Defense Of Sham Marriage Deportations

José, a Mexican citizen, has visited the United States. On his visits, he observed that many jobs were available for unskilled laborers. The pay, low by United States standards, was high compared with his wages in Mexico. Also, he saw other aspects of life which he liked. Therefore he hoped to find a way to emigrate to the United States. The procedures were very complicated, however, and he was told that even if he qualified, it would be several years before he could get a resident visa.

José contacted a marriage broker. The broker explained to him if he married a United States citizen he could get a United States resident visa immediately. To facilitate José's marriage, the broker was prepared to find him a suitable spouse and arrange the ceremony. In return for this service and its attendant risks (the entire procedure is illegal), José was to pay the broker $2000. The broker would in turn pay the spouse $300. He further explained that it was alright if José was not really interested in setting up housekeeping with a stranger, and that in order to satisfy the United States Immigration and Naturalization Service (INS), José only needed to create the appearance that the marriage was genuine. Also, the broker told José that he should divorce his own wife, so that he would not legally be a bigamist. Later on, when José was settled, he could divorce the citizen spouse, remarry his wife, and bring her to the United States. José agreed to the scheme. It sounded dishonest, but the broker assured him that it would work, and José was eager to get one of those better-paying jobs in the United States.

José's situation is typical. His planned marriage with the United States citizen is commonly referred to as a sham marriage.[1] In most cases a sham marriage is fully documented. But United States law, as implemented by I.N.S. guidelines, requires more of a marriage than mere documentation. It requires that the purpose of the marriage go beyond circumvention of the immigration laws, and that the normal characteristics of a marriage be present.[2]

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[1]Interview with Thomas Laughlin, Director, Sacramento Office of I.N.S., October 30, 1974 [hereinafter cited as Interview]; article in the *Sacramento Bee*, August 25, 1974, at 7, col. 1.

[2]Lutwak v. United States, 344 U.S. 604 (1953).

If José goes through with the marriage, the I.N.S. could make José the subject of a deportation proceeding.[3] José could also be charged with civil and criminal fraud.[4]

José's defense depends upon an understanding of several legal and pragmatic factors: 1) the way in which marriage expedites an alien's entry into the United States; 2) the legal requirements of a marriage which is used as the basis of immigration; 3) the methods by which the I.N.S. discovers sham marriages; 4) the level of proof required at deportation hearings based on sham marriage; 5) who must bear the burden of proof; 6) the kinds of evidence likely to be helpful; and 7) the right of an alien to remain in the United States if special circumstances exist. These and other issues of importance in sham marriage deportation proceedings will be examined in this article.

I. HOW MARRIAGE EXPEDITES ENTRY

Under the present law, an alien may have to wait years for a visa.[5] Special provisions, however, shorten the waiting period if he marries a United States citizen or resident alien.[6] These provisions differ between Eastern and Western Hemisphere immigrants.

An alien visiting from an Eastern Hemisphere country, who wants to remain in the United States, must obtain a resident visa.[7] One may be available to him from the quota allotted to his country for the current year. If he can get a resident visa before his visitor visa runs out, he may adjust his status while in the United States,[8] but if a resident visa is not available he will have to find an alternative. His legal options are to (1) get an extension on his visitor's visa,[9] (2)

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[3]Interview, *supra* note 1.

[4]*Id.*

[5]*Id.*

[6]8 U.S.C. §1151(b)(1970) provides that:

> (b) 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.

[7]8 U.S.C. §1201(a)(1970).

[8]8 U.S.C. §1255(a)(1970). This section permits Eastern Hemisphere immigrants to adjust their status while in the United States.

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion, and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence and (3) an immigrant visa is immediately available to him at the time his application is approved.

[9]8 U.S.C. §1184(a)(1970).

return to his country of origin and wait for a visa,[10] or (3) enter into a marriage with a United States citizen or resident alien.[11] Of these options, marriage will most easily lead to resident status because the procedures involved are the surest and simplest. If the alien is not visiting the United States, his only options are to wait for a visitor visa or to marry a United States citizen or resident alien.

