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## Immigration Law

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# IMMIGRATION LAW

## DEFENSES AND RELIEF FROM DEPORTATION—RECENT DEVELOPMENTS IN THE NINTH CIRCUIT

Bill Ong Hing\*

### INTRODUCTION

A review of the Federal Reporter for the 1979-1980 term reveals that the Court of Appeals for the Ninth Circuit has been the busiest federal court of appeals in the immigration and deportation area.<sup>1</sup> This is a direct reflection of the high apprehension and deportation statistics in the western states for the Immigration and Naturalization Service.<sup>2</sup> The immigration decisions of the Ninth Circuit therefore directly affect large number of aliens and have great national significance. The discussion which follows surveys several key areas in which the Ninth Circuit has had significant impact in the past year on the development of defenses and relief from deportation.

### I. SUSPENSION OF DEPORTATION

Under section 244(a) of the Immigration and Nationality Act (the Act), the "Attorney General may, in his discretion, suspend deportation and adjust the status" of a deportable alien to that of a lawful permanent resident if certain statutory conditions are satisfied.<sup>3</sup> In general, there are three eligibility require-

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1. See *e.g.*, 604-628 F.2d (1979-1980).

2. See 1977 I.N.S. ANN. REP. 89.

3. Section 244(a) of the Act, 8 U.S.C. § 1254(a) (1976), provides:

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States ex-

ments: continuous physical presence, good moral character, and a showing of hardship.<sup>4</sup> During the past year, the Ninth Circuit has decided several important cases pertaining to the continuous physical presence and hardship requirements.

#### A. Continuous Physical Presence

Depending on what ground for deportation applies, an alien applying for suspension of deportation relief must have been "*physically present* in the United States for a *continuous period* of not less than" seven or ten years.<sup>5</sup> However, in *Chan. v. Immigration & Naturalization Service*,<sup>6</sup> the Ninth Circuit held that even though the aliens had made several departures of up to ninety-five days during the seven-year period, the continuous physical presence requirement had been satisfied, and in *de Gallardo v. Immigration and Naturalization Service*,<sup>7</sup> the same court found that a vacation of three and one-half months did not necessarily break the continuity requirement.

At first glance, the *Chan* and *de Gallardo* holdings appear

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cept the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person who deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a) [8 U.S.C. § 1251(a)]; has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

4. *Id.*

5. *Id.*

6. 610 F.2d 651 (9th Cir. 1979) (per Tang, J.; the other panel members were Goodwin, J., and Lydick, D.J., sitting by designation).

7. 624 F.2d 85 (9th Cir. 1980) (per Pregoner, J.; the other panel members were Nelson, J., and Wilkins, D.J., sitting by designation).

to totally ignore the explicit continuous physical presence language of section 244(a). Upon further analysis, however, the cases are consistent with the development of the law in this area by the Ninth Circuit.

The Ninth Circuit and the Board of Immigration Appeals had historically construed the language of section 244(a) strictly and held that any absence, however brief, broke the continuity of physical presence.<sup>8</sup> However, in *Wadman v. Immigration & Naturalization Service*,<sup>9</sup> the Ninth Circuit borrowed a concept developed by the Supreme Court in *Rosenberg v. Fleuti*<sup>10</sup> and indicated that the alien's five day vacation trip to Mexico was not a significant interruption of the continuous physical presence requirement. The court instructed that in determining "sufficient continuity," the finding should turn on "whether the interruption, viewed in balance with its consequences, can be said to have been a significant one."<sup>11</sup>

The approach of the Ninth Circuit in *Wadman* was adopted by the Board of Immigration Appeals<sup>12</sup> and led to similar decisions. In *Git Foo Wong v. Immigration & Naturalization Service*,<sup>13</sup> the facts were simple for the court. The alien's departure consisted of a two hour Sunday sightseeing trip to Mexico. The court held that the visit "should not be regarded as meaningfully interruptive" of continuous presence in the United States.<sup>14</sup> In *Toon-Ming Wong v. Immigration & Naturalization Service*,<sup>15</sup> the alien had studied in Canada for six months at the age of sixteen. However, since the alien's journey, which originally had been planned to last only a week or two, was the result of his

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8. See *Arrellano-Flores v. Hoy*, 262 F.2d 667 (9th Cir. 1958); In *In re S—R—*, 6 I. & N. Dec. 405, 409 (B.I.A. 1954), the Board of Immigration Appeals pointed out: "[W]e have held that physical presence means just what it says and that a person who has been out of the United States during the period he is required to establish physical presence cannot establish that required physical presence."

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

10. 374 U.S. 449 (1976). The *Fleuti* case involved the definition of "entry" under § 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1976). The Supreme Court held that in order for a new "entry" to exist, there must be an intent to depart in a manner regarded as meaningfully interruptive of an alien's permanent residence. 374 U.S. at 462.

11. 329 F.2d at 816.

12. See, e.g., *In re Wong*, 12 I. & N. Dec. 271 (B.I.A. 1967).

13. 358 F.2d 151 (9th Cir. 1966).

