THE TRANSITION BETWEEN SUSPENSION OF DEPORTATION AND CANCELLATION OF REMOVAL FOR NONPERMANENT RESIDENTS UNDER THE IMMIGRATION AND NATIONALITY ACT: THE IMPACT OF THE 1996 REFORM LEGISLATION

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I. INTRODUCTION

The United States has a long immigration history. Aliens have poured into this country in increasing numbers, seeking the traditional American dream. In the early days, there were few restrictions on immigration. Nevertheless, a 1798 statute gave the President the power to order the deportation of any alien who posed a threat to the peace and safety of the United States.[1] Even so, an alien

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still had the opportunity to convince the President that he was not a danger to the country.[2] In that event, the President could grant a "license" to such an alien to remain within the United States as long as the alien behaved himself.[3]

Eventually, the government became concerned about the immigration of alien workers and provided for the return of any immigrant who violated the restriction against foreign labor.[4] The government was able to obtain information about any violations by offering financial incentives to informants.[5] In time, the authorities paid particular attention to certain aliens who entered legally but whose conduct after entry left much to be desired.[6] For example, aliens who were involved in prostitution were deported,[7] and if they tried to return to the United States, they were subject to imprisonment for as long as two years.[8] Although the 1917 legislation provided for the deportation of aliens who were in the prostitution business,[9] it also reached aliens in other categories. An alien was subject to deportation within five years after entry if he was excludable at entry.[10] He was subject to a similar fate if he committed a crime of moral

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1. Act of June 25, 1798, ch. LVIII, § 1, 1 Stat. 570, 570-71 (expiring by the statute's own provisions June 25, 1800). The Act expressed the President's authority this way:

> [I]t shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States, within such time as shall be expressed in such order, which order shall be served on such alien by delivering him a copy thereof, or leaving the same at his usual abode, and returned to the office of the Secretary of State, by the marshal or other person to whom the same shall be directed.

Id.

2. *Id.* The evidence concerning the lack of the alien's dangerousness to the United States had to be given under oath. *Id.*

3. *Id.* The President could require the alien to post a bond with one or more sureties to guarantee the alien's good behavior. *Id.*

4. *See* Act of October 19, 1888, ch. 1210, 25 Stat. 565, 566 (repealed 1917).

5. *Id.* at 567.

6. *See* Act of March 26, 1910, ch. 128, § 2, 36 Stat. 263, 264-65.

7. *Id.* The statute covered not only those aliens who practiced prostitution, but also those aliens who promoted it or were employed by any place of amusement "habitually frequented by prostitutes." *Id.*

8. *Id.*

9. Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874, 876 (repealed 1952).

10. *Id.* § 19, 39 Stat. at 889. This meant that an alien who got into the United States despite his inadmissibility could still be deported later once the government found out about him. *Id.*

turpitude, or if he became a public charge, within the same five-year period.[11] Congress was concerned not only about the general increase in immigration but also about protecting society from certain undesirable elements.[12] The 1917 legislation reached not only those aliens who should not have been admitted in the first place, but also those aliens who misbehaved subsequent to entry.[13] The deportation classifications continued to develop over the years, taking into account the various categories of misfits.

As the law developed, there were always cases that called for compassionate treatment.[14] Sometimes an alien became deportable after developing close family relationships in the United States.[15] Before 1940 there was no relief available to aliens on these grounds.[16] Nevertheless, it was not unusual for the immigration authorities to withhold deportation while awaiting a legislative solution to the alien's problem.[17]

The Alien Registration Act of 1940 finally provided some relief by authorizing the Attorney General to suspend deportation—with certain exceptions—if an alien could show that his expulsion would result in "serious economic detriment to a citizen or legally resident alien who [was] the spouse,

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11. *Id.* The alien could avoid deportation under this public charge provision if he could show that his condition was caused by circumstances arising subsequent to his entry. *Id.*

12. *Id.* §§ 3, 19, 39 Stat. at 876, 889.

13. *Id.* § 19, 39 Stat. at 889. The Act reached conduct in which the alien engaged "at any time after entry," such as advocating anarchy, and also included conduct in which the alien engaged within "five years after entry," such as crimes of moral turpitude. *Id.* If the alien should not have been admitted, but was nevertheless admitted, he would still be subject to deportation within five years because he was excludable at entry. *Id.*

14. *See, e.g.*, Zurbrick v. Woodhead, 90 F.2d 991, 991 (6th Cir. 1937) ("Once more we are impelled to direct attention to the toll in human anguish which so often follows [a] literal reading of the Immigration Act . . . . But the law is clear, and however cruel the result, we have no recourse but protest and recommendation.").

15. *See, e.g.*, United States ex rel. Sage v. District Dir. of Immigration, 82 F.2d 630, 633 (7th Cir. 1936) ("There has been criticism directed to nonflexibility of the deportation laws, to their failure to give discretion to some official to be exercised in cases where family ties are broken through deportation of one member.").

16. The 1917 Act did provide that an alien would not be deported on criminal grounds if he received a pardon or if the judge who sentenced the alien recommended that the alien not be deported. *See* Act of February 5, 1917, § 19, 39 Stat. at 889-90.

17. H.R. DOC. NO. 392, at 5-6 (1932). While a judge could stay the deportation of an alien criminal, no one could prevent the deportation of an alien. *Id.* at 5. The Secretary of Labor could grant a temporary stay but granting a permanent stay was illegal. *Id.* at 6. The deportation of 2,862 aliens was stayed during a 32-month period between 1933 and 1935. *Id.* Ninety-eight percent of the cases involved family separations and none of the aliens had ever been convicted of a crime involving moral turpitude. *Id.* The majority of the aliens had entered the country illegally. *Id.* This record energized Congress into seeking a solution to the problem. *Id.*

parent, or minor child of such deportable alien."[18] This was a step in the right direction, for now aliens could petition for relief on the basis of some unforeseen hardship. This new avenue of relief had one drawback: Congress reserved the power to disapprove any suspension of deportation.[19] It was a power that would be challenged later.[20]

Suspension of deportation had its fair share of criticism.[21] Aliens who entered illegally were seen to enjoy an advantage over those aliens who waited their turn at home.[22] Aliens sometimes obtained suspension of deportation when they would have been unable to obtain visas abroad, and alien visitors always had an incentive to prolong their stay in order to qualify for relief.[23] It was only a question of time before the criterion of "serious economic detriment" gave way to another formulation.[24] In the minds of many, this standard was far too generous, and when Congress passed the Immigration and Nationality Act (INA)[25] in 1952, the suspension remedy became available to an alien who could show "exceptional and extremely unusual hardship [to himself] or to his spouse, parent, or child."[26] Although the 1952 suspension provisions seemed complex because of their five classifications, they reached certain groups of aliens such as criminals and subversives that were not previously covered.[27]

It was questionable whether the degree of hardship required by this latest version served the aliens' interests. Congress intended to tighten the standards a bit by substituting the "exceptional and extremely unusual hardship" criterion for serious economic detriment. Perhaps this time Congress went too far.[28] When it amended the INA again in 1962,[29] it divided the suspension statute into two

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18. Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672 (repealed 1952).

19. If the two Houses of Congress passed a concurrent resolution not favoring the alien's suspension of deportation, the alien would be deported. *Id.*

20. INS v. Chadha, 462 U.S. 919, 959 (1983) (holding congressional veto provision unconstitutional). The Court viewed the provision as legislative and thus subject to Article I, Section 7 of the Constitution. *Id.* at 946-48. Thus both the Senate and the House had to approve the legislation and then present it to the President. *Id.* at 954-55.

21. *See* S. REP. NO. 81-1515, at 600-03 (1950).

22. *Id.* at 600.

23. *Id.* at 601.

24. *See* Alien Registration Act of 1940, § 20, 54 Stat. at 672.

25. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1646 (1994 & Supp. III 1997)).

26. *Id.* § 244(a), 66 Stat. at 214-16.

27. *See id.* Section 244(a)(4) covered "criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes" who had been physically present for not less than ten years. *Id.* § 244(a)(4), 66 Stat. at 215.

28. *See id.* § 244(a), 66 Stat. at 214-16.

29. Act of October 24, 1962, Pub. L. No. 87-885, 76 Stat. 1247 (repealed 1996).

categories.[30] Aliens who were less serious violators and could prove seven years of continuous physical presence in the United States, were also required to show "extreme hardship."[31] Aliens with more serious violations had to show continuous physical presence of at least ten years and exceptional and extremely unusual hardship.[32]

It was obvious that Congress was struggling to produce a more lenient standard for those aliens who did not pose much of a threat to the community, while at the same time maintaining the exceptional requirements for less desirable aliens.[33] Although the extreme hardship standard seemed to be the best that Congress could do for aliens in the first suspension category, the statutory leniency presented a challenge for many aliens. There was certainly no unanimity within the Board of Immigration Appeals (BIA) and the courts in defining extreme hardship.[34] It was understood that an alien's hardship should be more severe than that experienced by the average alien facing deportation. However, a conflict arose when the Supreme Court affirmed the BIA's authority to interpret extreme hardship narrowly in *INS v. Wang*.[35] Thereafter, aliens found it more difficult to make their case for relief.[36] But this was not the end of

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30. *Id.* § 4, 76 Stat. at 1247-48.

31. *Id.*

32. *Id.* § 4, 76 Stat. at 1248.

33. *See* 6 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 74.07[2][d] (rev. ed. 1999); *see generally* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 374-462 (1997) (detailing legislative history of United States deportation policy and courts' statutory interpretation).

34. *Compare* Antoine-Dorcelli v. INS, 703 F.2d 19, 21 (1st Cir. 1983) (stating that "determination of 'extreme hardship' is committed to the sound discretion of the Attorney General"), Ramos v. INS, 695 F.2d 181, 185 (5th Cir. 1983) (finding the failure of the Board to address non-economic hardship and to consider all asserted hardships cumulatively denied Ramos the consideration to which he was entitled), Bastidas v. INS, 609 F.2d 101, 105 (3d Cir. 1979) (holding that a finding of no extreme hardship will not be affirmed where affection is shown unless the reasons for that finding are made clear), *and In re* Lum, 11 I. & N. Dec. 295, 298 (1965) (finding extreme hardship based solely on economic grounds), *with* Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982) (finding economic hardship alone does not suffice to show extreme hardship), Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979) (holding that "[t]he possibility of inconvenience to the citizen child is not itself sufficient to constitute extreme hardship"), *and In re* Kim, 15 I. & N. Dec. 88, 89-90 (1974) (finding that parents have not shown that their deportation would result in extreme hardship to their children).

35. INS v. Wang, 450 U.S. 139, 145 (1981).

36. *See* Hernandez-Cordero v. INS, 819 F.2d 558, 561 (5th Cir. 1987) (finding a bold statement by BIA that it considered all factors both individually and collectively indicated sufficient consideration of the issue); Minwalla v. INS, 706 F.2d 831, 835 (8th Cir. 1983) (finding that the failure to reopen proceedings to consider a claim of extreme hardship was not an error because the alien could still get a job as an engineer and have the support of his family after

the road. When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act[37] (IIRIRA) in 1996, it replaced suspension of deportation with cancellation of removal and returned to the exceptional and extremely unusual hardship standard, which it had previously only applied to the most serious violators.[38] It also made that standard applicable to all aliens seeking cancellation of removal, except those applicants who were battered or subject to extreme cruelty, for whom there was special protection.[39]

Another troublesome element in the development of suspension of deportation related to an alien's continuous physical presence. The 1948 amendment to the Immigration Act of 1917[40] provided for suspension not only when an alien's deportation would cause serious economic detriment to the alien's spouse, parent, or minor child, but also when the alien had resided continuously in the United States for at least seven years, regardless of family ties.[41] There was some dissatisfaction with the administrative interpretation of this provision.[42] An alien could remain outside the United States for as long as two years during the seven-year period and still comply with the continuous residence requirement.[43] Congress responded to these concerns in the INA by requiring an alien to be physically present for the required time.[44]

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deportation); Diaz-Salazar v. INS, 700 F.2d 1156, 1159 (7th Cir. 1983) (noting "the *Wang* case instructs us that the application of the extreme hardship standard in an individual case is a task allotted primarily to the INS and not to the courts"); Ramos v. INS, 695 F.2d at 185 (describing the post-*Wang* narrow scope of review for determinations of no extreme hardship); Ahn v. INS, 651 F.2d 1285, 1286 (9th Cir. 1981) (noting that the BIA has "broad discretion in determining what constitutes extreme hardship"); Hamid v. INS, 648 F.2d 635, 637 (9th Cir. 1981) (noting the Board's authority to construe extreme hardship and to assess the sufficiency of the grounds for relief without reopening proceedings for a hearing).

37. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

38. *Id.* § 304(a), 110 Stat. at 3009-594.

39. *Id.*

40. Act of July 1, 1948, ch. 783, 62 Stat. 1206, *repealed by* Immigration and Nationality Act of 1952, ch. 477, § 403(a), 66 Stat. 163, 279.

41. *Id.*

42. *See* S. REP. NO. 81-1515, at 602 (1950). The Senate ordered an investigation into the immigration system and the subsequent report indicated the INS position:

> Field Officers of the Immigration and Naturalization Service criticized the administrative interpretation of the 7-year residence provisions of the law. These provisions have been held applicable to an alien who has a total of 7 years' residence in the United States, although the alien has been out of the United States for as long as 2 years during the last 7 years.

Id.

43. *Id.*

44. Immigration and Nationality Act of 1952, § 244(a), 66 Stat. at 214-16.

It was predictable that there would be some disagreement over the meaning of "continuous physical presence."[45] There was a similar controversy in *Rosenberg v. Fleuti*[46] in defining the term "entry."[47] The Supreme Court explained that an alien did not make an entry upon his return to the United States if his trip abroad was innocent, casual, and brief, thus not making his absence meaningful.[48]

The Court's decision in *Fleuti* would have led any optimist to believe that the Court would give a similar liberal interpretation to continuous physical presence. Nevertheless, in *INS v. Phinpathya*,[49] the Court rejected the comparison to the *Fleuti* doctrine and opted for a literal interpretation of the language in the suspension provision.[50] Any absence—no matter how brief—interrupted an alien's continuous physical presence.[51] The Court's decision in *Phinpathya* inspired Congress to amend the INA so that an alien could still maintain continuous physical presence despite his brief, casual, and innocent absence, as long as the absence did not meaningfully interrupt the alien's stay in the United States.[52]

The new IIRIRA did not ignore these developments in providing for cancellation of removal.[53] It defined the events that would end an alien's continuous physical presence,[54] while at the same time prescribing the limits on an alien's absences from the United States.[55] IIRIRA replaced § 244 of the INA with § 240A(b).[56] Suspension of deportation, therefore, became cancellation of removal.[57] Congress must have thought that the new legislation would provide a solution to the old problems of § 244. It remains to be seen whether Congress has achieved its objective.

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45. *See id.* The statute required the alien to be "physically present in the United States for a continuous period" of not less than the required number of years. *Id.*

46. Rosenberg v. Fleuti, 374 U.S. 449 (1963).

47. *Id.* at 452-58.

48. *Id.* at 462.

49. INS v. Phinpathya, 464 U.S. 183 (1984).

50. *Id.* at 193-94.

51. *Id.* at 195-96.

52. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3439-40 (amending Immigration and Nationality Act of 1952, § 244(b), 66 Stat. at 217) (repealed 1996).

53. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-587 (codified at 8 U.S.C. § 1229b (Supp. III 1997)).

54. 8 U.S.C. § 1229b(d)(1).

55. *Id.* § 1229b(d)(2).

56. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 304(a), 308(b)(7), 110 Stat. at 3009-615.

57. *Id.* sec. 304(a)(3), § 240A, 110 Stat. at 3009-594.

This Article will attempt to trace the historical developments leading to this cancellation of removal provision, especially as they relate to the requirements of continuous physical presence and of exceptional and extremely unusual hardship. This survey will lead to a discussion of the cases that have dealt with these issues and will assess how the IIRIRA addressed the problems that arose under the previous regime. In the final analysis, this Article will show that Congress has become tougher on aliens in this context, and that if experience is any guide, aliens will face stiff challenges in meeting the new statutory requirements for cancellation of removal. If suspension of deportation seemed difficult in the past, cancellation of removal will seem even more difficult, especially when the BIA and the courts confront the degree of hardship required for granting relief.

II. THE CHANGING STANDARDS

A. *Serious Economic Detriment*

The showing of serious economic detriment[58] required by the government in the early days seemed like a step in the right direction. It was, after all, an attempt to provide an avenue of relief that was not previously available.[59] The emphasis on economic considerations recognized the underlying rationale for the increase in immigration. Aliens came to the United States to improve themselves, and the initial suspension of legislation provided relief if an alien's deportation would result in a substantial reduction in the alien's standard of living.[60] It was predictable that this approach would cause problems because most aliens did not relish returning to less desirable stations in life.[61] It was easy for them to highlight the new attractions in this country, while portraying the dark realities of the old existence.[62] There was hardly any controversy about the

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58. Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672 (amending Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889). The new language allowed for suspension of deportation if the Attorney General found that the alien's deportation would result in "serious economic detriment to a citizen or legally resident alien who [was] the spouse, parent, or minor child of such deportable alien." *Id.*

59. Before 1940, the only way that a deportable alien could remain in the United States was through a private bill enacted by the Senate and the House. INS v. Chadha, 462 U.S. 919, 933 (1983).

60. *See* S. REP. NO. 81-1515, at 597 (1950).

61. The Senate Report gave an example: "When an alien has property worth $300 and takes care of her home and looks after the needs of her two American-born minor children, deportation would work serious economic detriment to the children, although the family receives $62.50 of public funds monthly for its maintenance." *Id.* (footnote omitted).