Assuming that the alien decides to get married, whether he marries a citizen or a resident alien of the United States will affect his immigration status. If he marries a citizen, he will become an "immediate relative" of a United States citizen.[12] This status exempts him from the Eastern Hemisphere quota limitations.[13] If, on the other hand, the alien marries a resident alien, he remains subject to a country quota, albeit with "preference" status.[14] Since quotas are currently not oversubscribed, this will provide little or no obstacle.[15]

An alien visiting from a Western Hemisphere country faces different and perhaps more difficult problems. First, the Immigration and Nationality Act (I.N.A.) does not provide quotas for immigrants from countries in the Western Hemisphere.[16] Instead, the Act puts a ceiling on the number of people admitted each year, with a waiting list for those above the ceiling who wish to immigrate.[17] Since only 120,000 people are permitted to immigrate each year,[18] and many more are added to the waiting list annually, the current waiting period is approximately four years.[19] In addition, to become eligible for the waiting list an alien must obtain labor certification from the Secretary of Labor.[20] This certification is allowed only if the alien can show that his skills are needed in the United States.[21] Finally, if the alien is visiting in the United States when he becomes eligible for a resident visa, he must nevertheless return to his home country to

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[10] 8 U.S.C. § 1151(a) (1970) provides that:

> (a) Exclusive of special immigrants defined in section 1101(a)(27) of this title, and of the immediate relatives of United States citizens specified in subsection (b) of this section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to section 1153(a)(7) of this title enter conditionally, (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

[11] 8 U.S.C. § 1154(a) (1970).
[12] 8 U.S.C. § 1151(b) (1970).
[13] 8 U.S.C. § 1151(a) (1970).
[14] 8 U.S.C. § 1153(a)(2) (1970).
[15] Interview, *supra* note 1.
[16] 8 U.S.C. § § 1101(a)(27)(A); 1151(a); 1182(a)(14) (1970).
[17] *Id.*
[18] 29 C.F.R. § § 60.3-60.7 (Supp. 1974).
[19] Interview, *supra* note 1.
[20] 8 U.S.C. § 1182(a)(14) (1970).
[21] *Id.*

get the visa, because he cannot adjust his status while present in the United States.[22]

Because of this cumbersome system, the alien visiting the United States from the Western Hemisphere has two alternatives if he wants to become a resident. The first is to return to his home country to get labor certification and then wait for a visa. The second alternative is to return home, enter into a marriage with a United States citizen or resident alien if he has not already done so, get a visa, and then enter the United States. If he follows this course, he will avoid the labor certification requirement,[23] although he will not be able to avoid the bar on adjusting status from visitor to resident while in the United States.[24] The alien who begins the procedure from his home country must also obtain labor certification[25] or enter into a qualifying marriage[26] in order to obtain a resident visa.

If the Western Hemisphere alien marries a citizen of the United States, like the Eastern Hemisphere alien, he will become an "immediate relative" of a United States citizen.[27] This status will exempt him from the hemispherical ceiling,[28] although he will still have to go home to adjust his status.[29] If, on the other hand, he marries a resident alien, he will not need labor certification.[30] He will not be subject to a quota,[31] as are Eastern Hemisphere immigrants.[32] He will, however, have to meet the hemispherical ceiling. To meet the ceiling under current laws, he will have to add his name to the waiting list for a visa.[33]

II. MARRIAGE FOR ENTRY: WHAT IS SUFFICIENT?

In order for an alien to enter and remain in the United States through marriage, the marriage must be bona fide and not a mere façade.[34] If the alien does manage to obtain entry on the basis of a fraudulent marriage, and this is later detected, deportation proceedings will probably be initiated.[35]

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[22] 8 U.S.C. § 1255(c) (1970).
[23] 8 U.S.C. § 1182(a)(14) (1970).
[24] 8 U.S.C. § 1255(c) (1970).
[25] 8 U.S.C. § 1182(a)(14) (1970).
[26] 8 U.S.C. § 1154(a) (1970); 8 USC § 1182(a)(14) (1970).
[27] 8 U.S.C. § 1151(b) (1970).
[28] 8 U.S.C. § 1151(a) (1970).
[29] 8 U.S.C. § 1255(c) (1970).
[30] 8 U.S.C. § 1182(a)(14) (1970).
[31] *Id.*
[32] 8 U.S.C. § 1153(a)(2) (1970).
[33] 8 U.S.C. § 1182(a)(14) (1970).
[34] 8 U.S.C. § 1251(c) (1970).
[35] 8 U.S.C. § 1251(c) (1970); *see* section V of this Comment.

