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IMMIGRATION LAW

INTRODUCTION

More aliens[1] live within the geographical boundaries of the Ninth Circuit than within the bounds of any other circuit. Of the 4.5 million aliens who made address reports in 1974, over 1.3 million reported residences within the Ninth Circuit.[2] The Second and Fifth Circuits, which respectively had 850,000 and 750,000 aliens reporting,[3] rank second and third in terms of alien residents.

Twelve decisions dealing with the immigration law which affects these aliens were published during the survey period.[4] The conviction of a resident alien for marijuana possession was held to be a valid ground for deportation even though the conviction was in a foreign country.[5] For deportation purposes, a Ninth Circuit panel held that a long-time resident alien who was returning from a 30-day trip abroad was to be treated as if the alien were entering for the first time.[6] For exclusion purposes, however, a resident alien's return from a three-day trip abroad was found not to be a new "entry."[7]

The possibility of relief from deportation was sharply circumscribed during this past term. The court refused to extend a statutory provision which waives the deportation of certain aliens

1. An "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1970). A national of the United States is a: (1) "citizen of the United States"; or (2) "person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id* § 1101(a)(22).

2. 1974 Immigration & Nat. Serv. Rpt. 106.

3. *Id.*

4. *See* notes 5-14 *infra*. For cases dealing with border searches and arrests see the Criminal Law and Procedure article. A pre-survey case, Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir.), *cert. granted*, 417 U.S. 944 (1974)(reargued Jan. 12, 1976), is noteworthy because it held that due process is violated by federal regulations which bar all aliens from federal jobs requiring competitive examinations while admitting to such examinations only persons who are citizens or who owe permanent allegiance to the United States (*i.e.*, who are nationals of the United States).

5. *See* Brice v. Pickett, 515 F.2d 153 (9th Cir. May, 1975) (per Barnes, J.).

6. *See* Munoz-Casarez v. Immigration & Nat. Serv., 511 F.2d 947 (9th Cir. Feb., 1975) (per curiam).

7. *See* Maldonado-Sandoval v. Immigration & Nat. Serv., 518 F.2d 278 (9th Cir. May, 1975) (per curiam).

who enter by fraud to a case which involved an alien who was originally admitted by mistake.[8] Furthermore, the Ninth Circuit's otherwise expansive interpretation of the same provision was struck down by the Supreme Court.[9]

In other areas, the court: (1) determined that a right exists to collaterally attack a deportation order in defense of a charge of entering in violation of it;[10] (2) elucidated the procedure for reviewing the denial of a labor certificate to an alien;[11] (3) discussed the meaning of a "marriage" when it is challenged as a sham in deportation proceedings;[12] (4) supplied a general limitation to the situations in which aliens may be denaturalized for returning to their home countries;[13] and (5) examined two irreconcilable regulations affecting visa issuance.[14]

Since the comprehensive Immigration and Nationality Act (INA)[15] is the basic immigration law, almost all immigration decisions turn on an interpretation or application of its provisions. The INA is divided into three subchapters. The first subchapter,

8. *See* Mahone v. Immigration & Nat. Serv., 504 F.2d 414 (9th Cir. Oct., 1974) (per Thompson, D.J.).

9. *See* Reid v. Immigration & Nat. Serv., 420 U.S. 619 (1975), *overruling* Lee Fook Chuey v. Immigration & Nat. Serv., 439 F.2d 244 (9th Cir. 1970). For the first Ninth Circuit cases applying *Reid* see Guel-Perales v. Immigration & Nat. Serv., 519 F.2d 1372 (9th Cir. June, 1975) (per Duniway, J.); Echeverria v. Immigration & Nat. Serv., 519 F.2d 1373 (9th Cir. June, 1975) (per curiam).

10. *See* United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. Aug., 1975) (per Moore, J.). *But cf.* United States v. Dekermenjian, 508 F.2d 812 (9th Cir. Dec., 1974) (per Ely, J.).

11. *See* Yong v. Regional Manpower Adm'r, 509 F.2d 243 (9th Cir. Jan., 1975) (per Hufstedler, J.).

12. *See* Bark v. Immigration & Nat. Serv., 511 F.2d 1200 (9th Cir. Feb., 1975) (per Hufstedler, J.).

13. *See* United States v. Delmendo, 503 F.2d 98 (9th Cir. Sept., 1974) (per Hufstedler, J.).

14. *See* Maceren v. District Director, Immig. & Nat. Serv., 509 F.2d 934 (9th Cir. Oct., 1974) (per Moore, J.). A dissent by Judge Wallace questioned the irreconcilability of the two regulations. *Id.* at 941.

15. Act of June 27, 1952, ch. 477, §§ 101 *et seq.*, 66 Stat. 166 (McCarran-Walter Act), 8 U.S.C. §§ 1101 *et seq.* (1970). For a brief discussion of the development of the immigration laws see Note, *Immigrants, Aliens, and the Constitution*, 49 NOTRE DAME LAW. 1075, 1076 (1974).

Amended 36 times since 1952, the INA is among the longest of the world's immigration laws. *See* Wasserman, *The Undemocratic, Illogical, and Arbitrary Immigration Laws of the United States*, 3 INT'L LAW. 254 (1968). Nevertheless, it is generally criticized as being vague, arbitrary, overinclusive, and in need of a complete overhaul. *See, e.g.*, Edelstein, *The Lehmann Immigration Bill*, 3 FED. B. NEWS 283 (1956); Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975).

General Provisions,[16] includes definitions of terms and provisions for judicial review of final exclusion and deportation orders.[17] The next subchapter, Immigration,[18] includes lists of excludable and deportable aliens, outlines the exclusion and deportation procedures, and provides for the changing of an alien's visa status. It also includes the complex immigration quota system. The third subchapter, Nationality and Naturalization,[19] includes provisions for naturalization and the revocation of naturalization. The main agency for the enforcement of the immigration law is the Immigration and Naturalization Service (INS), a division of the Department of Justice.

The courts have long held that Congress' power in the immigration area is plenary.[20] Consequently, the courts view their role as limited to construing and applying the immigration statute.[21] Since the INA is a statute of many rules and even more exceptions to the rules, and of "plain words" that "do not always mean what they say,"[22] the courts' task has been a difficult one.

I. DEPORTATION AND EXCLUSION

Thirty-one general classes of aliens may be excluded from entering the United States.[23] After admission, an alien may still

16. INA §§ 101-06, 8 U.S.C. §§ 1101-05a (1970).

17. Administrative decisions of the Immigration & Naturalization Service are final if affirmed by the Board of Immigration Appeals, a non-statutory body which sits in Washington, D.C.

18. INA §§ 201-93, 8 U.S.C. §§ 1151-1363 (1970).

19. INA §§ 301-60, 8 U.S.C. §§ 1401-1503 (1970).

20. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Graham v. Richardson, 403 U.S. 365, 377 (1971); Galvan v. Press, 347 U.S. 522, 531-32 (1953); Fong Yue Ting v. United States, 149 U.S. 698, 705-07 (1893); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889). Congress' absolute power is said to derive from the sovereign power of the nation to protect itself from foreign interference and to control its political relations with foreign countries; both functions are considered to be beyond the constitutionally-prescribed limits of the judiciary.

