Estoppel in Immigration Proceedings—New Life From *Akbarin* and *Miranda* *

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The doctrine of equitable estoppel has been employed against the government in numerous contexts. In Schweiker v. Hansen, *the Supreme Court severely limited the use of the doctrine against governmental agencies. This article develops estoppel in immigration practice prior to* Miranda v. INS, *then focuses on two recent courts of appeals decisions which successfully distinguish* Hansen. *The author demonstrates that estoppel remains a viable tool against the Immigration and Naturalization Service, and outlines strategic considerations in bringing an estoppel action on behalf of an alien.*

For the immigration practitioner, the concept of equitable estoppel as a viable claim or deportation defense has at best been murky. The immigration bar was left with little guidance or hope for estoppel as a practicable claim after the Supreme Court rejected a rather sympathetic case and announced that the government would have to be guilty of "affirmative misconduct" in order for estoppel to be seriously considered in the immigration context.[1] With the exception of certain situations in which the government had exacerbated its mistake by violating its own

* For a final disposition of INS v. Miranda, 51 U.S.L.W. 3358 (U.S. Nov. 8, 1982) (per curiam), see *infra* ADDENDUM.

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1. *See* INS v. Hibi, 414 U.S. 5 (1973) (Supreme Court declined to find estoppel against the Immigration and Naturalization Service, suggesting that there was no

regulations,[2] and other more narrow circumstances,[3] most courts had declined to find "affirmative misconduct" by the government even in some extremely inequitable situations.[4]

However, two recent cases have provided practitioners with new optimism for the estoppel theory. By ruling in favor of the aliens involved in *Akbarin v. Immigration & Naturalization Service*,[5] and *Miranda v. Immigration & Naturalization Service*,[6] two federal courts of appeals have provided new guidance for establishing "affirmative misconduct" by the government. This article examines the effect of these two cases on estoppel as a concept to be applied in immigration proceedings. Part I provides a background of estoppel in the immigration context and discusses the previous case law; parts II and III discuss each of the cases; part IV analyzes these cases in the context of and contrasts them with prior case law; and part V discusses both the practical effects of these cases on estoppel claims and the formulation of strategy for practitioners.

BACKGROUND

The concept of applying the doctrine of equitable estoppel against the government in deportation proceedings has no statutory basis. The Supreme Court expressed reservations very early about applying estoppel against the government in general.[7] However, by relying heavily on considerations of "elementary fairness" which previously had moved the Supreme Court in other contexts,[8] lower courts found situations where the govern-

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affirmative misconduct). For a further discussion of this case, see *infra* notes 10-18 and accompanying text.

2. *See, e.g.*, Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976) (Immigration and Naturalization Service (INS) failed to follow regulation and grant petitioner labor certification and preference for which he was plainly qualified). See *infra* notes 49-50, 53-57 and accompanying text for further discussion of this case. Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (failure to warn alien, as required by 22 C.F.R. § 42.122(d), that marriage before entry would invalidate visa). For a further discussion of this case, see *infra* notes 32-51 and accompanying text.

3. *See, e.g.*, Galvez v. Howerton, 503 F. Supp. 35 (C.D. Cal. 1980) (INS breach of own Operations Instructions and duty to fill yearly quotas). For a further discussion of this case, see *infra* notes 62-65 and accompanying text.

4. *See* Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976) (aliens misled into thinking entry legal; later deported because failed to meet their visa requirements); *see also* Olegario v. United States, 629 F.2d 204 (2d Cir. 1980) (naturalization denied to Filipino war veteran who was not informed of his right to apply for United States citizenship).

5. 669 F.2d 839 (1st Cir. 1982).

6. 673 F.2d 1105 (9th Cir. 1982) (per curiam).

7. *See, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

8. *See, e.g.*, Moser v. United States, 341 U.S. 41 (1951) (denial of citizenship barred because the State Department misled the alien).

ment should be estopped.[9]

INS v. HIBI

In the immigration context, however, the Supreme Court jolted immigration practitioners with its 1973 ruling in *INS v. Hibi*.[10] Hibi was a Filipino who had served in the Philippine Scouts, a unit of the United States Army during World War II. He was honorably discharged in 1945.[11] Upon traveling to the United States in 1964, Hibi learned for the first time that under the Nationality Act of 1940, he could have applied for United States citizenship as a veteran, but that the deadline for filing had been established as December 31, 1946.[12] The law had also provided that officers be appointed to handle the naturalization procedures for non-citizens still serving in the armed forces and thus outside the jurisdiction of a naturalization court. However, while naturalization officers were sent to countries such as England, Iceland, and North Africa during World War II, none were sent to the Philippines.[13] Hibi thus argued that the government was estopped from relying on the 1946 deadline for its "failure to advise him, during the time he was eligible, of his right to apply for naturalization, and from the [Immigration and Naturalization Service's] failure to provide a naturalization representative in the Philippines during all of the time Hibi and those in his class were eligible for naturalization."[14]

The Supreme Court rejected Hibi's argument and concluded:

> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, no conduct of the sort there adverted to was involved

9. *See, e.g.*, United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973) (government action for money barred where parties had relied on government's approval of contracts); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) (government prevented from conveying land after company had expended large sums of money); Brandt v. Hickel, 421 F.2d 53 (9th Cir. 1970) (estoppel may be asserted especially when the government acts in a proprietary capacity); Tejeda v. INS, 346 F.2d 389 (9th Cir. 1965) (unjust to deport alien who had relied upon misstatement of government official regarding authority to reenter); Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962). *See generally* Bacon, *Estopping INS—"Affirmative Misconduct" Makes Positively Bad Law*, IMMIG. J., Jan.-Feb. 1982, at 8.

10. 414 U.S. 5 (1973).

11. *Id.* at 5-6.

12. Act of December 28, 1945, ch. 590, 59 Stat. 658 (amending Nationality Act of 1940, ch. 876, 54 Stat. 1137) (repealed 1952).

13. 414 U.S. at 10 (Douglas, J., dissenting).

14. *Id.* at 7-8.

> here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.[15]

These remarks have prompted lower courts to conclude that in order for an estoppel claim to be successful in the immigration context, "affirmative misconduct" by the government must be proven.[16] But while the possibility of estoppel against the government in the immigration context remained open, the Supreme Court provided lower courts with no standards or guidelines for defining "affirmative misconduct."[17] Judicial results were often mixed and, at times, distressing.[18]

SANTIAGO v. INS and the Ninth Circuit

Prior to *Hibi*, the Ninth Circuit had been the forerunner in developing the concept of estoppel in immigration cases.[19] In *Santiago v. INS*,[20] however, the Ninth Circuit felt obligated to retreat from this development in light of *Hibi* despite some rather compelling facts.[21]

Santiago involved four separate petitioners who had been granted immigrant visas under section 203(a)(8) of the Immigration and Nationality Act,[22] as the husband or child of a person entitled to immigration.[23] Each petitioner, or derivative beneficiary as they are commonly called, was subject to the "accompanying or following to join his spouse or parent" requirement of section

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15. *Id.* at 8-9 (citation omitted).

16. *See, e.g.*, Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976).

17. *See generally* Note, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 NOTRE DAME LAW. 731 (1981); Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 1 IMMIG. & NATIONALITY L. REV. 161 (1976-77); Article, *Estoppel and Immigration*, 22 CATH. LAW. 287 (1976).

