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## Immigration Law

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# IMMIGRATION LAW

## I. INS VIOLATIONS OF ITS OWN REGULATIONS: RELIEF FOR THE ALIEN

Terry Helbush\*

In recent years, the Ninth Circuit has indicated it is receptive to arguments by aliens that the Immigration and Naturalization Service (the Service) has not followed proper procedures in deciding their cases. Increasingly, the Ninth Circuit has been willing to grant relief to an alien in cases in which the Service violates a regulation or imposes additional burdens not found in the statute or regulation. This Article will discuss in detail three recent Ninth Circuit decisions exemplifying this trend and suggest how these cases may be used and expanded in the future.

### A. *Tejeda-Mata v. INS*: FAILURE TO FOLLOW INS REGULATIONS APPLIED IN DEPORTATION PROCEEDINGS

In *Tejeda-Mata v. INS*,<sup>1</sup> the Ninth Circuit for the first time directly applied the rationale of *United States v. Calderon-Medina*<sup>2</sup> and *United States v. Rangel-Gonzales*<sup>3</sup> to deportation proceedings. In the latter two cases, the Ninth Circuit found that aliens who face prosecution for illegal entry after deportation may raise as a defense the Service's failure to follow its own regulations in effecting their deportation, thereby rendering their deportation invalid.<sup>4</sup> In *Tejeda-Mata*, the court applied the same defense in a deportation proceeding itself.<sup>5</sup>

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1. 626 F.2d 721 (9th Cir. 1980) (per Bartels, D.J., sitting by designation; the other panel members were Choy and Ferguson, J.J.).

2. 591 F.2d 529 (9th Cir. 1979).

3. 617 F.2d 529 (9th Cir. 1980).

4. *United States v. Rangel-Gonzales*, 617 F.2d at 533; *United States v. Calderon-Medina*, 591 F.2d at 531.

5. In *Tejeda-Mata*, however, the court found that because the alien had not raised the defense in the deportation proceedings below, he was precluded from raising it on a

The *Calderon-Medina* court instituted a two-pronged test: The regulation in question must benefit the alien, and the Service violation must have prejudiced interests of the alien which the regulation protects.<sup>6</sup> The regulation in question in all three cases requires the Service to communicate with consular or diplomatic officials upon detaining nationals of certain countries.<sup>7</sup> The Service did not notify the Consul of Mexico in any of these cases even though the aliens were Mexican nationals, and Mexico and the United States maintained a treaty calling for immediate notification.

The rationale behind *Calderon-Medina* itself and behind applying it in the deportation context is much the same as that in traditional estoppel cases:<sup>7.1</sup> The Service should not profit from its own procedural irregularities.<sup>8</sup> The theory of *Calderon-Medina*, however, potentially has greater reach when applied to deportation proceedings because it is not tied to a finding of affirmative misconduct.<sup>8.1</sup> In other words, it does not depend on some kind of "fault" or "intent" which affirmative misconduct seems to connote.<sup>9</sup>

In addition, the *Calderon-Medina* theory, as applied to deportation actions through *Tejeda-Mata*, could have a wide application in immigration proceedings because it specifically is not tied to the due process clause. Although previous immigration cases have found that the Service's failure to follow its own regulations may render a proceeding unfair,<sup>10</sup> *Calderon-Medina*

petition for review. 626 F.2d at 726.

6. *United States v. Calderon-Medina*, 591 F.2d at 532.

7. 8 C.F.R. § 242.2(e) (1980). Section 242.2(e) provides:

*Privilege of Communication.* Every detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality in the United States. Existing treaties require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in exclusion of expulsion proceedings, whether or not requested by the alien, and, in fact, even if the alien requests that no communication be undertaken in his behalf . . . .

Mexico is one of the enumerated countries.

7.1 *See, e.g., Corneil-Rodriguez v. INS*, 532 F.2d 30 (2d Cir. 1976).

8. *See United States v. Calderon-Medina*, 591 F.2d at 531.

8.1 *INS v. Hibi*, 414 U.S. 5 (1973).

9. *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

10. *Bridges v. Wixon*, 326 U.S. 135, 153 (1945).

did not rely on the due process clause in reaching its result. In *Calderon-Medina*, the court carefully pointed out that the Service's failure to follow a regulation—even when the violation in question was not of such a degree as to render the proceeding unfair—could invalidate a deportation proceeding.<sup>11</sup> Thus, the *Calderon-Medina* theory may be raised as an alternate or complementary theory when an alien complains of procedural irregularities in deportation proceedings.

