Exclusion and Deportation: Some Avenues of Relief for the Alien

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This Article examines statutory remedies available to aliens whose violation of the immigration laws would ordinarily subject them to deportation or exclusion. Mr. Griffith analyzes sections 241(f), 212(c), and the suspension of deportation provisions of the Immigration and Nationality Act in conjunction with his evaluation of judicial interpretation of congressional intent. He concludes that troublesome construction of the Act has been caused by different judicial approaches to the purposes and philosophy of the immigration legislation. The author highlights the difficulties, discusses the causes and effects, and proposes solutions to problematical application of the Act.

INTRODUCTION

As the influx of immigrants continues unabated,[1] many aliens who are illegally in the United States yearn to become lawful permanent residents. For some aliens the prospect of expulsion or deportation seems more real than imagined as a result of their protracted stay in this country beyond the authorized period.[2] Others who have become

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1. The total number of immigrants admitted to the United States in the fiscal year 1975 was 386,194. Between the fiscal years 1961-1970, the total number admitted was 3,321,677. [1975] INS ANN. REP. 31.

2. During the fiscal year 1975, 679,252 aliens were expelled for one reason or another. Of these, 23,438 were deported and the remaining 655,814 were required to depart. *Id.* at 90. An alien who is coming to the United States must qualify either for an immigrant or non-immigrant visa. If he is a non-immigrant, this individual is admitted for a specific period of time and must seek an appropriate extension if a longer stay in the United States is desired. If the alien

permanent residents suddenly face deportation because of an infringement of the immigration laws subsequent to their entry.[3] The difficulty occasioned by the implementation of a deportation order can be readily appreciated, particularly if the affected alien has established close family relationships within the United States. The experience is no less disconcerting if the alien is excluded on his return to these shores after a temporary journey abroad.[4] Congress was well aware of the competing equities when it provided for statutory relief to some aliens whose violation of the immigration laws would ordinarily subject them to deportation or exclusion.

This Article examines a few of the statutory remedies available to such aliens. Some relief is available when the overriding consideration is close family relationships. Other relief is available when an alien has resided in the United States for a certain period of time and departure would constitute considerable hardship for him or his family. While Congress' objective is clear in most cases, sometimes judicial interpretation of the applicable statutory provisions results in denial of an alien's eligibility. It might be instructive to peruse the judicial trend in order to ascertain whether Congress' intentions are being honored.

SECTION 241(f) AND THE ALIEN

The historical foundations of section 241(f)[5] of the Immigration and Nationality Act (Act) suggest that the section was enacted to

lingers here without permission, he is deemed to be deportable for being present in the United States in violation of the law. Immigration and Nationality Act § 241(a)(2), (9), 8 U.S.C. § 1251(a)(2), (9) (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act]. Most of the aliens who extend their stay without permission, and are subsequently apprehended, are allowed to leave the country at their own expense, thereby avoiding deportation. The principal disability relating to an alien's deportation is the alien's inability to return to the United States without permission of the Attorney General. *Id.* § 212(a)(16)-(17), 8 U.S.C. § 1182(a)(16)-(17).

3. The 18 general classes of deportable aliens include immigrants and nonimmigrants alike, and the statute covers a wide range of situations, from an alien's becoming a public charge to an alien's conviction of a crime involving moral turpitude. *Id.* § 241(a), 8 U.S.C.A. § 1251(a) (West Supp. 1977).

4. The 32 general classes of excludable aliens also cover a very wide range. Technically, every time an alien applies for admission the alien is subject to exclusion if he falls within one of the classes. *Id.* § 212(a), 8 U.S.C. § 1182(a) (1970), *as amended by* Act of Oct. 12, 1976, Pub. L. 94-484, § 601(a), 90 Stat. 2300; Act of Oct. 20, 1976, Pub. L. 94-571, §§ 5, 7(d), 90 Stat. 2705, 2706.

5. *Id.* § 241(f), 8 U.S.C. § 1251(f), provides as follows:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

provide relief in certain cases to aliens whose fraudulent entry into the United States made them subject to deportation by the Immigration and Naturalization Service (INS). The intent of Congress was to exclude such aliens from this harsh sanction if they had subsequently established close family relationships with American citizens or permanent residents. A literal application of the section would restrict the benefits of section 241(f) to those aliens who are charged with entry in violation of section 212(a)(19)[6] because of their willful misrepresentations.[7] The difficulty arises because an alien's willful misrepresentation may result in the issuance of an invalid entry document. In this event, the INS can seek deportation through section 241(a)(1)[8] based on the alien's excludability at entry under section 212(a)(19) because of the fraud or under section 212(a)(20)[9] because of the invalid visa. In this situation, it has been argued that the preferment of charges by the INS under section 212(a)(20) does not allow the alien to qualify for the benefits of section 241(f).[10] The basis for that contention is rooted in the theory that the possession of an invalid document or visa is a different ground for deportation, and that section 241(f) is available to the alien only if the deportation charge under section 241(a)(1) is predicated on excludability at entry because of a section 212(a)(19) fraud.

The precursor of present § 241(f) was § 7 of the 1957 Act, which accommodated not only those aliens who had secured entry by fraud and had subsequently established close family relationships, but also those alien refugees who had made representations in securing entry into the United States to avoid persecution within their native lands. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640-41.

6. I. & N. Act § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970) provides as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . .
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> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact.

7. INS v. Errico, 385 U.S. 214 (1966).

8. I. & N. Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970), provides as follows:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

9. *Id.* § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970). Under this section, an alien is not eligible for admission unless he possesses a valid visa or other valid entry document.

10. Escobar Ordonez v. INS, 526 F.2d 969 (5th Cir. 1976); Castro-Guerrero v. INS, 515 F.2d 615 (5th Cir. 1975).

The same problem arises in other ways. It may be that the alien has secured entry into the United States by a false representation of United States citizenship. In this event, he would be deportable not only under section 241(a)(1) but also under section 241(a)(2).[11] Under the former section, he would be within the class of aliens excludable at the time of entry because of willful misrepresentation; under the latter section, he would be excludable because of entry into the United States without inspection. In the case of entry without inspection, an alien could not rely on the relief provisions of section 241(f) because such an entry has been regarded as an independent ground for deportation which is not at all allied with section 241(f).[12]

It is submitted that in cases like these the alien should benefit from section 241(f) and that the existence of separate deportation grounds in the statutory scheme should not be used to avoid the application of section 241(f). This is suggested because the basic inquiry should be whether the alien has entered the United States through fraudulent conduct, whether he was otherwise admissible at the time of that entry, and whether he is the spouse, parent, or child of a United States citizen or of a permanent resident. If the deportation charge is directly related to the fraud, then the alien should still be deemed eligible for statutory relief.