18. *See, e.g.*, Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976); Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976); Oki v. INS, 598 F.2d 1160 (9th Cir. 1979) (per curiam).

19. *See* Bacon, *supra* note 9, at 25. Bacon suggests that courts abandon the "affirmative misconduct" language and return to the Ninth Circuit's pre-*Hibi* formulation of: (1) determining whether all the elements of equitable estoppel are met; and (2) weighing the potential hardship to the parties seeking estoppel against the potential harm to the public interest if estoppel is granted. *Id.*

20. 526 F.2d 488 (9th Cir. 1975).

21. *See* Note, *Santiago v. Immigration and Naturalization Service—The Ninth Circuit Retreats from its Modern Approach to Estoppel Against the Government*, 1976 UTAH L. REV. 371.

22. 8 U.S.C. § 1153(a)(8) (Supp. IV 1980) (formerly section 203(a)(9) of the Act, 8 U.S.C. § 1153(a)(9)).

23. Santiago v. INS, 526 F.2d at 489.

203(a)(8) of the Act[24] at the time of entering the United States. Therefore the petitioners should not have been allowed to enter the United States unless the primary immigrant spouse or parent was with them, or had already entered. Although for various reasons none of the spouses or parents of the petitioners ever immigrated, thereby making it technically impossible to meet the "accompanying or following to join" requirement,[25] every petitioner was admitted for entry by immigration officers. This was in spite of the fact that it was evident on the face of each visa that the holder was entering based on a derivative beneficiary basis.[26] In fact, one petitioner was admitted even after being questioned by an immigration officer and found to be in noncompliance with the "accompanying or following to join" requirement.[27]

At their deportation hearings, the petitioners were found deportable due to their excludability at entry because of their failure to meet the cited visa requirement. On appeal, the petitioners argued that the government should be estopped from asserting their excludability at entry because they were "unfairly misled" into the belief that their entry was lawful.[28]

In adopting the "affirmative misconduct" standards of *Hibi* in immigration estoppel cases, the Ninth Circuit denied the petitioners' claim. Without defining or establishing guidelines for determining what "affirmative misconduct" is, the court simply concluded that the failures of INS officials here were "less blameworthy" than those in *Hibi*.[29]

Thus emerged the comparative test of whether government failures are "more blameworthy" than those in *Hibi*. There are two problems with this test. First, determining whether there has been "affirmative misconduct" made it difficult to grant estoppel claims, given the relatively sympathetic facts in *Hibi* and *Santiago* where no "affirmative misconduct" was found. This was apparent from the rulings in certain cases decided subsequent to *Santiago* within the Ninth Circuit.[30] Second, while the "compari-

24. 8 U.S.C. § 1153(a)(8) (Supp. IV 1980).
25. 526 F.2d at 489.
26. *Id.* at 490.
27. *Id.*
28. *Id.* at 491.
29. *Id.* at 493.
30. *See, e.g.*, Oki v. INS, 598 F.2d 1160 (9th Cir. 1979) (per curiam) (student's claim that failure to notify him that permission was needed to work excused his violation of student status was denied); Naturalization of 68 Filipino War Veter-

son with *Hibi*" test appears flexible given the variables in different immigration cases, the test could be viewed by some courts as license to do as they please.[31]

CORNEIL-RODRIGUEZ v. INS, Fundamental Fairness, and Violation of Regulations

The *Hibi* decision did not prove to be much of an obstacle to the Second Circuit, however, when it addressed an estoppel claim in *Corneil-Rodriguez v. INS*.[32] In that case the petitioner had received an immigrant visa as the *unmarried* child of a United States resident. However, the American consul who had issued the visa failed to warn her—as mandated by section 42.122(d) of title 22 of the Code of Federal Regulations—that her visa would automatically become invalid if she married before entering the United States.[33] Sometime after her visa interview and three days before entering the United States, the petitioner married her childhood sweetheart, ignorant of the fact that this action would technically invalidate her visa.[34] The INS sought to deport the petitioner, and on appeal the Second Circuit considered the issue of "affirmative misconduct."[35]

Well aware of the Supreme Court's failure in *Hibi* to provide a definition or test for "affirmative misconduct," the Second Circuit found "affirmative misconduct" by comparing the government's mistake in this case with those in other favorable courts of appeals decisions which had not been disturbed by the *Hibi* decision.[36] The court stated that the "equities must always be

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ans, 406 F. Supp. 931 (N.D. Cal. 1975) (in light of *Santiago*, the court revised its opinion to rely on non-estoppel grounds).

31. *See infra* notes 113-157 and accompanying text.

32. Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976).

33. *Id.* at 302-03.

34. *Id.* at 304.

35. *Id.* at 302.

36. *Id.* at 306-07. The court compared its facts with those in Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950) and Lee You Fee v. Dulles, 236 F.2d 885 (7th Cir. 1956), *rev'd on other grounds*, 355 U.S. 61 (1957), and concluded that the failure to warn as mandated by section 42.122(d) was as misleading and severe as in those cases. 532 F.2d at 306-07. In *Podea* the Second Circuit had reversed a lower court determination that the petitioner had lost his citizenship by serving in a foreign army and swearing allegiance to a foreign potentate. Although the law technically called for forfeiture of United States citizenship for this action, the petitioner had joined the Roumanian Army only after an erroneous State Department ruling that he had already lost his United States citizenship and had become a Roumanian national because of certain prior acts. *Lee You Fee* involved a statutory provision by which children born abroad to a United States citizen parent would forfeit United States citizenship unless they took up United States residence by their sixteenth birthday. Denial of citizenship was deemed improper by the Seventh Circuit where the child had made timely application but was prevented from entering the United States within the prescribed period by the "tardiness and unnecessary

carefully weighed in the context of the particular facts,"[37] and concluded that the failure to provide the warning mandated by section 42.122(d) amounted to "affirmative misconduct."[38] The Second Circuit's comparative type of analysis bears striking resemblance to that in *Santiago*, and the divergent result can be viewed as an example of how in practice the "affirmative misconduct" standard could actually provide flexibility in approach.[39]

Two other aspects of the *Corneil-Rodriguez* case are of extreme importance. First, a careful reading of the case reveals that the Second Circuit in many respects downplayed the affirmative misconduct estoppel issue in the case in favor of "basic notions of fairness" and prevention of "manifest injustice."[40] In striving for a "sensible and humane application of the law,"[41] the court relied heavily on a prior Supreme Court case, *Moser v. United States*.[42] There, the Supreme Court found it unnecessary to reach the estoppel issue in barring the United States from denying citizenship to an alien who had been misled by the State Department. Instead, the Supreme Court felt that a ruling in the alien's favor was "required by elementary fairness."[43] The most liberal reading of *Corneil-Rodriguez* in light of the reliance on *Moser* would suggest that, given the right equities, an alien could prevail on a fundamental fairness issue alone. At minimum it is certainly safe to conclude that where an opposite result would be unjust, extremely sympathetic circumstances could tip the scales in favor of an estoppel claim.[44]

Additionally, the petitioner's position in *Corneil-Rodriguez* was given great support by the fact that the government had violated its own regulation.[45] The regulation had been promulgated to pro-

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delay by officials of the consular office in issuing" the necessary travel orders. 236 F.2d at 887.

