Grounds and Procedures Relating to Deportation

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INTRODUCTION

Since the enactment of the 1952 Immigration and Nationality Act,[1] our laws contain the most detailed and complicated enumeration prescribed anywhere in the world for the deportation and disqualification of aliens seeking admission or to retain residence in a sovereign nation. In addition to an immigration statute of 173 pages, 14 of which relate to exclusion and 18 of which are devoted to deportation, there are 185 pages of immigration regulations,[2] 46 of which relate to exclusion and 12 of which are devoted to deportation[3] and 66 pages of visa regulations.[4] In addition, a comprehensive review of the subject requires reference to thousands of pages of Immigration Service Operation Instructions and of For-

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1. 8 U.S.C. § 1101 *et seq.* (1970) (originally enacted as Act of June 27, 1952, ch. 477, 66 Stat. 163). The statute has been amended 36 times. J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 437-41 (1973).
2. 8 C.F.R. §§ 1.1-499.1 (1975).
3. *Id.* §§ 211-37, 241-44.
4. 22 C.F.R. §§ 41-46.7 (1975).

eign Affairs Manual of the State Department, 13 volumes of Administrative Decisions under Immigration and Nationality Laws of the United States (referred to as "I. & N. Dec."), and several hundred Interim Decisions.

The statute has been denounced as "an affront to the conscience of the American people,"[5] "worthy of Stalin and not of America,"[6] "a nefarious discriminatory measure,"[7] "a betrayal of our American traditions"[8] and "a bacchanalia of meanness."[9] Our immigration laws are said to list some 700 grounds for the deportation of aliens from the United States.[10] These grounds vary, ranging from being within the excludable class at the time of entry no matter how far in the distant past,[11] noncompliance with immigration technicalities such as failure during January of each year to report one's current address,[12] to the teaching of proscribed beliefs.[13]

The severity and arbitrary character of our deportation laws stems not only from the substantive grounds but also from the absence of a statute of limitations and the retroactive application of the deportation mandate. There is a failure to forgive past sins and a failure to overlook minor infractions which do not warrant the drastic penalty of deportation.

The Statute of Limitations Deficiency

There is no statute of limitations with respect to most grounds of deportation.[14] In our Immigration Act of 1891, there was a

5. Statement by Rev. Walter W. Van Kirk, National Council of Churches of Christ, in Washington, D.C., October 28, 1952, before the President's Immigration Commission.

6. Statement by Walter P. Reuther, United Auto Workers, October 28, 1952, in Washington, D.C., before the President's Immigration Commission.

7. Address by John Cashmore, former Brooklyn Borough President, October 12, 1952.

8. Addresses by Senators Kefauver and Harriman in Detroit, Michigan, October 12, 1952.

9. Statements by Henry M. Hart and Louis L. Jaffe, Harvard Law School Professors, in Washington, D.C., October 28, 1952, before the President's Immigration Commission.

10. *Hearings on Department of Justice Appropriations for 1954 before the Senate Appropriations Comm.*, 83d Cong., 1st Sess. 250 (1953).

11. 8 U.S.C. § 1251(a)(1) (1970).

12. *Id.* §§ 1251(a)(5), 1305, 1306(b).

13. *Id.* § 1251(a)(6)(F). Under this section aliens who advocate unlawful damage or destruction of property become deportable.

14. The exceptions are institutionalization at public expense within five years after entry, 8 U.S.C. § 1251(a)(3) (1970); conviction of a single crime involving moral turpitude within five years after entry, *id.* § 1251(a)(4); aiding and abetting illegal entry within five years after entry, *id.* § 1251(a)(13); violating Title I of the Alien Registration Act of 1940 within five years

one-year statute of limitations on deportation.[15] The 1903 Immigration Act increased the period of limitations to three years[16] and in 1917 the period was increased to five years for most offenses.[17] Without any rational explanation the McCarran-Walter Act, our 1952 Immigration and Nationality Act, did away with the concept of a statute of limitations except for five of the many grounds of deportation.[18] In some countries, such as Peru, an alien's admission for permanent resident exempts him from deportation. In Brazil, aliens who are married to citizens and who are responsible for the support of citizen children may not be deported. The most common statute of limitations in foreign countries is a five-year period.[19] United States criminal statutes contain a five-year statute of limitations except for crimes punishable by death.[20] It is anomalous and almost incomprehensible for our Draconian deportation laws to be alone in avoiding the beneficial effect of a statute of limitations.[21]

RETROACTIVE APPLICATION OF DEPORTATION GROUNDS

Until 1940, it was not considered necessary or desirable to deport an alien upon the basis of retroactive legislation. On June 28, 1940, an all-consuming fear of communism prompted Congress to decree that former membership in the Communist Party, even though such membership preceded enactment of the legislation, required an alien's deportation.[22] Under the 1952 Immigraton Act, all classes

after entry, *id.* § 1251(a)(15); and becoming a public charge within five years after entry, *id.* § 1251(a)(8).

15. Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1086.

16. Act of March 3, 1903, ch. 1012, § 20, 32 Stat. 1218.

17. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

18. *See* statutes cited note 14 *supra.* THE PRESIDENT'S COMM. ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 197-98 (1952) recommended a ten-year statute of limitations.

19. UN, STUDY ON EXPULSION OF IMMIGRANTS (1955).

20. 18 U.S.C. § 3282 (1969).

21. Statutes of limitations are justified on the basis of necessity and convenience—to spare courts and individuals from litigating stale claims after witnesses have died or disappeared, memories have faded and evidence has been lost. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). In the case of aliens, it is wrong as a matter of principle to keep the threat of deportation hanging over their heads for an indefinite period.

22. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Act of June 28, 1940, ch. 439, 54 Stat. 670; Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012.

of deportable aliens are retroactively subject to expulsion.[23] Aliens who committed nondeportable offenses in 1925 and in 1938 or at any time prior to 1952, can be ordered deported by reason of the *ex post facto* operation of our present immigration laws.[24] Many students of constitutional law believe that the *ex post facto* prohibition of our Constitution is applicable to civil as well as to criminal legislation.[25] However, the Supreme Court has refused to apply this constitutional prohibition to the deportation provisions of our law because of its civil nature.[26] Retroactive laws, whether they are civil or criminal, are unfair because the person affected can have no notice that the proscribed conduct will produce the type of sanction set forth in the statute. Whether deportation is called a civil or criminal sanction is immaterial. It is the equivalent of banishment or exile and may result "in loss of both property and life; or of all that makes life worth living."[27] It is a dreadful penalty[28] which should not be imposed retroactively. Some countries, including Norway, Mexico, Portugal and Brazil, have express constitutional provisions forbidding all retroactive laws.[29] Our approach to the problem should be no less civilized. The unfairness of *ex post facto* civil laws which impose so drastic a penalty as deportation should lead us, as a matter of common decency, to forbid retroactive expulsion of aliens.

Deportation of Rehabilitated Aliens and Those Guilty of Minor Infractions

Our immigration statute exhibits an unyielding, unforgiving and vengeful attitude toward those who have sinned and been rehabilitated. It likewise is relentless in its mandate to deport for minor infractions of the law.

Past nominal members of the Communist Party, even if they have renounced their unhappy past, have been subjected to costly and

23. 8 U.S.C. § 1251(d) (1970).

24. Mulcahey v. Catalanotte, 353 U.S. 692 (1957); Lehmann v. United States *ex rel.* Carson, 353 U.S. 685 (1957); Marcello v. Bonds, 349 U.S. 302 (1955).

25. 1 L. Crosskey, Politics and the Constitution 324-51 (1953); McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Calif. L. Rev. 269, 270 (1927).

26. Marcello v. Bonds, 349 U.S. 302 (1955); Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

27. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). *See* Delgadillo v. Carmichael, 332 U.S. 388 (1947).

28. United States *ex rel.* Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926); *cf.* Jordan v. De George, 341 U.S. 223, 231, 242 (1951).

29. 2 W. Dodd, Modern Constitutions 141-42 (1900); 1 *id.* at 153.

lengthy deportation proceedings.[30] A lifelong alien resident of the United States who is convicted of smoking a marihuana cigarette is deportable even if he is pardoned for the offense.[31] The mandate of the statute is that a marihuana or narcotic conviction at any time after entry requires deportation.[32] Likewise, deportation is decreed for a person who at any time after entry practices prostitution for a brief period and subsequently undergoes reformation.[33] Some of these individuals may qualify for discretionary relief,[34] but there is little logic and no basis for subjecting them to the expense and inconvenience of deportation proceedings. An alien's past should be forgotten if he has been completely rehabilitated or if his infraction was of minor proportions.

GROUNDS OF DEPORTATION

Originally deportation was merely delayed exclusion.[35] Not until 1907 were aliens subjected to deportation for causes occurring subsequent to entry.[36] Under the deportation provisions of the present statute, the grounds for deportation for conduct subsequent to entry outnumber those which are enumerated for exclusion at the time of entry. Grounds of deportation include improper entry, illegal overstay or violation of terms of temporary admission, becoming a public charge, committing crimes involving moral turpitude and other proscribed criminal activity, or engaging in immoral conduct and subversion.

Improper Entry

An alien who entered the United States in violation of the law

30. *Compare* Rowoldt v. Perfetto, 355 U.S. 115 (1957), *with* Latva v. Nicolls, 106 F. Supp. 658 (D. Mass. 1952).

31. 8 U.S.C. §§ 1251(a)(11), 1251(b) (1970); Brownrigg v. INS, 356 F.2d 877 (9th Cir. 1966). Only expungement pursuant to a Youth Offender Act is given recognition. Mestre Morera v. INS, 462 F.2d 1030 (1st Cir. 1972). *But see* Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), holding that deportation under these circumstances is cruel and unusual punishment.

32. 8 U.S.C. § 1251(a)(11) (1970).

33. *Id.* § 1251(a)(12).

34. *See* text accompanying notes 90-119 *infra.*

35. Aliens who entered the United States were subject to deportation for one year after arrival. Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1086.

36. The Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 899 made prostitutes the first class of aliens deportable for conduct subsequent to entry.

existing at the time of entry is forever deportable.[37] The statutory mandate requires the deportation of aliens who were excludable at the time of entry and this encompasses all grounds of exclusion, existing under the law at the time of such entry.[38] "Any coming of an alien from a foreign port or place or from an outlying possession, whether voluntary or otherwise . . ." is an entry.[39] A meaningful interruption of residence is required for a permanent resident who makes a brief casual lawful departure from the United States.[40]

Aliens enter the United States improperly and are subject to deportation when they enter contrary to existing law and also where they enter: (a) without passports and visas where such documents are not waived or enter without other required documents;[41] (b) without proper labor clearances;[42] (c) with documents improperly designating their nationality, quota chargeability or preference category;[43] (d) without inspection;[44] (e) at a place or time not designated by the Attorney General;[45] (f) without remaining in contiguous territory in an adjacent island for two years when they come from such place upon a nonsignatory transportation line;[46] (g) after making material false and misleading statements or by fraud;[47] (h) upon the basis of marriage to a citizen or legal resi-

37. 8 U.S.C. § 1251(a)(1) (1970). *See id.* § 1182.

38. United States *ex rel.* Pierropoulos v. Shaughnessy, 239 F.2d 784 (2d Cir. 1957).

39. 8 U.S.C. § 1101(a)(13) (1970). Excepted from deportation are aliens excludable on ground of misrepresentation where they are otherwise admissible and are the spouse, parent or child of a citizen or permanent resident. INS v. Errico, 385 U.S. 214 (1966). *See* Reid v. INS, 95 S. Ct. 1164 (1975).

