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Practical Aspects of Representing an Alien at a Deportation Hearing

JACK WASSERMAN*

INTRODUCTION

It has been estimated that there are from four to twelve million illegal aliens in the United States who are subject to deportation.¹ During the 1974 fiscal year, the Immigration and Naturalization Service (INS) located 788,145 deportable aliens. 718,740 aliens were required to leave without a formal order of deportation; 18,824 were ordered deported,² and 50,265 were allowed to adjust status.³ In the same period 45,301 deportation cases were referred to immigration judges for hearings,⁴ and 3,468 cases were decided by the Board of Immigration Appeals. These figures reveal the breadth of the law's impact on the alien. They also demonstrate the necessity for

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3. 1974 INS, ANNUAL REPORT 17.
4. Id. at 16.
adequate representation in order to protect the rights and privileges accorded aliens under the Immigration and Nationality Act (Act).

Counsel for the alien must deal with the intricacies of both the Act and its accompanying regulations. The Act sets forth more than 700 grounds for deportation. It is the longest, the most ambiguous, the most complicated, and the most illogical statute on the books. Additionally, the practitioner often has to analyze and solve issues of constitutional law, domestic relations, administrative law, and foreign law to effectively represent his client. The drastic consequences which attend deportation require that counsel press every possible advantage. Thus, before a case is adjudicated on its merits, it is imperative that counsel present the case in a procedural posture advantageous to his client. Only a comprehensive working knowledge of the procedural aspects of deportation proceedings will afford counsel the opportunity to efficiently prepare and effectively litigate each case. This article will outline the procedural guidelines with which counsel must be familiar, highlight the practical measures that must be undertaken by the practitioner litigating a deportation action, and catalogue the various stages of a deportation proceeding.

THE RIGHT TO COUNSEL AND DUE PROCESS IN DEPORTATION PROCEEDINGS

Although a deportation hearing is not a criminal proceeding, courts have recognized that an alien involved in deportation proceedings is entitled to procedural due process. Due process includes the right to the assistance of counsel. Congress has acknowledged the constitutional guarantee to counsel by enacting statutory provisions which have codified the right.

Sections 242(b) (2) and 292 of the Act provide that “the alien shall have the privilege of being represented by counsel.” However,

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9. Immigration and Nationality Act § 242(b) (2), 8 U.S.C. § 1252(b) (2) (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.].
because deportation proceedings are civil in nature, there is no right to appointed counsel.\textsuperscript{11} The alien must be granted time to obtain counsel. The denial of a continuance in order to obtain counsel has been held violative of due process.\textsuperscript{12} Once counsel has been secured, the attorney representing the alien before the INS should ascertain the alien's registration number and file a notice of appearance on form G-28.

Deportation proceedings\textsuperscript{13} are instituted by the INS by serving the alien with an order to show cause\textsuperscript{14} on form I-221S. The order is combined with a notice of hearing and warrant for arrest of the alien. The order to show cause should contain a concise statement of the violation and a designation of charges.\textsuperscript{15} Due process requires that the alien be given a notice of charges and a hearing.\textsuperscript{16} To satisfy these constitutional standards, notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.\textsuperscript{17} Notice of the hearing should be given at least seven days prior to the hearing date, unless the public interest, safety or security requires a shorter period.\textsuperscript{18}

At the time the order to show cause is served, the District Director will decide whether to utilize the warrant of arrest. If it

\textsuperscript{11} United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975); Tupa-cyuanqui-Marin v. INS, 447 F.2d 603, 606 (7th Cir. 1971). See generally Appleman, Right to Counsel in Deportation Proceedings, 14 SAN DIEGO L. REV. 130 (1976).

\textsuperscript{12} Castaneda-Delgado v. INS, 525 F.2d 1295, 1298 (7th Cir. 1975); see Geders v. United States, 96 S. Ct. 1330 (1976).

\textsuperscript{13} A deportable alien who voluntarily surrenders to the Immigration and Naturalization Service or is located or apprehended by its officers may be offered voluntary departure. In order to qualify, the alien must establish that he has maintained good moral character for the five years preceding the deportation charge, that he has the ability and is willing to depart, and that he is not deportable on criminal, immoral, or subversive grounds. Voluntary departure is, however, a privilege, not a right. The grant of voluntary departure ultimately depends upon a favorable exercise of discretion by the District Director. I. & N. Act § 244(3), 8 U.S.C. § 1254(e) (1970); 8 C.F.R. § 242.5 (1976); INS, OPERATING INSTRUCTIONS § 242.10 (1975).

\textsuperscript{14} 8 C.F.R. § 242.1(a) (1976); see Manguerra v. INS, 390 F.2d 358, 359 (9th Cir. 1968).