*Matter of Garcia-Flores*,<sup>12</sup> a Board of Immigration Appeals case, illustrates the usefulness of the *Calderon-Medina* theory in defending against deportation even when a defense based on a due process argument undoubtedly would have failed. The alien in *Garcia-Flores* complained that prior to giving a statement to an immigration officer she was not advised of her right to counsel.<sup>13</sup> She therefore argued that the evidence presented against her at the hearing was inadmissible because it all resulted from questioning by the immigration officer. Any argument that the evidence should be excluded under the fourth amendment would have failed because the Board of Immigration Appeals has held that the exclusionary rule does not apply in deportation pro-

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11. 591 F.2d at 531.

12. I. & N. Dec. No. 2780 (Feb. 27, 1980).

13. Section 287.3 then provided in part:

An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer, unless no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, in which event the arresting officer, if the conduct of such examination is a part of the duties assigned to him, may examine the alien. . . . If the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws, further action in the case shall be taken as provided in Part 242 of this chapter. An alien arrested without warrant of arrest shall be advised of the reason of his own arrest and his right to be represented by counsel of his own choice, at no expense to the Government. . . . He shall also be advised that any statement he makes may be used against him in a subsequent proceeding and that a decision will be made within 24 hours or less as to whether he will be continued in custody or released on bond or recognizance.

8 C.F.R. § 287.3 (1977).

ceedings.<sup>14</sup> Although she could have maintained that her statements to the immigration officer were involuntary because she was not advised of her right to counsel,<sup>15</sup> that would have been a difficult argument given the standard of voluntariness and the facts in her case. The Board, however, remanded her case to the immigration judge under the authority of *Calderon-Medina* for a finding as to whether the failure to advise her of the right to counsel was prejudicial.

While *Garcia-Flores*, *Tejeda-Mata* and the previous cases involved violations of regulations directly related to the apprehension of aliens, their detention and deportation hearing procedures, nothing in any of the cases indicated that the theory should be limited to cover only violations of those kinds of regulations. Presumably, the theory would also encompass violations of regulations relating, for instance, to the filing and adjudication of applications for benefits under the immigration law, if prejudice could be shown. For this reason also, *Calderon-Medina* and *Tejeda-Mata* will undoubtedly have a far-reaching effect.

#### B. *Patel v. INS* AND *Bahat v. Sureck*: ADJUDICATORY RULE-MAKING AND NOTICE

*Patel v. INS*<sup>16</sup> and *Bahat v. Sureck*<sup>17</sup> involved similar fact situations. Both Patel and Bahat applied for permanent resident status on the basis of investments in the United States.<sup>18</sup> Both

14. Matter of Sandoval, I. & N. Dec. No. 2725 (Aug. 20, 1979).

15. *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977); Matter of Garcia, I. & N. Dec. No. 2778 (Feb. 20, 1980).

16. 638 F.2d 1199 (9th Cir. 1980) (per Wallace, J.; the other panel members were Skopil, J. and Markety, C.J., sitting by designation).

17. 637 F.2d 1315 (9th Cir. 1981) (per Boochever, J.; the other panel members were Hug, J. and Richey, D.J., sitting by designation).

18. Both sought residency under the nonpreference category, arguing that they were exempt from the labor certification requirement of § 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1976), because they fell within the business investor exception established by regulation in 1967 (8 C.F.R. § 212.8(b)(4) (1967)). Section 212(a)(14) provides that potential immigrants are excludable from the United States if they are:

Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching pro-

sought to qualify for permanent residence under a 1973 regulation governing business investors. That regulation required that in order to qualify for permanent residence as a business investor an alien must establish

that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing capital totaling at least \$10,000, and who establishes that he has at least 1 year's experience or training qualifying him to engage in such an enterprise.<sup>19</sup>

Although Patel and Bahat met the regulation requirements, the Service denied their applications for permanent residence because they failed to satisfy a third requirement—that the investment “must tend to expand job opportunities and thus offset any adverse impact which the alien’s employment may have on the market for jobs.”<sup>20</sup>

This third requirement was enunciated in *Matter of Heitland*,<sup>21</sup> a Board of Immigration Appeals case in which an investor applied for permanent residence under the 1967 version of the regulation governing business investors.<sup>22</sup> Although the earlier regulation required only that the investor “had invested a substantial amount of capital,”<sup>23</sup> the Board found that to insure

fession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1976).

