Suspension of Deportation: A Revitalized Relief for the Alien

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Suspension of deportation is one form of discretionary relief available to a deportable alien. To be eligible for this relief, the alien must prove, among other things, his continuous physical presence in the United States for a specified time. This Comment analyzes Kamheangpatiyooth v. INS, which dealt with the question whether a brief and temporary absence from the United States interrupts continuous physical presence. The author also discusses those factors which significantly affect continuous physical presence.

INTRODUCTION

Suspension of deportation is one remedy available to an alien involved in a deportation proceeding. Suspension of deportation not only protects the alien from physical deportation, but also adjusts the alien's status to that of an "alien lawfully admitted for permanent residence." Because this remedy allows the alien to legally remain in the United States, it is extremely valuable.

3. See Comment, Suspension of Deportation: Illusory Relief, 14 SAN DIEGO L. REV. 229, 231 (1976). "The effect of a grant of suspension of deportation is to extinguish the existing grounds for deportation; they may not be invoked subsequently to exclude or deport the alien (citing In re Paraskos, 10 I. & N. Dec. 491, 492-93 (1964)). The alien's status is adjusted from deportable to 'lawfully admitted for permanent residence.' " Id. at 233.

Other discretionary remedies, such as adjustment of status, I & N. Act § 245, 8
Before an alien may obtain suspension of deportation, he must establish a prima facie case of eligibility. One of the elements of a prima facie case is continuous physical presence in the United States during a statutorily specified time period. Occasionally, a long-term resident alien is temporarily and briefly absent from the United States during the statutory period. If the Immigration and Naturalization Service (INS) attempts to deport an alien subsequent to such an absence, and the alien seeks suspension of deportation, the question presented is whether the brief and temporary absence sufficiently interrupts the continuity of the

U.S.C. § 1255 (1976), or registry, id. § 249, 8 U.S.C. § 1259 (1976), permit the alien to remain in the United States as a legal resident. Since these remedies do not require Congressional ratification of the discretionary grant of relief, they are preferred to suspension of deportation. See generally Gordon, The Need to Modernize Our Immigration Laws, 13 SAN DIEGO L. REV. 1, 24-25 (1975). But in circumstances where the preferred remedies are unavailable, suspension of deportation may be the prime remedy protecting the alien from the harsh consequences of deportation. See 57 INTERPRETER RELEASES 76, 77 (1980): “Although no longer . . . the preeminent mode of discretionary relief, . . . suspension of deportation remains important for a small number of aliens for whom no other administrative solution is available.”

But cf. 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(a)(4) (rev. ed. 1979): “Suspension of deportation no longer is as important as it once was in the arsenal of discretionary remedies, since its impact is considerably diminished by the expanded authority to grant adjustments of status.”

4. The burden of proof is on the alien. See, e.g., Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), cert. denied, 365 U.S. 860 (1961).

5. To establish a prima facie case, the alien must prove the existence of statutorily required conditions, generally described as: a) the alien’s continuous physical presence in the United States for a specified period, 8 U.S.C. § 1254(a), (b), 8 U.S.C. § 1254(a), (b) (1976); b) his good morals during the specified period and at the time of the hearing, id. § 244(a), 8 U.S.C. § 1254(a) (1976); see generally id. § 101(f), 8 U.S.C. § 1101(f) (1976); c) the extreme hardship to the alien or to his spouse, parent, or child (or grandchild, Tovar v. INS, 794 (3d Cir. 1980)) who is a United States citizen or an alien lawfully admitted for permanent residence that would result from deportation, id. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976). (In other cases of more severe deportable misconduct, the alien must show “exceptional and extremely unusual hardship.” Id. § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1976)); d) the alien is not in a disqualified classification, id. § 244(f), 8 U.S.C. § 1254(f) (1976); see also 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(c) (rev. ed. 1979); 55 INTERPRETER RELEASES 184, 192 (1978).

In addition to proving a prima facie case of eligibility, the alien must also receive a favorable exercise of discretion by the Attorney General or his representative. See 2 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9(e) (rev. ed. 1979). Also, congressional ratification of the Attorney General’s decision is necessary for finalization of the suspension relief. See id. § 7.9(f)(3). See generally 57 INTERPRETER RELEASES 76, 77-79 (1980).

6. Compare I. & N. Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976) with id. § 244(a)(2). Under § 244(a)(1) the alien must be “physically present in the United States for a continuous period of not less than seven years immediately preceding the date of application for suspension. Under § 244(a)(2), which applies to more severe deportable misconduct, the minimum time period is “ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation . . . .” See generally Comment, Suspension of Deportation: Illusory Relief, 14 SAN DIEGO L. REV. 229, 236-39 (1976).
alien’s physical presence. If a brief and temporary absence does interrupt the alien’s continuous physical presence, the alien cannot prove the existence of an essential element of his prima facie case of eligibility for relief. The result is that suspension of deportation is unavailable as a remedy in a deportation proceeding.

This specific issue was addressed in the recent decision of Kamheangpatiyooth v. INS. Kamheangpatiyooth was lawfully admitted to the United States as a student. Six years and eleven months after his initial entry, he left the United States for a thirty day trip to his native Thailand. The trip occurred during a semester break from school, and his sole purpose was to visit his critically ill mother. Prior to leaving, he obtained an INS form attesting to his enrollment at an American university. While in Thailand he obtained a new student visa. Almost six years after his return from this trip, the INS instituted deportation proceedings. In the course of the proceedings Kamheangpatiyooth applied for suspension of deportation. The immigration judge held that Kamheangpatiyooth failed to establish a prima facie case because his physical presence in the United States was not continuous during the statutory period; therefore, suspension of deportation was unavailable. The Board of Immigration Appeals (BIA) affirmed. The Ninth Circuit reversed; its opinion focused on the relationship between continuous physical presence and hardship.

This Comment will analyze the continuous physical presence element required for an alien’s prima facie showing of eligibility for suspension of deportation. A discussion of the important factors affecting physical presence and the effects of Kamheangpatiyooth will be presented. Because modern courts have shown a lenient attitude toward suspension applicants, this discretionary remedy will become a revitalized relief for the alien.

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7. 597 F.2d 1253 (9th Cir. 1979).
9. The Immigration and Naturalization Service sought to deport Kamheangpatiyooth on the ground he stayed in the United States beyond his authorized date. Since this ground is not “severe” deportable misconduct, the seven year period for continuous physical presence applies. Id.
11. 597 F.2d 1253 (9th Cir. 1979).
In immigration law, the word "entry" is a term of art which comprehends both the initial entry and any subsequent re-entry. The early case law strictly interpreted this term despite harsh results to aliens. In *United States ex rel. Volpe v. Smith*, the Supreme Court upheld an order deporting a resident alien who re-entered the United States after a brief visit to Cuba, notwithstanding the legality of his original entry and his twenty-four year residency in the United States. The Court stated that "'entry'... includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."

