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EXCLUSION AND DEPORTATION—WAIVERS UNDER SECTION 212(c) AND SECTION 244(a)(1) OF THE IMMIGRATION AND NATIONALITY ACT

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There are many provisions in the Immigration and Nationality Act ("Act") for excluding or deporting aliens from the United States. Every time an alien seeks entry into the United States, he is confronted by the exclusion


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In exclusion proceedings, the alien has the burden of proof concerning his admissibility. Id. § 291, 8 U.S.C. § 1361 (Supp. V 1981). He is deportable only to the country from which he came, or in the alternative, to another country according to the statutory guidelines. Id. § 237(a), 8 U.S.C. § 1227(a) (Supp. V 1981). Further, he may challenge an exclusion order in the courts only through habeas corpus proceedings. Id. § 106(b), 8 U.S.C. § 1105a(b) (1976).

3. There are 19 grounds for deporting aliens. Id. § 241(a), 8 U.S.C. § 1251(a) (1976 & Supp. V 1981). For example, any alien may be deported who has been convicted of a crime involving serious moral turpitude within five years of entry, id. § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1976), or of violating Title I of the Alien Registration Act, id. § 241(a)(15), 8 U.S.C. § 1251(a)(15) (1976). An alien also may be deported who, at any time after entry, is or has been a narcotic drug addict, id. § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1976), or has been convicted of unlawfully possessing an automatic or semi-automatic weapon. Id. § 241(a)(14), 8 U.S.C. § 1251(a)(14) (1976).

4. The Immigration and Nationality Act defines “entry” as follows:

The term “entry” means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port
provisions; after entry, an alien is then subject to the deportation provisions. But the grounds for exclusion and deportation are by no means coextensive. For instance, an alien may commit an offense or suffer an affliction during his residence in the United States which will cause no difficulty as long as he remains here. If the alien then departs from the United States, however, he will be subject to inspection, and possibly exclusion, upon his attempt to return. The harshness of this reality is readily apparent when an alien ventures abroad for a short period after a lengthy stay in the United States, and is then confronted by the possibility of exclusion for an act committed many years before. In the meantime, the alien may have settled into a comfortable lifestyle, surrounded by family and friends. For such an alien, exclusion may be a true hardship. Deportation also would impose great hardship upon an alien in similar circumstances, but who has not left the United States. In response to these situations, Congress enacted certain waiver provisions which allow an alien to seek relief from the Attorney General. By and large, such waivers take into consideration an alien's family relationships and his length of residence in the United States.

Section 212(c) of the Act provides a way for an alien to counteract the

or place or in an outlying possession was not voluntary: Provided, that no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception. Id. § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1976).

5. For example, an alien who has an attack of insanity while living in the United States is not deportable. If he leaves and tries to reenter, however, he will be confronted with the provision that excludes "aliens who have had one or more attacks of insanity." See id. § 212(a)(3), 8 U.S.C. § 1182(a)(3) (1976).


7. See, e.g., Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1976) (waiver of exclusion possible for permanent resident returning to lawful unrelinquished domicile of seven consecutive years except on exclusion grounds relating to disloyalty); id. § 212(h), 8 U.S.C. § 1182(h) (Supp. V 1981) (waiver of exclusion possible for an alien intending to immigrate who is excludable on criminal or prostitution grounds, if exclusion would result in extreme hardship to the alien's spouse, parent, son or daughter who is a citizen or permanent resident of the United States); id. § 212(l), 8 U.S.C. § 1182(l) (1976) (waiver of exclusion possible for an alien intending to immigrate who is the spouse, parent, or child of a citizen or of a permanent resident of the United States, and who is excludable because of fraud or perjury); id. § 241(f), 8 U.S.C. § 1251(f) (Supp. V 1981) (waiver of deportation possible for alien who is the spouse, parent, or child of a citizen or of a permanent resident of the United States, and who is deportable because he was originally excludable at the time of entry on grounds of fraud); id. § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976 & Supp. V 1981) (suspension of deportation possible for alien who has had at least seven years of continuous physical presence in the United States and whose deportation would cause extreme hardship to the alien, or to his spouse, parent or child who is a citizen or permanent resident of the United States).

8. Section 212(c) provides as follows:
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exclusion provisions. Its language is directed to the lawful permanent resident who is returning after a trip abroad. Such an alien may be excludable on any one of several grounds because, under the Act, his application for admission on return subjects him to essentially the same scrutiny as on his first entry as an immigrant. In recognition of the equities which favor a lawful permanent resident, however, section 212(c) grants the Attorney General the discretion to admit such an alien who has a lawful unrelinquished domicile of seven consecutive years, even though the alien may not be eligible for admission because of a statutory prohibition. Initially, section 212(c) relief was available only to returning resident aliens who were excludable. The section, however, has been extended to deportation proceedings, thereby aiding aliens who may not have left the United States.

Section 244(a)(1) is another helpful provision which provides relief to an alien who faces deportation under the Act. Under this section, such an

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

Id. § 212(c), 8 U.S.C. § 1182(c) (1976).

9. Constitutional considerations, however, differ depending on an alien’s status. An alien who is seeking initial admission as a permanent resident has no constitutional rights because the government may refuse him admission as a sovereign prerogative. Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972). On the other hand, as a matter of due process, a permanent resident alien who is returning from a brief trip abroad is entitled to a hearing before he can be excluded. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). The immigration inspector must determine whether the returning alien is seeking to make an “entry” within the definition of section 101(a)(13) of the Act, and if so, a hearing must then be granted to determine if exclusion is appropriate. Landon v. Plascencia, 103 S. Ct. 321 (1982). If the returning alien is not making an entry, then he is entitled to a hearing in deportation proceedings, where the constitutional safeguards are more elaborate. Leng May Ma v. Barber, 357 U.S. 185 (1958); Maldonado-Sandoval v. INS, 518 F.2d 178 (9th Cir. 1975).

10. Such relief, however, is not available to an alien who is excludable on grounds of subversion. See Immigration and Nationality Act §§ 212(a)(27)-(29), 212(c), 8 U.S.C. §§ 1182(a)(27)-(29), 1182(c) (1976).

11. This restriction seemed reasonable because the statute requires the alien to be “returning to a lawful unrelinquished domicile.” Id. § 212(c), 8 U.S.C. § 1182(c) (1976).

12. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (section 212(c) relief available to an alien convicted of a narcotics offense, who has an unrelinquished domicile of more than seven years, but who did not depart from this country between date of his conviction and date of deportation order).

13. Congress initially sought to alleviate some of the hardships which befell aliens by passing the Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (amending Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874 (1917)). This statute authorized the Attorney General to suspend the deportation of certain aliens who could prove at least five years of good moral character, and whose repatriation would result in hardship to their families. Id. ch. 439 § 20(c), 54 Stat. at 672. A 1948 amendment to the statute required aliens to have seven years of residence in the United States to be eligible for relief. Act of July 1, 1948, ch. 783, 62 Stat. 1206 (1948). Subsequent amendments refined the suspension procedure and resulted in the current version
alien must forward to the Attorney General an application which states the basis of his eligibility for relief. Upon receiving an application for relief, the Attorney General must determine whether the alien meets the following statutory requirements. First, section 244(a)(1) requires the alien's continuous physical presence in the United States for at least seven years. It also requires a showing that the alien has been a person of good moral character, and that the alien's deportation will result in "extreme hardship to the alien or to his spouse, parent, or child" who is a citizen or a lawful permanent resident of the United States. When an alien demonstrates statutory eligibility for relief, the Attorney General will decide whether he will exercise his discretion favorably. If the alien's deportation is suspended, the alien will be granted lawful permanent residence.

This article will discuss the different approaches that the Board of Immigration Appeals ("Board") and the courts have taken in the application and interpretation of sections 212(c) and 244(a)(1). The issue that merits discussion regarding section 212(c) is whether an alien's lawful domicile of seven years must begin subsequent to his lawful admission for permanent residence. With one exception, the Board and the courts which have dealt of the statute, Immigration and Nationality Act of 1952, ch. 477, § 244(a)(1), 66 Stat. 163, 214 (1952), amended by Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1247-48 (1962) (current version at 8 U.S.C. § 1254(a)(1) (1976 & Supp. V 1981)). The current version provides as follows:

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(19) of this title) who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.


15. Id.
16. Id.
17. Until recently, Congress had the power to veto the Attorney General's decision to suspend deportation. Id. § 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976). In INS v. Chadha, 103 S. Ct. 2764 (1983), the Supreme Court held this power to be unconstitutional.
18. The Act defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." Immigration and Naturalization Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1976).
19. The Board of Immigration Appeals ("Board") is authorized by regulation and its members are appointed by the Attorney General. 8 C.F.R. § 3.1 (1983). It is primarily an appellate tribunal and its decisions are binding on the immigration judges and the Immigration and Naturalization Service ("Service") unless the Board states otherwise. Id. § 3.1(g).
20. Lok v. INS, 548 F.2d 37 (2d Cir. 1977); see infra notes 46-59 and accompanying text.
with this question have determined that only those years of lawful domicile which occurred subsequent to admission for permanent residence should be considered for purposes of section 212(c) relief. This article, however, will advance arguments against the prevailing interpretation of the section. In so doing, it will examine the legislative history with a view toward putting the issue in its proper perspective.

With respect to section 244(a)(1), this article will discuss the Supreme Court's decision in INS v. Wang concerning the Board's role in defining extreme hardship, and the courts' role in reviewing the Board's decisions. It also will be helpful to review the criteria for meeting the requirement of continuous physical presence, and to discuss how an alien's absence from the United States may meaningfully interrupt that presence. Finally, there will be an examination of the requirement of good moral character as well as an examination of the changes affecting that requirement that have resulted from the 1981 amendments to the Act.

**SECTION 212(c) WAIVER**

Section 212(c) currently requires that an alien who seeks relief thereunder must have been lawfully admitted for permanent residence, must have gone abroad voluntarily, and must be returning to a lawful unrelinquished domicile of seven consecutive years. Two significant elements of section 212(c) must be highlighted. The alien must have the status of a lawful permanent resident and his domicile must be lawful. Neither of these requirements was contained in the seventh proviso to section 3 of the Immigration Act of 1917, the precursor to section 212(c). Therefore, it was possible for an alien to seek relief under the seventh proviso regardless of whether his status or entry was lawful. This situation led to legislative reform of the seventh

21. See, e.g., Chiravacharadhiruk v. INS, 645 F.2d 248 (4th Cir. 1981) (waiver under § 212(c) unavailable where an alien was convicted for the unlawful possession of cocaine 10 years after his initial entry, but only one year after he was admitted as a permanent resident), cert. denied, 454 U.S. 923 (1982); Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979) (section 212(c) relief denied to an alien, convicted of inducing the entry of illegal aliens, who had resided in the United States for 12 years, 9 of which preceded admission for permanent residence); In re Newton, 17 I. & N. Dec. 133 (1979) (section 212(c) relief denied to an alien who was convicted of grand larceny two years after he became a permanent resident and 17 years after he first entered the United States); In re Anwo, 16 I. & N. Dec. 293 (1977) (appeal of deportation order denied when alien convicted of illegal possession of marijuana had resided in the United States for eight years, only four of which followed admission as a permanent resident), aff'd per curiam, 607 F.2d 435 (D.C. Cir. 1979).
proviso because Congress was concerned that aliens who would not qualify for admission could by some means gain entry to the United States and subsequently petition for relief on the ground that they had satisfied the domiciliary requirement. The same possibility for relief existed in the case of aliens who had overstayed their visas. There was also congressional concern that aliens who entered the country illegally would use the preexamination procedure for relief under the seventh proviso, thereby returning to the United States with a visa from an American consulate in a foreign country.

Therefore, an alien who was initially ineligible for a visa on a particular statutory ground might be able to circumvent the statute and eventually accomplish his goal of staying permanently in the United States.

Because of this application of the seventh proviso to circumvent the exclusion provision, Congress made sure that section 212(c) required the alien's domicile to be "lawful." But when the section was restricted to "aliens lawfully admitted for permanent residence," confusion arose as to whether the alien's lawful domicile of seven years had to begin subsequent to his lawful admission for permanent residence.

The Establishment of Domicile

a. The Board in In re S.

The significance of an alien's domicile first arose in In re S. In that
case, the alien had established only four years of lawful permanent residence but he already had spent eight years in the United States as an illegal alien. In 1953 he wanted to leave the United States temporarily. Therefore, he asked the Immigration and Naturalization Service ("Service") for advance clearance because he had committed an offense which would have foreclosed his return. Mindful of his unlawful status prior to 1949, the alien argued that his domicile during the period preceding his admission for permanent residence did not have to be lawful and that his sojourn of eight years satisfied the terms of section 212(c). His claim for relief rested on the separation of the word lawful from the requirement of an "unrelinquished domicile of seven consecutive years."