40. Rosenberg v. Fleuti, 374 U.S. 449 (1963); Palatian v. INS, 502 F.2d 1091 (9th Cir. 1974); Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972); *In re* Janati-Ataie, 14 I. & N. Dec. ___ (I.D. 2170 1972); *In re* Nakoi, 14 I. & N. Dec. ___ (I.D. 2168 1972). Reentry without permission after a prior arrest and deportation is not only a deportable offense but is a criminal violation. 8 U.S.C. § 1326 (1970); United States v. Alvarado-Soto, 120 F. Supp. 848 (S.D. Cal. 1954). A warrant of deportation, however, must issue prior to reentry. United States v. Wong Kim Bo, 466 F.2d 1298, *petition for rehearing denied*, 472 F.2d 720 (5th Cir. 1972).

41. 8 U.S.C. § 1181(a) (1970); United States *ex rel.* Polymeris v. Trudell, 284 U.S. 279 (1932); United States *ex rel.* Pierropoulos v. Shaughnessy, 239 F.2d 784 (2d Cir. 1957).

42. 8 U.S.C. § 1182(a)(14) (1970); 29 C.F.R. §§ 60.1, 60.5 (1974).

43. *In re* K-, 3 I. & N. Dec. 838 (1950); *In re* S-, 1 I. & N. Dec. 93 (1941).

44. Barber v. Lee Hong, 254 F.2d 382 (9th Cir. 1958); 8 U.S.C. § 1251(a)(2) (1970).

45. 8 U.S.C. § 1251(a)(2) (1970).

46. *Id.* § 1251(a)(10). This ground is not applicable to native born citizens of the Western Hemisphere and to returning residents.

47. 8 U.S.C. § 1251(c) (1970); Bufalino v. INS, 473 F.2d 728 (3d Cir.), *application for stay of deportation denied*, 411 U.S. 901 (1973).

dent where the marriage was terminated within two years subsequent to entry. (When this occurs, the alien is required to prove that his marriage and entry were not fraudulent. If an alien refuses to fulfill a marital agreement, which the Immigration Service determines was made for the purpose of procuring entry as an immigrant, deportation may likewise be ordered upon the basis of fraudulent entry.)[48]

Illegal Residence

Aliens who are admitted as visitors or nonimmigrants become subject to deportation when they: (a) overstay;[49] (b) fail to maintain their status or fail to abide by the terms of their admission;[50] or (c) manifest an intention to become a permanent resident.[51]

Economic Grounds

Aliens who become institutionalized at public expense subsequent to December 24, 1952 and within five years after entry because of a mental condition are deportable unless they establish that such condition did not exist prior to entry.[52] An alien who in the opinion of the Attorney General becomes a public charge within five years after entry from causes not affirmatively shown to have arisen after entry is likewise subject to deportation.[53]

Criminal Grounds

The criminal and subversive classes of aliens subject to deportation outnumber all others. The following classes of aliens are sub-

48. 8 U.S.C. §§ 1182(a)(19), 1251(c) (1970); Kokkinis v. District Director, 429 F.2d 938 (3d Cir. 1970); Sideropoulos v. INS, 357 F.2d 642 (6th Cir. 1966).

49. Mealha v. Shaughnessy, 219 F.2d 600 (2d Cir. 1955); 8 U.S.C. § 1251(a)(9) (1970). A crewman who willfully overstays is also liable to criminal prosecution. *Id.* § 1282(c).

50. 8 U.S.C. § 1251(a)(9) (1970). Acceptance of employment by students or visitors, where not authorized, is a deportable offense. Wang Chiun-Ming v. Shaughnessy, 136 F. Supp. 866 (S.D.N.Y. 1955).

51. *In re* A-, 6 I. & N. Dec. 651 (1955). This administrative view has not been tested judicially. *But see* Brownell v. Carija, 254 F.2d 78 (D.C. Cir. 1957); Chryssikos v. Commissioner, 3 F.2d 372 (2d Cir. 1924); *In re* Hosseinpour, 14 I. & N. Dec. ___ (I.D. 2349 1975).

52. 8 U.S.C. § 1251(a)(3) (1970).

53. *Id.* § 1251(a)(8).

ject to deportation: (a) aliens who committed crimes prior to entry which rendered their entry illegal;[54] (b) aliens convicted within five years after entry of a crime involving moral turpitude[55] where they are either sentenced to confinement or confined in a prison or corrective institution for one year or more;[56] (c) aliens convicted at any time after entry for two crimes involving moral turpitude[57] not arising out of a single scheme of criminal misconduct,[58] regardless of confinement to prison or whether the convictions arose in a single trial (The statute provides that in cases pertaining to crimes involving moral turpitude, a pardon granted by the governor of a state or by the President of the United States avoids deportation. Judicial recommendations made within 30 days of "the time of first imposing judgment or passing sentence" likewise preclude deportation);[59] (d) aliens violating 8 U.S.C. § 1305 requiring registration in January of each year and those failing to notify the Immigration Service within ten days of their change of address unless they establish that such failure was reasonably excusable or not willful;[60] (e) aliens convicted for false or fraudulent statements in an alien registration application, 8 U.S.C. § 1306(c);[61] (f) aliens convicted for violations or conspiracy to violate the Foreign Agents Registration Act, 22 U.S.C. §§ 611-21;[62] (g) aliens convicted of violating 18 U.S.C. § 1547 which punishes forgery and counterfeiting of visas or other entry documents and the making of false statements as to material matters in any immigration appli-

54. United States *ex rel.* Ventura v. Shaughnessy, 219 F.2d 249 (2d Cir. 1955).

55. *See* Wasserman, *Crimes Involving Moral Turpitude*, 1 MONTHLY REV., IMMIGRATION AND NATURALIZATION SERV. 2 (1944); *cf.* United States *ex rel.* Meyer v. Day, 54 F. 2d 336 (2d Cir. 1931).

56. 8 U.S.C. § 1251(a)(4) (1970); Holzapfel v. Wyrsch, 157 F. Supp. 43 (D.N.J. 1957).

