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Congressional Intent, the Supreme Court and Conflict Among the Circuits over Statutory Eligibility for Discretionary Relief Under Immigration and Naturalization Act §212(c)

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CONGRESSIONAL INTENT, THE SUPREME COURT AND CONFLICT AMONG THE CIRCUITS OVER STATUTORY ELIGIBILITY FOR DISCRETIONARY RELIEF UNDER IMMIGRATION AND NATURALIZATION ACT § 212(c)

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I. INTRODUCTION

The high level of drug-related crimes in the United States ("U.S.") is a matter of grave concern to both Congress and the executive branch.[1] The current policy of the U.S. government is to create a drug-free America by 1995.[2] This policy is the result of congressional findings on the ubiquitous presence of illegal drugs in the U.S.[3] An important component of the national crusade to eliminate illegal narcotics involves recent reform of U.S. immigration law and policy. Legislation aimed at the expedited deportation of the criminal alien[4] is part of Congress' prescription to halt America's growing drug problem.[5]

This Article will argue that a majority of circuits[6] have im-

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1. Anti-Drug Abuse Act [hereinafter 1988 Drug Act], Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 21 U.S.C. § 1501 (1988)) ("An Act [t]o prevent the manufacturing, distribution, and use of illegal drugs . . . .") H.R. 5210, 100th Cong. (1988); Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1988) (codified at 21 U.S.C. § 801 (1988)) ("The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.") *Id.* § 101(2).

The Anti-Drug Abuse Act also established a coordinated national policy against manufacturing, distributing, and using illegal drugs. 1988 Drug Act §§ 1001-02, *supra*.

2. 1988 Drug Act § 5251(b), *supra* note 1.

3. *Id.* § 5251(a). Congress lists twenty-one factual findings which clearly illustrate the scourge which the drug problem places upon American society. *Id.*

4. An alien is any person who is "not a citizen or a national of the United States." Immigration and Nationality Act ("INA") § 101(a)(3), 8 U.S.C. § 1101 (1988).

5. For congressional legislation aimed at the expeditious deportation of criminal aliens, see *infra* notes 12-45 and accompanying text.

6. A Circuit Court of Appeal is the maximum judicial authority within its jurisdiction with the exception of the U.S. Supreme Court. Accordingly, the importance of a Circuit Court's position on any given issue of law is crucial to those subject to its jurisdiction.

In the context of immigration law, judicial review is available only after a petitioner has exhausted all administrative remedies. IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 605 (4th ed. 1994) (hereinafter KURZBAN) (citing Castaneda-Suarez v. INS, 993 F.2d 142, 144-45 (7th Cir. 1993). Pursuant to INA § 106, 8 U.S.C. § 1105(a), judicial relief is limited to the review of final orders of deportation or exclusion. *Id.* at 593. This is a review of the decision of the Board of Immigration Appeals ("BIA"), not the Immigration Judge. *Id.* For a discussion of the

properly applied congressional legislation and policy aimed at the expeditious deportation of the criminal alien. The circuits are currently split on the issue of statutory eligibility for a discretionary waiver of deportation for the criminal alien. Specifically, they differ as to precisely when such eligibility based on lawful permanent residence terminates. This article posits that the minority circuits are correct in finding that eligibility for discretionary relief terminates once the appropriate administrative agency[7] issues a final order of deportation. This application is in accord with congressional policy, legislative enactments and Supreme Court decisions; and, therefore, it should be adopted by the majority circuits.[8]

II. CONGRESSIONAL ACTION AND THE CRIMINAL ALIEN

A. The Expanded Concept of the Criminal Alien

Congressional power over matters of exclusion and deportation of aliens is plenary.[9] At any time, Congress may order the deportation of aliens it deems hurtful, and may do so by appropriate executive proceedings.[10] Congress has steadily expanded the category of the deportable criminal alien through recent

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BIA and administrative procedure leading to judicial review, see *infra* note 7.

All agency decisions or interpretations based upon errors of law are subject to plenary review. KURZBAN, *supra*, at 620 (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)). Federal courts are usually limited to a review of the agency's record and may not decide questions of fact *de novo*. *Id.* at 621.

7. The BIA is the administrative body that reviews decisions from the immigration court, and, in some instances, from the INS. KURZBAN, *supra* note 6, at 572. The BIA is part of the Executive Office for Immigration Review ("EOIR"), and has appellate jurisdiction pursuant to 8 C.F.R. § 3.1(b). *Id.* Generally, the administrative review process begins with a decision by an Immigration Judge and, in some instances, a decision by an INS officer. *Id.* The BIA has the power to review the record *de novo*, "make its own findings and independently determine the legal sufficiency of the evidence." *Id.* at 579 (citing Charlesworth v. U.S. INS, 966 F.2d 1323, 1325 (9th Cir. 1992)).

8. The Supreme Court of the United States has recently denied review of this issue. *See* Katsis v. INS, 997 F.2d 1067 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 902 (1994). Thus, the split among the circuits will likely continue until either the Supreme Court issues a decision resolving the conflict or congress passes legislation which will affirmatively decide the issue. Otherwise, the decisions rendered by the circuit Courts of Appeals are authoritative law within each circuit's jurisdiction.

9. Fong Yue Ting v. United States, 149 U.S. 698 (1893). The Court held that "the right to exclude or expel all aliens [is] . . . an inherent and inalienable right of every sovereign and independent nation . . . ." *Id.* at 711.

10. Ng Fung Ho v. White, 259 U.S. 276 (1922).

immigration law reform.[11] The current Criminal Alien Program was established by § 701 of the Immigration Reform and Control Act of 1986 ("IRCA").[12] This section expressly provides that criminal aliens be subject to expedited deportation hearings. The provision, however, lacked specificity, and simply stated:

> In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction.[13]

In 1988, Congress passed an omnibus drug enforcement bill known as the Anti-Drug Abuse Act of 1988.[14] The 1988 Drug Act created a new class of deportable alien: the aggravated felon. An aggravated felony was defined to include:

> [M]urder, any drug trafficking crime as defined in section 924(c)(2) of title 18,[15] or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.[16]

Moreover, "[a]n alien convicted of an aggravated felony shall be *conclusively presumed* to be *deportable* from the United States."[17] Most significantly, Congress completely revised 8 U.S.C. § 1252(a) and (b) to establish expeditious procedures to deport aggravated felons.[18] The 1988 Drug Act required that

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11. *See, e.g.*, William R. Robie and Ira Sandron, *Criminal Aliens in the Immigration System*, 38 FED. B. NEWS & J. 449 (1991).

12. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

13. Pub. L. No. 99-603, 100 Stat. 3445 (1986). *See generally* INA §§ 241-44 which describe the offenses leading to the commencement of deportation proceedings. 8 U.S.C. §§ 1251-54.

14. 1988 Drug Act, *supra* note 1. Title VII, Subtitle J of the 1988 Drug Act contains the criminal alien provisions. Except where otherwise provided, all provisions were deemed to be amendments to the INA. 1988 Drug Act § 7341, *supra* note 1.

15. 18 U.S.C. § 924(c)(2) (1988). For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act, 21 U.S.C. §§ 801-904, the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951-966, or the Maritime Drug Law Enforcement Act, 46 U.S.C.App. §§ 1901-1904.

16. 1988 Drug Act § 7342, *supra* note 1.

17. *Id.* § 7347(c) (emphasis added).

