THE CHANGE-OF-STATUS ADJUDICATION: A CASE STUDY OF THE INFORMAL AGENCY PROCESS

*ABRAHAM D. SOFAER**

I. INTRODUCTION

IT is generally assumed that "informality"—the disposition of matters without "the conventionalized reception of evidence and testimony,"[1] cross-examination, a record and an appeal—facilitates, or even assures, speedier and less costly governmental action. Although the sheer mass of agency adjudications clearly requires informality in all but a very limited proportion of proceedings,[2] countervailing considerations based on constitutional principles, tradition, and notions of fairness have been advanced as arguments for increasing the procedural protection against arbitrariness and error. The Administrative Procedure Act[3] is one major legislative effort to regularize and formalize procedures in federal agencies. Similar measures have been adopted in many states. And agencies and courts have played an important role in formalizing administrative procedures, particularly in areas affecting important economic and social interests, such as welfare, education and housing.

By what standards should legislatures, agencies or courts decide whether to refuse or provide a given procedural protection? What criteria should govern the decision, for example, to allow counsel to appear at an agency

* Associate Professor of Law, Columbia University School of Law. This article is a revised portion of a report prepared to support a recommendation of the Committee on Informal Action of the Administrative Conference of the United States. It represents only the views of its author. An article discussing the manner in which discretion is and should be controlled at the Immigration and Naturalization Service (INS) will appear in a forthcoming issue of the *Columbia Law Review*. The author gratefully acknowledges the support of the Administrative Conference, the cooperation of the INS, and the assistance of members of the Committee on Informal Action, Professors Walter Gellhorn and Peter Strauss, and several students including Thomas Fortuin, Margaret A. Kohn, and Jamison V. Wilcox.

[1] Walter Gellhorn & Clark Byse, Administrative Law 639 (1960 ed.).

[2] The "lifeblood of the administrative process" consists of "informal" adjudication; an overwhelming majority of all federal agency dispositions never reach the formal stage. See the excellent discussion in Report of Attorney General's Commission on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 35 (1941); Walter Gellhorn & Clark Byse, *supra* note 1, at 639-708.

[3] Ch. 423, 60 Stat. 237 (1946), revised and codified by Act of Sept. 6, 1966, P.L.89-554, 80 Stat. 378, 381-388, 392-393, 5 U.S.C. §§ 551-559, 701-706 (1970).

HeinOnline -- 1 J. Legal Stud. 349 1972

proceeding, to require notice, or to insist on the promulgation of regulations? Do informal procedures always assure speedier and less costly adjudications than more formal models? What are the effects, if any, of delegating broad discretionary power in connection with adjudication? Efforts to obtain facts about informal adjudications, and about discretionary action in particular, seem potentially useful in answering these questions. The judicial test for determining whether formalization is necessary or desirable in a specific context has shifted from general formulas, such as "fair hearing" and the "right-privilege" distinction, to a more refined "balancing" approach which purportedly begins in each case with "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action,"[4] and has the due process issue turn on whether the interests in avoiding the adverse effects of government action outweigh "the governmental interest in summary adjudication."[5] Factual study of specific proceedings can contribute greatly to the effective use of this approach by more accurately describing the interests affected and the costs involved. It may also provide important guidance for the hitherto speculative process of determining what specific formalities are needed or desirable in a given context. Even the most venerated formalities, including the right to counsel, may do nothing in certain contexts to check abuses—may in fact operate as a positive detriment to the individuals affected.[6] On the other hand, less traditional means of improving the administrative process, such as personnel examinations for disqualifying biased adjudicators, may prove effective in checking arbitrariness and error in some situations.

A. *The Change-of-Status Proceeding*

Until 1952 an alien who entered the United States as a visitor, student or other nonimmigrant could become a permanent resident of the United States only by obtaining an immigrant visa; and the only persons qualified to issue such visas were consular officials, stationed abroad.[7] Many nonimmigrants who entered this country after World War I and who decided while they were here to become immigrants simply refused to leave the country to seek immi-

[4] Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961). See William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[5] Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

[6] See Anthony Platt & Ruth Friedman, The Limits of Advocacy: Occupational Hazards in Juvenile Court, 116 U. Pa. L. Rev. 1156 (1968); H.J. Elcock, Administrative Justice 75-76 (1969).

[7] See Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 [hereinafter cited as I. & N. Act], at §§ 101(a)(16) & 221, 8 U.S.C. §§ 1101(a)(16) & 1201 (1970). The only exceptions to this proposition were for aliens who qualified for suspension of deportation or registry proceedings. See 8 U.S.C. §§ 1254 & 1259 (1970).

HeinOnline -- 1 J. Legal Stud. 350 1972

grant visas abroad. By 1935 the number of aliens in illegal status in the United States, and therefore deportable, was intolerably large. Many had been in the United States for a long time and had established family ties. Service officials, reluctant to impose the extreme hardship of compelling these aliens to go abroad to apply for immigrant visas, sought new approaches to the problem.

In 1935 the Immigration and Naturalization Service established by regulation the system of preexamination, under which an alien could have INS determine his or her admissibility before leaving the United States. If found qualified to immigrate, and unless evidence adverse to the alien were subsequently discovered, the alien was guaranteed readmission to the United States, at least to resume his prior status, after a brief and relatively inexpensive visit to an American consular office in Canada. The procedure was enormously popular, since it eliminated the anxiety of possible exclusion if an immigrant visa was denied, as well as the cost of travel to the alien's home country. Between 1935 and 1950 INS adjudicated over 45,000 preexamination cases.[8]

In 1952 Congress sought to ease the situation further. It enacted section 245 of the Immigration and Nationality Act "so that aliens lawfully in the United States in a temporary status . . . [could] have their status adjusted to that of permanent resident without the necessity of leaving the United States."[9] The original version proved to be so restrictive in scope that preexamination, which had been removed from INS regulations when the statute was first passed, was restored in 1955.[10] The provision has since been substantially liberalized, and the statute now imposes essentially the same requirements as exist for obtaining an immigrant visa, except that relief is precluded for crewmen, Western Hemisphere natives and certain illegal entrants.

To be qualified under the statute for adjustment of status an alien must: (1) apply for relief; (2) be admissible for permanent residence; and (3) be eligible for the "immediate" issuance of an immigrant visa at the time the

[8] S. Rep. No. 1515, 81st Cong., 2d Sess. 603 (1950).

[9] *Id.*, at 605. The character of the provision is conveyed by a few statistics. Aliens who entered this country as visitors for pleasure accounted for 15,483 or 52.9% of all §245 applications granted nationally during fiscal year 1969. Others who received permission to become permanent residents included students (7,493 or 25.6%), the families of students (1,348 or 4.6%), parolees (1,121 or 3.8%) and exchange visitors (851 or 2.9%). See 1969 INS Ann. Rep., Table 6c (1970). The typical applicant obtaining relief recently has been in this country between one and four years. A significant number of aliens obtain permanent residence, however, after many years of "temporary" residence in the United States. During fiscal 1969, for example, 564 aliens who were granted permanent residence had entered this country in 1958 or earlier.

[10] This occurred although preexamination has substantial limitations in comparison to the present § 245. See generally, Charles Gordon & Harry N. Rosenfield, Immigration Law and Procedure, § 7.3 (1971) [hereinafter cited as Gordon & Rosenfield].

HeinOnline -- 1 J. Legal Stud. 351 1972

application is approved. Admissibility is defined by implication in section 212 of the Immigration and Nationality Act,[11] which delineates grounds of inadmissibility. An alien may be deemed inadmissible upon literally dozens of grounds, including physical and mental defects, poverty, prior criminal conduct, various forms of immorality, intent to seek employment without approval of the Secretary of Labor, stowaway or other improper entry to the United States, prior misrepresentations, draft evasion, narcotics involvement, and certain political affiliations, particularly with anarchists or communists. Waivers of inadmissibility are often available to aliens who fall within one or more of these categories.

The requirement that an immigrant visa be "immediately available" to the alien at the time his application is approved raises the most complex problems in obtaining relief under, and in administering, the statute. To be eligible for admission as a permanent resident the alien must show either that he is exempt from any of the numerical limitations on immigration or that any applicable numerical limitation is met. The law governing availability of immigrant visas at the time of this study was the Act of 1965,[12] which abolished in major respects the quota system based on national origin. The groups entirely exempted under the Act from any numerical limitation are generally "immediate relatives," including children, spouses and parents of citizens over the age of 21 years, and "special immigrants," except that Western Hemisphere natives, who are "special immigrants," are subject to an annual limitation of 120,000.[13] If a would-be immigrant qualifies as neither immediate relative nor special immigrant, he or she becomes subject to the Act's numerical limitations. These are, first, an overall limit for immigration by all but immediate relatives and special immigrants of 170,000 per year. Second, although the 1965 statute (unlike its predecessors) imposes no special numerical limitations related to the national origins of would-be entrants, no Eastern Hemisphere nation may supply more than 20,000 immigrants in any one year. Visa numbers available each year are issued on a first come-first served basis, but within a system of seven preferences, which in general accord priorities to close relatives and to workers or professionals with skills needed in the U. S. economy.[14] Would-be immigrants who are

[11] 8 U.S.C. § 1182 (1970), entitled "Excludable Aliens."

[12] Act of Oct. 3, 1965, P.L. 89-236, 79 Stat. 911, 8 U.S.C. § 1151 *et seq.* (1970).

[13] 8 U.S.C. § 1151 (1970); see also 8 U.S.C. § 1101(a)(27) (1970).

[14] The system can be summarized as follows:
First Preference (unmarried, adult sons and daughters of citizens; maximum of 20% of the world-wide annual quota, or 34,000 visas allocated).
Second Preference (spouses or unmarried sons and daughters of permanent residents; maximum of 34,000 visas allocated plus unused visas allocated to first preference).
Third Preference (professionals, and aliens of exceptional ability in the arts or sciences; 17,000 visas allocated; visas unused by the first two preferences unavailable).

HeinOnline -- 1 J. Legal Stud. 352 1972

subject to the numerical limitations normally seek to establish a preference which accords them priority over other applicants.

An alien who meets the statutory prerequisites is qualified for, but not entitled to, change-of-status relief. The statute provides that the Attorney General "may, in his discretion," grant relief to statutorily eligible aliens.[15] Therefore, an eligible alien must, in addition, persuade a Service adjudicator, acting as the Attorney General's delegate, to exercise discretion in the applicant's favor.

The change-of-status proceeding involves most of the important characteristics of informal agency action. First, there are large numbers of adjudications under the provision. From a modest 3,702 applications granted in fiscal 1956, the number of persons securing permanent residence through this device grew to 41,528 in fiscal 1970. Second, the procedure established to deal with these applications is relatively simple: most evidence required for disposition is obtained from the applicant himself, on forms, at an interview, and through a physical examination; other information is usually secured via the mails, and "introduced" into the file without any cross-examination; few, if any, of the formal rules of evidence are applied; the adjudicator is usually a non-lawyer, and the applicant frequently is unrepresented by counsel; only the barest record is kept; and, until this study, it was the Service's position that no "appeal" could be taken from the adjudicator's decision.

Section 245 is also an ideal vehicle for studying the exercise of discretion in the absence of formal procedural protections. Although discretion is inherent in all forms of administration, it seems essential, in formulating an agenda for study, to begin with an examination of relatively simple discretionary functions involving little policy formulation in the broad sense and sufficiently formalized to make data accumulation feasible in a modestly financed undertaking. The change-of-status adjudication meets these requirements. Most important, it enables a test of some of the major hypotheses concerning the exercise of discretion, including the propositions that clearly defined standards make for more consistent or more "just" discretionary

---

Fourth Preference (married sons and daughters of citizens; 17,000 visas allocated plus all unused visas from the three higher preferences).
Fifth Preference (brothers and sisters of citizens; 40,800 visas allocated plus visas unused by first four preferences).
Sixth Preference (skilled or unskilled laborers not of a temporary or seasonal nature, and in short supply; 17,000 visas allocated; unused visas from prior preferences unavailable).
Seventh Preference (refugees, known as "conditional entrants"; 6% of the quota allocated).
Nonpreference (other immigrants; all visas unused by immigrants with preference status available).

[15] 8 U.S.C. § 1255 (1970).

HeinOnline -- 1 J. Legal Stud. 353 1972

judgments[16] and that broad discretion leads to increased bias and political intervention.[17]

We were also able to collect data about discretion in the processes of administrative review and enforcement. A grant of relief at the informal level is final, in the absence of grounds for rescission. A denial of relief, however, whether on statutory or discretionary grounds or both, may be challenged in several ways. The disappointed alien may seek to reopen his case at the district office level, apply for reconsideration, or file a new application. Where important questions are presented he may seek to have the case certified for decision to the Regional Commissioner. Aliens denied relief are usually given about one month to depart voluntarily, and deportation proceedings are commenced against those who fail to depart. At the relatively formal deportation hearing which usually ensues, an alien may reapply for section 245 relief before a Special Inquiry Officer (SIO), who is law trained, and who may exercise discretion *de novo*. An adverse SIO decision is appealable to the Board of Immigration Appeals (BIA), from which review may be sought in the federal courts. In addition to these vehicles for obtaining administrative review, an alien may seek, through a variety of techniques, to delay or suspend the enforcement process.

B. *Methodology*

The study used as its principal source of empirical data the district office located in New York City, the largest and busiest of all INS offices. During fiscal 1968, for example, it completed 7,507 section 245 cases, or 20.9 per cent of such completions by all INS offices that year.[18] Several students and the author prepared reports on approximately 50 interviews of aliens by Immigration Examiners, the officers who adjudicate section 245 applications, and interviewed many INS officers at the district and national offices. For statistical information we relied on the monthly operations reports prepared by the New York office, which provide a fairly comprehensive record of INS operations. For nationwide statistics we relied on a similar report prepared by the national office on the basis of the monthly district-office reports, and on the Annual Reports of INS.

[16] Compare Henry J. Friendly, The Federal Administrative Agencies 54-57 (1962), and Kenneth Culp Davis, Discretionary Justice (1969), with H.W.R. Wade, Anglo-American Administrative Law: Some Reflections, 81 L.Q. Rev. 357, 371-79 (1965).

[17] See, *e.g.*, Emmette S. Redford, The Protection of the Public Interest with Special Reference to Administrative Regulation, 48 Amer. Pol. Sci. Rev. 1103 (1954).

[18] When the study began, there seemed no reason to suspect that the New York City office was unrepresentative of other INS offices in any significant way. Subsequent study indicates that, while some differences may exist, it is safe to rely on New York City data as supplemented by, and compared with, statistics and other information collected by the central office.

HeinOnline -- 1 J. Legal Stud. 354 1972

We also examined files of specific cases. We could not practicably study files in cases where the examiner granted relief since opinions were seldom (if ever) written in these cases and since there was no reliable and convenient means for selecting samples. We found, however, that the cases initially denied by examiners were sufficient for our purposes. Files in denial cases were easily located, and opinions have been written in each such case since about July 1967, when Congress passed the Freedom of Information Act. These opinions provided useful facts in each case, and, being filed chronologically, enabled us to count the number of denials in each month and select a representative sample. Denials also provided data concerning the processes of administrative review, investigation and enforcement. Most aliens initially denied relief sought review either before examiners or SIOs. This enabled us to study the consistency of decision making under section 245 by comparing the results of initial examiner decisions with the results of decisions by examiners and SIOs during the process of administrative review.

After learning that denial opinions are filed when ready without regard to the day or month of the year, we decided to use the first 15 denials filed for each month between September 1967 and May 1968, except that only eight cases were available for September 1967.[19] Although this procedure did not conform to ideal random-sampling technique, the data collected indicate that the sample is representative.[20] Furthermore, of the 379 denial opinions filed between September 1967 and May 1968, we selected 128 cases, an ample 34 per cent of the total.[21]

Our interest in the results of informal adjudication in large part reflects a particular interest in the exercise of discretion by administrators. We therefore selected, for the months of October 1967 through July 1968, all cases,

[19] Denial opinions were written after July 7, 1967, but the Service had inadvertently obliterated the file numbers on all opinions written from that date until around September 15, 1967. Opinions without file numbers were unusable, since we could not find the files in such cases.

[20] The random sample yielded 37 cases in which denials were based solely on discretion; in 17 or 46% of these cases for which data were available the applicant ultimately obtained permanent residence in the United States. This result compares very closely with corresponding results for the universe of cases during the same period which were based solely upon discretionary grounds; of the total universe of 136 such cases, 65 or 48% of the cases for which data were available resulted in the applicant's obtaining permanent residence in the United States. That the outcome of the purely discretionary cases in the random sample is so strikingly similar to that of the universe of such cases lends support to the representativeness of the random sample as a whole.

[21] We discovered some variation in the absolute number of cases filed each month, but the sample selected is so ample that the minor monthly variations did not necessitate selection of a consistent proportion of each month's cases. The convenience of selecting the first 15 cases, the greater ease with which student assistance could thus be directed, the fact that this method left several cases in each month for further use to study discretion, all combined to make the procedure adopted preferable.

HeinOnline -- 1 J. Legal Stud. 355 1972

beyond those in the random sample, in which the adjudicator relied entirely or in part on discretion in denying relief. We found 113 such cases, of which 99 were based on discretion alone and 14 on some combination of discretionary and statutory grounds.

II. The Informal Adjudication

During the course of this study we examined several aspects of the informal proceeding whereby section 245 applications are adjudicated. This paper focuses on those aspects—summary disposition, representation, and bias in the decision of applications—that seem most pertinent to an interest in the consequences of delegating broad discretionary power. More comprehensive discussion is contained in my final report to the Administrative Conference.

A. *Aspects of the Informal Proceeding*

1. *Summary disposition.* The Service has authorized summary denials of meritless applications, to avoid unnecessary interviews and processing.[22] We found that with some relatively rare exceptions[23] the power summarily to deny was exercised soundly and fairly. The most troubling summary denials were those in which a sympathetic review of the applicant's file would have

[22] The general policy is that interviews should not be conducted unless a "material question of fact cannot [otherwise] be resolved" or unless required by statute, regulation or operating instruction. INS, Operations Instructions § 103.2(n) (Nov. 27, 1968) [hereinafter cited Operations Instructions]. The I. & N. Act has no provision requiring interviews in § 245 cases, and the Service has authorized summary denial, without interview or investigation, of clearly meritless applications. Operations Instructions § 245.2(a) (Oct. 1, 1969); INS, Immigrant Inspectors Handbook 1-2, 10-2 (1964) [hereinafter cited Immigrant Inspectors Handbook]. Indeed, denials are required "at any stage of the proceedings [if] it is determined that an application should be denied . . . notwithstanding normal processing has not been completed." Operations Instructions § 245.5 (Oct. 1, 1969).

[23] Occasionally, relief is denied for lack of prosecution, although the alien failed to receive proper notice. Letter from Edith Lowenstein, Esq., N.Y.C., Feb. 2, 1972. These denials are readily reopened, however, as are those involving changed facts such as an intervening marriage, *e.g.*, case no. 071.

In case no. 048 the adjudicator denied relief summarily because of the Labor Department's decision to deny a labor certification after finding the applicant unqualified as a secretary for lack of formal schooling. The Service has recognized that, though the Labor Department's decisions concerning the qualifications of an individual as a member of a given profession are entitled to "considerable weight," the final decision on this issue (as opposed to the issues whether other qualified workers are available and whether the alien's employment would adversely affect wages and working conditions) must be made by INS. Immigrant Inspectors Handbook 5-10.2 to 5-11; Matter of Arjani, 12 I. & N. Dec. 649 (1967). No meaningful review of Labor's decision was accorded the alien, although the file indicated that the alien had had an academic education in Europe, and was employed as an aide of a major Wall Street brokerage firm. Her employer wrote that she could read, write and speak five languages fluently, and would be almost impossible to replace. After summary denial, the alien, who was unrepresented by counsel, left the United States. See also Orcales v. District Director, 431 F.2d 817, 820 (9th Cir. 1970).

HeinOnline -- 1 J. Legal Stud. 356 1972

indicated—or even demonstrated—that the apparently ineligible alien was entitled to relief on a ground other than the one advanced. In the few cases we found which alerted us to this problem the applicants were all represented by counsel.[24] Immigration Examiners who adjudicate section 245 applications[25] occasionally appear unwilling to assist aliens who have retained counsel (more on this shortly).

While INS summarily denies section 245 applications, it provides by regulation that no section 245 application may be granted without an interview,[26] even in the case of aliens serving in the United States armed forces abroad.[27] Our data indicate that the requirement serves little purpose in many cases.[28] While the interviews we examined provided too insubstantial a basis

[24] In case no. 068, the applicant, a native of Hungary, sought permanent residence in the nonpreference category. Visa numbers were unavailable at the time for aliens of that type, and the examiner denied the application without interview or further inquiry. The file indicated, however, that the applicant was qualified for a visa as an immediate relative, and had the examiner checked the file carefully he would have been able to inform the applicant that she could claim a higher preference, for which visa numbers were then available. He did not do so. Fortunately, the applicant was represented, and her attorney successfully moved to reopen on the basis of an approved visa petition filed by her daughter. In case no. 049 the applicant was denied relief on the ground that he had lost his second preference visa by marrying. What the adjudicator failed to develop was the fact that the applicant had married an American citizen and was therefore eligible for immediate relative status. Here, too, relief was obtained on reconsideration.

[25] Examiners were called Immigrant Inspectors until 1970. Starting pay for GS-11 Immigration Examiners is $11,905; a GS-15 Special Inquiry Officer starts at $22,885. The $10,980 difference in salaries increases by $1,464 after five years, when examiners and SIO's are receiving $13,493 and $25,937 respectively.

[26] 8 C.F.R. § 245.7 (1971). That this decision represents an administrative judgment rather than a dictate of Congress is reflected in its exception for children under the age of fourteen years.

[27] See Operations Instructions § 245.1(b) (Oct. 1, 1969). The local consul could easily perform this function when required.

[28] Fifty-two interviews were observed during this study. Observations took place on different days, and almost every examiner at the New York City office was observed in the process. Many of the observed interviews were extremely short. Many served no discernible purpose. Of the 52 interviews observed, 14 occupied no more than five minutes, not counting the time expended in checking the file and fetching the applicant. This gave the adjudicator just enough time to greet the applicant, administer an oath, review the answers on the application form, require the applicant to sign the form after swearing the answers were true, tell the applicant not to leave the country while the application was pending, and wish the applicant "good day." Another 15 interviews took ten minutes or less, allowing the adjudicator to do little more than go through the same ritual at a slightly slower pace. That adjudicators were not shirking their duties in these cases is reflected by the fact that the NYC district office has authorized interviews so abbreviated as to be meaningless. When a backlog of over 4,500 applications under § 245 had developed in New York City by June 1969, the District Director ordered an accelerated program of interviews. Adjudicators were authorized, in "cases which do not have any derogatory information and are prima facie approvable for adjustment . . . ," to limit the interview to between three and five minutes, "whereas, these same cases, heretofore, would have required ten to fifteen minutes or more." INS, G-23 Analysis, Application Section, at 1 (June 1969).