The Board's response in this case seemed to treat the terms "lawful entry" and "lawful admission for permanent residence" as synonymous. The Board stated that the "provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of seven consecutive years subsequent to a lawful entry." Had the Board stopped there, it would have clearly designated the alien's ineligibility for section 212(c) consideration because of his prior unlawful status; the alien simply did not have a lawful status for the required seven-year period. When the Board concluded that the seven-year domicile must follow lawful admission for permanent residence, it went beyond what was necessary for resolution of the case. The alien's predicament called for resolution of whether his unrelinquished domicile had to be lawful for the entire period. If the answer was yes, then his length of domicile would be measured only from the time of his lawful entry. The Board's decision that section 212(c) was available only to those aliens who had seven years of unrelinquished domicile subsequent to admission as a lawful permanent resident did not consider either the case of an alien's lawful entry as a nonimmigrant or the relationship between nonimmigrant status and domicile. The Board's language might have led one to believe that the alien could have made a lawful entry only if he were a lawful permanent resident. Perhaps this language has caused the greatest confusion because an alien's lawful domicile can originate in

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32. Advance clearance was an exercise of the seventh proviso prior to departure. See In re B., 1 I. & N. Dec. 204 (1942); 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.4a, at 7-40, 7-41 (1982).

33. In 1940 and 1941, the alien apparently had committed perjury, a crime involving moral turpitude. 5 I. & N. Dec. at 116.

34. Id. at 117.

35. Id. at 118.

36. Id.

37. See Comment, Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act, 47 U. Chi. L. Rev. 771, 788-89 (1980) [hereinafter cited as Comment, Lawful Domicile].


39. A lawful permanent resident is an alien who has been granted the right to remain permanently in the United States, such status not having changed. Id. § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1976).
either immigrant or nonimmigrant status, thus satisfying the Board’s contention that both the admission and the period of residence must be lawful. 40

In finding that the plain language of section 212(c) required the seven consecutive years of lawful domicile to follow the alien’s entry for lawful permanent residence, the Board did not give any lengthy rationale for its conclusion, but referred instead to the statute’s legislative history. 41 The Senate committee report 42 to which the Board referred highlighted the language “established after a lawful entry for permanent residence” 43 which was suggested for insertion in the seventh proviso but which was eventually omitted. In its report, the House Judiciary Committee acknowledged that prior to the enactment of section 212(c), aliens could be admitted at the discretion of the Attorney General without ever being lawfully admitted to the United States. 44 However, there seemed to be no language in any of the legislative history requiring the seven-year period of domicile to follow the alien’s lawful admission for permanent residence. Thus, it was rather startling for the Board to construe “the plain language of section 212(c)” as it did in In re S. 45

b. The Second Circuit in Lok v. INS

The Board’s decision in In re S. remained unchallenged until Lok v. INS (Lok I). 46 In Lok I, a deportation order was entered against an alien seaman who had remained in the United States beyond his authorized stay. 47 Subsequently, he married an American citizen and was allowed to remain in the United States while his petition for an immigrant visa was processed. 48 After his marriage, the service brought a deportation proceeding against him because of his conviction for possession of narcotics. At the deportation proceeding, he had to prove seven years of lawful domicile if he wanted to obtain relief under section 212(c). 49 His only hope for relief lay in the possibility that the period prior to his lawful admission for permanent residence would be

40. 51 & N. Dec. at 118.
41. Id.
43. Id. at 384.
45. The plain meaning rule calls for language to be given its natural meaning unless restricted by some other provision or inconsistent with legislative history. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 48-49 (4th ed. 1972 & Supp. 1982).
46. 548 F.2d 37 (2d Cir. 1977).
47. A deportation order was entered against Tim Lok on October 26, 1965. In re Lok, 151 & N. Dec. 720, 720 (1976).
48. He had become eligible to apply for the visa because of his marriage on February 23, 1968, to an American citizen. In re Lok, 548 F.2d 37, 38 (2d Cir. 1977) (citing Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976)).
49. He conceded deportability at a deportation hearing on April 21, 1975, but sought relief under § 212(c) of the Act. Id. at 38-39.
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considered part of the required domicile.\textsuperscript{10} Predictably, the Board followed its own decision in \textit{In re S.}\textsuperscript{11} The alien challenged the Board's position; therefore, the Second Circuit in \textit{Lok I} had to respond to the alien's arguments that section 212(c) did not require the alien's domicile to follow his lawful admission for permanent residence.

Initially, the Second Circuit recognized that it was customary to defer to the interpretation of the agency charged with administering the Act.\textsuperscript{12} The court, however, also understood that it should not defer to "administrative decisions that are inconsistent with a statutory mandate or which frustrate the congressional policy underlying legislation."\textsuperscript{13} The court's subsequent reluctance to defer was prompted by the Board's reasoning in \textit{In re S.}, which seemed to equate the terms "lawfully admitted for permanent residence" and "lawful unrelinquished domicile."\textsuperscript{14} The court stated explicitly that these terms were not synonymous and that an alien could in fact establish lawful domicile without being admitted for permanent residence.\textsuperscript{15} Given that possibility, the rationale for the Board's approach seemed to weaken; when the Service conceded that a literal reading of the statute did not support its position,\textsuperscript{16} the rationale faded entirely.

Next, the court considered the legislative history of section 212(c).\textsuperscript{17} The court viewed the Senate committee's discussions as requiring a result different from that reached by the Board. The court implied that the Senate

\textsuperscript{50} Although Tim Lok entered the United States as a seaman in 1959, he did not leave when his authorized stay expired. \textit{Id.} at 38. Through administrative discretion, Tim Lok managed to stay in the United States until October 25, 1971, when he left for Hong Kong to obtain a permanent resident visa. \textit{Id.} He returned to the United States as a lawful permanent resident on December 26, 1971. \textit{In re Lok}, 15 I. & N. Dec. 720, 721 (1976). Thus, Lok had spent approximately 12 years in the United States prior to his lawful admission as a permanent resident.\textsuperscript{51} \textit{In re Lok}, 15 I. & N. Dec. 720, 721 (1976) (citing \textit{In re S.}, 5 I. & N. Dec. 116 (1953)).

On July 30, 1976, the Board affirmed the Service's decision that Lok was ineligible for relief because he had not been a permanent resident for seven consecutive years. \textit{Id.} Thus, the Board held that only a lawful permanent resident could meet the "lawful unrelinquished domicile" requirement of § 212(c). \textit{Id.}

52. 548 F.2d 37, 40 (2d Cir. 1977) (citing Udall v. Tallman, 380 U.S. 1 (1965)).
53. \textit{Id.} (citing NLRB v. Brown, 380 U.S. 278, 290-92 (1965)).
55. \textit{Id.} at 40. To support its holding, the court unfortunately gave an example which is not supported by the Act. The example was stated as follows: "If a student . . . had resided here for three years, married an American citizen, obtained an appropriate visa for admission to permanent residence and then committed a deportable crime four years later, he certainly would have achieved a 'lawful unrelinquished domicile of seven consecutive years.'" \textit{Id.} The difficulty with this example is that for an alien to have a student visa, he must have a residence abroad which he has no intention of abandoning. Immigration and Nationality Act § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (Supp. V 1981). Therefore, in the court's example, the alien's initial three years as a student could not be counted towards the "lawful unrelinquished domicile" requirement. See \textit{In re Anwo}, 16 I & N. Dec. 293, 298-99 (1977), \textit{aff'd per curiam}, 607 F.2d 435 (D.C. Cir. 1979).
56. 548 F.2d at 39.
committee's proposal to limit section 212(c) relief to those aliens whose domicile was "established after a lawful entry for permanent residence" would have restricted the section markedly. To the court, the section was not so limited inasmuch as the section was designed to provide relief for deserving aliens with family ties in this country.

The Lok I court's approach to the domicile question was sound. On the other hand, the Board had assigned no meaning to the fact that the language "established after a lawful entry for permanent residence" was eventually omitted from section 212(c). Surely, if that phrase had been included in the statute, the required domicile would have to begin after, not before, the alien's lawful admission for permanent residence. By expressly refusing to adopt the "establishment" language, however, Congress demonstrated an intent to require only that the alien have the status of a lawful permanent resident on his return to his lawful domicile of seven consecutive years.

Further, the existence of the lawful domicile status does not depend at all on the assumption of permanent residence because domicile may be assumed by some nonimmigrants. Thus, according to Lok I and a correct interpretation of section 212(c), a lawful permanent resident of one day's standing could be returning to a domicile which he established as a nonimmigrant and still be ensured protection.

There is indeed no consolation to be found in the Board's view that the enacted language carried out congressional intent. This view would support the contention that having the status of a lawful permanent resident on reentry to a lawful domicile is synonymous with returning to a domicile established after admission as a lawful permanent resident. There is a distinct difference between the two situations, and it is difficult to believe that the Senate committee deliberately settled on the current statutory language if it wanted to insure that section 212(c) relief would be available only to lawful permanent residents of seven years standing. In any event, even if the ambiguity exists, it should be resolved in the alien's favor. Although the statute was intended to restrict the flow of illegal aliens into the United States and

58. Id. (quoting S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950)). The committee's proposal involved modifying the term "domicile" by adding the phrase "established after a lawful entry for permanent residence." Id. This proposal would have resulted in making § 212(c) relief unavailable to aliens whose admission for permanent residence did not pre-date seven years of domicile. Id.

59. Id. at 41; see also C. Gordon & H. Rosenfield, supra note 32, § 7.4c, at 7.50.

60. For the current version of § 212(c), see supra note 8.


64. See supra text accompanying notes 26-30.

65. In Tan v. Phelan, 333 U.S. 6, 10 (1948), the Supreme Court articulated the proposition that since deportation is a drastic measure, equal to banishment, the deportation provision of the Act should be given a narrow construction. This proposition has evolved into the princi-
to prevent abuses of the preexamination procedure, these objectives were achieved in large measure by the requirement that the alien must have gone abroad voluntarily and not under deportation, and that he must be returning to a lawful domicile. The statute, however, remains ameliorative and there is no rationale for torturing the plain language to accommodate the supposed legislative intent when Congress has been able to state its intent very clearly in other contexts when lawful permanent residence for a certain period was necessary.

\[66. \text{See Costello v. INS, 376 U.S. 120, 128 (1964); Mashi v. INS, 585 F.2d 1309, 1316 (5th Cir. 1978); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977). Nevertheless, while recognizing that principle, some courts have strictly construed the Act to reject an alien's claim. See, e.g., Pacheco v. INS, 546 F.2d 448, 449 (1st Cir. 1976) (court viewed congressional intent as requiring a restrictive interpretation of the Act with respect to an alien convicted of crimes of moral turpitude); Garcia-Gonzales v. INS, 344 F.2d 804, 809-10 (9th Cir. 1965) (court maintained that congressional intent required strict interpretation of the Act regarding aliens convicted of narcotics violations).}

\[67. \text{See Immigration and Nationality Act §§ 316(a), 319(a), 8 U.S.C. §§ 1427(a), 1430(a) (1976) (naturalization provisions).}

\[68. \text{16 I. & N. Dec. 293 (1977), aff'd per curiam, 607 F.2d 435 (D.C. Cir. 1979).}

\[69. \text{id. at 296.}

greater attachment to the United States than a permanent resident of five years with prior credit of ten years domicile as a nonimmigrant.11 Surely in the latter instance there is ample evidence of the alien’s close ties to this country.12 If the objective is to provide relief for aliens with a certain degree of attachment, then the requirement of a seven-year domicile as well as permanent resident status should be sufficient to secure that relief.13

The Board also observed in Anwo that Congress did not anticipate that nonimmigrants would reside in the United States for a long period of time before obtaining permanent residence status, thereby qualifying them for section 212(c) relief.14 This was a perplexing observation because there is no minimum period of residence required before a nonimmigrant can become a lawful permanent resident.15 Therefore, it is misleading for the Board to suggest that an alien would have to remain here for many years before qualifying for permanent residence and section 212(c) benefits. There are, of course, certain requirements for obtaining permanent residence, but length of stay is not one of them.16 Thus, the question is not whether a nonimmigrant who has sequestered himself for an extended period is availing himself of some undeserved immigration benefits. Instead, the question is whether

71. See Comment, Lawful Domicile, supra note 37, at 792 and nn. 127-28.
73. In contrast, Congress has established the rigorous requirement of physical presence as an important factor in the suspension of deportation provision. Id. § 244(a)(1), § 1254(a)(1) (1976 & Supp. V 1981). In § 244(a)(1), seven years of continuous physical presence is required, while in § 244(a)(2) 10 years is required if suspension of deportation is sought for an alien who has committed certain serious offenses. Id. § 244(a)(1), (2), 8 U.S.C. § 1254a(a)(1), (2) (1976 & Supp. V 1981). There is, however, no requirement of lawful admission for permanent residence in the suspension of deportation provision.
74. 16 I. & N. Dec. at 296. The Board expected a nonimmigrant “to enter, accomplish the purpose of his visit, and to leave within a relatively short period of time.” Id. This expectation did not, however, take into account the many nonimmigrants who came into this country for extended periods and who can legally establish domicile. See supra note 72.
76. A nonimmigrant may seek to obtain permanent residence by applying for an adjustment of status. Id. To do so, such an alien must be eligible for an immigrant visa. Id. In order to be eligible for an immigrant visa and for permanent residence, an alien must not fall within any of the classes of excludable aliens. Id. § 212(a), 8 U.S.C. § 1182(a) (1976 & Supp. V 1981). Examples of excludable aliens include the following: (1) aliens who are likely to become a public charge; (2) aliens who have sought to procure or have procured a visa or other documents by fraud or misrepresentation; and (3) aliens who the Attorney General has reason to believe have sought to enter the United States solely to engage in activities which would endanger the nation’s welfare, safety, or security, or would be prejudicial to the public interest. Id. Further, the availability of immigrant visas is largely determined by a scheme of categorizing aliens, and granting one category preference over another. Unmarried sons or daughters of United States citizens receive the highest preference. Id. § 203(a), 8 U.S.C. § 1153(a) (1976 & Supp. V 1981).
a lawful permanent resident will qualify for section 212(c) benefits if part of the domiciliary period is satisfied while he is a nonimmigrant.

