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Immigration Law

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IMMIGRATION LAW

I. ELIGIBILITY FOR LABOR CERTIFICATION: REQUISITE INTENT TO ENGAGE IN THE CERTIFIED EMPLOYMENT

A. INTRODUCTION

In *Yui Sing Tse v. Immigration and Naturalization Service,*[1] the Ninth Circuit considered the issue of how long an alien must intend, at time of entry, to engage in the employment for which he was certified in order to qualify for a labor category immigrant visa.

Petitioner was admitted to the United States on a student visa in January, 1971. In March, 1973, the Department of Labor issued petitioner an alien employment certification pursuant to section 1182(a)(14) of the Immigration and Nationality Act (the Act) authorizing petitioner's employment as a Chinese specialty cook.[2] Petitioner then applied for adjustment of status under section 1255[3] of the Act claiming entitlement to a "sixth preference"

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1. 596 F.2d 831 (9th Cir. Mar., 1979) (per Browning, J.; the other panel members were Wallace, J. and Waters, D.J.) (Judge Wallace dissented and filed an opinion).

2. 8 U.S.C. § 1182(a)(14) (1978) provides that aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor are ineligible to receive visas and are excludable

> unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General 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 admission to the United States . . . and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . . .

The visa represents permission to enter and stay in the United States. The labor certification, on the other hand, is a preliminary requirement for the issuance of certain visas. It is generally required of visa applicants whose primary purpose is the performance of labor and who do not qualify for immigration on the basis of relatives in the United States. *See generally* 1 C. GORDON AND H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE §§ 2.40, 3.6 (1978).

3. 8 U.S.C. § 1255 (1978) provides in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulation as he may proscribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and

visa under section 1153(a)(6).[4]

Petitioner's application for adjustment of status was denied and the Immigration and Naturalization Service instituted deportation proceedings. In the course of these proceedings petitioner requested reconsideration of his application for adjustment of status. At a hearing held in July, 1975, petitioner disclosed that he had been accepted for admission to dental school. He testified that it would require four years to complete his dental education, and that he intended to continue working as a Chinese specialty cook to support himself while attending school.[5]

The immigration judge denied petitioner's application and the Board of Immigration Appeals (BIA) affirmed. The BIA looked to whether, at the moment of entry, the alien intended to change from the certified employment. On the basis of this standard, the BIA concluded that as a matter of law petitioner was ineligible for the preference status since his intent was not to continue as a cook, but rather to become a dentist.[6] On appeal the Ninth Circuit rejected the BIA standard, reversed and remanded the case.

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(3) immigrant visa is immediately available to him at the time his application is filed.

In essence, adjustment of status is a procedure whereby an alien, already present in the United States in a temporary or irregular status, may apply for a permanent residence visa while remaining in the country. Before enactment of § 1255 the alien had to leave the United States, obtain the visa abroad, and return. *See generally* 2 C. GORDON AND H. ROSENFELD, *supra* note 2, at § 7.7. Although the applicant for adjustment of status is already in the United States, he will be regarded as an alien seeking entry for purposes of determining his eligibility for the permanent residence visa. Hamid v. Immigration & Nat. Serv., 538 F.2d 1389, 1390 (9th Cir. 1976); Talanoa v. Immigration & Nat. Serv., 397 F.2d 196, 200 (9th Cir. 1976).

4. 8 U.S.C. § 1153(a)(6) (1978) provides that visas will be provided to otherwise qualified persons "who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exist in the United States. . . ."

There are seven preference categories which allot a limited number of immigrant (permanent resident) visas to aliens seeking entry to the United States. For a discussion of the preference system *see generally* 1 C. GORDON AND H. ROSENFELD, *supra* note 2, at §§ 2.25-.28.

5. 596 F.2d at 833.

6. The BIA did not consider the ground on which the immigration judge based his decision. The immigration judge found petitioner ineligible since, at the time of petitioner's request for reconsideration of his application, he was employed by a different employer than the one designated on the labor certificate. The Ninth Circuit declined to consider this issue since the BIA did not rely on it. *Id.* at 833 n.3.

B. Background

Section 1153(a)(6) of the Act provides a limited number of "sixth preference" visas to aliens seeking permanent residence in the United States.[7] In order to be eligible, the applicant must be qualified to perform services which are not of a seasonal or temporary nature[8] and for which there exists a shortage of employable workers in this country. As a condition to eligibility for the "sixth preference" visa, the alien must apply for and receive a certification from the Department of Labor acknowledging that the labor which the alien intends to perform will not displace American workers or advesely affect their wages or working conditions.[9]

The Federal Regulations require the invalidation of any visa application where there is found any "change in the respective intentions of the prospective employer and the beneficiary (the alien) that the beneficiary will be employed by the employer in the capacity indicated in the supporting job offer."[10] Nothing in the language of the regulations, however, expressly indicates the length of time the alien must intend to occupy the position for which he was certified.

C. The New Balancing Standard

The specific question presented to the court in *Tse* was

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7. For the relevant statutory language, *see* note 4 *supra*.