HeinOnline -- 1 J. Legal Stud. 357 1972

for any far-reaching reform,[29] it is worth mentioning that the most persuasive argument advanced by Service personnel for retention of mandatory interviews was that discretion could not properly be exercised without personal exposure of the adjudicator to the applicant.[30] The impact of discretion on the cost of administration has seldom been considered, let alone tested. We may tend to associate discretion with informality—the existence of broad discretion implying a relative absence of rules and standards—and informality, we usually assume, costs less. In this instance, however, we find the Service adhering to a *more* costly procedure primarily because of its expansive view of the meaning of discretion in section 245.

2. ***Right to representation.*** The right to assistance of counsel, "at no expense to the Government," is guaranteed by statute in both exclusion and deportation proceedings. Regulations extend this right to every INS adjudication in which an examination is required,[31] including section 245 cases at the informal stage. No special qualifications exist for attorneys to practice before the Service; even foreign attorneys may be permitted to appear and be heard in individual cases. Private attorneys are generally available, especially in larger cities, for aliens able to pay their fees.[32] In New York City, indigents at deportation proceedings receive some assistance from the Legal Aid Society[33] and from private groups, but have little or no access to counsel or

[29] Standards for summary grants do seem possible to formulate. Our study makes clear that the adjudicators now almost invariably exercise discretion in the applicant's favor when substantial "equities" are present, such as possession by the alien of close relatives who are either citizens or permanent residents of the United States, or of extremely useful abilities, in short supply.

[30] One experienced SIO wrote in response to an earlier draft of this report that:

> the exercise of discretion is concerned with many of the psychological elements which are considered in connection with the punishment to be inflicted upon a conviction of a crime. The attitude of the alien towards the law enforcement process, the deliberateness of his attempted fraud upon the government of the United States, his remorse for the things he has done which he shouldn't have, his cooperation with the law enforcement authorities in uncovering other frauds, or persons illegally in the United States, the extent to which he is supporting his family either in the United States or elsewhere, his attitude towards the principles of government of the country to which he wishes to emigrate and a host of other factors, all are relevant to the question of whether a person is entitled as a matter of discretion to remain in the United States.

Comments submitted to the author, July 14, 1971. It is probably true, that, under so broad a view of discretionary power, no case could properly be resolved in an applicant's favor without a personal interview.

[31] 8 C.F.R. § 292.5(b) (1971); Immigrant Inspectors Handbook 2-2 (April 29, 1963).

[32] The Association of Immigration and Nationality Lawyers has 11 chapters throughout the country, and about 600 members, 200 of whom belong to the New York City chapter. Letter from Elmer Fried, Esquire, former President of the Association, July 13, 1971.

[33] The Society has three attorneys working full time on immigration matters in New York City, handling approximately 2,000 cases each year. They refer no cases to volunteer

HeinOnline -- 1 J. Legal Stud. 358 1972

other representatives on any institutionalized basis to assist them at informal hearings.

An early survey indicated that only about 20 per cent of all aliens were represented in deportation hearings.[34] Even though the courts have consistently upheld INS' refusal to supply counsel to indigents,[35] the incidence of representation at formal proceedings is now estimated to be roughly 30-40 per cent by an experienced SIO.[36] Aliens are apparently represented by counsel even at the informal level in more than 20 per cent of all change-of-status cases. Of the 50 interviews we observed, counsel was either present, or retained but not present, in 22; in the other 28 cases, we lacked information as to whether counsel had been retained.

Whether the absence of representation prejudices aliens who apply under section 245 is a many-faceted question. Although we found evidence of prejudice from lack of representation with respect to some aspects of the process, discussed below, no evidence of such prejudice was found at the informal hearing itself. To be sure, the decision to study denials and their subsequent history, rather than both denials and grants, precluded the most meaningful type of statistical evaluation of any correlation of rates of denial with the absence of counsel.

Examiners occasionally questioned unrepresented aliens closely or even unfairly at the interviews we observed, but they did so at least as frequently when the alien was represented. Indeed, an applicant without counsel who admitted an innocent violation of regulations appeared to be treated more sympathetically than one who was represented and unconvincingly denied wrongdoing. Several examiners indicated their belief that most aliens do not need counsel in section 245 cases and that aliens who hire counsel usually have something to hide. Moreover, while the immigration bar includes distinguished and honest practitioners, adjudicators are generally suspicious of immigration practitioners and other representatives, an attitude lent credence by the Service's special investigative program for "Suspect Third Parties," and by several successful criminal prosecutions.[37] Suspicion is especially strong when a representative "coaches" his or her alien client, as frequently occurs.

The impression from observation is supported by other facts, including the absence of a correlation between the presence of representation and

---

private attorneys. The Service provides space at its office for these attorneys. Interviews with Messrs. Levin and Biervliet, Esquires, NYC, June 23, 1970.

[34] William C. Van Vleck, The Administrative Control of Aliens 99 (1932).

[35] *E.g.*, Dun-Marin v. District Director, 426 F.2d 894 (9th Cir. 1970).

[36] Interview with Ira Fieldsteel, Esq., NYC, July 16, 1971. Mr. Fieldsteel estimated that Legal Aid handled about 10% of the cases in which attorneys appeared.

[37] See 1970 INS Ann. Rep. 20-21 (1971).

HeinOnline -- 1 J. Legal Stud. 359 1972

success on the merits of applications. Our observations of 50 interviews of aliens in the process of applying for section 245 relief indicated that at least 44 per cent were represented. Our random sample of denials, drawn from cases decided between one and two years before the interviews observed, indicated that about 60 per cent of the aliens denied relief were represented, three per cent by nonlawyers. Even assuming that the 44 per cent representation rate at interviews is something of an understatement,[38] these facts seem to indicate that aliens with representation are denied relief in a higher proportion of cases than unrepresented aliens. Of course, the higher proportion of grants to unrepresented aliens may result from a tendency among aliens with less meritorious cases, which are therefore more likely to be denied, to obtain counsel more often.

The evidence collected in this study indicates, as will appear, that denials based on statutory grounds are less vulnerable in the process of administrative review than those based on discretionary grounds. One possible reason for the relative lack of stability in discretionary grounds is that they are less easily supported than decisions based on statutory grounds, so if aliens were prejudiced by the lack of representation at the informal stage, we might expect that such prejudice would manifest itself in a tendency among adjudicators to rely on discretionary grounds more frequently when aliens are unrepresented than when they are represented. The evidence fails to support this hypothesis. Table 1 shows that aliens were represented at some stage in almost all denials based on discretionary grounds and that a representative is more likely to be present in cases denied on the basis of discretion than in cases decided on statutory grounds.

TABLE 1
INCIDENCE OF REPRESENTATION AMONG ALIENS DENIED RELIEF BY BASIS FOR DENIAL

	Discretionary Denials	Statutory Denials
Represented	84%	71%
Unrepresented	16	29
	(Base 121 cases)	(Base 68 cases)

If the hypothesis of prejudice were true, one might reasonably expect unrepresented aliens more frequently to make statements to adjudicators at interviews, and for such statements more frequently to prejudice unrepre-

[38] It was unclear in many cases whether the alien being interviewed was represented although unaccompanied by an attorney. Furthermore, no data were available on the incidence of representation among aliens denied relief without interviews. The 44% figure, however, may be an overstatement. Mr. William H. Cook, Supervisory Immigrant Examiner, Travel Control, estimated that about 30% of all applicants are represented at interviews.

HeinOnline -- 1 J. Legal Stud. 360 1972

sented aliens. In fact, unrepresented aliens denied relief were far less likely to have made statements to examiners than represented aliens denied relief. Of the represented aliens in the random sample, 34 per cent made statements, compared to only 18 per cent of those unrepresented. Of the unrepresented aliens who did make statements, the file examiner judged that 80 per cent (four out of five) in the random sample were "prejudiced" by the statements made. This is somewhat higher than the corresponding figure for represented aliens who made statements judged prejudicial, 60 per cent (18 out of 26), but the former figure is based on far fewer cases. Furthermore, of all the cases involving represented aliens, the statements in only 12 per cent were actually judged nonprejudicial, prejudice in the other 19 per cent of the cases being too difficult or impossible for the file examiner to judge.

3. *Multiple Functions.* Adjudicators routinely send for and analyze information about applicants from a variety of sources,[39] including consulates,[40] the FBI,[41] and the CIA.[42] Where necessary, they make special requests for investigations by INS personnel,[43] or by other agencies and law enforcement officers. They then marshal all the available information concerning an alien applicant, and utilize it to question the alien more intelligently and effectively. An examiner, therefore, may act as investigator, "prosecutor" and judge in

[39] Thus, adjudicators are required, as to each applicant over 14 years old, to check a Lookout Book in which the names of all persons "wanted" by the Service are listed. Immigrant Inspectors Handbook 1-4. The Service also puts out an Intelligence Report which describes prevalent fraud practices and persons whom the Service is seeking. Both sources, on occasion, help adjudicators identify wanted aliens. *E.g.*, case no. 256.

[40] The information is requested on INS Form G-325A, which is prepared for each applicant. This form contains pages requesting the United States Consul involved, the FBI, and the CIA to supply information about the applicant. Immigrant Inspectors Handbook 10-4-1. The FBI and CIA are given 30 days to respond or to request further time; the consul is given 45 days. If the agency has failed to respond within the time limit, the adjudicator may proceed to dispose of the application.

Of the responses thus obtained, reports from consular offices seem the most consistently useful. They usually contain brief summaries, sometimes with direct quotations, of what the applicant said when he applied for a nonimmigrant visa. Consular records were found in 12% of the random sample denials and in 17% of the denials based exclusively on discretion; in several cases adjudicators expressly relied on the reports in denying applications.

[41] FBI reports appeared in 6% of the random sample cases, but the information supplied seemed generally of little use, and was seldom expressly relied on by adjudicators.

[42] In only one random sample case did a CIA report appear. It was classified Confidential and conveyed information about a foreign student who was possibly a Communist, and who had been arrested while participating in an antiwar demonstration. Similar information was received in this case from the consul involved, and developed by INS itself. Case no. 230. In addition, the CIA informed the Service, in one of the cases studied as part of the discretionary universe, in a "Secret" report, that a "usually" reliable source claimed that the applicant had committed crimes in a foreign country. Case no. 004.

[43] At least one report was prepared by the Investigations Section in 18% of the random sample denials.

HeinOnline -- 1 J. Legal Stud. 361 1972

the same case. The danger Americans traditionally associate with such a merger of functions may be aggravated by the fact that much of the material that finds its way into the files of section 245 applicants is never introduced into the "record" of such cases, either because it is worthless or confidential.[44] Although INS prohibits examiners from relying on such information, the merger of functions creates the possibility that examiner decisions will be influenced by the inadmissible material.

The same problem was earlier faced by the Service in connection with the multiple functions of deportation adjudicators, and the 1952 Act required a separation of functions at least to the extent that Special Inquiry Officers may not hold hearings in cases they have participated in investigating or prosecuting.[45] The statute allows SIOs to conduct entire hearings, including cross-examination of witnesses, but "the current practice generally is to have the special inquiry officer pursue the inquiry alone only if deportability is conceded and there is no application for discretionary relief."[46] Where a contest is posed, an INS Trial Attorney is designated as prosecutor. The issue is whether similar restrictions ought to be imposed on the functions of examiners.

It seems likely, on the basis of our interviews and extensive file examinations, that the multiple functions of examiners do affect the outcome of some section 245 adjudications. Anonymous tips appear to pose little threat to aliens; the few adjudicators who discussed this issue seemed uniformly skeptical of such data, except as possible leads. But examiners also receive a variety of letters, phone calls and other communications from individuals who claim to know the applicant, usually containing adverse information, and requesting that the communicant's identity be concealed.[47] The most common type of unclassified information comprises letters from the alien's spouse accusing the alien of adultery and urging the Service to deny his or her application for permanent residence. Finally, some form of classified information appeared in about eight per cent of the random sample of denials and in several of the other cases studied. In some instances classified reports con-

[44] Any party to a proceeding, or his authorized representative, may examine, upon request, the "record of proceeding" in the case. 8 C.F.R. § 103.2(b)(2) (1971); Immigrant Inspectors Handbook 4-7. The nonpublic Inspector's Handbook requires inclusion in the record of proceeding (on the left side of each file) of any evidence considered in arriving at the initial decision . . . ," Immigrant Inspectors Handbook 4-2, but several provisions arguably undercut this requirement, *id.*, at 4-3.

[45] I. & N. Act, § 242(b), 8 U.S.C. § 1252(b) (1970).

[46] Gordon & Rosenfield § 5.7b, at 5-49.

[47] Examiners almost invariably honor these requests for anonymity, thereby hiding from the alien information which is often rebuttable. See the description in Will Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 Colum. L. Rev. 309, 356 (1956).

HeinOnline -- 1 J. Legal Stud. 362 1972

tained highly probative evidence but these cases invariably included usable, documentary information or other evidence which was unclassified. Most classified information examined was less probative and unusable as evidence.

Some adjudicators fervently and sincerely deny relying on nonrecord information in deciding cases, but other adjudicators and supervisors indicated that nonrecord, confidential information was in fact used in denying applications. One adjudicator frankly admitted to relying on derogatory, confidential information. Another examiner laughed when asked whether such information was used: "Are you for real? Of course I rely on it." When confidential information is present, the adjudicator said, "we search" for grounds on which to deny the application—"I deny on everything but the kitchen sink."

The files we studied lend further support to the view that nonrecord information, particularly if classified, is improperly relied on by adjudicators. In two cases where overwhelmingly probative, usable evidence was supplied along with the classified reports, the adjudicators initially relied on other, unrelated discretionary grounds to deny relief.[48] Only when the aliens involved in these cases renewed their applications before SIOs was evidence of Communist Party membership and prior crimes revealed. The same pattern is indicated where the nonrecord information is far less probative, as for example where classified evidence in the alien applicant's file concerning participation in a demonstration against a military regime was not mentioned by the adjudicator in denying relief on the discretionary ground of adultery.[49]

Other factors indicating that nonrecord information affects decisions at the informal level are the emphasis placed by the Service on subversive investigations and the stated policy of seeking grounds on which to deport aliens involved in antiwar demonstrations. In every annual report since the 1950s, the Service has emphasized the importance it attributes to its anti-subversive operations.[50] The Service is required to coordinate its work with agencies such as the FBI and CIA,[51] but it claims to do so in order "promptly" to furnish information it develops "to the appropriate agency or agencies,"[52] rather than vice versa. Thus the Service is engaged in a "continuing effort . . . to identify and compile evidence concerning various groups or organizations to determine whether their characterization as subversive organizations was warranted and, if so, whether involvement in those organizations by the foreign born justified Service action looking toward their exclusion or deportation from the United States or . . . [their denaturaliza-

[48] Case nos. 020, 051.

[49] Case no. 288 (pending at time of survey).

[50] *E.g.*, 1956 INS Ann. Rep. 11 (1957).

[51] I. & N. Act § 105, 8 U.S.C. § 1105 (1970).

[52] 1969 INS Ann. Rep. 19 (1970).

HeinOnline -- 1 J. Legal Stud. 363 1972

tion]."[53] The scope of antisubversive activity, moreover, goes well beyond that which is or may be proscribed by statute. The Service reported that during fiscal 1967 "investigations were conducted to identify certain aliens involved in demonstrations protesting the national effort in Vietnam and elsewhere, and to determine their amenability to Service proceedings."[54] In fiscal 1968 the Service also managed to find time to investigate aliens "involved in student disorders."[55] In two of the cases we examined, receipt by the Service of classified reports from other agencies set off full-scale INS investigations, one of which involved no fewer than 11 separate reports (based on many more interviews) by INS investigators.[56]

Finally, the Service's commitment to protecting the integrity of the consular process may be a factor engendering prejudicial nonrecord information. Adjudicators may well search for grounds on which to deny aliens relief because a consulate officer states that he either feels or has heard that the alien lied to obtain a visa to the United States. Thus, in case no. 172 an unclassified report was received by INS from a consulate stating that it had received information that the alien had bragged to his friends that he could hoodwink the government. Relief was denied at the informal level on the basis of discretion, without any mention of the consul's report. The SIO granted relief on the same "record," which of course did not include the consul's report of a hearsay statement by an unidentified informant of unascertained reliability.

Despite the evidence that examiners are affected by their multiple functions, the proper solution to the problem of their unauthorized reliance on nonrecord information, whether conscious or unconscious, is no simple matter. Unlike exclusion and deportation, the alien denied relief is entitled to a formal hearing on the issue of deportability, as well as to a de novo consideration of the merits of his section 245 application, before an SIO who, in the absence of special authorization, sees only record material. Separation of functions at the informal level would require an additional, qualified person to perform investigation, an expense that would be very substantial with respect to section 245 applications alone (of which there are some 45,000 each year), and staggering if applied to other, analogous adjudications.

The change-of-status adjudication therefore seems an appropriate occasion for resisting the temptation to judicialize the agency process. The danger

[53] *Ibid.* Apparently, even examiners sometimes participate in deciding whether particular groups are subversive. One adjudicator told of how several officers met and discussed whether they ought to regard "SDS" (Students for a Democratic Society) as subversive. He said they met informally, discussed and voted on the matter and split evenly. Presumably, each adjudicator was thereafter left free to implement his or her own policy, based on information supplied by time-consuming investigations.

[54] 1967 INS Ann. Rep. 16 (1968).

[55] 1968 INS Ann. Rep. 16 (1969). See also 1969 INS Ann. Rep. 19 (1970).

[56] Case nos. 230, 271.

HeinOnline -- 1 J. Legal Stud. 364 1972

posed by the multiple functions of examiners is real, but arises in far fewer than ten per cent of all cases; classified information is found in less than one per cent. And the opportunity for review by an SIO, who does not engage in investigation, adds a significant check to examiner decisions. But INS should take steps to correct the erroneous and unfair impressions adjudicators may be receiving from its official statements implying that demonstrators and other dissidents are "subversives."

B. *Consistency of Decisions*

Section 245 provides an excellent vehicle to test the hypothesis that broad discretion is correlated with inconsistency and with such possible causes of inconsistency as political intervention. In adjudicating section 245 applications examiners decide, first, whether the applicant is eligible for relief, in that he has met the statutory prerequisites for relief, including admissibility, immediate availability of a visa, etc. These are referred to in this study as "statutory grounds." In addition, examiners must determine whether to exercise "discretion" in the alien's favor. In doing so, the examiner decides whether the applicant's case presents a basis for denial on one of several "discretionary grounds." Since the statutory grounds invoked in the cases we examined are far better defined than the discretionary grounds relied on, we have a basis for attempting to determine whether the lack of standards causes greater inconsistency. We have in fact found that inconsistency and political intervention occurred with greater frequency in connection with the relatively ill-defined discretionary grounds than with the relatively well-defined statutory grounds.

1. *Relative Definition of Grounds of Decision*

When analyzed by grounds of decision, denials of applications for section 245 relief fall into three categories: (1) those based exclusively on statutory grounds; (2) those based exclusively on discretionary grounds; and (3) those based on both types of grounds. About 65 per cent of all denials examined in our random sample were based exclusively on statutory grounds, 28 per cent exclusively on discretionary grounds, and seven per cent on both types of grounds. It is accurate to say, therefore, that statutory grounds were invoked in 72 per cent of the denials studied, and discretion was relied on, whether necessarily or unnecessarily, in 25 per cent of all the cases.

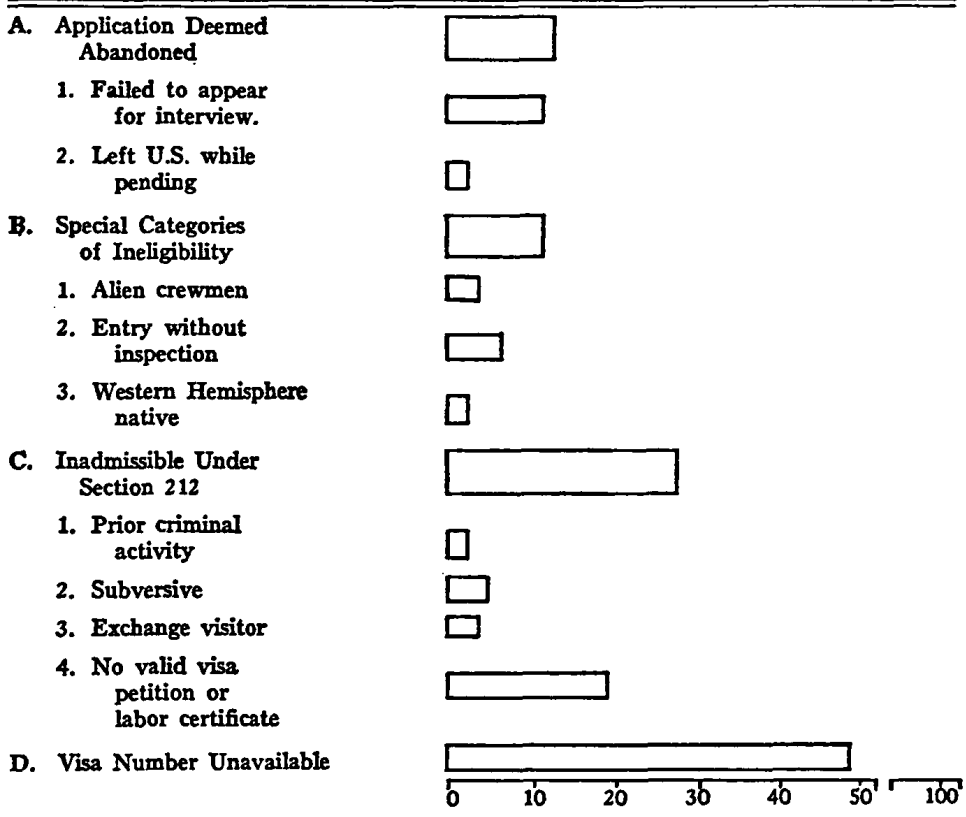
a. *Statutory grounds.* Section 245 applications may be denied on literally dozens of statutory grounds, which fall into four general categories. First, to be eligible, an alien must file an application. This provision has been interpreted to require that any filed application be pressed, and not abandoned. Second, certain specific groups of aliens, such as crewmen and Western

HeinOnline -- 1 J. Legal Stud. 365 1972

Hemisphere natives, are expressly made ineligible under section 245. Third, the alien must be admissible, a requirement that incorporates a variety of individual grounds, involving such things as physical or mental defects, certain political associations, certain prior crimes, a valid visa petition, and a labor certification where necessary. Fourth, a visa must be "immediately available" to the applicant; this ground reflects the requirement that even admissible aliens must be eligible for a visa number under the system of preferences established by the Act.