37. 532 F.2d at 306.

38. *Id.* at 306-07.

39. *See infra* notes 113-157 and accompanying text.

40. 532 F.2d at 302, 307.

41. *Id.* at 305.

42. 341 U.S. 41 (1951).

43. *Id.* at 47.

44. Similar use of a "traditional standards of fairness" theory can be found in Attoh v. INS, 606 F.2d 1273, 1278 (D.C. Cir. 1979) (due process denied where alien was not informed of nature of charges and right to counsel). *But see* Dong Sik Kwon v. INS, 646 F.2d 909 (5th Cir. 1981) (request for retroactive priority date denied in spite of INS mistake in accepting permanent residence application).

45. 532 F.2d at 304.

tect "minor aliens of marriageable age who might inadvertently forfeit their eligibility to enter our country in ignorance of this statute."[46] Thus with respect to such mandatory regulations, the court felt "certain that Congress would not have wished the government's flouting of these regulations to occasion the banishment of a hopeless alien from our shores."[47] The use of the government's violation of its own regulations to bolster estoppel claims has since occurred in other cases.[48] *Sun Il Yoo v. INS*,[49] for example, involved excessive delay in the adjudication of a sixth preference visa petition. The Ninth Circuit found "affirmative misconduct" on the part of INS but in doing so stressed the fact that the petitioner was plainly qualified for a labor certification and preference status under a regulation then in force and that INS's failure to follow the regulation prevented him from acquiring preference status in time to qualify for permanent residence.[50]

In demonstrating the possible flexibility of the "affirmative misconduct" standard, the *Corneil-Rodriguez* decision also illuminated the use of fundamental fairness and violation of regulations not only as supporting equities for estoppel, but as independent bases for relief.[51]

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46. *Id.* at 303.

47. *Id.* at 306.

48. *See generally* Hing, *When INS Breaks the Rules, Courts Will Listen*, IMMIG. J., Nov.-Dec. 1981, at 8. *See also* Galvez v. Howerton, 503 F. Supp. 35 (C.D. Cal. 1980) in which the INS's violation of its Operations Instructions contributed to the district court's finding of affirmative misconduct. Operations Instructions in general are not the same as regulations, but are given tremendous weight where a benefit is intended to be conferred by the particular instruction. *See* Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979) (Operations Instructions relating to deferred action); David v. INS, 548 F.2d 219, 223 (9th Cir. 1977) (Operations Instructions relating to deferred action).

49. 534 F.2d 1325 (9th Cir. 1976).

50. Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), was distinguished on the grounds that Yoo had an absolute right under INS's regulations while Santiago did not. 534 F.2d at 1329. The Ninth Circuit continued its comparative analysis approach in *Sun Il Yoo* by comparing its facts with those in *Santiago* and *Hibi*. 534 F.2d at 1328.

51. Corneil-Rodriguez v. INS, 532 F.2d at 302, 307. It has been acknowledged that where a regulation serves a purpose of benefit to the defendant and the government's violation of that regulation prejudiced the alien's interest, appropriate relief for the alien should be granted if properly raised. *See* Tejeda-Mata v. INS, 626 F.2d 721, 725-26 (9th Cir. 1980) (violation of regulations must be raised in timely fashion); Matter of Garcia-Flores, I.D. No. 2780 (1980) (prejudice shown where INS failed to advise alien of right to counsel); *cf.* United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979) (failure to advise alien of right to consult with foreign consulate insufficient without a showing of specific harm). *See generally* Hing, *supra* note 48; Helbush, *INS Violations of its Own Regulations: Relief for the Alien*, 12 GOLDEN GATE U.L. REV. 217 (1982).

Cases Involving Delay

The INS has always been notorious for its lengthy delays in processing petitions and applications. For a variety of reasons (such as increased workload, staff reduction, or intentional misconduct), the issue of excessive delay has been raised many times as a basis for establishing "affirmative misconduct."[52]

In *Sun Il Yoo v. INS*,[53] for example, the INS failed to explain a one-year delay in responding to the petitioner.[54] During that time the labor certification requirements were changed for the category under which the petitioner was applying and he could not meet the new requirements.[55] Petitioner argued that he should be eligible for relief under the previous requirements because, but for the INS's unjustified delay, he would have obtained a labor certification.[56] In finding "affirmative misconduct" and estopping the government from imposing the new requirements, the Ninth Circuit found "no apparent justification for the Service's unreasonable delay in recognizing the *bona fides* of Yoo's petition. Such conduct. . .fully merits the characterization of 'oppressive.' "[57]

In *Villena v. INS*[58] the Ninth Circuit continued its assault on excessive INS delays.[59] The Board of Immigration Appeals (BIA) had been critical of this petitioner for making no attempt to qualify as an immigrant.[60] In fact, however, Villena had petitioned for an occupational preference classification and the INS, without ap-

52. In *Galvez v. Howerton*, the backlogs due to workloads were considered by the court. 503 F. Supp. at 39.

53. 534 F.2d 1325 (9th Cir. 1976); *see supra* notes 49-50 and accompanying text.

54. 534 F.2d at 1328.

55. Under the new requirements, Yoo could not obtain a labor certification as a machinist without a job offer. He was unable to do so because the petitioning company was no longer in existence when the requirements changed. *Id.* at 1325.

56. *Id.* at 1328.

57. *Id.* The court distinguished Guinto v. INS, 446 F.2d 11 (9th Cir. 1971), where a delay of a few months in determining an alien's eligibility for third preference visa status was occasioned by the government's "understandable need" to obtain extensions of time in order to decide whether to proceed with an appeal. 534 F.2d at 1328.

58. 622 F.2d 1352 (9th Cir. 1980) (en banc).

59. The primary issue in *Villena* was suspension of deportation. Much of the liberal language in the case relating to motions to reopen for suspension purposes has been clouded because the Supreme Court reversed a companion case dealing with such motions to reopen. INS v. Wang, 450 U.S. 139 (1981). However, the language in *Villena* dealing with estoppel should remain precedential.

60. 622 F.2d at 1360.

parent justification, delayed responding to the petition for almost four years. The Ninth Circuit therefore held the INS was estopped from claiming that the petitioner failed to adequately pursue his claim for preference classification.[61]

Relying on *Villena* and *Sun Il Yoo*, a federal district court in *Galvez v. Howerton*[62] concluded that INS officials had engaged in "affirmative misconduct" where they improperly rejected plaintiffs' applications for adjustment of status coupled with an unreasonable delay in processing the applications.[63] The plaintiffs argued that had their fifth preference petitions been processed properly and within a reasonable time, they would have gained the benefits of an earlier priority date and been eligible for permanent resident status during a fiscal year in which there were sufficient fifth preference visas alloted to their native country.[64] Aided by what was considered the breach of INS's own operations standards and the government's "statutory duty to fulfill yearly quotas," the district court found that where a delay by INS is unreasonable and unjustified it constitutes "affirmative misconduct."[65]

While the particular facts of delay did not fare as well in the Seventh Circuit case of *Mendoza-Hernandez v. INS*,[66] the court left open the possibility of estoppel in excessive delay situations. In *Mendoza-Hernandez* there were two long delays. The first was a two-and-one-half year investigation of the petitioner's marital status ordered by an immigration judge.[67] The second was another investigation ordered by the immigration judge that took another two-and-one-half years following the petitioner's submission of a suspension of deportation application.[68] The petitioner argued that the INS should be estopped from deporting him because of these delays.[69] While the Seventh Circuit recognized that "unexplained delays by the Service in its administrative pro-

61. *Id.* at 1361.