8. Few decisions have definitively spoken to the question of what is or is not temporary or seasonal work. The BIA has considered two factors: 1) whether the nature of the work itself is permanent, Matter of Smith, 12 I. & N. Dec. 772 (1968) (employment by a firm which provides temporary office personnel to other companies not temporary since employing firm pays workers directly and employment was full-time and permanent); *cf.* Matter of Contopoulos, 10 I. & N. Dec. 654 (1964) (employment as a "governess, mother's helper" permanent since duties last as long as family unit exists); Matter of L—, 8 I. & N. Dec. 460 (1960) (position of intern at hospital found permanent); and 2) whether the employer intends to employ the alien permanently, Matter of Izdebska, 12 I. & N. Dec. 54 (1964) (employment temporary since in light of past practice, the employer failed to prove his intent to employ the alien permanently).

9. In discharging his responsibilities the Secretary of Labor has established two "schedules" listing occupations for which individual determinations need not be made. The first, "Schedule A," is a blanket determination that the entry of an alien in the occupations it enumerates will not adversely affect the American labor market. The second, "Schedule B," is a noncertification list or the blanket determination that there is an ample supply of American workers to fill the occupations it enumerates. Certification of jobs not listed on either schedule is made on an individual basis. For a discussion of the certification procedure *see generally* 1A C. Gordon and H. Rosenfeld, *supra* note 2, at § 3.6.

10. 8 C.F.R. § 204.4(b) (1979).

whether or not the BIA applied the appropriate legal standard in determining petitioner's eligibility for a "sixth preference" visa.

The Majority

The majority first addressed two interests it deemed worthy of protection in considering the appropriate standard to apply, the first being the protection of American labor.[11] According to the court, the "sixth preference" visa was designed to permit the entry of aliens capable of performing labor for which American workers were not available. The labor certification attempts to assure the protection of American workers from the competition of aliens who might otherwise take jobs Americans could fill.[12]

The majority next considered what it found to be a "second and potentially conflicting interest of an alien granted permanent resident status in the opportunity to earn a living"[13] and to improve his economic circumstances without undue limitation or discrimination. The court felt that undue restriction on a permanent resident's freedom to change occupations could raise serious constitutional problems.[14]

The standard applied by the BIA was then examined in the context of the two "protected interests". The BIA standard—which in effect requires the applicant to intend to occupy the certified position indefinitely—was found to be too narrow and rigid to accommodate the interests to be protected. The court held that "sixth preference" applicants need not intend to occupy the certified employment forever, but only for a "period of time that is reasonable in light both of the interest served by the statute and the interest in freedom to change employment."[15] Thus,

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11. 596 F.2d at 834.

12. *Id.* It is clear that the purpose of the labor certification is to exclude aliens who could otherwise compete for jobs American workers could fill. *See* S. REP. No. 748, 89th Cong., 1st Sess. 7, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3328, 3333.

13. 596 F.2d at 834.

14. As authority for the "second interest" the court cited 1 & 1A C. GORDON AND H. ROSENFELD, *supra* note 2, at §§ 1.34, 3.6g; 29 C.F.R. § 60.5(f) (1976), and Castaneda-Gonzalez v. Immigration & Nat. Serv., 564 F.2d 417, 433 n.36 (D.C. Cir. 1977). As the dissent points out, all of the above authority refers only to a permanent resident's right to pursue employment. There is no indication that the rights of resident aliens extend as well to aliens of another status. In fact, the section of C. GORDON AND H. ROSENFELD cited in the majority opinion expressly states that illegal and nonimmigrant (*i.e.*, non-permanent resident) aliens have no right to work in this country. *See* C. GORDON AND H. ROSENFELD *supra* note 2, at § 1.34A.

15. 596 F.2d at 835.

the court concluded that application of this standard to the facts of the case indicated that petitioner's intent to occupy the certified employment for a period of four years (while attending dental school) and to change employment only upon a condition that might not be satisfied (successful completion of dental school), was entirely reasonable in light of the interests to be protected.[16]

After examining the relevant statutory sections and regulation, which the court found not to be supportive of the BIA's position,[17] the court considered the two cases cited by the BIA as authority for its standard, and found both decisions distinguishable on their facts.[18]

As a result of its new balancing standard, the majority thus concluded that petitioner was eligible for adjustment of status. A petition for adjustment of status, however, calls for two determinations: whether the applicant is eligible for relief; and, if so, whether relief should be granted as a matter of discretion. Since the second determination was never made, the majority remanded the case for further proceedings.[19]

The Dissent

Judge Wallace focused his dissent on the analytical foundation of the majority opinion, the two "protected interests." Although agreeing that the policy behind the grant of "sixth preference" status was the protection of American labor, he found the majority far astray in its attempt to apply the "second and poten-

16. *Id.*

17. *Id.* The majority pointed out that the language of 8 U.S.C. § 1182(a)(14) does not bear on the length of commitment required. Likewise, 8 C.F.R. § 204.4(b), on its face, only requires that applicants intend to be employed in the job, not that they intend to remain in the job forever. The court also found that 8 U.S.C. § 1153(a)(6) which limits "sixth preference" visas to persons capable of performing labor "not of a temporary or seasonal nature" was not dispositive since the reference is only to the nature of the employment itself, not to the intent of the applicant.

It is interesting to note that in determining the temporary or permanent nature of employment the BIA has looked to the intent of the employer. *See* note 8 *supra.* If the intent of the employer is relevant to the determination of the nature of the employment, it is unclear why the intent of the applicant would be any less relevant.

