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Synopsis

SIGNIFICANT DEVELOPMENTS IN THE IMMIGRATION LAWS OF THE UNITED STATES
1979-1980

INTRODUCTION

This synopsis of developments in the immigration laws of the United States will focus on the few areas of the law in which there were significant developments from October, 1979 through September, 1980. In addition to summaries of major judicial decisions and administrative actions, the discussion will include a review of recently enacted legislation, regulations promulgated pursuant thereto, and a summary of significant proposed legislation.

UNITED STATES SUPREME COURT DECISIONS

Since October of 1979, the Supreme Court has decided one case¹ and granted certiorari in two others² in the area of immigration law. The Court denied review of cases in various areas of immigration law which nevertheless are significant.³

2. Fedorenko v. United States, 597 F.2d 946 (5th Cir. 1979), cert. granted, 444 U.S. 1070 (1980); United States v. Cortez, 595 F.2d 505 (9th Cir. 1979), cert. granted, 100 S. Ct. 2983 (1980).
3. For a summary of the 13 circuit court decisions which were denied review, and the five decisions for which petitions are pending, see 57 INTERPRETER RELEASES 419-22 (1980).

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In *Vance v. Terrazas*, the Court, in a 5-4 decision, sustained the validity of section 349(c) of the Immigration and Nationality Act (INA) requiring proof of expatriation by a preponderance of the evidence rather than by the higher standard of clear, convincing and unequivocal evidence. The Court also found valid the provision of section 349(c) which creates a rebuttable presumption that the expatriating act was voluntarily performed.

The *Terrazas* case involved a man who, having been born in the United States to a Mexican father, had dual citizenship. While attending school in Mexico, Terrazas executed an application for a certificate of Mexican nationality wherein he swore allegiance to Mexico and expressly renounced his United States citizenship. After the Department of State issued a certificate of loss of nationality, Terrazas brought suit in the district court against the Secretary of State for a declaration of his United States citizenship. The district court upheld the evidentiary standard set forth in section 349(c) of the INA and found that the government had proven by a preponderance of the evidence that Terrazas had knowingly and voluntarily renounced his allegiance to the United States. The district court also concluded that Terrazas's evidence was not sufficient to rebut the presumption of voluntariness in section 349(c).

Relying on *Afroyim v. Rusk*, the Seventh Circuit reversed the district court and held that the government had to prove both the taking of the oath of allegiance to a foreign state and the intent to renounce United States citizenship by clear, convincing and unequivocal evidence. The appellate court reasoned that Congress had no power to legislate the lesser evidentiary standard under section 349(c) because the citizenship clause of the fourteenth amendment required proof by clear, convincing and unequivocal evidence.

The Supreme Court reversed the Seventh Circuit and remanded the case. The Court concluded that the preponderence of

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6. 444 U.S. at 255.
7. Id. at 257.
8. Id.
9. 387 U.S. 253 (1967). The *Afroyim* case held unconstitutional 8 U.S.C. 1481(a)(5) (1976) which made voting in a political election of a foreign state an expatriating act. In so holding, the court reasoned that the fourteenth amendment protects every United States citizen against congressional forcible destruction of his citizenship. Id. at 268.
11. 577 F.2d at 10-12.
the evidence standard of proof provided by Congress in section 349(c) did not violate either the citizenship clause of the fourteenth amendment or the due process clause of the fifth amendment. The Court noted that expatriation proceedings are civil in nature and do not threaten a loss of liberty. Since expatriation requires proof of both a voluntary act of expatriation and an intent to renounce citizenship, Congress did not exceed its powers by requiring proof of an intentional act by a preponderence of the evidence. The Court viewed this standard as a sufficient protection for the interest of the individual in retaining his citizenship.

In addition, the Court found no reason why Congress lacks power to legislate the rebuttable presumption of voluntariness prescribed by section 349(c). The presumption is in accord with the ordinary rule that duress is a matter of affirmative defense which must be proved by the party claiming it. However, even though there is a presumption of voluntary performance of the act of expatriation, the commission of the act does not give rise to a presumption that it was performed with the intent to relinquish United States citizenship. This second element must be proved independently by the party claiming expatriation by a preponderence of the evidence.

In its 1980-81 term, the Supreme Court will review the decision in United States v. Fedorenko. In that case, the Fifth Circuit reversed a district court decision that held that an immigrant who had procured his naturalization by concealing the fact that he had served as a concentration camp guard during World War II had not made a “material misrepresentation” as defined by the Supreme Court in Chaunt v. United States and was therefore not subject to denaturalization. The Fifth Circuit held that the district court had misconstrued the Chaunt test of “materiality” and concluded that the test had been satisfied. The case was remanded to the district court with directions to cancel the immi-

12. 444 U.S. at 266.
13. Id.
14. Id. at 267.
15. Id.
16. Id. at 268.
19. 597 F.2d at 951.
grant's certificate of naturalization.  

The Supreme Court is also scheduled to review United States v. Cortez, in which the Ninth Circuit reversed a district court judgment which convicted two individuals of knowingly transporting illegal aliens in violation of section 274(a)(2) of the INA. The convictions were reversed on the ground that the evidence used against the defendants was the product of an illegal vehicle stop by border patrol officers and should have been suppressed. The Ninth Circuit found that, since the vehicle stop was solely the product of a profile and not specific facts associated with the defendants' behavior or appearance of the vehicle, the officers did not have a valid basis for singling out the vehicle as a carrier of illegal aliens. Thus, stopping the vehicle was a violation of the defendants' rights under the fourth amendment.

EXPATRIATION AND NATIONALITY

In addition to Vance v. Terrazas, there was one other noteworthy expatriation case heard in the past year. In Davis v. INS, the District Court for the District of Columbia held that a native and citizen of the United States who voluntarily signed an oath of renunciation of United States nationality at the American Embassy in Paris could not enter the United States without proper alien documents. Petitioner argued that there was sufficient ambiguity in his statements submitted to the United States Embassy to preclude renunciation of citizenship. The court concluded, however, that petitioner's statement that he could no longer remain solely loyal to the United States was not ambiguous and showed a clear intent to renounce United States citizenship. Moreover, the court found that petitioner's renunciation was voluntary. Thus, the petitioner no longer qualified as a United States citizen.

Petitioner argued further that renunciation of citizenship requires acquisition of another nationality, but the court read sec-

20. Id. at 954.
21. 595 F.2d 505 (9th Cir. 1979), cert. granted, 100 S. Ct. 2983 (1980).
23. 595 F.2d at 506.
24. Id. at 508.
25. Id.
26. See note 4 and accompanying text supra.
28. Id. at 1180.
29. Id.
30. Id. at 1181.
31. Id. at 1182.
32. Id. at 1180.
tion 349(a) of the INA\textsuperscript{33} as creating two separate methods for losing nationality: one may lose nationality either by acquiring a foreign nationality or by renouncing United States nationality.\textsuperscript{34} The court therefore concluded that petitioner was an alien and must accordingly possess a proper entry document before entering the United States.\textsuperscript{35}

REFUGEES AND ASYLUM

Refugee Act of 1980

The Refugee Act of 1980\textsuperscript{36} (Refugee Act), enacted on March 17, 1980, provides a comprehensive procedure for the admission and resettlement in the United States of refugees of “special humanitarian concern”\textsuperscript{37} and accomplishes three major objectives. Those objectives include a revised definition of the term refugee, new quotas and procedures for the admission of refugees and granting of political asylum, and new resettlement procedures. A summary of the major provisions of the Refugee Act follows.

First, the prior definition of “refugee” has been expanded to conform to the United Nations Protocol relating to the status of refugees.\textsuperscript{38} In addition to race, religion and political opinion, the

\begin{itemize}
  \item [\textsuperscript{33}] 8 U.S.C. § 1481(a)(1), (5) (1976 and Supp. II 1978) provide in pertinent part as follows:
  \begin{itemize}
    \item [(a)] From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by —
    \begin{itemize}
      \item [(1)] obtaining naturalization in a foreign state upon his own application
      \item [(5)] making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State . . . .
    \end{itemize}
  \end{itemize}

\textsuperscript{34} 401 F. Supp. at 1182.

