Alternatives To Deportation: Relief Provisions Of The Immigration And Nationality Act

I. REGULATION OF DEPORTATION

Deportation is a sovereign right of nations.[1] This right is recognized in the Immigration and Nationality Act of 1952 (INA)[2] which grants unfettered power to the Attorney General of the United States to regulate and to supervise deportation for the government.[3]

The Attorney General has delegated his authority to the Immigration and Naturalization Service (INS)[4] and to the Board of Immigration Appeals.[5] The officers of the Immigration Service exercise this authority in a variety of separate functions: the investigation of alien activity, the prosecution and adjudication of charges of deportation, the determination of administrative applications, and the direct supervision of aliens who are ordered deported.[6]

Although Congress recognizes the absolute power of government to deport, the harshness of deportation has also been noted.[7] Spe-

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[1]L.F. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 498-502 (8th ed., H. Laughterpacht, ed., 1955). The case of Ekiu v. United States, 142 U.S. 651 (1891), first established this concept in the exclusion context. Deportation cases include Fong Yue Ting v. United States, 149 U.S. 698 (1893); Bugajewitz v. Adams, 228 U.S. 585 (1913); Carlson v. Landon, 342 U.S. 524 (1952). In Harisiades v. Shaughnessy, 342 U.S. 580 (1952) the court held that "the government's power to terminate hospitality has been asserted and sustained by this court since the question first arose . . . such is the traditional power of the nation over the alien."

[2]The Immigration and Nationality Act of June 27, 1952 is popularly known as the McCarran-Walter Act (c. 477, 66 Stat. 166); 8 U.S.C. §1101 *et seq.* (1970). *See* 1952 U.S. CODE CONG. AND AD. NEWS 1653 for the history and purpose of the Act.

[3]Carlson v. Landon, 342 U.S. 524 (1952); 5 U.S.C. APPENDIX REORGANIZATION PLAN NO. V of 1940 (1967); 8 U.S.C. §1103(a) (1970).

[4]8 U.S.C. §1103(b) (1970); 8 C.F.R. § §2.1, 103.1 (1975). *See* Chart A.

[5]8 C.F.R. Part 3 (1975).

[6]8 C.F.R. §103.1 (1975).

[7]Bridges v. Wixon, 326 U.S. 135 (1945).

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cifically, the unconscionability of deportation in extreme circumstances has been cited both by Congress[8] and by the courts.[9] In response, the courts have gradually eroded the absolute power of Congress to regulate deportation,[10] and Congress itself has recognized not only the requirements of due process in deportation procedure,[11] but also the need for amelioration of deportation[12] and for review.[13]

The resulting law is highly complex, and its many amendments provide specific relief for deportable aliens who seek special consideration. Today, an alien may find alternatives to deportation at specific stages throughout the deportation process:[14] at the hearing, by application for relief, on appeal to the Board of Immigration Appeals, in the appellate jurisdiction of the courts, in habeas corpus[15] and in private Congressional bills.[16]

The immigration lawyer repeatedly faces the dilemma of whether to contest the substance of deportation charges against his client, whether to challenge the constitutional issues underlying deportation[17] or to seek relief from deportation under the code.[18] This article focuses on the eligibility requirements for relief from deportation and the procedures for seeking and challenging its denial.

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[8]The 1952 Act was passed over the veto of President Truman. *See* Truman, Harry S., Veto Message, H.R. DOC. NO. 520, 82d Cong., 2d Sess. 1-9 (1952). The Act retained the suspension privilege of the 1940 enactment. It recognized the extreme circumstances under which most aliens sought special legislative relief before the Congress but restricted relief to only exceptional and extreme circumstances. *See* comments on S. 2550, H.R. 5678, 1952 U.S. CODE CONG. AND AD. NEWS 1718.

[9]Bridges v. Wixon, 326 U.S. 135 (1945).

[10]*See generally*, H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330-60 (2d ed., P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, eds., 1973); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1961).

[11]8 U.S.C. § 1252(b) (1970). These requirements in general include: the right to fair hearing, reasonable notice of the charges, the right of cross examination, the right to subpoena witnesses, the right to counsel, and the right to an unbiased tribunal. *See generally*, Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 39 (1964). Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILLANOVA L. REV. 566 (1966).

[12]*See generally*, Gordon, *Discretionary Relief from Deportation*, 11 DECALOGUE J. 6 (1960).

[13]8 U.S.C. § 1105a (1970).

[14]*See* Chart B.

[15]8 U.S.C. § 1105a(9) (1970).

[16]*See* Comment, *Immigration and Naturalization — Equitable Safety Valves*, this volume.

[17]Alcala v. Wyoming State Board, 365 F. Supp. 560 (D. Wyo. 1973).

[18]1973 INS ANN. REP. 15-17 (1973). Some 80% of deportable aliens seek relief.

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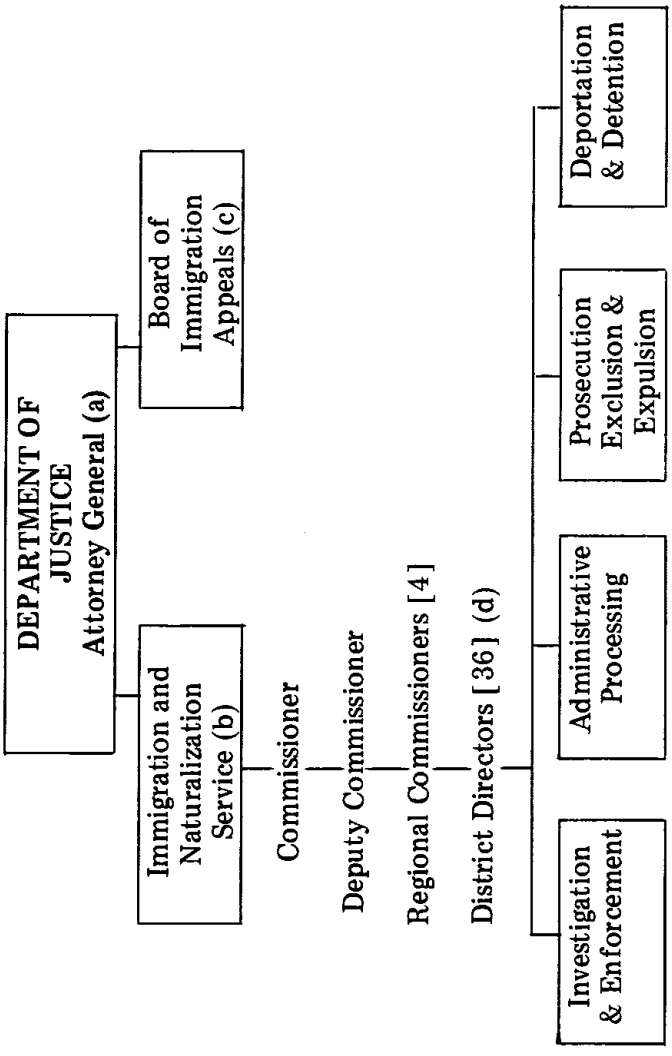
CHART A
DELEGATION OF AUTHORITY