In *INS v. Errico*,[13] two aliens had secured entry into the United States based on misrepresentations which granted them priority status under the immigration scheme. Instead of proceeding for deportation under the section dealing with fraud or misrepresentation, the INS proceeded under another section which dealt with the documentary requirements of entering aliens. The Court correctly concluded that section 241(f) would be operative to waive any deportation charge that resulted directly from the misrepresentation, even if the INS relied on another provision of the immigration law to effect the alien's deportation.[14] Furthermore, the Court interpreted the "otherwise admissible" requirement in a way that permitted the

11. There are 18 general classes of deportable aliens. An alien who has engaged in fraud may be deportable based not only on excludability at entry but also on presence in the United States in violation of law. Thus, a single act may give rise to preferment of charges by the INS under alternative sections. I. & N. Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970) provides as follows:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
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> . . . .
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> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States.

12. Reid v. INS, 420 U.S. 619 (1975).
13. 385 U.S. 214 (1966).
14. *Id.* at 217.

statute to do its work. This requirement permitted the alien to avoid deportation if there was no other disabling feature barring admission.

A similar question arose in *Reid v. INS*.[15] In that case, the alien had falsely represented that he was a United States citizen and had secured entry into the United States. The INS did not seek deportation on the basis of the alien's excludability at entry but relied instead on the theory that the alien had entered the United States without inspection in violation of section 241(a)(2).[16] The Court in *Reid* found that the alien could not depend on section 241(f) to avoid deportation because his transgressions had met the independent statutory test of section 241(a)(2).

An interesting feature of section 241(a)(2) is that it subjects an alien to deportation not only if he entered without inspection, but also if he is in the United States in violation of the immigration law. An appropriate query is whether the INS should be allowed to avoid the application of section 241(f) by seeking the alien's deportation under section 241(a)(2). It is submitted that the existence of such discretion in the INS abrogates a remedy which Congress apparently intended for those who, having been otherwise admissible at entry, have established close family relationships within the United States.

The commission of fraud will of necessity result in either the issuance of invalid documents or the entry of the alien into the United States without appropriate documentation. In such a case, it would seem that the chain of events begins with the alien's fraudulent conduct and, therefore, the alien's subsequent illegal status ought not to be permitted to obscure the alien's initial transgression. One would think that the admonition of the Supreme Court in *Errico* would be followed concerning the application of section 241(f) to any charge resulting directly from the alien's misrepresentation.

It is here urged that an alien who has avoided inspection as an alien or who is in the United States in violation of the immigration laws should not be automatically deemed ineligible for the protection of section 241(f). The INS might suggest that the alien is illegally in the United States because he has not secured a valid document and consequently his deportation should be predicated on section

15. 420 U.S. 619 (1975).
16. *Id.* at 622.

241(a)(2). However, the invalidity of the particular document may rest on the fraud committed by the alien at the time of issuance of the visa or at the time of entry. It would seem, therefore, that the appropriate method of determining the alien's eligibility for relief is to concentrate on the origin of the invalid document. In the same way that the *Errico* decision prevented the INS from denying the alien the protection of section 241(f) simply because he did not meet the appropriate documentary requirements, the alien should similarly not be denied protection simply because the INS may deem him to be in the United States in violation of another section.[17]

When it is recalled that the basic thrust of section 241(f) is to allow aliens with close family relationships to remain in the United States despite their fraudulent conduct,[18] then any ambiguity in statutory language should be resolved in favor of the alien. Therefore, fraudulent conduct resulting in the alien's illegal status in the United States or in the alien's entry into the United States through superficial interrogation should not deprive him of the remedy of section 241(f).

An alternative interpretation is entirely possible. First, it may be suggested that an entry without inspection can be restricted to those circumstances when the alien has entered the United States surreptitiously and, therefore, has avoided the detection of the immigration authorities. Second, the language of section 241(a)(2) dealing with an alien's illegal status in the United States can easily apply even though an alien may not have committed fraud in securing a visa or entry. If an alien remains in the United States beyond the period permitted by the INS, he is in violation of the immigration law and is therefore deportable under section 241(a)(2). Thus, the section is fully operative within the statutory scheme under this kind of interpretation.

It is not to be assumed that the mere perpetration of fraud concerning American citizenship automatically results in an unchallenged entry into the United States.[19] At first blush the language "entry

17. In *Errico*, the aliens' fraud resulted in their avoidance of the quota restrictions imposed by the I. & N. Act, and they were, therefore, deportable under § 241(a)(1) because they were excludable at the time of entry. Mr. Errico had gained his first preference quota status because of his misrepresentation that he was a skilled mechanic, and the other alien involved, Miss Scott, gained non-quota status because of her purported marriage to a United States citizen. Neither of their visas was therefore valid. I. & N. Act § 211(a), 8 U.S.C. § 1181(a) (1970).

18. H.R. REP. NO. 1086, 87th Cong., 1st Sess. 37 (1961). See also, H.R. REP. NO. 1199, 85th Cong., 1st Sess. 11 (1957); S. REP. NO. 1057, 85th Cong., 1st Sess. 11 (1957), for the historical significance of the predecessor statute, § 7 of the 1957 Act.

19. I. & N. Act § 235(a), 8 U.S.C. § 1225(a) (1970), provides in part as follows:

> Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of

without inspection" suggests that the alien has avoided all interrogation and has somehow entered the United States without being subjected to any inquiry from the immigration authorities. Surely if the alien feigns citizenship and is admitted to the United States on this basis, it cannot be said that he has entered without inspection. The alien must convince some authority at the point of entry that he is indeed a citizen of the United States; and even though such an inspection may be perfunctory, it is indeed a subjection to interrogation. Furthermore, it is unreasonable to suggest that an entry without inspection is the same as an entry with partial inspection. Therefore, when an alien is subjected to brief questioning because of his asserted American citizenship, he has in fact had an inspection, although that inspection is not as thorough as it might have been if the assertion had not been made.

Even in the case of aliens entering as aliens, immigration authorities may engage in gradations of inspections, depending on the particular alien and his country of origin.[20] It cannot be said that an

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> time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 1182 . . . .

This section has a caption "Inspection by Immigration Officers: (a) Powers of Officers." An inspection officer is given broad discretion in determining the status of any person seeking entry into the United States. In that sense the officer is engaging in an inspection. If the inspection provides the wrong information or no information at all, this has to do with the success or failure of the inspection in eliciting the required information. It is the alien's successful ploy that aborts a full inspection. But a premature termination of the inspection process is by no means synonymous with an entry without inspection. If the requirement is that the alien must be inspected as an alien, then it is respectfully submitted that § 241(a)(2) ought to stipulate that the inspection required is one concerning the alien's entry in his capacity as an alien.