62. *Id.* at 600.

economic detriment that an alien would experience upon return to his homeland.[63] The issue was whether the detriment was serious enough to merit statutory relief.[64]

By and large, aliens emphasized their holdings and investments, thus revealing their impressive achievements since their arrival in the United States.[65] These factors were even more compelling when an alien's spouse and children were United States citizens.[66] Aliens clamored for relief in order to avoid being separated from their families.[67] Even so, the availability of the suspension remedy seemed to reward those aliens who had bypassed the waiting lists abroad and had established roots within the United States, even if such aliens were here illegally.[68] Aliens realized that they had a good chance of regularizing their status once they reached this country and remained undetected for the statutory period.[69] The attraction was too great for many of them. They had the necessary incentive to succeed because the greater their success, the easier it was for them to show the necessary detriment for suspension of deportation.

It was not difficult to measure success. In many cases, the alien argued that if he was deported, his family could not maintain the standard of living to which it had become accustomed.[70] In *In re B—*,[71] the alien, a physician, argued that his family's income would be reduced by more than fifty percent if he was deported.[72] Although his citizen wife was also working, her expenses as a professional were "considerably higher than those of the ordinary housewife who remain[ed] at home."[73] In assessing the impact of the alien's deportation upon the family's standard of living, the BIA had to be mindful not only of such expenses, but also of the fact that the family's income would be reduced if the alien was deported.[74] But that was not all—the BIA took note of the rising cost

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63. *Id.* at 600-01.

64. *Id.*

65. S. REP. NO. 81-1515, at 600.

66. *See id.* The Senate Report revealed: "During the hearings on the bill authorizing suspension of deportation, statements were made that the relief requested was needed for aliens of long residence and family ties in the United States. Many aliens who were deportable had spouses and children who were citizens of the United States." *Id.*

67. *Id.* at 600-01.

68. The Senate Report noted that "[c]omplaints were received that the suspension of deportation provisions of the law invite illegal entry of aliens and invite aliens who entered under the nonimmigrant provisions of the law to overstay the time limit of their documents." *Id.* at 601.

69. *Id.* at 601-02.

70. *See In re* B—, 2 I. & N. Dec. 627, 627 (1946).

71. *In re* B—, 2 I. & N. Dec. 627 (1946).

72. *Id.* at 628.

73. *Id.*

74. *Id.*

of living that would affect the family's ability to make the grade in the alien's absence.[75] In other cases, the BIA recognized that the alien's absence from the homestead would have a serious effect on the alien's spouse and minor children who depended totally on the alien for support.[76] It was important to keep the family intact at all costs.[77] Even when alternative relief was available, the BIA decreed that a determination of serious economic detriment should not be made in relation to such relief.[78] The BIA assumed that the alien would be deported and considered other possibilities of relief only if the alien was ineligible for suspension.[79] The government gave its full attention to an alien's suspension claim, without being diverted to other possibilities.[80]

Much to the alien's satisfaction, the BIA usually considered the conditions in the country to which the alien might be deported.[81] Such considerations were to the alien's benefit because the rationale for the flight of many aliens was the desire to seek a better life in the United States.[82] The BIA's liberal interpretation of the term "serious economic detriment" was not lost on aliens who longed for a new home in this country.[83] Aliens had an incentive to gain access to the country

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75. *Id.* The alien provided more than fifty percent of the family's income. *Id.*

76. *In re* M—, 2 I. & N. Dec. 751, 751 (1946).

77. *Id.* at 753. In *In re W—*, deportation would have meant sending the alien back to China. *In re* W—, 2 I. & N. Dec. 679, 680 (1946). The BIA saw this as serious economic detriment to the alien's citizen spouse and children, because the alien would have had to support his wife while she was abroad while maintaining a home for himself and their children. *Id.* at 681.

78. *Id.* at 680.

79. *Id.*

80. In *In re A—*, the BIA explained: "Economic detriment cannot, under section 19(c) of the act of February 5, 1917, be measured in relation to an alternative form of relief such as voluntary departure and preexamination. It must be measured on the assumption that the alien is to be deported and permanently separated from his family." *In re* A—, 2 I. & N. Dec. 683, 684 (1946).

81. In *In re T—*, the BIA felt that the alien's deportation would result in serious economic detriment to the alien's minor child "particularly in the light of the condition of the quota for Greece, as well as the present chaotic condition abroad, particularly in the country of the alien's nativity." *In re* T—, 3 I. & N. Dec. 707, 710 (1949). The BIA used similar language in *In re W—*, when it suspended the alien's deportation. *In* re W—, 2 I. & N. Dec. at 681. It said that "China [was] a devastated country; that food, clothing, and housing [were] scarce; and that inflation [was] rampant." *Id.*

82. The Senate report dealing with the immigration system in the United States acknowledged the BIA's position that "serious economic detriment exist[ed] if the effect of deportation of the applicant would be substantially to lower the standard of living of the dependent relative." S. REP. NO. 81-1515, at 597 (1950).

83. *See id.*

by any means in anticipation of a suspension remedy that would eventually rescue them from their illegal status.[84]

The BIA occasionally looked beyond the financial implications of an alien's deportation to accommodate the human element.[85] In *In re T—*,[86] the alien argued that, as a matter of common sense, no one could deny that a mother's deportation would be a serious detriment to her two-year-old child because there was no substitute for a mother's care and love.[87] On the other hand, if the child accompanied his mother abroad, he would suffer the deprivation of his father's "love, care, and guidance."[88] The alien believed that the BIA should give a wider meaning to "economic detriment" by including "all that pertain[ed] to the satisfaction of man's needs, and that the child's greatest needs [were] the love and care of his mother and father in an unbroken home."[89] The Immigration and Naturalization Service was sure that there could be no serious economic detriment in a case like this where the alien and her spouse had substantial assets, and thus the minor child would not be lacking for much, even if the alien was deported.[90] The BIA did not agree.[91]

The BIA's approach to the case gave a new meaning to economic detriment in the sense that the BIA recognized that the separation of the alien mother from her minor child would deprive the minor of her mother's care and attention, and that the mother's absence abroad would deprive the homestead of maintenance if the wife then had to support herself abroad.[92] There would be some detriment because the mother would have to pay someone else to act as her

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84. The Senate report made the following observation:

> Complaints were received that the suspension of deportation provisions of the law invite illegal entry of aliens and invite aliens who entered under the nonimmigrant provisions of the law to overstay the time limit of their documents. Many aliens who enter legally as visitors marry a citizen of the United States, and by the time the aliens are apprehended for overstaying they have one or more children, who are United States citizens.

Id. at 601.

85. *See In re* T—, 3 I. & N. Dec. at 710 (1949).

86. *In re* T—, 3 I. & N. Dec. 707 (1949).

87. *Id.* at 709.

88. *Id.*

89. *Id.* at 710.

90. *Id.* at 709.

91. *Id.* at 710-11.

92. *Id.* at 709. The alien had cash and securities amounting to $100,000. *Id.* Thus her contribution to the home could not be ignored. She was equally responsible for the support of the child. *Id.*

surrogate in catering to the needs of the minor child.[93] In this case, the BIA was not deterred by the alien's substantial holdings, for the BIA acknowledged the effect of the alien's separation on the child.[94] It is arguable whether the alien and her spouse could have mastered the ensuing discomfort of a separation, at least from the economic perspective,[95] but the BIA wanted to look beyond that aspect.

In *In re B—*,[96] the BIA was similarly persuaded in terms of relief for the alien. This time the alien and her children were entirely dependent upon the alien's husband for support, and therefore, the burden of maintaining separate households would have fallen on the citizen husband if the alien wife had been deported.[97] Such an obligation would have included hiring somebody to care for the two minor children.[98] There was no indication of the alien's inability to work, and therefore, one cannot tell whether there were good reasons for the alien's inability to earn a living abroad.[99] The BIA noted the husband's prominent position in business and acknowledged his "considerable assets."[100] It would have been helpful if the BIA had explained the serious economic detriment that would have ensued because of the alien's deportation, given these favorable economic indicators. There again the minor children stood to suffer the deprivation of their mother's love and care, and it was clear the alien's spouse would have had to provide a suitable substitute for the children.[101] Perhaps the BIA was persuaded by such economic repercussions of the mother's departure.

The BIA has not always been that generous, because it frequently looked beyond the question of whether the alien had satisfied the minimum

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93. The BIA put it this way: "[N]o amount of nurses, governesses or pediatricians can take the place of . . . any child's life of love and care of his mother." *Id.*

94. *Id.* The more the alien possessed, the more she had to lose on deportation. *Id.* at 709-10. The BIA looked not only at the alien's holdings, but also at "the condition of the quota for Greece" and the then chaotic condition abroad, "particularly in the country of the alien's nativity." *Id.* at 710.

95. *Id.*

96. *In re* B—, 5 I. & N. Dec. 72 (1953).

97. *Id.* at 75.

98. *Id.*

99. Even if the alien had been unable to sustain herself abroad, the citizen spouse and minor children would still have suffered in her absence. *Id.* The minor children would have been deprived of their mother's care and attention, thus requiring the father to obtain a substitute caretaker. *Id.*

100. *Id.*

101. *Id.* There was a similar situation in *In re T—*, which attracted the BIA's sympathy. *In re* T—, 3 I. & N. Dec. 707, 707-08 (1949).

requirements for suspension of deportation.[102] In this respect, the BIA underscored the discretionary nature of the remedy.[103] In *In re O—G—*,[104] the aliens admitted that they had entered the United States illegally so their child could be born here, thus hoping for a favorable decision on suspension.[105] The BIA viewed this as an attempt to circumvent the normal immigration rules for obtaining permanent residence and was not persuaded to act favorably on the alien's petition.[106]

The BIA might have had a hard time if it had to deal with that point alone, but the family did not have much going for it in light of its short stay in the United States.[107] Furthermore, the mother seemed willing to return to Mexico with her children if the alien members of the family could not remain here.[108] That concession seemed to be a contributing factor in the BIA's decision, and the aliens' fate was sealed when the BIA recognized the aliens' strong connection with Mexico.[109] Being citizens of Mexico, the aliens were not subject to quota limitations,[110] and therefore, they could readily return and resume where they had left off.

The BIA reached a similar result in *In re K—*[111] because the aliens had been in the United States for less than two years.[112] But they were residents of Canada and the BIA used the proximity of the aliens' homeland to deny the

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102. *See In re* O—G—, 4 I. & N. Dec. 729, 730 (1952).

103. *Id.*

104. *In re* O—G—, 4 I. & N. Dec. 729 (1952).

105. *Id.* at 730. The child's birth in the United States made the child a citizen of the United States, even though the child's parents were in the United States illegally. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." *Id.* This constitutional mandate has been subject to occasional criticism. *See* Dan Stein & John Bauer, *Interpreting the 14th Amendment: Automatic Citizenship for Children of Illegal Immigrants?*, STAN. L. & POL'Y REV., Summer 1996, at 130.

106. *In re* O— G—, 4 I. & N. Dec. at 730. The BIA may have been uncomfortable with the alien's admission about ensuring that his child would be born in the United States. *See id.* Furthermore, the proximity of the family's home in Mexico could have accounted for the alien's failure to get a favorable decision from the BIA.

107. *Id.*

108. *Id.* The willingness to relocate no doubt undercut the argument about serious economic detriment.

109. *Id.* The BIA observed that "[t]he mother [was] apparently of Mexican extraction and [was] accustomed to the ways of life in Mexico." *Id.*

110. The quota restrictions applied generally to countries outside the Western Hemisphere and, therefore, did not affect Mexico. *See* 3 GORDON ET AL., *supra* note 33, § 31.01[1].

111. *In re* K—, 4 I. & N. Dec. 731 (1952).

112. *Id.* at 732.

aliens relief.[113] They were so close to home that the BIA saw the privilege of voluntary departure as the logical compromise for aliens with little connection to this country.[114] Despite the unwillingness to act favorably on the aliens' petition, the BIA was nevertheless willing to consider the aliens' situation if Canada refused to readmit them.[115] The BIA seemed to be looking for something more than the aliens' mere presence in the United States. The aliens did not establish themselves here for a reasonable period of time and they could easily return to their Canadian homestead without much difficulty.[116]

The BIA took no different posture if an alien was from Mexico.[117] In *In re C—C—*,[118] the aliens entered illegally from Mexico and had lived in the United States for just under three years.[119] The alien husband thought that he would fare better if he could be regarded as an entrepreneur rather than a mere laborer and farm hand.[120] He was, after all, raising his own cotton which he began to sell at a tidy profit to support his family.[121] The BIA would not accept the alien's new calling as a reason to ignore his ability to return to Mexico in order to carry on where he had left off.[122]

If the BIA has occasionally been firm, it has been with good reason. In *In re L—*,[123] the alien seemed convinced that his wife would suffer serious

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113. *Id.* The BIA observed that "voluntary departure" was the maximum relief to which the aliens were entitled. *Id.* The BIA still left the door open to suspension of deportation if Canada refused to admit the aliens. *Id.*

114. *Id.* The privilege of voluntary departure would have avoided the aliens' deportation. *See* Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672-73 (amending Immigration Act of 1917, § 19, 39 Stat. 889) (codified at 8 U.S.C. § 1229c (Supp. III 1997)). Under the current statute, an alien may be allowed before the completion of removal proceedings or at the end of removal proceedings to depart voluntarily. 8 U.S.C. § 1229c(a), (b) (Supp. III 1997). If he takes the former route, the conditions are more generous; he will have 120 days instead of 60 days to settle his affairs. *See id.* § 1229.

115. *In re* K—, 4 I. & N. Dec. at 732.

116. *Id.*

117. *See In re* C—C—, 4 I. & N. Dec. 709, 710 (1952).

118. *In re* C— C—, 4 I. & N. Dec. 709 (1952).

119. *Id.*

120. *Id.* at 710. The alien's counsel argued that the alien's activities had removed the "alien from the category of a laborer and farm hand to the class of those who aspire to run their own property." *Id.*

121. *Id.*

122. *Id.* Here again, the alien asked the BIA to exercise its discretionary power to grant suspension. *Id.* at 709. The aliens had no passports, no visas, and entered without the permission of the INS. *Id.* It made no difference that he had two children who were United States citizens. *Id.*; *see also In re* T— F—, 4 I. & N. Dec. 711, 712 (1952) (reaffirming deportation even though alien had two native-born children).

123. *In re* L—, 4 I. & N. Dec. 437 (1951).

economic detriment if he could no longer counsel her about her million-dollar portfolio.[124] Furthermore, the alien was concerned that his deportation would require the family to maintain separate residences. As a result, the spouse would miss the alien's guidance on a play in which she had invested.[125]

The BIA observed that the parties had adequate income to maintain themselves comfortably and that the alien had little influence on the play's success.[126] As a matter of fact, the play had already gone through a trial run, resulting in the hiring of another person to revise the script.[127] It was not surprising that the BIA found that the case lacked the degree of economic detriment necessary to sustain the alien's petition for relief.[128]

It seemed that the BIA always looked at whether the economic detriment alleged by the alien was serious enough to merit relief. If the alien and his spouse had to live apart due to circumstances beyond their control and depended on each other to keep the family going, the BIA gave them a sympathetic hearing.[129] In *In re L—*,[130] the citizen wife had to care for her sick mother and other members of her family, and was not well herself.[131] The alien husband contributed to his wife's support whenever he could, thus recognizing the family's overall financial constraints.[132] The BIA recognized that the wife would necessarily suffer if the alien husband was deported under these circumstances.[133] It seemed that the economic detriment here would have affected not only the citizen wife but also the dependents.[134] The wife's family, therefore, became the vicarious beneficiaries of the BIA's liberal assessment of the situation.[135] The BIA must have been impressed by the detriment the parties

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124. *Id.* at 438. The alien's spouse had assets of approximately $1,500,000. *Id.* She had an independent income in excess of $50,000. *Id.*

125. *Id.* The alien's spouse had invested $67,000 in a play that the alien wrote. *Id.* It was alleged that the alien had to attend the various production meetings relating to the play. *Id.*

126. *Id.* at 438-39.

127. *Id.* at 438.

128. *Id.* at 438-39. The alien had an income "sufficient for ordinary needs" and the spouse had a yearly income that was sufficient "to maintain her most comfortably." *Id.* at 439. The alien could not sufficiently link his role as investment counsel and the spouse's investment success. *Id.*

129. *See In re* L—, 2 I. & N. Dec. 775, 776 (1947).

130. *In re* L—, 2 I. & N. Dec 775 (1947).

131. *Id.* at 776.

132. *Id.*

133. *Id.*

134. The alien's wife had a sick daughter who required the wife's attention. *Id.*

135. *Id.*

would experience in living apart.[136] If the wife would find it difficult to discharge her responsibilities in those circumstances, the BIA must have thought that the wife would have been unable to survive the exigencies of the time if her alien husband could no longer make his contribution because of his absence from the United States.

As these cases indicate, there was nothing magical about the criteria for suspension of deportation in the early days. Aliens generally understood what they were up against and tried to emphasize the economics of the situation. In one sense, the standard of serious economic detriment provided more of an opportunity for aliens to make their case.[137] In another sense, it might have worked against some aliens who did not make the most of their stay in the United States and thus did not have much to show for it.[138] The more an alien had to lose, the better off he was in proving detriment required for relief. Aliens, therefore, had an incentive to strive for financial success because it could be their ticket to eventual permanent residence in the United States.[139] It was only a question of time before things would change.

B. *Exceptional and Extremely Unusual Hardship*

Illegal entrants worked and improved their lot pending resolution of their immigration problems. Eventually, Congress became concerned about the advantage such aliens enjoyed. Therefore, it was only a matter of time before Congress required aliens to show, instead, that deportation would result in "exceptional and extremely unusual hardship."[140] The 1952 change in criteria

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136. If the parties were having such a hard time under these circumstances, it would have been more difficult for them if the alien had been deported. The BIA noted: "Without assistance from the alien the citizen wife would necessarily suffer." *Id.*

137. It was the ease with which aliens obtained relief that motivated Congress to stiffen the requirements. S. REP. NO. 82-1137, at 25 (1952). The criterion for serious economic detriment provided avenues for manipulation because nonimmigrants deliberately flouted the immigration laws to gain a foothold in the United States. *Id.* Congress wanted to restrict the suspension remedy to cases in which the alien's deportation would be "unconscionable." *Id.*

138. This was particularly the case if the alien had been in the United States only a short time. *See, e.g.*, *In re* C—C—, 4 I. & N. Dec. 709, 710 (1952) (finding that alien leasing 25 acres and making $2000 profit on cotton crop not compelling enough to suspend deportation); *In re* M—, 4 I. & N. Dec. 707, 708 (1952) (rejecting an appeal after finding the alien family had no assets except some equity in a house).