There is no evidence that Congress objected to the establishment of domicile in this manner. In situations in which Congress has wanted to require a certain period of permanent residence before aliens could qualify for specific benefits, it has done so clearly. In the legislative history of section 212(c), there is no evidence that Congress intended to deny the benefits of the section to aliens who enter as nonimmigrants. Not even the Anwo approach would dictate that result. Therefore, the issue is whether domicile must be restricted to lawful permanent residents, and if not so restricted, whether section 212(c) nevertheless requires that the seven-year period of lawful domicile must follow the alien's lawful admission for permanent residence.

The Anwo interpretation that "lawful unrelinquished domicile" can be established only after admission for lawful permanent residence is inconsistent with the notion that nonimmigrants can establish lawful domicile without ever having applied for permanent status.

A Fourth Circuit case, similar to the one before the Board in Anwo, is Chiravacharadhikul v. INS. In Chiravacharadhikul, relief under section 212(c) could have been granted to an alien whose domicile was established during his nonimmigrant status. The alien had been a nonimmigrant employee of a foreign government and he held an A-2 visa, which under the statute did not prevent him from acquiring a lawful domicile. Yet, a majority of the court felt compelled to follow the Board's view that an alien's domicile must be established after his admission as a permanent resident. The Fourth Circuit's deference to the Board was founded on the theory that Congress would not have tolerated indefinitely a statutory construction which did not reflect its intent. This deference was inappropriate, however, and the case

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77. One example is the naturalization provision, where the prerequisite of a five year period of lawful permanent residence has the objective of nurturing the alien's commitment to a new country, and of preparing him for citizenship. Id. § 316(a), 8 U.S.C. § 1427(a) (1976).

78. Even under the Board's approach in In re Anwo, 16 I. & N. Dec. 293 (1977), aff'd per curiam, 607 F.2d 435 (D.C. Cir. 1979), an alien who entered as a nonimmigrant would still be eligible for relief under section 212(c) once he had been domiciled here for seven years after adjustment of his status to a lawful permanent resident.


82. 645 F.2d at 251. The court also noted that even if the alien could satisfy the residency requirement, he should be denied section 212(c) relief because of his involvement in cocaine distribution. Id. at 249.

83. The court believed the Board's interpretation to be neither "inconsistent nor unjustified." Id. at 251. It is true that "[l]ong-continued contemporaneous and practical interpretation of a statute . . . constitutes an invaluable aid in determining the meaning of a doubtful statute." 2A J. SUTHERLAND, supra note 45, § 49.03, at 233. Further, if that interpretation has gone unchallenged for a long time, that will be an important consideration in construing the statute. Id. § 49.07, at 251-52. On the other hand, there is no evidence that the Board has consistently applied its interpretation since In re S., and congressional inaction to the 1953 Board inter-
provided a perfect opportunity for the court to give meaning to the clear language of the statute. Thus, this was not a situation in which particular expertise in immigration law was required for an appropriate interpretation of the provision. Furthermore, the court should have determined that the Board abused its discretion by refusing to rely on the plain meaning of the statutory language. There does not seem to be any ambiguity in the statutory language which would call for uncompromising deference to agency interpretation in this case. Yet the court stated that this was "an ambiguous provision with little legislative history to clarify how Congress intended it to be applied." Contrary to the court's assertion, however, legislative history of the provision does exist, and it reveals the concerns that were discussed and the suggestions that were made by members of Congress. The Board's administrative conclusion with respect to these discussions should not be controlling if it frustrates the legislative policy underlying the statute, which centered around alleviation of the hardship that might befall an alien who was excluded from these shores after establishing close ties in this country.

Another defect of Anwo, which went unrecognized by the Fourth Circuit in Chiravacharadhidukul, was that the Board put itself in a quandary by suggesting that the suspension of deportation provision, section 244(a)(1), would be greatly weakened by separating the requirement of lawful permanent residence from that of domicile in section 212(c). The Board's argument was that an alien who sought relief under section 244(a)(1) had to show not only that he was a person of good moral character, but also that his deportation would cause extreme hardship to certain relatives who were United States citizens or lawful permanent residents. On the other hand, it was believed that since those strict qualitative standards were missing from section 212(c), it would be appropriate to require stronger ties on the part of those aliens who sought relief under that section. Notwithstanding the

84. If language is not to be accorded its natural or usual meaning, then it should be shown that some other provision restricts its meaning or that it is inconsistent with legislative history. 2A J. SUTHERLAND, supra note 45, § 46.01, at 49. Moreover, the plain meaning should be upheld even if it provides some mistaken legislative policy as long as it does not produce an absurdity. Id. at 18 (Supp. 1983).
85. See supra text accompanying notes 26-30.
Anwo Board's observations on this point, it ignored the extensive review required of aliens seeking permanent residence. Further, the legislators did not intend to create an overlap by applying both sections 212(c) and 244(a)(1) to deportable aliens. Rather, it was envisioned that section 212(c) would apply only to returning residents whose domicile was lawful. It was not until recently, in Francis v. INS, that the section was held equally applicable to deportable aliens. Thus, any existing incongruity resulting from Francis should have no bearing on the meaning of section 212(c) in the context of Anwo. The Board's concern that other provisions of the Act might be undermined by too liberal an interpretation of section 212(c) seemed unwarranted under these circumstances.

It is unfortunate that the Second Circuit, in Lok I, is the only court to disagree with the results reached by the Board in In re S. and Anwo. Other courts have followed the holding in In re S., though with some hesitation concerning its statutory interpretation. For example, in Castillo-Felix v. INS, the Ninth Circuit would only speculate about the Senate Judiciary Committee's rejection of language that dealt with the establishment of the alien's domicile. It is unclear why the court believed that the committee might have regarded the language as superfluous. If the committee assumed that it had properly conveyed its intent through the statutory language, but in fact an ambiguity resulted, it would seem that the section should be read liberally in the alien's favor. This interpretation is entirely reasonable in light of the court's opinion that the language of section 212(c) "could support either the [Service's] interpretation or that adopted in Lok." Given the court's view, a construction in favor of the alien would have provided an incentive for congressional clarification of the section.

While conceding the ambiguity of section 212(c), the court in Castillo-

244(a)(1), it was logical to require that after his lawful admission for permanent residence the alien have seven years domicile.

92. See Castillo-Felix v. INS, 601 F.2d 459, 469 (9th Cir. 1979) (Tagasuki, J., dissenting). Judge Tagasuki declared that "the broad discretionary powers available to the Attorney General in granting lawful permanent residence could, and presumably do, serve a function equal in stringency to the establishment of good moral character and extreme hardship under § 244(a)." Id.

93. Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976).

94. Id. at 272-73 (under equal protection clause, an alien is eligible for § 212(c) relief, even though he did not leave the United States after committing the offense that would render him excludable).

95. See Lok v. INS, 548 F.2d 37 (2d Cir. 1977).

96. 601 F.2d 459 (9th Cir. 1979). Petitioner illegally entered the United States in 1963, was granted permanent residence in 1972, and was convicted of knowingly inducing the illegal entry of two aliens in 1975. He conceded deportability, but was denied § 212(c) relief because he had not been lawfully and continuously domiciled in the United States for seven years subsequent to his admission for permanent residence in 1972. Id. at 461.

97. Id. at 465.

98. Id. The Ninth Circuit suggested that the Senate subcommittee "might have considered [the establishment language] superfluous, believing that the enacted version adequately conveyed their intent that admission for permanent residence precede the seven years of domicile." Id.

99. Id. at 468 (Tagasugi, J., dissenting); see also cases cited supra note 65.

100. 601 F.2d at 464.
Felix maintained that the Act's definition of lawful permanent residence\(^\text{101}\) did not necessarily negate congressional intent that lawful permanent residence be a prerequisite to the establishment of lawful domicile.\(^\text{102}\) The difficulty with such a position is that according to the Act, there are some nonimmigrants who can establish lawful domicile without being admitted as lawful permanent residents.\(^\text{103}\) Although the number of nonimmigrants in that group may be small in comparison with the number of aliens lawfully admitted for permanent residence,\(^\text{104}\) the existence of those nonimmigrants destroys the possibility of equating lawful domicile with lawful permanent residence. Section 212(c) requires that to obtain relief, an alien need only be lawfully admitted for permanent residence and be returning to a lawful unrelinquished domicile. If domicile can be established without lawful admission for permanent residence, then the language of section 212(c) should be interpreted with reference to the other provisions of the Act allowing for that possibility.

If the period of domicile was intended to be only that time following the alien's lawful admission for permanent residence, then it may be argued that qualifying domicile with the word *lawful* is redundant. In other words, there would be hardly a case where a lawful permanent resident would be returning to an unrelinquished domicile which was not lawful.\(^\text{105}\) For example, a permanent resident is one who has been accorded the right to stay permanently in the United States.\(^\text{106}\) If the domicile contemplated in section 212(c) is to ensue from lawful admission for permanent residence, then the domicile would be clearly lawful provided the alien's status has not changed. Therefore, it is possible that Congress contemplated the alien's return to a domicile established before the alien's admission for permanent residence, but which might be termed *unlawful* in whole or in part. In fact, legislative history indicates that Congress was concerned about aliens who were still

\(\text{101. For the Act's definition of "lawfully admitted for permanent residence," see supra note 18.}\)

\(\text{102. 601 F.2d at 464.}\)

\(\text{103. Certain nonimmigrants are not required to maintain a foreign residence or to be in the United States for a temporary purpose. See supra note 72. The Castillo-Felix court recognized that such aliens would be able to establish a lawful domicile without having been admitted as lawful permanent residents. 601 F.2d at 464 n.12.}\)

\(\text{104. The following figures are illustrative:}\)

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Foreign government officials</td>
<td>48,165</td>
<td>460,348</td>
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<tr>
<td>Treaty traders and investors</td>
<td>36,975</td>
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<tr>
<td>Representatives to international organizations</td>
<td>27,823</td>
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<tr>
<td>Representatives of foreign information media</td>
<td>7,906</td>
<td></td>
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<tr>
<td>NATO officials</td>
<td>4,530</td>
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\(\text{1979 INS Statistical Yearbook 7. These figures illustrate that the number of nonimmigrants only represents approximately 20% of the total number of aliens entering the United States.}\)

\(\text{105. The Board conceded in In re Lok that "it is illogical to conclude that the domicile of one who retains his lawful permanent resident status could be anything but lawful." Int. Dec. 2878 at 7 (1981).}\)

eligible for relief after entering the United States with forged documents or without inspection. Though such aliens may have been residents of long standing, there was considerable legislative sentiment that the statutory loophole had to be closed to preclude their eligibility for relief. Within that context, the application of the word lawful to the unrelinquished domicile of seven consecutive years makes sense and is not redundant because relief would be available only to aliens who are returning to a domicile of lawful origin.

Lawfulness of Domicile

Although the Act does not define the term domicile, it is generally accepted that domicile generally refers to the place that one intends to call one's permanent home. It is, however, the lawfulness of the domicile that is important in section 212(c). It was this aspect of section 212(c) that Tim Lok had to deal with in the second round of his judicial skirmish.

When the Second Circuit found in favor of the alien in Lok I, it did not settle the entire controversy. The alien still had to show that he had established lawful domicile for at least seven years. Therefore, the matter was remanded for determination of that question. After an unfavorable Board decision, Tim Lok again went before the Second Circuit in Lok v. INS (Lok II). This time, he did not achieve the success of his first venture.

107. S. REP. No. 1515, 81st Cong., 2d Sess. 382 (1950). For further discussion of congressional intent to limit the availability of relief from exclusion, see supra text accompanying notes 26-30.

108. It was proposed that the seventh proviso be abolished because it helped "the bad alien to remain in the United States," while keeping out "the potential good and law-abiding citizen." S. REP. No. 1515, 81st Cong., 2d Sess. 382, 383 (1950).

109. See Anwo v. INS, 607 F.2d 435, 437 & n.7 (D.C. Cir. 1979); 2 C. GORDON & H. ROSENFIELD, supra note 32, § 7.4b, at 7-46. The Act does, however, define the term "residence" as the "actual dwelling place in fact, without regard to intent." Immigration and Nationality Act § 101(a)(33), 8 U.S.C. § 1101(a)(33) (Supp. V 1981); see also Elkins v. Moreno, 435 U.S. 647, 665 (1978) (the Court indicated that a nonimmigrant student could not lawfully maintain a domicile in the United States because a nonimmigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for the purpose of pursuing . . . a course of study") (quoting Immigration and Nationality Act § 101(a)(15)(F), 8 U.S.C. § 1101(a)(15)(F) (1976)).

110. 548 F.2d 37 (2d Cir. 1977).


