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

I. REGULATION OF DEPORTATION

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

The Attorney General has delegated his authority to the Immigration and Naturalization Service (INS) and to the Board of Immigration Appeals. 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.

Although Congress recognizes the absolute power of government to deport, the harshness of deportation has also been noted.

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1. L.F. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 498-502 (5th 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."


cifically, the unconscionability of deportation in extreme circumstances has been cited both by Congress\textsuperscript{8} and by the courts.\textsuperscript{9} In response, the courts have gradually eroded the absolute power of Congress to regulate deportation,\textsuperscript{10} and Congress itself has recognized not only the requirements of due process in deportation procedure,\textsuperscript{11} but also the need for amelioration of deportation\textsuperscript{12} and for review.\textsuperscript{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:\textsuperscript{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\textsuperscript{15} and in private Congressional bills.\textsuperscript{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\textsuperscript{17} or to seek relief from deportation under the code.\textsuperscript{18} This article focuses on the eligibility requirements for relief from deportation and the procedures for seeking and challenging its denial.

\textsuperscript{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.

\textsuperscript{9}Bridges v. Wixon, 326 U.S. 135 (1945).


\textsuperscript{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).

\textsuperscript{12}See generally, Gordon, Discretionary Relief from Deportation, 11 Deca- Logue J. 6 (1960).


\textsuperscript{14}See Chart B.


\textsuperscript{16}See Comment, Immigration and Naturalization — Equitable Safety Valves, this volume.


CHART A
DELEGATION OF AUTHORITY

DEPARTMENT OF JUSTICE
Attorney General (a)

Immigration and Naturalization Service (b)
Commissioner
Deputy Commissioner
Regional Commissioners [4]
District Directors [36] (d)

Board of Immigration Appeals (c)

Investigation & Enforcement
Administrative Processing
Prosecution Exclusion & Expulsion
Deportation & Detention

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
II. THE DEPORTATION PROCESS

A. THE GROUNDS FOR DEPORTATION

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

Three classes of aliens are deportable: those here in violation of entry requirements, those who have overstayed a temporary entry permit, and those deportable on the basis of misconduct after entry. (Misconduct includes subversion, criminal activity, narcotics and sexual violations, violations of registration requirements, the smuggling of aliens into the country, and the receipt of public assistance.) In all, some seven hundred grounds for deportation exist, including the grounds for exclusion. 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.

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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 28 C.F.R. § 242.23(a) (1975).
27 Such activity may in fact have arisen before as well as after entry. 8 U.S.C. § 1251(a)(4) (1970).
B. ADMINISTRATIVE PROCEDURES

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

1. OVERVIEW

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

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

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


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.


45 8 C.F.R. § 242.16(c) (1975).


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

2. FORMAL PROCEDURES

Issuance of an order to show cause initiates the formal proceedings of deportation.\textsuperscript{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.\textsuperscript{56} Prior to receipt of the order an alien may request "voluntary departure"\textsuperscript{57} to avoid the stigma of deportation. Occasionally the alien may even arrange an adjustment of his status or his readmission prior to departure.\textsuperscript{58} But if the alien has chosen to contest the order and to remain, he must complete the hearing process.\textsuperscript{59} Once an order has been issued he may depart only with official sanction.\textsuperscript{60} He may, however, have the hearing continued upon a showing of good cause.\textsuperscript{61}

An Immigration Judge presides at the deportation hearing.\textsuperscript{62} Historically, the duties of the Judge included investigative and prosecutorial functions as well as adjudicative responsibilities.\textsuperscript{63} Today, regulations divide these duties to avoid any apparent conflict of interest.\textsuperscript{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.\textsuperscript{65} He must advise the alien of his rights and explain the charges against the alien,\textsuperscript{66} and his decision becomes a

\textsuperscript{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.
\textsuperscript{54}8 C.F.R. § § 3.1(c), 103.4 (1975). See also Gordon & Rosenfield, supra note 52, § 5.13.
\textsuperscript{55}8 C.F.R. § 242 (1975).
\textsuperscript{56}Id.
\textsuperscript{57}See generally, Gordon & Rosenfield, supra note 52, § § 7.2 c,d.
\textsuperscript{58}Bufalino v. Holland, 277 F.2d 1970 (3d Cir. 1960).
\textsuperscript{59}8 C.F.R. § 242.17(d) (1975).
\textsuperscript{60}Id.
\textsuperscript{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.
\textsuperscript{62}8 C.F.R. § § 242.8(a) and (b) (1975).
\textsuperscript{63}8 C.F.R. § 242.9 (1975).
\textsuperscript{64}Id.
\textsuperscript{65}Id.; see also Gordon, supra note 11 at 39.
\textsuperscript{66}8 C.F.R. § 242.16(a) (1975).
part of the record of the hearing. As in judicial proceedings, he may be disqualified for cause. Unless appealed to the Board within ten days, the order of the Judge is final.