14. 358 F.2d at 153.

15. 363 F.2d 234 (9th Cir. 1966).

foster parents' orders and not an exercise of his own volition, the continuity requirement was not necessarily violated. Because of the age of the alien and the circumstances involved, *Toon-Ming Wong* cannot be generally cited for the proposition that a six month absence will be disregarded. However it is significant that the court stated that "length of absence is relevant, but not alone determinative."<sup>16</sup>

After *Mamanee v. Immigration & Naturalization Service*,<sup>17</sup> however, it was clear that although the continuous physical presence requirement would not be "rigidly construed", length of absence was an important factor in the Ninth Circuit.<sup>18</sup> In that case the alien took two trips to Thailand. The first lasted five months and was taken to help her sick mother, and the second, with her husband and daughter, lasted nine months while her husband recovered from an injury. On those facts, the court found the alien ineligible for suspension because the "second departure, if not the first, was a meaningful interruption" of the continuity requirement.<sup>19</sup>

The Ninth Circuit clarified its standards for the continuous physical presence requirement in *Kamheangpatiyooth v. Immigration & Naturalization Service*<sup>20</sup> In that case the alien student took a one month trip to Thailand during Christmas vacation to visit his mother who was gravely ill. It was his only absence from the United States during the twelve year period from his initial entry until his application for suspension of deportation. In finding the alien ineligible, the immigration judge and the Board of Immigration Appeals relied on three factors

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16. *Id.* at 236. The language in *Toon-Ming Wong* is quite limiting. The court discussed the importance of the fact that the alien was a minor and stated:

On the other hand, a very brief absence might suffice [to break the continuity requirement] if voluntary and accompanied by a realization of possible consequences to the alien's status as a United States resident, particularly if the journey abroad were motivated by a purpose inconsistent with the policies of the Act.

*Id.*

17. 566 F.2d 1103 (9th Cir. 1977).

18. *Id.* at 1105.

19. *Id.*

20. 597 F.2d 1253 (9th Cir. 1979). See generally Note, *Suspension of Deportation: A New Approach To The Continuous Physical Presence Requirement*, 10 GOLDEN GATE U. L. REV. 303 (1980).

mentioned in *Rosenberg v. Fleuti*:<sup>21</sup> the length of visit, the purposes thereof, and whether the alien had to obtain any travel documents.<sup>22</sup> The judge and the Board concluded that because the alien traveled “several thousand miles”, was away for a month, and obtained new documents, the continuous physical presence requirement was not met.<sup>23</sup> The Ninth Circuit concluded that the judge and the Board used an “erroneous legal standard.”<sup>24</sup> Instead, the court announced the following standard for determining when an alien’s departure from the United States is meaningfully interruptive so as to break the continuous physical presence requirement:

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.<sup>25</sup>

Thus, although the *Fleuti* factors are important, they are not “in themselves determinative” of the continuity requirement.<sup>26</sup> Rather, they are “only evidentiary” on the central issue of how the absence bears on the question of “the hardship and unexpectedness of exposure to expulsion” in suspension cases.<sup>27</sup>

With that backdrop, the holdings in *Chan* and *de Gallardo* are easier to understand. Yet because of the lengthy absences involved, the decisions represent a major development in the line of cases involving the continuous physical presence requirement.<sup>28</sup>

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21. See note 10 *supra*.

22. 597 F.2d at 1257.

23. The alien student in *Kamheangpatiyooth* obtained an immigration acceptance form from his school (Form I-20A), extended his Thai passport, and obtained a new student visa abroad. *Id.* at 1257.

24. *Id.* at 1260.

25. *Id.* at 1257.

26. *Id.*

27. *Id.*

28. Although *Toon-Ming Wong v. I.N.S.*, 363 F.2d 234 (9th Cir. 1966), involved a six month absence, the alien was an unemancipated youth who was following the orders of his foster parents. See note 16 *supra*.

The *Chan* case involved two aliens who were married. During the required period of time under section 244(a), the husband took two trips during school vacation. One to Hong Kong lasted more than two and one-half months, and the other to Canada lasted six days. The wife made three departures—two trips to Hong Kong (lasting ninety-five and fifty-three days, respectively) and a fifty-two day trip to Australia. On those facts, the immigration judge and Board of Immigration Appeals concluded that the time and distances of the trips broke the continuous physical presence requirement. The Ninth Circuit reversed and, in reaffirming the *Kamheangpatiyooth* standards, found that “in light of the [ameliorative] Congressional purposes behind the suspension of deportation statute,” none of the absences were meaningfully interruptive of the continuous presence requirement.<sup>29</sup> The *Chan* court was impressed by the fact that the trips were taken during school vacations, that no new travel documents were needed, that nothing was suspicious about the trips, that the aliens traveled separately, and that they did not suspect that their status in the United States would be altered.<sup>30</sup>

In *de Gallardo*, the alien traveled to Honduras for a three and one-half month vacation during the requisite period of continuous presence. In vacating the finding of the immigration judge and the Board of Immigration Appeals that the trip had interrupted the continuity requirement, the Ninth Circuit reiterated the *Kamheangpatiyooth* standards and held that length of absence, along with the other *Fleuti* factors, are not “determinative” but are “guides” in determining “whether the alien’s absence from this country is meaningfully interruptive” of the continuous physical presence requirement.<sup>31</sup>

The *Chan* and *de Gallardo* holdings are therefore extremely significant because the absences involved were relatively lengthy, and the Ninth Circuit has reaffirmed its *Kamheangpatiyooth* standards in continuous physical presence cases. The court has

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29. 610 F.2d at 655.

