

# Regulating Administrative Discretion: Immigration and Marriage

## I. *Introduction*

In immigration law and its administrative application, linedrawing is a fact of life. Charged by Congress to administer the Immigration and Nationality Act ["INA" or "the Act"],<sup>1</sup> the Attorney General and his delegate, the Immigration and Naturalization Service ["INS" or "the Service"], would be unable to cope with the caseload, given budget constraints, if each case required a full hearing on the merits.<sup>2</sup> Linedrawing works well in the thousands of routine cases in which the grant or denial of permanent or temporary visas depends on the applicant's fulfillment of certain well-defined criteria. Congress contemplates and accepts a few unfair results at the administrative level as the price of a speedy and efficient adjudication of the overwhelming majority of cases. Even in these situations, though, it has provided for administrative and judicial redress of most potential unfairness.

However, in the area of revocation of approved spousal petitions, the situation is dramatically different. Here Congress grapples with the troublesome situations in which a U.S. citizen who has married an alien and petitioned for his or her immigrant visa either obtains a divorce or "withdraws" the "approved spousal petition" before the visa is granted.<sup>3</sup> Congress has decided that the Attorney General may "for what he deems to be good and sufficient cause," revoke the approval of spousal petitions in such cases. Pursuant to this congressional pronouncement, the Attorney General issued the automatic revocation regulations, which, in effect, determine that there is "good and sufficient cause" to revoke an approved petition

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1. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1557 (1982) [hereinafter cited as INA].

2. In 1985, 361,039 immigrant visas and 5,793,343 non-immigrant visas were issued. 5 Bureau of Consular Affairs, No. 83, reprinted in *Interpreter Releases* 179-85 (Feb. 21, 1986). While the INS issued only about 15 percent of the immigrant visas directly, it processed, investigated, and approved the petitions for most immigrant visas. In addition, the INS is in charge of processing and eventually deporting illegal aliens. In 1985 the INS apprehended 1.2 million illegal aliens, and presumably processed the majority of them. "Startling" Surge Is Reported in *Illegal Aliens from Mexico*, *New York Times*, Feb. 21, 1986, at 1, col. 1.

3. An approved spousal petition is critical to the alien's ability to reside permanently in the United States.

in all cases of divorce or petition withdrawal. Since the Attorney General's case-by-case discretion has been exhausted by the implementation of these regulations, no hearing need take place.

The INS takes the position that the regulations' denial of an administrative forum is justified because it discourages fraudulent spousal petitions. However, these regulations do not help achieve the objective of deterring sham marriages. Rather, they abridge legitimate statutory and common law rights and other important interests of both citizens and aliens. As a result, when measured against current legal tests, these regulations are an abuse of the Attorney General's statutory discretion and an unwarranted denial of due process both to the aliens and to the U.S. citizens involved. The adoption of alternative administrative methods could correct these infirmities while substantially serving the legitimate interest of the INS in expeditious resolution of immigration cases.<sup>4</sup>

## II. *Approved Petition Revocation: The Bureaucratic Scheme*

### A. *The Issues at Stake*

Consider the case of John, a U.S. citizen, and Maria, a Costa Rican citizen, who have been living together and decide to settle down and raise a family in New York. They get married and have a baby. Pursuant to federal statutes and regulations, John files a petition with the INS to accord Maria immigrant status as his spouse. Even though the petition may be approved in a relatively short time, the process is not yet complete. Following approval, the alien spouse either "adjusts status"<sup>5</sup> or applies for an immigrant visa at a United States consulate abroad.<sup>6</sup> If no other problem arises, a waiting period of nine months to a year is not uncommon prior to the issuance of the immigrant visa or "green card."<sup>7</sup>

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4. Because this Comment concentrates on approved spousal petitions, it does not reach larger immigration issues; in particular, it does not touch upon the Simpson-Mazoli immigration bill or its amended version currently before Congress. Neither version proposes changes in the approval revocation statute.

5. The INA, 8 U.S.C. § 1255(a) (1982), provides in part that "[t]he status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General." In other words, the alien who meets the statutory criteria may obtain an immigrant visa, popularly known as a "green card," in the United States and be spared the inconvenience of having to apply for it at a consulate abroad.

6. INA, 8 U.S.C. § 1255(c) (1982), denies the § 1255(a) privilege of adjustment of status in the United States to alien crewmen, to aliens who worked in the U.S. without permission prior to the application for adjustment of status, and to aliens "in transit without visa." By its own terms, § 1255(a) does not apply to an alien who entered without inspection.

7. Some courts have recognized this well-known fact of delay. See, e.g., *Kalezic v.*

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During this waiting period, John and Maria find that they have irreconcilable differences and therefore divorce. The divorce order awards Maria custody of their child while requiring John to pay alimony and child maintenance. John also obtains certain rights to visit and bring up the child. Because Maria and John have divorced, the Service *must* revoke Maria's approved petition.<sup>8</sup> She must leave the country or be deported. Because she has custody rights, Maria takes the child with her. John's visitation rights and duties to make child maintenance and alimony payments under the divorce decree become unenforceable, at least in practice.

In a slightly different scenario, John, in order to obtain a more favorable decree, goes to the INS and properly withdraws his petition for adjustment of Maria's status before filing for divorce in state court. Again, faced with the withdrawal of the petition, the Service *must* revoke the prior approval.<sup>9</sup> Maria must leave the country or be deported. Maria's chances of successfully defending her rights in a New York divorce proceeding from Costa Rica are slim at best. After Maria is deported, nothing remains to stop John from obtaining an uncontested divorce decree which will likely be more favorable to him than any decree he could have obtained had his spouse been able to contest the divorce.<sup>10</sup> These scenarios, drawn from real

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INS, 647 F.2d 920, 922 (9th Cir. 1981) (making reference to "the tortoise-like pace of immigration proceedings"). This should not be taken as a blanket criticism. On occasion, slowness in decision-making reflects seriousness and thoroughness in the Service's investigations and performance of its other duties. On other occasions, in deference to the citizen's and the alien's need, the Service stays the proceedings, and therefore deportation, awaiting a decision from the courts or the results of an investigation (e.g., in political asylum cases the Department of State conducts an investigation and issues an opinion to the INS).

8. 8 C.F.R. § 205.1(a)(4) (1986). This regulation provides for automatic revocation of approved spousal petitions when divorce occurs.

9. 8 C.F.R. § 205.1(a)(1) (1986). This regulation provides for automatic revocation of approved spousal petitions when the petition is withdrawn.

10. A citizen may find subtle uses for the immigration regulations, against which no legal restraint is available. As a dissenting judge noted in an automatic revocation case, "[t]here is evidence showing that the withdrawal of the visa petition by [the beneficiary's] wife was motivated by her desire to prevent [him] from interfering with an adulterous affair . . . ." *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, 273-274 (2d Cir. 1966) (Moore, J., dissenting). In a slightly different context, the Ninth Circuit noted that:

[m]arital difficulties that culminate in divorce are too common an occurrence not to make one hesitate to accept the position of the INS. Moreover, the subtle but significant influence that position would impart to the citizen or resident alien spouse over the [beneficiary] also counsels hesitancy, although this reflects a concern that may not be relevant to the purpose Congress sought to serve by enacting the provision.

*Kalezic v. INS*, 647 F.2d at 922. It is also quite possible that the highly adversarial nature of many dissolving marriages will result in the exploitation of the powerful advantage which the citizen spouse enjoys over the alien spouse even before divorce proceedings.

cases, dramatize the legal and policy shortcomings of the automatic revocation regulations.

