DEPORTATION AND THE ALIEN—SOME ASPECTS

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I. INTRODUCTION

The attraction which this nation holds for immigrants is best exemplified by the impressive figures found in the reports of the Immigration and Naturalization Service.[1] The records of that agency reveal a constant influx of aliens into this country. Some of them are lawful permanent residents; some are aliens whose presence here has not received official sanction.[2] Among the latter group are those who can find no immediate opportunity for establishing legal residence here but yet are intent on carving out a niche for themselves in this land of immigrants. Thus, they come as visitors and stay on for extended periods seeking new opportunities; or they may secure entry initially as immigrants through questionable strategies. Such plans are motivated in part by the desire to cope with the various restrictions imposed by the immigration law.[3] Such restrictions include numerical allocations and quotas which depend in large measure on family relationships and occupational skills.[4] For example, immigrants from the western hemisphere subject to a numerical limitation are allocated 120,000 visas annually while those from other areas of the world have a total annual limitation of 170,000. Within the latter group, visas are further allocated on a quota preference system.[5] This naturally provides some incentive for many aliens to accelerate their own entry into the United States through circumvention of the normal immigration process. Moreover, the labor certification requirement[6] which is intended to protect the American labor market creates hardships for many aliens who are unable to comply therewith.

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1. During fiscal year 1974, 394,861 immigrants were admitted to the United States for permanent residence. IMMIGRATION & NATURALIZATION SERVICE, ANNUAL REPORT 3 (1974) [hereinafter cited as ANNUAL REPORT]. Three major categories of aliens were represented by this number: natives of the Eastern Hemisphere; "special immigrants" coming usually from the Western Hemisphere; and immediate relatives of United States citizens. Immediate relatives include the spouses, children and parents and are admitted without limit. Only 120,000 visas are available annually for the Western Hemisphere and 170,000 visas are available annually for other immigrants. Act of Oct. 3, 1965, Pub. L. No. 89-236, §§ 1, 21(e), 79 Stat. 911, *amending* 8 U.S.C. § 1151 (1964).

2. During fiscal 1974, the Immigration and Naturalization Service located 788,145 deportable aliens and 693,084 entered the United States surreptitiously at places other than normal ports of entry. Except for 7,154 crewmen, most of the remaining 780,991 illegal aliens were located within 30 days. However, 22 percent remained in their illegal status without detection for longer than one month. ANNUAL REPORT, *supra* note 1, at 9.

3. 8 U.S.C. § 1151 et seq. (1970) *as amended.*

4. Immigration and Nationality Act §§ 201, 205, 8 U.S.C. §§ 1151, 1153 (1970).

5. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 21(e), 79 Stat. 921.

6. Immigration and Nationality Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970). Except for certain special categories, aliens coming to work are normally required to obtain

The alien's successful entry does not necessarily end the immigration story. The Immigration and Nationality Act provides for the deportation of aliens who are excludable at the time of entry;[7] thus, an alien who could have been excluded because of an invalid visa may indeed be subject later to deportation.[8] Another provision provides for deportation if an alien commits a serious crime after entry.[9] It should be instructive to examine some aspects of the deportation process to see what relief is available to the alien.[10] This review will be of limited scope because of the vast number of provisions covering deportation.[11] However, the interpretation by the courts of some of the relevant sections provides an interesting framework for discussion, and this article is intended to review the different approaches taken in grappling with these problems.

II. Section 241(f) of the Immigration and Nationality Act and False Claims of Citizenship

An initial review of the deportation question suggests a consideration of section 10 of the Displaced Persons Act of 1948.[12] That section provided for the deportation of refugees who had gained admission to the United States through fraudulent representations concerning their status as displaced persons soon after World War II. This provision was enacted as a result of the vast number of fraudulent applications being made by people who were seeking to avoid the tyranny of their native lands. Their fraud was motivated in large measure by their fear of being sent back to their own countries which had fallen under communist domination. The possibility of involuntary repatriation therefore compelled these refugees to seek new opportunities and resettlement in another land.

The provisions of section 10 were continued in section 212(a)(19) of the Immigration and Nationality Act of 1952.[13] While the language of this

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a labor certification from the Secretary of Labor indicating that there are not enough qualified people available to perform the job and the employment of such aliens will not affect the wages and working conditions of workers employed in the same field. Aliens who are unable to satisfy this requirement are deemed excludable from the United States. The aliens subject to the restriction are special immigrants defined in 8 U.S.C. § 1101(a)(27)(A) (1970) other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence, third-preference and sixth-preference immigrants and non-preference immigrants. *Id.*

7. Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1970). There are 31 categories of excludable aliens set out which reflect the qualitative aspects of the immigration policy.

8. Immigration and Nationality Act § 212(a)(20), 8 U.S.C. § 1182(a)(20)(1970).

9. Immigration and Nationality Act § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970).

10. Suspension of deportation is available where an alien has been physically present in the United States for 7 years, is of good moral character, and severe hardship will result to him, his spouse or his child if he is deported. 8 U.S.C. § 1254(a)(1) (1970). Another provision grants relief to an alien, otherwise admissible at the time of entry, who was excludable on the grounds of fraud but who nevertheless gained entry and is the spouse, parent or child of a United States citizen or of an alien lawfully admitted for permanent residence. *Id.* § 1251(f). This article shall be dealing primarily with this latter provision.

11. *See* Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1970). This section categorizes 18 types of aliens who are subject to deportation.

12. Act of June 25, 1948, ch. 647, § 10, 62 Stat. 1013.

13. Act of June 27, 1952, ch. 477, § 212(a)(19), 66 Stat. 183.

successor statute provided that the alien's misrepresentations should be material for deportation to be warranted, the actual application of the section did not result in any softening of the statute toward refugees fleeing communism and subsequent bills were introduced in Congress for their assistance.[14] Unfortunately, all of these bills failed until 1957, when an act[15] was passed giving relief to certain aliens who had entered the country by fraud or misrepresentation and had subsequently established close family relationships here. Thus, those aliens who had procured visas or entry by fraud or misrepresentation were saved from deportation it they were the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence and were otherwise admissible at the time of entry. An additional provision granted relief from deportation to those persons who had misrepresented their nationality, place of birth or residence if they could establish that the misrepresentation was based on fear of persecution and was not engaged in simply to avoid quota restrictions.[16] This latter provision was included to deal especially with the influx of immigration during the immediate post-war period.

The present section 241(f)[17] of the Immigration and Nationality Act is essentially a codification of section 7 of the 1957 Act except that the provision dealing with displaced aliens who had entered the United States during the post-war period has now been deleted because it has served its purpose.[18] The

14. *See* H.R. 6888, 84th Cong., 2d Sess. (1956); S. 3168, 84th Cong., 1st Sess. (1956); H.R. REP. No. 1365, 82d Cong., 2d Sess. 128 (1952).

15. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640-41 (*repealed by* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 24(3), 75 Stat. 657).

16. *Id.*

17. Immigration and Nationality Act § 241(f), 8 U.S.C. 1251(f) (1970) provides as follows:

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

18. Section 7 of the 1957 Act read as follows:

> The provisions of section 241 of the Immigration and Nationality Act relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien otherwise admissible at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954, both dates inclusive, and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: *Provided*, That such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere . . . .

Act of Sept. 11, 1957, Pub. L. No. 85-316, § 7, 71 Stat. 640-41. The language dealing with admissions between 1945 and 1954 referred to the situation existing immediately after

section providing for relief from deportation of those aliens who had engaged in fraud still remains and the alien is granted relief if he has established the required family relationships in the United States and is otherwise admissible.

Section 241(a)[19] of the Act provides several grounds for the deportation of aliens in the United States. For example, an alien is deportable if he was within one or more classes excludable by law at the time of his entry[20] or if he entered the United States without inspection.[21] Section 212(a)(19)[22] provides that an alien is excludable if he procures entry or seeks to procure entry by fraud or by willfully misrepresenting a material fact. Very often the question arises whether an alien who has entered the United States through a false claim of American citizenship is entitled to the protection of section 241(f) as one who was excludable because of an entry based on willful misrepresentation, or whether he should be regarded as having entered the United States without inspection based on his false citizenship claim so that he is not eligible for the benefits of the section.

In the early case of *Ex parte Saadi*,[23] an alien was ordered deported for entering the United States without inspection. This deportation was based on the alien's misrepresentation of American citizenship. At the time of this decision, there was no provision imposing deportation for false or misleading statements.[24] The court felt that the mere assertion by the alien that he was a United States citizen lulled the immigration inspector into not subjecting Mr. Saadi to interrogation as an alien and, therefore, the court held that the alien had in effect entered the United States without inspection. Another case,

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the second World War when people were seeking a new start and resorted to various means to meet immigration requirements.

19. Immigration and Nationality Act § 241(a), 8 U.S.C. § 1251(a) (1970).

20. Immigration and Nationality Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970) provides as follows:

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

21. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970) provides as follows:

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

22. Immigration and Nationality Act § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970).

23. 26 F.2d 458 (9th Cir.), *cert. denied sub nom.* Saadi v. Carr, 278 U.S. 616 (1928).

24. The relevant provision which applied at the time read as follows:

> . . . [A]t any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889.

United States ex rel. Volpe v. Smith,[25] also involved an alien's entry into the United States on the basis of a claim to United States citizenship. The court there also held that the alien had in fact entered without inspection and was, therefore, deportable on the basis of his false assertion of citizenship. It is significant that at the time of this decision also there was no language in the statute dealing with false or misleading representations and this case was decided on the basis of the language dealing with entry without inspection.[26] As a matter of fact, the dissenting judge in that case pointed out that congressional attempts to include language in the statute dealing with entry through material misrepresentations were unsuccessful.[27] This language was contemplated in the face of previous decisions which had not interpreted the language "entry without inspection" as including false statements about citizenship.[28] Such language concerning false representations was subsequently added to the statute in 1952 and the language dealing with entry without inspection was also retained.[29] An interesting query is whether this additional language was intended to cover an additional case or whether it was merely intended as a clarification of an ambiguity.

The word "inspection" is not, and has never been, defined in any immigration statute.[30] Some cases have taken the approach that any appearance before an immigration inspector constitutes inspection for purposes of the statute and that the failure of the inspector to elicit the necessary information ought not to affect that conclusion.[31] Moreover, it has also been held that giving false and misleading answers concerning citizenship does not mean that there has been no inspection.[32] The basic question is whether one enters

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25. 62 F.2d 808 (7th Cir.), *aff'd on other grounds*, 289 U.S. 422 (1933).

26. *See* Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889-90.