21. Statutes within the immigration system have been held unconstitutional only when they affected *citizens*. *See* Afroyim v. Rusk, 387 U.S. 253 (1967); Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For an in-depth criticism of the plenary power doctrine see *Aliens, Deportation, and the Equal Protection Clause: A Critical Reappraisal*, 6 GOLDEN GATE U.L. REV. 23 (1975).

22. Yuen San Low v. Attorney General, 479 F.2d 820, 821 (9th Cir. 1973), *cert. denied*, 414 U.S. 1073 (1973) (held, *inter alia*, that three aliens who had been physically within the United States for over 20 years were not "physically present" during that time).

23. *See* INA § 212(a)(1)-(31), 8 U.S.C. § 1182(a)(1)-(31) (1970). "This portion of the Act is like a magic mirror, reflecting the fears and concerns of past Congresses." Lennon v. Immigration & Nat. Serv., 527 F.2d 187 (2d Cir. 1975) (in context of discussing the exclusion provision relating to aliens convicted of marijuana possession).

be deported upon any one of 18 grounds.[24] Because of the plenary power doctrine the content of these provisions has not been subject to constitutional challenge.[25]

A. Congress' Power to Deport

In *Brice v. Pickett*,[26] the court demonstrated its unvarying treatment of arguments challenging the constitutionality of deportation provisions. The INS ordered Brice's deportation pursuant to INA section 241(a)(11).[27] This section authorizes the deportation of any alien who is convicted at any time of a violation of "any law or regulation relating to the illicit possession of . . . marihuana."

Brice, an alien resident, had been convicted of marijuana possession in Japan in 1969. Appealing to the Ninth Circuit from the deportation order,[28] he contended that: (1) Congress did not intend section 241(a)(11) to apply to *foreign* marijuana convictions; and (2) if Congress did intend this, a deportation order based on a criminal conviction in a foreign country is unconstitutional.[29] Based on these contentions, Brice felt that he should be entitled to relitigate his guilt in a United States court.[30]

The court rejected all of appellant's arguments. The court held that: (1) Congress probably *did* intend to make foreign marijuana convictions a basis for deportation, since a "plain reading of 'any law or regulation' would include foreign laws or regulations";[31] (2) since congressional power over the admission and

24. *See* INA § 241(a)(1)-(18), 8 U.S.C. § 1251(a)(1)-(18) (1970). The 18 grounds are so lengthy and broad, however, that there are, in effect, approximately 700 grounds for deportation. *See* Wasserman, *supra* note 15.

25. *See* authorities cited at notes 20-21 *supra*.

26. 515 F.2d 153 (9th Cir. May, 1975) (per Barnes, J.).

27. 8 U.S.C. § 1251(a)(11) (1970).

28. INA § 106(a), 8 U.S.C. § 1105a(a) (1970), provides for direct review of final deportation orders by a court of appeals.

29. 515 F.2d at 153-54. Brice's precise argument, omitted from the opinion, is presumably that a United States deportation order based on a conviction that was arrived at without the guarantees of the United States Constitution is itself unconstitutional, *i.e.*, a denial of due process.

30. *Id.* at 154.

31. *Id.* While it is *possible* that Congress intended deportations of resident aliens based on marijuana convictions to apply only to acts committed within the United States, there is no solid authority for the proposition. Furthermore, the specific legislative history of section 241(a)(11) reflects strong concern about drug control. *See* S. Rep. No. 1651, 86th Cong., 2d Sess. 3 (1960). One possible argument, however, would be that so long as the statute is not completely unambiguous, it should be construed in favor of the alien. *See* authority cited at note 77 *infra*. At least one eminent commentator

deportation of aliens is plenary, Congress may provide for the deportation of any alien "for any reason which makes his residence here not in the best interest of the government";[32] and (3) even if the Japanese conviction were unconstitutional by American standards, the decision of Congress to deport on the basis of a foreign conviction is final and valid.[33]

The decision in *Brice*, a routine application of the plenary power theory, appears to have involved an issue of first impression at the time it was rendered.[34] Since then, however, the Second Circuit announced a ruling in *Lennon v. Immigration & Naturalization Service*[35] which interpreted congressional intent differently. In *Lennon*, the INS had denied ex-Beatle John Lennon's petition for permanent residence on the ground of excludability because several years earlier he had been convicted in England of violating a law "relating to the illicit possession of marihuana."[36] The Second Circuit held that a deportation based on a foreign conviction for "illicit possession" required that intent be an element of the offense for which the alien was convicted.[37] Since British law at that time imposed "absolute liability" for mere possession of marijuana, the foreign conviction could not serve as a basis for exclusion. The *Lennon* court, which avoided discussion of the due process issues apparently raised in *Brice*, felt that Congress could not have intended that a conviction for mere possession (involving no moral culpability) should serve as a basis for deportation.[38] Since the *Brice* opinion does not contain a discussion of the Japanese law under which Brice was convicted, it is possible that the *Lennon* rationale could not have been applied in *Brice*. It is therefore possible that, when confronted with an ap-

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has urged the retraction of the application of section 241(a)(11) to even domestic marijuana violators, terming it "irrationally severe." *See* Gordon, *supra* note 15, at 21.

32. 515 F.2d at 154.

33. *Id.*

34. A Second Circuit per curiam decision, Gardos v. Immigration & Nat. Serv., 324 F.2d 179 (2d Cir. 1963), *aff'g* 10 I. & N. Dec. 261 (1963), treated section 241(a)(11) "as if" it included foreign convictions; but in *Gardos* the only issue raised was whether the addition in 1960 of marijuana convictions as a deportation basis was being applied ex post facto to an alien convicted in Canada in 1956. In *In re* Romadia-Herros, 11 I. & N. Dec. 772 (1966), the alien in a deportation hearing unsuccessfully challenged the jurisdiction of a Mexican court to convict him for morphine and codeine possession and again INS only impliedly assumed that the foreign conviction was included in section 241(a)(11).

35. 527 F.2d 187 (2d Cir. 1976).

36. *See* INA § 212(a)(23), 8 U.S.C. § 1182(a)(23) (1970), which is the exclusion provision corresponding to the deportation provision in *Brice*.

37. 527 F.2d at 193.

38. *Id.* at 194.

propriate set of facts, the Ninth Circuit will adopt the *Lennon* position.

B. The Re-Entry Doctrine

Aliens who leave the United States are, upon their return, subject to all of the entry provisions of the immigration laws as if they were entering for the first time.[39] This rule has been termed the re-entry doctrine, and it even applies to aliens who have been granted resident status or who leave the country for only a brief period.[40] The doctrine is frequently used to deport resident aliens who would not normally be subject to deportation because of the duration of their residence in the United States.[41]

The re-entry doctrine was originally a judicial interpretation of the scope of former immigration statutes.[42] Early cases applying it were characterized by harshness; long-time resident aliens were often deported or excluded after returning from brief trips out of the country.[43] The strict application of the doctrine, however, was somewhat relaxed in 1947, when the Supreme Court excluded from its scope those re-entries which resulted from unintentional departures from the United States.[44] In 1952 Congress, following the Court's lead, limited the re-entry doctrine to

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39. *See* 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.3 (1975).

40. *See id.* The doctrine is a potential threat to many aliens; in 1974, over 840,000 returns from trips abroad were made by resident aliens. 1974 Immigration & Nat. Serv. Rep. 5.

41. *See, e.g.*, Bonetti v. Rogers, 356 U.S. 691 (1958); United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); Lapina v. Williams, 232 U.S. 78 (1913). The re-entry doctrine has been severely criticized. *See, e.g.*, Comment, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 San Diego L. Rev. 192 (1975).

