Reentering the Golden Door: Waiving Good-Bye to Exclusion Grounds for Permanent Resident Aliens

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REENTERING THE GOLDEN DOOR: WAIVING GOOD-BYE TO EXCLUSION GROUNDS FOR PERMANENT RESIDENT ALIENS

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Abstract: Under the exclusion provisions of the Immigration and Nationality Act (INA), an alien admitted to the United States for permanent residence can be prohibited from reentering the United States after a trip out of the country. Because exclusion grounds differ from deportation grounds, permanent resident aliens who are not deportable could leave the country and find themselves excluded at the border upon return. The INA provides relief in such cases by allowing permanent resident aliens who have lived in the United States for over seven years to apply for a discretionary waiver of exclusion grounds under INA § 212(c). In Francis v. INS, the Fifth Circuit expanded the scope of this waiver and held that the equal protection clause requires that INA § 212(c) be available in deportation proceedings as a waiver of deportation grounds. This expansion conflicts with both the plain language of the statute and Congressional intent. Nonetheless, § 212(c) has become an essential form of relief for permanent resident aliens with significant ties to the United States. This Comment examines the confusion caused by the extension of § 212(c) and proposes amendments to the INA redefining entry under § 101(a)(13), eliminating § 212(c), and creating a new waiver of deportation under § 241.

Manuel Leal-Rodriguez ("Leal"), born in Mexico in 1949, came to the United States in 1970. The following year he married his high school sweetheart, Irma Montenegro, a U.S. citizen. The couple’s first daughter was born in 1974, after which Leal became a permanent resident alien of the United States. In 1980, however, Leal was convicted of possession of a controlled substance and was sentenced to five years probation.¹

While on probation, Leal obtained written permission from his probation officer and a federal district judge to visit his sick grandfather in Mexico. Leal entered Mexico on December 21, 1982, and tried to return on January 6, 1983. However, at the Immigration and Naturalization Service (INS) inspection point at Eagle Pass, Texas, an INS officer searched Leal’s baggage and found the note from his probation officer. The immigration officers, alerted to the prior conviction, took Leal’s green card² and denied him reentry. They

¹. The facts in this scenario are taken from Leal-Rodriguez v. INS, 990 F.2d 939, 941–42 (7th Cir. 1993).
². An Alien Registration Receipt Card, Form I-551, known as a "green card," is issued after an alien is admitted for lawful permanent residence and is valid for 10 years. See 54 Fed. Reg. 47,586 (1989). If the alien leaves the country for no longer than 12 months, the green card can be used as a reentry permit required by INA § 223. 8 C.F.R. § 211.1(b) (1993). However, even with a green card, a permanent resident alien is still subject to exclusion.
informed Leal that a hearing would be scheduled and asked him to provide a Mexican address where information could be sent. Leal's hearing was eventually set for April 19, 1983, more than four months after he tried to return.

Leal did not wait for his hearing. His oldest daughter was in the hospital, and he wanted to return to Chicago immediately. Because Leal no longer had his green card, he crossed the border by wading across the Rio Grande. After walking for 20 hours, he was picked up by a motorist and taken to Chicago. Leal believed that as he had obtained permission to travel to Mexico from a federal judge, he would be able to work things out with the INS once he returned home. However, Leal was wrong. He relied on his probation officer and a federal judge, two people with no authority over INS border inspectors. Subsequently, an immigration judge found Leal deportable, and due to his crossing of the Rio Grande, Leal lost his only chance of staying in the United States. Under § 212(c), Leal could have sought a waiver of exclusion for his prior drug conviction. However, when Leal waded across the border, he made an illegal entry, a deportable offense that cannot be waived under § 212(c).

Leal's case is not unique. Under the Immigration and Nationality Act (INA),³ aliens who are permanently admitted for residence⁴ in the United States may be deported for any number of acts they commit after they arrive. For example, a permanent resident alien convicted⁵ of one crime of moral turpitude⁶ within five years after the date of entry is deportable.⁷ Additionally, permanent resident aliens who travel out of the country may be denied reentry upon return under the exclusion provisions of the

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4. Generally, there are two types of aliens admitted for residence in the United States: immigrants and nonimmigrants. Immigrants come to the United States as permanent residents, while nonimmigrants enter for a limited duration determined by the purpose of their stay. This Comment examines immigrants, commonly referred to as permanent resident aliens.

5. An alien is convicted of a crime for immigration purposes if all of the following elements are present: 1) the alien has been found guilty, has pled guilty, or sufficient facts exist to warrant a finding of guilty; 2) some form of punishment or restraint on liberty (including probation, a fine or restitution, revocation of a driver's license, or community service) has been ordered; and 3) a judgment of guilt may be entered if the alien fails to comply with some aspect of the court's order. Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988). In states authorizing probation prior to a final judgment of guilt, a person may still be considered convicted for immigration purposes. Id. at 553.

6. Generally, crimes involving violence, fraud, narcotics offenses, most sexual offenses, and even certain misdemeanors, such as larceny, are considered to involve moral turpitude. See Thomas Alexander Aleinikoff & David A. Martin, Immigration Processes and Policy 503–24 (2d ed. 1991).

One such provision provides for the exclusion of aliens who have committed a crime involving moral turpitude at any time prior to reentry. Therefore, a permanent resident alien who commits a single crime of moral turpitude after being in the United States for more than five years is not deportable, but if this same alien travels abroad she is excludable upon return. To further confuse matters, permanent resident aliens who were excludable at the time of entry or adjustment of status are deportable because they were excludable. Consequently, permanent resident aliens allowed back into the United States may still be deported at a later date if it is discovered that they were excludable upon return.

