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IMMIGRATION LAW—DEPORTATION: WHAT FRAUD HATH BROUGHT TOGETHER LET NO MAN PUT ASUNDER—*Muslemi v. Immigration and Naturalization Service*, 408 F.2d 1196 (9th Cir. 1969).

Petitioner, an alien, entered the United States on a temporary visitor visa after being denied an immigrant visa because the quota for his country was oversubscribed.[1] Five days after he was notified that deportation proceedings were being initiated against him due to expiration of his visa, petitioner married a United States citizen.[2] His petition for permanent residence on the basis of that marriage was granted by a special inquiry officer,[3] but the decision was reversed by the Board of Immigration Appeals [hereinafter referred to as the Board].[4] Petitioner moved for reconsideration urging that his deportation be suspended pursuant to 8 U.S.C. § 1251(f) (1964), which provides that an alien married to a United States citizen and "otherwise admissible at time of entry" shall not be deported for gaining entry to this country by misrepresentation or fraud.[5] This motion was denied by the Board. His deportation was based on the charge that, because of his intention to remain here permanently, he was excludable at the time of entry as an immigrant without a valid immigrant visa. The Board held that this charge did not directly result

1. Muslemi was a native of India and a citizen of Iran. The quotas of both countries were oversubscribed at the time of his application. Matter of Muslemi, 12 I. & N. Dec. 249 (1967).

2. Muslemi and his wife met in India while he and her then-husband were employed by the Bank of America. Because she was already married, they devised a plan whereby she would accompany him to the United States if he could obtain a visitor visa. After she obtained a divorce and they were married, he would petition for permanent residence on the basis of that marriage. *Id.* at 250-51.

3. Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (Supp. IV, 1968), *amending* 8 U.S.C. § 1255 (1964), provides in part that the Attorney General has the discretion to change the status of a visiting alien to that of an alien lawfully admitted for permanent residence if the alien who makes the application is eligible to have an immigrant visa and the immigrant visa is immediately available.

4. The Board based its decision on the ground that the petitioner's fraudulent concealment of his intention to remain permanently in the United States rendered him ineligible for favorable discretionary relief pursuant to § 1255. 12 I. & N. Dec. at 251-52.

5. Immigration and Nationality Act § 241(f), 8 U.S.C. § 1251(f) (1964):
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.

from the fraudulent concealment of his intentions. Petitioner sought judicial review of the decision.[6] *Held*: the deportation order directly resulted from petitioner's fraudulent concealment of his intention to remain permanently in the United States; therefore, even though he did not enter the country on an immigrant visa, petitioner is eligible for relief under § 1251(f) on the specific charge brought, if he was otherwise admissible at time of entry.[7] *Muslemi v. Immigration and Naturalization Service*, 408 F.2d 1196 (9th Cir. 1969).

Two conflicting cases involving aliens who had obtained immigrant visas by fraud came before the United States Supreme Court in *Errico v. Immigration and Naturalization Service*.[8] The aliens had evaded existing immigration quota requirements. Subsequent to their entering the United States, family ties were established with American citizens.[9] The Court gave § 1251(f) a liberal interpretation in view of the humanitarian intention of Congress to avoid separating families.[10] In applying § 1251(f) to aliens with prescribed family ties who by fraud obtained immigrant visas, the *Errico* decision established (1) that it does not matter if the specific charge in deportation proceedings fails to allege fraud so long as but for some fraud no deportation proceedings would have been instituted,[11] and (2) that evasion of quota restrictions does not preclude an alien from being "otherwise admissible at the time of entry."[12]

6. The court's jurisdiction rests on Immigration and Nationality Act § 105(a) 8 U.S.C. § 1105(a) (1964).

7. The case was remanded to the Board to determine whether petitioner was otherwise admissible at the time of entry.

8. 385 U.S. 214 (1966) [hereinafter cited as *Errico*]. The two cases were Errico v. Immigration and Naturalization Service, 349 F.2d 541 (9th Cir. 1965) (granting relief); and Scott v. Immigration and Naturalization Service, 350 F.2d 279 (2d Cir. 1965) (denying relief).

9. Both Mrs. Errico and Mrs. Scott had babies in the United States, making petitioners in both instances parents of American citizens by that fact. *Errico*, 385 U.S. at 215-16.

10. For a thorough examination of the legislative history of the section see 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). *See also* 34 GEO. WASH. L. REV. 351 (1965), and 42 ST. JOHN'S L. REV. 118 (1967).

