I. & N. Dec. 309 (BIA, 1965).

92. Cheng Fu Sheng v. INS, 400 F.2d 678 (9th Cir. 1968), *cert. denied*, 393 U.S. 1054 (1969); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). *See also* Gena v. INS, 424 F.2d 227 (5th Cir. 1970).

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

94. Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968).

95. The law does not state this, but when a child's parent is deported, the child ordinarily has no choice but to leave with his parent.

96. *In re* Kim, I.D. No. 2318 (BIA, Aug. 22, 1974) (Roberts, Chairman, dissenting).

97. Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1972); *In re* Kim, I.D. No. 2318 (BIA, Aug. 22, 1974).

The decisions relating to hardship are devoid of consistency. However, it is clear that aliens in truly "hardship" situations are being denied the relief of suspension of deportation.

Exercise of Discretion

Once the alien has fulfilled the necessary requirements, his application may nevertheless be denied because "[s]uspension of deportation is a matter of discretion and of administrative grace, not mere eligibility; discretion must be exercised even though the statutory prerequisites have been met."[98] While statutory eligibility does not in itself compel the grant of suspension, it triggers the exercise of discretion by the Attorney General.[99]

The Attorney General's discretionary powers are broad. He may deny relief without disclosure of the rationale for his decision.[100] His discretion is virtually "unfettered."[101] The only limitation is that discretion may not be exercised capriciously or arbitrarily.[102]

98. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1956). *See, e.g.*, Fernandez-Gonzalez v. INS, 347 F.2d 737 (7th Cir. 1965). *See generally* Note, *Possible Limitations on the Discretionary Powers of the Immigration & Naturalization Service to Order Deportation*, 4 N.Y.U. J. INT'L L. & POL. 459, 461 (1971).

99. Asimakopoulos v. INS, 445 F.2d 1362, 1365 (9th Cir. 1971). For a discussion of the discretionary powers under the immigration laws, see Roberts, *The Exercise of Administrative Discretion under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).

100. Jay v. Boyd, 351 U.S. 345, 347-48 (1956) (use of confidential information is authorized by the statute). *But see id.* at 376 (Douglas, J., dissenting): "A hearing is not a hearing in the American sense if faceless informers or confidential information may be used to deprive a man of his liberty. That kind of hearing is so un-American that we should lean over backwards to avoid imputing to Congress a purpose to sanction it under section 244." *See also* Case Comment, 59 W. VA. L. REV. 199 (1957).

101. Jay v. Boyd, 351 U.S. 345, 357-58 (1956): "[S]uspension of deportation is not given to deportable aliens as a right, but, by Congressional direction, it is dispensed according to the unfettered discretion of the Attorney General." *See generally* United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950) (Hand, J.) ("The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's power to pardon a convict."); Note, *Possible Limitations on the Discretionary Powers of the Immigration & Naturalization Service to Order·Deportation*, 4 N.Y.U. J. INT'L L. & POL. 459, 462 (1971).

102. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1956). *See, e.g.*, Carrasco-Favela v. INS, 445 F.2d 865 (9th Cir. 1971).

However, the meaning of this limitation is unclear. Discretion has been unfavorably exercised for many reasons;[103] among them are material misrepresentation to immigration officials, fraudulent procurement of passports, birth certificates, or border crossing cards, conviction of murder, lack of family ties, concealment of wife and child, and use of dilatory tactics.

The factors considered for statutory eligibility and discretion often overlap. Consequently, when the Attorney General grants suspension, isolating the factors that influenced his decision is difficult. In exercising discretion, he may consider length of residence,[104] family ties,[105] hardship, and good moral character. Fulfillment of statutory requirements also hinges on these factors.