20. For example, the INS is engaged in the Caribbean Investigations Coordination Program to prevent undesirable aliens from Latin America from entering the United States. Therefore, it is probable than an alien from that area may receive closer attention than an alien from another part of the world which does not send many visitors to this country. *See* [1975] INS ANN. REP. 17; 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 3.16d (rev. ed. 1975). The inspection powers of immigration officers, however, are not restricted to aliens. Immigration officers may interrogate any person coming into the United States about his purpose for coming, the period of time he intends to remain here, and may elicit any other information which would be helpful in determining whether that individual is an American citizen or an alien. I. & N. Act § 235(a), 8 U.S.C. § 1225(a) (1970). Such authority is contained in a general section dealing with the inspection powers of immigration officers. While it must be conceded that the inspection ritual for aliens is much more extensive than that

alien who is admitted into the United States without an intensive interrogation or inspection has not, therefore, been inspected within the meaning of the statute. Why then should it be any different when the same alien is admitted on the basis of a claim of American citizenship? If indeed an allegation of American citizenship is regarded by Congress as a far more serious indiscretion than the general fraud contemplated in section 241(f), then that exception should receive special recognition in the statute and should not be left to judicial interpretation.

Section 241(f) does not restrict its relief only to those aliens who have secured visas by fraud. It relates also to those aliens who secured entry by fraud.[21] Thus, its coverage may extend to aliens who possess no documents because of their success in avoiding the documentary requirements of entering aliens through a false assertion of citizenship. It is not entirely clear why Congress would have intended to exclude fraud associated with the assertion of citizenship and did not specifically set it out as an exception in the section. Because one type of fraud might conceivably facilitate matters for the deceptive alien should be no reason for treating it differently in construing the statute unless it can be clearly shown that this was the intent of Congress. The type of fraud which results in less vigilance by the immigration authorities should not necessarily be deprived of the protection of section 241(f).

Since the *Reid* decision, at least one court has granted an alien the benefit of section 241(f)—in spite of the INS's preference for a charge of improper documentation. The alien in *Persaud v. INS*[22] was not entitled to enter the United States as an immigrant because his sponsoring wife had died before his entry.[23] Because he did not

for citizens, there is sufficient language in the section to suggest that Congress did not intend that persons alleging citizenship could wander aimlessly through the ports of entry into the United States. If an alien has entered the United States at a place other than one designated by the Attorney General, it is likely that he has entered without confrontation and without subjection to official enquiry. If the inspection requirements of § 241(a)(2) are construed in this way, the language of the section becomes more meaningful.

21. I. & N. Act § 241(f), 8 U.S.C. § 1251(f) (1970). The point is that fraud involved in the acquisition of documents and in an entry without documents are both covered. If an alien relies on a false assertion of citizenship, the alien is looking towards entry without the documents traditionally required of aliens. It is stretching the imagination to suggest that Congress intended to exclude a fraudulent entry based on a false citizenship claim but somehow did not specifically say so.

22. 537 F.2d 776 (3d Cir. 1976).

23. Since the alien's deceased wife was an American citizen, the alien was an "immediate relative" and could be admitted as a lawful permanent resident without regard to the numerical limitations of the I. & N. Act. However, since his wife died before his admission, his status as an "immediate relative" ended and he was not therefore entitled to admission on that basis. *See* I. & N. Act §

possess the proper documentation for entry as an immigrant and he had also been fraudulent in not informing the authorities of a change in circumstances, the INS opted for deportation on the basis of the alien's excludability at entry under sections 212(a)(19) and 212(a)(20).[24] The court should be applauded for its recognition of the principle laid down in *Errico* that section 241(f) waives any deportation charge that results directly from fraud regardless of the section under which the charge is brought.[25] In this respect, it must be said that no tribunal has demonstrated why an alien must be deprived of section 241(f) benefits simply because the fraud perpetrated has resulted in a violation of another section of the immigration law. In *Persaud*, the alien's entry into the United States and his subsequent illegal status were occasioned directly by his assertion of a relationship which had ceased to exist. In view of these circumstances, the court was correct in not permitting its attention to be diverted to other immigration violations caused essentially by the alien's fraud.[26] In any consideration of the operative effect of section 241(f), these violations should be regarded as subsidiary to the main issue. This is not to suggest that an alien is any less blameworthy for his infringements. But within the context of the Act, it is a matter of deciding whether the congressional purpose to preserve family unity can be thwarted by a retreat to other obscure provisions which flow directly from the alien's fraud, which is itself forgiven by section 241(f).

The spectre of *Reid* reappeared recently in *Cacho v. INS.*[27] In that case an alien who was already married wed an American citizen and, therefore, he was able to enter the United States as her immediate relative.[28] Because of his alleged status, the alien was not required to

201(a), (b), 8 U.S.C.A. § 1151(a), (b) (West Supp. 1977). Sections 201 and 202 have been amended by the I. & N. Act Amendments of 1976, Pub. L. No. 94-571, § 2 & 3, 90 Stat. 2703, but those amendments would not have affected the alien's status in this case.

24. The § 212(a)(19) basis referred to the fraud committed because the alien did not inform the INS of the change in his circumstances occasioned by his wife's death. The § 212(a)(20) basis rested on the alien's visa, which became invalid once he was no longer the spouse of an American citizen. I. & N. Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970); *id.* § 212(a)(19), (20), 8 U.S.C. § 1182(a)(19), (20).

25. 537 F.2d at 778, quoting appropriate language from *Errico*.

26. *Id.* at 779. The court regarded a § 212(a)(20) violation as an offense which is included in the § 212(a)(19) violation. The fraudulent act caused the visa to take on an aspect of invalidity.

27. 547 F.2d 1057 (9th Cir. 1976).

28. An immediate relative is admissible without regard to any numerical limitations. I. & N. Act § 201(b), 8 U.S.C. § 1151(b) (1970).

seek a labor certification. When the INS ascertained the alien's fraud, it sought deportation under section 241(a)(1), based on the failure of the alien to obtain a labor certification under section 212(a)(14)[29] and also on the alien's invalid immigrant visa under section 212(a)(20).[30] Although the court took the view that *Reid* did not prevent the operation of section 241(f) in connection with the section 212(a)(20) charge, it found the alien deportable under section 212(a)(14) because of the missing labor certification.[31]

Although the court was correct in its decision on the application of section 241(f) to a charge of deportability based on the exclusion provisions of section 212(a)(20), it is submitted that the court should have applied section 241(f) in the same way so as to qualify the alien for relief as a result of his failure to comply with section 212(a)(14). It must be noted that as an immediate relative of a United States citizen, the alien was not required to seek labor certification in order to enter the United States,[32] and that if section 241(f) forgave the fraud surrounding his marriage, then it would seem that the forgiveness of that fraud should carry with it the forgiveness of his failure to seek the necessary labor certification. If the fraudulent act of which the alien was accused had not been queried, the alien would have been admissible without a labor certification. How then can the alien be forgiven for his violation and at the same time the labor certification requirement be imposed as a condition of that forgiveness? It would seem that such an act would constitute an empty gesture for purposes of satisfying the statute.

The correct approach to the application of section 241(f) would be to treat as fulfilled that condition around which the alien's fraud revolves and to look to other requirements of the immigration law to fulfill the "otherwise admissible" ingredient. Thus, the court in *Cacho* should have paid closer attention to the *Errico* doctrine, for there seems to be a closer comparison between the quota requirements discussed in that case and the labor certification requirement

29. With certain exceptions, aliens coming to the United States to work must obtain certification from the Secretary of Labor that there are not enough workers available here to perform the same work. If Mr. Cacho's marriage had been valid, he would not have required labor certification because he would have fallen within one of the exemptions as the spouse of an American citizen. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14).