Several deportation provisions have built-in five-year statutes of limitations which run from the date of the (most recent) entry. *See* INA §§ 241(a)(4), (8), (13), (15), 8 U.S.C.§§1251(a)(4), (8), (13), (15) (1970). Thus, aliens who commit acts justifying deportation cannot be deported for such acts unless the act occurred within 5 years of an "entry."

42. *See* United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); Lapina v. Williams, 232 U.S. 78 (1913).

43. In Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), an alien resident of 27 years was denied entry upon return from a visit to his dying mother in Romania; in United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933), the return home from a brief trip abroad of an alien resident of 24 years was deemed a new entry for the sole purpose of bringing the deportation order within the requirement that an order be made within 5 years of an entry. For cases with similarly harsh results see United States *ex rel.* Stapf v. Corsi, 287 U.S. 129 (1932); United States *ex rel.* Claussen v. Day, 279 U.S. 398 (1929).

44. *See* Delgadillo v. Carmichael, 332 U.S. 338 (1947) (resident alien held not to have

returns from only voluntary and intentional departures.[45]

This rather narrow exception to the re-entry doctrine was considerably expanded by the Supreme Court in *Rosenberg v. Fleuti*.[46] The Court in *Fleuti* held that no "voluntary and intentional" departure is made unless it is made with *an intent to meaningfully interrupt residence* within the United States.[47] Thus, in effect, there are now two types of trips an alien may make outside of the country which will not be considered a new "entry" upon the alien's return: (1) involuntary excursions (which are excused by statute); and (2) excursions not intended to be meaningful interruptions of residence (*Fleuti*).

The *Fleuti* Court announced three relevant objective factors which bear on the question of whether a returning alien actually intended an excursion to be "meaningfully interruptive": (1) the length of time the alien is out of the country; (2) the purpose of the trip;[48] and (3) the necessity of prior planning for the trip.[49] The Court also stated that a non-interruptive excursion had to be "innocent, casual and brief."[50] The *Fleuti* Court enunciated its re-entry exception because it recognized that subjective intent controls the issue of whether a resident alien's departure is "volun-

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entered for deportation purposes when he returned from a week's recuperative stay in Cuba after his ship had been torpedoed). *See also* Carmichael v. Delaney, 170 F.2d 239 (9th Cir. 1948); Yukio Chai v. Bonham, 165 F.2d 207 (9th Cir. 1947); Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947).

45. *See* INA § 103(a)(13), 8 U.S.C. § 1101(a)(13) (1970), in which entry is defined as

> any coming of an alien into the United States, . . . except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure . . . was not intended or reasonably to be expected by him or . . . was not voluntary . . . .

46. 374 U.S. 449 (1963).

47. *Id.* at 462-63. The INS had sought deportation of the petitioner, a resident of seven years, after he made a two hour trip to Mexico. In holding that the petitioner had not "re-entered," the Court avoided the issue of whether the deportation provision upon which INS sought to deport the petitioner—that aliens afflicted with psychopathic personalities at the date of entry are deportable—was unconstitutionally vague as applied to the petitioner, a homosexual.

48. *Id.* at 462. The Court indicated that prior intent to accomplish some objective contrary to the immigration laws (*e.g.*, smuggling) would in itself render the departure interruptive of residence.

49. *Id.* The Court opined that prior planning would indicate fuller consideration of the possible consequences of leaving the country, and would hence be indicative of *intentional* interruption of residence.

50. *Id.*

tary and intentional." However, the Court's use of objective considerations to determine the nature of such intent has frequently led lower courts to treat those considerations as the exclusive test.[51]

Munoz-Casarez v. Immigration & Naturalization Service[52] involved the Ninth Circuit in a re-entry problem. In *Munoz-Casarez*, the INS sought to deport a resident alien who had been convicted of voluntary manslaughter. Deportation was ordered under INA section 241(a)(4), which authorizes deportation of any alien who

> is convicted of a crime involving moral turpitude committed *within five years after entry* and either sentenced to confinement or confined . . . for a year or more . . . .[53]

The petitioner would not normally have been subject to deportation because he had resided in the United States for more than five years.[54] However, he had taken a one-month trip to Mexico to visit his parents and ill sister a few months before his felonious act and conviction. If the return from this short trip was an "entry," petitioner was once again subject to the threat of deportation. Thus, the only question before the court was whether petitioner's return from Mexico was an entry.

The petitioner argued that when he took his trip he never intended to abandon his permanent residence in the United States—an argument which directly addresses the issue of subjective intent to meaningfully interrupt residence. The *Munoz-Casarez* court, however, stated that the exclusive test under *Fleuti* is whether the departure itself breaks the continuity of permanent residence, irrespective of what the petitioner may have intended or believed.[55] Focusing on the departure, the court observed that petitioner's trip lasted about 30 days, that he had planned and

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51. *See, e.g.*, Palatian v. Immigration & Nat. Serv., 502 F.2d 1091 (9th Cir. 1974). The court held that a 22 year old alien of long-time residence was excludable, despite his assertion of a strong attachment to his home and family in America, because his return from a *two day* trip to Mexico was a re-entry. 502 F.2d at 1093. The exclusion, based on his conviction of attempted marijuana smuggling across the Mexican border, came after he served a two year prison sentence, and resulted in his repatriation to communist Bulgaria.

52. 511 F.2d 947 (9th Cir. Feb., 1975) (per curiam).

53. INA § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970) (emphasis added). The INS brought the proceedings three years after the petitioner's conviction; presumably, he had served at least one year in prison.

54. For a discussion of the five year limitations periods see note 41 *supra*.

55. 511 F.2d at 949. *Fleuti* had adopted the "break in the continuity of residence"

saved for the trip for five years, and that he had travelled about a thousand miles into Mexico. The decision relied upon these objective factors in holding that the departure was sufficiently interruptive of permanent residence to warrant a finding of a new entry upon the return; therefore, the deportation order was upheld.[56]

The *Munoz-Casarez* court indicated that it read the *Fleuti* re-entry exception narrowly; the exception will be applied with little regard for the alien's expectations, and only to very casual excursions.[57] While the *Munoz-Casarez* holding is basically in accord with *Fleuti*,[58] the court's methodology overlooks and may therefore suppress *Fleuti's* humanitarian concerns.[59] Other circuits have rejected the exclusively objective approach, looking instead to the spirit of *Fleuti* and, therefore, to the alien's actual intentions.[60]

The re-entry doctrine also arose in *Maldonado-Sandoval v. Im-*

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language from INA naturalization provisions (INA § 316(b), 8 U.S.C. § 1427(b) (1970)), which state that an alien may be absent from the country for up to six months without "breaking the continuity" of residence. In *Fleuti*, this language was used to construe the re-entry exception *liberally*. 374 U.S. 449, 459 (1963).

56. 511 F.2d at 949.

57. The court may well have been sensitive to *Fleuti's* expansion of the re-entry exception to circumvent the homosexuality issue in the case. *See* note 47 *supra*.

58. *Fleuti did* involve a mere two hour trip, as opposed to the 30 day trip in *Munoz-Casarez*; further, *Fleuti* involved a deportation order based on homosexuality, while *Munoz-Casarez* involved a deportation order based on a voluntary manslaughter conviction.