The proportion in which each category is utilized is illustrated in Table 2.

TABLE 2
STATUTORY GROUNDS INVOKED TO DENY SECTION 245 RELIEF*



(Base: 72 Cases)

* Percentages sum to more than 100 per cent due to reliance on multiple grounds.

As can readily be seen, visa unavailability is the category most frequently invoked—in 49 per cent of the random sample denials based in whole or in part on a statutory ground. In all of these cases, the alien's preference cate-

HeinOnline -- 1 J. Legal Stud. 366 1972

gory was oversubscribed. Specific grounds of ineligibility were invoked in 13 per cent of the statutory denials, the most frequent of which was entry without inspection (nine per cent). Applications were found abandoned in 14 per cent of the statutory cases, mostly because of failure to appear for scheduled interviews. A variety of grounds of inadmissibility were invoked in 27 per cent of the cases. No valid visa petition or labor certification had been obtained in 19 per cent of the cases; since these two grounds were present together in all cases in which they were invoked, they are treated as one. Other grounds of inadmissibility were relied on in only nine per cent of the cases. Of the aliens deemed inadmissible four were found to fall within one of the "subversive" categories; one involved a prior criminal violation; and three were exchange visitors. None of the other grounds of inadmissibility, such as public charge, illiteracy, prostitution, or physical or mental defect, was invoked in the random sample denials.[57]

Application deemed abandoned. A small proportion of all applications is denied either because the alien failed to appear at an interview or departed the United States during the pendency of the application. Under the former ground, adjudicators may deny applications on the basis of one or more failures to appear, after due notice, but they are free to disregard such conduct. This authority seems more limited when an applicant departs pending final adjudication, because of the regulation's explicit provision that an applicant's departure "shall be deemed an abandonment of his application constituting grounds for denial. . . ."[58] But broad discretion is conferred through the exceptions to this rule for persons who "had previously been granted permission by the Service for such absence . . . ," and for those whose departure the adjudicator concludes "was unintended or innocent and casual," and whose "absence was brief."[59] This particular ground is therefore discretionary in nature.

Specific exceptions to section 245 relief. There are three specific exceptions of importance: (1) entry without inspection; (2) alien crewman; and (3)

[57] In fact, none of these latter grounds was invoked in a separate group of cases, studied in connection with the more intensive collection of denials based at least in part on discretionary grounds. Of the latter collection, 26 cases were based on both statutory and discretionary grounds; 10 were based on substantive grounds of inadmissibility, seven prior crime cases, two subversive cases, and one exchange visitor.

[58] 8 C.F.R. § 245.2(a)(3) (1971).

[59] At several interviews we attended, applicants sought permission to depart. Adjudicators seemed skeptical of the accuracy of recurrent claims, particularly made during holidays, that a relative is ill in the "home country." While the rule authorizing denial for departure is reasonable in light of the purpose of § 245—to save aliens the trouble of going back overseas to obtain relief—some written standards ought to be established and publicized to guide both adjudicators and applicants on this issue. Some consistency is obtained through the practice of examiners to refer all such requests to the Section Chief for decision or advice.

HeinOnline -- 1 J. Legal Stud. 367 1972

Western Hemisphere native. All are well defined. The provision that an alien be "inspected and admitted or paroled" has been construed to negate any "requirement that this admission must have been regular, lawful or permanent."[60] The Operations Instructions make clear that, to be eligible, it is sufficient that the alien entered "as a nonimmigrant, with or without a visa, [as] an immigrant, [as] a United States citizen when such entry was not obtained on the basis of a willful false claim to citizenship, or [as a] parolee. . . ."[61] Numerous decisions, principally of the Board of Immigration Appeals (BIA), further define the requirement.[62] The statute, its legislative history, INS regulations and decisions of the BIA and the courts, have likewise well defined the meaning of "alien crewmen" and of "Western Hemisphere native."

Grounds of inadmissibility. Considerable definition exists as to each of the grounds of inadmissibility. An example of a relatively well-defined ground is the provision making "illiterates" inadmissible. The provision's applicability is carefully limited by the statute itself,[63] and procedural safeguards are established for its administration.[64] The statutory language of most other grounds of inadmissibility is also reasonably clear or readily susceptible of definition.[65] This is certainly true of the most frequently invoked grounds of inadmissibility, the requirement that certain applicants demonstrate that valid, unexpired visa petitions have been approved in their behalf and the requirement that certain applicants obtain labor certifications. The visa-petition ground is governed by reasonably well defined standards,[66] and is

[60] Gordon & Rosenfield § 7.7b(1), at 7-56.

[61] Operations Instructions § 245.1(a) (April 8, 1970).

[62] *E.g.*, Matter of Lim, 10 I. & N. Dec. 653 (1963) (member of U.S. armed forces ineligible since not amenable to inspection); Matter of C.N.J., 9 I. & N. Dec. 141 (1960) (spouse of alien who entered on fraudulent claim of citizenship held eligible despite husband's fraud).

[63] I. & N. Act, § 212(a)(25), 8 U.S.C. § 1182(a)(25) (1970).

[64] § 212(b) goes into great detail about the manner in which consular and immigration officers are to resolve the literacy issue. The Attorney General is called upon to prepare and furnish adjudicators "with slips of uniform size, . . . each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type, in one of the various languages or dialects of immigrants." I. & N. Act § 1212(b), 8 U.S.C. § 1182(b) (1970). The alien is allowed to designate the particular language or dialect in which the examination is to be made.

[65] See, *e.g.*, I. & N. Act, § 212(a)(30), 8 U.S.C. § 1182(a)(30) (1970) (aliens accompanying excluded, dependent aliens); § 212(a)(19) 8 U.S.C. § 1182(a)(19) (1970) (stowaways); § 212(a)(1), 8 U.S.C. § 1182(a)(1) (1970) (mental retardation); § 212(a)(6), 8 U.S.C. § 1182(a)(6) (1970) (aliens afflicted with dangerous contagious disease); § 212 (a)(11), 8 U.S.C. § 1182(a)(11) (1970) (polygamists); § 212(a)(12) 8 U.S.C. § 1182(a) (12) (1970) (prostitutes); § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970) (procuring or use of fraudulent visa).

[66] For extensive discussion of the requirement, see Gordon & Rosenfield § 3.5.

HeinOnline -- 1 J. Legal Stud. 368 1972

initially adjudicated separately from the section 245 proceeding. Unless an adjudicator chooses to look behind an adjudicated visa petition, his task on this issue is essentially ministerial—to determine whether the applicant seeks classification on one of the grounds requiring a visa petition, and if so whether a petition has been filed and approved. The adjudicator's task is also largely mechanical in determining whether, where required,[67] a certification has been obtained from the Secretary of Labor that no adverse effects to American labor will result from the alien's admission. Whether an alien comes within any of the "precertified" occupations[68] is an issue handled as part of the separate visa-petition process, except in nonpreference cases, where examiners make this determination.[69] The examiner must determine whether a nonpreference alien is qualified in the occupation for which a certification is issued, and must review the validity of certifications in all Third, Sixth and nonpreference cases. These determinations involve considerable "discretion," but standards have been established which often resolve and always guide the examiner's decisions.[70]

Some statutory grounds of inadmissibility are exceedingly vague, including the provisions making inadmissible aliens "who have had one or more attacks of insanity," who are afflicted with "psychopathic personality," who have committed crimes of moral turpitude, and who seek to enter the United States "to engage in any immoral sexual act."[71] Others expressly or by clear implication confer discretionary authority to decide whether aliens fall within a statutory class of inadmissibility[72] and whether aliens who do fall within some inadmissible class should be granted a waiver.[73] In most instances,

[67] The requirement applies only to third and sixth preference and nonpreference immigrants, and to some Western Hemisphere special immigrants. *Id.* § 2.20.

[68] The Labor Department has issued a schedule that sometimes obviates the need for individual certifications. "Schedule A" is a list of occupations which are in short supply in the United States, any member of which is automatically entitled to a certification. See generally Gordon & Rosenfield § 3.6.

[69] Immigrant Inspectors Handbook 5-1 to 5-23; see Operations Instructions § 245.2(c) (Oct. 1, 1969).

[70] See 29 C.F.R. § 60.5 (1971); Gordon & Rosenfield §§ 2.27(d) & (g); PLI, Labor Aspects of Immigration Law (Barbara Flicker & Nicholas Vazzana ed. 1969).

[71] I. & N. Act § 212(a)(3), (4), (9), (13), 8 U.S.C. § 1182(a), (3), (4), (9), (13) (1970).

[72] Examples of this type of discretionary authority are the provisions which call upon consular or immigration officers to determine whether certain physical defects, though not serious enough to warrant inadmissibility on various specified medical grounds, are of "such a nature" that they "may affect the ability of the alien to earn a living," I. & N. Act, § 212(a)(7), 8 U.S.C. § 1182(a)(7) (1970), and whether aliens "are likely at any time to become public charges," I. & N. Act, § 212(a)(15), § 1182(a)(15) (1970).

[73] Some examples are the provisions enabling previously excluded or deported aliens to gain admissibility if "the Attorney General has consented to their reapplying for admission," I. & N. Act, § 212(a)(16) & (17), 8 U.S.C. §§ 1182(a)(16) & (17) (1970); authorizing the admission of "the spouse, parent, or child" of a citizen or permanent resident, even

HeinOnline -- 1 J. Legal Stud. 369 1972

however, Congress, the Service, and the courts have combined to give reasonably specific content to the vague statutory pronouncements and to provisions incorporating, explicitly or implicitly, the exercise of discretion. Furthermore, these grounds were seldom invoked in the cases we studied. Those grounds of inadmissibility that were most frequently relied on by examiners in our random sample—prior criminal activity,[74] subversive activities and affiliations,[75] and exchange-visitor provisions[76]—have received considerable definition.

---

though otherwise inadmissible because of fraud, misrepresentation or perjury in securing entry to the United States, where the Attorney General "in his discretion" consents to application for a visa and admission, I & N Act, § 212(i), 8 U.S.C. § 1182(i) (1970); and allowing temporary admission on parole of any alien by the Attorney General "in his discretion," for "emergency or for reasons deemed strictly in the public interest . . . ," I. & N. Act, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970).

[74] Two statutory provisions relate to criminal activity. § 212(a)(10) is reasonably precise, and has raised few problems in application; it bars aliens who have been convicted of two or more "offenses," "regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were five years or more." I. & N. Act, § 212(a)(10), 8 U.S.C. § 1182(a)(10) (1970); see Gordon & Rosenfield § 4.12e. § 212(a)(9), on the other hand, is extremely vague; it makes inadmissible aliens who have been "convicted" of, or "admit" committing, a "crime" involving "moral turpitude." 8 U.S.C. § 1182(a)(9) (1970). Despite the vagueness of this provision, significant clarity has been introduced, through regulations and adjudication, as to the meaning of "crime," Gordon & Rosenfield § 4.12c, "convicted," *id.*, § 4.12d, "admit," *id.*, § 2.43c(1)-(4), and as to its general scope, *id.*, § 2.43c. Obviously, great difficulty is presented by the phrase "moral turpitude." But the phrase occurs elsewhere in many laws, see Jordan v. De George, 341 U.S. 223, 227 (1951), and has received persistent attention from agencies, courts and scholars. While no satisfactory abstract definition of the term seems feasible, the sheer mass of cases dealing with literally dozens of specific issues has added considerable certainty in the pragmatic task of deciding cases. See, *e.g.*, the extensive discussion of specific crimes, classified into various categories, in Gordon & Rosenfield § 4.14. The statutory scheme includes a variety of exemptions and waivers. Some are surprisingly well defined. The ill-defined exceptions are applicable in very few cases. See generally *id.*, § 2.43d.

[75] Three provisions make "subversive" aliens inadmissible. Two of these, I. & N. Act, § 212(a)(27) & (29), 8 U.S.C. § 1182(a)(27) & (29) (1970), lack significance for our purposes, since intense criticism, and perhaps the danger of judicial invalidation, has deterred their invocation to deny § 245 relief. The third provision, invoked with some regularity in § 245 cases, makes inadmissible aliens who are, or at any time have been members of certain subversive organizations, particularly of the Communist Party. I. & N. Act, § 212(a)(28), 8 U.S.C. § 1182(a)(28) (1970). Though vague and threatening on its face, this provision has been narrowed through statutory limitations and judicial interpretation. Gordon & Rosenfield §§ 2.47c & 4.11. Broad discretion is conferred on the Attorney General to exempt certain otherwise admissible aliens from the statute's operation. I. & N. Act, § 212(a)(28)(I), 8 U.S.C. § 1182(a)(28)(I) (1970). But this discretionary power is limited in its potential applicability by the fairly detailed conditions of its exercise, which have received some administrative definition, *e.g.*, 22 C.F.R. § 42.91(a)(28)(vii) (1972), and the likelihood of considered (albeit cautious) decision making is enhanced by the statute's requirement that the Attorney General "promptly make a detailed report to the Congress" in each case where the waiver provision is applied.

[76] 8 U.S.C. § 1182(e) (1970), makes any "exchange visitor" inadmissible until the alien has spent at least two years in the country of his nationality or, until recently, another

HeinOnline -- 1 J. Legal Stud. 370 1972

Visa number unavailable. By far the most frequent basis for denying applications is unavailability of an immigrant visa number. Adjudicating this issue usually is simple. The examiner consults the current Department of State Visa Office Bulletin on Availability of Immigrant Visa Numbers, which describes whether visa numbers are currently available for all categories of aliens and estimates when numbers will become available. The statute says a number must be "immediately available" to an applicant "at the time his application is approved."[77] The regulations define this term to mean that an application will be accepted for processing "if the applicant has a priority date on the waiting list which is not more than 90 days later than shown in the [visa] Bulletin or the Bulletin shows that numbers for visa applicants in his category are current."[78] Other provisions settle most conceivable doubts concerning this ground.[79]

b. *Discretionary grounds.* Examination of 135 denials based on discretion revealed six categories of discretionary ground: (1) mala fide nonimmigrant at time of entry; (2) violation of nonimmigrant status after entry; (3) bad faith dealings with the government; (4) lack of "good moral character"; (5) foreign relations needs; and (6) desire to keep the alien's family unit together. Though analytically distinct, these grounds frequently overlap when applied. For example, an alien who, at the time he applies for a nonimmigrant visa or nonimmigrant entry, intends to remain in the United States permanently or to seek unauthorized employment is considered a mala

---

country approved by the Secretary of State. This statutory proscription is clear in that there is no doubt to whom it applies. But considerable discretion is created by the provision which states that the Attorney General, in certain circumstances, "may waive" the two-year requirement when he finds a waiver to be "in the public interest." Before the Attorney General may act, however, there must be a favorable recommendation by the Secretary of State at the request of an interested government agency, or of the Commissioner of INS "after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child" where such spouse or child is a citizen or lawfully resident alien. See Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970). Some legislative history exists, moreover, to guide the Service in exercising this waiver power, and procedures and standards have been established for handling requests for waivers at the recommendation of government agencies, which in any event occur infrequently. See Gordon & Rosenfield 6-50 to 6-53. Waivers on hardship grounds are more frequent. Some guidelines exist, both as to what factors are considered in determining exceptional hardship and as to the factors which in themselves will not usually be found to satisfy the statutory prerequisite. *Id.* at 6-53 to 6-56. But the scope of discretion is great, and apparently fluctuates according to congressional desire.

[77] 8 U.S.C. § 1255 (1970).

[78] 8 C.F.R. § 245.1(g) (1971).

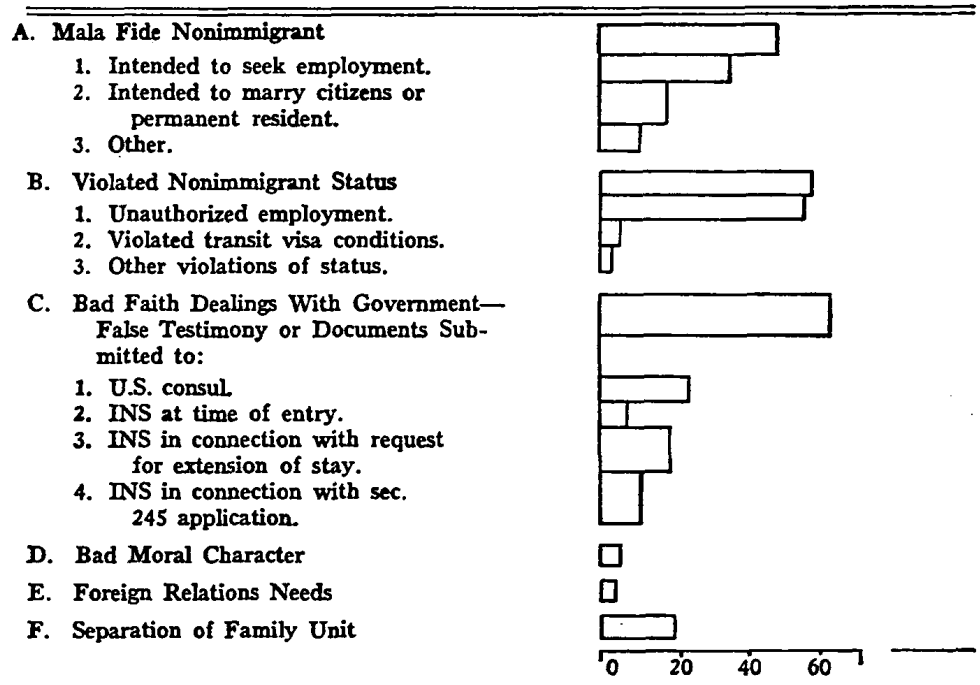
[79] The regulation clearly defines "priority date," and states that no application shall be approved "until an immigrant visa number has been allocated by the Department of State." When a visa number becomes unavailable after an application is accepted for filing and processing, the case is "held in abeyance pending the allocation of a visa number by the Visa Office." Operations Instructions § 245.4(a) & (b) (May 20, 1970). Adjudication can become complex when 8 U.S.C. § 1152 (1970) is involved.

HeinOnline -- 1 J. Legal Stud. 371 1972

fide nonimmigrant. If he actually works, after entry, without INS permission, he will have violated his nonimmigrant status. To get here he may have lied to the consulate in his application for a nonimmigrant visa concerning his intention to work or remain in the United States. To stay here he may have lied to INS in an application to extend his visit concerning his employment status. Such overlap does not prevent analysis of independent grounds, however, since each ground is regarded and used as an independently valid basis for the adverse exercise of discretion.

The proportion in which each of these categories of discretionary grounds was utilized by examiners in the cases we studied is shown in Table 3. The most frequently cited category, that of fraud or bad faith, was present in 65 per

TABLE 3
DISCRETIONARY GROUNDS INVOKED TO DENY SECTION 245 RELIEF*



(Base: 135 cases)

* Percentages sum to more than 100 per cent due to reliance on multiple grounds.

cent of the discretionary denials. False evidence was submitted to the consul in 28 per cent of the cases, and to INS in extension-of-stay applications in 22 per cent. Aliens were found to have violated their nonimmigrant status in 53 per cent of the discretionary denials, almost all of which (48 per cent) consisted of findings of unauthorized employment. The mala fide nonimmi-

HeinOnline -- 1 J. Legal Stud. 372 1972

grant ground was invoked in 40 per cent of the cases; intent to seek employment at time of entry was relied on in 15 per cent of the cases; foreign relations needs in four per cent; and bad moral character in four per cent.

Identification of the categories of discretionary grounds was possible through several Board of Immigration Appeals decisions, and through many more unpublished denial opinions made available under the Freedom of Information Act. But here any significant guidance ends. There are few guides to adjudicators in applying these grounds, and virtually no limit on their authority to decide *any* application one way or the other. The Attorney General, through the Service, has promulgated virtually no regulations; such standards as have been formulated are almost invariably nonpublic, and in any event leave wide authority in the hands of adjudicators. During the last 19 years of activity under section 245, the Board of Immigration Appeals has published about 35 decisions concerning the exercise of discretion which the Service insists provide adequate guidance. But this meager collection deals with only a minute proportion of the issues relating to discretion under section 245; contains few opinions of general significance; includes several decisions expressly or implicitly inconsistent with each other; and in fact reflects a position on the meaning of discretion that is antithetical to a meaningful system of precedent. The courts have adopted a hands-off policy, despite the availability of established principles[80] to perform their legally mandated supervisory role. The overall result has been what Judge Abraham Freedman called "a wide-open system."[81]

Burden of proof. Relying on the notion that adjustment to permanent resident is a "privilege" rather than a "right," the Service initially adopted the rule that "adjustment of status under section 245 will be denied in the absence of particular equities."[82] In *Matter of Ortiz-Prieto* the BIA stated that the "extraordinary relief" provided for in section 245 can be granted only in meritorious cases.[83] The courts upheld this position, through the notion that one "who meets the objective prerequisites is merely *eligible* for adjustment of status . . . [and] in no way *entitled* to such relief."[84] The problem created by this rule for aliens, and adjudicators, was the lack of any guidance as to when relief should be granted.

The burden-of-proof ground was not invoked as an independent basis for denying relief in any of the cases we studied, although it was mentioned as

[80] See, *e.g.*, Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.).

[81] Ameeriar v. INS, 438 F.2d 1028, 1042 (3d Cir. 1971) (*en banc*) (dissenting opinion).

[82] Matter of Fuentes-Blanco, Int. Dec. No. 1938, at 4, — I. & N. Dec. — (1968), citing Matter of Leger, 11 I. & N. Dec. 796 (1966), and Matter of Ramirez, 12 I. & N. Dec. 78 (1967).

[83] 11 I. & N. Dec. 317 (1965).

[84] Jarecha v. INS, 417 F.2d 220, 223 (5th Cir. 1969), and cases cited therein.

HeinOnline -- 1 J. Legal Stud. 373 1972

a background factor in many of them. Examiners probably realized how unfair it would be to deny relief for essentially no reason. The BIA, in *Matter of Arai*, has recently overruled its precedent and held that, despite the absence of "equities," if the application presents no "adverse factors, adjustment will ordinarily be granted. . . ."[85]

Mala fide nonimmigrant. The notion that change-of-status relief should depend on the good faith of the applicant's entry as a nonimmigrant originated with the 1952 Act. The Attorney General was to exercise his discretion to grant relief "under such regulations as he may prescribe to *insure* the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants. . . ."[86] Therefore, the ground was a statutory prerequisite to the favorable exercise of discretion. In 1960, Congress deleted the requirement in order to "broaden the existing procedure for the adjustment of the status of a nonimmigrant . . . to include all aliens (other than crewmen) who have been inspected at the time of their entry . . . or who have been paroled into the United States."[87]

The Service, however, has adopted the position (in nonpublic Operating Instructions) that although the requirement has been deleted from the statute, "admission as a mala fide nonimmigrant shall be considered with other factors in determining whether favorable discretion will be exercised."[88] Both the BIA and the courts have upheld this construction, reasoning that Congress in 1960 eliminated the requirement as a statutory prerequisite but did not foreclose consideration of the factor to prevent aliens from disregarding immigration laws.[89] The position makes clear, at least to a knowledgeable alien, that the circumstances of his entry may be a relevant factor in section 245 cases. It does little, however, to clarify the meaning of a "bad faith" entry, and does virtually nothing to guide or limit the adjudicator's power to give or not give such an entry controlling significance.