57. 8 U.S.C. § 1251(a)(4) (1970).

58. Sawkow v. INS, 314 F.2d 34 (3d Cir. 1963); Wood v. Hoy, 266 F.2d 825 (9th Cir. 1959); Jeronimo v. Murff, 157 F. Supp. 808 (S.D.N.Y. 1957).

59. 8 U.S.C. § 1251(b) (1970). This section is inapplicable to narcotic or marihuana offenses and no provision seems to be made for crimes not involving moral turpitude. It would be illogical not to apply these provisions to offenses of lesser gravity.

60. *Id.* § 1251(a)(5). No conviction is required. United States *ex rel.* Czapkowski v. Holland, 220 F.2d 436 (3d Cir.), *cert. denied*, 350 U.S. 826 (1955); *see* Fong v. INS, 308 F.2d 191 (9th Cir. 1962). *Compare* Bufalino v. Holland, 277 F.2d 270 (3d Cir.), *cert. denied*, 364 U.S. 863 (1960), *and* Patsis v. INS, 337 F.2d 733 (8th Cir. 1964), *with* Bufalino v. INS, 473 F.2d 728 (3d Cir. 1973).

61. 8 U.S.C. §§ 1251(a)(5), 1306(c) (1970); *In re* S-, 2 I. & N. Dec. 353 (1945).

62. 8 U.S.C. § 1251(a)(5) (1970); *In re* G-, 4 I. & N. Dec. 269 (1951); *In re* M-, 3 I. & N. Dec. 310 (1950).

cation;[63] (h) aliens who are narcotic addicts after entry;[64] (i) aliens convicted after entry of narcotic, marihuana or drug violations[65] (Neither a pardon nor a judicial recommendation against deportation will eliminate this ground of deportability.[66] Only expungement pursuant to a Youth Offender Act is recognized to alleviate expulsion.);[67] (j) aliens who have prior to, at time of, or within five years after entry assisted another alien knowingly and for gain to enter the United States in violation of law;[68] (k) aliens convicted at any time after entry for possession of or carrying a sawed-off shotgun or any weapon shooting automatically more than one shot without reloading;[69] (l) aliens convicted any time within five years after entry of violating Title I of the Alien Registration Act or at any time for two such violations;[70] (m) aliens convicted of violating certain wartime statutes and who have been found by the Immigration Service to be undesirable residents by reason of such conviction;[71] (n) aliens convicted of importing an alien into the United States for prostitution or for any other immoral purpose contrary to 8 U.S.C. § 1328.[72]

Immoral Grounds

Aliens who subsequent to entry become members of any class excludable under 8 U.S.C. § 1182(a)(12) are deportable.[73] This in-

63. 8 U.S.C. § 1251(a)(5) (1970).
64. *Id.* § 1251(a)(11). No conviction is necessary. *In re* F-S-C-, 8 I. & N. Dec. 108 (1958); *In re* K-C-B-, 6 I. & N. Dec. 374 (1954).
65. 8 U.S.C. § 1251(a)(11) (1970); Mulcahey v. Catalanotte, 353 U.S. 692 (1957); Marcello v. Bonds, 349 U.S. 302 (1955).
66. 8 U.S.C. § 1251(b) (1970); *cf.* Brownrigg v. INS, 356 F.2d 877 (9th Cir. 1966).
67. *See* authorities cited note 31 *supra.*
68. 8 U.S.C. § 1251(a)(13) (1970); Burquez v. INS, 513 F.2d 751 (10th Cir. 1975).
69. 8 U.S.C. § 1251(a)(14) (1970).
70. *Id.* §§ 1251(a)(15)-(16). Title I of the Alien Registration Act was originally enacted as Act of June 28, 1940, ch. 439, §§ 1-5, 54 Stat. 670-71. It is now codified in 18 U.S.C. §§ 2385, 2387 (1970).
71. 8 U.S.C. § 1251(a)(17) (1970); United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950); Mahler v. Eby, 264 U.S. 32 (1924).
72. 8 U.S.C. § 1251(a)(18) (1970). This provision would appear to be unnecessary in view of section 1251(a)(12) which provides for deportation without a conviction.
73. *Id.* § 1251(a)(12). Reformed prostitutes are deportable. *In re* G-, 5 I. & N. Dec. 559 (1953).

cludes prostitutes, those who practice prostitution, and those who engage in commercialized vice.[74] Managers or those connected with the management of a house of prostitution or any other immoral place are likewise deportable.[75]

Subversive Grounds

Aliens are deportable who are, or at any time have been after entry, members of the following classes: (a) aliens who have a purpose to engage in activities prejudicial to the best interests, welfare, or security of the United States;[76] (b) aliens who have a purpose to engage in subversive activities or to join a subversive organization;[77] (c) aliens who are anarchists;[78] (d) aliens who are advocates, members of, or affiliated with organizations advocating opposition to organized government;[79] (e) aliens who are members of, or affiliated with, the Communist Party or any other totalitarian party of any state of the United States or of any foreign state;[80] (f) aliens who are advocates of doctrines of World Communism or totalitarian dictatorship in the United States, or members of, or affiliated with organizations advocating such doctrines;[81] (g) aliens who are members of, or affiliated with organizations required to be registered under the Subversive Activities Control Act of 1950;[82] (h) aliens who are advocates (1) of violent or unconstitutional overthrow of the Government of the United States or of

74. The exact meaning of the term "commercialized vice" has not been determined. *See* Caminetti v. United States, 242 U.S. 470, 484 (1917).

75. 8 U.S.C. § 1251(a)(12) (1970). The term "other immoral place" has not been defined either administratively or judicially.

76. *Id.* § 1251(a)(7). This provision may be void for vagueness. *See* Jordan v. De George, 341 U.S. 223 (1951).

77. 8 U.S.C. § 1251(a)(7) (1970).