18. 596 F.2d at 835. The court found that the petitioner in Matter of La Pietra, 13 I. & N. Dec. 11 (1964), did not possess the skills on which the certification was based. Likewise, Matter of Kim, 13 I. & N. Dec. 16 (1968) was distinguishable in that the petitioner never occupied the certified position and had no intention of doing so at any time in the future.

19. 596 F.2d at 835-36.

tially conflicting interest."[20]

The dissent first attacked the scant authority relied upon for that second interest. All of the majority's authority reciting the principle of "freedom to work" referred only to the rights of properly admitted permanent residents, not to aliens seeking admission.[21]

The dissent also found the majority misleading in its approach to the issue and its understanding of the BIA standard. The dissent stated that the issue was not whether an alien, once properly admitted for permanent residence, may change jobs. Rather, "the question is whether an alien who applies for immigrant status . . . may definitively intend, at the time that he makes his application, to change employment from that for which he acquired his labor certificate."[22]

The BIA did not forbid an immigrant alien from improving his employment situation, the dissent pointed out. The BIA simply held that when the petitioning alien submits his application he must have made the choice to work in the area for which he received the work certificate. The dissent concluded that when the petitioner admitted that his desire to work in the certified employment was merely temporary, i.e., until he became a dentist, he should not qualify.[23]

The dissent found the BIA principle illustrated in *Matter of Poulin.*[24] In *Poulin,* the alien worked in the certified employment for only one day after which he began working in uncertified employment. At the exclusion hearing, the alien admitted that he intended, at time of entry, to work in the certified position only until his papers were finalized. The BIA upheld the alien's exclusion on the grounds that he "actually intended" to work in the uncertified job. The dissent found the underlying principle of

20. *Id.* at 836.

21. *Id.* The dissent also pointed out that 29 C.F.R. § 60.5(f) (1976), relied upon by the majority for the "second interest," had been repealed. The regulation provided in relevant part that "the terms and conditions of the labor certificate shall not be construed as preventing an immigrant properly admitted to the United States from subsequently changing jobs. . . ." The new regulations do not contain comparable language. *See* 20 C.F.R. § 656 (1979).

22. 596 F.2d at 837.

23. *Id.*

24. 13 I. & N. Dec. 264 (1968).

Poulin equally applicable to the facts in *Tse*. Although the petitioner in *Tse* intended to work for four years rather than one day, in both cases the intent was, for the foreseeable future, not to work in the certified job, but to work in that job only until another uncertified job became available.[25] The dissent concluded that the majority's holding would only frustrate the statutory mandate of protecting American labor.[26]

D. CRITIQUE

As pointed out by the dissent, the primary weakness of the majority decision lies in the "second interest," the probable constitutional right of permanent residents to earn a livelihood. It is not clear from the majority's reasoning which alien status is vested of this right. Did the court understand the right to belong solely to aliens properly admitted for permanent residence?[27] Or did the majority view the right to earn a living as equally applicable to petitioner, an alien seeking admission to the United States?[28]

If the majority found the "second interest" solely in a permanent resident's right to earn a livelihood, it did not establish how the BIA standard failed to accommodate a permanent resident's right. It would appear that the majority misunderstood the BIA standard which only holds that an alien seeking admission to the United States for the purpose of performing labor must intend, at time of entry, to indefinitely occupy the certified position. The BIA has never held that an alien once admitted for permanent residence must occupy the certified employment forever. Once

25. 596 F.2d at 837.

26. *Id.*

27. The majority framed the "second interest" solely in terms of permanent resident's rights. "The second and potentially conflicting interest of an alien *granted permanent residence status* is the opportunity to earn a living . . . ." *Id.* at 834 (emphasis added). There is no express indication in the body of the majority decision of its intention to extend this "right" to aliens seeking admission.

28. That the majority intended to extend the right to earn a livelihood to non-resident aliens may be evidenced by its discussion of the decision of the immigration judge in footnote 3 of the majority opinion. The immigration judge denied petitioner's application on the ground that petitioner, at that time a non-immigrant student, had changed from the job for which he had been certified. The majority approved the BIA's failure to rely on this ground. "Board rulings in *analogous* circumstances cast doubt upon the validity of the immigration judge's ruling . . . ." *Id.* at 833 n.3 (emphasis added). The two rulings referred to by the court, however, dealt solely with the permanent resident's freedom to change occupations. *See* Matter of Cardoso, 13 I. & N. Dec. 228 (1969); Matter of Klein, 12 I. & N. Dec. 819 (1968).

properly admitted, a permanent resident is free to change his mind and seek different employment.[29]

On the other hand, if a permanent resident's right to work was intended by the court to apply, by analogy, to aliens seeking admission, the court is embarking upon a novel and unprecedented territory. It is well established that aliens have no constitutional right to enter the United States.[30] In this light, it seems incongruous to imply that an alien seeking admission, who has no right even to enter this country, would have a constitutionally protected right to work here.[31]

E. Conclusion

The significance of *Tse* rests more on its ambiguous reasoning than on its holding. Whether *Tse* represents the Ninth Circuit's misunderstanding of the BIA standard, its confusion of the rights of permanent residents with those of aliens seeking admission, or the court's willingness to extend the constitutional right to work to aliens seeking admission, remains to be seen.