A. VALIDITY

Courts frequently state that a marriage must be both "valid" and "subsisting" for it to be recognized for immigration purposes. Three major requirements determine whether a marriage is "valid." Title Eight of the United States Code, section 1101(a)(35) sets out one of them:

> The term "spouse," "wife," or "husband" do [sic] not include a spouse, wife or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.[36]

Stated another way, a marriage by proxy between a United States citizen in the United States and an alien abroad, prior to the alien's entering the United States, is not valid unless it has been consummated. To make it valid, the United States citizen might go abroad to consummate the marriage. Alternatively, if the alien were from the Eastern Hemisphere, he might first enter the United States as a visitor and then, following consummation, adjust his status to obtain a resident visa. A Western Hemisphere alien would not have this second alternative because he cannot adjust his status while in the United States.[37]

The cases present another requirement: the marriage must meet all the legal requirements for marriage in the country where the ceremony was celebrated.[38] If it does not, it cannot be considered valid in the United States.[39]

In addition, the marriage must meet the general requirements of state law for the state in this country where the couple is domiciled.[40] Typical examples of marriages invalidated by state law are those contracted before one of the parties obtains a final decree of divorce from a previous spouse,[41] and polygamous or incestuous marriages.[42]

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[36] 8 U.S.C. § 1101(a)(35) (1970).
[37] 8 U.S.C. § 1255(c) (1970).
[38] *See* Gee Chee On v. Brownell, 253 F.2d 814 (5th Cir. 1958); In the Matter of P, 4 I. & N. Dec. 610 (1952); Matter of G, 6 I. & N. Dec. 337 (1954); Matter of C, 7 I. & N. Dec. 108 (1956); Matter of Awadilla, 10 I. & N. Dec. 580 (1964); Matter of Duran-Montoya, 10 I. & N. Dec. 767 (1963).
[39] *Id.*
[40] *See, e.g.*, Matter of G, 6 I. & N. Dec. 337 (1954); Matter of T, 8 I. & N. Dec. 529 (1960); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 2.18a(4).
[41] *See* Espinoza Ojeda v. I.N.S., 419 F.2d 183 (9th Cir. 1969); Ferrante v. I.N.S., 399 F.2d 98 (6th Cir. 1968).
[42] *See* Matter of H, 9 I. & N. Dec. 640 (1962); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.18a(4).

B. SUBSISTING MARRIAGE

A bona fide marriage must be "subsisting" as well as valid.[43] A subsisting marriage is one in which the parties actually intend, at the time of the wedding, to remain married and to fulfill all of the obligations of marriage.[44] Failure to have the requisite intent is a statutory ground for deportation.[45] The I.N.S. has often relied upon this ground in instituting proceedings.[46]

Two cases illustrate the theory behind the subsistence requirement. In *United States v. Rubenstein*[47] a couple had agreed before marriage to divorce after six months, and the alien had paid the United States citizen $200 for his cooperation. The court noted that the validity of the marriage was irrelevant, because the parties had concealed the material fact that they intended to divorce. Since the parties intended to obtain a divorce, the court reasoned that neither of them meant to fulfill the marital agreement. The marital agreement is a type of contract, and requires mutual consent. This element is absent when the parties do not expect that the agreement will be performed. Therefore, the court declared that the parties to the marriage were never actually married for purposes of immigration, despite the certificate. The court said: "They must assent to

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[43] *See* Matter of Lew, 11 I. & N. Dec. 1460 (1965); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 2.18a(1).

[44] 8 U.S.C. § 1251(c)(2) (1970) provides that:

> (c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 1182(a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a)(2) of this section if . . . (2) it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant.

Bark v. Immigration and Naturalization Service, 511 F.2d 1200 (9th Cir. 1975) (because the couple intended to remain married, the alien was not deported despite later separation.)

[45] 8 U.S.C. § 1251(c)(2) (1970).

[46] *See* Lutwak v. United States, 344 U.S. 604 (1953) (conspiracy to defraud the United States by misusing the provisions of the War Brides Act, 59 Stat. 659 (1945), expired Dec. 28, 1948); United States v. Rubenstein, 151 F.2d 915 (2nd Cir. 1945) (marriage was not consummated, and a lawyer's aid was enlisted in the conspiracy to obtain a resident visa); Matter of E, 5 I. & N. Dec. 305 (1953) (spouses were not living together, but the alien was not deported because the separation was a result of the citizen spouse's mental illness, and not a result of fraud); Matter of M, 8 I. & N. Dec. 217 (1958) (alien deported since no bona fide husband-wife relationship was intended); Matter of Slade, 10 I. & N. Dec. 128 (1962) (alien was deported for entering into a fraudulent marriage, because the couple did not consummate the marriage and had no bona fide intent to live together); United States v. Diogo, 320 F.2d 898 (2d Cir. 1963) (couple had no bona fide intent to live together); Scott v. Immigration and Naturalization Service, 350 F.2d 279 (2d Cir. 1965) (couple had no bona fide intent to live together).