30. *Id.* § 212(a)(20), 8 U.S.C. § 1182(a)(20). This section renders excludable an alien who does not have valid documentation at the time entry is sought.

31. 547 F.2d at 1062. It must be pointed out that the alien had divorced his prior wives and had married a permanent resident alien subsequent to his entry. That union established the relationship necessary for the invocation of § 241(f).

32. *See* note 29 *supra*. The 1976 Amendments would not change this portion of the law. I. & N. Act Amendments of 1976, Pub. L. No. 94-571, § 5, 90 Stat. 2705 (codified at I. & N. Act § 212(a)(14), 8 U.S.C.A. § 1182(a)(14) (West Supp. 1977)).

of *Cacho*. In suggesting *Errico* as the appropriate precedent for resolution of a case like *Cacho*, one must necessarily part company with *Reid* because *Reid* recognized *Errico* as extending section 241(f) to grounds of excludability under section 212(a)(19) only. Such a restrictive reading of *Errico* would have the effect of absolving the alien in *Cacho* of his misconduct, but at the same time not regarding him as the spouse of an American citizen at entry. Thus, he would have had to seek the labor certification in order to enter the United States.

It is not clear why the *Cacho* court was able to see a distinction between the valid immigrant visa requirement and the labor certification requirement for purposes of the application of section 241(f).[33] The reason that the alien did not have a valid immigrant visa was because he was not validly married to his purported American wife. The reason that he did not have any labor clearance was that it was not required if his marriage to this American was a valid one. It was appropriate then to treat the labor certification requirement as if it had been a part of the general documentary requirements for entering aliens. In this respect, it can be more readily seen that the alien's fraudulent conduct resulted in a dispensation of the labor certification requirement because of the status which he claimed.[34] It is suggested that in ignoring this fact, the court in *Cacho*[35] relied heavily on the Court's contention in *Reid* that section 241(f) does not apply where the INS prefers a ground for deportation other than one based on the excludability provisions of section 212(a)(19).

There is no doubt that *Reid's* construction of *Errico* misled the *Cacho* court into thinking that the section 241(f) waiver did not apply to a section 212(a)(14) exclusion simply because the latter section does not involve quotas. The court in *Cacho* cannot be

33. 547 F.2d at 1061-62. The court felt that § 212(a)(14) dealt with an independent ground for the alien's exclusion—that is, the state of the labor market. But if the alien had procured labor certification by fraud, would he then not be entitled to § 241(f) consideration? By the same token his marriage to an American citizen removed the labor certification requirement and therefore, if the fraud underlying that marriage is forgiven, the correlative labor certificate should also be forgiven if § 241(f) is to have any effect.

34. If the alien's marriage was regarded as valid, so that the labor certificate was dispensed with, then there should be no problem about § 241(f) relief. The labor certificate would not be necessary if the alien was the spouse of an American citizen. This approach is very similar to avoiding quota requirements as in *Errico*.

35. 547 F.2d at 1061.

criticized too harshly for this approach because *Reid* did in effect place that construction on *Errico*; and it is unfortunate because the latter Court was quite prepared to grant a section 241(f) waiver where the charge resulted directly from the alien's fraud, despite the INS's dependence on another section. It is questionable indeed whether *Errico* should be read as restricting the waiver to grounds of excludability predicated on section 212(a)(19) only. Neither should the waiver be restricted to fraud dealing with quota requirements.

Further evidence may be garnered for the proposition that section 241(f) relief is not restricted to the case where deportation is based on the cognate provisions of section 241(a)(1) and section 212(a)(19). A reflective look at section 241(c)[36] will indicate that the INS will regard an entry as questionable if the marriage which formed the basis for the issuance of the immigrant's visa was entered into less than two years before the entry and terminated less than two years thereafter. The interesting feature of section 241(c) is that unless the alien can establish to the Attorney General's satisfaction that the marriage was not intended as a vehicle for evading the immigration laws, the alien is deportable not only under section 241(a)(1) because of his excludability at entry under section 212(a)(19), but also under section 241(a)(2) as an alien who is in the United States in violation of the immigration laws. Thus, within this very section dealing with the classes of deportable aliens there is an acknowledgment that a single fraudulent act may constitute grounds for deportation under two subsections of section 241(a). If this is to be read, therefore, as providing a choice for the INS to select the appropriate section for deportation based on the alien's fraudulent marriage, there is a stronger case for an appropriate amendment to section 241(f).

Section 241(c) provides some basis for the view that as far as section 241(f) is concerned, sections 241(a)(1) and 241(a)(2) are not necessarily independent grounds for deportation.[37] It is evident that the same fraudulent marriage may lead to deportation on two grounds: sections 241(a)(1) and 241(a)(2). Thus the Court's rationale in *Reid* that entry without inspection is a wholly independent basis for deportation is not quite convincing when considered in relation to

36. I. & N. Act § 241(c), 8 U.S.C. § 1251(c) (1970), creates a presumption of fraud with respect to a marriage that takes place within two years before, and is terminated within two years after the alien's entry.

37. It was important in *Reid v. INS* that the Court stressed the independence of the ground in § 241(a)(2) upon which the INS relied for the alien's deportation. 420 U.S. at 623. It is noteworthy, therefore, that § 241(c) regards an entry resulting from a fraudulent marriage as a basis for deportation under § 241(a)(1) because of § 212(a)(19) excludability and also under § 241(a)(2). But both of these bases depend on the same fraudulent act, and therefore, in that sense, they cannot be truly independent.

the requirements of section 241(f). The difficulty in acknowledging section 241(a)(2) as a separate ground for denying the alien the remedies of section 241(f) is based on the fact that the Court rested that independence on the theory that the alien could be deportable for having entered without inspection regardless of whether exclusion was warranted at the time of entry. But the relevant inquiry ought to be whether the ground on which the INS has depended for deportation is rooted in the alien's fraud or willful misrepresentation. Thus, even if the alien's false claim of citizenship can by any stretch of the imagination constitute an entry without inspection, it is suggested that deportation under section 241(a)(1) based on excludability at entry should be the governing consideration in deciding whether the relief provisions of section 241(f) should be available.

The mere fact that an alien can be deported because he entered without inspection without being excludable at entry does not mean that the alien should be denied whatever relief is available where he was excludable at entry and also entered without inspection or is within the United States in violation of the immigration law. There are, in fact, situations where the grounds for deportation are indeed separate and independent, but they must be distinguished from situations where a single fraudulent act might constitute several grounds for deportation because of the peculiar language of the immigration statutes.[38] Therefore, an alien who is deportable because of a fraudulent marriage mentioned in section 241(c) should qualify for section 241(f) relief even though subsection (c) does mention that he would also be deportable for being present in the United States in violation of section 241(a)(2).