\textsuperscript{35} Id. at 1183.


\textsuperscript{37} Id. § 101(b). No definition of “special humanitarian concern” appears in the statute. However, both the House and Senate Reports provide the following guidelines: the plight of the refugees, the pattern of human rights violations in the country of origin, family ties, historical, cultural or religious ties, the likelihood of finding sanctuary elsewhere, and previous contact with the United States Government. H.R. REP. No. 96-608, 96th Cong., 1st Sess. 13 (1979); S. REP. No. 96-608, 96th Cong., 1st Sess. 6 (1979).

\textsuperscript{38} The United Nations Protocol Relating to the Status of Refugees assures equitable treatment to anyone who, owing to persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is unable
bases for a refugee’s fear of persecution now include nationality and membership in a particular social group. The term “refugee” does not include any person who has participated in the persecution of another. While the term “refugee” refers to an individual outside the country of his nationality or habitual residence, the Refugee Act allows the President, under special circumstances, to give refugee treatment to an alien who is still within the country of his nationality or habitual residence. In any event, the term “refugee” as referred to in both section 101(a)(42) of the INA and section 207 of the new Refugee Act means an alien who is outside the United States.

The second major section of the Refugee Act concerns the admission of refugees and granting of political asylum. The annual worldwide limitation on visa numbers has been reduced from 290,000 to 270,000 exclusive of refugees and their immediate relatives. Section 203(a)(7) of the INA governing refugee admission under the seventh preference has been repealed by the Refugee Act, and the six percent of visa numbers formerly allotted to it have been added to the allotment for the second preference, increasing it to twenty-six percent. The new law provides for the annual admission of 50,000 “normal flow” refugees for the years 1980 through 1982. The law also provides for an additional number if a greater need is projected by the President after appropriate consultation at the beginning of each fiscal year. Af-

or unwilling to return to his or her country of nationality or residence. Although the United States endorsed the United Nations Protocol by signing it in 1968, the broad United Nations Protocol definition of refugee was inconsistent with § 203(a)(7) of the INA which limited refugee status to aliens from Communist or Communist dominated countries. The new Act resolves this inconsistency. H.R. REP. No. 96-781, 97th Cong., 2d Sess. 20 (1980).

40. Id.
41. Section 207(c)(1) of the new Act states that the alien must not have resettled in any foreign country.
43. Id. §§ 207, 208.
44. Id. § 203(a).
45. Pursuant to 8 U.S.C.A. § 1153 (West Supp. 1980) immigrant visas are allocated in categories of preference priority. Under former law, the seventh preference was reserved for refugee admission. The second preference, both in the past and at the present, governs the admission of immigrants who are the spouses or unmarried sons or daughters of an alien admitted for permanent residence.
46. Section 203(a)(7), 8 U.S.C.A. § 1153 (West Supp. 1980) was repealed as well as §§ 203(f), (g) and (h), 8 U.S.C. § 1153 (1970) providing for adjustment of status thereunder.
47. Refugee Act of 1980, Pub. L. No. 96-212, § 207(a), 94 Stat. 102 (1980). This figure is over and above the worldwide quota.
48. Section 207(e) of the new Refugee Act defines “appropriate consultation” as “discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation.”
ter 1982, the number of yearly admissions is to be determined entirely through consultation at the start of each fiscal year. Finally, the new law provides for an emergency refugee situation not anticipated at the start of the fiscal year whereby refugees can be admitted after appropriate consultation for a period not exceeding twelve months.

While the term "refugee" refers to an alien applying for admission to the United States from another country, the term "asylum" refers to an alien who is inside the United States or applying for admission at a land border or port of entry. To qualify, the asylum applicant must satisfy the attorney general that he or she is a refugee within the meaning of section 101(a)(42)(A). If asylum is granted, it is granted for a period of one year with a possibility of renewal at the end of that year if political conditions in the alien's home country remain the same. A spouse or child of an alien admitted under either the refugee or asylum procedures is entitled to the same status as the alien. This rule applies even if the spouse or child is not independently eligible for refugee or asylum status. The spouse or child, however, must accompany the refugee or asylee or follow and join in the United States.

Section 243(h) of the INA, which provides for withholding of deportation when the attorney general believes an alien would be persecuted if deported, has been amended. The basis for fear of persecution under this section now includes nationality and membership in a particular social group. Moreover, withholding of deportation is now mandatory whenever an alien can show that his life or freedom would be threatened, as opposed to the showing under former law that he would be subject to persecution. Even when an alien can make such a showing, however, the statute sets forth four specific instances in which relief may not be granted: the alien's persecution of another, his conviction of a serious

50. See note 48 supra.
52. Id. § 207(b).
53. Id. § 208.
54. Id.
55. Id. §§ 207(c)(2), 208(c).
56. Id.
57. Id.
58. Id. § 203(e).
crime, the commission by him of a serious nonpolitical crime outside the United States, and danger to the security of the United States. By virtue of title 8, section 208.8 of the Code of Federal Regulations, these exceptions are made applicable to individuals seeking asylum.

The new Refugee Act restricts the authority of the attorney general to exercise the parole power contained in section 212(d)(5) of the INA. The attorney general may not parole into the United States an alien who is a refugee unless it is determined that compelling reasons militate in favor of paroling the refugee, instead of admitting the refugee under section 207 of the Refugee Act.

Aliens admitted as refugees under section 207 or granted asylum under section 208 are not given the status of lawful permanent residents immediately. Refugees are allowed to adjust their status after one year of physical presence in the United States. The refugee "visa allocation" is determined at the time of the refugee's original entry, and there is no further quota or numerical limitation when the time comes for the refugee to apply for permanent residence status. Permanent residence is recorded retroactively as of the date of original entrance to the United States.

In contrast, asylees are allowed to adjust their status one year after the grant of asylum. The Refugee Act only provides for the potential allocation of up to 5,000 visas for asylees applying to adjust status. Both refugees and asylees seeking to adjust status are subject to the exclusions to admissibility set forth in section 212(a) of the INA. The exclusions in paragraphs 14, 15, 20, 21, 25 and 32 of section 212(a), however, are not applicable to refugees and asylees seeking adjustment. Moreover, the attorney general may waive most of the other exclusion provisions for humanitarian purposes.

The third major section of the Refugee Act concerns the resettlement of aliens granted asylum or admitted to the United States as refugees. This portion of the Refugee Act provides for the presidential appointment of a United States Coordinator for Refugee Affairs having the rank of Ambassador at Large. The Coor-
The coordinator will be responsible for policy formulation, budget development, and coordination between agencies on a national and international level. The Refugee Act also creates an office of Refugee Resettlement in the Department of Health and Human Services which is responsible for channeling assistance to refugees. The director of this office, to be appointed by the Secretary of Health and Human Services, will be responsible for funding and administering most of the programs of the federal government under the guidance of the United States Coordinator for Refugee Affairs. The Secretary of State has administrative authority over the refugee programs through 1981, at which time administrative authority is to be transferred to the Director of the Office of Refugee Resettlement. In the interim, the President is to initiate a study to determine which agency is best suited to administer the program. The results are to be reported to Congress before March 1, 1981.

In In re Rodriguez, the first case to fall within the ambit of the new Refugee Act, the Board of Immigration Appeals (BIA) was called upon to define the meaning of “serious nonpolitical crime” referred to in amended section 243(h). Under this section, an alien requesting asylum may be excluded from the United States if he has committed a serious nonpolitical crime outside the United States prior to his arrival.