30. *Id.*

31. 624 F.2d at 87. In *de Gallardo*, the court was also confronted with the charge that because the alien had reentered the United States under the pretext of intending to stay only a few days, the continuity requirement should be more rigidly construed. However, the court, citing *Git Foo Wong*, reaffirmed the principle that “not every violation of law taints an otherwise innocent trip abroad.” 624 F.2d at 87.

made clear that length of absence is only one of many factors, and that in determining “meaningful interruption” in suspension cases the main issue is how the absence bears on the question of the hardship and unexpectedness of exposure to expulsion.<sup>32</sup>

## B. Hardship Requirement

In a major en banc decision, *Wang v. Immigration & Naturalization Service*,<sup>33</sup> the Ninth Circuit announced important standards for the Board of Immigration Appeals and immigration judges to follow when presented with motions to reopen to apply for suspension and the issue of “extreme hardship” is involved.<sup>34</sup> However, in a blow to the liberalizing trend of the Ninth Circuit in suspension cases, the United States Supreme Court reversed without full briefing or oral argument.<sup>35</sup>

The aliens, husband and wife, had previously been denied adjustment of status under section 245 of the Act in deportation proceedings. After the Board of Immigration Appeals dismissed their appeal on the adjustment of status issue, the aliens moved to reopen their deportation proceedings in order to apply for suspension of deportation under section 244(a)(1). However, the Board denied the motion to reopen on the grounds that the aliens had failed to make a prima facie showing of extreme hardship.

The claim of extreme hardship in *Wang* was twofold. First, the aliens asserted that their two United States citizen children, who could not speak Korean, would suffer “serious economic, educational, and cultural difficulties” if forced to leave the

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32. 597 F.2d at 1257; 624 F.2d at 87.

33. 622 F.2d 1341 (9th Cir. 1980) (per Choy, J.) (en banc), *rev'd*, 101 S. Ct. 1027 (1981).

34. As in the requirement of continuous physical presence, the hardship requirement for suspension varies depending on the applicable ground for deportation. See note 3 *supra*. If a serious ground for deportation is charged, then under section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2) (1976), there must be a showing that the deportation would result in “exceptional and extremely unusual hardship” to the alien, or to the citizen or resident spouse, parent or child of the alien. If a less serious ground for deportation is charged, then the less rigorous requirement of “extreme hardship” is used under § 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) (1976). Motions to reopen are governed by the provisions of 8 C.F.R. § 3.2 (1980).

35. *I.N.S. v. Wang*, 101 S. Ct. 1027 (1981).



United States with their parents.<sup>36</sup> Second, the aliens argued that deportation would “impose a severe economic hardship on themselves.”<sup>37</sup> The respondents had purchased a dry cleaning business valued at \$75,000 and a home valued at \$60,000. They had approximately \$44,000 in assets and liabilities of \$81,000. Apparently, none of the allegations of hardship in support of the motion to reopen was supported by sworn statements or by evidentiary materials, as required by 8 C.F.R. section 3.8(a) (1980).<sup>38</sup>

The Ninth Circuit first acknowledged that an “alien cannot gain favored status merely because he has a child who is a United States citizen.”<sup>39</sup> However, the court recognized that children are within the protected class of relatives mentioned in section 244(a)(1), and believed that the severity of hardship to them “is difficult to discern without a hearing.”<sup>40</sup> As to the claim of economic hardship, the Ninth Circuit also acknowledged that economic loss alone was insufficient to find extreme hardship, but stated:

Economic loss is not the same as economic hardship. An alien who is forced to sell property because he is being deported, whether he shows a financial loss or a profit, might, nonetheless, suffer hardship. Moreover, where an alien is forced to sell a business that has taken him years of hard work to establish, the hardship to the alien cannot be measured by any dollar amount.<sup>41</sup>

Therefore, the Ninth Circuit ruled that the Board should have granted a hearing where “a showing of economic hardship is combined with some other substantial hardship.”<sup>42</sup>

The Supreme Court concluded that the Ninth Circuit had

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36. 622 F.2d at 1347-48.

37. *Id.* at 1348.

38. 101 S. Ct. at 1030. In pertinent part, 8 C.F.R. § 3.8(a)(1980) provides: “The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.”

39. 622 F.2d at 1348 (citing *Choe v. I.N.S.*, 597 F.2d 168 (9th Cir. 1979)).