19. 8 C.F.R. § 212.8(b)(4) (1973).

20. *Matter of Heitland*, 14 I. & N. Dec. 563, 567 (1974), *aff'd*, 551 F.2d 495 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977), *quoted in* *Patel v. INS*, 638 F.2d at 1202.

21. 14 I. & N. Dec. 563 (1974), *aff'd*, 551 F.2d 459 (2d. Cir.), *cert. denied*, 434 U.S. 819 (1977).

22. The 1967 version of § 212.8(b)(4) provided in relevant part:

The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require labor certification: . . . (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

8 C.F.R. § 212.8(b)(4) (1967).

23. *Id.*

that the investor alien's primary function would not be to perform skilled or unskilled labor, the investment should also tend to expand job opportunities.<sup>24</sup>

In *Heitland*, the Board indicated that it would apply the "job-creation criterion"<sup>25</sup> to cases arising under the 1973 version of code section 212.8(b)(4)<sup>26</sup> as well, and did so in *Matter of Ruangswang*.<sup>27</sup> Thus, the Board's decisions in *Bahat* and *Patel* relied on both *Heitland* and *Ruangswang*.

The Ninth Circuit reversed the Board's decisions in *Bahat* and *Patel* on two grounds: (1) the dictum in the 1973 *Heitland* decision gave inadequate notice to *Bahat* and *Patel* that their investments would be required to satisfy the job-creation criterion; and (2) the Board could not enunciate through adjudicative means a rule which is properly created through the regulatory process.

In finding no adequate notice, the Ninth Circuit relied on its earlier case, *Ruangswang v. INS*,<sup>28</sup> wherein the court had reversed the Board and found that the dictum in *Heitland* gave inadequate notice to *Ruangswang* since she had applied prior to the *Heitland* decision.<sup>29</sup>

In *Bahat* and *Patel*, the aliens made their investments in 1976, some two years after the *Heitland* decision. The Ninth Circuit found, however, that since the rule as applied to the 1973 regulation was only dictum in *Heitland*, and was somewhat obscure and confusing at that, the rule failed to provide adequate notice.

In *Patel*, the court fully developed its argument that application of the *Heitland* decision to the 1973 regulation circumvented the rulemaking procedure. The *Patel* court premised its analysis on the fact that the Service as an agency had requested the *Heitland* requirement at the time the 1973 regulation was

24. 14 I. & N. Dec. at 567.

25. The term "job-creation criterion" is one coined by the court in *Patel v. INS*, 638 F.2d at 1204.

26. 14 I. & N. Dec. at 566-67.

27. 16 I. & N. Dec. 76 (1976).

28. 591 F.2d 39 (9th Cir. 1978).

29. *Id.* at 45.

proposed. The original Service proposal for the 1973 regulation called for a minimum investment of \$25,000 in an enterprise "reasonably . . . expected to be of prospective benefit to the economy of the United States and not intended solely to provide a livelihood for the investor and his family."<sup>30</sup> However, while the Service normally proposed the dual requirements of a \$25,000 investment and an expansion of job opportunities, it instead promulgated the dual requirements of a \$10,000 investment and one year's experience. Consequently the court found that when the Board in *Heitland* grafted the job-creation criterion onto the 1973 regulation, it sought to do through the adjudicative process what the Service appeared unable to achieve through the rulemaking process.

The *Patel* court found that the Board circumvented the rulemaking procedure thereby abusing its discretion. In its finding, the *Patel* court relied primarily on *NLRB v. Wyman-Gordon Co.*<sup>31</sup> In *Wyman-Gordon*, the Supreme Court invalidated a rule created by the National Labor Relations Board in an agency decision.<sup>32</sup> The Court concluded that the NLRB rule was "an agency statement of general or particular applicability and future effect" and that the Administrative Procedure Act (the APA) forbade its promulgation in an adjudicative proceeding.<sup>33</sup> The Ninth Circuit, in *Patel*, held that the *Heitland* rule as applied to the 1973 regulation was similar to the NLRB rule in *Wyman-Gordon* because "it was the prospective pronouncement of a broad, generally applicable requirement, without application of the requirement to the parties"<sup>34</sup> actually before the Board.