11. *Errico*, 385 U.S. at 217. The court affirmed the administrative rule that § 1251(f) "waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry.'"

12. *Errico*, 385 U.S. at 223:

> The present § 1251(f) is essentially a re-enactment of § 7 of the 1957 Act. The legislative history leaves no doubt that no substantive change in the section was

The major factual distinction between *Errico* and *Muslemi* is that the former involved aliens entering the United States on immigrant visas whereas the latter involved an alien entering on a visitor visa. The broad question posed by *Muslemi* is whether this difference in the kind of documentation through which entry is fraudulently procured compels a result differing from *Errico*. By means of an extremely narrow holding, the *Muslemi* court avoided providing an answer to this broad question. The *Muslemi* opinion, relying on *Errico*, established only the applicability of § 1251(f) to the specific charge brought. The case was remanded on the "otherwise admissible" issue without guidance as to what disqualifying criteria should govern that issue in the visitor visa context. This note explores whether the logic of *Muslemi* supports extending § 1251(f) protection to nonimmigrants as far as such protection was extended to immigrants in *Errico*.

Prior decisions, both administrative and judicial, have denied nonimmigrant aliens relief under § 1251(f).[13] But these cases can be distinguished from *Muslemi* in two respects. First, the issue of fraud did not occupy the status of a finding of fact as it did in *Muslemi* (the special inquiry officer so found). The cases were decided on other grounds, and if fraud was mentioned, it was referred to only in dictum. Where fraud was not mentioned, it cannot be known whether a fraud issue may have been lurking in the background. In one case, an alien did attempt to inject § 1251(f) into the proceedings by an assertion that the deportation charge selected by the government was really the result of fraud, but he was not allowed to do so.[14]

intended. . . . The intent of § 7 of the 1957 Act not to require that aliens who are close relatives of United States citizens have complied with quota restrictions to escape deportation for fraud is clear from its language, and there is nothing in legislative history to suggest that Congress had in mind a contrary result.

Since *Errico*, determination that aliens are not "otherwise admissible" has been subject only to qualitative (*i.e.* non-quota) standards. *See* Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967) (homosexuality); Velasquez Espinosa v. Immigration and Naturalization Serv., 404 F.2d 544 (9th Cir. 1968) (draft evasion); Matter of Eng, 12 I. & N. Dec. 855 (1968) (narcotics offense). *See also* Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961) (Communist Party membership).

13. Cases include the following: Ntovas v. Ahrens, 276 F.2d 483 (7th Cir. 1960), *cert. denied*, 364 U.S. 826 (1960) (fraud at entry not proven); Tsaconis v. Immigration and Naturalization Serv., 397 F.2d 946 (7th Cir. 1968) (no fraud at entry); Ferrante v. Immigration and Naturalization Serv., 399 F.2d 98 (6th Cir. 1968) (no fraud at entry); Matter of Cadiz, 12 I. & N. Dec. 560 (1968) (purpose in coming to the United States was not family reunification); Matter of West, 12 I. & N. Dec. 683 (1968) (no fraud at entry).

14. Ntovas v. Ahrens, 276 F.2d 483, 484 (7th Cir. 1960). There the court said:

Second, the specific charge made against the aliens was not the same as that made in *Muslemi.* Petitioner in *Muslemi* was ordered deported on the ground that he was excludable at the time of entry as an immigrant without a valid immigrant visa,[15] whereas petitioners in the other cases were ordered deported as nonimmigrants who overstayed their temporary visas.[16] *Muslemi* applied § 1251(f) explicitly only to the charge in that case. The court said:[17]

> We need not decide in general whether 1251(f) saves aliens who have fraudulently entered the country on nonimmigrant visas and who have the requisite family ties from deportation on *any charge.* We need decide only whether petitioner is saved from deportation on the *specific charge entered against him* in this proceeding. (Emphasis added.)

In using this language, the *Muslemi* court shunned comment on prior decisions which have ordered deportation on the grounds of overstaying temporary visas. But, if *Muslemi* can provide authority for applying § 1251(f) to one deportation charge involving a nonimmigrant, there is no logical basis for differentiating between immigrants and nonimmigrants with respect to applying §1251(f) to *all* charges that directly result from misrepresentation or fraud. Implicit in *Errico* is the point that the government should not be allowed to avoid § 1251(f) by a simple selection of charges.[18] No reason appears why the government should be permitted to play the game by different rules under *Muslemi* facts. Thus, a court using the *Muslemi* approach ought to reach the *Muselmi* result when faced with a charge of overstaying a temporary visa.