40. 622 F.2d at 1348 (citing *Urbano de Malaluan v. I.N.S.*, 577 F.2d 589 (9th Cir. 1978)).

41. 622 F.2d at 1348-49.

42. *Id.* at 1349.

erred in two respects. First the Supreme Court believed that the Ninth Circuit had ignored the language of 8 C.F.R. section 3.8(a) which sets forth the requirements of a motion to reopen.<sup>43</sup> Specifically, the regulation requires that the motion be “supported by affidavits or other evidentiary material.” Since the allegations of hardship in the case had been “in the main conclusory and unsupported by affidavit,” the Supreme Court concluded that the Ninth Circuit’s grant of a new hearing “circumvented” the cited language of the regulation.<sup>44</sup>

The Supreme Court’s second ground for reversal is more troubling. The Court concluded that the Ninth Circuit had “encroached” on the authority to determine extreme hardship which the Act conferred on the Attorney General and his delegates, viz., the Board of Immigration Appeals. The import of this ground for reversal is the Supreme Court’s mandate that virtually absolute deference must be paid to the Board’s determination of what constitutes a prima facie case of extreme hardship for suspension purposes. In criticizing the Ninth Circuit’s liberal approach to the granting of a new hearing in suspension cases, the Supreme Court stated: “The Attorney General and his delegates have the authority to construe ‘extreme hardship’ narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the ‘extreme hardship’ language which itself indicates the exceptional nature of the suspension remedy.”<sup>45</sup> This decision appears, therefore, to effectively foreclose review by the courts of appeals of decisions of the Board of Immigration Appeals denying motions to reopen to apply for suspension where the primary issue is extreme hardship. The determination as to what constitutes a prima facie case of extreme hardship is left to the Board by the Supreme Court.

The Supreme Court’s opinion in *Wang* is a serious setback to the Ninth Circuit’s trend of fairness to aliens in suspension cases.<sup>46</sup> Yet, the Ninth Circuit’s decisions in *Wang* and in a companion case, *Villena v. Immigration & Naturalization Service*,<sup>47</sup> are not exactly what the Supreme Court might have character-

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43. 101 S. Ct. at 1030. See note 38 *supra*.

44. *Id.*

45. *Id.* at 1031.

46. See text accompanying notes 5-32 *supra*.

47. 622 F.2d 1352 (9th Cir. 1980) (per Choy, J.) (en banc).

ized them to be. *Wang* and *Villena* were remanded to the Board on the issue of improper denial of a motion to reopen. The Ninth Circuit in *Wang* had reminded practitioners that:

Although an alien who sets forth a prima facie case of eligibility for relief must be afforded a hearing, the mere fact that a prima facie case is made does not preordain the result of the hearing. Proof of eligibility does not compel that relief be granted . . . but only triggers the exercise of the Attorney General's discretion to determine whether the alien merits the relief.<sup>48</sup>

Thus it could be argued that all the Ninth Circuit was doing in *Wang* was to insure that the alien had a fair hearing on the suspension application, not to substitute its opinion of what constituted extreme hardship at the hearing itself. Viewed in that light, the Supreme Court decision in *Wang* represents an over-reaction to a mere due process/fair hearing concept rather than substantive grants of suspension of deportation.

For practitioners, the end to this chapter in the suspension of deportation area will be written by the Board of Immigration Appeals which has, with the Supreme Court's opinion in *Wang*, received the blessing of the nation's highest court to act almost at will in determining when to grant an alien's motion to reopen to apply for suspension of deportation when the primary issue is extreme hardship.

## II. ADJUSTMENT OF STATUS—MOTION TO REOPEN

In a troubling en banc decision, *Obitz v. Immigration & Naturalization Service*,<sup>49</sup> the Ninth Circuit affirmed a Board of Immigration Appeals denial of an alien's motion to reopen to apply for adjustment of status to that of a permanent resident. This was done in spite of the fact that the alien had recently married a United States citizen, the alien was the beneficiary of an approved visa petition filed by her husband, and the government did not dispute the alien's statutory eligibility for adjustment of status.<sup>50</sup> The result is surprising in light of the Ninth Circuit's recent holdings favoring the grant of motions to

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48. *Id.* at 1347.

49. 623 F.2d 1331 (9th Cir. 1980) (per Sneed, J.) (en banc).

50. *Id.* at 1332.

reopen in the much more discretionary area of suspension of deportation.<sup>51</sup>

The facts in *Obitz* are important in order to understand the context of the motion to reopen in question. On February 26, 1977 while under an order to depart the United States by March 18, 1977, the alien married a United States citizen.<sup>52</sup> After her husband filed an immediate relative<sup>53</sup> petition for her, the alien moved to reopen her deportation hearing in order to request extended voluntary departure while the petition was pending. This request was denied by the Board and the Ninth Circuit affirmed in an unpublished decision.<sup>54</sup> The immediate relative visa petition was approved on December 10, 1977, so the alien filed a new motion to reopen to apply for adjustment of status.<sup>55</sup> The Board denied the new request to reopen as well,<sup>56</sup> and the Ninth Circuit followed suit.<sup>57</sup>

The court distinguished the suspension motion to reopen situations of *Wang v. Immigration & Naturalization Service*<sup>58</sup> and *Urbano de Malaluan v. Immigration & Naturalization Service*<sup>59</sup> from the adjustment motion to reopen with questionable

51. See discussion of *Wang* in text accompanying notes 33-48 *supra*.

52. 623 F.2d at 1332.