Reliance upon case law as precedent to determine when discretion will be favorably exercised is precarious because of its inconsistency. Discretion permits the Attorney General flexibility to make decisions based on the circumstances of each case rather than to force adherence to previously formulated guidelines.[106]

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103. Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975) (no abuse of discretion because there was no evidence of good moral character; the alien contended that sufficient information existed in his file to support a favorable finding); Chung Wook Myung v. District Director, 468 F.2d 627 (9th Cir. 1972) (no abuse of discretion); Penalosa v. INS, 468 F.2d 198 (9th Cir. 1972) (material misrepresentation); Strantzalis v. INS, 465 F.2d 1016 (3d Cir. 1972) (deceptive measures to avoid compliance with the law—*i.e.*, failure to file address card, assumption of a false name, perjury); Schieber v. INS, 427 F.2d 1019 (2d Cir. 1970) (no abuse even with knowledge that alien would face political persecution); Gambino v. INS, 419 F.2d 1355 (2d Cir. 1970) (failure to furnish information); Hamad v. INS, 420 F.2d 645 (D.C. Cir. 1969) (fraudulent passport, birth certificate, border crossing card, perjury, illegal entry three times); Ruiz v. INS, 410 F.2d 382 (6th Cir. 1969) (convicted of murder in Mexico, drunk and disorderly convictions); Goon Wing Wah v. INS, 386 F.2d 292 (1st Cir. 1967) (false documents, evasive testimony relating to family, dilatory tactics); Wong Wing Hang v. INS, 360 F.2d 715 (2d Cir. 1966) (concealment of wife and children); Fernandez-Gonzalez v. INS, 347 F.2d 737 (7th Cir. 1965) (falsified registration cards); United States v. Sweet, 235 F.2d 801 (8th Cir. 1956) (narcotics violation); *In re* Riccio, I.D. No. 2463 (BIA, Jan. 13, 1976) (method by which an alien has prolonged his stay in this country is a relevant factor). Suspension has also been denied for past membership in the Communist Party. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Bong Youn Choy v. Barber, 162 F. Supp. 629 (N.D. Cal. 1958).

104. Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956). *But see* United States v. Sweet, 235 F.2d 801 (8th Cir. 1956).

105. Melachrinos v. Brownell, 230 F.2d 42, 44 (D.C. Cir. 1956). *See* Lee Fook Chuey v. INS, 439 F.2d 244, 250 (9th Cir. 1971). Also, underlying each decision must be the knowledge that a grant of suspension reduces the immigration quota number of the alien's native country, and thus might exclude the entry of legal aliens waiting for a quota number. *See generally* Note, *The Special Inquiry Officer in Deportation Proceedings*, 42 VA. L. REV. 803 (1956).

106. *See generally* Comment, *Discretion Under the Immigration Laws:*

The grant of discretion to the Attorney General was intended by Congress to be a humanitarian power to relieve hardship in deportation cases.[107] Yet, courts have emphasized the congressional purpose to limit grants of suspension.[108] Discretion as it is presently administered is merely another hurdle for the alien to surmount, and challenging the undefined power of the Attorney General is difficult.

THE CONTIGUOUS-COUNTRY EXCEPTION

Section 244(f)(3)[109] bars aliens who are natives of contiguous countries or adjacent islands[110] from obtaining suspension of deportation. However, a proviso within that exception allows certain of those aliens the benefit of suspension of deportation.[111] In order to

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May the Attorney General Adopt Rules or Must He Follow the "Crooked Cord" of Ad Hoc Proceedings?, 1972 UTAH L. REV. 294, 298 (1972).

107. Jay v. Boyd, 351 U.S. 345, 361 (1956) (Warren, C.J., dissenting):

> In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play in both our judicial and administrative processes.
>
> In the interest of humanity, the Congress, in order to relieve some of the harshness of the immigration laws, gave the Attorney General discretion to relieve hardship in deportation cases. I do not believe it was "an unfettered discretion," as stated in the opinion. It was an administrative discretion calling for a report to Congress on the manner of its use.

108. *Id.* at 356. *See, e.g.*, United States v. Sweet, 235 F.2d 801 (8th Cir. 1956).