27. United States *ex rel.* Volpe v. Smith, 62 F.2d 808, 815 (7th Cir.) (Alschuler, C.J., dissenting), *aff'd on other grounds*, 289 U.S. 422 (1933).

28. *See, e.g., Ex parte* Guest, 287 F. 884 (D.R.I. 1923); *Ex parte* Lalime, 244 F. 179 (D. Mass. 1917); Lewis v. Frick, 189 F. 146 (E.D. Mich. 1911).

29. Immigration and Nationality Act of 1952 ch. 477, § 212(a)(19), 66 Stat. 183.

30. *See, e.g.*, Goon Mee Heung v. Immigration & Naturalization Serv., 380 F.2d 236 (1st Cir.), *cert. denied*, 389 U.S. 975 (1967); *Ex parte* Gouthro, 296 F. 506 (E.D. Mich. 1924), *aff'd sub nom.* United States v. Southro, 8 F.2d 1023 (6th Cir. 1925); *Ex parte* Lalime, 244 F. 179 (D. Mass. 1917).

The following observation was made by one court:

> No legal definition nor explanation of the meaning of the word "inspection," as used in this statute, has been brought to the attention of this court, and I have been unable to find any. The Immigration Act provides in general terms that "the inspection" of aliens seeking admission shall be "conducted by immigrant inspectors," and such inspectors are authorized to "board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States."

Ex parte Gouthro, 296 F. 506, 511 (E.D. Mich. 1924), *aff'd sub nom.* United States v. Southro, 8 F.2d 1023 (6th Cir. 1925).

Similar language is continued in the present version of the statute. Immigration and Nationality Act § 235(a), 8 U.S.C. § 1225(a) (1970).

31. *E.g., Ex parte* Gouthro, 296 F. 506, 511-12 (E.D. Mich. 1924), *aff'd sub nom.* United States v. Southro, 8 F.2d 1023 (6th Cir. 1925).

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

without inspection if one gives false answers about citizenship. The issue is further complicated by the fact that an alien who now makes false representations is deportable under one section,[33] while if he has entered without inspection, he is deportable also under another section.[34] Can it be said then that a person who makes false claims of citizenship is not deportable under section 241(a)(1) but rather under section 241(a)(2)? The answer to that inquiry is determinative of the alien's eligibility for relief under section 241(f). If section 241(a)(1) applies, then the alien may seek refuge through section 241(f); otherwise, he is precluded.

In *Lee Fook Chuey v. Immigration & Naturalization Service*,[35] an alien argued that he was entitled to the protection of section 241(f) and, therefore, not subject to deportation even though he had made a false claim of citizenship. The Government, on the other hand, contended that the section did not apply to those who had totally evaded immigration inspection but that it applied only to those who, even in spite of fraudulent representations, had still been amenable to the immigration process as aliens.[36] The court agreed with the alien and held that he was, in fact, entitled to relief under section 241(f) because its "otherwise admissible" language, in effect, took care of the qualitative requirements of admission and thus there was no reason to make a distinction between different species of fraud. The court therefore agreed that the alien did not enter without inspection.

It is significant that at the time of *United States* v. *Southro*,[37] the predecessor statute[38] of section 241(a)(2) also contained language concerning entry without inspection, but it was allied with other language dealing with entry into the United States by water or by land at any place other than one designated by the Immigration Service. The combination of this language in the same provision suggests that under this statute "entry without inspection" involved entry by surreptitious means and apparently was not calculated to include entry through false representations. Entry without inspection could be reasonably interpreted under this provision as entry through total evasion of the immigration process. This thinking is perpetuated in section 241(a) of the Act, which lists two separate categories of aliens who are deemed deportable. The category found in subsection (1) has to do with the deportation of aliens

33. Immigration and Nationality Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970).
34. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970).
35. 439 F.2d 244 (9th Cir. 1971).
36. Obviously the person claiming United States citizenship is not required to have a visa and does not have to meet the standards applied to immigrant aliens.
37. 8 F.2d 1023 (6th Cir. 1925).
38. Act of February 5, 1917, ch. 29, § 19, 39 Stat. 889 provided:

> [A]ny alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

who are excludable by law at the time of entry,[39] and the other found in subsection (2) affects aliens who enter the United States without inspection or at any time or place other than as designated by the Attorney General.[40] The use of that language in subsection (2) suggests that surreptitious entry is the object of coverage and, thus, leaves subsection (1) to deal with the deportation of aliens who are excludable at entry, including those who may have secured entry through fraudulent means.[41] There is, indeed, no compelling evidence that Congress intended to make a distinction between misrepresentations concerning citizenship and other miscellaneous misrepresentations. Surely, if an alien presents himself for entry into the United States and is allowed to pass without any meaningful interrogation, it may not be said he has entered the United States without inspection. Such a determination would interpret the language "without inspection" as including any successful entry of the alien based on fraudulent representations. The same comment may be made about a false claim of citizenship which discourages further interrogation. Such a successful ploy should not be equated with no inspection. The very legislative history of section 241(f) and its predecessor indicates that the section was enacted to give relief to those persons who had misrepresented their citizenship in order to seek refuge in the United States.[42] The same legislative history refers to Mexican nationals as being the group most likely to benefit from this statutory relief.[43] This was so because many Mexican nationals had entered the United States when border patrol operations were not at their best; therefore, it was easy for them to evade the immigration process. This

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39. Immigration and Nationality Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970).

40. Immigration and Nationality Act § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1970).

41. An alien who obtains a visa or entry into the United States through fraud or willful misrepresentation of a material fact is excludable. Immigration and Nationality Act § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1970). If he is already in the United States, he is subject to deportation for being in that excludable class at entry. Immigration and Nationality Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1970). It is to the alien's advantage to fit himself within the above sections because he will then be eligible for relief under section 241(f) of the Act if he meets the other requirements thereof. Immigration and Nationality Act § 241(f), 8 U.S.C. § 1251(f) (1970).

42. *See* H.R. No. 1199, 84th Cong., 1st Sess. 11 (1957); S. REP. No. 1057, 85th Cong., 1st Sess. 11 (1957); H.R. No. 1086, 87th Cong., 1st Sess. 37 (1961).

43. H.R. REP. No. 1199, 85th Cong., 1st Sess. 11 (1957). The ameliorative effect of the legislation was explained in part by the following language:

> The provisions of this include, in addition to displaced persons and other immigrants who entered the United States immediately following World War II, the spouses, parents, and children of United States citizens or lawfully resident aliens who seek admission to the United States and who may have misrepresented their place of birth, nationality, immigrant status, and the like, if their exclusion would work extreme hardship to their families. 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.

Id.

historical reference adds some credibility to the theory that entry without inspection refers to a furtive entry.

In *Monarrez-Monarrez* v. *Immigration & Naturalization Service*,[44] an alien entered the United States concealed in the trunk of an automobile. Another alien in the same case entered the United States surreptitiously without presenting himself for inspection at any port of entry. In that case, section 241(f) was properly denied to both aliens on the grounds that there was no fraud or misrepresentation as required by the statute.[45] It is submitted that this case was correctly decided because there was, in fact, no representation, fraudulent or otherwise, and the aliens found themselves somehow within the United States without giving the Government the opportunity to interrogate them or to inspect them at all.

In *Immigration & Naturalization Service* v. *Errico*,[46] the Court dealt with the case of two aliens who had made fraudulent representations to secure visas. One of them, Errico, falsely represented that he was a qualified mechanic and thereby evaded the quota restrictions applicable to aliens entering the United States from Italy. The other alien entered into a fraudulent marriage solely to obtain non-quota status from Jamaica. Both of these aliens were granted relief from deportation because the Court felt that section 241(f) should apply to any charge resulting directly from fraudulent misrepresentations regardless of the section under which the charge was brought, as long as the aliens were otherwise admissible at the time of entry.[47] This case was decided by the Court over a strong dissent but it is significant that the majority of the Court took time to point out that as long as the Government's charge referred to a visa or entry obtained by fraud, then the aliens could seek the protection of section 241(f). It was held that the Government could not depend on a charge of quota evasion to avoid giving the aliens relief from deportation as long as their entry to the United States was achieved through some fraudulent scheme. The dissenting minority stated that section 241(f) did not apply to the *Errico* case because that section granted aliens relief only if they were charged with some fraudulent act.[48] They also emphasized that these aliens were not otherwise admissible within the definition of that term in section 241(f).

Having made its point in *Errico*, the Court was confronted with a situation in *Reid* v. *Immigration & Naturalization Service*[49] in which an alien falsely

44. 472 F.2d 119 (9th Cir. 1972). *See also* Cervantes v. Immigration & Naturalization Serv., 510 F.2d 89 (10th Cir. 1975); Gambino v. Immigration & Naturalization Serv., 419 F.2d 1355 (2d Cir.), *cert. denied*, 399 U.S. 905 (1970).

45. The statute covers only those aliens whose fraud secured their entry into the United States. The absence of that fraud element makes the statute inapplicable. Immigration and Nationality Act § 241(f), 8 U.S.C. § 1251(f) (1970).

46. 385 U.S. 214 (1966).

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

48. *Id.* at 227 (Stewart, J., dissenting).

49. 420 U.S. 619 (1975).

represented that he was a citizen of the United States and he sought protection under section 241(f) when he found himself subject to deportation. The Court decided, after a review of the authorities, that a fraudulent entry into the United States based on a claim of citizenship was the equivalent of entry without inspection and, therefore, that the alien could not claim the protection of section 241(f). It is significant that this decision was reached in the face of language in *Errico* that section 241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge is brought, provided that the alien is otherwise admissible at the time of entry. The Court in *Reid* distinguished *Errico* on the ground that the fraud perpetrated by the aliens in *Errico* related to their failure to comply with the quota requirements of section 211(a) and that the Government could not use that section to deprive the alien of his rights under section 241(f). The Court also made the point that the latter section was not intended to create a vehicle for the wholesale evasion of the immigration process by aliens who gained admission to the United States through fraud. However, this broad statement does not grant due deference to the policy behind the enactment of section 241(f). Section 241(f) was intended to grant relief to those aliens whose fraud in securing entry into the United States was more than offset by the close family ties established by them within the United States. It is suggested that an alien who fraudulently asserts United States citizenship ought not to be deprived of the protection of section 241 even if he violates the documentary requirements of another section.