53. The immediate relative category is provided for in § 201(b) of the Act, 8 U.S.C. § 1151(b) (1976), which provides:

The immediate relatives referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: *Provided*, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Chapter.

54. 623 F.2d at 1332. This initial motion to reopen to apply for extended voluntary departure from the Board appears to be in itself inappropriate. Authority to extend voluntary departure time specified initially by an immigration judge or the Board is "within the sole jurisdiction of the district director." 8 C.F.R. § 244.2 (1980).

55. The alien was not eligible to apply for adjustment of status until the visa petition was approved. 8 C.F.R. § 245.1(d) (1980). Also, because deportation proceedings had commenced, it can be presumed that an order to show cause had been issued. 8 C.F.R. § 242.1(a) (1980). Therefore, the request for adjustment of status could not be made to the district director who lost jurisdiction over adjustment as soon as the order to show cause was served. 8 C.F.R. § 245.2(a) (1980).

56. 623 F.2d at 1332.

57. *Id.* at 1333.

58. See note 33 *supra* and accompanying text.

59. 577 F.2d 589 (9th Cir. 1978).

rationale. Basically, the court reasoned that statutory eligibility for suspension of deportation was a discretionary determination, due to the extreme hardship requirement which was difficult to make without a hearing.<sup>60</sup> However, statutory eligibility for "adjustment of status does not involve a discretionary determination. Eligibility turns on compliance with fixed statutory standards."<sup>61</sup> Thus, the court believed that unlike the suspension cases, a determination of statutory eligibility for adjustment of status did not require a hearing.<sup>62</sup> Rather, the inquiry should be whether the alien seeking adjustment of status had presented new evidence "that bears on whether the Attorney General should exercise his discretion to adjust her status now that her statutory eligibility has been established."<sup>63</sup> The court believed that the alien had not done so because her statutory eligibility had been established by the "essentially ministerial act of the Service" approving the visa petition, and the facts were substantially as they were when the first motion to reopen had been made for voluntary departure.<sup>64</sup>

The dissent in *Obitz*<sup>65</sup> pointed out several flaws in the majority's analysis. First, the eligibility determination for adjustment of status is not "essentially ministerial" given the thirty-three grounds for exclusion found in section 212(a)<sup>66</sup> of the Act which must be satisfied.<sup>67</sup> Second, the holding in *Urbano de Malaluan* ordered a hearing reopened not for the sole purpose of determining eligibility, but also to determine whether discretion should be granted.<sup>68</sup> The dissent pointed out: "The majority approach therefore penalizes an alien for making too strong a showing of eligibility. In addition, under the majority view, there is nothing to prevent the Service from defeating the alien's right to a hearing through the simple expedient of stipulating to eligibility."<sup>69</sup> Additionally, the approval of the visa petition was an

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60. 623 F.2d at 1333.

61. *Id.* at 1332.

62. *Id.* at 1333.

63. *Id.*

64. *Id.*

65. *Id.* at 1333-37 (per Tang, J.).

66. 8 U.S.C. § 1182(a) (1976 & Supp. III 1979).

67. 623 F.2d at 1335.

68. *Id.* at 1336.

69. *Id.* The majority's position is particularly bothersome because it literally condones the government's refusal to exercise discretion once statutory eligibility has been

important new fact because it indicated the government's satisfaction that the marriage was *bona fide*.<sup>70</sup> Furthermore, the dissent strongly argued that as a matter of policy, it is judicially wise to treat motions to reopen uniformly for analogous remedial statutes.

The *Obitz* decision comes as a surprise to the immigration practitioner who correctly views adjustment of status under section 245 as a much more straight-forward relief than suspension of deportation under section 244. In practice, relief under section 245 is generally granted without much question once eligibility is established, and this fact serves as the basis for the unsettling feeling derived from the result in *Obitz*.

The effect of *Obitz* is, however, quite limited given the Board's decision in *In re Matter of Garcia*,<sup>71</sup> of which the Ninth Circuit was apparently unaware. *Garcia* was decided by the Board of Immigration Appeals subsequent to the second motion to reopen in *Obitz* and involved similar facts. The alien in *Garcia* was under an order to depart voluntarily when he married a United States citizen. In accordance with a new regulation,<sup>72</sup> the alien simultaneously submitted the visa petition and adjustment of status application and moved to reopen for relief under section 245.<sup>73</sup> In one large sense, therefore, the alien in *Obitz*, whose visa petition had been approved, was in a much better position than the alien in *Garcia*. Yet in *Garcia*, the Board held as a matter of policy that a motion to reopen should be granted to such a person "unless clear ineligibility is apparent in the record."<sup>74</sup> It would appear, therefore, that persons such as the alien in *Obitz*

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established. The failure to exercise discretion has traditionally been grounds for reversing the Board. See *Asimakopoulos v. I.N.S.*, 445 F.2d 1362 (9th Cir. 1971).