139. H. REP. NO. 82-1365, at 62-64 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1717-19.

140. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214. The Act had five subsections dealing with suspension of deportation and every subsection required exceptional and extremely unusual hardship. *Id.* § 244(a), 66 Stat. at 214-16.

sent the message that aliens had to prove something more than mere economic detriment.[141] Congress was aware that some kind of hardship would ensue from an alien's departure, but it wanted to respond to the aliens' deliberate flouting of the immigration law.[142] The congressional intent was to make the administrative remedy available only in those cases when it would be unconscionable to deport the alien.[143]

When Congress amended the INA in 1962, it continued the exceptional and extremely unusual hardship criterion but only for those aliens with serious violations.[144] Other aliens with less serious violations could obtain relief if they showed "extreme hardship."[145] When the amendment created two categories of relief, it raised a question whether Congress intended to affect the interpretation of exceptional and extremely unusual hardship.

In an early case, *In re S—*,[146] the BIA outlined certain factors to be considered in determining whether an alien's deportation would result in exceptional and extremely unusual hardship: (1) The alien's "length of residence in the United States"; (2) the alien's family ties; (3) the possibility of the alien getting a visa abroad; (4) the financial burden on the alien of going abroad to obtain a visa; and (5) the age and health of the alien in relation to the demands of traveling abroad for a visa.[147] The alien in *In re S—* had lived in the United States for twenty-eight years, long beyond the minimum statutory period of seven years.[148] She also had little money and if she had gone abroad, she would have had little chance of returning soon to the United States because of the over-subscribed quota.[149] In another case of the same period, *In re W—*,[150]

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141. S. REP. NO. 82-1137, at 25.

142. The report of the Senate Judiciary Committee revealed: "Many illiterate aliens have been entering illegally, and, by having their status adjusted pursuant to the procedure for suspension of deportation, have been avoiding the excluding provisions of the 1917 Act. Aliens who were previously deported have been granted suspension of deportation after reentering the United States illegally." S. REP. NO. 81-1515, at 601 (1950).

143. *Id.* at 600.

144. Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1248 (repealed 1996). The requirements of 10 year physical presence and exceptional and extremely unusual hardship applied to aliens convicted of a crime involving moral turpitude, aliens not registering, subversives, communists, drug addicts, promoters of prostitution, firearms offenders, undesirable residents, and importers of aliens for prostitution. *Id.*

145. *Id.* § 4, 76 Stat. at 1247-48.

146. *In re* S—, 5 I. & N. Dec. 409 (1953).

147. *Id.* at 410-11.

148. *Id.* at 410.

149. *Id.* at 411. The quota system began with the Quota Act of 1921, which imposed an annual quota of 350,000 for new immigrants. Quota Act of 1921, ch. 8, 42 Stat. 5. Then came the Immigration Act of 1924, which reduced the annual immigrant quota to 150,000 and allocated

the alien was also in the United States illegally, but only for nine years.[151] Hardship would have befallen the alien's husband and five minor children, who depended on the alien to look after the home.[152] Unlike the alien in *In re S—*,[153] the alien in *In re W—* could have obtained a visa if she had gone abroad.[154] Nevertheless, she had no funds and she would have had to leave her infant children behind, even if she could have traveled to secure a visa.[155] These two cases are good examples of the BIA's approach to the criteria for suspension relief prior to the 1962 amendment.

If there was to be a tightening of the reins, it was not reflected in the early decisions. In some cases an alien could still obtain relief on the basis of severe financial repercussions, even in the absence of dependents.[156] Furthermore, it was not unusual for the BIA to grant relief if the alien was ineligible for a visa abroad because of his conduct in the United States.[157] Nowhere was that point more poignant than in *In re H—*,[158] when the alien would not have obtained a visa because of a previous fraud.[159] The problem of an over-subscribed quota did not exist, and the BIA conceded that it was unusual to find exceptional hardship if there was no quota problem, unless the alien was indigent or could not travel because of advancing age or poor health.[160]

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visas within that quota to countries outside the Western hemisphere. Immigration Act of 1924, ch. 190, 43 Stat. 153. The visa allocations to each country were related to the number of persons of that country's nationality residing in the United States in 1920. 3 GORDON ET AL., *supra* note 33, § 31.01[1]. The national origin quota system continued until the Immigration Act of 1965. *Id.*

150. *In re* W—, 5 I. & N. Dec. 586 (1953).

151. *Id.* at 586.

152. *Id.* at 587.

153. *In re* S—, 5 I. & N. Dec. at 409.

154. *In re* W—, 5 I & N. Dec. at 586; *see also In re* U—, 5 I. & N. Dec. 413, 415 (1953) (finding the alien, who had spent half of his life in the United States, would have a substantial burden if he had to go abroad to get his visa and leave behind his wife, three children, and mother-in-law, with no one else to support the family in his absence).

155. *In re* W—, 5 I. & N. Dec. at 587. In granting the alien relief, the BIA observed that the alien's departure would cause "serious hardship, both economic and mental" to her, her husband, and her children. *Id.* This raised the question whether "serious hardship" was equated to exceptional and extremely unusual hardship. *Id.* The BIA obviously did not interpret the latter term literally. *See* Curtis Pierce, *The Benefits of "Hardship": Historical Analysis and Current Standards for Avoiding Removal*, 76 INTERPRETER RELEASES 405, 410 (1999).

156. *See In re* Z—, 5 I. & N. Dec. 419, 419 (1953); *In re* H—, 5 I. & N. Dec. 416, 416 (1953); *In re* S—, 5 I. & N. Dec. at 411.

157. *See In re* H—, 5 I. & N. Dec. at 416.

158. *In re* H—, 5 I. & N. Dec. 416 (1953).

159. *Id.* at 417.

160. *Id.*

Nevertheless, the BIA suspended the alien's deportation by equating her visa ineligibility due to fraud with the unavailability of a visa in other contexts because of an over-subscribed quota.[161] It was true that the alien had been absent from her native country for twenty-five years and would have found it tough to relocate, but the operative standard was exceptional and extremely unusual hardship.[162] This alien had no dependents but had family in her native Ireland.[163]

She was not destitute.[164] As a matter of fact, she offered to pay her own way back home if she was not granted relief.[165] If the alien was ineligible for relief because of her past fraudulent conduct, she was hardly entitled to the same consideration as someone who could not get a visa because the quota precluded it. The major stumbling block was the alien's inability to return to this country.[166] But that was her own undoing; the exceptional nature of her predicament did not arise from some misadventure, yet the BIA lent a sympathetic ear.[167]

The BIA frequently emphasized the financial implication of an alien's departure.[168] If a visa was not available within a reasonable time, the BIA thought it important to ascertain if the alien could survive for an extensive period outside the United States. If the alien had to leave a family behind when she sought a visa abroad, then the BIA had to assess the impact of that separation.[169] If there were no dependents and the alien was in good financial shape, the alien

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161. *Id.* at 418. A similar situation existed in *In re* M—, when the alien would have been unable to get a visa abroad because he had been convicted of a narcotic offense. *In re* M—, 5 I. & N. Dec. 448, 449 (1953). Had he been denied suspension of deportation, he would have left behind a wife and two minor children. *Id.* at 450. The BIA was impressed with his post-conviction activities in the community and concluded that deportation would have exceptional and extremely unusual hardship. *Id.*

162. *In re* H—, 5 I. & N. Dec. at 416.

163. *Id.* at 417.

164. *Id.* Respondent had been able to save $10,000. *Id.*

165. *Id.*

166. *Id.* at 417.

167. *See id.* at 418.

168. *See id.* at 418-19 (stating that "if not eligible for relief she not be deported but that she be permitted to defray the costs of the departure from the United States"); *In re* M—, 5 I. & N. Dec. 448, 450 (1953) (determining that the alien was the family's sole support because citizen wife was unable to work because of a nervous breakdown).

169. *See In re* H—, 5 I. & N. Dec. at 417 (finding that "[t]here is no one in the United States dependent upon her for support."); *In re* W—, 5 I. & N. Dec. 586, 588 (1953) (finding exceptional and extremely unusual hardship because the alien would have to leave a spouse and infant children behind).

had a hard time making a case for relief, even if the alien could not obtain a visa within a reasonable time.[170]

In a recent case, *Cortes-Castillo v. INS*,[171] the alien's reliance on the severance of family ties and the alien's inability to obtain a return visa did not pay off because the court viewed these hardships as commonplace.[172] The alien hoped the court would be more sympathetic to the factors established by the BIA.[173] It may have been a problem that the alien could not convince the court of any financial burden that would ensue from his deportation and he could show no hardship to his family.[174] The court observed that the definition of exceptional and extremely unusual hardship had now become more stringent since the BIA's early decisions.[175] It, therefore, required a "heightened showing" of the alien's hardship.[176]

The *Cortes-Castillo* decision left one wondering whether the 1962 amendment, creating the two categories—extreme hardship and exceptional and extremely unusual hardship—had made it more difficult for aliens to meet the latter standard. Because there was only one test before 1962 when *In re S—* and *In re U—* were decided, the *Cortes-Castillo* decision presents the question whether the aliens in those cases would have obtained relief if the same issues had arisen after the 1962 amendment had taken hold.

C. *Extreme Hardship*

1. *The Search for a Definition*

The extreme hardship standard posed the same dilemma for the BIA and the courts because both found it difficult to agree on a workable definition.[177] Extreme hardship was not a term of fixed meaning and a finding of such

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170. *See In re* S—, 5 I. & N. Dec. 695, 695-96 (1954) (holding that an alien could be deported because there was no economic hardship and the child was not dependent).

171. Cortes-Castillo v. INS, 997 F.2d 1199 (7th Cir. 1993).

172. *Id.* at 1204.

173. *Id.* The alien relied on the factors described in *In re S—*, 5 I. & N. Dec. 409 (1953) and *In re U—*, 5 I. & N. Dec. 413 (1953).

174. Cortes-Castillo v. INS, 997 F.2d at 1201 (noting that the Immigration Judge found the alien's deportation would not impose any financial burden or hardship upon the alien's family).

175. *Id.* at 1204 (citing *In re* U—, 5 I. & N. Dec. 413 (1953); *In re* S—, 5 I. & N. Dec. 409 (1953)).

176. *Id.*

177. *See* Ramos v. INS, 695 F.2d 181, 185-87 (5th Cir. 1983); *In re* Ige, 20 I. & N. Dec. 880, 885 (1994); *In re* Chumpitazi, 16 I. & N. Dec. 629, 635 (1978); *In re* Hwang, 10 I. & N. Dec. 448, 449 (1964).

hardship depended on the facts of each case.[178] The limits of hardship could not be stated in a hard and fast rule.[179]

Nevertheless, in *In re Anderson*,[180] the BIA identified some factors which should be considered in determining extreme hardship.[181] The BIA did not expect these criteria to be a magical formula for relief.[182] There was always some disagreement about whether an alien was too old to make a fresh start in his homeland, whether he had established enough roots in his American community, or even whether his family would be left penniless as a result of his deportation. This was not surprising. When Congress divided § 244(a) into two parts,[183] the logical question was whether it intended to reduce the degree of hardship required of some aliens for relief, while increasing it for others. The challenge was, however, in distinguishing the extreme hardship of subsection one from the exceptional and extremely unusual hardship of subsection two.[184] If Congress had maintained a single standard for relief, the BIA and the courts might have been able to produce clear directions for adjudicating aliens' claims.

The *Anderson* criteria produced a framework for evaluating extreme hardship.[185] In *Anderson*, however, the alien seemed to rely heavily on the state of the economy in his homeland.[186] Nevertheless, the BIA emphasized that relief should be available only when "other factors such as advanced age, severe illness, family ties, etc. combine with economic detriment to make deportation extremely hard on the alien or the citizen or permanent resident members of his family."[187] The alien in *Anderson* spent eight years in the United States as a carpenter and could have obtained similar employment in his own country.[188] He had no close family here, and he could have secured treatment at home for his

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178. *See* Ramos v. INS, 695 F.2d at 188.

179. *See id.*; *In re* Hwang, 10 I. & N. Dec. at 451.

180. *In re* Anderson, 16 I. & N. Dec. 596 (1978).

181. *Id.* at 597. The BIA relied on a congressional committee report, H.R. 8713, which identified the following among the relevant criteria: the alien's age, family ties, length of residence in the United States, alien's health, conditions in the alien's homeland, alien's financial status, community activities, possibility of other means to adjust status, and the alien's immigration history. *Id.* (citing H.R. REP. 94-506, at 17 (1975) (discussing proposed amendments to H.R. 8713)).

182. *Id.* at 598. The BIA looked for a combination of factors to make the alien eligible for relief. *Id.*

183. *See* Act of October 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1247-48 (repealed 1996).

184. *See id.*

185. *In re* Anderson, 16 I. & N. Dec. at 597.

186. *See id.*

187. *Id.* at 598.

188. *Id.*

wife's emotional difficulties.[189] This was not the type of hardship that the BIA regarded as extreme.[190]

Although the *Anderson* criteria provided some guidelines for a determination of extreme hardship, aliens suffered a setback in *INS v. Wang*, when the Supreme Court affirmed the BIA's authority to interpret the term narrowly.[191] According to that view, a court should substitute its own views for those of the BIA only if the BIA had abused its discretion.[192] After *Wang*, there was a tension between the *Anderson* criteria and the BIA's tendency to stray from the remedial nature of the statute.

In some cases, however, aliens prescribed their own ineligibility for relief by relying too much on a claim of economic hardship. While such hardship was a relevant consideration, it had to be combined with other factors for an alien to get relief.[193] If an alien had difficulty in finding employment or had to sell his business, that was not sufficient by itself to constitute extreme hardship.[194] On the other hand, if he was unable to work at all because of advanced age, then that was not mere economic detriment because the alien might be subject to "severe personal and non-economic consequences."[195] Under normal circumstances, therefore, an alien had to present other substantial equities in addition to economic detriment,[196] and the BIA had to consider all factors cumulatively in order to make a proper assessment of an alien's situation.[197]

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189. *Id.*

190. *Id.*

191. INS v. Wang, 450 U.S. 139, 145 (1981).

192. *See id.* at 143 (citing cases suggesting differing levels of deference that should be given to the BIA's exercise of discretion).

193. *See, e.g., In re* Anderson, 16 I. & N. Dec. at 598 (noting Congress intended economic hardship be considered in conjunction with factors such as advanced age, severe illness, and family ties).

194. *See* Santana-Fiqueroa v. INS, 644 F.2d 1354, 1356 (9th Cir. 1981).

195. *Id.* at 1356-57.

196. *See* Hernandez-Patino v. INS, 831 F.2d 750, 755 (7th Cir. 1987) (holding that absent factors such as advanced age, illness or family ties, the petitioner's plight was indistinguishable from other immigrants); *see also* Ramirez-Durazo v. INS, 794 F.2d 491, 498 (9th Cir. 1986) (holding that allegations of a lower standard of living in Mexico and the difficulties of cultural and environmental readjustment were not sufficient); Ramos v. INS, 695 F.2d 181, 189 (5th Cir. 1983) (holding that Board of Immigration Appeals failure to address noneconomic hardship constituted a denial of consideration to which the petitioners were entitled); *In re* Anderson, 16 I. & N. Dec. at 598 (stating that only when other factors such as advanced age, severe illness and family ties combined with economic hardship should a deportation order be suspended).

197. *See* Ramos v. INS, 695 F.2d at 189.

The difficulty in assessing an alien's extreme hardship originated from the courts' rigid interpretation of the *Wang* mandate.[198] In *Hernandez-Cordero v. INS*,[199] the Fifth Circuit said that it would find an abuse of discretion by the BIA only when an alien's hardship was "uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship [was] extreme."[200] It is questionable whether this formulation was helpful in delineating the contours of the definition. The court seemed to go overboard in this instance by relying on the Supreme Court's pronouncement about the Attorney General's authority to define extreme hardship narrowly.[201] After all, in *Wang* the Court concluded only that the BIA did not exceed its authority in finding the alien had not made a prima facie case of extreme hardship to support his motion to reopen.[202] The Court did not deal specifically with the standard of review that should be applied to initial BIA decisions on extreme hardship.[203] In its attempt to maintain a narrow scope of review, the court in *Hernandez-Cordero* used language that would have been more appropriately applied to old § 244(a)(2) requiring exceptional and extremely unusual hardship.[204] It was one thing to require extreme hardship; it was quite another to insist on "uniquely extreme" hardship.[205]

If one had to approach the "outer limits of the most severe hardship" in order to determine what was extreme, then there was really no norm to recognize the more compassionate approach of § 244(a)(1).[206] The *Anderson* criteria did not relate to such outer limits of severity. The BIA gave some idea of its assessment of the *Anderson* factors in the recent case, *In re O—J—O—*.[207] The alien had lived in the United States for over ten years since arriving at age

198. *See* Hernandes-Cordero v. INS, 819 F.2d 558, 562-63 (5th Cir. 1987).

199. Hernandez-Cordero v. INS, 819 F.2d 558 (5th Cir. 1987).

200. *Id.* at 563.

201. *Id.* at 562. The court doubted that "there remain[ed] much, if any, scope for judicial *substantive* review, even under an 'abuse of discretion' standard, of no 'extreme hardship' determinations." *Id.* (quoting Ramos v. INS, 695 F.2d at 185).

202. *See* INS v. Wang, 450 U.S. 139, 143 (1981).

203. *See id.* at 144. The Court took the view that the BIA's construction and application of the extreme hardship standard should not be overturned by a court simply because the court would prefer another interpretation. *Id.*

204. *See* Hernandez-Cordero v. INS, 819 F.2d at 563.

