WAIVER OF DEPORTATION: AN ANALYSIS OF SECTION 241(f) OF THE IMMIGRATION AND NATIONALITY ACT

[I]n the never, never land of the Immigration and Nationality Act . . . plain words do not always mean what they say.†

LEWIS A. WENZELL*
ROBERT J. KOLODNY**

The number of illegal aliens in the United States is estimated to be between 800,000 and 1,000,000, and the vast majority of these are natives of the Republic of Mexico.[1] During fiscal 1972, 505,949 illegal aliens were located or apprehended by the United States Immigration and Naturalization Service (Service).[2] Although the vast majority of the illegal entrant aliens apprehended have been here but a short period of time, over ten percent have been in this country for periods exceeding six months.[3] Frequently, aliens apprehended after having been here for relatively long periods of time have established familial ties with a United States citizen or an alien lawfully admitted for permanent residence. In addition, an alien who has lived in the United States for some time will probably have employment which is more satisfactory and lucrative than that obtainable in his native land.[4]

---

† Yuen Sang Low v. Attorney General, 479 F.2d 820, 821 (9th Cir. 1973), *cert. denied*, 414 U.S. 1039 (1973).

* Senior Trial Attorney, Federal Defenders of San Diego, Inc., San Diego, California. B.A., Northwestern University; J.D., Northwestern University; LL.M., Northwestern University. Member, California, Illinois, and United States Supreme Court Bars.

** J.D. Candidate, California Western School of Law.

1. DEPARTMENT OF JUSTICE, SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 6 (1973).

2. DEPARTMENT OF JUSTICE, 1972 ANNUAL REPORT OF IMMIGRATION AND NATURALIZATION SERVICE 7 (1972) [hereinafter cited as 1972 ANNUAL REPORT]. Of all the deportable aliens located, 85% were Mexican citizens and 79% had illegally entered this country at places other than designated ports of entry.

3. The Service estimates that in fiscal 1972, 48% of the aliens were apprehended within 72 hours after their arrival, 21% within four to 30 days after arrival and 19% within one to six months after arrival. *Id.*

4. *See* United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), *appeal docketed.*

An alien apprehended after entering this country, even though here illegally, is entitled to many basic rights,[5] including the right to a deportation hearing before he can be expelled. However, only a small percentage of those entitled to such hearings demand them. This is exemplified by fiscal 1972 statistics which reveal that of the one-half million aliens apprehended only 16,266 were actually deported.[6] The Immigration and Nationality Act (Act) provides that an alien may be granted a voluntary departure in lieu of being deported.[7] The alien with familial ties could accept a voluntary departure, return to his native land, and apply for admission into the United States under the sections of the Act granting preferential treatment in re-entering.[8] The alien who is not a native of the Western Hemisphere may also attempt to remain in this country and seek adjustment of status from that of an unlawful entrant to that of an alien lawfully admitted for permanent residence.[9]

---

5. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228 (1896) (Fifth and Sixth Amendments); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903) (Fifth Amendment); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (procedures required by Administrative Procedure Act, ch. 324, §§ 5, 11, 60 Stat. 239, 244 (1946), *as amended* 5 U.S.C. §§ 554, 3105 (1970)). *See also* United States v. Campos-Serrano, 404 U.S. 293 (1971), which reversed an illegal entrant alien's conviction notwithstanding his previous deportation.

6. 1972 ANNUAL REPORT, *supra* note 2, at 14.

7. Immigration and Nationality Act §§ 242(b), (g), 244(e), 8 U.S.C. §§ 1252(b), (g), 1254(e) (1970) [hereinafter referred to as Act]. Sections 242(b), (g) and 244(e) provide that the Attorney General may permit any alien to voluntarily depart from the United States in lieu of deportation at any stage of the expulsion process. The primary benefit of voluntary departure is that it avoids the stigma of deportation. Once an alien has been deported, he falls within the excludable classes of aliens and ordinarily will not be granted admission for at least one year. *See* Act, § 212(a)(16), 8 U.S.C. § 1182(a)(16) (1970). *See generally* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 7.2 (rev. ed. 1973). Furthermore, an alien who illegally reenters the country after deportation is guilty of violating the Act. Act, § 276, 8 U.S.C. § 1326 (1970). *Cf.* United States v. Palmer, 458 F.2d 663 (9th Cir. 1972); United States v. Osuna-Picos, 443 F.2d 907 (9th Cir. 1971) (concerning raising a Section 241(f) defense in the criminal proceeding). He is subject to a sentence of up to two years in jail and/or a $1,000 fine, while illegal entry without prior deportation is only punishable by a maximum term of six months in jail and/or a $500 fine. Act, § 275, 8 U.S.C. § 1325 (1970).

8. *See, e.g.*, Act, *supra* note 7, §§ 201(b), 203(a)(1)-(2) (1970). Section 201(b) provides that "immediate relatives" shall be admitted without regard to the numerical limitations prescribed in the Act. *See* note 35 *infra*. Sections 203(a)(1) and (2) provide first and second preference status respectively to unmarried sons and daughters of citizens and aliens lawfully admitted for permanent residence who would not qualify as immediate relatives.

9. The Act provides the Attorney General with discretion to adjust the

These alternatives have many drawbacks. The adjustment of status provisions of the Act are inapplicable to Mexican and all other Western Hemisphere natives.[10] Additionally, adjustment of status is discretionary and seemingly unavailable to an alien who has surreptitiously entered this country.[11] For aliens who have departed and are seeking re-entry, favorable treatment is accorded only if they qualify as an immediate relative of a United States citizen.[12] The "immediate relative" of a United States citizen is entitled to the issuance of an immigrant visa without regard to numerical limitations;[13] however, that large class

---

status of an alien who was inspected and admitted or paroled into the United States. Act, *supra* note 7, § 245, 8 U.S.C. § 1255 (1970). However, these provisions are inapplicable to Western Hemisphere natives. Status may be adjusted for an alien lawfully admitted for permanent residence after an application for such status, if it is determined that the alien is eligible. *See generally* 8 C.F.R. § 245.1-.7 (1972). If an alien's application for adjustment of status is granted, he is immediately entitled to an immigrant visa. Status may be adjusted even after an order of deportation is entered. Act, *supra* note 7, § 244, 8 U.S.C. § 1254 (1970).

10. In order to obviate the discrimination against Western Hemisphere natives who are ineligible for adjustment of status and because this subject is under consideration by Congress, the Service has instituted a Western Hemisphere Equity Program. 119 CONG. REC. 65 (H3236-7) (May 1, 1973); letter to authors from Joseph Sureck, then Regional Counsel, Southwest Region, Immigration & Naturalization Service, dated 25 January 1974 (on file with CALIF. W. INT'L L.J.). This Program grants special consideration to aliens from the Western Hemisphere who are illegally in this country. In general, if the alien is an immediate relative of a United States citizen or an unmarried child of a citizen or permanent resident, or the spouse of a permanent resident alien, and it appears an immigrant visa will be forthcoming, the alien will be allowed to remain in the United States until the visa is obtained. *See also* Memorandum of Donald T. Williams, Acting District Director, District 16, Immigration & Naturalization Service, Los Angeles, California, dated April 16, 1973 (on file with CALIF. W. INT'L L.J.).

11. The Act provides that only an alien "who was *inspected and admitted or paroled* into the United States . . ." may have his status adjusted. Act, *supra* note 7, § 245(a), 8 U.S.C. § 1255(a) (1970). (Emphasis added). Therefore, one who enters this country surreptitiously would not be entitled to adjustment of status.

The term surreptitious entry is used in this article to denote any entry accomplished without one physically presenting himself to immigration authorities at a designated port of entry, *e.g.*, entry in the trunk of a car or through or over a border fence at a point away from a port of entry. *See* Matter of Gabouriel, 13 I. & N. Dec. 742 (1971).

12. "Immediate relatives" are "the children, spouses and parents of a citizen of the United States: *Provided*, that in the case of parents, such citizen must be at least twenty-one years. . . ." Act, *supra* note 7, § 201(b), 8 U.S.C. § 1151(b) (1970).

13. The Act specifies the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted for

of aliens whose familial ties are with another alien lawfully admitted for permanent residence are not entitled to this preferential treatment. These aliens are required to wait significant periods of time to obtain an immigrant visa. For example, Mexican citizens now wait an average of twenty-two to twenty-four months for entry.[14] Even those aliens who are immediate relatives of citizens will suffer a delay of several months while their applications for a visa are being processed.[15] Thus, for the Western Hemisphere native who is not entitled to seek adjustment of status, and for the non-Western Hemisphere native whose application for adjustment of status has been disapproved, leaving this country and seeking re-entry will not only result in separation from the family, but undoubtedly the loss of employment. Obviously, the alien faced with this situation will seek to avoid deportation.

One of the most effective ways of avoiding deportation[16] is to seek waiver of deportation pursuant to Section 241(f) of the Act.[17] Section 241(f) provides:

> 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.

Although the scope of Section 241(f) has been frequently litigated, it has only once been interpreted by the Supreme Court[18] and has received little attention from the commentators.[19] In

permanent residence. *Id.*, § 201(a), 8 U.S.C. § 1151(a) (1970). This section specifically provides that the numerical limitations do not apply to the "immediate relatives" of a United States citizen.

14. Address by David Aberson, Esq., delivered at Immigration Seminar, Sept. 20, 1973, at San Diego, California. *See also Hearings on H.R. 981 Before the Subcomm. on Western Hemisphere Immigration of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., at 21-27 (1973).

15. Address by Barbara Honig, Esq., of National Lawyers Guild. *See* Seminar, note 14 *supra.*

16. For other ways of avoiding deportation, *see* notes 7 & 9 *supra.*

17. *See* Act, *supra* note 7, § 241(f), 8 U.S.C. § 1251(f) (1970).

18. *See* Immigration & Naturalization Serv. v. Errico, 385 U.S. 214 (1966), *noted in* 42 ST. JOHN'S L. REV. 118 (1967).

19. *See, e.g.*, Note, *Immigration—Relief from Deportation—Aliens with*

view of this, and the impact leaving this country will have upon an alien with familial ties, Section 241(f) will be examined with a view towards determining which individuals fall within the purview of the section. Suggestions will be made as to those areas still awaiting definitive interpretation as well as present interpretations of the section which should be considered ripe for further judicial review. To facilitate this discussion, the statute has been divided into four criteria which an alien must satisfy in order to benefit from its coverage. First, the alien must be the spouse, parent, or child of a United States citizen or an alien lawfully admitted for permanent residence. Second, the alien must be within the United States subject to deportation proceedings. Third, the alien must be deportable on the ground he obtained entry by fraud. Fourth, the alien must be otherwise admissible at the time of his entry. Critical to any analysis of Section 241(f) is an understanding and appreciation of its legislative background and history.

I. LEGISLATIVE BACKGROUND AND HISTORY

Prior to 1808 the Constitution prohibited Congress from restricting the entry of aliens into this country.[20] It was not until 1875 that Congress first enacted restrictive legislation excluding from entry aliens who were "[l]ewd and immoral . . . here for the purpose of prostitution . . . [and] persons who are undergoing a sentence for conviction in their own country of felonious crimes. . . ."[21] In 1882 Congress banned aliens of Chinese ancestry for a ten year period,[22] while additionally excluding "[a]ny con-

Familial Ties and Who Willfully Evaded Quota Restrictions are "Otherwise Admissible" at Time of Entry, 42 ST. JOHNS L. REV. 118 (1967); Note, *Immigration: The Criterion of "Otherwise Admissible" as a Basis for Relief from Deportation because of Fraud or Misrepresentation*, 66 COLUM. L. REV. 188 (1966); Note, *Administrative Law—Immigration Law—Relief from Deportation Allowed Independent of Attorney General's Discretion—Errico v. Immigration & Naturalization Serv.*, 349 F.2d 541 (9th Cir. 1965), 34 GEO. WASH. L. REV. 351 (1965). *See also* Note, *Immigration Law—Deportation: What Fraud Hath Brought Together Let No Man Put Asunder—Muslemi v. Immigration & Naturalization Serv.*, 408 F.2d 1196 (9th Cir. 1969); 45 WASH. L. REV. 637 (1970); Comment, *Family Unity Doctrine v. Sham Marriage Doctrine*, 1 CALIF. W. INT'L L.J. 80 (1970).

20. U.S. CONST., art. I, § 9.

21. Act of March 3, 1875, ch. 141, §§ 3, 5, 18 Stat. 477.

22. Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 59. *See generally* The Chinese Exclusion Case (Chae Can Ping v. United States), 130 U.S. 581 (1889).

vict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge. . . ."[23] Three years later Congress limited the number of contract laborers who could enter the country.[24] The list of the excludable classes was expanded in 1891 to include "insane persons, paupers . . . persons suffering from a loathsome or a dangerous, contagious disease . . . persons convicted of a misdemeanor involving moral turpitude, [and] polygamists. . . ."[25] In 1903,[26] 1907,[27] and 1910[28] the list was further expanded by Congress and in 1917 comprehensive legislation was enacted which codified the previous enactments and repealed inconsistent provisions.[29] The present Act, although making some refinements and modifications,[30] includes the same classes of excludable aliens found in the 1917 legislation.[31]

In 1921, Congress limited the number, as opposed to the type, of aliens allowed entry into this country. The enactment in that year was a temporary measure which allocated quotas to each nationality totaling three percent of the foreign born persons of that nationality residing in the United States in 1910.[32] This

23. Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214.