112. Lok v. INS (Lok II), 681 F.2d 107 (2d Cir. 1982). On November 8, 1979, in an unpublished opinion, the Board upheld the Service's decision that Lok had not established lawful domicile prior to his lawful admission in 1971 because he was in the United States illegally until that time. Id. at 108-09. Lok again petitioned the court of appeals, arguing that he had been a permanent resident since December 26, 1971, and that he had established seven years of lawful domicile since then. Id. at 109. The government agreed that the case should be remanded to the Board on that question. Lok v. INS, No. 50-4076 (2d Cir. June 18, 1980). On July 31, 1981, the Board denied Lok § 212(c) relief. 681 F.2d at 109. The Board held that Lok could not have established legal domicile before his admission for permanent residence in 1971 because he was in the United States illegally. Id. The Board also held that Lok's permanent residence, and therefore his domicile, was terminated when the order of deportation, resulting
This result was by no means a total surprise; his ability to establish domicile before lawful admission for permanent residence did not negate the requirement that he establish lawful domicile.

Tim Lok’s first problem was that he had overstayed his admission as a seaman, and thus, he was in the United States illegally between the expiration of his lawful stay and the date of his lawful admission as a permanent resident. Therefore, even if he had been able to establish domicile for that period, it would not have been lawful under these circumstances. Lok’s hopes for relief were dashed because no statutory credit was granted for the period of residence which preceded his lawful admission in 1971. The court had no choice but to affirm the Board’s decision that Tim Lok had failed to meet the requirements of section 212(c), because his 1968 marriage to an American citizen did not convert his illegal status into lawful domicile.

Further, although Lok was allowed to remain for a period of time as a matter of administrative discretion, that did not legalize his status. Thus, before his admission as a permanent resident in 1971, Tim Lok was still an illegal alien.

Once Tim Lok was admitted in 1971, he was able to establish lawful domicile. In the Board’s view, that lawful domicile terminated when the Board affirmed the denial of section 212(c) relief on July 30, 1976. Lok, however, did not appeal the immigration judge’s May 29, 1975, finding of deportability. Therefore, the Second Circuit maintained that the deportation order became final ten days later and that this ended his lawful domicile. At that point, Tim Lok’s only defense to deportation was an appeal for discretionary relief under section 212(c). The court, therefore, seemed to differentiate between administrative finality with respect to the issue of deportability and administrative finality concerning the denial of section 212(c) relief. In this respect, the court was more severe than the Board in establishing the time at which when the alien’s lawful domicile should terminate. Thus, under these circumstances, if an alien wants to...
preserve the lawfulness of his domicile, he should lodge an appeal not only from an adverse decision under section 212(c) but also from a finding of deportability. In so doing, he can protect his interest in extending his lawful domicile as long as possible.

In Lok II, the alien raised an interesting point to support the claim that his domicile in the United States was lawful prior to his admission for permanent residence. He argued that his domicile was lawful from the date of his marriage in 1968 because the Service allowed him to stay pending issuance of his immigrant visa in Hong Kong. The alien's intent to remain here was clear; thus, there was no doubt about his domicile. The difficulty with Lok's argument, however, was that he had breached his nonimmigrant status and therefore his status in the United States was no longer lawful. The grant of voluntary departure was available to him only as a matter of discretion and arose out of deportation proceedings which ensued from his overstay. Lok, however, urged the court to recognize his intent to establish domicile in the United States. If Lok had not violated the terms of his nonimmigrant status, the Board would have had to contend with different considerations. For instance, a nonimmigrant who maintains his proper status and then applies for adjustment to immigrant status may argue that his domicile should be recognized from the date of his application. By initiating this change, an alien would be indicating that he has every intention of abandoning his residence abroad and his visit could no longer

122. See 59 Interpreter Releases 423, 444 (1982). A recent decision by the Eleventh Circuit declined to follow the Lok II decision with regard to when an alien's lawful domicile ends. Marti-Xiques v. INS, 713 F.2d 1511, 1517 (11th Cir. 1983). The Marti-Xiques court reasoned that an alien who has been granted relief under § 212(c) would retain a lawful intent to remain in the United States. Id. at 1517-18. Further, the court maintained that Lok II encouraged appeals of all deportation orders. Id. at 1518.

123. 681 F.2d at 108.

124. The Attorney General has the discretion to allow a deportable alien to depart voluntarily at his own expense, except where he is subject to deportation for certain serious offenses. Immigration and Nationality Act § 244(e), 8 U.S.C. § 1254(e) (Supp. V 1981). Thus, a deportable alien almost routinely asks for voluntary departure. There are some advantages to leaving voluntarily rather than being deported. Voluntary departure avoids a record of deportation and allows the alien to choose his method of departure, thereby giving him some flexibility as to time. See E. Hutchinson, Legislative History of American Immigration Policy 1798-1965, 571-72 (1981). Furthermore, a disadvantage of deportation is that before reentering the United States, an alien must obtain the Attorney General's permission. Immigration and Nationality Act § 212(a)(17), 8 U.S.C. § 1182(a)(17) (Supp. V 1981).

125. The Act provides as follows:

The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.


126. The definitive language that isolates a bona fide nonimmigrant from others is that he
be characterized as temporary. It would seem, therefore, that an alien in this situation should be able to include the interim period between the filing and the approval of his adjustment application as part of the period of domicile for purposes of section 212(c).  

This theory would benefit the alien only if it is agreed that his lawful domicile may precede his admission as a lawful permanent resident.

Other Features

The Lok II decision was significant because it highlighted the time at which an alien's lawful domicile terminates, at least within the deportation context. It was only a matter of time before the Board was asked to decide whether the Lok II principle—that lawful domicile terminates upon a final deportation order—applied in exclusion proceedings. The issue arose because the Board had ruled earlier in In re M. that an alien's lawful domicile terminated when he reentered the United States after an event which rendered him excludable. The Board's ruling was based on the theory that when the reentry occurred after such an event and within seven years of the alien's initial lawful admission for permanent residence, the alien could not comply with the lawful domicile requirement of section 212(c). Further, the Board found it irrelevant that the formal finding of excludability did not occur until after the expiration of the seven-year period. Finally, in In re Duarte, the Board applied the Lok II principle to exclusion proceedings, thus overruling In re M. by requiring a final adjudication of excludability to terminate an alien's lawful domicile.

Another issue regarding section 212(c) relief is its applicability to aliens facing deportation. On its face, section 212(c) applies only to aliens who

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127. This alien's status would be different from that of an alien who already has breached his status. Section 245 specifically provides for adjustment of status so that the alien would not be here on sufferance. See id. § 245, 8 U.S.C. § 1255 (1976 & Supp. V 1981).
129. Id. at 142.
130. Id.
131. Id. The alien was lawfully admitted for permanent residence on December 22, 1945. Id. at 140. She was convicted of shoplifting on February 27, 1950, and was admitted to a mental institution on May 10, 1950. Id. Therefore, when she reentered the United States on March 3, 1952, she had not yet completed seven years residence and, in any event, she was then inadmissible because of her insanity.
133. In In re Duarte, the alien was a lawful permanent resident who left and returned to the United States within seven years after his initial admission but after his narcotics conviction. Id. at 2. Having been convicted, he was excludable on reentry. Id. Under In re M., his lawful domicile would have ended on that return, but the Board in Duarte added the further requirement of a final adjudication. Id. at 3-5; see also In re Gunaydin, Int. Dec. 2925 (1982) (final deportation order required to terminate alien's lawful status because it is not automatically terminated by entry without inspection).
are facing exclusion after returning from a visit abroad. At first blush, the language does not seem to include aliens who may be subject to deportation because they are within the United States. It was not long before the Board had to consider the question of whether the section should apply to such aliens. In re G.A. involved an alien who was convicted of a narcotics offense in 1947 and was temporarily absent from the United States in 1952. During deportation proceedings in 1956, the alien argued for the applicability of section 212(c) on the basis of his reentry in 1952. The Board agreed with the alien's contention, giving section 212(c) a nunc pro tunc application. This was a liberal interpretation, but one that still assumed that the alien had left and reentered subsequent to the occurrence which rendered him deportable. Several years later, the Board also extended section 212(c) to deportation proceedings when the alien applied for adjustment of status under section 245. The extension of this remedy was rather logical, because in the section 245 proceeding the alien is subject to all grounds of exclusion available under section 212(a).

The issue of the applicability of section 212(c) to deportation proceedings arose in Francis v. INS. In Francis, the alien had not left the United States subsequent to the event which rendered him deportable. The Second Circuit was faced with the question of the propriety of differentiating between aliens who had left and aliens who had remained within the United States. The court found that there was a violation of equal protection because the distinction drawn between these two classes of aliens was "not rationally related to any legitimate purpose of the statute." In scrutinizing the statute,
the court determined that it discriminated against aliens whose uninterrupted residence had indicated stronger ties to this country than those of aliens who had resided here intermittently. The Francis court held that permanent resident aliens who are within a particular group must be treated identically unless there are some criteria that can support different treatment in furtherance of a legitimate governmental interest. It was not surprising, therefore, that the Ninth Circuit and the Board soon followed the Second Circuit’s decision.

Although the court in Francis extended the protection of section 212(c) to aliens in deportation proceedings, it did not expand the grounds upon which relief may be granted. Thus, the application of section 212(c) created no difficulty when the ground for exclusion also constituted a ground for deportation. When a deportable alien sought section 212(c) relief, however, and the ground for deportation was not a ground for exclusion, the Board was reluctant to grant relief. Therefore, the section is not available to an alien who is deportable on some ground which is not reflected in the exclusion statute. The Board has held, however, that the section is applicable to any deportation ground that is substantially similar to an exclusion ground. Further, because section 212(c) is specific in making relief available to those aliens who are excludable under “paragraphs (1) through (25) and paragraphs (30) and (31)” of section 212(a), aliens who are excludable on other grounds are not within the ambit of section 212(c) relief.

action. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in District of Columbia schools held violative of due process under the fifth amendment); see also J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 383 (1978) (equal protection guarantees apply to the federal government through the fifth amendment due process clause); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 992 (1978) (the requirement of equal treatment under the due process clause of the fifth amendment is indistinguishable from the limitations imposed upon the states by the equal protection clause of the fourteenth amendment).

143. 532 F.2d at 273; see also Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981) (when an alien has demonstrated close ties to the United States by his continued presence, he is not deserving of less consideration than an alien who was not continuously present in this country).

144. Francis, 532 F.2d at 273.

145. Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981).


147. In re Granados, 16 I. & N. Dec. 726 (1979) (section 212(c) relief denied to an alien convicted for possession of a concealed sawed-off shotgun, which renders the alien deportable under Immigration and Nationality Act § 241(a)(14), 8 U.S.C. § 1251(a)(14) (1976), but does not constitute a ground of exclusion under Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1976)).


EXCLUSION AND DEPORTATION

SUSPENSION OF DEPORTATION

Section 212(c) provides a remedy only for lawful permanent residents. There is, however, another section of the Act which is not limited to lawful permanent residents and which provides discretionary relief for certain deportable aliens who are in the United States. Section 244(a)(1) authorizes the Attorney General to suspend an alien's deportation if the alien can demonstrate the following: (1) that he has been physically present in the United States for a continuous period of at least seven years; (2) that he has been a person of good moral character; and (3) that his deportation would result in extreme hardship to the alien or to his spouse, or child, who is a citizen of the United States or a permanent resident alien. By its own terms, the section is available only to deportable aliens and it does not apply in exclusion proceedings. The goal of the section is not only to suspend the alien's deportation but also to grant him permanent resident status. If the statutory conditions are met, the Attorney General must then decide whether he will exercise his discretion favorably.

Statutory Considerations

a. Extreme Hardship

One of the most troublesome elements of section 244(a)(1) is the requirement of proving extreme hardship. The issue of extreme hardship was considered recently by the United States Supreme Court in INS v. Wang. The aliens in that case alleged that if they were deported, they would suffer severe economic loss because of the forced liquidation of their business, and because their children would be deprived of the educational opportunities available in the United States. The Board found that these allegations constituted mere economic detriment which was insufficient to meet the statutory requirement of extreme hardship. The Ninth Circuit disagreed, reversed the Board's decision not to reopen the case, and remanded for a hearing on the merits.

The Supreme Court reversed the Ninth Circuit and held that the alien's motion to reopen should not have been granted. The Court based its ruling on two grounds. First, the lower court erred in not requiring the alien to support his motion by affidavit or other evidentiary material. Second,
and more importantly, the Ninth Circuit had substituted its own concept of extreme hardship for the Board's, thereby encroaching upon the authority granted by Congress to the Attorney General and his delegates. Consequently, the Court declared that it was not the appellate court's function to suggest another construction absent a finding that the Board had abused its discretion. The Supreme Court allowed the Board to give a narrow construction to the term "extreme hardship" because of the exceptional nature of the suspension remedy; such a construction was found to be consistent with the Service's interest in reopening only cases which present new material evidence. Otherwise, the floodgates would be open for the reconsideration of cases with frivolous claims of hardship, and the courts would be further embroiled in the adjudication of deportation matters.