It is submitted that where dual interpretation is possible, the doubt should be resolved in favor of the alien.[50] This approach restricts the right of the Government in selecting which section it will use for deportation of the alien and recognizes the intent of Congress in granting the alien access to statutory relief where fraud is involved.[51] A determination that an alien's false claim of citizenship ought not to be rewarded ignores the fact that such a claim is itself a fraudulent representation under section 212(a)(19),[52] which does not attempt to make any distinction between the different types of fraud that might result in an alien's entry into the United States. Moreover, the language "the willful representation of a material fact" should certainly include the question of citizenship and a separate provision concerning false claims of citizenship

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

51. *See* Significant Development, *Immigration Law—Applicability of Statutory Waiver of Deportation to Cases of Fraudulent Entry Under a False Claim of United States Citizenship*, 54 BOSTON U.L. REV. 851, 859 & n.54 (1974).

52. Section 212(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(19) (1970), provides as follows:

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

should have been included within section 241 if Congress did not intend such claims to be covered by the general language in section 212(a)(19). It is suggested that the majority in *Reid* could have explored in further detail the question of entry without inspection. That exploration may have led it to a different conclusion with respect to the rights granted under section 241(f).

Reid has established though that the alien who falsely asserts citizenship cannot have any relief under that section.[53] It is suggested that the dissent in that case sought to explore the basic issue previously discussed in *Errico*. That issue concerned the Government's option of bringing deportation charges under one section while the alien may have, in fact, run afoul of sections 241(a) and 212(a)(19), which violation would entitle him to protection under section 241(f) as one who has secured admission to the United States by fraud or misrepresentation.

It is no answer to say that the recognition of an alien's claim under section 241(f) based on a false claim of citizenship would create havoc for the Immigration Service.[54] The congressional intent reflected through this section is that certain aliens who have succeeded in gaining entry into the United States should nevertheless not be subject to deportation in view of their subsequent establishment of a certain familial relationship.[55] It has been said that an alien who makes a false assertion of citizenship has thereby completely evaded the immigration process.[56] Such an alien has, in fact, secured entry by

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53. In *Castro-Guerrero v. Immigration & Naturalization Service*, 515 F.2d 615 (5th Cir. 1975), an alien's deportation was sustained because he did not have valid entry documents at the time of entry. In adopting *Reid v. Immigration & Naturalization Service*, 420 U.S. 619 (1975), as authority, the court explained that case as follows:

> Section 241(f) waives the fraud on the part of the alien in only two situations—(i) where deportation is sought under § 241(a)(1) for excludability under § 211(a)(1)-(2), the grounds urged by the Immigration & Naturalization Service in *Errico*, (ii) where deportation is sought under § 241(a)(1) for excludability under § 212(a)(19) . . . . Thus, without overruling *Errico*, the Court [in *Reid*] has effected a change in emphasis. The only factor that need now be considered in determining the applicability of the forgiveness provision is the section of the Act under which deportation is sought and found to exist.

Castro-Guerrero v. Immigration & Naturalization Serv., 515 F.2d 615, 618 (5th Cir. 1975). This is a rather broad view of *Reid* bearing in mind that the Court was dealing there with a false claim of citizenship, which translated into an entry without inspection under 241(a)(2).

54. At the time that the alien seeks relief under section 241(f), the Government must determine whether he was otherwise admissible at the time of entry. This qualitative determination can be made just as well subsequent to such entry. For example, it might be easier to make a judgment on whether the alien was likely to become a public charge at entry if he did in fact become a public charge subsequently. Moreover, deportation is very often predicated on the status of the alien at the time he entered the United States. This is in accord with section 241(a) of the Act which permits deportation of any alien who was excludable at the time of entry pursuant to section 212(a). Obviously, the Service is not having great difficulties with these originally excludable aliens since in fiscal 1974 13,925 aliens out of a total of 18,824 deported aliens had entered without inspection or without proper documents. *See* ANNUAL REPORT, *supra* note 1, at 15; C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.7(a) (rev. ed. 1975); Wendell & Kolodny, *Waiver of Deportation: An Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CALIF. WEST. INT'L L.J. 271, 299 & n.153 (1974).

55. *See* H.R. REP. No. 1199, 85th Cong., 1st Sess. 11 (1957).

56. Reid v. Immigration & Naturalization Serv., 420 U.S. 619, 624 (1975); Goon Mee

misrepresenting a material fact and it would indeed be difficult to find a more material misrepresentation in the immigration context than a false assertion of citizenship.

Reid accepts the decisions of cases like *Ex parte Saadi* and *United States ex rel. Volpe v. Smith* without making a convincing distinction between the misrepresentations governed respectively by sections 241(a)(1) and 241(a)(2). It would indeed be significant if Congress went to the extreme of treating an alien falsely asserting citizenship as excludable and therefore deportable within section 241(a)(1) and, also, as deportable under section 241(a)(2) as one entering the United States without inspection. It is conceded that aliens are treated differently from United States citizens for purposes of the admission process. But this is not sufficient evidence for making a distinction between an alien who successfully avoids detection by asserting citizenship and an alien who achieves success by some other fraudulent means. If the distinction were so important in this legislative scheme, Congress would have made a point of it. In *Reid*, the petitioners sought to enter the United States through fraud by claiming United States citizenship. The Government did not rely on the fraud of the petitioners as the basis on which to suggest deportation, but relied instead on their entry as citizens, an entry which avoided the rigid scrutiny normally reserved for aliens. It is suggested that it is precisely this choice which the statute was designed to avoid, and where there is fraud affecting the very basis of the alien's entry, then the alien ought to be protected under section 241(f).[57] For example, in *Errico*, it was pointed out rather clearly that section 241(f) relief cannot be avoided by the Government solely by the preferment of a charge under a different section.[58] In other words, section 241(f) would be available to the alien as long as the charge results directly from the misrepresentation through which the alien secured entry into the United States, provided he is otherwise admissible.[59] Yet, in spite of *Errico*, *Reid* held that the alien's entry into the United States was the equivalent of an entry without inspection for purposes of section 241(a)(2). The distinction was predicated on the fact that the plaintiff in *Reid* had so frustrated the immigration process that he completely avoided any inquiry about his alien status.[60] But this is only a concession that the alien's material misrepresentation of his status succeeded and if that misrepresentation resulted

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Heung v. Immigration & Naturalization Serv., 380 F.2d 236 (1st Cir. 1967), *cert. denied*, 389 U.S. 975 (1968); Ben Huie v. Immigration & Naturalization Serv., 349 F.2d 1014, 1017 (9th Cir. 1965).

57. The dissenters in *Reid* recognized that the aliens in that case were excludable because they sought to enter the United States by fraud and cited *Errico* to support their position that section 241(f) waives any deportation charge resulting directly from the misrepresentation of the aliens in securing entry. Thus they would have applied that section regardless of whether the charge was brought under another section, as long as the aliens were otherwise admissible at the time of entry. Reid v. Immigration & Naturalization Serv., 420 U.S. 619, 633 (1975) (dissenting opinion).

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

59. *Id.*

60. Reid v. Immigration & Naturalization Serv., 420 U.S. 619, 624 (1975).

in a lack of inquiry by the immigration authorities into other areas, that should not be equated with entry without inspection.[61] The legislative history of the predecessor statute supports this approach because initially forgiveness of misrepresentation was predicated in part on the false assertion of nationality to avoid persecution in communist-dominated territories.[62] The avoidance by the alien of a thorough investigation ought not to be sufficient by itself to put him outside the coverage of the remedial section. It is true that citizens are subject to routine examinations whereas aliens are normally subjected to a searching inquiry in order to determine their admissibility to the United States.[63] But the assertion of citizenship forestalls a rigid examination only in the same sense that an alien's proclamation of affluence may disarm the government interrogator inquiring about the capacity of the alien to support himself.[64]

In *Reid*, the court quoted from *Goon Mee Heung v. Immigration & Naturalization Service*[65] to delineate the effect of the alien's false representations concerning citizenship. In *Goon Mee Heung*, the petitioner sought adjustment of status under section 245 of the Immigration and Nationality Act which granted adjustment to aliens who were inspected for entry.[66] The Government argued that since the alien claimed citizenship, he could not have been inspected under any definition of that term. The court's conclusion in that case was that the alien was not entitled to benefit from section 245 unless he was lawfully within the United States. However, the court's comparison of this alien with one who crossed the border surreptitiously did no justice to the

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61. The mere assertion by a person of a claim to citizenship does not forestall a further inquiry into his status. For example, Immigration and Nationality Act § 235(a), 8 U.S.C. § 1225(a) (1970) provides in part:

> The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence.

62. H.R. REP. No. 1199, 85th Cong., 1st Sess. 11 (1957).

63. The inspection of aliens involves inquiry into questions of birth, medical history, criminal records, literacy and employment skills. This examination of aliens is made both at the time of the visa application and the time of entry into the United States. The inspection of citizens is quite perfunctory but the burden is on the person to establish his citizenship. *See* Immigration and Nationality Act §§ 221(b), (d), 8 U.S.C. §§ 1201(b), (d) (1970); C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 3.16(b) (rev. ed. 1975).

64. Every alien seeking entry into the United States has to show evidence that he will not become a public charge. Immigration and Nationality Act § 212(a)(15), 8 U.S.C. § 1182(a)(15) (1970).

65. 380 F.2d 236 (1st Cir. 1967), *cert. denied*, 389 U.S. 975 (1968).

66. Immigration and Nationality Act § 245(a), 8 U.S.C. § 1255(a) (1970) provides as follows:

> The status of an alien, other than an alien crewman, who is inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

language of the statute. The dissenting judge took a very limited interpretation of the statute in accordance with *Fong Haw Tan* v. *Phelan*.[67] In fact, he reiterated a worthy example of a person who might evade further cross-examination because of his skill in giving misleading answers.[68] The question would arise then as to whether that person had, in fact, been subject to cross-examination. The answer should logically be in the affirmative and so the dissent took the position that successful avoidance of a thorough inspection because of a falsehood concerning citizenship was not the equivalent of non-inspection. Furthermore, if the alien did in fact present himself for inspection and was somehow admitted through a bona fide error of the Government, it could not then be claimed that he would not be entitled to adjustment of status because of this error in judgment on the part of the authorities. It is suggested that in that event the alien ought to be entitled to the protection of section 245 because he would have subjected himself to inspection regardless of the fact that the inspection might not have been thorough enough to reveal the error. This is not like the case where an alien is asleep at the time of entry because in that case the alien has made no misrepresentations at all and, therefore, it can be truly said that he has entered without inspection.[69] The same conclusion should be reached with respect to an alien who enters as a stowaway.[70] In such cases, the object of the exercise is to avoid all detection and to evade the normal confrontation of the inspectors.