109. I. & N. Act § 244(f)(3), 8 U.S.C. § 1254(f)(3) (1970). Section 244 (f) also contains two other exceptions: (1) aliens who entered the United States as crewmen subsequent to June 30, 1964 (*see* Siang Ken Wang v. INS, 413 F.2d 286 (9th Cir. 1969)); (2) aliens who were admitted to the United States pursuant to section 101(a)(15)(J) (teachers, exchange visitors) or who have acquired such status after admission to the United States (*see In re* Mombo, I.D. No. 2301 (BIA, July 2, 1974)).

110. I. & N. Act § 101(b)(5), 8 U.S.C. § 1101(b)(5) (1970):

> The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, the Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory [*sic*] or possessions in or bordering on the Caribbean Sea.

111. Section 244(f)(3) provides that no provision of this section shall be applicable to an alien who:

> (3) is a native of any country contiguous to the United States or of any adjacent island named in section 101(b)(5): *Provided*, That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

qualify under the proviso, an alien must establish his ineligibility to receive a "nonquota immigrant visa."[112]

The requirements of the proviso are unclear. The statute utilizes the term "nonquota immigrant." Yet it has been successfully argued that the presence of that term was an oversight in the 1965 statutory revision and that "nonquota immigrant" should read "special immigrant."[113] Currently, an alien can qualify under the proviso to section 244(f) (3) only if he is ineligible for a special immigrant visa. That departure from the clear language of the statute is highly significant in its effect upon the alien.

Under both interpretations it is sufficient for the alien to demonstrate that he is ineligible to receive an immigrant visa. Under the special-immigrant interpretation presently adopted by the courts, an alien must demonstrate he is ineligible to receive a special immigrant visa. *Special immigrant* is defined in the Act as "an immigrant who was born in any independent foreign country of the

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112. *Id.* For a discussion of the procedure for obtaining an immigrant visa, see Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193 (1976).

113. A footnote at page 81 in the publication of the Immigration and Nationality Act printed for the use of the Committee on the Judiciary, House of Representatives (1969), prepared and annotated by Garner J. Cline, Counsel, Committee on the Judiciary, House of Representatives, indicates that *nonquota* should read *special*. In *In re* Brandi, I.D. No. 2325 (BIA, Sept. 17, 1974), the court discussed this matter, concluding that:

> By the Act of October 3, 1965 (70 Stat. 911) the definition of "special immigrant" was substituted for the definition of "nonquota immigrant.". . . By section 21(e) of the Act of October 3, 1965 . . . provision was made for a numerical limitation of 120,000 annually on special immigrants within the meaning of section 101(a) (27) (A), exclusive of special immigrants who are immediate relatives of [*sic*] the United States beginning July 1, 1968 unless the Congress enacted legislation prior to that date.
>
> After careful analysis of the statutory changes made to section 101(a) (27) of the Act, we are convinced that it was the intent of Congress to substitute the term "special immigrant" for the term "nonquota immigrant," since the quota limitation for special immigrants was to begin in 1968 and then only if no legislation was enacted by Congress prior thereto. The failure on the part of Congress to change the language in the proviso to section 244(f) (3) of the Act from "nonquota immigrant" to "special immigrant" when the Western Hemisphere quota limitations took effect in 1968 did not in any way alter the Congressional intent with respect to aliens from Western Hemisphere countries. Our decisions interpreting section 244(f) (3) indicate that within the context of this section "nonquota immigrant" and "special immigrant" are synonymous.

See note 114 *infra*. The Act was amended by Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, *amending* Immigration and Nationality Act, 8 U.S.C. § 101 *et seq.* (1970).