Whatever may be the underlying reason for the court's stand in *Tse,* it is unlikely that the ruling will have a substantial deleterious impact on American labor. The number of aliens entering the United States on the basis of labor certifications is insignificant compared to the numbers in the American workforce.[32] In

29. Matter of Cardoso, 13 I. & N. Dec. 228 (1969) (alien's post-entry failure to continue in the certified employment may give rise to a suspicion that he never intended to fulfill his employment contract; however, if the alien has been admitted for permanent residence with the good faith intention of occupying the job, he is free to pursue other employment); Matter of Marcoux, 12 I. & N. Dec. 827 (1968) (permanent resident may leave certified job after short time because of dissatisfaction with working conditions or wages); Matter of Klein, 12 I. & N. Dec. 819 (1968) (permanent resident not deportable simply because the certified job was no longer available).

30. The Supreme Court has consistently held that the power of Congress to determine which aliens may enter the United States is plenary and unqualified. Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

31. Only one court has faced the issue extending the constitutional right to work to aliens other than permanent residents. In Pilapil v. Immigration & Nat. Serv., 424 F.2d 6 (10th Cir. 1970), the Tenth Circuit discussed the constitutional status of an alien seeking admission and concluded that an alien seeking admission has "no rights under the Constitution, laws or government of the United States. As a citizen and national of another country his rights were established by the alien law peculiar to his native domicile. . . . Therefore, no rights under the Constitution . . . relative to equal opportunity of employment are involved." *Id.* at 11.

32. In 1975, 15,087 "third" and "sixth preference" aliens were admitted for perma-

turn, the court's ruling affects only a small percentage of those aliens, those who admit by words or acts their intention to change from the certified employment. Moreover, the court's standard, in terms of the "first interest," recognizes the statutory duty to protect American labor. It is doubtful that the court, in future cases, will substantially frustrate the purpose for the labor certification.

Nevertheless, the court leaves us to merely speculate as to the possible results of future application of its new standard. Which of the two factors (i.e., length of commitment or uncertainty of change) will be the most dispositive in future considerations? Would a commitment to work in the certified job for two years and to change only upon the fulfillment of an uncertain condition be reasonable? Would a longer commitment be reasonable if the change were certain to occur? And will the court consider other factors, such as the nature of the future employment? If the future employment is presently one for which certifications are available, will the balance more likely tip in favor of the alien?

The implications of the new standard are certainly vague but will hopefully be clarified in later decisions. In the meantime the practitioner should be cautious of relying on *Tse*. Its ambiguous reasoning is conducive to several interpretations and it is easily distinguishable on its facts. At this point, it is only clear that the intent to work in certified employment for four years and to change from that employment only upon a condition that may not be satisfied (successful completion of dental school) will be deemed reasonable by this court.

Alex Schmid

II. SUSPENSION OF DEPORTATION: A NEW APPROACH TO THE CONTINUOUS PHYSICAL PRESENCE REQUIREMENT

A. INTRODUCTION

In *Kamheangpatiyooth v. Immigration and Naturalization*

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nent residence. [1976] INS ANN. REP. 45 (1976). The total number of persons in the American civilian labor force for that year was 92,613,000. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 9 (Sept. 1979).

Service,[1] the Ninth Circuit re-examined the standard applied to determine the "continuous physical presence" requirement for eligibility for suspension of deportation relief.

Petitioner was legally admitted to the United States as a student in 1964. In 1970, petitioner returned to Thailand during a semester vacation to visit his mother who was gravely ill. He left the United States on December 10, 1970, and returned on January 10, 1971. Before leaving on his trip, petitioner obtained an Immigration Form 1-20A[2] which he used in Bangkok to obtain a new student visa. This thirty-day visit to his mother was petitioner's only absence from the United States during the twelve-year period from his initial entry in 1964 until his application for suspension of deportation in 1976.[3]

Petitioner's authorization to remain in this country expired on January 23, 1976. When he did not depart, the Immigration and Naturalization Service (INS) initiated deportation proceedings. Petitioner admitted deportability but applied for suspension of deportation relief.[4] In evaluating whether petitioner's thirty-day absence would adversely affect his eligibility for the relief, the immigration judge purported to apply the test of *Rosenburg v. Fleuti.*[5] The "*Fleuti* test", the judge found, is "three-pronged: the length of the visit, the purposes thereof, and whether the alien had to receive any travel documents to make the trip."[6] The immigration judge then noted that petitioner travelled several thousand miles, was absent for one month, secured an I-20A form before departure, carried a Thai passport, and obtained a new student visa while abroad. Finding that the *Fleuti* prerequisites had not been met, the judge concluded that petitioner's one month absence rendered him ineligible for suspension of deportation relief.[7] The Board of Immigration Appeals (BIA) summarily affirmed the decision.[8]

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1. 597 F.2d 1253 (9th Cir. May, 1979)(per Browning, J.; the other panel members were Anderson, J. and Waters, D.J.).

2. Form I-20A is a certificate completed by an approved school attesting that the alien has been accepted by the school and will pursue a full course of studies. It is a prerequisite for non-immigrant student visas. *See* 8 C.F.R. § 214.2 (f) (1978).

3. 597 F.2d at 1255.

4. For discussion of suspension of deportation relief *see* text accompanying notes 11 to 21 *infra.*

5. 374 U.S. 449 (1963).

6. 597 F.2d at 1257.