The suggestion that a claim of citizenship precludes inspection of the alien is at least questionable.[71] While it is conceded that citizens are not subjected to the same searching scrutiny as aliens, anyone claiming citizenship has the

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67. 333 U.S. 6 (1948). In *Fong Haw Tan v. Phelan*, the Court was dealing with section 19(a) of the Immigration Act of 1917 which provided for the deportation of an alien who was sentenced more than once to imprisonment for a term of one year or more for a crime involving moral turpitude committed after entry. It was there held that the statute did not apply to an alien who was convicted and sentenced to life on two different counts in the same trial based on a single indictment. In holding for a narrow reading of the statute, the Court made the following comment about deportation:

> It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

68. Goon Mee Heung v. Immigration & Naturalization Serv., 380 F.2d 236, 239 (1st Cir. 1967) (Coffin, J., dissenting). The dissent made the point that a person has indeed been inspected even though his false responses may forestall further inquiry. The dissent relied on the approach taken in *Ex parte Gouthro*, 296 F. 506, 511-12, (E.D. Mich. 1924), *aff'd sub nom.* United States v. Southro, 8 F.2d 1023 (6th Cir. 1925).

69. Matter of Gabouriel, 13 I. & N. Dec. 742 (1971). In *Matter of Lim*, 13 I. & N. Dec. 249 (1969), the Board of Immigration Appeals held that an innocent misrepresentation of citizenship still brought the alien within the purview of section 241(f). In *Gabouriel*, there was no opportunity for the alien to make any representation.

70. Gambino v. Immigration & Naturalization Serv., 419 F.2d 1355 (2d Cir.), *cert. denied*, 399 U.S. 905 (1970).

71. *See* Immigration and Nationality Act §§ 235(a), 291, 8 U.S.C. §§ 1225(a), 1361 (1970); United States v. Sing Tuck, 194 U.S. 161 (1904); Lapidis v. Watkins, 165 F.2d 1017 (2d Cir. 1948).

burden of convincing the immigration officer of that fact and the officer himself has the right to interrogate anyone whom he suspects to be an alien.[72] It is not altogether accurate, therefore, to say that an entry based on a claim of citizenship is the equivalent of an entry without inspection. Meaningful inspection is avoided only if the inspector falls prey to the fraudulent tactics of the alien. If he does, then one can claim that the alien has secured entry by fraudulent means and, therefore, that he comes within coverage of section 241(a)(1). Moreover section 241(f) applies to aliens who have "procured visas or other documentation, or entry into the United States by fraud or misrepresentation," and "entry" is defined as any coming of an alien into the United States.[73] This language suggests that the protection of section 241(f) ought to be available not only to aliens possessing visas but also to those who manage to avoid the visa process entirely through a false declaration of citizenship. Those persons who apply for visas in effect admit their alienage since visas are not required of United States citizens for entry into their own country. Therefore, the reference to fraudulent entry may reasonably be construed to include the case where the alien contemplates admission based on a strategy not involving the issuance of a visa.[74] The total evasion of the screening process can be accomplished only if the alien succeeds with his fraudulent scheme and his success may be averted by the diligence exercised by the authorities at the time of visa issuance or at the port of entry.[75]

The House Committee Report[76] of the 1957 Act mentioned that the primary beneficiaries of the statute would be Mexican nationals who were able to avoid border patrols and establish a family in the United States, albeit illegally. The Supreme Court in *Errico* commented on the language of this Report by suggesting 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."[77] This comment by the Court suggests that it was thinking also of surreptitious entries. This is suggested because of the reference by the Court to a common land border. But, even beyond this, the common land border also provides greater opportunity for the assertion of false claims of citizenship because of the continuous flow of American travellers. Therefore, the House Committee Report taken together with the Court's comment in *Errico* contribute to the interpretation that fraudulent claims of citizenship were within the contemplation of the statute at the time of its enactment.[78] Congress could not have been aware that fraudulent

72. *See* note 46 *supra.*
73. Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970).
74. This argument was used by the Fifth Circuit in *Gonzalez de Moreno v. Immigration & Naturalization Service*, 492 F.2d 532, 536 (5th Cir. 1974). The Second Circuit rejected this approach in *Reid* and its opinion was confirmed by the Supreme Court. Reid v. Immigration & Naturalization Serv., 492 F.2d 251 (2d Cir. 1974), *aff'd*, 420 U.S. 619 (1975).
75. *See* note 61 *supra.*
76. H.R. REP. No. 1199, 85th Cong., 1st Sess. 11 (1957).
77. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 224 (1966).
78. Such fraudulent claims were in fact specifically covered. The provision dealing

schemes would include claims of citizenship and in view of the language referred to in the Report, it is suggested that Congress would have made a special exception with respect to those fraudulent claims if it did not intend for them to come within the purview of section 241(f). It is unfortunate that a certain type of fraud has been selected for special treatment without a clear statement of that congressional intent. If, indeed, the success of special types of fraud creates a hardship for the administration of the immigration laws, the remedy lies in statutory revision.[79] In any event, the Immigration Service is not particularly helpless in the face of a claim of citizenship. Avenues of inquiry are not automatically closed because of an assertion of citizenship. It is true that quite often such an assertion results in deferential treatment to the extent that further inquiry is averted. However, it is clear that Congress has made a decision that the preservation of the family relationship is more important in certain cases when counterbalanced with the existence of fraud.

III. The "Otherwise Admissible" Criterion

In *Errico*, the Supreme Court was faced with the question of whether aliens who had committed fraud to secure entry into the United States were "otherwise admissible" within the context of the statute.[80] The Court found that the statute previously granted relief to aliens who had close family relationships and were otherwise admissible, and also to aliens who had entered during the postwar period, were otherwise admissible and did not commit fraud for the purpose of evading quota restrictions. The Supreme Court found that since the statute made specific reference to the avoidance of quota restrictions and also used the language "otherwise admissible," it was clear that the evasion of quota restrictions was a separate category not included within the "otherwise admissible" concept. Moreover, the Court believed that since the statute was designed to ensure reunification of families, the statute should be read as liberally as possible in order to accomplish that objective. Although the provision dealing with aliens who had entered during the postwar period was no longer part of the statute because the purpose of that provision had been

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with aliens who had misrepresented their nationality and who had entered between 1945 and 1954 was dispensed with in the current section 241(f) because the purpose of its enactment had been accomplished. The Court in *Errico* discusses this aspect at length. *Id.* at 223.

79. In *Reid*, Judge Mulligan (dissenting) made the following statement: "The alien can secure admission fraudulently either with a visa procured by misrepresentation or by falsely posing as an American citizen. The latter alternative could not realistically have been overlooked by the Congress and the language of the statute covers both situations." Reid v. Immigration & Naturalization Serv., 492 F.2d 251, 261 (2d Cir. 1974) (dissenting opinion). He felt that section 241(f) was clear and supported the position of the petitioners. His position was shared by Mr. Justice Brennan and Mr. Justice Marshall in the Supreme Court. Reid v. Immigration & Naturalization Serv., 420 U.S. 619, 632 (1975) (dissenting opinion). It has been held in other cases that an innocent misrepresentation of citizenship did not result in an elusion of inspection. Zimmerman v. Lehmann, 339 F.2d 943 (7th Cir. 1965); Matter of Edwards, 10 I. & N. Dec. 717 (1964).

80. Immigration and Nationality Act § 241(f), 8 U.S.C. § 1251(f) (1970).

accomplished, the Court said that section 241(f) was in fact not intended to vary the intent of the statute and, therefore, it could not be suggested that aliens who had lied to avoid border restrictions should be denied the protection of the statute. The *Errico* decision provides guidance about the "otherwise admissible" language only with respect to quota restrictions. The question is whether the alien may still be considered "otherwise admissible" within the provisions of the statute in spite of his other shortcomings.

It has been held that immigration restrictions fall into two categories: (i) numerical or quantitative restrictions and (ii) qualitative restrictions.[81] The question then is whether the "otherwise admissible" criterion relates to qualitative or quantitative restrictions. Qualitative restrictions[82] concern themselves with the exclusion of those aliens who are morally, mentally, or physically undesirable while quantitative restrictions[83] simply regulate the number of aliens admitted to the United States. In terms of protecting the immigration scheme and at the same time giving weight to section 241(f), it may be argued that section 241(f) relief should be available to an alien who is otherwise morally, physically and mentally qualified. This interpretation, of necessity, relegates the "otherwise admissible" language to a qualitative meaning.

In *Espinosa v. Immigration & Naturalization Service*,[84] an alien obtained an immigrant visa by falsely stating that he had never remained outside the United States to avoid the draft in time of war or national emergency. The Government sought to deport him on that ground and he sought section 241(f) relief. The court restricted the *Errico* decision to the facts of that case involving quota restrictions. The court noted that the application of *Errico* to the facts of this case might result in granting relief to any alien on any substantive ground as long as the requisite family relationship has been established. In the court's view, that was indeed too broad an application of the section. This court was in a sense applying the qualitative-quantitative categorization to reach its conclusion. The same aspects were discussed in *Godoy v. Rosenberg*.[85] There an alien entered into a fraudulent marriage solely for the purpose of circumventing the labor certification requirements. The alien sought relief under section 241(f) but the Government contended that he was not otherwise admissible and, therefore, that he did not come within the coverage of that section. The court adverted to the distinction made in *Matter*

81. *See, e.g.*, Bufalino v. Immigration & Naturalization Serv., 473 F.2d 728 (3rd Cir.), *cert. denied*, 412 U.S. 928 (1973); Lee Fook Chuey v. Immigration & Naturalization Serv., 439 F.2d 244 (9th Cir. 1970); Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969); Vargas v. Immigration & Naturalization Serv., 409 F.2d 335 (5th Cir. 1968), *cert. denied*, 396 U.S. 895 (1969); Matter of Eng, 12 I. & N. Dec. 855 (1968).

82. See Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1970) for the general qualitative restrictions imposed on aliens.

83. See Immigration and Nationality Act §§ 201-04, 211, 8 U.S.C. §§ 1151-54, 1181 (1970) for examples of quantitative restrictions.

84. 404 F.2d 544 (9th Cir. 1968).

85. 415 F.2d 1266 (9th Cir. 1969).

of Eng[86] between qualitative and quantitative restrictions. The court stressed that the alien had misrepresented his status solely for the purpose of evading the special immigrant restrictions of the law because he required a labor certification to enter the United States and he did not possess it at the time of entry. However, since the alien claimed that he had subsequently become the parent of an American citizen, the court held that he was entitled to section 241(f) relief if that fact could be proved. The alien would be otherwise admissible because if he had been a parent at the time of entry he would not have required a labor certification. The case was therefore remanded for a determination on the question of parentage. In *Vargas v. Immigration & Naturalization Service*,[87] the alien sought refuge under section 241(f) when the Government sought to deport her on the ground that she was excludable at the time of entry, as one who reentered the United States after deportation without permission of the Attorney General. The alien sought protection under section 241(f) based on the family relationship which she established within the United States. The court concluded, however, that she did not come within the definition of "otherwise admissible" and again distinguished *Errico* on the ground that it applied only to quantitative restrictions on admission. The alien was within the qualitative category and, therefore, did not fulfill the "otherwise admissible" criterion.