18. *Id.* § 7347.

deportation proceedings be completed before the criminal alien was released from incarceration for the underlying sentence.[19] This Act clearly reaffirmed congressional intent for expedited deportation of the criminal alien convicted of an aggravated felony.[20]

B. The Criminal Alien and the Drug Problem

The growing concern over rising alien criminal activity led Congress to stern immigration reform in 1990. Drug crimes comprised a substantial portion of this criminal activity.[21] The Immigration and Naturalization Service ("INS") and the Department of Justice recognized this dramatic increase in drug-related criminal activity among aliens. Accordingly, both agencies increased their efforts to combat the problem[22] and advocated significant changes in the laws concerning criminal aliens.[23]

As a result, Congress acknowledged the criminal alien's

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19. *Id.* § 7347(a). This section mandated:

> The Attorney General shall provide for the availability of special deportation proceedings at certain Federal, State, and local correctional facilities. . . . Such shall be conducted . . . in a manner which eliminates the need for additional detention at any processing center of the Service and in a manner which assures expeditious deportation . . . following the end of the alien's incarceration for the underlying sentence.
>
> *Id.*

20. *Id.* § 7347(d)(1). This provision stated:

> Notwithstanding any other provision of law, the Attorney General shall provide for the initiation and, to the extent possible, the completion of deportation proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien's release from incarceration for the underlying aggravated felony.
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> *Id.*

21. Ira Sandron and Robert K. Bingham, *The INS Role in Criminal Justice: Deportation and Exclusion of Criminal Aliens*, 37 FED. B. NEWS & J. 275, 280 (1990). *See also*, Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEG. J. 201, 209-10 (1993).

22. The Department of Justice has recognized the removal of aliens involved in criminal activity as one of the highest departmental priorities. U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION ACT OF 1990 - REPORT ON CRIMINAL ALIENS 3 (Apr. 1992) *See* Feldman, *supra* note 21, at 209.

23. *See* Sandron and Bingham, *supra*, note 21, at 280 stating "[i]t is logical to expect that if the nationwide focus over illicit drugs (and crime in general) continues to intensify . . . it might also be anticipated that efforts will be made to curtail certain forms of discretionary relief now available to aliens who have been convicted of serious crimes." *Id. See also* Feldman, *supra* note 21, at 210.

significant contribution to the drug problem. It pressed to enact legislation imposing strict penalties on criminal aliens and the strengthening of enforcement procedures.[24] The Immigration Act of 1990[25] [hereinafter 1990 Act] irrefutably established the congressional mandate to treat alien drug offenders harshly. Thus, the Act addressed an important portion of the nation's pervasive illegal drug problem through the deportation of aliens involved in criminal drug activity.[26]

C. The Strict Mandates of the Immigration Act of 1990

Congress further expanded the definition of an aggravated felony[27] in the 1990 Act.[28] Through this measure, Congress significantly enlarged the category of deportable aliens.[29] Under the new definition, any illicit trafficking in any controlled substance as defined in § 102 of the Controlled Substances Act,[30] including any drug trafficking defined in 18 U.S.C. § 924(c)(2),[31] constitutes an aggravated felony. This definition now includes even an attempted violation of these laws by an alien.[32] Moreover, the definition of aggravated felony reaches both Federal and State convictions and is applied retroactively.[33]

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24. *See* 136 CONG. REC. S17,117-18 (daily ed. Oct. 26, 1990). Sen. Graham opined that Congress must act affirmatively, stating that:

> There are thousands of such aliens in our criminal justice system, and countless others who have somehow escaped justice or deportation. . . . [T]he Federal Government must make sure that dangerous aliens are not on the streets, not allowed to commit new crimes and not caught in a lengthy deportation process.

Id. (statement of Sen. Graham). *See* Feldman, *supra* note 21, at 210.

25. Pub. L. No. 101-649, 104 Stat. 4978 (1990) [hereinafter 1990 Act].

26. Richard Prinz, *Deportation for Crime in the Nineties-Who Needs the Aggravation?*, *in* 2 IMMIGRATION AND NATIONALITY LAW HANDBOOK 292, 293 (R. Patrick Murphy ed., AILA 1991) (drug crimes are the largest and most important group of aggravated felony offenses).

27. 1990 Act, *supra* note 25, tit. V (provisions affecting aggravated felonies).

28. 1990 Act § 501 (amending INA § 241(a)(11), 8 U.S.C. § 1101(a)(43) (1988)), *supra* note 25.

29. *Id.*

30. Pub. L. No. 91-513, 84 Stat. 1242 (1970).

31. *See supra* note 15.

32. 1990 Act § 501(a)(5) (amending INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1988)), *supra* note 25.

33. *Id.* (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1988)). This provision applies retroactively to any crime committed subsequent to November 18, 1988, the effective date of the 1988 Drug Act. *Id.* § 501(b) (amending INA § 101(a)(43), 8 U.S.C. § 1101 (a)(43) (1988)).

The 1990 Act also placed significant restrictions on the procedural rights of aggravated felons.[34] Congress reduced the time period within which an alien convicted of an aggravated felony must file a petition for judicial review of a final deportation order from sixty to thirty days.[35] This filing restriction created a serious obstacle for the aggravated felon seeking this type of judicial review.[36] Under the 1990 Act, the filing of a timely petition for review of a final deportation order no longer acts as an automatic stay of deportation proceedings. The federal court must specifically grant the stay.[37] Thus, the alien aggravated felon must file a petition with the Court of Appeals and secure a stay of deportation within thirty days of the entry of a deportation order by the Board of Immigration Appeals. In light of judicial administration delays and busy court calendars, this is a formidable task.

Congress solidified the aim of the 1988 Drug Act by ensuring that the alien aggravated felon is not released prior to the deportation hearing.[38] The 1990 Act completely eliminated "judicial recommendations against deportation."[39] Congress also introduced greater restrictions on discretionary relief available to the aggravated felon.[40] The 1990 Act reflects Congress' view that aliens convicted of aggravated felonies have *per se* committed a "particularly serious crime."[41]

The 1990 Act incorporated several provisions to coordinate

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34. One commentator stated that "attorney[s] must advise the alien that each judge has a *clear mandate* from Congress to rapidly deport aliens convicted of certain crimes." Prinz, *supra* note 26, at 292 (emphasis added).

35. 1990 Act § 502(a) (amending INA § 106(a)(1), 8 U.S.C. § 1152(a)(1) (1988)), *supra* note 25.

36. Failure to timely file a petition will result in dismissal. *See* Amarl v. INS, 977 F.2d 33 (1st Cir. 1992) (aggravated felon failed to file within 30 days). *See generally* Mary L. Sfasciotti, *Representing Aliens in Criminal Cases-Recent Amendments to the Immigration and Naturalization Act*, 79 ILL. B.J. 78, 82 (1991).

37. Sfasciotti, *supra* note 36, at 82.

38. 1990 Act § 504(a) (amending INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (1988)), *supra* note 25. However, aggravated felons who are lawful permanent residents are eligible for consideration of a bond hearing if the Attorney General determines that the alien is not a threat to the community and is likely to appear at future hearings. *Id.*

39. *Id.* § 505 (amending INA § 241(b), 8 U.S.C. § 1251(b) (1988)).

40. Section 511 eliminates the opportunity for a waiver of deportability under INA § 212(c) to those aggravated felons who have served a prison term of at least five years. *Id.* § 511 (amending INA 212(c), 8 U.S.C. 1182(c) (1988)).

41. *Id.* § 515(a)(2) (amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2) (1988)).

the task of expediting the deportation of criminal aliens between the executive and legislative branches. The 1990 Act specifically required the Attorney General to report to Congress on the progress of the INS in implementing the legislative mandates.[42] The same provision also required the Attorney General to submit a plan for the prompt removal of criminal aliens subject to deportation.[43]

The 1990 Act thus codified Congress' view that criminal aliens had too many procedural rights and that these rights should be curtailed.[44] By restricting their procedural rights and expediting deportation proceedings, Congress facilitated the removal of the "alien aggravated felon" from the United States.[45]

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42. 1990 Act § 510(a) states:

> The Attorney General shall submit to the appropriate Committees of the Congress, by not later than December 1, 1991, a report that describes the efforts of the Immigration and Naturalization Service to identify, apprehend, detain, and remove from the United States aliens who have been convicted of crimes in the United States.

Id.

43. 1990 Act § 510(c) provides:

> The Attorney General shall include in the report a plan for the prompt removal from the United States of criminal aliens who are subject to exclusion or deportation. Such plan shall also include a statement of additional funds that would be required to provide for the prompt removal from the United States. . . .

Id.