The Supreme Court's decision in *Wang* clearly recognized the Attorney General's role not only in deciding whether to reopen an alien's case, but also in articulating the ingredients of extreme hardship. Although there is considerable interest after *Wang* in the elements of extreme hardship, courts seem to be paying much more attention to how the Board reaches its decisions on that question. Therefore, the more searching inquiry is whether the Board's decisions are arbitrary or capricious, and whether they are based simply on factors taken in isolation, rather than as a whole. It is not that

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160. *Id.* at 144; see also 8 C.F.R. § 3.8 (1983) (the Board in its discretion may grant or deny a motion to reopen).

161. 450 U.S. at 144.

162. *Id.* at 145. The Court was quite accurate in regarding suspension of deportation as an exceptional remedy, thus justifying the Board's narrow view of the ingredients of extreme hardship. The early statutory version required "serious economic detriment." Alien Registration Act of 1940, ch. 439, § 20(c), 54 Stat. 672 (1940). The 1952 Act required "exceptional and extremely unusual hardship." Immigration and Nationality Act of 1952, ch. 477, § 244(a)(1), 66 Stat. 163, 214 (1952). The 1962 amendment changed the requirement to "extreme hardship" for aliens who were subject to deportation under § 244(a)(1). Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1247-48 (1962) (current version at 8 U.S.C. § 1254(a)(1) (1976 & Supp. V 1981)). The 1962 amendment, however, retained the more stringent standard of the 1952 Act for aliens who were deportable under § 244(a)(2) for subversive activities, failure to comply with, or convictions under, the Alien Registration Act of 1940, or felony convictions for drug trafficking, prostitution, illegal possession of firearms, or illegal importation of aliens. *Id.*, 76 Stat. 1244, 1247-48 (amending Act of June 27, 1952, ch. 477, § 244(a), 66 Stat. 163, 214); see also E. HUTCHINSON, supra note 124, at 568-71 (discussing the evolution of the present provisions governing suspension of deportation).

163. 450 U.S. at 145.

164. *Id.*

165. See, e.g., Balani v. INS, 669 F.2d 1157 (6th Cir. 1982) (per curiam) (no abuse of discretion where the Board considered economic detriment separate from hardship to alien's children because the facts, even when considered together, did not constitute extreme hardship); Ravanco v. INS, 658 F.2d 169 (3d Cir. 1981) (abuse of discretion where Board failed to consider material evidence previously unavailable in conjunction with the entire record); Perez v. INS, 643 F.2d 640 (9th Cir.) (per curiam) (abuse of discretion where Board's conclusion that aliens failed to establish a prima facie case of extreme hardship was based on an inadequate record), amended, 665 F.2d 269 (1981), *cert. dismissed*, 103 S. Ct. 320 (1983); Aguilar v. INS, 638 F.2d 717 (5th Cir. 1981) (per curiam) (no abuse of discretion where rational basis exists for Board's finding of no extreme hardship).
courts are attempting to impose their own definition of "extreme hardship" on the Board, because after Wang they know that such an approach is untenable. They want to ensure, however, that the Board does not overlook the cumulative impact of the alien's allegations.

A variety of factors can result in a finding of extreme hardship because the determination is made on the facts of each case. Many of the factors address the age and the health of the alien, his family relationships, his economic situation, and his period of residence in the United States. If the Board fails to consider all the factors involved in an alien's claim of extreme hardship, then the Board has abused its discretion. Therefore, the Board is not free to consider economic factors affecting the alien's claims of extreme hardship if at the same time it ignores other important aspects of the alien's case. Although economic detriment by itself is not sufficient to constitute extreme hardship under the statute, other factors may join with it to tip the scales in the alien's favor.

Although the argument is usually unsuccessful, aliens often assert that relocation to their native country will result in a lower standard of living due to their inability to find comparable employment. The Ninth Circuit,

166. Villena v. INS, 622 F.2d 1352, 1357 (9th Cir. 1980) ("'Extreme hardship' is not a fixed and inflexible term"); see also INS v. Wang, 450 U.S. 139, 144 (1981) (per curiam) (although a flexible term, the definition given by the Attorney General is favored); 2 C. GORDON & H. ROSENFIELD, supra note 32, § 7.9d, at 7-164 to 7-165 (discussing the impracticality of establishing fixed categories of conditions amounting to extreme hardship and the consequent need for case by case evaluation).


168. See, e.g., Santa-Figueroa v. INS, 644 F.2d 1354, 1356 (9th Cir. 1981) (failure to consider alien's asserted inability to find employment); Tovar v. INS, 612 F.2d 794, 797 (3d Cir. 1980) (failure to consider hardship to alien's grandchild); Chan v. INS, 610 F.2d 651, 655 (9th Cir. 1979) (failure to consider personal hardship); see also Bueno-Carrillo v. Landon, 682 F.2d 143, 145-46 & n.3 (7th Cir. 1982) (no abuse of discretion where Board considered all relevant evidence before it); Chang v. Jiugni, 669 F.2d 275, 278-79 (5th Cir. 1982) (per curiam) (no abuse of discretion where Board considered all factors and found no extreme hardship).

169. See, e.g., Bastidas v. INS, 609 F.2d 101, 104 (3d Cir. 1979) (failure to consider noneconomic hardship was considered error).

170. Balini v. INS, 669 F.2d 1157, 1161 (6th Cir. 1982) (per curiam); Chang v. Jiugni, 669 F.2d 275, 279 (5th Cir. 1982); Mendoza-Hernandez v. INS, 664 F.2d 635, 638 (7th Cir. 1981); Mejia-Carrillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981) (citing Jong Shik Choe v. INS, 597 F.2d 168, 170 (7th Cir. 1979)).

171. See, e.g., Mejia-Carrillo v. INS, 656 F.2d 520, 522-23 (9th Cir. 1981) (remand for Board's consideration of noneconomic factors, such as personal hardship resulting from separation from family); Bastidas v. INS, 609 F.2d 101, 105-06 (3d Cir. 1979) (remand for consideration of noneconomic factor of emotional impact resulting from alien's permanent separation from his two-year-old son); Urbano de Malaluan v. INS, 577 F.2d 589, 594-95 (9th Cir. 1978) (remand to consider effect of separation from family members who are U.S. citizens in conjunction with a consideration of economic factors); Yong v. INS, 459 F.2d 1004, 1005 (9th Cir. 1972) (per curiam) (remand to consider effects of separation from alien's husband who was lawfully within the U.S. as a student).

172. See, e.g., Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982) (conditions in alien's homeland not dispositive in a suspension hearing); Carnalla-Munoz v. INS, 627 F.2d
however, in *Santana-Figueroa v. INS*,173 found that the Board had misconstrued the alien's hardship as mere "economic detriment" when in fact the alien had asserted that he would be completely unemployable upon return to his native country.174 The court maintained that there was a "qualitative difference" between economic detriment and absolute unavailability of employment.175 Therefore, it was arbitrary and irrational for the Board to characterize the alien's claim of hardship as mere economic detriment simply because the claim was related to employment possibilities.176 However, when the alien in *Bueno-Carrillo v. Landon*177 equated his plight with that of Mr. Santana-Figueroa, he found the Seventh Circuit unresponsive. This result was not surprising when one considers the physical condition of each petitioner; Mr. Bueno-Carrillo was in good health and nothing prevented him from seeking employment,178 while Mr. Santana-Figueroa was an elderly alien who had a physical disability which foreclosed any possible employment.179 Mr. Santana-Figueroa's condition was serious enough for the Ninth Circuit to suggest that deportation would deprive him of "the means to survive."180 The Seventh Circuit saw a difference between the two situations and interpreted Mr. Bueno-Carrillo's contentions as merely claims of a reduction in his standard of living.181 Therefore, inability to obtain similar employment was not enough to constitute extreme hardship.

The decision in *Santana-Figueroa* has not received universal approval. In *Ahn v. INS*,182 another panel of the Ninth Circuit seemed singularly unimpressed with the decision, finding that the court in *Santana-Figueroa* had strained to reverse the Board in spite of *Wang*.183 The question arises, however, whether the court itself strained to affirm the Board in *Ahn*—especially since the court stated that the Board's opinion did not demonstrate that the factors in the case were considered cumulatively.184 The lack of clarity in the Board's decision led a dissenting judge to question whether the ma-

1004, 1006 (9th Cir. 1980) (depressed economic conditions in Mexico did not justify suspension of deportation); Acosta v. Gaffney, 558 F.2d 1153, 1157 (3d Cir. 1977) (hardship resulting from economic conditions in alien's homeland insufficient to warrant stay of deportation); Pelaez v. INS, 513 F.2d 303, 305 (5th Cir. 1975) (per curiam) (economic conditions in Philippines do not warrant suspension of deportation); *In re Anderson*, 16 I. & N. Dec. 596, 598 (1978) (economic conditions in alien's homeland relevant when combined with other adverse factors).

173. 644 F.2d 1354 (9th Cir. 1981).
174. Id. at 1357.
175. Id. at 1356.
176. Id. at 1357.
177. 682 F.2d 143 (7th Cir. 1982).
178. Id. at 146.
179. 644 F.2d at 1356 (Santana-Figueroa was 70 years old, unskilled, uneducated and had an injured leg).
180. Id.
181. 682 F.2d at 146.
182. 651 F.2d 1285 (9th Cir. 1981).
183. Id. at 1287 n.1.
184. Id. at 1287.
majority was "unduly influenced by the wash of the wake of Wang." He was concerned with the Board's language, which suggested that a certain type of detriment "alone" did not constitute extreme hardship and that other factors were to be considered but were not conclusive. Consequently, there was a lingering doubt as to whether the Board had really considered the cumulative effect of the alien's claims. Such a concern appears reasonable in light of the court's uncertainty about the Board's approach. Further, a failure to consider the cumulative effect of the alien's claim would create a basis for remand consistent with the rule in Wang, which forbids the court from substituting its judgment of extreme hardship for that of the Board absent a finding that the Board abused its discretion.

In Ahn, the court rejected the argument that the alien would experience extreme hardship because his political activity abroad would make it difficult for him to get a job at home. The court relied on the Board's position that political claims must be brought under section 243(h) rather than section 244(a) of the Act. The Ninth Circuit's apparent sweeping rejection of any hardship claim that had political overtones was unintended. Instead, the court wanted to avoid an alien's reliance upon "a claim of persecution to make up the deficit" under a hardship claim. When an alien experiences hardship in the form of political persecution, section 243(h) provides the appropriate remedy by requiring that an alien's deportation be withheld if such alien's life or freedom would be threatened. It is possible, however, for an alien to experience economic detriment as a result of political problems without jeopardizing his life or freedom. While it is established that economic factors alone do not give much weight to a hardship claim, they

185. Id. at 1288 (East, J., dissenting).
186. Id.
188. The Ahn majority interpreted the Board's decision in In re Kojoory, 12 I. & N. Dec. 215 (1967), as rejecting politically-based claims from consideration under § 244(a). 651 F.2d at 1288. On the other hand, Judge East, in his dissent, interpreted the Kojory decision as rejecting an alien's claim only after the Board had determined whether "there would be limited economic opportunities due to political persecution." 651 F.2d at 1288 (East, J., dissenting).
189. 651 F.2d at 1288 (quoting In re Kojoory, 12 I. & N. Dec. at 219-20). But cf. 2 C. GORDON & H. ROSENFIELD, supra note 32, § 7.9d, at 7-164. These commentators stated as follows: "Board dicta suggest that anticipated persecution cannot be considered as hardship for this purpose. These dicta are unsound, since the prospect of persecution seems to entail the highest degree of hardship." Id.
191. See Pelaex v. INS, 513 F.2d 303, 304 (5th Cir. 1975) (per curiam) (difficulty in obtaining employment in Philippines not enough to suspend deportation); Cheung v. INS, 422 F.2d 43, 46-47 (3d Cir. 1970) (per curiam) (difficulty in securing employment and reduction in wages not sufficient hardship to suspend deportation); Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968) (inability to obtain work in chosen field does not constitute hardship); In re Lam, 14 I. & N. Dec. 98, 99 (1972) (inability to find job and be self-supporting does not constitute hardship); see also 2 C. GORDON & H. ROSENFIELD, supra note 32, § 7.9d, at 7-162 ("It has been said that economic detriment alone may not be enough to qualify for relief.").
should not be dismissed solely because of their political origin, because they may be persuasive when combined with other factors. There must be many situations in which an alien would find it difficult to survive economically because of the repercussions of his political beliefs rather than because of the general economic conditions existing in his native country. There may be no threat to an alien's life or limb, but the political forces may operate to make life extremely hard for him. In a proper case, it should be possible for that alien to prove his extreme hardship regardless of the political overtones involved.

Another type of hardship upon which aliens base claims for section 244(a) relief involves medical problems. In these situations the alien is hard-pressed to meet the test of extreme hardship unless he can show that adequate medical care is unavailable in his own country. The alien's failure to carry this burden of proof usually will deprive him of this basis of relief. He may, however, establish extreme hardship without such proof by demonstrating the detrimental effects of uprooting a person afflicted with a particular medical condition. When the alien does demonstrate these factors, and the Board fails to consider them, the Board has abused its discretion—just as it would be an abuse of discretion if the Board refused to consider any factors bearing on the determination of extreme hardship.

b. Relatives Affected

The extreme hardship upon which an alien predices his claim for section 244(a)(1) relief may affect the alien or his spouse, parent or child.