Further, if § 1251(f) applies to all charges that directly result from misrepresentation or fraud, an alien should on judical review have the opportunity to show that the charge against him so resulted in order

In the administrative proceedings the ground selected and relied upon by the government was not fraud or misrepresentation and plaintiff has not the power to substitute for his own convenience a ground not involved in the deportation proceedings. Whether or not he subjectively harbored an intent to commit fraud is a matter between him and his conscience.

15. Immigration and Nationality Act § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1964).
16. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1964).
17. Muslemi v. Immigration and Naturalization Serv., 408 F.2d 1196, 1199 (9th Cir. 1969).
18. *See Errico,* 385 U.S. at 217.

to eliminate the possibility of cases in which fraud, if raised and shown, does not occupy the status of a finding of fact.

The *Muslemi* court remanded without hint of its view of the "otherwise admissible" criteria, but *Errico* expressly eliminated quota evasion as a disqualification for immigrants. Quota evasion may be the aim of both immigrants and nonimmigrants, and anyone who has successfully evaded the quotas, of course, may also have evaded applicable qualitative (non-quota) restrictions. In such cases pre-entry screening has been defeated and only post-entry investigation can detect qualitative shortcomings. Under *Errico*, immigrant aliens with requisite family relationships who evade preliminary investigation are not thereby prevented from being considered "otherwise admissible."[19] Should, then, an alien who entered on a visitor visa not be "otherwise admissible" because he failed to submit himself to the immigration visa-issuing process in order to determine whether he had any non-quota disqualification? This argument was used by the government in 1967 in *Matter of Lee*.[20]

In that case, the Board granted relief under § 1251(f) to an alien who had entered the United States on a false claim of citizenship. The Board held that the charge of entry without inspection,[21] directly resulted from petitioner's misrepresentation at the time of entry, and therefore, § 1251(f), as interpreted in *Errico*, operated to save the petitioner.[22] But, in a decision handed down on May 1, 1969, after the *Muslemi* decision, the Attorney General reversed the Board in *Matter of Lee*.[23] He held that a person entering the country under a false claim of citizenship is not saved by § 1251(f) since it[24]

> 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.

The Attorney General very likely had the *Muslemi* situation in mind,

19. *Id.* at 223.
20. Interim Decision No. 1960 (1969). The Board reached its decision on June 2, 1967, and affirmed on August 13, 1967 after a rehearing.
21. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1964).
22. Interim Decision No. 1960 (1969).
23. *Id.* The case was referred to the Attorney General by the Board for review pursuant to 8 C.F.R. § 3.1(h)(1)(iii) (1969).
24. Interim Decision No. 1960 at 10 (1969).

and his decision left little doubt as to the decision in *Muslemi* on remand:[25]

> Most of the immigration requirements are waived for aliens who come here as nonimmigrant visitors . . . . Consequently, an alien who has evaded most of the immigration requirements by fraud entering as a nonimmigrant visitor does not appear to be an otherwise admissible immigrant.

The government's position is rationalized by the following considerations: though the broad language of the statute would seem to include nonimmigrants as well as immigrants,[26] the legislative intent of Congress, as interpreted by the Immigration and Naturalization Service, was not to include nonimmigrants within the statutory protection.[27] Immigration is considered a privilege granted by the government to aliens who wish to become permanent residents of the United States.[28] The government, in granting this privilege, has seen fit to make it subject to both qualitative and quantitative standards. Thorough screening and investigation of applicants for immigrant visas is necessary to fulfill the requirements of the immigration laws.[29] Nonimmigrants, while ostensibly subject to some qualitative standards, are subject to no quantitative limitations and are, in fact, actively encouraged to visit the United States by our government.[30] Rigorous investigation of applicants for a visitor visa is not only impractical, but incompatible with the policy of encouraging visitors. In practice,

25. *Id.* at 10 n.4.

26. Immigration and Nationality Act § 241(f), 8 U.S.C. § 1251(f) (1964). The full text of the subsection is set forth in note 5 *supra.*

27. *See, e.g.*, Matter of Cadiz, 12 I. & N. Dec. 560 (1968). The special inquiry officer felt that the plain language of the statute included nonimmigrants, but the Board, interpreting the legislative history of § 1251(f), felt otherwise:

> We do not believe it was ever contemplated or intended that [1251(f)] should apply to fraud relating to a nonimmigrant entry. The history of this section . . . shows that its purpose was to excuse deportability for fraud or misrepresentation so that an alien need not be separated from his American citizen or resident alien parents, spouse or children. . . . The misrepresentations constantly referred to were . . . all material to entry or attempted entry for permanent residence. . . . Entry as a nonimmigrant visitor by statutory definition, was not for the purpose of family reunification. . . .

