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The Exercise of Administrative Discretion
Under the Immigration Laws

MAURICE A. ROBERTS

In terms of human misery, the potential impact of our immigration laws can hardly be overstated. With minor exceptions, the immigration laws operate directly and exclusively upon human beings, flesh and blood, men, women and children, whose hopes for future happiness in a realistic sense frequently depend on their ability to enter, or remain in, this land of freedom and opportunity. When an alien has been in the United States for many years and has established roots, his deportation may tear him from his home and family and deprive him "of all that makes life worth living." To the United States citizen or legally resident alien seeking reunion with his alien wife or children, the denial of the immigrant visas needed to bring them here presents the cruel option of choosing between his country and his loved ones.

The statutes themselves contain a built-in potential for hardship which is to some extent unavoidable. In carving out the general classes of aliens eligible to be admitted and to remain here, the laws obviously exclude all others who do not fit into the defined

* Editor, Interpreter Releases, American Council for Nationalities Service. Juris Doctor, Rutgers University Law School, 1932. Former Chairman, Board of Immigration Appeals, United States Department of Justice.
1. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
classes, with harsh results in marginal and borderline cases. The statutory provisions are highly technical and exceedingly complex, so that even the officials charged with their enforcement sometimes make mistakes and erroneously admit inadmissible aliens, who have established roots here by the time the error is later discovered. The chances of hardship are aggravated by the fact that there is no realistic time limit on the power of the Immigration and Naturalization Service (hereinafter referred to as the Service) to start deportation proceedings against an alien alleged to be here unlawfully. In practical effect, the Service is free to proceed no matter how many years have elapsed since the alien was admitted to this country, or since the events occurred which render him deportable.

To afford some opportunity for relief from the hardships that inevitably result from the application of laws thus cast in inflexible terms, Congress has through the years provided an ever-increasing array of administrative remedies. Some waive specified grounds of inadmissibility. Others suspend deportation and provide for the creation of a record of lawful admission for permanent residence

2. See, e.g., Santiago v. INS, No. 73-2497 (9th Cir. Mar. 4, 1975). The Court of Appeals held that the Immigration Service is estopped from bringing deportation proceedings against innocent aliens with immigrant visas thus erroneously admitted, where the sole ground for deportation is technical inadmissibility at the time of entry.

3. There are some time limits. Thus, for example, in the case of an alien lawfully admitted for permanent residence who is thereafter convicted of a crime involving moral turpitude and sentenced to prison for a year or more, deportation is prescribed only if the crime is "committed within five years after entry." Immigration and Nationality Act of 1952 [hereinafter cited as I. & N. Act], § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970). However, an alien who incurs deportability under this provision or others remains liable to the initiation of deportation proceedings no matter how many years have elapsed since he committed the deportable offense.

Time limitations under prior immigration laws were repealed in 1952 with the enactment of the 1952 Act. The retrospective application of the new provisions, which have the effect of rendering deportable aliens who had previously achieved nondeportability under the prior law's statute of limitations, has been sustained. Lehmann v. Carson, 353 U.S. 685 (1957). Numerous bills have since been introduced to prescribe a statute of limitations, but thus far none have been enacted.

4. See, e.g., Marcello v. Bonds, 349 U.S. 302 (1955), involving an alien who came to the United States as an eight-month-old baby in 1910 and whose deportation order was based on a 1938 marijuana conviction. The deportation proceedings are still pending.
for aliens here illegally or otherwise without that status. The vari-
ous forms of relief, which will be discussed in greater detail below,
have certain common features; each form of relief has specific
statutory eligibility requirements, and once statutory eligibility is
established, the award of relief is still committed to agency discre-
mination. “Suspension of deportation is a matter of discretion and of
administrative grace, not mere eligibility; discretion must be exer-
cised even though statutory prerequisites have been met.”

Quite apart from such typical examples of the exercise of ad-
ministrative discretion as a formal part of the adjudicatory process,
there are other aspects of immigration law enforcement in which
the exercise of discretion plays a crucial role. In recent years, the
number of aliens illegally in the United States has risen sharply.
In the fiscal year ending June 30, 1974, the Service apprehended
a record 788,000 deportable aliens and it has estimated that the total
number of illegal aliens “is possibly as great as 10 or 12 million.”
While the accuracy of these high estimates has been questioned,
it is clear that the Service has identified many more aliens here
unlawfully than it has proceeded against. In determining which
illegal aliens should be singled out for the initiation of deportation
proceedings and which should be permitted to remain unmolested,
for how long they should be permitted to remain and under what
conditions, the Service exercises what is tantamount to prosecu-
torial discretion.

Some degree of discretion is also subjectively involved in adjudi-
cating the various types of applications for benefits under the im-
migration laws, in which the supporting evidence submitted by the
applicant is appraised and fact findings are made. Typical is the
visa petition, in which a United States citizen or permanent resident
alien seeks to obtain expedited issuance of an immigrant visa to
a closely related alien on the basis of exemption from normal nu-
merical limitations or statutory preference within the numerical
limitations. Theoretically, the evidence submitted to establish
the existence or bona fides of the claimed relationship is weighed
objectively and dispassionately and appropriate fact findings are
made on the basis of the persuasiveness of the evidence. Realistic-

5. United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77
(1957).
6. 1974 INS ANN. REP. iii.
7. See, e.g., 120 CONG. REC. 6222 (daily ed. June 26, 1975) (remarks of
Representative Badillo).
9. Id. § 203(a), 8 U.S.C. § 1153(a).
ally, and especially where the proofs are conflicting, the appraisal of the evidence frequently involves a value judgment, in which the subjective attitudes of the adjudicator can often play a decisive part. While this fact finding process is not the exercise of discretion in the traditional sense, to the degree that it brings into play the adjudicator's subjective notions, it has much in common with the application of discretion qua discretion.