The principal controversy surrounding the meaning of the mala fide nonimmigrant ground is whether it was intended to protect the consular process, or whether it was meant only to prevent aliens from evading the quota or numerical-limitations system. Under the former view, an alien who obtains a nonimmigrant visa from a consular officer intending to become a permanent resident may be deemed unworthy of change of status relief even though he was eligible for the immediate issuance of an immigrant visa at the time he obtained the nonimmigrant visa. Such an alien has evaded the consular

[85] Int. Dec. No. 2027, at 3, — I. & N. Dec. — (1970).

[86] I. & N. Act, § 245, 66 Stat. 217.

[87] S. Rep. No. 1651, 86th Cong., 2d Sess, at 3 (1960).

[88] Operations Instructions § 245.1(a) (April 8, 1970).

[89] *E.g.*, Castillo v. INS, 350 F.2d 1, 3-4 (9th Cir. 1965).

HeinOnline -- 1 J. Legal Stud. 374 1972

procedure for becoming an immigrant but he has not evaded the quota system since he was eligible for an immigrant visa number. Under the latter view, the hypothetical alien could be denied relief on this ground only if he secured a nonimmigrant visa in bad faith because he was ineligible for an immigrant visa number.

In *Matter of Barrios*,[90] decided soon after the 1960 deletion of the bona fide nonimmigrant requirement, a Special Inquiry Officer denied relief to a 22-year old Bolivian after finding that he had entered the United States with a preconceived plan to remain permanently. The record contained ample evidence to support the SIO's finding, including admissions by the alien, and no equities were present, since Barrios was young, had no ties to the United States, and had been here only a short time. Despite these facts, the Board found that "discretionary relief is warranted. . . ."[91] The Board gave several reasons for its decision, and insisted that its judgment "turns upon the facts of this particular case."[92] The result seems most reasonably explained, however, by the fact that Barrios, a native of Bolivia, at the time a nonquota country, may have evaded the consular process but had not attempted to circumvent any quota restriction.[93] This reading is strongly supported by the Board's decision in *Matter of Sauer*,[94] a companion case to *Barrios*. Sauer, too, had evaded the consular process. But he had evaded the quota restrictions as well. Despite strong equities in his favor, the Board upheld the SIO's discretionary denial of relief because the alien had "intended to circumvent the quota restrictions when he falsely represented his immigration status to the Consul at Paris."[95]

The *Barrios* position could have both guided and limited examiner discretion. But in a series of decisions the BIA undermined *Barrios* by allowing

[90] 10 I. & N. Dec. 172 (1963).

[91] *Id.* at 176.

[92] *Id.* at 173.

[93] Barrios had been unable to obtain an immigrant visa because he had lacked an affidavit of support. The Board also relied on a notion, developed prior to 1960 by one federal court, to the effect that a nonimmigrant alien could intend to become a permanent resident at entry, without becoming ineligible for change of status to permanent resident, so long as the alien intended to attempt to achieve his aim through lawful means. See Brownell v. Gutnayer, 212 F.2d 462 (D.C. Cir. 1954); Brownell v. Carija, 254 F.2d 78 (D.C. Cir. 1957). But it refused to adopt the principle as a rule, and has never done so.

[94] 10 I. & N. Dec. 177 (1963).

[95] *Id.* at 177. Sauer had registered for an immigration visa under the Israeli quota in 1957. His parents received visas and entered the United States in 1958 and 1959. Sauer than applied at Tel Aviv for a nonimmigrant visa, which was denied on the ground that he intended to immigrate. He then went to Paris and secured a nonimmigrant visa, after falsely representing that he had never applied for an immigrant visa and that his parents were then residing in Israel. Within a few days of entry he had married an American resident, who filed a third preference visa petition in his behalf.

HeinOnline -- 1 J. Legal Stud. 375 1972

adjudicators to deny relief on the mala fide nonimmigrant ground despite the absence of any evidence of intent to evade quota restrictions.[96] Then in *Matter of Rubio-Vargas*, the Board reversed an SIO's *grant* of relief to an alien who entered as a visitor with intent to apply for permanent residence so he could stay with his American wife.[97] The SIO pointed out that the alien was eligible for admission as an immigrant and that to send him back to Peru would be an unnecessary waste of time and money. But the Board, now explicitly emphasizing the importance of protecting consular posts from evasion, stated that "the proper procedures followed in such posts should not be circumvented by aliens abroad who desire to accelerate their immigration to this country. Any short-cutting of these functions should be avoided."[98] The confusion engendered by these decisions is best illustrated in the Gordon and Rosenfield treatise, where they are all cited as equally authoritative instances of the proper exercise of discretion.[99]

The Service does provide, in its nonpublic Operations Instructions, that "when the evidence establishes that the alien obtained his nonimmigrant visa to evade the normal immigrant visa process and there are no substantial equities present in his case, the application should be denied in the exercise of discretion."[100] Furthermore, some "equities" have been identified, largely through BIA decisions, including marriage to a citizen, old age, close ties to an American citizen or permanent resident, and hardship if departure is required.[101] Finally, some indications are given adjudicators of the type of evidence that might indicate bad faith entry, including marriage or employment soon after arrival.[102]

These efforts appear far more meaningful than they are. First, what are

[96] Matter of Diaz-Villamil, 10 I. & N. Dec. 494 (1964) (alien's evasive and contradictory testimony failed to establish he did not intend to circumvent normal immigrant visa issuing process); Matter of Garcia-Castillo, 10 I. & N. Dec. 516 (1964) (alien entered fraudulently for medical treatment but secured employment within one week of entry); Matter of Azmitia, 10 I. & N. Dec. 774, 775 (1964) (alien in "completely frank" statement said that, while he told the consul abroad that he wanted only to visit the United States, his hope was to become an American after he arrived). In the first and second of these cases, *Barrios* was distinguished on the ground that Barrios' claim that at the time he secured his nonimmigrant visa he "had every intention of complying with the terms of his temporary admission" was uncontroverted. In the third case, *Barrios* is not mentioned.

[97] 11 I. & N. Dec. 167 (1965).

[98] *Id.* at 169.

[99] Gordon & Rosenfield § 7.7d, at 7-65.

[100] Operations Instructions § 245.3(b) (March 25, 1970).

[101] See, *e.g.*, Matter of Tonga, 11 I. & N. Dec. 621 (1966) (several "equities" identified: native born citizen child, presence of wife and other child; employment at good salary; citizen brother); Matter of Woo, 10 I. & N. Dec. 347 (1963) (fraud occurred at age 12; long residence in U.S.; excellent character and military record in U.S. Army).

[102] *E.g.*, Chen v. Foley, 385 F.2d 929 (6th Cir. 1967) (employed soon after arrival; relief denied partly for this reason).

HeinOnline -- 1 J. Legal Stud. 376 1972

"substantial" equities? The Service does not even try to say. Instead it states (once again in a nonpublic source): "Substantial equities are considered to exist in a case if the facts are such that the alien would be granted voluntary departure until he is invited to appear at an American consulate to apply for an immigrant visa. . . ."[103] The normal sort of voluntary departure is almost invariably offered to aliens *denied* section 245 relief, so that process certainly provides no guidance. The special sort of voluntary departure referred to in the instruction, which amounts to a suspension of enforcement of deportation until something like preexamination becomes available, is hardly a reassuring guide. The circumstances in which such relief must or should be afforded or denied are as unclear as those in which change of status must or should be granted or denied.[104] Second, while the Service guideline states that an examiner *should* deny relief to a mala fide nonimmigrant in the absence of "substantial equities," he is not told that a favorable exercise of discretion in such circumstances would be improper or an abuse of power. And the guideline need not be read even to imply that an examiner should *grant* relief to a mala fide nonimmigrant whose case does present "substantial equities."

Violation of nonimmigrant status. Nonimmigrant aliens who fail to maintain the status in which they entered the United States, or to comply with the conditions of their status, are deportable.[105] Adjudicating deportability on these grounds is relatively simple.[106]

Under the 1952 statute, an alien was eligible for relief only if he entered the United States as a bona fide nonimmigrant and "is continuing to maintain that status. . . ."[107] Congress eliminated this requirement by amendment in 1958 in order to liberalize section 245 to avoid private bills and to make preexamination unnecessary, with the result that violation of nonimmigrant status no longer precluded relief under section 245. The Service adopted the same position with respect to repeal of the violation-of-status requirement that it had taken in connection with repeal of the mala-fide-nonimmigrant ground. Examiners have continued to weigh evidence of violations of status in exercising discretion. And the Service gives even less guidance to adjudicators in deciding whether to apply this ground than it provides in connection with the bona fide nonimmigrant requirement. Examiners generally weigh the "equities" here as well, but nothing tells them what to weigh or how heavily. Finally, in exercising discretion adversely an examiner may rely on evidence of a violation which may be insufficient to warrant a finding of

[103] Operations Instructions § 245.3(b) (March 25, 1970).

[104] See *infra*, text accompanying notes 169-183.

[105] I. & N. Act §§ 241(a)(2), (9), 8 U.S.C. §§ 1252(a)(2), (9) (1970).

[106] See generally Gordon & Rosenfield § 4.9.

[107] I. & N. Act, § 245(a), 66 Stat. 217.

HeinOnline -- 1 J. Legal Stud. 377 1972

deportability. This result drastically reduces the utility and significance of guidelines and standards under the statutory ground.

Misrepresentation and bad moral character. The most frequent basis for discretionary denials is bad faith dealings with the government, invariably consisting of misrepresentations to secure entry to, or remain in, the United States. There are statutory provisions relating to misrepresentations that have been reasonably well defined. Thus, aliens are deportable if they were excludable at entry,[108] and one class of excludable or inadmissible aliens includes anyone who seeks to procure or procures "a visa or other documentation, or seeks to enter the United States, by fraud, or by wilfully representing a material fact."[109] Regulations, scholars and hundreds of cases have given particularized meaning to this provision, including the limitations of wilfulness and materiality.[110] Hardship waivers increase somewhat the difficulty of decision making, but the waiver provisions are narrow in scope and have received considerable definition.[111]

These standards could provide significant guidance to adjudicators under section 245. Instead, adjudicators freely rely on discretion in both these types of cases. This creates great uncertainty, obvious in those cases where no statutory violation has occurred. Less obvious, but also important, are those cases in which the adjudicator could rely on the statutory violation but instead denies as a matter of discretion. Aliens denied relief as a matter of discretion are apparently much better off when they apply for an immigrant visa overseas than if they were found deportable for misrepresentations. Adjudicators are therefore giving aliens a substantial benefit by relying on discretion instead of an available statutory ground, and doing so without standards to guide or limit their decisions.

Another statutory provision relating to misrepresentations is found in the "good moral character" requirement of section 101(f)(6).[112] The same statute contains provisions relating to types of conduct relied on by adjudicators in adversely exercising discretion in section 245 cases, including one that deems a person lacking in good moral character if, during the relevant period, he

[108] I. & N. Act, § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970).

[109] I. & N. Act, § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970).

[110] See generally Gordon & Rosenfield § 4.7c. Many cases have clarified, for example, the relative significance of common types of misrepresentations. *Id.*, § 4.7c(3).

[111] Only an alien who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence, and who is otherwise admissible, may qualify for the statutory hardship waivers for misrepresentations. Such an alien who is within the United States is automatically exempt from deportation. 8 U.S.C. § 1251(f) (1970). If such an alien is seeking to enter, he may overcome excludability if the Attorney General consents. 8 U.S.C. § 1182(i) (1970). See Gordon & Rosenfield § 4.7c(1) at 4-39 to 4-42.

[112] I. & N. Act, § 101(f)(6), 8 U.S.C. § 1101(f)(6) (1970).

HeinOnline -- 1 J. Legal Stud. 378 1972

or she "has committed adultery."[113] Apart from the presence of a vague but unused proviso,[114] the provisions of section 101(f) are either quite definite because they incorporate grounds of inadmissibility by reference, or have received substantial definition through litigation.[115] Supervision by the BIA and courts has occurred because the "good moral character" requirement is a statutory prerequisite to discretionary relief under provisions other than section 245. When an adjudicator denies suspension of deportation for lack of good moral character, courts may term his judgment "discretionary,"[116] but will often review the merits of such judgments by a standard discernibly more exacting than "arbitrary or capricious," under the recognized principle that "where discretionary relief is denied on the ground of ineligibility, the ruling is subject to full court review. . . ."[117]

The usefulness of standards developed under section 101(f) has been undermined, however, because the courts have allowed INS to deny relief to aliens on the basis of discretion even where the acts involved relate to statutory categories of ineligibility, and even where the acts are assumed to be insufficiently egregious to justify a finding of ineligibility for lack of good moral character. In the important case of *Wong Wing Hang* v. *INS*,[118] for example, an applicant for suspension of deportation was found by INS to possess good moral character despite what Judge Friendly termed "prevarication and concealment" to the Service during the relevant period. The court sustained denial of relief on the ground that INS could, in its discretion, require an alien "who has gained entry by a false claim of United States citizenship and has cooperated with others in similar efforts . . . [to] win their favor only by a spotless record in later dealings with them. . . ."[119] The court's rationale leaves INS free, subject only to review on the basis of the "arbitrary or capricious" standard, to give controlling significance in exercising discretion to any set of facts relating to arguably undesirable but concededly unproscribed conduct.

[113] I. & N. Act, § 101(f)(2), 8 U.S.C. § 1101(f)(2) (1970). Other categories of persons lacking good moral character under the statute include habitual drunkards, prostitutes, and persons who have been convicted of serious crimes.

[114] The statute provides that "the fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." I. & N. Act, § 101(f), 8 U.S.C. § 1101(f) (1970).

[115] For a thorough treatment of all the categories in § 101(f), including false testimony and adultery, see Comment, 61 Mich L. Rev. 352 (1962). See also Gordon & Rosenfield § 7.9d(3), at 7-99 to 7-102; Talavera v. Pederson, 334 F.2d 52 (6th Cir. 1964).

[116] *E.g.*, Fugiani v. Barber, 261 F.2d 709, 712 (9th Cir. 1958); Hiroichi v. Brownell, 235 F.2d 536 (D.C. Cir. 1956); Bruno v. Sweet, 235 F.2d 801 (8th Cir. 1956).

[117] Silva v. Carter, 326 F.2d 315, 320 (9th Cir. 1963).

[118] 360 F.2d 715 (2d Cir. 1966).

[119] *Id.* at 719.

HeinOnline -- 1 J. Legal Stud. 379 1972

Foreign relations needs. Foreign countries occasionally request the United States to deny applicants permanent residence, usually because the alien owes the foreign government money. Often the funds owed were given for study in the United States, although sometimes the alien may have stolen the money. Unless the alien involved entered under an exchange program, the government has no specific statutory ground upon which to deny permanent residence. Consequently, the government utilizes its discretionary power to deny relief in many such cases. The BIA has held that INS may legally rely on foreign relations needs in exercising discretion, even with respect to students not part of any exchange program.[120] A handful of BIA decisions have developed some rather vague standards to guide or limit decisions on this ground.[121] But many issues are completely unsettled.[122] Furthermore, the INS regulations on this subject do little to guide the judgment of adjudicators. The basic rule is that relief shall not be denied on this ground as a matter of discretion "unless there is in the record a firm, unequivocal statement" from the State Department that granting relief "would have an adverse effect upon the foreign relations between the United States and the country of the applicant's nationality. . . ."[123] A statement, however firm and unequivocal, is not a reason. And adjudicators are not called upon to insist that a reason be given. However, this lack of standards causes INS adjudicators relatively little difficulty. In the cases we examined, they relied on this ground only when the State Department recommended it, and apparently always accept a "firm, unequivocal" recommendation. Broad discretion exists but it seems to be primarily exercised by the State Department rather than INS.

[120] In Matter of Tayeb, 12 I. & N. Dec. 739, 742 (1968), the Board rejected as "wholly irrelevant" the argument that discretion should never be used to deny relief to aliens here on regular student visas, on the basis of foreign relations needs, since Congress has indicated that, unlike exchange students, aliens on regular student visas need not fulfill any foreign residence requirement or obtain waivers.

[121] Matter of Wolfe, 10 I. & N. Dec. 651 (1964), for example, involved an alien student whose education was financed by the Iranian Government, in exchange for which she signed a commitment to return and work in Iran for the same period of time she would spend in the United States. The State Department recommended that the alien be required to return to Iran or arrange with the Iranian Government for repayment of "at least some" of the $10,380 invested in her education. The SIO's denial of relief on this basis was upheld by the Board, which stated that favorable action could be considered when the applicant made "satisfactory arrangements for repayment *and* obtains a release from her commitment. . . ." *Id.* at 652 (emphasis added). Compare Matter of Youssef, 11 I. & N. Dec. 163 (1965), and Matter of Tayeb, 12 I. & N. Dec. 739, 740 (1968).

[122] For example, in Matter of A., 9 I. & N. Dec. 249 (1960), the BIA upheld denial of relief on this ground where a former U.A.R. official had misappropriated funds of his native country. What should the Government do if an alien denies his foreign country's claim that he misappropriated funds? Accept the foreign nation's allegation? Hold a hearing on the issue? Even more difficult problems are raised where a foreign government seeks to reobtain physical custody of an alien for political reasons.

[123] Immigrant Inspectors Handbook 10-41.1.

HeinOnline -- 1 J. Legal Stud. 380 1972

Separation of family unit. This is perhaps the least definite, and certainly the most questionable, of all discretionary grounds invoked by examiners to deny adjustment. Our immigration laws strongly favor uniting Americans with their families.[124] Further, it is clear that, in exercising discretion, an adjudicator may give favorable weight to the applicant's close family ties with permanent residents or citizens of the United States.[125] Conversely, the lack of family in the United States may at least arguably be a negative factor in connection with the exercise of discretion, particularly when the alien was assumed to have the burden of proving himself worthy of relief.[126] None of the standards or rules developed, however, has any relationship to the discretionary ground exercised by examiners. In the situations described above, aliens who are seeking to become Americans are *helped* if they have close family ties in America. What the Service does under the separation-of-family unit ground, however, is to *deny* a qualified alien relief for which he is eligible when to grant relief would separate the alien from members of his family unit abroad.

The separation-of-family-unit ground is typically used in two situations—where the alien applicant applies alone but has close family ties abroad, and where the applicant, though eligible himself, has applied along with members of his family who are found to be ineligible. The potential scope of the ground is enormous, since almost every alien who applies for permanent residence has close family ties abroad. Difficult questions of application abound. Must the family be viable? Must the alien be abandoning the family? How should cases be decided when the alien has close ties both here and abroad? Is it relevant to inquire whether the family abroad would be better or worse off if the alien were denied relief? What if the applicant proves that he wants to be united with his family and that he is working and saving for the purpose?

Several decisions of the BIA and courts provide some guidance—at least in making clear that the authority of examiners under this ground is extremely broad. Thus, it is settled that the ground may legitimately be invoked in exercising discretion.[127] Other cases allow adjudicators to consider

[124] Scalzo v. Hurney, 225 F. Supp. 560, 561 (E.D. Pa. 1963), *aff'd*, 338 F.2d 339 (3d Cir. 1964).

[125] *E.g.*, Matter of Huey, Int. Dec. No. 1903, — I. & N. Dec. — (1968); see Matter of M., 2 I. & N. Dec. 751 (1946) (suspension of deportation).

[126] *E.g.*, Santos v. INS, 375 F.2d 262 (9th Cir. 1967); see United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957) (suspension of deportation).

[127] Jarech v. INS, 417 F.2d 220, 225 (5th Cir. 1969) (wife in India); Hun Chak Sun v. INS, 415 F.2d 791 (9th Cir. 1969) (wife and two children in Taiwan) (*semble*); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967) (wife and eight children in Phillipines); Matter of Ortiz-Prieto, 11 I. & N. Dec. 317 (1965) (wife and three children in Chile); Matter of Leger, 11 I. & N. Dec. 796 (1966) (wife and three children in Tonga); Matter of Ramirez, 12 I. & N. Dec. 78 (1967) (wife and three children in El Salvador).

HeinOnline -- 1 J. Legal Stud. 381 1972

abandonment and inability of the alien to pay to bring his family to the United States, and to ignore such factors as whether the family is salvageable and whether the alien or the family abroad will be better or worse off if relief is denied.[128] In none of these cases is it suggested, however, that the adjudicator *must* weigh factors he is permitted to weigh or disregard factors he is permitted to ignore. The sole instance in which the Board has in any way limited discretion under this ground is *Matter of Mandrinan*, where the applicant, a Philippine architect, was found both eligible and entitled to section 245 relief, except for the fact that his wife, an exchange student who simultaneously applied, was ineligible because she had failed to satisfy, or obtain a waiver of, the two-year foreign residence requirement. The SIO denied the husband relief to avoid separation of the family unit. The Board reversed, stating that, on the facts of this particular case, if husband and wife chose to live apart "it is their concern."[129] This is, however, an inconsequential limitation on the power of adjudicators under a ground that is potentially applicable to many applicants and that was in fact applied in 15 per cent of the discretionary denials we studied.

2. *Standards and Consistency*

The foregoing analysis demonstrates that, in general, statutory prerequisites are more clearly defined than grounds for discretionary denial. Moreover, the scanty definition of discretionary grounds that does exist consists almost entirely of identifying factors relevant to decision making. Our inquiry here is whether the relative absence of standards correlates with inconsistent decision making on the merits of applications. Later, we will examine the possible effects of broad discretion on the process of administrative review and enforcement. We choose inconsistency as our standard of reference because, with all its difficulty, it is at least a standard: most persons will agree that justice means, at the very least, equal treatment by the government for those equally situated.

Interviews cannot be relied on heavily to prove inconsistency, but our overall impression from considerable exposure to examiners was that they applied

[128] Matter of Zavala, 10 I. & N. Dec. 628 (1963), for example, involved an alien widow with five children in Honduras, who were being cared for by their parental grandparents. The Board affirmed denial of relief, stating that to admit her to residency would be to "sanction abandonment of her children." *Id.* at 629. The Board did not inquire whether the alien parent would be an asset to her children. Indeed, Mrs. Zavala had been arrested for theft, and seemed irresponsible. In Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), the alien was denied relief partly because of his close family ties abroad, even though he had illegally remarried and was found to have shown no concern for his family. In Lihati Lui Unga v. INS, 404 F.2d 48, 49 (9th Cir. 1968), the applicant, a native of Tonga, had a wife and seven children, apparently was willing to unite his family in America, but was denied relief on the ground that he lacked the funds "soon" to do so.

