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Bill Ong Hing

THE NINTH CIRCUIT: NO PLACE FOR DRUG OFFENDERS

Bill Ong Hing*

In two troubling cases, the Ninth Circuit has ruled that relief from deportation under section 212(c) of the Immigration and Nationality Act (the Act),[1] is unavailable to lawful permanent resident alien drug offenders. The effect of the rulings in *Nicholas v. Immigration & Naturalization Service*[2] and *Bowe v. Immigration & Naturalization Service*[3] is to foreclose any relief in deportation hearings to longtime resident aliens who are convicted of drug-related crimes and are deportable under section 241(a)(11) of the Act.[4] This development places the Ninth Circuit in direct

* Assistant Professor of Law, Golden Gate University; J.D., University of San Francisco, 1974; LL.M. (candidate) Boalt Hall; Former Director, Immigration Law Unit, San Francisco Neighborhood Legal Assistance Foundation; Staff Advisory Group, Select Commission on Immigration and Refugee Policy.

1. Section 212(c) of the Act, 8 U.S.C. § 1182(c) (1976), provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consectutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30) and (31) of subsection (a) . . . .

2. 590 F.2d 802 (9th Cir. Feb., 1979) (per Takasugi, D.J., sitting by designation; the other panel members were Hufstedler and Tang, JJ.).

3. 597 F.2d 1158 (9th Cir. Feb., 1979) (per Choy, J.; Bright, J., sitting by designation, filed a separate dissenting opinion; the other panel member was Carter, J.).

4. Section 241(a)(11) of the Act, 8 U.S.C. § 1251 (a)(11) (1976), provides:

> Any alien in the United States . . . shall . . . be deported who—(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate . . . .

conflict with the Second and Tenth Circuits,[5] and ignores the 1976 decision of *Matter of Silva*[6] in which the Board of Immigration Appeals acquiesced in the Second Circuit's position and allowed such relief on a nationwide basis.

I. BACKGROUND

Drug offenders are in extreme disfavor under the immigration laws. Section 212(a)(23) of the Act provides for the exclusion from admission into the United States of any alien who has been convicted of a narcotic drug or marijuana offense,[7] while section 241(a)(11) of the Act provides for the deportation of any alien, including a lawful permanent resident alien, who has been convicted of a narcotic drug or marijuana offense.[8] Congress did, however, explicitly provide for the discretionary waiver of the drug-related ground for exclusion under section 212(c) of the Act,[9] if an alien: (1) was lawfully admitted for permanent residence previously, (2) had temporarily proceeded abroad voluntarily, and (3) was returning to a lawful unrelinquished domicile of seven consecutive years. Therefore, by its specific language, section 212(c) appears to apply only when a resident alien attempts to return after a temporary absence. However, the Board of Immigration Appeals has never interpreted the waiver provision so narrowly. In numerous cases, the Board has allowed a section 212(c) waiver of a ground of inadmissibility *nunc pro tunc* in deportation proceedings where an alien, after conviction, departed and was subjected to deportation charges after returning.[10]

The reliance of both of these decisions on Arias-Uribe v. Immigration & Nat. Serv., 466 F.2d 1198 (9th Cir. 1972), leaves open the question of whether an application for relief under § 212(c) of the Act, 8 U.S.C. § 1182(c) (1976), filed in conjunction with an adjustment of status application under § 245 of the Act, 8 U.S.C. § 1255 (1976), is acceptable. In *Arias-Uribe*, the court pointed out in a footnote that this question was left unanswered. 466 F.2d at 1199 n.3. Presumably, if a lawful permanent alien is deportable for a drug offense and is otherwise eligible for adjustment of status, an application for a waiver under § 212(c) of the Act, 8 U.S.C. § 1182(c) (1976), is not foreclosed. *See also* Matter of Smith, 11 I. & N. Dec. 325 (1965).