This Comment proposes changes to the INA to eliminate some of the problems caused by the excludability of permanent resident aliens. Part I discusses the definition of “entry” under the INA. Part II explores the history of § 212(c), discusses how agency and judicial fiat have expanded the waiver, and gives a brief overview of discretion under § 212(c). Part III identifies the difficulties caused by applying § 212(c) in a manner divorced from the explicit language of the statute. Such problems include judicial and administrative decisions that vary significantly among the circuits, resulting in reduced predictability. Part IV offers a practical solution by proposing changes to the INA that will

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10. The distinction between a deportation hearing and an exclusion hearing is significant. Generally, an alien in an exclusion hearing is not entitled to due process rights. This is emphasized by Justice Minton’s statement that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). Although Knauff has not been overruled, in Landon v. Plasencia, 459 U.S. 21 (1982), the Supreme Court recognized due process rights for a returning permanent resident alien who briefly left the United States. Id. at 32–33. By contrast, all deportation procedures must conform to the dictates of due process. The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 101 (1903). Additionally, aliens in deportation are allowed to choose the country they will be deported to, assuming that country will accept them. INA § 243(a), 8 U.S.C.A. § 1253(a) (West 1970 & Supp. 1994). Excluded aliens are sent back to the country where they boarded the vessel in which they arrived in the United States. INA § 237(a)(1), 8 U.S.C.A. § 1227(a)(1) (West 1970 & Supp. 1994).
11. Non-immigrant aliens already in the United States can apply to have their immigrant status changed to that of a permanent resident alien without having to leave the country if they qualify. INA § 245(a), 8 U.S.C.A. § 1255(a) (West 1970 & Supp. 1994). However, for deportation purposes, they are treated as if they are entering the United States at the time of the adjustment of status. INA § 241(a)(1)(A), 8 U.S.C.A. § 1251(a)(1)(A) (West 1970 & Supp. 1994). This provision, which has no statute of limitations, enables the government to remove aliens who had no legal right to enter the country in the first place.
eliminate many of § 212(c)'s problems without reducing the level of relief currently available.

I. THE REENTRY DOCTRINE

To understand the confusion surrounding § 212(c), it is helpful to begin with a discussion of “entry” under the INA. In United States ex rel. Volpe v. Smith,¹² the Supreme Court held that entry includes any time an alien comes into the United States from a foreign country, not only the first entry.¹³ The Volpe holding, known as the “reentry doctrine,” subjects permanent resident aliens to the possibility of exclusion every time they leave the country.¹⁴ In 1952, this definition was codified in § 101(a)(13).¹⁵

The Court softened the reentry doctrine in Rosenberg v. Fleuti,¹⁶ holding that entry occurs for permanent resident aliens only when the departure is intended to be “meaningfully interruptive of the alien’s permanent residence.”¹⁷ Therefore, permanent resident aliens who make “innocent, casual, and brief excursion[s]” abroad might not be subject to the consequences of reentry if the departure was not intended to disrupt their permanent residence status.¹⁸ If a permanent resident alien’s departure meets this standard, commonly referred to as the “Fleuti doctrine,” the alien will not be excluded, or later deported due to excludability. If a permanent resident alien does not fit within the Fleuti

¹². 289 U.S. 422 (1933).
¹³. Id. at 425.
¹⁴. See Aleinikoff & Martin, supra note 6 at 452 (arguing that this interpretation of entry conflicts with Congress’s decision, as reflected in § 19 of the Immigration Act of 1917, that aliens who have resided in the United States over five years should be allowed one wrongful act without triggering deportation).
¹⁷. Id. at 462. However, the courts have not clearly defined “meaningfully interruptive.” Factors to be considered are length and reason of the absence, frequency of prior absences, if travel documents were necessary or obtained, the alien's itinerary, and the alien's understanding of his immigration status. See Aleinikoff & Martin, supra note 6 at 462-64. “[R]eturns to this country have been deemed entries for [immigration] purposes when the absence abroad was for a protracted period, or when the alien was absent to engage in an illegal activity, or to face criminal charges, or visited proscribed countries without permission, or left while deportation proceedings were pending against him, or while a final order of deportation was out-standing against him thus executing it, or attempted to smuggle aliens on his return, or when he returned without inspection, or when he reentered the United States as a commuter.” Id. at 463 (quoting C. Gordon & S. Mailman, Immigration Law and Procedure § 4.6c (1989 ed.).)
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doctrine, a dichotomy may arise. A permanent resident alien who commits a single crime more than five years after entry is not deportable, but if the same alien leaves the country and reenters without being excluded, then the alien is deportable for being excludable upon entry. For permanent resident aliens who do not fall within the Fleuti doctrine, however, the Attorney General has discretion to waive exclusion grounds upon reentry under § 212(c).20 If the Attorney General rules in favor of the aliens, they are admitted. If not, the aliens are subject to exclusion simply because they left the country.

II. THE EVOLUTION OF INA § 212(C)

Over the years, both the Board of Immigration Appeals (BIA) and the federal courts have expanded the scope of § 212(c). Written as an exclusion waiver to allow reentry for returning permanent resident aliens who had traveled abroad, § 212(c) now provides relief from deportation for permanent resident aliens who have never left the country after committing a deportable act. Not only is § 212(c) muddled by an application that is virtually divorced from its plain language, the statute is also complicated by administrative and judicial discretion.

A. The BIA and the Courts Expand § 212(c)

The first expansion of § 212(c) occurred when its predecessor, the Seventh Proviso,21 was applied in a deportation case. In Matter of L,22

19. INA § 241(a)(1)(A), 8 U.S.C.A. § 1251(a)(1)(A) (West 1970 & Supp. 1994). When a permanent resident alien is returning to the United States, a border inspector will make a determination of the alien's admissibility. If a permanent resident alien is found to be excludable, a further determination must be made to decide if the alien may be permitted to enter under the Fleuti doctrine. If the alien is not allowed to enter, an exclusion hearing may be requested. While waiting for this hearing, which may take several months, the alien may be forced to remain outside the United States. See, e.g., Leal-Rodriguez v. INS, 990 F.2d 939 (7th Cir. 1993).

20. Section 212(c) provides:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)).... The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.


21. Section 212(c) began as the Seventh Proviso of § 3 of the 1917 Immigration Act, 39 Stat. 874, which authorized a waiver of exclusion grounds for aliens returning from a short absence to an
the Attorney General\textsuperscript{22} held that permanent resident aliens who qualify for a waiver of exclusion grounds may apply for the waiver when they are in deportation proceedings as a result of being excludable upon reentry. L had been admitted to the United States in 1909 and was convicted of stealing a watch in 1924.\textsuperscript{24} In 1939, he left the country to visit an ill relative and was readmitted upon return.\textsuperscript{25} Later he was arrested and placed in deportation for having committed a crime of moral turpitude prior to entry.\textsuperscript{26} If L had been found excludable upon entry, he would have been able to file for the waiver. The Attorney General held that the failure to catch the alien’s excludability upon entry should not preclude the alien from seeking a waiver.\textsuperscript{27} Although \textit{Matter of L}'s application of § 212(c) conflicts with the wording of the statute, the Attorney General felt that Congress did not intend “the immigration laws to operate in so capricious and whimsical a fashion.”\textsuperscript{28} If the Attorney General had limited § 212(c) to exclusion hearings, the INS could avoid granting § 212(c) waivers simply by admitting excludable returning permanent resident aliens and deporting them later when it is “discovered” they were excludable upon reentry.