205. *Id.*

206. *Id.* The *Hernandez-Cordero* court was willing to find a BIA abuse of discretion only when the hardship was "uniquely extreme, at or closely approaching the outer limits of the most severe hardship the alien could suffer and so severe that any reasonable person would necessarily conclude that the hardship is extreme." *Id.*

207. *In re* O—J—O—, Int. Dec. No. 3280, at 7 (B.I.A. 1996).

thirteen.[208] He took over his father's trucking business, was deeply involved in his church, and participated in many community activities.[209] The BIA considered not only the alien's length of residence, but also the "degree of integration into American society and the strength of attachments to friends and community."[210] It recognized, therefore, that this was not a case of an alien's mere readjustment to life in the old country after the alien had spent some time in the United States.[211] It was more the case of an alien's forced separation from a community with which the alien had formed a social and cultural bond after many years of residence.[212]

The BIA was willing to consider the depressed economic conditions and the difficult political situation in the alien's homeland, Nicaragua.[213] In this respect, the history of the alien's conflict with the Sandinistas related to the political climate that the alien was expected to face on his return. But above all, the most surprising element turned out to be the economic problems that the alien would face because he had to give up his trucking business.[214] This prospect did not seem particularly alarming. If the alien could not establish "the same kind of business" in his native country because of the economic and political conditions, were there no prospects for other kinds of business?[215] There was no hint in this case that the BIA was dealing with the type of problem encountered in *Santana-Figueroa v. INS*,[216] when the aged alien was unable to work and therefore would have been condemned to a life of penury and want.[217] The alien in *In re O—J—O—* was an independent trucker who took assignments as they came, and the sale of his truck would have approximated the loss of a job by an alien who was a mere employee.[218]

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208. *Id.* at 2.
209. *Id.*
210. *Id.* at 6.
211. *Id.* at 6-7.
212. *See id.* at 9-10.
213. *See id.* at 7. The BIA relied somewhat on the Ninth Circuit's holding in *Tukhowinich v. INS*, that political conditions in an alien's homeland should be considered in assessing hardship. *See id.* (citing Tukhowinich v. INS, 64 F.3d 460, 463 (9th Cir. 1995)).
214. *Id.* at 5.
215. *See id.* at 7.
216. Santana-Figueroa v. INS, 644 F.2d 1354 (9th Cir. 1981).
217. *See id.* at 1356-57. The alien contended that he would be unable to find any job. *Id.* at 1356. The BIA saw this as a "mere economic detriment" but the court saw a difference between "'mere economic detriment' and complete inability to find employment." *Id.* at 1356.
218. *See In re* O—J—O—, Int. Dec. No. 3280, at 5 (B.I.A. 1996).

The alien in *In re O—J—O—* seemed more fortunate than others. This was not the first time that an alien had stressed the economics of the situation.[219] More often than not, the courts were able to see the difference between an alien's economic detriment and an alien's inability to find work.[220] Aliens found little sympathy for the proposition that they should not be sent back to face a substantially lower standard of living in their homeland.[221] They stood a better chance of success if they could combine economic detriment with other factors such as advanced age, sickness, and family ties to support their claim of extreme hardship.[222]

The alien in *Bueno-Carrillo v. Landon*[223] took the usual stance by trying to drive home the elements of his extreme hardship.[224] He argued that he would be "virtually unemployable" if he had to return to Mexico.[225] When forced to explain, he admitted that he would not earn as much money in Mexico as he was earning in the United States.[226] The alien could not fulfill any of the additional hardship criteria because he was a healthy middle-aged person who could work, and there were no medical problems affecting him or his family.[227] The alien in *Luna-Rodriguez v. INS*[228] did not have any better luck when he said that he would be "completely unable to find work."[229] Not only was this allegation unsupported by any evidence, but it was also not tied to any other factor affecting the alien's claim of hardship.[230] On the other hand, an alien's similar claim found favor with the Ninth Circuit in *Santana-Figueroa v. INS* because the

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219. *See id.* at 7; Luna-Rodriguez v. INS, 104 F.3d 313, 315 (10th Cir. 1997); Ramirez-Gonzalez v. INS, 695 F.2d 1208, 1210-12 (9th Cir. 1983); Pelaez v. INS, 513 F.2d 303, 304 (1975).

220. *See* Luna-Rodriguez v. INS, 104 F.3d at 315; Ramirez-Gonzalez v. INS, 695 F.2d at 1211-12; Pelaez v. INS, 513 F.2d at 304-05.

221. *See* Luna-Rodriguez v. INS, 104 F.3d at 315; Ramirez-Gonzalez v. INS, 695 F.2d at 1211-12; Pelaez v. INS, 513 F.2d at 304-05; *In re* Chumpitazi, 16 I. & N. Dec. 629, 630 (1978).

222. *See* Luna-Rodriguez v. INS, 104 F.3d at 315; Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982); *In re* Anderson, 16 I. & N. Dec. 596, 598 (1978).

223. Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982).

224. *Id.* at 144-45.

225. *Id.* at 144.

226. *Id.* at 145.

227. *Id.* at 146.

228. Luna-Rodriguez v. INS, 104 F.3d 313 (10th Cir. 1997).

229. *Id.* at 315.

230. *See id.* The courts have always been unimpressed by unsubstantiated allegations. *See* Ramirez-Gonzalez v. INS, 695 F.2d 1208, 1211-12 (9th Cir. 1983); Santana-Figueroa v. INS, 644 F.2d 1354, 1357 & n.8 (9th Cir. 1981); Pelaez v. INS, 513 F.2d 303, 304-05 & n.1 (5th Cir. 1975). The BIA had already set out some important factors for determining extreme hardship: advanced age, severe illness, family ties, and economic detriment. *See In re* Anderson, 16 I. & N. Dec. 596, 598 (1978).

BIA had failed to consider the alien's advanced age, lack of skill, and lack of education in determining the alien's inability to find employment.[231] The BIA, led astray by the economic tag, had seen the case simply as one of economic detriment.[232] But the alien produced solid evidence to support his claims, and the court saw the BIA's characterization of the alien's potential suffering as "arbitrary and irrational."[233] This was not a situation where the only hardship would have been the alien's inability to find employment in his chosen trade or profession[234] because that would have been mere economic detriment.[235] There was a difference, however, between mere economic detriment and complete inability to work.[236]

In *Santana-Figueroa*, the alien was seventy, uneducated, unskilled, and disabled.[237] In *Urban v. INS*,[238] the alien was sixty-five, uneducated, unskilled, and had heart problems.[239] *Urban* seemed similar to *Santana-Figueroa*. Nevertheless, the court in *Urban* found the BIA unsympathetic to the alien's plight because the alien was still able "to clean downtown offices at a full-time clip."[240] The Seventh Circuit recognized that the alien had to keep working in order to pay for her own health care.[241] Therefore, the court did not hold this against the alien because if she did not try to work, she would have needed to forego her own care and stop supporting her children in Poland.[242] If deported, she would certainly have been unable to afford the expensive medications in that country.[243] Furthermore, her prospects in the job market were bleak in light of

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231. Santana-Figueroa v. INS, 644 F.2d at 1356.
232. *Id.*
233. *Id.* at 1357.
234. *Id.* at 1356; *cf.* Carnalla-Munoz v. INS, 627 F.2d 1004, 1006 & n.4 (9th Cir. 1980) (holding that difficulty in finding employment was not sufficient to constitute extreme hardship); Kasravi v. INS, 400 F.2d 675, 676 (9th Cir. 1968) (concluding that difficulty in finding employment in a particular field was merely an economic disadvantage).
235. Santana-Figueroa v. INS, 644 F.2d at 1356.
236. *See* Hernandez-Patino v. INS, 831 F.2d 750, 753-54 (7th Cir. 1987) (rejecting a hardship claim related to limited employment opportunities because the alien was young and in good health); Marquez-Medina v. INS, 765 F.2d 673, 676-77 (7th Cir. 1985) (rejecting claim of extreme hardship because the alien did not have any physical or mental impairment that would restrict employment).
237. Santana-Figueroa v. INS, 644 F.2d at 1356.
238. Urban v. INS, 123 F.3d 644 (7th Cir. 1997).
239. *Id.* at 646-47.
240. *Id.* at 649.
241. *Id.*
242. *Id.*
243. *Id.*

her medical condition and the high unemployment rate in Poland.[244] She would have had no opportunity to test the waters there. The court in *Urban* remanded for the BIA's reconsideration of the alien's claims, which like those in *Santana-Figueroa*, revolved around economic circumstances.[245] But it was not economic detriment alone that gave rise to the alien's extreme hardship.[246] The BIA did not address the alien's contention that the alien would not be able to find any work at all, and the court could remedy this only by asking the BIA to reconsider the cumulative effects of the alien's "unemployability, medical problems, and prospects for obtaining adequate medical care in Poland."[247]

It was surprising in *In re O—J—O—* the BIA was sympathetic to the alien's plight despite the alien's weak family ties.[248] The BIA acknowledged the point but did not regard that as preventing the alien from qualifying under other *Anderson* factors.[249] The Ninth Circuit took the same approach in *Tukhowinich v. INS*,[250] where the alien had no close family in the United States.[251] Nevertheless, the alien's overriding mission in life was to provide for her parents and siblings back in Thailand, and there was no way that she could continue that support with the wages she would earn back home.[252] Although the alien had no ties in the United States, the court felt the BIA should have considered the implications of the alien's financial loss.[253] If the BIA had considered those implications, it would have found deportation affecting the alien in an unusual way.[254] The alien did not rely on any hardship that might have ensued because

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244. *Id.*

245. *Id.* The alien presented the additional factors that complemented economic disadvantage. *Id.* at 646-47. She was of advanced age, had severe medical problems, and had little education. *Id.* at 649. This translated into lack of employment opportunities for her. *See id.* The additional factors were not present in *Hernandez-Patino v. INS*, 831 F.2d 750, 754-55 (7th Cir. 1987). Likewise, the alien in *Kuciemba v. INS*, was "young, healthy, and skilled" and could not substantiate his claim of extreme hardship. Kuciemba v. INS, 92 F.3d 496, 500 (7th Cir. 1996).

246. *See* Urban v. INS, 123 F.3d at 649.

247. *Id.* at 650.

248. *In re* O—J—O—, Int. Dec. No. 3280, at 8 (B.I.A. 1996). The BIA conceded that the "[f]amily unity considerations [did] not add measurably to the hardship aspects of this case." *Id.*

249. *Id.* The BIA had listed nine factors taken from the House Judiciary Report relating to the issue of extreme hardship. *See id.* at 4 (citing H.R. REP. NO. 94-506, at 17 (1975)). The family factor was high on the list. *See* H.R. REP. NO. 94-506, at 17. So, although it was not necessary to have all the factors present, the family aspect has always seemed to be important.

250. Tukhowinich v. INS, 64 F.3d 460 (9th Cir. 1995).

251. *See id.* at 462.

252. *Id.* at 464.

253. *Id.* at 463.

254. *Id.* at 463-64.

of separation from family in the United States.[255] Nevertheless, the implications of her deportation related to her primary objective in life to support her parents and siblings back home.[256] This was not mere economic detriment to the alien, therefore, but rather a hardship that touched her inability to perform her duty.[257] The economic detriment, such as it was, produced personal non-economic consequences.[258] Thus, even in a case like *Tukhowinich*, where the alien could not trumpet her cause on the basis of family ties in the United States, the court was nevertheless impressed with the alien's overall mission to help close relatives outside the United States.[259]

2. *The Separation Factor*

One of the important considerations in the assessment of hardship is the alien's separation from family living in the United States.[260] This is such an important element that courts have found an abuse of discretion when the BIA has failed to accord it the weight it deserves.[261] When the alien has a child who is a United States citizen, he may feel entitled to special consideration. However, the alien does not enjoy favored status just because he has such a citizen child.[262] Even so, courts have been particularly concerned about the impact of an alien's deportation on children, and have readily reversed the BIA when the BIA has rebuffed an alien's petition on the ground that any separation that might occur would be the result of the parent's choice.[263]

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255. *Id.* at 463.

256. *Id.* at 464.

257. *Id.*

258. *See id.* at 463-64; *see also* Ramirez-Gonzalez v. INS, 695 F.2d 1208, 1211 (9th Cir. 1983); Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981).

259. *See* Tukhowinich v. INS, 64 F.3d at 463-64. The court reversed and remanded because the BIA did not adequately discuss its reasons for denying the alien's request for suspension. *Id.* at 465. The BIA did not state clearly that it was adopting the reasoning of the Immigration Judge and its statement that it had adequately considered the evidence of hardship provided no assurance that the BIA had considered all the relevant factors. *Id.*

260. *See* Contreras-Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983); Antoine-Dorcelli v. INS, 703 F.2d 19, 21-22 (1st Cir. 1983).

261. *See* Salcido-Salcido v. INS, 138 F.3d 1292, 1293 (9th Cir. 1997); Gutierrez-Centeno v. INS, 99 F.3d 1529, 1533 (9th Cir. 1996); Babai v. INS, 985 F.2d 252, 255 (6th Cir. 1993); Cerrillo-Perez v. INS, 809 F.2d 1419, 1421 (9th Cir. 1987); Bastidas v. INS, 609 F.2d 101, 104-05 (3d Cir. 1979).

262. *See* Ramirez-Durazo v. INS, 794 F.2d 491, 498 (9th Cir. 1986); Marquez-Medina v. INS, 765 F.2d 673, 676 (7th Cir. 1985).

263. *See* Salcido-Salcido v. INS, 138 F.3d at 1293-94.

In *Perez v. INS*,[264] the BIA blamed the parents for any ensuing separation, but the Ninth Circuit found the BIA's approach harmless because the aliens had failed to show an intent to separate from their son.[265] Because the parents had made no preparations for such a separation, they could not establish this essential ingredient of their hardship claim.[266] In *Perez*, it was the aliens' fault for not producing the evidence to show the impact of separation.[267] The aliens might have relied on the general perception that most deportable aliens would not want to leave their children behind.

It was this generalization that led the INS in *Cerrillo-Perez v. INS*[268] to argue that the aliens' children were of such a tender age that they would probably join their parents in Mexico.[269] The *Cerrillo-Perez* court remanded the case to the BIA because the BIA had failed to consider the effect on the children if the parents returned to Mexico and left their children behind.[270] The court observed that the BIA had considered only the hardships which would ensue if the children also relocated to Mexico.[271] It did not occur to the BIA that the parents might want the children to remain in the United States to take advantage of the opportunities which this country had to offer them as United States citizens.[272] Nevertheless, the court wanted the BIA to determine extreme hardship on the basis of the actual circumstances relating to the alien under consideration.[273]

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264. Perez v. INS, 96 F.3d 390 (9th Cir. 1996).
265. *Id.* at 392-93.
266. *Id.* at 391-92.
267. *Id.* at 392.
268. Cerrillo-Perez v. INS, 809 F.2d 1419 (9th Cir. 1987).
269. *Id.* at 1426.
270. *Id.* at 1427.
271. *Id.* at 1423.
272. *Id.* at 1424 n.3. The court acknowledged that "[c]itizen children have . . . an absolute right to remain in the United States." *Id.* at 1423. This was an important distinction to make because the children were born to aliens living illegally in the United States. *Id.* at 1422. But the children were United States citizens because they were born in the United States, and their parents' illegal status was irrelevant. The court confirmed as much by stating that "[t]he advantage of growing up in this country is a right afforded citizens under the Constitution." *Id.* at 1424 n.3. The Fourteenth Amendment provides in part: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.
273. Cerrillo-Perez v. INS, 809 F.2d at 1426 (citing *In re* W—, 5 I. & N. Dec. 586, 586-88 (1953)). In *Babai v. INS*, the court cautioned that the BIA's consideration of the impact on a citizen child of the separation from the child's parents must be "'careful and individualized.'" Babai v. INS, 985 F.2d 252, 255 (6th Cir. 1993) (quoting Jara-Navarrete v. INS, 813 F.2d 1340, 1343 (9th Cir. 1986)). The court found that the BIA had abused its discretion by failing to consider the hardship for the citizen child if the child exercised his citizenship right and stayed in

The BIA's position on parental choice in subsequent decisions seemed slightly more palatable simply because the aliens involved did not marshal their forces to support their claim of hardship.[274] Thus in *In re Ige*,[275] the child's father alleged, without substantiation, that his deportation to Nigeria would cause "extraordinary hardship" to his citizen son if the son remained in the United States.[276] It was a "mere assertion" or an "indirect reference" to such a possibility, and the BIA was looking for more than that.[277] The BIA's minimum requirement was an affidavit from the parents stating the parents' intention to leave their child in the United States, and explaining the arrangements "that . . . [would] be made for the child's care and support."[278] The BIA seemed to be more concerned, however, about whether the child would suffer extreme hardship if he accompanied his parents abroad.[279] If no such hardship would ensue, then leaving the child here was a matter of "parental choice."[280]

The BIA left no room for the possibility that a parent might want to leave his child here for any number of reasons.[281] Unfortunately, the BIA equated the parent's parental choice to abandonment of the child in the United States.[282] The use of that language was certain to obscure the real problem confronting the BIA. A parent would not take lightly a decision to leave a child behind, and therefore, it was a stretch to characterize such a decision as abandonment of the child. If the parent found it necessary to leave the child, however, the government should have assessed the situation to determine whether the alien had met the threshold of hardship. The BIA's position was that the child should

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the United States. *Id.* at 254. This element was so important that the court believed that extreme hardship to the child alone could justify suspension of deportation. *Id.*

274. *See In re* Ige, 20 I. & N. Dec. 880, 885 (1994).

275. *In re* Ige, 20 I. & N. Dec. 880 (1994).

276. *Id.* at 885.

277. *Id.*

278. *Id.* The BIA was on solid ground here, citing the Supreme Court's decision in *INS v. Wang*, 450 U.S. 139, 143 (1981), concerning the evidentiary requirements. *In re* Ige, 20 I. & N. Dec. at 885.