\textsuperscript{15} Chlomos v. INS, 516 F.2d 310, 312 (3d Cir. 1975).


\textsuperscript{18} Cheung v. INS, 418 F.2d 490, 462 (D.C. Cir. 1969).
is not utilized, the alien will be released upon his own recognizance. However, if the warrant of arrest is used, a custody determination will be made, setting the amount of bond.\textsuperscript{19} Aliens have a constitutional right to bail pending their deportation hearing,\textsuperscript{20} pending judicial review,\textsuperscript{21} and until they are required to report for actual deportation.\textsuperscript{22}

\textbf{Prehearing Proceedings}

The bond amount will appear on the reverse side of the order to show cause, form I-221S. Although bonds may range from $500.00 to $75,000.00, generally a bond will be either $1,000.00 or $2,500.00. Bond may be posted by a surety company, but usually a cashier's or certified check payable to INS is deposited. Form I-352 (Immigration Bond) and form I-305 (Collateral Receipt) are executed when the collateral is posted and copies of each form are given to the obligor. Form I-305 must be returned to obtain the collateral when the alien has departed from the United States or when he becomes a permanent resident.

A bond may contain conditions. The conditions are of a general nature, usually requiring the alien to report for hearing and deportation. However, the District Director may in certain situations impose a condition barring unauthorized employment.\textsuperscript{23} Any bond determination or decision by the District Director not to release an alien is reviewable by appeal to any immigration judge who is available in the region. Further appeal may be taken to the Board of Immigration Appeals. The bail or bond proceedings described are separate from the deportation hearing.\textsuperscript{24}

\textbf{The Deportation Hearing}

\textit{Location of the Hearing}

The deportation hearing is held in the district of the alien's arrest or residence. Preferably, it should be held at his place of residence.\textsuperscript{25} Counsel may request a change in the hearing location to

\begin{itemize}
  \item \textsuperscript{19} 8 C.F.R. § 242.2(a) (1976).
  \item \textsuperscript{21} Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), aff'd, 346 U.S. 929 (1954).
  \item \textsuperscript{22} United States ex rel. Daniman v. Shaughnessy, 117 F. Supp. 388 (S.D.N.Y. 1953).
  \item \textsuperscript{23} 8 C.F.R. § 103.6(a) (2) (ii) (1976).
  \item \textsuperscript{24} Id. § 242.2(b); In re Kwun, 13 I. & N. Dec. 457 (BIA, 1970).
  \item \textsuperscript{25} La Franca v. INS, 413 F.2d 686, 689 (2d Cir. 1969).
\end{itemize}
the alien's place of residence. Generally, such a request will be
granted, especially if the alien is released on bond or is released
on his own recognizance. Hearings may be held in places other
than the district of the alien's residence or in more than one district
if required for the convenience of the alien, the alien's attorney,
or witnesses.

Government Officials Present

The presiding officer at the deportation hearing is the special in-
quiry officer. He is often referred to as an immigration judge, even
though he is not subject to the Administrative Procedure
Act. Although the immigration judge wears judicial robes and
sits at a desk on a raised platform, the other aspects of the deporta-
tion hearing are less formal than are those of judicial proceedings.
Witnesses, interpreters, and counsel sit around a conference table
equipped with microphones. A recording device rather than a sten-
ographer is used to preserve testimony adduced at the hearing.

The major functions of the immigration judge are to determine
deportability, to grant certain forms of discretionary relief, to deter-
mine the country of the alien's deportation, and to certify a decision
that involves an unusually complex or novel question of law or fact
to the Board of Immigration Appeals. As the presiding officer,
the immigration judge controls the conduct of the hearing, au-
thorizes deposition testimony, grants continuances, and places
both the interpreter and all witnesses under oath. He is required
to advise the unrepresented alien of his right to counsel and to
ask the alien to state his preference regarding such representation.
The immigration judge is also required to advise the alien that he
will have a reasonable opportunity to examine and object to adverse

27. 8 C.F.R. § 1.1(1) (1976). There are forty-one immigration judges as-
signed to conduct deportation and exclusion hearings.
29. 8 C.F.R. § 242.8 (1976).
30. Id. § 242.14(e).
31. Id. § 242.13. Usually only one continuance is granted except when
good cause is shown.
32. Id. §§ 242.12 & 242.14(d).
33. The alien defendant is referred to as the respondent in deportation
proceedings.
evidence and to cross-examine witnesses. He will have the factual allegations of the order to show cause read to the alien, explained in nontechnical language, and finally entered as an exhibit. The alien is required by the immigration judge to plead to the factual allegations of the order to show cause. After the hearing the judge will render an oral or written decision.