In 1956, a further expansion of § 212(c) permitted permanent resident aliens who were deportable prior to leaving the United States to apply for a § 212(c) waiver when they were placed in deportation proceedings after being allowed to reenter.\textsuperscript{29} This expansion differs from \textit{Matter of L}, because L was not deportable prior to his reentry. In \textit{Matter of G.A.}, a permanent resident alien, admitted in 1913, was convicted in 1947 under unrelinquished domicile of seven consecutive years. The Seventh Proviso became INA § 212(c) in 1952.

\textsuperscript{22} 1 I. \& N. Dec. 1 (BIA \& A.G. 1940).
\textsuperscript{23} Under the INA, an immigration judge is responsible for the first level of administrative decision making in a deportation or exclusion hearing. If the judge denies a permanent resident alien’s application for a § 212(c) waiver, the alien can appeal to the Board of Immigration Appeals (BIA). An appeal from a BIA decision denying a § 212(c) waiver in a deportation hearing is taken to the appropriate court of appeals under INA § 106(a), 8 U.S.C.A. §1105a(a) (West 1970 & Supp. 1994); whereas an appeal from a 212(c) denial in an exclusion hearing is taken to the district court under INA § 106(b), 8 U.S.C.A. § 1105a(b) (West 1970). When, as in \textit{Matter of L}, the INS loses a case at the BIA, the Chairman or a majority of the Board can refer the case to the Attorney General for review. The decision of the Attorney General is sent back to the Board and becomes precedent for the INS. 8 C.F.R. § 3.1(h) (1993).
\textsuperscript{24} \textit{Matter of L}, 1 I. \& N. Dec. at 1.
\textsuperscript{25} \textit{Id.} at 2.
\textsuperscript{26} \textit{Id.} at 1.
\textsuperscript{27} \textit{Id.} at 5–6.
\textsuperscript{28} \textit{Id.} at 5.
the Internal Revenue Code for importing marijuana without paying taxes.\(^{30}\) He left and reentered the United States in 1952, but was later found deportable both for his 1947 conviction\(^{31}\) and because he was excludable upon reentry.\(^{32}\) Under Matter of L, G.A. could apply for a § 212(c) waiver only for the deportation ground based upon his excludability. The BIA, noting that relief could be granted for one ground of deportation, found it "clearly repugnant" that G.A. would remain deportable based on the same conviction.\(^{33}\) Thus, the BIA held that granting a § 212(c) waiver for an exclusion ground based upon a criminal conviction precludes a deportation proceeding based upon the same conviction.\(^{34}\)

The BIA was persuaded by the particular facts of the case; G.A.'s wife was a legal resident, he had 10 citizen children, and he had lived in the United States for 43 years.\(^{35}\) However, the BIA failed to notice an important distinction between Matter of G.A. and Matter of L. G.A. was deportable for his drug conviction regardless of whether he left the country and reentered; whereas L's deportability was a product of his reentry. Perhaps attempting to avoid capricious results under a statute whose drafters were unable to foresee all contingencies, the BIA reasoned that G.A. and L were in substantially the same situation.\(^{36}\) The BIA stressed that L, like G.A., still would have been deportable for his conviction even if he had been granted an exclusion waiver.\(^{37}\) However, the distinguishing fact that L's deportability was triggered by his reentry was not mentioned. Allowing a § 212(c) waiver for an alien who was deportable regardless of reentry opened the door to further expansion.

In 1976, a final expansion allowed § 212(c) relief in any deportation proceeding in which the ground for deportation could have triggered exclusion had the alien left the country and reentered.\(^{38}\) In Francis v. INS, a permanent resident alien who, unlike L and G.A., had not left the country prior to his deportation hearing, filed for a § 212(c) waiver in

\(^{30}\) Id. at 274.


\(^{33}\) Id. at 275–76.

\(^{34}\) Id. at 275.

\(^{35}\) Id. at 275.

\(^{36}\) Id. at 276.

\(^{37}\) Id.

\(^{38}\) Francis v. INS, 532 F.2d 268 (2d Cir. 1976).
The immigration judge found him ineligible for a § 212(c) waiver of exclusion grounds since he was not in an exclusion hearing nor was his deportation hearing based on exclusion grounds. On appeal, Francis claimed that the Equal Protection Clause of the Fifth Amendment required that all aliens be eligible for this relief. If Francis had left the country after his drug offense and had been found excludable upon return, he could have applied for a § 212(c) waiver which, if granted, would have precluded subsequent deportation for the same conviction. Thus, Francis argued that the statute creates two classes of aliens identical in every respect, except that one has departed and returned to the United States at some point after becoming deportable. The Second Circuit held that the distinction between the two classes was created by irrelevant and fortuitous factors; therefore the statute was unconstitutional as applied. The court commented that both reason and fairness suggest that aliens whose ties to the U.S. are so strong that they have never left after their initial entries should receive at least as much consideration as those aliens who leave and return.

The Board of Immigration Appeals adopted the Francis holding nationwide by refusing to distinguish between permanent resident aliens who temporarily travel abroad and those who do not leave the U.S.

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39. Id. at 270.
40. The court noted that "[i]t has long been held that the constitutional promise of equal protection of the laws applies to aliens . . . ." Id. at 272 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
41. See supra note 34 and accompanying text.
42. Francis v. INS, 532 F.2d at 272.
43. Id. at 272–73. The court used a rational-basis test requiring that distinctions between different classes of people be reasonable, not arbitrary, and rest upon differences that are substantially related to the goal of the legislation. Therefore, similarly situated people must be treated alike. Id. (citing Stanton v. Stanton, 421 U.S. 7, 14 (1975)).
44. Id. at 273.
46. Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) (making § 212(c) available for all deportation grounds except entry without inspection, see Matter of Hernandez, Interim Decision 3147, 1990 WL 385764 (BIA); illegal possession of firearms, see Cabasug v. INS, 837 F.2d 880 (9th Cir. 1988); and those grounds specifically exempted by § 212(c) itself). A permanent resident alien who "at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, any weapon . . . is deportable." 8 U.S.C.A. § 1251(a)(2)(C) (West 1970 & Supp. 1994). Because § 212(c) is not available in such cases, a long-term permanent resident alien may be deported for possessing an unregistered gun. In one case, a permanent resident alien fired a friend's gun into the air at a New Year's Eve party. When police arrived, the permanent resident alien claimed the gun was his
expand § 212(c) even further and make the waiver available for virtually all deportation grounds.