279. *See id.*

280. *Id.* The BIA regarded as "abandoned" any citizen child left in the United States by his alien parents. *Id.* at 886. The BIA could not have used a more negative term. In *Liu v. United States Department of Justice*, the court noted in a similar case that the decision whether to leave the child in the United States rested solely with the alien parents. Liu v. United States Dept. of Justice, 13 F.3d 1175, 1177 (8th Cir. 1994). It was "not being imposed upon them by the government." *Id.*; *see also In re* Pilch, Int. Dec. No. 3298, at 9 (B.I.A. 1996), *petition for review dismissed for lack of juris.*, 129 F.3d 969 (7th Cir. 1997).

281. *In re* Ige, 20 I. & N. Dec. at 885-86.

282. *Id.* It is not clear why the BIA jumped to the conclusion that any time a parent leaves a child here, the parent has "unnecessarily abandoned" that child.

go with the deported parent unless the parent could show that extreme hardship would ensue under that arrangement.[283]

The BIA's willingness to accord such a deference to parental choice prevented the BIA from assessing the real impact of family separation. The BIA's failure to examine the reasons for a separation led the Ninth Circuit in *Salcido-Salcido v. INS*,[284] to conclude that the BIA had abused its discretion in not giving proper weight to testimony that the mother would leave her children with her husband and her mother.[285] The Ninth Circuit in *Cerrillo-Perez v. INS*, had previously criticized the BIA's employment of a per se rule that rejected the need to consider the hardship to a child when the parent was deported.[286] The BIA must have felt confident in the case because the court agreed with *Perez* that the aliens did not deserve relief because there was an element of parental choice that militated against it. But the court in *Perez* was careful to distance itself from this per se rule of attributing separation to parental choice, and it opted instead for an evidentiary requirement that supported the parent's claim that the family would be separated.[287] In *Perez*, the court referred to the BIA's observations about the lack of evidence concerning the arrangements for the child's care in the United States.[288] But, the court could not ignore the BIA's position that any hardship from separation was, in any event, the result of parental choice and not the result of the parent's deportation.[289] Even if the parents could have shown the arrangements they had made for their child to remain in the United States, the BIA might still have regarded parental choice as a disqualifying feature of the aliens' petition. One could reach this conclusion, given the court's attribution of the BIA's language that it was parental choice which would cause the separation "in any event."[290]

In *Salcido-Salcido*, the language attributed to the BIA was "personal choice."[291] The thrust was the same. The court did not accept the BIA's

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283. *Id.* That is, of course, different from the hardship that might ensue to children who remain in the United States. In the BIA's view, the focus must be on the child's departure with the parents. *Id.* In *In re Ige*, the BIA referred to one of its previous decisions which recognized that there would be extreme hardship if the child was not able to practice his religion in his parents' homeland. *Id.* The BIA felt comfortable with that because the child would have left with his parents and, therefore, there was no abandonment. *Id.*

284. Salcido-Salcido v. INS, 138 F.3d 1292 (9th Cir. 1998).

285. *Id.* at 1293-94.

286. Cerrillo-Perez v. INS, 809 F.2d 1419, 1426 (9th Cir. 1987).

287. Perez v. INS, 96 F.3d 390, 393 (9th Cir. 1996).

288. *Id.*

289. *Id.*

290. *Id.* at 392.

291. Salcido-Salcido v. INS, 138 F.3d 1292, 1293 (9th Cir. 1998).

contention that it was the parents' decision that would cause the child's hardship.[292] The court wanted the BIA to consider the hardship caused by separation, and the impact of that separation on the family.[293] The BIA has yet to respond to the Ninth Circuit's approach, but one can be optimistic that the BIA will be satisfied with an alien's evidentiary foundation supporting the claim of separation. In such cases, the BIA will include the separation factor in its assessment of extreme hardship.

The separation factor has been so important that one alien argued for an extension of the definition of "child" that included her nieces.[294] When the issue reached the Supreme Court in *INS v. Hector*,[295] the alien did not succeed in convincing the Court that it should ignore the statute's plain meaning.[296] The alien's position was that her relationship with her nieces resembled a parent-child relationship, and the hardship which would affect the nieces as a result of their separation from the alien, made her qualified for relief.[297]

The legislative history of the suspension remedy showed that the Senate had once considered a draft bill dealing with hardship to an alien's "immediate family."[298] The INS was uncomfortable with this designation and convinced the Senate to be more specific about the relatives that should be protected by the statute.[299] As a result, Congress passed a statute that specifically identified "spouse, parent, or child" as the persons covered.[300] Had Congress not settled on this specific designation, the courts would have had even more difficulty in determining the categories of persons affected by the statute.

3. *Community Involvement*

Another of the *Anderson* elements that courts have considered is the alien's community activities.[301] At first glance, it seems that such activities

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292. *Id.*

293. *Id.* The court was critical of the BIA for overlooking an opportunity to examine an essential element of the alien's case.

294. *See* INS v. Hector, 479 U.S. 85, 87 (1986).

295. INS v. Hector, 479 U.S. 85 (1986).

296. *Id.* at 90.

297. *Id.* at 87.

298. *See id.* at 90 n.6.

299. *See* S. 716, 82d Cong. § 244(a) (1951).

300. *See* Immigration and Nationality Act of 1952, ch. 5, § 244(a), 66 Stat. 163, 214-16.

301. Among the factors the BIA identified were: "whether [the alien] was of special assistance to the United States or community, . . . [and the alien's] position in the community." *In re* Anderson, 16 I. & N. Dec. 596, 597 (1978); *see also In re* Ige, 20 I. & N. Dec. 880, 882 (1994) (finding the alien's position in the community relevant to the inquiry).

should be relevant only to a community's hardship in parting company with the alien. But the courts have regarded the alien's community involvement as relevant to the alien's integration into the community at large, thus making it possible for the alien to show that a sudden separation from that constituency would contribute towards extreme hardship.[302] Nevertheless, despite the tendency of some courts to recognize an alien's attachment to the community, it has not always been easy to appreciate the significance of that relationship.

In *Santana-Figueroa v. INS*, the alien supported his claim of integration into American society with a letter from his priest that he had been "an asset to [his] church and community."[303] It was unclear how the alien had contributed to his community in that case. The court left the impression that the alien's regular attendance at church for at least ten years had met the test.[304] The court's failure to explain the alien's alleged involvement in community affairs did not do much to remove the confusion between that aspect and the alien's mere extended residence in the United States. It was as if the alien's presence in the United States for a ten-year period meant the alien had made some significant contribution to his community by virtue of longevity. It was one thing to say that the BIA had failed to consider the non-economic sources of hardship; it was quite another to go beyond that failure to suggest that the BIA should "not have disregarded the possibility that extreme hardship would result from the combined effect of depriving" the alien of a livelihood and ejecting him from a community to which he had contributed so much.[305]

As in *Anderson*, it is possible that the BIA was not as clear as it could have been, thus leaving the door open for subsequent meanderings about an alien's community involvement. The alien in *Anderson* did not rely on community service, but instead depended on the frail economy of the Dominican Republic to support his relief from deportation.[306] The alien drew the BIA's attention to a

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302. *See* Salameda v. INS, 70 F.3d 447, 449-50 (7th Cir. 1995); Turri v. INS, 997 F.2d 1306, 1310 (10th Cir. 1993); Zamora-Garcia v. INS, 737 F.2d 488, 495 (5th Cir. 1984); Villena v. INS, 622 F.2d 1352, 1357 (9th Cir. 1980).

303. Santana-Figueroa v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981) (internal quotations omitted).

304. *See id.*

305. *Id.* The court's view was that "[t]he Board should not have disregarded the possibility that extreme hardship would result from the combined effect of depriving the petitioner of his livelihood and uprooting him from a community to which he had belonged and contributed for more than a decade." *Id.* The court seemed to dilute the pertinent factors by faulting the BIA for its failure to consider the alien's non-economic sources of hardship. The court observed that the "petitioner regularly attended church for at least ten years, had close friends here, and testified that he felt he had become part of American society." *Id.*

306. *In re* Anderson, 16 I. & N. Dec. at 597.

House Judiciary Committee's report on a bill which provided for the adjustment of status of aliens whose deportation would result in unusual hardship, and the BIA seemed impressed with the criteria covered in that report.[307] There was a reference in those criteria to community service.[308] Unfortunately, *Anderson* merely recited the criteria that the committee had discussed and then concentrated on the economic issues that the alien had raised.[309] It was not exactly a ringing endorsement of the "community service" criterion. The BIA had little cause to dwell on community service because the alien had based much of his argument on economic detriment.[310] In any event, the BIA was looking for the combination of factors relating to the alien's age, medical condition, family ties, and economic detriment.[311] Even if community service had a role, it could not be examined in isolation.[312] The state of the economy in the Dominican Republic was not the deciding factor either.[313]

When the Seventh Circuit in *Salameda v. INS*[314] came out in favor of considering community assistance, it did so while conceding that it could find only "the barest hint" that the BIA supported that position.[315] The court hardly exhibited confidence in the BIA's support of community activities in the scheme of things.[316] In *Salameda*, the BIA was satisfied that the immigration judge had considered all the factors which were legally relevant to the issue of extreme hardship and had in fact considered the alien's community service.[317] The court in *Salameda* urged this point as evidence that such service was a relevant criterion in determining the existence of extreme hardship.[318] There should have been further explanation. The mere fact that the immigration judge had considered all relevant facts did not mean that all the facts he considered were

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307. *See id.* Section 4 of H.R. 8713 provided for the adjustment of an illegal alien's status under certain conditions if the alien's "deportation would result in unusual hardship." H.R. REP. NO. 94-506, at 17 (1975). The Attorney General was expected to apply criteria similar to that used in suspension of deportation and among them were the alien's "position in the community." *Id.* Congress took no action on the bill during the 94th Congress.

308. *In re* Anderson, 16 I. & N. Dec. at 597.

309. *Id.* at 597-98.

310. *Id.* at 597.

311. *Id.* at 598.

312. *Id.*

313. *Id.*

314. Salameda v. INS, 70 F.3d 447 (7th Cir. 1995).

315. *Id.* at 450.

316. *Id.* at 451.

317. *Id.* at 452.

318. *Id.*

relevant to all issues.[319] Therefore, it was unclear whether the BIA had regarded the alien's community activities as one of the criteria.[320] The dissent in *Salameda* seemed to regard the BIA's failure to comment on the judge's consideration of that matter as an encouraging sign.[321] In the same context, however, the court found it difficult to conclude that it was in fact the BIA's position that community assistance was an element of extreme hardship.[322] The court relied on the BIA's "apparent acquiescence" in the immigration judge's adoption of the position to support its own insistence on the point.[323] Surprisingly, the BIA did not actually consider community service as a relevant factor in the determination of the alien's eligibility for relief, but it saw such service as a positive factor in its exercise of discretion.[324] In light of this, the court accused the BIA of changing the standard which the BIA had previously acknowledged by recognizing the immigration judge's coverage of all the relevant factors.[325] It was questionable whether the BIA had changed its mind. It had not taken a position on the matter, and the court must have been persuaded that the BIA had done so by the BIA's blind acceptance of the immigration judge's approach to the problem.[326]

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319. *Id.* at 456 (Easterbrook, J., dissenting). The court was confused by the fact that the BIA's lawyer had represented the BIA's position to be that of accepting community service as a relevant criterion. *Id.* at 450. But the court found that the BIA had considered such service as irrelevant as a matter of law. *Id.* at 452. The court viewed the BIA as changing its own standard because the BIA had accepted the idea that the immigration judge had touched all the relevant bases. *Id.*

320. *Id.*

321. *Id.* at 456 (Easterbrook, J., dissenting).

322. *Id.* at 450. The court addressed the problem this way: "The Board did not say or hint that the administrative law judge had wasted his time in considering the Salamedas' contribution to their community. In view of this we can hardly ignore what the immigration judge said or the record that was before him." *Id.*

323. *Id.*

324. *Id.* at 452. The court relied on the BIA's "apparent acquiescence in the immigration judge's adoption of that position and the government's acknowledgment that it [was] the [BIA's] position . . . ." *Id.* at 450. The court had to hedge on this point because it was merely relying on the BIA's assertion that the immigration judge had considered all relevant facts. *Id.*

325. *Id.* at 452. The court criticized the BIA for ignoring its own standard in light of the position taken by the government's lawyer that community service was a relevant factor in determining extreme hardship. *Id.* at 451. The question was whether the BIA had in fact taken that position. *See id.* at 456 (Easterbrook, J., dissenting).

326. *See id.* at 450. Near the end of its opinion, the court stated the BIA seemed to acknowledge the changing of its standards when the BIA recognized immigration had "touched all bases." *Id.* at 452. The court itself should have recognized that the BIA could have touched all bases including that of community assistance, which might not have been required for the alien to prove his case. The aliens in *Salameda* believed the BIA's approach conflicted with the BIA's position in *Anderson*. *Id.* at 455 (Easterbrook, J., dissenting). It is questionable though whether

4. *Cumulative Effect*

It was not until *In re Ige* that the BIA clearly stated the factors that were relevant to the issue of extreme hardship.[327] It was also an opportunity for the BIA to remind us of the relevant factors which must be considered cumulatively.[328] It was a point worth repeating, for many of the BIA's mistakes were in failing to consider relative factors and also in dealing with the factors individually rather than cumulatively.[329]

This latter point has engaged the attention of the courts, particularly after the *Wang* decision. In *Ahn v. INS*,[330] the alien thought he had something to complain about when the BIA noted that his lower standard of living did not "alone" constitute extreme hardship.[331] The alien was concerned that the BIA might have considered this factor in isolation.[332] The BIA suggested that uprooting the alien's children and liquidation of the alien's property were additional factors that were worthy of consideration but were not conclusive.[333] Furthermore, evidence of the medical condition of the alien's son was not convincing enough to bring relief to the alien.[334] Despite the Ninth Circuit's problem with the BIA's language, the court found that the BIA's opinion, read as

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Anderson set any standard about community service. *Id.* (Easterbrook, J., dissenting). The alien in *Anderson* did not rely on community service as a part of his claim, and the BIA did not have to discuss the point. *Id.* (Easterbrook, J., dissenting). It is true, however, that the aspect of community service appeared in the report of the House Judiciary Committee to which the BIA referred in *Anderson*. *In re* Anderson, 16 I. & N. Dec. 596, 597 (1978) (citing H.R. REP. NO. 94-506, at 17 (1975)). But that aspect was not relevant in *Anderson*, because the alien there relied on claims of economic detriment more than anything else. *See id.*

327. *In re* Ige, 20 I. & N. Dec. 880, 882 (1994). The BIA identified the relevant factors as:

> the alien's age; the length of his residence in the United States; his family ties in the United States and abroad; his health; the economic and political conditions in the country to which he may be returned; his financial status, business, or occupation; the possibility of other means of adjustment of status; his immigration history; and his position in the community.

Id.

328. *Id.*

329. *See* Urbina-Osejo v. INS, 124 F.3d 1314, 1318 (9th Cir. 1997); Dulane v. INS, 46 F.3d 988, 999 (10th Cir. 1995); Prapavat v. INS, 662 F.2d 561, 562 (9th Cir. 1981).

330. Ahn v. INS, 651 F.2d 1285 (9th Cir. 1981).

331. *Id.* at 1287.

332. *Id.*

333. *Id.*

334. *Id.*

a whole, did not place much stock in any of the alien's arguments, whether considered separately or together.[335]

It will always be questionable whether *Wang* dictated the result in *Ahn*. Although courts should give some deference to the BIA's determination of extreme hardship, they should still insist on the BIA's consideration of all the relevant factors underlying an alien's claim.[336] When the *Wang* Court suggested that the BIA could construe extreme hardship narrowly,[337] it was really talking about the level of hardship required and not about the BIA's freedom to ignore the elements of the alien's case.

In *Ahn*, both the BIA and the court refused to consider the effect of the alien's previous political activities on the alien's job prospects back home.[338] They both seemed surprisingly content that the alien's political claims could be considered under the asylum provision but not in a deportation proceeding.[339] There was nothing in the asylum or suspension sections that prevented a court or the BIA from considering an alien's political claims.[340] The court sanctioned the BIA's narrow definition of extreme hardship by restricting political claims to the asylum context.[341] Therefore, it meant that the BIA had the authority to decide what factors were relevant, and in the absence of the BIA's concessions, an alien could not convince a court of the BIA's failure to consider all relevant factors.

Subsequent decisions have found the courts and the BIA softening their position by recognizing the legitimacy of factoring an alien's political hardship into a cumulative assessment of the alien's eligibility for relief.[342] In assessing the alien's hardship in *In re O—J—O—*, the BIA took into account the conflict of the alien's family with the Sandinistas in Nicaragua.[343] In doing so, it recognized that such a conflict was relevant to the alien's ability to survive the economic and political challenges that awaited him in his homeland.[344] It was a step in the right direction, given the BIA's tendency to shy away from political

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335. *Id.*

336. *Id.* The shortcoming here is that the court recognized the BIA's language did not show that the BIA considered the factors cumulatively rather than separately, but that the language could be interpreted either way. *See id.* If that was the case, the court should have given the alien the benefit of the doubt.

337. INS v. Wang, 450 U.S. 139, 145 (1981).

338. Ahn v. INS, 651 F.2d at 1288.

339. *See id.*

340. It was a question of distinguishing "potential economic detriment rooted in political sources" from "political persecution itself." *Id.* (East, J., dissenting).

341. *See id.*

342. *See In re* O—J—O—, Int. Dec. No. 3280, at 7 (B.I.A. 1996).