Most courts followed the strict definition of "entry" prescribed in *Volpe*. However, in *Di Pasquale v. Karnuth*, the Second Circuit rejected this rigid construction of "entry" as applied to a resident alien who re-entered the United States during an overnight train journey from Buffalo to Detroit via Canada. The court held that deporting an alien, without proof that the alien actually "knew [that he was leaving] or had any intention of leaving the United States," would be irrational and capricious.

Shortly thereafter, in *Delgadillo v. Carmichael*, the Supreme Court refined its definition of "entry." The Court held that a voluntary departure to, and return from, a foreign country was necessary to constitute a re-entry. In *Delgadillo*, a resident alien merchant seaman had embarked on an intercoastal voyage from Los Angeles to New York City during World War II. En route, the ship was torpedoed, and the alien "was catapulted into the ocean, rescued, and taken to Cuba" for one week to recuperate. Clearly, the alien would not have made an "entry" nor would he have been subject to deportation if the intercoastal voyage had not been interrupted by an enemy ship. It was "the exigencies of war, not his voluntary act, [that] put him on foreign soil."

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12. An "entry" is an event which interrupts an alien's continuous physical presence.
15. *Id.* at 425.
16. *See*, e.g., Guarneri v. Kessler, 98 F.2d 580 (5th Cir.), cert. denied, 305 U.S. 646 (1938); Ward v. De Barros, 75 F. 2d 34 (1st Cir. 1935); Taguchi v. Carr, 62 F.2d 307 (9th Cir. 1932); Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931).
17. 158 F.2d 878 (2d Cir. 1947). During the time the train traveled in Canada, Di Pasquale was asleep. *Id.* at 878. *Di Pasquale* is contrary to Zurbrick v. Borg, 47 F.2d 690 (6th Cir. 1931), which held an "entry" occurred under similar facts.
18. 158 F.2d at 879.
20. *Id.* at 390.
21. *Id.* at 391.
Therefore, the Court held that subjecting the alien to the harsh consequences of deportation, under the circumstance of an involuntary departure, would be “too irrational” and “capricious” to conform to the congressional purposes of the deportation provision.22

In light of *Di Pasquale* and *Delgadillo*, Congress defined “entry” in the 1952 Immigration and Nationality Act.23 As applied to a returning alien who had a lawful permanent residence in the United States, “entry” occurred only if the departure was intended and voluntary.24 But, despite easily anticipated harsh re-

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22. *Id.* In facts somewhat similar to *Delgadillo*, the Ninth Circuit held that an alien returning to Seattle from seasonal cannery work in Alaska did not make an entry when the vessel he was on made an unscheduled three-hour stop at Victoria, British Columbia. Yolko Chai v. Bonham, 165 F.2d 207 (9th Cir. 1947). In *Carmichael v. Delaney*, 170 F.2d 239 (9th Cir. 1948), no entry occurred when an alien, returning to the United States from wartime service as a merchant seaman, was aboard a vessel which made several stops at foreign ports pursuant to Navy orders.

A different example of an involuntary departure, resulting in no entry, is found in *In re Farmer*, 14 I. & N. Dec. 737 (1974) (permanent resident alien's husband bought a one-way ticket and placed her on a plane bound for Italy while she was suffering from impaired mental capacity). See also *In re Yam*, 16 L. & N. Dec. 355 (1978) (alien found floating in the Niagara River and brought to an American hospital while unconscious made no entry because his crossing into the United States was not voluntary).

23. The term “entry” means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held entitled to such exception.

24. Section 101(a)(13) defines the term “entry.” Frequent reference is made to the term “entry” in the immigration laws, and many consequences relating to the entry and departure of aliens flow from its use, but the term is not precisely defined in the present law. Normally an entry occurs when the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the precise-ness of the term “entry” has not been found to be as apparent. Earlier judicial constructions of the term..., as set forth in *Volpe v. Smith* (289 U.S. 422 (1933)), generally held that the term “entry” included any coming of an alien from a foreign country to the United States whether such coming
results for some returning aliens, Congress refused to exclude from the definition of “entry” an alien’s return following a brief and temporary absence.25 Eleven years later, the Supreme Court broadly interpreted the term “entry” in the split decision of Rosenberg v. Fleuti.26 In its holding, the Supreme Court ignored the desires of Congress and the apparently clear statutory definition of “entry.”27

Fleuti, a lawfully admitted resident alien, visited Mexico for a few hours and then returned to the United States. Fleuti intended (in the normal sense of the word) to travel into Mexico and knew that he was crossing the international border. The Court held, however, that this “innocent, casual; and brief” trip was not an intended departure because it did not meaningfully interrupt the alien’s permanent residence.28 In addition to the brevity, innocent purpose, and casual nature of the absence, the Supreme Court recognized that other factors might be relevant to the determination of a meaningful interruption.29

25. The dissent in Rosenberg v. Fleuti stated that “numerous organizations unsuccessfully urged that the definition [of entry] be” made more lenient so as to exclude an alien’s “return, after a temporary absence, to an unrelinquished domicile” in the United States. 374 U.S. 449, 467 (1963) (Clark, J., dissenting) (discussing Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess. 143 (1951)).


27. Id. See Gordon, Recent Developments in Judicial Review of Immigration Cases, 15 SAN DIEGO L. REV. 9, 18 (1977):

With characteristic severity, the sponsors of the McCarran-Walter Act [I. & N. Act] sought to halt the development of a more rational principle by defining entry as “any coming of an alien into the United States . . . , whether voluntary or otherwise,” unless he could establish that his departure or his presence in a foreign state was not voluntary. However, this legislative effort to codify an unsound premise did not deter the Warren Court from seeking to forge a more reasonable principle.

But see Rosenberg v. Fleuti, 374 U.S. 449, 468 (1963) (Clark, J., dissenting). The dissent indicated that the United States Supreme Court had already construed the word “entry” after the enactment of the Immigration and Nationality Act of 1952. The dissent stated “that the word ‘entry’ retained its plain meaning, . . . ‘a resident alien who leaves the country for any period, however brief, does make a new entry on his return. . . . ’ Bonetti v. Rogers, 356 U.S. 691, 698 (1958).”