70. 623 F.2d at 1336.

71. Interim Decision 2684 (B.I.A. Dec. 27, 1978).

72. 8 C.F.R. § 245.2(a)(2) (1980) provides in pertinent part:

If a visa petition is submitted simultaneously with the adjustment application, the adjustment application shall be retained for processing only if approval of the petition when reached for adjudication would make a visa immediately available at the time of filing of the adjustment application. If such petition is subsequently approved, the date of filing the adjustment application shall be deemed the date on which the accompanying petition was filed.

73. Interim Decision 2684, at 2.

74. *Id.* at 3.

would certainly fall within the policy of *Garcia*, and the Board will grant a motion to reopen, particularly where the government concedes eligibility.

### III. VIABILITY REQUIREMENT FOR MARRIAGES

Under section 201(b) of the Act,<sup>75</sup> the alien spouse of a United States citizen is classified as an immediate relative for immigration purposes. However, it has long been established that if a marriage is a sham or fraudulent from its inception, the marriage shall not bestow immigration benefits on the alien.<sup>76</sup> The more difficult policy question arises when the marriage was not a sham or fraudulent from its inception, but the marriage has become nonviability or "factually dead," although not legally terminated.

The Ninth Circuit addressed this question in a limited form last term in *Dabaghian v. Civiletti*.<sup>77</sup> After marrying a United States citizen, the alien student in *Dabaghian* applied for and was granted adjustment of status to that of a lawful permanent resident in 1972.<sup>78</sup> However, in 1974 the I.N.S. moved under section 246 of the Act<sup>79</sup> to rescind the adjustment of status on the ground that the alien had not been eligible for it in 1972.<sup>80</sup> The

75. See note 53 *supra*.

76. See *Bark v. I.N.S.*, 511 F.2d 1200 (9th Cir. 1975); *Garcia-Jaramillo v. I.N.S.*, 604 F.2d 1236 (9th Cir. 1979). Under § 241(c) of the Act, 8 U.S.C. § 1251(c) (1976), an alien who has obtained immigrant status on the basis of a sham marriage is deportable.

Furthermore, under § 204(c) of the Act, 8 U.S.C. § 1154(c) (1980), an alien who previously entered on the basis of a sham marriage is forever precluded from being the beneficiary of another petition.

77. 607 F.2d 868 (9th Cir. 1979) (per Choy, J.; the other panel members were Anderson, J., and Hug, J.).

78. *Id.* at 869.

79. Section 246 of the Act, 8 U.S.C. § 1256 (1976), provides in relevant part:

If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 or 1259 of this title [§ 245 or 249 of the Act] or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and compelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

80. 607 F.2d at 869.

basis of the government's argument was that at the time of adjustment of status, the couple was separated and the marriage was "dead in fact," even though still legally alive.<sup>81</sup> However, the government never claimed or proved that the marriage was a sham or fraud.

In rejecting the government's position, the court pointed out that there was no statutory or federal case law to support the nonviability or "dead in fact," theory and stated, "If a marriage is not sham or fraudulent from its inception, it is valid for the purposes of determining eligibility for adjustment of status under § 245 of the Act until it is legally dissolved."<sup>82</sup> Furthermore, the alien's purported ineligibility depended on whether he was the "spouse of a United States citizen at the time of adjustment," and because the word "spouses" in section 201(b) "includes the parties to all marriages that are . . . not sham," the alien was not ineligible under section 245 of the Act.<sup>83</sup> The court thereby reversed the Board and ordered that the alien be reinstated.<sup>84</sup>

The *Dabaghian* decision does not necessarily sound the death knell of the application of the viability requirement in immigration cases. The *Dabaghian* panel had to wrestle with an earlier Ninth Circuit decision, *Menezes v. Immigration & Naturalization Service*,<sup>85</sup> which contained troublesome language supporting the application of the viability requirement. *Menezes* involved a marriage and an actual section 245 adjustment of status application. At the deportation hearing, the immigration judge found the alien statutorily eligible, but denied the application as a matter of discretion because the couple had been separated for some time.<sup>86</sup> By the time *Menezes* reached the Board of Immigration Appeals, the alien and his United States citizen spouse were divorced, thus he was ineligible for adjustment of status

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81. *Id.*

82. *Id.* 8 C.F.R. § 245.1(d) (1980) provides that an applicant is not eligible for a § 245 adjustment unless a visa petition has been filed and approved. However, under 8 C.F.R. § 205.1(a)(4) (1980), the approval of a visa petition is automatically revoked when the relationship of husband and wife is legally terminated.

83. 607 F.2d at 871.

84. *Id.*

85. 601 F.2d 1028 (9th Cir. 1979).

