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IMMIGRATION LAW

INTRODUCTION

The Tenth Circuit Court of Appeals decided several cases involving immigration law during the 1994-95 survey period.[1] Because the Tenth Circuit serves as the first level of judicial review of administrative decisions concerning asylum and deportation,[2] many cases presented to the court were little more than judicial confirmation of administrative decisions. The Tenth Circuit did, however, decide several noteworthy cases as well as a few issues of first impression.

After a brief discussion in Part I of the background of the interlocking statutory components of United States immigration law, Part II of this Survey examines suspension of deportation and the standard of proof that an alien must meet to remain in this country. This year, the court continued its trend of narrow construction of the elements of discretionary relief. As a result, few aliens met the required standard.

Part III discusses the court's interpretation of statutes providing for asylum and withholding of deportation. Both the discretionary grant of asylum and the nondiscretionary withholding of deportation hinge on the applicant's ability to articulate an objective fear of persecution. As in the cases involving suspension of deportation, the court strictly followed the statutory standard, denying applications based on general political upheaval and subjective fear of persecution. In a matter of first impression, the court was asked to determine the burdens of proof and production that both the applicant and the Immigration and Naturalization Service (INS) must meet throughout the review process. A vehement dissent suggests that American courts have not seen the last of this issue.

Part IV examines a case involving the constitutional implications of the immigration process as it applies to aliens who marry United States citizens. The Tenth Circuit rejected a novel constitutional attack aimed at invalidating an amendment to the immigration laws designed to flush out fraudulent marriages. Finally, Part V examines an issue of growing importance in immigration law: the fate of naturalized citizens convicted of felony offenses. These cases involve prisoners seeking to compel deportation as well as those wishing to prevent deportation, and the effect of an aggravated felony conviction on the deportation process.

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1. The survey period covers decisions handed down between September 1, 1994, and August 31, 1995.

2. 8 U.S.C. § 1105a(a)(2) (1994). Upon review, the administrative determination is subject only to procedural protections of due process. Courtney E. Pellegrino, Comment, *A Generously Fluctuating Scale of Rights: Resident Aliens and First Amendment Free Speech Protections*, 46 SMU L. REV. 225, 229 (1992).

I. GENERAL BACKGROUND

The term "immigration" refers to the movement of people from one country to another.[3] Laws controlling entry into the United States are almost exclusively the product of the twentieth century.[4] The earliest such restriction, however, came about as a result of the depression of the 1870s and a concurrent increase in racial animosity toward Asian nationals.[5]

The statutes and decisions that constitute substantive immigration law form only a part of the unique framework used to regulate immigration.[6] In the United States, executive and departmental orders, executive proclamations, and treaties also affect immigration.[7] This Survey focuses on the substantive statutes, as interpreted and applied by the Tenth Circuit Court of Appeals. Relevant orders, proclamations, and treaties will be addressed, but only in the context of cases presented to the Tenth Circuit during the 1994-95 survey period.

The Immigration and Nationality Act of 1952 (INA)[8] provided the first comprehensive scheme of immigration control in the United States.[9] Congress has amended the INA five times,[10] and current national immigration policy is the product of over 150 years of cultural and societal development.[11]

Immigration remains a complicated area of the law, comprised of many elements.[12] Congress promulgates the controlling statutes,[13] as in other areas

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3. RICHARD A. BOSWELL & GILBERT P. CARRASCO, IMMIGRATION AND NATIONALITY LAW 4 (1991).

4. Joseph Minsky et al., *Introductory Overview of Immigration Law and Practice*, C394 ALI-ABA 1, 7-11 (1989).

5. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 1-2 (1992). Congress enacted two statutes governing immigration prior to 1875. *Id.* The Alien Act authorized the President to deport "dangerous" aliens. Ch. 58, 1 Stat. 570, 571 (1798) (expired 1800). *Id.* In 1862, Congress passed a law prohibiting the import of Chinese slave laborers. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, ch. 27, 12 Stat. 340 (1862) (repealed 1974); *see* FRAGOMEN & BELL, *supra*, at 1-2. To a great extent, this racial animosity continues today. For example, one commentator referred to immigration reform as the "snake oil" of the 1994 California state elections. Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 492 (1995).

6. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 383 (1981).

7. *Id.* By definition, international law concerns only the principles and rules of conduct between nations. David D. Jividen, Comment, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 U. CIN. L. REV. 943, 945 (1986). Therefore, although many treaties and agreements between nations establish refugee rights, it is incorrect to analyze international refugee rights in the context of rights within sovereign nations. *Id.*

8. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 (1952) (current version at 8 U.S.C. §§ 1101-1525 (1994)).

9. The INA served to collect the numerous, scattered statutory provisions already on the books. Minsky et al., *supra* note 4, at 9. The INA made no substantive changes other than the creation of new, ideological bases for exclusion. *Id.* President Truman vetoed the bill because of the exclusion provisions, but Congress overrode the veto. *Id.*

10. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1966); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1978); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1981); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1987); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991).

11. HUTCHINSON, *supra* note 6, at 3.

12. BOSWELL & CARRASCO, *supra* note 3, at 7.

of law, but four agencies of the executive branch are responsible for enforcement of immigration laws: the Department of Justice (DOJ); the Department of State; the Department of Labor; and the Public Health Service.[14] This Survey limits its discussion to the role of the INS, an agency within the DOJ,[15] in the enforcement of immigration laws. Although the other agencies mentioned play an important part in the overall functioning of immigration procedure in the United States, they are beyond the focus of the Tenth Circuit decisions in this Survey.[16]

The INS is divided into four geographic regions providing administrative direction to the district offices.[17] The regional directors' functions are primarily managerial, with the INS Commissioner being responsible for determining policy and overall management of the agency.[18] The Executive Office for Immigration Review (EOIR), the agency that presides over deportation hearings, exclusion hearings, and other related matters at the administrative level, is divided into two levels.[19] Immigration Judges (IJs) preside over hearings, take evidence, and determine deportability of alien applicants,[20] while the Board of Immigration Appeals (BIA) exercises appellate review of the IJ decisions.[21]

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13. In forging a nation almost entirely from immigrants and first- or second-generation nationals, the founding fathers might have been expected to explicitly address immigration issues. The Constitution, however, is silent on these subjects. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 1 (2d ed. 1991); *see also* Katherine Tonnas, Comment, *Out of a Far Country: The Sojourns of Cubans, Vietnamese, Haitians, and Chinese to America*, 20 S.U. L. REV. 295, 295 (1993) (discussing George Washington's view of America as an "asylum for the unfortunate of other countries" and Thomas Jefferson's affirmation of the "hospitality . . . extended to our fathers arriving in this land"). Although Congress has no explicit power to regulate immigration, the Supreme Court has held that the regulation of immigration falls within Congress's Commerce Clause authority over the flow of commerce across national borders. *See* Passenger Cases, 48 U.S. (7 How.) 283, 288 (1849); Head Money Cases, 112 U.S. 580, 600 (1884). The Court has also read Congress's Article I, § 8 power "to establish a uniform Rule of Naturalization" to include immigration. Pellegrino, *supra* note 2, at 228-29. In addition, the Court has held that immigration is a political question; therefore, congressional determinations regarding the exclusion of aliens and the conditions placed upon entry of aliens are not subject to judicial review. *Id.*

14. BOSWELL & CARRASCO, *supra* note 3, at 7.

15. *Id.*

16. For a brief description of the agencies within each governmental branch responsible for enforcement of immigration laws, see Minsky et al., *supra* note 4, at 11-14.

17. *Id.* at 11. The district offices receive applications and petitions for immigration benefits, enforce immigration laws, and institute deportation and exclusion proceedings when necessary. *Id.*

18. *Id.*

19. Noel A. Ferris, *Developments in Procedures Before the Executive Office for Immigration Review*, *in* BASIC IMMIGRATION LAW 1993, at 213, 213 (PLI Litig. & Admin. Prac. Course Handbook Series No. 466, 1993).

20. *Id.* The decision of the IJ, whether oral or written, includes a review of the evidence, a statement of factual findings supporting deportability, and a discussion of any discretionary relief requested by the alien. Samuel A. Yee, Survey, *Final Exit or Administrative Exhaustion? The Deported Alien's Catch-22*, 8 ADMIN. L.J. AM. U. 605, 614 (1994).

21. *See generally* Ferris, *supra* note 19. The deportation order is automatically stayed pending full disposition by the BIA. Yee, *supra* note 20, at 616.

II. SUSPENSION OF DEPORTATION

A. *Background*

When the INS learns of a deportable alien[22] within the borders of the United States, the agency initiates deportation proceedings by issuing an order to show cause (OSC), which requires the alien to "show cause" as to why she should not be deported.[23] Pending the outcome of the deportation hearing, the INS may take the alien into custody and either continue to hold her in custody or release her under bond or on conditional parole.[24] The Attorney General then has discretion to revoke the bond or parole.[25] Suspension of deportation,[26] a discretionary grant by the United States Attorney General, represents one form of relief an alien can request.[27] Such a grant requires the applicant to show that, although she may be deportable under immigration laws: (1) the alien has been physically present in the United States for a continuous period of not less than seven years; (2) the alien can offer evidence that during that entire time she has been, and currently is, a person of good moral character; and (3) the alien or the alien's spouse, parent, or child who is a United States citizen would suffer extreme hardship as a result of the deportation.[28] An

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22. 8 U.S.C. § 1251 (1994). The INA enumerates 33 grounds for deporting resident aliens. Because these grounds may be applied retroactively, an alien is, in effect, "perpetually subject to expulsion." Denyse Sabagh, *Deportation, Exclusion, Discretionary Relief, and Waivers*, C505 ALI-ABA 337, 345 (1990). In addition, delay will not prevent the INS from bringing charges at any time; there is no statute of limitations for deportation. *Id.*

23. 8 U.S.C. § 1252b(a)(1) (1994). The OSC notifies the alien of the deportation proceedings and describes the grounds and factual allegations on which the proceedings are based. Sabagh, *supra* note 22, at 346.