78. *Id.* § 1251(a)(6)(A). Philosophical anarchists are said to be included. United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); United States *ex rel.* Georgian v. Uhl, 271 F. 676 (2d Cir.), *cert. denied*, 256 U.S. 701 (1921); Lopez v. Howe, 259 F. 401 (2d Cir. 1919), *appeal dismissed, cert. denied*, 254 U.S. 613 (1920); *Ex parte* Pettine, 259 F. 733 (D. Mass. 1919).

79. 8 U.S.C. § 1251(a)(6)(B) (1970). Past as well as present membership is included. Harisiades v. Shaughnessy, 342 U.S. 580 (1952). However, membership must be voluntary and meaningful. Rowoldt v. Perfetto, 355 U.S. 115 (1957). Payment or promise of any money, however little and for any purpose, conclusively establishes affiliation. *See* Latva v. Nicolls, 106 F. Supp. 658 (D. Mass. 1952); *cf.* Bridges v. Wixon, 326 U.S. 135, 143 (1945). *But see* United States *ex rel.* Kettunen v. Reimer, 79 F.2d 315 (2d Cir. 1935).

80. 8 U.S.C. § 1251(a)(6)(C) (1970). *See* cases cited note 79 *supra.*

81. 8 U.S.C. § 1251(a)(6)(D) (1970).

82. *Id.* § 1251(a)(6)(E); 50 U.S.C. § 786 (1951) (repealed by Act of Jan. 2, 1968, Pub. L. No. 90-237 § 5, 81 Stat. 766).

all forms of law,[83] or (2) of the unlawful killing or assaulting of officers of the United States Government or of any other organized government,[84] or (3) of the unlawful destruction of damage of property[85] or sabotage,[86] or who are members of, or affiliated with, organizations advocating such doctrines; (i) aliens who are writers or publishers of subversive literature,[87] distributors, printers and displayers of subversive literature with knowledge of its subversive character,[88] or members of, or those affiliated with, organizations writing, printing, distributing or possessing for circulation subversive literature.[89]

RELIEF FROM DEPORTATION

There are five principal methods of accomplishing relief from deportation: applications for asylum or a claim of persecution,[90] applications for adjustment of status,[91] suspension of deportation,[92] registry[93] and voluntary departure.[94]

Asylum Requests or Claims of Persecution

Asylum requests or claims of persecutions may be made prior to[95] or during a deportation hearing.[96] Unless the application is clearly

83. 8 U.S.C. § 1251(a) (6) (F) (i) (1970). United States *ex rel.* Vogjewvic v. Curran, 11 F.2d 683 (2d Cir.), *cert. denied*, 271 U.S. 683 (1926). There is duplicity in this and other sections of the Act.
84. 8 U.S.C. § 1251(a) (6) (F) (ii) (1970).
85. *Id.* § 1251(a) (6) (F) (iii); United States *ex rel.* Diamond v. Uhl, 266 F. 34 (2d Cir. 1920).
86. 8 U.S.C. § 1251(a) (6) (F) (iv) (1970).
87. *Id.* § 1251(a) (6) (G); United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927).
88. 8 U.S.C. § 1251(a) (6) (G) (1970); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).
89. 8 U.S.C. § 1251(a) (6) (H) (1970); *cf.* United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924). *See* President Truman's veto of a similar provision because of its failure to require evil intent. H.R. Doc. No. 708, 81st Cong., 2d Sess. 9 (1950).
90. 8 U.S.C. § 1253(h) (1970).
91. *Id.* § 1254.
92. *Id.* § 1255.
93. *Id.* § 1259.
94. *Id.* § 1252(b); 8 C.F.R. § 242.5 (1975).
95. 8 C.F.R. § 108 (1975). The application made prior to deportation proceedings is made on form I-589 (Request for Asylum in the United States).
96. *Id.* § 242.17(d).

meritorious or clearly lacking in substance, the views of the Department of State must be consulted.[97] A District Director cannot disregard a favorable State Department recommendation unless he certifies the case to his Regional Commissioner. His denial of an application in all other cases is final but without prejudice to renewal in deportation proceedings.[98]

In deportation proceedings after the place of deportation has been designated, the alien is advised that he may apply for temporary withholding of deportation upon the ground that he would be subject to persecution on account of race, religion or political opinion. He will be subject to interrogation on this issue and confidential information may be utilized. When it is, the alien may be advised of its general nature.[99] The burden of establishing eligibility for relief is upon the alien and the grant of the application is discretionary.[100] When the application is approved, the alien is granted asylum.

Adjustment of Status

An alien may become a permanent resident by filing, prior to or during deportation proceedings, an application for adjustment on a prescribed form[101] pursuant to 8 U.S.C. § 1255. An alien must establish that he was inspected and admitted or paroled into

97. *Id.* § 108.2. Notification to the Department of State is required where the denial is based upon the ground that the application is clearly lacking in substance. The applicant is then given 30 days to supply favorable matter.

98. *Id.*

99. *Id.* § 242.17(c). A decision based in whole or part on such classified information shall state that such information is material to the decision.

100. *Id.* § 242.17(d). However, an alien must be afforded a fair opportunity to present evidence in support of his claim of persecution. Berdo v. INS, 432 F.2d 824 (6th Cir. 1970); Lim Fong v. Brownell, 215 F.2d 683 (D.C. Cir. 1954); United States *ex rel.* Paschalidis v. District Director, 143 F. Supp. 310 (S.D.N.Y. 1956). Substantial economic disadvantage or a substantial term of imprisonment for illegal departure is sufficient basis for finding persecution. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969); Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963). The views of the State Department on the possibility of an alien's persecution are not considered binding. Berdo v. INS, *supra*; Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1968). Although the decision is discretionary, it must be supported with findings of fact and a reasoned opinion. Hamad v. INS, 420 F.2d 645 (D.C. Cir. 1969); Jarecha v. INS, 417 F.2d 220 (5th Cir. 1969).