59. *See* 374 U.S. 449 (1963). Although deportation has long been held a civil penalty and not a punishment, The Chinese Exclusion Case, 130 U.S. 581 (1899), the *Fleuti* Court characterized it as punitive, 374 U.S. at 461. Justice Brewer's futile dissent in Fong Yue Ting v. United States, 149 U.S. 698 (1893), may nonetheless influence the courts' view of deportation:

> If a banishment of this sort be not punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Id. at 741.

60. The Fifth and Seventh Circuits have read *Fleuti* broadly. *See* Lozano v. Immigration & Nat. Serv., 506 F.2d 1073, 1077-78 (7th Cir. 1974) (considering the effect of uprooting alien, alien's family, job and home ties, and alien's relation to place of deportation, in finding no re-entry); Vargas-Banuelos v. Immigration & Nat. Serv., 466 F.2d 1371, 1374 (5th Cir. 1972) (holding that there was no re-entry where resident alien was caught attempting to smuggle illegal aliens over the border upon returning from two day trip to Mexico, because "every migrant's deviation from rectitude [should not be exalted] into illegal 'entries' within the statutory definition"); Yanez-Jaquez v. Immigration & Nat. Serv., 440 F.2d 701 (5th Cir. 1971); Zimmerman v. Lehmann, 339 F.2d 943, 948-49 (7th Cir. 1964), *cert. denied*, 381 U.S. 925 (1965). *But see* Palatian v. Immigration & Nat. Serv., 502 F.2d 1091 (9th Cir. 1974).

migration & Naturalization Service.[61] The petitioner in *Maldonado-Sandoval* was a native Mexican who apparently[62] was already married to a Mexican woman when he married a United States citizen in 1967. Later that year, the petitioner was granted permanent resident status based on his marriage to a citizen, and was issued a visa for admission. Sometime in 1970, the INS learned of the earlier marriage. In May of 1970 the petitioner visited Mexico for two or three days on personal business. When he attempted to return the INS refused to admit him. At an ensuing exclusion hearing, the INS found Maldonado-Sandoval to be excludable because his visa, which was based on a bigamous marriage, was invalid.[63]

On appeal the petitioner argued that an exclusion hearing, with its limited provisions for justice,[64] was improper in his case since: (1) his (attempted) return was not an "entry"; and (2) as a resident alien he was entitled to the advantages of a deportation hearing.[65]

Addressing the petitioner's first contention, the *Maldonado-Sandoval* court noted the brevity of his excursion, and held that the facts evidenced no intent to meaningfully interrupt residence.[66] Secondly, the court suggested that under usual INS practice, excludable resident aliens returning from outside the country normally receive deportation hearings rather than exclusion hearings.[67] The petitioner was thus entitled to deportation proceedings where, the court opined, his acquittal was "certainly possible."[68]

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61. 518 F.2d 278 (9th Cir. May, 1975) (per curiam).

62. The wording of the court's opinion suggests that the evidence regarding the existence of this marriage was not conclusive. *Id.* at 279.

63. Any alien "not in possession of a valid unexpired immigrant visa" is excludable at the time of (attempted) entry under INA § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970).

64. At an exclusion hearing, the burden of proof is upon the alien to disprove the charges, and "adequate evidence" alone is sufficient to support an INS finding of excludability. 8 U.S.C. § 1226(a) (1970). Appeal may be had only by habeas corpus. *Id.* § 1105a(b). In some cases, there is no right to appeal. *Id.* § 1226(d).

65. 518 F.2d at 280. At a deportation hearing, the burden of proof is on the government to sustain charges by clear, convincing, and unequivocal evidence, and the respondent has the right to counsel and to cross-examination. 8 U.S.C. § 1252(b) (1970). The losing alien has direct recourse to the court of appeals and is entitled to an automatic stay of deportation during the pendency of an appeal. *Id.* § 1105a(a).

66. 518 F.2d at 281.

67. *Id.* at 281 & n.6. This practice may be mandated. *See* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (a resident alien may not be deported without a full opportunity to be heard). *But see* Palatian v. Immigration & Nat. Serv., 502 F.2d 1091 (9th Cir. 1974).

68. 518 F.2d at 280.

Maldonado-Sandoval clearly presents the type of situation in which the *Fleuti* re-entry exception should apply; the limited relief sought by the alien makes its application even more compelling.[69] *Munoz-Casarez* and *Maldonado-Sandoval* both demonstrate that the court is only willing to significantly extend the exception to those excursions outside the United States which are strictly "innocent, casual, and brief."

C. INA Section 241(f): The Forgiveness Clause

The deportation provisions of the INA are not entirely rigid; there are exceptions which permit an otherwise deportable alien to avoid deportation if certain mitigating circumstances exist. One exception is INA section 241(f), sometimes called the "forgiveness clause." In the same section as the deportation provisions, it says:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation *shall not apply* to an alien otherwise admissible at the time of entry who is the spouse, parent or a child of a United States citizen or of an alien lawfully admitted for permanent residence.[70]

Under this clause, therefore, an alien who would otherwise be deported for having entered by fraud may nonetheless be entitled to a waiver of deportation if:

> (1) the ground for deportation is the alien's excludability at the time of entry;[71]
> (2) the excludability is rooted in expressly false representations made during the entry process;

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69. *See* authorities cited at note 67 *supra*.

70. INA § 241(f), 8 U.S.C. § 1251(f) (1970)(emphasis added).

71. INA § 241(a), 8 U.S.C. § 1251(a), states the grounds for deportation. The first ground, section 241(a)(1), specifies that any alien shall be deported who

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry
> . . . .

The "classes of aliens excludable" are listed at section 212(a)(1)-(31), 8 U.S.C. § 1182(a)(1)-(31) (1970). Thus, section 241(a)(1) alone actually incorporates 31 grounds for

(3) the alien is otherwise unobjectionable;[72] and
(4) since entering the alien has become an intimate member of a lawfully resident family.

Originally, this exception to deportation arose from a concern for the plight of refugees from totalitarian nations who had lied about their countries of origin in order to escape persecution or repatriation.[73] Subsequent congressional amendments, however, have transformed section 241(f), and its purpose is now considered to be the preservation of the unity of families in the United States.[74]

The first major judicial interpretation of section 241(f) by the Supreme Court, in *Immigration & Naturalization Service v. Errico*,[75] emphasized that this benevolent purpose overrides the strict application of the forgiveness clause requirements. In *Errico*, a 1966 case, the Court applied the forgiveness clause to waive the deportation of two aliens who had entered, by fraud, in violation of quota restrictions,[76] and who had subsequently become parents of United States citizens. Although the deportation order was not based on the aliens' excludability at the time of entry, the *Errico* Court held that "§ 241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought."[77]

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deportation. Technically, deportation based on excludability at time of entry is confined to section 241(a)(1) charges.

72. For a discussion of the issue of whether, in this context, an alien is otherwise unobjectionable see Immigration & Nat. Serv. v. Errico, 385 U.S. 214 (1966).

73. In 1952, when the immigration laws were revised, the House Committee proposed a provision excusing such misrepresentations. *See* H.R. REP. No. 1365, 82d Cong., 2d Sess. 128 (1952). Although deleted by the Conference Committee, *see* H.R. REP. No. 2096, 82d Cong., 2d Sess. 128 (1952), Congress, in 1957, amended the Act to provide for the waiver of deportation for any otherwise admissible alien who obtained entry by fraud or misrepresentations and who either: (1) was the spouse, parent, or child of a citizen or of a permanent resident; or (2) could show that the misrepresentations were made out of a fear of persecution or repatriation to the country of origin. Act of Sept. 11, 1957, § 7, 71 Stat. 640 (repealed).