In some districts, a trial attorney is assigned in all deportation cases. Assignment by the District Director is required in all cases in which deportability is an issue, in cases of unrepresented incompetents or children under sixteen, in cases when requested by the immigration judge, or in cases after which nonrecord, confidential information will be submitted to contest the grant of discretionary relief. Trial attorneys are generally members of the bar, but at times they may be immigration inspectors without law degrees.

The trial attorney is authorized to present evidence on behalf of the Government and to examine and cross-examine the alien and his witnesses. He is vested with authority to appeal a decision favorable to the alien and may move for reopening and reconsideration of decisions adverse to the Government's contentions. He may also file, in writing, additional charges of deportability. The document evidencing these additional charges will be entered as an exhibit and will serve as a basis for a continuance to allow the alien to meet the additional charges.

Courts have long perceived the importance of utilizing a competent interpreter. Some interpreters are highly skilled and efficient and have great experience and expertise in the art of translation. Others may not have acquired facility in the language. Inexperienced interpreters have problems transposing foreign sentences into English, a difficult task in any event because some languages have no literal counterpart for many English words. Thus, it is important for counsel to ascertain not only whether the interpreter speaks the same language as the alien but also whether the interpreter understands the same dialect.

At deportation hearings, unlike judicial proceedings, the Government
ment furnishes all interpreters at its expense. The interpreter may be an employee of INS, of the State Department, or he may be a nongovernmental individual employed on a contract basis. In appropriate cases, an alien will be permitted to bring his own interpreter into the hearing to monitor the accuracy of the official translation.

Prehearing Conferences

Neither the statute nor the regulations makes any provisions for prehearing conferences. Informal conferences, however, are frequently desirable and should be sought in appropriate cases either immediately prior to the deportation hearing or well in advance of the event. Such conferences may result in stipulations shortening the hearing. In some cases they will apprise counsel of adverse information contained in the Service's file. Two situations mandate consultation with the trial attorney prior to the formal hearing or rehearing. Such action will allow counsel to obtain advance revelation of evidence gathered by the INS. When deposition testimony has been received pursuant to an immigration judge's order, copies may not be sent to counsel prior to the scheduling of a rehearing. A request for copies of the deposition should be directed to the trial attorney. Similarly, when a rehearing is scheduled after a conditional grant of an adjustment of status, counsel might not be advised in the rehearing notice of its purpose. The alien is entitled to know the basis for the rehearing, and his counsel should demand that the adverse information upon which the rehearing is based be revealed to him in advance.

Motion Practice

Although there is no formal motion practice in deportation hearings, appropriate motions may be made either orally or in writing. The record of the hearing will reflect all motions. In appropriate cases, the following motions may be utilized: motion for continuance; motion to disqualify the immigration judge; motion for...
A motion for a change of venue may be made based on the residence of the alien, convenience for witnesses, or for other good cause. The motion should be made prior to or at the inception of the hearing. However, if evidence is developed at the hearing which necessitates a change of venue, a motion duly made should be considered timely.

Deportation hearings are open to the public. 8 C.F.R. § 242.16(a) (1976). However, the immigration judge may exclude the general public or specific individuals from the hearing. Id. This rule will have to be re-evaluated in light of recent court decisions. See Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972). Because the physical facilities for deportation hearings are comparatively small, limitations may be imposed upon the number of spectators in attendance. 8 C.F.R. § 242.16(a) (1976). Generally, neither the press nor the public attends deportation hearings. In those cases in which the alien is well-known, and large numbers of the public or press are present, larger hearing rooms are utilized.

District Directors or immigration judges are authorized to issue subpoenas. 8 C.F.R. § 287.4(a) (2) (1976). When the INS requires the attendance of a witness, application is made ex parte, frequently without a written application. An alien requesting a subpoena must inform the Service of his request. He is required to state what he expects to prove and that he has made a diligent effort to procure the witness needed. Id. The witness who resides more than 100 miles from the place of the hearing is required to appear at the nearest field office, unless he is allowed to appear at the proceeding itself. Anyone over eighteen years of age may serve the subpoena. The alien must tender one day’s attendance and mileage fee at the time of service. Id. § 287.4(c).

Depositions of witnesses may be taken by order of the immigration judge if he is satisfied that “a witness is not reasonably available . . . and that his testimony . . . is essential.” Id. § 242.14(e). Deposition testimony may be taken by written or oral interrogatories or in combination. It may be taken in the United States or abroad. The Federal Rules of Civil Procedure are used as a guide to the extent practicable. Although depositions are usually recorded stenographically or by dictaphone, video tape and sound recording may be appropriate if paid for by the party requesting them. See Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975); United States v. La Fatch, 382 F. Supp. 630 (N.D. Ohio 1974); F.B.I. R. Civ. P. 30(b) (4), 28 U.S.C. § 30(b) (4) (1970).