44. *See* 136 CONG. REC. S17,109 (daily ed. Oct. 26, 1990). Sen. Simpson stated: "The bill restructures our deportation procedures to bring them more in line with our Nation's rules of civil procedure. We were in a situation in deportation where the deportees had more due process than did an American citizen." *Id. See also* 136 CONG. REC. S11,940-41 (daily ed. Aug. 2, 1990) (statement of Sen. D'Amato contending that Congress must eliminate the outrageous claims used by criminal aliens to fight deportation since the system tilts too far in their favor); Feldman, *supra* note 21, at 231.

45. The Statement by President George Bush upon signing the 1990 Act stated:

> S.358 [the Immigration Act of 1990] meets several objectives of my Administration's war on drugs and violent crime. Specifically, it provides for the expeditious deportation of aliens who, by their violent criminal acts, forfeit their right to remain in this country. These offenders, comprising nearly a quarter of our Federal prison population, jeopardize the safety and well-being of every American resident.

Signing Statement, Statement by President of the United States, 26 WEEKLY COMP. PRES. DOC. 1947 (Dec. 3, 1990).

III. WHEN DOES THE DEPORTABLE ALIEN LOSE LAWFUL PERMANENT RESIDENT STATUS? CONFLICT AMONG THE CIRCUITS GROWS

A. The Conflict

The Board of Immigration Appeals ("BIA") is the administrative body producing the final deportation order. The BIA has consistently decided that an alien's lawful permanent residence status is terminated following an administrative final order of deportation.[46] This administrative holding renders the alien statutorily ineligible for the discretionary waiver of deportation under INA § 212(c),[47] which may be the only relief available to the alien.

Direct appeals of final INS deportation orders proceed to the Circuit Courts of Appeal and bypass the federal district courts.[48] However, the outcome may depend upon which circuit

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46. Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991); Matter of Lok, 18 I & N Dec. 101 (BIA 1981), *aff'd on other grounds*, Lok v. INS, 681 F.2d 107 (2nd Cir. 1982).

47. INA § 212(c), 8 U.S.C. § 1182(c) (1988). The relevant section provides in pertinent part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . .

Although § 212(c) by its terms applies only to excludable aliens seeking admissions to the United States, the BIA has held, following the Second Circuit's decision in Francis v. INS, 532 F.2d 268 (2nd Cir. 1976), that § 212(c) relief is available in deportation proceedings notwithstanding the fact that the respondent had not departed from this country since the act or event that rendered him excludable or deportable. Matter of Lok, 18 I & N Dec. 101 (BIA 1981); Matter of Silva, 16 I & N Dec. 26 (BIA 1976). *See also* Tapia-Acuna v. INS, 640 F.2d 223, 225 (9th Cir. 1981).

In *Tapia-Acuna*, aliens who had *not* left the country and were seeking discretionary relief from deportation argued they were denied equal protection and due process when compared to aliens who had left the country and therefore could resort to § 212(c). The Ninth Circuit agreed and held that "eligibility for § 212(c) relief cannot constitutionally be denied to an otherwise eligible alien who is deportable under § 1251(a)(11), whether or not the alien has departed from and returned to the United States." *Id.*

48. *See supra* notes 6-7 for explanation of the judicial review process of final administrative decisions.

court has jurisdiction in the matter. The Third[49] and Fifth[50] Circuits have supported the BIA's interpretation of § 212(c). The First,[51] Second,[52] Seventh[53] and Ninth[54] Circuits have reversed the BIA's interpretation and finding of statutory ineligibility for § 212(c) discretionary relief.[55]

The facts and procedural posture in all of the relevant cases[56] are quite similar. In *Henry v. INS*,[57] a final administrative order of deportation for Henry resulted from a state narcotics conviction for possession of cocaine with intent to distribute.[58] Henry moved to reopen previously denied applications for discretionary relief from deportation under § 212(c) pursuant to 8 C.F.R. § 3.2.[59] The BIA denied the motion to reopen on the ground that Henry could no longer satisfy the lawful permanent

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49. Katsis v. INS, 997 F.2d 1067 (3rd Cir. 1993).

50. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992).

51. Goncalves v. INS, 6 F.3d 830 (1st Cir. 1993).

52. Vargas v. INS, 938 F.2d 358 (2nd Cir. 1991).

53. Henry v. INS, 8 F.3d 426 (7th Cir. 1993).

54. Butros v. INS, 990 F.2d 1142 (9th Cir. 1993).

55. At the time this article was prepared, only the circuits mentioned have rendered decisions of import on the issue of precisely when the deportable alien loses lawful permanent resident status.

56. *See supra* notes 49-54.

57. 8 F.3d 426 (7th Cir. 1993).

58. *Id.* at 429-30. For the definition of "aggravated felony" resulting from drug trafficking crimes as grounds for deportability, see *supra* notes 15-16 and accompanying text.

59. Henry v. INS, 8 F.3d at 430. That regulation, which permits an alien to file a motion to reopen or reconsider any decision of the Board, provides in part as follows:

> The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of deportation proceedings subsequent to his departure to the United States. . . .

8 C.F.R. § 3.2 (1993).

resident requirement for § 212(c) relief after entry of a final deportation order.[60] The Seventh Circuit rejected this result and held that the BIA's position was an unreasonable interpretation of the INA. The Seventh Circuit further held that Henry remained eligible to reopen his § 212(c) application even after he became subject to a final deportation order.[61]

B. The Position of the Immigration & Naturalization Service

A principal mission of the BIA is to "[e]nsure as uniform an interpretation and application of this country's immigration laws as is possible."[62] In *Matter of Lok*[63] the BIA established a carefully reasoned point in time at which an alien subject to deportation becomes statutorily ineligible for a discretionary waiver of deportation. The crucial point to be determined is when, during deportation proceedings, an alien's lawful permanent resident status terminates.[64] The BIA concluded that:

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60. Henry v. INS, 8 F.3d 426, 430 (7th Cir. 1993).

61. *Id.* at 433.

62. Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991). In the appendix of the opinion the Court stated:

> The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue. Here, however, we are left with a patchwork application of the law - with the most profound decisions affecting aliens (all of whom in this context have been lawful permanent residents of the United States) tied to the mere happenstance of where their cases arise geographically.

Id.

63. Matter of Lok, 18 I & N Dec. 101 (BIA 1981), *aff'd on other grounds*, Lok v. INS, 681 F.2d 107 (2nd Cir. 1982).

64. *Id.* The Board provided:

> We have carefully examined the various stages within the deportation process at which the status of an alien "lawfully admitted for permanent residence" may be considered to have changed within the meaning of section 101(a)(20) of the Act: (1) upon the immigration judge's initial determination of deportability, (2) when the immigration judge's order becomes administratively final, (3) when a United States Court of Appeals acts upon petition for review of the Board's order or the time allowed for filing such petition expires, or (4) only upon the execution of the deportation order by the alien's departure, voluntary or enforced, from this country.

Id.

> the policies of the [INA] would best be served by deeming the lawful permanent resident status of an alien to end with the entry of a final administrative order of deportation - generally, when the Board renders its decision in the case upon appeal or certification or, where no appeal to the Board is taken, when appeal is waived or the time allotted for appeal has expired.[65]

The BIA reached this result by interpreting "lawfully admitted for permanent residence"[66] as having changed once an administrative final order of deportation is entered.[67] The BIA reasoned that this result presented no unfair or prejudicial circumstances to the alien's effort to obtain discretionary relief.[68]

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65. *Id.* at 105. The Court reached this larger issue through the question of whether the alien's "lawful domicile" came to an end with the Immigration Judge's (IJ) finding of deportability. The BIA framed the precise legal issue as whether the alien's status as "lawfully admitted for permanent residence" was then terminated. *Id.*

66. The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed.* INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1988) (emphasis added).