[47] United States v. Rubenstein, 151 F.2d 915 (2d Cir. 1945).

enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence or cover to deceive others."[48]

In *Lutwak v. United States*,[49] petitioners were convicted of conspiracy to defraud the United States by obtaining the illegal entry into the country of three aliens as spouses of honorably discharged veterans, under the War Brides Act.[50] The parties concealed the fact that they intended to divorce as soon as the aliens obtained visas, and relied on the validity of the marriages. The Court declared that the validity of the marriages was immaterial; the marriage ceremonies were only a step in the fraudulent scheme. The Court explained:

> The common understanding of a marriage, which Congress must have had in mind when it made provision for "alien *spouses*" in the War Brides Act, is that the two parties have undertaken to establish a life together and assume certain duties and obligations.[51]

These two cases show that the test for subsistence of a marriage is subjective. The *Lutwak* court defined it vaguely: "the two parties have undertaken to establish a life together and assume certain duties and obligations."[52] The *Rubenstein* court defined what it is not: a "pretence or cover to deceive others."[53] Basically, the courts' attitude is that they will not recognize a marriage for immigration purposes unless it achieves the social objectives of a marriage. When it is merely intended to serve the purpose of helping an alien gain entry into the country, it does not meet these objectives. Therefore, judges apply their knowledge of the normal marital relationship in order to detect its absence. When a court finds a marriage is not subsisting, it will be held insufficient for immigration purposes, even where the marriage is otherwise valid and binding.

III. I.N.S. DETECTION OF SHAM MARRIAGES

Because partners in invalid marriages are normally screened out before admission to the United States, the I.N.S. is concerned primarily with uncovering non-subsisting marriages.[54]

During its investigatory procedures, the I.N.S. applies a practical test of whether a marriage is a sham. The I.N.S. undertakes investigation of all petitions based on marriage. The first step in such an investigation[55] is to interview each husband and wife separately,

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[48] *Id.* at 919.
[49] 344 U.S. 604 (1953).
[50] War Brides Act, 59 Stat. 659 (1945), *expired* Dec. 28, 1948.
[51] 344 U.S. at 611.
[52] *Id.*
[53] 151 F.2d at 919.
[54] Interview, *supra* note 1.
[55] *See, e.g.*, Harriet Katz Berman, "Roundup in the Barrio," Civil Liberties, November, 1973, reprinted in A.C.L.U. REPORTS, *The Immigration and Natural-*

using a standard set of questions.[56] Frequently these interviews, coupled with confronting the parties with discrepancies in their stories, lead to confessions that the marriage is a sham.[57] If the couple does not confess to a fraudulent marriage, and immigration officials still doubt its legitimacy, the officials will investigate further. The investigation may include questioning of landlords and neighbors, talking to friends and acquaintances, and observing the comings and goings of persons at the alien's dwelling.[58] If, as a result of these procedures, the Immigration Service can prove that the alien and his citizen spouse are not living together, and have no good reason to live separately on a temporary basis, the Service has a prima facie case of deportability against the alien on the basis that his marriage is not subsisting.[59]

The next step is a deportation proceeding, carried out by way of an administrative hearing. A series of administrative appeals is possible, followed by appeal to the Circuit Court of Appeals for the Circuit in which the alien resides, and then certiorari to the United States Supreme Court.[60]

IV. PROVING THE ALIEN'S CASE

A. BURDEN AND STANDARD OF PROOF

1. NO DIVORCE

In the absence of a divorce, the burden of proof in a deportation proceeding involving a sham marriage rests upon the Government. It must prove by "clear, unequivocal, and convincing evidence"[61] that the alien has intentionally failed or refused to fulfill his marital agreement and never intended to do so.[62]

The level of proof required of the Government is the same one used in most deportation proceedings. This standard was established in 1966 by the United States Supreme Court in *Woodby v. Immigration and Naturalization Service.*[63] In that decision, the Court re-

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ization Service and Civil Liberties: A Report on the Abuse of Discretion, edited by Trudy Hayden, A.C.L.U. staff associate, July, 1974; Interview, *supra* note 1.