7. *Id.*

8. The BIA affirmed the immigration judge's decision *per curiam* citing two cases:

On petition for review, the Ninth Circuit held that the immigration judge and the BIA had based their determinations upon an erroneous legal standard. The three factors, the court explained, should not be the *object* of the inquiry. The factors are merely evidence of the central question of whether an "absence reduced the significance of the whole seven year period as reflective of *hardship* and *unexpectedness* of exposure to expulsion."[9] Since the immigration judge and the BIA failed to evaluate petitioner's application in the proper manner, the Ninth Circuit vacated and remanded the case.[10]

B. Background: Suspension of Deportation and the Continuous Presence Clause

Deportation is often considered a harsh and cruel punishment.[11] This is particularly true where the alien has lived in this country for a considerable period of time and has established significant ties to this society. Recognizing the harshness of deportation, Congress developed measures for relief.[12] One such measure is suspension of deportation.[13] The Immigration and Nationality Act[14] provides that the Attorney General may, at his discretion, suspend the deportation and adjust the status[15] to that

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Munor-Casarez v. Immigration & Nat. Serv., 511 F.2d 947 (9th Cir. 1975) and *In re* Janati-Ataie, 14 I. & N. Dec. 216, 221 (Atty. Gen. 1972). In *Munoz-Casarez*, petitioner's 30-day visit to an ill sister in Mexico was found to be "meaningfully interruptive" of his residence ven though petitioner never intended to abandon his residence. The Ninth Circuit noted that the trip involved an absence of 30 days, was knowing and purposeful, and involved travelling approximately 1,000 miles. In *Janati-Ataie*, the Attorney General found petitioner's two visits (one of 30 days, the other of 35 days) to his parents in Iran "meaningfully interruptive" despite petitioner's intent not to abandon his residence and his substantial ties to this country. The decision focused upon the duration of the absences, the procurement of travel documents, and the distance travelled.

Later in its opinion, the court, in a footnote, distinguished *Munoz-Casarez* and in part disapproved *Janati-Ataie*. 597 F.2d at 1259 n.7. *See* note 38 *supra*.

9. 597 F.2d at 1259 (emphasis added).

10. *Id.* at 1260.

11. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)("deportation is a drastic measure and at times the equivalent of banishment or exile").

12. The principle relief provisions are: 8 U.S.C. § 1254 (e) (1976)(voluntary departure); *id.* § 1251 (f)(waiver of deportation for aliens with family ties who obtained entry by fraud); *id.* § 1259 ("registry" which grants permanent residence to certain aliens who have resided in the United States since 1948); *id.* § 1253 (h)(withholding deportation to any country where alien would be subject to persecution); *id.* § 1255 (adjustment of status). *See generally* Mitgang, *Alternatives to Deportation: Relief Provisions of the Immigration and Nationality Act*, 8 U.C. Davis L. Rev. 323 (1975).

13. 8 U.S.C. § 1254 (1976).

14. 8 U.S.C. §§ 1101-1503 (1976).

15. Adjustment of status, 8 U.S.C. § 1255 (1976), is a procedure which permits an alien, already present in the United States in a temporary or irregular status, to apply

of a permanent resident of any alien who has been "physically present in the United States for a *continuous period of not less than seven years*, . . . is a person of good moral character . . . and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship . . . ."[16]

Interpretation of the continuous physical presence clause has been difficult for the courts. The clause involves two factors: physical presence and continuity. Although as a factual matter physical presence is easily determined,[17] the determination of whether a particular departure should be construed as interruptive of an alien's continuous presence in the United States has been more troublesome. The fact that an alien has taken a brief trip abroad often bears little rational relation to the ties he has developed in this country or to the probability that his deportation would cause extreme hardship.

In *Wadman v. Immigration & Naturalization Service*,[18] the Ninth Circuit faced the construction of the term "continuous" for the first time. In that case the INS argued that petitioner's five day trip to Mexico interrupted the continuity of his physical presence even though petitioner had lived in the United States for over seven years. The court rejected the INS argument and held that petitioner's absence, when viewed in balance with its consequences, was not meaningfully interruptive of the continuity of his presence.[19]

The *Wadman* approach was based upon the Supreme Court's ruling in *Rosenburg v. Fleuti*.[20] The standard announced in *Fleuti*

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for a permanent residence visa while remaining in the country. Before enactment of § 1255, the alien had to leave the United States, obtain the visa abroad, and return. *See generally* 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.7 at 7-71 to 7-117 (1979).

16. 8 U.S.C. § 1254 (a)(1)(1976)(emphasis added).

17. Mere maintenance of residence in the United States is not sufficient. With certain exceptions for veterans, *see* 8 U.S.C. § 1254 (b), the alien must have been physically within the United States borders for the requisite period of time. 2 C. GORDON & H. ROSENFIELD, *supra* note 15, § 7.9d at 7-144 to 7-165.

18. 329 F.2d 812 (9th Cir. 1964).

19. *Id.* at 816.