In Matter of Hernandez, a permanent resident alien, admitted to the U.S. in 1967, was found deportable for crossing the border without inspection and was denied a § 212(c) waiver. On appeal, the BIA decided to extend the availability of § 212(c) to all grounds of deportation except those with comparable exclusion grounds specifically exempted in § 212(c). The BIA expressed concern that under Francis, § 212(c) offered relief to aliens who had committed far more serious crimes than illegal entry. Emphasizing that the statute as applied bears little resemblance to the statute as written, the BIA concluded that the equal protection arguments made in Francis supported such an expansion. However, Hernandez was short lived. INS Commissioner McNary referred the decision to the Attorney General for review, requesting that § 212(c) be used only as a waiver of exclusion grounds for permanent resident aliens seeking reentry. The Attorney General reversed the BIA’s decision and held that § 212(c) relief be available in deportation hearings only when the asserted ground of deportation is also a ground of exclusion.

Recently, the Second Circuit again expanded § 212(c). In an opinion admittedly in direct conflict with the Attorney General in Hernandez, the court held that § 212(c) may apply in a deportation proceeding for entry without inspection. The Second Circuit acknowledged a traditional

because the owner, a U.S. citizen, was on probation and the gun was unregistered. Based on advice of his attorney, he pled guilty to a charge of reckless endangerment and was sentenced to community service. He was subsequently deported based on this conviction. Telephone Interview with Jay Stansell, Attorney for the Northwest Immigrant Rights Project, Seattle, Washington (July 26, 1994).

47. Interim Decision 3147, 1990 WL 385764 (BIA).
48. Id. at *2.
49. Id. at *4. When Hernandez was decided, § 212(c) exempted exclusion grounds relating to subversives and war criminals. Id. Today, § 212(c) denies relief to permanent resident aliens convicted of one or more aggravated felonies for which they have served a term of imprisonment of at least five years, aliens excludable as international child abductors under § 212(a)(9)(C) and aliens excludable for security and related grounds under § 212(a)(3). 8 U.S.C.A. §§ 1182(c), (a)(9)(C), (a)(3) (West 1970 & Supp. 1994). Aggravated felonies include murder, drug trafficking, and crimes of violence. 8 U.S.C.A. § 1101(a)(43) (West 1970 & Supp. 1994).
51. Id. at *4-*5.
52. See supra note 23.
55. Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993).
argument that because aliens who have already entered the United States can't be excluded, Congress did not intend § 212(c) to cover entry without inspection. However, the court believed that this rationale supported a finding that Congress did not consider the issue, making any attempt to find legislative intent fruitless. Absent any indication that Congress intended otherwise, the court felt that allowing § 212(c) waivers for entry without inspection promoted both coherence and consistency.

B. Exercise of Discretion Under § 212(c)

In addition to understanding the complex extension of § 212(c)'s scope, a brief overview of administrative and judicial discretion under § 212(c) clarifies how the statute actually functions. Section 212(c) is entirely discretionary and, although permanent resident aliens must demonstrate that their applications are entitled to favorable rulings, the statute provides no guidance as to when the alien meets this burden. Consequently, the BIA has attempted to develop a coherent standard for exercising discretion while the courts have struggled to do the same upon review.

In order to determine if a 212(c) application warrants favorable discretion, the BIA has established a balancing test that weighs positive and negative factors. Positive factors include family within the United States, length of residence, age when residence began (residence beginning at a young age weighs more favorably), evidence of hardship to the alien or her family if deportation takes place, service in the U.S. military, a consistent employment history, a showing of rehabilitation if a criminal record exists, prior service and value to the community, and other evidence attesting to good character. Negative factors include the nature and circumstances of the deportation or exclusion ground, additional violations of U.S. immigration laws, the nature, seriousness, and recency of any criminal record, and any other evidence of bad character or undesirability as a permanent resident of the United States.

56. Id. at 897.
57. Id.
58. Id.
60. Id. at 583.
61. Id. at 584–85.
62. Id. at 585.
When a permanent resident alien has committed a particularly grave offense, such as drug trafficking, the alien must make a greater showing of favorable circumstances by demonstrating unusual or outstanding equities. Additionally, some cases may involve adverse factors of such a serious nature that they cannot be offset.

When an alien appeals a BIA decision denying a § 212(c) waiver, the reviewing court uses an abuse of discretion standard of review. Generally, the BIA abuses its discretion if a decision is unsupported by rational explanations, departs from established policies, or discriminates invidiously against a particular race or group. Inclusion of an improper factor is grounds for remand, and a denial of relief can be affirmed only on the basis actually stated in the BIA decision. Improper factors may include the permanent resident alien’s failure to marry the mother of his children and the "illegitimacy" of those children. Factors that are not mentioned will be assumed not to have been considered. Consequently, the Board must consider all factors when weighing equities, so that a reviewing court can determine that the BIA’s decision resulted from thoughtful deliberation and was not merely a reaction.

When a permanent resident alien has been convicted of a crime, the BIA should evaluate the nature and underlying circumstances surrounding the conviction in order to evaluate its weight as a negative factor. The BIA or the immigration judge may not create a blanket rule

63. Id. at 585, 586 n.4.
64. See Matter of Buscemi, 19 I. & N. Dec. 628 (BIA 1988) (denying § 212(c) waiver for an alien convicted of attempted sale of heroin and attempted robbery who had shown considerable favorable equities).
65. See supra note 23 outlining the review process.
66. The BIA apparently lacks a clear standard for reviewing an immigration judge’s § 212(c) decision, reviewing either de novo or for abuse of discretion. See Charlesworth v. INS, 966 F.2d 1323, 1325 (9th Cir. 1992). For a scathing commentary by Judge Posner regarding this inconsistency, see Ortiz-Salas v. INS, 992 F.2d 105, 107 (7th Cir. 1993).
67. Vargas v. INS, 831 F.2d 906, 908 (9th Cir. 1987).
68. See, e.g., Rodriguez-Rivera v. INS, 993 F.2d 169, 170 (8th Cir. 1993); Yepes-Prado v. INS, 10 F.3d 1363, 1366 (9th Cir. 1993).
69. Braun v. INS, 992 F.2d 1016, 1021 (9th Cir. 1993).
70. Mattis v. INS, 774 F.2d 965, 967 (9th Cir. 1985).
71. Yepes-Prado, 10 F.3d at 1370.
72. Id.
73. See supra notes 60–64 and accompanying text.
74. Yepes-Prado, 10 F.3d at 1366.
75. See Becerra-Jimenez v. INS, 829 F.2d 996, 1000 (10th Cir. 1987) (citations omitted).
that categorically denies relief to aliens convicted of certain crimes.\textsuperscript{77} An unwritten policy of denying § 212(c) relief for certain categories of crimes is a contravention of Congressional policy and is inconsistent with the duty to evaluate applications on a case-by-case basis.\textsuperscript{78} The exercise of discretion under § 212(c) is a complex undertaking exacerbated by the statute’s lack of guidance.