### B. *The Framework for Automatic Revocation*

For an alien spouse (the "beneficiary") who seeks to obtain an immigrant visa, the filing of a spousal petition is the first step. The U.S.-citizen spouse (the "petitioner") files a petition formally requesting that the beneficiary be classified as having spousal status for immigration purposes. Next, the Service approves or denies the petition. Approval is granted when the INS is satisfied, usually after thorough investigation, that the marital relationship did in fact exist at the time of the filing.<sup>11</sup> Finally, with the approved petition, the alien may obtain an immigrant visa.<sup>12</sup>

To regulate the period between the approval of the petition and the obtaining of the visa, Congress enacted the Approval Revocation Statute, which reads in pertinent part:

The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him [e.g., spousal petitions] . . . .<sup>13</sup>

Under the authority of this statute, the Attorney General issued the following regulations, known as the Automatic Revocation Regulations, which read in part:

The approval of a petition . . . is revoked as of the date of approval if . . . any of the following circumstances occur before the beneficiary's journey to the United States commences or, if the beneficiary is an applicant for adjustment of status to that of a permanent resident, before the decision on his application becomes final:

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The threat of a petition withdrawal may serve virtually to enslave the alien spouse to the citizen spouse. Cf. Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984) (analyzing potential for fathers in child custody cases to use the threat of obtaining custody of the children as a "bargaining chip" in financial negotiations).

11. INA, 8 U.S.C. § 1154 (1982). See generally *Lutwak v. United States*, 344 U.S. 604 (1953); *Matter of Phillis*, 15 I. & N. Dec. 385 (1975).

12. An alien may become a permanent resident in one of two ways, depending on the circumstances. He or she either "adjusts status" without leaving the U.S., or applies for an immigrant visa in a U.S. consulate abroad.

13. INA, 8 U.S.C. § 1155 (1982). The remainder of the statute reads:

Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1226 of this title.

*Id.*

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### (a) *Relative Petitions.*

(1) Upon written notice of withdrawal filed by the petitioner with any officer of the Service who is authorized to grant or deny petitions

. . . .  
(4) Upon the legal termination of the relationship of husband and wife when a petition has accorded status as the spouse of a citizen or lawful resident alien . . . .<sup>14</sup>

By promulgating these automatic regulations, the Attorney General has effectively decided that there is “good and sufficient cause” to revoke an approved petition in every case of petition withdrawal or divorce. It follows that a hearing prior to revocation is never necessary: no person ever has the opportunity to show that his or her case falls short of the statutory “good and sufficient” criterion. In constitutional terms, the denial of a hearing even in certain cases where there is no “good and sufficient cause” to revoke is nonetheless tolerated because the governmental interest — the concern with sham marriages — outweighs the parties’ interests. The courts of appeals of three circuits have found the regulations acceptable, at least in the case of withdrawal of approved petitions.<sup>15</sup> However, the judicial decisions were mistaken in favoring the governmental interest over the individual rights because the governmental concern with sham marriages, although legitimate, is of little or no relevance at the approved-petition stage.

### III. *Judicial Confusion and Its Effect on Family Law Obligations*

The courts usually accord deference to the regulatory practices of the administrative agency charged by Congress to deal with a specific area. Immigration regulations are no exception; they receive extreme deference from the courts. However, with respect to the automatic revocation regulations, the courts have gone beyond deference. They have misunderstood the regulations and misconstrued the statute. In the process they have thwarted both state family law and important policies incorporated into other state and federal statutes.

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14. 8 C.F.R. §§ 205.1(a)(1),(4) (1986). Their predecessors, 8 C.F.R. §§ 206.1(b)(1), (4), were substantially similar.

15. *Wright v. INS*, 379 F.2d 275 (6th Cir. 1967), *cert. denied*, 389 U.S. 928 (1967); *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266 (2d Cir. 1966), *vacated*, 388 U.S. 462 (1967); *Pacheco Pereira v. INS*, 342 F.2d 422 (1st Cir. 1965) (*dictum*).

*A. Judicial Confusion of the Regulations' Scope*

There are few judicial decisions addressing the automatic revocation regulations,<sup>16</sup> and most of them have confused rather than clarified the issues involved. In *Pacheco Pereira v. INS*,<sup>17</sup> the wife (a U.S. citizen) requested that her spousal petition be withdrawn before the Service had acted upon it. The husband challenged the subsequent deportation order, but the federal court upheld the Service's decision. At that stage, as there was no petition to consider, there was nothing for the Service to approve or reject.<sup>18</sup> The automatic revocation regulation, therefore, was utterly irrelevant in this case precisely because there had been no approval to begin with.

The *Pacheco Pereira* court could have upheld the Service's deportation order simply on the basis of the lack of a petition. After noting that "before the Service had acted on her petition for change in her husband's status, the wife requested that it be withdrawn," and that "[t]he Service acceded,"<sup>19</sup> the court needed to go no further since there was no petition to act on. However, the court continued its misguided search and noted that "[e]ven after approval of a section 1155 petition the Attorney General could revoke the approval, terminating the alien spouse's eligibility . . . . Under the applicable regulation this revocation is automatic if the citizen spouse requests

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16. The INS does not publish statistics of how many people are deported as a result of the application of § 205.1(a)(1) and § 205.1(a)(4). Thus it is difficult to determine whether the dearth of case law is due to the lack of petition withdrawal and divorce cases, or to some other reason. That there are so few judicial decisions is probably the result of several factors, of which the following three appear to be the most important. First, federal litigation is expensive. Because deportation is not a criminal proceeding, the respondent therein is not entitled to counsel at the government's expense. Second, federal litigation is lengthy. Because automatic stay of deportation may be unavailable, the alien may be deported at the end of the administrative appeal process. When a person is deported, the deportation proceeding is finished and, in most situations, the challenge in federal court becomes moot. Third, the case may become moot if the immigration situation is resolved in some other way, for instance if the alien becomes ineligible for some form of statutory relief or for a visa on a different basis.

17. 342 F.2d 422 (1st Cir. 1965).

18. The U.S. citizen's petition starts the process. It is the alien spouse's relationship to him or her that confers the immigration benefit sought. When the petitioner dies or withdraws the petition before INS approval, the petition dies. In other words, the alien loses all possible benefits that he or she would have derived. This drastic measure is appropriate in the pre-approval period for two reasons. First, there is a relatively short period between filing and approval. The risk of disrupting deeply-established family relations is relatively low. Second, none of the anti-marriage-fraud safeguards inherent in the approval process has been applied. Therefore, the government's interest in an expeditious resolution is at its peak while the alien's equities have yet to arise. On this basis, the courts have held that the filing of a petition confers no vested right on the alien spouse. Once approved, the petition merely renders him or her eligible for immigrant status. See generally *Amarante v. Rosenberg*, 326 F.2d 58 (9th Cir. 1964).

19. 342 F.2d. at 423.

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the withdrawal.”<sup>20</sup> In an ironic twist, the court went on to chastise the INS counsel: “We must say that it is not clear to us why this determinative regulation was never mentioned until oral argument in this court.”<sup>21</sup> In fact, the INS counsel was correct in not briefing a regulation that did not bear on the issue. Unfortunately, this court’s confusion in the difficult area of spousal petitions is not an isolated incident. Although the confusion did not prejudice the result in that case, the holding has since been cited as precedent in cases where a petition has been approved and the regulation did not apply.<sup>22</sup> The *Pacheco Pereira* court thus helped to legitimize a regulation it should never have addressed.