[129] The case was one of those we examined, and is presently unreported.

HeinOnline -- 1 J. Legal Stud. 382 1972

different standards in exercising discretion. As to the mala fide nonimmigrant requirement, for example, one officer's view, similar to official policy, was to ignore violations when strong equities were present. Another examiner stated, however, that he applied the ground only when a blatant circumvention of the visa process occurred. A supervisor, one of whose functions is to help achieve uniformity, did not know in 1969 that the mala fide nonimmigrant requirement had been deleted as a statutory prerequisite in 1960, and therefore apparently regarded its application as mandatory. Sometimes the alien's "desirability" was treated as an "equity" in his or her favor, and desirability included the notion that the alien was an "asset" as an engineer, or "needed" as a nurse, or "decent" as a father who was supporting his family in the old country. Furthermore, adjudicators seemed to regard discretionary grounds as devices to deny aliens relief where they seemed undesirable but could not be proved inadmissible. One stated that examiners ignored violations of status unless "we were looking to deny it, and we couldn't exactly put our finger on why." An example of this sort of action was a case in which the adjudicator sent a letter to an applicant denying relief on the ground that the applicant had been admitted as a visitor, and "since you now intend to remain permanently in the United States, contrary to the purpose for which you were admitted, your application is denied as a matter of discretion."

Finally, and perhaps most significantly, adjudicators felt that Service policies actually allowed or fostered inconsistency. First, examiners stated that the Service has asked them to apply discretion differently at different periods; apparently INS had authorized much stricter application of discretionary grounds in previous years than it now desires. One suggested that discretionary standards were left vague to allow the Service to get tougher on aliens when necessary. Second, examiners are convinced that the Service capitulates to congressional and other pressure, thereby creating inconsistencies in the speed and outcome of adjudications. Inquiries, called "congressionals," occur in about five per cent of all section 245 cases.[130] They receive priority treatment, and are often assigned for processing to the most experienced adjudicators. Examiners sense and resent the extra time it takes to locate and examine files in such cases and to write letters to the Congressman involved

[130] Experienced INS officers estimated that inquiries by phone or letter occurred in approximately 5-10% of all § 245 cases. Interviews with Vincent Doria, Chief, Sec. 245 Unit, and with Charles Aronowitz, Immigration Examiner, NYC, Nov. 17, 1969. This estimate is fairly supported by a log, kept by the District Office, which reflects that during fiscal 1968, when the office adjudicated 7,507 applications for § 245 relief, 244 congressionals were recorded. The log is kept by Travel Control and contains the following information: date of inquiry; name or code for inquirer; name of applicant; file number; type of application; date file sent to District Director; and date file returned to Chief of Travel Control. The inquiries themselves, and the letters in response, are kept with the files involved in all § 245 cases; as to visa petitions, the practice is to keep all letters to Congressmen in a separate file.

HeinOnline -- 1 J. Legal Stud. 383 1972

describing what has been done. The time thus expended causes delays in handling cases in which no inquiry is made. Moreover, regardless of the actual motives of inquiring Congressmen, examiners felt that congressionals do influence decisions on the merits. One particularly able administrator stated that he strains to grant applications with respect to which inquiries are made in order to avoid the trouble of justifying any delay or adverse action. One officer told of a case where a Congressman requested that an applicant be permitted to depart and reenter the country while his application was pending. The alien, he said, "went in and out of the country like a yo-yo. Anything is possible with congressional pressure." Another explained how a priest's application was processed with amazing speed because of a Congressman's request, and told of a case in which the sister-in-law of a foreign dictator's secretary had received a special privilege under the immigration laws due to congressional pressure, whereas a ditchdigger was denied relief for lack of influence. One examiner firmly stated that he gave no weight whatever to congressional requests, except to speed up decisions; but he also added that, because of this, he was sent very few congressionals to handle.

The third Service policy which allows inconsistency in the eyes of examiners is its position on the legitimacy of inconsistent results in like cases. Official policy is "that there be Service-wide uniformity in the interpretation and application of the laws, regulations and related administrative policies in the rendering of decisions."[131] The BIA has, in addition, relied on the principle of uniformity to *deny* relief in cases where less compelling equities are present than in prior cases where relief was denied.[132] But the attitude which reaches adjudicators is reflected by the Board's express disavowal in at least one case of the binding nature of precedent,[133] and is illustrated in a dramatic story which is adjudicative folklore in New York City.[134]

[131] Immigrants Inspectors Handbook 1-6, 7.

[132] *E.g.*, Matter of C., 7 I. & N. Dec. 608 (1957).

[133] See Matter of Rubio-Vargas, 11 I. & N. Dec. 167 (1965); Matter of Vega, 11 I. & N. Dec. 337, 339 (1965).

[134] In defiance of the odds, two applications recently were filed in NYC which were, in all relevant respects, identical. Two Korean girls, who had been classmates and good friends in nursing school, left their native country at around the same time to work in Germany. Both received visitor's visas at Frankfurt to enter the United States. Both obtained jobs at the same hospital, specializing in psychiatric nursing, and both passed their permanent nursing exam with honors. Both filed extension-of-stay applications which reported falsely that they were unemployed. Both applied, and were concededly eligible, for § 245 relief. Both were represented by the same lawyer, but their applications were processed by different adjudicators. One examiner granted relief. The other found three grounds for refusing to exercise discretion favorably: (1) *mala fide* non-immigrant because of intent to work at time of entry; (2) violation of nonimmigrant status through working; and (3) false statements to the consul and to INS. The lawyer, an extremely able immigration practitioner, moved for reconsideration, which was denied because "the only substantial material in the motion was information to the effect that in a case with

HeinOnline -- 1 J. Legal Stud. 384 1972

For evidence of inconsistency more objective than interviews and individual files we are able to turn to two sources: (1) figures collected by INS on the number of section 245 applications decided, granted and denied each fiscal year; and (2) figures we collected indicating the rate of reversal of decisions where no change had occurred in the record. The national data demonstrate wide disparities each year in the rate of denial, among INS regions. Table 4 reflects that denial rates ranged in fiscal 1970 from 2.3 per cent of all completed applications in the Southeast Region to 7.4 per cent in the Northeast Region.

Even wider disparities have appeared in prior years.[135] These seemingly significant differences in rates of denial may conceivably be attributable to differences in the merits of cases filed in the regions, possibly on the hypothesis that less meritorious applications tend to be made in regions with large cities. One difficulty with this suggestion is that all the regions contain large cities,

---

an almost identical fact pattern, an application for permanent residence was granted." Notice of Certification, File No. A18-179-241, at 2 (Dec. 4, 1969). "It is recognized," District Director Esperdy candidly stated, "that the discretion could have been exercised favorably or unfavorably depending on the point of view of the individual adjudicator. . . . What has happened is not improper, illogical or unexpected. . . . Each case must stand on its own merits," unless "discretion has been abused" or "a case on all fours leading to an opposite conclusion has been publicized." *Id.* at 2-3. This honest and accurate appraisal of discretionary power at INS should be contrasted with the Regional Commissioner's decision reversing denial of relief. Without even mentioning the case in which relief had been granted, or the interest in uniformity, the opinion simply (and erroneously) recited that "the record here does not reveal sufficient grounds of excludability to warrant refusal of adjustment of status." In re Ja Park Cho, File No. A18-179-241 (NYC), N.E. Region (Jan. 12, 1970).

135

SECTION 245 ADJUDICATIONS
FISCAL YEARS 1968 AND 1969 BY REGION

Region	Completed	Denied	Percent of Denials
	Fiscal Year 1968		
Northeast	12,935	1,223	9.4
SE	6,746	120	1.8
NW	6,384	221	3.5
SW	9,870	855	8.7
U.S. Totals	35,935	2,419	6.7
	Fiscal Year 1969		
Northeast	9,667	1,070	11.1
SE	7,055	135	1.9
NW	5,783	225	3.9
SW	8,968	729	8.1
U.S. Totals	31,473	2,159	6.9

HeinOnline -- 1 J. Legal Stud. 385 1972

TABLE 4
SECTION 245 ADJUDICATIONS AND DENIAL RATES FOR FISCAL YEAR 1970 BY REGION

Region	Completed	Denied	% Denied
Northeast	16,351	1,204	7.4
Southeast	8,733	202	2.3
Northwest	7,409	268	3.6
Southwest	12,155	853	7.0
U.S. Totals	44,648	2,527	5.65

and the differences in denial rates among the ten district offices handling the largest number of applications seem as significant as the differences among regions. As Table 5 reflects, denial rates in fiscal 1970 ranged among the cities from a low of 2.0 per cent in Cleveland to a high of 13.4 per cent in Boston. The range has been equally great in other years.[136] These data tend to

136

SECTION 245 DENIAL RATES
TEN BUSIEST DISTRICT OFFICES,
FISCAL YEARS 1968 AND 1969

Rank*	District Office	Fiscal Year 1968 Completed	Denied	% Denied
1	New York City	7,507	947	12.6
2	Los Angeles	4,692	400	8.5
3	San Francisco	3,115	366	11.8
4	Chicago	3,009	101	3.4
5	Newark	2,296	108	4.7
6	Boston	1,548	130	8.4
7	Washington, D.C.	1,530	15	1.0
8	Philadelphia	1,441	20	1.4
9	Detroit	1,243	66	5.3
10	Cleveland	841	14	1.6
Rank*	District Office	Fiscal Year 1969 Completed	Denied	% Denied
1	New York City	5,845	837	14.3
2	Los Angeles	3,488	316	9.1
3	San Francisco	3,107	345	11.1
4	Chicago	2,503	107	4.3
5	Newark	1,018	78	7.7
6	Boston	1,432	130	9.1
7	Washington, D.C.	1,645	13	0.8
8	Philadelphia	1,425	31	2.2
9	Detroit	1,012	76	7.5
10	Cleveland	1,028	26	2.5

* The ranking of cities by the number of completed applications is the same for FY 1968 as for FY 1970. The relative ranking of these 10 cities for FY 1969 is somewhat different, and in that year a city not in the table (Baltimore) had 14 more completed applications than a city in the table (Detroit). However, to facilitate comparisons, the table for 1969 includes the same cities in the same order as the 1968 and 1970 tables.

HeinOnline -- 1 J. Legal Stud. 386 1972

TABLE 5
SECTION 245 DENIAL RATES FOR TEN BUSIEST* DISTRICT OFFICES
Fiscal Year 1970

District Office	(Region)	Completed	Denied	% Denied
1. New York City	(NE)	9,298	819	8.8
2. Los Angeles	(SW)	5,259	394	7.5
3. San Francisco	(SW)	3,953	338	8.6
4. Chicago	(NW)	3,184	74	2.3
5. Newark	(NE)	3,006	66	2.2
6. Boston	(NE)	2,101	282	13.4
7. Wash., D.C.	(SE)	1,973	55	2.8
8. Philadelphia	(SE)	1,745	50	2.9
9. Detroit	(NW)	1,585	107	6.8
10. Cleveland	(SE)	1,481	29	2.0

* "Busiest" here means handling the largest number of section 245 applications.

show prima facie inconsistency among regions and districts. Even more compelling is Table 6, which shows the variations by year among regions and the ten busiest districts. Since no significant changes have occurred in the rules governing decisions between fiscal 1968 and 1970, one would expect the merits of cases handled within a given region, and in a specific district office, to have remained relatively constant. Yet the fluctuations in rates of denial are in many instances sharp, ranging up to 93 per cent from the regional or district mean. In New York City, for example, the rates of denial for fiscal years 1968 through 1970 were 12.6 per cent, 14.3 per cent and 8.8 per cent, respectively. While in a very few districts the denial rate was relatively constant, this indicates only that the overall result of decisions by examiners in such districts was consistent, and not that decisions of individual examiners were consistent with decisions of other examiners.

The other source of data on inconsistency is based on our assumption that reversals of denials, in the absence of any change in the record, reflect differing views of the law. To the extent that the law is more flexible, or less limiting, we would expect a higher incidence of disagreement, to confirm our hypothesis concerning standards. The cases we examined were reviewed with sufficient frequency to allow for statistical evaluation at two stages—motions to reopen, decided by examiners, and deportation proceedings, decided by SIOs. At both stages the adjudicator was allowed to exercise discretion de novo, without according any more weight to the earlier judgment than he chose to give it. Our random sample of denials included 27 cases in which permanent residence was granted by examiners on motions to reopen. Of these, nine, or 33 per cent, were granted on the same record that had originally been before the examiner, thereby reflecting considerable evidence that examiners change their minds (six cases) or disagree with each other (three cases). An almost identical proportion of reversal on the same record (30 per cent) was

HeinOnline -- 1 J. Legal Stud. 387 1972

TABLE 6

VARIATIONS FROM THREE-YEAR MEAN IN SECTION 245 DENIAL RATES FOR ALL REGIONS AND TEN BUSIEST DISTRICT OFFICES

Region District Office	FY 1968-FY 1970 Three-Year Mean Rate (%)	FY 1968 Rate For Year (%)	FY 1968 Rate as % of Mean	FY 1969 Rate For Year (%)	FY 1969 Rate as % of Mean	FY 1970 Rate For Year (%)	FY 1970 Rate as % of Mean	High-Low Divergence (%)*
Northeast	9.0	9.4	105	11.1	113	7.4	83	30.5
1. N.Y.C.	11.5	12.6	110	14.3	124	8.8	77	47.5
5. Newark	4.0	4.7	118	7.7	193	2.2	55	137.8
6. Boston	10.7	8.4	79	9.1	85	13.4	125	46.5
Southeast	2.0	1.8	89	1.9	94	2.3	112	23.4
7. Wash., D.C.	1.6	1.0	61	0.8	50	2.8	174	124.3
8. Philadelphia	2.2	1.4	64	2.2	100	2.9	132	68.4
10. Cleveland	2.0	1.6	79	2.5	123	2.0	99	44.0
Northwest	3.7	3.5	96	3.9	107	3.6	99	11.0
4. Chicago	3.2	3.4	105	4.3	133	2.3	71	62.0
9. Detroit	6.5	5.3	82	7.5	116	6.8	105	23.3
Southwest	7.9	8.7	111	8.1	103	7.0	89	22.0
2. Los Angeles	8.3	8.5	103	9.1	110	7.5	91	19.3
3. San Francisco	10.3	11.8	115	11.1	108	8.6	84	31.5

* This is the sum of the absolute differences from the three-year mean of the highest and the lowest of the three individual yearly rates.

HeinOnline -- 1 J. Legal Stud. 388 1972

observed in the cases in which aliens renewed their applications before SIOs, thereby reflecting considerable disagreement between examiners and SIOs.

Most significant for our present purpose is the fact that a strikingly higher proportion of the observed disagreement and change of position is attributable to discretionary denials than to statutory denials.

TABLE 7
INCONSISTENCY—STATUTORY VS. DISCRETIONARY DENIALS

	Motions to Reopen in Which Relief was Granted by Examiners		
	Same Record	Supplemented Record	
Statutory*	22%	78%	(18 cases)
Discretionary**	50%	50%	(22 cases)
		Base:	(40 cases)

	Renewed Applications in Which Relief was Granted by SIOs		
	Same Record	Supplemented Record	
Statutory*	20%	80%	(5 cases)
Discretionary**	53%	47%	(38 cases)
		Base:	(43 cases)

* The statutory cases used were all those denials in the random sample which were based in whole or in part on a statutory ground.

** Because of the smaller number of discretionary denials in the random sample we used all the discretionary denials collected.

The results at both levels become even more definite when an adjustment is made for cases initially denied because the application was deemed abandoned. Such cases have been counted as statutory denials. But they are discretionary in that virtually no standards exist to guide their decision and they are reviewed under the arbitrary and capricious formula, which is reserved for discretionary action. When the few reversed denials based on the abandoned-application ground are counted as discretionary cases, the results at both levels are significant and similar.

TABLE 8
PROPORTION OF GRANTED APPLICATIONS

	Motions to Examiners		Renewals Before SIOs	
	Same Record	Supplemented Record	Same Record	Supplemented Record
Statutory	12%	88%	0%	100%
Discretionary*	54%	46%	55%	45%

* The discretionary denials here include cases denied on the basis of abandonment.

HeinOnline -- 1 J. Legal Stud. 389 1972

The facts of the cases in which discretionary denials were reversed on the same record indicate that inconsistency is indeed prevalent. In the cases reversed on motions to reopen, the results seem somewhat puzzling at first, since six out of nine of these cases were reversed by the same examiners who originally decided them. Is it evidence of inconsistency that examiners changed their minds? The answer is yes, since they did so immediately after the district office received a "congressional," asking for reconsideration. Congressional intervention explains a large proportion of the reversals on motion to reopen.

Some specific examples should illustrate. In case no. 098, a commodity broker was denied relief because, by his admission to the examiner, he had intended to settle in the United States but had applied for a visitor's visa because he did not want to be delayed at the consulate in his native country. Indeed, he arranged for a job in America before leaving his native land, and he applied for a labor certification and permanent residence as soon as he arrived here. A clearer case of a mala fide nonimmigrant is difficult to imagine, and this one involved a false statement to the consulate as well. The examiner denied relief on discretionary grounds. After the denial, however, a New York City Congressman wrote two letters urging reconsideration. The file was reopened and assigned to a different adjudicator, who granted the application on the same record. In case no. 112 the applicant was denied relief because he explicitly lied to the consul concerning a debt which he had not paid at the time he entered this country. A Congressman urged reconsideration and the case was reopened and reversed. Yet another case, no. 105, involved an alien who was reasonably found to have intended to seek employment in this country despite having entered as a nonimmigrant. After a letter from a Congressman, the decision was reversed. In case no. 168, a young secretary admitted to the examiner that she had arranged for employment in the United States before leaving her native country and had untruthfully told the consulate that she intended to visit a friend here. The examiner denied relief. Thereafter, the District Director received a letter from a highly placed INS official enclosing another letter requesting that the alien be granted relief from an individual who was described as "a personal friend" of an even more highly placed INS official. The file was sent to a different adjudicator for reconsideration and the decision was reversed on the same record.

While writers have frequently recognized that Congressmen and others might properly seek to influence "political" or policy decisions of agencies, or to speed up the disposition of cases and other applications, it is usually agreed that intervention with respect to the merits of adjudication is most nearly akin to attempts to influence the decisions of a court, and therefore improper. Of significance here, however, is the fact that not a single instance was found in this study of a successful intervention on the merits with re-

HeinOnline -- 1 J. Legal Stud. 390 1972

spect to a denial based on a statutory ground. Apparently, the Service is unwilling to change such decisions and Congressmen will not request (or press for) changes in such cases. Unlike denials based on statutory grounds, discretionary decisions under section 245 are almost invariably "correct" regardless of their outcome. The adjudicators could initially have granted each of the applications and been acting well within their discretionary power. Aliens and their lawyers know this, and seem less willing to accept denials of these grounds. And the Service knows that reversal of such denials involves no violation of congressional directives. Indeed, it is probable that the ultimate result in each of the cases was more humane and sensible than the initial decision. The unfairness lies in the fact that most aliens do not obtain congressional help, and are thereby placed in a disadvantageous position.

Reversals of discretionary denials on the same record by SIOs likewise reflect inconsistency, although here congressionals account for no part of the result. It is simply that SIOs, at least in New York City, have a radically different view on how discretion should properly be exercised. For example, in many cases SIOs granted relief despite adequately supported findings by examiners that the alien had evaded the visa-issuing process. Typical is case no. 073, involving a Philippine medical student who had become a doctor by the time she applied for relief. She freely admitted having intended to work in America after she arrived, and said "I did not tell the consul because I knew I wouldn't receive the tourist visa." The examiner denied relief on the basis of discretion, since there were no equities in the applicant's behalf. The SIO reversed without any change in facts having occurred, and without opposition from the Service's trial attorney. Identical results were reached in many other cases, some with facts far less sympathetic than in our example. In two cases, SIOs granted relief after waivers of inadmissibility had been obtained by the aliens, indicating that the examiners involved had not only invoked discretionary power with respect to a visa fraud covered by the statute but had done so where circumstances warranted a waiver of the statutory prerequisite.[187] In some cases the SIO reversed even though the District Director strongly supported the examiner's decision. For example, case no. 158 involved a Chinese secretary who was found by the examiner to have intended to work when she obtained her visitor's visa. She did in fact begin working four days after her arrival. She had no family ties in America or other equities in her favor, so the examiner denied relief in a well reasoned and scholarly opinion. Her attorney complained, arguing that "thousands" of similar cases are granted. The District Director refused to acknowledge any inconsistency and reaffirmed the denial. The application

[187] Case nos. 273, 245.

HeinOnline -- 1 J. Legal Stud. 391 1972

was renewed before an SIO and granted without opposition from the trial attorney.

Is the observed inconsistency between examiners and SIOs in exercising discretion peculiar to New York City or more widespread? The only data available to test this question are the number of renewed applications decided and denied by SIOs in all the district offices during the fiscal years 1968-1970. The rates of denial sometimes vary here,[138] but the overall national rate of denial has been fairly constant: 35.5 per cent in fiscal 1968, 32.8 per cent in 1969 and 34 per cent in 1970. The data on New York City indicate a somewhat lower rate of denial in 1968 (24.1 per cent) and in 1969 (25.9 per cent). In fiscal 1970, SIOs granted 11 and denied none of the renewed applications, a departure from previous practice that is difficult to explain. If 1970 is disregarded as exceptional, it seems that SIOs in New York City are more liberal in granting relief than those elsewhere. While these data seem ambiguous on the issue of New York City's typicality, the random sample data tend to indicate that the New York City practice is not out of line with nationwide practice. Of the 20 random sample cases in which SIO decisions were rendered, 13 or 65 per cent were granted, indicating a denial rate of about 35 per cent, which is very close to the national average. While 20 cases is a small number, it seems easily an adequate sample since in fiscal

138

DENIAL RATES OF RENEWED SECTION 245 APPLICATIONS DECIDED BY SPECIAL INQUIRY OFFICERS

	Fiscal Year 1968		
Region*	Completed	Denied	% Denied
NE	43	13	31
SE	20	8	40
NW	33	8	24
SW	87	36	41
	Fiscal Year 1970		
Region*	Completed	Denied	% Denied
NE	42	15	36
SE	25	8	32
NW	18	6	33
SW	89	28	32
	Fiscal Year 1969		
Region*	Completed	Denied	% Denied
NE	42	23	55
SE	29	4	14
NW	33	5	15
SW	105	39	37

* Numbers were too small to allow for comparison among districts.