[56]The I.N.S. maintains that the questions cannot be disclosed because knowledge would permit preparation, affecting the genuineness of answers.

[57]A.C.L.U. REPORTS, *supra* note 54.

[58]A.C.L.U. REPORTS, *supra* note 54.

[59]8 U.S.C. § 1251(c)(2).

[60]8 C.F.R. § 242 (Supp. 1974); *see* Comment, *Standards for Deportation*, this volume.

[61]Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

[62]8 U.S.C. § 1251(c)(2) (1970).

[63]385 U.S. 276 (1966). In *Woodby v. Immigration and Naturalization Service*, two cases were considered together. In both, the requisite burden of proof was in question. In one, *Immigration and Naturalization Service v. Sherman*, the alien had originally entered the United States in 1920. In 1938, following a trip

jected the previously used level of proof, equivalent to a preponderance of the evidence, and replaced it with a "clear, unequivocal, and convincing" standard which falls somewhere between a preponderance of the evidence and proof beyond a reasonable doubt.[64] The previous standard was based on the sections of the Immigration and Nationality Act (I.N.A.) which uses the language "reasonable, substantial, and probative evidence" in connection with deportation orders.[65] The *Woodby* Court observed that both provisions were addressed to the scope of judicial review rather than to the degree of proof required.[66] Since Congress had not defined the degree of proof, the decision was left to the Court. The Court reasoned that a deportation proceeding is neither as serious as a criminal prosecution, requiring proof beyond a reasonable doubt, nor as inconsequential to personal freedom as a civil case, requiring a mere preponderance of the evidence. An intermediate standard of clear, unequivocal, and convincing evidence is used for expatriation, denaturalization, and many serious civil cases.[67] The Court decided that fairness requires no lesser level of proof for deportations. Therefore, the Court held that no deportation order could be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged are true.[68]

2. FOLLOWING DIVORCE

There is a statutory presumption of fraud when an alien and his spouse have been married less than two years before the alien enters the United States and have been divorced within two years after his

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abroad, he allegedly re-entered the United States without inspection as an alien. Since entry without inspection makes an alien deportable under 8 U.S.C. § 1251(a)(2) (1970), deportation proceedings were instituted. The alien attacked the deportation order as being based on insufficient proof. In the other case, *Woodby v. Immigration and Naturalization Service*, the alien had entered as the wife of an American soldier. After her husband deserted her she engaged in prostitution, which is a deportable offense under 8 U.S.C. § 1251(a)(12) (1970) and § 1182(a)(12) (1970). Her defense was duress, and would have been sufficient, except that the I.N.S. concluded that she had continued as a prostitute after the duress was over. Proof that she had continued after the period of duress was challenged.

[64] *Id.* at 281.

[65] 385 U.S. at 286.

[66] 385 U.S. at 284.

[67] 385 U.S. at 285.

[68] 385 U.S. at 286. The *Woodby* case was followed by Kokkinis v. District Dir. of I.&N.S., N.Y., N.Y., & Buffalo, N.Y., 429 F.2d 938 (1970), in which an alien argued to the appellate court that a deportation hearing is closer to a criminal than to a civil proceeding because of the "drastic deprivations following the deportation of a resident alien" (at 941). Therefore, he contended, the higher, criminal standard of proof beyond a reasonable doubt should be employed in such cases. The court flatly rejected this argument, resting its decision squarely upon the *Woodby* opinion. It reiterated that the proper standard is that of clear, unequivocal, and convincing evidence (at 941).

entry.[69] To invoke the presumption, the government has the initial burden of coming forward with evidence of (1) alienage; (2) marriage to an American citizen within two years prior to entry; (3) admission on documents procured on the basis of the marriage; and (4) termination of the marriage by divorce or annulment within two years after entry.[70] Once the government has fulfilled its initial burden, the alien has the burden of proving that the marriage was not a fraud.[71]