5. Vissian v. Immigration & Nat. Serv., 548 F.2d 325 (10th Cir. 1977); Francis v. Immigration & Nat. Serv., 532 F.2d 268 (2d Cir. 1976). Since the Immigration & Naturalization Service did not contest the availability of relief to an alien narcotics offender in Byus-Narvaez v. Immigration & Nat. Serv., 601 F.2d 879 (5th Cir. 1979), such relief remains available in the Fifth Circuit as well.

6. Interim Decision 2532 (B.I.A. Sept. 10, 1976).

7. 8 U.S.C. § 1182(a)(23) (1976).

8. For the relevant statutory language of section 241(a)(11) of the Act, see note 4 *supra*.

9. For the relevant statutory language of section 212(c) of the Act, see note 1 *supra*.

10. *See, e.g.*, Matter of Tanori, Interim Decision 2467 (B.I.A. Feb. 4, 1976) (deporta-

Under the waiver provision, the requirement that an alien must have "temporarily proceeded abroad" created a curious situation. A seven-year lawful permanent resident alien convicted of possession of marijuana could obtain relief if s/he happened to take a vacation abroad after the conviction, while a similar alien who had not left the country would not be eligible to apply.[11] As incongruous as this result might appear, the "temporarily proceeded abroad" requirement had been traditionally upheld.[12]

In *Francis v. Immigration & Naturalization Service,*[13] the Second Circuit recognized the unfairness of such a result and struck down the departure requirement as violative of equal protection.[14] In *Matter of Silva,*[15] the Board of Immigration Appeals adopted *Francis* on a nationwide basis and stated:

> We conclude that, under the provisions of section 212(c) of the Act, a waiver of the ground of inadmissibility may be granted to a permanent resident alien in a deportation proceeding regardless of whether he departs the United States following the act or acts which render him deportable. In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens.[16]

In *Francis,* the alien had been convicted of possession of

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tion charges based on conviction of possession of marijuana for sale); Matter of G—A—, 7 I. & N. Dec. 274 (1956) (deportation charges based on conviction of importation of marijuana); Matter of S—, 6 I. & N. Dec. 392 (1954) (deportation charges based on four petty theft convictions).

11. The situation is best illustrated in Matter of Tanori, Interim Decision 2467 (B.I.A. Feb. 4, 1976), where the alien had been convicted of possession of marijuana for sale just over seven years from the date of his original entry. On the day of his conviction, he went to visit a relative in Mexico and returned about 24 hours later. The Board of Immigration Appeals held that the alien was eligible to apply for section 212(c) waiver relief because he had met the "temporarily proceeded abroad" requirement. *Id.* at 2-3.

12. *See, e.g.,* Matter of Arias-Uribe, 13 I. & N. Dec. 696 (1971), where the Board of Immigration Appeals held that the "requirement that an alien must have 'temporarily proceeded abroad voluntarily and not under an order of deportation' makes it clear that . . . we have no basis for avoiding the statutory requirement . . .." *Id.* at 700.

13. 532 F.2d 268 (2d Cir. 1976).

14. *Id.* at 273. *Accord,* Vissian v. Immigration & Nat. Serv., 548 F.2d 325 (10th Cir. 1977).

15. Interim Decision 2532 (B.I.A. Sept. 10, 1976).

16. *Id.* at 7.

marijuana. Similarly, the respondent in *Silva* was found guilty of possession of marijuana with the intent to distribute. Both aliens were therefore drug offenders and deportable under section 241(a)(11) of the Act. However, in determining whether waiver relief under section 212(c) of the Act was available, neither the Second Circuit nor the Board of Immigration Appeals was troubled with the fact that the alien had been convicted of an offense involving marijuana.[17] The plain statutory language left no question that narcotics offenders were eligible for relief under the waiver provision.[18] Rather, the concern was with the "temporarily proceeded abroad" requirement, which has nothing to do with the offense involved and which was eventually resolved in the aliens' favor in both cases.[19] But for these decisions, even long-time permanent residents of the United States convicted of the most minor drug offense would have no relief from deportation available to them if they had made no departure subsequent to conviction.[20]

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17. 532 F.2d at 270-72; Interim Decision 2532 at 3.