24. Contract Labor Law of 1885, ch. 344, § 1, 57 Stat. 600.

25. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

26. Act of March 3, 1903, ch. 1012, § 1, 32 Stat. 1213.

27. Act of February 20, 1907, ch. 1134, § 1, 34 Stat. 899.

28. Act of March 26, 1910, ch. 129, §§ 1-3, 36 Stat. 263.

29. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874. This legislation provided a comprehensive list of excludable aliens. The list included, in addition to those classes mentioned in the text: imbeciles, alcoholics, beggars, vagrants, aliens found to be and certified by an examining surgeon as being mentally or physically defective, polygamists, anarchists, persons who believe in or advocate the overthrow of the government of the United States by force or violence, persons who belong to subversive groups, persons with prior deportations, children under sixteen years of age not accompanied by an adult, and illiterates.

30. There are now thirty-one enumerated classes of excludable aliens found in the Act. Act, *supra* note 7, §§ 212(a)(1)-(31), 8 U.S.C. §§ 1182(a)(1)-(31) (1970). *See* text Section V. *infra*. Refining of the definitions did not necessarily eliminate ambiguity. *See, e.g.*, Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967); Appleman, *Misrepresentation in Immigration Law: Materiality*, 8 FED. B.J. 267 (1964).

31. The present Act has a few classes, such as narcotic addicts, not covered in the 1917 legislation. *See* Act, *supra* note 7, § 212(a)(5), 8 U.S.C. § 1182(1)(5) (1970).

32. Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5. The percentage limits provided in this legislation did not apply to the following individuals: government officials and their families, aliens in continuous transit through the United States, aliens visiting the United States as tourists or temporarily for business

national origins quota system for determining the number of entrants to be allowed was permanently established in 1924.[33] This legislation, as with the present Act, generally did not apply the quota restrictions to Western Hemisphere countries or the children, spouses or parents of United States citizens.[34] Although the method of determining numerical restrictions has changed,[35] the policy of restricting the number, in addition to the type, of entrants has been continued until the present day.

The aforementioned laws restricting both the numbers and types of aliens allowed to enter this country are to be contrasted with those laws providing for the removal of aliens already in this country. The former are said to deal with the *exclusion* of aliens while the latter deal with the *deportation* of aliens. From 1801 until 1891, there were no laws allowing the deportation of aliens found within this country.[36] In 1891 Congress provided for the deportation of aliens who had entered in violation of the contract labor law and were apprehended within one year after their entry.[37] The 1891 Act also provided for the deportation of any aliens within the excludable classes if apprehended within one year after their entry.[38] Legislation enacted in 1903 extended the time period during which excludable aliens could be deported to three years after entry, and also provided that any alien who became a public charge within two years after entry could be deported.[39] Expanding grounds for deportation generally paralleled the expanding classes of excludable aliens, and provided for the deportation of those aliens who would have been

---

or pleasure, and aliens from countries wherein immigration is regulated in accordance with treaties.

33. Quota Law of 1924, ch. 190, § 11, 43 Stat. 153.

34. Quota Law of 1924, ch. 190, § 4, 43 Stat. 153 and Act, *supra* note 7, §§ 101(a)(27), 201(a)(b), 8 U.S.C. §§ 1101(a)(27), 1151(a)(b) (1970).

35. Under the present Act the overall numerical limitation for the non-Western Hemisphere is 170,000 persons per year. Preferences are related to individual characteristics, rather than country of origin, but no one country can have more than 20,000 entrants per year. Act, *supra* note 7, §§ 201-3, 8 U.S.C. §§ 1151-3 (1970). The numerical limitation for the Western Hemisphere is 120,000 persons per year. Act of October 3, 1965 § 21(e), 79 Stat. 921.

36. Alien Act of 1798, ch. 58, 1 Stat. 570. This act and its companion, the Sedition Act of 1798, 1 Stat. 596, were heavily criticized. The latter was of dubious constitutional validity. New York Times Co. v. Sullivan, 376 U.S. 254, 273-276 (1964). They both expired by their own terms in 1801.

37. Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1086.

38. Act of March 3, 1891, ch. 551, § 11, 26 Stat. 1086.

39. Act of March 3, 1903, ch. 1012, § 20, 32 Stat. 1218.

excludable at the time of their entry.[40]

In 1917 the time limits for deporting aliens were expanded, including provisions removing all time limits for the deportation of aliens committing certain criminal and subversive acts.[41] The 1924 legislation, which established the quota system, provided that aliens who entered in violation of the visa and quota requirements were also deportable without time limitation.[42] The provisions of the Immigration and Nationality Act of 1952, which are essentially in force today, eliminated all limitations as to the time in which deportation proceedings must be instituted.[43] The retroactive effect of the deportation provisions of the legislation[44] has been held not to violate the prohibition against *ex post facto* laws.[45]

After a half-century of expanding the classes of excludable and deportable aliens and reducing quotas, Congress enacted the War Brides Act of 1945.[46] This legislation allowed the entry of the spouses and children of American servicemen without regard to quotas and excused certain other requirements.[47] In the following year legislation was enacted permitting similar entry to the fiancées of American servicemen.[48] A further liberalization of the restrictive entry and stern deportation provisions was accomplished in the Displaced Persons Act of 1948.[49] This Act admitted thousands of war refugees, but also provided for depor-

40. *See* notes 41-45 *infra.*

41. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889, provided:

> [A]t any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or shall be found in the United States in violation of this Act . . . any alien who within five years after entry becomes a public charge . . . shall be taken into custody and deported.

42. Quota Law of 1924, ch. 190, § 14, 43 Stat. 153.

43. Immigration & Nationality Act of 1952, ch. 477, § 241(d), 66 Stat. 181 (1952), 8 U.S.C. § 1251(d) (1964).

44. Act, *supra* note 7, § 241(d), 8 U.S.C. § 1251(d) (1970).

45. Lehmann v. Carson, 353 U.S. 685 (1957). *Cf.* Cortez v. Immigration & Naturalization Serv., 395 F.2d 964 (5th Cir. 1968) (deportation does not constitute cruel & unusual punishment).

46. The War Brides Act of 1945, ch. 591, § 1, 59 Stat. 659, provided:

> [A]lien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during [W.W. II], shall, if otherwise admissible under the immigration laws . . . be admitted to the United States. . . .

47. For example, the legislation excused physical and mental defects and documentary requirements. War Brides Act of 1945, ch. 591, § 1, 59 Stat. 661. *See also* Lutwak v. United States, 344 U.S. 604 (1953).

48. Fiancee's Act of 1946, ch. 520, 60 Stat. 339.

49. Displaced Person's Act of 1948, ch. 647, 62 Stat. 1009.

tation of those who made willful misrepresentations for the purpose of gaining entry.[50] Fearing political and social persecution if repatriated, many refugees had misrepresented their nationality and were therefore deportable.[51] Despite great concern for the plight of these refugees, ameliorative legislation was not enacted until 1957.[52]

Section 7 of the 1957 legislation[53] was the forerunner of the present Section 241(f). It waived deportation for an alien who had fraudulently entered this country or was not of the nationality specified in his visa, if the alien was the spouse, parent, or child of a United States citizen or lawfully admitted permanent resident alien and otherwise admissible. The section afforded similar relief to an alien who was admitted to the United States between 1945 and 1954, if the alien could satisfy the Attorney General that his misrepresentations were predicated upon a fear of persecution in his former country, and were not committed for the purpose of evading the quota restrictions. The most revealing statement concerning the Congressional intent in enacting Section 7 is found in the House Report:

> In respect to expulsion of aliens who are the spouses, parents, or children of United States citizens or lawfully resident aliens, and who are already in the United States, misrepresentation in obtaining documentation or entry would not be a ground for deportation if the aliens were otherwise admissible at the time of entry under the immigration law. The latter category of aliens includes mostly Mexican nationals, who, during the time when border-control operations suffered from regrettable laxity, were able to enter the United States, establish a family in this country, and were subsequently found to reside in the United States illegally.[54]

In 1961 Section 7 was repealed and replaced by Section

50. Displaced Person's Act of 1948, ch. 647, § 10, 62 Stat. 1013.

51. *See* H.R. No. 1365, 82nd Cong., 2d Sess. 128 (1952).

52. *See* H.R. No. 2096, 82nd Cong., 2d Sess. 128 (1952):

> [T]he sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or by willfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth.

53. Act of September 11, 1957, § 7, 71 Stat. 740, *repealed*, 75 Stat. 655 (1961).

54. *See* H.R. No. 1199, 85th Cong., 1st Sess. 11 (1957); S. Rep. No. 1057, 85th Cong., 1st Ses. 11 (1957).

241(f).[55] Section 241(f) differs from Section 7 in that it contains no provisions concerning aliens who had entered the United States between 1945 and 1954 or were not of the nationality specified in their visas. The expressed Congressional intent respecting these modifications indicates they were made merely to eliminate outdated provisions, and were not designed to change the substantive law.[56] Thus, the legislative history, while not expansive, illuminates Section 241(f) as a Congressional response to the plight of the illegal entrant alien with familial ties in this country.

II. SPOUSE, PARENT OR CHILD OF CITIZEN OR LAWFULLY IMMIGRATED ALIEN

A. Definition of Terms

The first requirement for invoking the benefits of Section 241(f) is that the alien be "the spouse, parent or child of a United States citizen or of an alien lawfully admitted for permanent residence." The Act defines each of these terms individually, and while problems concerning the definitions have not been significant, they do require some discussion.

An "alien" is defined in a negative sense as one who is not a citizen or a national of the United States.[57] A person may acquire United States citizenship by birth[58] or naturalization.[59] An alien "lawfully admitted for permanent residence" is simply an alien permanently residing in this country in accordance with

55. Act of September 11, 1957, § 7, 71 Stat. 740, *repealed*, 75 Stat. 655 (1961).

56. *See* H.R. No. 1086, 87th Cong., 1st Sess. 37 (1961).

57. Act, *supra* note 7, § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1970). The circumstances under which a person may lose his citizenship are beyond the scope of this article. *See generally* Afroyim v. Rusk, 387 U.S. 253 (1967). An individual who has lost his United States citizenship is considered an alien, Mangaoang v. Boyd, 205 F.2d 553 (9th Cir. 1953), *cert. denied*, 346 U.S. 876 (1953). Any person who cannot prove he is a national or citizen of the United States is considered an alien until such proof is forthcoming. *See, e.g.*, American President Lines, Inc. v. Mackey, 120 F. Supp. 897 (D.D.C. 1953).

58. Act, *supra* note 7, §§ 301-7, 8 U.S.C. §§ 1401-7 (1970). Of course, any child born in the United States is a citizen regardless of the nationality of the parents. Children born outside the United States to citizen parents are also generally citizens. *See generally* Rogers v. Bellei, 401 U.S. 815 (1971). However, if the child is born out of wedlock and claims citizenship through the father, the child must be legitimated by the father, prior to his twenty-first birthday. *See* notes 83-98 *infra* and accompanying text.

59. Act, *supra* note 7, §§ 310-44, 8 U.S.C. §§ 1422-55 (1970).

all relevant laws.[60]

The term "spouse" includes any individual who is a party to a marriage which is valid under laws in effect at the place of origin. The marriage must not violate any state laws or laws of the United States; not be entered into as a sham for the purpose of evading immigration laws; and be consummated if the marriage ceremony was conducted without the presence of both parties.[61] The principal rule respecting a marriage is that its validity is determined by the law of the place of origin.[62] However, if the marriage, although valid in the country of origin, would result in criminal punishment for the cohabiting parties in this country, the marriage is considered invalid and neither party would be a "spouse."[63] Thus, bigamous,[64] incestuous,[65] and polygamous[66] marriages although valid where contracted, would not confer "spouse" status for purposes of Section 241(f). When it is difficult to ascertain whether a particular marriage was valid at the place of origin, inquiry usually focuses upon whether there was a religious marriage ceremony.[67] If there was such a ceremony and the parties subsequently lived together in good faith and their cohabitation would not be criminal in this country, each party to the marriage will be considered a "spouse."[68] The validity of a marriage is usually presumed,[69] but when questioned, the burden of proof rests with the person claiming the benefits of that marriage.[70]

60. Act, *supra* note 7, § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1970). *See* Lai Haw Wong v. Immigration & Naturalization Serv., 474 F.2d 739 (9th Cir. 1973).

61. *See generally* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.18a (rev. ed. 1973).