20. 374 U.S. 449 (1963). The Supreme Court in *Fleuti* did not deal with the meaning of "continuous presence" for purposes of suspension of deportation relief but rather with the meaning of "entry" for purposes of the exclusion and deportation statutes. The Act defines entry 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 . . . if . . . his departure . . . was not intended . . . or was not voluntary." 8 U.S.C. § 1101(a)(13) (1976). The precise definition of "entry" is especially important to

was whether the alien's departure was intended to be "meaningfully interruptive" of the alien's residence. The Court explained that to determine meaningful interruption, factors such as the length of time of the absence, its purpose, and procruement of travel documents would be relevant. The Court also indicated that there may exist "other possible relevant factors."[21]

C. THE COURT'S REASONING

The Ninth Circuit first reviewed the general nature and purpose of the suspension of deportation provision of the Act.[22] Reaffirming that the principles of *Fleuti* apply to the provisions of suspension of deportation relief, the court decided that the section should not be read literally. Because suspension of deportation is a remedial measure, the court concluded that it must be interpreted generously in light of congressional intent. That intent, found the court, was to "relieve aliens of the harsh results, and the unsuspected risks and unintended consequences, that

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the administration of the exclusion laws since at "entry" aliens are subject to the strict mandates of the immigration laws regarding admissibility. *See generally* C. GORDON & H. ROSENFELD, *supra* note 15, § 2.32 at 2-251 to 2-254.

The "re-entry doctrine," provides that an alien's return following a temporary absence abroad will be deemed a new entry for purposes of the immigration laws. Volpe v. Smith, 289 U.S. 422, 425 (1933). As a result, a long-time permanent resident who leaves the country is subject to the strict entry requirements each and every time a "new entry" is made. Because the admission laws are often more encompassing or more difficult to satisfy than the deportation laws (*compare* 8 U.S.C. § 1182(a) (grounds for exclusion) *with* 8 U.S.C. § 1251(a) (grounds for deportation)), the resident alien returning from a trip abroad may be excluded or deported even though he could not have been had he remained in the country. The irrationality of predicating an alien's right to remain here upon travel abroad led the Supreme Court to reconsider the literal interpretation of the entry definition in *Fleuti*.

The *Fleuti* Court focused upon the intent exception to the Act's definition of entry. Reasoning that Congress intended to protect resident aliens from "unsuspected risks and unintended consequences of . . . wholly innocent action," 374 U.S. at 462, the Court construed the exception to mean an intent to "meaningfully interrupt" the alien's residence. *Id.*

Although *Fleuti* dealt with re-entry while *Wadman* involved "continuous presence," the *Wadman* court found the distinction "not . . . at all significant." 329 F.2d at 815. In both areas, the inquiry focused on the circumstances under which an alien's absence should affect his deportability. *Id.* at 814.

For a discussion of the history and impact of the "re-entry doctrine" *see generally* Gordon, *When Does an Alien Enter the United States?*, 9 FED. B.J. 248 (1948). For a critique of the doctrine *see* Maslow, *Recasting Our Deportation Laws: Proposals for Reform*, 56 COLUM. L. REV. 309, 327 (1956); *see also* Herron, *Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform*, 13 SAN. DIEGO L. REV. 192 (1975).

21. 374 U.S. at 462.

22. The court also reviewed the purpose of the entry section of the Act as identified in *Fleuti*. *See* note 20 *supra*.

would flow from a literal and rigid application of the provisions of the Act relating to expulsion and exclusion."[23]

The court then turned to the specific function of the continuous physical presence requirement. According to the court, Congress judged that seven years of physical presence would give rise to the likelihood of ties to this society sufficient to justify an examination by the Attorney General into whether deportation would be unduly harsh. The requirement of continuity was included because it "is important to the legitimacy of the inference that extended presence is likely to make deportation harsh."[24] The court noted that frequent and long absences abroad suggest that the alien has not become attached to this society. Conversely, however, brief and infrequent absences would not diminish the probability of attachment. "An alien who leaves the country briefly . . . may be in no different position realistically viewed alien who has remained within the borders for an identical period."[25]

To realize Congress' desire to avoid exposing aliens to unexpected risks of wholly innocent action, as identified by *Fleuti,*[26] and to realize the purpose of the "continuous period" requirement, the court held that the BIA must determine "whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the *hardship* and *unexpectedness* of expulsion."[27] As illustrative of this new standard the court explained that:

> An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.[28]

The court found that the immigration judge and the BIA failed to evaluate petitioner's absence in this manner. Instead,

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23. 597 F.2d at 1256.
24. *Id.*
25. *Id.* at 1257.
26. *See* note 20 *supra.*
27. 597 F.2d at 1257 (emphasis added).
28. *Id.*

the immigration judge focused solely on the three factors identified in *Fleuti* and proceeded to apply them as if they were themselves determinative of the meaning of the "continuous period" requirement. The court pointed out that these factors are not the object of inquiry, but merely evidentiary of the primary issue of whether the absence reduced the hardship or unexpectedness of expulsion.[29] The court concluded that to treat the factors "as if they were in themselves the object of inquiry may defeat the objectives of the statute."[30]

In light of the new standard, the court reviewed the facts of petitioner's thirty-day absence. The court noted two prior decisions which indicated that neither an absence of six[31] nor sixteen months[32] would, as a matter of law, conclusively interrupt the continuity of physical presence. Although petitioner was absent for thirty days and travelled several thousand miles, the court found that the trip was temporary by design,[33] his only absence from the country, and limited in duration and distance by the exigencies that produced it.[34] On balance, the court found that petitioner had significant ties to this country since he had been lawfully present in the United States for over twelve years and, during this period, had completed his education and pursued his chosen profession. The court thus concluded that "[n]othing in the circumstances of petitioner's 30-day trip to Thailand detracts in any way from the inference, otherwise appropriate from the length and nature of . . . his presence, that expulsion would be unexpected and would entail great hardship."[35]

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29. The court noted that the alien's purpose for the trip may have significance independent of its relevance in determining the importance of the absence in light of harshness and unexpectedness of deportation. Following the *Fleuti* interpretation, 374 U.S. at 642, the court held that if the purpose of the trip contravened some policy reflected in the immigration laws, the trip might be meaningfully interruptive. 597 F.2d at 1257-58 n.5. Considerable confusion has arisen in the application of the "purpose factor". *See* Herron, *supra* note 20, at 204.