HeinOnline -- 1 J. Legal Stud. 392 1972

1968 and 1969 (the period during which the random sample cases were processed) SIO's in New York City decided only 29 and 27 renewed applications respectively. Therefore, if, as we may reasonably expect, the proportion of discretionary denials reversed on the same record is consistent nationally, it seems likely that examiners and SIOs are exercising discretion inconsistently in all regions.

In contrast to the relative chaos associated with discretionary denials, decisions based on statutory grounds were seldom reversed on the same record, thereby reflecting an absence of congressional intervention and consistency between examiners and SIOs. The few reversals of statutory denials occurred with respect to grounds which lacked clear standards. Three of the denials reversed were based on the ground of failure to prosecute, concerning which there are virtually no standards. Two other cases involved illegal entries, and apparently were reversed by SIOs on the ground that the aliens deserved to be excused for their actions, as a matter of discretion. The Regional Commissioner reversed two cases on certification, but that device is used to handle novel and important questions of law.

III. Administrative Review and Enforcement

An alien may refuse to accept an adverse decision either by fighting it on the merits, through administrative review, or by seeking to prevent its enforcement. Instability is caused in both the review and enforcement processes to the extent that challenges are successful. In analyzing the data gathered concerning acceptance and instability of decisions in both these processes, we have attempted to determine whether the results observed correlate with discretionary decisions, and the effects, if any, of the absence of representation.

A. *Administrative Review*

Denials of change-of-status applications may be reviewed in several ways.[139] The disappointed applicant may move to reopen or to reconsider before "the authority which last made the decision in the case"[140]—here, the examiner, as delegate of the District Director.[141] A motion to reopen must

[139] We frequently saw adjudicators ask their supervisors for advice and guidance *before* deciding a case. Counsel for applicants also may, at the risk of offending an adjudicator, go "over the adjudicator's head" and ask the supervisor for help. Further, denials are reviewed by the supervisor before they are sent to the applicant. Decisions to "reverse" an adjudicator at this stage are not reflected in the data collected.

[140] Immigrant Inspectors Handbook 1-11.

[141] The applicant could also reapply on the basis of new facts or legal argument. In this study, reapplications—of which there were very few—are treated as motions to reopen or to reconsider.

HeinOnline -- 1 J. Legal Stud. 393 1972

state "the new facts to be proved at the reopened proceeding . . . ," and a motion to reconsider must state "the reasons for reconsideration. . . ."[142] Review is also possible by certification to the Regional Commissioner. District Directors "may certify their decisions . . . when the case involves an unusually complex or novel question of law or fact."[143] The alien may obtain certification through concurrence of either the District Director or the Regional Commissioner; he is given notice by mail and an opportunity to submit a brief. There is no appeal from the Regional Commissioner's decision on certification.

The regulations provide, and aliens were once told, that "no appeal shall lie from the denial of [an] . . . application by the district director. . . ."[144] The knowing alien, however, is actually given more than an appeal, since denials are "without prejudice to the alien's right to renew his application . . ." in deportation proceedings. Adjustment of status is one of the forms of discretionary relief that aliens may seek from SIOs,[145] in a formal proceeding with a lawyer-judge who has not been involved in the investigatory process, a formal record, and the right to appeal to the BIA and the courts.[146] The SIO is in no way bound by the examiner's decision, whether it is based on statutory grounds or on discretion.[147]

The frequency with which each of these forms of review was invoked in the random sample cases is reported in Table 9.

TABLE 9
FORMS OF ADMINISTRATIVE REVIEW INVOKED

Form of Review Sought	% of Random Sample
Motion to Reopen Before Dist. Dir.	42
Certification to Reg. Comm'r	2
Renewed Application before SIO	28
Appeal to BIA	4
(Base: 105 cases)	

[142] 8 C.F.R. § 103.5 (1971).

[143] 8 C.F.R. § 103.4 (1971). Certification appears generally to be used for the purpose intended. In case no. 099, for example, a sixty-year-old woman was denied relief as a Western Hemisphere native. She was born in Denmark, but had lived in the Dominican Republic since she was 10 years old. The Regional Commissioner reviewed on the question of law, and found the statutory preclusion inapplicable.

[144] 8 C.F.R. § 245.2(a)(4) (1971).

[145] 8 C.F.R. § 242.17(a) (1971).

[146] 8 C.F.R. § 242.21 (1971). In addition, the SIO has authority to certify his decision to the BIA "when it involves an unusually complex or novel question of law or fact," 8 C.F.R. § 242.8(a) (1971), and to grant reopening or reconsideration, 8 C.F.R. § 242.22 (1971).

[147] 8 C.F.R. § 242.8 (1971); Gordon & Rosenfield § 7.7e(1), at 7-67.

HeinOnline -- 1 J. Legal Stud. 394 1972

1. *Acceptance of decisions.* Table 9 shows that a high proportion—60 per cent—of aliens denied relief challenge informal section 245 adjudications. This figure actually understates the number of aliens who did not accept the judgments in their cases, since many who had not sought administrative review sought relief later at the enforcement stage. A maximum estimate of acceptance can be derived from the number of aliens denied relief who departed voluntarily before a deportation order was served: 21 per cent of the random sample. Even this figure overstates the extent to which decisions are accepted, since 68 per cent (15 of 22) of the aliens from the random sample who departed voluntarily were unrepresented and many of these probably acted out of ignorance or fear rather than acquiescence. The rate of challenge might exceed 90 per cent were aliens accurately informed of their opportunities.

An alien's decision to challenge the denial of his application does not necessarily reflect a conviction on his part that the denial was wrong or unfair. He may challenge a denial even though he feels that the decision is correct and will be adhered to by INS, because he wishes to delay his deportation or voluntary departure. Given these possible motivations, even a 90 per cent figure for nonacceptance may be a tolerable price to pay for leaving informal an adjudication which effectively disposes of about 80 per cent of all the applications filed (through initial grants). On the other hand, widespread action by aliens to secure delays of enforcement may reflect too lax a system for implementing decisions. And the possibility remains that at least a significant part of the rate of nonacceptance results from a genuine conviction that the decisions are wrong or unfair.

The latter possibilities find support in the fact that aliens denied relief on statutory grounds seem to seek administrative review before SIOs less frequently than those denied relief on discretionary grounds. Motions to reopen or reconsider were made in 40 per cent of the random sample statutory denials and in 31 per cent of the discretionary denials, indicating roughly equal use of that device. On the other hand, renewed applications before SIOs were made in 23 per cent of the statutory denials as compared to 46 per cent of the discretionary denials. Perhaps most significant is the fact that twice as high a proportion of aliens denied relief on statutory grounds (26 per cent) depart voluntarily as do aliens denied relief on discretionary grounds (13 per cent). This difference is not explained, moreover, by the slightly less frequent use of lawyers by aliens denied relief on statutory grounds. Only 29 per cent of those denied relief on statutory grounds were unrepresented compared to 25 per cent of those denied relief on discretionary grounds, and of such aliens who voluntarily departed 60 per cent and 50 per cent respectively were unrepresented.

One possible reason for the greater refusal of aliens denied relief on dis-

HeinOnline -- 1 J. Legal Stud. 395 1972

cretionary grounds to accept decisions than aliens denied relief on statutory grounds is that the latter may feel especially unfairly treated in light of their conceded eligibility to become permanent residents. While disparities in the "reversal" rate between such grounds have not heretofore been published, experienced counsel are undoubtedly aware that SIOs tend to agree less with some types of discretionary denials than they do with statutory denials. The other possible explanation concerns the enforcement process. Aliens denied relief on statutory grounds apparently have their best hope of obtaining relief (in the absence of changed circumstances) in delaying or halting enforcement. The devices available for this purpose (discussed below) are less known and more difficult to utilize than the methods for obtaining review. It seems possible that many attorneys are unaware of, or unable to manipulate, devices available to aliens at the enforcement stage, and therefore erroneously advise their clients denied relief on statutory grounds to depart voluntarily rather than to continue seeking relief.

2. *Stability of denials.* Section 245 denials seem extraordinarily unstable. Aliens not only tend to challenge denials of relief in a high proportion of cases; they are also very often successful, as Table 10 reflects. Of all the

TABLE 10
RESULTS OF ADMINISTRATIVE REVIEW OF SECTION 245 DENIALS

Result	Percent of Random Sample
1. Permanent Residence Granted	40
2. Departed before OSC*	21
3. Departed after OSC*	4
4. Deported	1
5. Pending	34
(Base: 105 cases)	

* Order to show cause why the alien should not be deported.

aliens denied relief in our random sample, 40 per cent had obtained permanent residence without leaving the United States at the time we collected the data. About 25 per cent had departed voluntarily, either before or after an SIO hearing; only one per cent had been deported. The remaining 34 per cent of the cases were still pending at the time we collected the data, although more than a year had elapsed since the initial denial in all the cases studied.

Table 10 greatly understates the extent of instability. Eliminating from our calculations those cases in which no challenge was made yields a base of 83 cases, in 42 (or 51 per cent) of which aliens had obtained permanent residence at the time the data were collected, and 36 (43 per cent) of which were pending. Finally, in light of our findings concerning pending cases, it is

HeinOnline -- 1 J. Legal Stud. 396 1972

inaccurate to assume that the results in even a large proportion of these cases can be considered stable; in my judgment, most will be overturned. If the pending cases are discounted entirely, we obtain a "reversal" or instability rate in excess of 90 per cent in all final cases in which challenges were made.

We have seen that greater inconsistency on the merits of decision seems to be present in connection with discretionary denials than with statutory denials. A similar correlation is found between discretionary denials and instability. Table 11 shows that whereas permanent residence had been ob-

TABLE 11
RESULTS OF ADMINISTRATIVE REVIEW BY TYPE OF GROUND OF INITIAL DECISION

Result	Grounds	
	Statutory	Discretionary
Permanent Residence Granted	36%	53%
Departed Before OSC	26%	14%
Departed After OSC	0%	11%
Deported	1%	0%
Pending	36%	22%
	(69 cases)	(105 cases)

tained in 36 per cent of the statutory denials, such relief had been secured in 53 per cent of the discretionary denials.

One possible argument against a finding that discretion and instability are related is implicit in the higher proportion of aliens denied relief on statutory grounds that departed the United States before a deportation order was served (26 per cent), compared to aliens denied relief on discretionary bases (14 per cent). If it is not proper to count such departures in determining stability, then the percentage of aliens denied relief on statutory grounds who obtain permanent residence is much lower. But such counting *is* proper: aliens who depart voluntarily without challenging denials thereby accept the judgments in their cases, and from that acceptance an expectation of stability may be inferred.

3. *Effect of representation.* The absence, discussed earlier, of any evidence that being unrepresented by counsel disadvantages alien applicants in any verifiable way in obtaining a favorable decision at the informal adjudication contrasts strikingly with strong evidence of prejudice in the post-adjudication process. Table 12 shows that unrepresented aliens obtained permanent residence far less frequently (21 per cent) than did represented aliens (47 per cent). The principal reason for this result seems obvious from the table itself: a much higher proportion of unrepresented aliens departed voluntarily before a deportation hearing (54 per cent) than represented aliens (nine per cent). When the cases in which aliens departed voluntarily without

HeinOnline -- 1 J. Legal Stud. 397 1972

TABLE 12
EFFECT OF REPRESENTATION ON SUBSEQUENT DISPOSITION OF SECTION 245 DENIALS

Ultimate Disposition	Counsel Present	Counsel Absent
Permanent residence granted	47%	21%
Departed before OSC	9%	54%
Departed after OSC	5%	0%
Deported	1%	0%
Pending	37%	25%
Number of cases	(76)	(28)

(Because of rounding, percentages do not add to 100)

a formal hearing are subtracted from the computations, the random sample data (Table 13) show about the same proportion of cases in which permanent residence is obtained. The number of cases in which aliens are both unrepresented and have not departed voluntarily before an SIO hearing is small, however, and this makes any conclusion on this point somewhat tentative. And the very skimpy evidence we have about the pending cases may indicate that unrepresented aliens fare somewhat less well in winning motions to reopen and renewed applications before SIOs. But it seems clear that most of the disparity in the likelihood of represented and unrepresented aliens' obtaining relief after initial denials is explained by the relatively high rate of voluntary departure of unrepresented aliens.

Why is the absence of counsel so critical immediately after an initial denial? The answer seems related to a form sent by the Service to each alien whose file was studied, informing him that his application was denied, and adding in unqualified terms: "There is no appeal from this order." Where voluntary departure was authorized, moreover, which was true in almost all cases, the alien was told to leave the country before a certain date (usually 30 days from the date of denial), or face possible arrest and deportation.

This form concealed a state of affairs that any experienced advocate would bring to a client's attention. While it is technically true that no "appeal" lies from a denial, there are numerous other avenues of relief. An alien may, for

TABLE 13
EFFECT OF REPRESENTATION ON SUBSEQUENT DISPOSITION OF SECTION 245 DENIALS WHEN VOLUNTARY DEPARTURES DISREGARDED

Ultimate Disposition	Counsel Present	Counsel Absent
Voluntary residence obtained	52%	46%
Voluntary departure after OSC	6%	0%
Deported	1%	0%
Pending	41%	54%
	(69)	(13)

HeinOnline -- 1 J. Legal Stud. 398 1972

example: (1) obtain extensions of the voluntary departure deadline; (2) reapply for relief or move to reopen; (3) urge the District Director to certify the case for limited review by the Regional Commissioner; (4) obtain a de novo hearing before an SIO, from the denial of which an appeal will lie to the BIA and the federal courts; (5) seek any of several forms of informal suspension of enforcement discussed below; and (6) secure the introduction of a private bill which automatically stays deportation for about one year.

Of course, it does not follow that counsel is required at the informal stage. Full and accurate disclosure by INS would be cheaper and might eliminate the need for counselling that we have found. Steps in that direction have now been taken. When the deficiencies of the denial form were called to the attention of the INS, the form was promptly revised. It now provides, in relevant part: "You are granted to [*date*] to effect your departure from the United States voluntarily, without the institution of proceedings to enforce your departure. . . . If you fail to depart . . . by the date specified, proceedings will be instituted to enforce your departure. You may renew your application for status as a permanent resident during such proceedings."[148] This revised form could be yet less threatening, and more helpful as to the means available to the alien for obtaining relief from the denial of his application. It does, however, negate the false notion that all chance for adjustment has now passed.

Perhaps those aliens who depart voluntarily after notice of denial do so because their cases lack merit. But the evidence we have leads us to doubt this possibility. We are able to tell, first, that aliens denied relief on discretionary grounds obtained permanent residence with considerably greater frequency without leaving the United States (53 per cent) than aliens denied relief on statutory grounds (37 per cent), whereas if voluntary departure were related to the merits we would expect to find that aliens denied relief on statutory grounds left voluntarily in significantly more cases than aliens suffering discretionary denials. Table 14 indicates, moreover, that the absence of representation seems to correlate equally in both types of cases with voluntary departure prior to the SIO hearing.

B. *Enforcement*

Enforcement is a critically important aspect of any adjudicatory system. Prompt, effective enforcement lends credibility, secures voluntary cooperation from affected persons, and thereby often obviates the need to enforce many decisions. In immigration cases the process of securing compliance with decisions is slow and usually results in the alien's avoiding departure. Partly this is due to "dilatory tactics" by aliens, which in deportation cases "are the

[148] Form I-291 (July 10, 1970).

HeinOnline -- 1 J. Legal Stud. 399 1972

TABLE 14
EFFECT OF REPRESENTATION ON SUBSEQUENT DISPOSITION OF SECTION 245 DENIALS

	Denials Based on Statutory Grounds		Denials Based on Discretion	
	Represented	Unrepresented	Represented	Unrepresented
1. Permanent residence obtained	44%	20%	59%	25%
2. Departure before SIO hearing	13%	60%	9%	50%
3. Departure after SIO hearing	—	—	11%	—
4. Pending	42%	20%	21%	25%
5. Other	2%	—	1%	—
	(48)	(20)	(101)	(20)

(Because of rounding, percentages do not add to 100. Four cases denied on both statutory and discretionary grounds have been excluded.)

rule rather than the exception. . . ."[149] But adequate tools exist to combat dilatory tactics. The Service can proceed to a deportation hearing with about seven days' notice after a change-of-status application is denied.[150] Apparently, in about 80 per cent of such hearings, deportability is conceded. The fact that an alien may have pending an application for a waiver of some statutory provision or for some other form of administrative relief gives him no right to a delay in the adjudication of his deportability.[151] Furthermore, dilatory motions to reconsider decisions may be denied peremptorily,[152] and courts frequently have refused to consider equities developed through delay.[153]

One can hardly resist the conclusion after examining the enforcement process and its results that delay and the frequent success of aliens in avoiding departure stem primarily from the Service's compassionate (and seem-

[149] Yiu Fong Cheung v. INS, 418 F.2d 460, 465 (D.C. Cir. 1969) (Burger, J., dissenting).

[150] Usually, at least, that much notice is given, though a shorter period may be set. Gordon & Rosenfield § 5.3c.

[151] See Manantan v. INS, 425 F.2d 693, 694 (7th Cir. 1970) (application pending for waiver of two-year foreign residence requirement), and cases cited therein; United States *ex rel.* Vermiglio v. Butterfield, 223 F.2d 804 (6th Cir. 1955) (application for pardon pending).

[152] See Gordon & Rosenfield § 5.13a, at 5-112; Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1956). Compare Pignatello v. Attorney General, 350 F.2d 719 (2d Cir. 1965) (must reopen deportation case to consider application for discretionary relief when petitioner will be prima facie eligible for it if his claim to citizenship fails).

[153] *E.g.*, Mealha v. Shaughnessy, 219 F.2d 600 (2d Cir. 1955).

HeinOnline -- 1 J. Legal Stud. 400 1972

ingly sensible) administration of section 245. We can begin to understand this conclusion by examining the legal framework that Congress provided for suspending enforcement of the relevant immigration laws, and then comparing what the Service has done in this area—often with the knowledge and cooperation of many Congressmen—to provide devices for easing the pain of prompt enforcement.

1. *Statutory devices for suspending enforcement.* There are two important statutory means for suspending enforcement of deportation against aliens denied change-of-status relief—suspension of deportation and voluntary departure.

Suspension of deportation. Section 244 of the I. & N. Act gives the Attorney General "discretion" to recommend suspension of deportation of aliens who meet certain conditions. Any alien deportable for reasons other than the provisions relating to subversives, criminals, immoral acts, narcotics violations or alien registration laws must, to be eligible for relief, demonstrate: (1) physical presence in the United States for a continuous period of seven years immediately preceding application for relief; (2) "good moral character" during the entire, seven-year period; and (3) that deportation would result in "extreme hardship" to the alien or to his United States citizen or permanent resident spouse, parent or child. Aliens deportable for subversive and other activities must, to be eligible, prove ten years of continuous physical presence, "good moral character" during that period, and that their deportation would cause "exceptional and extremely unusual hardship." Further, the following classes of aliens are barred from obtaining suspension: (1) crewmen entering the United States after June 30, 1964; (2) exchange visitors; and, generally, (3) natives of countries contiguous to the United States and of certain adjacent islands.[154] Finally, while applications for suspension are made at deportation hearings, and adjudicated by SIOs,[155] approval must in addition be obtained from Congress.

The Attorney General prepares a list of all approved applications for suspension, and submits it to the appropriate congressional committee along with a detailed statement of the facts and pertinent provisions of law in each case.[156] As to those aliens who must demonstrate seven years' continuous physical presence, the Attorney General's recommendations are automatically approved if neither House has indicated disapproval by the end of the second session during which the issue has been before Congress. As to those aliens who must demonstrate ten years' continuous physical presence and "excep-

[154] 8 U.S.C. §§ 1254(a)(1), (a)(2), & (f) (1970).

[155] 8 C.F.R. § 242.17(a) (1971). Denials of relief are appealable to the BIA. 8 C.F.R. § 242.21 (1971).

[156] 8 U.S.C. § 1254(c)(1) (1970).

HeinOnline -- 1 J. Legal Stud. 401 1972

tional and extremely unusual hardship," however, Congress must pass a concurrent resolution approving suspension before the end of the session following the one in which the case was submitted, or else suspension is denied.[157] When approval is granted, the Attorney General cancels the deportation proceedings and grants permanent residence as of the cancellation date.[158]

The gauntlet of restrictions that aliens are forced to run to obtain suspension has deterred aliens from seeking such relief. In none of the random sample cases studied was suspension even recommended by an SIO; recommendations were made in only three of 135 cases in the special collection of discretionary denials. The Service-wide figures for grants of suspension are similarly small—in fiscal 1969, for example, only 418 aliens obtained this form of relief.[159] Finally, Congress takes little interest in the suspension applications painstakingly compiled and submitted by the Attorney General,[160] and the process of legislative review has recently been rendered meaningless by two Congressmen who have effectively blocked any affirmative action.[161]

[157] 8 U.S.C. § 1254(c)(2) & (c)(3) (1970).

[158] 8 U.S.C. § 1254(d) (1970).

[159] 1969 INS Ann. Rep., table 6B (1970). Indications of a recent increase in applications for suspension in NYC may be due in part to the Act of 1965, P.L. 89-236, § 12, 79 Stat. 918, which amended I. & N. Act, § 244(f) to include crewmen; to the Chinese Confession Program which, during its existence, enabled Chinese aliens to confess to false parentage claims and obtain in exchange amnesty and the Service's cooperation in securing suspension of deportation; and the use of suspension applications to delay deportation until a visa becomes available either in the United States or overseas. Interview with William Fliegelman, Esq., SIO, NYC, July 31, 1970.

[160] Until recently, these matters were voted on as part of the "consent" calendar, without debate. The judiciary committees of the Senate and House have taken a more intense interest in these applications, but their aims appear divergent. In the Senate, applications are reviewed, according to one experienced observer, in order to determine whether INS has complied with the legal prerequisites; this committee tries not to second-guess the Service in its exercise of discretion. The House demonstrates much less "legislative restraint," and frequently recommends that applications supported by the Attorney General be rejected by Congress. Statement of Donald G. Benn, Assoc. Counsel, House Comm. on the Judiciary, at Conf. of the Assoc. of Immigration & Naturalization Lawyers, Miami, Fla. May 23, 1970.