Although the deportation hearing is an administrative trial, the Administrative Procedure Act does not strictly apply. 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. First, the hearing is open to the public but may be closed at the discretion of the Immigration Judge. 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. Hearsay evidence is admissible. The alien himself may present and cross-examine witnesses, and he may present evidence and rebut the evidence against him. 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. Everything considered at the hearing becomes part of the record. The alien may obtain counsel, but counsel is neither provided nor required. The Service provides interpreters.

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

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68 8 C.F.R. § 242.8(b) (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).
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); Sando v. McGrath, 196 F.2d 20 (D.C. Cir. 1952).
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.
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 period90 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

86 Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), off'd on other grounds, 1374 U.S. 449 (1963).
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).
eligibility exists. The initial determination that an alien qualifies for relief does not, however, mandate a decision in his favor.

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

Discretion is exercised on a case by case basis, weighing the equities and the facts in each circumstance. 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.

Two basic factors generally guide the exercise of discretion. One is the consideration of “good moral character.” 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. Some code provisions, for example, find adulterers ineligible for relief while other provisions do not specify. A “crime of moral turpitude” is unclear also. Findings relating to character are often an outgrowth of criminal convictions, but only convicted murderers are specified absolutely as ineligible for relief.


Id.


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).

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).

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. In some cases hardship may include considerations of age, duration of residence and length of absence from the alien’s original country. Economic hardship is considered but is not sufficient alone to avoid deportation.

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

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. 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 and

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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).


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).


aliens who have been here for seven. The real distinction is between criminal and non-criminal classes of aliens. Some classes of aliens, however, are totally ineligible 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. The interpretation of continuous presence is somewhat flexible, with statutory provisions excepting alien military veterans for example. Mere continuous presence without more is insufficient for relief. The alien must also show his good moral character, both currently and throughout the period of residence, and he must show extreme hardship to himself or to specified members of his family. Certain categories of aliens will not be considered for seven year suspension regardless of the extremity of hardship. Such ineligible aliens include crewmen, exchange visitors and Western Hemisphere aliens who are otherwise eligible for visas. Criminal classes are also ineligible under the seven year provision, including those deportable on narcotic, subversive or moral grounds.

Other aliens eligible for suspension are those who have been in the United States for ten years. 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. Murderers are always ineligible. 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. Such aliens must show good moral character both currently and throughout the entire ten year period. Presumably such behavior indicates rehabilitation. The burden of showing hard-
ship in this category is higher than that in the seven year cases. The
ten year category requires "exceptional and extremely unusual" cir-
cumstances as opposed only to "extreme hardship." In particular,
extreme economic hardship will be considered and again, certain
classes of aliens such as crewmen are ineligible.

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

Congress may ratify the grant of suspension. In addition, suspen-
sion may be revoked within five years. 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.
He may do so, however, only with official sanction. The alien may
apply for voluntary departure either prior to formal proceedings, at
the hearing stage, or after the final deportation order.

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. Voluntary departure is
technically 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 depa-

137 Id.
141 Id.
142 Id.
143 Id.
147 8 U.S.C. § 1254(e) (1970); see Wasserman, supra note 33 at 183.
149 Gordon & Rosenfield, supra note 52, § 7.2.
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 country153 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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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.
acter. Because the law of deportation applies retroactively, no time limit exists for an alien to apply for registration. The Service must support denial of an application for registry, and denial is appealable through the district director.

4. STAY OF DEPORTATION

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

If the Judge denies a stay, the alien will have the opportunity to submit written responses to the Judge’s determination. This must be done prior to a final order of deportation. Immigration Service regulations state that a denial of stay is “not appealable.” 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.

5. ADJUSTMENT OF STATUS

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

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164 8 C.F.R. § 249.2 (1975); it is possible for a case to be reopened.
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).
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.
172 Id.
174 Id.
than his original temporary status permits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{179}

The original application for an adjustment is administrative; and it is usually made prior to a deportation hearing.\textsuperscript{180} Because an alien entering temporarily has not gone through the immigration process, the applicant must establish his current admissibility.\textsuperscript{181} Just as an entering immigrant, he will be examined by a medical officer\textsuperscript{182} and be subject to interrogation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185} If the request is made or renewed at the hearing, the courts may also review the decision.\textsuperscript{186}