Regardless of the type of discretion involved, the fact remains that it is exercised by impressionable and fallible human beings at all levels of the administrative hierarchy. While the Act commits enforcement responsibility to the Attorney General and, upon his delegation, to the Commissioner of Immigration and Naturalization, in practice decision making has been delegated to and is exercised by a host of lesser officials. The Board of Immigration Appeals (hereinafter referred to as the Board), a five-member nonstatutory body appointed by and responsible to the Attorney General, acts for him in reviewing specified types of Service determinations. The Commissioner, pursuant to authority conferred by regulation, has redelegated his authority to various officials in the Service's central office and field offices: Associate Commissioners and their deputies; Assistant Commissioners; General Counsel; Regional Commissioners; District Directors; Officers in Charge; Immigration Officers; Special Inquiry Officers; and Chief Patrol Inspectors. In actual practice, most of the Service's decisions, which go out over the facsimile signatures of the various District Directors, are not made by the District Directors themselves, but are made in their name by adjudicators at various levels, who are not required to be lawyers or otherwise formally trained in the appraisal of evidence.

In the absence of carefully considered and clearly articulated

10. Id. § 103(a), 8 U.S.C. § 1103(a).
11. Id. § 103(b), 8 U.S.C. § 1103(b).
14. Special Inquiry Officers are statutory officials. I. & N. Act § 101(b) (4), 8 U.S.C. § 1101(b) (4) (1970). They have the authority to conduct exclusion and deportation proceedings. Id. §§ 236(a), 242(b), 8 U.S.C. §§ 1226 (a), 1252(b) (1970). They are also referred to as Immigration Judges. 8 C.F.R. § 1.1(1) (1975).
15. 8 C.F.R. § 103.1 (1975).
standards for the exercise of the various types of discretionary powers, the resulting decisions must necessarily vary with the personal attitudes and biases of the individual decision makers. Adjudicators with hard-nosed outlooks are likely to be more conservative in their evidentiary appraisals and in their dispensation of discretionary bounties than their counterparts with more permissive philosophies. It must be recognized as a fact of life that Service officers and Board members are no more immune than other persons to the influences that result in individual bias and predilection. To set up as a standard that a case must be “meritorious” before discretion is favorably exercised in behalf of an eligible applicant is therefore illusory. Too many subjective elements go into the making of such a value judgment.

The importance of achieving a reasonably sound exercise of discretion at the administrative level is underscored by the fact that, in a realistic sense, there is no other place to turn. Attempts at private legislation are becoming increasingly unproductive and the courts have repeatedly stated that, in reviewing the exercise of administrative discretion, they will not substitute their judgment for that of the executive officers to whom Congress has confided the power of decision.17

16. In the 90th Congress, of the 7,293 private immigration and nationality bills introduced, only 218 were enacted into law. In the 93rd Congress, only 63 became law. The statistics may be found in 1974 INS ANN. REP. 132, table 55.

17. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); Goon Wing Wah v. INS, 386 F.2d 292, 294 (1st Cir. 1967). On occasion, a court will suggest administrative lenity. See United States v. McAllister, 395 F.2d 852 (3d Cir. 1969). In United States v. Santelises, 509 F.2d 703 (2d Cir. 1975), the court pointed out that in less than a year the alien would have the residence prerequisite to relief under I. & N. Act § 244(a) (2), 8 U.S.C. § 1254(a) (2) (1970). The court added:

In view of the time which has passed since he committed the deportable offense, we hardly think the Immigration and Naturalization Service would be remiss in its duty if it were to wait the few months necessary to afford Santelises an opportunity to apply pursuant to § 1254. 509 F.2d at 704.

More typical is the attitude expressed in Dunn v. INS, No. 72-2186, (9th Cir. February 20, 1974) (unreported), cert. denied, 419 U.S. 919 (1974):

While this is a case in which the administrative discretion vested in the Immigration and Naturalization Service might have been exercised with greater compassion, the scope of our review in this area is extremely narrow. We may suspend a deportation order only if the decision of the Immigration Service is without “reasonable foundation.”

The facts of that case as spelled out in the opinion of Justices Stewart and Douglas, dissenting from the denial of certiorari, made out a sympathetic case for the favorable exercise of prosecutorial discretion. 419 U.S. at 919-
It is in the face of these practical considerations that the exercise of administrative discretion must be examined.

**Prosecutorial Discretion**

The question whether to bring a proceeding against an alien (or a citizen),\(^{18}\) when to proceed, and under what circumstances, is frequently presented to Service personnel at all levels.\(^{19}\) A few examples will suffice.