By the same token, it must be recognized that an alien can be within the United States in violation of the law without having been excludable at the time of entry.[39] If this is so, then section 241(f) can be interpreted to exclude such an alien without doing violence to the language of section 241(a)(2). It all reverts to the basic tenet of *Errico*

38. Section 241(f) says that the provisions of § 241 relating to the deportation of aliens on the ground of their excludability because of fraud does not apply in certain cases. The provisions referred to must mean subsections (a)(1) and (c). Therefore, even if the INS could charge an alien with violation of § 241(a)(2) because of the language in subsection (c) dealing with the alien's illegal status in the United States, it suggested that § 241(f) should still relieve that alien because it specifically refers to the "provisions" of § 241. I. & N. Act § 241(f), 8 U.S.C. § 1251(f) (1970).

39. For example, if an alien remains beyond his permitted time, the alien is in violation of law.

that the section should be applied where the basis for deportation is a direct result of the fraud. It is suggested, therefore, that the appropriate interpretation of section 241(c) is that an alien engaging in a fraudulent marriage might still be spared the sanctions of deportation if he has met the other requirements of section 241(f) despite the fact that he may also be deemed deportable under section 241(a)(2) as being in the United States in violation of law. Technically, this is the only reasonable way of interpreting section 241(f), and the treatment of an alien's fraudulent conduct with respect to the marriage situation mentioned in 241(c) indicates that section 241(f) relief was not intended to be circumvented by the INS's assertion of a claim that the alien has violated some other part of the immigration law which would deny him the remedy which the section was intended to provide.

When all is said and done, the key to the applicability of section 241(f) should be whether the charge results directly from the alien's misrepresentation; and the substantive issue should not be obscured by the INS's preference for a charge under a different section.[40] If this approach is not followed, the INS could be in the enviable position of deciding for itself whether a particular alien should have the benefit of section 241(f) simply by bringing the appropriate charge under section 241(a)(1) instead of section 241(a)(2).[41] After all, the INS need only rely on the language of section 241(a)(2) which provides for the deportation of the alien if he is in the United States in violation of any law. That would be a sure method of subjecting every alien who would ordinarily benefit from section 241(f) to the harsh penalty of deportation simply because of the language of section 241(a)(2).

40. This is the point raised by the court in Cacho v. INS, 547 F.2d 1057, 1061 (1976). Courts should not be misled simply because an alien's fraud may eventually result in more than one violation of the Act. In this respect the court in *Cacho* recognized that a fraudulent marriage would also result in a § 212(a)(20) violation because of the invalid documentation. *Id.*

41. Another variation of the same problem arises when an alien is convicted under a criminal statute for fraudulent conduct and is then rendered deportable under § 241. Should the alien be able to benefit from § 241(f)? In Deleon v. INS, 547 F.2d 142 (2d Cir. 1976), an alien was convicted under 18 U.S.C. § 1546 (1970) for impersonating another alien. The INS then sought to deport him pursuant to § 241(a)(5), which regards conviction under 18 U.S.C. § 1546 (1970) as a separate ground for deportation. The court held that the alien could be deported because § 241(f) was not applicable to an alien deportable under § 241(a)(5). Judge Oakes pointed out in his dissent that the aliens in *Errico* had also violated 18 U.S.C. § 1546 (1970) by making false statements in the visa application. The question is whether those aliens would have been denied relief under § 241(f) if they had been convicted first for making false statements. Deleon v. INS, 547 F.2d 142, 151 (2d Cir. 1976) (Oakes, J., dissenting).

SECTION 212(c) AND THE ALIEN

Another provision which grants the alien some relief is section 212(c)[42] of the Act, which permits the Attorney General to exercise discretion to admit an alien who may be excludable under some provisions of section 212(a).[43] This provision was previously interpreted as applying only to aliens who were returning to a lawful domicile of seven consecutive years.[44] Subsequently, it was amended to apply only to permanent resident aliens who were returning to a lawful domicile of seven consecutive years.[45] However, even before the 1952 amendment, the Board of Immigration Appeals (Board) had extended the precursor of section 212(c) to an alien in a deportation proceeding,[46] and this protection was granted even though the alien had not left the country subsequent to the conviction which gave rise to the deportation.[47] It was even applied in the situation where the alien petitioned for adjustment of status under section 245,[48] because the Board saw no valid reason for denying eligibility for that discretionary relief simply because the alien was not returning to the United States after a voluntary departure.[49]

Recently, though, the Board denied that section 212(c) applied to an alien who had not left the country since his narcotics conviction.[50]

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42. I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1970) provides as follows:

> . . . .
> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31), of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

43. *Id.* § 212(a), 8 U.S.C.A. § 1182(a) (West Supp. 1977), *as amended by* Act of Oct. 12, 1976, Pub. L. 94-484, § 601(a), 90 Stat. 2300; Act of Oct. 20, 1976, Pub. L. 94-571, § 5, 7(d), 90 Stat. 2705, 2706. This section prescribes the general classes of aliens excludable from admission for various reasons.

44. Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, § 3, 39 Stat. 878, prescribed general classes of excludable aliens. However, one of the exceptions was couched as follows: "*Provided further*, that aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe."

45. *See* note 42 *supra*.

46. *In re* L., 1 I. & N. Dec. 1 (1940).

47. *In re* A., 2 I. & N. Dec. 459 (1946).

48. I. & N. Act § 245, 8 U.S.C. § 1255 (1970) (amended 1976).

49. *In re* Smith, 11 I. & N. Dec. 325 (1965).

50. *In re* Arias-Uribe, 13 I. & N. Dec. 696 (1971), *aff'd*, 466 F.2d 1198 (9th Cir.

In reaching its decision, the Board stressed the fact that the 1952 amendment clearly requires the alien to be returning from a temporary departure abroad.[51] This construction of the statute was challenged in *Francis v. INS*[52] on the ground that it denied an alien equal protection of the laws in violation of the fifth amendment. The basic query in *Francis* was whether it was reasonable for the Government to make a distinction between two aliens simply because one alien was returning after a temporary departure whereas the other alien had never left the United States. In applying the minimal scrutiny test, the court examined the policy for the Board's distinctions in the application of section 212(c). The policy seemed to be based on Congress' intent that certain returning residents should not be denied the opportunity of rejoining their families despite their excludability. But if that was the case, there was no rational basis for distinguishing between an alien who had remained in the United States and one who was returning after a temporary visit abroad.[53] They could both be in the same position except for the simple fact of departure. In fact, the alien who has never left the United States may have a sounder case for dispensation. Thus the court in *Francis* reached the substance of the matter by holding that the alien was denied equal protection of the laws because the statute as interpreted denied relief to the alien simply because he had not left the United States after the grounds for his deportation had arisen.