### B. *Effects of the Regulations on the Citizen-Alien Family*

Even those courts that have correctly understood when the regulations do and do not apply have failed to consider the regulations’ impingement on the protected interests of all members of affected families. An example of the automatic revocation regulations’ thwarting of state family law is *Scalzo v. Hurney*.<sup>23</sup> In September of 1958, an Italian citizen married Mr. Scalzo, a U.S. citizen, and they settled in Philadelphia. In less than two months the petition to classify her status as his wife was approved. Later, marital discord arose. Pursuant to Mr. Scalzo’s withdrawal of his petition, the Service revoked the approved petition in May of 1959.<sup>24</sup> In an unpublished opinion, the Court of Common Pleas of Philadelphia County ordered him to reinstate the application for his wife’s adjustment of status.<sup>25</sup> Although the INS record contained contradictory evidence, there is little doubt that the Pennsylvania court ordered Mr. Scalzo to reinstate the visa petition for his wife to ensure compliance with the court’s eventual alimony payment orders. Perceiving the possibility that Mr. Scalzo would use his wife’s deportation to his own advantage, the state court acted to foil his attempt to use INS procedures to escape his obligations under Pennsylvania family law. Nevertheless, the INS denied the reinstated petition, rejected related efforts by Mrs. Scalzo, and ordered her deportation.

The federal district court in *Scalzo* found that the purpose of INA

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20. *Id.* (citing INA, 8 U.S.C. § 1156 and 8 C.F.R. § 206.1(b)(1)).

21. *Id.*

22. *See infra* note 90 and accompanying text.

23. 225 F. Supp. 560 (E.D. Pa. 1963).

24. *See id.* at 561.

25. *See id.*

§ 206<sup>26</sup> is “to keep families together,” and held that “[o]nce that purpose is no longer to be served, it would seem that cause for revocation of an approval previously granted is established.”<sup>27</sup> In this way, the court avoided considering the difficult question that Mrs. Scalzo had raised of whether the Attorney General had abused his discretion or acted unconstitutionally in deciding that there was “good and sufficient cause” to revoke the approval in her case without hearing the particular facts.<sup>28</sup> Finally, with no legal hurdle left to obstruct the decision of the issue as earlier framed by the court of appeals,<sup>29</sup> the district court summarily held that Mrs. Scalzo had acquired no vested right in the petition approval,<sup>30</sup> thus clearing the way for her deportation. The problem with the *Scalzo* case is not its result so much as its failure to scrutinize the automatic-revocation scheme. As a result of this failure, a citizen was allowed to dodge state family law obligations without even the hindrance of a hearing on the issue.

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26. INA, 8 U.S.C. § 1156 (1965), forerunner of the current revocation statute, INA, 8 U.S.C. § 1155 (1982).

27. 225 F. Supp. at 561. This holding, however, reflects an unsubstantiated and unjustified logical leap. Divorce does not mean that the purpose of the statute is no longer to be served by allowing the alien spouse to remain in the country. The *Scalzo* court may have been influenced by the traditional notion that in ending the bonds of matrimony, a divorce terminates all family relationships. This is not necessarily so. For example, a family whose members live in the same city or within commuting distance is functionally united but not “together.” A divorce decree will change the legal obligations and rights of the family members, but father, mother, and child may live in proximity so that both parents may attend to the child’s rearing. Deportation of one of the parents may make it impossible for the deported parent to do so. The implied conceptual distinction has not escaped judicial notice: “the mere unexplained desire of one spouse to rid herself of the other cannot be deemed per se sufficient cause to disrupt the unit, particularly where . . . there are minor children involved.” *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, 273 (2d Cir. 1966) (Moore, J., dissenting).

28. The federal judge’s conclusion is a particularly unjustified logical leap in this case, since the state court had made clear Pennsylvania’s interest in keeping Mrs. Scalzo in the country. There is no doubt that Congress has absolute authority in immigration matters. See generally *Shaughnessy v. Mezei*, 345 U.S. 206 (1953); *Wong Hing Fun v. Esperdy*, 335 F.2d 656 (2d Cir. 1964), cert. denied *sub nom.* *Ng Sui Sang v. Esperdy*, 379 U.S. 970 (1965). Thus the state is preempted when immigration matters are at stake. However, the issue here is not one of application of the immigration statute but one of whether or not the purpose of the Act is served by the questioned regulation, that is, whether a hearing or merely an automatic scheme is what the statute and the Constitution require. Under these circumstances, it is not clear whether the federal judge, or as here the federal executive, has jurisdiction to reverse the state’s determination. See *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938), and its teachings.

29. Although Mrs. Scalzo filed her suit in district court, it was transferred to the court of appeals on the theory that she was contesting the deportation order. However, the court of appeals found that Mrs. Scalzo was contesting her deportation order only insofar as she sought review of the denial of the petition to adjust her status. It found this question collateral to the deportation issue, and held that jurisdiction rested solely in the district court. 314 F.2d 675 (3d Cir. 1963).

30. 225 F. Supp. at 561.

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A richer, more complex example of the effects of the regulations is found in *United States ex rel. Stellas v. Esperdy*.<sup>31</sup> After marriage, Mrs. Stellas, a U.S. citizen, filed a petition for her husband, a Greek citizen, which was approved in August of 1963. Mr. Stellas — busy making a living for himself and his family — never went to a U.S. consulate to obtain his permanent visa.<sup>32</sup> By November of 1965 Mr. and Mrs. Stellas had two U.S.-citizen children. Apparently Mrs. Stellas began an extra-marital relationship at about that time and became afraid that her husband would beat her. Instead of seeking a divorce or police protection from her husband, Mrs. Stellas advised the INS that she wished to withdraw the approved petition “alleging that she was in fear of bodily harm.”<sup>33</sup> Accordingly, the INS automatically revoked the petition approval. The Second Circuit felt itself constrained by the automatic nature of the regulations and affirmed the INS’s revocation of the approval.<sup>34</sup> On appeal, in a per curiam order, the Supreme Court summarily vacated the judgment and ordered the INS to continue processing Mr. Stellas’ visa.<sup>35</sup> While the Court did not give any reason for its decision, its disposition demonstrated that it would not allow the Executive’s regulation to create an inequitable result.

A deficiency of the regulations that is even more glaring than their lack of concern for the alien spouse is their wholesale disregard for children’s interests. Neither the regulations nor interpreting courts have recognized that U.S.-citizen children, born in a citizen-alien family, have a strong interest in the outcome of the revocation process. In most immigration cases, the interests of the child and the parents coincide; all members of the family are better off if the alien parent obtains the visa.<sup>36</sup> The problem comes when the interests of the child conflict with the interests of one of the parents, for neither the INA nor the regulations allow for third party intervention. Attempts to intervene by U.S.-citizen children have been unsuccessful.<sup>37</sup>

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31. 366 F.2d 266 (2d Cir. 1966).

32. *Id.* at 268.

33. *Id.*

34. *Id.* at 270.

35. *United States ex rel. Stellas v. Esperdy*, 388 U.S. 462 (1967).

36. The case in which the interests of all the family members coincide is the typical case envisioned by the Act. Thus, usually there is no prejudice from refusing to allow the intervention of the child. This is important for the INS because it helps achieve expeditious disposition of cases.