Foreign students are admitted to the United States as nonimmigrants for a limited period to pursue a full course of study at a designated educational institution approved by the Attorney General.\(^{20}\) They are supposed to have the wherewithal to complete their studies without the need for outside paid employment, but the Service may permit part-time employment based on unforeseen circumstances arising subsequent to entry.\(^{21}\) A foreign student who takes up unauthorized employment thereby violates his stu-

\[^{24} \text{See also Oliver v. INS, 517 F.2d 426, 427 (2d Cir. 1975) where the court stated:}

This is a case illustrating that, once the machinery of the law has been set in motion, administrative and judicial authorities may be powerless to stop it, however much they wish. Perhaps petitioner can obtain relief from another branch of the Government; to our regret we cannot grant it to her.

18. Although the immigration laws are usually thought of as affecting only aliens, United States citizens may also be directly involved. Thus, for example, a citizen may file a petition which, if approved by the Service, will confer priority in the issuance of an immigrant visa to a closely related alien. See notes 8 & 9 supra and I. & N. Act § 204, 8 U.S.C. § 1154 (1970). For “good and sufficient cause,” the Service can proceed against a citizen to revoke the approval of his previously approved visa petition. I. & N. Act § 205, 8 U.S.C. § 1155 (1970); 8 C.F.R. § 205 (1975).


dent status and renders himself liable to deportation if he fails to leave the country. Since many foreign students manage to come here only through tremendous personal privation and sacrifices on the part of their parents and friends, such enforced departure before completion of the projected educational program here can be monetarily wasteful and emotionally destructive. Where such a violation of status was unwitting or brief, some Service officers may tend to overlook it and permit the alien to continue his student status unimpaired. Others may take a more serious view of the infraction and promptly start proceedings to compel the alien's departure.

Some aliens who are clearly deportable are not proceeded against where the Service concludes that adverse action would be unconscionable because of appealing humanitarian factors. The deportable alien may be infirm with age or a child of tender years. He may be an adult who came here as a baby, whose entire family resides here, and who would suffer extraordinary hardship if separated from his loved ones and forced to return to a country where he would be literally a stranger. In the exercise of prosecutorial discretion, cases which the Service considers appropriate are placed in a “nonpriority” category and action to compel the illegal alien’s departure is indefinitely deferred.

In some situations, aliens who are deportable as overstayed non-immigrant visitors can be granted permission by the Service to depart voluntarily without the issuance of an order to show cause in deportation proceedings, and for the beneficiaries of approved visa petitions the departure date can be periodically extended until an immigrant visa becomes available. This may be done in the case of an Eastern Hemisphere native with a permanent resident spouse in the United States, since visa availability will pave the way for eligibility to discretionary adjustment of his status to that of a permanent resident without the need for leaving the United States. In the case of a Western Hemisphere native who under current law gains no benefit priority-wise from his marriage to a permanent

22. That considerations of public relations may sometime underlie the Service inaction does not necessarily detract from the worthiness of the program. As one District Director candidly put it: “Any factor if exposed to public view, which would be seized upon by the sob-sisters of the daily press to paint us as inhumane, would probably get this kind of consideration.” SIXTH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 141 (Practicing Law Institute 1974).
resident alien and who is barred by statute from achieving permanent resident status without leaving the United States, the periodic extensions of voluntary departure until an immigrant visa becomes available permit him to go abroad and return promptly as an immigrant with the least possible disruption of his marriage. As a matter of policy, the Service extends this indulgence to Western Hemisphere natives only if both the marriage took place and the residence in the United States began on or before April 10, 1973, unless the District Director finds there are compelling factors which warrant an exception.

The foregoing are merely a few examples of the many instances in which the Service is called upon to exercise prosecutorial discretion. What is noteworthy is that the discretion is exercised by enforcement officials in the performance of their prosecutorial functions. It goes without saying that the determination to proceed against one deportable alien and not another may possibly be based on discriminations of the sort generally considered impermissible, e.g., political motivations or racial or religious prejudice. Yet, those who adjudicate the deportation cases (the Immigration Judges and the Board) confine themselves to the narrow question whether the record sustains the charge of deportability and refuse to review the exercise of prosecutorial discretion.

The courts also do not review the exercise of prosecutorial discretion, except for abuse. One court recently justified a judicial interest in reviewing selective prosecution allegedly based on impermissible discriminations and granted discovery to ascertain the actual basis on which the Service has elected to proceed.

25. Id. § 245(c), 8 U.S.C. § 1255(c).
26. See generally 2 C. Gordon & H. Rosenfield, IMMIGRATION LAW AND PROCEDURE § 7.2a (rev. ed. 1975); id. § 5.3e(4). The present policy is set forth in the Service's internal Operations Instructions, 01 242.10(a), as revised August 8, 1973.
27. "Our function is not to review the District Director's judgment in instituting deportation proceedings, but to determine whether the deportation charge is sustained by the requisite evidence." In re Lennon, 15 I. & N. Dec. 2304 (1974). See also In re Merced, 14 I. & N. Dec. 2273 (1974), aff'd per curiam, 514 F.2d 1070 (5th Cir. 1975); In re Anaya, 14 I. & N. Dec. 2243 (1974), aff'd per curiam, 500 F.2d 574 (5th Cir. 1974).
The standards by which prosecutorial discretion is exercised and the procedures for invoking this bounty have not been announced generally.30 With respect to the possibility of obtaining a “non-priority” classification, one District Director had the following to say:

I suggest that the attorney might go up front and see the District Director. The District Director does not have the sole authority to classify a case as a non-priority. A kind of biographical history of the case, a dossier, so to speak is prepared by the officer handling the case and submitted through supervisory channels to the District Director. If there is agreement all along the line, the District Director gets it, and, if he agrees with it, he can countersign the form. Then it goes to our regional office where the regional commissioner considers it. He agrees; he signs it. Then it goes to the central office where there is a non-priority committee. If they approve it, then it becomes an accomplished fact. The alien is notified that no action will be taken to enforce his departure. That is a comparatively new feature. Until about a year ago, we were not advising the individuals so affected.31

Since the potential beneficiary of the favorable exercise of prosecutorial discretion has so much at stake, common fairness would seem to require that the standards and procedures be articulated and published, so that all those affected may know in advance what considerations are relevant and how the pertinent proof should be channeled.

THE APPRAISAL OF EVIDENCE

In numerous Service proceedings, applicants for specified benefits under the immigration laws have the burden of proving that they meet the statutory requirements.32 Whether the issue arises in

stated:

Defendants argue that the decision to institute immigration proceedings on the basis of a non-priority classification or for any other reason is a matter that rests entirely in the discretion of the District Director and is unreviewable in any Court or administrative proceeding. As I view it, these cases hold no more than that the District Court lacks jurisdiction to review the judgment of the District Director in a bona fide exercise of his discretion in deciding to institute a deportation proceeding even if he acted arbitrarily, capriciously or irrationally in so doing. These cases do not, and, in my view, could not hold that a government official can with impunity, immune from judicial review, institute a deportation proceeding solely as a penalty for the lawful exercise of constitutional rights. Id. at 564 (emphasis by the court) (citations omitted).

30. For a good discussion of the various types of negative discretion exercised by the Service and the manner of their exercise, see 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure 5-23 to 5-26.5 (rev. ed. 1975).
31. Sixth Annual Immigration and Naturalization Institute, supra note 22, at 141.
a formal proceeding, such as a deportation hearing before an Immigration Judge, or in an application adjudicated by a District Director without a trial-type hearing, such as a visa petition, the applicant must present evidence to establish the existence of the facts on which his claimed eligibility rests. Frequently, the facts can be proved virtually beyond question by official records, such as birth certificates, marriage certificates, and the like. Often, however, all that may be available is proof of a less reliable nature, or discrepancies may turn up which are susceptible of conflicting inferences. In some instances, the ultimate fact finding made by the adjudicator may be influenced by subjective considerations, based on his own personal attitudes and negative experiences.

In many types of applications, eligibility depends on the existence of a close family relationship to a United States citizen or permanent resident alien. Where the claimed relationship originated in a foreign country, which is frequently the case, it may be difficult to prove. In many lands, public records of the sort we normally accept as reliable are deficient or nonexistent. The state of the pertinent foreign law, which itself a question of fact that must be proved like any other, may also be difficult to establish. This is especially true with respect to developing nations, in some of which the law depends on unrecorded local or tribal customs. Since the elimination of the National Origins system of selecting immigrants in 1965 and the substitution of what is essentially a "first-come, first-served" basis,33 there has been a radical change in the complexion of our new immigrants.34 Once settled in the United States, many of the immigrants seek to bring over the parents, wives and children they left behind, and questions of fact involving marriage, divorce, parentage, legitimacy, adoption, death, and the

34. In the fiscal year ending June 30, 1965, the last full year before the 1965 amendments took effect, the annual quota for all the Asian countries was 3,690. That year, 801 natives of China and other Chinese persons were charged to the quota, and this included 667 already in the United States who were granted suspension of deportation. In the same year, 95 quota immigrants from the Philippines were admitted. 43 INTERPRETER RELEASES 100 (1966). In the year ending June 30, 1974, 130,662 natives of Asia were admitted as immigrants, including 32,857 from the Philippines; 28,028 from Korea; 18,056 from China and Taiwan; 12,799 from India. 1974 INS ANN. REP. 30, table 6.
like are presented.\textsuperscript{35} If an adjudicator sitting in judgment on such a visa petition happens to feel that the National Origins system was a better one and that we already have received more immigrants of certain nationalities or races than he thinks are good for our well-being as a nation, this feeling can readily be translated into a negative decision in a case where the evidence is arguable or less than conclusive.

A fact finding as to the alien's good faith or intention is frequently necessary. Where benefits are made available on the basis of marriage to a United States citizen or resident alien, the statute contemplates a bona fide marital relationship.\textsuperscript{36} The rising tide of sham marriages in immigration cases has been noted by the Service\textsuperscript{37} and has led to closer scrutiny of applications seeking immigration benefits through marriage. In assessing the bona fides of a given marriage, the adjudicator must frequently take into account the post-marital conduct of the parties and measure it against his own notion of how married couples do (or should be expected to) conduct their lives, surely a subjective standard. In setting aside an administrative fact finding on such an issue, one court recently cautioned that "[a]liens cannot be required to have more successful or more conventional marriages than citizens."\textsuperscript{38}


\textsuperscript{38} Bark v. INS, 511 F.2d 1200, 1201-02 (9th Cir. 1975). In that case, the parties to the marriage had domestic quarrels and had separated from time to time. One of the factors cited in the Board opinion was a conflict in their testimony as to how much time they actually spent together. The Court of Appeals stated:

\textbf{[T]}he concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions. Aliens cannot be required to have more conventional or more successful marriages than citizens.