62. Matter of G-, 6 I. & N. Dec. 337 (1954).

63. Matter of T-, 8 I. & N. Dec. 529 (1960). However, where a spouse acted in good faith in entering a marriage, a subsequent determination that the marriage was invalid will not subject this spouse to deportation. Matter of T-, 8 I. & N. Dec. 493 (1959).

64. Matter of L-, 7 I. & N. Dec. 472 (1957).

65. Matter of C-, 4 I. & N. Dec. 632 (1952).

66. Matter of H-, 9 I. & N. Dec. 640 (1962).

67. Matter of K-, 7 I. & N. Dec. 492 (1957).

68. *Id.*

69. Matter of F-, 9 I. & N. Dec. 275 (1961).

70. Matter of S-, 9 I. & N. Dec. 513 (1961) (husband, married to another seven months earlier, who made no effort to locate former spouse, failed to show good faith in second marriage and therefore, presumption of validity held to be rebutted). *See also* Matter of Awadalla, 10 I. & N. Dec. 580 (1964) (validity of marriage doubtful because of defective divorce terminating prior marriage, and burden of proof not satisfied).

The Act has special provisions concerning the deportation of an alien who has obtained entry into the United States on the basis of a sham marriage.[71] Any deportation charge founded on such a marriage must be brought only under these provisions.[72] This is true even though an individual who attempts to enter the United States on the basis of a fraudulent marriage is also deportable because of the fraudulent entry or entry without a valid visa. However, an individual who secures entry upon the basis of a fraudulent marriage, but subsequently becomes the spouse, parent or child of a citizen or lawfully admitted alien may claim the benefits of Section 241(f).[73]

In order to be a "child", one must be unmarried and under 21 years of age.[74] The definition includes a legitimate child and a stepchild whether or not born out of wedlock. The marriage creating the status of the stepchild must have taken place while the child was under the age of eighteen. If the marriage creating the stepchild relationship has been terminated at the time the stepchild wishes to claim "child" status, such a claim will be disallowed.[75] The term "child" also includes legitimated[76] and adopted[77] children, and under some circumstances, an orphan about to be adopted by a couple, one of whom is a citizen.[78]

---

71. *See* Act, *supra* note 7, § 241(c), 8 U.S.C. § 1251(c) (1970):

> An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of Section 212(a) . . . if he or she obtains an entry . . . on the basis of a marriage entered into less than two years prior to such entry . . . which within two years subsequent to any entry . . . shall be judicially annulled or terminated. . . .

72. Matter of T-, 8 I. & N. Dec. 493 (1959); Matter of M-, 7 I. & N. Dec. 601 (1957).

73. Scott v. Immigration & Naturalization Serv., 350 F.2d 279 (2d Cir. 1965), *rev'd*, Immigration & Naturalization Serv. v. Errico, 385 U.S. 214 (1966). *See also, In re* Yuen Lan Hom, 289 F. Supp. 204 (S.D.N.Y. 1968) (innocent misrepresentation as to validity of marriage sufficient to entitle one to Section 241(f)'s benefits).

74. *See* Act, *supra* note 7, § 101(b)(1), 8 U.S.C. § 1101(b)(1) (1970).

75. Matter of Simiecvic, 10 I. & N. Dec. 363 (1963).

76. *See* Act, *supra* note 7, § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (1970). Legitimation is determined by the law of the child's or father's residence or domicile; it must take place before the child reaches 18, and must occur while the child is in the legal custody of the legitimating parent.

77. *Id.* § 101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E) (1970). The adoption must conform with the law of the jurisdiction where performed. *See* Matter of A-, 8 I. & N. Dec. 242 (1959); Matter of Lau, 10 I. & N. Dec. 597 (1964). The child must have been adopted while under the age of 14 and have been in custody of and residing with the adopting parents for at least two years.

78. *See* Act, *supra* note 7, § 1101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F)

Regarding illegitimate children, the Act provides that the relationship to the mother is controlling.[79] The illegitimate child whose mother is a United States citizen or alien lawfully admitted for permanent residence would be entitled to the benefits accorded by Section 241(f). Likewise, the alien mother of an illegitimate United States citizen child or child lawfully admitted for permanent residence would be a "parent" for Section 241(f) purposes. However, the illegitimate child whose father is a citizen or alien lawfully admitted for permanent residence would not be a "child", and the alien father of a citizen child or a child lawfully admitted for permanent residence would not be a "parent".

The term "parent" is not independently defined by the Act. Instead, the Act provides that an individual is a "parent . . . only where [that] relationship exists by reason of any of the circumstances set forth in . . ."[80] the definitions of a "child". Thus, whether an individual is a "parent" depends solely upon the relationship between that individual and a child. However, in order to be a "parent" under the Act, a "child" by the Act's definition, need not be in existence; only the requisite relationship need appear. For example, an alien with a married United States citizen child could be a "parent", but the child would not be a "child", as defined by the Act.[81]

B. Problems Surrounding Discriminations Based Upon Illegitimacy

Under the Act's definition, a legitimate child whose father is a citizen, or alien lawfully admitted for permanent residence, is considered a "child", while an *illegitimate* child of the same father would not be a "child".[82] Likewise, the father of a *le-*

(1970). The individual must be orphaned because of the death, disappearance, abandonment or desertion by the natural parents, or be a child for whom the surviving parent is incapable of providing proper support. Additionally, adoption must be sought by United States citizens and the visa application filed when the child is under the age of 14.

79. *Id.* § 101(b)(a)(D), 8 U.S.C. § 1101(b)(1)(D) (1970).

80. Act, *supra* note 7, § 101(b)(2), 8 U.S.C. § 1101(b)(2) (1970). If the claimed relationship is to a resident alien, the resident alien must be lawfully in this country. Lai Haw Wong v. Immigration & Naturalization Serv., 474 F.2d 739, 742 (9th Cir. 1973).

81. Matter of Louie, Interim Dec. No. 2223 (B.I.A. Aug. 27, 1973). *Cf.* Matter of Iesce, 13 I. & N. Dec. 156 (1967).

82. *See* Act, *supra* note 7, § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1970).

gitimate child is considered a "parent" under the Act, while the father of an *illegitimate* child is not a "parent". Thus, the Act discriminates against a child on the basis of his or her illegitimate status and against a male parent because of the illegitimate status of his child.[83]

Discriminations based upon illegitimacy raise the possibility of a violation of the constitutional guarantee of equal protection of the laws.[84] For example, state statutes barring an illegitimate child from recovering for the wrongful death of his mother[85] or prohibiting unacknowledged illegitimate children from recovering

83. The Act's definition of child also produces discrimination based upon sex. An illegitimate alien child whose *mother* is a citizen or alien lawfully admitted for permanent residence is considered a "child". However, the illegitimate alien child whose *father* is a citizen or alien lawfully admitted for permanent residence is not considered a "child". Likewise, the *mother* of either an illegitimate citizen-child or lawfully admitted resident alien-child would be considered a "parent", while the *father* of this same child would not be considered a "parent". Thus, the Act discriminates against an illegitimate child on the basis of the sex of the child's parents, and against the male parent of either an illegitimate citizen child or a child lawfully admitted for permanent residence. The Supreme Court has held that discriminations based upon sex may violate the Equal Protection Clause. Stanley v. Illinois, 405 U.S. 645 (1972) (father of an illegitimate child cannot be deprived of the child's custody unless the father is shown parentally unfit where state does not deprive a mother of a child's custody without such a showing); Reed v. Reed, 404 U.S. 71 (1971) (state law preferring males over equally qualified females in administering estates is invalid). In evaluating sexual discriminations the Supreme Court has used the "rational basis" test which merely requires that the discriminatory classification have some rational relationship to a legitimate state interest. This test is far less demanding upon the government than is the "suspect classifications" test. Thus, if the government can defend a classification under the "suspect classifications" test, it will obviously prevail under the "rational basis" test. Conversely, if the government cannot defend its discriminatory classification under the "suspect classifications" test, the discrimination will be unconstitutional even though possibly defensible under the "rational basis" test. Since discriminations based on illegitimacy are tested under the "suspect classification" test, only that analysis is treated here.

84. Although the Fifth Amendment does not explicitly guarantee equal protection of the laws, it implicitly does so. Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969). Aliens lawfully in the country are entitled to equal protection of the laws. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973). It would also appear aliens unlawfully here are entitled to the same protection. *See* cases cited note 5 *supra*. This is not to say that all classifications discriminating against aliens unlawfully in the country would be unconstitutional. Indeed, governments might justify denying certain benefits to illegal entrant aliens. *Cf.* Sugarman v. Dougall, *supra* at 647-649. However, the issue under consideration is whether the Act's discriminatory classification regarding an alien's very status in this country violates equal protection principles.

85. Levy v. Louisiana, 391 U.S. 68 (1968).

under workmen's compensation laws have been struck down by the Supreme Court.[86] A statute forbidding a mother from recovering for the wrongful death of her illegitimate child also contravenes the equal protection of the laws.[87] On the other hand, in *Labine v. Vincent*,[88] the Supreme Court refused to find that an intestacy law which barred unacknowledged illegitimate children from sharing equally with legitimate children violated equal protection of the laws.

In resolving issues concerning discrimination based upon illegitimacy, the Supreme Court has applied the "suspect classifications" test. Under this test:

> Statutory classifications which either are based upon certain "suspect" criterion or affect "fundamental rights" will be held to deny equal protection unless justified by a "compelling" governmental interest.[89]

In addition to this test, the Supreme Court appears to evaluate discriminations based upon illegitimacy in terms of the ease with which either the parent or child could alleviate the discrimination.[90] Thus, the Court recently distinguished *Labine v. Vincent* by noting that there the father could have easily modified his illegitimate daughter's disfavored position simply by making a will.[91]

Application of this test to the Act's classification of children initially requires that the governmental interests arguably promoted by the classification be delineated. First, the classification can be said to control the number of aliens allowed to remain in this country. Second, the classification can be considered as discouraging promiscuity, illicit relationships and illegitimacy. Third, the classification eliminates potentially difficult problems of proof in the administration of the immigration laws. Assuming that each of these governmental interests is "compelling",[92] the

86. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

87. Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968).

88. 401 U.S. 532 (1971).

89. Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting opinion).

90. Weber v. Aetna Casualty & Surety Co., 406 US.. 164, 170 (1972).

91. *Id. Labine v. Vincent* may also be distinguishable since the laws limiting immigration are of relatively recent origin while the inheritance laws under consideration in *Labine* were of ancient origin.

92. The governmental interest in controlling the entry of aliens seems a "compelling" one. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972). The

question remains whether the discrimination against illegitimate children is necessary to accomplish these interests.

Respecting the governmental interest in controlling the number of aliens in this country, it is doubtful Congress by its definition of "child" intended to control the number of immigrants: the legislative history indicates that the expansion of the definition of "child" to include illegitimate children was merely a response to a narrow reading of the term by the Service.[93] Moreover, there are certainly more direct ways of controlling the number of immigrants than discriminating against illegitimate children. Thus, even assuming the Congressional purpose was to control the number of immigrants, it seems obvious that the discrimination is not necessary to accomplish this end.

It is also difficult to see how penalizing the alien child, fathered by a citizen or lawfully admitted resident alien, will further the governmental interest of discouraging promiscuity. Arguing that a male would shun an illicit relationship with an alien female simply because the foreign born offspring of that relationship would not be allowed to remain in this country is tenuous, at best. Moreover, the amount of promiscuity to be discouraged is relatively small, since the class concerned is limited. The child must, of course, not be born in the United States. The child's mother cannot be a citizen, since in most cases even if the child is born in a foreign country, the child would have defeasible United States citizenship.[94] Therefore, under consideration are only the children produced by illicit relationships between a male citizen or alien lawfully admitted for permanent residence and an alien woman whose child is born outside the United States.

The primary problem of proof concerning the father of an illegitimate child arises from the inherent difficulty in determin-

interests in detering promiscuity and alleviating difficult proof problems are often argued to be "compelling". *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). In these cases, however, the Supreme Court has not specifically ruled whether the interests are "compelling". Instead, the Court has shown that the particular interest under consideration is not significantly furthered by the questioned classification. This analysis is used here.

93. *See generally* H.R. No. 1199, 85th Cong., 1st Sess. 7-8 (1957); S. Rep. No. 1057, 85th Cong., 1st Sess. 4-5 (1957).