6. WAIVER OF DEPORTATION

A waiver of deportation enables families to remain together by allowing the INS to disregard an originally fraudulent entry.\textsuperscript{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.\textsuperscript{188} He must show also, he was admissible in every respect at the time of his first entry except for his fraudulent action.\textsuperscript{189} This requirement is construed narrowly against the alien where the integrity of the immigration system outweighs considerations of hardship.\textsuperscript{190}

Litigation has focused on the threshold requirements to establish

\textsuperscript{177} Id.; certain aliens are statutorily ineligible: 8 C.F.R. \textsuperscript{180} \S\S 248.1, 248.2 (1975).
\textsuperscript{178} Id.; 8 C.F.R. \textsuperscript{181} \S 248 (1975).
\textsuperscript{179} Id.; 8 C.F.R. \textsuperscript{182} \S 248.3(a) and (b) (1975).
\textsuperscript{180} Id.; 8 C.F.R. \textsuperscript{183} \S 248.3(d) (1975) and 8 C.F.R. Part 103 (1975).
\textsuperscript{181} 8 C.F.R. \textsuperscript{184} \S 245.1 (1975).
\textsuperscript{182} 8 C.F.R. \textsuperscript{185} \S 245.6 (1975).
\textsuperscript{183} 8 C.F.R. \textsuperscript{186} \S 245.7 (1975).
\textsuperscript{184} 8 C.F.R. \textsuperscript{187} \S 245.1(d) (1975).
\textsuperscript{185} Id.
\textsuperscript{186} 8 C.F.R. \textsuperscript{188} \S\S 103, 245, 245.3, 248.3 (1975).
\textsuperscript{187} Remarks of C. Gordon and J. Wasserman, Proceedings, 3 Third Annual Immigration and Naturalization Institute (1970) [hereinafter cited as Gordon and Wasserman].
\textsuperscript{189} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Reid v. Immigration & Nat. Serv., 43 U.S.L.W. 4365 (U.S. March 18, 1975).
eligibility because waiver is the only provision which mandates favorable action once eligibility is found.\textsuperscript{191} Waiver is also the only provision which may be initiated and completed after expulsion through a consul outside the United States.\textsuperscript{192}

7. REOPENING AND RECONSIDERATION

The Board or Service may reopen a case on the basis of new evidence.\textsuperscript{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.\textsuperscript{194} The Board, however, will not reopen claims it has already considered.\textsuperscript{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.\textsuperscript{196} No particular standards exist, however, to determine those deserving of such Congressional consideration.\textsuperscript{197} While a bill is under consideration the Service will defer deportation.\textsuperscript{198}

9. JUDICIAL RECOMMENDATION AGAINST DEPORTATION

An alien deportable on the basis of a criminal conviction may seek a judicial recommendation against deportation\textsuperscript{199} and the hearing officer must consider such a recommendation.\textsuperscript{200} The attorney may also attempt to vacate the judgment.\textsuperscript{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\textsuperscript{202} and

\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} GORDON AND WASSERMAN, PROCEEDINGS, supra note 187.
\textsuperscript{194} 8 C.F.R. § § 103.5, 242.22 (1975).
\textsuperscript{195} 8 C.F.R. § 3.2 (1975).
\textsuperscript{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.
\textsuperscript{197} See Comment, supra note 16.
\textsuperscript{198} Id.
\textsuperscript{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.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} 8 C.F.R. § 242.21 (1975).
is totally independent of the Immigration and Naturalization Service.\textsuperscript{203} It is responsible only to the Attorney General and to Congress.\textsuperscript{204} Rarely, the Attorney General reviews the Board’s decisions\textsuperscript{205} and more frequently the Congress reviews the Board’s favorable actions.\textsuperscript{206} The Immigration Service may also bring a case before the Board, usually to determine complex issues of law.\textsuperscript{207}

The Board has jurisdiction to review all administrative decisions of the Immigration Service,\textsuperscript{208} and in so doing, it may make de novo findings of fact.\textsuperscript{209} The Board may review determinations relating to bond, parole, and detention made prior to and following the Service’s hearing.\textsuperscript{210} It may review administrative fines and penalties and any exercise of discretionary authority by any officer of the Immigration Service.\textsuperscript{211} The Board may grant discretionary relief not specifically sought by the alien.\textsuperscript{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.\textsuperscript{213} Occasionally the Board will grant motions to reopen and to reconsider on the basis of new evidence unavailable at the earlier hearing.\textsuperscript{214} Such relief is possible only if the alien has not already departed this country.\textsuperscript{215} Review by the Board is the last administrative proceeding.

