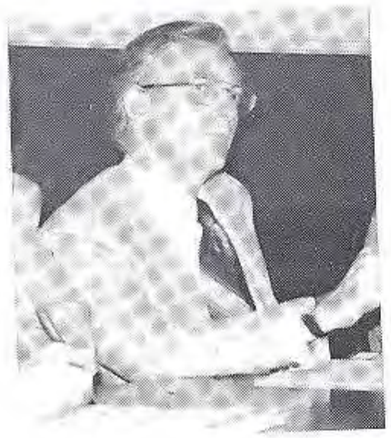
DEFERRED DEPARTURE FOR DEPORTABLE ALIENS



By LEON WILDES

Hidden in the "blue pages" of the officer's manual of the Immigration and Naturalization Service was an Operations Instruction[1] which granted "nonpriority" classification to deportable aliens whose removal from the United States would result in hardship. The program was virtually unknown to the general public and only apparent through its results to the specialized immigration bar until 1975 when it was discovered in a proceeding under the Freedom of Information Act filed in behalf of the former Beatle, **John Lennon**.[2] Lennon claimed that he was prejudiced by the government's secret handling of this type of case, in that cases involving aliens having lesser degrees of hardship than his own had resulted in permitting such aliens to remain in the United States for humanitarian reasons. He claimed that the procedures should be open to the public and that his own case should merit such classification. He succeeded on both grounds.

As a result of his lawsuit, and upon the urging of the United States Attorney for the Southern District of New York, who recognized that the program was already in the public domain, the Immigration Service issues its revised Operations Instruction and made it publicly available on April 30, 1975.

In representing Lennon in those proceedings, this author secured all of the then existing case records of nonpriority classification, constituting 1,843 cases. These cases were carefully examined and classified and the results of the study were published,[4] making the administration of the program and its results publicly available for the first time. What ensued was the birth of a new remedy for difficult or impossible cases of aliens who were clearly deportable, but in whose cases there existed humanitarian elements which would make their removal unconscionable.

The Government's Position

Since the publication of the nonpriority Operations Instructions which resulted from the Lennon litigation, the INS has consistently maintained that nonpriority status was merely an intra-agency guideline which conferred no substantive right upon an alien. The Immigration Service, while recognizing that the district director needed an administrative tool to exercise what the Service referred to as "prosecutorial discretion," nevertheless refused to acknowledge that aliens had achieved any right to apply for such benefit.[5]

> "Nor did the transfer of OI 103.1(a)(ii) from blue paper to white paper reflect an intent to initiate an application process. It merely constituted recognition that the 'secret instruction' was already so widely known that it was now in the best interest of the Service to let the world know, if it was interested, what Mr. Lennon had been suing for."[6]

Accordingly, the government has taken the position that the Operations Instruction merely sets forth publicly certain guidelines by which it might, within its own prosecutorial discretion, defer the departure of certain aliens. In doing so, it claims that the alien derives no right to remain. It was inevitable that this position would be challenged in the courts.

Conflicting Court Decisions

The first federal Court of Appeals to consider the issue was the Second Circuit in **Lennon** v. **INS**.[7] While it was not necessary that the Second Circuit actually consider the issue because Lennon was granted nonpriority classification a week before its decision was rendered, the court nevertheless noted the existence of the program. In a footnote, the Second Circuit described the nonpriority program as an "informal administrative stay of deportation." Moreover, the Court of Appeals reversed the government's determination as to Lennon's excludability, so there was no reason to reach the issue.

The Fifth Circuit, in **Soon Bok Yoon** v. **INS**,[8] held that there was no requirement that an alien be informed during the course of his deportation proceedings of the possible applicability of nonpriority status. It further held that the decision to grant or withhold such nonpriority status was within the particular discretion of the Service which had a power to create and employ such a category for its own administrative convenience without having to standardize the category or allow applications to be filed for inclusion in it. The court appeared to erroneously characterize nonpriority status as a "voluntary stay of the agency's mandate pendente lite, issued in large part for the convenience of the INS,"[9] differentiating the case from **Lennon** in that in **Yoon** "deportability is conceded and only delay is desired."[10]

It is submitted that the court misconstrued the entire purpose of the nonpriority Instruction, as the effect of invoking the Instruction is to automatically stay all action by the government, regardless of the motives of the parties involved, so long as the elements of humanitarian hardship exist. The Fifth Circuit was thus unwilling to acknowledge that the gov-

ernment had given any ground whatsoever by the publication of this Operations Instruction in the way of substantive rights for the benefit of aliens.