Due process requires that the Government produce upon demand evidence favorable to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). This principle has been held to apply to deportation proceedings. United States ex rel. Schluerer v. Watkins, 67 F. Supp. 566 (S.D.N.Y.), aff’d, 185 F.2d 853 (2d Cir. 1946). The alien is assisted in his effort to obtain information from the Government to aid his case by the Freedom of Information Act, 5 U.S.C. § 552 (1970); 8 C.F.R. § 103.10 (1976); 28 C.F.R. § 16 (1976). See also Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).

Aliens are protected by the fourth amendment against illegal searches
to suppress evidence secured by unlawful electronic surveillance.\footnote{51}{Evidence which has been unlawfully obtained by electronic surveillance may also be excluded by a motion to suppress. When the issue of electronic surveillance is raised, the Government is required to admit or deny the charge of an unlawful act. If a denial is made, it should include explicit assurances that all agencies providing information relevant to the inquiry were canvassed. In re Quinn, 525 F.2d 222 (1st Cir. 1975).}

\section*{PROCEDURE IN THE CONDUCT OF A DEPORTATION HEARING}

The immigration judge begins the hearing by turning on his recording machine. He then proceeds to call the case, identify the alien, counsel, the trial attorney, and the interpreter. The alien is asked whether he received the order to show cause which is entered as Exhibit 1. The alien or his attorney then pleads\footnote{52}{The alien may plead as an affirmative defense to a deportation charge that he is: a United States citizen; that he did not effect an entry (Rosenberg v. Fleuti, 374 U.S. 449 (1963)); that he did not enter illegally or overstay; that an essential allegation supporting deportability is not established by clear, convincing, and unequivocal evidence (Woodby v. INS, 335 U.S. 276 (1946); I. & N. Act § 242(b)(4), 8 U.S.C. § 1252(b)(4) (1970)); that he has a defense under government estoppel (Moser v. United States, 341 U.S. 41 (1951); Cornelio-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960)); selective deportation based on secret political grounds (Lennon v. INS, 527 F.2d 187 (2d Cir. 1975)); adoption of different standard in similar cases (Del Mundo v. Rosenberg, 341 F. Supp. 345 (C.D. Cal. 1972); United States ex rel. Partheniades v. Shaughnessy, 146 F. Supp. 772, 774-75 (S.D.N.Y. 1956)); res judicata (United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966)); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (The principle of res judicata in deportation proceedings, however, has not been accepted by our Administrators.); or claims of unconstitutionality. See Alcala v. Wyoming State Bd. of Barber Examiners, 365 F. Supp. 560 (Wyo. 1973) (It is questionable whether it is necessary to raise a constitutional issue administratively.).}} to the allegations of fact set forth in the order to show cause.\footnote{53}{8 C.F.R. § 242.16(b) (1976).} If the alien has no attorney, he is advised of his rights.\footnote{54}{Id. § 242.16(a).} If deportability is contested, evidence is adduced on the issue.
Deportability and alienage must be established by substantial evidence—that is, by clear, convincing, and unequivocal evidence. Hearsay is admissible, but uncorroborated hearsay is not substantial evidence. The use of hearsay and guilt by association is considered erroneous. When hearsay is admitted, counsel for the alien should exercise his right to cross-examine by requesting a subpoena or depositions. The prior statements of adverse witnesses may be obtained under the Jencks rule by making a demand for them. An alien is entitled to equal treatment and nondiscriminatory rulings on evidentiary issues. Failure to accord the alien such treatment results in the hearing being deemed unfair.

Although oral argument is usually not encouraged before an immigration judge, it will be allowed in some cases. Briefs are not usually submitted but should be filed in complicated cases. The alien is called as the first (and sometimes the only) witness. The alien may decline to answer upon grounds of self-incrimination. If deportability is conceded, if it is established, or even when it remains disputed, consideration must be given to applications for discretionary relief. Such applications must be made during the hearing, and the burden of proof is upon the alien to establish that he is entitled to relief.

**Discretionary Relief**

**Voluntary Departure**

An alien found deportable may apply for voluntary departure.