74. The express purpose of the 1957 amendment was unity of the family. *See* H.R. REP. No. 1199, 85th Cong., 1st Sess. 7 (1957); S. REP. No. 1057, 85th Cong., 1st Sess. (1957). The present section 241(f), 8 U.S.C. § 1251(f) (1970), is substantially a reenactment of the 1957 amendments, *see* H.R. REP. No. 1086, 87th Cong., 1st Sess. 37 (1961), with the exception that the provision dealing with refugees who lied about their countries of origin was deleted, since it had served its purpose. *Id.*

75. 385 U.S. 214 (1966).

76. *See* Act of June 27, 1957, § 211, ch. 477, 66 Stat. 181, *as amended*, 8 U.S.C. § 1181 (1970).

77. 385 U.S. at 217. The court also stated that, in consideration of the severity of the

Relying on *Errico*, the Ninth Circuit accordingly interpreted the forgiveness clause to waive, whenever the other applicable conditions existed, all deportation orders resulting directly from misrepresentations at entry.[78] In *Lee Fook Chuey v. Immigration & Naturalization Service*,[79] the Ninth Circuit applied the forgiveness clause to waive the deportation of aliens who had falsely claimed to be citizens at entry, even though the section under which they were charged did not rest upon their excludability at the time of entry.[80]

Mahone v. Immigration & Naturalization Service[81] presented another question about the scope of section 241(f). In *Mahone*, INS sought to deport an alien who should have been excluded from admission at the time she entered over a decade earlier, since she lacked a valid visa.[82] Subsequent to her entering, however, she had formed the close family bonds necessary for forgiveness under section 241(f). The question before the court was whether the forgiveness clause applied when there seemed to have been *no outright misrepresentation or fraud* on the petitioner's part; instead, there appeared to be a mistake on the part of border officials who admitted her. According to petitioner, she believed that she was a United States citizen when she entered in 1960, but she

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deportation penalty, doubts in construing the INA should be resolved in favor of the alien. *Id.* at 225.

78. *See e.g.*, United States v. Osuna-Picos, 443 F.2d 907 (9th Cir. 1971); Lee Fook Chuey v. Immigration & Nat. Serv., 439 F.2d 244 (9th Cir. 1970); Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969); Muslemi v. Immigration & Nat. Serv., 408 F.2d 1196 (9th Cir. 1969).

79. 439 F.2d 244 (9th Cir. 1970).

80. The aliens were charged with entering "without inspection" under section 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970). That section provides for the deportation of aliens who

> entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States . . . .

Misrepresentations of citizenship have long been held grounds for a deportation order based on entry without inspection. *See* Ben Huie v. Immigration & Nat. Serv. 349 F.2d 1014 (9th Cir. 1965); Saadi v. Carr, 26 F.2d 458 (9th Cir. 1928). The rationale for such holdings is the relatively perfunctory examination given citizens upon entry; an alien who misrepresents citizenship is "comparable to . . . a person who slips over the border and who has, therefore, clearly not been inspected." Goon Mee Heung v. Immigration & Nat. Serv., 380 F.2d 236, 237 (1st Cir. 1967). Entry "without inspection" is a deportation ground wholly independent from section 241(a)(1) deportation based on excludability.

81. 504 F.2d 414 (9th Cir. Oct., 1974) (per Thompson, D.J.).

82. *See* INA § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970). Section 212(a)(20) is discussed at note 63 *supra*.

could not remember whether any border officials asked her about it, or what, if anything, she said. There was no other account of the entry in the case.[83]

The *Mahone* court held that the forgiveness clause did not apply in petitioner's case. While recognizing the arbitrariness of the result, the court maintained that in order for an alien to qualify for section 241(f) forgiveness, the alien must have made *actual* misrepresentations at the time of entry.[84] In so limiting the forgiveness clause, the court avoided a ruling which, in its view, would have relieved aliens from deportation on the sole basis of family ties.

The peculiar rule adopted by the *Mahone* court results in the anomalous situation of honest aliens being ineligible for relief from deportation and dishonest aliens being allowed to remain. Nevertheless, this construction of section 241(f) is the generally accepted one.[85]

Mahone and *Lee Fook Chuey* both represented the Ninth Circuit's view regarding the post-*Errico* scope of section 241(f). As long as an alien established the requisite family ties, the court would waive deportation under section 241(f) if: (1) the alien obtained entry by express falsehood; and (2) the deportation order arose directly therefrom. Although the Fifth Circuit had reached similar conclusions,[86] other circuits had interpreted *Errico* more narrowly, applying section 241(f) only to specific types of deportation orders.[87]

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83. 504 F.2d at 415-16.

84. *Id.* The court relied on Monarrez-Monarrez v. Immigration & Nat. Serv., 472 F.2d 119 (9th Cir. 1972), in which forgiveness was denied to an alien who surreptitiously entered into the country in the trunk of a car and who later married a citizen. However, that situation is distinguishable from the *Mahone* situation, since border inspectors in *Monarrez-Monarrez* would have played no role in causing the resulting deportation charges.

85. *See, e.g.*, Pirzadian v. Immigration & Nat. Serv., 472 F.2d 1211 (8th Cir. 1973). With regard to innocent errors in general see Santiago v. Immigration & Nat. Serv., 526 F.2d 488 (9th Cir. 1976), in which the court held that the INS may deport innocent aliens admitted by mistake, even though the sole reason for deportation was that they had erroneously preceded, instead of accompanying or following, other family members into the United States. *But see In re* Yuen Lan Hom, 289 F.Supp. 204 (S.D.N.Y. 1968) (innocent mistakes are "lesser defects" included *a fortiorari* within fraud and misrepresentation), *disapproved in* Reid v. Immigration & Nat. Serv., 420 U.S. 619, 629-30 (1975).

86. *See* Gonzalez de Moreno v. Immigration & Nat. Serv., 492 F.2d 532 (5th Cir. 1974); Gonzalez v. Immigration & Nat. Serv., 493 F.2d 461 (5th Cir. 1974).

87. *See, e.g.*, Goon Mee Heung v. Immigration & Nat. Serv., 380 F.2d 236-37 (1st

The Supreme Court dealt with the conflicting views regarding the scope of section 241(f) in *Reid v. Immigration & Naturalization Service*.[88] The *Reid* Court eschewed the Ninth Circuit's liberal interpretation of *Errico*;[89] Justice Rehnquist's opinion observed that the wording of section 241(f) was identical to the wording of an exclusion provision, section 212(a)(19).[90] Therefore, the *Reid* Court held that section 241(f) forgives deportation of the statutorily-qualified aliens *only* if the deportation order is *specifically based* on their excludability at the time of entry due to fraud or misrepresentations under section 212(a)(19).[91]

Cir.), *cert. denied*, 389 U.S. 975 (1967) (fraudulently-entering alien charged with entry "without inspection" may not be forgiven under § 241(f)); Reid v. Immigration & Nat. Serv., 492 F.2d 251 (2nd Cir. 1974), *aff'd*, 420 U.S. 619 (1975); Bufalino v. Immigration & Nat. Serv., 473 F.2d 728 (3rd Cir.), *cert. denied*, 412 U.S. 928 (1973); *cf.* Milande v. Immigration & Nat. Serv., 484 F.2d 774 (7th Cir. 1973) (fraud in obtaining visa not relevant to deportation based on overstay); Preux v. Immigration & Nat. Serv., 484 F.2d 396 (10th Cir. 1973).