III. IDENTIFYING THE PROBLEMS

The expansion of § 212(c) far beyond the text, coupled with a vague standard for exercising discretion, makes interpreting the statute difficult. Even the most detailed reading of § 212(c) would shed little light on how the statute is actually applied. It is rather ironic that a statute applying to immigrants, whose English proficiency varies greatly, is understandable by only those thoroughly proficient in English and well-versed in immigration law. Even an attorney, when asked by permanent resident aliens if they place themselves at risk by leaving the country, would need to conduct an in-depth analysis before offering a qualified answer. Although increasing relief, the \textit{Fleuti} doctrine and \textit{Francis} and its legacy have complicated § 212(c) in a way Congress never could have foreseen.

\textit{A. Section 212(c)’s Complexity Creates Confusion and Reduces Predictability}

Complex case law together with variations in interpretation and application reduce the predictability of § 212(c). Permanent resident aliens traveling out of the country need to know whether they could be excluded upon return, and if so, whether their absences would fall within \textit{Fleuti}. If \textit{Fleuti} is applicable, they need to know if they could seek § 212(c) waivers and the likelihood that such waivers would be granted. Even under such a step-by-step analysis, it would be difficult to determine a predictable outcome. For aliens applying for a § 212(c) waiver of deportation, the uncertainty is just as great because the discretionary balancing of positive and negative factors offers little predictability.

\textsuperscript{77} See \textit{Yepes-Prado}, 10 F.3d at 1371 (holding that it was impermissible for the BIA to deny relief merely because the alien was convicted of a drug crime).

\textsuperscript{78} Id. at 1371–72. See also \textit{De Gonzalez v. INS}, 996 F.2d 804, 810–11 (6th Cir. 1993) (finding that the failure of the INS to produce more than one case in which the EIA exercised discretion in favor of a petitioner convicted of a serious drug offense strongly suggested an unauthorized policy of denying § 212(c) relief in drug cases).
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Manuel Leal’s case illustrates some of these problems. Although a federal judge gave Leal permission to travel to Mexico, Leal was not told he risked exclusion upon return due to his criminal conviction. In fact, Leal’s case is fraught with irony. Without the letter from his probation officer approving his travel plans, it is unlikely that he would have been excluded because the border inspectors were probably unaware of his prior conviction. If he had been allowed to enter, he still could have been deported at a later date for being excludable upon entry. However, if he could show his trip fell within the *Fleuti* doctrine, he could not be excluded or deported as a result of his reentry. Nevertheless, when Leal crossed the border illegally to be with his daughter in the hospital, his trip was no longer “innocent” and therefore was outside the scope of *Fleuti*. This illegal crossing, prompted by a father’s desire to be with a sick child, hurt Leal in two ways. He became ineligible for the *Fleuti* doctrine, and he lost the ability to apply for a § 212(c) waiver, since the Seventh Circuit does not allow a § 212(c) waiver for entry without inspection. By contrast, if Leal had been in the Second Circuit, this relief would have been available. Accordingly, the only predictable advice one can provide an alien is never leave the United States. This may seem unreasonable, but given the high stakes, it may be the most prudent advice.

B. The Expansion of § 212(c) Has Clouded the Role of the Judiciary

Although § 212(c)’s unpredictability is due, at least in part, to the judiciary, the courts have struggled to decipher the statute as well. The beginning point of statutory interpretation generally involves the obvious: read the statute. A plain reading of § 212(c) suggests that the statute allows a waiver of exclusion grounds for permanent resident aliens who are excludable but not deportable become naturalized citizens, if possible, before traveling out of the country.

79. Judge Cummings, dissenting in *Leal*, noted that most people would take it on good faith that when a federal judge gives permission to travel out of the country, it is proper to do so. *Leal-Rodriguez v. INS*, 990 F.2d 939, 956 (7th Cir. 1993) (Cummings, J., dissenting).
80. *Id.* at 944.
81. *Id.* at 946.
82. *See supra* notes 55–58 and accompanying text.
83. Telephone Interview with Jay Stansell, Attorney for the Northwest Immigrant Rights Project, Seattle, Washington (July 26, 1994). Mr. Stansell recommends that permanent resident aliens who are excludable but not deportable become naturalized citizens, if possible, before traveling out of the country. *Id.*
84. *See* H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in H. Friendly, *Benchmarks* 202 (1967) (offering Justice Friendly’s “threefold imperative to law students: (1) read the statute; (2) read the statute; (3) read the statute”).
aliens returning to the United States after traveling abroad. However, when the plain meaning gives an absurd result, as in *Matter of L*, where a permanent resident alien with a prior criminal conviction had traveled abroad and was not excluded upon return but was in deportation for being excludable upon entry, judicial interpretation is necessary.

Authorities are split on the proper role of the judiciary, however, Judge Richard Posner, a leading law and economics scholar, advocates the "imaginative reconstruction" method. This requires a judge to determine what the enacting legislature would have wanted and act accordingly. In *Matter of L*, one could argue that if Congress had thought about L’s situation, it would have written § 212(c) to encompass such circumstances. By comparison, Judge Easterbrook, also a law and economics scholar, supports a textualist “clear statement” approach that would have the judiciary follow only the specific instructions of the legislature. Easterbrook believes that silence or gaps in a statute are possible indicia of legislative intent. This approach could lead a judge to conclude that *Matter of L* was wrongly decided. For example, Congress could have intended that the government have the option of allowing excludable aliens who might qualify for § 212(c) waivers to reenter. After reentry, these excludable aliens could be placed in deportation proceedings in which § 212(c) waivers would not be available. Although this interpretation is questionable, Easterbrook argues that any finding of legislative intent is dubious due to the limited abilities of the judiciary.

These two views have found their way into the case law regarding § 212(c). The Ninth Circuit, for example, took a position similar to Judge Easterbrook’s. The court remarked that it had little reason to doubt that Congress intended § 212(c) apply only to exclusion, noting that Congress wrote a separate statute for discretionary relief from deportation.