86. *Id.* at 1029-30.



because the approved visa petition was automatically revoked.<sup>87</sup> However, rather than affirming the Board's decision on that point, the *Menezes* panel went on to affirm the immigration judge's discretionary authority to deny adjustment under section 245 if the marriage is no longer viable:

Congress provided that, to be admitted for permanent residence, immediate relatives must submit to the discretion of the Attorney General by applying for adjustment of status under § 245. In determining whether to grant permanent resident status based on a marriage, it is highly relevant that the relationship may no longer be in existence when the application is under consideration.<sup>88</sup>

The *Dabaghian* panel first labeled as dictum the *Menezes* panel's approval of the immigration judge's discretionary denial of adjustment on the basis of the non-sham, but nonviable marriage.<sup>89</sup> But the *Dabaghian* panel went out of its way to point out that this dictum did not conflict with its own holding because the "INS discretion that the *Menezes* Immigration Judge relied on comes into play only after eligibility under § 245 has been established; *Menezes* did not deny that any legally valid, non-sham marriage suffices for § 245 eligibility."<sup>90</sup>

Thus, the *Dabaghian* panel viewed its decision as a statutory eligibility case. In other words, the party to a non-sham but nonviable marriage may meet the statutory eligibility requirements for adjustment of status under section 245, but the Attorney General may "in his discretion" still deny adjustment if the marriage is "factually dead." Therefore, even after *Dabaghian*, the government may still deny section 245 adjustment in a marriage case where the relationship is not viable.<sup>91</sup>

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87. See note 82 *supra*.

88. 601 F.2d at 1035.

89. 607 F.2d at 871.

90. *Id.*

91. Recently in *In re McKee*, Interim Decision 2782 (B.I.A. 1980), the Board of Immigration Appeals struck down viability of marriage as a requirement for approval of a visa petition and adopted the reasoning in *Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978). However, the Board has not squarely faced the issue of whether, once the visa petition has been approved and the immigration judge adjudicates an adjustment application, the immigration judge may in his or her discretion deny the § 245 adjustment application on nonviability grounds. It seems incongruous that the Board would permit such a result, but the language in *Dabaghian* certainly would sustain such a result.

## IV. VIOLATION OF REGULATIONS

The Ninth Circuit decided several cases in the past term raising the issue of what effect the government's violation of its own regulations has on deportation proceedings. *United States v. Vega-Mejia*,<sup>92</sup> *United States v. Rangel-Gonzales*,<sup>93</sup> and *United States v. Lagarda-Aguilar*<sup>94</sup> were criminal cases in which the defendants were being charged with illegally reentering the United States after having been previously deported, a violation of section 276 of the Act.<sup>95</sup> *Tejeda-Mata v. Immigration & Naturalization Service*<sup>96</sup> was a deportation case.

In *Vega-Mejia* and *Rangel-Gonzales* the defendants argued that their underlying deportations were unlawful because the I.N.S. had failed to advise them of the right to confer with Mexican consular officials prior to hearing as required by 8 C.F.R. section 242.2(e).<sup>97</sup> Both defendants relied heavily on *United States v. Calderon-Median*<sup>98</sup> for their collateral attacks on de-

92. 611 F.2d 751 (9th Cir. 1979) (per curiam; the members of the panel were Duniway, J., Choy, J., and Peck, D.J., sitting by designation).

93. 617 F.2d 529 (9th Cir. 1980) (per Schroeder, J., the other members of the panel were Merrill, J., and Tang, J.).

94. 617 F.2d 527 (9th Cir. 1980) (per Schroeder, J.; the other members of the panel were Merrill, J., and Tang, J.).

95. Section 276 of the Act, 8 U.S.C. § 1326 (1976), provides:

Any alien who—

- (1) has been arrested and deported or excluded and deported, and thereafter
- (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States of his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1,000, or both.

96. 626 F.2d 721 (9th Cir. 1980) (per Bartels, D.J., sitting by designation; the other panel members were Choy, J., and Ferguson, J.).

97. 8 C.F.R. § 242.2(e) (1980), in relevant part provides: "Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States."

98. 691 F.2d 529 (9th Cir. 1979). *Rangel-Gonzales* was actually first before the Ninth Circuit as a companion to *Calderon-Medina*. However, the case was remanded to allow the defendant the opportunity to demonstrate prejudice resulting from the I.N.S. regulation violation. *Id.* at 532.

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portation based on violations of I.N.S. regulations. In *Calderon-Medina*, the Ninth Circuit adopted a two-step test to determine whether violation of a given regulation invalidates the deportation.<sup>99</sup> First the regulation itself must serve a purpose of benefit to the alien, and second, the I.N.S. violation must have prejudiced interests of the alien which were protected by the regulation.