88. 420 U.S. 619 (1975). For the lower court's discussion see Reid v. Immigration & Nat. Serv., 492 F.2d 251 (2d Cir. 1974). The petitioners had entered by falsely claiming citizenship, subsequently having two children in the United States. The INS ordered the petitioners deported for entering "without inspection." *See* note 80 *supra*. The Second Circuit affirmed the deportation, on the ground that Congress could not have intended fraud to include false claims of citizenship which totally circumvent the inspection process. For discussion of Second Circuit analysis see Note, *Waiver of Deportation under Section 241(f) of the Immigration and Nationality Act, Second Circuit Review*, 41 BROOKLYN L. REV. 846 (1975); Note, *Aliens Fraudulently Entering the U.S. and Establishing Familial Relationships–The Scope of Section 214(f)* [sic] *of the Immigration and Nationality Act, 8 U.S.C. § 1251(f)*, 18 How. L.J. 761 (1975).

89. 420 U.S. at 629-30. *Reid* expressly overruled the Ninth Circuit policy of applying section 241(f) to forgive deportation where an alien had been charged with entry "without inspection."

90. *Id.* at 622-23. Section 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970), commands the exclusion at entry of

> any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully misrepresenting a material fact . . . .

If the alien is not excluded at entry, the INS may order deportation at a later time under the combination of sections 241(a)(1) and 212(a)(19). For additional discussion see note 71 *supra*. *Reid* held that if the INS orders deportation under any other provision, section 241(f) cannot apply, even if all the facts are the same.

91. 420 U.S. at 630. Despite this holding, the Court professed adherence to *Errico*; in order to give the humanitarian concerns there expressed "due weight," the Court held that its ruling would not affect the waiver of deportations based on quota violations under section 211 when misrepresentations lead directly to the charge. This is the narrowest possible construction of the *Errico* holding.

The Court suggested that its strict interpretation of section 241(f) was founded upon its narrow purpose of providing relief to persecuted refugees who lied at entry. In view of the 1961 deletion of that statutory portion of the section, the suggestion seems peculiar.

The dissent of Justices Brennan and Marshall, *id.* at 633-36, pointed out that false-

The Ninth Circuit and the petitioner in *Guel-Perales v. Immigration & Naturalization Service*[92] were literally caught in the policy transition effected by the *Reid* decision. In *Guel-Perales*, the alien petitioner had established family ties in the United States after gaining entry through a false claim of citizenship. The INS predicated deportation on the alien's excludability under INA section 212(a)(20),[93] due to his *lack of a valid visa* at the time of entry. In reviewing the deportation order, the Ninth Circuit had previously held in a memorandum decision that the false claim of citizenship amounted to the required misrepresentation which, together with the family ties, entitled the petitioner to section 241(f) forgiveness.[94] But on the INS's petition for rehearing, the *Guel-Perales* court had withheld final decision pending the outcome of *Reid*.

When the *Reid* decision was rendered, the Ninth Circuit reversed its earlier memorandum decision, citing the Supreme Court's limitation of section 241(f), in essence, to deportation orders grounded in 212(a)(19) excludability. Accordingly, the deportation order, perhaps fortuitously based on section 212(a)(20), was upheld.[95]

Guel-Perales is perhaps best viewed as an indicator of section 241(f)'s lack of vitality after *Reid*. The section under which the INS orders deportation confers wide decision-making discretion to that agency.[96] A court may not inquire into whether another charge could have been brought, as long as the one which is brought is sufficient and adequately substantiated in the administrative record.[97] Since any material misrepresentation made during the entry process will create a defect in the visa or will result in entry "without inspection,"[98] the INS now seems able to circum-

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hoods which gain an alien entry such as lies concerning identity, occupation, and country of origin may circumvent the immigration system as much as false claims of citizenship. Whether the INS may order deportation for entry "without inspection" in these instances, too, is expressly left open by the majority opinion. *Id.* at 624.

92. 519 F.2d 1372 (9th Cir. June, 1975) (per Duniway, J.).

93. INA § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970). Section 212(a)(20) is discussed at note 63 *supra*.

94. 519 F.2d at 1373.

95. *Id.* The court on the same day reversed a prior decision in Echeverria v. Immigration & Nat. Serv., 519 F.2d 1373 (9th Cir. June, 1975), a case "in all material respects" identical to *Guel-Perales*.

96. *See* Reid v. Immigration & Nat. Serv., 420 U.S. 619, 623, 627 (1975); 1 C. GORDON & H. ROSENFIELD, *supra* note 39, § 4.4.

97. *See* Ntovas v. Ahrens, 276 F.2d 483 (7th Cir.), *cert. denied*, 364 U.S. 826 (1960); 2 C. GORDON & H. ROSENFIELD, *supra* note 39, § 8.11(b).

98. In 1974 over 73 percent of all aliens deported were deported for entering without

vent the forgiveness provision at will by simply basing the deportation on these charges instead of basing it on fraudulent entry under section 212(a)(20)—the only charge waivable by the foregiveness clause after *Reid*.[99] The argument that INS reliance on the entry "without inspection" provision is "in effect" a charge based on fraudulent entry has already been held to be *irrelevant* in light of *Reid*.[100]

D. Collateral Attack of Deportation Orders

An alien who enters or attempts to enter in defiance of a prior deportation order can be criminally charged.[101] The issue of whether the prior order can be collaterally attacked in a defense to such a charge arose twice during the survey term. Earlier Ninth Circuit decisions had uniformly indicated that the right existed.[102] But in *United States v. Dekermenjian*, [103] Judge Ely, while disallowing the attack in question on the merits, stated that "the pertinent law in our Circuit appears unclear,"[104] and emphasized that a conflict among the circuits exists on the issue.[105] Judge Ely's statements thus raised doubt as to whether a collateral attack upon a prior deportation order would be permitted in defense of a prosecution for defiant re-entry after *Dekermenjian*.

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inspection or without proper documents. 1974 Immigration & Nat. Serv. Rep. 15.

99. A material misrepresentation at entry creates a potential deportation order based on section 212(a)(19). *See* note 90 *supra*. If the alien established the requisite family ties since entering, section 241(f) forgives the misrepresentation, under *Reid*. The *same* misrepresentation, however, also gives rise to a potential "entry without inspection" or entry without "valid visa" deportation order. Under *Reid*, section 241(f) *cannot* forgive deportations based on *these* charges. For another recent case eroding the force of section 241(f) see Castro-Guerrero v. Immigration & Nat. Serv., 515 F.2d 615, 619 (5th Cir. 1975).

100. *See* Pereira-Barbera v. United States Dep't of Justice, 523 F.2d 503, 508 (2d Cir. 1975).

101. Entry in defiance of a prior deportation order violates INA § 276, 8 U.S.C. § 1326 (1970).

102. *See* Pena-Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968); United States v. Palmer, 458 F.2d 663 (9th Cir. 1972); United States v. Osuna-Picos, 443 F.2d 907 (9th Cir. 1971).

103. 508 F.2d 812 (9th Cir. Dec., 1975) (per Ely, J.).

