12-1-1982

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What Went Wrong With Wang?: An Examination of Immigration and Naturalization Service v. Wang

SANA LOUE*

In INS v. Wang, The Supreme Court severely limited judicial review of administrative decisions of suspension of deportation. This article explores the factors considered by adjudicative bodies in ruling on extreme hardship and motions to reopen suspension proceedings. The author concludes that guidelines must be established which will aid in defining the term “extreme hardship” and establish a single evidentiary standard necessary to support this claim.

INTRODUCTION

The Supreme Court has characterized deportation\textsuperscript{1} as “a drastic measure and at times the equivalent of banishment or exile . . . .”\textsuperscript{2} The deportation of an individual may separate him from his home and family and deprive him “of all that makes life worth

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2. Tan v. Phelan, 333 U.S. 6, 10 (1948). See also Gastelum Quinones v. Kennedy, 374 U.S. 469, 479 (1963) (“deportation is a drastic sanction, one which can destroy lives and disrupt families”).
living.”

Until 1940 deportation was mandatory for aliens illegally in the United States. This strict rule produced harsh results in many cases. Congress responded to requests for reform by enacting into law in 1940 provisions authorizing the legalization of an alien’s status where he could demonstrate both five years’ good moral character and that deportation would result in serious economic detriment to a permanent resident or citizen spouse, parent, or minor child. Congress extended the law in 1948 to authorize suspension of deportation for those without family ties who had resided in the United States for a period of seven years.

Section 244(a) (1) of the Immigration and Nationality Act of 1952 authorized suspension of deportation only where the alien could demonstrate “exceptional and extremely unusual hardship” to himself or to a lawful permanent resident or citizen spouse, parent, or child. Congress intended that this relief be available only where the hardship was unusual and where deportation would be unconscionable. In determining whether or not to grant relief under this provision, the Board of Immigration Appeals (Board) considered various factors: 1) the length of the alien's residence, including the means and purpose of entry; 2) the alien's family ties in the United States and overseas; 3) the possibility of the alien's obtaining a visa overseas; 4) the financial difficulty the alien would face in traveling overseas to obtain the visa; and 5) the alien's health and age. Hardship could be established by the presence of several of these factors.

In 1962 Congress changed the requirement of “exceptional and

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4. See, e.g., Chadha v. INS, 634 F.2d 408, 425 (9th Cir. 1980). In 1936 the Commissioner of Immigration found almost 3,000 cases pending which involved “such incredibly cruel family separations . . . so repugnant to every American principle of justice and humanity that deportation was stayed until Congress might take some action.” Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379 & H.R. 2816, Bills to Revise the Laws Relating to Immigration, Naturalization and Nationality Before the Subcomm. of the Comm. on the Judiciary, 82d Cong., 1st Sess. (1951) (statement of Gustav Lazarus, President, Assn of Immigration and Nationality Lawyers) [hereinafter cited as Hearings].
5. 8 U.S.C. § 155(c) (1940) (currently codified as 8 U.S.C. § 1254(a) (1976)).
11. See id. at 410.
extremely unusual hardship" to the current requirement of "extreme hardship," presumably to lessen the degree of hardship required for suspension of deportation. In 1975, the House Judiciary Committee recommended that in addition to the factors previously considered for section 244(a)(1) relief, the Board consider several additional factors: 1) the economic and political conditions of the country to which the alien would be returnable; 2) the alien's business and occupation; 3) the possibility of other means of adjustment of status; 4) whether the alien was of special assistance to the United States or to the community; 5) the alien's immigration history; and 6) the alien's position in the community.

The issue of suspension of deportation generally arises in the context of deportation proceedings, during which the alien may apply to the immigration judge for such relief. If circumstances change following the deportation proceeding, the alien may move to reopen the proceeding where "the evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing . . . ." Where the alien has appealed a final order of deportation to the Board and a decision has been rendered, the alien must address the motion to reopen to the Board, rather than to the immigration judge.


Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1) (1976) currently provides:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . . .


15. See 8 C.F.R. § 244.1 (1982).


17. "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not
Board neither exercises the discretion authorized by section 244 nor determines eligibility for relief, but rather determines if the alien has established a prima facie case of eligibility. Where the alien has done so the Board refers the case to the immigration judge to determine eligibility under section 244. Where eligibility exists, the Attorney General or his designee has discretion to grant relief.

Earlier court rulings regarding the existence of extreme hardship were excessively restrictive. In accordance with the legislative history of section 244(a)(1), the courts in more recent decisions construed that provision liberally to effectuate its ameliorative purpose. The Court of Appeals for the Ninth Circuit followed this construction in Wang v. INS, but was reversed by

available and could not have been discovered or presented at the former hearing.