62. 503 F. Supp. 35 (C.D. Cal. 1980).

63. *Id.* at 36.

64. *Id.* at 37-38.

65. *Id.* at 39; *see also* Kumi v. Civiletti, Civ. No. 80-0580-A (E.D. Va. Oct. 24, 1980) (four-and-one-half year delay) (as reported in 58 INTERPRETER RELEASES 130 (1981)).

66. 664 F.2d 635 (7th Cir. 1981).

67. *Id.* at 637.

68. *Id.* The ordering of a character investigation following the submission of a suspension of deportation application is routine. In fact, a character investigation is required under IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 242.7(b)(2) (1981). Character investigations vary in time from approximately six months to two years. The normal time span is nine to twelve months.

69. 664 F.2d at 639.

cedures can amount to affirmative misconduct," the court stated there must be a showing of actual "prejudice" to the alien in order to estop the government.[70] Since the petitioner made no showing that he had been prejudiced by the delays, the court found no basis for imposing estoppel.[71] But the Seventh Circuit appeared willing to grant estoppel where prejudice from delay can be proved.[72]

The BIA Stance

The BIA has never exhibited much receptivity for the government estoppel theory.[73] The BIA's most recent opinion is reflected in *Matter of M/V "Solemn Judge."*[74] The case involved large fines imposed on the owner of a carrier who violated section 273(a) of the Act,[75] by transporting Cuban refugees without visas into the United States during the spring of 1980.[76] The carrier argued that the government should be estopped from imposing the fines for several reasons. The carrier contended that he was encouraged to go to Cuba after former President Carter determined that persons who had taken sanctuary in the Peruvian embassy in Havana could be considered refugees, and because of this unforeseen emergency[77] up to 3500 refugees could be admitted into the

70. *Id.*

71. *Id.* Requiring a showing of "actual prejudice," while not explicitly stated, is certainly consistent with Ninth Circuit opinions dealing with excessive INS delays. For example, in Shon Ning Lee v. INS, 576 F.2d 1380 (9th Cir. 1978), a nine-month "delay" by the INS in processing an application while the BIA was making another decision was found not to constitute affirmative misconduct because there was no "causal connection" between the delay and the alien's failure to reapply while visas were still available. 576 F.2d at 1382. And certainly in Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976), the fact that the alien was actually prejudiced by INS's delay was extremely important. *Id.* at 1329; *see also* Villena v. INS, 622 F.2d at 1361.

72. Mendoza-Hernandez v. INS, 664 F.2d at 639. The road to "affirmative misconduct" paved by excessive INS delays appeared to run into a major roadblock, however, when the Supreme Court vacated and remanded Miranda v. INS, 638 F.2d 83 (9th Cir. 1980), *vacated and remanded*, 101 U.S. 1468 (1981), *reaffirmed* 673 F.2d 1105 (9th Cir. 1982), in light of Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam). But the Ninth Circuit stood firm on its position that such unjustified INS delays could amount to "affirmative misconduct." *See infra* notes 115-25 and accompanying text.

73. *See, e.g.*, Matter of Onal, I.D. No. 2886 (1981) (delay in holding rescission hearings not shown to be unreasonable or prejudicial).

74. I.D. No. 2894 (1982).

75. Immigration and Nationality Act § 273(a), 8 U.S.C. § 1323(a) (1976).

76. I.D. No. 2894, at 3 (1982).

77. *Id.* at 4-5.

United States due to grave humanitarian concerns. Furthermore the carrier felt that he acted pursuant to the President's "open hearts and open arms" policy.[78] Finally the carrier alleged that prior to departure, he went to a United States Customs Service office, advised officials of the nature of his voyage, and received a travel clearance without having been warned that he was subject to a fine for transporting refugees.[79]

The BIA found that there was no encouragement of the carrier to travel, and that there was no duty to warn him that he would be subject to fines.[80] It concluded that no "affirmative misconduct" had been established and denied the estoppel claim.

However, even if "affirmative misconduct" had been found by the BIA, language in its opinion indicates that it might not have granted estoppel at any rate. The BIA questioned whether it even had "the authority to apply [the estoppel] doctrine."[81] Furthermore, the BIA's reading of *Schweiker v. Hansen*[82] was that "the Supreme Court has not yet decided whether even 'affirmative misconduct' is sufficient to estop the government."[83] Thus the BIA certainly does not appear ready or willing to make new inroads in the estoppel area.

SCHWEIKER V. HANSEN

Prior to the *Akbarin* and *Miranda* decisions, the Supreme Court decided *Schweiker v. Hansen*,[84] denying a claim of estoppel against the government in the social security area. In *Hansen* the claimant met with a Social Security Administration representative who erroneously informed her that she was not eligible for benefits.[85] The representative also failed to recommend to the claimant, as was required of him under instructions in the internal department manual, that if she were uncertain about her eligi-

78. *Id.* at 5.
79. *Id.*
80. *Id.* at 6.
81. *Id.*
82. 450 U.S. 785 (1981) (per curiam).
83. I.D. No. 2894, at 5. Prior to the *Hansen* case the Fifth Circuit had similarly reasoned that the "Supreme Court has left unanswered the question whether, in some circumstances, the government may be estopped from denying citizenship to an applicant by the affirmative misconduct of the government or its employees." Dong Sik Kwon v. INS, 646 F.2d 909, 916 (5th Cir. 1981). Whether the Fifth Circuit would grant estoppel given the right circumstances was not answered in that case because there the alien's counsel acknowledged that there was no "affirmative misconduct" and that the facts did not give rise to estoppel. *Id.*
84. 450 U.S. 785 (1981) (per curiam). In fact, *Miranda* had originally been vacated and remanded in light of the *Hansen* decision. *See* INS v. Miranda, 101 U.S. 1468 (1981).
85. 450 U.S. at 786.

bility she should file a written application.[86] Had she filed at that time, the claimant would have been eligible for twelve months of retroactive benefits from the date of the conversation. She did not actually file until approximately a year later when she learned the truth.[87]

In rejecting the claimant's contention that the government should be estopped from determining her eligibility for benefits only as of the actual date of written application, the Supreme Court first concluded that there was no "affirmative misconduct."[88] The Court felt that at worst, the representative's conduct did not cause the claimant to take action or fail to take action that she "could not correct at any time."[89] Additionally, since the internal department manual contained no binding regulations, the errors of the representative were considered "far short" of noncompliance with a valid regulation which would raise a serious question of estoppel.[90]

Hansen made a point, emphasized in both *Akbarin* and *Miranda*, of protecting the public treasury. The Court noted that the judiciary has a duty to "observe the conditions defined by Congress for charging the public treasury."[91] In discussing the lower court cases cited in Justice Marshall's dissent where estoppel had been granted, the majority in *Hansen* distinguished several of the cases where "estoppel did not threaten the public fisc as estoppel does here."[92] This language was persuasively used by the *Akbarin* and *Miranda* courts to distinguish *Hansen* from immigration cases where the public fisc is generally not involved.[93]