24. 8 U.S.C. § 1252(a)(1) (1994).

25. *Id.* Historically, deportation proceedings began with an alien's arrest. Since changes in INS procedures in 1956, however, they are more commonly initiated with the order, or motion, to show cause. Yee, *supra* note 20, at 610.

Immigration laws now expressly provide for in absentia proceedings when an alien fails to appear for a hearing. 8 U.S.C. § 1252b(c); 8 C.F.R. § 3.26(a)-(b) (1995). A deportation order will be issued if the INS establishes by "clear, unequivocal, and convincing" evidence that written notice of the hearing was provided and that the alien is deportable. 8 U.S.C. § 1152b(c)(1). Provided that the notice was valid, review of an in absentia order is limited to whether the INS met its burden and the reason for the alien's failure to appear. *See* Ferris, *supra* note 19.

26. 8 U.S.C. § 1254(a) (1994).

27. The following applicants are, however, specifically excluded from eligibility for suspension of deportation:

> (1) [A]liens who entered the United States as crew members after June 30, 1964; (2) alien foreign medical graduates admitted in J nonimmigrant status, whether or not they are subject to the two-year foreign residence requirement imposed on some J nonimmigrants; (3) other J nonimmigrants who are subject to the two-year foreign residence requirement and have not received a waiver of it or fulfilled it; and (4) aliens who are deportable under [8 U.S.C. § 1251](a)(4)(D) as persons who participated in Nazi-directed persecution during World War II.

FRAGOMEN & BELL, *supra* note 5, at 7-73. A J nonimmigrant is an alien holder of a temporary visa to enter the United States for scholastic reasons (i.e., a "student visa"). 8 U.S.C. § 1101(a)(15)(J) (1994).

28. Under the provisions of § 1254(a)(2), if an alien is deportable under § 1251(a)(2) (criminal offenses), § 1251(a)(3) (failure to register and falsification of documents), or § 1251(a)(4) (security and related grounds), the criteria for suspension of deportation are stringent. The applicant must show: (1) continuous physical presence in the United States for not less than 10 years immediately following commission of the act or assumption of the status which constitutes the grounds

alien must demonstrate evidence of all three elements to qualify for suspension of deportation.[29]

An alien requesting a suspension of deportation often faces difficult evidentiary problems.[30] Continuous physical presence may be impossible to document because of the transient lifestyle of many aliens.[31] Also, as the following case illustrates, proving extreme hardship often presents a formidable barrier.[32] In determining "extreme hardship," the INS considers factors such as the alien's familial connections, medical problems, and the presence or absence of abuse or fraud in the applicant's immigration history.[33] The INS may also consider economic conditions in the alien's country of origin; however, the relative weakness of the "home country's" economy will not suffice.[34] Finally, even if the alien meets the required elements, the Attorney General has discretion to grant or refuse adjustment of status to that of a permanent resident.[35]

B. Amaya v. INS[36]

1. Facts

The United States deported Amaya from the United States on June 10, 1985.[37] She subsequently re-entered the United States without inspection, and on December 20, 1991, the INS again initiated deportation proceedings against

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for deportation; (2) good moral character; and (3) hardship. 8 U.S.C. § 1254(a)(2). If the alien is deportable for another reason—e.g., entry without inspection, being excludable at the time of entry, violating nonimmigrant status, alien smuggling, or becoming a public charge within five years of entry—the alien may be able to apply for suspension of deportation under the relatively looser standards of § 1254(a)(1). FRAGOMEN & BELL, *supra* note 5, at 7-72.

29. 8 U.S.C. § 1254(a)(1). Some have criticized this standard as "practically impossible" to meet. Friedler, *supra* note 5, at 494.

30. Materials are available to assist an attorney in pursuing withholding of deportation claims. *See, e.g.*, Minsky et al., *supra* note 4, at 25-29 (offering pragmatic advice for proceeding with a matter before the INS). Other sources offer suggestions for gathering important evidentiary documentation. *See, e.g.*, Arthur C. Helton, *Gaining Status for Your Client Under the Immigration Reform and Control Act of 1986, in* COPING WITH THE NEW IMMIGRATION LAW 123 (PLI Litig. & Admin. Prac. Course Handbook Series No. 329, 1987) (discussing the unique evidentiary problems facing aliens). For guidelines on bolstering weak cases, see generally Margaret C. Makar & Philip M. Alterman, *Suspension of Deportation, in* DEPORTATION DEFENSE (Continuing Legal Educ. of Colo., Inc., 1994) and MATERIALS ON SUSPENSION OF DEPORTATION 17-39 (National Lawyers' Guild, Nat'l Convention Seminar, 1986).

31. The migratory lifestyles of many immigrant farm workers illustrates this problem. Although they may have been in the United States for the required time period, many migrant farm workers can not offer proof of continuous presence. To address the problems of these workers, Congress created a legalization program for "special agricultural workers" (SAWs) and an admissions program for "replenishment agricultural workers" (RAWs). 8 U.S.C. §§ 1160, 1161 (1994); ALEINIKOFF & MARTIN, *supra* note 13, at 685-88.

32. Friedler, *supra* note 5, at 494.

33. FRAGOMEN & BELL, *supra* note 5, at 7-74.

34. *Id.*

35. 8 U.S.C. § 1254.

36. 36 F.3d 992 (10th Cir. 1994).

37. *Amaya*, 36 F.3d at 993.

her.[38] At a hearing on June 30, 1992, she conceded her deportability, but requested a suspension of deportation.[39]

The IJ found that, although Amaya had been continuously physically present within the United States for seven years, she had failed to show either good moral character or extreme hardship.[40] Because Amaya had pleaded guilty to welfare fraud during the seven-year period, the IJ concluded she did not establish good moral character.[41] Amaya argued that deportation would result in decreased educational opportunities for her citizen children.[42] The IJ ruled this did not qualify as extreme hardship,[43] and the BIA affirmed.[44]

2. Decision

The Tenth Circuit affirmed the decision on narrow grounds.[45] The court agreed that decreased educational opportunities did not constitute extreme hardship.[46] The court chose to confine its ruling to that issue, however, without discussing whether a welfare fraud conviction precludes an applicant from asserting good moral character.[47] Since suspension of deportation requires an applicant to affirmatively prove all of the criteria, Amaya's failure to meet the extreme hardship prong disqualified her from consideration for the requested relief, regardless of her moral character.[48]

C. *Analysis*

Applicants who have established sufficient ties to their community within the United States and who prove themselves a positive attribute to that community may qualify for suspension of deportation.[49] Because of the discretionary nature of the relief, the Supreme Court has referred to it as "administrative grace."[50] The statute providing this relief employs specific criteria for evaluating the applicant and, absent a showing of all requisite elements, the discretionary relief will not be granted.

D. *Other Circuits*

Several other circuit courts of appeals ruled on applications for suspension of deportation in the past year. In many instances, the other circuit courts also relied heavily on the judgment of the agency when determining eligibility of

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 994.
42. *Id.*
43. *Id.*
44. *Id.* at 994-95.
45. *Id.* at 995.
46. *Id.*
47. *Id.*
48. *Id.*
49. ALEINIKOFF & MARTIN, *supra* note 13, at 618.
50. United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957).

an applicant, ruling that the BIA had not abused its discretion in denying relief.[51] In addition, the Eighth and Ninth Circuits squarely confronted the issue the Tenth Circuit sidestepped.[52] Both circuits held that evidence of fraud precludes an applicant from showing good moral character, thus statutorily barring the applicant from suspension of deportation.[53]

In far more cases, however, appellate courts in other circuits found that the agency had abused its discretion, and remanded the cases to the agency for reconsideration based upon the appellate court findings.[54]

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51. Hussein v. INS, 61 F.3d 377, 382 (5th Cir. 1995) (ruling that alien failed to show lawful domicile for seven years); Raya-Ledesma v. INS, 55 F.3d 418 (9th Cir. 1994) (holding seven-year residency requirement not violative of equal protection principles); Miranda v. INS, 51 F.3d 767, 768-69 (8th Cir. 1995) (rejecting transsexual applicant's medical and social hardship claim); Shooshtary v. INS, 39 F.3d 1049, 1051 (9th Cir. 1994) (affirming agency determination that applicant did not show how joining him in Great Britain would cause extreme hardship to his family); Salas-Velazquez v. INS, 34 F.3d 705, 707-08 (8th Cir. 1994) (finding that applicant's previous attempt to evade immigration laws through a sham marriage precluded a showing of good moral character, despite his bona fide second marriage, and that applicant failed to show extreme hardship to his resident wife and children since the wife knew at the time of the marriage the applicant was deportable).

52. *See supra* text accompanying notes 46-47.

53. Flores v. INS, 66 F.3d 1069, 1073 (9th Cir. 1995) (involving welfare fraud), *withdrawn*, 73 F.3d 258 (9th Cir. 1996); Izedonmwen v. INS, 37 F.3d 416, 417-18 (8th Cir. 1994) (involving Pell Grant fraud). On rehearing in *Flores*, the Ninth Circuit filed an unpublished memorandum disposition distinguishing between commission *of* and conviction *for* fraudulent acts in finding bad moral character per se. Flores v. INS, No. 94-70178, 1996 WL 5569, at *1-*2 (9th Cir. Jan. 5, 1996) (citing 8 U.S.C. § 1101(f) (1994)), *on reh'g from*, 66 F.3d 1069 (9th Cir. 1995). The BIA erred, the court held, in finding per se bad moral character based on acts committed outside the seven-year continuous residency period, for purposes of 8 U.S.C. § 1254(a)(1). *Id.* at *2. The BIA could, however, find that the prior bad acts indicated "her moral character remained poor" after the inception of the seven-year period. *Id.* This satisfied the "catchall clause" of § 1101(f). *Id.* ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.") (quoting 8 U.S.C. § 1101(f)).