This view, that nonpriority status existed merely for the administrative convenience of the government, was not accepted by the Eighth Circuit. That court, in **Vergel** v. **Immigration and Naturalization Service,**[11] stayed its mandate upholding a deportation order for a period of ninety days to afford the alien an opportunity to apply to the district director for a discretionary stay of deportation on humanitarian grounds pursuant to the Operations Instruction. This action by the Eighth Circuit, while not clearly explained, is diametrically opposed to the interpretation given by the Fifth Circuit, recognizing that a humanitarian remedy is available to the alien through the district director. Impliedly, the court recognized the existence of a right on the part of the alien which may be requested of the district director.

The Nicholas Case

The Ninth Circuit faced the issue more squarely than any other previous case in **Nicholas** v. **Immigration and Naturalization Service.**[12] In that case the petitioner asked the Court of Appeals to overrule the district director's decision denying nonpriority status. Consistent with its position in the Lennon case, the INS had maintained that nonpriority status should be viewed as comparable to prosecutorial discretion and that in order for a reversal to be justified, a showing had to be made that an established pattern of treatment of others similarly situated was departed from without reason **and** that the decision was based upon impermissible considerations such as race or religion. The petitioner, on the other hand, advocated a strict standard, which is the test utilized to review discretion in suspension of deportation cases under Section 244(a) of the Immigration and Nationality Act. This standard, cited in **Rassano** v. **Immigration and Naturalization Service,**[13], requires only that the court find the decision "arbitrary or capricious or an abuse of discretion."[14]

The court concluded that this Operations Instruction confers "a substantive benefit upon the alien, rather than setting up an administrative convenience."[15] It distinguished the case from **Yan Wo Cheng** v. **Rinaldi,**[16] finding that the Instruction clearly and directly affects substantive rights and in fact very closely parallels the suspension of deportation statute in that "its effect can be final and permanent, with the same force as that of a Congressional statute."[17]. The court found that the sole basis for the granting of relief under the Operations Instruction is the presence of humanitarian factors and that the statute is directive in nature — "the District Director *shall* recommend."[18] It also found that the effect of such relief upon a deportation order is to defer it indefinitely. Clearly this establishes on the part of the alien a substantive right within the discretion of the district director paralleling the one which is established by statute in Sec. 244(a) of the Immigration and Nationality Act.

In holding for the petitioner, the court stated that if a showing could be made that the district director's decisions deviated from the norm and that such deviation was arbitrary or capricious, it must be reversed. However, the court found Nicholas unable to demonstrate the norm with regard to nonpriority decisions and thus unable to prove deviation from

(continued on page 10)

[1]Immigration and Naturalization Service, U.S. Department of Justice, Operations Instructions, Regulations and Interpretations (1952, as revised 1979, hereinafter cited as Operations Instructions).

[2]**Lennon** v. **Richardson**, 378 F.Supp. 39 (S.D.N.Y. 1974).

[3]Operations Instructions, supra, Note 1, Sec. 103.1(a)(ii), at 371. When determining whether a case should be recommended for deferred action category, consideration should include but not be limited to the following: (1) advanced or tender age; (2) number of years presence in United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States — effect of expulsion; (5) criminal, immoral or subversive activities or affiliations — recent conduct. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate.

[4]See Wildes, The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 San Diego L.Rev. 42, 53 n.6 (1976). See also Wildes, The Nonpriority Program of the Immigration and Naturalization Service (pts. 1 & 2), 53 Interpreter Releases 25, 33 (1976).

[5]See Wildes, The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules? 17 San Diego L.Rev. 99 (1980).

[6]Affidavit of Robert L. Stewart, Associate Commissioner, Enforcement, INS dated April 26, 1977 in **Ah Hou Cheong** v. **INS**, U.S. Dist.Ct. for the Dist. of Oregon, Civil Action No. 77-139. In the same affidavit, the affiant explains that the O.I. was amended December 31, 1975 by replacing "nonpriority" with the words "deferred action" as a result of the directive of the Commissioner, and solely because the term "nonpriority" displeased him.

[7]527 F.2d 187 (2d Cir. 1975)

[8]538 F.2d 1211 (5th Cir. 1976)

[9]Id. at 1213

[10]Id.

[11]536 F.2d 755 (8th Cir. 1976)

[12]590 F.2d 802 (9th Cir. 1979)

[13]492 F.2d 220 (7th Cir. 1974), cert. denied, 413 U.S. 1113 (1975)

[14]Id. at 227

[15]**Nicholas** v. **I.N.S.**, 590 F.2d 802, (9th Cir. 1979)

[16]389 F.Supp. 583 (D.N.J. 1975)

[17]**Nicholas** v. **I.N.S.**, supra.