Nor was the constitutional infirmity cured by the existence of section 244(a)(2).[54] Even though the Attorney General could exercise discretion with respect to deportable aliens who had been in the country for ten years, such an alien would still be entitled to discretionary consideration under section 244[55] if his sojourn abroad was brief enough so as not to constitute an interruption of his continuous presence in the United States. Therefore, the result under the Government's position would be that one alien might conceivably qualify for relief under both section 244(a)(2) and section 212(c) whereas another who had never left the United States would not be able to qualify for relief under section 212(c).[56]

1972). *See also* Dunn v. INS, 499 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975).

51. The language of § 212(c) seems to restrict the statutory remedy to aliens returning after a temporary sojourn abroad. *See* note 42 *supra*.

52. 532 F.2d 268 (2d Cir. 1976).

53. *Id.* at 272. *See also In re* Edwards, 10 I. & N. Dec. 506 (1963), where an alien who was convicted of two crimes was able to show eligibility for § 212(c) relief because some months after his last conviction he had left for a few hours to attend a funeral in Canada.

54. I. & N. Act § 244(a)(2), 8 U.S.C. § 1254(a)(2) (1970).

55. *Id.*

56. 532 F.2d at 273.

Another question arising under section 212(c) is whether an alien must have resided in the United States as a permanent resident alien for a period of seven years in order to benefit from the section. The forerunner of present section 212(c) did not impose a permanent residence requirement for aliens to be eligible for discretionary relief.[57] It simply required the alien to be returning to an unrelinquished domicile of seven consecutive years. The insertion of the permanent residence language in section 212(c) presented the question of whether an alien need only have the status of a permanent resident alien at the time he seeks the benefits of the section or whether the seven-year unrelinquished domicile must come subsequent to the assumption of that status.

In re S.[58] presented that very question to the Board. The alien contended for a construction which would have separated the permanent residence requirement from the seven-year requirement. The Board's resort to legislative history indicated that the question was in fact discussed during congressional deliberations on the Act and it was apparently suggested that the words "established after a lawful entry for permanent residence" should be inserted to modify the domicile requirement.[59] Despite the suggestion, the Senate Committee finally recommended that the section be restricted to aliens having the status of lawful permanent residents who were returning to a lawful domicile of seven consecutive years.[60] A fair reading of that recommendation would indicate that the permanent resident's status should be determined as of the time of return to that lawful domicile. If this result was not intended, then it would seem that additional language would have been required to relate the concept of permanent residence status to the seven-year period. In *In re S.*, the Board viewed the plain language of section 212(c) as requiring the alien to reside for seven consecutive years subsequent to lawful admission for permanent residence.[61] In reaching this conclusion, it said that the section should apply "only to those lawfully resident aliens who are returning to an unrelinquished domicile of seven consecutive years subsequent to a lawful entry."[62]

57. Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, § 3, 39 Stat. 878.
58. 5 I. & N. Dec. 116 (1953).
59. S. REP. No. 1515, 81st Cong., 2d Sess. 384 (1950).
60. H.R. REP. No. 1365, 82d Cong., 2d Sess. 51 (1952).
61. 5 I. & N. Dec. at 118.
62. *Id.* In construing the plain language of the statute, the Board of Immigration Appeals used the term "lawful entry" somewhat erroneously, in the sense

This question arose again in the case of *Tim Lok v. INS*,[63] where the alien contended that the section only required a lawful domicile of seven years as long as he was a lawful permanent resident at the time that he sought to invoke it. The court considered the legislative history of the section and concluded that the seven-year period referred only to the alien's lawful domicile and did not regard that period as applying to the permanent residence of the alien, although the court agreed that the alien must be a permanent resident at the time that he seeks the benefits of section 212(c).[64] It is suggested that the court in *Tim Lok* construed the section correctly. An individual who is returning to a lawful domicile of seven years has established relationships and, having begun permanent residence, has further indicated a willingness to establish roots in the United States. If Congress wanted to restrict the benefits of section 212(c) to those aliens who had established permanent residence of at least seven years standing, it would have said that in the same way that it has prescribed a certain period of residence for those seeking American citizenship.[65] Congress has indeed prescribed the requirement of permanent residence, but it has tied the seven-year requirement to lawful domicile only. Therefore, once the alien has established his lawful status as a permanent resident, he should be able to utilize any previous time spent lawfully within the United States, even in a temporary status, as a basis for the invocation of section 212(c).

Section 212(c) may be invoked in another context. In *Vissian v. INS*,[66] the INS sought to deport an alien on the basis of section 241(a)(11)[67] instead of section 241(a)(1), which relates to the exclusion provisions of section 212(a)(23).[68] The court took a liberal ap-

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that an entry can be made by someone other than a permanent resident. What the Board of Immigration Appeals probably meant was "lawful admission for permanent residence."

63. 548 F.2d 37 (2d Cir. 1977).

64. *Id.* at 41.

65. I. & N. Act § 316(a), 8 U.S.C. § 1427(a) (1970), provides in pertinent part:

> (a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . . .

It is clear from the above language that the required period of residence does not commence until the alien has been admitted for permanent residence.

66. 548 F.2d 325 (10th Cir. 1977).

67. I. & N. Act § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970), provides in effect for the deportation of aliens who are narcotics addicts or who deal in narcotics. *See also id.* § 212(a)(23), 8 U.S.C. § 1182(a)(23).

68. If the alien's deportation had been sought under § 241(a)(1), because of the § 212(a)(23) excludability provision dealing with narcotics violations, the alien would have been eligible for a waiver under § 212(c) *nunc pro tunc*. The basic question was whether this same relief should be available if deportation was sought under § 241(a)(11), which is not tied to excludability at entry.

proach in suggesting that section 212(c) relief should not be denied an alien simply because he was not then a returning resident. *Francis* had already regarded this distinction as a denial of equal protection,[69] and *Vissian* was able to cut through the maze to acknowledge the availability of section 212(c) relief to the alien even though he had already entered the United States.

The willingness of these courts to reach the substance of the matter provides real hope that in the future the same approach will be taken with respect to section 241(f) relief. If an alien is not to be deprived of section 212(c) remedies simply because he is already in the United States, then an alien ought not to be deprived of section 241(f) relief simply because the INS prefers a charge which may also be covered under another section of the immigration statutes.[70]

It seems now that the waiver of inadmissibility under section 212(c) will be granted to a permanent resident alien even though he may not have left the United States subsequent to the act which rendered him deportable.[71]

SUSPENSION OF DEPORTATION

An alien who is in the United States illegally lives in fear of deportation. The prospect of deportation is even more disturbing when he has lived in this country for a considerable period of time. In certain cases it is this longevity that will accrue to the benefit of the alien. He may then be able to qualify for suspension of deportation under section 244.[72] Section 244(a)(1) includes aliens who are

69. 532 F.2d at 273.

70. This problem seems to be quite similar to the one raised in connection with § 241(f). Is the alien to be denied relief simply because the INS utilizes as a ground for deportation a provision which provides an illusion of separateness and independence?