94. *See* Act, *supra* note 7, §§ 301(a)(7), (b), 8 U.S.C. §§ 1401(a)(7), (b), 1409 (1970). Generally, a child is a citizen if he comes to the United States prior to attaining the age of twenty-three and lives here continuously for at least five years between the ages of fourteen and twenty-eight.

ing paternity.[95] This problem is aggravated when the child is born of an illicit relationship with an alien woman and is born in a foreign country. However, the proof problems are attenuated when it is recognized that the burden of proof rests upon the child claiming Section 241(f) benefits.[96] The Service would ordinarily not present proof, but merely review that presented by the child who is required to demonstrate the existence of his father. It would also seem reasonable to require that absent the father's admission of paternity, or a prior judicial determination thereof, the child's claim would not be established.[97] In light of the financial responsibilities and other adverse consequences flowing from an admission of paternity, it seems unlikely that many men would fraudulently make such an acknowledgement.[98] Furthermore, the Service is often confronted with the necessity of determining claims based upon a child's assertion that a particular individual is his father.[99] Consequently, with the burden

95. A child may learn the apparent identity of his father even without his mother's cooperation from friends, other relatives or birth records. However, proof of paternity is another matter. Properly conducted blood grouping tests can only show a particular individual is not the father of a child. *See generally* S. SHATKIN, DISPUTED PATERNITY PROCEEDINGS (4th ed. 1967); Note, *Blood Tests & the Conclusive Presumption of Legitimacy—California's Tangled Web*, 20 STAN. L. REV. 754 (1968). Normally, proof of paternity is obtained by the testimony of the mother. *Cf.* S.D.W. v. Holden, 275 Cal. App. 2d 313, 321, 80 Cal. Rptr. 269 (1st Dist. 1969) (mother's testimony amply demonstrated that the father of her child was the defendant in a paternity suit rather than her former husband and blood tests substantiated that the former husband was not the father; however, California's conclusive presumption of legitimacy defeated the paternity claim).

96. *See* Act, *supra* note 7, § 291, 8 U.S.C. § 1361 (1970). This section specifies that the burden of proof rests with the person applying for admission or seeking other benefits under the immigration laws. *See also* Matter of Awadalla, 10 I. & N. Dec. 580 (1964).

97. Paternity suits can often be nothing but unwieldy swearing contests. *See, e.g.*, Berry v. Chaplin, 74 Cal. App. 2d 652, 669, 169 P.2d 442 (2d Dist. 1946). Interjecting such proceedings into immigration hearings would be unfortunate. Moreover, since the result of establishing that the child's father was a citizen or resident alien would be to allow the child to remain in the United Sates, the child's health and welfare must be considered. The father's admission of paternity would result in providing for this support to some extent. *See, e.g.*, CAL. PENAL CODE § 270 (West 1970).

98. *See, e.g.*, CAL. PENAL CODE § 270 (West 1970) (providing criminal punishment for failure to provide "clothing, food, shelter, medical attendance or other remedial care. . . ."); ILL. REV. STAT., ch. 106¾, §§ 56-64 (1971) (providing for civil contempt proceeding against father who fails to support child).

99. *See, e.g.*, United States *ex rel.* Lee Kum Hoy v. Shaughnessy, 237 F. 307 (2d Cir. 1956), *aff'd per curiam*, 355 U.S. 169 (1957).

of proof upon the child, and the aforementioned requirements in existence, proof problems would not significantly be increased by a holding that an illegitimate child fathered by a citizen or lawfully admitted resident alien was entitled to Section 241(f)'s benefits.

Finally, it should be apparent that there is little the illegitimate child can do to alleviate his disfavored position. The child cannot force the father to legitimate him and cannot procure legitimation on his own.[100] The father may have difficulty in legitimating the child, as legitimation is often a complicated, time consuming procedure which may be impossible.[101] Additionally, the legitimation process, even if available, would be made even more difficult since the child and the mother will ordinarily be in a foreign country. This difficulty in alleviating the illegitimate child's disfavored position, coupled with the fact the discrimination does not appear to be justified by a compelling governmental interest, reasonably leads to the conclusion that the discrimination against the illegitimate child produced by the Act violates equal protection principles.

The situation of a father whose illegitimate child is a citizen or an alien lawfully admitted for permanent residence is a different matter. If the illegal entrant father of an illegitimate child were to be afforded benefits under Section 241(f), it would be in the father's best interest to seek out illicit relationships with a woman who is a citizen or lawfully admitted for permanent residence. It would be in the father's interest to assure that a child was born of his illicit relationship, even though this might be adverse to the interests of the woman.[102] Consequently, a holding that a father whose illegitimate child is a citizen or alien lawfully admitted for permanent residence should be considered a "parent", encourages promiscuity and the bearing of illegitimate children.

100. *See, e.g.*, Weber v. Aetna Casualty Co., 406 U.S. 164, 170-1 (1972); CAL. CIVIL CODE §§ 230 (West 1954) (California legitimation statute).

101. *Id.*

102. Justice Douglas has reasoned concerning unwanted pregnancies that:

> [R]ejected applicants under the Georgia (abortion) statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

Doe v. Bolton, 410 U.S. 179, 215 (1973) (Douglas, J., concurring). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

Proof problems would also be aggravated by a holding that the father of an illegitimate child should be considered a "parent". It is difficult to disprove a male's claim that a particular child is his.[103] The possibilities for fraud exist even if it is held that the mother must substantiate the father's claim of parenthood. As contrasted with the case of the detriment to a father who acknowledges an illegitimate child, the mother may be encouraged or pressured to name a father.[104] The enhancement of proof problems, coupled with the frustration of Congressional intent respecting deterence of promiscuity, appears to result in the Act's discrimination against the father of an illegitimate child not being unconstitutional.

The problems inherent in proving the requisite familial ties are clear. If an alien is unsuccessful in establishing as well as proving these relationships, he will not be able to invoke Section 241(f) relief. However, this first criterion has caused the fewest problems. It is the remaining three criteria which have generated the most confusion and litigation.

III. WITHIN THE UNITED STATES SUBJECT TO DEPORTATION

Section 241(f), by its very terms, indicates that it applies only to deportation proceedings.[105] However, every alien who is apprehended on United States soil is not entitled to a deportation hearing. "[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality."[106] The former are entitled to an exclusionary hearing, while the latter are entitled to a deportation hearing. This distinction is not only critical be-

103. *See* note 95 *supra.*

104. For example welfare laws often provide that the mother must name the putative father in order to receive welfare for the child. *See, e.g.,* CAL. WEL. & INST. CODE, § 1147 (West 1972).

105. The first sentence of this section reads: "The provisions of this section relating to the deportation. . . ." Act, *supra* note 7, § 241(f), 8 U.S.C. § 1251(f) (1970). The reference to "this section" obviously refers to § 241 which contains the other deportation grounds. *See* notes 127-129 *infra. See also* Khadjenouri v. Immigration & Naturalization Serv., 460 F.2d 461 (9th Cir. 1972); (Section 241(f) inapplicable to an adjustment of status proceeding); Matter of Caglio, 12 I. & N. Dec. 350 (1967) (Section 241(f) inapplicable to visa petition proceedings).

106. Leng May Ma v. Barber, 357 U.S. 185, 187 (1958).

cause the Act confers privileges upon those subject to deportation proceedings which are not conferred upon those subject to exclusionary hearings, but also because an individual's rights in an exclusionary hearing are more limited than in a deportation hearing.[107]

A case which highlights and can serve to clarify this distinction is *Leng May Ma v. Barber*.[108] Leng May Ma was a native of China who arrived in this country in May, 1951, claiming to be a United States citizen because her father was a citizen. Immediately upon her arrival she was taken into custody until it could be ascertained whether or not her claim to citizenship was valid. After having been in custody for over a year, she was released from custody pursuant to Section 212(d)(5),[109] which gives the Attorney General discretionary authority to temporarily "parole" certain aliens into the United States. After having failed to establish her claim of citizenship, Leng May Ma was ordered excluded. She surrendered to the authorities and applied for a stay of deportation pursuant to Section 243(h)[110] asserting that her return to China would subject her to persecution. Section 243(h) provides that its benefits are only available to an alien "[w]ithin the United States. . . ." Moreover, Section 243(h) is applicable only in the case of an alien subject to deportation proceedings.[111] Thus, the question before the Court

107. *Compare* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276 (1966) (burden of proof upon government to prove facts supporting deportation charge by clear, unequivocal, and convincing evidence); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (interpreting regulation allowing use of undisclosed confidential information in immigration hearings to be restricted to exclusionary hearings), *with* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

108. 357 U.S. 185 (1958).

109. Act, *supra* note 7, § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1970) which provides:

> The Attorney General may in his discretion parole into the United States temporarily . . . any alien applying for admission into the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served the alien shall . . . be dealt with in the same manner as that of any other applicant for admission to the United States.

110. Act, *supra* note 7, § 243(h), 8 U.S.C. § 1253(h) (1970). This section allows the Attorney General discretion to withhold deportation where he believes the alien's return to his native land would subject him to persecution based upon race, religion or political opinion.

111. The Court stated:

> Section 243(h), under which [Leng May Ma] claims relief was inserted

could be phrased: Was Leng May Ma "within the United States" or alternatively, was she subject to a deportation rather than an exclusion hearing?

In resolving the issue, the Supreme Court reiterated the long standing distinction made between those within the country and those seeking admission into this country. The Court held that the mere fact Leng May Ma had been paroled into the United States pending determination of the issue of her right to enter, could not change her status from one seeking admission, to one within this country entitled to a deportation hearing. The Court's decision in this regard was supported by the statute[112] and earlier cases,[113] and has been consistently followed.[114] Although Leng May Ma may have been physically present in this country, she was not "within the United States" for the purpose of the statute's application.

The words "within the United States" also appear in Section 241(f). The rationale for the Supreme Court's decision in *Leng May Ma* supports a similar interpretation of these words as they appear in Section 241(f). Moreover, the reference in Section 241(f) to its application in deportation proceedings, further evidences that Section 241(f) relief is limited to this type of proceeding.

An "entry accompanied by freedom from official restraint" is the phrase used to delineate those circumstances in which an alien is entitled to a deportation hearing.[115] It should be emphasized that such an entry need not have been legal.[116] Con-

---

by Congress *not* among Chapter IV's "Provisions Relating to Entry and Exclusion," but squarely within Chapter V, a strikingly inappropriate place if, as [she] claims, it was intended to apply to excluded aliens.

Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).

112. *See* note 109 *supra.*

113. *See, e.g.,* Kaplan v. Tod, 267 U.S. 228 (1925); United States v. Ju Toy, 198 U.S. 253 (1905).

114. *See, e.g.,* Yuen Sang Low v. Attorney General, 479 F.2d 820 (9th Cir. 1973), *cert. denied,* 414 U.S. 1030 (Nov. 19, 1973) (alien in United States 20 years under parole not entitled to deportation hearing); Kordic v. Esperdy, 386 F.2d 232 (2d Cir. 1967).

115. *See, e.g.,* United States v. Vasilatos, 209 F.2d 195, 197 (3rd Cir. 1954); Lazarescu v. United States, 199 F.2d 898, 900 (4th Cir. 1952); United States *ex rel.* Schirrmeister v. Watkins, 171 F.2d 858 (2d Cir. 1949).

116. *Id.* The Act defines "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise. . . ." Act, *supra* note 7, § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970). *See generally* Rosenberg v. Fleuti, 374 U.S. 449 (1963).

versely, if the entry of the alien is produced while he is under official restraint, the alien is not subject to deportation.[117] A recurring problem in federal districts which share a common land border with foreign nations, (such as the Southern District of California) is whether an alien who travels the short distance between the border line and the port of entry is entitled to a deportation or an exclusionary hearing.[118]

Consider the case of an alien seeking entry through the port of entry at San Ysidro, California, located immediately north of the border from Tijuana, Mexico and approximately ten miles south of San Diego, California. The pedestrian and vehicular gates at this port of entry are located about 100 yards north of the Mexican-United States border. Consequently, an individual who has arrived at the inspector's station has traversed United States territory for at least a short distance.

Although an alien coming to the inspector's station at the San Ysidro port of entry may travel over United States soil, he is realistically never free from official restraint. The access to this port of entry is fenced in such a manner as to allow only two choices, going to the inspector's station or returning to Mexico. An individual facing this situation is in the same position as one on board a ship arriving in this country. An alien arriving on board a ship is entitled only to an exclusionary hearing,[119] not a deportation hearing. It has been indicated that even though ports of entry may be inland from the actual international boundary, the ports can be considered the "functional equivalent" of the border.[120] Thus, the short journey over United States' territory to the port of entry, literally free from official restraint, would not entitle one to a deportation hearing.

The Act itself indicates that mere arrival at a port of entry does not confer the right to a deportation hearing. The provisions of the Act relating to the entry, inspection, and exclusion of aliens, all provide that the determination of whether an alien

117. Thack v. Zubrick, 51 F.2d 634 (6th Cir. 1931); United States *ex rel.* Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947).

118. *See, e.g.*, Matter of Barragan, *appeal filed*, No. A20-000-136, B.I.A., Dec. 14, 1973.

119. United States v. Ju Toy, 198 U.S. 253 (1905).

120. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *See also* Thack v. Zubrick, 51 F.2d 634 (2d Cir. 1949).

should be allowed admission into the country, or should be excluded, is to be made upon the arrival of the person at the port of entry.[121] Nothing in the Act even intimates that travel from a foreign country to the port of entry would entitle one to other than an exclusionary hearing.