Where an attorney has appealed from the denial of a motion to reopen as a dilatory tactic and there was no showing of new evidence, the courts have assessed double costs against the attorney. See Bonsukan v. INS, 554 F.2d 2 (1st Cir. 1977); Acevedo v. INS, 539 F.2d 918 (2d Cir. 1976).

Discretion is not limited to what is authorized but includes all that is within "the effective limits" on the officer's power. Discretion includes interim choices as well as final ones and procedural choices as well as substantive ones. Discretion extends to methods, forms, timing, degrees of emphasis, and many other subsidiary factors.

An officer who decides what to do or not to do often (1) finds facts, (2) applies law, and (3) decides what is desirable in the circumstances after the facts and the law are known. Interpreting facts and interpreting law may both involve some exercise of discretion, but the third of the three functions is usually the largest element of discretion.

An officer who exercises discretion needs not only the facts which gave rise to the discretionary problem; he may also need facts to guide his exercise of discretion.


In construing § 244 we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which would otherwise result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension in cases of
the United States Supreme Court. This article will examine the nature of the “extreme hardship” requirement of the suspension provision within the context of motions to reopen deportation proceedings and the Supreme Court’s decision in Wang, and will propose the formulation of guidelines by the Attorney General.

THROUGH THE ADJUDICATIVE LOOKING GLASS: EXTREME HARDSHIP DEFINED

Various courts have acknowledged the difficulty in any attempt to define the term “extreme hardship,” recognizing that “[t]hese words are not self-explanatory and reasonable men could easily differ as to their construction.” Although the House Judiciary Committee suggested various factors to be considered by the Board in making such determinations, ultimately the Board and the courts must weigh the variables in each individual case. The doubtful merit. It would simply tend to increase the scope of the Attorney General’s review and thus his power to act in amelioration of hardship.

Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964).

In Fong v. INS, 308 F.2d 191 (9th Cir. 1962) the court stated:

The statutory provisions relating to suspension of deportation are designed to ameliorate the ordinary drastic consequences of an order of deportation. As stated by Mr. Justice Douglas in speaking for the Court in Fong Haw Ton v. Phelan, “[w]e resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is a forfeiture for misconduct of residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.”

308 F.2d at 195-96 (citations omitted); see also Tovar v. INS, 612 F.2d 794 (3d Cir. 1980) (consideration of hardship to grandchild in determining grandmother’s eligibility for suspension of deportation where grandmother acted in loco parentis).


24. For a discussion of the physical presence requirement, see Kamheangpaitiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979); Comment, Suspension of Deportation: A Revitalized Relief for the Alien, 18 SAN DIEGO L. REV. 65 (1980). For an interesting discussion of the requirement of good moral character, see Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), petition for cert. filed, 59 INTERPRETER RELEASES 504 (U.S. July 16, 1982) (No. 82-91).

25. See, e.g., Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 598, 595 (9th Cir. 1978).


27. See supra text accompanying note 14.
task confronting an alien attempting to establish extreme hardship before these adjudicative bodies may well appear herculean.

The alien may base a claim of extreme hardship on hardship to himself or "his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." However, the presence of a single factor will not by itself warrant a finding of extreme hardship. The courts and the Board have consistently refused to find extreme hardship present where the alien premised his claim primarily upon economic detriment or upon the existence of United States citizen children. Even these two factors taken together will not necessarily trigger a finding of extreme hardship. Indeed, the presence of additional factors will guarantee the alien neither a pronouncement of extreme hardship nor a result consistent with prior decisions.

The courts differ, too, in the extent to which they are willing to infer additional factors from the presentation of a single consideration. Most aliens would experience some degree of financial loss

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29. See, e.g., Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980); Choklokaew v. INS, 601 F.2d 216 (5th Cir. 1979); Blanco-Dominguez v. INS, 528 F.2d 382 (9th Cir. 1975); Palaez v. INS, 513 F.2d 503 (5th Cir. 1975), cert. denied, 423 U.S. 892 (1976); Nishikage v. INS, 443 F.2d 904 (9th Cir. 1971); Fong Choi Yu v. INS, 439 F.2d 719 (9th Cir. 1971); Yeung Ying Cheung v. INS, 422 F.2d 43 (3d Cir. 1970); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968); Matter of Gibson, 16 L & N. Dec. 58 (1976); Matter of Sangater, 11 L & N. Dec. 309 (1965); Matter of Uy, 11 L & N. Dec. 159 (1965); Matter of Hwang, 10 L & N. 448 (1964).

The court in De Reynoso v. INS, 627 F.2d 958 (9th Cir. 1980) stated: If this court were to grant relief [for hardship resulting from a change in the personal standard of living which occurs when a relatively wealthy individual is forced to move from the United States to Mexico], we would be holding that the hardship involved in returning to a former, lower material standard of living automatically requires a remand in every deportation case that fits the residential and character requirements of § 1254. We are satisfied that Congress did not intend, in granting discretion to the Attorney General, to burden that officer with the number of hearings that would be required if the discretion conferred by the statute were to be as limited as the petitioners' contentions would limit it.