\section*{V. JUDICIAL REVIEW OF DEPORTATION}

\subsection*{A. THE JURISDICTION OF THE COURTS}

Congress originally established deportation as an administrative process with no provision for appeal.\textsuperscript{216} In keeping with Constitu-

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\textsuperscript{203} 8 C.F.R. §§ 3.1(d)(1), (2) and (h) (1975).
\textsuperscript{204} Id.
\textsuperscript{205} 8 C.F.R. § 2.1(d)(2) (1975). Only two such cases were reviewed in 1973. \textit{See} 1973 INS ANN. REP. 15-17 and Tables. The alien, however, is not afforded this channel of review.
\textsuperscript{206} 8 C.F.R. § 242.2(b) (1975).
\textsuperscript{207} 8 C.F.R. § 3.1 (1975).
\textsuperscript{208} Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), \textit{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).
\textsuperscript{209} Id.
\textsuperscript{210} 8 C.F.R. § 3.1 (1975).
\textsuperscript{211} 8 C.F.R. § 242.2(b) (1975).
\textsuperscript{212} 8 C.F.R. § 242.2 (1975).
\textsuperscript{213} 8 C.F.R. Part 3 (1975) refers to a final order.
\textsuperscript{214} 8 C.F.R. § 242.22 (1975); 8 C.F.R. § 3.61 (1975).
\textsuperscript{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.
\textsuperscript{216} Although under the Constitution habeas corpus could never be precluded, no statute provided for judicial review until 1961; \textit{see} note 10.
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tional requirements, however, the courts expanded jurisdiction in deportation cases. In 1961 Congress established a statutory right to review, specifying an exclusive and a limited forum. Today review on issues of exclusion and deportation is available directly to the Federal Courts of Appeal. The courts in addition have expanded their jurisdiction over decisions on discretionary relief.

The Administrative Procedure Act still governs determinations ancillary to the hearing. 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, rather than in an action for declaratory judgment. Declaratory judgment suits, however, remain available for any immigration determination outside the deportation order itself. This includes review of the denial of a stay of deportation following a final order. Unreasonable detention may also be challenged in habeas corpus. Both the government and the alien may initiate appeal.

B. THE SCOPE OF REVIEW

To seek review the alien must have exhausted administrative remedies; he must appeal, therefore, from a final determination of the Board of Immigration Appeals. Judicial scrutiny is restricted to the administrative record of deportations, 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, unfairness of procedure, lack of substantial evidence.

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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.
222 Mendez v. Major, 340 F.2d 128 (8th Cir. 1965).
226 8 C.F.R. § 3.1 (1975).
228 8 C.F.R. §§ 3.1(c), 103.4 (1975).
and the denial of discretion. Errors of law include erroneous statutory interpretation. Unfair procedure is colored by the civil nature of the hearing. A lack of substantial evidence is cause for remand to the Service. Challenges to discretion are restricted to failure to act or to arbitrary determinations. A claim of citizenship, on the contrary, requires de novo review.

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. The Administrative Procedure Act (APA) restricts review of discretionary activity and several provisions of the INA and of the INS regulations specifically state that discretionary action of the Service or the Board is “final.” In theory, then, such action is unreviewable.

The Immigration Code limits judicial review to exclusion and deportation only. 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. The courts have litigated and reviewed each of the discretionary relief provisions here considered.

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

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


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).


237 See supra note 52.


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


242 See Wasserman, supra note 33.
2. STRUCTURING DISCRETION

Immigration Service action on discretionary relief is subject to a two-part scrutiny. Such scrutiny provides insight into the decision-making process. First, the court reviews the alien's eligibility for relief under the statute. Second, the court recognizes that not all aliens will be granted relief even though eligibility is established. 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 "merely eligibility" has been held insufficient to require favorable relief from deportation, 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" and as action exceeding the scope and purpose of articulated rules. 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. The Supreme Court has standardized the discretionary decision-making activities of parole authorities,

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244 Id.
250 Id.
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); Ameeri v. Immigration & Nat. Serv., 438 F.2d 1029 (3d Cir. 1971).
255 Id.
welfare officials and cabinet ministers. 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. Congress, for example, has enacted legislation in response to the guidance of the courts. Review has required adherence to some standards in the area of relief and has forced the decision-making process to be public. An immigration officer who decides questions of relief must support his determination with a reasoned, written memorandum; thus, the alien seeking relief from deportation may expect the Service to adhere to the purposes of regulations. The alien may also find guidance in the precedent such procedures establish. He may expect, finally, the opportunity and the forum for appeal.

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.

Iris Feldman Mitgang

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 229 (5th Cir. 1969); Hamad v. Immigration & Nat. Serv., 420 F.2d 645 (D.C. Cir. 1969).
262 Id.
264 Id.
265 Ameeriar v. Immigration & Nat. Serv., 438 F.2d 1028 (3d Cir. 1971).