101. Form I-485 (Application for Status as Permanent Resident). This must be accompanied by form G-325A (Biographic Information), fingerprints, two photographs, a birth record, an entry permit (Form I-94), an application for a social security card (SS-5) and a fee of $25.00. If there has been a denial of adjustment prior to deportation proceedings, it may be renewed at the deportation hearing.

the United States, that he is eligible to receive an immigrant visa and admissible to the United States for permanent residence,[102] and that he has at the time of approval of his application, an immigrant visa immediately available to him.[103] Crewmen, exchange visitors who require a waiver of the two-year residence rule and who have not obtained such a waiver, transits without visas, and natives of Western Hemisphere countries or adjacent islands are ineligible for adjustment under 8 C.F.R. § 1255.[104]

Suspension of Deportation

Congress has delegated to our immigration officials the unwelcome and impossible task of measuring without scientific instruments the possible pain and suffering aliens would endure if required to depart our shores. In waivers of the two-year foreign residence requirement for exchange visitors, the test is "exceptional hardship."[105] For aliens seeking suspension of deportation the test is "extreme hardship" (seven-year cases) or "exceptional and extremely unusual hardship" (ten-year cases) for the alien, his legal resident or citizen spouse, parent or child. In addition to the requisite hardship an alien must establish that he has had continuous physical presence in the United States for seven[106] or ten years immediately preceding his application,[107] that he has had

102. Eligibility for a visa and admissibility is determined under 8 U.S.C. § 1182 (1970). If the alien is excludable but is granted a waiver of the ground of excludability, he is eligible.

103. The alien must be qualified for an immediate relative preference or quota status within 90 days. 8 C.F.R. § 245.1(g)(1) (1975).

104. *Id.* § 245.

105. 8 U.S.C. § 1182(e) (1970); 8 C.F.R. § 214.2(j) (1975). The factors to be considered in determining "hardship" are (a) length of residence in the United States, (b) family ties, (c) possibility of obtaining a visa abroad, (d) financial burden in proceeding abroad for a visa and (e) health and age of the alien. *In re* S-, 5 I. & N. Dec. 409 (1953). It is sometimes said that to qualify for exceptional and unusual hardship, it must be shown that deportation would be unconscionable. Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956).

106. 8 U.S.C. § 1254(a)(1) (1970). The seven-year period is the period from a date seven years before the application. McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960). A brief absence from the United States may preclude a finding of continuous physical presence. *In re* P-, 5 I. & N. Dec. 220 (1953).

107. 8 U.S.C. § 1254(a)(2) (1970). The ten-year period is computed from the deportable act to the date of application. *In re* M-, 5 I. & N. Dec. 261 (1953).

good moral character for the period set forth above,[108] and that he has not entered the United States as a crewman subsequent to June 30, 1964, was not admitted as an exchange visitor or acquired such status after admission, or is not a native of contiguous foreign territory or an adjacent island unless he can establish ineligibility to obtain a Western Hemisphere immigrant visa.[109] The suspension application must be filed, during the deportation hearing on forms I-256A and G-325A with a fee of $50.00.[110]

For the seven-year suspension cases, the alien must not be deportable on criminal, subversive, narcotic or immoral grounds specified in 8 U.S.C. §§ 1251(a)(4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18), and deportation must cause "extreme hardship."

For ten-year cases, the alien must have ten years physical presence and good moral character subsequent to the commission of the act or assumption of deportable status and prior to the suspension application. He must be deportable on criminal, subversive, narcotic, immoral grounds or for failure to file an annual address card or change of address notice. His deportation must cause "exceptional and extremely unusual hardship."

Registry

Both prior to and during a deportation hearing, an alien who entered the United States prior to June 30, 1948, may apply[111] for the creation of a record of lawful admission, provided: (a) he has had a continuous residence in the United States since entry;[112]

108. Good moral character cannot be found if during the statutory period an alien was a habitual drunkard, an adulterer, a polygamist, connected with prostitution or unlawful commercial vice, assisted another alien to enter illegally, committed or convicted of a crime involving moral turpitude, convicted of two crimes for which the aggregate prison sentences actually imposed was five years, committed a narcotics violation, derived income principally from illegal gambling, convicted of two or more gambling offenses, gave false testimony to obtain benefits under the 1952 Immigration Act, confined to a penal institution for 180 days, or convicted anytime of murder. 8 U.S.C. § 1101(f) (1970). Good moral character does not, however, require moral excellence and is not destroyed by a single lapse. It is a concept of a person's natural worth derived from the sum total of all his actions in the community. *In re* B-, 1 I. & N. Dec. 611 (1943). Good character and not reputation is the test of eligibility. United States *ex rel.* Exarchou v. Murff, 265 F.2d 504 (2d Cir. 1959).

109. 8 U.S.C. § 1254(f) (1970).

110. 8 C.F.R. §§ 242.17, 244 (1975).

111. 8 U.S.C. § 1259 (1970); 8 C.F.R. §§ 242.17, 249 (1975). The application is file on form I-485 and G-325A with a fee of $25.00.

112. Brief absences from the United States will not interrupt continuous residence. *In re* C-, 1 I. & N. Dec. 631, 638 (1943).

(b) he is of good moral character;[113] (c) he is not ineligible for citizenship;[114] and (d) he is not inadmissible under 8 U.S.C. § 1182(a) insofar as it relates to criminals, procurers, other immoral persons, subversives, violators of narcotic laws, or smugglers of aliens.[115]

Where entry occurred prior to July 1, 1924, a record of lawful admission will be created as of the date of such entry. Where entry occurred after July 1, 1924, the record of admission will be created as of the date of approval of the application.