18. For the relevant statutory language of section 212(c) of the Act, see note 1 *supra*. Since the language explicitly extends the waiver possibility to aliens excludable under section 212(a) (23) of the Act, 8 U.S.C. § 1182(a)(23) (1976) (narcotics offenders), it is clear that Congress intended to make this relief available to narcotics offenders.

19. 532 F.2d at 272-73; Interim Decision 2532 at 7.

20. The *Francis* and *Silva* decisions were a result of a direct recognition of the plight faced by longtime lawful permanent resident aliens who were, years after initially immigrating, convicted of a narcotics or marijuana offense. Prior to those decisions, it was understood that no § 212(c) relief was available to such aliens unless the "temporarily proceeded abroad" requirement had been met. There were innumberable sympathetic examples of the hardships that resulted. Most often the cases involved resident aliens who had entered as juveniles and who, fifteen or twenty years later, were convicted of simple possession of marijuana. Generally, there was simply no relief from deportation available to such individuals. Most had not met the "temporarily proceeded abroad" requirement of § 212(c) of the Act. Also, suspension of deportation under § 244(a)(2) of the Act, 8 U.S.C. § 1254 (a)(2) (1976), is, for all practical purposes, not available. This is because § 244(a)(2) requires a showing of good moral character for ten years subsequent to the crime, but deportation authorities are not likely to wait ten years before instituting proceedings. Additionally, all arguments that deportation of aliens for simple possession of marijuana constitutes a cruel and unusual punishment have failed. *See, e.g.*, Lieggi v. Immigration & Nat. Serv., 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd without published opinion*, 529 F.2d 530 (7th Cir.), *cert. denied*, 429 U.S. 939 (1976).

Thus, the Board of Immigration Appeal's adoption of *Francis* in the *Silva* decision was a large step in alleviating the harsh result of deportation in sympathetic cases. *See also* Matter of Marin, Interim Decision 2666 (B.I.A. Aug. 4, 1976).

The Immigration and Naturalization Service itself took administrative steps to alleviate such harsh results in some cases. On April 21, 1977, it adopted § 241.1(a)(28) into the Operating Instructions of the Immigration and Naturalization Service which provides:

> Unless prior approval has been received from the regional commissioner, no order to show cause shall be issued in the case of an alien who is a lawful permanent resident of the United

II. THE *Nicholas* AND *Bowe* OPINIONS: FACTUAL BACKGROUND AND ISSUES PRESENTED

In *Nicholas v. Immigration & Naturalization Service,*[21] the alien, who had last entered the United States in 1967,[22] was found deportable on two grounds. Because of a 1975 conviction for conspiracy to possess a controlled substance with the intent to distribute, he was deportable under section 241(a)(11) of the Act as a narcotics offender. He was also deportable under section 241(a)(1) of the Act as an alien who was excludable at the time of entry. Apparently he had been previously deported and had not been granted consent to apply for readmission in 1967 as required by section 212(a)(17) of the Act.[23]

On appeal to the Board of Immigration Appeals, Nicholas raised several points which do not appear to have been raised at the deportation hearing.[24] He sought a discretionary waiver of

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> States and whose deportability is based on section 241(a)(11) as one having been convicted of possession, importation or distribution of marijuana for no renumeration: Provided the amount of marijuana involved does not exceed 100 grams: Provided further, that in the case of a conviction for distribution without renumeration, the alien has been convicted of only one such offense.

5 IMMIGRATION & NATURALIZATION SERVICE, OPERATIONS, INSTRUCTIONS, REGULATIONS AND INTERPRETATION 2852.5 (rev. ed. 1952) *partially codified as* 8 C.F.R. § 242.1(a)(1979).

21. 590 F.2d 802 (9th Cir. 1979). Most of the *Nicholas* opinion dealt with the standards for review of a decision of the district director (the chief administrator of the local immigration office) denying the alien's application for nonpriority (deferred) status. Under such a status, the alien's deportation would be deferred indefinitely. This portion of the court's opinion is significant in that it is the First Circuit court decision which discusses the standards for reviewing district director decisions on nonpriority status applications. *Id.* at 805-08. *See also* Lennon v. Immigration & Nat. Serv., 527 F.2d 187 (2d Cir. 1975).