THE *AKBARIN* CASE

In *Akbarin v. Immigration & Naturalization Service*,[94] the primary alien had entered the United States as a nonimmigrant student as defined in section 101(a)(15)(F)(i) of the Act.[95] Akbarin

86. *Id.*
87. *Id.* at 786-87.
88. *Id.* at 789.
89. *Id.*
90. *Id.* at 789-90.
91. *Id.* at 788 (citing Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)).
92. Schweiker v. Hansen, 450 U.S. at 788 n.4.
93. Akbarin v. INS, 669 F.2d 839, 843 (1st Cir. 1982); Miranda v. INS, 673 F.2d 1105, 1106 (9th Cir. 1982).
94. 669 F.2d 839 (1st Cir. 1982).
95. 8 U.S.C. § 1101(a)(15)(F)(i) (1976), *as amended by* Immigration and Na-

was required to meet many conditions in order to maintain his student status, including one which prohibited him from engaging in off-campus employment unless he submitted an application for permission to work, form I-538, to a school official and then to INS officials.[96] Without filing form I-538, Akbarin worked as a busboy for three weeks at a hotel. Upon learning of this situation, INS officials issued an order to show cause against Akbarin for failing to maintain his nonimmigrant status by accepting "unauthorized employment" at the hotel, and becoming deportable under section 241(a)(9) of the Act.[97]

At his hearing, Akbarin attempted to introduce evidence explaining his failure to file form I-538 and to raise an estoppel defense; however, the immigration judge ruled all such evidence irrelevant.[98] The evidence which Akbarin had unsuccessfully sought to introduce consisted of his own testimony and that of the hotel's personnel director. It seems that when Akbarin went to the hotel to inquire about employment, he informed the personnel director that he, Akbarin, was an Iranian student. The personnel director then telephoned the INS, and an unidentified official told the personnel director that Akbarin could work up to twenty

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tionality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1611. Akbarin's wife entered the United States as the spouse of a nonimmigrant student as defined in section 101(a)(15)(F)(ii) of the Act. *Id.* § 1101(a)(15)(F)(ii). Therefore her status and claim depended on those of her husband. *See* 669 F.2d at 840.

96. The requirements governing Akbarin's employment are as follows:

> A nonimmigrant who has a classification under section 101(a)(15)(F)(i) of the Act is not permitted to engage in off-campus employment in the United States, either for an employer or independently, unless all of the following conditions are met: (i) The student is in good standing as a student who is carrying a full course of studies . . . ; (ii) the student has demonstrated economic necessity due to unforeseen circumstances arising subsequent to entry or subsequent to change to student classification; (iii) the student has demonstrated that acceptance of employment will not interfere with his/her carrying a full course of study; (iv) the student has agreed that employment while school is in session will not exceed 20 hours per week; and (v) the student has submitted to an authorized official of a school approved by the Attorney General a form I-538, and this form has been certified by that official that all the aforementioned requirements have been met. The authorized official of the school will submit the certified form I-538 containing his recommendation together with the student's form I-94 to the Service office which has jurisdiction over the place where the school is located. The student has permission to accept employment when he/she receives the form I-94 endorsed by the Service to that effect.

8 C.F.R. § 214.2(f)(6) (1982).

97. Section 241(a)(9), 8 U.S.C. § 1251(a)(9) (1976), provides in pertinent part:

> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . . (9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status. . . .

98. Akbarin v. INS, 669 F.2d at 841.

hours per week. The conversation was related to Akbarin and a busboy position for twenty hours per week was offered and accepted.[99] INS authorities instituted deportation proceedings against Akbarin after receiving a letter from the hotel personnel director informing them of Akbarin's employment. Akbarin was found deportable and granted voluntary departure.[100]

The BIA rejected Akbarin's estoppel argument on the grounds that there was no "affirmative misconduct" by INS and because Akbarin knew that he had to file form I-538 in order to obtain employment authorization.[101] The First Circuit disagreed and concluded that the facts alleged by Akbarin, if true, might estop the government from asserting failure to comply with section 214.2(f)(6) of title 8 of the Code of Federal Regulations. Akbarin's petition for review was granted and the case was remanded for a new hearing.[102]

In reaching its decision, the First Circuit necessarily had to address the Supreme Court's unfavorable estoppel decision in *Schweiker v. Hansen*.[103] But the court of appeals distinguished that case rather summarily.

> *Hansen* itself is not otherwise helpful here because the decision seems to rest to some degree on the fact that the estoppel threaten[ed] the public fisc. . . . The immigration question in this case does not. In addition, the alleged error by the INS in the instant case was a misinterpretation of a binding federal regulation, not a nonbinding one as in *Hansen*.[104]

The court then discussed the development of "affirmative misconduct" in other cases such as *Santiago* and *Corneil-Rodriguez*,[105] and proceeded to set forth a method for analyzing estoppel claims in immigration cases.[106]

The court felt that two principal inquiries are necessary in any estoppel claim: "[1] whether the government's action was error, and [2] if the complaining party reacted to the error, whether the action was intended to or could reasonably have been intended to induce reliance."[107] However, the court announced sev-

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 845.
103. 450 U.S. 785 (1981) (per curiam). For a discussion of this case, see *supra* notes 84-93 and accompanying text.
104. Akbarin v. INS, 669 F.2d at 843 (citation omitted).
105. *Id.*
106. *Id.*
107. *Id.*

eral qualifications for its estoppel test:[108]

1. The complaining party's action must have been induced by the government's misconduct. If the petitioner would have acted in the same manner without governmental misconduct, estoppel may be precluded;
2. Complainant must have exhausted or must lack opportunities to correct the error;
3. Where estopping the government would amount to frustrating the intent of Congress by validating a misinterpretation of the law, or would intrude on the executive's promotion of policy, estoppel may not lie except where the combination of governmental misconduct and petitioner reliance deny a benefit otherwise available;
4. Other equitable principles, such as the alien's unclean hands, may preclude the assertion of estoppel against the government.

Applying these criteria to Akbarin's situation, the court concluded that if the facts alleged were proven, the government might be estopped from asserting failure to comply with section 214.2(f)(6).[109] As a result of the telephone conversation with the INS officials, the hotel personnel director could reasonably have believed that Akbarin did not have to file any form in order to work. Having started work, Akbarin could not cure the problem by filing I-538 because his employment already rendered him deportable. Estoppel in this case would not interfere with the operation of the immigration laws or "hinder achievement of important federal immigration goals."[110] The laws in fact do not prohibit nonimmigrant students from working. There were also no equitable defenses raised by the INS.[111]

In light of these considerations, Akbarin was entitled to a new hearing in order to present evidence to support the estoppel claim.[112]

THE *MIRANDA* CASE

Miranda v. Immigration & Naturalization Service[113] involved the denial of petitioner's adjustment of status application following the unexplained failure of INS to act on an immediate relative visa petition for an eighteen-month period. The visa petition had

108. *Id.* at 843-44.
109. *Id.* at 844.
110. *Id.* at 845.
111. *Id.*
112. *Id.*
113. 673 F.2d 1105 (9th Cir. 1982) (per curiam).