37. *See, e.g., Agosto v. Boyd*, 443 F.2d 917 (9th Cir. 1971) (intervention attempted by both children and mother); *Application of Amoury*, 307 F. Supp. 213 (S.D.N.Y. 1969). The courts have rationalized the denial of intervention on the basis that although people

This denial of intervention rights makes the fact pattern in the *Stellas* case all too common. Mrs. Stellas wants to withdraw the petition and have her husband deported. In this way, she can keep her lover and the children without going through full divorce proceedings in family court. The children, on the other hand, are probably better off if they can keep their father in the United States because this will give them a better chance of receiving full parental nurturing as well as full child support.<sup>38</sup> Further, the state will also benefit for the related reason that the children will be less likely to end up as public charges.<sup>39</sup> At present, however, only the citizen spouse, and not the children, has the right to petition for the alien spouse<sup>40</sup> and to withdraw the petition. It is exactly in this context — where a hearing would be most useful to preserve the children's interests — that the regulations deny a hearing altogether. Thus, the interests of the children may go completely unattended.<sup>41</sup>

Had Mrs. Stellas been successful in having her husband automatically deported by petition withdrawal, she would have been able to

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born in the U.S. have a right to choice of residence, the government has no obligation to help them remain in their country of birth and "in the case of an infant below the age of discretion the right is purely theoretical . . . since the infant is incapable of exercising it." *Newton v. INS*, 736 F.2d 336, 342 (6th Cir. 1984), citing *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977). While it may be true that the infant is incapable of exercising the right of choice the INS has recognized that a guardian may be appointed. *Matter of McQuaid*, 15 I. & N. Dec. 582 (1976). *But cf.* *Encisco-Cardozo v. INS*, 504 F.2d 1252 (2d Cir. 1974). The *Encisco-Cardozo* court left open the possibility that under the appropriate circumstances it would recognize the right of the child to intervene. The court denied intervention because it found that the mother was capable of raising all the appropriate issues to safeguard the child's interests.

38. A divorce proceeding takes place in state court and, if the father is the main provider, he will probably have to pay child support. There is a better chance that the child will get these payments if the father is in the U.S. rather than abroad. First, the father's earnings will probably be greater in the U.S. than abroad. Second, the court order has a better possibility of enforcement if the father is in the U.S. For new efforts to enforce child support payments, see Lieberman, *Time to Get Tough on Child Support Payments*, N.Y. Times, Oct. 12, 1985, at 27, col. 2.

39. If the father is the provider, the government has a strong interest in the matter, that of keeping the children from becoming public charges. *Id.* Though the single mother can provide support in many cases, the statistical odds are in favor of a decrease in the children's standard of living. See Neely, *supra* note 10, at 179.

40. INA, 8 U.S.C. § 1101(40)(b)(1) (1982) (a child under 21 may not petition for his parent).

41. In most other instances, such as exclusion or deportation, the regulations provide for a hearing. Even though the children are not formal parties to those hearings, immigration judges and hearing officers routinely consider the potential hardships for them. Typical examples of this concern are found in the area of suspension of deportation cases, INA, 8 U.S.C. § 1254(a) (1982). See, e.g., *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983) (close family ties, particularly the effect on grade-school-age children, must be considered); *Banks v. INS*, 594 F.2d 760, 762 (9th Cir. 1979). See generally GORDON & ROSENFIELD, 2 IMMIGRATION LAW AND PROCEDURE §§ 7-166 to 7-176.7 (1985).

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avoid the prospect of a less favorable divorce judgment in a state court family law proceeding. In other words, the automatic revocation regulations have the potential effect of vitiating the state family law process. Had this happened, the *Stellas'* two U.S.-citizen children would have been deprived of state family law rights without any chance to advance their interests before a state court or the INS.<sup>42</sup> Their rights to parental maintenance and their interest in a two-parent upbringing (even where the parents are separated)<sup>43</sup> might have been extinguished without any consideration. In the typical state family court setting, as opposed to the automatic INS scheme, the judge carefully considers all matters relating to the children on the basis of "the best interest of the child" standard.<sup>44</sup> The INS regulations fail to address, let alone resolve, their potential for ignoring the citizen children's interests.

Permutations of the *Stellas* example result in similar and equally unfair outcomes. A citizen husband can safely ignore court orders requiring payments of alimony and child support when the divorce from, and resulting deportation of, his wife effectively prevents her from enforcing the divorce judgment. A different but equally common permutation occurs when the citizen father wishes to continue his relationship with his children. If the mother gains custody of the children and is deported, the citizen father will be effectively deprived of the right to visit and raise his citizen children.<sup>45</sup> The statute, with its avowed purpose of "keeping families of United States citizens and immigrants united,"<sup>46</sup> does not contemplate these unfair results.<sup>47</sup>

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42. State law routinely recognizes the parents' obligations to support and discipline their children. The child's right is so strong that mere disobedience or even delinquency does not terminate the parental duty of maintenance. *But see* *Roe v. Doe*, 29 N.Y.2d 188, 193, 328 N.Y.S.2d 506, 68 Misc. 2d 833 (1971) (recognizing this principle, but reaching a contrary holding on the facts).

43. This is an interest shared by a large and growing number of U.S.-citizen children.

44. *See* *Neely*, *supra* note 10, at 170 n.5.

45. The father's right to participate in decisions concerning his children and their upbringing is of constitutional dimension and has even been extended to unwed fathers. *See* *Stanley v. Illinois*, 405 U.S. 645 (1972); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975) ("a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised . . .,'" citing *Stanley v. Illinois*, 405 U.S. at 651.)

46. *INS v. Errico*, 385 U.S. 214, 220 (1966).

47. In fact a separation or divorce of the parents does not terminate the family relationship altogether. A divorce proceeding is designed to dissolve the marriage and determine the duties and rights of the parties to the family unit after the divorce takes place.

IV. *Constitutional and Statutory Shortcomings*

Like other administrative agencies, the INS works on a constrained budget. The Service justifies the automatic revocation regulations on the basis that they are the most efficient way to deal with the problem of sham marriages during the period between approval and visa issuance. In fact, the regulations are of little use in deterring the perceived evil. Moreover, they provide neither the minimal due process to which aliens are entitled, nor the full due process to which citizens are entitled. Because they fail to advance their professed objective while impinging on important individual rights and interests, the regulations fail to pass constitutional muster. Further, the regulations cannot stand because they represent an abuse of the discretion that the approval revocation statute confers on the Attorney General.

The Supreme Court has established that aliens do enjoy due process rights, at least under certain circumstances. A distinction must be made between exclusion and deportation proceedings. An alien is subject to exclusion proceedings if he has not "entered" the United States, and to deportation if he has made an "entry."<sup>48</sup> The courts have held that aliens in exclusion proceedings generally have only statutorily created, and no constitutionally mandated, rights.<sup>49</sup> Due process rights are no exception.<sup>50</sup> However, in the case of de-

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48. See *Landon v. Plascencia*, 459 U.S. 21, 25 (1982) (explaining distinction between deportation and exclusion hearings). "Entry" is a term of art in immigration law. While it is defined in the Act, 8 U.S.C. § 1101(a)(13) (1982), its meaning is still hotly debated and unsettled. See, e.g., *INS v. Phinpathya*, 464 U.S. 183, 193-194 (1984), and cases cited therein. In general a person who comes into the country with a visitor visa and overstays, or even a person who comes in evading border inspections has "entered." On the other hand, a crewman, a stowaway or a person who is "paroled" in (i.e. stopped at the border and allowed in to appear in front of an immigration judge), even if a permanent resident, has not "entered."

49. *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950), for the proposition that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). An alien abroad is not a "person" for the purposes of the fifth and fourteenth amendments. The same analysis applies to an individual who has not made an "entry." *United States v. Ju Toy*, 198 U.S. 253, 263 (1905). Exclusion without a hearing is not unconstitutional. *Wong Hing Fun v. Esperdy*, 335 F.2d 656 (2d Cir. 1964), cert. denied sub nom. *Ng Sui Sang v. Esperdy*, 379 U.S. 970 (1965). Cf. *Kaplan v. Tod*, 267 U.S. 228 (1925) (exclusion based on warrant issued more than five years after entry upheld because fifth amendment due process inapplicable).