67. Matter of Lok, 18 I & N Dec. 101, 105 (BIA 1981), *aff'd on other grounds*, Lok v. INS 681 F.2d 107 (2nd Cir. 1982). The BIA further held:

> [b]arring a reversal on the merits of that deportability finding by an appellate court or administratively upon a motion for reopening or reconsideration, the alien could not thereafter establish eligibility as a lawful permanent resident for section 212(c) relief nor could his domicile in this country from then on be considered lawful.

Id. at 105-06. The BIA found it inherently incongruous that an alien under a final order of deportation could remain a lawful permanent resident. *Id.* at 106. It further concluded:

> [L]awful permanent resident status ought not be considered to continue beyond the entry of a final administrative order of deportation through the judicial appellate process. Authority to adjudicate an alien's deportability is vested primarily in the Attorney General and his delegates, the immigration judge and the Board. Where an administrative appeal has been taken, the alien is entitled to seek review of an adverse decision of the Board in the United States Circuit Courts of Appeals pursuant to the provisions of section 106 of the Act, 8 U.S.C. 1105(a)(4). To hold that an alien under a final administrative order of deportation remains a lawful permanent resident throughout the judicial proceedings would encourage spurious appeals to the courts, made solely for the purpose of accumulating more time toward eligibility for section 212(c) relief. The termination of lawful permanent resident status upon the entry of a final administrative order of deportation, on the other hand, would result in no ultimate prejudice to the alien.

Id. at 107.

68. *Id.* at 107. The Board stated that "[i]n those relatively rare instances where

In *Matter of Lok*, the BIA set a uniform standard in its determination of an alien's eligibility for § 212(c) relief.[69]

The BIA recently stood firmly behind its position, despite adverse decisions in certain circuits.[70] The BIA explicitly stated that it will not follow any holding to the contrary outside the jurisdiction of the circuit which renders an adverse decision.[71] The BIA also reiterated its harsh treatment of aliens convicted of drug-related crimes.[72] Thus, the BIA is currently at odds with four of the Circuit Courts of Appeal[73] over its determination of when an aggravated felon's statutory eligibility for discretionary relief under § 212(c) terminates.

IV. THE SOURCES OF CONFLICT

A. The Different Standards of Review Applicable to Decisions by the Board of Immigration Appeals

1. Variations in the Standard of Review

The standard of review to be applied by the circuit courts to a BIA decision of statutory ineligibility for § 212(c) discretionary relief is of crucial importance. The standard of review varies

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the [circuit] court determines that the Board erred, as a matter of fact or law, with respect to its deportability finding, reversal of the Board's order of deportation nullifies the order and restores the alien's lawful permanent resident status. *Id.*

69. *Id.* at 107. The BIA stated that it had never before directly addressed the specific issue at hand in Matter of Lok, but to the extent any conflict with prior Board decisions exists, its decision in Matter of Lok supersedes its previous decisions. *Id.* Furthermore, the precedent decisions of the BIA are binding nationwide. 8 C.F.R. § 3.1(g) (1992).

70. Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991) ("For reasons we articulated in Matter of Lok . . . we concluded that the most appropriate rule was that an alien's status as a lawful permanent resident ends with an administratively final order of deportation . . . ").

71. *Id.* The Board stated that authority from one circuit is not binding in another, and it declines to follow adverse holdings outside of the circuit's jurisdiction. *Id.*

72. *Id.* at 8-9. The Board stated "[t]he respondent can have been under no illusion of the seriousness with which drug trafficking is viewed. While drug trafficking crimes of this nature are not unique in the gravity with which we view them, there are few adverse matters we view as more serious. . . . The responsibility for the hardships and difficulties that this respondent and his family may face rest squarely on the respondent's shoulders." *Id.*

73. *See supra* notes 51-54 and accompanying text.

substantially among circuits. The Ninth Circuit labeled the question "purely legal," calling for *de novo* review of the Board's decisions.[74] The Second Circuit conducted only a "limited review."[75] The Fifth Circuit employed a more deferential standard, reviewing only for an abuse of discretion.[76] The Third Circuit applied an even more deferential standard in its review, respecting the agency's interpretation unless "manifestly contrary to the statute."[77]

The decisions at the circuit level are clearly affected by the standard of review applied. For example, many commentators and practitioners have stated that the Ninth Circuit, which employs *de novo* review of BIA decisions in these cases, is significantly more sympathetic to the claims of aliens than any other circuit.[78] Indeed, the results of certain circuit court opinions

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74. Butros v. INS, 990 F.2d 1142, 1144 (9th Cir. 1993) ("We review de novo the Board's determination of purely legal questions regarding the requirements of the Immigration and Nationality Act. Interpretation of the language 'such status not having changed,' found in the definition of lawful permanent residence, 8 U.S.C. § 1101(a)(20) (1988), is a purely legal question."). *Id.*

75. Vargas v. INS, 938 F.2d 358, 360 (2nd Cir. 1991) ("We seek only to determine whether the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. . . . In doing so, we must consider the statement of reasons justifying the decision to determine whether the path which the agency followed can be discerned, and whether the decision was reached 'for an impermissible reason or no reason at all.' "). *Id.*

76. Ghassan v. INS, 972 F.2d 631, 634 (5th Cir. 1992) ("The Board's denial of an applicant's petition for relief under section 212(c) is reviewed for an abuse of discretion. Such denial will be upheld unless it is arbitrary, irrational or contrary to law."). *Id.* In that review, the court gave "great weight to the agency's interpretation of its own regulations," but was nonetheless prepared to discount any interpretation that was "plainly unreasonable." *Id.* at 637. In another decision the Fifth Circuit stated that it must give "great deference" to the BIA's interpretation of the INA. Rivera v. INS, 810 F.2d 540, 540 (5th Cir. 1987). The court further noted that the BIA, in contrast, has the power of de novo review of an immigration judge's decision. *Id.* at 541.

77. Katsis v. INS, 997 F.2d 1067, 1070 (3rd Cir. 1993). Relying on the Supreme Court's opinion in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) the Third Circuit explained:

> [C]ourts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program, INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987), unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 844, 104 S.Ct. at 2782.

Id. at 1070. *See also* Butros v. INS, 990 F.2d at 1149 (Trott, J., dissenting).

78. Peter H. Schuck and Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115, 120 (1992). For instance, Schuck and Hsien Wang correctly perceive the Ninth Circuit as being more protective of alien rights than the other circuits. *Id.* at 119. Aliens in

have frequently been contrary to Supreme Court decisions on the proper standard of review to be applied to agency interpretations.[79]

2. The Supreme Court Decisions

The Supreme Court views the authority of Congress to legislate in the field of immigration as a function of the sovereign nature of government, allowing little or no judicial interference.[80] Judicial review of immigration cases, however, has expanded on a procedural level through the interpretation of statutes, regulations, or other forms of non-substantive immigration law.[81]

Several prominent Supreme Court decisions address the scope of judicial review of agency statutory procedures and interpretation. In *Udall v. Tallman*,[82] the Supreme Court established a standard requiring the federal judiciary to show great deference to the interpretation of both statutes and regulations

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deportation or exclusion proceedings often seek, and are granted, changes of venue to California. *Id. See also* Sana Loue, *Alien Rights and Governmental Authority: An Examination of the Conflicting Views of the Ninth Circuit Court of Appeals and the United States Supreme Court*, 22 SAN DIEGO L. REV. 1021 (1985). Loue stated: "[w]ithin the last ten years, the United States Court of Appeals for the Ninth Circuit has adjudicated issues of major import in the area of immigration and nationality law. The United States Supreme Court has reversed the majority of these holdings, often reiterating holdings from other circuits." *Id.* at 1021.

79. *See* Loue, *supra* note 78, at 1021.

80. *See supra* notes 9-10 and accompanying text. This view can be observed in a plethora of Supreme Court opinions. *See, e.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). *Id.* at 210; Harisiades v. Shaughnessy, 342 U.S. 580 (1952) ("Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose."). *Id.* at 586-87; Fong Yue Ting v. United States, 149 U.S. 698 (1893) (the plenary power doctrine barred judicial review of deportation of aliens in the United States). *See also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); *See generally* Loue, *supra* note 78.