been filed by Miranda's wife on his behalf, but by the end of the eighteen months, the marriage had broken up and the wife had withdrawn the petition.[114] The Ninth Circuit found "affirmative misconduct" and estopped the INS from considering the visa petition withdrawn.[115]

The procedural appellate history of *Miranda* is of interest. The Ninth Circuit's original decision[116] in the matter was decided in a rather summary fashion. There the court had simply concluded that the "unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petitioner's withdrawal following the break up of Miranda's marriage was affirmative misconduct by the INS."[117] The government petitioned for review, however, and the Supreme Court vacated the original judgment and remanded for further consideration in light of the *Hansen* decision.[118] Most practitioners viewed this action by the Supreme Court as a bad omen for the application of estoppel in immigration matters.[119] On remand, however, the Ninth Circuit distinguished *Hansen* in a fashion similar to that of the First Circuit in *Akbarin*, and found that *Hansen* did not compel an outcome different from its first decision.[120]

First, the court felt that the applicability of *Hansen* was limited to situations where charges to the public treasury were at stake.[121] By contrast the petitioner in *Miranda* was "not seeking benefit payments out of the public fisc."[122] Next the court noted that in *Hansen* there had been no finding of "affirmative misconduct" by the government representative. Without confronting the more complex issue of what test to use, the Ninth Circuit simply said that its original and present opinion "rested precisely on such a finding" of affirmative misconduct because of the unexplained eighteen-month delay.[123] Finally, the court recalled that

114. *Id.* at 1106.
115. *Id.*
116. Miranda v. INS, 638 F.2d 83 (9th Cir. 1980), *vacated and remanded*, 101 U.S. 1468 (1981), *reaffirmed* 673 F.2d 1105 (9th Cir. 1982).
117. *Id.* at 84. In support of this conclusion the court cited two prior decisions, Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976); Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc).
118. INS v. Miranda, 101 U.S. 1468 (1981).
119. *See* Bacon, *supra* note 9; Hing, *supra* note 48.
120. Miranda v. INS, 673 F.2d 1105, 1106 (9th Cir. 1982) (per curiam).
121. *Id.*
122. *Id.*
123. *Id.*

in *Hansen*, the claimant had not been caused to act or fail to act in a manner that could not be corrected.[124] The court felt that Miranda, on the other hand, had suffered irreparable damage because of the INS misconduct.[125]

Given these distinctions between *Hansen* and its facts, the *Miranda* court stood firm and adhered to its prior decision.[126]

Analysis

The *Akbarin* and *Miranda* decisions indicate that the concept of government estoppel is a viable tool against the INS and has survived *Hansen*. Both the First and Ninth Circuits independently limited the *Hansen* case to situations threatening the public fisc. If this distinction stands, the effect of the *Hansen* decision in the immigration context appears rather slight given the fact that immigration cases in general have no direct burden on public funds.[127]

Both courts also distinguished *Hansen* on a second ground. In *Hansen*, it was important to the Supreme Court that the Social Security representative's conduct did not create a situation that the claimant "could not correct at any time."[128] However, the *Akbarin* and *Miranda* courts both felt the plight of their respective petitioners could not have been corrected once the official misconduct took place.[129] The instant Akbarin began working without authorization he became technically deportable under section 214(a)(9) of the Act.[130] In *Miranda*, however, the Ninth Circuit's summary conclusion that the unjustified eighteen-month delay inflicted "irrevocable damage on the petitioner"[131] deserved further explanation. A skeptic could argue that Miranda could have "corrected" or at least avoided the effect of the government's misconduct by making periodic inquiries on the status of the immediate relative petition. With study, the court would have found that such a requirement would be an unreasonable burden on aliens. As a practical matter the INS discourages these types of inquiries because they consume staff time. Furthermore, most

124. *Id.*
125. *Id.*
126. *Id.*
127. *See, e.g., id.*
128. Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (per curiam).
129. Akbarin v. INS, 669 F.2d 839, 844 (1st Cir. 1982); Miranda v. INS, 673 F.2d at 1106. The Eighth Circuit recently denied an estoppel claim where the alien could have helped herself. Aiyadurai v. INS, 683 F.2d 1195, 1200-01 (8th Cir. 1982) (by exhausting administrative remedies, the alien could have averted her problem).
130. 8 U.S.C. § 1251(a)(9) (1976); Akbarin v. INS, 669 F.2d at 844; *see also supra* notes 97, 103 & 120-21 and accompanying text.
131. 673 F.2d at 1106.

aliens would be discouraged from making such inquiries once a petition has been filed because of the lengthy lines and bureaucratic maze usually found at local INS offices. Additionally, it is of course the duty of INS under its own standards to act in a reasonable time.[132] As was stated in *Sun Il Yoo v. INS*,[133]

> Immigration agents may have no duty to inform aliens of matters which the alien themselves have primary responsibility for knowing and could discover through the application of due diligence, but once an alien has gathered and supplied all relevant information and has fulfilled all requirements, INS officials are under a duty to accord to him within a reasonable time the status to which he is entitled by law.[134]

The Ninth Circuit's analysis would have been more convincing had the court reiterated these points.

The bases for distinguishing *Hansen* used by the First and Ninth Circuits are, however, quite sound. *Hansen* was a social security benefits case, and the Supreme Court's decision contained no broad sweeping indictments of the government estoppel theory. And while the Supreme Court did not find "affirmative misconduct" or provide guidance on the issue of when estoppel against the government should be granted, there was no criticism of lower court opinions where estoppel had been granted.[135] Therefore, both the *Akbarin* and *Miranda* decisions are well within the parameters of any Supreme Court restrictions on government estoppel.[136]

The *Miranda* case has solidified the concept that unreasonable INS delays will give rise to a finding of "affirmative misconduct" on the part of the government.[137] The decision also comports with the precedent-setting *en banc* decision of the Ninth Circuit in *Santiago v. INS*.[138] In *Santiago* the Ninth Circuit had initiated its "affirmative misconduct" methodology of comparing particular case facts with the *Hibi* facts for blameworthiness.[139] Soon thereafter the Ninth Circuit concluded that unreasonable INS delays which have injured the alien are so "oppressive" and, compared

132. *See* Galvez v. Howerton, 503 F. Supp. 35, 39 (C.D. Cal. 1980).
133. 534 F.2d 1325 (9th Cir. 1976).
134. *Id.* at 1328-29.
135. *See* Schweiker v. Hansen, 450 U.S. at 788 n.4.
136. It is obvious that the First and Ninth Circuits have chosen a more liberal interpretation of estoppel in light of *Hansen* than has the BIA. *See* Matter of M/V "Solemn Judge," I.D. No. 2894 (1982); *cf.* Dong Sik Kwon v. INS, 646 F.2d 909 (5th Cir. 1981).
137. *See* Miranda v. INS, 673 F.2d at 1106.
138. 526 F.2d 488 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976).
139. *See supra* notes 19-31 and accompanying text.

with the *Santiago* or *Hibi* circumstances, they constitute "affirmative misconduct."[140] *Miranda* is therefore properly viewed as continuing the *Sun Il Yoo* and *Villena* trend.

The *Akbarin* decision represents a significant advance in the development of estoppel law in the immigration area. While the decisions following *Hibi* have by and large been decided on a case-by-case comparative basis, the First Circuit in *Akbarin* has attempted to lay down specific criteria to be raised in immigration estoppel cases.[141] The guidelines set forth by the court[142] make a good deal of sense and should be welcomed by practitioners and other courts in search of direction.