Id. at 959-60. For a discussion of the distinction between "mere economic detriment" and economic hardship, see infra text accompanying notes 94-98.

30. See, e.g., Chiaramonte v. INS, 626 F.2d 1093, 1100 (2d Cir. 1980). But see Tovar v. INS, 612 F.2d 794 (3d Cir. 1980) (extreme hardship may exist where a relationship between grandparent and grandchild resembles a parent-child relationship).

31. See Men Keng Chang v. Jiugni, 669 F.2d 275 (5th Cir. 1982); Jong Shik Choe v. INS, 597 F.2d 168 (9th Cir. 1980); Carnalla-Munoz v. INS, 627 F.2d 1004 (9th Cir. 1980); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980); Faddah v. INS, 553 F.2d 491 (5th Cir. 1977).

32. For a listing of all factors which may be considered in determining extreme hardship, see 2 C. Gordon & H. Rosenfield, supra note 13, at 7-194.3. The Board has noted that "[d]iscretionary determinations must be based on the circumstances present in the case under consideration. Favorable and unfavorable factors must be weighed." Matter of Riccio, 15 L & N. Dec. 548, 549 (1976).
upon deportation. Few courts, though, have recognized as worthy of consideration the personal consequences which emanate naturally from this one source, including decreased health care, a loss of educational opportunities, and possible malnutrition. Where an alien asserts hardship to a United States citizen child departing with the deportable parent(s), the courts will not infer particular consequences from the fact of the relocation. Rather, the alien must not only allege any educational deprivation, emotional difficulty, or lack of medical care which would ensue upon the child's departure with the deportable parent(s), but will also be required to demonstrate that such benefits are unavailable in the country to which the family would relocate.

The Board and the courts have thus visited their struggles with "extreme hardship" upon the aliens appearing before them. Even when presented with the most compelling circumstances, the adjudicative body often finds that the alien has failed to demonstrate "extreme hardship." The criteria are nebulous and difficult to establish. The unsuccessful alien's only additional recourse may be a change of circumstances allowing the presentation of new evidence in support of a motion to reopen.

The alien moving to reopen deportation proceedings must establish a prima facie case of eligibility before addressing extreme hardship. While this appears upon preliminary examination to be a lesser burden than the establishment of extreme hardship, the task confronting the alien may actually be substantial. Although the alien may appeal a Board denial of his motion to the

34. See, e.g., Montenegro-Davila v. INS, No. 80-1191 (3d Cir. Nov. 26, 1980).
35. See, e.g., Mejia-Carillo v. INS, 656 F.2d 520 (9th Cir. 1981); Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981).
36. But see Mejia-Carillo v. INS, 656 F.2d 520 (9th Cir. 1981).
37. But see Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981).
38. See Mejia-Carillo v. INS, 656 F.2d 520 (9th Cir. 1981); Vaughn v. INS, 643 F.2d 35 (9th Cir. 1981).
39. See Gomez-Gomez v. INS, 681 F.2d 1347 (11th Cir. 1982); Braithwaite v. INS, 633 F.2d 1657 (2d Cir. 1980); Patel v. INS, 638 F.2d 1199 (9th Cir. 1980); Prapavat v. INS, 638 F.2d 87 (9th Cir. 1980).
40. See Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981); Banks v. INS, 594 F.2d 760 (9th Cir. 1979).
41. See Banks v. INS, 594 F.2d 760 (9th Cir. 1979).
42. See infra note 83 and accompanying text.
court of appeals,43 \textit{Wang} has seriously curtailed the parameters of the appellate court's authority with respect to such motions.

\textit{Immigration and Naturalization Service v. Wang}

\textit{Wang} involved a husband and wife, citizens of Korea, who entered the United States as "treaty traders" in 1970. They were found deportable in 1974 as individuals who had overstayed their authorized visit and were granted voluntary departure. In 1975 they moved to reopen their deportation proceedings to apply for adjustment of status. Following a finding of ineligibility, they appealed to the Board. The Board dismissed their appeal and they subsequently moved to reopen to apply for suspension of deportation. The Board denied the motion, finding that the Wangs had failed to establish a prima facie case of eligibility to justify suspension.44

The court of appeals reversed, finding that the Wangs had established a prima facie case in support of the motion. The court addressed at length the requirements of a successful motion to reopen and the standard applicable to Board rulings on such motions. The alien must allege new facts supported by affidavits or other evidentiary material.45 Conclusory allegations were deemed insufficient to require a reopening and afford the alien a hearing. The facts had to be such as to establish eligibility and potentially affect the outcome of the proceedings. The court required the Board to include in its decision a discussion of the evidence upon which it based its decision to grant or to deny the alien's request.46