Using the *Calderon-Medina* test, the court in *Rangel-Gonzales* first found that 8 C.F.R. section 242.2(e) serves a purpose of benefit to the alien.<sup>100</sup> "It was intended to insure compliance with this country's treaty obligations to promote assistance from their country of origin for aliens facing deportation proceedings in the United States."<sup>101</sup> As to the issue of prejudice, the court analyzed the evidence presented by both parties and concluded that the defendant satisfied his burden of establishing that he did not know about his right to consult with consular officials, that he would have availed himself of the right had he known of it, and that he would have obtained assistance in resisting deportation.<sup>102</sup> The court therefore dismissed the indictment.<sup>103</sup>

The defendant in *Vega-Mejia* was not as successful. The court affirmed the district court finding that the defendant was not prejudiced by the regulation violation in that the defendant would not have spoken to the Mexican consul.<sup>104</sup> Additionally,

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99. *Id.* at 531.

100. 617 F.2d at 530.

101. *Id.*

102. *Id.* at 531. The evidence submitted by the defendant indicated that he would have probably obtained voluntary departure under § 244(e) rather than deportation. Section 244(e) of the Act, 8 U.S.C. § 1254(e) (1976) provides:

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18), of section 1251 of this title [§ 241(o) of the Act] (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

103. 617 F.2d at 533.

104. 611 F.2d at 752.

the record reflected that the defendant's main concern was to "avoid detention and delay" his return to Mexico.<sup>105</sup>

The defendant in *United States v. Lagarda-Aguilar* admitted that he had previously been deported in 1977.<sup>106</sup> However, he returned in 1978 under the discretionary parole status authority of the Attorney General of section 212(d)(5) of the Act.<sup>107</sup> When the government sought to terminate the defendant's parole status, agents merely escorted him to the Mexican border without formal written notice as required by 8 C.F.R. section 212.5(b).<sup>108</sup> The court affirmed the district court's dismissal of the indictment without even having to refer to the *Calderon-Medina* test since the requirement of written notice is the "only safeguard, for both the alien and the United States government, that parole status is administered in an orderly manner."<sup>109</sup>

The alien in *Tejeda-Mata v. Immigration & Naturalization Service* was facing deportation rather than criminal charges.

105. *Id.*

106. 617 F.2d at 527.

107. 8 U.S.C. § 1182(d)(5) (1976), provides:

The Attorney General may [except as provided in subparagraph (b)], in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

108. 8 C.F.R. § 212.5(b) (1980) provides:

*Termination of parole.* At the expiration of the period of time or upon accomplishment of the purpose for which parole was authorized or when the opinion of the district director in charge of the area in which the alien is located that neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole, and further inspection or hearing shall be conducted under section 235 or 236 of the Act [8 U.S.C. §§ 1225, 1226] and this chapter, or any order of exclusion and deportation previously entered shall be executed.

109. 617 F.2d at 528.

However on appeal he argued that the failure of the I.N.S. to advise him of his right to contact the Mexican consul violated 8 C.F.R. section 242.2(e) citing *Calderon-Medina*.<sup>110</sup> The argument was somewhat novel because in *Rangel-Gonzales*, *Vega-Mejia*, and *Lagarda-Aguilar*, the defendants were not contesting deportability, but rather were challenging their criminal indictments. However, in *Tejeda-Mata*, the alien appears to have been raising the violation of regulation question as a defense to deportability itself. The court actually did not meet this question squarely because the alien had failed to raise the issue below and was deemed not to have exhausted administrative remedies.<sup>111</sup> If the court had gone on to the *Calderon-Medina* test in this particular case, it is doubtful that the alien would have benefited by its application because of the regulation involved. Where an alien is clearly deportable, as was the case in *Tejeda-Mata*, the only real benefit that such an alien might derive from exercising the right to contact the foreign consul is that the consul could assist in obtaining voluntary departure in lieu of deportation.<sup>112</sup> Such was the case in *Rangel-Gonzales*. However, in *Tejeda-Mata*, the alien had already been granted the privilege of voluntary departure by the immigration judge.<sup>113</sup> Thus, it would have been difficult for the alien to make a showing of prejudice as required by *Calderon-Medina*.<sup>114</sup>

However, the importance of *Tejeda-Mata* lies in the court's apparent willingness to entertain a timely raised violation of regulation argument in the deportation setting itself. As long as the two-step test of *Calderon-Medina* is met, it appears that the Ninth Circuit will be prepared to fashion relief which will alleviate the demonstrated prejudice to the alien.<sup>115</sup>

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110. 626 F.2d at 725.

111. *Id.* at 726.

112. See note 102 *infra*.

113. 626 F.2d at 723.

114. Prejudice could be shown if there were defenses or relief other than voluntary departure which were available to the alien, which the consul would have assisted on. However, the record in *Tejeda-Mata* did not suggest the possibility of any other relief.

115. In *Sun Il Yoo v. I.N.S.* 534 F.2d 1325 (9th Cir. 1976), the court used a violation of regulation theory in a deportation setting to support the major contention that there had been "affirmative misconduct" on the part of I.N.S. who should thereby be estopped. And in *Mendez v. I.N.S.*, 563 F.2d 956 (9th Cir. 1977), the court ordered that an alien be readmitted after being deported in violation of a regulation. See also, *Corneil-Rodriguez v. I.N.S.*, 532 F.2d 301 (2d Cir. 1976).