At an exclusion hearing, Rodriguez admitted that he had been arrested and convicted of robbery in Cuba. To determine whether the robbery conviction was a serious nonpolitical crime, the Board applied a balancing test, weighing the nature of the offense against the degree of persecution to be suffered by the alien if returned to his country of origin. Taking into account the nature of the crime of robbery and the sentence imposed, the Board

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65. Id. § 301(b).
66. Id. § 411.
67. Id. Provision has been made for a three year reimbursement period for direct cash and medical assistance provided by states to newly arrived refugees and asylees. Id. § 412(e). An annual sum of $200,000 has been appropriated for refugee supportive services for the fiscal years 1980 through 1981. Id. § 414.
68. Id. § 412(b).
69. Id.
70. I.D. No. 2815 (1980).
72. I.D. No. 2815 (1980). The Board was unable to locate anything in the 1980 Refugee Act to assist in defining the phrase “serious nonpolitical crime,” so it relied on a balancing test set forth in Handbook on Procedures and Criteria for De-
viewed the crime as serious. In addition, they found the evidence supporting the alien's claim of persecution insufficient. Rodríguez, therefore, was not given asylum.73

Cuban-Haitian Entrants

In a policy statement issued on June 20, 1980, Victor Palmieri, United States Coordinator for Refugee Affairs, announced the administration's belief that the sudden massive influx of Cubans and Haitians into the United States in the spring of 1980 created a situation not contemplated by the new Refugee Act of 1980.74 The announcement sets forth President Carter's decision to seek special legislation for the Cuban-Haitian entrants.

In accordance with the administration's position, the Cuban-Haitian Entrant Status Bill was introduced in Congress on August 5, 1980.75 The purpose of the proposed legislation is to resolve the problem of the refugee influx quickly and humanely. The proposal creates a special Cuban-Haitian Entrant status available to Cubans who arrived in the United States after April 20 and before June 20, 1980, and to Haitians who were involved in INS proceedings before June 20, 1980. Cuban-Haitian entrant status will also be extended to identifiable Haitians who arrived in Florida prior to June 20, 1980, but whose presence in the United States is not currently known to the INS.

Under the proposed legislation, the attorney general is authorized to deny or terminate the Cuban-Haitian status of any alien who is excludable under the INA, with certain exceptions. For aliens allowed to remain in the United States, the legislation gives the attorney general power to grant them authorization to engage in employment. The proposed legislation repeals the Cuban Refugee Adjustment Act of November 2, 1966, and special entrants are allowed to adjust their status after two years. Such admissions do not count against the annual numerical limitation set

terminating Refugee Status (Sept. 1979) published by the Office of the United Nations High Commissioner for Refugees. Id. at 6-8.

73. Id. at 9.

74. UNITED STATES DEP'T OF STATE, Current Policy No. 193, Cuban-Haitian Arrivals in U.S., June 20, 1980. For a discussion of the new policy see 57 INTERPRETER RELEASES 312 (1980). Approximately 114,000 Cubans arrived in Florida between April and June of 1980. Moreover, in recent years, Florida has become an entry point for thousands of Haitian “boat people.” Id.

forth in the INA. The proposed legislation also provides for federal reimbursement to states that provide assistance and services to Cuban-Haitian entrants.

**Haitian and Cuban Litigation**

In *Haitian Refugee Center v. Civiletti*, the District Court for the Southern District of Florida overturned the procedures under which asylum claims by over 4,000 Haitians were processed by the INS. In order to accelerate the processing of Haitian asylum claims, the INS shortened the time within which Haitians could submit asylum claims. The INS also scheduled mass hearings to consider the claims. As a result, Haitians were disabled from fully presenting their claims. The court concluded that the record amply sustained the plaintiffs' charge that in processing their asylum claims the INS had violated the Constitution, the immigration statutes, international agreements, INS regulations, and INS operating procedures. The district court ordered the INS to submit for court approval "a detailed plan providing for the orderly, case-by-case, nondiscriminatory and procedurally fair reprocessing of the plaintiffs' asylum applications upon a full record which will permit meaningful judicial review." In addition, the defendants were enjoined from expelling or deporting any member of the plaintiffs' class and from further processing applications until the reprocessing plan has been approved.

In *Mir v. Wilkinson*, the first case to arise out of the detention of recently arrived Cuban refugees, the District Court for Kansas ordered that detained Cubans be given exclusion hearings within sixty days of the court's decision. The case was initiated by seven Cuban nationals who, after admitting to convictions for robbery and burglary in Cuba, were detained pending exclusion hearings. The Cubans challenged their detention on three

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77. *Id.*
79. Immigration officers determined that petitioners were likely to be denied admission under 8 U.S.C. § 1182 (1976) which requires the exclusion of any applicant who has recently been convicted of a crime involving moral turpitude. The crimes of theft, burglary, and robbery are crimes involving moral turpitude under § 1182(a)(9). *Mir v. Wilkinson*, No. 80-3139 through 3145, slip op. at 7 (D. Kan. decided September 2, 1980).
First, they claimed that imprisonment without opportunity to post bail offended the eighth amendment. Second, they claimed they were being held without legal authority because they had not been convicted of a crime in the United States. Finally, they claimed that their imprisonment was unlawful because hearings had not been held within a reasonable time.

The court held that the petitioners had no statutory or constitutional right to release on bail. In addition, the petitioners failed to show that the attorney general had abused his discretion in denying parole under section 212(d)(5) of the INA. The court further held that detention of petitioners pending adjudication of their admissibility was expressly authorized by Congress. The court agreed with the petitioners, however, that detention of unadmitted aliens may be rendered unlawful by unreasonable delay in starting exclusion hearings. Here, the court found that detention of the Cuban refugees was not yet unreasonable but that it would become unreasonable if continued for another sixty days. Therefore, the INS was ordered to conclude exclusion hearings for petitioners within that time period.

**Requirement for Maintenance of Status for Nonimmigrant Students from Iran**

In response to Iran’s unlawful seizure of the American Embassy and the taking of hostages in Tehran, on November 10, 1979, President Carter ordered the attorney general to identify Iranian students in the United States who were not maintaining proper status and to begin deportation proceedings against such persons. On November 13, 1979, in response to that directive, the attorney general amended the Code of Federal Regulations to add section 214.5. The new regulation directed Iranian nonimmigrants to maintain proper status.

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80. Id., slip op. at 8.
81. Id.
82. 8 U.S.C. § 1182(d)(5) (1976); see Mir v. Wilkinson, No. 80-3139 through 3145, slip op. at 10 (D. Kan. decided September 2, 1980).
84. Id., slip op. at 12.
85. Id., slip op. at 16.
86. Id.
87. Announcement on Actions to be Taken by the Department of Justice, 15 Weekly Comp. of Pres. Doc. 2107, 2107 (Nov. 10, 1979).
88. Broad authority is conferred upon the attorney general by 8 U.S.C. § 1103(a) (1976) which provides that he shall “establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the Immigration Act].” In addition, 8 U.S.C. § 1184(a) (1976) gives the attorney general power to prescribe regulations under which nonimmigrants may be admitted and allowed to stay in the United States.
89. 8 C.F.R. § 214.5 (1980).
grant postsecondary students to report to the INS by December 14, 1979, with evidence of their residence and student status. Failure to comply or willfully supplying false information would subject such students to immediate deportation proceedings. The last section of the rule reminded students that a condition of their admission and continuation of stay in the United States is obedience to all laws of the United States. In light of the international crisis created by the events in Iran, the notice and comment and delayed effective date provisions of the Administrative Procedure Act were waived by the attorney general as being impracticable and contrary to the public interest. The regulation went into effect on November 13, 1979.