71. Vissian v. INS, 548 F.2d 325 (10th Cir. 1977); Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

72. I. & N. Act § 244(a), 8 U.S.C. § 1254(a) (1970), provides as follows:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would in the opinion of the Attorney General, result in extreme hardship to the

deportable for grounds less serious than those mentioned in section 244(a)(2), and, therefore, the requirements for discretionary relief under subsection (1) are somewhat less exacting.

Under section 244(a)(1), the alien must have been physically present in the United States for a continuous period of at least seven years. However, the continuity of that physical presence is not broken by occasional overseas visits.[73] A meaningful interruption of the alien's continuous physical presence depends on the duration of absence, the purpose behind the trip, and the planning involved to accomplish the particular departure.[74] Relying on this standard, some courts have held that a brief trip to Mexico did not break the continued physical presence for purposes of satisfying the statute.[75] Moreover, for purposes of determining whether the alien has fulfilled the continuous presence requirement, it should not matter whether the original entry was illegal. This interpretation is in keeping with the intent of the statute to forestall the deportation of an alien in appropriate circumstances.

Occasionally though, a court will find that the alien's physical presence has been interrupted because of an original illegal entry, followed by a departure and a deceptive reentry. Thus, in *Heitland v. INS*[76] the court seemed distressed by the alien's illegal status and held that the alien could not expect to benefit from his illegal entry in order to qualify under section 244(a)(1) for discretionary relief. One would have thought that the alien's illegal status in this country would not have made him ineligible for relief in view of the Board's previous holding in *In re Wong*, where the alien's original entry was illegal and was followed by an entry without inspection.[77]

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alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

73. Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966); *In re* Harrison, 13 I. & N. Dec. 540 (1970).

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

75. Yanez-Jacquez v. INS, 440 F.2d 701 (5th Cir. 1971); Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966).

76. 551 F.2d 495 (2d Cir. 1977).

77. 12 I. & N. Dec. 271 (1967). As a matter of fact, the alien had made about five trips to Canada to visit his family. Yet, the Board of Immigration Appeals did not regard him as ineligible for relief simply because of his subsequent deceptive entries.

While the alien's conduct in *Heitland* was by no means commendable, the court's conclusion that the alien's presence was not continuous simply because he had violated the immigration law by reentering without permission ignored the trend relating to the availability of relief and the interpretation of the continuous residence requirement. *Rosenberg v. Fleuti*,[78] for instance, did not prescribe a magical formula for determining whether the interruption of an alien's physical presence was meaningful. But, under the principles discussed in that case, the appropriate query is whether the interruption is a significant one in light of its consequences.[79] The aliens in *Heitland* did obtain passports and visas for their journey to Germany and, therefore, according to the *Fleuti* criteria, that was a significant element in passing on the aliens' awareness of the implications involved in their departure from the country.

The *Heitland* court was perhaps confused in its application of another criterion set forth by the *Fleuti* Court, which had to do with the alien's purpose for leaving the country. The latter Court had suggested that a departure to achieve some illegal objective would be a strong indication of a meaningful interruption of the alien's physical presence.[80] In *Heitland* the aliens engaged in certain conduct to avoid the strictures of the immigration law, but it cannot be deduced from this activity that they had an interest in accomplishing some objective which was contrary to the policy of the immigration laws.[81] Surely they did not leave the United States simply to see if they could evade the immigration inspectors upon their return. Their purpose in departing was to visit a sick relative in Germany. Strictly speaking, the purpose was essentially commendable and the court's invocation of the *Fleuti* criterion in this respect rendered meaningless the discretionary relief available in section 244. After all, any alien who leaves the United States and tries to resume his illegal status could never qualify for section 244 protection under the *Heitland* approach.[82] Simply because the aliens had originally entered illegally,

78. 374 U.S. 449 (1963).
79. *Id.* at 462.
80. *Id.*
81. If the objective to leave the United States and return undetected is itself sufficient to break the continuity of the alien's physical presence, then it is suggested that such a conclusion must be reached without regard to whether the alien has made an entry. The criterion of leaving with a fixed illegal objective is not necessarily fulfilled simply because an alien hopes to reenter without revealing his true status.
82. The requirements of § 244(a)(1) concern the alien's physical presence, his good moral character, and extreme hardship to the alien or a spouse, parent, or

the court took the view that they could entertain no reasonable expectations of remaining in the United States for a further period of time or of being readmitted once they had departed. But the application of relief in this type of a case does not depend on the alien's reasonable expectations concerning the possibility of securing permission to remain in the United States. Application for discretionary relief should be predicated on fulfillment of the criteria set forth in the appropriate section.

The aliens' procurement of the necessary documentation for departure to Germany was significant only to the planning that was required for their trip. Perhaps the court in *Heitland* placed too much emphasis on the fraudulent aspects of the aliens' reentry and their illegal presence in the United States. In doing so, it impliedly created a distinction for purposes of section 244 relief[83] between an alien who is legally within the United States and one who is not. It is suggested that this distinction should be left to the Attorney General's discretion in each particular case, and that it ought not to be regarded as a disqualifying feature with respect to an alien's application under that section. The question should not be whether the section 244 remedy provides a reward for the alien's misleading conduct. If that were the governing standard, there would be very few cases where an alien could benefit from suspension of deportation. It is submitted, therefore, that an alien should still be eligible for consideration even though his original entry was illegal and a subsequent entry was accomplished by less than candid methods. The alien who most needs section 244 protection is the alien who is enduring illegal status in the United States but at the same time has cultivated relationships that would render it extremely difficult for him to sever his ties here.

Another requirement of section 244(a)(1) is that extreme hardship would result either for the alien personally or for a child,[84] spouse or parent. The requirement of "extreme hardship" in section 244(a)(1) is different from the requirement of "exceptional and extremely unusual hardship" in section 244(a)(2) for aliens who are deportable on more serious grounds. While it has been said that economic hardship

child. If applied strictly only to those aliens whose seven-year residence period was sanctioned by the INS, the section would benefit limited classes of aliens—for instance, students and others whose stay will normally be expected to last a substantial period of time. But the suspension is intended to have wider application. After all, the alien may be deportable because he has in fact stayed beyond the period originally granted by the INS.

83. But in so doing the court should have been reminded that the reason an alien seeks suspension from deportation is that the alien believes himself qualified for relief despite deportability. To qualify, the alien must be "deportable." I. & N. Act § 244(a), 8 U.S.C. § 1254(a) (1970).