Although it appears that an alien arriving at the port of entry is not entitled to a deportation hearing, this result may be neither fair nor reasonable. Consider an alien possessing all other criteria necessary for application of Section 241(f) who comes to the port of entry and either by fraudulent claim of citizenship, or by the presentation of a fraudulently obtained document, actually procures entry into the United States. If this alien is later apprehended he can defend against deportation upon the grounds asserted in Section 241(f).[122] On the other hand, an alien who comes to the port and whose fraud is discovered before he is allowed admission is only entitled to an exclusionary hearing.[123] The anomaly is aggravated if the alien is criminally prosecuted for unlawful use of the false document.[124] An alien could be within the criminal jurisdiction of the United States, convicted of unlawfully entering and incarcerated in the United States, and yet, not be "in the United States" for the purposes of receiving a deportation hearing.

This inconsistent result also encourages fraud. For example, an alien meeting the requirements of Section 241(f), who learns that he cannot obtain its benefits by seeking fraudulent entry at the port of entry, may consider surreptitiously entering the United States. If he is apprehended in the United States and deportation proceedings instituted upon the basis of a surreptitious entry, Section 241(f) will be inapplicable.[125] However, the usual method for ascertaining how entry was gained is for the authorities to question the alien. Thus, the alien is encouraged

121. *See* Act, *supra* note 7, §§ 331-9, 8 U.S.C. §§ 1221-9 (1970).

122. *See* text section IV *infra.*

123. *See* note 105 *supra* and accompanying text.

124. *See* note 137 *infra. Compare* United States v. Corsi, 65 F.2d 322 (2d Cir. 1933) (alien prosecuted and incarcerated for preparing a false card which was presented at port of entry did not secure an "entry"), *with* United States v. Oscar, — F.2d —, No. 73-3606 (9th Cir. May 6, 1974) (alien who presents false card at port of entry has not secured an entry for purposes of prosecution for illegal entry under Act, *supra* note 7, § 275, 8 U.S.C. § 1325 (1970)).

125. *See* text accompanying notes 168-170 *infra.*

to conceal his surreptitious entry and claim he entered the United States through the port of entry by making a fraudulent claim of citizenship. The unfortunate result is that the alien may be enticed to commit the additional offense of willful misrepresentation[126] in order to obtain the benefits of Section 241(f).

These anomalies could be avoided by a holding that the words "within the United States" in Section 241(f) are to be given a literal meaning.[127] This holding would not only require strained judicial interpretation of the statute, but also rejection of a chain of precedent on questionable grounds. Such departures from the principle of *stare decisis* are subject to deserved criticism and should not be encouraged. Moreover, resolution of this issue would require a determination as to how many immigrants Congress wishes to allow to reside in this country. This decision should not be made by the judicial branch. Congress has the duty,[128] and should move to resolve this difficult political issue.

IV. THE REQUISITE FRAUDULENT ENTRY

Assuming an alien has established the required familial relationship and is within the United States subject to deportation proceedings, the next criterion is whether the alien's deportation is sought upon the grounds delineated in Section 241(f). Section 241(f) relief is only available where deportation is based upon the ground the aliens 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. . . ." Thus, an alien whose deportation is sought on the ground that he has been convicted of a crime

126. In addition to the unlawful entry, the alien's misrepresentations would be in violation of 18 U.S.C. § 1001 (1970) which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined not more than $10,000 or imprisoned not more than five years or both.

127. *Cf.* Khadjenouri v. Immigration & Naturalization Serv., 460 F.2d 461 (9th Cir. 1972) (court refused to give a literal meaning to the words and held Section 241(f) inapplicable where an alien asserted fraud in procuring adjustment of status); Chung Wook Myung v. Immigration & Naturalization Serv., 468 F.2d 627 (9th Cir. 1972) (Section 241(f) inapplicable where citizen child moved to Korea and literal application would promote family disunity).

128. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972); Galvan v. Press, 347 U.S. 522 (1954); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889).

of moral turpitude,[129] has become a drug addict,[130] or has been found to have engaged in subversive activities,[131] would not qualify under Section 241(f). On the other hand, an individual who faces deportation on the ground that entry was procured by a sham marriage is entitled to the benefits of Section 241(f).[132] The question remains as to what other types of fraudulent entry are encompassed in Section 241(f).

The Supreme Court has said that if read "[l]iterally, Section 241(f) applies only when the alien is charged with entering in violation of Section 212(a)(19) of the statute which excludes from entry '(a)ny alien who . . . has procured a visa or other documentation . . . by fraud, or by willfully misrepresenting a material fact.' "[133] This is not entirely accurate since the language of Section 241(f) does not parallel the language of Section 212(a)(19).[134] Thus, Section 212(a)(19) does not specifically provide for the exclusion of an alien who has actually completed his entry into the United States. An alien who by making a false claim of citizenship actually completed his entry would not be covered by Section 212(a)(19) for he would not merely have

129. *See* Act, *supra* note 7, § 241(a)(4), (13), 18 U.S.C. § 1251(a)(4), (13) (1970). Section 241(a)(4) provides for the deportation of any individual who within five years after entry is convicted of a crime involving moral turpitude or at any time after entry is convicted of two such crimes. Section 241(f) has no application in this instance since the basis for the deportation occurred subsequent to the entry. Hames-Herrera v. Rosenberg, 463 F.2d 451 (9th Cir. 1972). Section 241(a)(13) provides for the deportation of any alien who has, within five years after entry, aided and abetted the illegal entry of aliens for gain. This separate ground for deportation does not allow for a Section 241(f) defense. Castillo-Lopez v. Immigration & Naturalization Serv., 437 F.2d 74 (5th Cir. 1971). The fact that an individual is deportable for one of the separate grounds stated in Section 241(a) should not be confused with the issue of whether a person is "otherwise admissible". Some of the grounds for deportation do overlap those for exclusion discussed in section V *infra*. However, whether an individual is deportable for a ground stated in Section 241(a), to which Section 241(f) is inapplicable, is an issue separate and distinct from whether a person seemingly covered by Section 241(f) fulfills the "otherwise admissible" requirement.

130. *See* Act, *supra* note 7, § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1970).

131. *Id.*, §§ 241(a)(6), (7), 8 U.S.C. §§ 1251(a)(6), (7) (1970).

132. The Act specifically provides that an alien who has entered into a sham marriage is deportable for having entered by a fraud under Section 212(a)(19). *Id.*, § 241(c), 8 U.S.C. § 1251(c) (1970). Consequently such an individual would be saved by Section 241(f). *Accord*, Matter of Manchisi, 13 I. & N. Dec. 132 (1967).

133. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 217 (1966).

134. The Act provides that any alien is excludable who "seeks to enter

sought entry but would have actually *procured* entry. This alien would be literally within the purview of Section 241(f) since he obviously procured entry by fraud. Consequently, a consistently literal reading of Section 241(f) would not necessarily limit its coverage solely to persons excludable under Section 212(a)(19).

A reading of Section 241(f) which would restrict its scope to deportations based upon Section 241(a)(1) and 212(a)(19) would be contradictory to expressed Congressional intent. If Section 241(f) is applied only to deportations based upon Section 241(a)(1) and 212(a)(19), there is no significant situation where the Service could not defeat the application of Section 241(f) by simply electing a charge other than 241(a)(1) and 212(a)(19). In those cases where the entry was secured by the use of a fraudulently obtained document, the alien could be readily scheduled for deportation as being excludable at the time of entry for failure to have a valid passport, visa, or other document required by Section 212(a)(20).[135] Furthermore, an alien who had fraudulently obtained his immigrant visa might aggravate his fraud by using such false documentation to acquire an alien registration receipt card.[136] In additon to subjecting himself to criminal penalties for false statements made in obtaining the card,[137] this alien would not have a valid alien registration receipt card, which must be carried at all times.[138] He would, therefore, be in violation of the Act and deportable under Section 241(a)(2).[139] If the alien with the fraudulent immigrant visa was unwilling to exploit the fraud surrounding his entry and declined

---

the United States, by fraud, or by willfully misrepresenting a material fact . . . ." Act, *supra* note 7, § 212(a)(19), 8 U.S.C. § 1182(a)(19), (1970). In contrast, § 241(f) provides for the waiver of deportation where deportation is sought on the ground that the alien was "excludable at the time of entry as one . . . who . . . procured . . . entry into the United States by fraud or misrepresentation. . . ." Act, *supra* note 7, § 241(f), 8 U.S.C. § 1251(f) (1970).

135. *Id.* § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970).

136. The Act provides for the fingerprinting and registration of aliens. *Id.*, §§ 261-6, 8 U.S.C. §§ 3101-6 (1970).

137. *Id.*, § 266(c), 8 U.S.C. § 1306(c) (1970). *See also* 18 U.S.C. § 1426(c) (1970) providing for criminal punishment of an individual who, "uses as true or genuine any false . . . paper . . . relating to . . . registry of aliens . . . knowing the same to be false. . . ." *Cf.* United States v. Campos-Serrano, 404 U.S. 293 (1971), holding that possession of a false alien registration receipt card is not punishable under 18 U.S.C. § 1546 (1970).

138. Act, *supra* note 7, § 264(e), 8 U.S.C. § 1304(e) (1970).

139. The Act provides for the deportation of any alien who "is in the United States in violation of the Act or in violation of any law of the United States. . . ." Act, *supra* note 7, § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970).

to register, he would be in violation of Section 262[140] requiring the alien to register within 30 days after entry. Here also, the alien would be deportable under Section 241(a)(2) upon a ground unrelated to the alien's fraudulent entry. Additionally, the Service could always prosecute a person who has obtained a visa by fraud for the criminal offense of fraudulently obtaining the document.[141] This individual could then be deported under Section 241(a)(5).[142] Thus, by artful selection of the charges upon which deportation is sought, the Service could easily avoid the application of Section 241(f) if it is read as applying only to deportations pursuant to Sections 241(a)(1) and 212(a)(19). It is abundantly clear that Congress did not intend that the operation of Section 241(f) be discretionary with the Service;[143] therefore, a literal reading would emasculate the legislative intent.

The administrative and judicial rulings have consistently reiterated the position that Section 241(f) cannot be read literally. This also was the position of the Supreme Court in *Immigration and Naturalization Service v. Errico*.[144] In *Errico*, the Court considered the cases of two aliens facing deportation for not being of the status specified in their visas, as was required by former Section 211(a)(4).[145] The aliens were not being deported on the basis of a charge under Section 212(a)(19). Implicit in the Court's holding that these aliens were saved from deportation by Section 241(f) was the holding that a charge under Section 212

140. *Id.*, § 262, 18 U.S.C. § 1302 (1970).

141. *See* discussion in notes 126 and 137 *supra*.

142. Act, *supra* note 7, § 241(a)(4)-(5), 8 U.S.C. § 1251(a)(4)-(5) (1970). Section 241(a)(4) is the general deportation section relating to conviction of crime while Section 241(a)(5) specifically provides that any individual convicted pursuant to Section 266(c) of the Act shall be deported.

143. *See* Act, *supra* note 7, § 212(i), 8 U.S.C. § 1182(i) (1970) which provides for waiver of exclusion on the identical grounds that Section 241(f) provides for waiver of deportation. However, Section 212(i) provides that the Attorney General shall have discretion in the application of this section. Section 212(i) was based upon a portion of Section 7 of the 1957 legislation, the predecessor of Section 241(f). *See* text accompanying notes 53-54 *supra*. The failure to specifically provide for discretion in the deportation section while specifically including discretion in the exclusion section coupled with the legislative history, (note 54 *supra*) clearly reveals the legislative judgment that operation of Section 241(f) should not be discretionary with the Attorney General.

144. 385 U.S. 214 (1966).

145. The Immigration & Nationality Act of 1952, § 211(a)(4), ch. 477, § 211(a)(4), 66 Stat. 181 (1952), *repealed*, 79 Stat. 917 (1965) predicated admissibility upon the immigrant being "of the proper status under the quota specified in the immigrant visa. . . ."

(a)(19) was not a prerequisite to Section 241(f)'s coverage. The Supreme Court did not suggest what other types of fradulent entry the "non-literal" reading of Section 241(f) would permit. The lower courts have been left to struggle with what types of fraudulent entries are included in Section 241(f). This struggle is exemplified by comparison of several recent decisions of the United States Court of Appeals for the Ninth Circuit.

In *Lee Fook Chuey v. Immigration and Naturalization Service*,[146] the court was called upon to decide whether an alien who secured entry into the United States by making a false claim to United States citizenship was saved from deportation by Section 241(f). An alien who enters the United States by making a false claim of citizenship is deportable under Section 241(a)(2) as having entered without inspection, since by claiming citizenship, inspection under the immigration laws is avoided.[147] In *Lee Fook Chuey*, the government contended Section 241(f) did not apply to this situation, but "only encompasses fraud or misrepresentation committed by an alien in the course of furnishing information, or otherwise being processed as required by our immigration laws."[148] The government attempted to distinguish *Errico* on the ground that there the aliens did not totally evade the immigration process, while a false claim of citizenship permitted the alien to enter without being subjected to any of the normal alien screening processes. The government argued that the fraud engendered in a fallacious citizenship claim results in a more deleterious effect upon the enforcement of the immigration laws than the type of fraudulent activity in *Errico*, and should not be covered by Section 241(f).