The reasoning of the court in *Patel* and the results reached in both decisions are significant for future immigration cases in

30. 37 Fed. Reg. 23,274 (1974), quoted in *Patel v. INS*, 638 F.2d at 1202.

31. 394 U.S. 759 (1969).

32. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

33. Section 1 of the Administrative Procedure Act provides definitions to be followed in applying the Act. 5 U.S.C. § 551 (1976). It defines adjudication as an "agency process for the formulation of an order." *Id.* § 551(7). An order is the "final disposition . . . of an agency in a matter other than rulemaking." *Id.* § 551(6). Rulemaking means an "agency process for formulating, amending, or repealing a rule." *Id.* § 551(5).

A rule is an "agency statement of general or particular applicability and future effect." *Id.* § 551(4). Thus, by tracing the definitions, it is evident that a statement of future effect is a rule and therefore not allowed in an adjudicatory proceeding.

34. *Patel v. INS*, 638 F.2d at 1203.



two important ways. First, *Patel* indicates a willingness on the Ninth Circuit's part to look outside the immigration field for guidance in immigration cases and to apply the APA to the immigration field. All too often, immigration practitioners presume conclusively that the APA does not apply to immigration cases. While it is true that the APA has been found inapplicable to deportation and exclusion *procedures*,<sup>35</sup> in other ways the APA can have a significant applicability in the immigration field, as shown by this case.<sup>36</sup>

Second, the results reached in *Bahat* and *Patel* seem to indicate an unwillingness by the Ninth Circuit to accept the Service's attempts to graft additional requirements onto statutes and regulations. In this way, these cases are similar to the recent decisions *Palmer v. Reddy*<sup>37</sup> and *Dabaghian v. Civiletti*.<sup>38</sup> In *Palmer*, the court held the Service requirement that a stepparent who petitions for her stepchild must show a "close family unit" exceeded the statutory language of section 101(b)(1)(B) of the Immigration and Nationality Act, as it defines stepchild.<sup>39</sup> In *Dabaghian*, the Service attempted to rescind the alien's permanent resident status on the ground that he was ineligible for status as the spouse of an American citizen. The court ruled that the INS could not read into the word "spouse" a requirement that the marriage be viable or subsisting.<sup>40</sup>

Undoubtedly, the Service has wide discretion in determining new principles in an adjudicative proceeding. Nonetheless, the agency must not use the adjudicative process to replace either the legislative or the regulatory process. Nor can an agency announce a rule in the adjudicative process contrary to a statute or regulation. In addition, *Patel* and *Bahat* indicate that in certain circumstances the court will find on the basis of inadequate notice that an adjudicative rule announced in one decision cannot be applied to other cases.

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35. *Marcello v. Bonds*, 349 U.S. 302 (1955). See generally 2 C. GORDON & E. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE*, § 8.12b, at 8-106 (1981).

36. See also *Parco v. Morris*, 426 F. Supp. 976 (E.D. Pa. 1977).

37. 622 F.2d 463 (9th Cir. 1980).

38. 607 F.2d 868 (9th Cir. 1979).

39. 622 F.2d at 464.

40. 607 F.2d at 871.

### C. CONCLUSION

The frustrations for immigration lawyers and aliens in dealing with the Service are great. The Service operates with a shortage of personnel and under an internally contradictory and antiquated statute while the aliens' rights and real options for legal immigration are often severely limited. It is no wonder that aliens are increasingly looking for means to bring their cases before the courts. The Ninth Circuit, in cases like those discussed above, has opened the door slightly to aliens' complaints. Immigration lawyers and aliens will certainly seek to push that door open wider in future years. It is equally certain that the Reagan administration intends to limit aliens' access to the federal court system.<sup>41</sup> The questions of the scope of judicial review of Service actions and of the propriety of Service procedures are ones which will be hotly debated in the next years both in the legislative and judicial arenas.