56. Corroborated hearsay is admissible and may be utilized. Glaros v. INS, 416 F.2d 441, 443 (5th Cir. 1969); see Fed. R. Evid. 802-05, 28 U.S.C. §§ 802-05 (1970).
58. Rassano v. INS, 492 F.2d 220, 227 (7th Cir. 1974).
62. Kimm v. Rosenberg, 363 U.S. 405, 406 (1960); United States ex rel. Belfrage v. Shaughnessy, 212 F.2d 128, 130 (2d Cir. 1954). However, the alien's prior statements, oral or written, are admissible. 8 C.F.R. § 242.14(c) (1976).
63. Id.
64. Id.
65. I. & N. Act § 244(e), 8 U.S.C. § 1254(e) (1970). See also Comment,
If the alien is deportable on grounds other than subversion, immorality, or criminal acts, he must establish that he has demonstrated good moral character for the five preceding years. If deportable on subversive, immoral, or criminal grounds, the alien must establish that he has ten years continuous residence in the United States and possessed good moral character during this period. Applications for voluntary departure may be made orally and require no fee. In cases in which the alien's good moral character is uncontested, the alien's testimony that he has no arrests or convictions, is not a subversive, and has behaved himself, will be accepted. When good moral character is at issue, the alien should produce witnesses or character letters from his employer, neighbors, and acquaintances. The alien must also prove that he has the financial ability and the willingness to depart from the United States. Normally, the Service will consent to thirty days' voluntary departure unless there are special considerations such as marriage to an American citizen or other compelling factors.\textsuperscript{66} Extensions of the period for voluntary departure may be granted only by the District Director.\textsuperscript{67}

Applications for Adjustment of Status

Applications for adjustment of status are discretionary in nature and confidential information may be used.\textsuperscript{68} The immigration judge must first determine statutory eligibility before reaching the issue of discretion.\textsuperscript{69} If eligibility is found, discretion should be exercised.\textsuperscript{70} The factual findings upon which discretion is exercised must be articulated in a reasoned decision,\textsuperscript{71} and the decision must meet the substantial-evidence test.\textsuperscript{72} If the immigration judge uti-
lizes an improper standard or fails to consider relevant factors in the exercise of his discretion, the decision will be reversed by the courts.73

Adjustment of status74 is utilized more frequently than any other provision of the statute to acquire permanent residence. Alien crewmen, exchange visitors who must reside two years abroad, aliens who enter in transit without visas, without inspection, or fraudulently are ineligible.75 The alien attempting to adjust status must be inspected and admitted or paroled. He must be eligible to receive an immigration visa and be otherwise admissible. An immigration visa must be immediately available at the time of approval.76 In order to adjust status, the alien is required to file form I-485 with a fee of $25.00 and submit accompanying documents, including forms G-325A, SS-5, a fingerprint chart, two passport photographs, and a birth certificate.77 If the alien departs from the United States after filing his adjustment application, his departure is considered an abandonment of the application.78

717 (2d Cir. 1966); cf. Khalil v. District Director, 457 F.2d 1276, 1277-78 (9th Cir. 1972) (applying the reasonable foundation test).


75. 8 C.F.R. § 245.1 (1976). The Immigration and Nationality Act Amendments of 1976 render ineligible those aliens who accept unauthorized employment in the United States prior to their filing adjustment of status applications. See generally Afterword, supra note 74.

76. 8 C.F.R. § 245.2. The alien's priority date must be within ninety days of being reached. Id. § 245.1(g). The alien has to file a relative petition, file for sixth or third preference, establish that he either has a labor clearance or is exempt, establish refugee or investor status, or utilize his filing date of the permanent residence application (nonpreference) to obtain a priority date. Id. § 245. Aliens who have had nonimmigrant status under I. & N. Act §§ 101(a) (15) (A), (E), & (G), 8 U.S.C. §§ 1101(a) (15) (A), (E), & (G) (1970), are required to sign a written waiver of immunities previously granted to them under such nonimmigrant status. Id. § 247(b), 8 U.S.C. § 1257(b).

77. 8 C.F.R. § 245.2(a) (2) (1976).

78. The INS may, however, grant the alien permission to leave the United States. This is usually accomplished by an advance parole. Id. § 245.2(a) (3).
If the adjustment application is uncontested, the deportation proceeding may be terminated and the application referred to the District Director for adjudication. If it is contested, the immigration judge reviews the application form (I-485) with the alien off the record, administers an oath to him, requires him to sign the form, and then enters it in evidence. The alien may offer evidence in support of his application, in support of his good moral character, and in establishing any other favorable factors.\textsuperscript{79} He is subject to cross-examination on his application. Relief is granted as a matter of discretion, and it will be in the form of a conditional grant, subject to reopening if adverse information is developed when the application is processed by the travel control section of the District Director's office. A denial of adjustment is appealable to the Board of Immigration Appeals.