In rejecting these arguments the court initially noted that it is the purpose of the immigration processing system to achieve the important governmental function of "excluding aliens who are mentally, physically, or morally undesirable."[149] The court indicated that the logical purpose for the "otherwise admissible" requirement in Section 241(f) was to assure that these qualitative grounds for admissibility did not exist.[150] The court held that the government had ample opportunity to "determine qualitative

146. 439 F.2d 244 (9th Cir. 1971).

147. Matter of F-, 1 I. & N. Dec. 343 (1942).

148. Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244, 247 (9th Cir. 1971).

149. *Id.*, at 248.

150. *Id.*

admissibility of these aliens during the investigatory process which preceded any claim for relief under Section 241(f)."[151] Thus, a holding that Section 241(f) encompasses false claims of citizenship would not significantly impair the government's ability to regulate the quality of immigrants.

The court also found the very enactment of Section 241(f) showed that Congress would tolerate some avoidance of the immigration law's strictures.[152] Since deportation is such a drastic measure, resolution of any doubts as to proper construction of the statute should be decided in favor of the alien. The court, finding no meaningful distinction between the type of fraud involved in a false claim of citizenship and that involved in *Errico*, held a fraudulent claim to citizenship was encompassed within the waiver provisions of Section 241(f).[153]

---

151. *Id.*

152. *Id.*

153. *Id.* A very recent decision of the United States Court of Appeals for the Second Circuit has ruled directly contrary to *Lee Fook Chuey*. *Reid v. Immigration & Naturalization Serv.*, — F.2d —, No. 73-1067 (2d Cir. Feb. 13, 1974) (2-1 decision) held that an alien who secures entry by making a false claim to citizenship cannot be saved from deportation by Section 241(f). The majority opinion conceded that a literal reading of Section 241(f) would include an alien who enters by a misrepresentation of citizenship. However, since the Supreme Court in *Errico* had sanctioned a non-literal reading of the section to *foster* its humanitarian purposes, see text accompanying notes 132-144 *supra*, the majority reasoned that a non-literal reading *restricting* application of the statute could also be sanctioned. Although the majority contended that the legislative history of Section 241(f) did not indicate that it was meant to apply to the alien who misrepresents his citizenship, they ignored the most illuminating legislative history, see note 54 *supra*, which does indicate to the contrary. *See also* note 177 *infra*. The majority's main argument against applying Section 241(f) to an alien who makes a false claim of citizenship was that this alien totally escapes the immigration screening process. The majority believed "that a *post hoc* investigation would not be an adequate substitute for the exhaustive contemporaneous probe and examination required of the consular and I.N.S. services." Slip Opinion at 1756. This argument is tenuous at best. Remembering that it is qualitative rather than quantitative, see section V *infra*, attributes that are to be measured, it should be apparent that a *post hoc* determination of whether an alien is, for example, insane, mentally retarded, a narcotic addict, possessed of a contagious disease, or a convicted felon is at most minimally more difficult than a contemporaneous determination. Indeed, some qualitative disqualifications would appear easier to ascertain after entry than at the time of entry. The very example given by the majority to support their argument, determining those who are likely to become public charges, would seem best evidenced by whether the alien had in fact become a public charge at a later time. It also must be remembered that the burden is on the alien seeking Section 241(f)'s benefits to show that he is "otherwise admissible." Consequently, whatever are the difficulties in ascertaining the existence or lack of a qualitative disqualifica-

In *Muslemi v. Immigration and Naturalization Service*,[154] the alien entered the United States with a temporary visitor's (non-immigrant) visa after having initially been denied an immigrant visa. Muslemi overstayed the time allowed by his visa. Deportation proceedings were then instituted on the ground that he was excludable at the time of entry for not possessing a valid immigrant visa as required by Section 212(a)(20).[155] Five days after receiving notification that deportation proceedings had been initiated, Muslemi married a United States citizen and asserted Section 241(f) as a defense. The Service chose to deport Muslemi under Section 212(a)(20) because it was determined that at the time of his application for a non-immigrant visa, he actually intended to permanently remain in the United States, and therefore, had actually entered as an immigrant.[156] Since he entered as an immigrant without a proper visa, Muslemi was deportable under Section 241(a)(1) as an alien excludable at the time of entry for failure to have a valid immigrant visa in his possession as required by Section 212(a)(20). The court indicated that it was not deciding the general question of whether Section

tion, such difficulties would redound to the benefit of the Service and the detriment of the alien seeking relief. Furthermore, in almost all cases where a Section 241(f) defense is presented, the Service is confronted with the problem of verifying whether the alien was "otherwise admissible" at the time of entry. This is so because visa applications rely heavily on answers and documents supplied by the applicant, and the Service is not in a position to fully investigate all the information supplied. Consequently, eliminating Section 241(f) defenses in those cases where entry is accomplished by a false claim of citizenship does little to eliminate the necessity of *post hoc* determinations of whether an individual is "otherwise admissible." Finally, the majority's suggestion that it would be "extremely difficult, if not impossible," Slip Opinion at 1753, to make a *post hoc* determination as to whether a person might be "otherwise admissible" shows naivete about, if not purposeful ignorance of, Section 241(a)(1) of the Act. Section 241(a)(1) allows the deportation of any alien who would have been excludable at the time of entry for any of the reasons stated in Section 212(a). "[S]ince a large proportion of deportation proceedings are predicated on this charge," C. GORDON AND H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 4.7(a) at 4.36 (rev. ed. 1973), it is evident that the Service itself does not find *post hoc* determinations concerning an alien's status at the time of entry either difficult or impossible. Consequently, to suggest that giving the alien an opportunity to do so would be disruptive of the screening process is untenable.

154. 408 F.2d 1196 (9th Cir. 1969).

155. Act, *supra* note 7, § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1970).

156. The Act provides that every alien is to be deemed an "immigrant" unless he fits within a specific non-immigrant category, *e.g.*, ambassadors, students and those coming temporarily to the United States for business or pleasure. *Id.*, § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1970).

241(f) is applicable to aliens with the requisite family ties who enter the country by presenting fraudulently obtained non-immigrant visas.[157] The court, focusing solely upon the deportation charge brought against Muslemi, found this charge "resulted directly from [his] fraudulent concealment of his intention to remain in this country permanently."[158] Therefore, Muslemi having gained entry by fraud would be saved from deportation under Section 241(f).[159]

The issue of whether Section 241(f) is applicable in the case of an alien who enters with a fraudulently obtained non-immigrant visa[160] was presented in *Cabuco-Flores v. Immigration and Naturalization Service.*[161] In *Cabuco-Flores*, two Philippine citizens entered the United States as non-immigrant visitors and subsequently, each gave birth to a child. Deportation proceedings were commenced against each on the ground that they had remained in this country longer than permitted by their visas and were deportable for being in the United States in violation of Section 241(a)(2). Both aliens asserted they were saved from deportation by Section 241(f). Recognizing that Section 241(f) cannot be read literally, the court noted that "Section 241(f) is properly invoked only when a fraud is 'germane to the charge' upon which deportation is sought . . . and the charge relates to entry."[162] The court held that Section 241(f) would relieve only those frauds or misrepresentations which the government must prove to establish deportability.[163] Section 241(f) did not make the alien's fraud "independently exculpatory without re-

157. Muslemi v. Immigration & Naturalization Serv., 408 F.2d 1196, 1199 (9th Cir. 1969).

158. *Id.*

159. *Id.*

160. Vitales v. Immigration & Naturalization Serv., 443 F.2d 343 (9th Cir. 1971), *rev'd mem.*, 405 U.S. 983 (1972) held that Section 241(f) was applicable in the case of a non-immigrant who had obtained her non-immigrant visa by fraudulently misrepresenting her intention to remain in this country. However, the case was reversed by the Supreme Court on the ground of mootness when the alien left the country pending hearing in the Supreme Court. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950). The grant of certiorari may have been prompted by the fact that the Sixth and Seventh Circuits had reached a conclusion opposite to *Vitales.* Ferrante v. Immigration & Naturalization Serv., 399 F.2d 98 (6th Cir. 1968); Tsaconas v. Immigration & Naturalization Serv., 397 F.2d 946 (7th Cir. 1968). *Accord,* Matter of Kanyzma, 13 I. & N. Dec. 514 (1970).

161. 477 F.2d 108 (9th Cir. 1973), *cert. denied,* 414 U.S. 841 (1973).

162. *Id.*, at 110.

163. *Id.*

gard to the proof required to establish the ground for deportability relied upon by the government.'[164] Therefore, Section 241(f) was inapplicable to the cases under consideration since the government had not sought to establish that the aliens' entries were fraudulent, but simply that each had overstayed her non-immigrant visa.[165]

Justifying its conclusion, the court said its holding avoided "the anomalous consequence that an alien may escape deportation simply by 'substitut[ing] for his own convenience a ground not involved in the deportation proceedings.' "[166] The court did not mention the more anomalous consequence that by its holding the government could escape the application of Section 241(f) simply by substituting for their own convenience a ground not involving fraudulent entry. The court also found that *Muslemi* and *Lee Fook Chuey* were not inconsistent with its decision since in those cases the government had been required to prove a fraud or misrepresentation had taken place during the entry process.[167]

In *Monarrez-Monarrez v. Immigration and Naturalization Service*,[168] the court considered whether Section 241(f) would apply to an alien who surreptitiously entered the United States and who was being deported under Section 241(a)(2) for having entered without inspection. In *Monarrez-Monarrez*, two aliens had entered the United States surreptitiously; one later fathered an American child and the other married an American citizen. Both aliens defended against deportation by asserting the provisions of Section 241(f). The court rejected this contention since the aliens "were not charged with fraud and they did not commit any fraud or make any misrepresentations to gain entry."[169] The court's reasoning was captured in one short paragraph:

> Section 241(f) cannot be expanded to include petitioners. Fraud and misrepresentation cannot be equated to surreptitious entry without bending the language of Sections 241 (a)(2) and 241(f) into shapelessness and without ignoring the history of Section 241(f) recited in *Errico*. If petitioners' reading of Section 241(f) were adopted, no alien who illegally entered this country and who was not otherwise in-

164. *Id.*
165. *Id.*, at 111.
166. *Id.*
167. *Id.*
168. 472 F.2d 119 (9th Cir. 1972).
169. *Id.*, at 120.

> admissible could be deported by reason of his illegal entry after he acquired the requisite family ties. Congress had no such alien bonanza in mind.[170]

Any attempt at reconciliation of the *Cabuco-Flores* and *Monarrez-Monarrez* decisions with *Lee Fook Chuey* and *Muslemi* would be no more than an exercise in sophistry. The result of such an attempt would serve only to prove the axiom that the law of the case is often determined by the composition of the court. In *Lee Fook Chuey* the court found that the "major purpose of Congress in establishing Section 241(f) was a humanitarian desire to keep family units together."[171] The *Lee Fook Chuey* court also set forth the following principles of statutory construction which it believed were applicable in resolving the issues concerning the scope of Section 241(f):

> We have always understood that a cardinal principle of statutory interpretation is that Congressional enactments should be read as rational, coherent and purposeful elaborations of legislative policy. They should never be construed as establishing statutory schemes which are illogical, unjust or capricious. We may never ascribe to Congress an intent to provide different rules in functionally similar situations, involving important individual interests such as the right to remain in this country with one's family, based on purely fortuitous factual differences.[172]

Applying these principles to the cases of the surreptitious entrant and the person who gains entry by misrepresenting his true intent to stay permanently, leaves little doubt that Section 241(f) should be available to them. Those who enter surreptitiously or overstay their visa cannot be meaningfully distinguished from those who enter by misrepresenting their citizenship, skill, or the nature of their marriage. The court's suggestion in *Cabuco-Flores* and *Monarrez-Monarrez* that the nature of the charge, rather than the nature of the entry, is to govern the applicability of Section 241(f) is inconsistent with *Errico*. This argument was made by the dissenters in *Errico*[173] and was necessarily rejected by the majority's holding that Section 241(f) benefited the aliens. In almost every case of fraudulent entry a de-

170. *Id.*

171. Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244, 247 (9th Cir. 1971).

172. *Id.*, at 249.

173. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 225-228 (1966).

portation charge may be founded upon some basis other than the fraudulent entry.[174] Thus, as a practical matter, *Cabuco-Flores* and *Monarrez-Monarrez* result in giving the Service uncontrolled discretion to determine whether the alien shall be saved by Section 241(f) or deported. Granting such discretion clearly contravenes the manifested Congressional intent.[175] Finally, the court's argument in *Monarrez-Monarrez* that reading Section 241(f) as encompassing surreptitious entries would result in "ignoring the history of Section 241(f) recited in *Errico* . . ."[176] is particularly unfortunate. Clearly, the legislative history as recited in *Errico* indicates that Section 241(f)'s predecessor was meant to benefit the surreptitious entrant.[177]

The essential difference between the *Cabuco-Flores* and *Monarrez-Monarrez* decisions and *Lee Fook Chuey* and *Muslemi* is the degree to which the "alien bonanza" mentioned in *Monarrez-Monarrez* is emphasized. If one is convinced that Congress intends to strictly regulate and restrict the immigrant population, notwithstanding family ties, then obviously *Monarrez-Monarrez* and *Cabuco-Flores* are appealing. On the other hand, if one believes that Congress in enacting Section 241(f), intended limited enlargement of the immigrant population to include those with family ties or was implicitly aware of such a consequence, then *Lee Fook Chuey* and *Muslemi* will be persuasive. The decision regarding the size of the immigrant population is clearly for Congress and not the courts.[178]

174. *See* text accompanying notes 134-42 *supra.*

175. *See* discussion in note 143 *supra.*

176. 472 F.2d 119, 120 (9th Cir. 1972).

177. The House Report indicated that Section 241(f)'s predecessor was primarily to benefit "Mexican nationals, *who during the time when border control operations suffered from regrettable laxity* were able to enter the United States. . . ." H.R. No. 1199, 85th Cong., 1st Sess. 11 (1957). (Emphasis added.) Taken in its historical and literal context there is really little doubt that the "regrettable laxity" mentioned was the simple fact that the border was not adequately patrolled, making surreptitious entry easy. This situation may not have materially changed. *Cf.* United States v. Bowen, — F.2d —, No. 72-1012 (9th Cir. May 6, 1974) (*en banc*). However, whatever doubt emanated from the House Report, the Supreme Court determined that the terms referred to entries other than at the designated ports of entry, that is surreptitious entries. For in *Errico*, the court noted that "it has always been far easier to avoid border restrictions when entering from Mexico, than when entering from countries that do not have a common land border with the United States." Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 244 (1966). The only border restrictions that are easier to avoid with countries sharing a common land border with the United States are the ports of entry.

178. *See* cases cited note 128 *supra.*

Where the legislative background and history do not provide a clear solution to a problem within the Congressional domain, reasoned and consistent judicial decision making is crucial. Judicial speculation about present Congressional belief concerning the scope of a statute's coverage does not justify departure from prior decisions interpreting the statute. If a logically consistent line of decisons produces a result Congress deems inappropriate, Congress should correct the error. Furthermore, judicial reluctance to altering a course of decisions should be heightened where the existing decisions favor those who are in the least effective position to obtain legislative change. Obviously, the Service has better access to the legislative machinery than does the illegal entrant; therefore, construction of Section 241(f) should favor the alien who is unable to obtain legislative relief and stands to suffer prolonged separation from his family and work. New legislation in this area must be meticulously drafted and preceded by detailed legislative intent, in order to assure that Congressional intent is manifested and ambiguities as to the statute's scope are minimized or eliminated.

V. THE REQUIREMENT OF BEING OTHERWISE ADMISSIBLE AT THE TIME OF ENTRY

The final criterion which must be satisfied before an individual is entitled to the benefits of Section 241(f) is that he be "otherwise admissible at the time of entry." Although the words "otherwise admissible" are not defined in the Act, they have received the attention of the Supreme Court. In *Errico*, the Supreme Court considered the cases of two aliens, one of whom had misrepresented his true employment skills in order to obtain first preference quota status, and the other who had entered into a sham marriage in order to obtain non-quota admission preference. Each alien subsequently became the parent of a United States citizen. The government initiated deportation proceedings against each on the ground that they were excludable at the time of entry under Section 241(a)(1), having determined they were not of the status specified in their visa as required by then Section 211(a)(4).[179] The government argued in both cases that to be "otherwise admissible at the time of entry, the alien must show he would have been admitted even if he had not lied

179. Immigration & Nationality Act of 1952, § 211(a)(4), ch. 477, 66 Stat. 181 (1952), *repealed*, 79 Stat. 917 (1965).

. . . ."[180] Since each alien would not have been admitted because they illegally circumvented the quota restrictions, the government contended they were not "otherwise admissible," and therefore, not saved from deportation by Section 241(f).

In determining whether an alien committing fraud for the purpose of evading quota restrictions was "otherwise admissible", the Supreme Court concentrated upon an analysis of Section 7 of the 1957 act,[181] the forerunner of Section 241(f). Section 7 provided a waiver of deportation for an alien who was the spouse, parent or child of a United States citizen, and for an alien who entered during the post-war period but misrepresented his nationality, place of birth, identity, or residence. With respect to those who were not of the nationality specified in their visa, Section 7 required that *in addition* to being "otherwise admissible at the time of entry," the misrepresentation as to nationality must not have been committed for the purpose of evading quota restrictions. The court reasoned that if a person who had evaded the quota restrictions would not be "otherwise admissible," then Congress' addition of quota evasion as a *separate* disqualifying ground would have been redundant. Since Congress specifically added that the evasion of the quota restrictions would make Section 7 unavailable, Congress must have believed that this disqualifying ground was not included with the scope of the "otherwise admissible" limitation.

The Court also noted that "the fundamental purpose of this legislation was to unite families."[182] Additionally, it was wholly consistent with this purpose to provide that aliens who had misrepresented their nationality to avoid oversubscribed quotas should be allowed to remain in the United States with their families. Finally, the court noted that "even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."[183]

---

180. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 217 (1966).

181. Act of September 11, 1957, § 7, 71 Stat. 740, *repealed*, 75 Stat. 655 (1961). *See* text accompanying notes 53-55 *supra*.

182. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 220 (1966).

183. *Id.* at 219. The court might have further buttressed its argument by noting that the term "otherwise admissible" was used in both the 1907 and 1917 Acts which antedated the quota restrictions which first appeared in 1921. *See* notes 27, 29, 32 *supra*.

Errico decided that for the purposes of Section 241(f), an alien might be "otherwise admissible at the time of entry," despite the fact that at that time he did not satisfy all the prerequisites for obtaining a valid immigrant visa. The remaining question was whether any other prerequisites to a valid entry could be lacking and the alien still be "otherwise admissible at the time of entry."

Shortly after *Errico*, the Board of Immigration Appeals made a distinction between "quantitative" and "qualitative" immigration restrictions.

> Immigration restrictions fall into two categories: (1) those which put a limit on the number of aliens who shall enter (numerical or quantitative), and (2) those which seek to provide that only the morally, mentally, and physically fit shall enter (qualitative). Numerical control of entering aliens is achieved through the requirement that an immigrant have a visa to enter. Some factors in the allocation of visas under numerical limitations are in alien's training, his place of birth, and his relationship to United States citizens or to legally resident aliens. . . .
>
> Qualitative restrictions provide that no undesirable alien shall receive a visa or be admitted. Undesirable aliens are those physically, mentally or morally disqualified; the subversives; and the violators of criminal, immigration, or narcotics laws. . . .[184]

Using this quantitative-qualitative distinction for the purposes of determining whether an alien is "otherwise admissible" does not seem unreasonable. The exclusion of physically, mentally, and morally undesirable individuals is historically substantiated, having existed long before numerical limitations and antedating provisions for deportation. More importantly, if quantitative grounds, that is those generally relating to documentary requirements,[185] were not held to be outside the scope of the term "oth-

184. Matter of Eng., 12 I. & N. Dec. 855, 857 (1958). This distinction was quickly adopted by the 5th and 9th Circuits. De Vargas v. Immigration & Naturalization Serv., 409 F.2d 335 (5th Cir. 1968), *cert. denied*, 396 U.S. 895 (1969) (prior deportation prevented the alien from being "otherwise admissible" since the prior deportation constituted a qualitative as opposed to quantitative restriction); Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969) (labor certification requirement held not to render an alien "otherwise admissible" and § 241(f) relief granted).

185. Although the term "qualitative" adequately describes those who would *not* be "otherwise admissible", the term "quantitative" does not adequately describe those who *are* "otherwise admissible". Consequently, in the remainder

erwise admissible," several provisions of the Act where the term appears, including Section 241(f), would be rendered ineffectual.[186]

Section 212(a) of the Act lists those classes of individuals who are excludable at entry, but not all of these restrictions are qualitative. Initially, the disqualification stated in Section 212(a)(19) is non-qualitative since Section 241(f) itself excuses this ground.[187] *Errico* expressly held that an individual who was not of the required quota status at the time of entry would still be "otherwise admissible." Implicit in *Errico* was the holding that

---

of this article, those restrictions on entry which do not prevent a person from being "otherwise admissible" will be referred to as "non-qualitative". Thus, a "non-qualitative" restriction does not render one outside the coverage of Section 241(f).

186. If, in order to be "otherwise admissible", an alien must satisfy all documentary requirements, he would be led through a circuitous legal maze and never be "otherwise admissible". The term "otherwise admissible" is used in several sections of the Act: §§ 212(a)(9), (28)(I), §§ 212(b), (g), (h), (i), 8 U.S.C. §§ 1182(a)(9), (28)(I), §§ 1182(b), (g), (h), (i) (1970). These sections allow certain grounds for excludability to be excused if the alien is "otherwise admissible". For example, § 212(b) excuses the exclusionary ground of illiteracy for certain aliens if they are "otherwise admissible". Excusing this ground is a necessary prerequisite to obtaining a visa. If in order to become "otherwise admissible" a visa must be obtained, but in order to obtain a visa the alien must be "otherwise admissible", it can be seen that neither requirement would ever be satisfied. Similarly, with Section 241(f), a fraudulent entry precludes the obtaining of a valid visa. However, if in order to be "otherwise admissible" a valid visa was necessary, then the same fraudulent entry which would make Section 241(f) available would preclude its operation by rendering the individual not "otherwise admissible".

It has been argued regarding "otherwise admissible" that "in its context, certainly, the phrase appears to comprehend all grounds of inadmissibility other than fraud or misrepresentation." Note, *Immigration: The Criterion of "Otherwise Admissible" as a Basis for Relief from Deportation because of Fraud or Misrepresentation*, 66 COLUM. L. REV. 188, 196 (1966). This argument is not persuasive since one of its basic premises is faulty. The argument assumes that if the term "otherwise admissible" were read broadly, there would still be some individuals who would fall within the scope of Section 241(f). None of the examples given in the article support this premise. For example, if the phrase "otherwise admissible" were given the broad meaning advocated in the Columbia article, the lawfully admitted alien, who to avoid inconvenience, obtains entry by a false claim of citizenship would be excludable for having entered without inspection. *See* Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244 (9th Cir. 1971). Thus, this individual would be inadmissible upon grounds other than fraud or misrepresentation and the benefits of Section 241(f) would be unavailable. Similarly, the alien whose misrepresentations in obtaining a visa did not conceal an underlying ground of inadmissibility could still be considered as having an invalid visa and thus be inadmissible on that ground.

187. *See* text accompanying notes 132-33 *supra*.

an individual not in possession of a valid visa would also be "otherwise admissible." *Lee Fook Chuey* expressly held that failure to possess a valid immigrant visa as required by Section 212(a)(20) was a non-qualitative restriction, violation of which would not affect the alien's "otherwise admissible" status.[188] The requirements stated in Section 212(a)(14) regarding labor certification[189] have also been held to be non-qualitative.[190]

Section 212(a)(21) requires that the entrant seeking admission have his visa issued in compliance with the applicable numerical restrictions.[191] Former Section 211(a)(4) required that before an alien could be admitted he must occupy the quota status stated in his visa.[192] Section 212(a)(21) protects the integrity of the numerical restrictions while Section 211(a)(4) protected the integrity of the quota restrictions. *Errico* held that a violation of former Section 211(a)(4) would not prevent an alien from being "otherwise admissible". The similarity between the numerical restrictions and the quota restrictions[193] reflects that a violation of Section 212(a)(21) should also not prevent an alien from being "otherwise admissible".

Section 212(a)(26)[194] presents another unusual situation. This section provides that a non-immigrant without a valid non-immigrant visa or border crossing card is excludable. This sec-

188. Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244, 250 (9th Cir. 1971).

189. Labor certification is required when an individual enters this country to perform skilled labor unless he is the spouse, parent, or child of a United States citizen, or an alien lawfully admitted for permanent residence. Act, *supra* note 8, § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970).

190. Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969). *See also* Becerra-Monje v. Immigration & Naturalization Serv., 418 F.2d 108 (9th Cir. 1969).

191. *See* note 35 *supra*. Any immigrant who at the time of application for admission does not have a visa issued in compliance with other provisions of the Act is excludable at entry. Act, *supra* note 7, § 212(a)(21), 8 U.S.C. § 1182(a)(21) (1970). For an examination of the provisions which must be satisfied, *see id.*, § 203, 8 U.S.C. § 1153 (1970).

192. *See* notes 144-45 *supra* and accompanying text.

193. *See* note 35 *supra*.