Voluntary Departure

An alien who is deported, thereafter requires special permission to return to the United States.[116] It is therefore an advantage for an alien to apply for and obtain voluntary departure which permits him to leave the United States at his own expense and pursuant to his own arrangements. An application for voluntary departure can be made prior to and during a deportation hearing.[117] The alien must establish that "he is willing and has the immediate means with which to depart promptly from the United States."[118] He must prove good moral character for five years. This form of relief is unavailable to aliens deportable on criminal, subversive, narcotic or immoral grounds unless the alien is eligible for suspension of deportation as a ten-year case.[119]

DEPORTATION PROCEDURES

Constitutional and Statutory Rights

An alien in deportation proceedings is entitled to a constitutional

113. *See* note 108 *supra.*
114. 8 U.S.C. § 1101(a)(19) (1970).
115. Inadmissibility for crimes involving moral turpitude, *id.* § 1182(a)(9); for two crimes aggregating five years actual imprisonment, *id.* § 1182(a)(10); prostitution and other unlawful commercialized vice, *id.* § 1182(a)(12) may be waived where the alien has immediate relatives who are citizens or residents.
116. 8 U.S.C. § 1182(a)(17) (1970). Reentry without permission after deportation is a criminal offense. United States v. Alvarado-Soto, 120 F. Supp. 848 (S.D. Cal. 1954); 8 U.S.C. § 1326 (1970).
117. 8 C.F.R. §§ 242.17(b), 244 (1975).
118. *Id.* § 244.1.
119. 8 U.S.C. § 1254(e) (1970).

right to due process,[120] a right to counsel[121] and the right to cross-examine adverse witnesses.[122] He has the right to invoke the fifth amendment and claim self-incrimination.[123] He has the protection of the fourth amendment against unreasonable searches and seizures[124] and the right to reasonable bail pending final adjudication of deportability[125] except where he is a security risk, liable to abscond or where deportation is imminent.[126]

An alien is entitled to the equal protection of the laws[127] and is protected against cruel and unusual punishment.[128] However his deportation is not protected by the constitutional prohibition against *ex post facto* laws or those condemning bills of attainder.[129]

As part of his right to due process the alien is required to be accorded, in his deportation proceeding, reasonable notice of charges and hearing,[130] and if additional charges are lodged at the hearing, he is entitled to a continuance, 8 C.F.R. § 242.16(d).

The Deportation Hearing

A deportation proceeding is initiated by service of an order to show cause.[131] The order to show cause may be served in con-

120. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

121. Handlovitz v. Adcock, 80 F. Supp. 425 (E.D. Mich. 1948); 5 U.S.C. § 500 (1970); 8 U.S.C. § 1252(b)(2) (1970); 8 C.F.R. § 242.10 (1975).

122. Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952); 8 U.S.C. § 1252(b)(3) (1970).

123. Kimm v. Rosenberg, 363 U.S. 405 (1960) (issue raised not decided); United States *ex rel.* Belfrage v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954).

124. United States v. Brignoni-Ponce, 95 S. Ct. 2574 (1975); United States v. Ortiz, 95 S. Ct. 2585 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

125. Carlson v. Landon, 342 U.S. 524 (1952); Rubenstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd*, 346 U.S. 929 (1954).

126. Barbour v. District Director of INS, 491 F.2d 573 (5th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974); United States *ex rel.* Daniman v. Shaughnessy, 117 F. Supp. 388 (S.D.N.Y. 1953).

127. Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffith, 413 U.S. 717 (1973); Yick Wo v. Hopkins, 118 U.S. 356 (1886). *But see* Noel v. Green, 376 F. Supp. 1095 (S.D.N.Y. 1974). An alien can insist on the application of the same standards in similar cases. Del Mundo v. Rosenberg, 341 F. Supp. 345 (C.D. Cal. 1972).

128. Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975).

129. Marcello v. Bonds, 349 U.S. 302 (1955); De Lucia v. INS, 370 F.2d 305 (7th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967).

130. Yiu Fong Cheung v. INS, 418 F.2d 460 (D.C. Cir. 1969); *Ex parte* Woo Wah Ning, 67 F. Supp. 56 (W.D. Wash. 1946); 8 U.S.C. § 1252(b)(1) (1970); 8 C.F.R. § 242.1(b) (1975).

131. Manguerra v. INS, 390 F.2d 358 (9th Cir. 1968); 8 C.F.R. § 242.1 (1975). The order to show cause is required to be explained to the alien when served. *Id.* § 242.2(a).

junction with a warrant of arrest[132] in which event a determination will be made by a District Director or his assistant as to detention or release of the alien on bond.[133] Review of the District Director's determination is made by application to an Immigration Judge, also known as a Special Inquiry Officer and an appeal to the Board of Immigration Appeals.[134] Bail or bond proceedings are separate and apart from the deportation hearing.[135]

The deportation hearing is required to be held in the district of the alien's arrest or residence[136] unless those involved consent to a hearing elsewhere. Where an attorney represents the alien, who is called the respondent, he is obliged to file a notice of appearance.[137] A trial attorney may be assigned to represent the Immigration Service, but such trial attorney is not required to be a member of the bar.[138] At the deportation hearing, the alien or his representative will plead to the deportation charges [8 C.F.R. § 242.16(b)] and may move for a change of venue, to exclude the general public or specific individuals,[139] to take depositions of witnesses unavailable at the place of hearing, to require attendance of witnesses by subpoena,[140] to produce favorable testimony,[141] to suppress illegally obtained evidence or to invoke the rule of *Jencks v. United States*.[142]

The Immigration Service will furnish an interpreter for the alien[143] and will frequently introduce hearsay evidence which is considered admissible.[144] However, hearsay is not considered