84. The term *child* is defined in *id.* § 101(b)(1), 8 U.S.C.A. § 1101(b)(1) (West Supp. 1977).

alone is not sufficient ground for invoking section 244,[85] the reality is that the economic thread runs through a great number of section 244 cases.[86] Whether it be the seven-year or the ten-year residence requirement, the disturbance of an alien's residence in the United States will normally place him at a severe economic disadvantage. After all, many aliens come to the United States in order to improve their financial position. The mere fulfillment of the continuous residence requirement stipulated in section 244 suggests a situation where an alien has built up certain equities. Thus, it is quite often not simply a question of becoming more affluent in the United States; it is often a choice between bare survival and a decent existence. Therefore, while the element of extreme hardship seems perfectly logical on its face, it is not so easily applied. When the statute was amended in 1962,[87] the "extreme hardship" language was substituted in the first category of less serious violations for the previous language "exceptional and extremely unusual hardship." But the latter language still applies in the case of serious violations covered in section 244(a)(2). Clearly then, Congress was trying to impose a different standard for the two categories.[88]

Although it is eminently reasonable to impose a more severe sanction on aliens with more serious violations, it is suggested that the application of the present standards creates insuperable difficulties and that perhaps a more realistic approach needs to be taken for the treatment of these aliens. It has been proposed that there should be a return to the old criterion of serious economic detriment.[89] Although

85. Pelaez v. INS, 513 F.2d 303 (5th Cir.), *cert. denied*, 423 U.S. 892 (1975);Fong Chai Yu v. INS, 439 F.2d 719 (9th Cir. 1971); Yeung Ying Cheung v. INS, 422 F.2d 43 (3d Cir. 1970); Kasravi v. INS, 400 F.2d 675 (9th Cir. 1968).

86. *See, e.g.*, Yeung Ying Cheung v. INS, 422 F.2d 43 (3d Cir. 1970); Llacer v. INS, 388 F.2d 681 (9th Cir. 1968); *In re* Lam, 14 I. & N. Dec. 98 (1972); *In re* H., 5 I. & N. Dec. 416 (1953).

87. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247 (codified at I. & N. Act § 244, 8 U.S.C. § 1254 (1970)).

88. With respect to § 244(a)(2), one committee report suggested that special dispensation should be available to such aliens only if deportation would be unconscionable. S. REP. NO. 1137, 82d Cong., 2d Sess. 25 (1952). In the House Committee it was felt that the alien's circumstances must not only be "unusual" but also "exceptionally and extremely unusual." H.R. REP. NO. 1365, 82d Cong., 2d Sess. 62-63 (1952).

89. PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 215 (Da Capo Press Reprint Ser. 1971) (reprint of the 1953 report of the President's Commission on Immigration and Naturalization); Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 255 (1976).

that would be a less stringent standard, at least it would be a recognition of the realities of the alien's situation without at the same time diluting the other requirements of good moral character and continuous physical presence.

Suspension of deportation is not available to a native of a country contiguous to the United States or of an adjacent island unless that alien shows himself to be ineligible for a non-quota immigrant visa.[90] Even if the native of a contiguous territory is ineligible for a non-quota visa, he must still fulfill the other requirements of section 244. Thus, the alien may be excludable for any reason at all and, therefore, may be ineligible to receive an immigrant visa. But the assertion of a particular ground for excludability may return later to haunt the alien during subsequent application for an immigrant visa. Whether that is desirable is certainly debatable. The alien can become entrapped in a situation where attempts to establish grounds for discretionary relief under section 244 may eventually operate to deny him an immigrant visa. It is reasonable to assume that if the proviso of section 244(f) is interpreted as referring only to the alien's ineligibility for a non-quota immigrant visa, then the difficulties envisaged under the previous language will to some extent be obviated.

One would think that the recent amendment of section 245[91] permitting Western Hemisphere aliens to qualify for adjustment of status within the United States would have been an incentive for amendment of section 244 by removing the contiguous territory exception. It is not clear why this exception should be sustained. If it is to destroy the incentive of those alien visitors whose proximity to this country's shores entices them to seek immigrant status, it is questionable whether this objective has been accomplished. If an alien has fulfilled the other requirements of section 244, it does not seem particularly admirable to deny him the remedies of that statute simply on the basis of the territory's proximity. Furthermore, in certain circumstances, the alien may be driven to find some basis of ineligibility for a visa so as to fulfill the prerequisites of the statutory exception. Unfortunately that ineligibility may be subsequently invoked to deny the individual entry into the United States. Although the ill effects of this exception have been attenuated by the recent amendments to the Act, it must be said that they cannot be totally removed without the deletion of that exception in section 244(f).

90. I. & N. Act § 244(f), 8 U.S.C. § 1254(f) (1970). Before the 1976 amendments, the term *non-quota immigrant* was interpreted as *special immigrant. See* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.9c (rev. ed. 1975); Comment, *Suspension of Deportation: Illusory Relief*, 14 SAN DIEGO L. REV. 229, 248-50 & n.113.

91. I. & N. Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2705 (amending I. & N. Act § 245, 8 U.S.C. 1255 (1970)).

CONCLUSION

An attempt has been made in this Article to explore some of the troublesome nuances of the Act. Existing difficulties have been caused mostly by different judicial approaches to the purposes and philosophy of the immigration legislation. Because the Act is so comprehensive, much discretionary relief is available to the alien. With respect to section 241(f), there should be some legislative clarification of the intended scope of the remedy. It is a futile exercise for fraud or misrepresentation to be forgiven under one section only to have it invoked as a sword under another. If an alien has procured a visa or other documentation by fraud, he will be in the United States illegally and, therefore, could be deprived of his section 241(f) remedies through the application of another section.

The same thing may be said about inspection. If eligibility for the statutory pardon depends upon the type of fraud committed by the alien, the statute should state this specifically to resolve any lingering doubts.[92] The judicial interpretation concerning the types of fraud envisaged by section 241(f) cannot be sustained either by the language of the statute or its legislative history. This is not to suggest that there may not be certain degrees of culpability in connection with an alien's fraudulent entry into the United States. However, it is respectfully suggested that the statute does not delineate these differences and there is really nothing open for judicial interpretation. Furthermore, some action is necessary if the INS is to be regarded as prohibited from invoking a section which would effectively deny the remedy of section 241(f) if the charge is directly related to fraud or misrepresentation.

Section 212(c) should also be amended to reflect the availability of the remedy to an alien who has not left the United States but is otherwise eligible for the protection of that section. After all, the important ingredients seem to be lawful permanent residence and the seven-year period. Perhaps the language of the section can be clarified to show that the seven-year domicile requirement need not be compiled subsequent to the alien's admission as a permanent resident.

As far as section 244 is concerned, there may be a legitimate basis for making a distinction between minor and major viola-

92. There may be good reason for making a distinction between the types of fraud to be protected. But this should not be implied in a deportation statute.

tions for the purposes of prescribing the eligibility requirements for discretionary relief. However, it is not clear that the terms "extreme hardship" and "exceptional and extremely unusual hardship" offer any clear delineation of congressional expectations. When all is said and done, it is basically a question of economic hardship. While it is not suggested here that economic hardship should be the single criterion for eligibility, it seems that the section creates some perplexity by setting different hardship standards for the two categories. Perhaps a more palatable solution might be to impose a standard of serious economic hardship on both categories of aliens and to increase the required period of physical presence for those who are major violators.[93] At least the standard would be clearer and more precise.

93. *See* PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 215 (Da Capo Press Reprint Ser. 1971) (reprint of the 1953 report of the President's Commission on Immigration and Naturalization).