87. Id. at 287.
89. Id.
90. See id. at 551 (arguing that few judges “have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters... would have answered questions that never occurred to them”).
91. Cabasug v. INS, 837 F.2d 880, 883 (9th Cir. 1988) (referring to Suspension of Deportation under INA § 244(a)(2), 8 U.S.C.A. 1254(a)(2) (West 1970 & Supp. 1994)). Suspension of deportation allows the Attorney General to waive deportation for any eligible alien and adjust the alien’s status to that of an alien lawfully admitted for permanent residence. For a permanent resident alien who is found to be deportable, this would have the effect of reinstating his lawful permanent
Likewise, the First Circuit seemed to approve a “clear statement” approach. When refusing to expand § 212(c), the court commented that, although § 212(c) is a poorly framed statute, judicial “tinkering” is much to blame for the “mess.” The court concluded that Francis and its aftermath created an “untidy patchwork” and reasoned that, absent judicial intervention, Congress would have recognized and repaired any problems long ago. Although unable to imagine a Congressperson who would be pleased with the present state of § 212(c), the court still deferred to Congress for any improvement. Although Congressional action is possibly the most appropriate method of solving problems created by § 212(c), the First Circuit may be giving Congress too much credit. It has been more than 50 years since Matter of L, and although numerous courts have lamented § 212(c)’s confusion, Congress has offered no remedy.

The Second Circuit, unwilling to wait for Congressional action, has expanded § 212(c) to include entry without inspection. The court supported its decision by citing Congressional inaction since Francis, the significant departure from the text of the statute, and the need for coherence and consistency the statute’s application. However, due to the conflicting perspectives on the role of the judiciary in interpreting statutes, the consistency the Second Circuit seeks is unattainable. The BIA adopted the Francis rule nationally, and seven circuits have explicitly accepted the Francis holding. The Second Circuit is now the only circuit to allow a § 212(c) waiver for entry without inspection. This varied application of § 212(c) can be corrected only by Congress. The confusion surrounding the interpretation and application of § 212(c) and

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resident alien status. However, suspension is construed more narrowly than § 212(c). See infra notes 129–38 and accompanying text. The court in Cabasug went on to note that Congress would not have enacted § 244(a) if it intended for § 212(c) to apply to both exclusion and deportation. Cabasug v. INS, 837 F.2d at 883.

93. Id.
94. Id. at 316.
95. Id.
96. Bedoya-Valencia v. INS, 6 F.3d 891 (2d. Cir. 1993).
97. Id. at 897.
98. See supra note 45 and accompanying text.
99. See De Gonzalez v. INS, 996 F.2d 804, 806 (6th Cir. 1993); Variamparambil v. INS, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); Tapia-Acuna v. INS, 640 F.2d 223, 224 (9th Cir. 1981); Chiravacharadhihikul v. INS, 645 F.2d 248, 248 n.1 (4th Cir.), cert. denied, 454 U.S. 893 (1981); Mantell v. INS, 798 F.2d 124, 125 (5th Cir. 1986); Lozada v. INS, 857 F.2d 10, 11 n.1 (1st Cir. 1988); Vissian v. INS, 548 F.2d 325, 328 n.3 (10th Cir. 1977).
the Second Circuit's unitary holding send this message loud and clear: it is time to amend the INA.

IV. PROPOSAL TO AMEND THE INA

The most logical way to correct the problems with § 212(c) is to amend the statute. The following proposal suggests redefining entry so as to exempt permanent resident aliens from the consequences of an entry when they choose to travel abroad. However, this would make § 212(c) unnecessary because the INS could no longer exclude permanent resident aliens and thus § 212(c) could be repealed. Although these two changes eliminate all of the problems mentioned above, they deprive permanent resident aliens of the valuable relief from deportation that § 212(c) now offers. Therefore, the final part of this proposal suggests the creation of a new exemption from deportation for long-term permanent resident aliens who fall within the current scope of § 212(c).

A. Eliminating the Reentry Doctrine for Permanent Resident Aliens

Changing the definition of entry under INA § 101(a)(13) so that permanent resident aliens are no longer subject to the reentry doctrine would effectively eliminate the controversy surrounding § 212(c) and the Fleuti doctrine. This can be accomplished by amending the definition to read as follows:

The term "entry" means any coming of an alien, other than an alien who is a lawful permanent resident of the United States, into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise.\textsuperscript{100}

As long as permanent resident aliens remain in lawful status, they are free to travel.\textsuperscript{101} On the other hand, if they are deportable, then the government must pursue deportation, not exclusion, to remove such aliens from the country. This serves four purposes: 1) it resolves the equal protection problems raised in Francis,\textsuperscript{102} 2) it eliminates the confusion caused by the administrative and judicial expansion of §

\textsuperscript{100} This is very similar to a definition proposed in a 1986 bill that passed the House but was not considered by the Senate. H.R. 4823, § 101(a), 99th Cong., 2d Sess. (1986).

\textsuperscript{101} However, permanent resident aliens who travel abroad for more than a year risk losing their permanent resident status. 8 C.F.R. § 211.1A (1993).

\textsuperscript{102} Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976). See supra notes 38–44 and accompanying text.
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212(c) and the varying interpretations of Fleuti among the circuits, 3) it allows for much more efficient processing of returning permanent resident aliens at the border, and 4) it ensures permanent resident aliens due process in deportation hearings.103

Under this revised definition of entry, permanent resident aliens could reenter the country without being subject to exclusion grounds, thus eliminating the dichotomy in Francis. Permanent resident aliens could not be placed in deportation because they were excludable upon reentry; they could be found deportable only for acts unrelated to their reentry.104 The two classes of aliens that created an equal protection violation under Francis would no longer exist. Although Francis would still be deportable for his crimes, there would no longer be a similarly situated group of aliens who could file for a waiver simply because they traveled abroad and returned prior to being placed in deportation.