22. The facts, as set forth in the opinion, do not state the precise status upon which Nicholas entered the United States in 1967. But because he had never been "lawfully admitted for permanent resident status," it can be inferred that he either entered illegally or as a nonimmigrant.

23. Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17) (1976), provides:

> Except as otherwise provided . . . the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission . . . (17) Aliens who have been arrested and deported . . . unless prior to their embarcation or reembarcation at a place outside the United States or their attempt to be admitted . . . the Attorney General has consented to their applying or reapplying for admission . . . .

24. The opinion indicates that the only relief sought by Nicholas at his deportation hearing was *nunc pro tunc* permission to reapply for admission after deportation. The immigration judge denied the requested reapplication. 590 F.2d at 804.

deportability under section 212(c) of the Act and a remand to show eligibility for non-priority status and to apply for political asylum. The Board dismissed the appeal and Nicholas petitioned for review in the Ninth Circuit. However, the Ninth Circuit denied his claim to nonpriority status[25] and held that relief under section 212(c) of the Act was unavailable.

In support of his request for relief under section 212(c) of the Act, Nicholas contended that even though he had not been "lawfully admitted for permanent resident status," as required by the statute,[26] to deny him such relief would constitute a denial of equal protection. However, the court felt that it did not have to reach the equal protection argument, and shocked observers by stating that "[r]elief under section 212(c) has been held in this circuit to be unavailable to an alien facing deportation for conviction of a drug-related crime, pursuant to [section 214(a)(11) of the Act]."[27] The court reasoned that since this was one of the two grounds of deportability, Nicholas would be ineligible for relief under section 212(c) of the Act "even in the event he was granted permanent resident status."[28] The court cited two cases to support the proposition that the waiver relief of section 212(c) was unavailable to narcotics offenders: *Arias-Uribe v. Immigration & Naturalization Service,*[29] and *Dunn v. Immigration & Naturalization Service.*[30]

In *Bowe v. Immigration & Naturalization Service,*[31] section 241(a)(11) of the Act was the sole ground for deportation. Bowe had entered the United States as a lawful permanent resident at the age of sixteen in 1966, but in 1976 he was convicted of smuggling cocaine. At his deportation hearing, Bowe admitted deportability but applied for discretionary waiver relief under section 212(c) of the Act. The immigration judge denied the waiver and Bowe appealed to the Board of Immigration Appeals. He contended that the immigration judge had failed to afford him a full and fair hearing on the application for section 212(c) waiver by not allowing him to present certain evidence. However, the Board

25. *See* note 20 *supra* and accompanying text.
26. For the relevant statutory language of § 212(c) of the Act, see note 1 *supra.*
27. 590 F.2d at 808.
28. *Id.*
29. 466 F.2d 1198 (9th Cir. 1972).
30. 499 F.2d 856 (9th Cir.), *cert. denied,* 419 U.S. 1106 (1974).
31. 597 F.2d 1158 (9th Cir. 1979).

affirmed the decision of the immigration judge and Bowe sought review in the Ninth Circuit.[32]

In its original decision issued on February 7, 1979, a unanimous Ninth Circuit panel remanded the matter, agreeing that Bowe had been denied a fair hearing. But the court, thereafter, recalled its mandate and issued the revised opinion on April 23, 1979. In a two-to-one decision, the majority relied on the *Nicholas* opinion which had been issued on February 2, 1979, for the proposition that relief under section 212(c) of the Act was unavailable to narcotics offenders.[33] In addition to *Nicholas*, the *Bowe* majority cited only *Dunn* and *Arias-Uribe*.[34]

III. Analysis

The *Nicholas* decision relied on merely two cases for the premise that waiver relief under section 212(c) of the Act is unavailable to narcotics offenders deportable under section 241(a)(11) of the Act. The *Bowe* case in turn relied on *Nicholas*.[35] Thus if the reasoning in *Nicholas* fails, so must that in *Bowe*. An examination of *Arias-Uribe v. Immigration & Naturalization Service*[36] and *Dunn v. Immigration & Naturalization Service*[37] reveals that those cases do not stand for the principle which the panel in *Nicholas* (and thus the panel in *Bowe*) ascribes to them.