Moreover, the determination may have been influenced by the irrelevant fact, cited by respondent to support the Service, that the
Good moral character is frequently a statutory eligibility requirement\(^3\) which, like other such requirements, must be found as fact before discretionary relief may be granted. The statute enumerates a number of instances in which a finding of good moral character is precluded.\(^4\) In making fact findings on disputed evidence and in reaching the ultimate fact finding on how the alien's conduct measures up to community standards, the adjudicator can readily be influenced by subjective factors in his own makeup. This is especially true with respect to value judgments on issues of sexual morality, such as adultery, which Congress has seen fit to enumerate specifically as a bar to a finding of good moral character.\(^4\)

The question of an alien's intentions at the time of admission as a nonimmigrant (say, a temporary visitor or student) is often a crucial one. Many aliens come here by means of the readily accessible nonimmigrant route, a means of entry to which they are ineligible and which would be denied them if they revealed an actual but undisclosed intention to work here or to remain indefinitely.\(^4\) Whether the Service will thereafter exercise prosecutorial discretion favorably in behalf of such an alien or will grant discretionary relief from deportation will frequently depend upon a fact finding as to the bona fides of his nonimmigrant entry. In arriving at a decision on that issue, the adjudicator must often take into account not only the alien's circumstances abroad (e.g., statements to the consul in applying for the visa, economic and domestic situation) but also his post-entry conduct (how soon after entry he undertook paid employment, divorced his wife abroad, married a United States citizen, etc.). In making such fact findings, the adjudicator can be readily influenced by his own subjective attitudes, based on his experiences in other cases and other nonrecord evidence.\(^4\)

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wife could and did leave as she pleased when they were together. The bona fides of a marriage do not and cannot rest on either marital partner's choice about his or her mobility after marriage. Id. (citations omitted).

39. See, e.g., I. & N. Act §§244(a), 244(e), 249, 8 U.S.C. §§1254(a), 1254(e), 1259 (1970).

40. Id. §101(f), 8 U.S.C. §1101(f).

41. Id. §101(f) (2), 8 U.S.C. §1101(f) (2).

42. Such aliens are "immigrants" and hence inadmissible without an immigrant visa. Id. §§101(a)(15), 212(a)(20), 8 U.S.C. §§1101(a)(15), 1182(a)(20).

43. See, e.g., the observation of one of the Immigration Judges in an un-
Where the fact finder clearly sets forth the reasons for his findings, the way is open for the person affected by an adverse finding to seek further administrative or judicial review if he thinks the ultimate finding is unsupported or otherwise unwarranted. But what remedy is there where the real basis for the adverse finding is the adjudicator's unexpressed (and perhaps unconscious) bias?

**DISCRETIONARY RELIEF**

The exercise of administrative discretion in the usual sense of that phrase is involved in those cases in which the immigration laws provide a discretionary remedy waiving specified grounds of inadmissibility or deportability or providing for the creation of a record of lawful admission for permanent residence for an alien without that status. Since these forms of relief are a matter of grace and not of right, they are distinguishable from the few statutory dispensations which are cast in absolute terms and which become operative automatically once the statutory facts are fixed.44

Among the statutory dispensations available as a matter of administrative discretion to eligible aliens are waivers of inadmissibility to permanent resident aliens returning from a temporary visit abroad to a lawful unrelinquished domicile of seven consecutive years,45 waivers of certain grounds of inadmissibility for certain nonimmigrant applicants,46 waiver of the two-year foreign resi-

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44. *See, e.g.*, *I. & N. Act § 241(f), 8 U.S.C. § 1251(f) (1970)*, barring deportation for fraudulent entry in certain instances. *See also id. § 241(b), 8 U.S.C. § 1251(b)*, barring deportation based on conviction of crime involving moral turpitude where there has been an executive pardon or judicial recommendation against deportation. *See also id. § 243(h), 8 U.S.C. § 1253(h)*, in which the Attorney General is "authorized" to withhold deportation to any country in which in his opinion the alien would be persecuted. As construed in the light of pertinent commitments under the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6224, when the finding of likely persecution is made, withholding of deportation follows. *In re Dunar, 14 I. & N. Dec. ___* (I.D. 2192 1973). Similarly, once the statutory elements have been made out, labor certification issuance is not discretionary but required. *Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973)*.


46. *Id. § 212(d) (3), 8 U.S.C. § 1182(d) (3).*
dence requirement for certain exchange visitors, and waiver of certain grounds of inadmissibility for specified classes of aliens. Waivers of this sort are important not only to aliens outside the United States applying for admission but also to aliens in the United States seeking a statutory remedy which requires a showing of admissibility to the United States.

In the cases of aliens in the United States unlawfully or otherwise without permanent residence status, certain discretionary remedies are available which either convert their status to that of a permanent resident or pave the way for the acquisition of that status. Chief among these remedies are suspension of deportation, voluntary departure, adjustment of status to permanent residence, and creation of a record of lawful admission for permanent residence.