29. Id. at 462. The Court anticipated that these factors would be judicially developed by means of “the gradual process of judicial inclusion and exclusion.” Id.
Most "entry" and "physical presence" decisions following Fleuti and prior to Kamheangpatiyooth focused on the identification of other factors relevant to a finding of a meaningfully interruptive departure.\(^{30}\) One case in this period, Wadman v. INS,\(^{31}\) however, while addressing relevant factors, merits special consideration for other reasons. In Wadman, the Ninth Circuit stated that continuity of physical presence in the suspension of deportation context was sufficiently analogous to the concept of "entry" and must be determined with regard to the meaningful interruption guideline identified in Fleuti.\(^{32}\) The court also stated that a "liberal," not a "strict and technical" construction, was appropriate to remain consistent with the ameliorative purpose of the suspension of deportation statute.\(^{33}\) Finally, the court held that Wadman's five day visit to Mexico was not, as a matter of law, meaningfully interruptive.\(^{34}\) Rather, the facts and circumstances of each specific case must support a finding of "meaningfully interruptive."\(^{35}\)

**JUDICIAL DEVELOPMENT OF RELEVANT FACTORS**

In "physical presence" and "entry" cases, the courts have stressed the importance of certain factors to determine whether an alien's departure was meaningfully interruptive.\(^{36}\) In Fleuti the Supreme Court identified the three most important factors as the length of the absence, the purpose of the trip, and the casual nature of the trip.\(^{37}\) Subsequent cases amplified these three fac-

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The importance of this broad, if not vague, language was to provide the immigration judges, Board of Immigration Appeals, and the federal circuit courts with the flexibility necessary to decide future similar cases in a fair and lenient manner.

30. See, e.g., Mamanee v. INS, 566 F.2d 1103 (9th Cir. 1977) (frequency of departures); Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975) (distance traveled); Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966) (minority of the alien); Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966) (legality of the original entry).

31. 329 F.2d 812 (9th Cir. 1964).
32. See id. at 815.
33. Id. at 816-17.
34. See id. at 816. Accord, Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965).
35. 329 F.2d 812 (9th Cir. 1964).
36. See, e.g., Rosenberg v. Fleuti, 374 U.S. 449 (1963); Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965).
tors and highlighted others. The presence or absence of these factors individually or in combination may significantly affect judicial and administrative decision making.

Perhaps the most important factor is the length of the alien's absence. Many of the early cases involved a few hours' stay in a country contiguous to, or en route to, the United States. However, depending on the facts and circumstances of the specific case, an absence of six months, or even sixteen months, may be insufficient to break the continuity of an alien's physical presence. For example, if an alien is wrongfully seized and is prevented from quickly returning to the United States, it may be appropriate to find continuous physical presence despite the lengthy absence. Although unusual facts may occasionally diminish the importance of this factor, the length of an alien's absence has generally retained its vitality in identifying a meaningful interruption.

A factor closely related to the length of the absence is the frequency of absences. For example, the Seventh Circuit held that an alien who departed three times for a total absence of seven months over a two year period meaningfully interrupted his continuous physical presence, even though no one absence was sufficiently long to break the continuity. Generally, courts are more sympathetic to an alien who has made only one departure during his presence in the United States.

In Fleuti, the Supreme Court required that the purpose of the trip be innocent. Usually a pleasure trip or vacation, a trip to

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38. See, e.g., Heitland v. INS, 551 F.2d 495 (2d Cir. 1977); Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966); Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965).
41. Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966).
42. McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960). In McLeod, the court stated that a "year's absence [normally] would be sufficient" to break the continuity of physical presence. Id. at 186. But because McLeod's absence was caused solely by the misconduct of the Immigration and Naturalization Service, his lengthy absence would not interrupt his physical presence.
43. Id. at 186.
44. See, e.g., In re Salazar, I.D. No. 2741 (1979).
46. Lozano-Giron v. INS, 505 F.2d 1073, 1078 (7th Cir. 1974).
47. See, e.g., Kamheangpatiyooth v. INS, 597 F.2d 1253, 1258 (9th Cir. 1979); In re Karl, 10 L & N. Dec. 480 (1964). Accord, Palatian v. INS, 502 F.2d 1091, 1092 (9th Cir. 1974). See also In re Hoffman-Arvayo, 13 L & N. Dec. 750 (1971).
49. E.g., id.; Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir.), cert. denied, 381 U.S. 925 (1965); Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); In re Yoo, 10 L & N. Dec. 376 (1963).
visit family or friends (especially if they are ill), or a temporary and bona fide business trip which enhances the alien's professional skills is considered innocent. Conversely, a trip with a purpose which violates the laws or policies of the United States, or which reflects a substantial probability that the alien might never return, is generally disruptive of continuous physical presence.

Dictum in Fleuti suggests that a trip is not innocent if the alien has an improper purpose in mind when he departs from the United States. It is generally accepted, however, that the innocent purpose of the departure may be destroyed if the alien formulates and accomplishes an unlawful act during the absence.

50. E.g., Chan v. INS, 610 F.2d 651 (9th Cir. 1979); Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979); In re Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (1960); In re Cardenas-Pinedo, 10 I. & N. Dec. 341 (1963). But see Munoz-Caserez v. INS, 511 F.2d 947 (9th Cir. 1975).


52. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963). Accord, Toon-Ming Wong v. INS, 363 F.2d 234 (9th Cir. 1966); see Solis-Davila v. INS, 456 F.2d 424 (5th Cir. 1972) (alien departed with the purpose of smuggling illegal aliens across the border); In re Valdivinos, 14 I. & N. Dec. 438 (1973) (smuggling aliens); In re Payan, 14 I. & N. Dec. 58 (1972) (providing fraudulent documents to enable Mexican aliens to illegally cross the border). Cf. Bilbao-Bastida v. INS, 409 F.2d 820 (9th Cir.), cert. dismissed, 396 U.S. 802 (1969) (alien’s pleasure trip to Cuba, a prohibited area, considered to be a trip with a purpose contrary to the national policies reflected in American immigration laws).

53. See Lozano-Giron v. INS, 506 F.2d 1073, 1079 (7th Cir. 1974) (alien departed to marry a Colombian national who might insist on living in Columbia or who might be excludable under American immigration laws).


55. See Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977); Cuevas-Cuevas v. INS, 523 F.2d 883 (9th Cir. 1975) (resident alien knowingly assisted Mexican aliens to cross the border illegally); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974) (resident alien attempted to smuggle 55 pounds of untaxed marijuana across the Mexico-United States border); In re Alvarez-Verduzco, 14 I. & N. Dec. 625 (1966) (resident alien departed with an innocent purpose, but attempted to re-enter the United States with two grams of heroin purchased in Mexico). Cf. Longoria-Castaneda v. INS, 548 F.2d 233 (8th Cir. 1977) (A resident alien, who intended to violate the immigration laws by knowingly transporting illegal aliens within the United States, crossed into Mexico to eat lunch and to meet an accomplice; after failing to find the accomplice, he returned to the United States and later participated in his part of the improper plan. Held: the alien's re-entry was meaningfully interruptive).