[18]Operations Instructions, See Note 3, supra.

[19]Supra, Note 2.

on the ground that he had failed to establish extreme hardship. The Court upheld the suspension denial, but reversed, and remanded for the exercise of discretion in relation to the adjustment application.

The Court pointed out that the Board, in **Heitland**, had attempted to add a requirement not in the regulations. While it recognized that an administrative agency was not precluded from announcing new principles in an adjudicative proceeding, it found that the Board had not properly done so in **Heitland** and had abused its discretion by circumventing the rule-making procedures of the APA. Therefore, its job-creation criterion could not properly be applied here. It further held that because of the ambiguity of the **Heitland** decision as to whom the criterion would be applied, and of conflicting INS information, it was impossible for someone in Patel's position to know exactly what was required of an investor, and this was a further reason not to apply the **Heitland** standard.

EVIDENCE IN ASSISTING ALIENS TO ENTER FOR GAIN CASE
Ontiveros-Aldana v. INS,
No. 80-1181, September 25, 1980 (5th Cir. - Unpublished)

The alien was found deportable under 241(a)(13) and denied voluntary departure as one who could not establish good moral character. He was admitted for permanent residence on 2/24/78, and arrested on 5/8/78, in Texas, with several illegal aliens in his car. In upholding the deportation order, the BIA relied in part on a statement taken from him by an immigration officer, in Spanish, but written in English and signed by the alien, in which he admitted to having agreed to take the aliens to Dallas for $300 each, to be paid after each found employment. On review, the alien challenged the sufficiency and propriety of that statement, arguing that it was written in a language he couldn't understand and therefore couldn't intelligently approve the statement as his own. The Court stated:

"Although the question has not been squarely faced in the Fifth Circuit (footnote omitted), there is authority elsewhere that casts grave doubt on the probative value of such a statement. The affiant who must sign a statement not in his own language is at the mercy of the misunderstandings and mistranslations of an immigration officer who is his adversary in the investigation leading to deportation. Such a statement — standing alone — may be inadequate to meet the government's burden. See **Guzman-Guzman v. INS**, 559 F.2d 1149 (9th Cir. 1977); Gonzales-Gomez v. INS, 450 F.2d 103 (9th Cir. 1971); **United States v. DeLeon**, 412 F. Supp. 89 (D.V.I. 1976)." However, the Court found that there was sufficient evidence in the record, without the statement, to support the finding of deportability. It also affirmed the finding that he was statutorily ineligible for voluntary departure because 101(f)(3) prohibits a finding of good moral character where one has helped an alien to enter the U.S. illegally for gain.

Deferred Departure for Deportable Aliens

(continued from page 8)

the norm. Nicholas had submitted only the findings of the study by this writer based upon the data obtained in the Lennon litigation. The court rejected the study as an inadequate basis, pointing out that the article digested only the cases in which nonpriority status was **approved**, and did not contain any statistics as to **denied** cases.

The implications of a Nicholas decision are clearly far-reaching. The INS has evolved a program conferring a substantial benefit upon aliens which, apparently, at least in the view of two distinguished circuit courts, has the force and impact of a rule and perhaps even that of a statute. All this notwithstanding, the Immigration Service continues to play down the impact of this important program.

The Denied Cases

It is ironic to note that subsequent to the decision in **Nicholas** v. **INS**, pursuant to an agreement reached between counsel for John Lennon and the government regarding the ongoing litigation in **Lennon** v. **Richardson**,[19] the freedom of information action, counsel received the record copies of all denied nonpriority decisions for a six-month period from May 1976 to November 1976 in the North Eastern region. The period of six months was based upon the amended regulation's prescription that records be kept for no longer than six months under the program. Not a single case had been rejected on its merits! In each case the Regional Commissioner referred the record back to the district director pointing out why nonpriority status was not needed, either because deportation had already been stayed or because alternative relief was available. It would appear, therefore, that there is absolutely no data available from which one might infer the norm or standard for reaching a nonpriority decision other than the data analyzed and published by the author in his original study which was presented to the Court of Appeals in the Nicholas case. Nonpriority records of denied cases are still presumably retained by the Regional Commissioner for only six months.

The Need for Further Litigation

It is obvious that the government will not move from its consistently held position that the Operations Instruction is merely a useful administrative tool, conferring no rights upon an alien. Further litigation will clearly be required to resolve this issue. The court in Nicholas came close to reaching the desired result. It is to be hoped that future litigation will accomplish this purpose.