50. See generally *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Currently, 8 U.S.C. § 1226(a)(1982) provides for some form of hearing in most exclusion cases, with appeal to the Attorney General, 8 U.S.C. § 1226(b), and ultimately judicial review by way of habeas corpus, 8 U.S.C. § 1105(a)(6). Stowaways, however, are denied a hearing in most situations, 8 U.S.C. § 1323(d). But see *Chun & Shan v. Sava*, 708 F.2d 869 (2d Cir. 1983).

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portation proceedings, the Supreme Court has held that some constitutional safeguards, including due process, apply.<sup>51</sup> Because the automatic revocation regulations operate on an individual regardless of whether he is in deportation or exclusion proceedings, they are not immune to a due process challenge.

### A. *The Sham Marriage Rationale and the Rational Relation Test*

The Service's main concern is with the large and growing number of fraudulent or sham marriages,<sup>52</sup> which are defined as marriages entered into for the primary purpose of circumventing the immigration laws. Fear of encouraging further fraud in the area of marital petitions leads the Service to retain and enforce the automatic revocation regulations.<sup>53</sup> However, no matter how serious the problem with fraudulent marriages<sup>54</sup> — and the potential seriousness of the problem should by no means be ignored — the automatic revocation regulations are neither reasonably nor rationally related to the proffered objective of curtailing the incidence of such marriages.<sup>55</sup>

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51. Most procedural safeguards in deportation proceedings are now codified, INA, 8 U.S.C. § 1252(b) (1982 & Supp. II 1986). However, because deportation has been held to be a civil and not a criminal proceeding, the guarantees of the fourth, fifth, sixth, and eighth amendments and the ex post facto clause of article I, § 9 of the Constitution as applied in criminal settings do not necessarily apply in deportation proceedings. *See generally* INS. v. Lopez Mendoza, 104 S. Ct. 3479 (1984) (the exclusionary rule does not apply in a deportation proceeding).

52. The belief that this is the case is widely shared by members of the immigration bar. In his response to a proposal for change in the automatic revocation regulations, Warren Leiden, Executive Director of the American Immigration Lawyers Association, noted: "Regretfully, I fear your proposal [to modify the automatic revocation regulations] will encounter strong opposition, given the Service's present attitude toward spousal petitions and marriage fraud." Letter from Warren Leiden, Executive Director of the American Immigration Lawyers Association, to David Scheinfeld (Sept. 10, 1985) (on file with the YALE LAW & POLICY REVIEW). Mr. Leiden's observation about the Service's present attitude is correct.

53. In his letter to David Scheinfeld, R. Michael Miller, the INS officer responsible for automatic revocations, stated: "Unfortunately, because of the ease in immigrating through marriage, the number of fraudulent or sham marriages has increased tremendously. I fear that if we attempted to regulate your proposed revision [to 8 C.F.R. § 205.1(a)] we would be encouraging fraud in an area that already has enough problems." Letter from R. Michael Miller, Deputy Assistant Commissioner, Adjudications, to David Scheinfeld (Oct. 11, 1985) (on file with the YALE LAW & POLICY REVIEW).

54. For example, Congress, also concerned with this problem, enacted the so-called "gigolo" statute, INA, 8 U.S.C. § 1251(c)(1), which provides that if the marriage was entered into less than two years prior to issuance of the visa, and its dissolution takes place within two years of such issuance, the alien has the burden of proving that the marriage was entered into for bona fide purposes.

55. The reasonable or rational relation test is usually used by the courts to review administrative rulemaking. Depending on the language of the statute against which the regulation is judged, the courts use the terms "unreasonable," "irrational," "arbitrary and capricious," "contrary to law," and others to refer to a regulation that cannot stand. *See* J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW 319-342 (1985), and cases cited

The sham marriage is not new. Years of experience with it have prompted the Service to establish an elaborate system of interviews and investigations designed to detect and deny petitions based on sham marriages. Before approval, spousal petitions are routinely subjected to intense scrutiny.<sup>56</sup> The Service's approval of a petition takes place only after the INS officer is convinced that there is no reason to doubt the validity of the marital relationship. If reason for doubt exists, the petitioner has the burden of showing that the marriage is not a sham.<sup>57</sup> A finding of fraudulent or sham marriage leads to denial of the petition.<sup>58</sup> Stiff penalties may attach. The alien may be deported and barred from future admission.<sup>59</sup> In some cases, the citizen or resident involved is also subject to criminal penalties.<sup>60</sup>

The automatic revocation regulations apply only to approved petitions. These are cases in which the Service has already thoroughly

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therein. Judges use the standards which accord with the relevant statutory language but the intensity of scrutiny is the same under any of them. *See, e.g.*, *National Tire Dealers & Retreaders Ass'n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974) (concepts of "rational relation," "remote relation," and "significant nexus" used interchangeably in opinion striking down an agency standard requiring permanent labeling on retreaded tires). *See generally* Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. Rev. 899, 934 (1973). On the other hand, some commentators believe that the "arbitrary and capricious" standard of § 706(A) of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, generally used for informal rulemaking review, is less exacting than the "substantial evidence" standard of Section 706(E) of the Administrative Procedure Act, generally used for individual adjudication review. *See* MASHAW & MERRILL, *supra* note 55, at 333.

56. An elaborate interview by an immigration officer takes place before the petition is approved or rejected. In the New York District of the INS, the interview process has been highly formalized. *See* *Stikes v. INS*, 393 F. Supp. 24, 30-31 (S.D.N.Y. 1975) (describing investigative procedures of the INS in sham marriage cases). For example, in New York City, where *Stikes* controls, the INS officer interrogates the husband and the wife separately as to their experiences and life in common to find inconsistencies. It is this author's experience that the Service denies a petition if there are three or four inconsistent answers out of forty or fifty questions, even if all the other evidence supports the conclusion that the marriage is not a sham. Personal investigation at the marital abode and interviews with neighbors are other common techniques.

57. *Matter of Phillis*, 15 I. & N. Dec. 385 (1975). Indeed, the petitioner always has the burden of establishing eligibility for the benefits sought. *Matter of Brantigan*, 11 I. & N. Dec. 493 (1966).

58. *Matter of M.*, 8 I. & N. Dec. 217 (1958); *See generally* *Lutwak v. United States*, 344 U.S. 604 (1953); *Johl v. United States*, 370 F.2d 174 (9th Cir. 1966); *Matter of McKee*, 17 I. & N. Dec. 332 (1980).

59. INA, 8 U.S.C. §§ 1182(a)(16), (17), (19)(1982 & Supp. II 1986) (deported aliens, arrested and deported aliens, and aliens who committed fraud are ineligible to receive visas and excludable), and INA, 8 U.S.C. § 1251(c)(1)(1982) (the "gigolo" statute). Under certain circumstances, waiver of excludability grounds and relief from deportation are available. INA, 8 U.S.C. §§ 1182(c), 1251(f).

60. *See* 18 U.S.C. § 1001 (broad prohibition against falsification to the government). This statute has been used to prosecute both parties to a sham marriage. *See, e.g.*, *Lutwak v. U.S.*, 344 U.S. 604 (1953); *U.S. v. Lopez*, 728 F.2d 1359 (11th Cir. 1984).

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checked for fraud and found none to exist. In effect, in all the cases covered by the automatic revocation regulations, the Service has already established to its satisfaction that the underlying marriage is not a sham.<sup>61</sup> This crucial fact brings into focus both the statutory and constitutional weaknesses of the regulatory scheme. First, whether or not the approval revocation statute was enacted to vest the Attorney General with discretion to withhold revocation in those cases where there is “good and sufficient cause,”<sup>62</sup> the Attorney General’s refusal to find good and sufficient cause in those admittedly non-sham cases is an abuse of that discretion. Second, when the Attorney General automatically revokes petitions without a hearing to the purported end of preventing sham marriages, he acts without rational or reasonable basis.