But see Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972) (no meaningful interruption was caused by an unlawful act when the intent to commit the act was nonexistent at the time of departure). But cf. Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971) (where a resident alien departed the United States with the intent to

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Also, several circuits have held that an innocent purpose may be lost if the alien misrepresents facts concerning his status to border officials when he attempts to re-enter the country.56

Usually the distance traveled by the alien depends on and is therefore closely related to the purpose of the trip.57 Although many early decisions reflected a harsh attitude toward aliens traveling far from the United States,58 modern courts recognize that aliens generally travel no further than the purpose of their trip necessitates.59 As a matter of policy, the modern view is preferred. Assume two similarly situated aliens who simultaneously depart from and return to the United States. Further assume that the purpose of each departure was to visit family, and that each traveled no further than necessary to reach his destination. It would not be fair or logical to treat these aliens differently simply because one alien’s family lived only 100 miles from the United States border and the family of the other alien lived 10,000 miles away. Thus, the accepted view today is that travel to a distant place does not conclusively break continuity of presence.

In Fleuti, the Supreme Court sought to avoid subjecting an alien to the “unsuspected risks and unintended consequences”60 of deportation stemming from a casual departure. The Court stated that protecting an alien from the harsh consequences of deportation was consonant with a “civilized application of our immigration laws.”61 Conversely, if an alien has considered the full implications of leaving the United States, including the increased probability of deportation, then the risks and consequences can be neither unsuspected nor unintended. The result is that the

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56. Heitland v. INS, 551 F.2d 495, 502-04 (2d Cir.), cert. denied, 434 U.S. 819 (1977) (“implicit misrepresentation” to border officials to secure re-entry); Mamanee v. INS, 566 F.2d 1103, 1105 (9th Cir. 1977); Bufalino v. INS, 473 F.2d 728, 731 (3d Cir.), cert. denied, 412 U.S. 928 (1973); In re Kolk, 11 I. & N. Dec. 103 (1965); In re Karl, 10 I. & N. Dec. 480 (1964).

57. See Chan v. INS, 610 F.2d 651, 655 (9th Cir. 1979) (purpose was to visit family and friends who lived in Hong Kong); Kamheangpatiyooth v. INS, 597 F.2d 1253, 1258 (9th Cir. 1979) (purpose was to visit critically ill mother who lived in Thailand).

58. See In re Janati-Ataie, 14 I. & N. Dec. 216 (1972) (Iran); In re Guimares, 10 I. & N. Dec. 529 (1964) (Portugal); but see Itzcovitz v. Selective Serv. Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971) (Israel). See also Rosenberg v. Fleuti, 374 U.S. 449, 461 (1963). The Court referred to a trip where the alien “merely stepped across an international border.” Id. Actually, Fleuti’s departure was to Ensenada, Mexico, which is about 50 miles south of the United States border.

59. Kamheangpatiyooth v. INS, 597 F.2d at 1258: “His trip was limited . . . in distance as the exigencies that produced it—his mother’s fatal illness at her home in Thailand—permitted it to be.”


61. Id.
trip is not casual, but rather, meaningfully interruptive of the alien's continuous physical presence. A meaningfully interruptive trip, caused by an alien's recognition and appreciation of the implications of departing, normally would be manifested by the procurement of travel documents,\textsuperscript{62} or possibly by making formal arrangements to stay for a significant duration in the foreign country.\textsuperscript{63}

In \textit{Itzcovitz v. Selective Service Local Board No. 6},\textsuperscript{64} the Second Circuit lessened the importance of the "casual" factor. Before his departure, Itzcovitz sought and obtained a declaratory judgment enabling him to re-enter the United States following an anticipated three week absence.\textsuperscript{65} Had he left the United States without obtaining this declaratory relief, the INS would have prohibited his re-entry.\textsuperscript{66} Because he sought judicial protection prior to his departure, the obvious conclusion was that he fully considered the risks and consequences of leaving the United States. Such consideration normally would have rendered the absence meaningfully interruptive and would have destroyed his eligibility for suspension of deportation. The court, recognizing that Itzcovitz faced a dilemma, logically and fairly resolved the problem by holding that his absence would not be meaningfully interruptive.\textsuperscript{67}

In \textit{Kamheangpatiyooth}, the Ninth Circuit discussed the casual factor in light of \textit{Fleuti} and \textit{Itzcovitz}. The court stated that "the arrangements made by an alien prior to departure, including documentation obtained, may confirm the essential continuity of his presence in this country and the lack of any reasonable basis for anticipating that the planned absence might imperil his status."\textsuperscript{68} Thus, pre-departure conduct may clearly demonstrate an alien's intent that his trip is not to adversely affect his status in the

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\item \textsuperscript{63} See Palatian v. INS, 502 F.2d 1091, 1092 (9th Cir. 1974).
\item \textsuperscript{64} 447 F.2d 888 (2d Cir. 1971).
\item \textsuperscript{65} Id. at 889.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} 597 F.2d 1253, 1259 (9th Cir. 1979). In prior cases, obtaining travel documents normally indicated that the alien had considered the full implications of his departure. But in \textit{Kamheangpatiyooth}, the court took an opposite tack and stated that obtaining travel documents may indicate the alien's intent to maintain a continued physical presence in the United States. \textit{id}.
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Deportation would be particularly harsh for an alien who has established firm roots in the United States. Indeed, the suspension of deportation provision "was not designed to protect the wanderers or the rootless."70 When an alien's departure to a foreign country "uproots" his ties to the United States, continuity of physical presence is destroyed.71 For example, the Ninth Circuit held that when an alien and his entire family departed the United States, physical presence was meaningfully interrupted.72

On the other hand, long-term maintenance of a United States residence or legal resident status;73 the American citizenship of the alien's dependent spouse,74 children,75 or parents;76 the alien's residence or business property in the United States;77 the alien's employment in the United States;78 the alien's prior honorable military service to the United States;79 and the alien's intent to re-