104. *Id.* at 814.

105. For cases holding that a prior deportation order is challengeable see United States v. Bowles, 331 F.2d 742 (3d Cir. 1964); United States v. Heikkinen, 221 F.2d 890 (7th Cir. 1955); Marcello v. Kennedy, 312 F.2d 874 (D.C. Cir.), *cert. denied*, 373 U.S. 933 (1962); Matter of Malone, 11 I. & N. Dec. 730 (1966); Matter of Farinas, 12 I. & N. Dec. 467 (1967). INA § 106(c), 8 U.S.C. § 1105a(c) (1970), is also relevant in this area in that it defines when judicial review can be obtained. For cases holding that a prior deportation order "good on its face" may *not* be challenged see United States v. Gonzalez-Parra,

The Ninth Circuit's subsequent decision in *United States v. Gasca-Kraft*[106] dispelled the doubt raised by *Dekermenjian*. The defendant alien was charged with attempted entry in violation of a previous deportation. As a defense, he alleged that the prior deportation was "not according to law," since as an indigent he had not been furnished with counsel at government expense. Writing for the court, Judge Moore, sitting by designation, observed that, since deportation proceedings are civil proceedings,[107] due process does not require the government to supply indigent aliens with counsel.[108] Although the court thus denied the defendant's attack, Judge Moore clarified Ninth Circuit policy by stating that any criminal defendant has the right to challenge the government's proof of any material element of the charge brought against the defendant, and prior lawful deportation is a material element of the criminal charge of entering in violation of it. Therefore, the court concluded that an alien defendant has the right to challenge the lawfulness of a prior deportation order in criminal proceedings which are based on an entry in violation of the prior order.[109]

II. THE VALIDITY OF AN ALIEN'S MARRIAGE

Bark v. Immigration & Naturalization Service[110] involved the frequently litigated issue of whether an alien's marriage is merely an expedient calculated to prevent deportation. In this case, the petitioner, originally a temporary visitor, sought adjustment of his visa status to that of a permanent resident. He based his eligibility on his marriage to a lawfully admitted permanent resident.[111] The INS, however, denied the visa on the ground that the marriage was a "sham." This determination rested almost

438 F.2d 694 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971); Arriaga-Ramirez v. United States, 325 F.2d 857 (10th Cir. 1963). The Supreme Court has reserved judgment on the issue. *See* United States v. Spector, 343 U.S. 169 (1952).

106. 522 F.2d 149 (9th Cir. Aug., 1975) (per Moore, J.).

107. *See* Harisiades v. Shaughnessy, 342 U.S. 580 (1952). For discussion of the civil nature of deportation see note 59 *supra*.

108. *Accord*, Martin-Mendoza v. Immigration & Nat. Serv., 499 F.2d 918 (9th Cir. 1974). INA §§ 242(b), 292, 8 U.S.C. §§ 1252(b), 1362 (1970), define a variety of procedural rights which have been accorded to aliens who are subjected to deportation proceedings.

109. 522 F.2d at 152.

110. 511 F.2d 1200 (9th Cir. Feb., 1975) (per Hufstedler, J.).

111. The adjustment of visa status to permanent resident status based on marriage to a citizen or resident alien is authorized under INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1970). Section 203(a)(2) only applies to bona fide marriages. *See* Lutwak v. United

exclusively upon evidence that shortly after their wedding, the petitioner and his wife separated. The couple testified in reply that they married for love but subsequently quarreled and obtained separate quarters.

The *Bark* court observed that, for a multitude of reasons, including domestic difficulty, many couples experience either temporary or permanent separation. Therefore, a separation alone is not a sufficient basis for concluding that a marriage is a "sham." Instead, the court found that the crucial consideration in determining the validity of a marriage is, at least for immigration law purposes, whether the alien and the spouse intended to establish a life together at the time they were married.[112]

Commendably, Judge Hufstedler also remarked that there may be serious constitutional difficulties with imposing "federal dictates" upon partners to a marriage "in the guise of specifying the requirements of a bona fide marriage."[113] She did not elaborate further, but the paucity of language supporting constitutional challenges to the immigration provisions[114] makes Judge Hufstedler's dictum noteworthy.

III. DENATURALIZATION OF AN ALIEN CITIZEN

In *United States v. Delmendo*,[115] the court focused on INA section 340(d),[116] which authorizes cancellation of the naturalization of an alien who returns to the alien's native country and makes a permanent residence there within five years of becoming naturalized. The underlying rationale for permitting cancellation,

States, 344 U.S. 604, 611 (1953).

112. 511 F.2d at 1201; *accord*, Lutwak v. United States, 344 U.S. 604, 611 (1953); *see* United States v. Abdel-Khaleq, 354 F.2d 642 (7th Cir. 1965); United States v. Pantelopoulos, 336 F.2d 421 (2d Cir. 1964); United States v. Rubenstein, 151 F.2d 915, 919 (2d Cir. 1945); *cf.* INA § 241(c)(2), 8 U.S.C. § 1251(c)(2) (1970). This test is also discussed in *Defense of Sham Marriage Deportations*, 8 U.C. DAVIS L. REV. 309, 314-15, 319 (1975).

113. *See* 511 F.2d at 1201, *citing* Roe v. Wade, 410 U.S. 113 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Griswold v. Connecticut, 381 U.S. 479 (1965). *But see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

114. This is due to the hegemony of the plenary power theory. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972) (first amendment challenge barred); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (first and fifth amendment challenges barred); Hitai v. Immigration & Nat. Serv., 343 F.2d 466 (2d Cir.) (fifth amendment and equal protection challenges barred), *cert. denied*, 382 U.S. 816 (1965).

115. 503 F.2d 98 (9th Cir. Sept., 1974) (per Hufstedler, J.).

116. 8 U.S.C. § 1451(d) (1970).

as set out in section 340(d), is that such a return constitutes a prima facie case of wilful misrepresentation of intent to become a citizen. Countervailing evidence, however, may rebut the presumption of misrepresentation.

Petitioner Delmendo had been a naturalized immigrant for more than four years when he returned to his native country to visit his wife and child. There he suffered illness, and eventually became impoverished to the extent that he lacked the means to return to America. After three years, the State Department erroneously informed him that his citizenship had been automatically revoked.[117] The petitioner remained in his native country until, more than a decade later, a district court re-ordered his denaturalization pursuant to section 340(d).

On appeal the district court's judgment was reversed. The Ninth Circuit held that circumstances such as Delmendo's cannot adequately support a prima facie case of wilful misrepresentation of intent to become a citizen.[118] The court noted that the purpose of section 340(d) is to insure the good faith of aliens seeking citizenship; as an objective measure of that good faith, the five year "probation" period is necessarily arbitrary. Thus, as an index of good faith, the five years' residence requirement becomes less significant as the new citizen's residency approaches five years.[119]

Applying this insight to *Delmendo*, a resident of more than four years who came to the courts vigorously defending his citizenship, the court found that the elements necessary to invoke the statutory presumption had not been established. Further, the court assumed that, even if the facts in *Delmendo* could support the presumption of bad faith, the factual situation constituted a sufficient countervailing case to rebut it.[120]

IV. REGULATIONS

Most immigration law decisions are confined to an interpretation and application of the INA. Two cases decided during the

117. The State Department acted in accordance with INA § 352(a)(1), 8 U.S.C. § 1484(a)(1) (1970), which authorizes automatic revocation of citizenship of aliens who, after naturalization, returned to their home countries for over three years. Though unrepealed, section 352(a)(1) was declared so discriminatory as to be violative of due process in Schneider v. Rusk, 377 U.S. 163 (1964).