343. *Id.*

344. *Id.* at 8.

considerations outside the asylum context.[345] Although an asylum claim required an alien to prove that he had a well-founded fear of persecution, the political situation in the alien's homeland was still relevant to a cumulative assessment of the alien's hardship.[346] The BIA redeemed itself in *In re O—J—O—* by recognizing that the *Anderson* factors did not prevent the BIA from considering other aspects of hardship.[347]

The BIA's acceptance of political considerations has not always led the BIA to do the right thing. In *Urbina-Osejo v. INS*,[348] the Ninth Circuit had to remand the case to the BIA for a review of the alien's claim because the BIA had given cursory treatment to the alien's allegations of retaliation by the Sandinistas.[349] The BIA had acknowledged the relevance of the political conditions in Nicaragua, but it had not specifically considered the alien's affidavit relating to his continuing feud with the Sandinistas.[350] The court, therefore, asked the BIA to consider the cumulative effect of all relevant factors.[351]

The Ninth Circuit refined the BIA's approach in *Ordonez v. INS*[352] by linking the alien's persecution claims to his application for suspension relief.[353] The court saw no statutory requirement for considering "political persecution"

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345. *Id.* The BIA made the point: "In light of the [alien's family] history of conflict with the Sandinistas, the current political situation in Nicaragua should be factored into the hardship assessment." *Id.*

346. *Id.*

347. *Id.* at 4 (discussing *In re* Anderson, 16 I. & N. Dec. 596, 597 (1978)). The BIA looked at a combination of hardships. Among them were the "difficult economic and political circumstances in [the alien's] native country, including the possible loss of an ongoing business concern." *Id.* at 9. In *Blanco v. INS*, the court criticized the BIA for overlooking the alien's claim of hardship based on the violence in El Salvador. Blanco v. INS, 68 F.3d 642, 646 (2d Cir. 1995). It said that "violence and threats that fail to establish the political, religious, or ethnic motivation necessary for asylum may nonetheless be probative of extreme hardship qualifying for suspension of deportation." *Id.* It was a similar situation in *Tukhowinich v. INS* where the BIA failed to consider the political unrest in Thailand. Tukhowinich v. INS, 64 F.3d 460, 463 (9th Cir. 1995).

348. Urbina-Osejo v. INS, 124 F.3d 1314 (9th Cir. 1997).

349. *Id.* at 1318.

350. *Id.* at 1318-19.

351. *Id.* at 1319 (requiring evaluation of each relevant factor to claim of extreme hardship including political persecution, alone and cumulatively); *see also* Gutierrez-Centeno v. INS, 99 F.3d 1529, 1534-35 (9th Cir. 1996) (deciding that total cumulative effect of all relevant factors in claim of extreme hardship must be considered, including "political hardship," and not just "political persecution"); Blanco v. INS, 68 F.3d at 646-47 (holding that all relevant factors must be considered in evaluating claim of "extreme hardship," but not requiring the hardship result from "political persecution").

352. Ordonez v. INS, 137 F.3d 1120 (9th Cir. 1998).

353. *Id.* at 1123.

claims in the suspension context, but it determined that if the BIA considered such evidence, asylum law no longer controlled.[354] The difficulty here was that this approach allowed the BIA to ignore one possible ingredient of extreme hardship, and it deprived the alien of his right to have all possibilities considered.[355]

The alien in *Ordonez* feared persecution in Guatemala because of the Guatemalan practice of killing former police officers.[356] The BIA did not see any connection between the alien's persecution and the political conditions in Guatemala, and therefore, denied suspension because the alien did not meet one of the factors set out in *Anderson* relating to such conditions.[357] Even though the court did not think the BIA had to consider the alien's persecution claim, once the BIA did so, it could not restrict its analysis to a political context.[358] The court took a more liberal view and required the BIA to consider the alien's persecution claims within a broader framework.[359] Therefore, it was necessary to consider all facts that related to the alien's claim of extreme hardship. If the alien could show that he faced certain death at the hands of organized crime if he returned to his homeland, it would not necessarily prevent him from showing extreme hardship just because he could not show the political motives of his attackers.[360]

The court in *Ordonez* should not have supported the BIA's authority to defer consideration of persecution evidence outside the asylum context. If it did so on the pretext of allowing the BIA to frame extreme hardship narrowly, it was

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354. *Id.*; *cf.* Kuciemba v. INS, 92 F.3d 496, 502 (7th Cir. 1996) (stating that "claims of political persecution have limited probative value in determining 'extreme hardship'"); Blanco v. INS, 68 F.3d at 646 (stating that it is irrelevant whether vulnerability to violence is politically motivated but noting that violence and threats may be "probative of extreme hardship qualifying for suspension of deportation"); Gebremichael v. INS, 10 F.3d 28, 40 (1st Cir. 1993) (holding it was within Board's discretion to "discount evidence of persecution when calculating 'extreme hardship'").

355. Ordonez v. INS, 137 F.3d at 1124.

356. *Id.* at 1122.

357. *Id.* at 1124 (citing *In re* Anderson, 16 I. & N. Dec. 596, 597 (1978)).

358. *Id.* at 1123. The mere fact that the asylum statute specifically mentions "persecution" should not give the BIA the leeway to ignore an alien's persecution in the suspension context. *Id.* An alien's extreme hardship can be based on any of several grounds as indicated in *In re Anderson*. *Id.* (citing *In re* Anderson, 16 I. & N. Dec. at 597). The asylum context restricts persecution to one of five specific grounds, but the alien may suffer persecution on other grounds not specifically mentioned there. *Id.* The extreme hardship criterion in the suspension statute leaves it to the BIA to decide whether the alien has made the necessary link between persecution and hardship. *Id.*

359. *Id.* at 1124.

360. *Id.*

mistaken because it diverted the BIA's attention from the cumulative effect of the components of the alien's hardship. The alien's reliance on an asylum claim would require her to show persecution on account of certain factors, including political opinion.[361] This requirement would be different from a claim of persecution that was unrelated to the asylum grounds. There was no statutory authority for an alien's persecution claim to be restricted in that way. Such a claim may indeed be meritorious if examined within the general context of extreme hardship, even though it may not rest on political grounds. It is yet to be seen if the courts will make further advances in this area by giving wider relevance to claims of persecution.

III. THE APPROACH UNDER IIRIRA

A. *Return to a Single Standard*

One would have thought that aliens had a hard enough time proving extreme hardship under former § 244. Obviously, Congress was not at all sympathetic to the alien's plight. Congress was determined to respond to the diluted standard of extreme hardship which supported relief for those aliens who had become "acclimated" to the United States.[362] In all fairness, however, it must be noted that in *In re O—J—O*, the case cited in the congressional report on the IIRIRA, the BIA did not rely solely on the alien's integration into the American community.[363] The BIA also considered other factors.[364] It noted that the alien would face "difficult economic and political circumstances in his native country, including the possible loss of an ongoing business concern."[365] It was this combination of factors that led the BIA to conclude that the alien would

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361. The court's position was that the BIA was "not statutorily required to consider evidence of persecution at all outside of an asylum or withholding of deportation claim." *Id.* (citing Kashefi-Zihagh v. INS, 791 F.2d 708, 710 (9th Cir. 1986)).

362. *See* 8 U.S.C. § 1101(a)(42)(A) (Supp. III 1997). The Attorney General may grant asylum to an alien who qualifies as a refugee under 8 U.S.C. § 1101(a)(42)(A), which requires an alien to have a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*

363. *In re* O—J—O, Int. Dec. No. 3280, at 9 (B.I.A. 1996). The Conference Report explained the rationale for tightening the standard: "The 'extreme hardship' standard has been weakened by recent administrative decisions holding that forced removal of an alien who has become 'acclimated' to the United States would constitute a hardship sufficient to support a grant of suspension of deportation." H.R. REP. NO. 104-828, at 213 (1996).

364. *In re* O—J—O, Int. Dec. No. 3280, at 9.

365. *Id.*

suffer extreme hardship.[366] *In re O—J—O* was a close case, and the BIA admitted as much.[367] But there was nothing to suggest that the acculturation process alone had qualified the alien for relief.[368]

Congress may have wanted to draw a hard line by returning to the requirement of exceptional and extremely unusual hardship. It was understandable, for even under the extreme hardship criterion, *In re O—J—O* had produced a division within the BIA.[369] If the more demanding standard had been in effect, the decision would probably have gone against the alien.[370] If Congress wanted to send a message that it was going to make it more difficult for aliens to avoid deportation, so be it. But that is quite different from trying to throw the "acclimation" factor out the window.[371] Even in the context of the heightened standard, it will always be relevant whether the alien has had a long-term relationship with the United States.[372] Nevertheless, it is only one of many

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366. *Id.* It was the cumulative nature of the hardship elements that helped the alien in the long run.

367. *Id.* The BIA observed: "This is a close case on the issue of 'extreme hardship' but one which, in the final analysis, meets the requirement of significant hardships over and above the normal economic and social disruptions involved in deportation." *Id.* The BIA sat en banc with twelve members. *Id.* at 1. BIA Member Guendelsberger wrote the opinion for five members. *Id.* at 2. There were concurring opinions written by Members Dunne, Holmes, and Rosenberger, while Members Vacca, Heilman, and Cole joined the dissenting opinion written by Member Filppu. *Id.* at 11, 13, 24, 36.

368. The court took into account not only the alien's assimilation into American culture but also the difficult economic and political situation in the alien's native country. *See id.* at 9.

369. There were four dissenters in the case out of the twelve BIA Members sitting en banc. *Id.* at 36. BIA Member Filppu, in writing the dissenting opinion stressed the lack of the alien's family connection in the United States. *Id.* at 46 (BIA Member Filppu, dissenting). The alien's fiancée and brother had no lawful immigration status in the United States. *Id.* The fiancée was an undocumented alien with a pending asylum claim. *Id.* at 8. The majority admitted family considerations did "not add measurably to the hardship aspects of [the] case." *Id.*

370. The alien owned one truck which he used in his trucking business as an independent contractor. *Id.* at 45. He had no employees, and his work earned him income which was about $2,000 below the poverty line. *Id.* (citing Annual Update of the HHS Poverty Guidelines, 59 Fed. Reg. 6277, 6277-78 (1994)). He was never threatened in his native land of Nicaragua, and therefore, had no political problems. *Id.* This situation hardly approached the high standard of exceptional and extremely unusual hardship.

371. The point here was that the committee interpreted *In re O—J—O* as indicating that deportation of an acclimated alien would constitute extreme hardship. *See* H.R. REP. NO. 104-828, at 213 (1996). The BIA concluded that it was a "combination of hardships" that amounted to extreme hardship. *In re* O—J—O, Int. Dec. No. 3280, at 9. The committee seemed to have overreacted to a concededly liberal decision, and therefore, its interpretation is debatable. *See* LEGOMSKY, *supra* note 33, at 487.

372. *See* H.R. REP. NO. 104-828, at 213.

factors that should be taken into account.[373] One wonders whether Congress went too far in escalating the requirements for relief in reaction to a single BIA decision favoring the alien.

As late as *In re Pena-Diaz*,[374] the BIA had an opportunity to reflect on an alien's motion to reopen and in doing so, reviewed certain factors related to the alien's claim of exceptional and extremely unusual hardship.[375] The BIA looked favorably on the alien's long residence in the United States, his steady employment, the family's roots in the community, and the treatment that was available here for the heart condition of the alien's child.[376] In deciding whether the alien had made a prima facie case for reopening, the BIA certainly was attracted to more factors than the alien's acclimation.[377] Congress apparently wanted to remove the lower standard so the BIA would no longer have to worry about the inevitable comparison between hardship that was merely "extreme" and hardship that was "exceptional and extremely unusual."[378] It is questionable, however, whether Congress intended to return to the previous standard which required deportation to be "unconscionable" before an alien could qualify for relief.[379] The congressional dissatisfaction with the BIA's assessment of extreme hardship may have led to an overreaction. When Congress created an additional standard of extreme hardship for certain aliens who had to show seven years of physical presence, while retaining the requirement of exceptional and extremely unusual hardship for serious immigration offenders, it is arguable whether Congress wanted to lessen the degree of hardship for aliens in the first category.[380] It was understandable that Congress would continue that heightened

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373. The BIA in *In re O—J—O* reverted to the factors originally set out in *In re Anderson*. *See In re* O—J—O, Int. Dec. No. 3280, at 4 (citing *In re* Anderson, 16 I. & N. Dec. 596, 597 (1978)). In *In re Anderson*, the BIA relied on factors identified in a report of the House Judiciary Committee, which at the time was considering a bill (H.R. 8713) dealing with the adjustment of status for certain aliens. *In re* Anderson, 16 I & N. Dec., at 597 (citing H.R. REP. No. 94-506, at 17 (1975)). H.R. 8713 was never enacted.

374. *In re* Pena-Diaz, 20 I. & N. Dec. 841 (1994).

375. *Id.* at 845.

376. *Id.*

377. *Id.* One of the factors that the BIA considered was that the alien's drug conviction made him ineligible for any other form of relief from deportation and prevented him from immigrating to the United States. *Id.* The alien had no other options open to him, and thus, it was important for the BIA to consider those elements in deciding on the alien's motion to reopen. *Id.*

378. *See* 8 U.S.C. § 1254(a)(1), (2) (repealed 1996).

379. Relief under the 1952 Act was intended to be limited to situations where deportation of an alien would be unconscionable. *See* Bueno-Carrillo v. Landon, 682 F.2d 143, 145 n.1 (7th Cir. 1982); S. REP. No. 82-1137, at 25 (1952).

380. *See In re* Hwang, 10 I. & N. Dec. 448, 452 (1964); *In re* Louie, 10 I. & N. Dec. 223, 224 (1963); 6 GORDON ET AL., *supra* note 33, § 74.07[5][f]. *But see* Hernandez-Patino v. INS,

showing for certain undesirable aliens whom Congress wanted to keep out of the United States.

There was no discernible trend over the years that the BIA had softened its stand on the suspension standards. Nevertheless, it was unfortunate that in *In re O—J—O* the BIA made its first point in applying the *Anderson* criteria by observing that the alien had "assimilated into American life and culture."[381] It was all that Congress apparently needed to justify its retrenchment from the dual categories applicable in suspension cases.[382] Prior to *In re O—J—O*, there was almost an even division in the number of cases ruling on an alien's eligibility for relief. *In re O—J—O* was not the first time acclimation was a factor.[383] When the alien in *In re Chumpitazi*[384] argued that he would find difficulty readjusting to life in Peru, he did not reach the extreme hardship threshold.[385] It was the same result in *In re Gibson*,[386] when the BIA acknowledged that although the alien had become accustomed to the "American way of life," it could not be a ground for granting relief to the alien.[387] Around the same time, the BIA granted relief in *In re Loo*[388] to an alien who had been in the United States for twenty-

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831 F.2d 750, 753 (7th Cir. 1987) ("But nowhere do we find concrete support for the proposition that the amendment of 'exceptional and extremely unusual' to merely 'extreme' hardship entails a broadening of the remedy, much less a departure from norms established by the BIA and approved by the courts.").

381. *In re* O—J—O, Int. Dec. No. 3280, at 5 (1996). The House Report used the term "acclimated" instead of the BIA's term "assimilated." *See* H.R. REP. NO. 104-828, at 213 (1996). Nevertheless, there was no doubt about the congressional intent, evidenced by the fact the Report cited *In re O—J—O*. *See id.*

382. Congress was concerned not only with the acclimation factor, but also with aliens' dependence for relief on the birth of a child in the United States. H.R. REP. NO. 104-828, at 213. The House Report made the point: "[A] showing that an alien's United States citizen child would fare less well in the alien's country of nationality than in the United States does not establish 'exceptional' or 'extremely unusual' hardship and thus would not support a grant of relief under this provision." *Id.*

383. *See In re* Chumpitazi, 16 I. & N. Dec. 629, 635 (1978).

384. *In re* Chumpitazi, 16 I. & N. Dec. 629 (1978).

385. *Id.* at 630-35. The BIA said:

> It has long been clear that the loss of a job and the concomitant financial loss incurred is not synonymous with extreme hardship . . . . Similarly, the readjustment of an alien to life in his native country after having spent a number of years in the United States is not the type of hardship that we have characterized as extreme . . . .

Id. at 635.

386. *In re* Gibson, 16 I. & N. Dec. 58 (1976).

387. *Id.* at 60. The BIA took the traditional position: "While [the alien] obviously has become accustomed to the American way of life, the difference in economic standards which exists between the United States and other countries cannot be held to command the favorable exercise of discretion." *Id.* (citing Yeung Ying Cheung v. INS, 422 F.2d 43, 45-46 (3d Cir. 1970)).

388. *In re* Loo, 15 I. & N. Dec. 601 (1976).

five years and had invested in a small business.[389] It is possible that the alien's long period of residence impressed the BIA, because it was longer than that encountered in many cases where the alien did not get relief. In *In re Loo*, the alien also had a daughter who was a lawful permanent resident, and that contributed to his connection with the community.[390] The BIA observed that because the alien had "a small investment" in a business, the deportation would cause "significant economic hardship" for the alien.[391] Congress may have wondered how the BIA found this hardship to be any different from that experienced by the vast majority of aliens who had made some small investment to establish themselves, and then suddenly face the prospect of liquidating their holdings to return to a much lower standard of living.

Even before *In re Loo*, the BIA had surely left the wrong impression in *In re Ching*[392] about the meaning of extreme hardship.[393] The alien was fortunate to have received favorable treatment from the BIA.[394] Both the alien and his wife were working and had a savings account of $18,700—a considerable nest egg in 1968.[395] The couple had no dependents or relatives in the United States.[396] The alien contended that he would be unable to find work abroad to support himself and his wife.[397] But he went further and assured the BIA "that he [had] become adjusted to the manner of living in the United States and could not adjust elsewhere as he [had] maintained a residence in this country for more than 20 years."[398] The alien's wife, who was 54, muddied the waters further by pleading that there would be no one to take care of her if her husband was deported.[399] The traditional BIA response in such a situation was for the spouse to join her mate abroad, even if in a reduced standard of living. The BIA reacted sympathetically to the alien in this case without really explaining the rationale for its deviation.[400]

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389. *Id.* at 605.

390. *Id.* The BIA felt the alien's deportation would not only cause him significant economic hardship, but "also separate him from his home and the ties he has developed in this country over the last 25 years." *Id.*

391. *Id.* It is arguable whether the loss of a small investment amounts to the kind of extreme hardship contemplated by the statute. In a case like this, it may be the age-old question of economic detriment.

392. *In re* Ching, 12 I. & N. Dec. 710 (1968).

393. *Id.* at 713-14.