54. Tukhowinich v. INS, 64 F.3d 460, 463-64 (9th Cir. 1995) (ruling that BIA improperly failed to review all facts of alien's case, including political conditions in native country and particular and unusual psychological hardship alien would face upon deportation, and that BIA's order failed to adequately articulate reasons for denying relief); Watkins v. INS, 63 F.3d 844, 848 (9th Cir. 1995) (finding abuse of discretion in agency's failure to mention several relevant factors in decision denying extreme hardship, to consider cumulative effect of factors, and to offer reasoned explanation for decision); Acosta-Montero v. INS, 62 F.3d 1347, 1350-51 (11th Cir. 1995) (holding that the agency abused its discretion when it did not consider new evidence of applicant's changed family responsibilities); Castrejon-Garcia v. INS, 60 F.3d 1359, 1362-63 (9th Cir. 1995) (ruling that applicant's eight-day trip to Mexico did not interrupt required continuous presence); Foroughi v. INS, 60 F.3d 570, 575-76 (9th Cir. 1995) (stating that an applicant does not lose eligibility to apply for discretionary relief when lawful permanent resident status ended with final deportation order after he had achieved seven years of continuous lawful residence); Rodriguez-Gutierrez v. INS, 59 F.3d 504, 509-10 (5th Cir. 1995) (holding that departures of one or two days each did not interrupt continuous physical presence, and that the BIA abused its discretion by not meaningfully addressing positive equities in denying relief); Avelar-Cruz v. INS, 58 F.3d 338, 341 (7th Cir. 1995) (noting that in accumulating seven years of continuous residence an applicant need not be a lawful permanent resident to be lawfully domiciled in this country); Biggs v. INS, 55 F.3d 1398, 1401-02 (9th Cir. 1995) (finding that IJ abused discretion in essentially ignoring evidence of serious illness and refusing to allow physician to testify by telephone); Delmundo v. INS, 43 F.3d 436, 438, 443 (9th Cir. 1994) (holding that BIA did not adequately consider hardship that applicant's deportation would cause to her family).

III. ASYLUM AND WITHHOLDING OF DEPORTATION: STATUTORY INTERPRETATION

A. *Background*

Before 1952, the United States had no mechanism in place for providing sanctuary to persons in fear of persecution, other than through special legislation or by designating the person as a parolee.[55] Since World War II, Congress has frequently amended the statutory provisions governing refugee status and asylum admissions.[56] The Refugee Act of 1980, the most significant recent legislation affecting refugees, incorporated U.N. convention standards in an effort to improve the handling of refugee admissions.[57] Despite these changes, however, the United States is still far from having a truly adequate and reliable system for processing the great number of immigration applications received each year.[58]

To qualify for either asylum or withholding of deportation, an applicant must first show that she qualifies as a refugee.[59] Under the statute, a refugee is a person outside the country of her nationality who is unwilling or unable to return to that country because of a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.[60] The applicant must show that a reasonable person in her position would fear persecution; only once this is established does the applicant's subjective fear become relevant.[61]

Applicants for refugee status and applicants for asylum must both satisfy the statutory criteria expressed in § 1101(a)(42), but annual quotas are placed only on refugee applications, not requests for asylum.[62] Gaining refugee

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55. BOSWELL & CARRASCO, *supra* note 3, at 143. A "parolee," as the term was originally used, described an alien who could be removed from a vessel pending the ultimate outcome of her case. *Id.* at 42. Statutory authority for parole is now contained in 8 U.S.C. § 1182(d)(5)(A) (1994).

56. ALEINIKOFF & MARTIN, *supra* note 13, at 694.

57. BOSWELL & CARRASCO, *supra* note 3, at 145.

58. ALEINIKOFF & MARTIN, *supra* note 13, at 694; *see infra* note 187.

59. 8 U.S.C. § 1158(a) (1994). Although applicants for refugee status, asylum, and withholding of deportation must all show varying degrees of persecution based on the same statutory language, each category faces different procedural hurdles. An application for refugee status differs from that of asylum because it is based, in part, on the applicant's location at the time of application. If the person is outside her home country, but not in the United States, the application must be for refugee status. If the person is within the United States, the application must be for asylum. BOSWELL & CARRASCO, *supra* note 3, at 146. Asylum differs from withholding of deportation by the degree of power that the Attorney General wields over the application. Asylum is available only as a discretionary grant by the Attorney General. 8 U.S.C. § 1158. Conversely, withholding of deportation is mandatory if an alien meets the statutory requirements. 8 U.S.C. § 1253(h) (1994).

60. 8 U.S.C. § 1101(a)(42) (1994).

61. Aguilera-Cota v. INS, 914 F.2d 1375, 1378 (9th Cir. 1990). The narrow scope of current immigration law governing refugee status has prompted intense litigation, especially where the applicant's homeland is experiencing internal armed conflict. For a discussion of the current trend toward disallowing generalized claims of fear of violence to satisfy the statutory persecution requirement, see Mark R. von Sternberg, *Emerging Bases of "Persecution" in American Refugee Law: Political Opinion and the Dilemma of Neutrality*, 13 SUFFOLK TRANSNAT'L L.J. 1 (1989).

62. BOSWELL & CARRASCO, *supra* note 3, at 145.

status does not therefore necessarily guarantee admission into the United States.[63]

Although both asylum and withholding of deportation prevent forcible return to a country where persecution is likely, important differences distinguish the two forms of relief.[64] The Attorney General is statutorily prohibited from deporting an alien to a country where her life or freedom would be at risk.[65] However, even if an alien meets the statutory requirements and establishes refugee status, the Attorney General can refuse to grant asylum and order deportation of the applicant.[66] As a practical matter, when faced with an application for both asylum and withholding of deportation, the decision-maker reviews the asylum request first.[67] If the applicant cannot meet the less stringent standard for a grant of asylum, the agency denies the entire application.[68]

At first glance, withholding of deportation seems a more favorable status for the alien than asylum; however, the scope of relief available under withholding of deportation is limited.[69] Asylum status confers upon the alien employment authorization,[70] the opportunity to include her spouse and minor children in the grant,[71] and the possibility of an adjustment of status to permanent resident.[72] Conversely, withholding of deportation does not provide for inclusion of the alien's family, and the alien's status cannot adjust to that of permanent resident.[73]

Tenth Circuit decisions during the past year demonstrate a reluctance to grant asylum absent clear evidence of an objective basis for petitioner's fear of persecution.[74] As the following cases show, many obstacles prevent

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63. *Id.* at 145-46.

64. Jividen, *supra* note 7, at 943. In practice, the INS treats all applications for asylum filed during exclusion or deportation proceedings as applications for withholding of deportation as well. 8 C.F.R. § 208.3(b) (1995).

65. The statute providing for withholding of deportation states: "The Attorney General *shall not deport* . . . an alien . . . if the Attorney General determines that such alien's life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (emphasis added). This provision does not apply to aliens who have participated in the persecution of other groups, or been convicted of a "particularly serious crime." *Id.* § 1253(h)(2)(A)-(D). In addition, an alien is not eligible for withholding of deportation if the Attorney General finds "serious reasons" to believe the alien committed a "serious nonpolitical crime" in another country or represents a "danger to the security of the United States." *Id.*

66. The statute providing for asylum states that it may be granted "in the *discretion* of the Attorney General." *Id.* § 1158(a) (emphasis added).

67. Hadjimehdigholi v. INS, 49 F.3d 642, 646-47 (10th Cir. 1995).

68. *Id.*

69. Evangeline G. Abriel, *Presumed Ineligible: The Effect of Criminal Convictions on Applications for Asylum and Withholding of Deportation Under Section 515 of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 27, 33-34 (1992).

70. *Id.* at 33.

71. *Id.*

72. Jividen, *supra* note 7, at 944.

73. Abriel, *supra* note 69, at 34.

74. As increasing numbers of asylum-seekers have come to the United States from nations such as Cuba, Haiti, Nicaragua, and El Salvador, the tension in American immigration law has become more apparent, and the treatment of these asylum-seekers by the United States has become highly controversial. ALEINIKOFF & MARTIN, *supra* note 13, at 690; *see also* Tonnas, *supra*

applicants from meeting their burden because: (1) claimed persecution based on subjective fear alone does not suffice;[75] (2) evidence of firm resettlement in a third country bars an application for asylum;[76] and (3) in one instance, the court even required a petitioner to carry the burden of negative proof of a foreign law.[77] In addition, the court remanded one case to the BIA because it incorrectly required an alien to establish a nationality of origin as a prerequisite to a grant of asylum.[78] Issues of credibility peppered many decisions, causing the Tenth Circuit to stray from what sometimes appeared to be a "rubber stamp" affirmation of administrative decisions. For example, in one case, the court required the BIA to state with specificity the basis for its determination that certain testimony was not credible.[79]

B. *Tenth Circuit Decisions*

1. *Hadjimehdigholi v. INS*[80]

a. *Facts*

Hadjimehdigholi served in the Iranian army from 1959 until 1986.[81] In 1963, as a tank commander under the Shah, he led one of the four tank units instrumental in quelling an uprising by supporters of the Ayatollah Khomeini.[82] He later received commendations for his part in putting down this revolt.[83] Hadjimehdigholi's military records reflected his activities against Khomeini supporters, but the new government failed to discover them when the Ayatollah came to power.[84] In his application for asylum and withholding of deportation, he claimed that it was only a matter of time before the Iranian government discovered his early military activities.[85] In support of his claimed fear of persecution, Hadjimehdigholi offered evidence of other military officers put to death because of their involvement in anti-Khomeini activities.[86]

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note 13, at 308 (discussing how the 1990 INA "highlights the right of the sovereign to exclude immigrants for any reason").

75. *Hadjimehdigholi*, 49 F.3d at 646.