In *Lee Fook Chuey v. Immigration & Naturalization Service*,[88] the issue was whether an alien who obtained entry into the United States by a false claim of citizenship could satisfy the "otherwise admissible" criterion. This court harked back to the qualitative and quantitative restrictions previously mentioned. The Government recognized the choice that had to be made between penalizing fraud and at the same time accommodating the interest of Congress in maintaining family unity. This court made the point that there was no need for discriminating between different types of fraud found in this case and in *Errico*. In this case, the alien entered without a visa but the court found no reason to deny him the relief of section 241(f), suggesting that there was no difference between the alien who entered under a false claim of citizenship and the alien who entered with a visa procured by fraud and misrepresentation.[89] Other cases dealing with section 241(f) relief and holding aliens not otherwise admissible have involved aliens convicted of crimes involving moral turpitude,[90] aliens who were members of the Communist Party[91] and aliens who have left the United States to avoid military service.[92]

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86. 12 I. & N. Dec. 855 (1968).
87. 409 F.2d 335 (5th Cir. 1968).
88. 439 F.2d 244 (9th Cir. 1970).
89. *See also* Gonzalez v. Immigration & Naturalization Serv., 493 F.2d 461 (5th Cir. 1974); Gonzalez de Moreno v. Immigration & Naturalization Serv., 492 F.2d 532 (5th Cir. 1974).
90. *See, e.g.*, Hames-Herrera v. Rosenberg, 463 F.2d 451 (9th Cir. 1972).
91. *See, e.g.*, Langhammer v. Hamilton, 295 F.2d 642 (1st Cir. 1961).
92. *See, e.g.*, Jolley v. Immigration & Naturalization Serv., 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971).

It is suggested that the interpretation of the language "otherwise admissible" is reasonable in these cases. The basic approach in such cases ought to be whether the alien has met other substantive requirements despite his fraud. In other words, has he met the qualitative restrictions of the immigration provisions? This approach in effect recognizes the distinctions that have been created in the immigration law between those restrictions which were intended to limit the number of aliens[93] and those restrictions which were intended to weed out undesirable aliens.[94] In dealing with the question of fraud, Congress obviously made the determination that fraud itself ought not to preclude the entry of those aliens who have subsequently established a strong familial relationship within the United States. To grant the "otherwise admissible" language an unusually broad meaning would be to ignore the congressional intent.

There is a definite link between the terms "otherwise admissible" and "entry without inspection." If an alien has gained entry through a false claim of citizenship then he ought to qualify for the relief provisions of 241(f) if, despite the fraud, he is otherwise admissible because of his satisfaction of the qualitative requirements of the immigration statutes.[95] After all, section 241(f) was intended to give relief to those people who may have perpetrated a fraud in securing entry into the United States but, at the same time, are fit for admission to the United States despite the perpetration of that fraud.[96] If relief is to be granted, therefore, on the basis of section 241(f), the alien ought to be subjected only to the other qualitative tests of admission which explore his moral, mental and physical fitness. In other words, as long as the fraud is germane to the charge,[97] then relief ought not to be denied to the alien on the ground that he is not otherwise admissible. This approach is necessary to prevent the substitution of charges for which section 241(f) grants no relief.

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93. Immigration and Nationality Act §§ 201-04, 8 U.S.C. §§ 1151-54 (1970).

94. Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1970).

95. In *Gonzalez de Moreno v. Immigration & Naturalization Service*, 492 F.2d 532 (5th Cir. 1974), the court extended the protection of section 241(f) to innocent misrepresentations of citizenship. It remanded the case for a determination of the alien's admissibility on qualitative grounds in fulfillment of the "otherwise admissible" requirements. *See also In re* Lim, 13 I. & N. Dec. 169 (1969).

96. This is the reason for the "otherwise admissible" requirement of section 241(f). In spite of the fraud, the close family ties of the alien grant statutory forgiveness to prevent his deportation if there is no other qualitative impediment. One author has suggested that *Errico* took the wrong approach in treating as otherwise admissible aliens who had not complied with quota restrictions because our immigration policies would be thereby frustrated. 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). That view somewhat underestimated the intent of Congress in granting forgiveness of fraud covered by section 212(a)(19).

97. In *Muslemi v. Immigration & Naturalization Service*, 408 F.2d 1196 (9th Cir. 1969), deportation charges were brought against the petitioner on the ground that he was excludable at the time of entry as an immigrant with the appropriate immigrant visa. The petitioner had entered on a visitor's visa when in fact he intended to stay permanently. The court held that the fraud was germane to the deportation charge and that the petitioner would be saved from deportation if he was otherwise admissible as an immigrant. The case was therefore remanded on the issue of whether the petitioner was otherwise admissible.

It would be less than appealing to suggest that an alien who has secured entry on a claim of citizenship is not otherwise admissible because he has transgressed the inspection mandate inherent in section 241(a)(2) which, under *Reid*, is an independent ground for deportation. Under the facts of *Reid*, entry without inspection ought not to be an independent ground of inadmissibility because that inadmissibility could be claimed solely because of the perpetration of a fraud and fraud is the key to a claim for relief; thus, it is an empty gesture to concede that section 241(f) relief would be available to the alien except for his inadmissibility based on an entry without inspection. The application of section 241(a)(2) under these circumstances denies the alien the protection accorded to him under section 241(f). If Congress had wanted to deprive him of that protection, it ought to have prescribed an exception in section 241(f) to the effect that the alien would be deemed deportable in spite of fraudulent representations of citizenship. Under those facts, he would not be otherwise admissible under the statute. But Congress has not done that. So glaring an omission could not be attributed to Congress in the face of the legislative history of the statute.

IV. Section 241(f) Relief and Nonimmigrants

Some attention has been paid to the availability of section 241(f) relief to those aliens who enter the United States as nonimmigrants.[98] The language or the section does not indicate specifically that it applies only to immigrants. An interesting question then is whether a nonimmigrant alien may benefit from the provision of section 241(f).

In *Muslemi v. Immigration & Naturalization Service*,[99] an alien entered the United States on a nonimmigrant visa after he had been denied an immigrant visa because his country's quota was oversubscribed. His nonimmigrant visa expired and the Immigration Service brought deportation proceedings against him. The alien then married a United States citizen and thereafter resisted the Service's effort to deport him. He argued that at the time he applied for a nonimmigrant visa, he misrepresented his intention to the consul because he wanted to stay permanently in this country. He claimed the protection of section 241(f) on the ground that he had become the spouse of a United States citizen. The Ninth Circuit court of appeals agreed with the alien's contention and held that since the deportation order was based on the alien's concealment of a material fact, he was, therefore, entitled to protection under section 241(f) if he was otherwise admissible at the time of entry.

Careful reading of the statute does not indicate that it is restricted to immigrants only. Moreover, in *Muslemi* the charge against the alien was based

98. The language of section 241(f) of the Act makes no distinction between immigrant and nonimmigrant aliens. The question is whether an alien entering as a nonimmigrant through fraud can subsequently seek relief under the section.

99. 408 F.2d 1196 (9th Cir. 1969).

on the alien's misrepresentation which rendered him excludable at the time of entry. In *Errico*, the Court reaffirmed previous administrative holdings that section 241(f) waives any deportation charge that arises directly from fraud or misrepresentation regardless of the section under which the charge is brought, as long as the alien is otherwise admissible at time of entry.[100] In *Muslemi*, the actual charge was directly related to the alien's visa application and thus the court's decision was consistent with *Errico* in that respect.

Most of the cases that have considered the use of section 241(f) by aliens who entered as nonimmigrants have reached the conclusion that the section was not applicable.[101] This is so because the charge involved in most cases was the alien's overstaying his allotted time and it was not related to his entry or his procurement of documents. The aliens in these cases adopted the traditional argument that at the time they applied for a nonimmigrant visa they really intended to remain permanently within the United States and, therefore, their fraudulent conduct brought them within the coverage of section 241(f). Moreover, they argued, the Immigration Service should not be allowed to select a charge which would avoid the application of the section. Of course, this difficulty only arises in those cases where the alien has actually stayed beyond the time granted to him as a visitor. This is a distinct and separate violation[102] and a reasonable interpretation of section 241(f) does not prevent deportation of the alien for a violation of his nonimmigrant status. The Immigration Service would not usually have to be involved with these nonimmigrant aliens unless and until they have violated the terms of their status. But these violations do, in fact, occur when such aliens implement their secret plans to prolong their stay indefinitely. It is arguable that the decisions which deny the application of section 241(f) to nonimmigrants are correct in the sense that if the visitor is in violation of his status, he ought not to be shielded from deportation even if he has secured entry into the United States by fraud.[103] To

100. Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 217 & n.5 (1966), *citing* Matter of S—, 7 I. & N. Dec. 715 (1958); Matter of Y—, 8 I. & N. Dec. 143 (1959).

101. *See* Cortez-Flores v. Immigration & Naturalization Serv., 500 F.2d 178 (5th Cir. 1974); Robles v. Immigration & Naturalization Serv., 485 F.2d 100 (10th Cir. 1973); Milande v. Immigration & Naturalization Serv., 484 F.2d 774 (7th Cir. 1973); Preux v. Immigration & Naturalization Serv., 484 F.2d 396 (10th Cir. 1973); Cabuco-Flores v. Immigration & Naturalization Serv., 477 F.2d 108 (9th Cir. 1973), *cert. denied*, 414 U.S. 841 (1973). *Contra*, Vitales v. Immigration & Naturalization Serv., 443 F.2d 343 (9th Cir.), *cert. granted*, 404 U.S. 983 (1971), *cert. dismissed*, 405 U.S. 983 (1972) (the case was dismissed by the Supreme Court as moot because the alien had left the United States in the interim); Pirzadian v. Immigration & Naturalization Serv., 472 F.2d 1211 (8th Cir. 1973). In *Pirzadian*, the court stated that if fraud had been claimed, section 241(f) relief might have been available. 471 F.2d at 1213. In *Muslemi v. Immigration & Naturalization Service*, 408 F.2d 1196 (9th Cir. 1969), section 241(f) was held as applicable to a nonimmigrant entrant who was actually charged with securing his visa by fraud.