394. *See id.*

395. *Id.* at 713.

396. *Id.*

397. *Id.*

398. *Id.* at 713-14.

399. *Id.* at 714.

400. *See id.*

This case seemed marginal, at best, in terms of its assessment of extreme hardship, and the BIA did not strengthen its position by volunteering that the alien would have met the more stringent standard of exceptional and extremely unusual hardship.[401] It was the kind of dicta that must have made the legislators worry about the existing standards. Perhaps the BIA felt a little unsure about the new standard which had been in existence only for a short time when *Ching* was decided.[402] One might say the BIA was being generous while it worked out the contours of the 1962 extreme hardship test. In the intervening years, the BIA seemed to harden its stance, confident that its narrow view of extreme hardship would stand the test of time.[403] If the BIA had maintained that posture, Congress might not have been persuaded to reform the suspension remedy. The BIA itself acknowledged that *In re O—J—O* was a close case on the issue of extreme hardship.[404] Congress likely regarded this as the beginning of a trend, and therefore, was not prepared to see a further weakening of the standards. The BIA's emphasis on the alien's assimilation into American culture and on the alien's difficulty in readjusting to life back home added some credibility to the congressional concern for the direction in which the BIA was headed.

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401. *See id.* Section 244(a)(2) was more stringent than § 244(a)(1) because it required an alien to be physically present for not less than 10 years and covered aliens from less desirable classes such as criminals, anarchists, subversives and drug addicts. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 244(a), 76 Stat. 1247, 1248 (amending the 1952 version of § 244(A)) (repealed 1996); *see supra* note 37 and accompanying text. It is curious that the BIA made the gratuitous gesture of deeming the alien to be qualified under the more stringent § 244(a)(2) when the alien had already qualified under § 244(a)(1). *See In re* Ching, 12 I. & N. Dec. at 714.

402. The 1962 version of § 244(a) was in existence for only six years when the BIA decided *In re Ching*. Either the BIA was feeling its way, or *Ching* was an aberration.

403. The BIA must have been encouraged by the Supreme Court's decision in *INS v. Wang*, which upheld the BIA's decision to deny an alien's motion to reopen. INS v. Wang, 450 U.S. 139, 146 (1981). The BIA was convinced that the alien had not made a prima facie case, but the Court seemed to affirm on the basis that the BIA did not have to grant the motion to reopen even if the alien had made a prima facie case. *See id.* at 142-44. In any event, the Court affirmed the Attorney General's authority to construe extreme hardship narrowly. *Id.* at 145. It may be argued that the BIA construed the term more narrowly over the last two decades then it did immediately after the 1962 amendment to the INA. *See In re* O—J—O, Int. Dec. No. 3280, at 40 (B.I.A. 1996) (Board Member Filppu, dissenting); *cf.* Cortes-Castillo v. INS, 997 F.2d 1199, 1204 (7th Cir. 1993) (noting that the exceptional and extremely unusual hardship criterion was applied more stringently over the 40 years preceding that decision than it had been in earlier cases in which the standard was significantly less stringent); *see also supra* note 402 and accompanying text (illustrating the BIA's extreme hardship test was initially more lenient).

404. *See In re* O—J—O, Int. Dec. No. 3280, at 9. One cannot help but think that the BIA's concern about the alien's readjustment to life in Nicaragua rubbed Congress the wrong way. *See* H.R. REP. NO. 104-828, at 213 (1996).

B. *Continuous Physical Presence*

Former § 244(a) required certain periods of continuous physical presence.[405] There were some early disagreements over the meaning of "continuous physical presence."[406] Some early decisions held that any absence, however brief, broke the continuity of an alien's physical presence,[407] while others preferred that the statute be construed with sufficient flexibility to ignore an alien's brief trip abroad.[408]

Those courts which accepted a liberal statutory construction had *Rosenberg v. Fleuti* as precedent.[409] In *Fleuti*, the Supreme Court relieved lawful resident aliens of the consequences of re-entry when such aliens returned to the United States from a brief sojourn abroad that was not intended to result in any meaningful interruption of their permanent residence.[410] The result was that lawful permanent residents who benefited from the *Fleuti* doctrine were spared the agony of being excluded on the basis of a short trip that was innocent, casual, and brief.[411] There was no good reason why a similar approach could not be taken with respect to the continuity of an alien's physical presence in suspension of deportation cases. The Ninth Circuit took the point in *Wadman v. INS*,[412] and held an alien's brief vacation in Mexico did not interrupt his continuous physical presence in the United States.[413]

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405. *See* 8 U.S.C. § 1254(a) (repealed 1996).

406. *See In re* Graham, 11 I. & N. Dec. 234, 238 (1965) (finding a two-month absence during school vacation broke the continuous physical presence); *In re* Jacobson, 10 I. & N. Dec. 782, 783 (1964) (finding four hours in Mexico broke the continuous physical presence); *In re* Loza-Bedoya, 10 I. & N. Dec. 778, 781 (1964) (finding a two-week absence broke the continuous physical presence).

407. *See* McColvin v. INS, 648 F.2d 935, 938-39 (4th Cir. 1981); Heitland v. INS, 551 F.2d 495, 504 (2d Cir. 1977); Wadman v. INS, 329 F.2d 812, 815-16 (9th Cir. 1964); *In re* Wong, 12 I. & N. Dec. 271, 275 (1967); *In re* Graham, 11 I. & N. Dec. at 238; *In re* Jacobson, 10 I. & N. Dec. at 783; *In re* Loza-Bedoya, 10 I. & N. Dec. at 781.

408. *See* McColvin v. INS, 648 F.2d at 938-39; Heitland v. INS, 551 F.2d at 504; Wadman v. INS, 329 F.2d at 815-16; *In re* Wong, 12 I. & N. Dec. at 275.

409. Rosenberg v. Fleuti, 374 U.S. 449 (1963).

410. *See id.* at 462.

411. The Court decided that "an innocent, casual, and brief excursion by a resident alien . . . may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Id.*

412. Wadman v. INS, 329 F.2d 812 (9th Cir. 1964).

413. *See id.* at 816; 6 GORDON ET AL., *supra* note 33, § 74.07[5][c]; LEGOMSKY, *supra* note 33, at 475.

After *Wadman*, the courts and the BIA diligently applied the meaningful interruption test in suspension of deportation cases.[414] In 1984, however, the Supreme Court put a stop to this liberal contraction when it decided *INS v. Phinpathya* and adopted a literal interpretation of the term "continuous physical presence."[415] The Court opted for this approach despite the INS's concession that the statutory language supported a flexible interpretation, but that the alien's absence in this case was meaningful.[416] Nevertheless, the Court did not stop with a discussion of "meaningful absence," but it proceeded to a literal interpretation of the statute which rendered any absence fatal to an alien's eligibility for relief.[417] In doing so, the Court rejected the *Fleuti* formulation forgiving absences which were innocent, casual, and brief.[418]

The *Phinpathya* decision was remarkable because the facts of the case did not require the Court to go as far as it did, especially when the INS agreed that it was relevant to determine whether the alien's absence was meaningful.[419] The INS must have been surprised when the Court avoided the question of the alien's meaningful absence and opted instead for an interpretation that treated any absence as disrupting an alien's continuous physical presence.[420] After

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414. *See* McColvin v. INS, 648 F.2d 935, 938-39 (4th Cir. 1981); Kamheangpatiyooth v. INS, 597 F.2d 1253, 1260 (9th Cir. 1979); Heitland v. INS, 551 F.2d 495, 504 (2d Cir. 1977); *In re* Wong, 12 I. & N. Dec. 271, 275 (1967).

415. INS v. Phinpathya, 464 U.S. 183, 196 (1984).

416. *Id.* at 197 (Brennan, J., concurring). In his concurring judgment, Justice Brennan stressed that it was unnecessary to question whether the continuous physical presence requirement was intended to be interpreted literally. *Id.* (Brennan, J., concurring). He felt that the alien did not qualify for relief in any event because of an unexplained three-month absence from the country. *Id.* (Brennan, J., concurring).

417. *Id.* at 190. The Court was mindful of the fact that in 1952 Congress replaced the "continuous residence" requirement with the continuous physical presence requirement, thus indicating congressional intent to change the criteria. *Id.* (citing H.R. REP. No. 82-1365, at 31 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1682).

418. If one applied the same hard-nosed literal interpretation to *Fleuti*, it is arguable that the word "intended" in the statutory exception to entry, as set out in the previous statute, went only to the subjective nature of the alien's decision. Instead, the Court in *Fleuti* related the term to the alien's intent to depart in a manner which could be regarded as meaningfully interruptive. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

419. *See* 6 GORDON ET AL., *supra* note 33, § 74.07[5][c]; LEGOMSKY, *supra* note 33, at 476; Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1196 (1993); Eleanor Pelta, INS v. Phinpathya: *Literalist Statutory Interpretation in the Supreme Court*, 23 SAN DIEGO L. REV. 401, 406-11 (1986).

420. 6 GORDON ET AL., *supra* note 33, § 74.07[5][c].

Phinpathya, the BIA abandoned its generous interpretation and fell dutifully in line with the Court's ruling on the matter.[421]

The Court thought it was on safe ground in taking a literal approach to the statutory language because there was evidence Congress had permitted some flexibility in other contexts when it wanted to accommodate absences not affecting an alien's continuous physical presence.[422] Furthermore, Congress left the impression that the statute should be more strictly construed when it amended the 1952 statute to require "continuous physical presence" instead of merely "continuous residence."[423] Congress wanted "to discontinue lax practices and discourage abuses."[424] The question was whether Congress wanted to go as far as preventing any absence at all, or whether it thought it was tightening the suspension standard without going to that extreme. Justices Brennan, Marshall, and Stevens were quite content to recognize congressional concern for the suspension remedy by simply concentrating on the alien's meaningful absence.[425] If their views had prevailed, their interpretation would not have been out of line,

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421. *See In re* Dilla, 19 I. & N. Dec. 54, 55 (1984).

422. INS v. Phinpathya, 464 U.S. 183, 196 (1984). In 1972, Congress amended former § 301(b) of the Immigration and Nationality Act to read as follows:

> (b) Any person . . . shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than 60 days in the aggregate during the period for which continuous physical presence in the United States is required shall not break the continuity of such physical presence.

Act of Oct. 24, 1972, Pub. L. No. 92-584, § 1, 86 Stat. 1289, 1289, *repealed by* Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046, 1046.

423. *See* H.R. REP. NO. 82-1365, at 31 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1717; S. REP. NO. 82-1137, at 25 (1952).

424. H.R. REP. NO. 82-1365, at 31, *reprinted in* 1952 U.S.C.C.A.N. at 1717.

425. INS v. Phinpathya, 464 U.S. at 198-205 (Brennan, J., concurring). These three justices were against a literal interpretation of the statute. *Id.* at 197 (Brennan, J., concurring). Their views were summed up in the concurring opinion of Justice Brennan:

> Because the Court's opinion seems to interpret the Immigration and Nationality Act in a way that is not briefed by the parties, is unnecessary to decide this case, is contrary to the view of the agency with principal responsibility for administering the Act, is unsupported by the statute's legislative history, and would certainly produce unreasonable results never envisioned by Congress, I cannot join the Court's opinion, but concur only in the judgement.

Id. at 205 (Brennan, J., concurring).

for the Court had responded to a similar problem in *Fleuti* by not regarding every return of an alien as an entry.[426]

The Court's decision in *Phinpathya* brought an immediate reaction from Congress. In the same year, 1984, the House of Representatives passed a *Fleuti*-type amendment that recognized only meaningful absences as a disruption of continuous physical presence.[427] The Senate did not act on the House bill that year. Nevertheless, when Congress passed the Immigration Reform and Control Act of 1986, it included a provision that preserved an alien's continuous physical presence if the alien's absence was brief, casual, innocent, and not meaningfully interruptive.[428]

Because former § 244 did not require the period of continuous physical presence to accrue prior to deportation proceedings, an alien could meet the requirement during the appellate stages.[429] In many instances this provided an incentive for an alien to prolong the proceedings in order to achieve that objective. This did not always sit well with the courts, and the Supreme Court in *INS v. Rios-Pineda*[430] made it clear that the BIA and the courts could consider an alien's frivolous appeals in denying relief.[431]

Congress took these issues into account when it amended the INA in 1996.[432] The new § 240A(b) prescribes only one requirement of at least ten years physical presence and disqualifies anybody who has been convicted of certain crimes, has engaged in certain fraudulent conduct, or has failed to comply with registration requirements.[433] There is now no reward for the non-criminal types who could escape the tough ten-year requirement under the old statute in favor of the more lenient seven years. There is but one statutory period which

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426. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

427. 130 CONG. REC. 16,348-16,350 (1984). The amendment read: "An alien shall not be considered to have failed to maintain continuous physical presence . . . if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence." *Id.* at 16,348. Representative Roybal explained the amendment this way: "This amendment would clarify that the requirements allow brief absences during this 7-year period; that is, absences that do not meaningfully interrupt the continuous physical presence." *Id.* (remarks of Rep. Roybal).

428. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(b), 100 Stat. 3359, 3441.

429. *See* INS v. Rios-Pineda, 471 U.S. 444, 447 (1985).

430. INS v. Rios-Pineda, 471 U.S. 444 (1985).

431. *Id.* at 449-51.

432. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

433. 8 U.S.C. § 1229b(b)(1)(A), (C) (Supp. III 1997).

every alien must meet, and such persons must be of good moral character during that time.[434]

Section 240A(b) maintains the requirement of continuous physical presence, but it replaces the flexible pre-IIRIRA rule relating to the innocence, casualness, and brevity of an alien's absence with a specific test relating to the length of such absence.[435] If the alien was away from the United States for any single period of more than ninety days, or for aggregate periods exceeding 180 days, he will not meet the requirement of continuous physical presence.[436] There is something to be said for avoiding the problem of meaningful interruption and dealing instead with a definite period that breaks the alien's continuity of physical presence. The *Phinpathya* decision brought a strong congressional reaction to the Court's strict statutory interpretation, but the allowance for temporary absences has led to its own difficulties. It was not difficult to forecast that the old § 244(b)(2) test would lead to differences of opinion on what was brief, casual, and innocent. The IIRIRA has sacrificed flexibility for precision, and aliens will have a bright line for guidance.[437]

Apart from those absences that constitute a break in an alien's physical presence, other events will terminate such presence. The period of continuous physical presence ends when the alien is served with a notice to appear for removal proceedings or when the alien commits an offense that renders him inadmissible or deportable, whichever happens first.[438] As a result, an alien cannot accrue additional time towards eligibility for relief once one of these events occurs.[439] The surprising element in this new language is the effect of a

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434. *Id.* § 1229b(b)(1)(B).

435. *Id.* § 1229b(d)(2).

436. *Id.*; *see also* Nadine K. Wettstein, *The 1996 Immigration Act: New Removal Proceedings, Cancellation of Removal, and Voluntary Departure*, 73 INTERPRETER RELEASES 1677, 1685 (1996) (explaining there was a break of physical presence with "any departure of more than 90 days or an aggregate of absences of more than 180 days").

437. *See* AUSTIN T. FRAGOMEN, JR. ET AL., 1996 IMMIGRATION LEGISLATION HANDBOOK 4-18 (1998 ed.).

438. 8 U.S.C. § 1229b(d)(1).

439. It was not unusual for aliens to prolong their stay with the objective of accruing the time necessary for statutory relief. In considering amendments to the INA, the House Judiciary Committee observed the following:

> Suspension of deportation is often abused by aliens seeking to delay proceedings until 7 years have accrued. This includes aliens who failed to appear for their deportation proceeding and were ordered deported in absentia, and then seek to re-open proceedings once the requisite time has passed. Such tactics are possible because some Federal courts permit aliens to continue to accrue time toward the seven year threshold even after they have been placed in deportation proceedings.

notice to appear. It deals a fatal blow to aliens who are in removal proceedings without having accrued the necessary ten years of continuous physical presence. Section 244 was kinder to aliens, for it was possible for the alien to satisfy the eligibility period while his proceedings were pending, or even after an appeal was lodged.[440] In this context, a motion to reopen was a handy mechanism that saved many an alien from deportation.

The transitional rule that allows the service of a notice issued before, on, or after the IIRIRA's enactment date to terminate an alien's physical presence,[441] has already created disagreements between the BIA and the courts. The BIA took a hard line in *In re N—J—B*[442] that the service of an order to show cause under pre-IIRIRA law terminated the period of physical presence, even though at that time there was no such thing as a notice to appear.[443] The BIA applied the interpretation retroactively to affect aliens who were already in the pipeline when the IIRIRA was enacted and adopted the congressional policy of tightening the requirements for suspension of deportation.[444] Aliens challenged the BIA's approach to this issue of retroactivity, and they managed to secure a stay of application of the BIA decision.[445]

The Attorney General subsequently vacated the BIA's decision in *In re N—J—B*, anticipating that Congress would solve the problem of statutory retroactivity raised in that case.[446] Many aliens from El Salvador, Guatemala,

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H.R. REP. NO. 104-469, at 122 (1996). Eventually, the Supreme Court upheld the BIA's authority to deny suspension relief when the alien had accrued the necessary time through baseless appeals. INS v. Rios-Pineda, 471 U.S. 444, 450 (1985).

440. *See* Batoon v. INS, 791 F.2d 681, 685 (9th Cir. 1986) (en banc); Sida v. INS, 764 F.2d 1319, 1321 (9th Cir. 1985).

441. *See* Illegal Immigration Reform and Immigration and Nationality Act of 1996, Pub. L. No. 104-208, § 309(c)(5), 110 Stat. 3009-546, 3009-627.

442. *In re* N—J—B, Int. Dec. No. 3309 (B.I.A. 1997).

443. *Id.* at 8-9.

444. *Id.* The BIA read the legislative history as showing Congress's displeasure with the ability of aliens to prolong the deportation process and thus benefit from the accrual of time towards satisfaction of the continuous physical presence requirement. *Id.* at 12.