Western Hemisphere or in the Canal Zone."[114] To obtain an immigrant visa the special immigrant must be admissible.[115] One requirement for admissibility is that the alien acquire labor certification from the Secretary of Labor.[116] However, an alien from a con-

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114. I. & N. Act § 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A) (1970). As this Comment was going to press, Congress enacted a bill to amend the Immigration and Nationality Act. Immigration & Nationality Act Amendments of 1976, Pub. L. No. 94-571 (Oct. 20, 1976) [hereinafter cited as 1976 Amendment]. The purpose of the bill, H.R. 14535, 94th Cong., 2d Sess. (1976), was to equalize treatment of the Eastern and Western Hemispheres. H.R. REP. No. 94-1553, 94th Cong., 2d Sess. 1 (1976). Included within the scope of the bill is a change in I. & N. Act § 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A) (1970). That section is amended by striking out subparagraph (A), and by redesignating subparagraphs (B) through (E) as subparagraphs (A) through (D). 1976 Amendment § 7. Thus, the definition of *special immigrant* employed in this Comment is obsolete. As of January 1, 1977, Western Hemisphere aliens will be included within a quota system. *See id.* § 2, *amending* I. & N. Act § 201(a), 8 U.S.C. § 1151(a) (1970). However, the new law does not go into effect until January 1, 1977. *See* 1976 Amendment § 10. Even then, existing law will apply to those aliens who applied for suspension of deportation prior to the effective date of the amended Act. *See id.* § 9.

The 1976 amendments do not discuss the contiguous-country exception. Thus, inequities will still exist in the treatment of Western Hemisphere countries contiguous to the United States despite the avowed policy of the 1976 amendments. For a discussion of the 1976 amendments, *see Afterword: The Immigration & Nationality Act Amendments of 1976*, 14 SAN DIEGO L. REV. 326 (1976).

Natives of an adjacent island which is a colony of a foreign state are eligible for suspension of deportation under the proviso because such aliens, by definition, are not eligible for a special immigrant visa. *In re* Piggott, I.D. No. 2329 (BIA, Oct. 30, 1974). *But see In re* Longsworth, I. & N. Dec. 225 (BIA, 1969).

115. Thirty-one grounds for excludability are listed in I. & N. Act § 212(a), 8 U.S.C. § 1182(a) (1970).

116. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). All aliens seeking a visa, not only special immigrants, must obtain labor certification unless specifically exempted. The labor certification requirement is specifically required of special immigrants. *Id.* § 101(a)(27)(A), 8 U.S.C. § 1101(a)(27)(A). *See In re* Velasquez-Hernandez, 11 I. & N. Dec. 781 (BIA, 1966). For a thorough discussion of labor certification, see Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

The labor certification requirement has been amended by the 1976 amendments. *See* note 114 *supra.* Section 212(a)(14) has been amended by deleting the following language:

> to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence).

For a detailed discussion of the labor certification requirement as affected

tiguous country[117] is exempt from the labor certification requirement if he is the parent, spouse, or child of a United States citizen or of a permanent resident alien.[118] Thus, if an alien is eligible for a special immigrant visa, he is rendered ineligible for suspension of deportation within the proviso of section 244(f) (3).

Under the nonquota interpretation an alien would have to prove only that he is ineligible for a nonquota immigrant visa. The nonquota interpretation can be argued in two ways. The alien can argue that the statute should be read literally. The statute says "nonquota," and because nonquota visas are no longer authorized,[119] an alien clearly cannot qualify for one. However, that argument has been rejected as inconsistent with congressional intent.[120]

A second argument is that the term "nonquota immigrant" refers to aliens who are excluded from the numerical quota limitations. Among those aliens exempt from quota restrictions are immediate relatives of United States citizens.[121] An immediate relative is an alien who is the spouse, parent, or child of a United States citizen, provided that in the case of an alien parent, the citizen-child is over twenty-one years of age.[122] For example, if an alien has a child under twenty-one years of age, the alien cannot qualify as an immediate relative. Therefore he would be eligible for suspension of deportation because he is ineligible for a nonquota visa.

Special immigrants who are not immediate relatives constitute an example of aliens who would fall within the proviso under the nonquota interpretation, but who would not fall within the proviso under the special-immigrant interpretation. An alien who is the parent of a citizen is exempt from the requirement of labor certification[123] and is eligible for a special immigrant visa. Thus, the interpretation given to the statute may be crucially significant to the contiguous-country alien, for an alien may or may not qualify for suspension of deportation depending upon the interpretation adopted.