102. Immigration and Nationality Act § 241(a)(9), 8 U.S.C. § 1251(a)(9) (1970).

103. A nonimmigrant who fails to maintain his status is deportable under 8 U.S.C. § 1251(a)(9) (1970). However, he may usually be granted the privilege of departing voluntarily at his own expense. *Id.* § 1254(e). Voluntary departure is an advantage for the alien because if he is deported, he cannot reenter the United States without the Attorney General's permission. *Id.* § 1182(a)(16), (17).

a certain extent, this gives the Service an option of proceeding either because of the fraud or because of the overstay. The difference is, though, that in the situation where the alien overstays his visitor's visa, a charge based on the violation of his status is separate from any charge based on the initial fraud perpetrated in entering the United States. In this sense, the charge is not germane to the original fraudulent act.[104] This charge would be based on an independent ground and, therefore, there should be no inhibition in the application of the sanctions governing visitors who remain without permission.

On another ground, it may be argued that section 241(f) ought not to apply to nonimmigrants because they do not go through the same rigorous investigation as immigrants in their application for visas.[105] It might be akin to their claiming citizenship falsely because under those conditions aliens are not subjected to the same scrutiny either. However, the contrary argument can be made that section 241(f) simply refers to aliens who were excludable at the time of entry[106] because they procured or sought to procure documents or entry by fraud and it is not restricted to immigrant aliens. It may be said that if an alien has secured entry into the United States as a nonimmigrant fraudulently and then he finds himself subject to deportation because of that fraud, then he ought to be able to utilize section 241(f) to forestall deportation if he complies with the other requirements of that section. After all, one of the reasons for the enactment of the section was to prevent separation of families despite a defective entry and it ought not to matter whether the alien has entered the United States as an immigrant or a nonimmigrant.[107]

In *Vitales v. Immigration & Naturalization Service*,[108] a Philippine native came to the United States as a visitor and subsequently gave birth to a child. She overstayed her time as a visitor and was thereafter ordered deported by the Immigration Service. The deportation decision was affirmed by the Board of Immigration Appeals but the Ninth Circuit held that section 241(f) was indeed

104. It is arguable that the alien's overstay has indeed occurred because he planned originally to remain in the United States permanently. Therefore, his objective could only be accomplished by securing entry initially as a nonimmigrant and then staying on in the hope of avoiding detection. To this extent any charge brought against the alien for the violation of his nonimmigrant status is in a sense related to his basic fraudulent intention to reap the benefits of immigrant status through a nonimmigrant visa. The fraud is therefore germane to the deportation charge. *See* Muslemi v. Immigration & Naturalization Serv., 408 F.2d 1196, 1199 (9th Cir. 1968).

105. *See* note 63 *supra*.

106. Immigration and Nationality Act § 212, 8 U.S.C. § 1182 (1970) deals with the general classes of excludable aliens. These exclusions apply to immigrants and nonimmigrants alike. Any restrictive application of section 241(f) then has to come really from the peculiar legislative history of that section.

107. It must be noted that in order to invoke section 241(f), the alien must engage in fraudulent conduct connected with his entry or with his obtaining a visa or similar document related to that entry. Where there is nothing irregular about his admission as a nonimmigrant but he subsequently procures adjustment of status to a permanent resident while in the United States, the alien cannot seek refuge under section 241(f). In that case, the alien was not excludable at the time of entry as a nonimmigrant and in order to use section 241(f), he must come within one of the excludable classes of section 212(a)(19). *See* Pereira-Barbeira v. Immigration & Naturalization Serv., 523 F.2d 503 (2d Cir. 1975).

108. 443 F.2d 343 (9th Cir. 1971).

applicable to the alien on the basis of her misrepresentation in obtaining a nonimmigrant visa, when in fact she intended to stay permanently. The court relied on *Lee Fook Chuey v. Immigration & Naturalization Service*,[109] where it was held that section 241(f) waived "any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought." Subsequently, the same court ruled on a case involving similar facts in *Cabuco-Flores v. Immigration & Naturalization Service*.[110] There, the court sustained the deportation of an alien who had entered the United States on a visitor's visa and had overstayed his time. The court stated that section 241(f) could be invoked only when the fraud was germane to the charge upon which deportation was predicated.[111] A cursory examination of this test would indicate that the overstaying violation gives rise to a charge which, indeed, has some relation to the fraud committed at the time a nonimmigrant visa is sought. In one sense, the fraud and the violation of nonimmigrant status are two different violations under the immigration laws.[112] Realistically, though, if the alien fully intended to remain permanently within the United States at the time he sought his nonimmigrant visa, then to that extent his overstaying is somewhat related to the original fraud. It is clear that the alien will not have an opportunity to reveal his fraudulent intentions until he has been summoned to answer for his failure to depart the country. The court in *Cabuco-Flores* went further and said that section 241(f) applied only to the fraud that the Government must prove to sustain deportation. In effect, this approach was somewhat less liberal than that taken in cases like *Muslemi v. Immigration & Naturalization Service*.[113] The difficulty is that the application of this standard may result in the Government's ability to deprive the alien of the protection of section 241(f) simply by relying on the alien's violation of his nonimmigrant status which does not involve the issue of fraud.[114] This approach grants the Government an unfettered discretion to select the charge which would most effectively deprive the alien of the availability of section 241(f). It is true that because of the problem of proof the alien has an unenviable task in establishing his fraud where the charge lodged concerns other violations of the immigration law at the time of his visa issuance. Yet, the difficulty of proof should not of itself deprive the alien of the rights granted to him under section 241(f) in connection with his intention to remain in the country permanently. It has also been said that the deportation charge must be directly related to the fraud for the section to apply.[115] Where the alien

109. 439 F.2d 244 (9th Cir. 1970).
110. 477 F.2d 108 (9th Cir.), *cert. denied*, 414 U.S. 841 (1973).
111. Cabuco-Flores v. Immigration & Naturalization Serv., 477 F.2d 108, 111 (9th Cir.), *cert. denied*, 414 U.S. 841 (1973).
112. *See* note 103 *supra*.
113. 408 F.2d 1196 (9th Cir. 1969). *See* Note, *Fraud by Nonimmigrant Visitors as a Self-Serving Waiver of Deportation*, 13 COLUM. J. TRANSNAT'L L. 436, 449 (1974).
114. *See* Wenzell & Kolodny, *Waiver of Deportation: An Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CALIF. WEST INT'L L.J. 271, 302 (1974).
115. *See* note 47 *supra*.

harbors an intention to reside permanently at the time he applies for a nonimmigrant visa, he can effectuate that intention only by staying beyond the period allowed him as a visitor. Even if the Immigration Service is aware immediately that the alien has perpetrated a fraud by seeking a nonimmigrant visa, the Service can wait until the alien's authorized stay has expired in order to seek his deportation on a charge of overstaying which, according to the Service, would bear no relationship to the original misrepresentation. Of course, a denial of that right to the Government does create some difficulty in the sense that it would allow the alien to substitute his own charge for that of the charge brought by the Service.[116] His interest in this substitution would be predicated on the assumption that a remedy would be available to him through section 241(f) on the grounds of fraud. The difficulty with the application of the section may be realized in a case like *Muslemi* where the alien might have been charged with overstaying his nonimmigrant visa if the deportation proceedings had been brought somewhat later. As it was, the deportation proceedings were brought before the expiration of the nonimmigrant visa and, therefore, the alien was allowed the benefit of section 241(f). It would be unfortunate then if the section were interpreted as granting a remedy to the alien depending on the time that the charge was brought. The alien's rights ought not to depend on such fortuitous circumstances.

A resolution of the issue attending a nonimmigrant's fraud should depend on whether it can be shown that his prolonged stay is in pursuance of a plan initiated at visa issuance or entry. Where, as in *Muslemi*, he is charged with entering without an immigrant visa, then he ought to be able to utilize section 241(f) to establish his eligibility for relief. *Reid* does not take this position and does not protect the alien whose transgression evokes a charge under the cognate provisions of sections 241(a)(1) and 212(a)(20).[117] But *Errico*

116. Cabuco-Flores v. Immigration & Naturalization Serv., 477 F.2d 108, 111 (9th Cir.), *cert. denied*, 414 U.S. 841 (1973).

117. In *Reid v. Immigration & Naturalization Service*, 420 U.S. 619 (1975), the Court said:

> In view of the language of 241(f) and the cognate provisions of § 212(a)(19), we do not believe *Errico's* holding may properly be read to extend the waiver provisions of § 241(f) to any of the grounds of excludability specified in § 212(a) other than subsection 19.

Id. at 630.

In a recent case, *Jamie Guel-Perales v. Immigration & Naturalization Service*, — F.2d — (1975), it was held that section 241(f) was not applicable to aliens who were deportable under section 241(a)(1) on the grounds of their excludability at entry under section 212(a)(20). In that case the aliens were excludable because of their lack of a valid unexpired immigrant visa. The court relied on the *Reid* holding that the waiver provisions of section 241(f) did not apply to any of the provisions of excludability in section 212(a) other than subsection 19. In *Castro-Guerrero v. Immigration & Naturalization Service*, 515 F.2d 615 (5th Cir. 1975), the court also held section 241(f) to be unavailable to an alien who was ordered deported based on his excludability at entry for lacking a valid immigrant visa. The court regarded *Reid* as authority for the proposition that section 241(f) waives the alien's fraud in two situations only: (i) where deportation is ordered under the dual provisions of section 241(a)(1) and section 211(a); and (ii) where deportation is sought under section 241(a)(1) for excludability under section 212(a)(19). *See also* Ruiz-Salazar v. Immigration & Naturalization Serv., 515 F.2d 619 (5th Cir. 1975).

suggests that a decision on the alien's rights ought not to exalt form over substance and the denial of relief to an alien in these circumstances simply because of the Government's choice of a particular section gives priority to the form of the charge rather than to the substance thereof. The same reasoning should apply where the alien has in fact entered as an immigrant through fraud. Where the issue of fraud is pertinent to the charge, the section 241(f) remedy should not be discarded simply because of the designation of a section other than 212(a)(19).

In *Errico*, the section in question was former section 211(a)(4) dealing with quota requirements.[118] That case suggested that section 241(f) remedies could not be ignored merely because the alien's violation was not categorized under 212(a)(19). An alien who intends to immigrate has indeed misrepresented his status when he applies instead for a nonimmigrant visa. A substitution of section 212(a)(20) for section 212(a)(19) in the preferment of charges against the alien does not alter the basic issue surrounding the fraud. The alien would be excludable at entry because he obtained a nonimmigrant visa through some device calculated to deceive the visa issuer. The allegations that the alien has entered without an immigrant visa presupposes that he was in fact an immigrant in nonimmigrant's clothing. Such an acknowledgement cannot be ignored in view of the *Errico* pronouncements.