192. See, e.g., Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1982) (epileptic child), rev'd on other grounds, 52 U.S.L.W. 4027 (U.S. Jan. 10, 1984); Chang v. Jiugni, 669 F.2d 275 (5th Cir. 1982) (per curiam) (variety of medical problems including chest pains and high blood pressure); Hamid v. INS, 648 F.2d 635 (9th Cir. 1981) (poor host resistance and multiple allergic history of alien's child).

193. Hamid v. INS, 648 F.2d 635, 637 (9th Cir. 1981) (alien denied relief for failure to establish a prima facie case of hardship); cf. Phinpathya v. INS, 673 F.2d 1013, 1016 (9th Cir. 1982) (absence of proof of inadequate medical care not dispositive in all cases).


195. Id.

196. See Santana-Figueroa v. INS, 644 F.2d 1354, 1356 (9th Cir. 1981) ("When important aspects of the individual claim are distorted or disregarded, denial of relief is arbitrary."); Bastidas v. INS, 609 F.2d 101, 104 (3d Cir. 1979) (insufficient consideration of noneconomic hardship was error).

197. See Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981) (hardship to alien's child, who was a U.S. citizen); Mejia-Carrillo v. INS, 656 F.2d 520 (9th Cir. 1981) (hardship to alien's three children, one of whom was a permanent resident alien); see also INS v. Wang, 450 U.S. 139, 144-45 (1981) (per curiam) (upholding Board's finding that neither aliens nor their children would suffer extreme hardship); Mwasi v. INS, 625 F.2d 884 (9th Cir. 1980) (upholding Board's denial of eligibility under section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) (1976 & Supp. V 1981), based on a claim of hardship to alien's stepson and estranged wife). Furthermore, an alien cannot gain favored status solely based on a claim of hardship to a child who is a U.S. citizen. See, e.g., Vaugh v. INS, 643 F.2d 35, 37-38 (1st Cir. 1981) (suspension of deportation denied despite hardship to children because parent alien chose to rely unnecessarily
Thus, the statute takes account of the disruption that might occur in the alien's immediate family if the alien is deported. There are, however, situations in which the alien's deportation may affect a close relative who does not fall within the designated group.

The issue of the availability of section 244(a)(1) relief where relatives outside the designated group are involved arose in Tovar v. INS. In Tovar, the Third Circuit was persuaded that the alien's relationship to her grandchild was so similar to the parent-child relationship that the hardship to the grandchild should be considered in determining the alien's eligibility for relief from deportation. Although this holding had the effect of expanding the statutory definition of child, the court reasoned that this expansion beyond the plain language of the statute was consistent with the expressed legislative objective of protecting the immediate members of the alien's family from extreme hardship. The court stressed that the grandchild's emotional attachment to, and financial dependence on, the alien justified granting relief in this instance.

While the alien's relationship to her grandchild in Tovar may have been closely akin to that of parent to child, the statute leaves little room for flexibility. The Act clearly defines the term child and the Tovar court's conclusion did not respect that definition. The overriding consideration in Tovar was not that the alien was the child's grandmother, but rather that the alien and her grandchild were united as a family unit by a bond that normally exists between parent and child. Nevertheless, it was not sufficient for

on public assistance for support); Faddah v. INS, 553 F.2d 491, 496 (5th Cir. 1977) (hardship on children insufficient to suspend deportation when parent alien was not of good moral character); Lee v. INS, 550 F.2d 554, 555-56 (9th Cir. 1977) (suspension of deportation denied notwithstanding hardship to citizen child because alien father knowingly and illegally brought wife into country).

198. See Tovar v. INS, 612 F.2d 794, 797 (3rd Cir. 1980); Pelaez v. INS, 513 F.2d 303, 305 (5th Cir. 1975).
199. 612 F.2d 794 (3rd Cir. 1980).
200. Id. at 797.
201. Id. (citing Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979)).
202. Id. at 798.
204. 612 F.2d at 797. A logical extension of the Tovar court's rationale would expand the statute's coverage to persons who are not even related to the alien. See Antoine-Dorcelli v. INS, 703 F.2d 19 (1st Cir. 1983). In applying the analysis of Tovar to a situation in which the alien sought relief on the basis of hardship to a non-relative, the Antoine-Dorcelli court declared:

It is all the more appropriate to apply such a substance over form analysis to the question of the hardship to an alien resulting from separation from the only family she has known, albeit not of the same blood, because of the breadth of the statutory language relevant to this issue and the fact sensitive inquiry it requires. To distinguish Tovar from the case before us on the basis that the alien and grandchild in Tovar were related is to ignore the logic of that case's analysis.

Id. at 22 (footnotes omitted).
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the child to recognize the alien as her surrogate mother. Instead, the question should have been whether the child involved was in fact the alien's child within the meaning of the statute.

Although one can appreciate the motives of the court in Tovar, doubts may be raised about the legitimacy of the court's statutory interpretation.\(^{205}\)
The difficulty lies in dealing with the meaning of the word *child* elsewhere in the Act.\(^{206}\) The problem is highlighted by the Act's definition of the term *immediate relatives*.\(^{207}\) There is no mention in that definition of a *grandchild*, and the term *child* is defined in relation to a *parent*.\(^{208}\) Nevertheless, if the Tovar definition is acceptable, then there is no reason why a similarly expansive approach cannot be taken in other contexts.

The Third Circuit's liberal position in Tovar came under attack by the Second Circuit in Chiaramonte v. INS.\(^{209}\) In that case, an alien was not allowed to present evidence of extreme hardship to his father because the alien was not a child under the statute and thus his father could not qualify as a parent.\(^{210}\) The restraint of the Chiaramonte court should be admired only because the court recognized that it was beyond its lawful powers to exceed the clear statutory designations of the Act.\(^{211}\) Yet in resisting the impulse to engage in such excesses, the court in Chiaramonte expressed some sympathy for the position of the Tovar court because the latter was mindful of the congressional concern for minors.\(^{212}\) The Chiaramonte court was willing to concede that "some latitude in construction of the statute to cover a perhaps unforeseen situation, in order to benefit a child, may in fact further the intent of Congress."\(^{213}\) Nevertheless, the court was unwilling "to

\(^{205}\) The plain meaning rule requires language to be given its natural meaning unless restricted by some other provision or inconsistent with legislative history. 2A J. SUTHERLAND, supra note 45, at § 46.01. Further, statutory interpretation requires each part or section of a statute to be construed with every other part or section to arrive at a "harmonious whole." Id. at § 46.05.

\(^{206}\) A few examples of how the Act deals with the status of a child include the following: (1) a child of a United States citizen is classified as an immediate relative under § 201(b) and is admitted as an immigrant without regard to the numerical limitations in the Act, Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976); (2) a child of a United States citizen or of a lawful permanent resident who obtains a visa by fraud may obtain a waiver of deportation, id. 241(f)(1)(A), § 1251(f)(1)(A) (Supp. V 1981); and (3) a waiver of deportation is also possible for minor narcotic violations if an alien is the child of a citizen or of a lawful permanent resident, id. 241(f)(2), § 1251(f)(2) (Supp. V 1981).

\(^{207}\) Immigration and Nationality Act § 201(b), 8 U.S.C. § 1151(b) (1976) provides in pertinent part: "The 'immediate relatives' referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States. . . ."


\(^{209}\) 626 F.2d 1093 (2d Cir. 1980).

\(^{210}\) Id. at 1099-100. The court reasoned that the father could be a parent only by virtue of a paternal relationship recognized under § 101(b)(1) and then only if the alien was unmarried and under 21 years of age as required by § 101(b)(2). Id. at 1100 (citing Immigration and Nationality Act § 101(b)(1), (2), 8 U.S.C. § 1101(b)(1), (2) (1976 & Supp. V 1981)).

\(^{211}\) Id.

\(^{212}\) Id. The Chiaramonte court found Tovar distinguishable because Tovar involved a minor. Id.

\(^{213}\) Id.
extrapolate from clearly and precisely defined statutory eligibility requirements.\textsuperscript{214} If the requirements are in fact so clear, then the extension of eligibility to a grandchild in \textit{Tovar} was unwarranted.\textsuperscript{215}

A different situation arises when an alien claims that he himself would suffer extreme hardship because of separation from his family. Generally, courts have been sympathetic to such situations.\textsuperscript{216} Recently, the First Circuit in \textit{Antoine-Dorcelli v. INS}\textsuperscript{17} went even further and held that the Board should consider whether an alien would suffer extreme hardship upon separation from a family with whom she had lived for many years, even though the alien was not related to any member of that family.\textsuperscript{218} The court's direction to the Board was consistent with language of the Act because a decision about the alien's hardship need not depend upon hardship to others, but rather, can be based upon an alien's individual hardship.\textsuperscript{219} Therefore, it was not necessary under the statute for the alien to be related to the family. The court in \textit{Antoine-Dorcelli} was not constrained by requirements that the family with whom the alien lived must fall within any specific category. Instead, the question was whether the alien had established such a close relationship over the years with the family involved that a sudden separation from it would constitute extreme hardship to her.\textsuperscript{220} Further, the court did not have to rely on \textit{Tovar} because in that case the alien claimed that the hardship would fall not on herself, but on her grandchild. Consequently, one can support the decision in \textit{Antoine-Dorcelli} while disagreeing with the decision in \textit{Tovar}; there are no statutory constraints on a court's determination of the elements of extreme hardship, whereas the statute clearly specifies those persons whose extreme hardship, suffered as a result of an alien's deportation, might provide a basis for relief.\textsuperscript{221}

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id.} The \textit{Chiaramonte} court declared that a court should not substitute its judgment for that of the legislature simply because the statute requires an unfortunate result in a specified case. \textit{Id.}; see also \textit{Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983)} (court rejected \textit{Tovar} by refusing to consider the hardship of the son of a woman with whom the alien was living and, instead, strictly construed the definition of "stepchild").

\textsuperscript{216} See \textit{Mejia-Carrillo v. INS, 656 F.2d 520 (9th Cir. 1981)}; \textit{Bastidas v. INS, 609 F.2d 101 (3rd Cir. 1979)}.

\textsuperscript{217} 703 F.2d 19 (lst Cir. 1983).

\textsuperscript{218} \textit{Id.} at 21-22.

\textsuperscript{219} Suspension of deportation may be granted if the alien's deportation will result in extreme hardship either to the alien himself or to his spouse, parent, or child. \textit{Immigration and Nationality Act} § 244(a)(1), 8 U.S.C. § 1254 (a)(1) (1976 & Supp. V 1981); see also \textit{Barrera-Leyva v. INS, 637 F.2d 640, 643 n.5 (9th Cir. 1980)} (court rejects notion that hardship to anyone other than alien, his spouse, parent or child should be recognized).

\textsuperscript{220} 703 F.2d at 22.

\textsuperscript{221} See \textit{Barrera-Leyva v. INS, 637 F.2d 640, 643-44 (9th Cir. 1980)}. Although hardship should be considered only with respect to members of the specified class, separation from a close family unit is relevant to the question of whether extreme hardship has been proved. \textit{Id.}; see also \textit{Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983)} (alien's separation from woman with whom he was living and her son should be considered in deciding whether deportation would cause extreme hardship to the alien).
The availability of section 244(a)(1) relief when stepchildren and illegitimate children are involved depends upon whether such children are included in the term *child.* Stepchildren are included under the Act's definition of the term *child—but at the time of a marriage, a child must be under the age of eighteen to achieve the status of stepchild. Regarding illegitimate children, the Board once held that only a mother's illegitimate children were to be regarded as stepchildren. In a subsequent district court opinion, a father's illegitimate children came within the definition as long as there was a preexisting family relationship. Two years later, when the same federal court decided that the Act did not require such a relationship, the Service unsuccessfully requested the Board to abandon the district court's previous interpretation nationwide. Instead, the Board substituted its own formula in *In re Moreira,* requiring that the petitioner exhibit an active interest in the general welfare of the child whether born in or out of wedlock. The Ninth Circuit, however, applied a more liberal interpretation to the statute in *Palmer v. Reddy* by not requiring any evidence of parental interest or of a family relationship. The Board then retreated from its position in *Moreira* and agreed with the Ninth Circuit's decision. The position now adopted is that if the parent and the stepparent are divorced, the relationship between the stepchild and the stepparent normally terminates. If, however, the stepparent and the stepchild continue a family relationship, either after the divorce of the parent and the stepparent or after the death of the parent, the relationship is still recognized for immigration purposes.

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222. A stepparent-stepchild relationship can be very important in the immigration context because an illegitimate child can obtain or confer any benefit only through his mother. See *Fiallo v. Bell,* 430 U.S. 787, 799-800 (1977) (upholding the constitutionality of section 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1976), which has the effect of excluding the relationship of father and his illegitimate child from the relationships given special preference immigration status). Thus, the father of an illegitimate child can cure this disability through marriage to the child's stepmother before the child reaches the age of 18. *In re McMillan,* 17 I. & N. Dec. 605, 607 (1981).


225. *Nation v. Esperdy,* 239 F. Supp. 531 (S.D.N.Y. 1965) (court looked at the broad language used by Congress in defining the term "stepchildren" and found it to include a mother's, as well as a father's, illegitimate children).


228. *Id.* at 46.

229. 622 F.2d 463 (9th Cir. 1980). The Ninth Circuit considered the plain language of the Act and held that visa preference should be "available to stepchildren as a class without further qualification." *Id.* at 464.