Within a month, however, the rule was invalidated by the United States District Court for the District of Columbia in Narenji v. Civiletti. In Narenji, plaintiffs challenged the regulation as a violation of the fifth amendment because it discriminated against Iranian students on the basis of national origin. Plaintiffs also maintained that it violated the fourth amendment by permitting INS officials to seize and interrogate Iranian students without reasonable grounds to suspect that nonimmigrant

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90. 8 C.F.R. § 214.5(a) (1980) specifically requires that at the time of reporting, the student must provide the following: (1) passport and form I-94 (arrival and departure record); (2) evidence from the school of enrollment, including documentation showing payment of fees or waiver of payment of fees for the current semester; (3) a letter from school authorities that shows the number of course hours in which he or she is enrolled; and (4) evidence of his or her current address in the United States.
91. 8 C.F.R. § 214.5(b) (1980). Section 241(a)(9) of the Immigration Act provides for the deportation of any alien who "was admitted as a nonimmigrant and failed...to comply with the conditions of any such status," Immigration & Nationality Act § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1976) [hereinafter cited as I. & N. Act].
92. 8 C.F.R. § 214.5(c) (1980). This section refers to laws which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. Id.
95. 481 F. Supp. 1132 (D.D.C. 1979), rev’d, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 100 S. Ct. 2928 (1980). The cases of Narenji v. Civiletti, Civ. No. 79-3189 (D.D.C. filed Nov. 21, 1979), and Confederation of Iranian Students v. Civiletti, Civ. No. 79-3210 (D.D.C. filed Nov. 27, 1979) were consolidated on November 27, 1979 with a full hearing on the merits held December 4, 1979. The former was filed as a class action by three nonimmigrant students from Iran on behalf of all Iranians admitted to the United States as nonimmigrant students. Their motion for class certification was granted. The latter was filed by an association composed of approximately 1500 members.
96. 481 F. Supp. at 1136.
status was violated. In addition, they claimed it violated their first amendment rights of speech, association and assembly. Finally, they claimed the notice and comment procedure of the Administrative Procedure Act was not complied with and was improperly waived.

The court rejected the plaintiffs' challenge to the regulation based on failure to comply with the Administrative Procedure Act, concluding that the rationale stated in the published regulation showed good cause for the waiver. Also rejected was the plaintiffs' challenge to the specific requirements of the regulation. The court indicated that the specific provisions were within the latitude of the Executive under section 1184(a). But the court agreed with the plaintiffs' contention that the regulation was founded upon a classification based on national origin. Finding no compelling national interest to justify the discriminatory regulation, the court held that the regulation denied plaintiffs the equal protection of the laws guaranteed by the fifth amendment. Having found the regulation invalid under the fifth amendment, it was unnecessary for the court to reach the first and fourth amendment issues. The judgment enjoined the government from enforcing the regulation, from continuing any deportation proceedings already instituted against Iranian students as a result of their compliance with the regulation, and from using any information gathered from the Iranian students who reported to the INS under the new regulation in any proceedings under the immigration laws that might result in deportation or any other penalty.

On December 14, 1979, the Court of Appeals for the District of Columbia Circuit granted the government's motion for a stay of the district court judgment pending appeal. The stay was granted based on the government's representation that the attor-

97. Id.
98. Id.
99. Id.
100. Id. at 1137.
101. See note 90 supra.
102. 481 F. Supp. at 1137-38.
103. Id. 8 U.S.C. § 1184(a) (1976) gives the attorney general power "to insure that . . . upon failure to maintain the status under which he was admitted . . . such alien will depart from the United States."
104. 481 F. Supp. at 1138-45.
105. Id.
106. Id. at 1147.
107. Id. at 1146.
108. Id.
109. Id.
ney general would extend the reporting deadline to December 29, 1979, and not enforce any deportation orders resulting from interviews until litigation was resolved. On December 17, 1979, the attorney general signed an amendment to the regulation extending the reporting deadline to December 31, 1979.

On December 27, 1979, the court of appeals reversed the district court. The circuit court's decision was based in part on the broad authority conferred upon the attorney general by section 103(a) of the INA and the specific authority conferred by section 263(a). It was also based on case law supporting distinctions on the basis of nationality in the field of immigration by the Congress or the Executive so long as the distinctions are not wholly irrational. The court indicated that classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis. The court was satisfied that that requirement was met here. The court also emphasized the finding that the regulation was directly related to the crisis in Iran, and thus was in the field of foreign affairs, an area over which the President has constitutional authority.

On January 31, 1980, the court of appeals denied plaintiffs' motion for rehearing en banc. A few months later, on May 19, 1980, the United States Supreme Court denied certiorari.

### STUDENT REGULATIONS

Events of the past year have focused attention upon nonimmigrant students and caused the INS to reconsider its position on

114. L & N. Act § 103(a), 8 U.S.C. § 1103(a) (1976), gives the attorney general authority to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions" of the INA.
115. L & N. Act § 263(a), 8 U.S.C. § 1303(a) (1976), gives the attorney general authority "to prescribe special regulations and forms for the registration of fingerprinting of . . . (5) aliens of any other class not lawfully admitted to the United States for permanent residence."
117. Id. at 748.
118. Id.
119. Id. at 745.
120. 100 S. Ct. 2928 (1980).
121. The takeover of the American Embassy in Tehran, Iran, initiated official
the new student regulations that went into effect on January 1, 1979. The new regulations provide for the admission of nonimmigrant students for the duration of their student status rather than for a fixed period of time, and they also govern student employment. It was hoped that these regulations would help to ease the administrative burden on both the INS and nonimmigrant students, but the INS now believes that more effective controls must be placed on nonimmigrant students. Accordingly, the INS has proposed amendments to the regulations to enable it to ensure that nonimmigrant students are maintaining the proper status. Under the proposed amendments, students will be admitted for a fixed period of time with the opportunity to apply for extensions. In addition, periodic personal interviews by INS personnel will be required of students to determine if they are maintaining student status. Central files will be maintained on each student, as opposed to the present practice of maintaining such files locally.

LABOR CERTIFICATION AND EMPLOYMENT

Recent activity in the area of labor certification and employment includes both proposed legislation and judicial and administrative decisions. In 1979, the INS proposed new rules for employment authorizations for certain aliens. Due to numerous comments relating to those proposals, however, they never became final and the INS published revised proposed rules. The revised proposed rules create a new section 109 to be added to Title 8 of the Code of Federal Regulations. The new section enumerates the classes of aliens who do not need specific authorization to be employed and sets forth classes of aliens who may apply to the District Director for employment authorization.

inquiries into the number and whereabouts of foreign students in the United States. In addition, violent activities on the part of some foreign students has caused concern that the INS lacks effective control over students. See 57 INTERPRETER RELEASES 85 (1980).

123. 8 C.F.R. § 214.2(f) (2) (1979).
124. Id. § 214.2(f) (6).
127. Id.
128. Id.
129. Id.
130. See 56 INTERPRETER RELEASES 354, 361-62 (1979) for a summary of the original proposed rules.
Decisions by the District Director are final and unappealable under the proposed regulation. In addition, the new section sets forth the grounds and procedures for revocation of employment authorization.

Three recent decisions are of particular importance in this area. In *Stewart Infra-Red Commissary v. Coomey*, the District Court for Massachusetts ruled that labor certification decisions lie exclusively with the Department of Labor and cannot be invalidated by the INS. Thus, the INS had exceeded its statutory authority in denying a sixth preference visa petition on the ground that the alien was not qualified for the position for which the Department of Labor had certified her. The court indicated, however, that an alien's willful misrepresentation of facts to the Department of Labor or INS may provide a basis for rejection of a visa petition.

The other two decisions involved aliens who sought to obtain exemptions from the labor certification requirement by obtaining investor status under 8 C.F.R. § 212.8(b)(4). The first case, *Pistentis v. INS*, involved an alien who purchased a dairy bar and grocery store for $10,000 and thereafter sought investor status. His request was denied by the District Director when it was learned that the investment had been made by giving the seller the proceeds of a $5,000 bank loan and a promissory note in the sum of $5,000. After later conceding his deportability, the alien resubmitted his application for adjustment of status to permanent resident with investor status. Once again it was denied. Since the alien conducted the business himself and employed no one, the immigration judge and the BIA concluded that the alien had not satisfied the requirements for investor status set forth in *In re Ruangswang*, a case decided six months after the alien filed

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133. Id. at 346-47.
134. Id. at 347.
135. 8 C.F.R. § 212.8(b)(4) (1980).
136. 611 F.2d 483 (3d Cir. 1979).
137. On June 18, 1976 when Pistentis applied for investor status, 8 C.F.R. § 212.8(b)(4) required that an alien make an investment totaling $10,000. On September 7, 1976 the regulation was amended to require an investment of $40,000. *Id.* at 484, 487.
138. *Id.* at 485.
139. I.D. No. 2546 (1976). *In re Ruangswang* held that an investment must expand job opportunities for United States citizens and lawful permanent residents.
his petition.\textsuperscript{140} The Third Circuit disagreed with this conclusion and relied on \textit{In re Ko}\textsuperscript{141} in holding that any request for labor certification exemption as an investor may be decided under either current or previous law, whichever is more favorable to the alien.\textsuperscript{142} Since it appeared that the requirements for investor status in force at the time the alien filed his petition were more favorable than those existing thereafter, the case was remanded.\textsuperscript{143} The Third Circuit also remanded on the issue of whether the alien had established a sufficient $10,000 investment.\textsuperscript{144}