A further comment may be made with respect to the relevance of section 241(f) to the plight of a nonimmigrant who seeks to adjust his status by fraudulent means to that of a lawful permanent resident. An alien in this position may seek to extend the section's waiver to a fraudulent act committed in connection with the adjustment process while he is in the United States. It is suggested that the section ought not to apply in this case because he would not be excludable at entry as required by section 212(a)(19). It is not sufficient that the alien sought to procure a document through fraud but that procurement must be in connection with an entry into the United States. Thus a waiver of the fraudulent act is appropriate only if the alien was excludable at entry because of that fraud under section 212(a)(19) and thereafter deportable because of the operation of section 241(a)(1). There is indeed a distinction between an alien's entry and adjustment of an alien's status and it is clear that section 241(f) applies only where the entry is procured through fraud.[119]

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118. At the time of *Errico*, section 211 of the Act read as follows:

> No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such immigrant visa of the accompanying parent, (2) is properly chargeable to the quota specified in the immigrant visa, (3) is a nonquota immigrant if specified as such in the immigrant visa, (4) is of the proper status under the quota specified in the immigrant visa, and (5) is otherwise admissible under this chapter.

Immigration and Nationality Act § 211(a), 8 U.S.C. § 1181(a) (1964). The section was amended in 1965 pursuant to a general revision of the immigration law. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 9, 79 Stat. 917.

119. Pereira-Barbeira v. Immigration & Naturalization Serv., 523 F.2d 503 (2d Cir.

V. Entry of the Alien

The alien's time of entry can be rather important in quite a few instances. For example, if an alien is convicted of a crime involving moral turpitude within five years after entry, he is subject to deportation if he has been sentenced to confinement for a year or more.[120] It becomes critical, therefore, to determine when the alien has made the last entry. The term "entry" is defined in part as any coming of an alien into the United States except for a returning permanent resident who satisfies the Attorney General that his departure to some foreign place was involuntary or that he did not expect it to occur.[121] It may become material, therefore, for an alien to show that his presence outside the United States was unforeseen or that he otherwise comes within a statutory exception.[122]

Several courts have grappled with the definition of "entry" especially in cases where aliens have found themselves outside the United States by chance. For example, in *Delgadillo v. Carmichael*,[123] an alien was rescued from a torpedoed ship and taken to Cuba for recuperation. It was held in that case that there was no entry when he finally returned to the United States. In *Vi Pasquale v. Karmuth*,[124] an alien travelled on a railroad train from Buffalo to Detroit and part of the tracks lay in Canada. It was held that there was no entry by the alien. In *Carmichael v. Delaney*,[125] an alien was on board a ship as he returned from wartime service and the ship stopped at many foreign

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1975); Khadjenouri v. Immigration & Naturalization Serv., 460 F.2d 461 (9th Cir. 1972); Ferrante v. Immigration & Naturalization Serv., 399 F.2d 98 (6th Cir. 1968).

120. Immigration and Nationality Act § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1970) provides:

> Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

121. Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970) reads as follows:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided*, That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception.

122. The exception relates to an alien having a lawful permanent residence in the United States. *Id.*

123. 332 U.S. 388 (1947).

124. 158 F.2d 878 (2d Cir. 1947).

125. 170 F.2d 239 (9th Cir. 1948).

ports pursuant to government orders. It was held there that the alien did not make an entry within the definition of the term.

In 1963, the Supreme Court of the United States decided the case of *Rosenberg v. Fleuti*.[126] In that case, an alien was ordered deported because his return to the United States after a short trip to Mexico constituted an entry within the statute and he was, therefore, excludable because of a psychopathic personality.[127] The Supreme Court held that the alien's return to the States after the brief trip to Mexico did not necessarily result in an entry and sent the case back to the court of appeals for a review of the alien's intent to interrupt his lawful permanent residence in a meaningful way. In reaching its decision, the Court suggested three basic elements which must be considered in determining whether there was an entry. The first element had to do with the length of time the alien was out of the country. The other considerations were the purpose of the trip and the necessity of securing travel documents. The Court discussed those factors as a method of ensuring that an innocent and brief departure of the alien outside the United States would not be regarded as an entry for purposes of the statute.

The difficulty of the Court's decision is understood when the statute is examined. The definition of "entry" applied to the early cases worked great hardship on those aliens who had unwittingly left the country even temporarily.[128] It did not matter then whether the alien intended to break the continuity of his residence or whether he had, in fact, been aware of the consequences of his departure from the United States. Later, the harshness of these early decisions was recognized in a case[129] where an alien had been taken to Cuba to recuperate after his ship had been attacked during the second World War. The Supreme Court pointed out that the alien found himself outside the United States only because of the ravages of war and that his return to the United States did not constitute an entry under those circumstances. It was against this background that section 101(a)(13) was included in the Immigration and Nationality Act of 1952.[130] The basic objective was to ensure that the alien who had been admitted to permanent residence did not place himself in jeopardy by some casual departure from the United States. The dissent's position in *Rosenberg v. Fleuti*[131] is readily understood when one

126. 374 U.S. 449 (1963).

127. An alien is excludable if he is afflicted with psychopathic personality, or sexual deviation, or a mental defect. Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1970). This statutory provision excluding aliens with psychopathic personality has withstood a challenge that it was unconstitutionally vague in its application to sexual deviates. Lavoie v. Immigration & Naturalization Serv., 418 F.2d 732 (9th Cir. 1969), *cert. denied*, 400 U.S. 854 (1970). *See also* Baoutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967).

128. *See, e.g.*, United States *ex rel.* Volpe v. Smith, 62 F.2d 808 (7th Cir.), *aff'd on other grounds*, 289 U.S. 422 (1933); H.R. REP. No. 1365, 82d Cong., 2d Sess. 32 (1952); S. REP. No. 1137, 82d Cong., 2d Sess. 4 (1952).

129. Delgadillo v. Carmichael, 332 U.S. 388 (1947).

130. Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970).

131. 374 U.S. 449, 467-68 (1963) (dissenting opinion).

considers that at the time of the congressional hearings on this statute there was support for the insertion of a provision which would not have treated the return of a resident alien to lawful domicile in the United States as an entry, but Congress did not go along with that language. As a matter of fact, the 1952 statute continued the approach of *United States ex rel. Volpe v. Smith*[132] in the definition of entry except that it recognized that an alien should not be regarded as making an entry if his departure from the United States was unintentional or involuntary.[133] Strictly interpreted, the statute does not make any exception for a departure which may be brief and casual but, at the same time, intentional and voluntary. *Fleuti* made this distinction. It held that even though the departure was, in fact, intentional, the alien should be regarded as not making an entry into the United States for purposes of the statute if an examination of the circumstances indicates that he did not intend to make his departure a meaningful interruption of his permanent residence. The dissent reached the heart of the matter when it said that Congress certainly could have proclaimed that the term "entry" did not include a return following a brief, though voluntary, departure and that the ability of Congress to articulate its position was well evidenced by the distinction that it made in the case of the residence requirements for naturalization.[134] For example, the alien does not affect his naturalization requirements unless he remains outside the country for six months and temporary absences from the country have no cumulative effect unless they aggregate more than half the five-year period preceding the filing of the petition for naturalization.[135]

Fleuti considered the purpose of the departure from the United States as one of the controlling elements in deciding whether there had, in fact, been a meaningful interruption of the alien's residence. The Court felt there that if the purpose for leaving the country was to accomplish some objective which was violative of the policy of the immigration law, then that feature would be significant on the question of whether the alien had interrupted his continuous residence so that he would be regarded as making an entry on his return.[136] But *Fleuti* did not discuss whether the purpose was to be formulated prior to the alien's departure from the United States and that has caused some consternation in the cases. The statute itself speaks in terms of an intended departure from the United States and if the purpose is one of the material features, then it seems that the purpose should be formulated by the time of the departure.

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132. 289 U.S. 422 (1933).
133. Rosenberg v. Fleuti, 374 U.S. 449, 466 (1963) (dissenting opinion).
134. Immigration and Nationality Act § 316, 8 U.S.C. § 1427 (1970) sets out the residence period required for naturalization and deals specifically with physical presence within the United States. The dissent in *Fleuti* therefore makes a good point when it says that "Congress knows well how to temper rigidity when it wishes." Rosenberg v. Fleuti, 374 U.S. 449, 467 (1963) (dissenting opinion).
135. Immigration and Nationality Act § 316(a), 8 U.S.C. § 1427(a) (1970).
136. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

In *Vargas-Banuelos v. Immigration & Naturalization Service*,[137] an alien went to Mexico for a legitimate purpose and formulated an intent there to smuggle aliens back to the United States. The court in that case noted that since the criminal intent was formulated subsequent to the alien's departure from the United States, he could not have intended to interrupt his residence status and, therefore, his return was not an entry. A similar situation arose in *Palatian v. Immigration & Naturalization Service*.[138] It was agreed that the alien in that case did not decide to smuggle marijuana back into the United States until after he was in Mexico. The court reasoned that even though the alien formulated the intent after his departure from the United States, his purpose was still to pursue some criminal activity which was itself contrary to the policy of the immigration laws and, therefore, the court found that his conduct meaningfully interrupted his permanent residence within the United States. Yet, the language in *Fleuti* referred specifically to the alien's purpose for leaving the country. Surely, if the alien does in fact have a purpose for leaving the country, that purpose must be formulated prior to his departure. The court in *Palatian* suggested that the language in *Fleuti* referring to "an intent to depart" should not be controlling. It felt that the purpose whenever formed was sufficient to constitute a meaningful interruption of the permanent residence status so as to regard the alien's return as an entry within the statute.