69. Id.
72. Mamanee v. INS, 566 F.2d 1103 (9th Cir. 1977). Cf. Chan v. INS, 610 F.2d 651 (9th Cir. 1979). The same court held that a trip, where only the alien departed while the spouse remained in the United States, was not meaningfully interruptive.
73. See Zimmerman v. Lehmann, 339 F.2d 943, 948 (7th Cir.), cert. denied, 381 U.S. 925 (1965) (39 years).
74. See id.
75. See id., but see Heitland v. INS, 551 F.2d 497 (2d Cir.), cert. denied, 434 U.S. 819 (1977) (birth of an alien's child in the United States, which provides American citizenship for the child, is usually insufficient "roots," especially if the parents are in the United States illegally).
76. See Chan v. INS, 610 F.2d 651, 653 (9th Cir. 1979).
77. See Lozano-Giron v. INS, 508 F.2d 1073, 1077-78 (7th Cir. 1974); Zimmerman v. Lehman, 339 F.2d 943, 949 (7th Cir.), cert. denied, 381 U.S. 925 (1965).
79. See Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966). Wong had honorably served in the United States Army for one year, eleven months, and twenty-three days. Had he served for a full two years, continuous physical presence would have been waived as a requirement for suspension of deportation eligibility. See I. & N. Act § 244(b), 8 U.S.C. § 1254(b) (1976). However, in finding continuous physical presence, the Court appeared to act more generously with the alien United States Army veteran. Cf. Itzcovitz v. Selective Serv. Local Bd. No. 6, 447 F.2d 888 (2d Cir. 1971) (resident alien, who was an Argentine national, claimed his treaty right of exemption from induction into the United States military service; as a result, the INS eagerly sought to exclude Itzcovitz twice). See also In re M, 3 I. & N. Dec. 249 (1948); In re W, 2 I. & N. Dec. 899 (1947).
80. Cf. In re J.M.D., 7 I. & N. Dec. 105 (1956) (alien's absence to a foreign country, if caused by active duty in the United States armed services, does not break the continuity of the alien's physical presence; rather, the time spent overseas is regarded as time physically present in the United States).
81. See also I. & N. Act § 244(b), 8 U.S.C. § 1254(b) (1976). The issue of "entry" or whether a brief departure meaningfully interrupts an alien's physical presence is
tain his American residence are indicative that the alien has established firm “roots” in American soil. The establishment of roots in and the personal commitment to American society legitimizes the inference that deportation would be unduly harsh and contrary to the legislative purpose of the suspension of deportation provision.

In the early administrative decisions, an alien’s petition for suspension of deportation was rejected if his original entry was unlawful. These cases stressed that section 101 of the Immigration and Nationality Act defined entry as “any coming of an alien.” However, section 101 also provided that no “entry” occurred following an involuntary or unintended departure. This exception was narrowly construed to apply only to aliens having lawful permanent resident status. The early decisions narrowly limited the Fleuti doctrine to cases involving lawful permanent resident aliens because Fleuti was concerned solely with the unintended departure of a lawful resident alien. Thus, Fleuti provided no relief to an alien who originally entered the United States illegally.

80. Heitland v. INS, 551 F.2d 495, 501 (2d Cir.), cert. denied, 434 U.S. 819 (1977); Munoz-Casarez v. INS, 511 F.2d 947 (9th Cir. 1975). Lack of an intent to abandon resident status will not necessarily bar a finding of meaningful interruption. Id.; In re Nakoi, 14 I. & N. Dec. 208 (1972) (“intent to abandon permanent residence status” is not synonymous with “intent to depart in a meaningfully interruptive manner”); In re Guimares, 10 I. & N. Dec. 529 (1964) (in determining whether an “entry” has been made following a temporary absence, the alien’s intent to maintain a United States residence is not decisive, but only one factor for the court to consider). However, the alien’s intent to retain his residence in the United States has been significant in several cases. See, e.g., Zimmerman v. Lehmann, 339 F.2d 943, 949 (7th Cir.), cert. denied, 381 U.S. 925 (1965).

Some courts have suggested that an alien’s departure during the narrow time period of a school semester break indicates the alien’s intent to return. See, e.g., Chan v. INS, 610 F.2d 651 (9th Cir. 1979); Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979).


84. Id.

It was not until Wadman that a court of appeals demanded a "liberal" rather than a "strict and technical construction" of the section 101 entry definition. But despite Wadman, an alien who illegally entered the United States received little benefit from the suspension of deportation provision until the case of Git Foo Wong v. INS. In Git Foo Wong, the Ninth Circuit held that the illegality of the alien's original entry was immaterial to a finding of continuous physical presence. The BIA ultimately acceded to this view.

If the illegality of the alien's original entry is immaterial to continuous physical presence, then the illegality of the alien's presence in the United States just prior to his departure should be immaterial also. However, in Heitland v. INS, the Second Circuit suggested a contrary view. The court stated that because of their illegal presence prior to departure, the aliens had no reasonable expectation that the government would permit them to re-enter and remain in the United States. Absent a legal right to stay in the United States or a reasonable expectation of re-entry, the alien probably must resort to misrepresentation of facts to border officials which taints the innocence of his departure.

86. 329 F.2d 812, 816-17 (9th Cir. 1964).
87. 358 F.2d 151 (9th Cir. 1966).
88. *Id.* The usual fact pattern where the illegality of the original entry is at issue is as follows: the alien illegally enters; he resides in the United States for the statutorily required time period; during this period, he temporarily and briefly departs from the United States; he returns and resumes his presence in the United States; deportation proceedings ensue; and the alien attempts to show continuous physical presence as an element of his prima facie case of eligibility for suspension of deportation relief. *See id.*
90. 551 F.2d 495 (2d Cir.), cert. denied, 434 U.S. 819 (1977). *Heitland* presented a rare set of facts. The Heitlands legally entered the United States in 1968 on a six month non-immigrant visa. They illegally remained in the United States after their visa expired. In 1970, they took a six week trip to Germany with full knowledge they were illegally present in the United States at the time of their departure. To gain re-entry into the United States, they used implicitly deceitful tactics. In 1971, about three years after the Heitlands' original entry, the INS instituted deportation proceedings. From 1971 until 1975, the Heitlands and the INS were entangled in deportation proceedings. In 1975, following their seven year stay in the United States, the Heitlands sought suspension of deportation. *Id.* at 502.
91. *See also In re Graham, 11 I. & N. Dec. 234 (1965).* The facts of Graham are somewhat similar to *Heitland* in that Graham's original entry was legal. In contrast with *Heitland* though, Graham briefly departed from the United States during a period when she had lawful nonimmigrant student status. Upon her return, she retained her lawful status. Five years later, after her authorized date expired, the INS instituted deportation proceedings. Despite facts favorable to Graham, she was ordered to deport because she never was lawfully admitted for permanent resident status. *See note 80 supra.*
92. *See id.; cf. In re Maldonado-Sandoval, 14 I. & N. Dec. 475 (1973).* In *Maldonado-
The purpose of the suspension provision is to provide discretionary relief to deserving, but deportable aliens. To distinguish between an illegal original entry and an illegal presence just prior to departure results in logically incongruous holdings. To exclude an alien who was illegally present just prior to a non-meaningfully interruptive departure, or to deport him because he is forced by immigration laws and policies to use deceitful tactics to re-enter, frustrates the ameliorative purpose of the suspension provision and contravenes the Supreme Court's holding in *Fleuti*. The Supreme Court should resolve this issue by ruling that if the alien makes a non-meaningfully interruptive departure, the illegality of his original entry or of his presence prior to departure is irrelevant to a finding of continuous physical presence.

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*nado-Sandoval* the alien's original entry was fraudulent, and therefore, his presence prior to a brief departure was unlawful. When he attempted to return, he was *excluded* because he had no right to re-enter. Because an alien subject to exclusion has fewer rights and remedies (including suspension of deportation) than one subject to deportation, an alien might be well advised to gain entry by whatever means necessary to avoid exclusion and to risk deportation.