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by that change, and of possible ramifications, *see Afterword: The Immigration & National Act Amendments of 1976*, 14 SAN DIEGO L. REV. 326 (1976).

117. This applies to all special immigrants. I. & N. Act § 212(a) (14), 8 U.S.C. § 1182(a) (14) (1970).

118. *Id. See In re* Brandi, I.D. No. 2325 (BIA, Sept. 17, 1974); *In re* Padilla-Munoz, 11 I. & N. Dec. 836 (BIA, 1966). *See* note 116 *supra.*

119. *See* note 113 *supra.*

120. *In re* Brandi, I.D. No. 2325 (BIA, Sept. 17, 1974).

121. I. & N. Act § 201(a), 8 U.S.C. § 1151(a) (1970).

122. *Id.* § 201(b), 8 U.S.C. § 1151(b).

123. *Id.* § 212(a) (14), 8 U.S.C. § 1182(a) (14). *See* note 116 *supra.*

Although the proviso to the contiguous-country exception offers the appearance of relief, in practice it works a great hardship upon aliens who are natives of contiguous countries. Regardless of hardship, a contiguous-country alien must show ineligibility for an immigrant visa in order to be eligible for suspension. In one case, suspension of deportation was denied to Mexican aliens who had seven citizen-children.[124] As parents of United States citizens, they were exempt from the labor certification requirements. They were also not within any of the other grounds for excludability. Accordingly, they were eligible to receive a visa but had to wait fourteen months for assignment of a quota number.[125] The court, denying suspension of deportation, held the time delay was an element of extreme hardship, but not of ineligibility.[126] It has also been argued that a backlog of visa applications for two to four years is the functional equivalent of ineligibility. However, courts have refused to equate a time delay with ineligibility.[127]

To be ineligible for an immigrant visa, the alien must demonstrate he is excludable.[128] Aliens who are likely to become public charges are among those who are excludable.[129] It logically follows that if an alien has been a public charge, he would be ineligible to receive a special immigrant visa. That ineligibility should place him within the ambit of the contiguous-country proviso, qualifying him for suspension of deportation. Logical as this approach is, it has not been followed. For example, a Mexican native claimed she was ineligible to obtain a special immigrant visa because she was a welfare recipient.[130] The Board of Immigration Appeals denied relief, concluding that the sole fact that an alien has been on welfare does not establish she is likely to become a public charge. Rather, such a prediction must be based on the totality of the circumstances.[131]

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124. *In re* Najar, 13 I. & N. Dec. 737 (BIA, 1971).
125. The priority date for visas issued in July 1976, was March 1, 1974, a wait of two years, four months. Telephone conversation with the Immigration and Naturalization Service, San Diego, Cal., July 15, 1976.
126. *In re* Najar, 13 I. & N. Dec. 737 (BIA, 1971).
127. Blanco-Dominguez v. INS, 528 F.2d 832 (9th Cir. 1975).
128. I. & N. Act § 212(a), 8 U.S.C. § 1182(a) (1970), lists thirty-one general classes of aliens ineligible to receive visas.
129. *Id.* § 212(a)(15), 8 U.S.C. § 1182(a)(15).
130. *In re* Perez, I.D. No. 2331 (BIA, Nov. 12, 1974).
131. *Id.* The immigration judge held that she was ineligible to receive a special immigrant visa but denied relief because of discretion. The Board

The successful establishment by the alien of ineligibility for a special immigrant visa does not obviate the need to satisfy the other requirements for suspension of deportation. Once the alien acquires eligibility within the proviso, he must fulfill the other section 244 (a) (1) requirements of physical presence, good moral character, and hardship.[132] The alien must qualify under section 244(f) (3) but claim relief under section 244(a) (1). If the alien can establish these affirmative requirements, he becomes subject to discretionary approval by the Attorney General. Because the alien must establish ineligibility in order to receive a special immigrant visa, he must show that he falls within one of the excludable categories. However, the evidence of excludability may work against the alien when he argues for a favorable exercise of discretion. Also, depending upon the excludability ground, he may be precluded from proving good moral character.