### B. Abuse of Discretion

There is no doubt that the Service has very broad discretion in applying the Act.<sup>63</sup> To address the myriad of regulatory problems which it faces, the Service may resort to two different types of decision-making: adjudication (decision on a case-by-case basis) or rulemaking (decisions for groups or classes of cases). Different standards of judicial review are prescribed by Congress for each type of decision-making, and in reviewing agency rulemaking the courts follow these standards.<sup>64</sup> The courts will uphold a regulation promulgated by the INS unless there is an affirmative showing that

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61. As has been recognized by the courts and the INS, the central question in these proceedings is whether the bride and groom intended to establish a life together at the time they were married. *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of McKee*, 17 I. & N. Dec 332.

62. As the Second Circuit noted in discussing INA, 8 U.S.C. § 1155, “[t]he purpose of placing such [statutory] discretion regarding immigration in the hands of the Attorney General, rather than having that field governed by a detailed statute, is to give some flexibility in treating a myriad of possible situations.” *Pierna v. INS*, 397 F.2d at 951.

63. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control,” citing *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). See generally *Yuk-Ling Wu Jew v. Attorney General*, 524 F. Supp. 1258, 1260 (D.D.C. 1981).

64. See *supra* note 55. For example, Section 706 of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, concerning judicial review, mandates that “the reviewing court shall — (2) hold unlawful and set aside agency action, findings, and conclusions found to be — (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, . . . (E) unsupported by substantial evidence . . . or otherwise reviewed on the record of an agency hearing provided by statute.” Some commentators discern a trend toward more exacting judicial scrutiny of the substantive basis for administrative rules. MASHAW & MERRILL, *supra* note 55, at 342.

it is unreasonable or contrary to legislative intent.<sup>65</sup> Applying this standard in *Mak v. INS*,<sup>66</sup> the Second Circuit held that it would not disturb the Attorney General's decision by regulation "if his determination is founded on considerations rationally related to the statute he is administering."<sup>67</sup>

In *Mak*, an alien who had been granted permission to travel through the United States but had remained illegally in the country sought adjustment of his status. The relevant regulation denied the exercise of visa eligibility and deportation review rights to all aliens who had been admitted for purposes of "lawful transit only." The regulation was upheld because the court was convinced that "one paramount element [of the class being regulated] create[d] such 'likeness' [of each class member to each of the other class members] that other elements [could] not be so legally significant as to warrant a difference in treatment."<sup>68</sup> The *Mak* court's treatment of regulation review finds support in the Supreme Court's earlier treatment of a similar immigration regulation in *Carlson v. Landon*.<sup>69</sup> There, the Court held that the Attorney General's bail-setting discretion under the Internal Security Act was broad enough to justify a regulation providing for the offenders' detention without bail. In justifying the exercise of the Attorney General's discretion by regulation, the Court observed that there had been individualized findings of "membership plus personal activity in supporting and extending the [Communist] Party's philosophy concerning violence."<sup>70</sup> Thus, the *Carlson* court upheld the application of the regulation to the case before it only after becoming convinced that the application had been triggered by individualized findings of a single paramount element which warranted like treatment of all cases. On the basis of *Carlson*, the Ninth Circuit in *National Center for Immigration Rights v. INS* concluded that "[t]he discretion of the Attorney General to impose a condition on a particularized showing in an individual case is quite different from the authority to do so by a blanket rule."<sup>71</sup>

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65. *Nazareno v. Attorney General*, 512 F.2d 936, 939-941, *cert. denied*, 423 U.S. 832 (1975). The presumption of reasonableness applies whether the Service's interpretation takes place on a case-by-case basis or by regulation. *United States ex rel. Stellas v. Esperdy*, 388 U.S. 462, and cases cited therein.

66. 435 F.2d 728, 730 (2d Cir. 1970).

67. *Id.*

68. *Id.*

69. 342 U.S. 524 (1952).

70. *Id.* at 541.

71. *National Center For Immigration Rights, Inc. v. INS*, 743 F.2d 1365 (9th Cir. 1984). The court of appeals quoted Justice Frankfurter's observation:

If the Attorney General, after the Internal Security Act, had made a general ruling

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Applying the elements of the *Mak* test, approvingly used by the Supreme Court and the Ninth Circuit in other immigration contexts, the courts will legitimate agency decisions by regulation only after scrutinizing each case to make sure that the regulation denying a hearing is in fact based on “one paramount element,” and that the case at bar bears sufficient “likeness” to the rest of the regulated class. If the regulation fails this test, it is struck down as “arbitrary and capricious” or as an “abuse of discretion.”<sup>72</sup>

The automatic revocation regulations fail *Mak*'s “one paramount element” test both for petition withdrawal and divorce cases. First, the situations in which a spouse may wish to withdraw the petition are so varied that there is no “one paramount element” creating enough “likeness” to justify treating all withdrawal cases alike. While some spouses may withdraw a petition for the good reason that they no longer intend to maintain their family unit, others may file their withdrawals to obtain undue advantages in their subsequent divorce proceedings and settlements. Where there are at least these two clearly defined sets of spouses withdrawing petitions, there can be no “one paramount element” which warrants like treatment of both sets. As for divorces, while some legal terminations of marriages also terminate family obligations, others do no more than redefine them. The ex-spouses continue to be bound by the orders in the divorce decree. Children still need economic and emotional support after the divorce. Again, the variety of family arrangements in the wake of divorce defies identical treatment of all divorce situations. Therefore, neither the withdrawal nor the divorce situations present sufficient internal “likeness” to meet the “one paramount element” test which in *Mak* justifies treating all cases alike. As *Carlson* and *National Center* make clear, courts should carefully review the Attorney General's denial by regulation of an individualized hearing and should consider whether other legally significant elements — such as the presence or absence of children, or changes in the alien spouse's life and property arrangements in reasonable reliance on

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that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party — an indiscriminating, unindividualized class determination — it would disregard the clear directive of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion. *Carlson v. Landon*, 342 U.S. at 558 (Frankfurter, J., dissenting).

743 F.2d at 1371.

72. *Mak v. INS*, 435 F.2d at 730. *Cf. Chiravacharadhikul v. INS*, 645 F.2d 248, 250-251 (5th Cir. 1981) (“only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations”).

the marriage promises — warrant a difference in treatment. In divorce and petition withdrawal cases, different treatment is necessary.

Moreover, statutory interpretation is a question of law. It is ultimately the responsibility of the judiciary, not the agency, to determine such questions. Thus, when reviewing an agency's application of a statute to a particular case which the INS has decided by regulation, the courts give some deference to the agency's interpretation but must decide upon their own reading of the statute.

In *Leano v. INS*,<sup>73</sup> the Ninth Circuit reviewed the Service's denial, pursuant to a regulation similar to the automatic revocation regulations,<sup>74</sup> of an application for adjustment of status. The Service conducted an inquiry into the alien's application which took over eleven months. In the meantime, the petitioner, the alien's U.S.-citizen father, died, triggering automatic revocation. In its one-page per curiam decision, the Ninth Circuit exercised its power to review *de novo* and summarily ordered the Service to reconsider the revocation. Rejecting the Service's reliance on its regulation, the court simply stated that the Service should have used "with propriety" the discretionary power conferred by the adjustment of status statute and the approval revocation statute.<sup>75</sup> While the Service has broad discretion to apply the Act, whatever standard it uses and whether it articulates that standard or not, the courts still have the ultimate duty to make sure that the Service is applying the Act properly. If, as in the area of divorce and petition withdrawal, the Service misapplies the statute to a given fact pattern, the court should conclude that the Service has abused its discretion and should vacate its decision.<sup>76</sup>

### C. *Due Process*

The problem with the automatic regulations is not only statutory; it is also constitutional. "From its founding the Nation's basic com-

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73. *Leano v. INS*, 460 F.2d 1260 (9th Cir. 1972) (per curiam). At the time, on death of the petitioner after approval of the petition, the Service would revoke the petition automatically if the visa had not yet been issued. Here, almost a year had gone by since approval. The court of appeals held that under the "unusual circumstances," "the strict position taken by the Service was not required." Unfortunately, the court did not elaborate on this observation in its one-page decision. Currently, the regulations provide for the Service's exercise of some discretion before revocation in death-of-petitioner cases. See 8 C.F.R. § 205.1(a)(3)(1986) and *infra* notes 93-101 and accompanying text.