Special statutory provisions govern adjustment of status for fiancées, fiancées, diplomats, Cuban refugees, and conditional entrants. Fiances and fiancées are required to marry within three months of entry in order to be eligible for adjustment of status.\textsuperscript{80} Diplomats and accredited representatives to an international organization entering under a status known as A(i), A(ii), G(i) or G(ii)\textsuperscript{81} who overstay or defect are also eligible for adjustment.\textsuperscript{82} In order for adjustment to be granted, the Attorney General must find that the alien possesses good moral character, is admissible, and that "such action would not be contrary to the national welfare, safety or security." Aliens whose duties were of a custodial, clerical, or manual nature are ineligible, as are those aliens who can adjust under other provisions of law.\textsuperscript{83} Cuban refugees\textsuperscript{84} and conditional entrants\textsuperscript{85} require two years' residence before they may qualify for adjust-


\textsuperscript{80} I. & N. Act § 214(d), 8 U.S.C. § 1184(d) (1970); 8 C.F.R. § 245.2(d) (1976).

\textsuperscript{81} I. & N. Act §§ 101(a) (15) (A)-(i), (A) (ii), (G) (i), or (G) (ii), 8 U.S.C. §§ 1101(a) (15) (A) (i), (A) (ii), (G) (i), or (G) (ii) (1970).


\textsuperscript{83} 8 C.F.R. § 245.3 (1976).

\textsuperscript{84} Cuban Refugee Act of November 2, 1966, 80 Stat. 1161.

ment. These special classes must file form I-485 or form I-485A with a fee of $25.00 and the accompanying documents noted above.\textsuperscript{86}

\textbf{Suspension of Deportation}

An alien is eligible for suspension of deportation\textsuperscript{87} if he can show seven years’ continuous physical presence in the United States and that he is not deportable on criminal, moral, or subversive grounds.\textsuperscript{88} Aliens in this category must also demonstrate extreme hardship.\textsuperscript{89} Aliens who are deportable on criminal, moral, or subversive grounds must prove ten years’ continuous physical presence\textsuperscript{90} and extremely unusual hardship.\textsuperscript{91} In both types of cases, good moral character must be shown. Applications for suspension of deportation are filed on form 256A with a fee of $65.00. Aliens who entered as crewmen, who are exchange visitors, or who are natives of contiguous territory or an adjacent island are statutorily ineligible. Suspension cases are reported to Congress.\textsuperscript{93} The seven-year cases require an affirmative resolution to be rejected; the ten-year cases require an affirmative resolution for approval.\textsuperscript{94} Suspension cases are investigated prior to final approval, and several years may elapse between the time required for investigation and congressional action.\textsuperscript{95}

\begin{itemize}
\item \textsuperscript{86} 8 C.F.R. § 245.2(c) (1976).
\item \textsuperscript{89} Id. § 244(a) (1), 8 U.S.C. § 1254(a) (1).
\item \textsuperscript{90} The continuous residence provisions are inapplicable to aliens who have served twenty-four months in the United States Armed Forces and if separated, have been honorably discharged, \textit{Id.} § 244(b), 8 U.S.C. § 1254(b).
\item \textsuperscript{91} Id. § 244(a) (2), 8 U.S.C. § 1254(a) (2). Factors considered in determining hardship are: (1) length of residence in the United States; (2) family ties; (3) possibility of obtaining a visa abroad; (4) financial burden on the alien; (5) health and age of the alien. \textit{In re S —,} 5 I. & N. Dec. 409, 410–11 (BIA, 1953). See also Blanco-Dominguez v. INS, 528 F.2d 382 (9th Cir. 1975); Rassano v. INS, 492 F.2d 220 (7th Cir. 1974).
\item \textsuperscript{93} Id. § 244(c) (1), 8 U.S.C. § 1254(c) (1).
\item \textsuperscript{94} Id. § 244(c) (2) (3), 8 U.S.C. § 1254(c) (2) (3).
\item \textsuperscript{95} The author believes that this congressional oversight violates the separation of powers provisions of the Constitution. See Montgomery v. Ellis, 364 F. Supp. 517, 532 n.7 (N.D. Ala. 1973); 37 Op. Att’y Gen. 56 (1933); Ginnane, \textit{The Control of Federal Administration by Congressional Resolutions and Committees}, 66 HARV. L. REV. 569 (1953).
\end{itemize}
Registry

An alien may apply for registry by filing a form I-485 together with a fee of $25.00. Entry prior to June 30, 1948 is required, and aliens inadmissible as criminals, procurers, subversives, narcotic violators, smugglers of aliens, or other immoral people are ineligible.

The alien must prove continuous residence in the United States since entry, good moral character, and that he is not ineligible for citizenship.