81. *See* Motomura, *supra* note 80 at 560-61.

82. 85 S.Ct. 792 (1965).

by the officers or agency charged with their administration.[83] Thereafter, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[84] the Supreme Court reconfirmed this standard and endorsed substantial deference to agency statutory interpretation. In *Chevron,* the Supreme Court held that, absent discernible expression of congressional intent, judges may decide only whether the agency's view is reasonable, not whether it is "appropriate."[85]

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.[86] The BIA's interpre-

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83. *Id.* at 801. The court explained in detail the standard of review to be applied to agency interpretation:

> To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the decision arisen in the first instance in judicial proceedings. Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction if the meaning of the words used is in doubt. [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Id.

84. 104 S.Ct. 2778 (1984).

85. *Id.* at 2781-83. The decision provided in part:

> [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency. We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'

Id. at 2782-83. *See also* INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981); Morton v. Ruiz, 415 U.S. 199, 231 (1974). *Cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987) (Courts should not defer to agency interpretations on pure questions of law but only on mixed questions of law and fact).

86. Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 104 S.Ct. at

tations of its statutes and regulations, however, are both well-reasoned and in accord with congressional intent.[87] A danger does exist when judges defer to agencies. They risk deferring to interpretations which likely reflect only the contemporary legal culture, even if at an unspoken level.[88]

One commentator predicts that the *Chevron* rule of substantial deference to agency interpretations is likely to result in sustaining determinations that reflect current policy concerns more than they reflect legislative intent.[89] On the issue of statutory eligibility for § 212(c) discretionary relief, however, contemporary legal culture advocating expedited deportation proceedings for aggravated felons is in accord with the original intent of recent legislation.[90]

B. The Board of Immigration Appeals' Discretion to Reopen Proceedings

The divergent circuit court opinions turn on the interpreta-

2781 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). *Id. See also* FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981).

87. For a discussion of the BIA's interpretations of the relevant statutes and regulations, see *supra* notes 62-73 and accompanying text. For a discussion of recent legislation and congressional intent, see *supra* notes 12-47 and accompanying text.

88. *See* Motomura, *supra* note 80, at 562-63. Another commentator has further described the situation in the § 212(c) context as follows:

> Nowhere is it more difficult to obtain discretionary relief from an Immigration Judge than with respect to an aggravated felon. Clearly expressed statutory, Congressional, and executive policy favor the prompt removal of such criminal aliens from the United States. Immigration Judges are invariably law-abiding and enforcement-oriented individuals who feel a personal commitment to implement stated national policy objectives. The burden of proof is clearly upon the respondent in applying for discretionary relief, and the initial attitude of many Immigration Judges may be to give a respondent his 'day in court' and *and then order him deported.*

Martin L. Rothstein, *Practicality of Obtaining Discretionary Relief from Deportation in Aggravated Felony Cases*, *in* 2 IMMIGRATION & NATIONALITY LAW HANDBOOK 302, 303-04 (R. Patrick Murphy ed., 1991) (emphasis in original).

89. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 42-46(1988).

90. For discussion of findings regarding illegal drug activity among aliens and the congressional legislation enacted to address this situation through the expedited deportation of the criminal alien, see *supra* notes 12-47 and accompanying text.

tion of 8 C.F.R. § 3.2[91] and its application to INA § 212(c).[92] There is no statutory provision for a motion to reopen deportation proceedings. The authority for such a motion derives solely from regulations promulgated by the Attorney General.[93] Thus, the granting of a motion to reopen is discretionary and the Attorney General has "broad discretion" to grant or deny such motions.[94]

Furthermore, the Supreme Court has defined 8 C.F.R. § 3.2 as "couched solely in negative terms."[95] The regulation promulgated by the Attorney General requires that under certain circumstances a motion to reopen be denied, but it does not specify the conditions under which it shall be granted.[96] Given the executive grant of discretion, the Supreme Court declared the abuse of discretion standard of review to be proper in these cases.[97] The Ninth Circuit, however, has continued to apply *de*

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91. *See supra* note 59 for the text of the regulation.

92. *See supra* note 47 for the text of the statutory provision.

93. Congress granted the Attorney General ultimate authority in deportation matters, including authority to promulgate regulations, as evidenced by the language of the INA, which states in pertinent part:

> The Attorney General shall be charged with the administration and enforcement [of the Act] . . . shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of [the Act].

8 U.S.C. § 1103(a) (1988). *See also* INS v. Rios-Pineda, 471 U.S. 444, 446 (1985) ("Although Congress did not provide a statutory mechanism for reopening suspension proceedings once suspension has been denied, the Attorney General has promulgated regulations under the Act allowing for such a procedure. 8 CFR § 3.2 (1985).").

94. INS v. Doherty, 112 S.Ct. 719, 724 (1992); INS v. Rios-Pineda, 471 U.S. 444, 449 (1985); INS v. Phinpathya, 464 U.S. 183, 188 (1984).

95. INS v. Doherty, 112 S.Ct. at 724. *See* INS v. Jong Ha Wang, 450 U.S. 139, 143 (1981) where the Supreme Court stated:

> [section 3.2] is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition. Thus, the regulations may be construed to provide the Board with discretion in determining under what circumstances proceedings should be reopened.

Id.

96. INS v. Doherty, 112 S.Ct. at 724. The Supreme Court has indicated on several occasions that granting a motion to reopen is a discretionary matter with the BIA. *See* INS v. Rios-Pineda, 471 U.S. 444, 449 (1984); INS v Phinpathya, 464 U.S. 183, 188, n.6 (1984).

97. INS v. Doherty, 112 S.Ct. at 725. The Court stated that when a denial of a motion to reopen is based on a failure to prove a *prima facie* case for the relief sought or as a failure to introduce previously unavailable, material evidence, abuse of discretion is the correct standard of review. *Id. See also* INS v. Abudu, 485 U.S. 94, 105 (1987) (the court also stated that it is the proper standard regardless of the

novo review.[98] The Supreme Court addressed this concern and pronounced that "[i]n this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review."[99]

The Supreme Court determined three independent grounds on which the BIA may deny a motion to reopen proceedings.[100] The relevant ground here is the petitioner's failure to establish a *prima facie* case for the underlying relief sought. Once the BIA enters an administrative final order of deportation, the criminal alien should no longer be able to establish *prima facie* eligibility for the relief sought under § 212(c), because he or she is no longer a lawful permanent resident of this country.[101]

Moreover, the Supreme Court decisions are in accord with congressional policy concerning expedited deportation proceedings for criminal aliens. The Supreme Court has repeatedly stated that "[m]otions for reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence."[102] This is especially true in a deportation proceeding

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underlying basis of the alien's request for relief). *Id.* at 99.

98. Butros v. INS, 990 F.2d 1142, 1144 (1993).

99. INS v. Rios-Pineda, 471 U.S. 444. 452 (1985) (emphasis in original). *See* INS v. Phinpathya, 464 U.S. 183, 195-96 (1984); INS v. Jong Ha Wang, 450 U.S. 139, 144-454 (1981). For Justice Trott's powerful dissent in Butros v. INS, 990 F.2d 1142, 1147 (1993), see also *infra* notes 157-160 and accompanying text.

100. INS v. Abudu, 485 U.S. 94, 104-05 (1987). The Court set out three independent grounds:

> First it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. . . . Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence . . . , or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially . . . .

Id.

Only the first ground, however, is pertinent for present purposes. As stated by INS v. Doherty, 112 S.Ct. 719 (1992), the proper standard of review in cases of failure to prove a *prima facie* case for the relief sought is abuse of discretion. *Id.* at 725.

101. Of course, this depends upon which jurisdiction the alien applying to reopen a § 212(c) application pursuant to 8 C.F.R. § 3.2 is in. The Third and Fifth Circuits uphold the BIA's interpretation of *prima facie* ineligibility due to loss of lawful permanent residence. On the other hand, the First, Second, Seventh, and Ninth Circuits do permit motions to reopen § 212(c) proceedings even after entry of a final deportation order. *See infra* notes 118-157 and accompanying text.