Eliminating the reentry doctrine for permanent resident aliens also eliminates the confusion surrounding the Fleuti doctrine. Determining when an alien intends his departure to be "meaningfully interruptive of . . . permanent residence"105 is no easy task. The Select Commission on Immigration and Refugee Policy (SCIRP) recognized the difficulty of interpreting the Fleuti doctrine when it made a similar proposal to redefine entry in 1981.106 SCIRP noted that, although the Fleuti doctrine exempts permanent resident aliens who take innocent, casual, and brief trips out of the country from exclusion upon return,107 the Supreme Court had not defined this exemption.108 Testimony regarding the hardship on permanent resident aliens created by the case-by-case interpretation of the reentry doctrine109 further convinced SCIRP of the need for an amendment.110

103. See supra note 10.
106. Select Committee on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Final Report 284–86 (1981) [hereinafter SCIRP] (recommending that returning permanent resident aliens still be subjected to exclusion for crimes committed while abroad, certain political grounds, entry into the United States without inspection, and engaging in persecution.).
107. See supra notes 17–18 and accompanying text.
108. SCIRP, supra note 106, at 285.
109. See, e.g., Leal-Rodriguez v. INS, 990 F.2d 939, 941 (7th Cir. 1993).
110. SCIRP, supra note 106, at 285–86.

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Additionally, this new definition of entry would substantially reduce litigation and provide for more efficient use of INS resources. Additionally, the number of deportation and exclusion hearings would decrease, and border inspections could focus on persons entering the United States for the first time or for reasons other than residency, such as business and tourism. The INS expressed reservations about such an amendment to "entry" in 1986, when a bill which included a version of the SCIRP recommendation was introduced in the House. The fact that some permanent resident aliens who would be excludable under the current system (i.e., for committing one crime of moral turpitude prior to reentry) would not be deportable under the proposal troubled the INS. Additionally, the INS claimed that if it were required to deport, rather than exclude, returning permanent resident aliens, its costs would increase because in deportation the burden is on the government to establish deportability; whereas in exclusion the burden is on the alien to prove admissibility. However, as the SCIRP report suggested, by removing an entire class of aliens from exclusion proceedings, the INS's caseload may actually diminish, especially given that not all permanent resident aliens who could be excluded are also deportable. Consequently, the INS's position fails to consider overall efficiency and the fact that, but for the mere incident of leaving the country and reentering, the permanent resident alien would not be excludable.

The final purpose served by redefining entry is that it guarantees permanent resident aliens the due process of a deportation hearing. The Supreme Court has consistently held that aliens have little or no due process rights in exclusion hearings. However, once in the United States, they have due process rights in deportation hearings.

111. Id. at 286.
112. H.R. 4823, supra note 100. The bill would have defined "entry" as "any coming of an alien, other than an alien having a lawful permanent residence in the United States, into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise." Id. § 101(a).
115. The INS's concerns seem particularly unfounded given that the bill also proposed an amendment to INA § 242 to allow the immediate detaining of returning permanent resident aliens pending a determination of deportability. H.R. 4823, § 101, 99th Cong., 2d Sess. § 101(b) (1986). The apparent reason for this addition was to alleviate concerns that deportable permanent resident aliens, who could no longer be excluded, would escape detection once they were back inside the United States.
States, Constitutional protection provides due process rights in deportation hearings. This results from the distinction between an alien at the border and an alien in the United States who is both subject to and protected by its laws. Therefore, the government is free to determine what procedure it deems fair for aliens who are entering for the first time or for illegal entrants at the border. Ironically, an illegal alien in the United States is entitled to more due process than a permanent resident alien in an exclusion hearing.

Although the Supreme Court has recognized the possibility of increased due process rights for returning permanent resident aliens placed in exclusion proceedings, permanent resident aliens still face much uncertainty if they choose to travel outside the country. Because courts recognize due process rights for aliens who have lawfully, or even unlawfully, entered the United States, it is both inconsistent and inequitable that aliens lawfully admitted for permanent residence may lose these rights simply because they have left and then returned. While considering the 1986 bill, the Committee on the Judiciary agreed that it was unfair to place returning permanent resident aliens in exclusion rather than in deportation. The American Immigration Lawyers Association (AILA) also supported the bill. AILA argued that the contributions of permanent resident aliens, combined with the increased likelihood of family ties and personal investments in the United States, warranted providing them greater due process rights than an illegal, temporary, or first-time visitor. The INS’s concern for administrative efficiency, even if well founded, hardly seems a valid reason for lower

117. Id.


119. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law... But an alien on the threshold of entry stands on a different footing.”).

120. See Landon v. Plasencia, 459 U.S. 21 (1982) (holding that a returning permanent resident alien placed in exclusion is entitled to due process rights, but not necessarily equivalent due process to a deportation hearing).


123. Id.

124. See supra note 113 and accompanying text.
due process protections. Redefining entry as proposed entitles those aliens with the greatest ties to the United States to the due process of deportation hearings, thus guaranteeing them the same level of due process as aliens who have entered the United States illegally.

B. Repeal and Replacement of § 212(c)

If permanent resident aliens are not excludable, then § 212(c) becomes unnecessary. The elimination of § 212(c) reduces the confusion caused by the expansion of the statute and enhances efficiency by reducing the INS's caseload.\textsuperscript{125} However, eliminating § 212(c) also removes a valuable source of relief from deportation for permanent resident aliens\textsuperscript{126} because the catch-all relief from deportation under INA § 244,\textsuperscript{127} suspension of deportation,\textsuperscript{128} does not provide as much protection to permanent resident aliens. Consequently, this proposal suggests an amendment to § 241 adding a waiver of deportation that provides relief comparable to § 212(c).

Suspension of deportation under § 244 applies to all aliens, not just permanent resident aliens, and thus is strictly construed. Suspension allows any deportable alien to apply for a discretionary waiver of deportation and adjustment of status to that of a lawfully admitted permanent resident alien.\textsuperscript{129} To qualify for suspension, an alien being deported for a criminal conviction must be “physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation . . . .”\textsuperscript{130} This language imposes a considerably more stringent residency requirement than that of § 212(c),\textsuperscript{131} which requires only that a permanent resident alien

\textsuperscript{125} See supra note 111 and accompanying text.
\textsuperscript{126} Neither the SCIRP report nor the House bill proposed eliminating § 212(c), even though the proposed amendment to § 101(a)(13) would make § 212(c) unnecessary. Although it is possible that this was a mere oversight, it seems more likely that § 212(c) was left intact so that permanent resident aliens could still apply for the waiver in deportation.
\textsuperscript{128} See Cabasug v. INS, 837 F.2d 880, 883 (9th Cir. 1988). See supra note 91 and accompanying text.
\textsuperscript{130} Id.
\textsuperscript{131} The strict language of § 244 is softened somewhat by adopting Fleuti and excluding absences that are brief, innocent, and casual and that do not meaningfully interrupt the alien's presence. 8 U.S.C.A. § 1254(b)(2) (West 1970 & Supp. 1994). Initially, § 244 did not contain a Fleuti limitation and "continuous physical presence" was given a literal interpretation that denied
demonstrate a “lawful unrelinquished domicile” in the United States for at least seven years. While § 244 generally requires that the deportable act occurred more than ten years ago,\textsuperscript{132} § 212(c) requires only that the alien’s residence be lawful for seven years.\textsuperscript{133}