SOURCES: (a) 8 U.S.C. §1101 *et seq.*
(b) 8 C.F.R., Parts 2 and 100
(c) 8 C.F.R., Part 3
(d) 8 C.F.R., Part 103.1

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CHART B
THE DEPORTATION PROCESS

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II. THE DEPORTATION PROCESS

A. THE GROUNDS FOR DEPORTATION

Since only aliens may be deported,[19] the government has the burden to establish that any party under deportation proceedings is not a citizen of the United States.[20] If an alien claims citizenship, such claim is subject to special procedures under the INA,[21] and if alienage is not established, deportation may not be ordered.[22]

Three classes of aliens are deportable: those here in violation of entry requirements,[23] those who have overstayed a temporary entry permit,[24] and those deportable on the basis of misconduct after entry.[25] (Misconduct includes subversion,[26] criminal activity,[27] narcotics[28] and sexual violations,[29] violations of registration requirements,[30] the smuggling of aliens into the country,[31] and the receipt of public assistance.[32]) In all, some seven hundred grounds for deportation exist,[33] including the grounds for exclusion.[34] The ground on which an alien is deportable will affect the avenue of relief available to him later, especially where subsequent relief requires a finding of good moral character.[35]

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[19] 8 U.S.C. § 1361 (1970).
[20] Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963); Bilokumsky v. Tod, 263 U.S. 149; *for example*, a party may claim derivative citizenship or wrongful expatriation. *See* Comment, *The Conditional Status of Derivative Citizenship*, this volume, and Comment, *Expatriation — A Concept in Need of Clarification*, this volume.
[21] 8 C.F.R. § 242.23(a) (1975).
[22] 8 U.S.C. § 1361 (1970).
[23] 8 U.S.C. § 1251(a)(1) (1970).
[24] 8 U.S.C. § 1251(a)(9) (1970).
[25] 8 U.S.C. § § 1251(a), 1306(b) (1970).
[26] 8 U.S.C. § 1251(a)(7) (1970).
[27] Such activity may in fact have arisen before as well as after entry. 8 U.S.C. § 1251(a)(4) (1970).
[28] 8 U.S.C. § 1251(a)(11) (1970); 42 U.S.C. § 201(k) (1970).
[29] 8 U.S.C. § 1251(a)(12) (1970).
[30] 8 U.S.C. § 1251(a)(5) (1970).
[31] 8 U.S.C. § 1251(a)(13) (1970).
[32] 8 U.S.C. § 1251(a)(8) (1970).
[33] S. 2550, H.R. 5678, 1952 U.S. CODE CONG. AND AD. NEWS 1715; J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 143 (1973) [hereinafter cited as WASSERMAN]; 8 U.S.C. § 1251 (1970). The bases of most deportation proceedings are entry or registry violations. Only a small percentage of aliens are deported for criminal behavior, narcotics violations, moral or security reasons. *See* Tables, 1973 INS ANN. REP. 78-88 (1973).
[34] 8 U.S.C. § 1227 (1970); 8 U.S.C. § 1251(a)(1) (1970); 8 U.S.C. § 1182 (1970).
[35] Although the standards for a determination of good moral character are not clear, an alien deported on the basis of certain criminal charges will be unable to make a showing of good moral character required for voluntary departure: *see* 8 U.S.C. § 1252(b) (1970) and 8 U.S.C. § 1254(a)(2) (1970). Or for suspension: 8 U.S.C. § 1251(a)(4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) (1970). Murderers are never eligible for relief, 8 U.S.C. § 1101(b) (1970). Good moral character does not, however, require moral excellence: *In re* B-, 1 I. & N.

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B. ADMINISTRATIVE PROCEDURES

Some 800,000 aliens are apprehended annually[36] and most leave voluntarily.[37] Of those aliens who do go through the hearing process, few overcome the government's charges of deportation;[38] the majority seek relief from deportation through administrative and judicial channels.[39]

1. OVERVIEW

The administrative proceedings relating to deportation include chronologically: issuance of an order to show cause;[40] hearing before an Immigration Judge[41] and announcement of the Judge's decision[42] (*i.e.*, termination, relief or deportation); appeal from the decision to the Board of Immigration Appeals;[43] and issuance of a warrant and an order for deportation in the case of deportability.[44]

The hearing itself has four separate components: a determination of deportability,[45] the designation of a country of destination in case of deportation,[46] a determination regarding relief,[47] and a determination regarding claims of potential political persecution in the country chosen for deportation.[48]

In addition, informal processes of investigation, apprehension and determination of priorities precede the issuance of each order to show cause.[49] These are primarily enforcement functions, and include interrogation and search.[50] Administrative processes regulating

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Dec. 611 (1954). *See also* discussion of good moral character: S. KANSAS, NEW IMMIGRATION LAW SIMPLIFIED 206-08 (1967).

[36] 1973 INS ANN. REP. 15-17 and Tables 23-27B (1973).

[37] *Id.*

[38] Of forty two thousand cases actually before the Service in 1973, 18,523 were heard, and of those cases heard, 2,060 were appealed to the Board of Immigration Appeals. 534 cases of deportation were challenged in the courts; 218 cases were on direct review under the provisions of the Immigration Act and the Supreme Court granted certiorari to none of the 12 petitioners seeking its review. Only forty-two appeals have been favorable to aliens in the five years from 1969-1973. The overwhelming majority of deportations were uncontested. *Id.*

[39] *Id.*

[40] 8 C.F.R. § 242.1 (1975).

[41] 8 U.S.C. § 1252(b) (1970); 8 C.F.R. § 242.17 (1975).

[42] *Id.* 8 C.F.R. § § 242.17, 242.15 (1975).

[43] 8 C.F.R. § 242.2 (1975).

[44] 8 C.F.R. § 243.2 (1975).

[45] 8 C.F.R. § 242.16(c) (1975).

[46] 8 C.F.R. § 242.8 (1975).

[47] 8 C.F.R. § 242.17 (1975).

[48] 8 C.F.R. § 242.8 (1975).

[49] 8 U.S.C. § 1362 (1970); 8 C.F.R. § 287.1(c) (1975).

[50] Abel v. United States, 326 U.S. 217 (1960). A finding of deportability will extinguish irregulatiries in the initial process. *See also* U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923) and Comment, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, this volume.