Applications for Stays

After the immigration judge designates the countries of deportation, he is required to advise the alien “that pursuant to section 243(h) of the Act, he may apply for temporary withholding of deportation . . . .” The alien may then be granted not more than ten days in which to submit his application and a $25.00 filing fee. The alien has the burden of proving that his deportation to the designated country would subject him to persecution because of race, religion, or political opinion as claimed. The alien’s affidavit may be supported by excerpts from magazines, books, almanacs, newspaper articles, State Department area handbooks, congressional reports, material from various interested organizations, and by showing the form of government, the repressive practices of that government, and whatever other evidence is available to establish that the alien will be subjected to repression. The alien must

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97. If entry occurred prior to July 1, 1924, adjustment is granted as of the date of entry.

98. Documentary evidence of residence is required as are character letters or affidavits.

99. 8 C.F.R. § 242.17(c) (1976).

100. Id. provides that the application:

[S]hall consist of respondent's [alien's] statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available.

101. Id.

establish a clear probability that he will be singled out for persecution.103

The alien who has applied for a stay under section 243(h) is, in effect, seeking asylum in the United States. However, the alien may also make an application for asylum to the District Director under Articles 32 and 33 of the Convention Relating to the Status of Refugees.104

Customarily, persecution or asylum claims are referred to the Office of Refugee and Migration Affairs of the State Department for its views. The responses are not always meaningful and do not control the decision of the immigration judge.105 Confidential material may be used in deciding these claims.106 Stays of deportation may also be granted for health, business, or other humanitarian considerations which warrant a delay in deportation. Applications must be made to the District Director on form I-246 (an affidavit may be used), and a fee of $40.00 is required.

Waivers

Aliens with citizen or resident ties may obtain a waiver for tuberculosis.108 Aliens who are excludable for conviction of crimes and who have certain family ties may obtain a waiver if there is extreme hardship and a finding that the waiver will not be contrary to the national welfare, safety, or security. Family ties also provide the basis for a waiver of fraud.110 Aliens with family ties judged deportable solely for entry by fraud may also have their offenses waived.111 The immigration judge may exercise authority to waive grounds of excludability in conjunction with applications for permanent residence.112

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104. 8 C.F.R. § 103.2 (1976).
105. See Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976) (conclusions by the Department of State as to adjudicative facts improper); Berdo v. INS, 432 F.2d 824, 849 (6th Cir. 1970) (statements about the potential unreliability of Department of State letters). See also Hosseinmardi v. INS, 405 F.2d 25, 26 (9th Cir. 1969); Kasravi v. INS, 400 F.2d 675, 677 (9th Cir. 1968). The alien must be given a reasonable opportunity to present evidence whenever he claims persecution. United States ex rel. Paschalidis v. District Director, 143 F. Supp. 310, 312 (S.D.N.Y. 1956).
106. 8 C.F.R. § 242.17(c) (1976).
107. Id. § 243.4.
109. Id. § 212(a) (9) (10) (11), 8 U.S.C. § 1182(a) (9) (10) (11).
110. Id. § 212 (1), 8 U.S.C. § 1182 (1).
112. 8 C.F.R. § 242.17(a) (1976).
The immigration judge also has authority to adjudicate investor applications in conjunction with adjustment applications and to take any other action consistent with law and regulations "as may be appropriate to the disposition of the case."  

**Designating the Place of Deportation**

Prior to the conclusion of the hearing, the alien will be permitted to designate a place of deportation, if he is ordered deported. He may designate only one place of deportation, and this decision must be made in good faith. The alien may not designate contiguous territory or adjacent islands unless he has been a native, citizen, or resident of such places. The immigration judge may designate as an alternative place of deportation the alien's country of citizenship or last residence or any country willing to receive him.

**The Immigration Judge's Decision**

The immigration judge's decision may be oral or written. If deportability is contested, the decision contains a discussion of the evidence and findings concerning deportability. The decision also contains a discussion of evidence pertinent to discretionary relief and is concluded with an order granting or denying relief. The decision orders termination, grants permanent residence, orders voluntary departure with an alternate order of deportation, or deportation.