30. 597 F.2d at 1257-58.

31. Toon-Ming Wong v. Immigration & Nat. Serv., 363 F.2d 234, 236 (9th Cir. 1966).

32. McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960). However, *McLeod*, a pre-*Fleuti* case, was decided on estoppel principles since petitioner's absence was caused by the wrongful conduct of the INS.

33. The trip was taken during a semester break. Petitioner left when classes ended and returned when they resumed. 597 F.2d at 1258.

34. Petitioner went to Thailand to visit his mother who was gravely ill. *Id.* at 1255.

35. *Id.* at 1258.

Similarly, the fact that petitioner secured travel documents was not dispositive. The court explained that procurement of documents is relevant in two ways: on the one hand, it may undermine the alien's continuous presence by showing the alien's awareness of the immigration consequences of his trip;[36] on the other hand, it may confirm the continuity of his presence by showing his determination that the trip not affect his right to remain in this country.[37] Contrary to the holding of the immigration judge, the court found that the steps petitioner took to obtain the documents and the nature of the documents he obtained confirmed the continuity of his presence since it demonstrated that he was "determined that his trip should not affect his status in this country."[38]

The Ninth Circuit, therefore, concluded that the only determination consistent with the statutory purpose was that petitioner's absence did not break the continuity of his twelve-year physical presence. However, since the immigration judge and the BIA had based their contrary decisions upon an erroneous legal standard, the court properly remanded the case for a determination based upon the correct standard.[39]

D. The Ninth Circuit's Standard

Before *Kamheangpatiyooth,* considerable confusion had arisen in the judicial and administrative efforts to apply the *Fleuti* standard.[40] This standard, whether the alien's absence is

36. The *Fleuti* court explained that procurement of travel documents was relevant because "the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country." 374 U.S. at 462. Presumably the alien's knowledge, in turn, would be relevant to the determination of unexpectedness of deportation.

37. 597 F.2d at 1259. The court relied on Itzcovitz v. Selective Service, 447 F.2d 888 (2d Cir. 1971). In that case the alien sought and obtained a declaratory judgement that an expected business trip to Israel would not affect his status.

38. The court further noted that although petitioner in *Kamheangpatiyooth,* unlike *Itzcovitz,* did not seek a judicial determination before his trip, his procurement of return travel documents demonstrated with equal clarity his "determination" that the trip not affect his status. 597 F.2d at 1259.

In a footnote to the discussion of travel documents, the court also discussed the two decisions relied on by the BIA. *Id.* at 1259 n. 7. The court distinguished *Munoz-Casarez* on the grounds that, unlike *Kamheangpatiyooth,* there was no "affirmative demonstration" of unexpectedness of deportation since it was not evident whether the alien in that case secured travel documents. The court disapproved in part *Janati-Ataie,* finding that the alien in that case did demonstrate adequate "pre-absence affirmative action." *Id.*

39. *Id.* at 1259-60.

40. For an excellent discussion of the post-*Fleuti* decisions *see* Herron, supra note 20, at 200-06.

"meaningfully interruptive" of his residence, is conclusionary and thus provides little guidance for rational determinations in specific situations. As a result, some decisions narrowly focused upon the factors suggested by the Supreme Court, treating the factors themselves as the test or standard of "meaningful interruption."[41] Many decisions, on the other hand, developed and relied upon "other relevant factors."[42] Lack of focus regarding what the "other factors" were relevant to, however, has led to disagreement over what factors should or should not be considered.[43]

The Ninth Circuit's approach represents a significant departure from this past confusion. By defining "meaningful interruption" in terms of whether an absence reduces the hardship and unexpectedness of deportation, the court provides guidance for future determinations. By rejecting the rigid application of the *Fleuti* factors, the court redirects the determination to effectuate the remedial purpose of suspension of deportation relief.

The decision may be subject to charges of judicial legislation since the Ninth Circuit appears to have taken abundant liberties with the otherwise clear and plain meaning of the term "continuous." Nevertheless, the court's "liberal construction" of the continuous presence clause seems justifiable since it is firmly grounded in the principles set forth by the *Fleuti* Court. This holding simply reflects an extension of prior judicial efforts to ameliorate the harsh consequences of literal application of our often out-dated[44] immigration laws. Moreover, the decision does not contravene Congress' overall purpose for the statute. As the

41. *See, e.g.*, Munoz-Casarez v. Immigration & Nat. Serv., 511 F.2d 947 (9th Cir. 1975); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 222-25 (Atty. Gen. 1972); *In re* Guimaraes, 10 I. & N. Dec. 529 (1964).