[161] The usual procedure for legislative review in the House is for the Subcommittee on Immigration to review suspension recommendations, and then to have placed on the "private calendar" of the House a series of proposals for approval or disapproval of applications requiring affirmative action. In the last three Congresses, however, two Representatives, Durward G. Hall of Missouri and H.R. Gross of Iowa, have refused to permit applications for suspension to be approved or disapproved on the private calendar. The private calendar must be passed without opposition, and because of the relative unimportance of these matters (especially toward the end of a session when votes on suspensions are normally taken), the Chairman of the House Subcommittee has chosen not to place the recommendations on the regular calendar for action. Telephone interview with Donald G. Benn, Esq., Wash., D.C., July 1970. As a result, applications requiring

HeinOnline -- 1 J. Legal Stud. 402 1972

Voluntary departure. Congress has authorized the Attorney General "in his discretion" to allow certain aliens "under deportation proceedings" to depart voluntarily at their own expense in lieu of deportation. Aliens deportable for a variety of criminal and subversive activities are ineligible for this form of relief unless they meet the prerequisites for suspension of deportation.[162] Any other alien subject to deportation is eligible if "he is, and has been, a person of good moral character for at least five years preceding his application for voluntary departure. . . ."[163] None of these prerequisites applies, however, to aliens who are informally denied change-of-status relief; with minor exceptions, the Service can allow any alien who is not under deportation proceedings to depart voluntarily.[164]

Voluntary departure is almost invariably granted to aliens informally denied section 245 relief, usually for a period of 30 days. In a handful of the cases we studied the alien was not told he could depart voluntarily, apparently because the Service wanted to institute deportation proceedings. Voluntary departure is also usually available after an order to show cause has been served. Even after a finding of deportability is made, and any renewed application for permanent residence denied, SIOs almost always grant voluntary departure;[165] of the 21 aliens denied relief in the random sample cases which resulted in findings of deportability, 19 were granted voluntary departure.

The Service is liberal in granting voluntary departure because deporting an alien is a costly and time-consuming enterprise, even if efficiently executed. Voluntary departure is also beneficial to the alien concerned. When an alien is deported, his chances of becoming an immigrant are diminished, because the consular process is less subject to administrative and judicial control, and because deported aliens may reenter the United States only with the special permission of the Attorney General.[166] Finally, one might expect aliens

affirmative action for approval have been automatically disapproved in the last three Congresses, and applications requiring no affirmative action have been approved, despite frequent Subcommittee recommendations that certain applications be affirmatively approved or disapproved. In the last few years, for example, the House Committee recommended affirmative disapproval in about 62 of 433 cases in which the Attorney General had recommended suspension be granted. Congress' failure to act in effect overruled the Committee's recommendations.

[162] The categories of aliens ineligible for relief are set forth in 8 U.S.C. § 1254(e) (1970).

[163] 8 U.S.C. § 1254(e) (1970). See generally Gordon & Rosenfield § 7.2.

[164] See 8 C.F.R. §§ 242.5(a) & 242.7 (1971).

[165] Until 1968, SIOs could only authorize voluntary departure. District Directors had exclusive authority to fix the time for and conditions of departure, and to rule on requests for extensions. In 1968, 8 C.F.R. § 244.1 was amended to authorize SIOs to fix the time and conditions for departure, and to authorize an extension, though not to fix the time and conditions of an extension. See decision of BIA, 3/24/70, reported as File: A15-750-231, 38 U.S.L.W. 2560 (April 21, 1970).

[166] I. & N. Act, § 212(a)(16), 8 U.S.C. § 1182(a)(16) (1970).

HeinOnline -- 1 J. Legal Stud. 403 1972

promptly to take advantage of offers to depart voluntarily because it is well established that the courts generally will not disturb the "highly discretionary" judgment of the Service that an alien who fails to depart voluntarily within the time afforded him should be extended no further opportunity to do so.[167] It had been Service policy, during the time the cases we examined were decided, to renew grants of voluntary departure to aliens who demonstrated their good faith intention to depart immediately upon renewal of the grant, but this policy was modified in July 1969, so as to caution District Directors to refuse extensions "to any alien who has remained in the United States for an extended period of time by means of obviously dilatory actions in Courts or elsewhere."[168]

Despite the Service's generosity in awarding voluntary departure, and its theoretical attractiveness to aliens, it is seldom actually used. Of the aliens denied relief by examiners in our random sample, only 21 per cent departed voluntarily before an OSC was served, and 68 per cent of those were unrepresented. Of the 19 aliens afforded voluntary departure by SIOs, only four took advantage of the opportunity. Moreover, at both levels, though more so at the informal stage, extensions were liberally granted, either in the hope that the aliens involved would eventually leave without any need for a deportation proceeding, or for humanitarian reasons. The failure of voluntary departure to cause aliens to leave is due in large part to the Service's use of devices discussed below to suspend enforcement. It is also due, however, to the ineffective enforcement system that exists, at least in New York City, to insure that aliens granted voluntary departure in fact have left, and to deport those who unlawfully remain.

The process for checking on voluntary departures begins, in New York City, soon after an application is denied. The case is referred to the Deportation Section, and if voluntary departure is granted, the applicant's name is noted on a card in Docket Control, indicating the date by which the alien must depart. Aliens are usually given 30 days in which to depart, so nothing is done for at least one month. If no extension has been granted, the next step is to verify the alien's departure. This is no small task for the Deportation Section's staff of 13 officers (including three supervisory persons): it is charged with the duty of tracking down aliens and enforcing decisions in

[167] *E.g.*, Lau Wun Man v. INS, 426 F.2d 689, 690 (3d Cir. 1970). Discretion is broad in other respects as well. *E.g.*, Bartsch v. Watkins, 175 F.2d 245 (2d Cir. 1949) (time limit discretionary); United States ex rel. Ciannamea v. Neelly 202 F.2d 289 (7th Cir. 1953) (A.G. may consider "best interests of the United States").

[168] Operations Instructions § 243.1(a) (July 30, 1969). See the excellent discussion in Fan Wan Keung v. INS, 434 F.2d 301 (2d Cir. 1970). The regulation provides that, except in certain classes of aliens discussed below, the usual time limit shall be no more than 30 days, "and an extension . . . shall not be authorized except under meritorious circumstances." Operations Instructions § 242.10(b) (June 18, 1969).

HeinOnline -- 1 J. Legal Stud. 404 1972

about 56,000 cases each year.[169] The Service therefore attempts to check on departure automatically. It issues to each alien with the denial of his application a Form I-94, which either the alien or the carrier (airline, ship, etc.) is required to submit to the Service at, or soon after, the time of departure.

When everything goes according to plan, the Form I-94 is received by the district office and filed about two months after the alien's departure. In New York City, however, docket cards are not reviewed for verification until some three to four months past the date on which the Form I-94 would in the normal course have been received from carriers. Indeed, personnel shortages have sometimes made reviews impossible for as long as six months past the time carrier verification would be expected. Consequently, even as to aliens who do depart as ordered, and as to whom carrier verifications are duly filed, verification of departure takes from six to nine months after the initial denial.[170]

When departure of an alien who has not been through a deportation hearing is unverified, the case is referred by Docket Control to Investigation. A notice is sent to the alien asking him to appear at the District Office, and if he does appear he is served with an OSC setting a date for a deportation hearing. If the alien does not appear, the OSC is sent to him by mail. If the alien is located the deportation hearing is set down within about ten days of service of the OSC if a trial attorney is unnecessary to present the government's case. If a trial attorney is needed, the hearing is still usually held within one month. Of course, extensions are often requested and usually granted. But there is little backlog on the SIO hearing calendar. Finally, the SIO usually decides the case on the day of the hearing; if the alien is found deportable, he is generally given another voluntary departure date 30 to 60 days thence.

The weaknesses of this system of enforcement are patent, even assuming obedient, passive subjects. Aliens generally fight the system, and most of them win. Often there is no need even to fight. An alien has a good chance of spending months, perhaps even years, in the United States if he simply waits for the Service to act. In several cases, we found a total lack of follow-up. In case no. 014, for example, the alien was denied relief for unlawful employment, and granted 30 days in which to depart. That was in October 1967. As of July 1970, nothing had been done. According to the file, no extension was sought or granted. Several such cases were found.[171] Some of these

[169] These figures were supplied by Mr. Harold Grace, Ass't Dist. Dir. for Deportation, NYC, July 16, 1971. In FY 1971, the section handled 56,282 cases.

[170] This description is based on a series of interviews with INS personnel, especially Deportation Officer Mapel, NYC, April 1970.

[171] Accord, case no. 021 (file examined March 1970; nothing since denial in August 1968); case no. 022 (file examined July 1970; nothing done since April 1968, despite

HeinOnline -- 1 J. Legal Stud. 405 1972

"overlooked" cases involved patent frauds.[172] In case no. 138, a Muslim alien from Lebanon claimed immediate-relative status on the basis of his marriage to a Catholic, Cuban woman, 24 years older than he. An investigation by INS revealed that the alien and his Cuban wife were living separately, and that she intended to divorce him. The consul in Lebanon supplied evidence that the alien intended to get permanent residence, divorce his Cuban wife, and then send for his wife and children in Lebanon, where they were living with the alien's parents. Relief was denied on February 27, 1968, and voluntary departure granted for 30 days. Extensions were requested and granted until July 31, 1968. An attempt to verify departure failed as of January 7, 1969, and no action was taken between then and July 1970, the last time we checked this and other similar files. These instances of nonenforcement help explain why INS orders lack credibility.

2. *Administrative devices for suspending enforcement.* The discussion above demonstrates that Congress has been miserly in providing INS with the tools for alleviating hardship in the application of the immigration laws and for enforcing them where appropriate. While voluntary departure might assist the Service in enforcing decisions, it is clear that the New York office is too understaffed to make its threats credible. The Service's response has been to create a complex, highly discretionary system for informally suspending enforcement. Some form of informal suspension was used in 16 per cent of the random sample cases.

Nonpriority cases. The best established of the devices used to stay enforcement is the "nonpriority" program. Almost any officer of the Service can recommend nonpriority treatment to a case, including an Immigration Examiner; usually, however, such recommendations are made by officers in the investigation and deportation sections. If a change-of-status application or immigrant visa petition is involved, the officer may recommend nonpriority status only after ruling on the application's merits.[173] A recommendation is appropriate when the officer concludes that "compelling humanitarian factors" dictate that no action be taken to enforce the alien's departure.[174] A

attorney's letters in May 1968 and July 1970 claiming not to have received decision); case no. 106 (file examined December 1969; nothing in file since February 1968); case no. 109 (file examined April 1970; nothing in file since denial in January 1968); case no. 272 (file examined June 1970; nothing since denial in May 1968).

[172] *E.g.*, case no. 101 (marriage fraud; nothing done after expiration of grant of voluntary departure in January 1968; file examined July 1970).

[173] See Operations Instructions § 243.3(a) (July 30, 1969). Much of the information on this program's operation was obtained from District Director Sol Marks, NYC, February 25, 1970.

[174] Memorandum from Assoc. Comm'r Operations, "Nonpriority Program," Nov. 15, 1968. The relevant instruction seems somewhat more flexible, providing that "in every case involving appealing humanitarian factors," appropriate steps should be taken to avoid public ridicule. Operations Instructions § 103.1(a)(1)(ii) (Feb. 23, 1967).

HeinOnline -- 1 J. Legal Stud. 406 1972

printed form must be prepared, setting forth the alien's present status, availability of administrative relief, grounds of deportability and other factors potentially relevant to the appropriateness of such relief. The District Director and the Regional Commissioner must both review and approve each such recommendation. Nonpriority status may be granted, however, only by the Central Office Committee on Nonpriority Cases; and once the Committee grants such status, only it may finally authorize removal of a case from nonpriority. The District Director must maintain a two-year call-up on all nonpriority cases, and must report to the Committee any changes in circumstances which may be relevant.

There are few explicit indications of the types of cases in which nonpriority status is granted. Advanced age is undoubtedly one ground for granting relief. The Operations Instructions stress the importance of protecting the government from "public ridicule,"[175] a questionable standard for doing equity. Other factors relevant to the issue are reflected on the required form: grounds of deportability; extent of residence in the United States; physical or mental condition requiring treatment here; family situation, and ties with Americans; "effect of expulsion"; criminal record; and subversive activities or affiliations.[176] Other examples of cases in which relief is recommended and granted are: children; veterans of the United States armed forces who are deportable and ineligible for permanent residence; refugees who are institutionalized for mental trouble and therefore deportable. "It's this sort of thing that's kept us out of the newspapers," said Sol Marks, District Director of the New York office. "In the old days we regarded Congress' rules as a mandate. We felt we had no waiver power." Now, he said "we do this with the explicit or implicit approval of congressional watchdog committees." The courts have held that the power to withhold enforcement for "humanitarian reasons" is in the District Director's discretion.[177]

A rough check of the control cards for nonpriority cases indicated that there were approximately 600 pending cases in the NYC office in February 1970.[178] These have collected over a period of many years, however. We encountered very few such cases in our study. While many cases were found that appeared to be appropriate subjects for nonpriority treatment, Service adjudicators and other line personnel chose instead to deal with the cases much less formally than the nonpriority system allows.

"Special Projects." If a case presents compelling humanitarian factors, or is "sensitive" in that deportation might subject the Service to adverse

[175] *Ibid.*

[176] Form G-132, Nonpriority Case Summary (Rev. Feb. 7, 1963).

[177] See Gordon & Rosenfield § 5.3e.

[178] The count is based on a procedure followed at the district office of pushing the index cards tightly together and measuring them, counting 100 cards per inch.

HeinOnline -- 1 J. Legal Stud. 407 1972

publicity, an officer working in NYC can save himself considerable trouble by placing the case in "Special Projects," instead of recommending nonpriority treatment. No form need be completed, and review by the Regional Commissioner and Central Office is not sought. An officer, usually with the approval of his supervisor, completes a docket card for deportation control, but marks it "Special Projects." This means that no deportation order is issued in the case, which is then handled by Deportation Control, usually on a six-month call-up basis. Special Project cases supposedly result in suspension of enforcement for a relatively shorter time period than nonpriority cases. This may be true in general. But in the Special Project cases we studied suspension of enforcement was open-ended, indicating that the device is often used as an informal substitute for the nonpriority program.[179]

A sampling of deportation-control docket cards, taken by a Service Officer, indicated that about 140 cases were in Special Projects in New York City as of February 1970.[180] Of the cases selected for this study, however, many more received Special Project than nonpriority treatment. The cases placed in Special Projects usually involved aliens of advanced age.[181] One exception was a young secretary who worked for the United Nations; at the request of a Congressman and of U. N. officials, the case was placed on a six-month call-up, under which the secretary, though deportable, was allowed to remain here so long as she continued to work for the U. N.[182] One of the cases reflected the Service's concern to avoid adverse comment. The alien was a 70-year old woman, a native of France, but resident of a South American country. She was ineligible for permanent residence and had no relatives or other ties in the United States. The adjudicator recommended suspension of enforcement in this "sensitive" case, noting that the alien had risked her life for the Allies in France during the Nazi occupation.[183]

Voluntary departure. While Special Project treatment is relatively easy to invoke—certainly less formal than the nonpriority system—the most commonly used method of suspending enforcement, and the least formal, is to grant voluntary departure, repeatedly if necessary, for long intervals.

Many of the situations in which voluntary departure is used to stay deportation are spelled out in government regulations and memoranda. The controlling Operations Instruction sets out eight categories of aliens who should "normally" be granted voluntary departure, including any alien

[179] One experienced SIO referred to the Special Project device as "in effect" the same as nonpriority treatment. Interview with Francis Lyons, Esq., NYC, June 17, 1970.

[180] The sample consisted of a batch of about 20% of all docket cards, according to the officer who did the counting.

[181] Case nos. 226, 291.

[182] Case no. 067.

[183] Case no. 226.

HeinOnline -- 1 J. Legal Stud. 408 1972

whose application for an extension of stay is denied, or who voluntarily surrenders himself to the Service, or "who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days."[184] Extensions are not to be authorized in the absence of "meritorious circumstances," except in four of the eight classes, for which specific rules regarding extensions are set forth: (1) a nonimmigrant student or exchange visitor, and his spouse and children, who has lost his status solely because of a private bill introduced in his behalf, or, in the case of an exchange visitor, solely because he has formally filed an application for waiver of the two-year foreign residence requirement; (2) with some exceptions, a beneficiary of an approved Third Preference petition (professional), or a Western Hemisphere native who has Third Preference qualifications and has applied for an immigrant visa, or a beneficiary of an approved Sixth Preference petition who is qualified for Third Preference but cannot obtain a visa solely because a visa number is unavailable; (3) an alien, other than a native or citizen of contiguous foreign territory, who has applied for an immigrant visa at a consulate that has accepted jurisdiction of the case, and who has a priority date for a visa in not more than 60 days; (4) any alien "in whose case the district director has determined there are compelling factors warranting grant of voluntary departure," to be granted "in increments of time, not to exceed one year, as determined by the district director to be appropriate." The instructions provide that these categories are exclusive except for other specific instructions;[185] but this limitation is somewhat pointless, in light of the unlimited power already conferred on the district director under the fourth class.

The category authorizing renewable or indefinite grants of voluntary departure to Third Preference aliens created some difficulties for adjudicators. Nowhere does the Service indicate that the discretionary grounds are inapplicable to Third-Preference qualified aliens, although the instructions may be read to *allow* an examiner to find that an alien's professional qualifications present "substantial equities" warranting waiver, for example, of the mala fide nonimmigrant ground. Consequently, inconsistency is allowed to flourish. In one of several similar cases, the SIO who granted informal suspension stated in an interview that he regarded the alien accountant's professional qualifications as a fact "in her favor. The Government can use her." He was

[184] Operations Instructions § 242.10(a)(2)-(4) (July 30, 1969).

[185] Operations Instructions § 242.10(b) (Feb. 12, 1969). Other specific instructions do exist. For example, a Cuban alien seeking extension of his stay as a visitor beyond 30 days of entry is to be granted voluntary departure "for an indefinite period" unless his permanent residence is in some country other than Cuba, and the spouse or child of a Filippino enlistee in the U.S. Coast Guard or Navy is also to be granted "indefinite" voluntary departure, rather than extensions of stay, until the date of completion of service by the enlistee.

HeinOnline -- 1 J. Legal Stud. 409 1972

unmoved by the examiner's finding, supported by the consul, that the alien had intended to seek employment here when she left her native country with a visitor's visa.

Voluntary departure was also frequently used for aliens whose applications for immigrant visas had been accepted for processing at a consulate abroad. In substance, this practice is much like the supposedly defunct system of pre-examination.[186] We found several cases where aliens waited here, with the Service's approval, until their visas were processed across the border in Canada, or in Ireland; when their visas were ready they made a brief visit to the relevant consulate and reentered the United States as immigrants.[187] The regulation's requirement that the alien have a priority date for a visa number in not more than 60 days is apparently ignored in practice. One experienced SIO stated that he used this device after off-the-record discussions with counsel convinced him that relief would be forthcoming within a year or so, apparently without regard to whether the consulate had formally accepted jurisdiction. He felt that his practice avoided dilatory tactics by counsel, such as application for suspension of deportation, which are even more time-consuming and of great expense to the Service. Finally, adjudicators are not required by this provision to allow any deportable alien to remain in the United States while his application is being processed at a consulate. Thus, an alien was denied a renewal of voluntary departure, after applying to a consulate, because he had intentionally delayed his deportation through securing the introduction of private bills and other legal action.[188] Presumably, an adjudicator may exercise discretion to deny such relief to any alien he regards as undesirable or undeserving.

The fourth category of aliens for whom extended grants of voluntary departure are authorized confers sweeping power on district directors, which in New York at least has been frequently utilized. One common type of case in which adjudicators find "compelling" circumstances is when an otherwise qualified refugee or conditional entrant is ineligible for a visa number because he has not been in the United States for two years, as required by the statute.[189] We found several such cases in which voluntary departure was granted after denial until the two-year residence requirement had been fulfilled, conditioned on the continuing availability of a visa number at the time

[186] A State Department official recently announced that her agency intended to reconsider its practice of allowing aliens, denied § 245 relief, to obtain immigrant visas in consulates in Canada, when the aliens were natives of countries other than Canada. Statement of State Department Representative, Conf. of the Assoc. of Immigration & Naturalization Lawyers, Miami, Fla., May 23, 1970.

[187] Case nos. 007, 019, 039, 050 & 178.

[188] United States *ex rel.* Fen v. Esperdy, 423 F.2d 6 (2d Cir. 1970).

[189] 8 U.S.C. § 1153(g) & (h) (1970).

HeinOnline -- 1 J. Legal Stud. 410 1972

of each extension.[190] Other situations do not easily fit a "compelling" need test. Apparently, a Congressman's intervention on behalf of reasonably sympathetic aliens often results in the award of relief even where the alien lacks any professional qualifications. Thus, at a Congressman's request, one alien received an extended grant of voluntary departure until a close relative obtained section 245 relief, thereby enabling the alien to secure a higher preference;[191] another alien received voluntary departure for two years, until a visa number became available.[192] Further, there are several cases which seem explicable only in terms of the special ability of counsel to convince the Service to grant relief. One lawyer argued estoppel, on the ground that a visa had become unavailable because the Service failed properly to apply for one; rather than contest the point of law, the Service suspended enforcement.[193] Other attorneys were able to secure five and six month extensions for a maid,[194] and for a nonpreference Italian.[195] Finally, in one remarkable case, counsel was able to obtain extensions of voluntary departure for an alien crewman, who could never have obtained section 245 relief, until the alien became a United States citizen.[196] In sum, positively remarkable things have been done, through a device intended to encourage prompt, inexpensive departures, to enable aliens to stay here for long periods or to avoid leaving entirely.

3. *Private bills—a congressional device for suspending enforcement.* During the last fifteen or twenty years, Congress has enacted "private bills" to grant relief from deportation to about 5,000 aliens both within and without the country and to some individuals deprived of United States citizenship. These bills have relieved individuals from hardship, corrected the unwise or unfair exercise of administrative discretion, avoided the need for detailed legislation to cover special situations, and averted the promulgation of undesirable general rules.[197] These objectives have been served at great expense, however. To grant relief in 5,000 or so cases, Congress considered some 70,000. This required considerable expenditure of the time of individual Congressmen, subcommittees and their staffs, agency personnel, and the President's

[190] Case nos. 034, 212 (both refugees from Eastern Europe).

[191] Case no. 201.

[192] Case no. 190.

[193] Case no. 087.

[194] The cases referred to were not part of the sample formally collected, but were found and examined by the author during the period of data collection.

[195] Case no. 211.

[196] Case no. 090. A previous grant of permanent residence to the alien had been rescinded on the ground of marriage fraud.

[197] See generally, Note, Private Bills and the Immigration Law, 69 Harv. L. Rev. 1083, 1091 (1956); Gordon & Rosenfield § 7.12.