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parole, detention and expulsion follow the hearing,[51] as do Congressional action[52] and judicial review.[53] The Board of Immigration Appeals as well as the courts may review any determination made during the hearing.[54]

2. *FORMAL PROCEDURES*

Issuance of an order to show cause initiates the formal proceedings of deportation.[55] The order to show cause is a combination of summons and complaint which includes both notice of the hearing and the alleged grounds for deportation.[56] Prior to receipt of the order an alien may request "voluntary departure"[57] to avoid the stigma of deportation. Occasionally the alien may even arrange an adjustment of his status or his readmission prior to departure.[58] But if the alien has chosen to contest the order and to remain, he must complete the hearing process.[59] Once an order has been issued he may depart only with official sanction.[60] He may, however, have the hearing continued upon a showing of good cause.[61]

An Immigration Judge presides at the deportation hearing.[62] Historically, the duties of the Judge included investigative and prosecutorial functions as well as adjudicative responsibilities.[63] Today, regulations divide these duties to avoid any apparent conflict of interest.[64] Many of the responsibilities of the Immigration Judge are similar to those of any other judge. He must conduct the hearing in a fair and equitable manner,[65] he must advise the alien of his rights and explain the charges against the alien,[66] and his decision becomes a

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[51] 8 C.F.R. § 242.17 (1975) and 8 C.F.R. § § 243.1, 243.2, 243.3, 243.6, 243.7, 243.8 (1975).
[52] There are no published rules regarding private legislation. *See generally*, C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.12 (1974) [hereinafter cited as GORDON & ROSENFIELD]. *See also* Comment, *supra* note 16.
[53] 8 U.S.C. § 1105a(1970).
[54] 8 C.F.R. § § 3.1(c), 103.4 (1975). *See also* GORDON & ROSENFIELD, *supra* note 52, § 5.13.
[55] 8 C.F.R. § 242 (1975).
[56] *Id.*
[57] *See generally*, GORDON & ROSENFIELD, *supra* note 52, § § 7.2 c,d.
[58] Bufalino v. Holland, 277 F.2d 1970 (3d Cir. 1960).
[59] 8 C.F.R. § 242.17(d) (1975).
[60] *Id.*
[61] 8 C.F.R. § 242.13 (1975); *for example*, he may request a continuance to seek legal counsel, but he may do so only once.
[62] 8 C.F.R. § § 242.8(a) and (b) (1975).
[63] 8 C.F.R. § 242.9 (1975).
[64] *Id.*
[65] *Id.; see also* Gordon, *supra* note 11 at 39.
[66] 8 C.F.R. § 242.16(a) (1975).

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part of the record of the hearing.[67] As in judicial proceedings, he may be disqualified for cause.[68] Unless appealed to the Board within ten days, the order of the Judge is final.[69]

Although the deportation hearing is an administrative trial, the Administrative Procedure Act does not strictly apply.[70] Civil trial standards are also inapplicable. Although many of the procedures are analogous to such proceedings, by regulation the deportation hearing has its own procedural and evidentiary standards.[71] First, the hearing is open to the public but may be closed at the discretion of the Immigration Judge.[72] The attorney for the Immigration Service must prove each element of the government's case, establishing deportability on the basis of clear and unequivocal evidence.[73] Hearsay evidence is admissible.[74] The alien himself may present and cross-examine witnesses, and he may present evidence and rebut the evidence against him.[75] When an application for relief is under consideration, although the Judge sees it as part of the file, evidence against the alien may be withheld for reasons of security.[76] Everything considered at the hearing becomes part of the record.[77] The alien may obtain counsel,[78] but counsel is neither provided nor required.[79] The Service provides interpreters.[80]

The courts have held repeatedly that deportation is not punishment. Thus deportation is a civil and not a criminal proceeding.[81] Although the burden of proof is higher in a deportation proceeding than in an ordinary civil case,[82] many of the alien's rights are nevertheless proscribed. The hearing may be *ex parte*,[83] the law may be

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[67] 8 C.F.R. § § 242.15 and 242.8 (1975).
[68] 8 C.F.R. § 242.8(b) (1975).
[69] 8 C.F.R. § 242.21 (1975).
[70] Hao v. Barker, 222 F.2d 821 (9th Cir. 1955).
[71] 8 C.F.R. § 242.16(c) (1975).
[72] 8 C.F.R. § 242.8 (1975).
[73] 8 C.F.R. § § 242.14, 242(b)(4), 242.15, and 242.8 (1975). Woodby v. Immigration & Nat. Serv., 385 U.S. 276 (1966).
[74] 8 C.F.R. § 242.16(a) (1970); Navarette-Navarette v. Landon, 223 F.2d 234 (9th Cir. 1955), *cert. denied*, 351 U.S. 911 (1956); Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952).
[75] Sung v. McGrath, 339 U.S. 33 (1950); 8 U.S.C. § 2352(b) (1970).
[76] Jay v. Boyd, 351 U.S. 345 (1956).
[77] 8 C.F.R. § § 242.15 and 242.8 (1975).
[78] 8 U.S.C. § 1362 (1970); 8 C.F.R. § 236.2 (1975).
[79] 8 C.F.R. § 242.16 (1975); Comment, *Due Process & Deportation — Is There A Right to Assigned Counsel?*, this volume.
[80] 8 C.F.R. § 242.12 (1975); *see* Comment, *Attorneys Guide to Use of Court Interpreters, With an English and Spanish Glossary of Criminal Law Terms*, this volume.
[81] Woodby v. Immigration & Nat. Serv., 385 U.S. 276 (1966); Harisiades v. Shaughnessey, 342 U.S. 580 (1952).
[82] *In re* S-, 7 I. & N. Dec. 529 (1957).
[83] Harisiades v. Shaughnessey, 342 U.S. 580 (1952); Galvan v. Press, 347 U.S. 522 (1954); 8 U.S.C. § 1251(d) (1970).

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applied retroactively;[84] no statute of limitations exists,[85] and silence may be used against an alien who chooses to invoke the Fifth Amendment.[86] The courts have avoided the issue of vagueness.[87]

3. PROCEEDINGS SUBSEQUENT TO THE HEARING

Further administrative activity follows the hearing once the Immigration Judge makes a finding of deportability.[88] Under the direction of the district director and through the appropriate Immigration Service department, the alien will receive a final order and warrant of deportation.[89] Determinations made regarding bond, parole, and detention during this period[90] are totally separate from the earlier finding of deportability. The District Director exercises his continuing authority during this period and through the time of the alien's departure.[91] An alien declared stateless and who cannot be deported will indefinitely remain under the supervision of the Immigration Service.[92]

III. RELIEF FROM DEPORTATION

A. THE EXERCISE OF DISCRETION

If an alien is found deportable or has stipulated to deportability, he may be eligible for relief. Relief means the favorable exercise of discretion by a Service officer which relieves an alien from deportation. Such relief is specified in the code and each section has different requirements regarding timeliness, fees and applications.[93] Every applicant for relief is entitled to at least a determination of his eligibility,[94] but the burden of proof is on the alien to establish that

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[84] However, a few grounds for deportation must occur within five years of initial, legal entry. These include the smuggling of aliens, 8 U.S.C. § 1251(a)(13) (1970), a single crime of moral turpitude, 8 U.S.C. § 1251(a)(4) (1970), institutionalization at public expense, 8 U.S.C. § 1251(a)(3) (1970) and violation of registration, 8 U.S.C. § 1251(a)(15) (1970). Martinez-Martinez v. Immigration & Nat. Serv., 414 U.S. 1066 (1974) clarifies the time of initial entry.