The difficulty of qualifying for § 244 is further compounded by two other provisions that require an alien to prove “good moral character”\textsuperscript{134} and to demonstrate that deportation would result in “exceptional and extremely unusual hardship” to the alien or a spouse, parent, or child who is a U.S. citizen.\textsuperscript{135} What constitutes extreme hardship remains unclear. For example, economic hardship can be considered but, by itself, is insufficient.\textsuperscript{136} These additional requirements may be justified because, as noted above, any alien who meets the residency requirements may apply for suspension. No preference is given to aliens who are permanent resident aliens. An alien who has managed to live illegally in the United States for the necessary period is as eligible as a permanent resident alien who has been in the country for the same amount of time. Since § 244 is clearly an inadequate substitute for § 212(c) for long-term permanent resident aliens, Congress should adopt a separate category of relief for permanent resident aliens under § 241.

An additional waiver under a newly drafted § 241(d) could read as follows:

(d) Waiver of grounds of deportation for certain immigrants

132. The ten-year requirement is for aliens deportable for criminal convictions. 8 U.S.C.A. § 1254(a)(2) (West 1970 & Supp. 1994). Under this proposal long-term permanent resident aliens could not be excluded, therefore the only relief lost by repealing § 212(c) is the ability to apply for a waiver of deportation for criminal grounds.

133. Although it is not settled as to when a deportable act causes lawful domicile to end for § 212(c) purposes, one court has held that the date of the deportable act itself does not end lawful domicile. Marti-Xiques v. INS, 741 F.2d 350 (11th Cir. 1984).

134. Good moral character is not defined in the INA, although, § 101(f) defines what is not good moral character—for example, habitual drunkenness. 8 U.S.C.A. § 1101(f) (West 1970 & Supp. 1994).

135. 8 U.S.C.A. § 1254(a)(2) (West 1970 & Supp. 1994). The Court has applied a strict statutory interpretation to this section, allowing aliens to qualify only if they can demonstrate the necessary hardship to themselves or to specified family members. See INS v. Hector, 479 U.S. 85, 107 (1986) (per curiam) (overturning a Third Circuit decision ordering the BIA to consider an alien’s relationship to her nieces for demonstrating extreme hardship, and holding that Congress specifically determined the class of relatives to be considered).

136. Bueno-Carrillo v. Landon, 682 F.2d 143, 146 (7th Cir. 1982).
The provisions of subsection (a) of this section (other than paragraph 4) shall not apply to an alien lawfully admitted for permanent residence who has maintained a lawful unrelinquished domicile of 7 consecutive years unless, in the opinion of the Attorney General, the alien is found to lack good moral character as described in section 101(f) during the first 7 years of lawful unrelinquished domicile required to qualify for this subsection. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

This waiver would function like § 212(c), with some significant improvements. The biggest difference is that the proposed § 241(d) greatly reduces the scope of discretion. It allows waiver of deportation unless the alien is found to lack good moral character. This determination is still subjective, of course, but the INA offers some guidelines as to what is not considered good moral character. By limiting discretion to one issue, the proposed § 241(d) increases efficiency. The balancing test of positive and negative factors under § 212(c) is no longer necessary. The burden would shift to the government to show lack of good moral character, forcing the government to be more selective in choosing whom to deport. However, it would not preclude the deportation of those permanent resident aliens that the government feels are a particular detriment to society. Fewer deportation hearings coupled with fewer exclusion hearings, as a result of exempting returning permanent resident aliens from exclusion, should allow the INS to redirect resources to more pressing matters, such as border control.

137. Focusing on good moral character reduces the overall scope of discretion, but may not be the best way to increase fairness and efficiency. A similar waiver, focusing on the balancing test set forth in Marin, may be a better solution. See supra notes 59–64 and accompanying text. Although this would allow for more discretion, it would also allow factors such as family in the United States, evidence of rehabilitation, and other positive considerations, to offset any negative factors. Additionally, both the INS and immigration attorneys are accustomed to this test.


139. See supra notes 59–64 and accompanying text.

140. The SCIRP report considered abolishing deportation entirely for long-term (seven to ten years) permanent resident aliens, except in the case of heinous crimes. Of the eight members who voted, five were in favor of such a proposal (five members chose to pass on this vote). The members in favor of the proposal felt that permanent resident aliens and their families suffer undue hardship as a result of deportation when other penalties would be more appropriate. They also noted that the suspension of deportation process is not an adequate remedy. SCIRP, supra note 106, at 279–81.
Additionally, unlike § 244, the proposed § 241(d) requires aliens to be of good moral character only during the first seven years of lawful unrelinquished domicile. Under § 244, aliens resident in the United States for longer than seven years are required to show good moral character for all years of continuous presence prior to their application for suspension. Like § 212(c), the proposed § 241(d) would not require a showing of hardship or extreme hardship. Neither would it include the extremely restrictive residency requirement that § 244 imposes on aliens who are deportable for crimes. Placing this waiver in the deportation chapter of the INA would also make the statute easier to read. Such a waiver would officially recognize the special relationship that long-term permanent resident aliens have with the United States and would increase predictability, while not infringing on the INS’s ability to monitor the borders.

V. CONCLUSION

Permanent resident aliens occupy a unique status in our society. In 1893, Justice Brewer suggested that a separate class, “denizen,” be created for permanent resident aliens who dwell in this “middle state, between an alien and a natural born [citizen].” Although the immigration laws have evolved, this uncertain “middle state” still exists, allowing the INS to deny reentry to permanent resident aliens who are not deportable. The expansion of § 212(c) provides permanent resident aliens with some added protection, but Congress has not explicitly approved of this practice. Such uncertainties make the INA difficult for even federal judges to interpret. Yet for immigrants, the people most affected by the INA, understanding these provisions is vital. A few simple amendments to the INA would begin to solve these problems, while also increasing the INS’s efficiency and its ability to control the borders.

141. All relief from deportation would be under Chapter V of Title II of the INA, which deals with deportation and adjustment of status. On the other hand, § 212(c) is under Chapter II of Title II, which deals with admission and travel control.

142. Fong Yue Ting v. United States, 149 U.S. 698, 736 (1893) (Brewer, J., dissenting).