In cases of this sort, the first question ordinarily presented is whether the pertinent statutory eligibility requirements have been made out, for unless eligibility is established the power to exercise discretion may not be invoked. Even where eligibility is clear, however, the administrative adjudicator still has a judgment to make. In the exercise of discretion, he must either grant the relief sought or deny it. In some instances, the question of eligibility has been pretermitted altogether and relief has been denied in the exercise of administrative discretion, without more.

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47. Id. § 212(e), 8 U.S.C. § 1182(e).
48. Id. §§ 212(g), (h), (i), 8 U.S.C. §§ 1182(g), (h), (i).
49. See, e.g., id. § 245(a), 8 U.S.C. § 1255(a).
50. Id. § 244(a), 8 U.S.C. § 1254(a).
51. Id. § 244(e), 8 U.S.C. § 1254(e).
52. Id. § 245, 8 U.S.C. § 1255.
53. Id. § 249, 8 U.S.C. § 1259.
56. Goon Wing Wah v. INS, 386 F.2d 292 (1st Cir. 1967); Silva v. Carter, 326 F.2d 315 (9th Cir. 1963), cert. denied, 377 U.S. 917 (1964). One court has recently held in a case involving an alien in the United States that where the discretionary denial was predicated on a fact finding which could later lead a consul abroad to reach an unreviewable determination that the alien is ineligible for a visa, the alien is entitled to an express administrative determination of eligibility, notwithstanding the eligibility-discretion dichotomy, in order that he might avail himself of administrative and judicial review of the eligibility determination while still in the United States. Bagamasbad v. INS, No. 74-1440 (3d Cir. June 9, 1975).
In view of the broad range of the discretionary authority thus confided to the Attorney General and his delegates, some standards are clearly needed to preclude arbitrary and capricious decision-making by the many delegates of the Attorney General exercising his discretion. The courts have held that discretion must be exercised on the individual facts of each case and have forbidden the prescription by the Attorney General of arbitrary classifications or lists of specific aliens to whom relief must be denied. Where the limitations on the grant of relief as a matter of discretion to aliens otherwise statutorily eligible have been prescribed by formal regulation, however, they have been sustained.

The absence of meaningful administrative standards as guides to adjudicators in the exercise of discretion has been noted and criticized in recent years. One judge has suggested that "proper administration would be advanced and reviewing courts would be assisted if the Attorney General, or his delegate, without attempting to be exhaustive in an area inherently insusceptible of such treatment, were to outline certain bases deemed to warrant the affirmative exercise of discretion and other grounds generally militating against it." The Board has attempted to lay down general guidelines in its published decisions, but the adjudicators have not all considered them as satisfactory.

Typical of the problems is the situation presented in a section 245 case, in which statutory eligibility has been successfully estab-
lished but where the adjudicator is unsure whether to exercise discretion favorably. There are many factual variables in the cases. The applicant may have a clean record but little by way of so-called "equities"; he may be a newcomer with only brief residence here. He may have no close family ties here, and may indeed have strong ties abroad. He may be at a great distance from the consular office abroad where he would have to apply for a visa if denied section 245 adjustment, so that the denial would entail not only great travel expenses but also loss of time and possibly loss of his job here. Since such an alien is already eligible for a visa, what important institutional purpose is served by denying section 245 relief in the exercise of discretion and forcing him to obtain his visa abroad?

In the case of an alien whose record is not completely "clean" or presents factors which the Service considers "adverse," discretionary denial is often justified on the need to preserve the integrity of the system. Thus, the alien who comes to the United States in the guise of a nonimmigrant visitor, knowing that he can establish visa eligibility promptly after arrival and intending to do so as a predicate for section 245 adjustment, circumvents the consular visa-issuing process. Discretionary denial in such a case can be realistically justified as discouraging such an abuse and restoring the alien to the position abroad that he would have had if he had dealt in good faith with the consul.

Other factors may underlie the alien's desire to come to the United States through the relatively easy nonimmigrant route. He may have an unbearable marriage in a country which does not permit divorce, and may desire to get a "quickie" divorce here. Or he may come here in good faith as a nonimmigrant visitor or student and change his mind and decide to stay here permanently only after admission, because he has been persuaded by relatives he

sets standards with regard to the granting or denying of applications under section 245 as a matter of discretion. I have been with the Immigration Service for 35 years, 15 as a hearing officer. It has been said that I am very astute and competent. Yet, notwithstanding my experience, astuteness, and competence, I must confess that no matter how conscientiously I attempt to follow the guidelines set by the precedent decisions of the Board with regard to the exercise of discretion, I haven't the slightest idea whether my decision will be sustained or reversed. I have discussed this with a number of my colleagues and I also find it true with them. Indeed, I can safely say that this is the single most frustrating aspect of the work of [an Immigration Judge] . . . .
visits here, or has fallen in love with a United States citizen or resident alien he has met here. He may come here as a nonimmigrant in good faith, with a qualified intention to remain here only if permitted to do so by law.  

There are numerous other variables. The alien may have left behind in the old country his wife and children, whom he continues to support and whom he intends to bring over as soon as he can. He may have deserted his wife and children and failed to support them. He may have temporarily taken up with another woman here, pending such time as his wife can join him. The other woman may have become pregnant, and he may have divorced his wife abroad and married the girl here in order to legitimatize their American-born offspring.