76. Abdalla v. INS, 43 F.3d 1397, 1399 (10th Cir. 1994).

77. Sadeghi v. INS, 40 F.3d 1139, 1142-43 (10th Cir. 1994).

78. Dulane v. INS, 46 F.3d 988, 997, 999 (10th Cir. 1995).

79. *Id.* In addition, the court remanded at least one decision to the BIA because of its failure to articulate a reason for finding the petitioner's testimony not credible. Velis v. INS, No. 94-9526, 1995 WL 66536, at *3 (10th Cir. Feb. 13, 1995) (unpublished decision). Credibility determinations are critical to the process because often an applicant's own testimony is essentially the only evidence offered in support of the applicant's "well-founded fear of persecution." *See, e.g.*, Deborah Anker & Carolyn P. Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in* INS v. Cardoza-Fonesca, *in* 22ND ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 147 (PLI Litig. & Admin. Prac. Course Handbook Series No. 384, 1989).

80. 49 F.3d 642 (10th Cir. 1995).

81. *Hadjimehdigholi*, 49 F.3d at 644.

82. *Id.*

83. *Id.*

84. *Id.* at 644-45.

85. *Id.* at 645.

86. *Id.* at 648-49. Although the court was unpersuaded in this case, circumstantial evidence involving persons similarly situated can be used to show the required objective fear of persecu-

The IJ ruled that although Hadjimehdigholi had established a subjective fear of persecution upon his return to Iran, he did not prove the required objective fear of persecution.[87] Unconvinced that a reasonable person in the petitioner's position would fear persecution based on race, religion, nationality, political beliefs, or membership in a social group, the IJ denied Hadjimehdigholi's application.[88]

The BIA affirmed the IJ's decision, stating that Hadjimehdigholi's fear was based on speculation[89] and that a grant of asylum requires hard evidence of the likelihood of persecution.[90] The BIA pointed out that Hadjimehdigholi had served in the Iranian army for several years after the Ayatollah came to power, and that the Khomeini government did not persecute him, but rather promoted him several times and even granted him a pension upon his retirement.[91]

b. *Decision*

The Tenth Circuit ruled that the BIA applied the correct standard for determining asylum eligibility.[92] Although Hadjimehdigholi demonstrated a subjective fear, he failed to provide evidence supporting an objective fear of persecution on any of the enumerated statutory grounds.[93]

2. *Abdalla v. INS*[94]

a. *Facts*

Petitioner, a Sudanese national, lived for twenty years in the United Arab Emirates (UAE) under a "residence" visa/permit prior to entering the United States.[95] Denying Abdalla's application for asylum, the BIA held that under recent regulatory amendments to 8 C.F.R. § 208.14(c)(2),[96] an alien's firm resettlement in a third country prior to entering the United States precludes a grant of asylum based on persecution in his native country.[97] The firm resettlement in a third country presumably demonstrated that Abdalla found a safe haven in the UAE, which undermined an asylum claim based on feared persecution in his native country.[98]

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tion. 8 C.F.R. § 208.13(b)(2)(i)(A)-(B) (1995).

87. *Hadjimehdigholi*, 49 F.3d at 646.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 647.
92. *Id.* at 650.
93. *Id.* at 648.
94. 43 F.3d 1397 (10th Cir. 1994).
95. *Abdalla*, 43 F.3d at 1398-99.
96. 8 C.F.R. § 208.14(c)(2) (1995).
97. *Abdulla*, 43 F.3d at 1399.
98. Although immigration laws did not specifically contain provisions relating to firm resettlement until the 1980 Refugee Act, the concept has "long been" a part of United States immigration policy. *In re* Lam, 18 I. & N. Dec. 15, 19 (1981). However, an alien may be found not to have "firmly resettled" if the third country restricted the alien's rights significantly more than those of its own citizens. *See generally* Arthur C. Helton, *Reform of Political Asylum*, *in* 27TH

b. *Decision*

The Tenth Circuit upheld the BIA's evidentiary finding that Abdalla had firmly resettled in the UAE, and it therefore determined that Abdalla was precluded from a grant of asylum or withholding of deportation.[99]

3. *Sadeghi v. INS*[100]

a. *Facts*

Sadeghi, an Iranian national, sought asylum and withholding of deportation, asserting that the Iranian government was attempting to arrest him for purposes of persecution, rather than for legitimate criminal prosecution, because he counseled a fourteen-year-old student not to enter the military.[101] The IJ ruled that Sadeghi's fear was of criminal prosecution and not persecution based on race, religion, nationality, membership in a social group, or political opinion, as required under the statute.[102] Consequently, the request for asylum and withholding of deportation was denied.[103] The BIA affirmed the IJ's denial of asylum and withholding of deportation on the same grounds, but further found the petitioner's testimony not entirely credible.[104]

b. *Decision*

The Tenth Circuit agreed with the BIA that the Iranian government's act of seeking petitioner for arrest did not qualify as persecution based on statutory grounds.[105] Rather, the Iranian government was simply trying to prosecute a criminal act under its laws.[106] Furthermore, the court stated that Sadeghi was required to disprove the existence of a law that was the basis for his criminal act, which he did not do.[107]

In a dissenting opinion, Judge Kane argued that there was no evidence that Sadeghi had violated any law.[108] Furthermore, requiring Sadeghi to disprove the existence of the very law upon which the INS rested its case required him to go far beyond his own burden.[109]

ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 145 (PLI Litig. & Admin. Pract. Course Handbook Series No. 515, 1994) (discussing the asylum process in the United States).

99. *Abdalla*, 43 F.3d at 1399-1400.

100. 40 F.3d 1139 (10th Cir. 1994).

101. *Sadeghi*, 40 F.3d at 1140-41.

102. *Id.* at 1141.

103. *Id.*

104. *Id.* at 1142.

105. *Id.* at 1143.

106. *Id.* at 1142.

107. *Id.* at 1143. The majority concluded that requiring the government to produce evidence of a foreign law would run contrary to the requirement that the petitioner bear the burden of proof throughout the asylum hearing. *Id.*

108. *Id.* at 1145 (Kane, J., dissenting).

109. *Id.* at 1146. The dissent also pointed out a fact the majority did not address: Iran is a signatory to an international treaty which prohibits participating countries from permitting or requiring children to participate in wars. The Convention on the Rights of the Child, G.A. Res. 25,

4. *Dulane v. INS*[110]

a. *Facts*

Dulane entered the United States from Somalia on June 11, 1983, under a student visa.[111] Although he possessed a Somalian passport, Dulane was actually an Ethiopian national.[112] He filed asylum applications in September 1983 and June 1988, but received no response from the INS to either application.[113] The INS denied his third application for asylum, filed in November 1988.[114] After hearing the case, an IJ ruled that Dulane's deportability had been established, and that he had only provided evidence of general political upheaval in his native country, a ground insufficient to satisfy the refugee requirement for a grant of asylum.[115]

Dulane then filed a motion to reopen[116] with the BIA, alleging new facts in support of his application.[117] The BIA denied the motion, stating that even in light of the new facts Dulane failed to establish a prima facie case of eligibility for asylum.[118]

b. *Decision*

The Tenth Circuit ruled that the BIA had not sufficiently articulated its reasoning for denying the motion,[119] reversed the decision, and reviewed the

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art. 38, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (1989), *reprinted in* 28 I.L.M. 1448, 1470 (1989). The United States also signed this treaty on February 16, 1995. Sandra L. Jamison, *Proposition 187: The United States May Be Jeopardizing Its International Treaty Obligations*, 24 DENV. J. INT'L L. & POL'Y 229, 233 (1995). And although Congress must still ratify this treaty before it becomes binding, the United States has demonstrated a clear intent to join the other 169 signatories worldwide. *Id.* If this Iranian law does, in fact, exist, its enforcement in this instance would amount to a direct "conflict with fundamental human rights under both the Geneva Convention and customary international law." *Sadeghi*, 40 F.3d at 1147 (Kane, J., dissenting).

110. 46 F.3d 988 (1995).

111. *Dulane*, 46 F.3d at 990.

112. *Id.* at 992. Petitioner explained that in order to flee Ethiopia, he had acquired a Somalian passport on the black market. When filling out his application, he was instructed by INS staff that his country of origin must match the passport in his possession. *Id.*

113. *Id.* at 990.

114. *Id.* at 990, 993.

115. *Id.*

116. A motion to reopen, available only in limited circumstances, requires the petitioner to meet a heavy burden of proof. Barbara Hines, *Asylum and Withholding of Deportation, in* IMMIGRATION & NATIONALITY LAW HANDBOOK 411, 429-30 (R. Patrick Murphy et al. eds., 1992). The motion must be consolidated with any petition requesting review of a final deportation order, 8 U.S.C. § 1105a(a)(6) (1994), and will not be granted unless the respondent offers material new evidence unavailable during prior proceedings. Yee, *supra* note 20, at 615. Filing a motion to reopen does not stay deportation proceedings, and the alien may be forced to leave the country while the motion is pending. *Id.* at 622.

117. *Dulane*, 46 F.3d at 993.

118. *Id.* at 994. The new evidence, which the Tenth Circuit referred to as "significant," included "an affidavit by . . . a long-time family friend, explaining Dulane's father's position in relation to the Ethiopian government, as a leader of the Ogaden secessionist movement . . . [and] an affidavit of Dulane outlining facts which he had learned since the hearing before the IJ from a friend who immigrated to Canada." *Id.* at 995.

119. As in cases involving credibility, discussed *supra* note 79, the Tenth Circuit demands enough specificity for an adequate review of the administrative decision. *See, e.g., Dulane*, 46 F.3d at 994 (scrutinizing the BIA's decision for "procedural regularity" and consideration of all

evidence presented by Dulane.[120] Upon examination, the court concluded that the BIA had failed to address whether Dulane had a well-founded fear of persecution if he returned to either Ethiopia or Somalia, and remanded for further proceedings on the issue.[121] Specifically, the Tenth Circuit ruled that the BIA erred in requiring Dulane to establish his nationality as a prerequisite to a granting of asylum. The statute lists no such requirement.[122]

C. *Analysis*

Both asylum and withholding of deportation decisions rely heavily on the quality of factual evidence the applicant puts forth, and can pose problems for reviewing courts. Since review is necessarily limited to evidence submitted to the agency during administrative proceedings, the circuit courts all demonstrate a heavy reliance on the agency's judgment in making factual determinations. As the decisions over the past year show, only when the agency's determination is clearly unsupported by evidence contained in the record will the Tenth Circuit disturb the administrative ruling.