[85] U.S. *ex rel.* Heikkeinen v. Gordon, 190 F.2d 16 (7th Cir. 1951), *dismissed as moot*, 344 U.S. 870 (1951); Kimm v. Rosenberg, 363 U.S. 405 (1960).

[86] Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), *aff'd on other grounds*, 1374 U.S. 449 (1963).

[87] 8 C.F.R. § § 243, 243.1 (1975).

[88] 8 C.F.R. § 103.2 (1975).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] U.S. v. Witkovich, 353 U.S. 194 (1957). *For example*, one such alien declared stateless has been under legal supervision of the INS for nearly 18 years (SF District File #A20-455-469); *see* 8 U.S.C. § 1253(h) (1970); 8 U.S.C. § 1252(c) (1970); Park v. Barber, 107 F. Supp. 605 (Cal. 1952); Wong Wing v. United States, 163 U.S. 228 (1895); 8 C.F.R. § § 103.7(a), (b) (1975).

[93] An alien is, however, deportable to any country which will accept him; 8 U.S.C. § 1253(a) (1970).

[94] Wong Wing Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966).

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eligibility exists.[95] The initial determination that an alien qualifies for relief does not, however, mandate a decision in his favor.[96]

The Attorney General has the primary statutory authority to exercise discretion in deportation hearings.[97] He delegates this power to the 36 district directors of the Immigration Service who, in turn, delegate authority to subordinate officers.[98] No specific standards guide their exercise of discretion.[99]

Discretion is exercised on a case by case basis, weighing the equities and the facts in each circumstance.[100] While this allows for a desirable flexibility for individual hardship, it also leaves room for unevenness in the law's administration. Different offices may reach opposite results in their decisions.[101]

Two basic factors generally guide the exercise of discretion. One is the consideration of "good moral character."[102] Normally an Immigration Judge will not act favorably toward an alien who has failed to show this trait, but the phrase "good moral character" is not clearly defined.[103] Some code provisions, for example, find adulterers ineligible for relief while other provisions do not specify. A "crime of moral turpitude" is unclear also.[104] Findings relating to character are often an outgrowth of criminal convictions, but only convicted murderers are specified absolutely as ineligible for relief.[105] It is presum-

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For example, eligibility for voluntary departure requires a finding of good moral character (for definitions, *see* 8 U.S.C. § 1101(f) (1970) and *In re* P-, 8 I. & N. Dec. 162 (1958)), and a willingness and ability to depart at the alien's own expense. Accardi v. Shaughnessy, 347 U.S. 260 (1954); James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953), *cert. denied* 345 U.S. 969 (1953).

[95] 8 C.F.R. § 242.17(d) (1975); Marcello v. Bonds, 349 U.S. 302, 313 (1954); Barreiro v. Brownell, 215 F.2d 585 (8th Cir. 1954).

[96] At the least discretion must be exercised. Asimakopoulos v. Immigration & Nat. Serv., 445 F.2d 1362 (9th Cir. 1971); Partheniades v. Shaughnessy, 146 F. Supp. 772, (D.C.N.Y. 1956).

[97] Hintopoulos v. Shaughnessy, 353 U.S. 72 (1952); 8 C.F.R. § § 2.1, 103.1 (1975).

[98] 8 C.F.R. § 103.1 (1975).

[99] *Id.*

[100] Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[101] Reid v. Immigration & Nat. Serv., 43 U.S.L.W. 4365 (March 18, 1975).

[102] 8 U.S.C. § 1101(f) (1970).

[103] 8 U.S.C. § 1101(f) (1970) provides that adulterers are inadmissible. The definition of adultery itself is not provided in the code, and case law has been somewhat flexible. *In re* U-, 7 I. & N. Dec. 350 (1956); Aalund v. Marshall, 461 F.2d 710 (5th Cir. 1970); Wadman v. Immigration & Nat. Serv., 329 F.2d 812 (9th Cir. 1964).

[104] Where the statute does not specify against particular acts, a finding of good moral character is not precluded even in the face of illegal activities which may be specifically precluded by other sections of the code. United States *ex rel.* Exarchou v. Murff, 265 F.2d 504 (2d Cir. 1959).

[105] Larceny generally precludes a finding of good moral character as does false testimony. Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966); Bufalino v. Holland, 277 F.2d 270 (3d Cir. 1960), *cert. denied*, 364 U.S. 863 (1960); Wurzinger v. Immigration & Nat. Serv., 414 U.S. 1070 (1974).

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able that convictions for other crimes will not necessarily preclude relief; although, in each case the type of conviction will be weighed with other factors.

Hardship, both to the alien and to his family, is a second consideration guiding the exercise of discretion.[106] In some cases hardship may include considerations of age,[107] duration of residence[108] and length of absence from the alien's original country.[109] Economic hardship is considered but is not sufficient alone to avoid deportation.[110]

Hardship to the alien and good moral character balance against the interests of the government in determinations of relief.[111] Such governmental interests include questions of foreign policy,[112] of labor needs and of the economy,[113] and of the integrity of the immigration system.[114]

B. SPECIFIC CATEGORIES OF RELIEF

Relief from potential deportation is available to the alien under various provisions of the code. Determinations outside of the formal process may also affect determinations for relief. The criteria to establish eligibility for relief differ according to the type of relief which the alien seeks.

1. SUSPENSION OF DEPORTATION

Suspension voids the order of deportation.[115] Since two categories of aliens are eligible for suspension of deportation, the application for suspension is a complex process. The two categories of eligibility include aliens who have been in this country for ten years[116] and

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[106] 8 U.S.C. § 1182(h) (1970); 8 U.S.C. § 1182(a) (1970); 8 U.S.C. § 1182(i) (1970). *But see* Diaz-Aguilar v. Immigration & Nat. Serv., 414 U.S. 853 (1974) and Alvarez-Rodriguez v. Immigration & Nat. Serv., 414 U.S. 977 (1974).

[107] *In re* S-, 7 I. & N. Dec. 408 (1957).

[108] *Id.*

[109] *Id.*

[110] The hardship must be extreme; *i.e.*, economic hardship alone is insufficient. S. REP. NO. 1137, 82d Cong., 2d Sess. 25 (1952); Kasravi v. Immigration & Nat. Serv., 400 F.2d 675 (9th Cir. 1968); Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied* 365 U.S. 860 (1961).

[111] Ahrens v. Rojas, 292 F.2d 406 (5th Cir. 1961).

[112] Jay v. Boyd, 351 U.S. 345 (1956).

[113] Lack of proper or available labor certification will generally preclude a change of status. Special consideration will be given, however, to third preference aliens who have special skills. *See generally* LABOR ASPECTS OF IMMIGRATION LAW INSTITUTE FOR CORPORATE LAW AND PRACTICE 339-82 (B. Flecker and N. Vazzana, eds., 1969). *See also* remarks of Leon Rosen regarding the purpose of 8 U.S.C. § 212(a)(14) in 6 PROCEEDINGS, ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 7-13 (1973).