> Perhaps the court in *Heitland* placed too much emphasis on the alien's illegal presence in the United States. In doing so, it impliedly created a distinction for purposes of section 244 relief between an alien who is legally within the United States and one who is not. It is suggested that this distinction should be left to the Attorney General's discretion in each particular case, and that it ought not to be regarded as a disqualifying feature with respect to an alien's application under that section . . . . It is submitted, therefore, that an alien should still be eligible for consideration even though his original entry (or his presence prior to departure) was illegal . . . . The alien who most needs section 244 protection is the alien who is enduring illegal status in the United States but at the same time has cultivated relationships that would render it extremely difficult for him to sever his ties here.

94. To the extent *Heitland* is inconsistent with this proposed rule, it should be overruled.

95. Past decisions have suggested that other factors are relevant. *See Toon-Ming Wong v. INS*, 303 F.2d 234, 236 (9th Cir. 1966) (alien's age). When an alien minor departs from the United States, the court must inquire whether it is the minor's intent or that of his parent or guardian which is predominant. Generally, "an unemancipated minor [alien], under the custody and control of his parents (or guardian)," without a choice as to his departure, does not meaningfully interrupt his continued physical presence when he leaves the United States pursuant to his parent's decision. *Id.; see also United States ex rel. Valenti v. Karnuth*, 1 F. Supp. 370 (N.D.N.Y. 1932); *In re Bauer*, 10 L. & N. Dec. 304 (1963).

*See Lozano-Giron v. INS*, 506 F.2d 1073, 1078 (7th Cir. 1974) ("the nature of the environment to which [the alien] would be deported, and his relation to that environment"); *Palatian v. INS*, 502 F.2d 1091, 1092 (9th Cir. 1974) (court concerned
Prior to Kamheangpatiyooth, courts focused on the identification of factors relevant to finding a meaningfully interruptive absence. In Kamheangpatiyooth the Ninth Circuit altered the focus on “factors” in two ways. First, the court emphatically stated that the legal objective is to determine whether an absence is meaningfully interruptive of the alien's continuous physical presence.96 The existence or nonexistence of particular factors is merely evidentiary and is not conclusive on ineligibility for suspension relief.97 It is the cumulative effect of all relevant factors which is determinative and which must be considered.

Second, the court emphasized the importance of considering the hardship to the alien in determining meaningful interruption of continuous physical presence.98 The court stressed the remedial legislative purpose of the suspension of deportation provision.99 The court recognized that the provision was designed to relieve aliens of the harsh results, unexpected risks, and unintended consequences that would stem from a strict interpretation and application of deportation provisions.100 When an alien has developed a sufficient loyalty and commitment to the United States by virtue of his lengthy physical presence, deportation would harshly uproot the resident and destroy his dreams and existence by deporting the alien to communist Bulgaria where he would be deprived of personal freedoms enjoyed in the United States). Also, the reason for deportation has affected physical presence in some cases. For example, the courts appear to treat aliens guilty of relatively minor deportable misconduct more leniently than aliens guilty of severe deportable misconduct. Compare Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979) (alien remained in the United States beyond his authorized date) and Pimental-Navarro v. Del Guercio, 256 F.2d 877 (9th Cir. 1958) (due to economic stress, alien transported an illegal alien across the border; although declaring the alien ineligible for suspension relief, the court noted “the trifling nature of the offense,” and remanded for further consideration of alternative discretionary relief in light of the severe hardship to the alien and his family) with Munoz-Caserez v. INS, 511 F.2d 947 (9th Cir. 1975) (alien convicted of manslaughter) and In re Abi-Richard, 10 I & N. Dec. 551 (1964) (voluntary manslaughter).

96. 597 F.2d at 1257-58.
97. Id.; cf. Cuevas-Cuevas v. INS, 523 F.2d 883, 885 (9th Cir. 1975) (Browning, J., concurring): “Controlling weight should not be given to only one of several factors.”
98. 597 F.2d at 1256. For an alien to make a prima facie case of eligibility for suspension of deportation relief, he must prove “extreme hardship” or “exceptional and extremely unusual hardship” depending on whether § 244(a)(1) or § 244(a)(2) applies. See note 5 supra. However, the court distinguished hardship as an element of the prima facie case from hardship as a factor in determining a meaningful interruption in continuous physical presence.
99. 597 F.2d at 1256 n.4.
100. 597 F.2d at 1256.
pectations for a continued life in America. The court stated that continuity of physical presence is important to a legitimate inference that deportation would be unduly harsh. By emphasizing hardship, the court catapulted this factor in importance and comparatively weakened the other factors relevant to an alien's prima facie case of eligibility.

A New Legal Standard

In addition to restating the Wadman admonition that “meaningful interruption” must be generously construed in favor of the alien, the Ninth Circuit created a new standard for determining whether an alien's absence is meaningfully interruptive. The court rejected the vague “Fleuti test” that emphasized the brevity, innocent purpose, and casual nature of the absence. The court stated that the immigration judge or the BIA must determine whether a particular absence during the seven-year period reduced the significance of the whole period as reflective of the hardship and unexpectedness of expulsion. An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

Thus, to be meaningfully interruptive of continuous physical presence, the absence itself must have diminished the potential hardship to the alien by virtue of the alien's reasonable expectation of an increase in the probability of deportation. If the alien could

101. See id.
102. Id.
103. Id. The standard to determine continuous physical presence, which is only one element of the alien's prima facie case for eligibility, logically should be generous to the alien because the effect of a liberal standard is not to automatically grant suspension relief but merely to permit the Attorney General to review the case on its merits. If the alien's case is unworthy of a favorable exercise of discretion, the Attorney General would not grant the remedy nor would Congress ratify the suspension request. See Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964).
104. Since the BIA and the immigration judge used the incorrect legal standard, the case was remanded for redetermination. Kamheangpatiyooth v. INS, 597 F.2d at 1260.
105. Id. at 1257.
106. Id.
107. As to the alien's reasonable expectations of deportability stemming from the absence, the court failed to state whether an objective or subjective test should apply. In other words, should the governing expectation be that of the "reasonable and ordinary alien" or that of the alien subject to deportation in the
not have anticipated the increased likelihood of deportation as a result of the absence, then the severity of hardship to the alien would be equal to the severity of hardship had the alien remained within the United States during the entire statutory period for continuous physical presence.\textsuperscript{108}

Prospective Effects

In the past, courts frequently failed to clearly analyze and articulate those factors that were most important to the holding of the case.\textsuperscript{109} But in Kamheangpatiyooth, the court clearly stressed hardship as the primary factor. This emphasis should encourage other courts to pinpoint those factors whose cumulative effect supports the finding regarding continuous physical presence.