In the second case, \textit{Sanghavi v. INS},\textsuperscript{145} an alien was unsuccessful in establishing investor status because the Fifth Circuit Court of Appeals was not convinced that the alien had invested or was actively in the process of investing capital totaling $10,000 as required by the investor regulation.\textsuperscript{146} The Fifth Circuit held that the alien had not met his burden of showing the investment because it was unclear as to whether the proceeds of an $8,000 loan were used to finance a one-time purchase of furniture for sale as opposed to a permanent investment in inventory.\textsuperscript{147} Nevertheless, the court indicated that the fact $10,000 was not invested at the date of application for investor status was not determinative.\textsuperscript{148} An alien may qualify for investor status if he is actively in the process of investing, which means that he must have actual intent to invest the funds and be pursuing a plan of investment.\textsuperscript{149} Although there was evidence to suggest that the alien added sufficient capital within two years of his application for investor status, the court held that the alien had not carried his burden of proof.\textsuperscript{150}

Two administrative decisions are also significant. In \textit{In re Kumar},\textsuperscript{151} an alien who failed to qualify for investor status under the old investor regulation tried to have a different investment,
made after the regulation was revised, analyzed under the more lenient standard set forth in the earlier regulation. The BIA held that an alien has no lingering right to have an investment made after the regulatory change reviewed under pre-regulatory change standards when the initial application never satisfied the earlier standards.152

In another investor exemption case, In re Lett,153 the BIA held that the management of an investment by an alien qualified as an investor does not constitute employment within the meaning of section 212(a)(14) of the INA.154 Therefore, such an alien would not be precluded from adjusting his status under section 245(c)(2) of the INA.155 An alien who fails to obtain an investor exemption, however, runs the risk that work performed in connection with his investment may be considered unauthorized employment and prevent adjustment of status under section 245(c)(2) of the INA.156

RESTRICTIONS ON ACCESS OF ALIENS TO SUPPLEMENTAL SECURITY INCOME (SSI) BENEFITS

On June 9, 1980, the Social Security Act was amended, placing new eligibility restrictions on aliens who apply for SSI benefits for the first time after September 30, 1980.157 Under the new law, for purposes of determining eligibility and the amount of benefits for an alien, the income and resources of any person who executed an affidavit of support or similar agreement on behalf of the alien shall be deemed to be the income and resources of the alien.158 This attribution of the sponsor’s income and resources to the alien operates only if the alien applies for SSI benefits within three years of his entry into the United States.159 When the alien resides with his sponsor, an exception to the attribution of income rule is applied.160

152. Id. No. 2777 at 4 (1980).
153. Id. No. 2776 (1980).
156. Id.
158. Id. In addition, the income and resources of the sponsor’s spouse shall be deemed to be the income and resources of the alien.
159. Id. § 504(b).
160. Id.
In order to have his eligibility considered, an alien is required to obtain the cooperation of his sponsor in providing the necessary information and evidence to enable the Social Security Administration to make its decision. The new law holds the alien and sponsor jointly and severally liable for the repayment of any SSI benefits incorrectly paid due to misinformation.

The provisions of the new law do not apply to an alien who becomes blind or disabled after entry into the United States. They also do not apply to aliens admitted as refugees or granted political asylum by the attorney general.

FAMILY RELATIONS

Validity of Marriage

The Ninth Circuit Court of Appeals rendered an important decision involving marriage validity in Dabaghian v. Civiletti. Following the trend of a number of its recent decisions, the Ninth Circuit held that where a valid marriage is entered into in good faith and is still legally binding, the marriage may support a spouse's visa petition and eligibility for adjustment of status under section 245 of the INA, even though the couple is separated at the time of adjustment of status.

Dabaghian involved a nonimmigrant student who married a United States citizen and applied for adjustment of status to permanent resident under section 245 of the INA. Two weeks after his adjustment of status was granted, he filed for a divorce from his wife and it was granted. Thereafter, the INS brought proceedings to rescind the adjustment of status on the basis that at the time it was granted, the marriage was "factually dead." According to the INS, the alien was not the spouse of a United States citizen pursuant to section 201(b) of the INA. The immigration judge ordered rescission and the BIA dismissed the alien's appeal. Later, his action for review and relief in the district court was dismissed on summary judgment.

The Ninth Circuit reversed the district court with instructions.

161. Id.
162. Id.
163. Id.
164. Id.
165. 607 F.2d 868 (9th Cir. 1979).
166. See Menezes v. INS, 601 F.2d 1028 (9th Cir. 1979); Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977); Bark v. INS, 511 F.2d 1200 (9th Cir. 1975); see also Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978).
169. 607 F.2d at 869.
to enter a judgment directing the INS to reinstate appellant's permanent residence. The Ninth Circuit held that since at the time of adjustment appellant was a spouse in a legally valid marriage which was not sham or fraudulent at its inception, he was eligible for adjustment of status and his permanent resident status could not be rescinded. The fact that his marriage was factually dead at the time of adjustment was of no importance.

In re McKee, a BIA decision subsequent to Dabaghian relied on Chan v. Bell in holding that, where parties enter into a valid marriage and there is nothing to show that they have since obtained a legal separation or dissolution, a visa petition filed on behalf of the alien spouse should not be denied solely because the parties are separated. The Board went on to hold, however, that separation is a relevant factor in determining whether the marriage was a sham at the time it was entered into.

The definition of spouse was also the issue in Adams v. Howerton where two males, one an alien and the other a United States citizen, married one another in Colorado and later sought a declaration granting immediate relative status on behalf of the alien. The district court denied the declaration, holding that neither Colorado nor federal law recognizes the marriage of persons of the same sex. In addition, the court held that the denial of immediate relative status to the alien did not constitute a denial of constitutional rights under the equal protection and due process clauses.

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170. Id. at 871.
171. Id. In In re Kondo, I.D. No. 2781 (1980), a recent decision by the BIA, the Board followed Dabaghian and held that a marriage legally valid but "factually dead" (nonviable) at the time of the adjustment of status cannot be the basis for rescission for cases arising in the Ninth Circuit. In so holding, the Board overruled its earlier decision in In re Sosa, I.D. No. 2469 (1976) indicating that it no longer applies in the Ninth Circuit.
172. I.D. No. 2782 (1980). The McKee case, which was decided after In re Kondo, I.D. No. 2781 (1980), discussed in note 171 supra, may have an effect on whether Kondo will be limited to the Ninth Circuit.
176. Id. at 1122-23.
177. Id. at 1124-25.
Visa Petitions for Family Members

In an unusual visa petition case, *In re Fong*, a natural child of his father's second wife was successful in persuading the BIA to acknowledge the child's eligibility to obtain a visa petition for his father's first wife as his stepmother. The Board's decision was based on two factors. First, the father's marriage to the first wife could not be considered polygamous because the father was married to no one else at the time. Second, the Board found authority for treating the father's first wife as petitioner's stepmother. Moreover, the Board held that the fact petitioner had already successfully petitioned for his natural mother did not preclude approval of a visa petition for his stepmother.