Arias-Uribe involved a lawful permanent resident alien who had been convicted of possession of heroin. Deportability was charged under section 241(a)(11) of the Act, and waiver relief under section 212(c) was sought at the deportation hearing.[38] The deportation proceedings and subsequent review by the Board of Immigration Appeals took place prior to the Second Circuit decision in *Francis v. Immigration & Naturalization Service*[39] and the Board's new policy opinion in *Matter of Silva*.[40] Arias-Uribe therefore faced a strict reading of section 212(c)—especially the requirement that he must have "temporarily proceeded abroad"

32. *Id.* at 1159-60.
33. *Id.* at 1158.
34. *Id.*
35. *Id.*
36. 466 F.2d 1198 (9th Cir. 1972).
37. 499 F.2d 856 (9th Cir.), *cert. denied*, 419 U.S. 1106 (1974).
38. 466 F.2d at 1199.
39. 532 F.2d 268 (2d Cir. 1976).
40. Interim Decision 2532 (B.I.A. Sept. 10, 1976).

subsequent to his conviction.[41] Since Arias-Uribe had never done so, the Board of Immigration Appeals found that section 212(c) relief was unavailable, affirmed the order of deportation and dismissed the appeal.[42]

On appeal to the Ninth Circuit, the court affirmed the decision of the Board of Immigration Appeals.[43] In so doing, the court in *Arias-Uribe* did not purport to deviate from the Board's reasoning. Thus the Ninth Circuit held relief under section 212(c) of the Act unavailable not because Arias-Uribe had been convicted of possession of heroin, but because he had not "temporarily proceeded abroad" as required by the language of the waiver provision.[44] In discussing cases relied upon by Arias-Uribe's counsel, the court did not distinguish cases involving narcotics convictions from cases involving non-narcotics convictions.[45] Instead, the court was most concerned with the point that "[e]ach of them involved an alien who was excludable at the time he last entered the United States."[46] Thus, what was significant to the court was that Arias-Uribe had not departed and reentered subsequent to conviction. The court spoke of the disfavor in which the Immigration and Nationality Act holds narcotics offenders; however, at no point did the court attempt to go beyond the provisions of the Act to develop additional sanctions against narcotics offenders.[47] The language of section 212(c) of the Act explicitly covers narcotics offenders.[48] The court did not overturn an administrative decision cited by the appellant in which such waiver relief had been granted to a narcotics offender.[49] Thus *Arias-Uribe* cannot be

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41. For the relevant statutory language of § 212(c) of the Act, see note 1 *supra.*

42. Matter of Arias-Uribe, 13 I. & N. Dec. 696 (1971).

43. 466 F.2d at 1200.

44. *Id.*

45. *Id.* at 1199, *citing* Matter of Eng. 12 I. & N. Dec. 855 (1968) (possession of heroin); Matter of Smith, 11 I. & N. Dec. 325 (1965) (disorderly conduct); Matter of G—A—, 7 I. & N. Dec. 274 (1956) (importation of marijuana); Matter of S—, 6 I. & N. Dec. 393 (1954) (petty larceny).

46. 466 F.2d at 1199.

47. *Id.*

48. *See* note 18 *supra.*

49. 466 F.2d at 1199. Matter of G—A—, 7 I. & N. Dec. 274 (1956) (convicted of importation of marijuana).