118. 503 F.2d at 100.

119. *Accord*, Perrone v. United States, 26 F.2d 213 (3d Cir. 1928).

120. 503 F.2d at 100.

term, however, required the Ninth Circuit to interpret regulations promulgated under the INA. In doing so, the court formulated new record keeping requirements for agencies which deal with aliens and invalidated a portion of one regulation which conflicted with another.

A. Judicial Review of Labor Certificate Denials

In *Yong v. Regional Manpower Administrator*,[121] an alien who had originally entered the United States as a non-immigrant student sought eligibility for a visa to remain permanently as a skilled laborer. INA section 212(a)(14) requires aliens desiring such a visa to obtain a labor certificate.[122] Yong and his prospective employer applied to the local Office of Manpower Administration (OMA),[123] but the application was denied on the basis of information regarding the local labor market received from other agencies. On appeal to the Regional Manpower Administration (RMA),[124] Yong and his employer met with an RMA reviewing officer and submitted additional supporting documents and evidence. Subsequent to the meeting, however, a *different* officer of the RMA again denied certification.

In examining the RMA action, the Ninth Circuit held that the agency's inadequate maintenance of administrative records rendered a review of the certification denial impossible.[125] The *Yong* court noted that no statute requires the RMA to conduct a formal administrative hearing.[126] Nevertheless, the court held that the record of whatever review the RMA does make must adequately reveal: (1) the foundation of the original denial by OMA; (2) the substance of relevant evidence presented by the applicant in re-

121. 509 F.2d 243 (9th Cir. Jan., 1975) (per Hufstedler, J.).

122. 8 U.S.C. § 1182(a)(14) (1970). The certification states that

> (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa . . . and at the place to which the alien is destined to perform such skilled or unskilled labor, and
> (B) that employment of such alien will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

For a criticism of the labor certification requirement in general see Gordon, note 15 *supra*, at 12.

123. The Secretary of Labor, pursuant to 29 C.F.R. § 60.3 (1974), has charged the OMA with the issuance of such certificates.

124. *Id.* § 60.4 (1974) provides for RMA review of OMA denials.

125. 509 F.2d at 246.

126. *Id.* at 245, *citing* 29 C.F.R. § 60.4(b)(c) (1974).

sponse; (3) the transmittal to the deciding RMA official of (1) and (2); and (4) the receipt and consideration by the *deciding* RMA official of (1) and (2) before determining whether to grant the labor certification.[127]

B. Conflicting Savings Clauses

Maceren v. District Director, Immigration & Naturalization Service[128] is a complicated case involving a conflict between the "savings clauses" of two regulations. In *Maceren*, the plaintiff alien sought adjustment of his visa status from "visitor" to "permanent resident."[129] To facilitate the issuance of the adjusted visa, Maceren, a music teacher, applied for approval of a "third preference" petition.[130] Approval of a third preference petition first requires that the applicant obtain a labor certificate.[131] This certificate was issued to plaintiff in November, 1969, and at that time was valid indefinitely.[132] The preference petition was then approved and, under regulations effective in 1969, was valid for one year from the date the *certificate* was issued.[133]

Due to a long visa waiting list, the plaintiff's petition expired before the visa was issued. Further, on February 4, 1971, the Secretary of Labor promulgated a new regulation (the labor regulation)[134] which purported to retroactively invalidate all labor certificates over one year old, including Maceren's certificate.

The INS notified the plaintiff that his visa could not be adjusted to reflect permanent resident status due to the lapse of his *petition*. But on March 30, 1971, the Attorney General revised the regulations regarding third preference petitions to provide, *inter alia*, that all petitions which had theretofore lapsed because one year had passed since the date the labor certificate was issued were thereby reinstated (the AG regulation).[135] At this juncture,

127. *Id.* at 246.

128. 509 F.2d 934 (9th Cir. Oct., 1974).

129. *See* INA § 245, 8 U.S.C. § 1255 (1970).

130. "Third preference" designates an alien as a member of a class of professionals possessing skills beneficial to the United States, and thus entitling the alien to a preferred position on the list of aliens seeking visas. INA §§ 203, 204(a), 8 U.S.C. §§ 1153, 1154(a) (1970).

131. INA § 204(b), 8 U.S.C. § 1154(b) (1970). For references to statutes defining other procedural requirements see note 108 *supra*.

132. *See* 29 C.F.R. § 60.5(b) (1971).

133. *See* 8 C.F.R. § 204.4 (1968).

134. 29 C.F.R. § 60.5(b) (1972).

135. 8 C.F.R. § 204.4(b) (1974). The labor regulation and the AG regulation taken together made no effective change. Their net effect was to transform a labor certificate

the plaintiff filed suit asking that his residence visa be granted.

The INS contended that Maceren's petition must be supported by a valid labor certificate in order for the reinstatement to be successful, and, although indefinitely valid when granted, Maceren's certificate had been retroactively invalidated by the labor regulation. The Ninth Circuit did not accept the INS rationale. Judge Moore, sitting by designation, observed that, before the AG regulation, the *only way* for a petition to lapse was for one year to pass from the time the labor certificate was issued. No. expired petition could therefore be supported by a certificate less than one year old. But if the labor regulation invalidated all outstanding labor certificates one year old, no petition susceptible to reinstatement could be supported by a valid certificate. Therefore, under the INS view, since no petition is valid without an underlying valid certificate, the AG regulation would be ineffective to reinstate *any* petition.

Judge Moore thus found the savings clauses of the two regulations—the labor regulation's retroactive invalidation of certificates and the AG regulation's retroactive reinstatement of petitions—irreconcilable. Two grounds, however, existed in favor of holding the labor regulation inapplicable rather than the AG regulation: (1) the well-established principle that the later in time of two inconsistent regulations should prevail, which the court found determinative;[136] and (2) a balancing of the possible inequities, which the court found persuasive. Judge Moore observed that the purpose of the labor regulation, which was to help insure protection of the domestic economy, would not be substantially enhanced by retroactive invalidation of outstanding certificates. On the other hand, aliens who, like Maceren, would not be able to obtain new labor certificates due to changes in the economy would face certain deportation despite their contributions of skills to this country and their acquisition of ties to their communities while awaiting visa approval.[137]

Judge Wallace dissented, stating that Maceren theoretically could have *revalidated* his certificate between February 4th, when

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which was valid indefinitely, and a petition which was valid for only one year from the date of the labor certificate, into a labor certificate valid for only one year and a petition valid only as long as the labor certificate retained validity. Consequently, the only persons really affected were those, like Maceren, who were caught in the confusion. The conflict is between the "savings clauses" of the two regulations.

136. 509 F.2d at 940-41.

137. *Id.* at 940.

it was retroactively invalidated, and March 30th, when the AG regulation was promulgated.[138] This would have resulted in plaintiff's having a valid certificate, but an expired petition—precisely the situation the AG savings clause was designed to remedy. Although this harmonization of the two regulations is technically correct, the dissent concedes that it limits the AG reinstatement provision to an exceedingly short period of time;[139] moreover, it ignores the inequitable results which were considered by the majority.

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138. *Id.* at 941.
139. *Id.* at 942.