In *In re Moreira*, also referred to as "Moreira II," the BIA expanded its earlier decision involving steprelationships. In its earlier decision, the Board rejected the "close family unit" requirement for steprelationships, but held that more than a purely technical relationship was needed to establish a relationship that would qualify for immigration purposes. The Board further held that a steprelationship could be established by showing that the stepparent had, prior to the child's eighteenth birthday, evinced an active concern for the stepchild's support, instruction and general welfare. Since the marriage in *Moreira* took place only four months prior to the child's eighteenth birthday, it was impossible to prove the steprelationship under the criteria set forth in the first *Moreira* decision. Therefore, in the second *Moreira* decision, the Board held that inquiry may properly be made into what occurred between the stepparent and stepchild before the marriage, or after the child reached the age of eighteen, in order to determine if the standards set forth in the

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179. Id. at 3.
180. Id. at 2.
181. Id. at 3.
182. I.D. No. 2792 (1980). The section of the INA interpreted in both *Moreira* decisions was § 101(b)(1)(B), 8 U.S.C. 1101(b)(1)(B) (1976) which includes the following within the definition of the term "child": "a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred . . . ." 183. *In re Moreira*, I.D. No. 2720 (1979). After declining this case, the Board remanded it to the district court to determine whether a steprelationship existed under its precedent decision. The Board also ordered that the case be certified back to the Board if the district court's decision was adverse to petitioner. The district court's decision was adverse, so the case was returned to the Board. For a more detailed discussion of the first *Moreira* decision see Synopsis, Recent Developments in the Immigration Laws of the United States 1978-1979, 17 SAN DIEGO L. REV. 173, 187 (1979).
184. I.D. No. 2720 at 5.
185. Id. at 7, 9.
earlier decision have been met.\textsuperscript{186}

In an interesting decision, \textit{In re Gonzalez},\textsuperscript{187} the BIA relied on the first \textit{Moreira}\textsuperscript{188} decision in approving a visa petition on behalf of petitioner's stepbrother even though the stepbrother was the son of a woman petitioner's father never married. The petitioner's father was unable to act as common parent in this case because the son was not legitimated.\textsuperscript{189} However, since petitioner's natural mother had shown the active parental concern for the beneficiary required by \textit{Moreira}, the Board found a stepparent relationship between petitioner's mother and her stepbrother.\textsuperscript{190} Petitioner's mother thus served as the common parent of petitioner and her stepbrother, qualifying them as siblings.\textsuperscript{191}

Both the "close family unit"\textsuperscript{192} and \textit{Moreira}\textsuperscript{193} standards for determining the existence of a stepparent relationship in granting visa preferences were recently rejected by the Ninth Circuit Court of Appeals in \textit{Palmer v. Reddy}.\textsuperscript{194} Relying on precedents predating \textit{Moreira},\textsuperscript{195} the \textit{Palmer} court interpreted "stepchild" literally and held that visa preferences are available to stepchildren without qualification.\textsuperscript{196}

\textbf{Visa Allocation}

The controversy surrounding the allocation of recaptured visa numbers improperly charged against the Western Hemisphere immigration quota\textsuperscript{197} during the adjustment of status of Cuban refugees between 1968 and 1976\textsuperscript{198} has been settled by the Sev-
The Seventh Circuit reversed the judgment of the district court as to the formula governing the allocation of recaptured visa numbers and remanded the matter to the district court for a new computation under a revised formula.200

The Seventh Circuit rejected the plaintiffs' proposal to assign the recaptured visa numbers in strict chronological order by priority date without regard to national origin.201 Instead, the court adopted a modified version of the defendants' "historical approach."202 The historical approach provides three criteria for the issuance of recaptured visas. First, a determination must be made as to how many visa numbers were charged to Cuban adjustees in each of the relevant fiscal years. Second, a determination must be made as to what percentage of the properly issued visa numbers was awarded to applicants from each of the Western Hemisphere nations in each of the relevant fiscal years. Third, the visa numbers recaptured from each year must be issued so that they are apportioned among plaintiff class members from each nation in the same percentage that immigrants from that nation received properly issued visa numbers in that fiscal year.203

The first modification to this approach is that visa numbers already issued pursuant to the unauthorized recapture program are to be credited against each country's total historical share.204 The second modification is directed at expediting the recapture and allocation procedure. Instead of setting up separate and sequential allocations for each of the eight fiscal years involved since 1968, the historical share of each country over the entire eight year period is aggregated.205 In addition, historical share visa numbers which are unused shall be redistributed to countries with quali-

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199. 605 F.2d 978 (7th Cir. 1979).
200. Id.
201. Id. at 988.
202. Id.
203. Id. at 983.
204. Id. at 988. This modification was necessary because by August of 1977 defendants had taken it upon themselves to recapture and reissue many of the wrongfully issued visa numbers without court permission. Id. at 982.
205. Id. at 989.
fied visa demand in excess of their historical shares. Finally, the Seventh Circuit ordered that the entire recapture program be completed within two years of entry of the order of the district court on remand.

Another recent case, Contreras de Avila v. Bell, also involved a dispute over the allocation of visas. The dispute arose after an amendment to the Immigration and Nationality Act on October 20, 1976, imposed a preference system and a 20,000 limit on visa numbers which could be issued for each country under the Western Hemisphere quota of 120,000. The new law went into effect on January 1, 1977, three months after the fiscal year had begun. By January of 1977, 14,203 visas had already been issued to Mexican immigrants. The visa office concluded that the visas which had been issued to Mexican immigrants up to January, 1977 should be charged to the 20,000 quota, thus leaving only 5,797 visa numbers for the balance of the fiscal year.

In response to that decision, plaintiffs brought a class action against the State Department seeking declaratory and injunctive relief. The complaint asserted that the defendants had improperly charged the visa numbers to the 20,000 quota and sought the recapture of 13,336 visas which allegedly would have been available to Mexican natives. Plaintiffs sought certification of three classes. Only two of the classes, however, were certified. The two subclasses consisted of all current preference applicants and nonpreference applicants as of October 1, 1977.

The district court concluded that the State Department’s interpretation of the new law was unreasonable and contrary to congressional intent. First, the visas issued in the first three months of the fiscal year were not issued pursuant to the preference system as required by the new law. Moreover, Congress did not intend the new law to apply retroactively. But the court would not

206. Id.
207. Id.
208. No. 78 C 1166 (N.D. Ill., filed May 18, 1979), digested in 56 INTERPRETER RELEASES 342 (1979).
211. Id. The third class sought to be classified consisted of permanent residents or United States citizens on whose visa petitions the plaintiffs in class one received their preference classifications and priority dates. The third class was combined with the first class for certification.
accept the argument that the full 20,000 limit was to apply to the remaining nine months of the fiscal year. Instead, the court held that a reasonable approach was to prorate the 20,000 quota so that 15,000 visa numbers would be available for the remainder of the year. Because 5,435 visas had been issued subsequent to January 1, 1977, a total of 9,565 visas remained to be used. The court held that those visas should be distributed to the two certified subclasses. The district court's entire order is currently on appeal to the Seventh Circuit Court of Appeals.

DEPORTATION AND IMMIGRATION PROCEDURE

Suspension of Deportation

Of the many cases which have been decided in the area of suspension of deportation under section 244(a)(1) of the INA,\(^{212}\) a few are particularly significant. In *Kamheangpatiyooth v. INS*,\(^ {213}\) the Ninth Circuit Court of Appeals vacated an order of the BIA denying eligibility for suspension of deportation to an alien who, due to a one month absence from the United States five years prior to his application for suspension, failed to satisfy the requirement of "continuous seven years physical presence" preceding the date of application.\(^ {214}\)

The petitioner in *Kamheangpatiyooth* was a native and citizen of Thailand who was allowed to enter and remain in the United States as a student from 1964 to 1976.\(^ {215}\) Approximately midway through his twelve-year presence in this country, he took a one month trip to Thailand to visit his dying mother.\(^ {216}\) The trip was scheduled between semesters so that petitioner would not miss school.\(^ {217}\) When petitioner was found deportable for failure to depart on schedule, he applied for suspension of deportation.

The immigration judge purported to apply a "*Fleuti test*"\(^ {218}\) to

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212. 8 U.S.C. § 1254 (1976). This section permits the attorney general to consider the merits of an application for suspension of deportation if the alien makes a prima facie showing that he satisfies the following requirements:

[He] 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 the spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id. (emphasis added).

213. 597 F.2d 1253 (9th Cir. 1979).

214. *See* note 212 *supra*.

215. 597 F.2d at 1255.