The level of proof required of the alien to rebut the presumption is not set forth in the statute and it is not directly established by any case. Therefore, one must anticipate how an appellate court would rule on this point based on the *Woodby* opinion and on *Matter of V*,[72] the one reported case in which an alien has proved that he did not enter into his marriage in order to evade the immigration laws when he was divorced within two years after entry. In *Matter of V*, the alien defendant proved his case by a preponderance of the evidence when a preponderance was the level of proof required of the government in cases not covered by the statutory presumption of fraud. Nine years later, *Woodby* increased the level of proof required of the government.[73]

One might surmise that because *Woodby* increased the Government's degree of proof, a spirit of symmetry dictates that when the burden is on the alien he be required to meet the same higher standard as that imposed on the Government. The better position, however, is that the alien retains the less demanding "preponderance of evidence" standard of proof. First, it appears that the Court's general policy in *Woodby* would support a lower standard of proof for the alien than for the Government. The Court exhibited concern for the alien resident threatened by deportation[74] and, by its holding, made deportation more difficult for the Government. Also, the Court made the decision without considering its application to divorced aliens, who carry the burden of proof when deportation proceedings are instituted against them. If the *Woodby* decision were to increase the divorced alien's burden the Court's concern for the alien would be frustrated. Second, the application of a lower standard to a defendant is not without precedent. In criminal cases the defendant often

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[69] 8 U.S.C. § 1251(c)(1) (1970); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 5.10b, at 5-78.

[70] *See* Small v. Immigration and Naturalization Service, 438 F.2d 1125 (2d Cir. 1971); Matter of Oliveira, 13 I. & N. Dec. 503 (1970); Matter of V, 7 I. & N. Dec. 460 (1957); Matter of T, 7 I. & N. Dec. 417 (1957); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 4.7d, at 4-52.

[71] Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

[72] Matter of V, 7 I. & N. Dec. 460 (1957).

[73] Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

[74] *Id.* at 285.

bears the burden of proving a special defense.[75] An example of such a defense is proof of a good faith marriage in a bigamy prosecution.[76] Although the prosecution must prove beyond a reasonable doubt that the defendant is a bigamist, the defendant need only prove his defense by a preponderance of the evidence.[77] The defendant may prove his affirmative defense by a lower standard because it consists of a factor which is not an element of the crime and so does not directly contradict any point which the prosecution has already proved beyond a reasonable doubt.[78] Likewise, in a sham marriage deportation proceeding after a court has terminated the alien's marriage, affirmative proof of good faith would not directly contradict any of the points which the Government must establish in its prima facie case. Therefore, it is arguable that an alien carrying the burden of proof will not be held to the newer standard of proof by clear, unequivocal, and convincing evidence.

B. EVIDENCE

If the Government establishes its prima facie case, the alien will want to establish that his marriage was a legitimate one. The Government will attempt to prove the converse. What kinds of evidence can be used to accomplish these ends?

Because deportation proceedings are administrative hearings, any oral or documentary evidence is admissible, including hearsay evidence, unless it is irrelevant, immaterial, or unduly repetitive.[79]

Types of evidence which tend to establish that the alien did not have fraudulent intent are love letters to or from the spouse,[80] testimony that the couple courted before marriage,[81] and proof that the couple lived together after the wedding.[82] It is also helpful to show a justification for the separation or divorce, such as incarceration of a spouse,[83] desertion by the non-alien spouse,[84] hospitalization of a spouse,[85] economic necessity, or incompatability of the couple.[86]

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[75] WITKIN, CALIFORNIA CRIMINAL PROCEDURE, § 345.
[76] *See* People v. Vogel, 46 Cal. 2d 798, 803, 299 P.2d 850 (1956).
[77] *Id.*
[78] *Id.*
[79] *See* Matter of Hays, Int. Dec. #2162 (1972); 5 U.S.C. § 556(d); GORDON & ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, § 5.10a, at 5-75.
[80] *See* Matter of Hays, Int. Dec. #2162 (1972).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *See* Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).
[85] *See* Matter of E, 5 I. & N. Dec. 305 (1953).
[86] *See* Bark v. Immigration and Naturalization Service, 511 F.2d 1200 (9th Cir. 1975); Matter of Hays, Int. Dec. #2162 (1972). It would also seem that evidence that a family has been established, and evidence that the partners have conducted their affairs jointly would be helpful. Conversely, the Government might want to prove that the partners conducted their affairs separately.