The Board has recognized the imperative of even-handed justice and through the years has laid down general guidelines, while acknowledging the need for individual adjudication. The standards have varied from time to time and have not been too consistent. A few references to its reported decisions will suffice to illustrate the problems.

In In re Barrios, a native of Bolivia, who under the then-existing law could have applied for an immigrant visa without regard to numerical limitations, entered as a nonimmigrant visitor after he failed to qualify for an immigrant visa because he could not furnish an affidavit of support. In subsequent proceedings for section 245 adjustment, he testified that when he was admitted he intended to visit some factories and visit some relatives, but not to change to a resident; that at entry he contemplated the possibility of applying for permanent residence if legally permitted to do so, but did not actually make the decision to change status until after entry, when he saw that he would have the opportunity to work and study at the same time. The Board held that this combination of factors did not spell out a case of circumventing the immigration laws and that relief was warranted in the exercise of discretion.

In In re Diaz-Villamil, a Colombian native who had entered

64. See In re M-, 4 I. & N. Dec. 626, 627 (1952):
We wish to caution that what we say here is not to be taken as an invariable rule, but that in each case the decision ultimately must be predicated upon the merits or demerits of that case. Nevertheless, when considering discretionary action, it is of the greatest importance in striving for justice and impartiality that all aliens whose cases are substantially similar receive like treatment.
as a nonimmigrant visitor gave conflicting and evasive testimony in his section 245 application as to his intentions at entry. The Immigration Judge concluded he had a preconceived intention to adjust to a permanent resident after entry and denied the application as a matter of discretion. The Board agreed, stating that "[t]o hold otherwise would be an invitation for nonquota and open quota intending immigrants to render useless the legally designated visa issuing functions of United States consuls abroad." This rationale was followed in In re Garcia-Castillo, involving a native of Peru, then a nonquota country, who had entered with the proscribed preconceived intention.

In later decisions, the Board concluded that where such a preconceived intent is present, section 245 adjustment should be denied in the exercise of discretion in the absence of "substantial equities." In In re Rubio-Vargas, a permanent resident alien wife in the United States, whom the applicant had married in Peru and whom he came here to join in the guise of a visitor, was not considered a substantial equity sufficient to warrant discretionary relief.

A new dimension was added in In re Ortiz-Prieto, involving a native of Chile who was clearly eligible for section 245 adjustment and whose good faith entry as a nonimmigrant was incontrovertibly established. Noting that he had no close family ties or dependents living in the United States and that he had a wife and three children living in Chile, the Board concluded that discretionary denial was warranted because there were no "outstanding equities" in his case. Thus, in addition to eligibility, special equities were required as a condition of the discretionary grant, regardless of whether there had been a preconceived intent at entry.

Even after the 1965 legislation removed the exemption of Western Hemisphere countries from quota limitations, the same principles were applied and even made more restrictive. In In re Leger, the Board stated that, "[t]here must be outstanding equities, in a generally meritorious case, to warrant [the grant of adjustment]."

67. Id. at 496.
In *In re Ramirez*, the discretionary denial of adjustment to an eligible alien from El Salvador was sustained on the following rationale: "This Board has consistently held that the extraordinary discretionary relief provided for in [section 245] should only be granted in meritorious cases . . . . On the basis of the factors hereinbefore recited, we find that there are no outstanding equities crying out for favorable action on the application."73

Since section 245 adjustment merely grants permanent resident status to an alien already eligible for that status, one may wonder why it should be considered "extraordinary". Suspension of deportation under section 244(a) of the Act74 may be thought of as extraordinary since it confers lawful permanent residence on a deportable alien. Registry under section 249 of the Act75 may be deemed extraordinary since it authorizes the creation of a record of lawful admission for permanent residence where none existed before. In the case of a section 245 applicant, however, the alien must establish not only that he is eligible for admission and for an immigrant visa, but also that such a visa is immediately available to him. It is true that if discretion is favorably exercised in his behalf, the cost of round-trip transportation abroad, the waiting time abroad, and separation from his family and employment are obviated. However, he gains no status which would not otherwise be his under the law.76 I fail to see what governmental interest is served by forcing such an eligible alien to leave the United States even temporarily, absent some overriding considerations.

In *In re Arai*, the Board found it desirable to restate its standards. The case involved a 27-year-old single male who had entered in good faith as a nonimmigrant visitor, who was concededly eligible for section 245 adjustment, and whose background reflected no adverse factors. The Immigration Judge had nevertheless denied relief in the exercise of discretion on the basis of *In re Ortiz-Prieto*, 13 L.N. Dec. 494 (1970).

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73. Id. at 80.
75. Id. § 249, 8 U.S.C. § 1259.
76. There are two other possible disadvantages to an eligible alien who is nevertheless required to go abroad to apply for his immigrant visa. First, the American consul abroad may arbitrarily refuse to issue the visa, and such a decision is not subject to judicial review. Brownell v. Tom We Shung, 352 U.S. 180, 184, n.3 (1956); Loza-Bedoya v. INS, 410 F.2d 343 (9th Cir. 1969). Second, his home country may seize him for military service, if due.
since there were no "outstanding equities" to make the case "meritorious." The Board stated:

"We are now of the opinion that the language set forth in Matter of Ortiz-Prieto, supra, should be clarified and modified because it is too broad in its impact and probably more demanding than necessary. Accordingly, the language of the instant decision will supersede that contained in Ortiz-Prieto."