445. Tefel v. Reno, 972 F. Supp. 623, 633 (S.D. Fla. 1997).

446. Letter from Janet Reno, Attorney General, U.S. Department of Justice, to Newt Gingrich, Speaker of the House of Representatives (undated) (copy on file with author). The Attorney General vacated the BIA's decision on July 10, 1997. Int. Dec. No. 3415, 1997 BIA LEXIS 42, at *77 (A.G. July 10, 1997). The Attorney General remanded the case to the BIA on August 20, 1999, to determine whether the alien is clearly ineligible for relief under the Nicaraguan Adjustment Relief and Central American Relief Act (NACARA). Int. Dec. No. 3415, 1997 BIA LEXIS 42, at *77-78 (A.G. Aug. 20, 1999). If the alien is not clearly ineligible for such relief, the case goes back to the Immigration Court for adjudication of the alien's status under § 202 of NACARA. *Id.* at *78.

and Nicaragua were upset about the BIA's ruling because they believed that they would continue to be eligible for suspension of deportation.[447] The BIA took a different view because the aliens had received their order to show cause before they had reached their seven-year period of eligibility.[448] When Congress responded, it did so with the Nicaraguan Adjustment and Central American Relief Act (NACARA).[449] NACARA essentially codified the ruling *In re N—J—B*, but provided an exception from the old suspension of deportation rules for certain nationals of El Salvador, Guatemala, and various European countries.[450] It also provided amnesty for aliens from Nicaragua and Cuba who were in the United States before December 1, 1995.[451] The BIA was left to settle the issue after enactment of NACARA. In *In re Nolasco*,[452] the BIA decided that the § 240A rule applied to suspension of deportation generally under the transitional rules of the IIRIRA, as amended by the NACARA, and that an alien's period of continuous physical presence ended when he was served with an order to show cause.[453]

The alien's continuous physical presence also ends when he commits an offense referred to in § 212(a)(2) that renders the alien inadmissible under § 212(a), or removable under § 237(a)(2).[454] Even this language has its own shortcomings, for it raises a question whether the section is restricted to offenses where the mere commission of the act determines the alien's fate, as distinguished from those offenses where there is a conviction. If the accrual of time stops only when an alien commits a § 212(a)(2) offense that renders the alien inadmissible or removable without a conviction, then such an interpretation would be more favorable for the alien.[455]

C. *The Battered Spouse or Child*

There is a special rule for battered spouses or children who seek cancellation of removal.[456] It derives from the former § 244(a)(3), which was added by 1994 legislation that accommodated such spouses and children who

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447. *Id.*
448. *Id.*
449. Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160 (1997).
450. *Id.* § 203, 111 Stat. at 2196.
451. *Id.* § 202, 111 Stat. at 2194.
452. *In re* Nolasco, Int. Dec. No. 3385 (B.I.A. 1999).
453. *Id.* at 8-10.
454. 8 U.S.C. § 1229b(d)(1) (Supp. III 1997).
455. *See* Wettstein, *supra* note 436, at 1686.
456. 8 U.S.C. § 1229b(b)(2).

were deportable except for certain serious offenses.[457] Like the other cancellation provision, this one also applies to both inadmissible and deportable aliens.[458]

There is a significant difference in the requirement for continuous physical presence. In this case an alien who has been battered or subject to extreme cruelty must be physically present in the United States for a continuous period of not less than three years immediately preceding the date of application for relief.[459] This contrasts sharply with the usual ten-year requirement for other aliens.[460] Whereas § 240A(b)(1) denies eligibility for cancellation of removal to an alien who has been convicted of certain offenses under §§ 212 and 237,[461] the special rule for battered spouses and children denies eligibility to aliens who are inadmissible under certain provisions of §§ 212(a) and 237(a), and to aliens who have been convicted of an aggravated felony.[462] Although the required period of continuous physical presence is shorter for such spouses and children, a stricter standard applies in terms of the grounds that will disqualify aliens from consideration.

Furthermore, although conviction is required for aliens to be disqualified under § 240A(b)(1), the mere inadmissibility under the applicable § 212(a) or § 237(a) provisions is all that is required to disqualify the battered spouse or child.[463] Therefore, any disqualifying conduct under those sections will disqualify the alien even if there is no conviction. The other problem for the alien is that conviction for an aggravated felony also precludes eligibility, and this will have widespread impact because of the extensive definition of the term "aggravated felony."[464]

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457. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40703, 108 Stat. 1796, 1955 (current version at 8 U.S.C. § 1229b(b)(2)).

458. 8 U.S.C. § 1229b(b)(2).

459. *Id.* § 1229b(b)(2)(B).

460. *Id.* § 1229b(b)(1)(A).

461. *Id.* §§ 1182, 1227, 1229b. Aliens are ineligible if they were inadmissible under § 212(a)(2) on criminal and related grounds, deportable under § 237(a)(2) for criminal offenses, and under § 237(a)(3) for failure to register and falsification of documents. *Id.* §§ 1229b(b)(1)(c), 1182(a)(2), 1227(a)(2)-(3).

462. *Id.* §§ 1182, 1227, 1229b. Aliens are ineligible if they were inadmissible on criminal and related grounds, security and related grounds, and if they are deportable for marriage fraud, criminal offenses, failure to register, falsification of documents, and security and related grounds. *Id.* §§ 1229b(b)(2)(D), 1182(a)(2)-(3), 1227(a)(1)(C), (2)-(4).

463. *Id.* § 1229b(b)(2)(D).

464. *Id.* § 1101(a)(43) (1994). The term "aggravated felony" has 19 classifications and some of them have sub-classifications. *Id.*

Although the general rule requires an alien to show that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child,[465] the special rule covering a battered spouse or child requires a showing of extreme hardship to the alien, the alien's child, or the alien's parent.[466] There are two important points here. There is a big difference between extreme hardship and exceptional and extremely unusual hardship, and the lesser burden imposed by the special rule should allow greater leeway for an alien to show eligibility for relief. The standards reflected in the pre-IIRIRA cases should be helpful in determining whether an alien meets the qualifying test of extreme hardship.[467] In addition, although hardship to the alien will not bring relief under § 240A(b)(1), such hardship can be used under the special rule of § 240A(b)(1) for battered spouses or children.[468]

The Violence Against Women Act of 1994[469] introduced suspension of deportation for battered women at the same time that it enacted the provision allowing such women to seek admission themselves without relying on their battering spouses to file the necessary petition.[470] If the spouse did not file the necessary papers while the alien victim was in the United States, the alien could become an undocumented alien who was then subject to deportation.[471] It is evident, therefore, that an alien no longer has to remain with the batterer because she fears that her undocumented status will lead to automatic deportation. In this respect, the section removes the incentive for the victim to suffer silently while hoping for a speedy resolution of her immigrant status. Nevertheless, if the victim leaves her spouse, she can seek cancellation of removal only if she is in

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465. *Id.* § 1229b(b)(1)(D) (Supp. III 1997).

466. *Id.* § 1229b(b)(2)(E).

467. *See* Salameda v. INS, 70 F.3d 447, 450-51 (7th Cir. 1995) (remanding because BIA failed to consider adequately the hardship to alien's child and alien's separation from community); Tukhowinich v. INS, 64 F.3d 460, 463-64 (9th Cir. 1995) (remanding because of BIA's failure to consider alien's role as family providers); Turri v. INS, 997 F.2d 1306, 1309-10 (10th Cir. 1993) (remanding because BIA did not consider alien's community involvement); Mejia-Carrillo v. INS, 656 F.2d 520, 526 (9th Cir. 1981) (remanding because BIA did not consider non-economic problems of alien). *But see In re* O—J—O, Int. Dec. No. 3280, at 9-10 (B.I.A. 1996) (finding alien's combination of hardship amounted to extreme hardship); *In re* Loo, 15 I. & N. Dec. 601, 605 (1976) (finding extreme hardship met because of alien's long residence in United States, daughter's dependence on alien, and alien's investment in small business).

468. The eligibility standard for relief in the case of the battered spouse or child is a little more lenient in that it requires only extreme hardship—the alien is included in the group covered by the statute. 8 U.S.C. § 1229b(b)(2)(E).

469. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796.

470. *Id.* § 40701(a)(1), 108 Stat. at 1954.

471. *Id.* § 40701(a)(1), 108 Stat. at 1953.

removal proceedings.[472] Although an alien is not usually enthusiastic about being in such proceedings, she may welcome them when they open the door to relief from the spouse's extreme cruelty.[473] Because such relief leads to the alien's adjustment to permanent resident status,[474] it also removes some of the disabilities inherent in the status of being an undocumented alien. In the interim, the alien is left to her own devices, and that is particularly problematic when children are involved.[475] The alien can apply for permission to work once she is in removal proceedings,[476] but if there is a delay in initiating such proceedings, she may have no alternative other than to return to her battering spouse.[477]

Even if the alien tries to make it on her own, she may find that her income is not sufficient to support her family. This may lead her to seek some kind of public assistance. Unfortunately, recent legislation has restricted this avenue of relief to undocumented aliens.[478] This means that an alien must decide whether

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472. 8 U.S.C. § 1229a (Supp. III 1997). The only difficulty here is that there is no statutory mechanism for an alien to initiate cancellation of removal. The alien can seek the remedy as a part of the removal proceeding brought by the INS. *Id.* § 1229b. Of course, if the alien turns himself in the INS will usually place him in removal proceedings, and thus the alien will then seek the necessary relief. *Id.*

473. The alien would have to be sure that she meets the three-year physical presence requirement, in addition to the other requirements of § 240A(2). *Id.* § 1229b(b)(2)(B).

474. The attractive feature of § 240A(b) is that the alien who gets relief thereunder has his status changed to that of a lawful permanent resident. *Id.* § 1229b(b)(2). Relief for the alien is much more than mere cancellation of removal. The alien's status is regularized. Admission for lawful permanent residence means that the alien has been allowed to reside permanently in the United States as an immigrant. *Id.* § 1101(a)(2) (1994).

475. The alien often has to return to the battering spouse because of the difficulty in finding suitable accommodations and employment. Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891, 893 (1995); Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings of 1996*, 11 GEO. IMMIGR. L.J. 303, 317 (1997); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 23 (1991).

476. 8 C.F.R. § 274a.12(c)(10) (1999). Employment authorization is available in increments not exceeding one year during the period the application is pending. *Id.*

477. Another incentive for staying in the relationship may be the alien's interest in securing enough evidence to substantiate the extreme cruelty required by the statute. 8 U.S.C. § 1229b(b)(2)(A); *see also* Linda Kelly, *Stories From the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 695-96 (1998) (discussing how VAWA forces women to stay in abusive relationships in order to collect enough evidence to meet VAWA requirements).

478. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 431, 110 Stat. 2105, 2274 (codified at 8 U.S.C. § 1641 (Supp. III 1997)). An alien who has been battered or subjected to extreme cruelty may be a "qualified alien" to receive benefits, but only if there is a substantial connection between the battery or cruelty and the need for benefits. 8 U.S.C. § 1641(c)(1)(A), (B)(iii). The alien must have been approved for

she can make it on her own once she leaves her batterer.[479] If she leaves and fails to make the adjustment, her return to the homestead may be even less hospitable than when she left. The satisfactory solution to this enigma is for Congress to liberalize the provisions relating to public benefits so they recognize the peculiar status of the battered spouse or child under § 240A(b)(2).[480] It is pointless to make relief available under that section if the victim does not have access to the full panoply of benefits otherwise available to "qualified aliens." If there should be restrictions, they should be related to the period of availability more than anything else. The affected alien should have enough time to get back on her feet, while avoiding the battery or extreme cruelty recognized under the statute.

IV. CONCLUSION

Cancellation of removal replaced suspension of deportation for persons placed in removal proceedings on or after April 1, 1997.[481] Although the new section affects both inadmissible and deportable aliens,[482] there is little doubt Congress intended to make it more difficult for aliens to obtain relief.[483] The delineation of the specific circumstances under which an alien would fail to maintain his physical presence cannot be very comforting to those people who

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cancellation of removal or has a petition pending which shows a prima facie case for that relief. *Id.* § 1641(c)(1)(B)(iii). In any event, a qualified alien (with certain exceptions) is not eligible for any federal means-tested benefit for five years, and cannot get any supplementary security income (SSI) or food stamps even beyond that five-year period. *Id.* §§ 1612(a)(3), 1613(a).

479. An alien who is not a qualified alien is not generally eligible for any state or public benefit. *Id.* § 1621. A notable exception is made for emergency health care and disaster relief. *Id.* § 1621(b).

480. FRAGOMEN ET AL., *supra* note 437, at 11-21; Kelly, *supra* note 475, at 304; Tien-Li Loke, Note, *Trapped in Domestic Violence: The Impact of Unites States Immigration Laws on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 627 (1997).

481. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(a), 110 Stat. 3009-587, 3009-625.

482. Under the pre-1996 law, suspension of deportation was unavailable to aliens in exclusion proceedings. *See* 8 U.S.C. § 1254(a) (repealed 1996); *In re* Torres, 19 I. & N. Dec. 371, 374-75 (1986); 6 GORDON ET AL., *supra* note 33, at § 74.07[2][e]. The new language makes cancellation available to an alien who is "admissible or deportable." 8 U.S.C. § 1229b(b) (Supp. III 1997). An alien who enters without inspection is regarded now as an applicant for admission, and therefore could be a candidate for cancellation under § 240A(b) because he would be inadmissible. 8 U.S.C. § 1182(a)(6)(A) (1994).

483. *See* H.R. REP. NO. 104-828, at 213-14 (1996). This is also evident from the preclusion of judicial review of any judgment regarding suspension of deportation. *See* 8 U.S.C. § 1252(a)(2)(B); Moosa v. INS, 171 F.3d 994 (5th Cir. 1999); Skutnik v. INS, 128 F.3d 512 (7th Cir. 1997).

found flexibility in the concept of a meaningful absence.[484] Even so, there is something to be said for creating a definite standard by which an alien's physical presence can be measured. Nevertheless, one wonders whether the adoption of a ten-year period of continuous physical presence for most aliens is justified.[485] The removal of the seven-year requirement has obviously made it more difficult for aliens to meet the eligibility standards.

The longer ten-year period alone would not have been so bad, but when combined with the more extreme hardship standard, it provides an almost insurmountable hurdle for aliens.[486] If history is any guide, the BIA will respond to the cancellation provisions with the narrow interpretation approved by the Supreme Court in *Wang*. It is unfortunate that Congress took this hard line on the basis of a BIA decision it interpreted as a trend in favor of aliens.[487] If

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484. *See, e.g.*, Heitland v. INS, 551 F.2d 495, 503 (2d Cir. 1977) (finding a six-week trip to Germany precluded a showing of seven-year continuous physical presence in the United States); Wadman v. INS, 329 F.2d 812, 816-17 (9th Cir. 1964) (finding the requirement of continuous physical presence should not be literally construed). The cases analogized the concept of a meaningful departure in former INA § 244 to the concept of an intended departure in INA § 101(a)(13). Kamheangpatiyooth v. INS, 597 F.2d 1253, 1257-58 (9th Cir. 1979). According to *Rosenberg v. Fleuti*, an alien's return to the United States could not be an entry if the alien's departure was innocent, casual, and brief. Rosenberg v. Fleuti, 374 U.S. 449, 461 (1963). If an alien's departure was in furtherance of some illegal scheme, then it was "meaningfully interruptive." Longoria-Castaneda v. INS, 548 F.2d 233, 237 (8th Cir. 1977).

485. During the debate on the immigration bill (§ 1664), Senator Roth expressed his frustration with the immigration system:

> Under current law, aliens who commit aggravated felonies or crimes of moral turpitude are deportable. But last year only about four percent of the estimated total number of criminal aliens in the United States were deported. The law is not being enforced in part because it is too complex with too many levels of appeal. It needs to be simplified.

142 CONG. REC. S4600 (daily ed. May 2, 1996) (remarks of Sen. Roth).

486. The old § 244 allowed aliens without a criminal background to qualify for relief with seven years continuous physical presence, and a showing of extreme hardship. Act of June 27, 1952, § 244(a)(1), 66 Stat. 214, 214. On the other hand criminal aliens had to show 10 years of physical presence and exceptional and extremely unusual hardship. *Id.* § 244(a)(4), 66 Stat. at 215. New § 240A(b) removes the less lenient requirements for non-criminal aliens and imposes the steeper requirements on everybody. Illegal Immigration on Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240A(b), 110 Stat. 3009-594, 3009-594.

487. Congress obviously wanted to send a signal that the BIA was straying from the narrow interpretation of extreme hardship supported by Congress. *See* H.R. REP. NO. 104-828, at 213 (1996). The Conference Report made the point that "the 'extreme hardship' standard has been weakened by recent administrative decisions holding that forced removal of an alien who has become 'acclimated' to the United States would constitute a hardship sufficient to support a grant of suspension of deportation." *Id.* *In re O—J—O* was decided by the BIA en banc (12 member). *In re* O—J—O, Int. Dec. No. 3280, at 1 (B.I.A. 1996). BIA Member Filppu, joined by BIA

Congress was concerned about the categories of aliens that would benefit from the cancellation provision, it could have assured itself on that count by denying relief to any alien who was convicted of or who admitted committing certain offenses.

In this connection, the statute takes a slightly different approach to the battered spouse or child by making more grounds of inadmissibility and deportability applicable to such an alien. Congress could have taken a similar approach in the general cancellation provision by requiring the alien to show that he is not inadmissible under certain categories. By taking that approach, Congress would have controlled the quality of the admittee while maintaining the more lenient standard of extreme hardship. In the case of the battered spouse or child, there should be some link between the relief available under § 240A and the public assistance provisions. The alien will only have full protection if she is able to avoid her batterer while avoiding her removal from the country.

Members Vacca, Heilman, and Cole, wrote the dissenting opinion. *Id.* at 36. There were three concurring opinions written by BIA Members Dunne, Holmes, and Rosenberger. *Id.* at 11-36. BIA Member Guendelsberger's plurality opinion recognized the decision as "a close case on the issue of 'extreme hardship.'" *Id.* at 9. The decision could hardly be regarded as a trend that should have driven Congress to this level of severity.