Kinds of evidence which tend to establish that the alien did have fraudulent intent, and thus should be deported, are proof that a marriage broker was involved,[87] a showing that the partners were not acquainted before marriage,[88] evidence of great disparity in the spouses' ages,[89] a showing that the couple never lived together,[90] and testimony to the effect that the partners did not intend to remain married.[91]

V. AFFIRMATIVE DEFENSE: SUBSEQUENT BONA FIDE MARRIAGE

In some instances, a current bona fide marriage or other immediate relative status is sufficient, under Title 8 of the United States Code, section 1251(f) (often called the "forgiveness" statute),[92] to prevent the deportation of an alien who has procured a sham marriage in order to get a resident visa. This statute provides that if an alien within the United States entered on the basis of a sham marriage, he will not be deported if he was "otherwise admissible" at the time of entry and is now married to a United States citizen or resident alien.[93]

The statute places two requirements on the alien who wishes to invoke it to prevent deportation. First, the alien must currently be a partner in a bona fide marriage to a United States citizen or resident alien. This requirement has created no confusion among the courts.

The second requirement is that the alien must have been otherwise admissible at the time of entry. The meaning of the phrase "otherwise admissible" has spawned much discussion. Some courts have interpreted this phrase literally to mean that the class at which the statute is aimed cannot be saved from deportation, because the fraud or misrepresentation embodied in presenting a sham marriage to obtain a visa is itself grounds for exclusion of an alien.[94] In other

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[87] *See* United States v. Diogo, 320 F.2d 898 (2d Cir. 1963).

[88] *Id.*

[89] *See* Kokkinis v. District Dir. of I.&N.S., N.Y., N.Y., & Buffalo, N.Y., 429 F.2d 938 (2d Cir. 1970).

[90] *See* Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6th Cir. 1968).

[91] *See* United States v. Rubenstein, 151 F.2d 915 (2d Cir. 1945).

[92] 8 U.S.C. § 1251(f) (1970) provides that:

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

[93] *Id.*

[94] *See* Volianitis v. Immigration and Naturalization Service, 352 F.2d 766 (9th Cir. 1965).

words, these courts apparently have held that the statute means nothing at all.

In 1966, the United States Supreme Court, in *I.N.S. v. Errico*,[95] interpreted the phrase by using legislative history. In this decision, the Court heard two cases of fraudulent entry with subsequent bona fide marriages. One of these involved a sham marriage. The Court noted that the purpose of the statute was to unite families, and that doubts as to statutory construction should be resolved in favor of the alien. The Court said that Congress expected that this statute's greatest benefit would be to those Mexican nationals who had entered the United States during a period of laxity in border control operations and had established families.[96] Under this broad interpretation of the statute, the Court held that an alien who enters into a bona fide marriage to a United States citizen or resident alien will not be deported if the sole ground stated for his deportation is entry through a sham marriage or other fraudulent means.[97]

VI. CONCLUSION

Because of the intensive preliminary screening, very few sham marriage cases are brought to hearing unless the I.N.S. believes it has strong evidence to support deportation. The alien should be prepared to rebut the evidence likely to be presented against him. Such evidence often includes the following: (1) a showing that the alien paid his spouse to participate in the marriage ceremony and to file the necessary petitions with the I.N.S.; (2) evidence that a marriage broker arranged the wedding; (3) proof that the alien and his spouse did not live together after they were married; (4) evidence that the alien, if a man, did not financially support his wife after they were married; and (5) testimony that the alien has indicated that he does not consider himself married to his putative spouse. Frequently the spouse will be the witness testifying that the alien paid for the spouse's cooperation.

Applicable statutes and cases, however, have often favored alien defendants. The alien with a meritorious case who carefully plans his defense to establish that the marriage he entered under is genuine will find that several factors, if available, may operate in his favor. The following are examples: (1) evidence that he knew his citizen or resident alien spouse before he married, and (2) a showing that the alien and his spouse set up a home together after their wedding. Evidence that the alien knew his spouse before the wedding may be presented in the form of love letters, testimony or affidavits of wit-

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[95] 385 U.S. 214 (1966).
[96] *Id.* at 224-25.
[97] *Id.* at 223.

nesses who were acquainted with the couple before they were married, the alien's own testimony, and, if possible, the spouse's testimony. Also, the alien who entered the United States by means of a questionable marriage may nevertheless have a right to remain in the United States if he is presently married to a United States citizen or resident alien. With such types of evidence and defenses available, the alien may well be successful.

Barbara J. Leidigh