[114] Hamad v. Immigration & Nat. Serv., 420 F.2d 645 (D.C. Cir. 1969).

[115] 8 U.S.C. § 1254 (1970).

[116] 8 U.S.C. § 1254(a)(2) (1970).

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aliens who have been here for seven.[117] The real distinction is between criminal and non-criminal classes of aliens. Some classes of aliens, however, are totally ineligible[118] for suspension.

The first category of alien who may apply for suspension includes those aliens who show continuous physical presence in the United States for a minimum of seven years preceding the suspension application.[119] The interpretation of continuous presence is somewhat flexible,[120] with statutory provisions excepting alien military veterans for example.[121] Mere continuous presence without more is insufficient for relief.[122] The alien must also show his good moral character, both currently and throughout the period of residence,[123] and he must show extreme hardship to himself or to specified members of his family.[124] Certain categories of aliens will not be considered for seven year suspension regardless of the extremity of hardship.[125] Such ineligible aliens include crewmen,[126] exchange visitors[127] and Western Hemisphere aliens who are otherwise eligible for visas.[128] Criminal classes are also ineligible under the seven year provision,[129] including those deportable on narcotic, subversive or moral grounds.[130]

Other aliens eligible for suspension are those who have been in the United States for ten years.[131] This provision differs from the seven year cases in that certain criminal aliens who have been continuously present in this country for ten years may also be eligible for relief.[132] Murderers are always ineligible.[133] The time of continuous presence runs from the time immediately following the commission of an act which is the basis of deportation to the time of application for suspension.[134] Such aliens must show good moral character both currently and throughout the entire ten year period.[135] Presumably such behavior indicates rehabilitation. The burden of showing hard-

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[117] 8 U.S.C. § 1254(a)(1) (1970).
[118] 8 U.S.C. § 1254(f) (1970).
[119] 8 U.S.C. § 1254(a)(1) (1970).
[120] U.S. *ex rel.* Adel v. Shaughnessey, 183 F.2d 371 (2nd Cir. 1950).
[121] Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960).
[122] U.S. *ex rel.* Adel v. Shaughnessey, 183 F.2d 371 (2d Cir. 1950).
[123] *In re* B-, 1 I. & N. Dec. 611 (1943).
[124] Wadman v. Immigration & Nat. Serv., 329 F.2d 812 (9th Cir. 1964).
[125] 8 U.S.C. § 1254(f) (1970).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] 8 U.S.C. § 1254(a)(1) (1970).
[130] 8 U.S.C. § 1251(a)(4) (1970).
[131] 8 U.S.C. § 1254(a) (1970).
[132] 8 U.S.C. § 1254 (1970).
[133] 8 U.S.C. § 1254(a)(2) (1970). *In re* M-, 5 I. & N. Dec. 261, 265 (1955).
[134] *Id.*
[135] *Id.*

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ship in this category is higher than that in the seven year cases. The ten year category requires "exceptional and extremely unusual" circumstances[136] as opposed only to "extreme hardship." In particular, extreme economic hardship will be considered[137] and again, certain classes of aliens such as crewmen are ineligible.[138]

The longer an alien has been in this country, the more likely discretion will be exercised in his favor.[139] The decision may hinge on whether a visa is available to the alien,[140] whether he may be able to work once deported,[141] and on age[142] and health considerations.[143] Presumably the strongest case for relief would show a combination of such circumstances.

Congress may ratify the grant of suspension.[144] In addition, suspension may be revoked within five years.[145] Although a grant of suspension may be denied on application, this does not preclude the grant of relief under some other provision, in particular voluntary departure.

2. *VOLUNTARY DEPARTURE*

The grant of voluntary departure will allow the alien to leave the country on his own and thus to avoid the stigma of deportation.[146] He may do so, however, only with official sanction.[147] The alien may apply for voluntary departure either prior to formal proceedings, at the hearing stage, or after the final deportation order.[148]

The value of voluntary departure to the alien is that he may apply for re-entry to the United States, and he may arrange for his re-entry even before he must leave this country.[149] Voluntary departure is thus especially important to the alien whose family is in the United States. The Immigration Judge, cognizant of such needs, often will set a date for departure several months into the future. This allows the alien time to arrange his re-entry in advance and to await his visa number while he is still in the United States. Although the alien must leave the country to meet the requirements of the voluntary depar-

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[136] *In re* S-, 7 I. & N. Dec. 409 (1957); Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956).
[137] *Id.*
[138] 8 U.S.C. § 1254(f) (1970).
[139] 8 U.S.C. § § 1254(a)(1), (2) (1970).
[140] *In re* S-, 7 I. & N. Dec. 409 (1957).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] McGrath v. Kristensen, 340 U.S. 162 (1950).
[145] 8 U.S.C. § 1256 (1970). *In re* Galtieri, 12 I. & N. Dec. 778 (1968).
[146] 8 U.S.C. § 1254(e) (1970; 8 U.S.C. § 1182(a)(17) (1970).
[147] 8 U.S.C. § 1254(e) (1970); *see* WASSERMAN, *supra* note 33 at 183.
[148] 8 U.S.C. § 1254(e) (1970).
[149] GORDON & ROSENFIELD, *supra* note 52, § 7.2.

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ture provision, he may do so temporarily.[150] A Western Hemisphere immigrant need only pick up his visa outside the United States and he may return immediately to this country.

To be eligible for voluntary departure the alien must first show his good moral character.[151] In this case the requirement precludes the grant of voluntary departure to all convicted criminals.[152] The alien must also be willing to leave the country[153] at his own expense.[154] The grant of voluntary departure thus saves the government the cost of transporting aliens out of this country. The alien's willingness to leave the country voluntarily, however, does not preclude an intention to return immediately to the United States.

Applications for voluntary departure are relatively routine. In the larger districts, the Immigration Service regularly holds special hearings for the summary disposal of voluntary departure applications.[155] More complex cases of voluntary departure should be placed on the regular hearing calendar. Such cases, for example, will include those with alternative pleadings.

3. CREATION OF RECORDS

In 1940 the Attorney General and the State Department enacted regulations requiring all aliens within the United States to register their entry with the government.[156] Some aliens have failed to do so and are therefore deportable. The registration statute authorizes the Attorney General to create a record of lawful registration for those long-term resident aliens who entered the United States prior to 1948 and who can prove their legal entry.[157] Without such records deportability is presumed once the government makes a showing of alienage.[158]

Registry is thus a creation of a record of legal entry after the fact.[159] Such documentation will rebut any presumption of deportability. To qualify for registration, the alien must also establish his present admissibility to the United States,[160] his continuous residency up to the time of his application,[161] and his good moral char-

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[150] *In re* Ocampo-Ocampo, 13 I. & N. Dec. 707 (1971).
[151] 8 U.S.C. § 1254(e) (1970).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] In San Francisco, for example, between 30 and 40 cases are heard in Multiple Accelerated Summary Hearings (M.A.S.H.) one day each week.
[156] 8 U.S.C. § 1251(5) (1970); 8 U.S.C. § § 1305, 1306(c) (1970).
[157] 8 U.S.C. § 1259 (1970).
[158] Such entry must be prior to 1948. 8 U.S.C. § 1259(a) (1970).
[159] 8 U.S.C. § 1259 (1970).
[160] 8 U.S.C. § 1259(d) (1970).
[161] 8 U.S.C. § 1259(b) (1970).