102. INS v. Doherty, 112 S.Ct. at 724. The Court elaborated on the current and

where, as a general matter, every delay works to the advantage of the deportable alien who undoubtedly wishes to remain in the United States.[103]

Ironically, the two most recent cases to this conflict, decided in the Third[104] and Seventh[105] Circuits, applied a standard of review based on the standard set forth in *Chevron*,[106] but they reached opposite results. *Chevron* declared that a "court may not

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prior decisions:

> The reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases.

INS v. Abudu, 485 U.S. 94, 107 (1987). This language takes on greater significance when placed against another prominent Supreme Court decision which provided:

> If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case. It will also waste the time and efforts of immigration judges called upon to preside at hearings automatically required by the prima facie allegations.

INS v. Jong Ha Wang, 450 U.S. 139, 143, n.5 (1981).

103. INS v. Doherty, 112 S.Ct. at 724-25. *See* INS v. Rios-Pineda, 471 U.S. 444, 450 (1984) ("The purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in hope of eventually satisfying legal prerequisites."). *Id.* In Katsis v. INS, 997 F.2d 1067 (1993), the Third Circuit applied this rationale in its review of the BIA's interpretation of INA §§ 101(a)(20) and 212(c) and its application to 8 C.F.R. § 3.2:

> As a consequence, the Board's standard (1) discourages unnecessary litigation and promotes finality; (2) reduces both Board and circuit court exposure to multiple, piecemeal requests for consideration of one kind or another; and (3) reduces the incentive to file meritless petitions for review in the circuit courts, which lessens the burdens on these courts, just to buy the alien more time to create after-the-fact evidence of equities.

Id. at 1074. *See also* Butros v. INS, 990 F.2d 1142, 1150 (1993) (Trott, J., dissenting). For clear evidence of congressional concern with aggressively pursuing expedited deportation proceedings for criminal aliens, see *supra* notes 12-47 and accompanying text.

104. Katsis v. INS, 997 F.2d 1067, 1069 (3rd Cir. 1993). This case was decided on July 6, 1993. The case cited *Chevron* as the leading Supreme Court decision upon which the Court relied in setting its standard of review. *Id.*

105. Henry v. INS, 8 F.3d 426, 434 (7th Cir. 1993). This case was decided on October 15, 1993. This Circuit also relied on *Chevron* for the proposition that the Board's interpretation is entitled to deference and will be upheld if reasonable. *Id.*

106. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 104 S.Ct. 2778 (1984). *See supra* note 85 for the relevant language in the decision.

substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[107] *Chevron* further pronounced that administrative regulations are to be given controlling weight unless they are "arbitrary, capricious, or manifestly contrary to statute."[108] The Second and Seventh Circuits held the BIA's denial of a motion to reopen, following a final deportation order, to be arbitrary and capricious. They reasoned that this denial effectively amends an existing regulation without notice or opportunity for comment.[109]

The Seventh Circuit agreed with the Second Circuit that a motion to reopen merely revives the earlier § 212(c) application and does not constitute an entirely new request for discretionary relief.[110] Thus, the Seventh Circuit held the BIA's position to be strained and unreasonable.[111] The most recent Seventh Circuit decision reiterated the Second Circuit's opinion that the BIA's interpretation in fact amounts to an "amendment of the regulation [8 C.F.R. § 3.2] without benefit of notice and the opportunity for public comment."[112] The Second Circuit further believed that the BIA's application of the *Lok*[113] rule has been

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107. *Id.* at 2782.

108. *Id.*

109. Henry v. INS, 8 F.3d 426, 439 (7th Cir. 1993); Vargas v. INS, 938 F.2d 358, 361 (2nd Cir. 1991). See *infra* note 146 explaining that the BIA's interpretation effectively amends 8 C.F.R. § 3.2 as the second and seventh circuits hold that the regulation bars motions to reopen or reconsider only upon physical deportation. Thus, this supports their conclusion that the decision is arbitrary and capricious.

110. The Seventh Circuit distinguished the position taken by the BIA concerning motions to reopen. Its analysis diverges from the BIA's conclusion that a motion to reopen, unlike a motion to reconsider, constitutes a new, unrelated application for § 212(c) relief. *See infra* note 116. The Seventh Circuit finds the distinction drawn by the BIA to be somewhat artificial. Henry v. INS, 8 F.3d at 438. The Court reasoned that even though a motion to reopen contemplates the consideration of additional evidence, this does not make it a different application that must be adjudicated on a different factual record. "Rather, the underlying application presumably remains the same, as does the factual record; they are simply supplemented with the new evidence. It is inconceivable that the Board would commence an entirely new proceeding with no reference to the earlier application. We therefore agree with *Vargas* that a motion to reopen merely revives the earlier § 212(c) application and does not constitute an entirely new request for discretionary relief." *Id. But see* Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991).

111. Henry v. INS, 8 F.3d at 438. *But see* Katsis v. INS, 997 F.2d 1067, 1076 (3rd Cir. 1993) (holding the position of the BIA to be reasonable and permissible).

112. Henry v. INS, 8 F.3d at 439.

113. *See supra* notes 62-73 and accompanying text for discussion of the position of the INS.

inconsistent and erratic.[114] The Second Circuit stated that a "motion to reopen or to reconsider is not a request for a new decision. Rather, it permits a decisionmaker to reevaluate the original decision."[115]

This is erroneous, however, because the BIA has consistently applied the *Lok* rule in denying motions to reopen where *prima facie* statutory eligibility has been terminated due to an administrative final order of deportation.[116] Indeed, the Su-

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114. Vargas v. INS, 938 F.2d at 362.

115. *Id.* The Second Circuit found the logic of the BIA decision to be puzzling. "Such motions are typically permitted because they assist the decisionmaker in correctly resolving the litigant's claim on the merits. Naturally, 'this policy must be balanced against the desire to achieve finality in litigation.'" *Id.* In this particular case, however, the BIA did not rest on considerations of finality in refusing to hear petitioner's motion. Rather, the BIA dismissed the motion as if it were a new request for § 212(c) relief; the petitioner was deemed ineligible because he was already finally deportable and no longer a permanent resident. *Id. See also* Rivera v. INS, 810 F.2d 540, 543 (5th Cir. 1987), *reh'g denied*, 816 F.2d 677 (1987). (Williams, J. dissenting) ("This is precisely as if a court on petition for rehearing denied it not on the merits but on the ground that the petitioner no longer had the right to petition for a rehearing jurisdictionally because he had lost the original decision in court. Lawbooks will be searched in vain for any justification for this remarkable conclusion.").

116. Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991). The BIA in *Cerna* declared "the regulations certainly do not create an express right to have proceedings considered for reopening in order to further pursue applications for relief under section 212(c) of the act." *Id.* The Board in *Cerna* continued: "[m]oreover, the controlling regulations are not 'effectively amended' in this context - or in any other - by the application of the rule that a motion to reopen deportation proceedings to apply for relief will be denied in the absence of a showing of prima facie eligibility for the relief in question." *Id.* The Board also draws a significant distinction between a motion to reopen and a motion to reconsider.