## II. UPDATE—*TAPIA-ACUNA v. INS*: THE NINTH CIRCUIT ADOPTS *FRANCIS*

In *Tapia-Acuna v. INS*,<sup>1</sup> the Ninth Circuit adopted the rationale of *Francis v. INS*,<sup>2</sup> in which the Second Circuit extended section 212(c) relief to an alien who is otherwise deportable under section 241(a)(11) and has not left the United States since first immigrating. Petitioner Tapia-Acuna, a lawful permanent resident alien, was convicted of possession of marijuana for sale. Subsequently, the Immigration and Naturalization Service initiated deportation proceedings under section 241(a)(11) of the Immigration and Nationality Act (the Act).<sup>3</sup> Finding petitioner de-

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41. Such proposals are found in S. 1765 as proposed to the Senate. 127 CONG. REC. S11,996-97 (daily ed. Oct. 22, 1981).

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1. 640 F.2d 223 (9th Cir. 1981) (per Ferguson, J.; the other panel members were Goodwin, J. and Skelton, D.J., sitting by designation).

2. 532 F.2d 268 (2d Cir. 1976).

3. Section 241(a)(11) provides in pertinent part:

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . . .

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of

portable, the immigration judge denied his application for section 212(c) relief.<sup>4</sup> After the Board of Immigration Appeals (the BIA) affirmed, petitioner sought review in the Ninth Circuit.

While his petition was pending in the Ninth Circuit, petitioner moved to reopen his case based on a state court order expunging his conviction. The BIA denied petitioner's request based on recent Ninth Circuit decisions that found an alien who is deportable under section 241(a)(11) of the Act ineligible for section 212(c) relief. Although the Ninth Circuit affirmed the BIA denial, the Supreme Court vacated the decision and ordered the Ninth Circuit to reconsider its position based on the Solicitor General's assertion that aliens deportable under section 241(a)(11) are eligible for section 212(c) relief.

The Ninth Circuit acknowledged the fact that although section 212(c) refers only to grounds for exclusion, it has also been readily applied to deportation proceedings. Past Ninth Circuit decisions have denied the possibility of section 212(c) relief in cases where the alien has not voluntarily departed from and returned to the United States.<sup>5</sup> A recent Second Circuit case, however, found such interpretations of section 212(c) violative of due process. In *Francis v. INS*,<sup>6</sup> the Second Circuit faced a fact situation similar to that in *Tapia-Acuna*. The *Francis* court found that because section 212(c) relief is afforded to aliens who depart and return to the United States, it should be equally available to aliens who have remained in the United States

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a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of . . . any law or regulation governing or controlling . . . the sale . . . of opium, cocoa leaves, herion, marihuana . . . .

8 U.S.C. § 1251(a)(11) (1976).

4. Section 212(c) provides that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawfully unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of [§§ 241(a)(1) to 241(a)(25)]." 8 U.S.C. § 1182(c) (1976).

5. See *Dunn v. INS*, 499 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1106 (1975); *Arias-Uribe v. INS*, 466 F.2d 1198 (9th Cir. 1972). Section 212(c) relief requires that the alien voluntarily depart and return to the United States. See note 4 *supra* for the relevant text of § 212(c).

6. 532 F.2d 268 (2d Cir. 1976).

continuously.<sup>7</sup>

The *Tapia-Acuna* court further noted that the BIA has voluntarily adopted the *Francis* rationale and rejected the previous distinction.<sup>8</sup> Several Ninth Circuit cases decided after *Francis*, however, have continued to extend section 212(c) relief only to aliens that have voluntarily departed and returned.<sup>9</sup> Rejecting these earlier decisions as having "create[d] a distinction that lacks a rational basis,"<sup>10</sup> the *Tapia-Acuna* court adopted *Francis* and extended section 212(c) relief to an otherwise eligible alien regardless of any prior departure and reentry to the United States.

*Tapia-Acuna* ends a series of Ninth Circuit decisions which have distinguished cases on the basis of a totally irrelevant consideration.<sup>11</sup> With *Tapia-Acuna*, the Ninth Circuit has caught up with the Second Circuit and the BIA and reversed an unhealthy trend in this circuit.

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7. *Id.* at 271-73.

8. See *Matter of Marin*, 16 I. & N. Dec. 581, 582 (1978); *Matter of Hom*, 16 I. & N. Dec. 112, 113-14 (1977); *Matter of Silva*, 16 I. & N. Dec. 26, 29-30 (1976).

9. *Bowe v. INS*, 597 F.2d 1158 (9th Cir. 1979); *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979).

10. 640 F.2d at 225.

11. For an excellent discussion of this issue, see Hing, *The Ninth Circuit: No Place for Drug Offenders*, 10 GOLDEN GATE U.L. REV. 1 (1980).