The *Arias-Uribe* decision could be read for the proposition that the only time a drug offender is eligible for relief under § 212(c) of the Act is when the grounds for exclusion under 212(a)(23) of the Act are being charged by the government. This would require that the person be the subject of an exclusion proceeding or of a deportation proceeding under § 241 (a)(1) of the Act, where the alien was excludable at the time of entry before the relief of § 212(c) would be available. Under such an interpretation, the immigration authorities

cited for the proposition that the *Nicholas* and *Bowe* panels ascribe to it, that is, that narcotics offenders are per se ineligible for relief under section 212(c) of the Act. Rather, it is merely another pre-*Francis* and *Silva* decision which mandated strict adherence to the "temporarily proceeded abroad" requirement.

Dunn v. Immigration & Naturalization Service[50] adds nothing to the court's reasoning in *Nicholas* and *Bowe*. Ten years after his admission as a permanent resident, Dunn was convicted of possession of marijuana. Deportation proceedings were instituted against him under section 241(a)(11) of the Act and he sought waiver relief under section 212(c) even though he had never left the United States since his original entry.[51] The controlling issue for the court in *Dunn* was again the fact that the "temporarily proceeded abroad" requirement of section 212(c) had not been met.

> Petitioner urges that he should be eligible for discretionary relief from deportation under § 212(c) of the Act . . . even though he is not technically "returning to the United States after a voluntary departure." In effect Petitioner is requesting advance permission to return to an unrelinquished domicile, despite the fact that otherwise he would be ineligible for admittance under section 212(a)(23) . . . as an "alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana."
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> As petitioner recognizes in his brief, this precise contention was rejected by this court in *Arias-Uribe v. INS* . . . .[52]

The court in *Dunn* did not hold that narcotics offenders are per se ineligible for relief under section 212(c) of the Act; rather, it was concerned that Dunn was not returning after a voluntary

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could thwart § 212(c) relief to such an alien by charging deportability under § 241 (a)(11) of the Act instead. This interpretation of the law was expressly rejected in Matter of G—A—, 7 I. & N. Dec. 274 (1956). It is clear that such a result would render § 212(c) of the Act totally meaningless whenever a corresponding ground for deportation (§ 241(a)(1)) existed for a ground of exclusion (§ 241(a)(11)).

50. 499 F.2d 856 (9th Cir.), *cert. denied*, 419 U.S. 1106 (1974).

51. *Id.* at 857.

52. *Id.* (footnote omitted).

departure.[53] The court's reliance on *Arias-Uribe* was only for that limited principle as well, and the case was not cited for the unsupported notion that section 212(c) relief is not available to any narcotics offenders.

The Ninth Circuit decisions in *Arias-Uribe* and *Dunn* do not, therefore, support the conclusions which the panels in *Nicholas* and *Bowe* appear to have reached, namely that all narcotics offenders are ineligible for relief under section 212(c) of the Act. The key point in *Arias-Uribe* and *Dunn* was that the alien had made no departure subsequent to conviction and therefore did not meet the "temporarily proceeded abroad" requirement. The fact that both cases involved narcotics offenders is coincidental. A long-time permanent resident alien deportable for another criminal offense prior to *Silva*[54] would have also been denied section 212(c) waiver relief if the "temporarily proceeded abroad" requirement subsequent to conviction had not been met.[55]

The decisions in *Nicholas* and *Bowe* are troubling in other respects. Neither panel dealt with *Silva*[56] which was decided subsequent to *Arias-Uribe* and *Dunn,* in which the Board of Immigration Appeals acquiesced in the Second Circuit's opinion of *Francis v. Immigration & Naturalization Service*[57] on a nationwide basis. As a result, after *Nicholas* and *Bowe,* relief under section 212(c) of the Act is available to narcotics offenders everywhere except in the Ninth Circuit.[58] Additionally, on appeal the government had not contended in either *Nicholas* or *Bowe* that relief under section 212(c) of the Act was unavailable to lawful permanent resident aliens convicted of narcotics offenses.[59] The

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53. *Id.*

54. Interim Decision 2532 (B.I.A. Sept. 10, 1976).

55. *See, e.g.,* Munoz-Casarez v. Immigration & Nat. Serv., 511 F.2d 947 (9th Cir. 1975).

56. Interim Decision 2532 (B.I.A. Sept. 10, 1976).

57. 532 F.2d 268 (2d Cir. 1976).