The court's "principal inquiries" into whether the government's action was error and whether the action was intended to or could reasonably have been intended to induce reliance are easy enough to understand and apply.[143] However, the "secondary factors" which were mentioned by the court[144] will ultimately need further clarification. Specifically, the court noted that frustrating congressional intent and intrusion "on the executive's ability to promote important federal policies" were considerations that "may also affect the decision."[145] The court then pointed out that those problems were not present where the government misconduct and subsequent reliance thereon operated to deny a benefit that "might otherwise be available."[146] This point could very well be construed to mean that where an alien has been misled by INS misconduct into thinking that a benefit is available when in fact it is not, and severe detrimental reliance ensues, the "constitutional and policy considerations" might militate against a grant of estoppel.[147] However, the First Circuit's choice of language that such factors "*may* also affect the decision"[148] would indicate that such "constitutional and policy considerations" are to be weighed but are not necessarily controlling.

Other equitable doctrines may militate against an application of estoppel.[149] By citing "unclean hands" as an example, future

140. *See* Sun Il Yoo v. INS, 534 F.2d at 1328-29; *see also* Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc).

141. Commentators have suggested criteria that differ from those set forth in *Akbarin*. *See generally* Bacon, *supra* note 9, at 19; Note, *supra* note 17.

142. *See* Akbarin v. INS, 669 F.2d at 843-44; *see also supra* notes 94-111 and accompanying text.

143. *See supra* note 107 and accompanying text.

144. *See supra* note 108 and accompanying text.

145. Akbarin v. INS, 669 F.2d at 844.

146. *Id.*

147. *Id.*

148. *Id.* (emphasis added).

149. *Id.*

cases will have to decide whether to incorporate the gamut of the laws of equity.[150] Significantly, the First Circuit cited *Corneil-Rodriguez v. INS*[151] for its consideration of equities.[152] This is significant because of the fair amount of attention given by the *Corneil-Rodriguez* decision to "basic notions of fairness" and the prevention of "manifest injustice."[153] In that vein, therefore, the *Akbarin* case could be considered a refinement of the cases which have relied on "fundamental fairness" to correct inequities.[154]

Akbarin could also be viewed as consistent with cases that have used the government's violation of its own regulations to bolster estoppel claims.[155] It was important to the *Akbarin* court that the INS error in its case "was a misinterpretation of a binding federal regulation, not of a nonbinding one as in *Hansen*."[156] While this point was important to the First Circuit for purposes of distinguishing *Hansen*, this alleged regulatory misinterpretation, if proven, would also satisfy the court's first principal estoppel inquiry, that is, whether the government's action was error.[157]

Akbarin and *Miranda* have therefore reaffirmed the availability of estoppel in the immigration context. In so doing, the decisions have continued a commitment to previous immigration estoppel concepts and have begun to clarify the standards for "affirmative misconduct."

STRATEGICAL CONSIDERATIONS FOR PRACTITIONERS

For the practitioner representing a client in immigration or deportation proceedings, the case law from *Hibi* to *Miranda* and *Akbarin* suggests several considerations to keep in mind when preparing an estoppel claim.

Compare Facts with Other Cases

Because the Supreme Court has never provided a test or set of

150. See generally M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL (6th ed. 1913); J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE (5th ed. 1941).
151. Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976).
152. Akbarin v. INS, 669 F.2d at 844.
153. Corneil-Rodriguez v. INS, 532 F.2d at 302, 307.
154. *See supra* notes 32-51 and accompanying text.
155. *Id.*
156. Akbarin v. INS, 669 F.2d at 843.
157. *Id.* at 843-44.

criteria to delineate "affirmative misconduct" a court is free to compare the facts before it with the facts in other estoppel cases to determine if the misconduct of the government under consideration is as "blameworthy" or "oppressive."[158] Therefore, the practitioner should describe to the fullest extent the seriousness of the government misconduct in this case and emphasize the disparity with previous estoppel claims.

Consider Any Possible Unreasonable Delay

Given the reaffirmance in *Miranda* that unjustified delays by INS can constitute "affirmative misconduct," the practitioner must consider any possible delay that might be labelled unreasonable. There now appears to be almost a presumption of "affirmative misconduct" where there has been excessive INS delay injuring or prejudicing the alien.[159] Once "an alien has supplied the INS with all of the relevant information, the INS has a duty to accord him [or her] within a reasonable time the status to which he [or she] is entitled."[160]

Consider Possible Violation of Regulations

The violation of any applicable regulations must be raised. *Akbarin* reemphasizes the fact that a violation or misinterpretation of a binding regulation can lead to or bolster a finding of "affirmative misconduct."[161] In fact the violation of a binding regulation by the government would allow the alien to satisfy the first part of the *Akbarin* test, that is, whether the government's action was error, without much difficulty.[162] Therefore the plethora of regulations which are applicable to the practice of immigra-

158. This flexible comparative analysis approach serves the practitioner well. Although the outcome differed in each case, both Santiago v. INS, 526 F.2d 488, 493 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971 (1976), and Sun Il Yoo v. INS, 534 F.2d 1325, 1328 (9th Cir. 1976), demonstrate this analysis.

159. *See* Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981); Shon Ning Lee v. INS, 576 F.2d 1380, 1382 (9th Cir. 1978); Sun Il Yoo v. INS, 534 F.2d at 1329 (9th Cir. 1976).

160. Villena v. INS, 622 F.2d 1352, 1360-61 (9th Cir. 1980) (en banc); Sun Il Yoo v. INS, 534 F.2d at 1328. Under IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 245.2a (1981), the INS has set its own standards that can be used as a yardstick for reasonableness. Galvez v. Howerton, 503 F. Supp. 35, 39 (C.D. Cal. 1980). Many INS districts have adopted "instant," "up front," or "one step" adjudication procedures that may also affect future claims of delay. Memorandum Re: One Step Processing by E.B. Duarte, Jr., Director of the Outreach Program, Central Office, INS (May 21, 1981).

161. *See* Akbarin v. INS, 669 F.2d at 843; *see also* Corneil-Rodriguez v. INS, 532 F.2d at 306-07; *supra* notes 45-51 and accompanying text.

162. *See* Akbarin v. INS, 669 F.2d at 843.

tion law[163] must be familiar to the practitioner.

Consider Possible Violation of Operations Instructions

Violation by the INS of one of its own Operations Instructions[164] with resulting prejudice to the alien, should also be used to bolster an estoppel claim.[165] In *Hansen*, of course, the claimant's estoppel argument was not aided much by the misinterpretation of an internal department manual that had "no legally binding effect."[166] But because *Hansen* can be distinguished from immigration cases on the "public fisc" issue,[167] the fact that an internal INS Operations Instruction has been breached should be placed on the scales. Additionally, while Operations Instructions do not generally carry the same weight as regulations, certain Operations Instructions which are intended to confer benefits usually are given more substantive effect.[168] Correspondingly their violation should be considered as serious as the breach of regulations.