The Ninth Circuit also found that, contrary to the opinion of the Board, the Wangs had established the existence of extreme hardship.47 The court found that the alien need allege extreme hardship to only one of the persons enumerated in the statute, but admonished the Board to consider as well the aggregate effect of deportation on all individuals alleged by the alien to suffer extreme hardship as a result.48 The court further noted that the de-

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44. See Wang v. INS, 622 F.2d 1341, 1344 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981).
45. 8 C.F.R. § 3.2 (1979), construed in Wang v. INS, 622 F.2d 1341, 1344 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981).
47. See Wang v. INS, 622 F.2d 1341, 1349 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981).
48. The language of the statute is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its con-
termination of the existence of a prima facie showing of extreme hardship was to be based upon the facts of each individual case.49

The Wangs had claimed that their children would encounter serious economic, educational, and cultural deficiencies if they were forced to leave the United States with their parents. The Board found that this consideration did not constitute the degree of hardship contemplated by the statute. The court noted that both children had always lived in the United States and that neither spoke Korean. The court acknowledged that the existence of a United States citizen child would not confer favored status on an alien nor validate an invalid claim of extreme hardship or automatically establish extreme hardship to the child. The court found, however, that the Board had failed altogether to consider whether the parents' deportation would, in fact, cause the child extreme hardship.50

The Wangs further alleged that deportation would force them to liquidate their United States-held assets to their detriment. The Board found that a mere showing of economic hardship was equally insufficient to establish extreme hardship within the

49. The determination whether a prima facie showing of extreme hardship has been made, like the post-hearing discretionary determinations whether extreme hardship actually exists and whether, if it does, deportation should be suspended, "is not bound by hard and fast rules; each case must be decided on its own facts. . . . The Board should avoid drawing fine lines of distinction, and should also avoid acting inconsistently with guidelines provided by earlier decisions." Id. at 1347 (citing Banks v. INS, 594 F.2d 760 (9th Cir. 1979); Urbano de Malaluan v. INS, 577 F.2d 589, 595 (9th Cir. 1978)).

Even where an alien establishes a prima facie case of eligibility so as to mandate a hearing, it does not mandate a finding of eligibility. Further, proof of eligibility does not require the granting of relief, but merely allows the Attorney General to exercise his discretion to determine if the alien merits relief. See Wang v. INS, 622 F.2d 1341, 1347 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981).

50. See Wang v. INS, 622 F.2d 1341 (9th Cir. 1980), rev'd, 450 U.S. 139 (1981). "The possibility of inconvenience to the citizen child is not a hardship of the degree contemplated by the statutory language of extreme hardship." Id. at 1348. The courts have rejected the argument that deportation of the parent would amount to de facto deportation of the child and thus violate the constitutional rights of the United States citizen child. See Aguilar v. INS, 638 F.2d 717 (5th Cir. 1981); Mamanee v. INS, 566 F.2d 1103 (9th Cir. 1977); Lopez v. Franklin, 427 F. Supp. 345 (E.D. Mich. 1977).
meaning of the statute. The court noted that economic hardship need not be totally eliminated from consideration, but could be considered in conjunction with additional factors present to determine the existence of extreme hardship.

The United States Supreme Court reversed the decision of the Ninth Circuit, holding that the court of appeals had erred in granting the motion to reopen. The Court acknowledged the difficulty involved in construing the term “extreme hardship” but refused to adopt a liberal construction of its meaning. It found instead that the Immigration and Nationality Act committed the definition and construction of “extreme hardship” to the Attorney General and his delegates. It further noted that the Attorney General acted within his authority to adopt a narrow interpretation of “extreme hardship.”

THE AFTERMATH OF WANG

Prior to Wang, courts had demonstrated uncertainty as to the appropriate standard for judicial review of rulings on suspension of deportation. One court had distinguished between the dis-

51. Accord, Patel v. INS, 638 F.2d 1199 (9th Cir. 1980); Yeung Ying Cheung v. INS, 422 F.2d 43 (3d Cir. 1970); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968). The Board of Immigration Appeals has stated:
Conditions in an alien’s homeland are relevant in determining hardship. . . . It is obvious, however, that laying critical emphasis on the economic and political situation would mandate a grant of relief in most cases for it is a demonstrable fact that despite the beleaguered state of our own economy, the United States enjoys a standard of living higher than that in most of the other countries of the world. For this reason, most deported aliens will likely suffer some degree of financial hardship. Nonetheless, we do not believe that Congress intended to remedy this situation by suspending the deportation of all those who will be unable to maintain the standard of living at home which they have managed to achieve in this country. Clearly, it is only when other factors such as advanced age, severe illness, family ties, etc. combine with economic detriment to make deportation extremely hard on the alien or the citizen or permanent resident members of his family that Congress has authorized suspension of deportation.

52. 622 F.2d at 1349.
54. The crucial question in this case is what constitutes “extreme hardship.” [T]he Act commits [the] definition in the first instance to the Attorney General and his delegates and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute . . . .

. . . .

The Attorney General and his delegates have the authority to construe “extreme hardship” narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the “extreme hardship” language, which itself indicates the exceptional nature of the suspension remedy.

_Id._ at 144-45.
55. _E.g._, Braithwaite v. INS, 633 F.2d 1657, 1659-60 (2d Cir. 1980).
cretionary decision to grant suspension and the determination of eligibility under the statute. The court required that the latter determination be “supported by reasonable, substantial, and probative evidence on the record considered as a whole,” and allowed the former determination to be overturned only upon a showing of an abuse of discretion. It would appear upon initial examination that the judicial determination could be approached from two levels, requiring the application of the substantial evidence test to findings of fact and an “arbitrary, capricious or abuse of discretion” test to the exercise of discretion. However, the questions of fact and discretion in such cases are often inseparable, thereby rendering such a distinction impracticable.

Post-Wang decisions have uniformly held that the abuse of discretion test applies to review of both denials of motions to reopen and to adminis-

58. Id. “Abuse of discretion” is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below has committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961) (quoting In re Josephson, 218 F.2d 174, 182 (1st Cir. 1955)). This court appears to equate the “clearly erroneous” test with the “arbitrary-capricious” (abuse of discretion) test, the same equation which the Court recited and followed in the later case of Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). For a discussion of the faulty logic of this equation, see K. Davis, Administrative Law Treatise § 29.01 (Supp. 1980); K. Davis, Administrative Law of the Seventies § 29.00 (1976). Other courts have noted that:

[t]here is no exact measure of what constitutes abuse of discretion. It is more than the substitution of the judgment of one tribunal for that of another. Judicial discretion is governed by the situation and circumstances affecting each individual case. “Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances.”


59. See 2 C. Gordon & H. Rosenfield, supra note 13, at 7-166.
60. See K. Davis, supra note 58, § 29.01; 2 C. Gordon & H. Rosenfield, supra note 13, at 8-123.
61. The Supreme Court in INS v. Wang . . . did not explicitly identify the standard of review of a denial of a motion to reopen. The Court appeared to suggest, however, that the abuse of discretion standard applies and that
trative determinations of eligibility for suspension.62

Courts since Wang have found an abuse of discretion when reviewing administrative determinations of extreme hardship where the administrative body fails to consider all relevant aspects of the individual's claim63 or is unduly influenced by factors tangential to the statutory requirements of eligibility.64 The courts similarly find an abuse of discretion in cases involving motions to reopen where they find that the procedures followed by the Board in deciding the motion constitute an improper exercise of its discretion.65 The various circuits differ widely in their construction of "abuse of discretion." The application of different standards and factual considerations in reviewing motions to reopen give rise to inconsistent results in the different circuits.

The Sixth Circuit gives a narrow construction to the Wang holding. Balani v. INS66 involved the deportation of an Indian citizen. Balani had maintained an ongoing business in the United States for a period of seven years and alleged that this business was the sole support for himself and his family. All of his close relatives, including a United States citizen child, resided legally in the United States. The court acknowledged that the Board had considered the alleged hardship to the child separately from the possible economic loss to the petitioner,67 but refused to find the failure to consider the factors cumulatively an abuse of discretion.

the BIA has discretion to deny a motion to reopen even if the alien establishes a prima facie case of eligibility for suspension of deportation. Sida v. INS, 665 F.2d 851, 854 (9th Cir. 1981); see Balani v. INS, 669 F.2d 1157, 1161-62 (6th Cir. 1982); Reyes v. INS, 673 F.2d 1087, 1089 (9th Cir. 1981). Cases prior to Wang found the denial of a motion to reopen following a prima facie showing of eligibility an abuse of discretion. See, e.g., Jong Shik Choe v. INS, 597 F.2d 168, 170 (9th Cir. 1980).

62. But see Prapavat v. INS, 638 F.2d 87, 89 n.1 (9th Cir. 1980). The court in this case found the abuse of discretion standard applicable to administrative determinations of extreme hardship but seemed to characterize the requirement of a "prima facie showing of eligibility" for motions to reopen as a separate and distinct standard of review.

63. See, e.g., Mejia-Carillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981); Santana-Figueroa v. INS, 644 F.2d 1354, 1356 (9th Cir. 1981); Guadarrama-Rogel v. INS, 638 F.2d 1228, 1229 (9th Cir. 1981).

64. See, e.g., Santana-Figueroa v. INS, 644 F.2d 1354, 1356 n.2 (9th Cir. 1981) (citing with approval Chung v. INS, 602 F.2d 608, 612 (3d Cir. 1979)).