216. *Id.*

217. *Id.*

218. The threshold question in determining whether an alien is subject to one
evaluate the significance of petitioner's absence. The following factors were considered: the length of the visit, the purposes thereof, and documentation necessary to make the trip. After considering these factors, the judge concluded that the trip broke the continuity of petitioner's physical presence because the distance traveled was great, the length of the visit was thirty days, and travel documents were obtained. The BIA affirmed the immigration judge's decision to deny suspension of deportation.

The Ninth Circuit disagreed with the immigration judge and stated that the Fleuti factors had been applied as if "they were in themselves determinative both of the meaning of 'intended' departure in Section 101(a)(13) and of the meaning of a 'continuous period' of presence in Section 244(a)(1)." The Ninth Circuit proposed instead that the significance of the absence be analyzed in terms of the statutory requirement of a continuous seven-year waiting period. As viewed by the Ninth Circuit, the purpose of that requirement was to guarantee the "legitimacy of the inference that extended presence was likely to make deportation harsh." An absence cannot be considered interruptive of the

of the many exclusions to admissibility to the United States set forth in § 212 of the INA is whether the alien made an "entry" as defined in § 101(a)(13) of the INA. In Rosenberg v. Fleuti, 374 U.S. 449 (1963), the United States Supreme Court gave an expansive interpretation to the definition of "entry." In Fleuti, the Court held that an "innocent, casual and brief" trip outside the United States was not an intended departure and therefore did not meaningfully interrupt the alien's permanent residence. Thus, such an alien was not subject to an "entry" upon returning to the United States; and further, the alien was not subject to exclusion. In Fleuti, the Court identified three factors which are important in determining whether an alien's departure was intended and therefore meaningfully interruptive of his permanent residence. These factors are: the length of the absence; the purpose of the trip; and the casual nature of the trip.

In Wadman v. INS, 329 F.2d 812 (9th Cir. 1964), the Ninth Circuit held that the guidelines set forth in Fleuti for purposes of determining an entry in the exclusion context could be used in determining whether there had been continuity of physical presence for purposes of granting suspension of deportation. Apparently, the immigration judge relied on Wadman in applying the Fleuti test to Kamheangpatyoth.
period of presence if the hardship to the alien would be the same with or without the absence.\textsuperscript{226} In that context, the Ninth Circuit found nothing in the circumstances of petitioner's thirty day trip to Thailand to detract from the inference, appropriate from the length and nature of his twelve-year presence in the United States, that deportation would present a great hardship.\textsuperscript{227} The Ninth Circuit further stated that the fact petitioner obtained travel documents was additional evidence of the temporary nature of his absence, and it did nothing to diminish the likelihood that petitioner had established roots in this country which would have made deportation harsh.\textsuperscript{228} The Ninth Circuit remanded the case for reconsideration of the continuous presence requirement and for a determination of petitioner's good moral character and hardship.\textsuperscript{229}

In a later case, \textit{Chan v. INS},\textsuperscript{230} the Ninth Circuit Court of Appeals reaffirmed the principles set forth in \textit{Kamheangpatiyooth}. The \textit{Chan} case involved a husband and wife who were natives of Hong Kong and citizens of Great Britain. Both remained in the United States past the time authorized by their student visas and were ordered deported. Their applications for suspension were denied by the immigration judge because they had separately taken a number of vacations to Hong Kong, Canada and Australia, thus breaking the continuity of their physical presence in the United States.\textsuperscript{231} The Ninth Circuit held that the denial of their applications was an abuse of discretion. The trips were not meaningfully interruptive of their residence because the Chans were absent separately; the sole purpose of the trips was to visit family and friends; the trips were during school vacations; and they traveled with passports they already had.\textsuperscript{232}

The case also involved the issue of whether deportation was a sufficient hardship to the Chans. Even though the Chans admitted they would be able to find employment abroad, the Ninth Circuit held that the BIA had abused its discretion in not considering fully the personal hardship on the Chans because Mrs. Chan would be separated from her family and Mr. Chan's ability to support his parents abroad would be diminished.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{226} Id. at 1257.
\item \textsuperscript{227} Id. at 1258.
\item \textsuperscript{228} Id. at 1259.
\item \textsuperscript{229} Id. at 1260.
\item \textsuperscript{230} 610 F.2d 651 (9th Cir. 1979).
\item \textsuperscript{231} Id. at 653.
\item \textsuperscript{232} Id. at 655.
\item \textsuperscript{233} Id.
\end{itemize}
In another suspension case, *Tovar v. INS*, the Third Circuit Court of Appeals ruled that an alien woman could qualify for suspension of deportation on the basis of extreme hardship to her grandson, who lived with her and was a United States citizen, even though section 244 of the INA only provides for consideration of hardship to the alien’s “spouse, parent or child.” Because the alien’s relationship to her grandson resembled that of parent to child, the court held that the hardship to the grandchild from deportation of his grandmother should be considered in determining whether the latter was eligible for a stay of deportation.

A number of decisions interpreting the requirement of “extreme hardship” were handed down in the past year. In *Bastidas v. INS*, the Third Circuit Court of Appeals reversed a decision of an immigration judge denying suspension of deportation based on failure to establish extreme hardship. The Third Circuit held that insufficient consideration had been given to the noneconomic emotional hardship which would result from the alien’s separation from his young son, a United States citizen. In so holding, the Third Circuit confirmed the importance of the question of separation of family members from each other for purposes of a section 244(a) (1) extreme hardship determination.

Extreme hardship was also the issue in *Wang v. INS*. In *Wang*, an order of deportation by the BIA would have required two school age children, both United States citizens who spoke only English, to accompany their alien parents to Korea. In applying for a motion to reopen deportation proceedings, petitioners argued that their children would suffer serious economic, educational and cultural difficulties if forced to leave this country. In addition, petitioners argued that they would suffer an economic loss upon the sale of their home and business. After considering the combined effects of the hardship to the children and the eco-
nominal loss to petitioners, the Ninth Circuit concluded that a prima facie case of extreme hardship had been shown. The case was remanded for more thorough consideration of both factors.

In another case involving children who were United States citizens, 

\[ \text{Villena v. INS} \]

the Ninth Circuit Court of Appeals affirmed the BIA's denial of an alien's original application for suspension when there was insufficient evidence of extreme hardship to his two year old child whom a psychologist said could easily adjust to life in the Philippines. Moreover, there was evidence that petitioner would not be deprived of employment in the Philippines. The circuit court, however, reversed the BIA's decision denying petitioner's motion to reopen deportation proceedings because he had alleged new facts supporting his claim of extreme hardship. The court acknowledged that since the new factors arose after the determination that petitioner was deportable, they were entitled to less weight. In the aggregate, however, these facts plus his previous allegations of hardship, combined with the hardship and prejudice suffered by petitioner by reason of the INS' delay in responding to his preference classification petition established a prima facie showing of extreme hardship. The Board's denial of the motion to reopen was reversed and the case was remanded to determine whether petitioner was eligible for suspension of deportation.

**Exclusionary Rule in Deportation Proceedings**

In *In re Sandoval,* a recent decision of importance, the BIA concluded that evidence obtained illegally by immigration officials

241. *Id.* at 1349.
242. 622 F.2d 1352 (9th Cir. 1980).
243. *Id.* at 1358.
244. *Id.*
245. The new facts were: (1) hardship to petitioner's parents who were admitted as lawful permanent residents and were residing with petitioner; (2) the birth of another U.S. citizen child; (3) additional hardship to petitioner's children; (4) petitioner purchased a home; (5) petitioner's wife was applying for suspension of deportation; and (6) petitioner's brother had become a lawful permanent resident. *Id.* at 1359, 1361.
246. *Id.* at 1361.
247. *Id.* As of this writing, two Ninth Circuit cases have been decided under *Wang* and *Villena.* See *Carnalla-Munoz v. INS*, 80 Daily Journal D.A.R. 2646 (9th Cir. 1980) (prima facie case not shown where there was only economic hardship to the deportable aliens and no additional equities); *Berrera-Loyva v. INS*, 80 Daily Journal D.A.R. 2653 (9th Cir. 1980) (Board abused its discretion in refusing to consider economic hardship together with separation of family and other personal hardships in determining whether petitioner had made a sufficient showing of extreme hardship).
248. I.D. No. 2725 (1979). *Sandoval* involved a female alien who, as a result of an illegal search of an apartment building, was taken into custody. After being advised of her rights, she signed an affidavit admitting her alienage and illegal entry.
in violation of an alien's fourth amendment rights can be used as a basis for a finding of deportability. In making its decision, the Board found that the exclusionary rule was designed to deter law enforcement officials from violating fourth amendment rights, but the United States Supreme Court had never used it to exclude evidence from a civil proceeding. Since deportation proceedings have consistently been classified as civil rather than criminal, the Board could find no reason to extend the fourth amendment exclusionary rule to deportation proceedings. The Board reasoned that the internal safeguards against an immigration officer's misconduct were sufficient, so the application of the exclusionary rule would not provide a useful additional deterrent. Moreover, the “societal costs” posed by the application of the rule outweighed any deterrent effect that the rule might provide. Thus, the Board held that neither legal nor policy considerations militated in favor of the exclusion of unlawfully seized evidence from deportation proceedings.