D. *Other Circuits*

A variety of issues faced other circuit courts during the past year in their review of denials of asylum and withholding of deportation. On June 6, 1993, a Chinese ocean liner, the M/V *Golden Venture*, ran aground on a sandbar 100 yards from the shore in New York harbor.[123] Several of the Chinese immigrants aboard presented applications for asylum and withholding of deportation, claiming persecution based on China's family planning policy.[124] The circuit courts held uniformly that evidence of this national policy, on its own, failed to establish evidence of persecution necessary for asylum or withholding of deportation.[125]

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relevant factors).

120. *Dulane*, 46 F.3d at 996.

121. *Id.* at 999.

122. *Id.* at 997; 8 U.S.C. § 1101(a)(42)(A) (1994).

123. Approximately 300 illegal Chinese immigrants were aboard, each having paid approximately $35,000 to a Chinese gang for passage to the United States. Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1334 & n.1 (4th Cir. 1995). When the ship ran aground, hundreds of the immigrants attempted to swim to shore. *Id.* INS officials apprehended most of the would-be immigrants, but 10 died before reaching the shore. *Id.* News of the *Golden Venture* refugees was widely reported across the United States. *See generally* Malcolm Gladwell & Rachel E. Stassen-Berger, *Immigrant Boat Tragedy Ended 4-Month Odyssey*, CHI. SUN TIMES, June 8, 1993, at 10; *'Well-Coached' Chinese Refugees Await Hearings*, BALTIMORE SUN, June 8, 1993, at 12A.

124. The People's Republic of China imposes a "one couple, one child" policy on its citizens and requires forced abortion/sterilization of those who violate the policy. *Chen Zhou Chai*, 48 F.3d at 1334-35.

125. *Id.* at 1334, 1339-40. In *Chen Zhou Chai*, for example, the Fourth Circuit ruled that the applicant failed to show persecution for his political opinions despite his wife's forced abortion, his sterilization, and the government's imposition of a fine equal to 12 times his annual salary. *Id.*; *see also* Chang Lian Zheng v. INS, 44 F.3d 379 (5th Cir. 1995) (finding that the BIA's determination that applicants were not entitled to asylum because of China's population control policy was not arbitrary and capricious). Some commentators have accused the INS and the Clinton Administration of bias in asylum proceedings requested by the *Golden Venture* aliens. Robyn K. Pretlow, *Attorney General's Motion for a Protective Order Limiting the Scope of Discovery Depo-*

Numerous other decisions rendered by circuit courts over the past year articulated a variety of reasons for denying relief to the applicants.[126] However, a significant number were remanded by the circuit courts to the BIA for reconsideration.[127] In one case, the Second Circuit ordered payment of attorney's fees to the prevailing applicant when the court determined that the government's position in litigation was not substantially justified.[128]

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sitions Is Denied in Golden Venture *Litigation*, 9 GEO. IMMIGR. L.J. 221, 221 (1995).

126. Hamzehi v. INS, 64 F.3d 1240, 1243 (8th Cir. 1995) (holding that applicant failed to establish requisite "selective and severe" injuries on which to base a well-founded fear of persecution); Ahmetovic v. INS, 62 F.3d 48, 52 (2d Cir. 1995) (affirming denial of political asylum despite BIA's failure to consider the underlying circumstances of alien's conviction for first-degree manslaughter); Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (finding that evidence did not establish well-founded fear of persecution despite alien's having successfully shown existence of private discrimination against Coptic Christians); Adhiyappa v. INS, 58 F.3d 261, 263, 268 (6th Cir. 1995) (finding that applicant who provided names of student activists to the government was subject to persecution by separatists because of his activities, not his political opinions); Gomez-Mejia v. INS, 56 F.3d 700, 702 (5th Cir. 1995) (affirming that former soldier did not establish possibility of persecution in Nicaragua because he had never expressed his political opinion); Urukov v. INS, 55 F.3d 222, 228 (7th Cir. 1995) (holding that, although applicant demonstrated that members of his ethnic group were treated as "second-class citizens," he failed to establish that he had been "singled out" for persecution); Anton v. INS, 50 F.3d 469, 471-72 (7th Cir. 1995) (finding that applicant's inability to refute evidence that Romania's current government allows the free practice of religion precluded his showing of religious persecution); Bevc v. INS, 47 F.3d 907, 910 (7th Cir. 1995) (stating that although this "may not be an ideal time for any non-Serbians to be living in Serbia," general unrest does not satisfy the requirements for fear of persecution); Prasad v. INS, 47 F.3d 336, 339-40 (9th Cir. 1995) (ruling evidence that applicant received a jail-cell beating and that his home had been stoned by ethnic Fijians unconnected with the government was insufficient to establish persecution); Kazlauskas v. INS, 46 F.3d 902, 906 (9th Cir. 1995) (ruling that dramatic changes in applicant's country of origin since his departure prevented demonstration of well-founded fear of persecution); Ozdemir v. INS, 46 F.3d 6, 7-8 (5th Cir. 1994) (affirming the BIA's conclusion that even if applicant's testimony was credible, he had failed to establish past persecution based on one beating and two subsequent police questionings); Cuevas v. INS, 43 F.3d 1167, 1169, 1171 (7th Cir. 1995) (finding that harassment following applicants' refusal to sell land to individuals suspected of acting on behalf of the "armed wing of Communist Party of the Philippines" was not basis for well-founded fear of persecution); Jukic v. INS, 40 F.3d 747, 748, 750 (5th Cir. 1994) (holding that applicant's fear of persecution based on his having ignored a recall notice to serve in the Yugoslavian army did not warrant grant of asylum or withholding of deportation); Faddoul v. INS, 37 F.3d 185, 188-90 (5th Cir. 1994) (ruling that Saudi Arabia's failure to grant citizenship to individuals of non-Saudi heritage born within its borders did not reach level of individualized persecution because "statelessness alone does not warrant asylum").

127. Singh v. Ilchert, 63 F.3d 1501, 1504, 1510 (9th Cir. 1995) (holding that an applicant beaten by police for suspected military connections was not required to show nationwide persecution); Ramos-Vasquez v. INS, 57 F.3d 857, 863-64 (9th Cir. 1995) (remanding case due to the BIA's failure to consider testimony regarding treatment of military deserters or whether applicant's desertion based on "political neutrality" represented a political opinion); Singh v. Moschorak, 53 F.3d 1031, 1034 (9th Cir. 1995) (stating that in denying the petitioner's application, the BIA wrongly assumed that fortitude in the face of danger demonstrated an absence of fear); Sanon v. INS, 52 F.3d 648, 652 (7th Cir. 1995) (criticizing the BIA's failure to demonstrate that it had actually considered the fact that the applicant escaped from Burkina Faso, in West Africa, only because of an error and was the only student to successfully immigrate to the United States); Makonnen v. INS, 44 F.3d 1378, 1384 (8th Cir. 1995) (rejecting the BIA's requirement that an Ethiopian national demonstrate persecution of all members of her ethnic group, especially since her grasp of English was such that she likely used the term "Oromo People" to mean "members of the Oromo Liberation Front," a political group); Cordero-Trejo v. INS, 40 F.3d 482, 492 (1st Cir. 1994) (expressing "grave doubts" that a reasonable fact-finder could decide the applicant, a Guatemalan national, was ineligible for asylum after disregarding 150 pages of information concerning 60 specific acts of persecution).

128. Sotelo-Aquije v. Slattery, 62 F.3d 54 (2d Cir. 1995).

IV. CONSTITUTIONAL IMPLICATIONS OF UNITED STATES IMMIGRATION PROCEDURES

A. *Background*

Congress first provided for expedited processing of immigrant visa applications submitted by those aliens who married United States citizens when it enacted the War Brides Act of 1945.[129] By marrying a United States citizen, an immigrant can obtain an immigrant visa,[130] obtain admission into the United States (if not already present), and apply for permanent residency after three years of residency.[131] The relative ease with which marriage conveys an immigrant visa, and subsequent permanent residency, creates a tension between the objective of preventing fraud and abuse and that of facilitating family unification.[132] In response to this concern, Congress complicated the procedure by enacting a two-year administrative process for deciding permanent residency applications based on marriage.[133]

The BIA in In re *Garcia*,[134] an interim decision, established a rule that "pending prima facie approvable visa petition[s] would be treated as though [they] were already approved for purposes of reopening."[135] Thus, a marriage between an alien and a United States citizen was considered prima facie valid under the *Garcia* analysis.[136] Following the enactment of the Immigration Marriage Fraud Amendments of 1986 (IMFA)[137] and the Immigration Act of 1990 (IA),[138] however, the BIA modified this holding in In re *Arthur*,[139] Under the *Arthur* rule, the INS presumes that marriages entered into after deportation proceedings have begun are fraudulent; hence, the BIA will reject motions to reopen while visa petitions are pending.[140] The following case examined the constitutionality of the *Arthur* rule.

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129. Act of Dec. 28, 1945, Pub. L. No. 271, 59 Stat 659 (1946).

130. 8 U.S.C. § 1151(b)(2)(A)(i) (1994).

131. *Id.* § 1430(a) (1994).

132. ALEINIKOFF & MARTIN, *supra* note 13, at 161.

133. *See* Mary L. Sfasciotti & Luanne B. Redmond, *Marriage, Divorce, and the Immigration Laws*, 81 ILL. B.J. 644, 644-46 (1993) (suggesting that the IMFA creates an "administrative trap for the unwary").