65. See, e.g., Reyes v. INS, 673 F.2d 1087, 1090 (9th Cir. 1981); Ravanco v. INS, 658 F.2d 169, 176 (3d Cir. 1981). The Board's function at the motion to reopen stage of proceedings is to determine whether the alien has established a prima facie case of eligibility for relief. The motion to reopen serves as a preliminary step which enables the Board to eliminate those claims which clearly lack merit and are capable of a resolution without a hearing. The Board's function at this stage of the proceedings does not include a determination of the alien's eligibility for suspension of deportation. Reyes v. INS, 673 F.2d at 1089.

66. 669 F.2d 1157 (6th Cir. 1982).

67. Id. at 1160 n.4.
The court read *Wang* as indicating that even a cumulative weighing of hardship to a citizen child together with economic hardship to the petitioner would not establish extreme hardship as a matter of law. The *Balani* court indicated that absent the establishment of extreme hardship as a matter of law, it could not justify a reversal of the Board's decision as an abuse of discretion.  

*Ravancho v. INS* presented a similar fact pattern to the Third Circuit. The *Ravancho* court distinguished the case from *Wang*, noting that unlike the Wangs, the Ravanchos had filed appropriate affidavits and documentary evidence. The court proceeded to find an abuse of discretion based upon the Board's consideration of each factor separately rather than cumulatively.

The Fifth and Ninth Circuits are in disagreement as to the proper factors for the Board to consider in ruling on a motion. The Fifth Circuit in *Men Keng Chang v. Jiugni* permitted the Board to consider the means by which the alien accrued the seven years' physical presence. The Ninth Circuit in *Reyes v.*

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68. Given the Supreme Court's summary reversal of the Ninth Circuit's determination of extreme hardship in *Wang*, which was based on a consideration of hardship to the citizen child together with the hardship to the aliens, there is no basis, in the instant case, for concluding that the Board's determination of no extreme hardship was an abuse of discretion on the ground that the Board considered the hardship to the Petitioner's citizen child, separate and apart from the economic hardship to the Petitioner, himself. The Supreme Court's reversal in *Wang* clearly demonstrates that extreme hardship is not established as a matter of law when purported hardships to citizen children are considered collectively with, as opposed to separately from, the hardships to the alien seeking to avoid deportation. Thus, even if this court were to reverse the Board's decision on the ground that it had erred in failing to consider all factors of hardship presented herein, as an integrated whole, our decision would be susceptible to the same summary reversal as visited upon the Ninth Circuit in *Wang*, on the theory that these factors together do not constitute extreme hardship as a matter of law, thereby warranting reversal of the Board's decision as an abuse of discretion.


70. Both the husband and the wife overstayed their visas. They sought to establish extreme hardship for the purposes of suspension based upon economic hardship and hardship to their child. The child knew only English and deportation would have been to a non-English speaking country. Mrs. Ravancho had a brother and sister who were both lawful permanent residents of the United States. Mr. Ravancho had a brother who was a permanent resident. At the motion to reopen, the Ravanchos introduced a psychiatric evaluation indicating the effect of the move on their daughter's mental, physical, and emotional stability.

71. *Id.* at 175-76.


73. *Id.* at 278 (citing with approval *Faddah v. INS*, 553 F.2d 491, 496 (5th Cir. 1977)).
INS\textsuperscript{74} expressed "grave doubts" as to the appropriateness of such considerations.\textsuperscript{75}

The Ninth Circuit has been the most liberal in its construction of "abuse of discretion," often "strain[ing] to find reasons to reverse the Board despite Wang . . . ."\textsuperscript{76} That court has found an abuse of discretion, for example, where the Board addresses only a portion of the newly offered evidence rather than all factors relevant to the determination of extreme hardship;\textsuperscript{77} where it weighs each relevant factor in isolation, rather than assessing the cumulative weight;\textsuperscript{78} where it arbitrarily requires corroborating evidence;\textsuperscript{79} and where it fails to address new evidence presented and to state reasons for its decisions.\textsuperscript{80} Despite this liberal approach, however, the Ninth Circuit has acknowledged that the Board does not necessarily abuse its discretion in denying a motion to reopen, even while conceding the petitioner's eligibility for relief.\textsuperscript{81}

\textsuperscript{74} 673 F.2d 1087 (9th Cir. 1981).

\textsuperscript{75} Id. at 1090-91. The court declined to decide the issue, finding that its resolution was unnecessary within the context of the case.

\textsuperscript{76} Ahn v. INS, 651 F.2d 1285, 1287 n.1 (9th Cir. 1981).

\textsuperscript{77} See Sida v. INS, 665 F.2d 851 (9th Cir. 1981); accord Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981).

\textsuperscript{78} See, e.g., Prapatav v. INS, 638 F.2d 87 (9th Cir. 1980). Cases prior to Wang also found that such action constituted an abuse of discretion. See, e.g., Villena v. INS, 622 F.2d 1352, 1360 (9th Cir. 1980).

\textsuperscript{79} See, e.g., Reyes v. INS, 673 F.2d 1067, 1090 (9th Cir. 1981).