Emphasize All Sympathetic Factors and Equities

By emphasizing the "equitable" nature of estoppel and whether reliance has been reasonable, the *Akbarin* court has left the door open for evidence of equities and other sympathetic facts.[169] The teachings of *Corneil-Rodriguez* also emphasize a desire to prevent manifest injustice where fundamental fairness has been violated.[170] And the comparative type of analysis in *Sun Il Yoo* and *Santiago* certainly invites a look into the sympathetic nature of a case.[171] Therefore the practitioner must emphasize all the equities in a case and point out any unfairness to the client. Given cases such as *Moser v. INS*[172] and *Corneil-Rodriguez*, a practi-

163. *See, e.g.*, 22 C.F.R. §§ 1.1-1471.10 (1981); 28 C.F.R. §§ 0.1-572.43 (1981).
164. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEP'T OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS (1981).
165. *See* Galvez v. Howerton, 503 F. Supp. at 39.
166. Schweiker v. Hansen, 450 U.S. 785, 787, 790 (1981) (per curiam).
167. *See supra* notes 84-93 and accompanying text.
168. *See* Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979) (Operations Instruction relating to deferred action); *accord* David v. INS, 548 F.2d 219, 223 (8th Cir. 1977); Vergel v. INS, 536 F.2d 755 (8th Cir. 1976); *see also* Galvez v. Howerton, 503 F. Supp. at 39.
169. *See* Akbarin v. INS, 669 F.2d at 843-44.
170. *See* Corneil-Rodriguez v. INS, 532 F.2d at 306-07.
171. *See* Sun Il Yoo v. INS, 534 F.2d at 1328; Santiago v. INS, 526 F.2d at 493.
172. 341 U.S. 41 (1951).

tioner could, in fact, reasonably request relief solely on grounds of "fundamental fairness" first and then use those arguments to aid a follow-up estoppel claim.[173]

Balance Away Negative Facts

Most cases are not, of course, perfect. Many negative facts may exist in a given case. Indeed the *Akbarin* criteria invite evidence of whether there has been an opportunity to correct the government's error, whether a benefit would not otherwise have been available and whether the government might have any equitable defenses.[174] The practitioner should keep in mind, however, that the estoppel concept is a doctrine of equity. Any negative factors are usually only factors to be weighed against positive factors. So the applicable strategical considerations listed above, as well as those that the practitioner's own creativity may develop, certainly provide the basis for limiting the effect of negative factors. Here, of course, is where effective presentation of evidence and advocacy play their most significant roles.

Fashion the Remedy Appropriately

The estoppel theory is not a panacea and any remedy requested pursuant to such a claim must be fashioned in a manner that seems appropriate. A successful claimant will therefore not necessarily be granted permanent residency status. For example, in *Villena* the remedy for the successful estoppel claim was that the government could not assert that the alien had not adequately pursued a preference classification.[175] In *Akbarin* the ultimate relief would be that Akbarin would not be deportable and would presumably resume his status as a nonimmigrant student. Of course in cases such as *Miranda* and *Sun Il Yoo* the relief, that is, the ability to apply for adjustment of status, would lead to permanent residency. An implicit admonition in *Akbarin* that the practitioner must keep in mind is that any benefit sought must have otherwise been available.[176] If an alien, for example, has been misled by government misconduct into believing that a benefit was available, problems could arise if the relief sought is that benefit which was never actually available. In such a situation the practitioner should devise a possible remedy which might be

173. *See supra* notes 40-44 and accompanying text.

174. *See* Akbarin v. INS, 669 F.2d at 844. The fact that the court suggests consideration of equitable defenses for the government invites just such an argument used to introduce evidence ameliorating negative factors on the alien's side.

175. *See* Villena v. INS, 622 F.2d 1352, 1361 (9th Cir. 1980) (en banc).

176. *See* Akbarin v. INS, 669 F.2d at 844.

palatable to the court. For example, a grant of deferred status or extended voluntary departure for an alien who has been seriously misled to his or her detriment might be suggested in some equitable situations.[177]

Raise Estoppel Claims Early

Despite the BIA's discouraging language regarding estoppel in the immigration context,[178] the claim must be made if the opportunity arises. Particularly in the deportation context, if claims for relief are not made with justification when the opportunity exists, the relief may be deemed waived.[179] While the BIA has not granted estoppel and has indicated hesitation in doing so, it has not emphatically rejected estoppel as a viable claim. Of course, if the BIA rules against such a claim in a deportation or exclusion case, review can be obtained in the federal courts.[180]

CONCLUSION

The doctrine of equitable estoppel as applied in the immigration area has survived the Supreme Court's most recent ruling on government estoppel, *Schweiker v. Hansen*. The First Circuit in *Akbarin* and the Ninth Circuit in *Miranda* have distinguished the *Hansen* case in a manner that virtually makes the Supreme Court decision inapplicable to immigration cases. In so doing, these courts have reaffirmed many developing doctrines in the immigration estoppel area and have begun to set forth manageable criteria for determining what is "affirmative misconduct." The teachings of these cases and those of other decisions provide practitioners with a basis for developing strategies in the presentation of estoppel claims, and provide new and continued hope for the application of this doctrine in immigration cases.

177. *See, e.g.*, Yassini v. Crosland, 613 F.2d 219 (9th Cir. 1980).

178. *See* Matter of M/V "Solemn Judge," I.D. No. 2894 (1982); *see also supra* notes 73-83 and accompanying text.

179. *See, e.g.*, Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980) (violation of regulations must be raised in timely fashion).

180. *See* Immigration and Nationality Act § 106, 8 U.S.C. § 1105a(a) (1976) *as amended by* Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611, 1620. The Senate has passed a version of an immigration bill which would eliminate any federal court review of final orders of exclusion except for habeas corpus. S. 2222, 97th Cong., 2d Sess. (1982); H.R. 5872, 97th Cong., 2d Sess. (1982). The House bill was renumbered as H.R. 6514 after being reported out by the House Subcommittee on Immigration, Refugees, and International Law.

ADDENDUM

As this article went to print, the United States Supreme Court reversed the Ninth Circuit's *Miranda* decision without receiving briefs on the merits or hearing oral argument.[181] In its per curiam opinion, the Court found that even if the INS was negligent in delaying for eighteen months, there was no affirmative misconduct given the large number of applications received by the INS and the need to investigate their validity, especially where possible sham marriages were involved. Interestingly, the Court used a comparison-with-other-cases approach in deciding that there was no affirmative misconduct. For example, the Court compared the government's conduct in *Miranda* with that in *Hibi*, and found that it was not significantly different. Furthermore, the Court felt that the Ninth Circuit's public fisc distinction of *Hansen* was unpersuasive because enforcement of the immigration laws is an important interest of broad public concern. The Court explicitly reserved the question of whether the government would be estopped even if affirmative misconduct was shown.

While the Supreme Court's decision increases the difficulty of arguing estoppel in immigration proceedings, the Court's refusal to expressly strike down the estoppel concept leaves open the possibility of its application. Even in delay cases, the new *Miranda* decision is distinguishable because of the reasonable need to investigate the validity of the marriage. Given the Court's application of the flexible comparison-with-other-cases approach in the new opinion, it is even more important for practitioners to consider all the strategical factors mentioned in the article, to balance equities, and to compare facts.

181. INS v. Miranda, 51 U.S.L.W. 3358 (U.S. Nov. 8, 1982) (per curiam).