In a later decision, In re Garcia-Flores, the Board limited the broad rule expressed in Sandoval. In Garcia-Flores an alien argued that evidence supporting a deportation charge against her as an alien who had entered without inspection was inadmissible because a service officer had failed to advise her of her right to an attorney pursuant to the federal regulations. The Board concluded that a violation of the regulations may lead to a finding of
Adopting a test set forth in *United States v. Calderon-Medina*, the Board held that, when a regulation is designed to benefit an alien and its violation prejudices interests of the alien protected by the regulation, evidence obtained pursuant to the violation may be excluded. Here, the Board was satisfied that the subject regulation was a benefit to the alien, but the matter was remanded to determine whether the alien had actually been prejudiced.

**NATURALIZATION AND DENATURALIZATION**

In *Olegario v. United States*, the Second Circuit upheld executive action withdrawing the means by which Filipino veterans of the United States armed forces during World War II could obtain United States citizenship pursuant to special federal legislation. In so holding, the court reversed a decision of the district court, which had granted a petition for naturalization to a Filipino who had served in the United States armed forces during World War II but had failed to file a petition for naturalization before December 31, 1946, when the special legislation expired.

The controversy over Filipino veterans seeking United States citizenship began when the attorney general withdrew naturalization facilities from the Philippines between 1945 and 1946, after the Philippine government expressed concern that it would lose too many citizens to the United States. As a result of this action, many eligible Filipinos were disabled from obtaining United States citizenship. In *In re Naturalization of 68 Filipino War Veterans*, a group of Filipino war veterans successfully challenged executive action removing naturalization facilities from the Philippines. The district court divided petitioners seeking citizenship.

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256. I.D. No. 2780 at 4.
257. 591 F.2d 529 (9th Cir. 1979).
258. I.D. No. 2780 at 5.
259. Id. at 6.
261. On March 27, 1942, Congress amended the Nationality Act of 1940 to provide for the naturalization of noncitizens who served in the United States armed forces during World War II. The new law exempted noncitizen servicemen who served outside the continental United States from some of the usual naturalization requirements, such as a period of residence in this country and literacy in English. It also provided for the overseas naturalization of persons eligible who were in active service in the United States military and were not within the jurisdiction of any court authorized to naturalize aliens. Act of Dec. 28, 1945, Pub. L. No. 79-270, § 202(c)(1), 59 Stat. 658.
into two categories. In the first were those who had taken affirmative action to file for naturalization before the statutory deadline, but whose applications were rejected because of the INS policy not to naturalize Filipinos. As to these petitioners, the court held that the rejection of applications amounted to affirmative misconduct which estopped the INS from relying on the expiration of the legislation. The second category was composed of Filipino veterans who did not take timely steps to be naturalized before the legislation expired. As to the category two petitioners, the court held that the deliberate failure to have INS facilities available was a denial of due process. Therefore, petitioners eligible for citizenship under the expired legislation were ordered admitted to citizenship.

Because the government conceded that the aliens in category one were prejudiced by the government’s failure to process their applications, it did not oppose their petitions. However, the government vigorously challenged the granting of citizenship to Filipinos in category two who made no attempt to procure citizenship before the expiration of the statute.

The petitioner in Olegario fell into the second category. Although qualified for the special legislation, Olegario made no attempt to file a petition for naturalization prior to the expiration of the legislation. Nevertheless, relying on the 68 Veterans case, the district court concluded that Olegario had been denied due process of law in a manner which could only be remedied by admitting him to citizenship. The Second Circuit conceded that Olegario was entitled to claim the protection of the due process clause at the time the naturalization examiner was withdrawn from the Philippines. The court, however, held that the Executive’s action in removing the means by which Filipino servicemen could become naturalized did not contravene Congress’ intent in passing the special legislation. Nor did it discriminate against a

265. Id. at 936.
266. Id. at 939.
267. Id. at 940.
268. Id. at 951.
269. Id.
270. 473 F. Supp. 185, 186 (S.D.N.Y. 1979), rev’d, 629 F.2d 204 (2d Cir. 1980).
271. Id.
272. Id.
273. 629 F.2d at 233.
certain class. The court held further that the withdrawal of the naturalization examiner was within the Executive's broad discretion in foreign affairs and did not exceed the authority granted to the Commissioner of the INS and the attorney general to implement the INA. The court concluded by stating that the removal of the examiner was justified by a sufficiently important federal interest.

In United States v. Banafshe, a recent case involving denaturalization, the Ninth Circuit affirmed a district court decision which revoked an alien's naturalization pursuant to section 340(d) of the INA. Section 340(d) creates a rebuttable presumption of fraud when a naturalized citizen sets up permanent residence in his native land within five years after naturalization. Banafshe argued that the statutory presumption was unconstitutional because it eliminated the government's burden to prove its case by clear, unequivocal and convincing evidence pursuant to Schneiderman v. United States. The Ninth Circuit concluded, however, that the statute was a valid exercise of Congress' authority to enact rules of evidence and procedure. In reaching that conclusion the Ninth Circuit relied on Luria v. United States, a case in which the United States Supreme Court upheld the constitutionality of a predecessor statute. The court also relied on Vance v. Terrazas which held that Congress is free to supplant the courts' evidentiary standards because they are judge-made rules that are not rooted in the Constitution.

Banafshe argued further that, even if the statute were constitutional, he had presented sufficient evidence to overcome the presumption in that he returned to his native country after his father became ill in order to assist in running a family business. The court, however, affirmed the district court's finding that all of Banafshe's activities in the native country indicated an intent to remain there.

CONCLUSION

As this synopsis indicates, a significant portion of the activity which has taken place in the immigration field in the past year

274. Id.
275. Id.
276. Id.
277. 616 F.2d 1143 (9th Cir. 1980).
279. 616 F.2d at 1146; see Schneiderman v. United States, 320 U.S. 118 (1943).
280. 616 F.2d at 1146.
281. 231 U.S. 9 (1913).
283. 616 F.2d at 1147.
284. Id.
has concerned refugees and asylum. The government referred to the June, 1980 influx of Cuban refugees as the "greatest overload" on the immigration service system in INS history. Although it was hoped that the Refugee and Asylum Act of 1980 would have the potential to accommodate large influxes of aliens into the United States, the President found it necessary to call for new legislation to deal with the Haitians and Cubans.

Increasing the strain on the INS is the effort to deport Iranians who are not fulfilling the requirements of their nonimmigrant status. This effort has called attention to the degree of control exercised by the INS over nonimmigrants. In response to demonstrations by foreign students, the government has proposed changes to the liberalized student regulations that went into effect in January of 1980. The proposed changes will increase control over nonimmigrant students. This action reflects the INS' continuing effort to balance the need to reduce the administrative time and expense involved in processing immigration matters against the need to maintain effective controls over aliens in the United States.

The Select Commission on Immigration and Refugee Policy, established in 1978 to evaluate existing laws, policies and procedures governing the admission of immigrants and refugees to the United States, is now fully staffed and operational. The due date for the Commission's final report of its findings and recommendations to the President and Congress has been extended to March 1, 1981. Whether the Commission's efforts will affect the course of immigration and nationality law remains to be seen.

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