\textsuperscript{80} This approach does not compel the BIA to grant motions to reopen where a prima facie case is established. Rather, this approach compels the BIA to address the evidence presented and state the reasons why, for example, the evidence is not sufficient under the applicable regulations; why a prima facie case has not been made out; or why if a prima facie case is made out, a reopening is not warranted.

\textsuperscript{81} "If any meaning is to be given the Board's discretion to deny suspension despite an applicant's eligibility under the statute . . . we cannot mandate that suspension be granted simply upon a showing of such hardship." Vaughn v. INS, 643 F.2d 35, 37 (9th Cir. 1981).

The Wang court noted that regulations do not affirmatively require that the Board reopen proceedings under any circumstances. See 450 U.S. at 143 n.5. Judge Wallace in his dissent in Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (Wallace, J., dissenting), stated that the INS could in its discretion require proof beyond that sufficient for a prima facie case.

If INS discretion is to mean anything, it must be that INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.
The Board has since adopted this construction and has avoided a determination of eligibility for relief where it found that the application would be denied as a matter of discretion, whether or not the alien established eligibility.

The Board itself has had occasion since Wang to articulate the standard upon which it relies in ruling on a motion to reopen. Where proceedings have been finalized for an extended period of time prior to the motion and where the affidavits submitted in support of the motion contain significant factual omissions, the Board will consider it "warranted and reasonable to require a clear, unambiguous showing of evidentiary support to justify reopening with all its attendant delays."

**WHAT NEXT?**

Despite the fears voiced by several courts, suspension of deportation has not been a readily available remedy for aliens illegally present in the United States. Even where the alien has fulfilled the good moral character and physical presence requirements, the establishment of extreme hardship may remain an unattainable vision. With the exception of the Ninth Circuit, the Supreme Court's decision in Wang effectively curtailed whatever liberality the courts of appeals had been demonstrating in ruling upon motions to reopen. The courts have been increasingly reluctant since Wang to find an abuse of discretion in the denials of motions to reopen, and the Board has vehemently reasserted its authority to deny such motions in the exercise of its discretion. In light of the often harsh consequences of deportation and the ameliorative purposes underlying the relevant legislation, this narrowing construction is unfortunate and ill-advised.

One writer has suggested that the impact of Wang be limited

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83. See id. (citing with approval INS v. Bagamasbad, 429 U.S. 24 (1976)); see also Hibbert v. INS, 554 F.2d 17, 21-22 (2d Cir. 1977).
85. See, e.g., INS v. Wang, 450 U.S. 139, 144-45 (1981); Villena v. INS, 622 F.2d 1352, 1362 (9th Cir. 1980) (Wallace, J., dissenting); Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977).
86. See, e.g., Balani v. INS, 669 F.2d 1157, 1162 n.5 (6th Cir. 1982).
87. See, e.g., Balani v. INS, 669 F.2d 1157 (6th Cir. 1982).
through application to motions to reopen only. Such a construction, however, would establish two standards for review of suspension decisions, one for those seeking review of decisions made within the context of deportation proceedings, and a second for those seeking review of decisions regarding motions to reopen. This differentiation would presumably be subject to attack, as it would create two classes within a group of persons seeking the same type of relief.

As currently construed, the suspension provision and related regulations allow the Attorney General to exercise discretion at three levels: 1) in finding the existence of extreme hardship as a result of the individual's deportation; 2) in suspending deportation; and 3) in ruling upon a motion to reopen. In *Wang*, the Supreme Court effectively cut off judicial review of the definition and determination of "extreme hardship," thereby allowing instances of injustice to remain uncorrected. There currently are no guidelines to aid the Attorney General and his delegates in defining that term. With severely limited judicial review of these decisions, the need for regulations has become all the more critical in order to provide a standard and to promote consistency. The

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90. See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike").
92. The *Wang* Court actually committed the definition of the term "extreme hardship" to the Attorney General and his delegates "in the first instance," implying that such decisions are reviewable. *INS v. Wang*, 450 U.S. 139, 144 (1981). Given the actual result of *Wang*, however, and court decisions since then, it would appear that determinations as to the existence of extreme hardship are not reviewable. The nonreviewability of such determinations may have serious consequences:

Although the conclusion is clear that some discretionary power exercised by agencies is so far "committed" to agency discretion as to be unreviewable and some is not, the problem of determining what action is so committed and what is not is often subtle, elusive and unclear . . . .

The most important problem about action committed to agency discretion by law is the extent to which courts should refrain from entering highly specialized areas of administration for the purpose of determining whether discretion has been abused. When administrators are specialists, when the subject matter is within their specialization, when the factors that may have influenced their discretionary determination are numerous and complex, and when the judges as generalists have little confidence in their own capacity to provide a useful check, the natural tendency of judges is to get rid of the challenge of the administrators' discretion by reciting that the action is committed to agency discretion by law and that it is therefore unreviewable. Yet *whenever a court so holds, a party who thinks that discretion has been abused is denied a meaningful judicial check*.