HeinOnline -- 1 J. Legal Stud. 411 1972

staff.[198] The practice is, moreover, contrary to the express policy of Congress against private legislation.[199] In this instance it often duplicates work done by the agency, tends to remove pressure for overall legislative reform, and results in actual or felt inequities, since Congress' procedures are relatively unknown, its individual members possessed of varying degrees of influence, and its standards for considering such legislation nonexistent. Other criticisms of the practice are (1) the willingness of some Congressmen to introduce bills for persons about whom they know little or nothing, even for some residing outside their districts or states; (2) the fact that many persons for whom bills are sought, and some for whom bills are passed, are undeserving by virtually any reasonable standard; (3) the persistent indications that Congressmen introduce private bills in exchange for campaign contributions and other favors; (4) the practice of attorneys in "selling" their influence, alleged or real, to desperate aliens; and (5) the overwhelming proof that private bills are usually introduced solely to delay the deportation of aliens who Congressmen are well aware stand no chance of obtaining legislative relief.[200]

To the extent that the proportion of private bills denied reflects intent to delay enforcement, evidence of delay seems overwhelming. Whereas in the 86th Congress (1959-1960) some 15.9 per cent of all private bills introduced

[198] See S. Rep. No. 1515, 81st Cong., 2d Sess. 607-09 (1950). Private bills must be sponsored by individual members of Congress. Most are introduced in the House, where they are processed by the Subcommittee on Immigration and Naturalization of the Judiciary Committee. If the sponsor requests it, a factual report is prepared by INS. Also at the sponsor's request, nonadversary hearings are occasionally held, attended by representatives from INS and the State Department. Before being placed on the private calendar for action, each bill approved by the Subcommittee is reviewed by six "objectors," three from each Party. The vote of one objector can have a bill passed over; two votes can remove it from the calendar altogether, which effectively kills a bill. When introduced in the Senate, bills are assigned individually to staff members of the Judiciary Subcommittee. INS reports are automatically requested in all cases where no report has been prepared. Bills are voted on by the Committee in executive session, and, if approved, referred to the Senate for passage. After passage, the Bureau of the Budget prepares a memo on each bill for the President, and if necessary the President's counsel provides additional information. Vetoes are rare, but they do occur. See generally Note, 79 Harv. L. Rev. 1684 (1966).

[199] See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified in various sections of various titles).

[200] Extensive criticism on all these grounds is contained in a series of articles by Mr. Jack Steele in the New York World Telegram & Sun, March 15, 17, 18, 19 and 30, 1954. A more recent series by Mr. Seth Kantor, in the Washington Daily News during September, 1969, demonstrated that the practices exposed by Steele were continuing, particularly in connection with Chinese seamen. See editorial, Wash., D.C., Daily News, Sept. 23, 1969. Another detailed exposé appeared in the Miami Herald, Aug. 4, 1969, at 1, col. 5, and the Senate Ethics Committee announced it would conduct an investigation into private relief bills. Senator Stennis, committee chairman, said there would be two aspects to the investigation: allegations that bills had been introduced "without the full knowledge of sponsoring Senators," and that there were "payments to the Senators involved." See N.Y. Times, Sept. 30, 1969, at 33, col. 2.

HeinOnline -- 1 J. Legal Stud. 412 1972

became laws, the proportion passed dropped to 5.4 per cent in the 88th Congress, 3.0 per cent in the 90th Congress (1967-1968), and 1.8 per cent in the 91st Congress (1969-1970).[201] In none of the cases we examined was passage of a private bill actually secured. This decline in the proportion of bills deemed meritorious enough for passage has resulted only in part from a decline in the absolute number of bills passed, from 488 in the 86th Congress to 113 in the 91st. At the same time, despite several sensational exposés and substantial criticism, the absolute number of bills introduced each Congress increased during the same period from 3,069 to 6,266. Of particular significance here, during the same period the proportion of bills introduced in behalf of aliens within the United States, as compared to those outside seeking to enter through consulates, increased from 17.3 per cent of all bills introduced to a whopping 86.9 per cent.

The effect of private bills on INS operations stems from the practice of suspending deportation while a private bill is pending. Stays had previously been granted in one-year intervals, but are now given for the life of the Congress in which the bill is introduced, or up to a two-year period. Moreover, a bill may be reintroduced by the author at a subsequent Congress, thereby resulting in another two-year extension. By 1969, approximately 1,400 private-bill cases were pending in the New York office alone. The Service claims that its practice is one of "courtesy and comity"[202] and stays have in some extremely isolated past instances been denied.[203] But the virtually automatic practice is to grant stays in all cases in which the House Subcommittee on Immigration and Naturalization requests a report, and until 1969 the Subcommittee requested reports automatically. This meant that, in addition to suspending enforcement, INS investigators would be required to prepare a statement describing the case and the results of any investigation for each of several thousand cases per year.[204]

In 1969, the House Subcommittee adopted new rules of procedure to govern private legislation, including one which states in its present form that the Subcommittee "shall not address to the Attorney General communications designed to defer deportation of beneficiaries of private bills" who entered the United States as "non-immigrants, stowaways in transit, deserting crewmen, or by surreptitiously entering without inspection. . . ." Exemption is to

[201] The source of these figures is the Annual Reports of INS, which contain the number of bills introduced and passed in each Congress.

[202] Gordon & Rosenfield § 7.12c.

[203] See Roumeliotis v. INS, 304 F.2d 453 (7th Cir. 1962), *cert. denied,* 371 U.S. 921 (1962); United States *ex rel.* Knauff v. McGrath, 181 F.2d 839 (2d Cir. 1950), vacated as moot, 340 U.S. 940 (1951).

[204] INS no longer makes recommendations on all pending bills. See Gordon & Rosenfield § 7.12c. Most of the investigations are superficial, but the process is still time consuming.

HeinOnline -- 1 J. Legal Stud. 413 1972

be granted only when the bill "is designed to prevent unusual hardship," and only when the sponsor files with the Subcommittee "full and complete documentary evidence in support of his request to waive this rule."[205] This new rule has not been applied to any bills pending at the time it was adopted. Several of the pending bills date back to at least the 89th Congress (1963-1964), when they were first introduced; such bills have recently been "tenaciously" reintroduced, to avoid the strictures of the new rule.[206]

The new rule is, however, having an effect. The backlog of pending private-bill cases has been reduced from 1,400 in 1969,[207] to about 1,000 in mid-1971. INS officers reduce the backlog by periodically checking with the beneficiaries of bills to determine their eligibility for relief through regular means. The difference of late, however, is that they are clearing more cases than are coming in.[208]

The problem created by private bills is in part of the Service's own making. It may be true, as has been suggested, that private bills are caused, in part, by the failure of Congress to accord greater discretion to INS to suspend deportation and waive grounds of deportability. But the evidence we uncovered indicated that many of the cases in which private bills were filed involved questions on which the Service possessed broad discretion.[209] For example, with respect to denials based on the ill-defined discretionary ground of "separation of family unit" the rate of congressional intervention through private bills is higher than on any other single ground of denial—private bills were filed in five of 20 such cases. This is evidence that undefined grounds of decision invite legislative intervention in the enforcement process.

4. *Effects of the enforcement system.* We have already noted, in connection with informal adjudication and administrative review, substantial evidence of inconsistency, refusal of aliens to accept section 245 denials, and high rates of instability. The enforcement process presents a similar picture. Inconsistency is virtually inherent in any system of informal suspensions of enforcement. The more formal devices—suspension of deportation and voluntary departure (in its intended form of actually encouraging aliens to de-

[205] Rule 6, Rules of Procedure (Private Legislation), Subcomm. No. 1, H. Comm. on the Judiciary, 91st Cong. The rules were subsequently revised, and the rule quoted in text is now Rule 4. It differs from Rule 6 in that the former version applied to "visitors, exchange visitors, students," whereas the present rule applies to all classes of nonimmigrants. For some unknown reason the prior rule was also changed in that it required a showing for exemption of "extreme" hardship, whereas the present rule requires a showing of "unusual" hardship.

[206] Telephone interview with Donald Day, Supervisory Criminal Investigator, NYC, June 25, 1971.

[207] Memorandum obtained from Investigations Section NYC, inscribed March 26, 1969.

[208] Interview, *supra* note 195.

[209] See also Note, 69 Harv. L. Rev. 1083, 1094-95 (1956).

HeinOnline -- 1 J. Legal Stud. 414 1972

part)—restrict discretion, and administrative and judicial review help assure uniformity of application; further, the Service has done an exemplary job in formulating standards and controls for the nonpriority program and voluntary departure. But the Special Project category, and the freewheeling power of district directors to grant extended periods of voluntary departure, are at once the least defined and most often invoked devices.

Combining the evidence from our administrative review and our enforcement analyses, we are now prepared to answer the question: What proportion of all denied cases will ultimately be reversed, either on the same record or because of changed facts? A problem is that many of the cases we examined are still awaiting final action. I felt it worthwhile, therefore, personally to examine all pending cases, to judge whether relief would be granted. Based on exposure to hundreds of similar cases, I was able to reach definite conclusions one way or the other in 22 of the 36 pending random sample cases; whenever any reasonable uncertainty as to result arose, the case was classified "Result Uncertain." Of the 22 cases in which judgments seemed clear, 14 were classified as probable grants and 8 as probable denials. Using these data we obtain (Table 15) a relatively more complete view of the ultimate results —and of the seemingly extraordinary instability—of section 245 denials. And even Table 15 fails to reflect the full potential rate of instability, since as mentioned earlier many of those who departed voluntarily appear to have done so out of ignorance or fear.

TABLE 15
RESULTS OF ADMINISTRATIVE REVIEW AND ENFORCEMENT OF SECTION 245 DENIALS

Result	% of Random Sample
Permanent Residence Obtained	42%
Permanent Residence Probable	13%
Total	55%
Voluntary Departures	25%
Probable Denials	7%
Total	32%
Result Uncertain	13%

A particularly interesting aspect of the enforcement process is the variation in its impact on denials based on statutory and discretionary grounds. While the relatively standardless discretionary denials were less consistent and less stable in the administrative review process than decisions based on statutory grounds, it is the statutory denials that most frequently involved informal suspensions of enforcement. Thus, some form of administrative suspension was

HeinOnline -- 1 J. Legal Stud. 415 1972

invoked in 19 per cent of the denials based in whole or in part on a statutory ground, as compared with only 5 per cent of all purely discretionary denials. Similarly, while virtually all congressional intervention designed to change the result of decisions on the merits concerned discretionary denials, congressional intervention frequently occurred in connection with statutory denials at the enforcement stage, to help the alien secure delays. Consequently, the overall rate of congressional inquiry or influence, other than private bills, was roughly the same in denials based at least in part on a statutory ground (18 per cent) as in the comprehensive collection of discretionary denials (17 per cent). Private bills, however, were introduced in 15 per cent of the statutory denials as compared to 9 per cent of all discretionary denials.

The result was to leave pending at the time we collected data a higher proportion of statutory than discretionary denials. Of the random denials based on statutory grounds, 37 per cent were pending when data collection ceased, as compared to 21 per cent of all the discretionary denials. Moreover, a higher proportion of pending statutory denials seemed destined for grants of permanent residence than of discretionary denials. Of the 26 pending statutory denials, eight involved informal suspensions, indicating almost certain ultimate success, whereas enforcement was informally suspended in only four of the 26 pending discretionary denials. The interesting result of this difference is that it produces an overall picture in which the instability of discretionary and statutory denials looks far less unequal than the review process seemed to indicate. As Table 16 reflects, it is entirely possible that, despite the far higher proportion of instability reflected by discretionary denials on the merits of decisions, by the time results in these cases are final, statutory denials will be fully as unstable as discretionary denials.

TABLE 16
RESULTS OF ADMINISTRATIVE REVIEW AND ENFORCEMENT OF SECTION 245 DENIALS BY TYPE OF DENIAL

Result	Statutory	Discretionary
Permanent Residence Obtained	38%	60%
Permanent Residence Probable	15%	2%
Total	53%	62%
Voluntary Departure	25%	25%
Result Uncertain	22%	13%
	(69)	(121)

Different reasons exist for instability in each category of cases. Discretionary denials are more often reversed on the same record, indicating inconsistency in the application of standards, or political intervention, on the merits. Statutory denials, on the other hand, are generally reversed only because certain facts have changed, and political intervention in such cases is usually for

HeinOnline -- 1 J. Legal Stud. 416 1972

the purpose of securing delays designed to help the alien change the facts in his case. But how significant are these differences? Viewed in conjunction with adjudications on the merits, cases based on discretionary judgments seem to reflect significantly different characteristics as compared with those based on statutory grounds. But it may be artificial to examine the characteristics of decisions at discrete stages of the administrative process. For example, it means very little to say that discretionary denials appear to be more costly than statutory denials in that the former are more frequently reversed on the same record at some stage of administrative review. Statutory denials may, in fact, be more costly, because of the delays and effort entailed in suspending enforcement. Similarly, it may be true that relatively greater inconsistency on the merits exists with respect to discretionary decisions, but it seems also to be true that inconsistency is present in the enforcement process, where statutory denials are primarily affected. What does seem safe to say is that INS, with input from Congressmen, and lots of agitation and obstruction by aliens, effectively overrules the implementation of most examiner decisions, whether based on statutory or discretionary grounds. And one important element of this result is that it was achieved, in both discretionary and statutory cases, through the exercise of relatively unchanneled powers—power to reverse discretionary denials on the merits, and power to suspend enforcement of denials based on statutory prerequisites.

A final aspect of the enforcement process worth mentioning is the effect of representation. First, there appears to be some evidence (Table 17) that the absence of representation may prejudice aliens in obtaining suspension of enforcement. While 18 per cent of the represented aliens in the random sample of denials obtained suspension of enforcement, 11 per cent of those unrepresented obtained similar relief.

TABLE 17
PROPORTION OF RANDOM SAMPLE DENIALS IN WHICH REPRESENTED ALIENS OBTAINED INFORMAL SUSPENSION

Informal Suspension	Representation	
	Present	Absent
Yes	18%	11%
No	82%	89%
	100%	100%
Number of cases	(76)	(28)

Striking evidence of prejudice exists in connection with congressional intervention in the form of inquiries or private bills: aliens with representation far more frequently managed to secure the assistance of Congressmen than unrepresented aliens, as Table 18 reflects. Therefore, giving substantial weight

HeinOnline -- 1 J. Legal Stud. 417 1972

TABLE 18
PROPORTION OF RANDOM SAMPLE DENIALS IN WHICH REPRESENTED ALIENS OBTAINED CONGRESSIONAL ASSISTANCE

Form of Assistance	Representation	
	Present	Absent
Congressional inquiry	30%	11%
Private bill introduced	18%	4%
	(76)	(28)

to congressional efforts in behalf of aliens is even more discriminatory than one might normally suspect. If the Service were truly to seek to minimize the inconsistent application of the law, it would either ignore congressional interventions or establish a method for according to all aliens the same treatment obtained by aliens who secure congressional assistance.

Using the random sample statutory denials and the universe of discretionary denials as our base, we see in Table 19 that the evidence of prejudice from lack of representation in connection with statutory grounds is extremely strong: aliens denied relief on statutory grounds obtained informal suspension in 25 per cent of the cases where represented, but in only five per cent (one of 20) where unrepresented. On the other hand, while the absolute numbers are small, unrepresented aliens denied relief on discretionary grounds

TABLE 19
PROPORTION OF REPRESENTED ALIENS WHO OBTAINED INFORMAL SUSPENSION, BY BASIS OF INITIAL DENIAL

Informal Suspension	Statutory		Discretionary	
	Represented	Unrepresented	Represented	Unrepresented
Yes	25% (52)	5% (20)	3% (101)	15% (20)

secured informal suspension more often proportionately (15 per cent or three of 20 cases), than represented aliens denied relief on such grounds (three per cent or three of 101 cases). Unrepresented aliens may tend to accept statutory denials once the review process is complete, whereas those who are represented may, with guidance, know more about how the enforcement process operates. Why isn't the same true of aliens denied relief on discretionary grounds? Possibly they are led to find means of protest through a feeling of unfair treatment. Or perhaps SIOs and others who disagree with examiner decisions use the enforcement process especially to help affected aliens who are unrepresented. Whatever the reasons, the same phenomenon seems to appear in connection with the extent to which represented and unrepresented aliens obtained congressional assistance. Table 20 shows that represented

HeinOnline -- 1 J. Legal Stud. 418 1972

aliens denied relief on statutory grounds were far more successful than their unrepresented counterparts but that unrepresented aliens denied relief on discretionary grounds were relatively successful in getting Congressmen to inquire in their behalfs, although not in securing the introduction of private bills.

TABLE 20
PROPORTION OF REPRESENTED ALIENS WHO OBTAINED CONGRESSIONAL ASSISTANCE, BY TYPE OF ASSISTANCE AND BASIS OF DENIAL

Type of Assistance	Statutory		Discretionary	
	Represented	Unrepresented	Represented	Unrepresented
Congressional Inquiry	25%	5%	19%	25%
Private Bill Introduced	24%	—	12%	5%
	(52)	(20)	(101)	(20)

These facts indicate that evidence of prejudice from lack of representation may lie relatively hidden in the cases pending at the time data collection ceased. Interestingly, if aliens were prejudiced in this way, it appears to be because they lacked know-how about the enforcement system. Representation at the enforcement stage may assure proper notice to aliens of the importance of congressional assistance and how to get it. The same result apparently occurred in connection with aliens after their applications were denied—representation seemed to overcome the effect of the misleading assertion by INS that no "appeal" was available. In both situations representation appears to have made a difference. Yet the representatives involved performed no technical legal work and might be superfluous in many cases if INS gave full and fair notice to the alien of all available opportunities for relief.

IV. CONCLUSION

In beginning this study, I assumed I would find that broad discretion caused considerable injustice to individuals who sought relief. This seems a commonly held attitude, based ultimately on the notion that human beings tend to act arbitrarily if they are given the power to do so. I had also assumed (once again, I believe, in common with others) that, while limiting discretionary power through such devices as rulemaking may be a desirable objective, such limitations would make administration more formal and therefore more costly. These assumptions prepared me to confront the following (simplified) question: How much was it reasonable to expect or require the government to pay to control discretion and thereby achieve more justice?

It turns out that my assumptions had little to do with reality. We found considerable evidence of injustice, but little to support the conclusion that

HeinOnline -- 1 J. Legal Stud. 419 1972

the injustices were caused or related to the exercise of broad discretion under section 245. We noted, first, that discretionary judgments seemed less consistent than decisions based on more well defined, more closely reviewed, standards. An aspect of this inconsistency was the political intervention seemingly invited by the presence of discretionary power. Further, adjudicators seem to have utilized discretionary grounds to give effect to their biases, and as vehicles for relying on nonrecord information.

These indicia of injustice lose part of their sting, however, when the administrative process is considered as a whole. The one overpoweringly evident consequence of the system is that almost every applicant obtains section 245 relief. Most of those whose applications are initially denied on relatively well defined statutory grounds become the beneficiaries of inconsistently made, but favorable, discretionary judgments in the enforcement process. Most of those whose applications are initially denied on discretionary grounds obtain relief through administrative review *because* discretion is inconsistently exercised. Thus, the inconsistency caused by broad discretion operated against aliens at one stage, on the merits, but later operated in the aliens' favor, on the merits and in connection with enforcement. The biases of one administrator were frequently offset by the biases (or lack of bias) of other administrators. And consideration of nonrecord information was precluded at the deportation proceeding, thereby largely negating the injustice caused by those examiners who failed to follow Service instructions to disregard such material.

True, some aliens departed voluntarily, without seeking administrative review or suspension of the enforcement process. And others failed to obtain relief despite efforts at both levels. But these situations were not necessarily related to the discretionary power delegated under section 245 or inherent in enforcement. Aliens who departed voluntarily, or whose efforts to obtain relief were unavailing, fell into roughly three categories: (1) those who were statutorily inadmissible, and would have been denied immigrant visas abroad; (2) those who were admissible, but for whom it was unlikely that a visa would be available for the next two or three years, and whose cases presented no strong humanitarian considerations, such as old age; and (3) those who were unrepresented, or who were represented ineffectively. Only aliens in the last category could advance a telling claim of injustice. To the extent that their plight was caused by lack of counsel, the injustice is not attributable to the exercise of discretion, since INS lacks discretion to supply counsel at government cost. Our data indicate, moreover, that voluntary departures and ineffective representation were more likely caused by the aliens' lack of accurate and complete information about available remedies in the processes of administrative review and enforcement. Here, too, it seems improper to attribute these injustices to discretionary power, as we have used the term. The Service has no lawfully recognized discretion to give aliens an erroneous

HeinOnline -- 1 J. Legal Stud. 420 1972

or materially incomplete description of its available procedures. Both the Freedom of Information Act and Department of Justice regulations call for disclosure (presumably accurate) of all procedural opportunities.

If the overall effects of discretion under section 245 are remarkably benevolent, it is also true that adjudication and enforcement under section 245 are far more, not less, costly because of the broad discretionary power given INS. Summary grants of applications are prohibited, principally (in my judgment) because the Service feels it should judge the worthiness of each applicant as if it were a board of parole. This requires time-consuming and often pointless interviews in every case. The range of inquiry at interviews and during investigation is also greatly broadened because of the numerous bases on which adjudicators rely in adversely exercising discretion on the merits. Denials based on discretion are less readily accepted by aliens, perhaps because they sense that discretion is being inconsistently applied by examiners and that SIOs have their own, more liberal, standards. Consequently few (if any) informed aliens denied relief on discretionary grounds fail to exercise their opportunities for administrative review. The presence of broad discretionary power to suspend the enforcement process likewise attracts efforts by aliens initially denied relief, even on statutory grounds, to secure delays so that eligibility or equities can be established. Finally, congressional intervention on the merits of applications occurs almost exclusively in connection with denials based on discretion. Intervention in the enforcement process is almost invariably designed to secure delays, the granting of which is highly discretionary in all situations except those involving private bills.

If Congress or the Service want to cut the cost of administering section 245, they should limit, not increase, the discretionary power exercised by adjudicators on the merits and in enforcement. On the other hand, cost-saving reforms might well result in more injustice. For example, if SIOs were denied the power to exercise discretion de novo in section 245 cases, many aliens who are statutorily eligible to immigrate would fail to obtain relief. Decision making would become more consistent if the power to suspend enforcement in denials based on statutory grounds were curtailed, or if discretion to grant relief to mala fide nonimmigrants were eliminated. Yet, the result of such changes, in my view at least, would be consistent injustice, inexpensive to INS, but extremely burdensome to many aliens and possibly to the Congress, because of the pressures aliens and their American relatives, employers and friends would bring to bear on it. That is not to say, of course, that nothing should be done to streamline administration, such as the adoption of standards. Delay is itself an injustice that aliens should be spared where possible. But the steps taken must be adopted with care—with "discretion" if you will—lest sound and humane results be subordinated to improvements in form.

HeinOnline -- 1 J. Legal Stud. 421 1972

HeinOnline -- 1 J. Legal Stud. 422 1972