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acter.[162] Because the law of deportation applies retroactively, no time limit exists for an alien to apply for registration.[163] The Service must support denial of an application for registry, and denial is appealable through the district director.[164]

4. STAY OF DEPORTATION

A stay of deportation is only a postponement of actual expulsion.[165] The alien may make an application for stay during or after the hearing.[166] To obtain a stay the applicant must offer proof of special circumstances and submit to interrogation.[167] Often all an alien may need is a short extension of time to settle personal affairs[168] or to find a country suitable for his resettlement.[169] Aliens have received stays, for example, to complete other court proceedings, to seek recommendation against deportation,[171] or to reopen the deportation proceeding itself on the basis of new evidence.[172]

If the Judge denies a stay, the alien will have the opportunity to submit written responses to the Judge's determination.[173] This must be done prior to a final order of deportation. Immigration Service regulations state that a denial of stay is "not appealable."[174] Nevertheless, denials of stay have been reviewed both by the Board of Immigration Appeals and by the courts. Such review has been granted in conjunction with motions to reopen and to reconsider deportation proceedings.[175]

5. ADJUSTMENT OF STATUS

Adjustment of status simulates an entry into the United States of an alien already present in this country.[176] An alien often requests an adjustment when he wishes to remain in the United States longer

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[162] 8 U.S.C. § 1259(c) (1970).
[163] 8 C.F.R. § 249 (1975).
[164] 8 C.F.R. § 249.2 (1975); it is possible for a case to be reopened.
[165] 8 C.F.R. § 243.4 (1975).
[166] The regulations are unclear. 8 C.F.R. § 242.17 (1975) indicates applications for stay must be made at the hearing, but stay may be granted after the hearing in conjunction with a motion to reopen or other ancillary determinations. 8 C.F.R. § 242.22 (1975).
[167] 8 C.F.R. § 243.4 (1975).
[168] This often may be done in conjunction with voluntary departure. 8 C.F.R. § 244.2 (1975).
[169] *Id.* 8 C.F.R. § 242.17(c) (1975).
[170] *Id.*
[171] 8 C.F.R. § 243.4 (1975).
[172] *Id.*
[173] 8 C.F.R. § 243.4 (1975).
[174] *Id.*
[175] United States *ex rel.* McLeod v. Garfinkel, 129 F. Supp. 591 (W.D. Pa. 1955).
[176] 8 U.S.C. § § 1254(a), 1255(b), 1251 (1970).

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than his original temporary status permits.[177] To do so the alien can request that his status be changed, for example, from visitor to immigrant, as in the case of a student.[178] In most cases, he is not required to leave the United States for such a change, but his application must be timely in order to avoid deportation.[179]

The original application for an adjustment is administrative; and it is usually made prior to a deportation hearing.[180] Because an alien entering temporarily has not gone through the immigration process, the applicant must establish his current admissibility.[181] Just as an entering immigrant, he will be examined by a medical officer[182] and be subject to interrogation.[183] If the application for adjustment is denied and an order to show cause is subsequently issued, the alien may renew his request for adjustment if he has a subsequent deportation hearing.[184] By regulation, however, the only appeal from denial of an adjustment is administrative: to the district director and to the Board of Immigration Appeals.[185] If the request is made or renewed at the hearing, the courts may also review the decision.[186]

6. WAIVER OF DEPORTATION

A waiver of deportation enables families to remain together by allowing the INS to disregard an originally fraudulent entry.[187] An alien who now has a dependent family residing in the United States might have originally circumvented the immigration inspection process at the time of his entry. For the waiver provision to be applicable, the alien must show extreme hardship to these citizen or resident alien dependents.[188] He must show also, he was admissible in every respect at the time of his first entry except for his fraudulent action.[189] This requirement is construed narrowly against the alien where the integrity of the immigration system outweighs considerations of hardship.[190]

Litigation has focused on the threshold requirements to establish

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[177] *Id.*; certain aliens are statutorily ineligible: 8 C.F.R. § § 248.1, 248.2 (1975).
[178] *Id.*; 8 C.F.R. § 248 (1975).
[179] *Id.*; 8 C.F.R. § § 248.3(a) and (b) (1975).
[180] *Id.*; 8 C.F.R. § 248.3(d) (1975) and 8 C.F.R. Part 103 (1975).
[181] 8 C.F.R. § 245.1 (1975).
[182] 8 C.F.R. § 245.6 (1975).
[183] 8 C.F.R. § 245.7 (1975).
[184] 8 C.F.R. § 245.1(d) (1975).
[185] *Id.*
[186] 8 C.F.R. § § 103, 245, 245.3, 248.3 (1975).
[187] Remarks of C. GORDON and J. WASSERMAN, PROCEEDINGS, 3 THIRD ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE (1970) [hereinafter cited as GORDON AND WASSERMAN].
[188] *Id.*
[189] *Id.*
[190] Reid v. Immigration & Nat. Serv., 43 U.S.L.W. 4365 (U.S. March 18, 1975).

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eligibility because waiver is the only provision which mandates favorable action once eligibility is found.[191] Waiver is also the only provision which may be initiated and completed after expulsion through a consul outside the United States.[192]

7. REOPENING AND RECONSIDERATION

The Board or Service may reopen a case on the basis of new evidence.[193] An alien who has already left the country will be ineligible for reopening; therefore, he should apply simultaneously for a stay of deportation at the time of his application to reopen.[194] The Board, however, will not reopen claims it has already considered.[195]

8. PRIVATE BILLS

Private legislation differs from the Congressional approval required when the Service grants applications for stay or suspension. Relief by private bill seeks the intervention of Congress in the most extreme cases of hardship.[196] No particular standards exist, however, to determine those deserving of such Congressional consideration.[197] While a bill is under consideration the Service will defer deportation.[198]

9. JUDICIAL RECOMMENDATION AGAINST DEPORTATION

An alien deportable on the basis of a criminal conviction may seek a judicial recommendation against deportation[199] and the hearing officer must consider such a recommendation.[200] The attorney may also attempt to vacate the judgment.[201] An expunged record regarding underlying convictions will at the least affect eligibility for relief and more probably will affect the charge of deportation itself.

IV. ADMINISTRATIVE APPEAL

If an alien is found deportable on initial hearing or if he is denied relief from deportation, he may appeal these decisions to the Board of Immigration Appeals. The Board meets only in Washington[202] and

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[191] *Id.*
[192] *Id.*
[193] GORDON AND WASSERMAN, PROCEEDINGS, *supra* note 187.
[194] 8 C.F.R. § § 103.5, 242.22 (1975).
[195] 8 C.F.R. § 3.2 (1975).
[196] *See* note 51. Revised rules are available on request from the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, Suite 2137, House of Representatives, Washington, D.C. 20515.
[197] *See* Comment, *supra* note 16.
[198] *Id.*
[199] 8 C.F.R. § 241.1 (1975); 8 U.S.C. § 1251(b) (1970); such a recommendation will not be considered, however, in marijuana or narcotics cases.
[200] *Id.*
[201] *Id.*
[202] 8 C.F.R. § 242.21 (1975).