If deportability is determined on the pleadings and no discretionary relief other than voluntary departure is requested, the immigration judge enters an order of voluntary departure with an alternate order of deportation to a named country on form I-39 or an order of deportation on form I-38. These forms are served on the alien and his attorney at the conclusion of the hearing, and unless appeal
is waived, service of the appeal form (I-290A) is required with advice about the appeal procedure.\textsuperscript{121}

When an oral decision is rendered, it is done in the presence of the alien, his counsel, and the trial attorney. Unless an appeal is waived, the appeal form and advice about appeal must be given. Upon request, the decision and a transcript will be provided without cost to enable the alien to pursue his appeal.\textsuperscript{122} If no appeal is taken, the immigration judge’s decision is final.\textsuperscript{123} If the decision is favorable to the alien, the trial attorney has the right to appeal, and in appropriate cases, the case may be certified to the Board of Immigration Appeals for review by the immigration judge, by the Service, or by the Board.\textsuperscript{124}

**Appeals to the Board of Immigration Appeals**

The Board of Immigration Appeals is a five-member, nonstatutory body subject to the general supervision of the Deputy Attorney General of the Department of Justice.\textsuperscript{125} Appeals to the Board must be filed in triplicate with a fee of $50.00 within ten days after an oral decision or within thirteen days after the mailing of a written decision. The grounds for appeal must be stated briefly on the notice of appeal, form I-290A. Requests may be made to the immigration judge or to the Board of Immigration Appeals for time to file a brief.\textsuperscript{126} Generally, a thirty-day period for filing a brief is requested. If the request is granted, the brief must be filed in triplicate.

Counsel may also request oral argument. Oral argument is heard before a three-member panel of the Board. The Board hears oral argument at 2:00 P.M. weekdays in Washington, D.C.\textsuperscript{127} Each side is allotted fifteen minutes for argument although additional time may be granted upon request. Oral argument may be denied and a summary dismissal entered for failure to specify the grounds for appeal, if the basis for appeal is a finding of fact or conclusion of

\textsuperscript{121} Id. § 242.19(c). Failure to advise of the ten-day appeal period results in restoring the alien’s right to appeal. Haidar v. Coomey, 401 F. Supp. 717, 721 (D. Mass. 1974).

\textsuperscript{122} 8 C.F.R. § 242.19(b) (1976).

\textsuperscript{123} Id. § 242.20.

\textsuperscript{124} Id. §§ 3.1(c), 242.3, 242.20.

\textsuperscript{125} The Board is authorized to hear appeals pursuant to id. § 3.1(b). It is not subject to the Administrative Procedure Act. Giambanco v. INS, 531 F.2d 141, 144 (3d Cir. 1976); Cisternas-Estay v. INS, 531 F.2d 155, 159 (3d Cir. 1976).

\textsuperscript{126} 8 C.F.R. § 3.3(c) (1976).

\textsuperscript{127} Id. § 3.1(e).
law conceded at the hearing, if appeal is from an order that granted the relief requested, or if the Board is satisfied that the appeal is frivolous.\textsuperscript{128} The Board will render its decision on the merits of the case within several months after oral argument.

\textbf{Motions to Reopen and Reconsider}

A motion to reopen or reconsider may be made at any time\textsuperscript{129} after filing a written motion setting forth either evidence not previously available or a claim of an erroneous interpretation of law.\textsuperscript{130} However, the Board of Immigration Appeals is reluctant to reopen or reconsider cases. Counsel should include full supporting data in his motion to reopen.\textsuperscript{131} Applications for adjustment of status filed after a deportation hearing has been completed may also be treated as a motion to reopen, and they are handled in a similar manner.\textsuperscript{132}

If relief from deportation is denied to the alien, he may seek judicial review by petition filed in a United States Court of Appeals or by habeas corpus.\textsuperscript{133} The petition for review must be filed within six months. A timely notice of appeal filed with a United States Court of Appeals will result in an automatic stay.\textsuperscript{134} Habeas corpus requires some form of technical custody\textsuperscript{135} and is available at any time prior to the effectuation of deportation.

\textbf{CONCLUSION}

Representing an alien in a deportation proceeding can be a rewarding and intriguing experience, especially if a life is saved, a family is united, a marriage is preserved, or a person is helped to start a new and constructive life.

\textsuperscript{128} Id. § 3.1(d) (1-a).
\textsuperscript{129} In re C—, 8 I. & N. Dec. 577, 579 (BIA, 1960).
\textsuperscript{130} 8 C.F.R. §§ 3.2, 242.22 (1976). A $50.00 filing fee is required.
\textsuperscript{131} Schieber v. INS, 461 F.2d 1078, 1079 (2d Cir. 1972); Luna-Benalcazar v. INS, 414 F.2d 254, 256 (6th Cir. 1969).
\textsuperscript{132} 8 C.F.R. § 242.22 (1976).
\textsuperscript{134} If deportation is eventually ordered, after a warrant of deportation is issued, the alien is given at least seventy-two hours' notice. 8 C.F.R. § 243.3 (1976). He may also be permitted to deport himself by departing on his own to any foreign country of his choice. Id. § 243.5.