134. 16 I. & N. Dec. 653 (1978).

135. *In re* Arthur, No. A-29575767, 1992 WL 195807, at *3 (B.I.A. May 5, 1992) (citing In re *Garcia*, 16 I. & N. Dec. at 653).

136. *See, e.g., id.*

137. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1989) (codified as amended at 8 U.S.C. § 1186(a) (1994)). The IMFA was enacted to deter fraud by aliens seeking to acquire lawful residency in the United States through marriage to a United States citizen or lawful permanent resident by requiring a two-year foreign residence requirement when the marriage was entered into *after* initiation of deportation proceedings by the INS. *See* Sfasciotti & Redmond, *supra* note 133, at 645-48 (describing the provisions of the 1986 IMFA).

138. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991). The IA exempted qualified applicants from the two-year foreign residence requirement and the bar to adjustment imposed by the 1986 amendments. *See* Sfasciotti & Redmond, *supra* note 133, at 648 (discussing the 1990 revisions to the IMFA).

139. No. A-29575767, 1992 WL 195807 (B.I.A. May 5, 1992).

140. In re *Arthur*, 1992 WL 195807, at *4.

B. Rezai v. INS[141]

1. Facts

Petitioner Saeed Rezai, an Iranian national, arrived in the United States on a student visa in 1986 after residing in Germany for seven years.[142] He graduated from college in 1990, but did not apply for asylum until eight months after the INS initiated deportation proceedings against him for overstaying his student visa.[143]

During the proceedings with the INS, Rezai claimed that while residing in Germany he participated actively in the Council of Iranian Royalists, an activity which would result in his persecution if the United States forced him to return to Iran.[144] The tribunal doubted the credibility of this assertion, however, because petitioner only raised this issue after the INS brought deportation proceedings against him, not in his original residency application.[145]

In addition to a claim for asylum, Rezai sought residency status through marriage to two different United States citizens.[146] The first marriage in 1988 ended in divorce in 1990.[147] In 1991, Rezai entered into a second marriage, six months after the IJ had issued a deportation order.[148] The INS rejected the subsequent application for an immigrant visa filed by his wife because the evidence showed that Rezai had entered into his first marriage fraudulently, for the purpose of receiving immigration benefits.[149] The BIA denied the motion to reopen and reconsider this ruling based on the *Arthur* rule.[150] Rezai appealed this decision, asserting that application of the *Arthur* rule was a violation of his First Amendment right to familial association.[151]

2. Decision

The Tenth Circuit rejected this constitutional attack, stating that the BIA's decision not to reopen the proceedings was motivated by a bona fide desire not to interfere with the role of the district director in adjudicating outstanding visa petitions.[152] The court held that the BIA's decision not to interfere with the district director's power to hear visa petitions did not violate petitioner's First Amendment rights.[153]

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141. 62 F.3d 1286 (10th Cir. 1995).
142. *Rezai*, 62 F.3d at 1287.
143. *Id.* at 1288.
144. *Id.* at 1287-88.
145. *Id.* at 1288.
146. *Id.*
147. *Id.*
148. *Id.* at 1288, 1290.
149. *Id.* at 1290.
150. *Id.* at 1290-91.
151. *Id.*
152. *Id.* The court stated that so long as the basis for the decision is facially legitimate, the *Arthur* rule does not violate the First Amendment. *Id.* Note that in denying this motion, the BIA did not foreclose all avenues of relief for petitioner. His visa application, filed by his new wife after their marriage, was still pending. *Id.*
153. *Id.* at 1292.

C. *Analysis*

Rejecting a visa application based on suspected fraudulent marriage is consistent with other forms of deportation relief that rely on the applicant's good moral character.[154] Because strong policy motivations support family unity, aliens can qualify for permanent residency rather expeditiously through marriage to a United States citizen.[155] This policy goal is tempered, however, by the government's fear that ignoring evidence of "sham marriages" may lead to a rash of visa applications based on marriages to United States citizens.[156]

D. *Other Circuits*

The Eleventh Circuit upheld a constitutional attack, on equal protection grounds, of a decision in which the IJ ruled an alien ineligible to file for a waiver of deportation based on his marriage to a lawful permanent resident and the fact that his child was a United States citizen.[157] The court held that the BIA had created two virtually identical classifications of aliens in waiver of deportation decisions—the only difference being that one class departed and returned prior to filing for the waiver.[158] As such, the BIA's interpretation was unconstitutional as applied.[159]

The Seventh Circuit decided two cases involving sham marriages entered into for the purpose of circumventing immigration laws. In *Yong Hong Guan v. INS*,[160] the Court of Appeals upheld a BIA deportation order based on a sham marriage, even though the applicant had subsequently remarried another United States citizen and given birth to a United States citizen.[161] The court cited "legitimate concerns regarding the administration of the immigration laws" in support of its conclusion.[162] *Ghaly v. INS*[163] involved another constitutional challenge, based on the Fifth Amendment procedural due process guarantee.[164] Ghaly charged that the INS's failure to provide him with a copy of his first wife's statement denying the validity of their marriage deprived him of the opportunity to address the evidence against him or adequately prepare a defense.[165] The Seventh Circuit rejected this argument, stating that the summary the agency provided sufficiently satisfied procedural due process.[166]

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154. *See supra* note 28 and accompanying text.

155. *See* Sfasciotti & Redmond, *supra* note 133, at 649. Some have criticized amendments to the statutory scheme providing for residency through marriage as an attempt to "micro-manage the problem of marriage fraud by an elaborate administrative process." *Id.*

156. In support of the proposed 1986 Marriage Fraud Amendments, the INS reported to Congress that a full 30% of marriage-based visa applications were fraudulant. Sfasciotti & Redmond, *supra* note 133, at 645. The basis for this study has subsequently been challenged. *Id.*

157. Po Shing Yeung v. INS, 76 F.3d 337 (11th Cir. 1995).

158. *Id.* at 339.

159. *Id.* at 344.

160. 49 F.3d 1259 (7th Cir. 1995).

161. *Yong Hong Guan*, 49 F.3d at 1260-61.

162. *Id.* at 1263.

163. 48 F.3d 1426 (7th Cir. 1995).

164. *Ghaly*, 48 F.3d at 1434.

165. *Id.*

166. *Id.* The *Arthur* rule has withstood attack in other circuit courts: Dielmann v. INS, 34

V. DEPORTATION OF PERSONS CONVICTED OF CRIMES

A. *Background*

Non-citizens[167] may be deported under U.S. immigration laws for crimes committed within the United States. The Immigration and Nationality Act provides the Attorney General with the authority to denaturalize, and even deport, undesirable citizens.[168] Two statutes under Title 8 of the U.S. Code compel the deportation of alien criminals: § 1251[169] and § 1253.[170] Section 1251 provides for deportation based on four criminal categories:[171] general crimes,[172] controlled substances violations,[173] certain firearms offenses,[174] and miscellaneous crimes."[175] Section 1253 precludes relief of withholding of deportation for an alien convicted of a particularly serious crime.[176] The provisions applicable to the Tenth Circuit cases decided over the past year concern general crimes (including aggravated felonies)[177] and controlled substances violations.[178]

Under § 1253, the Attorney General is instructed not to deport any person whose deportation would threaten that person's life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion.[179] This withholding of deportation does not apply, however, if the Attorney General determines that an alien convicted of a particularly serious crime "constitutes a danger to the community."[180] Although the Supreme Court has recognized deportation as a drastic measure equivalent to "banishment or exile,"[181] Congress has enacted several major pieces of legislation to respond to growing concern about the relationship between

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F.3d 851, 853 (9th Cir. 1994) (rejecting due process challenge and finding "no deficit, constitutional or otherwise" in the *Arthur* rule); Pritchett v. INS, 993 F.2d 80, 84 (5th Cir.) (upholding the *Arthur* rule as an expression of policy in an "area where the BIA carries expertise and has been bestowed with broad discretion"), *cert. denied*, 114 S. Ct. 345 (1993).

167. This includes lawful permanent residents, nonimmigrants, and undocumented aliens. Minsky et al., *supra* note 4, at 14.

168. 8 U.S.C. §§ 1251, 1451 (1994).

169. 8 U.S.C. § 1251(a)(2)(A)(i).

170. 8 U.S.C. § 1253(h)(2)(B) (1994).

171. *See generally* Robert Frank, *Criminal Defense of Foreign Nationals*, 167 N.J. LAW. 36 (1995) (discussing deportation of immigrants through criminal procedures).

172. 8 U.S.C. § 1251(a)(2)(A).

173. *Id.* § 1251(a)(2)(B).

174. *Id.* § 1251(a)(2)(C).

175. *Id.* § 1251(a)(2)(D).

176. *Id.* § 1253(h)(2)(B).

177. For purposes of § 1251(a)(2)(A)(iii), an aggravated felony encompasses conviction for a crime of violence where the "term of imprisonment imposed . . . is at least [5] years." 8 U.S.C. § 1101(a)(43)(F) (1994).

178. A violation of The Controlled Substances Act, 21 U.S.C. § 802 (1994), renders an alien deportable. Frank, *supra* note 171, at 37-38.

179. 8 U.S.C. § 1253(h)(1).

180. *Id.* § 1253(h)(2)(B).

181. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may result in "loss of both property and life, or of all that makes life worth living").

immigration and crime.[182] As a result of this recent legislation, the INS began its Alien Criminal Apprehension Program (ACAP), an aggressive pilot program created to expeditiously remove criminal aliens from the street, from the community, and from the United States.[183]

Even though conviction of a crime of requisite seriousness renders an alien deportable under United States immigration law, the citizens of the United States have an interest in requiring the fulfillment of the imposed prison sentence.[184] In fact, the statute providing for deportation of criminal aliens specifically mandates, "An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement."[185]

The INS has often come under attack for inefficiencies in the system causing cases to progress slowly.[186] Aliens convicted of qualifying crimes are released from prison into INS custody to await deportation proceedings.[187] Congress has articulated the goal, at least for aliens who commit aggravated felonies, of completing deportation proceedings prior to the end of their prison term.[188] However, the statute does not require prior completion of the proceedings.