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is totally independent of the Immigration and Naturalization Service.[203] It is responsible only to the Attorney General and to Congress.[204] Rarely, the Attorney General reviews the Board's decisions[205] and more frequently the Congress reviews the Board's favorable actions.[206] The Immigration Service may also bring a case before the Board, usually to determine complex issues of law.[207]

The Board has jurisdiction to review all administrative decisions of the Immigration Service,[208] and in so doing, it may make de novo findings of fact.[209] The Board may review determinations relating to bond, parole, and detention made prior to and following the Service's hearing.[210] It may review administrative fines and penalties and any exercise of discretionary authority by any officer of the Immigration Service.[211] The Board may grant discretionary relief not specifically sought by the alien.[212]

All of the decisions of the Immigration Judge are reviewable. In the absence of a hearing by the Board, his decision will be final.[213] Occasionally the Board will grant motions to reopen and to reconsider on the basis of new evidence unavailable at the earlier hearing.[214] Such relief is possible only if the alien has not already departed this country.[215] Review by the Board is the last administrative proceeding.

V. JUDICIAL REVIEW OF DEPORTATION

A. THE JURISDICTION OF THE COURTS

Congress originally established deportation as an administrative process with no provision for appeal.[216] In keeping with Constitu-

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[203] 8 C.F.R. § § 3.1(d)(1), (2) and (h) (1975).
[204] *Id.*
[205] 8 C.F.R. § 2.1(d)(2) (1975). Only two such cases were reviewed in 1973. *See* 1973 INS ANN. REP. 15-17 and Tables. The alien, however, is not afforded this channel of review.
[206] 8 C.F.R. § 242.2(b) (1975).
[207] 8 C.F.R. § 3.1 (1975).
[208] Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), *cert. denied* 365 U.S. 860 (1960). The Board may make its own findings of fact, may review discretion, and may determine its own relief in the authority necessary to the disposition of the case. 8 C.F.R. § 3.1 (1975).
[209] *Id.*
[210] 8 C.F.R. § 3.1 (1975).
[211] 8 C.F.R. § 242.2(b) (1975).
[212] 8 C.F.R. § 242.2 (1975).
[213] 8 C.F.R. Part 3 (1975) refers to a final order.
[214] 8 C.F.R. § 242.22 (1975); 8 C.F.R. § 3.61 (1975).
[215] *Id.*, although stay will be granted on initial review by the Board, 8 C.F.R. § 3.3(a) (1975); 8 U.S.C. § 1101(a) (1970) provides that once an alien has left the country following a final order he is considered as having been legally deported. Reopening and reconsideration are separate procedures.
[216] Although under the Constitution habeas corpus could never be precluded, no statute provided for judicial review until 1961; *see* note 10.

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tional requirements, however, the courts expanded jurisdiction in deportation cases.[217] In 1961 Congress established a statutory right to review, specifying an exclusive and a limited forum.[218] Today review on issues of exclusion and deportation is available directly to the Federal Courts of Appeal.[219] The courts in addition have expanded their jurisdiction over decisions on discretionary relief.[220]

The Administrative Procedure Act still governs determinations ancillary to the hearing.[221] Such claims, however, would be heard in the Federal District Courts rather than in the Federal Courts of Appeal. Today remedies are available regarding claims of citizenship in a petition for review,[222] rather than in an action for declaratory judgment. Declaratory judgment suits, however, remain available for any immigration determination outside the deportation order itself.[223] This includes review of the denial of a stay of deportation following a final order. Unreasonable detention may also be challenged in habeas corpus.[224] Both the government and the alien may initiate appeal.

B. THE SCOPE OF REVIEW

To seek review the alien must have exhausted administrative remedies;[225] he must appeal, therefore, from a final determination[226] of the Board of Immigration Appeals. Judicial scrutiny is restricted to the administrative record of deportations,[227] including the findings of the Board as well as the Service. A court may not substitute its discretion for that of the Service. It may only look to errors of law,[228] unfairness of procedure,[229] lack of substantial evidence,[230]

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[217] Ng Fung Ho v. White, 259 U.S. 276 (1922). Review was held possible also under 5 U.S.C. § 1009 *et seq.* (1946), the Administrative Procedure Act, *currently enacted at* 5 U.S.C. § § 701-06 (1967).

[218] Public Law No. 87-301, *currently enacted at* 8 U.S.C. § 1105a (1970) limits proceedings to the Federal Courts of Appeal in addition to the following requirements: petition must be filed within six months of the final order of deportation; administrative remedies must be exhausted; the alien must still be present in the United States; and claims must be neither frivolous nor repetitious. Rule 15(a) of the Federal Rules of Appellate Procedure at 28 U.S.C. § 2344 (Supp. 1966) allows an abbreviated form of petition. The purpose of direct appeal circumventing appeal at the District level is to avoid possible dilatory tactics by aliens. 8 U.S.C. § 1105a (1970).

[219] *Id.*

[220] Foti v. Immigration & Nat. Serv., 373 U.S. 217 (1961). *See generally*, WASSERMAN, *supra* note 33, Chapter VIII. Giova v. Rosenberg, 379 U.S. 18 (1964).

[221] 5 U.S.C. § 701 (1970); 5 U.S.C. § 706 (1970).

[222] Mendez v. Major, 340 F.2d 128 (8th Cir. 1965).

[223] 28 U.S.C. § 2344 (1970).

[224] 8 U.S.C. § 1105 a (7)(c) (1970); GORDON & ROSENFIELD, *supra* note 52, § 8.14.

[225] 5 U.S.C. § § 701-06 (1967).

[226] 8 C.F.R. § 3.1 (1975).

[227] 5 U.S.C. § § 701-06 (1967).

[228] 8 C.F.R. § § 3.1(c), 103.4 (1975).

[229] Sung v. McGrath, 339 U.S. 33 (1950).

[230] Woodby v. Immigration & Nat. Serv., 385 U.S. 276 (1966); Yiannopoulos v.

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and the denial of discretion.[231] Errors of law include erroneous statutory interpretation.[232] Unfair procedure is colored by the civil nature of the hearing.[233] A lack of substantial evidence is cause for remand to the Service.[234] Challenges to discretion are restricted to failure to act or to arbitrary determinations.[235] A claim of citizenship, on the contrary, requires de novo review.[236]

C. REVIEW OF DISCRETIONARY RELIEF

1. THE CONCEPT OF UNREVIEWABLE ACTION

In direct contrast to the Board's expanded jurisdiction in deportation cases is the concept that some types of administrative activity are not reviewable.[237] The Administrative Procedure Act (APA) restricts review of discretionary activity[238] and several provisions of the INA and of the INS regulations specifically state that discretionary action of the Service or the Board is "final."[239] In theory, then, such action is unreviewable.