The Board stated at length:

> We have never held that a respondent who has been denied relief under section 212(c) is precluded from having the original decision *reconsidered.* A motion to reconsider asserts that at the time of the Board's previous decision an error was made . . . . The very nature of a motion to reconsider is that the original decision was defective in some regard. A motion to reopen proceedings, however, is a fundamentally different motion. . . . Rather, a motion to reopen proceedings seeks to reopen proceedings so that new evidence can be presented, and so that a new decision can be entered, normally after a further evidentiary hearing. We find nothing either inconsistent or illogical in holding that a respondent can move for reconsideration of a decision, which was entered while he was a lawful permanent resident and which denied relief under section 212(c), based on an argument that that decision was incorrectly entered, while a respondent who has lost his status as a lawful permanent resident cannot thereafter successfully move to reopen proceedings to have a different application for relief under section 212(c) adjudicated on a different factual record. Rather, we would find it inconsistent to conclude that an alien

preme Court explicitly stated that the BIA has authority to deny a motion to reopen a deportation proceeding based on the failure of the movant to establish a *prima facie* case for the underlying substantive relief.[117]

The BIA has not implicitly amended its regulations or applied its decisions in an erratic manner as the Second and Seventh Circuits believe.[118] The BIA drew an extremely significant distinction between a motion to reopen and a motion to reconsider which has been overlooked by these two circuits.[119] Consistently, the Board has refused a motion to reopen only where the movant fails to establish a *prima facie* case of statutory eligibility.[120]

The discussion which follows analyzes the circuit court decisions and argues that the minority circuits are correct in their support of the BIA's interpretation. The BIA is correct because it applies the proper standard of review. It also acts within its discretion in determining whether or not to grant a motion to reopen. Consequently, the BIA leads the INS in its statutory mission of deporting criminal aliens from the United States.

V. ANALYSIS OF THE CONFLICTING CIRCUIT COURT DECISIONS

A. The Minority Circuits: The Third and Fifth

The Fifth Circuit was the first to address the issue of when a deportable alien's status as a lawful permanent resident

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who is no longer a lawful permanent resident of the United States could have proceedings reopened to apply for relief only available to lawful permanent residents.

Id.

117. INS v. Abudu, 485 U.S. 94, 104 (1987).

118. *See infra* note 146.

119. *See supra* note 116. The motion to reopen is, at base, a request to alter an earlier decision. Attorneys sometimes confuse a motion to reopen as a motion to reconsider. However, they are separate types of motions, with key differences in purpose and form. The motion to reconsider "is a request that the Board reexamine its decision in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked, while the motion to reopen is usually based upon new evidence or a change in factual circumstances." Gerald S. Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 SAN DIEGO L. REV. 79, 81, 89-90 (1982).

120. Hurwitz, *supra* note 119 at 85. "The motion to reopen must present evidence which comprises a prima facie case for reopening as a matter of law." *Id.*

terminates.[121] Its opinion in *Rivera v. INS* applied the standard of review mandated by the Supreme Court on the issue of judicial review of agency interpretation.[122] The Fifth Circuit upheld the BIA's carefully reasoned finding of statutory ineligibility based on an administrative final order of deportation.[123] Moreover, the decision coincided with growing congressional policies mandating expeditious deportation proceedings for the criminal alien.[124]

The Fifth Circuit reaffirmed its holding in *Rivera* five years later, when it once again addressed the issue of statutory eligibility for § 212(c) relief.[125] In *Ghassan v. INS*, the respondent

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121. Rivera v. INS, 810 F.2d 540 (5th Cir. 1987), *vacating on reh'g* 791 F.2d 1202 (5th Cir. 1986). The court defined the narrow issue for decision as: "[w]hether [Rivera] was a lawful permanent resident of this country . . . when he sought section 212(c) relief. The answer to this question depends upon when, following the immigration judge's order that Rivera be deported, Rivera's status changed so that he was no longer a lawful resident of the United States." *Id.*

122. *Id.* at 540. For a discussion of the Supreme Court cases which set the standard for review of agency interpretation of its own statutes and regulations, see *supra* notes 82-86 and accompanying text.

123. The court upheld the BIA's interpretation finding Rivera to be statutorily ineligible for § 212(c) relief based upon the Board's well-reasoned opinion in Matter of Lok, 18 I & N Dec. 101 (BIA 1981), *aff'd on other grounds*, Lok v. INS, 681 F.2d 107 (2nd Cir. 1982). The court stated "[t]he Lok opinion, which the Board followed in the instant case, reflects careful consideration of the solution to the problem of when lawful residence in this country should terminate. We find nothing unreasonable about the BIA's rationale or its conclusion. Moreover, we see nothing unfair about terminating lawful resident status after an adverse decision by the initial factfinder and an affirmance by the BIA following *de novo* review." Rivera v. INS, 810 F.2d at 541 (emphasis in original).

124. Rivera v. INS, 810 F.2d at 542. The Court concluded: "[i]n sum, the conclusion of the BIA as to when the alien's lawful resident status terminates is a sensible one. It gives the alien ample time to assert his claim for §212(c) relief and prevents him from litigating his various claims in a piecemeal fashion." *Id.* The court further provided that "[r]equiring the alien to assert his claim for discretionary relief from deportation while his deportation order is on appeal to the Board permits the Board to consider both claims together; this in turn prevents the alien from stringing out his claims and delaying the ultimate disposition of his case." *Id.* at 541. If it were otherwise, the alien would be encouraged "to wait until after he appeals the deportation order to the court of appeals before filing his petition for section 212(c) relief. This would require the immigration judge and the BIA to again review the alien's case to rule on the claim for §212(c) relief. Such a rule would allow the alien to string out his claims, unnecessarily increase the Board's work load and delay the ultimate disposition of the case." *Id.* at 542. *See supra* notes 12-13 for an overview of the relevant legislation at the time this case was decided which commenced the congressional policy of expedited deportation proceedings.

125. Ghassan v. INS, 972 F.2d 631, 637-38 (5th Cir. 1992). (The Court reiterated that "[u]nder *Rivera* an alien's lawful status ends when the BIA rules him deportable. . . . Thus, after the BIA decides that an alien is deportable, he is no longer a

was convicted of conspiracy to import and distribute heroin and thus became deportable.[126] Ghassan moved to reconsider or reopen the deportation proceedings for § 212(c) relief after the BIA entered an administrative final order of deportation.[127] The BIA denied the motion because Ghassan was rendered statutorily ineligible for § 212(c) relief by the final deportation order.[128] Due in part to its deferential standard of review, the Fifth Circuit once again upheld the BIA's interpretation, finding lawful permanent residence to have terminated with the final order of deportation.

Strong policy considerations play an important role in these decisions regarding the fate of criminal aliens convicted of drug offenses.[129] Congress declared that an alien convicted of an aggravated felony shall be considered to have committed a "particularly serious crime"[130] so as to prevent the granting of politi-

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legal resident and thus is not eligible for section 212(c) relief, so his petition for reopening must be rejected."). *Id.* This may appear rather drastic and helps explain the split in the circuits over this outcome. The Fifth Circuit has consistently upheld the BIA's practice of denying motions to reopen proceedings under § 212(c) once a final administrative order of deportation has been issued. *See* Garcia-Hernandez v. INS, 821 F.2d 222, 224 (5th Cir. 1987). The reasoning is based on a lack of authority to reopen. That is, when the § 212(c) claim was defeated finally by denial in appeal to the circuit court and the determination of deportability had also become final before that time, there was no longer any authority to reopen because the petitioner clearly was no longer a lawful permanent resident. Ghassan v. INS, 972 F.2d at 637. *But see* Vargas v. INS, 938 F.2d 358 (2nd Cir. 1991), which finds this rule to be arbitrary and capricious because it "bars a motion to reopen or reconsider a decision under § 212(c) not on the grounds of physical deportation, but because the BIA's order is 'administratively final.' The decision thus prevents a large group of aliens (those subject to orders of deportability issued by the BIA) from making the very motions to reconsider or reopen contemplated by 8 C.F.R. § 3.2." *Id.* at 362. However, the Second Circuit in this decision explicitly states that it does not hold that this argument alone would justify vacatur. *Id.* For the Supreme Court decisions interpreting motions to reopen and 8 C.F.R. § 3.2, see *supra* part IV.C.

126. Ghassan v. INS, 972 F.2d at 633.

127. *Id.*

128. *Id.* at 637.

129. The Supreme Court has repeatedly acknowledged the severity of societal problems stemming from the importation of illegal drugs. *See e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (drug smuggling is "one of the greatest problems affecting the health and welfare of our population"); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (citing a "veritable national crisis in law enforcement caused by smuggling of illicit narcotics"). Furthermore, the Fifth Circuit has upheld the distinction between narcotics offenders and other offenders as reasonable. Anetekhai v. INS, 876 F.2d 1218, 1224 (5th Cir. 1989). *See also* Matter of Cerna, BIA Int. Dec. 3161 (Oct. 7, 1991) (BIA stated that there are few adverse matters which the BIA views as more serious than the illegal importation of drugs).