Section 244(f) (3) frequently denies relief to natives of the Western Hemisphere and deprives them of the opportunity to attain permanent residence. Suspension is available to immigrants from all other parts of the world, but the contiguous-country alien who is otherwise fully qualified for suspension faces discrimination. This discrimination against aliens of contiguous countries should be eliminated.[133]

VOLUNTARY DEPARTURE

In addition to suspension of deportation, section 244 contains another form of discretionary relief—voluntary departure. Section 244(e)[134] authorizes the Attorney General to grant voluntary departure in lieu of deportation to aliens who can prove good moral character for five years immediately preceding their application. Any alien, except those exempted in section 244(a) (2), may ap-

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of Immigration Appeals dismissed the appeal, stating that she was not likely to become a public charge. The record showed that the alien was in good health, twenty-eight years old, and could remedy her welfare situation by working.

An interesting situation arises when an alien who has been deported tries to re-enter the United States. The United States Consul may deny a visa on the ground that the alien will become a public charge. Yet, the alien was denied suspension because the Immigration and Naturalization Service did not consider the alien ineligible for a visa because he was a public charge.

132. Gregor v. INS, 351 F.2d 290, 291 (9th Cir. 1965).

133. Legislation to eliminate the contiguous-country exception is pending. H.R. 8713, 94th Cong., 1st Sess. (1975). *See also* H.R. REP. No. 94-506, 94th Cong., 1st Sess. 11 (1975).

134. I. & N. Act § 244(e), 8 U.S.C. § 1254(e) (1970).

ply.[135] The alien must establish that he is willing and has the immediate means to depart promptly.[136]

The application for voluntary departure is usually submitted during deportation proceedings as an alternative request for relief in the event suspension of deportation is denied. Suspension of deportation and voluntary departure may be incompatible in terms of proof. In establishing hardship for suspension of deportation, the alien may have testified he has no money. However, his testimony will serve to preclude the alien's voluntary departure because he will be unable to prove he has the immediate means to depart.[137]

Voluntary departure is strategically important to the alien because it facilitates his future return to the United States, avoids the stigma of deportation,[138] and extends the alien's stay in this country. Also, through the implementation of other administrative procedures, the alien can delay his deportation to attain the residence requirements which will make him eligible for suspension of deportation. However, these delaying tactics are disfavored by the courts.[139] As a result, the Immigration and Naturalization Service revoked its generous policy of granting voluntary departure to those who have remained in the United States by means of "obviously dilatory actions."[140] The Board of Immigration appeals now demands that an alien demonstrate the "existence of compelling reasons or circumstances for his failure to depart within the original time allotted."[141] The purpose of constricting the grant is to prevent additional delays in the deportation process.[142]

Voluntary departure is beneficial both to the alien and to the Immigration and Naturalization Service. The alien avoids deportation,

135. Voluntary departure has been extended to Western Hemisphere natives. *In re* Anaya, I.D. No. 2243 (BIA, Nov. 23, 1973). The Attorney General does not have discretion to grant voluntary departure to an alien convicted of a narcotics offense. Arias-Uribe v. INS, 466 F.2d 1198 (9th Cir. 1972).

136. 8 C.F.R. § 244.1 (1976). *See* United States *ex rel.* Ling Shing v. Esperdy, 305 F. Supp. 1106 (S.D.N.Y. 1969).

137. Diric v. INS, 400 F.2d 658 (9th Cir. 1968). *See also* Shkukani v. INS, 435 F.2d 1378 (8th Cir. 1971).

138. Tzantarmas v. United States, 402 F.2d 163, 165 n.1 (9th Cir. 1968).

139. Fan Wan Keung v. INS, 434 F.2d 301, 303 (2d Cir. 1970); *see* Paul v. INS, 529 F.2d 1278 (1st Cir. 1976).

140. 8 C.F.R. § 243.1(a) (1976).

141. *In re* Onyedibia, I.D. No. 2307 (BIA, July 25, 1974).