Although extreme hardship to a spouse is a relevant consideration, the Act does not define the term *spouse*. Nevertheless, the Act specifically provides that someone who is a party to an unconsummated marriage should not be considered a spouse. Thus, even if a marriage complies with the formalities of the jurisdiction where it occurs, it will not be recognized as a valid marriage if the parties intended it solely as a method of obtaining immigration benefits. In the past, the Board insisted that a marriage must be found viable and subsisting if it were to be the basis for immigration benefits. This viability requirement, however, did not find favor with the courts and it was not long before the Board reversed its position. It is now generally accepted that an alien can seek immigration benefits on the basis of his relationship to a spouse from whom he is separated. Therefore, even if the marriage is not viable, the possibility of proving extreme hardship under section 244 is not foreclosed as long as there has been no legal dissolution. The viability of the marriage, however, may be rele-

234. Lutwak v. United States, 344 U.S. 604, 611 (1953). It is within the authority of the INS to determine whether an alien entered a marriage to evade the immigration laws. See, e.g., Skelly v. INS, 630 F.2d 1375, 1382 (10th Cir. 1980) (marriage validly performed under Oklahoma law held invalid for immigration purposes); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) (valid marriage under New Mexico law is invalid for immigration purposes when substantial evidence shows it is a sham); De Figueroa v. INS, 501 F.2d 191, 195 (7th Cir. 1974) (valid marriage under Illinois law does not, in itself, exempt an alien from deportation); Kokkinis v. District Director of Immigration and Naturalization Serv., New York, New York and Buffalo, New York, 429 F.2d 938, 941 (2d Cir. 1970) (where alien entered valid marriage solely to facilitate his receipt of a visa, he is deportable); see also Adams v. Howerton, 673 F.2d 1036, 1038-40 (9th Cir.) (even if state law validates a homosexual marriage, it is insufficient to confer spouse status for purposes of federal immigration law), cert. denied, 102 S. Ct. 3494 (1982).
236. See Dabaghian v. Civiletti, 607 F.2d 868, 871 (9th Cir. 1979) (marriage valid for purposes of eligibility under § 245 until legally dissolved); Whetstone v. INS, 561 F.2d 1303, 1306-07 (9th Cir. 1977) (fiancée can adjust to permanent residence even though separation occurred within 30 days); Bark v. INS, 511 F.2d 1200, 1201-02 (9th Cir. 1975) (adjustment to permanent residence not precluded even though parties separated after marriage); Chan v. Bell, 464 F. Supp. 125 (D.D.C. 1978) (visa petition should not be denied because parties lived apart). But see Kalezic v. INS, 647 F.2d 920, 922-23 (9th Cir. 1981) (section 241(f) waiver of deportability unavailable where citizen spouse had revoked visa petition and had started divorce proceedings).
238. *In re Pierce*, 17 I. & N. Dec. 456 (1980) (alien seeking preference on basis of marriage is not excludable simply because of separation from spouse); *In re Boromand*, 17 I. & N. Dec. 450 (1980) (rescission of adjustment denied even though alien stated falsely that he was living with his wife, since misstatement about viability of marriage was not material to admissibility); *In re Adalatkhah*, 17 I. & N. Dec. 404 (1980) (alien found to be an “immediate relative” within § 245 despite being separated from spouse). But cf. *In re Lenning*, 17 I. & N. Dec. 476 (1980) (where separation agreement can be converted into a divorce decree, the marriage no longer exists).
vant to the establishment of extreme hardship because in the absence of a close domestic relationship it may be difficult for an alien to meet his burden of proof and, thus, the likelihood of eligibility for suspension of deportation would be decreased. In other words, if a marriage is factually dead, it may be difficult to prove extreme hardship even if the alien can show that he has a spouse within the meaning of the statute.

c. Continuous Physical Presence

Another of the requirements under section 244(a)(1) is the alien's physical presence in the United States for a continuous period of not less than seven years. Early decisions regarded an alien's departure from the United States as meaningfully interruptive even if it was brief and casual. In United States ex rel. Volpe v. Smith, the frailty of an alien's status was exemplified by the Supreme Court's decision to uphold the deportation of an alien who had made a brief trip to Cuba. The Court considered "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one" to be an "entry" subjecting the alien to the hazards of the exclusion and deportation provisions.

The strictness of the Volpe approach was apparent in Di Pasquale v. Karnuth, where the Second Circuit was confronted with the case of an alien whose train took him on an overnight ride through Canada on the way from Buffalo to Detroit. Had the Second Circuit taken the Volpe approach, it would have regarded the alien's return as an entry. There was, however, no evidence that the alien knew that he was leaving the United States and thus, the arrival in Detroit after a temporary excursion through Canadian territory was not considered an entry.

239. For the text of section 244(a)(1), see supra note 13.
240. The Supreme Court recently discussed the question of whether an alien's excursion outside the United States was "meaningfully interruptive" in Landon v. Plasencia, 103 S. Ct. 321 (1982). The Court, maintaining that the alien's intent was an important factor, declared that when an alien leaves the United States for purposes that are contrary to the policies of the immigration laws, that absence meaningfully interrupts the alien's residence. Id. at 327 (quoting Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963)).
241. 289 U.S. 422 (1933).
242. Volpe had gone to Cuba without a passport and remained there for only a few days before returning to the United States. United States ex rel. Volpe v. Smith, 62 F.2d 808, 809 (7th Cir. 1933). Further, Volpe had been convicted of counterfeiting while lawfully in the United States and, thus, was deportable for the commission of a crime involving moral turpitude. 289 U.S. at 423-24.
243. 289 U.S. at 425.
244. 158 F.2d 878 (2d Cir. 1947).
245. The alien had served two prison terms for robbery, a crime involving moral turpitude, and would have been deportable upon reentry. Id. at 878.
246. Id. at 879. The problem of working out a realistic definition of "entry" was also at issue in Delgadillo v. Carmichael, 332 U.S. 388 (1947). In Delgadillo, the hazards of war took
Eventually Congress defined the term entry in the Immigration and Nationality Act. The definition assured that at least the unintended or involuntary departure of a lawful permanent resident would not result in an entry when the alien returned. It is noteworthy, however, that the definition included no exception for a trip abroad which was brief and casual. Therefore, it remained for the Supreme Court in Rosenberg v. Fleuti to further clarify the term entry. The Court found that an alien who had ventured to Mexico for a few hours had not meaningfully interrupted his permanent residence because the trip was “innocent, casual, and brief.” Thus, when the alien returned, there was no entry because the Court maintained that it was as if he had never left. The Court declared that the dominant factors for determining meaningful interruption are the length of the alien’s absence, the purpose of his visit and the necessity of obtaining travel documents.

After Fleuti, courts took turns grappling with the factors laid out in that case. For example, in Itzcovitz v. Selective Service, an alien, prior to his three-week departure, obtained a declaratory judgment providing that his return would not constitute an entry within the meaning of section 101(a)(13) of the Act. The obtaining of a declaratory judgment prior to departure ordinarily militates against an alien’s contention that his trip was casual. The court, however, did not hold this factor against him and, thus, there was no meaningful interruption of the alien’s residence.

an alien beyond American territory to Cuba for one week. Id. at 389. The Court did not regard the alien’s return as an entry because his departure was involuntary. Id. at 390.

247. For the definition of entry, see supra note 4.
249. Id. at 461-62. Deportation proceedings had been brought against Fleuti for conviction of a crime involving moral turpitude under § 212(a)(9) of the Act and subsequently on the ground that he was “afflicted with psychopathic personality” and excludable under § 212(a)(4) because he was a homosexual. Id. at 450-51.
250. 374 U.S. at 462.
251. See, e.g., McCollin v. INS, 648 F.2d 935 (4th Cir. 1981) (one day departure under threat of deportation is meaningfully interruptive of alien’s continuous presence in the United States); Mamane v. INS, 566 F.2d 1103 (9th Cir. 1977) (per curiam) (two trips to Thailand for a total absence of 14 months is meaningfully interruptive of alien’s stay in the United States); Laredo-Miranda v. INS, 555 F.2d 1242 (5th Cir. 1977) (short trip to Mexico is meaningfully interruptive of alien’s permanent residence when alien assisted five aliens to enter the United States illegally); Heitland v. INS, 551 F.2d 495 (2d Cir.) (aliens’ six week trip to Germany precluded them from showing seven years of continuous presence in the United States), cert. denied, 434 U.S. 819 (1977); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir. 1977) (alien’s brief trip to Mexico for the purpose of aiding illegal entry of aliens is meaningfully interruptive of his resident alien status); Lozano-Giron v. INS, 506 F.2d 1073 (7th Cir. 1974) (27-day trip to Colombia to be married constitutes a meaningful interruption of the alien’s permanent residence); Vargas-Banuelos v. INS, 466 F.2d 1371 (5th Cir. 1972) (alien’s trip to Mexico to make a condolence call did not interrupt his residential status).
252. 447 F.2d 888 (2d Cir. 1971).
253. Id. at 891.
254. Id. at 894 (the court gave little weight to the fact that the alien obtained a declaratory judgment because the purpose of the trip was “bona fide, honorable, and lawful”).
Another case in which the Fleuti factors were considered was Heitland v. INS.\textsuperscript{255} Heitland presented a slightly different twist because the aliens were in the United States illegally and had ventured to Germany for six weeks to visit an ailing relative.\textsuperscript{256} The Second Circuit agreed with the Board that this six-week trip abroad broke the seven-year continuous residence requirement, and it denied the alien’s eligibility under section 244(a)(1).\textsuperscript{257} The court seemed concerned that the aliens should not benefit from their illegal status in the United States.\textsuperscript{258} Further, the Second Circuit was impressed by the aliens’ careful planning, including their efforts to obtain documents for their travels abroad.\textsuperscript{259} Such actions reflected deliberate conduct and not an innocent foray into foreign territory. In addition, the aliens compounded their transgression by securing reentry into the United States through deceptive methods.\textsuperscript{260} This combination of events—the aliens’ illegal presence in the United States, the length of their stay abroad, and their deceptive reentry—convinced the court that these aliens had experienced a meaningful interruption of their residence in this country, thus disqualifying them from relief under section 244(a)(1).\textsuperscript{261} It is questionable, however, whether the aliens’ illegal status in the United States should have had an adverse effect upon their eligibility for relief. The statutory purpose of section 244(a)(1) is frustrated by a policy that looks with disfavor on the aliens’ illegal status, because the possibility of suspension of deportation was meant for all aliens who are subject to deportation.\textsuperscript{262} By excluding illegal aliens from consideration, the number of eligible aliens would be decimated.

The Fleuti issues were confronted again in Kamheangpatiyooth v. INS.\textsuperscript{263} In that case, the Ninth Circuit had to determine whether the alien’s one month trip to Thailand was meaningfully interruptive of his residence in the United States.\textsuperscript{264} While an immigration judge had applied the Fleuti test strictly and determined that the alien did not fulfill the continuous residence requirement, the court disagreed that the criteria considered in Fleuti should be determinative.\textsuperscript{265} Instead, the court suggested a refinement of the Fleuti test to determine the significance of an alien’s absence from the United States. The new test provided the following guideline:

\begin{enumerate}
\item \textsuperscript{255} 551 F.2d 495 (2d Cir.), cert. denied, 434 U.S. 819 (1977).
\item \textsuperscript{256} Id. at 497. The aliens had been in the United States for two years before going to Germany.
\item \textsuperscript{257} Id. at 501.
\item \textsuperscript{258} Id. at 502.
\item \textsuperscript{259} The court stated that “[i]n order to proceed to Germany, the petitioners had to obtain passports and visas, which is a far cry from the situation in Fleuti.” Id.
\item \textsuperscript{260} Id. at 502-03.
\item \textsuperscript{261} Id. at 504.
\item \textsuperscript{262} The Board has held that an alien’s original illegal entry should not affect findings as to an alien’s continuous physical presence. In re Wong, 12 I. & N. Dec. 271 (1967).
\item \textsuperscript{263} 597 F.2d 1253 (9th Cir. 1979).
\item \textsuperscript{264} Id. at 1255.
\item \textsuperscript{265} Id. at 1257 (declaring that the Fleuti factors were “only evidentiary” for the purpose of determining the effect of an absence on the continuous residence requirement).
\end{enumerate}
An absence cannot be significant or meaningfully interruptive of the whole period if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.\(^{266}\)

It was inevitable that the Supreme Court would have to deal with the "continuous physical presence" requirement. That opportunity came in *INS v. Phinpathya*,\(^{267}\) when the Service challenged the Ninth Circuit's decision in a case involving an alien's three-month trip abroad. The Ninth Circuit, being sympathetic with the *Kamheangpatiyooth* criteria, had found that the Board overemphasized the alien's illegal status and the increased likelihood of deportation that flowed from her absence, and it remanded for further proceedings on the continuous physical presence question.\(^{268}\)

The Supreme Court, in turn, reversed the Ninth Circuit, holding in effect that the language *continuous physical presence* must be literally interpreted and that any absence from the United States breaks the continuity required under section 244(a)(1).