74. See also *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968); *United States ex rel. Stellas v. Esperdy*, 388 U.S. 462 (1967).

75. *Leano v. INS*, 460 F.2d at 1260.

76. *Id.* at 1260. *Accord Pierno v. INS*, 397 F.2d 949.

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mitment has been to foster the dignity and well-being of *all persons* within its borders.”<sup>77</sup> Constitutional review of regulations on due process grounds involves a balancing of private and governmental interests. The Supreme Court described this balancing in *Mathews v. Eldridge*:

“Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance,” [citations omitted]. . . . Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [citations omitted]. . . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>78</sup>

The automatic revocation regulations violate the fundamentals of due process by denying notice and a hearing to the alien.<sup>79</sup> They also deny due process to U.S. citizens: the U.S. parent and the U.S.-born children. The parent may be deprived of state family law protection and constitutional privacy rights. The children, in turn, may be deprived of their interests in being raised by both parents (even if separated) and in growing up within the American cultural milieu, as well as their right to economic support.

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77. *Goldberg v. Kelly*, 397 U.S. 254, 264-265 (1970) (emphasis added) (constitutional challenge to termination, without prior hearing, of financial aid under the Aid to Families with Dependent Children program).

78. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (constitutional challenge to termination of Social Security disability payments without prior hearing).

79. Early in the history of immigration regulation, the Supreme Court set the minimum standards of fairness and due process:

But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law’ as understood at the time of adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends — not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

*Japanese Immigration Case*, 189 U.S. 86, 100-101 (1903). See also *Sung v. McGrath*, 339 U.S. 33 (1950); *Chew v. Colding*, 344 U.S. 590 (1953).

Without a hearing before the INS, alien parents (and therefore the U.S.-citizen parents and children) have no forum in which to raise the traditional personal defenses of duress, misinformation, error, illegality or other possible defects in the grounds for the revocation.<sup>80</sup> It is true that prior to expulsion aliens may be heard in deportation or exclusion proceedings. Yet this is an empty right for aliens being deported on the basis of the automatic revocation regulations, since they may not attack the grounds for the revocation in those proceedings. Because the regulations are mandatory and automatic, the reasons for the withdrawal or divorce are deemed immaterial for purposes of deportation. Worse yet, an immigration judge's refusal to consider such reasons has been found to be unreviewable in federal court.<sup>81</sup>

This denial of a hearing constitutes a plain violation of the due process clause under the *Mathews v. Eldridge* test. First, the private interests potentially affected are clear. They involve the most basic family values. Some have been recognized as individual rights by statute and common law. Others have constitutional protection.<sup>82</sup> Second, there is the highest possible risk of erroneous deprivation of these interests, since the INS, without a hearing, may never learn of the needs of the children of the alien spouse and the U.S. citizen. Concomitantly, the probable value of the additional procedural safeguard of a hearing is extremely high in that it would provide the INS with the information necessary to exercise its discretion on a

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80. Cf. 8 C.F.R. §§ 103.3(a), 103.5(a)(c)(1)(1986). These two regulations contain the general standards to be followed in immigration proceedings. As opposed to the automatic revocation regulations, they carefully define rights regarding notice procedures, the opportunity to be heard and the appeal process in most other situations with which the INS deals.

81. Because the circumstances surrounding withdrawal cannot be raised in a deportation proceeding, they become a "collateral issue" on appeal. At least one court has found that this precluded consideration of those circumstances during review of a deportation order. *De Figueroa v. INS*, 501 F.2d 191 (7th Cir. 1974).

82. The Supreme Court has recognized the fundamental, constitutionally protected "freedom of personal choice in matters of marriage and family life." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974); see also *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); *id.* at 502-503 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 542-544, 549-553 (1961) (Harlan, J., dissenting). Furthermore, administrative policies that implicate personal rights or interests, just as legislative policies that do, are subject to intense due process scrutiny and substantive review by the courts. In the review process, the Supreme Court has recognized important privacy and family rights derived from the Constitution. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Roe v. Wade*, 410 U.S. 113 (1973). Administrative actions affecting mere economic rights are also subject to constitutional scrutiny, but enjoy a stronger presumption of regularity. See, e.g., *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

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factually complete record. Third, a hearing would neither inhibit the pursuit of government interests nor create a burden on the government. The government's interest in discouraging sham marriages is already well served by pre-approval investigation and interview methods, so the automatic regulations do not even marginally add to the advancement of that interest. Further, in light of the large volume of INS hearings, hearings in divorce and petition withdrawal cases would not increase the agency's fiscal and administrative burden. There are relatively few such cases. The INS itself does not consider the added burden a significant factor in its decision to keep the revocation regulations.<sup>83</sup>

Although the automatic revocation regulations are open to serious due process attack,<sup>84</sup> research has disclosed only one deportation case, *Wright v. INS*,<sup>85</sup> in which a court was directly faced with a due process challenge. But in *Wright*, rather than address the constitutional issue, the Sixth Circuit accepted without inquiry the Attorney General's "opinion," constructively expressed in the automatic revocation regulation, that "good and sufficient cause" existed for revocation.<sup>86</sup> Such extreme judicial deference is in actuality an abdication of judicial duty.<sup>87</sup> While it is true that the scope of judicial inquiry into immigration legislation is limited, a federal court should not give deference to Congress' or the Executive's interpretation of constitutional mandates if it finds compelling indications that the interpretation is wrong.<sup>88</sup> Moreover, against a constitu-

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83. See *supra* notes 52-53.

84. GORDON & ROSENFELD, 1 IMMIGRATION LAW AND PROCEDURE §§ 3.5i, 3-60.9 (1985).

85. 379 F.2d 275 (6th Cir. 1967) (per curiam), cert. denied, 389 U.S. 928 (1967).

86. *Id.* In its brief per curiam decision, the Court devoted ten lines to the issue. Without even discussing the standard or test to be used, the Court held that the due process requirement was satisfied because "[t]he regulations do not provide for a hearing on either the approval or revocation of a petition." *Id.* at 276. In support of this proposition, the Court limited itself to citing *United States ex rel. Stellas v. Esperdy*, 366 F.2d 266, *Pacheco Pereira v. INS*, 342 F.2d 422, and *Scalzo v. Hurney*, 225 F. Supp. 560. However, the decision in *Wright* cannot be defended on the basis of *stare decisis* because unlike *Wright*, (1) *Stellas* was grounded in an exclusion proceeding where no constitutional due process is required, (2) *Pacheco Pereira* involved a petition which had not yet been approved, thereby leaving 8 C.F.R. § 205.1 untriggered, and (3) *Scalzo* dealt with the statute and not with the regulation.

87. "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946), and cases cited therein.