K. Davis, *supra* note 18, at 64-65 (emphasis added).
commonality of the factors presented for consideration in determining extreme hardship provide a foundation for the formulation of such guidelines. The regulations must further provide, as courts are now demanding with respect to motions to reopen, that the Board in its determinations regarding extreme hardship discuss each factor separately and in conjunction with all other factors presented. This requirement would result in greater attention to each case on its own merits and greater consistency between cases, as well as facilitate judicial review.

The Board routinely denies suspension of deportation when the allegation of extreme hardship is economic in nature. Adjudicative bodies have been reluctant to draw a distinction between "mere economic detriment" and economic hardship so severe as to constitute "extreme hardship." One court has deemed the loss of one's investment and difficulty in finding employment in one's profession as "mere economic detriment" insufficient to rise to the level of "extreme hardship." The same court noted, however, that there exists "a qualitative difference between 'mere economic detriment' and the complete inability to find employment." The complete inability to find employment in the country of deportation may indeed constitute extreme hardship if taken together with its attendant consequences of decreased health care, malnutrition, and possible starvation. Although the Board has expressed a willingness to consider economic detri-

93. Suspension applications routinely present (1) the existence of a United States citizen or permanent resident child who may suffer emotional trauma, a reduction of educational benefits, and/or decreased medical care as a result of displacement with the deportable parent; (2) the existence of a United States citizen or permanent resident child who may suffer emotional harm if separated from a deported parent; (3) the unavailability of adequate medical care for the deported alien; (4) the unavailability of employment within the alien's field of expertise in the country of deportation; (5) the unavailability of any employment within the country of deportation, with all attendant consequences including malnutrition, starvation, and even death; (6) a decrease in the standard of living of close United States citizen or permanent resident relatives of the alien who are dependent on the deportable alien for support; (7) the alien's loss of a substantial investment in the United States; (8) the United States' loss of an employer or an individual performing needed services; and/or (9) a decrease in the standard of living which the alien will encounter abroad.

94. See supra note 29.
95. Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981).
96. Id. at 1356.
ment together with advanced age and/or severe illness to find the extreme hardship necessary for suspension of deportation,\textsuperscript{97} it has, in fact, not done so.\textsuperscript{98} The regulations must reflect the realities of existence and distinguish between those factors which constitute “mere economic detriment” and those which, either taken separately or in conjunction with each other, rise to the level of “extreme hardship.” Extreme hardship must necessarily encompass, as a sole consideration, the alien’s total inability to find employment where the alien has no other demonstrable means of support.

In addition to guidelines for defining and establishing extreme hardship, the proposed regulations must also establish the standard of evidence necessary to support such a claim. The Board currently appears to equate “a clear, unambiguous showing of evidentiary support” with “a clear and unambiguous showing of prima facie eligibility for relief” and with “a significant showing of a likelihood of success on the merits.”\textsuperscript{99} This equation is not workable. Logically, “a clear, unambiguous showing of evidentiary support” may not provide “a significant showing of a likelihood of success on the merits.” Both of these standards encourage the Board to engage in more than a preliminary examination of the merits of the alien’s claim, a task properly left to the immigration judge. Further, the requirement of “a significant showing of a likelihood of success on the merits” appears to require more than the Board’s previously-formulated standard requiring only a “prima facie” showing of eligibility in order to reopen.\textsuperscript{100}

Varying standards of proof cannot exist for different cases; such standards must be uniform. Such uniformity is properly addressed by the promulgation of regulations. Regulations could also enumerate which factors are properly considered in ruling upon the motion to reopen. These regulations would result in greater uniformity in judicial review, which is currently in disarray due to the emphasis placed on various factors by the different circuits.\textsuperscript{101}

The promulgation of guidelines, to be truly effective, must address both the exercise of discretion in finding extreme hardship and in ruling on motions to reopen. Such regulations would pro-

\begin{itemize}
  \item \textsuperscript{97} Matter of Anderson, 16 I. & N. Dec. 596, 598 (1978).
  \item \textsuperscript{98} See Montenegro-Davila v. INS, No. 80-1191 (3d Cir. Nov. 26, 1980).
  \item \textsuperscript{99} Matter of Reyes, I.D. No. 2907, at 5 (1982).
  \item \textsuperscript{100} See supra note 19.
  \item \textsuperscript{101} See supra notes 63-84 and accompanying text.
\end{itemize}
vide a reliable index and enhance the consistency of the resolutions. Justice and the ameliorative intent behind the suspension of deportation provisions would thus be served.102

102. "The main answer our legal system gives to the question of how we can improve the quality of justice in individual cases is by building a system of rules and principles to guide decisions in particular cases." K. Davis, supra note 18, at 444.