194. Act, *supra* note 7, § 212(a)(26), 8 U.S.C. § 1182(a)(26) (1970) renders inadmissible:

> Any non-immigrant who is not in possession of (A) a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission or contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period; and (B) at the time of the application for admission a valid non-immigrant visa or border crossing card . . . .

tion presents a documentary restriction which by analogy to Section 212(a)(20) would be a non-qualitative ground for exclusion. Thus, a person not in possession of a valid non-immigrant visa would still be "otherwise admissible". Consider, however, the case of an individual who has obtained a non-immigrant visa by a misrepresentation or fraud other than a fraudulent representation of his true intent for entering the country. Further assume that the individual immediately after his entry becomes the spouse or parent of a citizen. If, prior to the termination of the time period stated in the non-immigrant visa, the Service attempted to deport the alien on the ground he procured this document by fraud, the waiver provisions of Section 241(f) would save him from deportation. On the other hand, if the Service waited until the visa expired (perhaps in preparation for the deportation hearing) the alien could then be deported for having overstayed his visa. In the latter case, the *Cabuco-Flores* decision[195] leads to the intolerable result that by simply choosing when to act the Service can manipulate Section 241(f)'s coverage.

Certain grounds for exclusion in Section 212(a) have specifically been held to state qualitative restrictions rendering an alien "otherwise [in]admissible". For example, Section 212(a)(22),[196] which excludes those who have left the country in order to avoid the draft, is considered a qualitative restriction.[197] Individuals convicted of crimes involving moral turpitude are excludable under Section 212(a)(9)[198] and also are "otherwise [in]-admissible".[199] Some of the crimes which involve moral tur-

195. *See* text accompanying notes 161-67 *supra.*

196. Act, *supra* note 7, § 212(a)(22), 8 U.S.C. § 1182(a)(22) (1970).

197. Jolley v. Immigration & Naturalization Serv., 441 F.2d 1245 (5th Cir. 1971), *cert. denied*, 404 U.S. 946 (1971) (due to his abhorrence to the selective service system and war in Vietnam Jolley renounced his United States citizenship and refused induction into the armed services; despite familial ties, he was rendered "otherwise [in]admissible" and subject to deportation). *Accord*, Velasquez Espinosa v. Immigration & Naturalization Serv., 404 F.2d 544 (9th Cir. 1968); Loos v. Immigration & Naturalization Serv., 407 F.2d 651 (7th Cir. 1969), *cert. denied*, 396 U.S. 877 (1969).

198. Act, *supra* note 7, § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970). In Jordan v. DeGeorge, 341 U.S. 223 (1951), the Supreme Court pointed out that the meaning of "moral turpitude" in the context of the immigration statute must be determined by examining its use in other areas and found further that the phrase "crime involving moral turpitude" was not unreasonably vague and therefore did not offend due process requirements. *Cf.* Gubbels v. Hay, 261 F.2d 952 (9th Cir. 1958) (court marshall conviction not a crime of moral turpitude).

199. Hames-Herrera v. Rosenberg, 463 F.2d 451 (9th Cir. 1972) (alien had

pitude are: assault with a deadly weapon;[200] murder and voluntary manslaughter,[201] attempted suicide,[202] rape,[203] adultery,[204] prostitution,[205] lewdness,[206] arson,[207] blackmail,[208] forgery,[209] robbery,[210] larceny,[211] bribery,[212] willful tax evasion,[213] alien smuggling while on parole into this country,[214] and even some misdemeanors.[215] Even if moral turpitude is not involved, aliens convicted of two or more, other than purely political, offenses for which the aggregate sentences to confinement total five years or more are "otherwise [in]admissible".[216] However, the Act specifically excepts from its coverage certain crimes and certain offenses of younger individuals.[217]

---

been convincted of petty theft and forgery; although he had fraudulently procured a visa and was married to an American citizen, he was not "otherwise admissible" and not entitled to Section 241(f) (relief). *See also* Matter of Eng., 12 I. & N. Dec. 855 (1958).

200. *In re* Aliano, 43 F. 517 (C.C.S.D.N.Y. 1890).

201. United States *ex rel.* Allessio v. Day, 42 F.2d 217 (2d Cir. 1930); Matter of S-, 9 I. & N. Dec. 496 (1961); Matter of Abi-Rached, 10 I. & N. Dec. 551 (1964).

202. Matter of D-, 4 I. & N. Dec. 149 (1950).

203. Bendel v. Nagle, 17 F.2d 719 (9th Cir. 1927); Matter of R-, 3 I. & N. Dec. 562 (1949).

204. Matter of A-, 3 I. & N. Dec. 168 (1948).

205. Matter of A-, 5 I. & N. Dec. 546 (1953).

206. Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959).

207. Johnson v. Pepe, 28 F.2d 810 (2d Cir. 1928).

208. United States *ex rel.* Dentinco v. Esperdy, 280 F.2d 71 (2d Cir. 1960) (defendant was convicted of conspiracy to extort).

209. Matter of S-, 9 I. & N. Dec. 688 (1962).

210. United States *ex rel.* Cerami v. Uhl, 78 F.2d 698 (2d Cir. 1935).

211. Orlando v. Robinson, 262 F.2d 850 (7th Cir. 1959), *cert. denied*, 359 U.S. 980 (1959).

212. United States *ex rel.* Sollazo v. Esperdy, 285 F.2d 341 (2d Cir. 1961).

213. Chanan Din Khan v. Barber, 253 F.2d 547 (9th Cir. 1958).

214. Klapholz v. Esperdy, 302 F.2d 928 (2d Cir. 1962), *cert. denied*, 371 U.S. 891 (1962).

215. *See, e.g.*, Hames-Herrera v. Rosenberg, 463 F.2d 451 (9th Cir. 1972) (petty theft).

216. Act, *supra* note 7, § 212(a)(10), 8 U.S.C. § 1182(a)(10) (1970).

217. *See* Act, *supra* note 7, § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1970) which allows entry where there is only one conviction which occurred, or the imprisonment therefor ended, five years prior to the application for entry if the crime was committed when the alien was under eighteen years of age. Whether statutes allowing the expunging of convictions, which are often applicable to youthful offenders, would render § 212(a)(9) inapplicable is not clear. *See, e.g.*, Kelly v. Immigration & Naturalization Serv., 349 F.2d 473 (9th Cir. 1965); Garcia-Gonzales v. Immigration & Naturalization Serv., 344 F.2d 804 (9th Cir. 1965) (holding California provisions allowing guilty pleas to be set aside and narcotic convictions to be dismissed do not thwart deportation). The Circuits

The Act also specifically excludes stowaways,[218] and it would appear they are "otherwise [in]admissible".[219] Three subsections of Section 212(a) deal with the exclusion of aliens who are, have been, or may become engaged in subversive activities or connected with subversive organizations.[220] It has been held that membership in the Communist Party at the time of entry renders an alien "otherwise [in]admissible".[221] However, there are exceptions to these rather lengthy provisions relating to subversives and their activities.[222]

Decisions are lacking which determine whether the remaining excludable classes in Section 212(a) are qualitative or non-qualitative. It would appear that with the exception of Sections 212(a)(24) and (30),[223] all of the remaining classes set forth

---

are split as to the effect upon deportation of a certificate setting aside a conviction under the Federal Youth Corrections Act, 18 U.S.C. § 5021 (1970). *Compare* Hernandez-Valensuela v. Rosenberg, 304 F.2d 639 (9th Cir. 1962) (mere possibility of certificate setting aside conviction does not render alien non-deportable) *with* Mestre-Morera v. Immigration & Naturalization Serv., 462 F.2d 1030 (1st Cir. 1972) (obtaining the certificate setting aside a conviction renders alien non-deportable even for narcotics conviction).

218. Act, *supra* note 7, § 212(a)(18), 8 U.S.C. § 1182(a)(18) (1970).

219. Gambino v. Immigration & Naturalization Serv., 419 F.2d 1355 (2d Cir. 1970), *cert. denied*, 399 U.S. 905 (1970). Stowaways may be equated to surreptitious entrants; however, such an analogy ignores the logical reason for excluding stowaways. The rationale for excluding stowaways is the prophylactic effect upon the evasion of travel costs. A vessel captain discovering a stowaway can either turn back or bring him to the destination. If the stowaway were allowed entry at the destination, the ship line would rarely collect its costs. Consequently, the exclusion of stowaways appears more an accommodation to international shipping problems than a statement of a type of fraud not qualifying for Section 241(f) coverage. *See* text section IV *supra*.

220. *See* Act, *supra* note 7, § 212(a)(27)-(29), 8 U.S.C. § 1182(a)(27)-(29) (1970). The determination whether the alien may engage in subversive activities is determined by the consular office or the Attorney General.

221. Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) (alien as youth had joined Hitler's Youth Movement and after the war became a member of the Communist Party of East Germany; although he had the requisite familial ties, his membership in the Communist Party rendered him "otherwise [in]admissible" and he was deported).

222. *See* Matter of Mazar, 10 I. & N. Dec. 79 (1962) (alien who was a citizen of Yugoslavia and had joined the Communist Party in response to demands placed on her because of her officer rank in the army was "otherwise admissible" because her membership was involuntary and not an indication of her ideological belief).

223. Act, *supra* note 7, § 212(a)(24), (30), 8 U.S.C. §§ 1182(a)(24), (30) (1970). Section 212(a)(24) excludes:

> Aliens . . . who seek admission from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a non-signatory line. . . .

qualitative restrictions preventing a person from being "otherwise admissible".

The conclusion may be drawn that the "otherwise admissible" criterion of Section 241(f) merely describes those individuals whose physical, mental, and/or moral undesirability would allow their deportation despite the requisite familial ties. Conversely, those individuals whose excludability would be based upon violations of documentary or regulatory provisions, but who are not physically, mentally or morally unfit, will be saved from deportation if the other three requirements of Section 241(f) are satisfied.

VI. CONCLUSION

Having established familial ties in this country, an illegal entrant alien when apprehended is presented with a serious dilemma. Since the discretionary relief available is often illusory, save to the most sophisticated, the alien must either depart, leaving his dependant family to seek welfare or other assistance, or face the stigma of formal deportation. Faced with long separation while immigration papers are slowly processed through the bureaucratic maze, the most apparent remedy for the alien is Section 241(f).

Successful assertion of Section 241(f) requires that the alien be within the United States, possess the necessary familial ties, have fraudulently entered, and be otherwise admissible. Recent judicial interpretations of the section have failed to adhere to the reasoning of the Supreme Court in interpreting the section, and have refused to afford this ameliorative provision the expansive reading such statutes deserve. Concern for the plight of the alien in this country with familial ties necessitates the enactment of incisive legislation. An example of the type of statute required would read:

> Any alien who has secured entry, as that term is defined in Section 101(a)(13) and (A), who is the spouse, parent or child, whether legitimate or illegitimate, of a United States citizen or alien lawfully admitted for permanent residence and (B) who would not now be excludable for one or more

---

Section 212(a)(30) excludes:

> [A]liens accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness, a mental or physical disability or infancy . . . whose protection or guardianship is required by the alien ordered excluded and deported.

> of the reasons stated in Sections 212(a)(1)-(7), (9)-(13), (17)-(18), (22)-(23), (27)-(29) and (30)-(31), and (C) who is not now deportable for one of the reasons stated in Section 241(a)(3)-(8) and (11)-(17) shall be deemed an alien lawfully admitted for permanent residence.

This provision should be added as a separate section of the Act and be followed by subsections providing for prompt administration and enforcement of the statute.

The proposed statute is a significant departure from Section 241(f). It is more than a mere defense to deportation; it is an affirmative grant of immigrant status to aliens who possess the requisite familial ties.[224] It also distinctly and specifically describes those aliens who shall not be afforded relief. The classes benefited reflect a view which recognizes that an alien's departure from this country imposes hardship upon the individual and the family.[225] Addition or deletion of subsections could provide for restricting or enlarging those eligible for such relief.

Congress, of course, must make the ultimate determination as to how restrictive it wishes to be with respect to the residence of aliens in the United States. Humanitarian principles suggest that aliens who have familial ties in this country should be allowed to strengthen them. It should constantly be remembered that the necessity for a statute implementing this humanitarian policy "[i]s simply the result of the ineffective enforcement of the immigration laws, not the cause of it."[226] Until Congress acts decisively, interpretations of Section 241(f) constricting its coverage remain inconsistent with the salutory principles announced by the Supreme Court in *Errico*, and should continually be challenged.

---

224. Under the present Act if an individual successfully asserts a Section 241(f) defense, his status in this country is ambiguous. Nothing in the Act affords him the right to be granted an immigrant visa. On the other hand, the successful assertion of a Section 241(f) defense renders him non-deportable. The statute proposed here resolves this issue by specifically granting, to those who qualify, the status of an alien lawfully admitted for permanent residence.

225. The proposed statute grants relief to children fathered by United States citizens and aliens lawfully admitted for permanent residence. The proposed statute also requires that any reasons for exclusion, which are primarily those presently considered qualitative, be determined as of the present time, rather than the time of entry. Thus, an individual who may have entered the United States as a pauper, but who has become successful in the United States would be entitled to relief under the proposed statute.

226. Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244, 250 (9th Cir. 1971).