88. In resolving regulatory issues, the courts are guided "by the venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 381 (1969).

tional challenge, regulatory action deserves less deference than congressional action.<sup>89</sup> Yet instead of pursuing an independent review of the constitutional validity of the regulations, the Sixth Circuit in *Wright* upheld them on the simple basis that the Attorney General had promulgated and applied the regulation in question. Unfortunately, the court expressly relied on the confused decisions in *Pacheco Pereira v. INS* and *Scalzo v. Hurney* and the Second Circuit's decision in *United States ex rel. Stellas v. Esperdy*.<sup>90</sup> Whereas the misguided analysis of *Pacheco Pereira* hampered the future development of case law at the statutory level, the *Wright* court compounded the problem by elevating to a constitutional due process level the confusion that those decisions had created.<sup>91</sup>

V. *An Alternative to Automatic Revocation: The "Humanitarian Reasons" Procedure*

During the 1960's, in cases where the petitioner died after approval but before visa issuance, the INS operated under an automatic revocation regulation<sup>92</sup> similar to the revocation regulations for the case of petition withdrawal or divorce. The harshness of this automatic revocation provision was limited in *Pierno v. INS*.<sup>93</sup> When Mr. Pierno, a U.S. citizen, died eight months after approval of the petition for his alien wife, the INS denied her application for adjustment of status and found her deportable. Rather than blindly upholding the automatic revocation, the Second Circuit vacated the INS's order and remanded for further proceedings.<sup>94</sup> Relying both on the dissent from its prior decision in *Stellas* and on the fact that the Supreme Court vacated the majority decision in that case, the court refused to apply the regulation in a way that would frustrate the congressional intent to include some amount of discretion in the

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89. In situations in which "the arbitrary and capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause," the same standard will require more from an administrative rule. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

90. *Wright v. INS* was decided on June 22, 1967, ten days after the Supreme Court's reversal of the Second Circuit's decision in *United States ex rel. Stellas v. Esperdy*. Mrs. Wright's petition for certiorari was denied. There is no record of a petition for rehearing to the Sixth Circuit.

91. G. CALABRESI, *COMMON LAW COURTS IN THE AGE OF STATUTES* (1985). By upholding the regulation against a constitutional challenge, the *Wright* decision complicated the problem in that it increased the political cost, its "inertia" in Calabresian terms, of modifying the regulation.

92. 8 C.F.R. § 206.1(a)(4) (1957), now 8 C.F.R. § 205.1(a)(2)(1986).

93. 397 F.2d 949 (2d Cir. 1968).

94. *Id.*

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approval revocation process.<sup>95</sup>

By 1976 the INS recognized the importance of not treating all death-of-petitioner cases alike. It amended the regulation to allow for discretion while still placing a heavy burden on the applicant. As amended, the regulation now provides that automatic revocation will take place “upon the death of the petitioner *unless the Attorney General in his discretion determines that for humanitarian reasons revocation would be inappropriate*.”<sup>96</sup> This provision allows for the exercise of limited discretion on a case-by-case basis, thus permitting flexibility in application. On occasion, an actual hearing will be necessary. In other situations, the case may be decided on written submissions, such as a brief and adequate affidavit and documentary evidence.<sup>97</sup> Further, the heavy burden on the applicant which is embodied in the “humanitarian reasons” standard discourages frivolous cases.<sup>98</sup> Finally, the INS has never reported that the amendment of the death-of-petitioner regulation increased its caseload or impaired its ability to attend to its other obligations within its budgetary constraints.

The discretion reserved to the INS in the death-of-petitioner regulation may serve as a guide to fashion the type of discretion the INS could reserve to itself in withdrawal and divorce cases.<sup>99</sup> The

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95. *Id.* The court placed some emphasis on the fact that several months had gone by as a result of a stay in the administrative proceeding necessitated by an ongoing state court action. *Id.* However, an eight month wait is not uncommon. More important was the court's finding that the statute requires individualized hearings.

96. 8 C.F.R. § 205.1(a)(3)(1986)(emphasis added).

97. As a rule, the INS is staffed with highly experienced hearing examiners. If a remedy is available, they are generally not averse to granting it in appropriate cases. Furthermore, there is always judicial review of adjudicatory decisions.

98. The “humanitarian reasons” standard of discretion is definitely not a “bright line” standard. As such, it is subject to strong criticism, including the charge that it does not conform to the highest ideals of due process. This author believes, based on his limited experience, that “humanitarian reasons” means the opposite of “economic reasons.” One can find many references to these terms in the area of suspension of deportation relief. By itself, mere economic hardship imposed upon the alien or his or her family by deportation is not enough to suspend the deportation proceeding and adjust the alien's status. Of much greater weight are factors such as family ties in the United States, length of stay in the country, health problems in the family that cannot be treated abroad, career loss for the alien's spouse and cultural acclimatization of the alien and children. These are a case's “equities” and on occasion are collectively referred to as the humanitarian considerations. Together with considerations based on the length of time between petition approval and petitioner's death and the circumstances that created such delay, these equities would constitute the pertinent “humanitarian reasons.” See, e.g., *Pierno v. INS*, 397 F.2d 949 (annulment action brought by beneficiary's stepson provoked an unusually long investigation period); *Leano v. INS*, 460 F.2d 1260 (consul delayed response to INS inquiry for over eleven months).

99. The “humanitarian reasons” standard is a flexible one. As applied, it tends to give greater weight to the potential hardships related to family ties, health, and cultural factors than to economic hardship. In general, this is an acceptable distinction because most, if not all, immigration cases present one form or another of economic hardship.

revocation would take place unless the applicant met the burden of proving that revocation would be inappropriate for humanitarian reasons. Providing this relatively inexpensive and informal forum at the administrative level would remove, to a large extent,<sup>100</sup> the infirmities of due process and abuse of discretion which afflict the current regulations. The "humanitarian reasons" amendment would also promote the following policies: (1) the equities in the case would be heard in the first instance not by federal judges, but by INS officers and family law judges who are more experienced in the area;<sup>101</sup> (2) the government would drastically reduce the risk of having the couple's children become public charges; (3) the government would help reduce overall litigation costs by disposing of many cases at the administrative level; and (4) the federal government would no longer unwittingly help citizens dodge state family law obligations.

## VI. Conclusion

The regulations providing for automatic revocation of approval on petition withdrawal or divorce foreclose administrative consideration both of the interests and equities of all the members of the family, including the U.S. citizens, and of the reasons for the withdrawal or divorce. They do not advance the proffered objective of reducing fraudulent marriage cases. In issuing the regulations, the Attorney General abused his statutory discretion and unconstitutionally denied due process to U.S. citizens and aliens. As a consequence, he hampered important policies underlying the constitutional protections and the bar on abuse of discretion. A "humanitarian reasons" exception to the regulation would solve the

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Thus, economic hardship alone cannot be determinative in individual cases involving discretion.

100. Two relevant issues are not considered in the presentation of the "humanitarian reasons" alternative: (1) whether the statutory burden of showing "good and sufficient cause" is on the Attorney General or the applicant, and (2) whether the administrative decision of accepting only "humanitarian reasons" — as opposed to (more obscurely yet) "non-humanitarian reasons" — in the process of determining good and sufficient cause is in itself so restrictive as to amount to abuse of discretion or infringement of constitutionally protected rights. However, since (1) the Service, once it does hear a case, usually considers and safeguards the interests of all the individuals involved adequately, and (2) imposing a heavier burden on the Service might begin to weaken its capacity for speedy and economical disposition of cases, the "humanitarian reasons" alternative is the best policy solution given the current budgetary allocation.

101. Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 349 (1956); Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A. J. 34, 36 (1964).

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current shortcomings without decreasing the current effectiveness of the Service or requiring an increase in its budget.

— *Guillermo Gleizer*