B. *Tenth Circuit Decisions*

1. Aggravated Felony Conviction Bars a Withholding of Deportation

In *Al-Salehi v. INS*,[189] the Tenth Circuit decided an issue of first impression regarding whether an aggravated felony conviction, without an additional finding that the alien posed a danger to the community, precluded withholding of deportation under 8 U.S.C. § 1253(h)(2)(B).[190] Congress enacted § 1253 pursuant to Article 33 of the United Nations Protocol Relating to the Status of Refugees, which states in pertinent part:

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182. Those Acts are: the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1989); the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1990); and the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1991). Abriel, *supra* note 69, at 39-40.

183. *INS Increases Efforts Against Criminal Aliens*, 65 INTERPRETER RELEASES 955, 955 (1988).

184. Walford v. INS, 48 F.3d 477, 478 (10th Cir. 1995).

185. 8 U.S.C. § 1252(h) (1994).

186. *See* Kenneth Y. Geman, *Important New Asylum Regulations*, *in* 27TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 175 (PLI Litig. & Admin. Prac. Course Handbook Series No. 515, 1994). In 1993, 150,000 asylum applications were filed. Of these, only 36,000 were decided or administratively closed. The rest joined a backlog of nearly 400,000 cases. *Id.*

187. *See* Abriel, *supra* note 69, at 42. Aliens convicted of aggravated felonies are presumed deportable. Aliens awaiting deportation proceedings must remain in INS custody unless they lawfully entered the United States and can demonstrate they pose no threat to society and are likely to appear for any scheduled hearings. *Id.*

188. *See* 8 U.S.C. § 1252a(d)(1) (1994). As part of recent legislative reforms designed to streamline the deportation of convicted aliens, the Executive Office for Immigration Review (EOIR) enacted an institutional hearing program and began holding deportation hearings against alien criminals in state and federal prisons. *INS Increases Efforts Against Criminal Aliens*, *supra* note 183, at 956.

189. 47 F.3d 390 (10th Cir. 1995).

190. *Al-Salehi*, 47 F.3d at 396.

> 1. No Contracting State shall expel . . . a refugee . . . to . . . territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. *The benefit of the present provision may not, however, be claimed by a refugee . . . who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*[191]

For the decade following the Refugee Act of 1980, In re *Frentescu*[192] set the standards for interpreting this provision. In re *Frentescu* did not require an independent determination of the danger that the applicant posed to the community,[193] but required a case-by-case determination of whether the offense was a crime of requisite seriousness.[194]

In *Arauz v. Rivkind*,[195] the Eleventh Circuit ruled that conviction of a "particularly serious crime"[196] was the only evidence required for a showing of dangerousness to the community. The conviction made the alien per se statutorily ineligible for withholding of deportation.[197] Based on its interpretation that all applicants have a right to a hearing under 8 C.F.R. § 208,[198] however, the *Arauz* court held that an IJ, unlike a district director, must still consider evidence other than conviction of a serious offense before denying an application.[199] In response to *Arauz*, the Attorney General revised the regulations so that mandatory denial of asylum applications[200] would not require a hearing for aliens convicted of a "particularly serious crime."[201] The Immigration Act of 1990[202] further simplified the analysis by defining aggravated

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191. *See* Mosquera-Perez v. INS, 3 F.3d 553, 556-57 (1st Cir. 1993) (internal citations omitted) (emphasis added).

192. 18 I. & N. Dec. 244 (1982).

193. In re *Frentescu*, 18 I. & N. Dec. at 247. "Withholding of deportation as well as asylum is not available to an alien who, having been convicted by a final judgment of a 'particularly serious crime, constitutes a danger to the community of the United States.'" *Id.* at 245 (citing 8 C.F.R. § 208.8(f)(iv) (1995)).

194. *Id.* at 247.

195. 845 F.2d 271 (11th Cir. 1988) (superseded by regulation as stated in Narhns v. INS, 972 F.2d 657 (5th Cir. 1992)).

196. *Arauz*, 845 F.2d at 275 (citing Crespo-Gomez v. Richard, 780 F.2d 932, 934 (11th Cir. 1986)).

197. *Id.* (citing 8 U.S.C. § 1253(h)(2)(B)).

198. *Id.*

199. *Id.* at 276-77.

200. For the conditions required for mandatory denial, see 8 C.F.R. § 208.14(d) (1995).

201. *Id.* § 208.14(d)(1); *see also* Martins v. INS, 972 F.2d 657, 662 (5th Cir. 1992) (discussing the Attorney General's attempt to defeat the right to a judicial hearing created in the *Arauz* line of cases).

202. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

felonies as "particularly serious crimes."[203] The Tenth Circuit Court of Appeals addressed this issue for the first time in the following case.

a. Al-Salehi v. INS[204]

i. Facts

Al-Salehi pleaded guilty to possession with intent to distribute at least 500 grams of cocaine, a statutorily-defined aggravated felony.[205] When the INS initiated deportation proceedings, Al-Salehi applied for asylum and withholding of deportation.[206] The application included statements from the prosecuting attorney and the presiding judge strongly supporting his request because of his role in convicting a major drug dealer.[207] The IJ denied the application, holding that, according to 8 U.S.C. §§ 1158(d) and 1253(h)(2)(B), an aggravated felony conviction absolutely barred the relief sought.[208] Al-Salehi appealed only the withholding of deportation to the BIA, which upheld the IJ's decision.[209]

ii. Decision

The Tenth Circuit agreed with the statutory interpretation employed by both the IJ and the BIA, ruling that Al-Salehi's conviction of an enumerated aggravated felony conclusively disqualified him from seeking a withholding of deportation.[210] The circumstances surrounding the conviction, the court stated, cannot serve to mitigate the effect of the statute.[211]

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203. "For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime." 104 Stat. at 5053, 8 U.S.C. § 1253(h) (1994); *see* Garcia v. INS, 7 F.3d 1320, 1323 (7th Cir. 1993) (holding that Congress intended aggravated felony convictions to function as barriers to withholding of deportation); Mosquera-Perez v. INS, 3 F.3d 553, 555, 559 (1st Cir. 1993) (stating that conviction for cocaine possession with intent to distribute operates as an absolute bar to withholding deportation); Martins v. INS, 972 F.2d 657, 661 (5th Cir. 1992) (denying withholding of deportation on showing of conviction for conspiracy to possess heroin with intent to distribute).

204. 47 F.3d 390 (10th Cir. 1995).

205. *Al-Salehi*, 47 F.3d at 391; *see* 8 U.S.C. § 1101(a)(43)(B) (1994) (defining drug trafficking as an aggravated felony).

206. *Al-Salehi*, 47 F.3d at 391.

207. *Id.* The presiding judge noted that the evidence showed that petitioner had likely been "prodded" by a "badgering" DEA agent to arrange for the sale, and that the supplier "would never have been convicted without [petitioner's] assistance and testimony." *Id.* at 391 n.2 (quoting Record at 58, *Al-Salehi* (No. 94-9527)). The prosecuting attorney also wrote of petitioner's "minimal criminal involvement, sincere remorse, and substantial cooperation in the conviction of a 'significant cocaine supplier.'" *Id.* (quoting Record at 56-57, *Al-Salehi* (No. 94-9527)).

208. *Id.* at 391.

209. *Id.*

210. *Id.* at 396.

211. *Id.*

2. The Legal Effect of the Prison Sentence Determines Deportability Under § 1251

a. Nam Quoc Nguyen v. INS[212]

i. Facts

Nam, a native and citizen of Vietnam, entered the United States in 1989 and was granted permanent resident status in 1990.[213] In 1993, a Kansas court convicted Nam of aggravated assault and sentenced him to a prison term of three to eight years.[214] The INS subsequently charged Nam with deportability under § 1251.[215] Both the IJ and the BIA found Nam statutorily deportable under §§ 1251 and 1101.[216] The IJ ruled, and the BIA agreed, that the indeterminate sentence had the legal effect of at least a five year sentence, barring Nam from a withholding of deportation.[217]

ii. Decision

The Tenth Circuit agreed with the agency's decision.[218] The court held that where Congress has not specifically addressed an issue, an agency has broad discretion in applying the law, provided its interpretation constitutes a permissible construction of its enabling statute.[219] Furthermore, the statutory construction employed by the agency need not be the only one it could have permissibly adopted, or even the construction that the reviewing court would have applied.[220] The BIA did not err, therefore, in considering the maximum term imposed to define the conviction as an aggravated felony.[221]

3. Inmates Do Not Have Standing to Compel Their Own Deportation Under § 1253(h)

a. Walford v. INS[222]

i. Facts

An INS deportation order alerted prison officials that upon Walford's completion of his prison term, they were to transfer him to the INS for processing.[223] Walford claimed the deportation order violated his due process

212. 53 F.3d 310 (10th Cir. 1995).
213. *Nguyen*, 53 F.3d at 311.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).
220. *Id.* at 843 n.11.
221. *Nguyen*, 53 F.3d at 311.
222. 48 F.3d 477 (10th Cir. 1995).
223. *Walford*, 48 F.3d at 477.

rights.[224] Since the notice resulted in a higher security classification, Walford argued that it prevented him from participating in activities that could expedite his release from prison.[225] Walford requested relief in the form of either immediate deportation or a lifting of the deportation order during incarceration.[226] The district court treated the habeas corpus application as an attack on the merits of the final deportation order and dismissed the motion for lack of jurisdiction.[227]

ii. Decision

The Tenth Circuit treated Walford's petition as both a writ of habeas corpus[228] and a writ of mandamus.[229] The Tenth Circuit upheld the district court's denial of the writ of mandamus, agreeing that an inmate cannot compel deportation proceedings.[230] An administrative decision by the INS to delay deportation proceedings pending an inmate's release is immune from judicial review.[231]

As for the habeas petition, Walford denied that the petition attacked the merits of the final deportation order; he alleged, rather, that the existence of the order violated his due process rights.[232] The Tenth Circuit ruled that absent an attack on the merits of the order, the petition did not constitute a due process violation.[233] The detainer itself clearly instructed prison officials that its existence did not limit their decisions affecting "the offender's classification, work and quarters assignments or other treatment which he would otherwise receive."[234]

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224. *Id.* at 477-78.