42. *See, e.g.*, Heitland v. Immigration & Nat. Serv., 551 F.2d 495, 502 (2d Cir. 1977) (illegality of original entry is a relevant factor); Lozano-Giron v. Immigration & Nat. Serv., 506 F.2d 1073, 1077-78 (7th Cir. 1974) (alien's ties to this country and nature of environment to which he would be deported is relevant); Toon-Ming Wong v. Immigration & Nat. Serv., 363 F.2d 234, 236 (9th Cir. 1966) (petitioner's minority considered a factor); Zimmerman v. Lehmann, 339 F.2d 943, 949 (7th Cir.), *cert. denied*, 381 U.S. 925 (1965) (subjective intent of alien not to abandon domicile is relevant).

43. *Compare* Heitland v. Immigration & Nat. Serv., 551 F.2d 495, 502 (2d Cir. 1977) (illegality of original entry relevant), *with* Git Foo Wong v. Immigration & Nat. Serv., 358 F.2d 151, 153-54 (9th Cir. 1966) (illegality of original entry irrelevant); *and compare* Munoz-Casarez v. Immigration & Nat. Serv., 511 F.2d 947, 949 (9th Cir. 1975) (subjective intent of alien not the test) *with* Zimmerman v. Lehmann, 339 F.2d 943, 949 (7th Cir.), *cert. denied*, 381 U.S. 925 (1965) (subjective intent a relevant factor).

44. *See* Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1 (1975-1976); *see also* Maslow, *supra* note 20.

court explained, the new standard will not require the granting of relief in unmeritorious cases; once eligibility is determined, it is still up to the Attorney General to review the case and to decide whether, in his or her discretion, relief in fact would be warranted.[45]

It is not clear from the decision how great a reduction in the harshness or unexpectedness of deportation an absence must cause before the court will find meaningful interruption. The decision simply indicates that the reduction must be "significant."[46] Since the term is not precisely defined, it is difficult to predict how the court will rule in future cases where the facts differ significantly from those in *Kamheangpatiyooth.*

Equally unclear from the decision is how the determination of "unexpectedness" will be made. During its discussion of the significance of securing travel documents, the court implied that deportation would be unexpected where the alien lacked awareness that his departure could adversely affect his immigration status.[47] However, the court also indicated that an alien's own determination that his trip not affect his status would show "unexpectedness."[48] As a result it remains uncertain which definition the court will use in future applications of the standard. An alien may be "determined" to retain his status while at the same time fully "aware" of the immigration consequences of his departure.

The *Kamheangpatiyooth* decision is an important case for the immigration practitioner. It greatly expands the boundary of permissible argument in suspension of deportation cases.[49] No

45. The statute emphasizes that the Attorney General may, in his discretion, suspend deportation. 8 U.S.C. § 1254(a) (1976). Consequently, even if the applicant meets the statutory requirements, he must still appeal to the discretion of the Attorney General, exercised through his delegates (ultimately the BIA). There are no published guidelines for the exercise of this discretion. *See generally* C. GORDON & H. ROSENFELD *supra* note 15, § 7.9e at 7-165 to 7-170. If the Attorney General does not grant relief, the applicant must show an abuse of discretion. *Id.* § 8.15c at 8-99 to 8-105.

46. 597 F.2d at 1259.

47. See the court's discussion of the relevance of petitioner's procurement of travel documents. *Id.* at 1259; *see also* notes 36 to 38 *supra* and accompanying text.

48. 597 F.2d at 1259.

49. The present decision may also be persuasive authority in cases involving the reentry doctrine. *See* note 20 *supra.* The court relied heavily upon *Fleuti* in developing its standard and reaffirmed that the principles of *Fleuti* used "in deciding whether an entry was intentional . . . should also guide the determination of whether an intervening absence interrupts the continuity of physical presence . . ." 597 F.2d at 1256.

longer should the fulfillment of the three *Fleuti* factors be the sole or primary objects of the inquiry. The new standard invites all evidence relevant to the significance of the absence. As the standard suggests, particularly important will be the harshness and unexpectedness of deportation. Although even before *Kamheangpatiyooth* some courts considered harshness and unexpectedness as factors in their determinations,[50] the new standard elevates these elements to the focus of the inquiry. In this light, the practitioner should concentrate his or her argument upon these two elements with the aim of showing that their significance was not meaningfully reduced by the alien's absence. One should emphasize such factors as the length of the alien's residence in relation to the brevity of his absence, the preservation of economic and emotional ties to this society, the intent of the alien not to abandon his residence, and the alien's determination that his absence not affect his immigration status.

E. Conclusion

Like many legal standards, the Ninth Circuit's new approach does not provide a simple mathematical formula for predicting the results of its application to different fact situations. Future decisions, however, should serve to further delineate the specific parameters of the standard and thus alleviate much of the remaining confusion surrounding the continuous presence clause. For the alien applying for suspension of deportation relief, the new standard represents a step forward in the removal of an irrational barrier. Although the standard makes no guarantees that the alien's application will be approved, it increases the chances of consideration on the merits instead of dismissal based on an inflexible requirement.

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50. *See, e.g.*, Lozano-Giron v. Immigration & Nat. Serv., 506 F.2d 1073, 1077-78 (7th Cir. 1974).