The Court opted for the ordinary meaning of the statutory language and found that the statute did not leave any room for an exception to the continuous physical presence requirement.\(^{269}\) The Court took the view that when Congress wanted to provide flexibility in the application of the continuous physical presence requirement, it included statutory language to accomplish that objective.\(^{270}\) Furthermore, it seemed that Congress intended a more

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\(^{266}\) Id. The court, in suggesting the new test, maintained that the distance travelled or the time spent abroad should not result in any conclusive presumption of a break in the alien's continuity of residence. *Id.* at 1257-58. But see Mamanee v. INS, 566 F.2d 1103, 1105 (9th Cir. 1977) (per curiam) (alien's arrangement to have her family join her abroad for an indefinite period of time held to be meaningfully interruptive of residence in United States).

The *Kamheangpatiyooth* court's approach was realistic in several respects. First, it was realistic in that an alien's fate should not depend upon his destination. In other words, an alien who travels to the other side of the world should not need to fear automatic exclusion. Further, the court refused to hold that since the alien had obtained travel documents, his trip could not be viewed as causal. 597 F.2d at 1295. Instead, the court took the practical view that when the alien had obtained a new student visa and a certificate of attendance at his school, he had done everything possible to assure the continuity of his residence. *Id.*


268. Phinpathya v. INS, 673 F.2d 1013, 1017-18 (9th Cir. 1981), rev'd on other grounds, 52 U.S.L.W. 4027 (U.S. Jan. 10, 1984). The court rejected the idea that the alien's absence must be found meaningfully interruptive simply because one of the *Kamheangpatiyooth* factors was missing. *Id.* at 1018.

269. 52 U.S.L.W. at 4029 (citing McColvin v. INS, 648 F.2d 935, 937 (4th Cir. 1981) (alien's one-day absence held meaningfully interruptive)).

270. The Court cited former section 301(b) of the Act, which required two years of continuous physical presence for a foreign-born United States citizen to maintain his citizenship but provided that an absence from the United States of less than 60 days did not break the continuity of presence. See Act of Oct. 27, 1972, Pub. L. 92-584, § 1, 86 Stat. 1289, repealed by Act of Oct. 10, 1978, Pub. L. 95-432, § 1, 92 Stat. 1046.
stringent application when it changed the statutory requirement in 1952 from "continuous residence" to "continuous physical presence."\textsuperscript{271}

The alien could find no comfort in the Court's \textit{Fleuti} decision. In \textit{Fleuti}, the Court had to deal with a statutory exception\textsuperscript{272} to the "entry" doctrine which was enacted to counteract prior strict judicial views about the significance of an alien's absence.\textsuperscript{273} Thus, the Court felt that a flexible approach to the construction of the term \textit{entry} in section 101(a)(13) was justified in \textit{Fleuti}.\textsuperscript{274} On the other hand, section 244(a)(1) itself set a restrictive threshold requirement concerning an alien's continuity of physical presence that must be met before the Attorney General can exercise his discretion.\textsuperscript{275} The Court concluded, therefore, that the \textit{Fleuti} decision was essentially irrelevant in the context of the suspension remedy.\textsuperscript{276}

The alien urged the Court to recognize that the Ninth Circuit's views of what constitutes a meaningful interruption of an alien's presence were consistent with the ameliorative aspects of the suspension remedy.\textsuperscript{277} Unfortunately, when the Ninth Circuit related the meaningful interruption of the hardship of deportation, it unwittingly involved another requirement of the suspension, i.e., extreme hardship. The Court found it difficult, therefore, to read this "hardship" element into the continuous physical presence requirement when "extreme hardship" itself was a separate statutory requirement.\textsuperscript{278} It feared that the continuous physical presence requirement might become redundant under these circumstances.

It was significant that the Service did not press for a literal reading of the statute. It thought that the court of appeals had interpreted the statute too liberally. As a matter of fact, Justice Brennan, joined by Justice Marshall and Justice Stevens, reminded the Court in a concurring opinion that the Service had admitted that there was room for flexibility in interpreting the statute.\textsuperscript{279} Thus, while agreeing with the Court's judgment that the alien did not qualify for relief, Justice Brennan did not think it necessary that the Court reach the question of whether the continuous physical presence requirement should be literally interpreted.\textsuperscript{280}

\textsuperscript{272} Although an "entry" is defined as "any coming of an alien into the United States," a lawful permanent resident is not regarded as making an entry if his departure was not intended or reasonably to be expected by him. See Immigration and Nationality Act § 101(a)(13).
\textsuperscript{273} 52 U.S.L.W. at 4030 (citing \textit{Fleuti}, 374 U.S. at 457-62).
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. The Court stated that "[t]he language and history of [section 244(a)(1)] suggest that 'continuous physical presence' and 'extreme hardship' are separate preconditions for a suspension of deportation." \textit{Id.}
\textsuperscript{279} Id. at 4031 & n.1 (Brennan, J., concurring) (citing In re Wong, 12 I. & N. Dec. 271 (1967)).
\textsuperscript{280} Id.
Justice Brennan recognized that formerly there was a sixty-day exception to the continuous physical presence requirement for foreign-born citizens who wanted to avoid losing their citizenship. He did not interpret the lack of a similar provision in the suspension provision as an indication that Congress wanted to require the alien to be physically present at all times in the United States. As the Court pointed out, however, this previous exception indicated that Congress knew how to relax the requirement of the continuity of physical presence, and it is reasonable to conclude that the absence of such mitigating language demonstrates that Congress intended strict compliance with the statutory language. Furthermore, when Congress changed the requirement from "continuous residence" to "continuous physical presence," it signalled its intention to halt the prior statutory abuses. Nevertheless, it is entirely possible that Congress overreacted by using language that foreclosed even the briefest excursion into foreign territory. Justice Brennan was convinced that Congress did not intend to go to that extreme. Perhaps that was not its intent, but the context of the statutory amendment led the Court to believe that Congress knew what it was doing. Thus, if there is to be some exception to this harsh application of the suspension provision, there must be legislative action either to deal with an alien's casual and brief absences or to give an alien some leeway, however slight, in complying with the continuous physical presence requirement.

d. Good Moral Character

Another requirement of eligibility for relief under section 244(a)(1) is that of good moral character. The Act gives some guidance as to what this requirement means by listing those patterns of conduct which preclude a finding of good moral character. The listing, however, is not intended to be exclusive, and a failure to find good moral character may be predicated on conduct not specifically identified in the Act.

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281. Id.
282. See id. at 4029.
283. Congress replaced the "continuous residence" requirement with the "continuous physical presence" requirement "in an attempt to discontinue lax practices and discourage abuses." H.R. REP. No. 1365, 82d Cong., 2d Sess. 31, reprinted in 1952 U.S. CODE CONG. & AD. NEWS 1653; see 52 U.S.L.W. at 4029.
284. This was the kind of predicament that led to the problem in Fleuti. In that case, the issue concerned the meaning of the term intended in the statutory context of the definition of entry.
285. 52 U.S.L.W. at 4032-33 (Brennan, J., concurring).
287. See 2 C. GORDON & H. ROSENFELD, supra note 32, § 7.9d, at 7-158 to 7-159 (examples of conduct outside statutory listing which have been considered in determining whether an alien lacks good moral character include the following: being on parole or probation; neglecting family responsibilities; engaging in extramarital affairs; and engaging in illegal activities).
A significant circumstance identified in the Act that will give rise to a finding that an alien is not of good moral character is a conviction of a crime involving moral turpitude.288 The Board has determined that such a conviction exists for immigration purposes when the following elements are present: (1) the court has found the alien guilty; (2) the court imposes a fine or imprisonment or suspends sentence; and (3) the state characterizes the court's action as a conviction to some extent.289 However, when a court withholds adjudication of guilt under a state statute and discharges an alien without conviction after a satisfactory probation, there is no conviction for immigration purposes.290 Further, an alien's guilty plea will not be regarded as an admission of the crime in that situation because there was no adjudication of guilt according to the statute.291

Another circumstance operating against a finding of good moral character under the Act is giving false testimony to obtain immigration benefits.292 While this provision seems clear on its face, the issue has arisen as to what constitutes testimony. In Phinpathya v. INS,293 the court held that an alien's false statements made in her application for suspension of deportation were not testimony within the meaning of section 101(f)(6).294 The court defined testimony as evidence given under oath to prove a fact to a court or a tribunal, and distinguished testimony from evidence obtained from writings and similar sources.295 Nevertheless, the court's conclusion that the alien's

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288. Immigration and Nationality Act § 101(f)(3), 8 U.S.C. § 1101(f)(3) (1976 & Supp. V 1981). “Moral turpitude” has been defined by the Board as “anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general.” In re Sloan, 12 I. & N. Dec. 840, 849 (1968). In a more recent decision, the Board described moral turpitude as “a nebulous concept which refers generally to conduct which is generally base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general.” In re Flores, 17 I. & N. Dec. 225, 227 (1980) (citations omitted). In determining whether a conviction under a statute involves moral turpitude, it is necessary to consider whether “intent” is an essential element of the crime. See In re Zangwill, Int. Dec. 2858 (1981) (where statutory prohibition against issuing worthless checks only required that the issuance be “knowing” and there was no requirement that there be intent to defraud, a conviction under the statute did not give rise to a finding of moral turpitude).


290. In re Seda, 17 I. & N. Dec. 550, 553-54 (1980) (alien's sentence of five years probation for forgery under Georgia Statewide Probation Act was not considered a conviction).

291. Id. at 554. The Seda Board declared that where a guilty plea did not amount to a conviction, it also could not be regarded as an admission. Id. But see In re Zangwill, Int. Dec. 2858 (1981) (alien deemed convicted for immigration purposes although there was no adjudication of guilt where the alien pleaded guilty to issuing worthless checks and the state statute did not provide for exoneration after completion of probation).


294. Id. at 1018-20.

295. Id. at 1019.
statements in the application were not false testimony did not deprive the Board of its discretion in deciding whether to suspend the alien's deportation under section 244(a)(1).\textsuperscript{296}

Prior to the 1981 amendments to the Act, section 101(f) precluded a finding of good moral character for an alien who committed adultery.\textsuperscript{297} The amendments recognized the difficulty of strictly enforcing section 101(f)(2) and deleted the ground of adultery as one which automatically precludes a finding of good moral character.\textsuperscript{298} This change simply allows the Attorney General to exercise his discretion with respect to an alien's individual circumstances, and therefore still permits a finding based on adultery that an alien has failed to meet the standard of "good moral character."\textsuperscript{299} Similarly, the courts may feel more comfortable in looking to see whether the alien's adulterous conduct has destroyed an otherwise viable marriage.\textsuperscript{300}

Congress also liberalized section 101(f)(3), which previously precluded a finding of good moral character for those aliens who have been found guilty of possessing or trafficking in drugs.\textsuperscript{301} Presently, an alien who is convicted of "a single offense of simple possession of 30 grams or less of marihuana" may still be regarded as a person of good moral character.\textsuperscript{302} This was a genuine attempt on the part of Congress to distinguish between aliens who are habitual users and traffickers of drugs and aliens who are not.

\textbf{CONCLUSION}

The review of section 212(c) undertaken here has suggested that in determining the period of lawful domicile, account should be taken of the period preceding, as well as following, an alien's admission for permanent residence. Further, this article illustrates that the section was intended to apply to any alien who has the status of a lawful permanent resident at the time he seeks to return to that lawful domicile. The section was meant to alleviate the

\textsuperscript{296} \textit{Id.} (recognizing that evaluation of false statements is one of the numerous factors that the Board can consider in exercising its discretion).


\textsuperscript{299} The following comments were made about the impact of the amendment deleting adultery from section 101(f)(2): Presently if a couple is legally separated and one person cohabits with another who is not his spouse he will automatically be barred from becoming a citizen. This change is designed to remedy the above situation. If adultery is found to be the primary cause of the destruction of a viable marriage or is found to result in children becoming public charges the offender will still be found lacking the necessary moral character.

\textsuperscript{300} \textit{Id.} (recognizing that evaluation of false statements is one of the numerous factors that the Board can consider in exercising its discretion).


\textsuperscript{302} \textit{Id.}
hardship which might ensue from the unexpected exclusion of aliens with long residence and strong ties to the United States. Therefore, it was appropriate for the Second Circuit in *Lok I* to allow the alien to include the period prior to his lawful admission for permanent residence as a part of the required lawful domicile. Such an approach satisfies congressional concerns that an alien should be eligible for 212(c) relief only if he normally would qualify for admission. In addition, these principles are fully applicable to aliens whose domicile in the United States began during their nonimmigrant status.

This article also considered section 244(a)(1), which provides a substantial measure of relief for those aliens who find themselves subject to deportation. With respect to this section, there has been notable progress in dealing with the elements of extreme hardship. The Supreme Court’s verdict in *Wang* established the Attorney General and his delegates as the proper arbiters of extreme hardship. In so doing, it imposed on the lower courts the responsibility of deciding whether the Board has abused its discretion in particular cases. Thus, the courts’ function is not to impose their own views of extreme hardship on the administrative tribunal. Yet, the Board is required to make its determination based on the totality of circumstances and, if it has not done so, the courts can rightfully find that the Board abused its discretion.

The Supreme Court has now given the last word on the continuous physical presence requirement. If aliens are to obtain any relief from the Court’s strict interpretation, it obviously must come from Congress. There is need for an amendment that will provide the necessary flexibility for the courts. Only time will tell whether Congress really intended this literal interpretation.