132. 8 C.F.R. § 242.2 (1975).
133. *Id.* § 242.2(a).
134. *Id.* §§ 1.1(1), 3, 242.2(b).
135. Confidential information may be utilized. *Id.* § 242.2(b).
136. La Franca v. INS, 413 F.2d 686 (2d Cir. 1969).
137. 8 C.F.R. § 292.4(a) (1975). Form G-28 is used. Where no attorney appears, the alien is advised of his right to counsel at his own expense. *Id.* § 242.16. As to whether an indigent alien is entitled to counsel, *see* Rosales-Caballero v. INS, 472 F.2d 1158 (5th Cir. 1973).
138. 8 C.F.R. § 242.9 (1975); *In re* Reyes-Gomez, 41 U.S.L.W. 2437 (I. & N. Dec. Jan. 2, 1973).
139. 8 C.F.R. § 242.16(a) (1975).
140. *Id.* §§ 242.14(e), 287.4.
141. Brady v. Maryland, 373 U.S. 83 (1963); United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556 (S.D.N.Y.), *aff'd*, 158 F.2d 853 (1946).
142. 353 U.S. 657 (1957). *See* Carlisle v. Rogers, 262 F.2d 19 (D.C. Cir. 1958); Petrowicz v. Holland, 142 F. Supp. 369 (E.D. Pa. 1956).
143. *See* 8 C.F.R. § 242.12 (1975).
144. *See* Rassano v. INS, 492 F.2d 220 (7th Cir. 1974); Glaros v. INS, 416 F.2d 441 (5th Cir. 1969); FED. R. EVID. 804(b)(5).

substantial evidence.[145] Alienage and deportability must be established by the Immigration Service by clear, convincing and unequivocal evidence.[146] However, the burden is upon the alien to sustain his application for discretionary relief from deportation.[147] He is given an opportunity to designate a single place of deportation[148] and will, if deportation is directed, be ordered deported to such country[149] and in the alternative to the country of his last residence or citizenship.[150] An alien may be deported to any other country willing to accept him,[151] but where there is no country willing to accept him,[152] the deportation order will remain unexecuted.

The decision of the Immigration Judge may be orally rendered at the hearing or set forth in writing.[153] It will discuss the evidence and findings as to deportability and the evidence pertinent to any application for relief from deportation. It will conclude with an order as to the relief granted or denied and/or as to the places of deportation.[154] The order is final, unless appealed within ten days to the Board of Immigration Appeals on a prescribed form (I-290A) setting forth reasons and indicating whether a brief will be filed or oral argument requested.[155] However, a motion for reopening and reconsideration may be made but will not be entertained unless there is newly discovered evidence or a claimed er-

145. Sardo v. McGrath, 196 F.2d 20 (D.C. Cir. 1952).
146. Woodby v. INS, 385 U.S. 276 (1966); 8 U.S.C. § 1252(a)(4) (1970).
147. 8 C.F.R. § 242.17(d) (1975).
148. Wong Kam Cheung v. INS, 408 F.2d 35 (2d Cir. 1969); 8 U.S.C. § 1253(a) (1970).
149. 8 U.S.C. § 1253(a) (1970). An alien who has not been a resident or citizen of contiguous territory or an adjacent island may not designate such a country.
150. 8 C.F.R. § 242.18(c) (1975).
151. 8 U.S.C. § 1253(a) (1970).
152. Rogers v. Lu, 262 F.2d 471 (D.C. Cir. 1958). Aliens deportable on criminal, subversive, or immoral grounds are required to make timely application for travel documents. They may be prosecuted for failure to comply with this requirement. United States v. Spector, 343 U.S. 169 (1952); 8 U.S.C. § 1252(e) (1970).
153. 8 C.F.R. § 242.19 (1975).
154. *Id.* § 242.18. Where the only relief requested is voluntary departure, the decision will be a summary one without any discussion of the evidence or findings. It will be served on the alien at the hearing. *Id.* § 242.19(c).
155. *Id.* §§ 3.3, 242.21. Three additional days are granted where the decision is mailed. No appeal lies from an order granting voluntary departure within a period of at least thirty days if the sole ground is that a greater period should have been fixed. *Id.* § 3.1(b)(2). A fee of $25.00 must accompany the appeal and briefs may be filed in triplicate within such time fixed by the Immigration Judge or Special Inquiry Officer. *Id.* § 3.3(c).

roneous interpretation of law.[156] Cases may be certified to the Board by the Immigration Judge or appealed to the Board by the Immigration Service as well as by the alien.[157] The Board of Immigration Appeals is a non-statutory body acting for the Attorney General. It consists of five members and sits daily in Washington, D.C., at 2:00 p.m. to hear argument on deportation appeals.[158] In rare cases, its decisions are certified to the Attorney General.[159] A final administrative order of deportation is appealable within six months to a Court of Appeals where the alien resides or where his deportation hearing was held. Habeas corpus is also available[160] where the alien is in detention, on bond or parole or under some form of supervision or restraint.

CONCLUSION

Except for the use of confidential information[161] in bail cases, the deportation procedures prescribed under our immigration laws are just and reasonable. However, the twenty-three-year-old statute is badly in need of revision and updating. Its obsolete and repetitive provisions should be eliminated. Its cumbersome and unwieldy provisions should be replaced by simple and direct language. *Ex post facto* application of the statute should be eliminated and a statute of limitations on deportation should be inserted. The variety of hardship standards should give way to vesting discretion to waive deportation in any meritorious or deserving case. The distinctions in treatment between natives of the Western and Eastern Hemisphere should be eliminated and all persons regardless of origin should be treated with justice and equality.

156. *Id.* § 242.22. Affidavits or other evidential material are generally required. Schieber v. INS, 461 F.2d 1078 (2d Cir. 1972); Luna-Benalcazar v. INS, 414 F.2d 254 (6th Cir. 1969). There is no time limitation on motions to reopen or reconsider. *In re* C-, 8 I. & N. Dec. 577 (1960).

157. 8 C.F.R. §§ 3.3, 3.7 (1975).

158. *Id.* § 3.1(e). In some cases the Board may deny oral argument and summarily dismiss an appeal. *Id.* § 3.1(d)(1a). Motions to reopen, reconsider, or for a stay of deportation may be decided without oral argument. *Id.* § 3.1(e).

159. *Id.* §§ 3.1(h), (i).

160. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Giova v. Rosenberg, 379 U.S. 18 (1964); Foti v. INS, 375 U.S. 217 (1963); 8 U.S.C. § 1105(a) (1970).

161. 8 C.F.R. § 242.2(b) (1975).