By stressing the importance of hardship as a factor and by creating a new standard which correlates hardship to a finding of meaningful interruption, the Ninth Circuit made it much easier for an alien seeking suspension relief to prove the continuous physical presence element of his prima facie case. Because of the court's lenient attitude toward hardship as a factor in continuous physical presence, it is highly probable that this attitude of leniency also will affect the extreme hardship element of the alien's prima facie case.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item See id. \textsuperscript{108}
\item Intermittent departures that are brief and infrequent do not diminish the probability that deportation would occasion undue hardship. An alien who leaves the country briefly and for innocent reasons during the requisite seven years may be in no different position, realistically viewed, than an alien who has remained within the borders for an identical period. \textit{Id. Compare} Heitland v. INS, 551 F.2d 495 (2d Cir.), cert. denied, 434 U.S. 819 (1978), where the court stated: \textit{[T]}o deny a person the benefits of seven years' continuous residence because of one or two short interruptions might well defeat the purpose of [the suspension of deportation statute], since the hardship in such case would not be substantially different from that where the presence has been uninterrupted.
\item See generally Comment, \textit{Exclusion and Deportation of Resident Aliens: The Re-entry Doctrine and the Need for Reform}, 13 SAN DIEGO L. REV. 192, 200-06 (1975). \textsuperscript{110}
\item Because the BIA applied an improper standard in denying Kamheangpatiyooth's petition for suspension of deportation, the court of appeals vacated the decision and remanded the case for a redetermination based on the correct standard. 597 F.2d at 1260. On remand, the legal argument focused on the extreme hardship element of a prima facie case for eligibility; the question of good morals could be settled as a factual matter. The continuous physical presence issue was apparently conceded to the applicant by virtue of the prior court of appeal holding. Whether the Ninth Circuit's decision will affect the determination concerning extreme hardship remains to be seen.
\end{enumerate}
\end{footnotesize}
Kamheangpatiyooth may ease the alien’s burden of establishing a prima facie case of eligibility for suspension of deportation relief. Will it also impact the Attorney General’s exercise of discretion in a manner favorable to the alien?\textsuperscript{111} The law is well established that suspension of deportation is a matter of discretion and administrative grace.\textsuperscript{112} Congress specifically granted the authority and responsibility of exercising discretion to the Attorney General (or his representative, the immigration judge).\textsuperscript{113} Normally, courts will not substitute their discretion for that of the Attorney General.\textsuperscript{114} However, limited judicial review will follow when the Attorney General fails to exercise discretion, or the fairness of the procedure is challenged, or an abuse of discretion is alleged.\textsuperscript{115}

Once an alien establishes a prima facie case of eligibility, he is entitled to have his application for relief considered as a matter of right.\textsuperscript{116} But if an alien fails to show eligibility, the Attorney General need not exercise discretion. If the Attorney General applies an erroneous legal standard in rejecting an alien’s claim of eligibility and therefore fails to exercise discretion, a reviewing body\textsuperscript{117} will reject this finding\textsuperscript{118} and remand the case for a re-determination of eligibility based on the correct standard. This process occurred in Kamheangpatiyooth. The Ninth Circuit created and applied a new legal standard regarding continuous physical

\textsuperscript{111} See note 5 supra.
\textsuperscript{113} Although the statute charges the Attorney General with discretionary responsibilities, I. & N. Act § 244(a), 8 U.S.C. § 1254(a) (1976), the Attorney General delegates this responsibility to the immigration judge. It is the immigration judge who hears the evidence, determines whether a prima facie case of eligibility exists, and if so, grants or denies the requested suspension relief. This process is subject to review by the BIA, and ultimately by the federal courts. See generally Roberts, The Exercise of Administrative Discretion Under the Immigration Laws, 13 SAN DIEGO L. REV. 144, 147 (1975).
\textsuperscript{114} See, e.g., Melachrinos v. Brownell, 230 F.2d 42 (D.C. Cir. 1956); Kaloudis v. Shaughnessy, 180 F.2d 469 (2d Cir. 1950).
\textsuperscript{116} McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960). It is error for the Attorney General to fail to exercise discretion once the applicant has made a prima facie case. E.g., Asimakopoulos v. INS, 445 F.2d 1362 (9th Cir. 1971); Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir.), cert. denied, 365 U.S. 860 (1961).
\textsuperscript{118} See McGrath v. Kristensen, 340 U.S. 162 (1950).
It is likely that to effectuate a trend of leniency toward aliens other new standards will be created regarding the hardship or good morals elements of a prima facie case.

A reviewing body may also reject the Attorney General’s finding of fact. For example, on the issue of hardship, a court could leave the legal standard unchanged and simply find that the facts show the requisite degree of hardship. However, unless the finding of fact was arbitrary and without a reasonable basis of support, courts should not interfere with the fact finding function of the Attorney General.120

As stated previously, once an alien shows eligibility, the Attorney General must exercise discretion. But, an alien is not entitled to an automatic, favorable exercise of discretion.121 When an alien is denied relief, he may challenge such denial on the grounds of unfair procedure or abuse of discretion.122

The standard of review for exercises of administrative discretion is usually couched in ambiguous terms and is incapable of precise definition.124 Generally, a clear showing of abuse of discretion occurs if the exercise of discretion by the Attorney General is “arbitrary or capricious.”125 In properly exercising discretion, the immigration judge must consider the relevant factors in each case.126 But because there is considerable similarity between the factors pertinent to the elements of a prima facie case, and the factors relevant to a proper exercise of discretion,127 the court’s emphasis on hardship in Kamheangpatiyooth may ul-

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119. See Kamheangpatiyooth v. INS, 597 F.2d at 1257.
121. The Attorney General may not exclude from eligibility classes of aliens determined by arbitrary categories. Creation of such classes would be deemed a failure to exercise discretion. Although the Attorney General may create general standards and guidelines, each claim of eligibility must be reviewed on its own merits. Id.
123. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). The general rule is that the procedure must be fair and reasonable.
124. See Wong Wing Hang v. INS, 369 F.2d 715 (2d Cir. 1966).
126. Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), cert. denied, 365 U.S. 860 (1961). An abuse of discretion occurs if the administrative decision without a “rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group,” or on other considerations that Congress could not have intended to make relevant. Wong Wing Hang v. INS, 369 F.2d 715 (2d Cir. 1966).
128. Id.
timately affect the immigration judge's exercise of discretion. In future cases, the immigration judge should be more inclined to grant suspension of deportation when the applicant makes a strong showing of hardship.

The BIA and the courts of appeals may subsequently review the determination by the immigration judge.\textsuperscript{128} Although the Ninth Circuit has professed a new, lenient standard of meaningful interruption and emphasized the hardship factor, it remains to be seen how the other reviewing bodies will respond to \textit{Kamheangpatiyooth}. Except for those areas of the Northern and Western Regions of the BIA which are under the Ninth Circuit's jurisdiction, the reviewing bodies are not obligated to follow the \textit{Kamheangpatiyooth} precedent. However, Ninth Circuit immigration decisions are important because a majority of the deportable aliens enter and reside within the jurisdictional boundaries of the Ninth Circuit.\textsuperscript{129} Additionally, because the well reasoned opinion in \textit{Kamheangpatiyooth} better effectuates the ameliorative purpose of the suspension of deportation statute, other reviewing bodies should follow the Ninth Circuit's lead.