The Immigration Code limits judicial review to exclusion and deportation only.[240] The statute does not mention review of discretionary findings. Despite this restriction and a traditional reluctance to tamper with administrative discretion, the Federal Courts of Appeal have expanded their jurisdiction.[241] The courts have litigated and reviewed each of the discretionary relief provisions here considered.[242]

Initially courts refused to review acts of discretion regarding deportation. They distinguished discretionary activity as a matter of

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Robinson, 247 F.2d 655 (7th Cir. 1952).

[231] Carlson v. Landon, 342 U.S. 524 (1952); U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Fong Haw Tan v. Phelan, 333 U.S. 610 (1948).

[232] Immigration & Nat. Serv. v. Errico, 385 U.S. 214 (1966).

[233] Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir. 1952); Bridges v. Wixon, 326 U.S. 135 (1945).

[234] The area of the court's inquiry has expanded. The first cases required only an inference to support a finding of deportation and only a cursory look at the proceedings on review. (*See* U.S. *ex rel.* Vajtauer v. Curran, 15 F.2d 127 (S.D.N.Y. 1925.) Later the courts required the increased weight of "substantial" evidence (Latig v. Pilliod, 289 F.2d 478 (7th Cir. 1961); and finally in 1966 the standard changed to clear and unequivocal evidence, higher than the normal civil burden and less than that of the criminal. (Woodby v. Immigration & Nat. Serv., 386 U.S. 276 (1966)).

[235] Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966).

[236] U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).

[237] *See supra* note 52.

[238] 5 U.S.C. § § 701-06 (1967).

[239] *For example*, 8 C.F.R. § 249.2 (1975).

[240] 8 U.S.C. § 1105a (1970).

[241] Foti v. Immigration & Nat. Serv., 375 U.S. 217 (1963); Ameeriar v. Immigration & Nat. Serv., 328 F.2d 1028 (3d Cir. 1971); Giova v. Rosenberg, 379 U.S. 18 (1964).

[242] *See* WASSERMAN, *supra* note 33.

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grace;[243] in fact, valid use of discretionary power included any action "according to the conscience of the Attorney General."[244] The hesitancy of courts to intervene in agency action has several sources. One source of hesitancy is the view that agency expertise makes an agency more qualified to make determinations than is a court of law.[245] Another is the presumption that officials properly perform their functions although such functions result from delegation of discretionary power.[246] In particular courts are hesitant because of the elusiveness of discretion as a basis for review.[247]

2. *STRUCTURING DISCRETION*

Immigration Service action on discretionary relief is subject to a two-part scrutiny.[248] Such scrutiny provides insight into the decision-making process. First, the court reviews the alien's eligibility for relief under the statute.[249] Second, the court recognizes that not all aliens will be granted relief even though eligibility is established.[250] Once eligibility is found, however, no guide exists to determine on what basis an alien will receive favorable action. An alien who cannot establish at least basic eligibility for consideration would have no judicial forum for review. Although "mere eligibility" has been held insufficient to require favorable relief from deportation,[251] an eligible alien could challenge discretionary action at least where he has clearly shown more. Courts have begun to characterize abuse of discretion as action which "departed from established policies"[252] and as action exceeding the scope and purpose of articulated rules.[253] Few rules are articulated for the exercise of discretion, yet this definition establishes some basis for review.

The courts have begun also to explore procedural requirements to structure acts of discretion.[254] The Supreme Court has standardized the discretionary decision-making activities of parole authorities,[255]

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[243] Jay v. Boyd, 351 U.S. 345 (1956).
[244] *Id.*
[245] James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953), *cert. denied*, 345 U.S. 169 (1953).
[246] *In re* M., 4 I. & N. Dec. 626 (1952).
[247] James v. Shaughnessy, 202 F.2d 519 (2d Cir. 1953), *cert. denied*, 345 U.S. 169 (1953).
[248] Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966).
[249] Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957).
[250] *Id.*
[251] Hamad v. Immigration & Nat. Serv., 420 F.2d 645 (D.C. Cir. 1969); Jarecha v. Immigration & Nat. Serv., 417 F.2d 220 (5th Cir. 1969).
[252] Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966).
[253] *Id.*, and *see also* Jarecha v. Immigration & Nat. Serv., 417 F.2d 220 (5th Cir., 1969); Ameeriar v. Immigration & Nat. Serv., 438 F.2d 1029 (3d Cir. 1971).
[254] Morrissey v. Brewer, 408 U.S. 471 (1972).
[255] *Id.*

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welfare officials[256] and cabinet ministers.[257] Whether courts can structure the decision-making power of the Attorney General where deportation is based in part beyond the Constitution remains an open question.

Even limited judicial review, however, has value. The court in its reviewing capacity serves at least to control the deportation procedure.[258] Congress, for example, has enacted legislation in response to the guidance of the courts.[259] Review has required adherence to some standards in the area of relief[260] and has forced the decision-making process to be public.[261] An immigration officer who decides questions of relief must support his determination with a reasoned, written memorandum;[262] thus, the alien seeking relief from deportation may expect the Service to adhere to the purposes of regulations.[263] The alien may also find guidance in the precedent such procedures establish.[264] He may expect, finally, the opportunity and the forum for appeal.[265]

VI. CONCLUSION

The law of deportation is complex and its consequences extreme as noted. The broad discretion of Service officers creates unevenness in the application and interpretation of the law, but the alien is not without remedy when faced with deportation. Today, the alien will find opportunity for challenge throughout the deportation process. Although review of discretion remains limited, awareness of the need for review of relief decisions is growing. The focus is increasing in all areas of discretion, thus the rights of the alien to fair discretionary action may well expand.[266]

Iris Feldman Mitgang

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[256] Goldberg v. Kelly, 397 U.S. 254 (1970).
[257] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Env. Defense Fund v. Ruckelshaus, 439 F.2d (D.C. Cir. 1971).
[258] Sung v. McGrath, 339 U.S. 33 (1950).
[259] *See supra* note 10.
[260] Hang v. Immigration & Nat. Serv., 360 F.2d 715 (2d Cir. 1966); Ameeriar v. Immigration & Nat. Serv., 438 F.2d 1028 (3d Cir. 1971); *see for example*, 8 C.F.R. § § 242.18, 242.19, 244.2, 246.6, 247.12(b), 248(d) (1975).
[261] *Id.* and Jarecha v. Immigration & Nat. Serv., 417 F.2d 220 (5th Cir. 1969); Hamad v. Immigration & Nat. Serv., 420 F.2d 645 (D.C. Cir. 1969).
[262] *Id.*
[263] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Env. Defense Fund v. Ruckelshaus, 438 F.2d (D.C. Cir. 1971).
[264] *Id.*
[265] Ameeriar v. Immigration & Nat. Serv., 438 F.2d 1028 (3d Cir. 1971).
[266] *See generally* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

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