58. The situation is well illustrated in the position taken by the Board of Immigration Appeals in a recent unreported case decided on August 2, 1979. Matter of Monge-Miranda, Immigration File No. A11 435 534 (B.I.A. Aug. 2, 1979). The per curiam decision stated:

> The decision of the immigration judge is affirmed. A waiver of excludability under 212(c) of the INA, 8 U.S.C. 1182(c), for a charge based on section 241(a)(11) of the Act, is not available in the Ninth Circuit. *See Bowe v. INS* . . .; *Nicholas v. INS* . . . . Accordingly, the decision of the immigration judge was correct and is affirmed.

59. 597 F.2d at 1159 (Bright, J., dissenting). *See also* Byus-Narvaez v. Immigration & Nat. Serv., 601 F.2d 879 (5th Cir. 1979); note 5 *supra.*

facts in *Nicholas* indicate that the alien was not even a lawful permanent resident. Since the language of section 212(c) of the Act expressly requires lawful admission for permanent residence, relief would have more appropriately been denied on the grounds that there had been a failure to meet that requirement. Similarly, by following *Nicholas* blindly without analysis, the Ninth Circuit, in *Bowe*, compounded the error.

IV. CONCLUSION

The proposition announced in *Nicholas v. Immigration & Naturalization Service* and *Bowe v. Immigration & Naturalization Service* that relief under section 212(c) of the Act is unavailable to any alien narcotics offender deportable under section 241(a)(11) of the Act, was advanced without proper authority.[60] The decisions ignored the direct conflict created not only with cases in two other circuits, but with an administrative decision which had more generously made relief available to alien narcotics offenders. By destroying the possibility of section 212(c) relief to narcotics offenders in deportation proceedings in this circuit,

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60. On February 19, 1980, in support of a motion to reopen directed to the Board of Immigration Appeals by the alien Bowe, the Immigration and Naturalization Service surprisingly urged the Board to ignore the *Nicholas* and *Bowe* decisions even in the Ninth Circuit. The Service's position was that relief under § 212(c) should be administered uniformly throughout the country under the *Silva* decision, and that *Nicholas* and *Bowe* were decided incorrectly insofar as they hold that § 212(c) relief is unavailable to narcotic violators per se. To date the Board has not ruled on Bowe's motion. Memorandum from Deputy General Counsel Paul W. Schmidt, INS, to Chairman David L. Milhollan, BIA (Feb. 19, 1980). In the recent case of Castillo-Felix v. Immigration & Nat. Serv., 601 F.2d 459 (9th Cir. 1979), the Ninth Circuit appears to have limited the *Nicholas* case to a mere reinforcement of the "temporarily proceeded abroad" requirement of § 212(c), as opposed to a broader reading which would prohibit such relief in any narcotics cases. In a footnote to its opinion, the court stated:

> Consequently, we need not resolve an apparent conflict between this circuit and the Second Circuit. In *Francis v. INS* . . ., the Second Circuit ruled that the nunc pro tunc extension of [§ 212(c)] . . . violated equal protection. The court held that it was irrational to extend [§ 212(c)] relief to deportees who had fortuitously departed after committing a deportable offense, but deny it to deportees who had not. The INS acquiesced in the *Francis* ruling and no longer requires actual departure by deportees requesting [§ 212(c)] relief. *Matter of Silva* . . . .
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> This circuit, however, continues to recognize the actual departure requirement. *Arias-Uribe v. INS* . . . followed in *Nicholas v. INS* . . . *Dunn v. INS* . . . . Under this line of cases, petitioner would fail to qualify for [§ 212(c)] relief because he did not depart the country after committing the offense for which he is being deported.

Id. at 462 n.6.

the Ninth Circuit has thereby retarded the efforts of the Board of Immigration Appeals to more liberally interpret the immigration laws in favor of such offenders, and has created a serious inconsistency in the application of the immigration laws between this circuit and all others. The results are unsettling and implore clarification and a more reasoned resolution by the Ninth Circuit.