The difficulty in applying the *Fleuti* criteria is exemplified in *Palatian*, for it is not clear in the latter case that the alien's purpose for leaving the country was to smuggle drugs into the United States. If the *Fleuti* Court had intended to regard the formulation of the illegal purpose as significant regardless of the time when such formulation took place, it should have stated clearly that the controlling conduct must occur between departure and reentry. Furthermore, another difficulty arises when the alien harbors a motive which is contrary to some policy expressed in the immigration law but fails to realize his objective after his departure from the United States. If, in fact, the existence of the purpose is to be accorded the weight expressed in the *Fleuti* case, then it should be manifestly clear that the actual accomplishment of the objective is irrelevant with respect to a meaningful interruption of the alien's permanent residence. Surely the brevity of the alien's stay outside the United States and the lack of travel documents ought not necessarily to take priority over the fact that the alien has formulated an intent to secure an objective which runs contrary to the policy of the immigration law.[139] In *Palatian*, the court was impressed with the fact that the alien had engaged in activity which was in direct violation of immigration laws and expressed an intimate concern for the problem of drug control. The court went on to state that the alien's intent to smuggle marijuana into the United States was just as meaningful if formed after departure of the

137. 466 F.2d 1371 (5th Cir. 1972).
138. 502 F.2d 1091 (9th Cir. 1974).
139. Yanez-Jacquez v. Immigration & Naturalization Serv., 440 F.2d 701 (5th Cir. 1971).

alien as it would be if first formed prior thereto.[140] The court further sought to distinguish *Yanez-Jacquez v. Immigration & Naturalization Service*[141] on the theory that the alien's purpose there in going to Mexico to avenge the previous assault made upon him did not result in the accomplishment of his objective and that he, therefore, commited no offense. The difficulty with that conclusion is that *Fleuti* did not discuss the accomplishment of a particular objective but stressed instead the alien's purpose for leaving the country to accomplish the feat which he had in mind. The alien ought not to be heard to say that his departure was innocent in the sense that his objective has not been accomplished.[142] To this extent, the *Palatian* interpretation of the *Fleuti* criteria is questionable. After all, the exception stated in the definition of "entry" has to do with whether the alien's departure is intended. This exception was in response to judicial precedent which had regarded any return of an alien as an entry within the definition of the former statute.[143] In the same way that specific periods of time are set out in the statute dealing with naturalization, Congress could have circumscribed the limits of the alien's stay outside the United States to meet the very same criteria propounded by the Court in *Fleuti*. Congress relied instead on the emphasis to be accorded to the alien's intention or expectations arising as a consequence of his departure. It is perplexing that the legislative history of the statute shows that Congress was aware of the implications of a casual or brief departure from the United States and yet simply relegated the statutory language to intent or voluntariness.[144] It is reasonable, indeed, to query whether Congress would have overlooked such a profound issue when the cases were all reaching the harsh conclusion that any return to the United States constituted an entry, regardless of the alien's intent.

It is by rejecting the plain meaning of the statute that the Court in *Fleuti*

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140. Palatian v. Immigration & Naturalization Serv., 502 F.2d 1091, 1093 (1974).

141. In *Yanez-Jacquez v. Immigration & Naturalization Service*, 440 F.2d 701 (5th Cir. 1971), it was held that an alien had not made an entry when he returned after a short trip to Mexico. The alien was convicted of a crime and deportation was sought on the basis of his conviction of a crime involving moral turpitude within five years after entry. The alien's trip to Mexico was to seek revenge for a previous robbery and this trip, like all the others to Mexico, was brief and for that single purpose. *See also* Munoz-Casarez v. Immigration & Naturalization Serv., 511 F.2d 947 (9th Cir. 1975); Barragan-Sanchez v. Rosenberg, 471 F.2d 758 (9th Cir. 1972); Toon-Ming Wong v. Immigration & Naturalization Serv., 363 F.2d 234 (9th Cir. 1966).

142. The court in *Palatian* in distinguishing *Yanez-Jacquez* said as follows: "Obviously, he commited no offense at all, much less one that is contrary to a policy reflected in our immigration laws. The case is not in point." Palatian v. Immigration & Naturalization Serv., 502 F.2d 1091, 1093 (1974). The point of *Yanez-Jacquez* was that the one factor involving the alien's criminal intent was not sufficiently indicative of the alien's intent to interrupt his permanent residence when viewed together with the other criteria set out in *Fleuti*. The allusion in *Palatian* to the alien's failure to accomplish the stated objective was, therefore, somewhat misleading on the question of the purpose of the alien's departure. *See also* Vargas-Banuelos v. Immigration & Naturalization Serv., 466 F.2d 1371 (5th Cir. 1972).

143. *See* Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 889; United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933); United States *ex rel.* Kowalenski v. Flynn, 17 F.2d 524 (W.D.N.Y. 1927).

144. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952).

was forced to discuss standards which, while perhaps easy to formulate, are difficult to apply. So in construing the statute, the Court said in effect that the alien did not really intend to leave the country if his departure was casual or brief, or unless he entertained illegal motives, or he needed travel documents, or his trip was of long duration. It seems that this judicial construction of the statute introduces criteria into the application of the law that were considered by Congress and were rejected in favor of the plain application of the alien's intention and voluntariness.[145] For example, it has been held that an alien's departure to be married was meaningfully interruptive of the alien's permanent residence,[146] whereas an alien's departure to take a training course mandated by his employer was not.[147] Yet, in both cases, the aliens fully intended to depart the United States and their departure was voluntary pursuant to the terms of the statute. It is true that if they did not leave the United States, they could not have accomplished the objectives which they had in mind. However, in no sense could the departure of these aliens be adequately defined as involuntary or unintentional. In accord with the dissent in *Fleuti*, it must be said that the intentional departure referred to in the statute is better described as a knowing departure and really has nothing to do with the casualness or briefness of the alien's excursion into foreign territory.[148] A different characterization would recognize the approach, ultimately rejected by Congress, which sought to accommodate the return of an alien after a temporary absence to an unrelinquished domicile in the United States.[149]

VI. Conclusion

A traditional review of the deportation question necessarily involves an excursion into the policy determinations behind any exceptions created by Congress within the immigration framework. There is no question that the integrity of the immigration system must be maintained. But this must not be confused with the congressional decision to provide some relief for those who may have violated some aspect of the immigration law. It is arguable, therefore, that where there is doubt in the interpretation of a particular statute which grants a remedy to the alien, this doubt should be resolved in his favor and that it should be left to Congress then to clarify any existing ambiguity. It must be recognized that Congress has decided statutorily to forgive some aliens

145. *See Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1716, H.R. 2379*, H.R. 2816, 82d Cong., 1st Sess. 143 (1951).

146. Lozano-Giron v. Immigration & Naturalization Serv., 506 F.2d 1073 (7th Cir. 1974). In this case the alien was ordered deported on the ground that he had been convicted of a crime involving moral turpitude committed within five years after entry. The relevant entry was his return from a trip to Colombia to get married. This marriage venture was unsuccessful because his fiancee changed her mind.

147. Itzcovitz v. Selective Serv. Bd., 447 F.2d 888 (2d Cir. 1971). Here the alien obtained a declaratory judgment that his return after a trip to Israel would not be deemed an entry. The purpose of the trip was to attend a three-week course required by the employer.

148. Rosenberg v. Fleuti, 374 U.S. 449, 467 (1963) (dissenting opinion).

149. *See* note 145 *supra*.

who may have engaged in fraudulent conduct to gain entry into the United States. Congress, in its wisdom, has seen fit to recognize the equities of particular situations and has provided the necessary vehicle for the protection of those aliens whose position requires some special accommodation.

If an alien's false claim of citizenship is a special kind of misrepresentation which ought not to benefit from the relief of section 241(f), then a statutory amendment is in order clarifying the situation. The seriousness of deportation itself requires a careful evaluation of the policies inherent in the statutory provisions governing deportation. Where Congress has made an exception in the interests of family unity, then a very hard look must be given to a particular case to determine whether relief would in effect thwart the congressional purpose. The congressional decision to save certain aliens from deportation suggests that this protection should not be lightly regarded.

GUILTY PLEAS IN THE NORTHERN MIDWEST

Arthur N. Bishop†

In these dynamic 1970's, replete with major overhaulings of criminal procedure codes by several states and court rule renovation by several others, even the taken-for-granted plea of guilty is receiving wide attention. Even the conservative northern Midwest has broadened its procedural scope in this highly focalized area which accounts for the great bulk of the criminal dockets across the nation. Particularly is this true in Iowa, which has, by common law, come forth in recent years with processing requirements for pleas of guilty invoking drastic changes.

Before we commence our in-depth inspection of the Iowa and Minnesota cases, it is good to know that there are broad background research materials nationally. Annotations over the years are multiple.[1] Leading articles in the law reviews have been few in number,[2] but student-written materials offer

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1. Annot., 25 L. Ed. 2d 1025 (1971) (validity of guilty pleas—Supreme Court cases); Annot., 20 A.L.R.3d 724 (1968) (plea of guilty as waiver of claim of unlawful search and seizure); 9 A.L.R.3d 990 (1966) (plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question); 97 A.L.R.2d 549 (1964) (court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof); 75 A.L.R.2d 683 (1961) (plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense); 42 A.L.R.2d 995 (1955) (plea of guilty in justice of the peace court or similar inferior court as precluding appeal); 34 A.L.R.2d 919 (1954) (duty of court upon plea of guilty or nolo contendere to offense involving several degrees, to hear evidence to determine degree); 149 A.L.R. 1403 (1944) (plea of guilty without advice of counsel); 146 A.L.R. 1430 (1943) (withdrawal of guilty plea and substitution of plea of not-guilty after conviction); 134 A.L.R. 968 (1941) (failure to examine witness to determine degree of guilt before pronouncing sentence upon plea of guilty as grounds for habeas corpus); 110 A.L.R. 1300 (1937) (plea of guilty as affected by objection that it was not made by defendant personally); 96 A.L.R. 1064 (1935) (duty of trial court to accept tendered plea of guilt of lesser degree of crime where prosecuting officer has agreed to recommend acceptance of such plea if defendant will turn State's evidence); 37 A.L.R. 1116 (1925) (effect of pleading guilty after statute of limitations has run); 30 A.L.R. 686 (1924) (writ of error coram nobis as a remedy where plea of guilty is entered under fraud, duress or mistake); 20 A.L.R. 1445 (1922) as supplemented by 66 A.L.R. 628 (1930) (right to withdraw plea of guilty); 6 A.L.R. 694 (1920) (plea of non vult contendere or guilty in capital case); 35 L.R.A. 1146 (1912) (right upon plea of guilty to sentence accused without intervention of jury); 34 L.R.A. 257 (1911) (plea of guilty under intimidation); 16 L.R.A. 358 (1892) (statute allowing plea of guilty in capital cases); 1914A Ann. Cas. 451 (validity and effect of conditional plea of guilty in capital cases); 8 Ann. Cas. 237 (1908) as supplemented by 16 Ann. Cas. 973 (1910) and 1912D Ann. Cas. 243 (right to withdraw plea of guilty in criminal action).

2. Bishop, *Waivers in Pleas of Guilty*, 60 F.R.D. 513 (1974); Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME L. REV. 835 (1973); Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137 (1972); Davis, *The Guilty Plea Process: Explor-*