225. *Id.* at 477.

226. *Id.* at 477-78.

227. *Id.* at 478. Attacks on the merits of final deportation orders must be brought directly before the circuit court of appeals, which serves as the forum for judicial review of agency decisions. 8 U.S.C. § 1105a(a)(2) (1994).

228. *Walford*, 48 F.3d at 477. 28 U.S.C. § 2241 (1994) authorizes issuance of writs of habeas corpus.

229. *Walford*, 48 F.3d at 477. 28 U.S.C. § 1361 (1994) pertains to writs of mandamus.

230. *Walford*, 48 F.3d at 478.

231. *See, e.g., Chevron*, 467 U.S. at 843-45 (stating that courts may not substitute their judgment for an agency's reasonable interpretation). Appellate courts from other circuits have ruled similarly on writs of mandamus. *See* Rodriguez v. INS, 994 F.2d 110, 111 (2d Cir. 1993) (holding that an alien may not be deported before completing term of imprisonment); Perez v. INS, 979 F.2d 299, 301 (3d Cir. 1992) (stating that the INS cannot be compelled to deport a prisoner).

232. *Walford*, 48 F.3d at 478.

233. *Id.*; *accord* McDonald v. New Mexico Parole Bd., 955 F.2d 631, 635 (10th Cir. 1991) (dismissing writ of habeas corpus upon finding that an unexecuted detainer warrant does not deny any constitutional rights, even though petitioner claimed it prevented him from taking advantage of prison programs).

234. *Walford*, 48 F.3d at 478.

b. Hernandez-Avalos v. INS[235]

i. Facts

Four aliens convicted of deportable offenses sought a writ of mandamus compelling the INS to initiate deportation proceedings against them.[236] The district court dismissed the claims for lack of jurisdiction, stating that no law applied to the case because the Immigration Act itself did not contain any criteria for evaluating the government's actions, and no relevant regulations existed.[237]

ii. Decision

The Tenth Circuit ruled that, at a minimum, no private right of action exists under § 1252(i).[238] Additionally, since legislative history indicated congressional intent that no one would be able to satisfy the "zone of interests" test in a suit to enforce § 1252(i), "no would-be plaintiff has standing to bring suit, either directly under the statute or by way of the Mandamus Act."[239]

As an alternative basis for denying the petitioners' relief, the court stated that the "zone of interests" test under the Administrative Procedure Act (APA) governs standing to seek mandamus.[240] Both the APA and the Mandamus Act compel "wrongfully withheld agency action,"[241] with the analysis focusing on whether the defendant agency has failed to discharge a duty owed to plaintiff.[242] The question, then, was whether these plaintiffs satisfied the zone of interests test, and should therefore be heard,[243] regardless of whom the statute was enacted to benefit.[244] The court determined that Congress did not

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235. 50 F.3d 842 (10th Cir.), *cert. denied*, 116 S. Ct. 92 (1995).

236. *Hernandez-Avalos*, 50 F.3d at 843.

237. *Id.* The underlying statute, 8 U.S.C. § 1252(i) (1994), states only that deportation should begin "expeditiously" after conviction.

238. *Hernandez-Avalos*, 50 F.3d at 844.

239. *Id.*

240. *Id.*

241. *Id.* at 845 n.7.

242. Resilient Tile Layers Local Union No. 419 v. Brown, 656 F.2d 564, 566-67 (10th Cir. 1981).

243. *Hernandez-Avalos*, 50 F.3d at 847.

244. Id. at 847-48. The court stated that the legislative history behind § 1252(i) makes it clear that the statute was enacted to benefit the taxpayer by avoiding the costs associated with maintaining deportable criminal aliens:

> These people are not being deported; the expedited procedure is not working; the local and State jails are jammed up, the Immigration and Naturalization Service has no incentive to give priority to these because the burden of inaction falls on State and local governments and not on the Federal system.

Id. at 848 n.12 (quoting 132 CONG. REC. H9794 (daily ed. Oct. 9, 1986) (statement of Rep. MacKay)). The court quoted Senator Alan Simpson:

> Not only will the Federal prison system benefit from an enhanced program to deport aliens in its custody, but even . . . greater benefits can be anticipated at the State and local level, if the program can reach that far. It may well be that a supplemental request may be necessary to provide for additional personnel and resources to expedite these deportations. However, any such increases would be but a small fraction of the cost to

intend to create a duty to plaintiffs by enactment of the statute, nor that incarcerated aliens would enforce the statute.[245]

C. *Analysis*

American citizenship is a precious right which some fear recent developments in United States immigration laws will dangerously erode.[246] Competing policy considerations come into play when examining the issue of alien criminals. Although United States citizens have an interest in seeing justice served through incarceration of the alien criminal, imprisonment is expensive and places an ever-increasing burden on the already overcrowded prison system.[247]

Immediate deportation of alien criminals also presents a host of problems. In addition to negating the deterrence effect of incarceration, many deported criminals may simply re-enter the United States. These returning criminal aliens have the potential to further impact negatively on society, financially or otherwise.

The current strategy of conducting deportation proceedings after the term of the alien's incarceration, although resulting in longer periods of detention, represents the most prudent approach. The valid interests of the United States in maintaining the highest level of social order should subordinate any frustration experienced by aliens awaiting the slow process of deportation.

D. *Other Circuits*

When faced with aliens convicted of aggravated felonies, other circuits have consistently ruled that a bar of discretionary relief from deportation does not require a separate finding of dangerousness.[248] In a case of first impression, the Eleventh Circuit ruled that the aggravated felony conviction language contained in § 1251 referred to all aggravated felonies, regardless of the

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provide prison and jail space for these individuals.

Id. (quoting 132 CONG. REC. S16,908 (daily ed. Oct. 17, 1986) (statement of Sen. Simpson)).

245. *Id.* at 847-48.

246. *See generally* Jeffrey A. Evans, *Denaturalization/Deportation: What Standards for Withdrawing the Welcome Mat?*, 23 U.S.F. L. REV. 415 (1989) (discussing the denaturalization and deportation of "undesirable citizens" accused of committing serious crimes prior to entering the United States).

247. *See* Walford v. INS, 48 F.3d 477, 478 (1995) (stating that Congress considered the deterrent effect of prison sentences, and the savings that could be realized by deporting aliens without imprisoning them first, when enacting 8 U.S.C. § 1252(h), which requires an alien criminal to serve the entire prison sentence); *see also New York Deports 86 Illegal Aliens*, PATRIOT LEDGER, Aug. 29, 1995, at 02 (reporting that criminal aliens comprise approximately 5% of the state's "costly and overcrowded prison system").

248. *See* Kofa v. INS, 60 F.3d 1084, 1088-89, 1091 (4th Cir. 1995) (including survey of five other circuits not requiring separate determination); *see also* Ramsey v. INS, 55 F.3d 580, 584 (11th Cir. 1995) (holding that lewd assault was a "crime of violence" constituting an aggravated felony for purposes of deportation); Samaniego-Meraz v. INS, 53 F.3d 254, 257 (9th Cir. 1995) (ruling that aggravated felony bar pre-dates enactment of Anti-Drug Abuse Act); Gjonaj v. INS, 47 F.3d 824, 826 (6th Cir. 1995) (stating that assault with firearm with intent to murder qualifies as a "particularly serious crime" to bar relief from deportation).

date.[249] Two other circuits decided cases involving the moral turpitude provision of § 1251, ruling that second-degree malicious mischief is not a crime of moral turpitude,[250] but that first-degree incest is.[251]

In a case involving a writ of habeas corpus, the Ninth Circuit, reversing a view articulated in a previous decision,[252] ruled that incarcerated aliens do not have standing to compel expedited deportation hearings.[253] In another habeas action, the Ninth Circuit held that an excludable alien has no private right of action to assert procedural due process rights concerning admission or exclusion;[254] rather, the Attorney General has the authority to detain an excludable alien indefinitely if undeportable.[255]

CONCLUSION

At first glance, many of the Tenth Circuit's immigration rulings seem somewhat harsh. Stories of political upheaval, warfare, and tragic economic hardship strike a sympathetic chord in most. Analyzed in light of the legislative history and congressional intent underlying current immigration policy, however, it becomes apparent that this narrow construction remained true to the letter of the law during the 1994-95 survey period.

The United States, for very practical reasons, can only afford to welcome aliens whom society deems beneficial and, hence, "worthy" of citizenship. Immigration laws provide a structure for determining this worth based on established public policy goals. The agencies and courts, on the other hand, provide the mechanism which tests these goals. Combined, the structure of these laws and enforcement mechanisms theoretically ensure that each applicant is evaluated in light of both practical and idealistic goals.

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249. Asencio v. INS, 37 F.3d 614, 617 (11th Cir. 1994).
250. Rodriguez-Herrera v. INS, 52 F.3d 238, 240 (9th Cir. 1995).
251. Gonzalez-Alvarado v. INS, 39 F.3d 245, 246-47 (9th Cir. 1994).
252. Garcia v. Taylor, 40 F.3d 299, 304 (9th Cir. 1994), *superseded by statute as stated in* Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995).
253. Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995).
254. Barrera-Echavarria v. Rison, 44 F.3d 1441, 1449 (9th Cir.), *cert. denied*, 116 S. Ct. 479 (1995).
255. *Id.* at 1444.