142. *Id.*

and the Government is spared his transportation expenses. However, the system is jeopardized by its use as a delaying tactic. Understandably, the alien who seeks to avoid deportation should desire to pursue every administrative avenue of relief available to him. If suspension of deportation were more readily and favorably granted, abuses of voluntary departure should diminish.

LEGISLATIVE PROPOSALS

The disparity between the legislative intent and the practical application of section 244 must be resolved. Guidelines must be formulated and the statutory language refined in order to ameliorate hardship. Several changes should be made.

Section 244(a)(2), which deals with aggravated violations, should be eliminated as a statutory prerequisite. That category as it presently exists is arbitrary and harsh. This is not to suggest that aggravated offenses be overlooked. Rather, the Attorney General should consider such acts when he exercises his discretion. Each case must be examined individually by weighing the facts presented. If an alien is statutorily ineligible for relief, discretionary power is never exercised. However, if the Attorney General is able to consider each case on its merits, taking into consideration both favorable and unfavorable factors, the legislative purpose of ameliorating hardship will be better served.

Because drastic legislative changes such as elimination of an entire category are slowly enacted, the following proposals offer an immediate, although temporary, improvement. Failure to register should be deleted from section 244(a)(2) as a ground for exemption of relief. Failing to register should not invoke the same sanctions as criminal, immoral, and subversive activities. Furthermore, the grounds upon which deportation is charged should not be the exclusive determinant of which eligibility category will apply. The nature of the deportable offenses must be examined. Minor offenses, even though they may be encompassed within the statute, should not be treated in section 244(a)(2).

Congress should clearly indicate when the physical-presence period for section 244(a)(2) begins. Commencing the ten-year period at the time of entry, and not at the time of violation, would comport with the congressional intent of alleviating hardship on long-term residence aliens. As suggested above, the Attorney General would have broader power to consider violations when exercising discretion. That power would create a fairer standard for determining whether an alien qualifies for suspension.

The requirement of good moral character is susceptible to arbitrary judgment, and therefore should be limited to a finding that the alien has not committed serious or deportable offenses during the physical-presence period. The alien should not be punished for indiscretions committed before the probationary period.

The terms "extreme hardship" and "exceptional and extremely unusual hardship" are vague and unmanageable. Economic hardship is generally the major consideration to the alien. Requiring the alien to demonstrate more than serious economic detriment is unreasonable. In addition, the single alien or the alien without family ties in the United States should not be denied suspension because of his marital or familial status. Moreover, the alien who has been educated in the United States and who has established a new life here should not be denied suspension. By such denial, the Immigration and Naturalization Service *creates* hardship.

A balance must be struck between statutory specificity and discretionary authority. To effectively grant relief from hardship, the Attorney General must have discretionary power. However, to avoid abuse, the statute must offer guidelines for the exercise of discretion.

Finally, the contiguous-country exception should be removed. It is inconsistent with the purpose of suspension of deportation to deny relief to contiguous country natives. Such aliens should be accorded suspension of deportation if they fulfill the statutory requirements demanded of other aliens. Their hardships are no less severe than those of other immigrants.

Until remedial legislation is enacted, all doubts concerning statutory construction should be resolved in favor of the alien. In view of the drastic nature of deportation and the legislative purpose to relieve hardship, such a resolution is the only equitable route.

CONCLUSION

Although suspension of deportation was intended to ameliorate hardship, the process is extremely difficult for the alien. Statutory requirements are harshly construed, and discretion arbitrarily exercised. The statute is hedged with restrictions that make relief difficult for the alien to attain. These obstacles clearly contradict the

purpose behind section 244 as enunciated in *Wadman v. Immigration and Naturalization Service*:

> In construing section 244 we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship.[143]

However, in spite of the legislative purpose, the requirements are strictly construed and discretion inscrutably withheld, making suspension of deportation an illusory promise of relief.

SYLVIA G. COLE

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143. 329 F.2d 812, 816-17 (9th Cir. 1964).