Even if other reviewing bodies follow the lenient but logical holding in \textit{Kamheangpatiyooth}, the ameliorative purpose of the suspension provision may nevertheless be frustrated. Believing that the arbitrary and capricious standard may be a shield from penetrating judicial review, immigration judges may be reluctant to exercise discretion consistently with the logic of \textit{Kamheangpatiyooth}. To prevent the immigration judges from circumventing judicial standards, reviewing bodies should take the following course of action.

- First, reviewing bodies should require written statements from immigration judges which articulate the facts and reasons supporting a particular exercise of discretion.\textsuperscript{130} An alien may have

\begin{itemize}
\item \textsuperscript{128} Since both the BIA and the federal courts may review the exercise of discretion, these two "reviewing bodies" will be discussed together in the text.
\item \textsuperscript{129} \textit{See, e.g.}, \textit{56 Interpreter Releases} 373-86 (1979) (immigration statistics for 1977); \textit{55 Interpreter Releases} 171-83 (1978) (immigration statistics for 1976).
\item \textsuperscript{130} \textit{See} \textit{Environmental Defense Fund, Inc. v. Ruckelshaus}, 439 F.2d 584, 598 (D.C. Cir. 1971): "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." \textit{See also} 2 K. DAVIS, \textIT{ADMINISTRATIVE LAW TREATISE} § 8.2 (2d ed. 1979). An articulated statement is especially needed when an alien's request for suspension is denied. But to provide guidance for future exercises of discretion, articulated statements should be made whether relief is denied or granted.
\end{itemize}
unique facts and circumstances surrounding his request for suspension relief which merit individualized consideration. Thus, immigration judges must retain the essential flexibility needed to perform those discretionary responsibilities mandated by Congress. However, requiring immigration judges to articulate the facts and reasons supporting an exercise of discretion would not be a harmful intrusion upon the needed flexibility. Rather, thoughtful consideration and articulation will improve the quality of discretion.

Second, reviewing bodies should provide clear guidelines to "structure" INS discretion. A main way to structure discretion is through stating findings and reasons and following precedents. By developing a body of well reasoned and published opinions, reviewing bodies will provide immigration judges with a framework for determining proper exercises of discretion. Reviewing bodies should not render the congressional grant of discretionary authority meaningless by substituting their own discretion for that of the INS. But where guiding standards are vague, ambiguous, or nonexistent, or where they need to be changed to better effectuate the legislative purpose of ameliorating undue hardship, reviewing bodies should intercede.

Because of the expansive interpretation of a statutory provision

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132. Quality of discretion comprehends concepts such as fairness to the alien, effectuating congressional purposes, and consistency and predictability in decision making.
133. See K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 8.9, 8.10 (2d ed. 1979). By publishing reasoned opinions and treating them as binding, the INS can partially resolve its problem of unstructured discretion. In discussing the discretionary remedy of adjustment of status under L & N. Act § 245, 8 U.S.C. § 1255 (1976), Professor Davis quotes Recommendation 71-5 of the Administrative Conference which states that "when neither rules nor standards provide effective guidance for the exercise of discretion . . . Section 245 decisions should be reached upon the basis . . . of precedents established by the [immigration judges] themselves." Id. § 8.10, at 204. But where the INS has inadequately provided a guideline to structure discretion, see id., reviewing bodies should assume this responsibility. Since few immigration judge opinions and only selected BIA opinions are available for use as precedents, the courts should take a more active role in structuring INS discretion. See id. § 8.4, at 170. See generally Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293, 1314 (1972).
134. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8.4, at 169 (2d ed. 1979).
135. See note 114 supra.
136. See, e.g., Kamheangpatiyooth v. INS, 597 F.2d 1253, 1256 (9th Cir. 1979); Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).
137. As the courts become more involved in structuring INS discretion, inconsistent exercises of discretion will be minimized. Citing several sources, one commentator stated "that inconsistency is at the very core of arbitrariness; that uniformity is a crucial component of justice." Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293, 1350 (1972).
in Kamheangpatiyooth, Congress may respond by amending the immigration laws. However, this is unlikely for several reasons. First, legislators and immigration commentators both recognize the need for a comprehensive reformation of American immigration law; a piecemeal approach will not resolve the many immigration problems. Secondly, the Ninth Circuit stressed the consistency of its holding in Kamheangpatiyooth with the legislative purpose behind the suspension of deportation provision. If the Court’s view is correct and Kamheangpatiyooth reflects the current congressional attitude, there is no need to amend the statute. Finally, Congress can tolerate lenient administrative and judicial attitudes toward aliens seeking suspension of deportation because it has the final approval of each grant of suspension relief via the ratification process.

CONCLUSION

The far reaching Kamheangpatiyooth decision rejuvenated the ameliorative purpose of the suspension of deportation provision. The decision evidences a lenient attitude toward deserving, deportable aliens. After Kamheangpatiyooth, the alien will be able to prove more easily both the continuous physical presence and the extreme hardship elements of his prima facie case of eligibility. Also, the administrative and judicial decision makers are encouraged to carefully analyze in each case the evidentiary factors that are important to a determination consistent with the ameliorative purpose of the suspension of deportation provision.


139. 597 F.2d at 1257.

140. A perfect example of this proposition is stated in Itzcovitz v. Selective Serv. Local Bd. No. 6, 447 F.2d 888, 894 (2d Cir. 1971): “Statutory interpretation has been made a little easier since Congress has had the gloss of Fleuti before it for seven years [by now it has been almost 17 years] without tightening subsection (13) of the statute [the definitional provision regarding “entry”] or indeed changing it, even while changing provision after provision of subdivision (a) of § 101.” Even though the dissent in Fleuti may have correctly analyzed the legislative history and purpose and properly construed the language of the statute, see 374 U.S. at 462-68 (Clark, J., dissenting), the majority apparently construed the statute in a manner consistent with the then prevailing desires of Congress. This conclusion is indicated by the failure of Congress to statutorily amend the Fleuti decision. If Kamheangpatiyooth is harmonious with the currently prevailing congressional attitude, then an amendment to modify the court decision is unlikely.

rative purpose of the statute. The Attorney General, the Board of Immigration Appeals, and other circuit courts of appeals will be influenced significantly by this decision. This influence probably will be manifested by greater leniency toward aliens seeking suspension of deportation relief. Since it is unlikely that Congress will statutorily reject *Kamheangpatiyooth*, the effects of the decision should be longstanding.

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