Id. at 562.

28. *See* Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967).

29. *See* 22 C.F.R. § 42 (1969); Immigration and Nationality Act §§ 221, 222, 8 U.S.C. §§ 1201, 1202 (Supp. IV, 1968), *amending* 8 U.S.C. §§ 1201, 1202 (1964).

30. See 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 3.10a at 3-65 (1967) for a general discussion of this encouragement.

a visitor visa is often obtained on the day of application.[31] Applying § 1251(f) to nonimmigrants invites the circumvention of the immigrant screening process, since there is no practical system capable of encouraging visitors and investigating them thoroughly at the same time.[32]

Against these considerations urged by the government, the plight of individuals should be weighed. It is as easy to condemn the quota system as to condemn the alien's fraudulent actions.[33] In a world of such inequality among nations that the relative affluence of one forces it to erect barriers in order to keep citizens of less affluent countries out, it is hard to blame an individual for merely wanting to better his lot in life. And it is even harder to blame one when a familial concern is involved. As interpreted by *Errico,* § 1251(f) provides a legal vehicle for properly giving such individual/familial interests consideration in the face of the general severity of the national quota policy.[34] To deny nonimmigrants with the proper family ties relief from deportation may result in the very hardship of family separation against which *Errico* said § 1251(f) was intended to stand.

The government has argued that applying § 1251(f) to nonimmigrants results in rewarding fraud.[35] This is, of course, true. But the same argument was accurately made as to immigrants in *Errico.*[36] It did not prevail. The Supreme Court decided in favor of the individuals. In view of that decision, it is hard to see why the same reasoning should not apply to nonimmigrants, who differ only in that they gain admission to the country with a different set of papers. Indeed, to impose one rule for immigrants and another for nonimmigrants is to unjustifiably discriminate among different techniques of fraud. Take

31. *Id.*

32. The statutory scheme (*see* note 29 *supra*) sets up detailed and time-consuming procedures.

33. Determination of the number of aliens who would take advantage of § 1251(f) is difficult since, after a court or Board decision is made, it is applied as a matter of course in similar situations which arise thereafter. No appeals are necessary; consequently, there are no records of the number of aliens the statute affects.

34. The *Errico* court was very much concerned with interests of individuals. *See* 385 U.S. at 225. *Muslemi* goes *Errico* one better in this regard by suggesting that romance can conquer the quota system—indeed, a humane exception to an otherwise Draconian law.

35. Brief for Respondent at 20-22, Muslemi v. Immigration and Naturalization Serv., 408 F.2d 1196 (9th Cir. 1969).

36. *Errico*, 385 U.S. at 226, 230 (Stewart, J., joined by Harlan & White, JJ., dissenting.)

the example of two aliens, both of whom wish to become United States residents, but cannot because of long waiting lists for immigration visas. The first applies for preferential treatment as an immigrant and is clever enough to get through the preliminary screening process. The second obtains a visitor visa with the intention of finding a way to remain in this country permanently once he arrives. Using the government's rationale in *Matter of Lee*, the first, absent qualitative defects, will be able to stay, while the second will be deported.

The screening process for alien immigrants who can avoid the general quotas only eliminates those with non-quota disqualifications. However, since *Errico* excepts quota evasion from the "otherwise admissible" issue in § 1251(f) cases, the result is that only qualitative restrictions can lead to deportation of an immigrant with proper family ties who is already in this country.[37] Such immigrants, then, can be deported only if the screening process has failed. The government's position in *Matter of Lee* that the nonimmigrant alien can be deported because he evaded the screening process could as well apply to the immigrant, but *Errico* forecloses the latter argument. In both situations the screening process has been defeated and in both situations any further investigation must be conducted after entry. Since a nonimmigrant must go through a post-entry process in order to obtain permanent United States residence,[38] any qualitative shortcomings could be spotted there.

Consequently, no sound reason appears why the question left open by *Muslemi* should not be resolved for nonimmigrants in the same way it was resolved for immigrants in *Errico*.

37. *See* note 12 *supra.*
38. *See* note 3 *supra.*