"It is difficult and probably inadvisable to set up restrictive guidelines for the exercise of discretion. Problems which may arise in applications for adjustment must of necessity be resolved on an individual basis. Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion."

While this formulation represented an improvement insofar as it furnished more detailed examples of the decisive factors, rather than merely referring only to such nebulous criteria as "meritorious" and "outstanding equities," it left many questions unanswered. How much weight should be accorded to each of the favorable factors enumerated, i.e., family ties in the United States, hardship, length of residence here? In addition to the type of preconceived intent generally considered an "adverse factor," what other types of conduct should be considered adverse? Suppose the alien had taken up employment without Service permission? Suppose he had failed to reveal that employment when applying to the Service for an extension of stay? Suppose the family ties had been created in the United States rather than abroad, i.e., the alien had married a United States citizen or permanent resident alien while still in lawful status? Suppose he had married her after his lawful non-immigrant status here had terminated? Suppose his relationship with her had started while he was still in legal status and marriage had to be deferred until after he or she had obtained a legal termination of a prior marriage? If the break-up of a foreign marriage is to be considered a relevant factor, isn’t it equally relevant to determine who was responsible for the break-up? Where the alien had obtained a divorce while here from his wife in the old country.

78. Id. at 495-96.
and had remarried here to a citizen or permanent resident alien, what effect should be given to the fact that his enforced departure, while breaking up his marriage here and possibly forcing his American wife and child to go on relief, would not in any event restore him to his family abroad?

The situation has been further confused by the Board's turnabout adherence to its pre-Arai generalized formulations. By a divided vote, the Board on August 2, 1974, stated in an opinion designated for publication as a precedent:

Adjustment of status under section 245 of the Act was not designed to supersede the regular consular visa-issuing processes or to be granted in non-meritorious cases . . . . An applicant who meets the objective prerequisites for adjustment of status is in no way entitled to that relief . . . . That relief is extraordinary inasmuch as it dispenses with ordinary immigration procedures . . . . We therefore held in Matter of Ortiz-Prieto, supra, and affirm, that the extraordinary discretionary relief provided in section 245 of the Act can only be granted in meritorious cases, and that the burden is always upon the alien to establish that his application for that relief merits favorable consideration . . . .

In Matter of Arai, supra, at page 495, we had stated the following: "In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion." That statement should not be misinterpreted as implying that adjustment of status must be granted in the absence of major adverse factors, or that the Service has the burden of showing that the alien is not entitled to adjustment of status. Adjustment of status pursuant to section 245 of the Immigration and Nationality Act may be granted where the alien has established that favorably exercise of discretion is warranted.79

I fail to see how his negative and retrogressive approach clarifies anything except the adjudicator's license to function without the restraining influence of meaningful standards.

It should be possible to achieve greater uniformity of decision, while at the same time minimizing the opportunities for result-oriented adjudication based on an adjudicator's subjective feelings, by defining with greater precision not only the policies to be served but also the elements to be considered. It does not matter whether the guiding principles are laid down in published regulations or in the Board's published precedent decisions, which are binding on the Service.80 Certainly, greater care should be taken in thinking through and then defining those elements which should be con-

79. In re Blas, INS file A 18437421 (Aug. 2, 1974) (citations omitted). The Board's decision has been certified to the Attorney General for review, 8 C.F.R. § 3.1(h)(ii) (1975), and is now pending before the Attorney General.
80. 8 C.F.R. § 3.1(g) (1975).
considered "adverse" and those which can be properly juxtaposed in mitigation. Greater precisiveness need not completely straitjacket the adjudicator or limit the range of elements which may properly be considered.

Of course, even with more precise definition of the relevant factors, the adjudicator must still determine how much weight to assign to each of the competing elements and in this appraisal his subjective notions can still come into play. It is at this point that clear policy statements become of overriding importance as a guide to action.

Uniformity of decision with mathematical precision is, of course, possible. Specific point values could be prescribed for each element deemed relevant, e.g., so many minus points for a preconceived intent, so many for a wife abroad, so many for each minor child abroad, so many for being responsible for the break-up of the foreign marriage, so many for each intentional misstatement to the Service, etc. Plus points could be assigned for an American citizen or permanent resident wife, for each American child, for each year of the alien's residence here, and the like. An appropriate plus score could be fixed as a prerequisite to the favorable exercise of discretion. Positive accuracy could be achieved by feeding the data into a computer and simply pressing a button for the right answer!

Any notion of such mechanical jurisprudence would, of course, be summarily rejected if seriously suggested. Yet, unless more realistic and specific guidelines are laid down, the opposite extreme becomes possible if it is left to each individual adjudicator to determine for himself, on the basis of his own subjective experiences and beliefs, just what factors in the alien's life should be determinative in exercising discretion and how much weight should be accorded each factor. An intolerant adjudicator could deny relief to aliens whose cultural patterns, political views, moral standards or life styles differed from his own. Worse still, a hostile or xenophobic adjudicator could vent his spleen on aliens he personally considered offensive without articulating the actual basis for his decision.

Unless standards are laid down which are not illusory and can be uniformly applied in the real world, we depart from evenhanded justice and the rule of law. The computer, at least, is impersonal!