130. 1990 Act § 515(a)(2) (amending INA § 243(h)(2), 8 U.S.C. § 1253(h)(2)

cal asylum or the withholding of deportation. This ineligibility applies even where the alien has a "well-founded fear of persecution" if returned to his country of origin.[131] Similarly, the Fifth Circuit labeled the crime of conspiracy to smuggle heroin to be "extremely serious."[132] Such factors are important in a circuit court's review for abuse of discretion. As the opinion in *Ghassan* concluded:

> Nevertheless, in light of the well established public policy against drug trafficking, we cannot say that the BIA abused its discretion in mandating Ghassan's deportation. As the importation of illegal narcotics continues to pose a grave menace to society, those involved with the drug trade can expect to find that they inevitably hurt those they care for as well as those upon whom they prey.[133]

In *Katsis*, the Third Circuit also reviewed the BIA's interpretation based on the deferential standard prescribed by the Supreme Court.[134] The facts and procedural background of this case are typical of the cases involved in the conflict. Katsis was convicted of a controlled substance violation.[135] Due to this drug conviction, the INS commenced deportation proceedings under the statutory provision requiring the deportation of aliens

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(1988)), *supra* note 25.

131. 8 U.S.C. § 1158. 8 C.F.R. § 208.14(c) is the mandatory denial of asylum regulation. Under that provision, an Asylum Officer ("A.O.") or IJ shall deny an asylum application if the alien, having been convicted by a final judgment of a particularly serious crime in the U.S., constitutes a danger to the community. *Id.* For purposes of the mandatory bar to asylum, under the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Congress has determined that an alien convicted of an aggravated felony is ineligible to apply for or be granted asylum whether the conviction occurred before, on, or after, the enactment date. KURZBAN, *supra* note 6, at 200 (citing Matter of A-A, Int. Dec. 3176 (BIA 1992)). However, one must still determine whether a crime which occurred before 1988 is an aggravated felony as defined by Congress. *Id.* at 200-01.

132. Ghassan v. INS, 972 F.2d at 636.

133. *Id.* at 639. This is significant in balancing the harsh consequences of deportation against the gravity of drug offenses under the immigration laws. Applicants for discretionary relief who have been convicted of serious drug offenses must show unusual or outstanding equities, and an applicant with a criminal record will ordinarily be required to make a showing of rehabilitation. *See* In re Marin, 16 I & N Dec. 581 (BIA 1978).

134. Katsis v. INS, 997 F.2d 1067 (3rd Cir. 1993) (considerable weight should be accorded to an executive department's construction of the statutory scheme it is entrusted to administer).

135. *Id.* at 1068.

convicted of offenses involving controlled substances.[136] Katsis conceded deportability and applied for a waiver of deportation under INA § 212(c).[137]

Following a denial by the BIA, Katsis submitted a motion to the BIA to reopen proceedings under 8 C.F.R. § 3.2.[138] The BIA denied his motion as a matter of law without reaching the discretionary aspect of the statute. It determined that Katsis was statutorily ineligible for § 212(c) relief at the time he submitted his motion to reopen.[139] The Board's ruling found that Katsis was no longer an alien "lawfully admitted for permanent residence" at the time he filed his motion to reopen.[140]

Katsis argued that the BIA's reading of the statutes contradicted the right to reopen granted by 8 C.F.R. § 3.2.[141] The Third Circuit responded by holding that the regulation must be read to conform to the statutory mandate. It further held that the BIA's interpretation of its own regulation is not clearly erroneous or inconsistent with that mandate.[142] The BIA interprets INA § 101(a)(20) in the context of § 212(c) relief to mean that an alien's status as a lawful permanent resident changes when he or she becomes subject to an administrative final order of deportation.[143] The Third Circuit found this to be a reasonable and

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136. *Id. See* INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1993).

137. Katsis v INS, 997 F.2d at 1068. *See* 8 U.S.C. § 1182(c). *See supra* note 47 for the text of INA § 212(c).

138. *Id.* at 1069. *See supra* note 59 for the text of 8 C.F.R. § 3.2.

139. Katsis v. INS, 997 F.2d 1067, 1069 (3rd Cir. 1993).

140. *Id.*

141. *Id.* at 1075

142. *Id.* The Third Circuit reasoned that:

> [t]he regulation, however, cannot provide a right broader than that which is provided by a necessarily implicated statute. Section 212(c) contains pertinent language limiting its application to alien "lawfully admitted for permanent residence." [INA] [s]ection 101(a)(20) defines that term to exclude aliens who once were lawfully admitted for permanent residence but whose status has since changed. Congress left it to the Attorney General to interpret that language, and the Board, as the delegate of the Attorney General, has done so in permissible fashion. The Board's permissible interpretation articulates the contours of the section 212(c) restriction pertinent here, and those contours cannot be said to contradict the INS regulations that create and govern motions to reopen.

Id.

143. *Id.* The Third Circuit stated that:

> [t]his interpretation in the specific context of motions to reopen proceedings to obtain section 212(c) discretionary relief from deportation results in an alien's statutory ineligibility for such relief if the motion is filed

permissible construction of the statute and thus deferred to the BIA's interpretation.

B. The Majority Circuits: The First, Second, and Seventh

Based on similar factual and procedural backgrounds, *Henry v. INS*[144] and *Vargas v. INS*[145] both held that the criminal aliens remained eligible to reopen their applications under 8 C.F.R. § 3.2 for § 212(c) discretionary relief, even after they became subject to administrative final orders of deportation. Both the Second and the Seventh Circuits held that the BIA's interpretation denying motions to reopen applications for § 212(c) relief under 8 C.F.R. § 3.2 amounted to an amendment of the regulation without compliance with the statutory requirement of notice and opportunity for public comment.[146]

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after the alien becomes subject to a final deportation order.

Id. See supra note 59 for the text of INA § 101(a)(20).

144. Henry v. INS, 8 F.3d 426 (7th Cir. 1993). *See supra* notes 57-61 and accompanying text for a description of the factual and procedural background of Henry v. INS. The Seventh Circuit in *Henry* stated "[w]e have yet to directly address the issue, but we hold today that the Board's position is an unreasonable interpretation of the INA and that Henry . . . remained eligible to reopen . . . [his] section 212(c) application[] even after . . . [he] became subject to a final order[] of deportation." Henry v. INS, 8 F.3d at 433.

145. Vargas v. INS, 938 F.2d 358 (2nd Cir. 1991). Vargas was convicted of criminal possession of cocaine. *Id.* at 359. The INS charged that Vargas was deportable on the narcotics conviction and Vargas conceded his deportability. *Id.* Vargas then applied for § 212(c) relief and was denied. *Id.* at 360. After finding that Vargas was eligible for § 212(c) relief, the BIA affirmed the Immigration Judge's denial of relief and issued a final order of deportation. *Id.* at 360. Vargas next moved to reopen the BIA's denial of relief under § 212(c). *Id.* The BIA denied the motion because Vargas was no longer statutorily eligible for § 212(c) relief due to the final deportation order. *Id.* The Second Circuit vacated the BIA's decision as arbitrary and capricious. *Id.* at 364. The Court stated the "concern which motivated the creation of the rule in *Matter of Lok* - preventing an alien from manipulating deportability proceedings so as to acquire the seven years of domicile - is not present here. The BIA justified the decision with no other basis or explanation. We thus cannot conclude that the decision is the 'product of reasoned decision-making.'" *Id.* at 361.

146. *Id.* at 361. Henry v. INS, 8 F.3d 426, 439 (7th Cir. 1993). The Second Circuit in *Vargas* reached this determination through its interpretation of 8 C.F.R. § 3.2. That Court interprets the regulation as barring motions to reopen or reconsider only upon physical deportation. Vargas v. INS, 938 F.2d at 361. Furthermore, the Court stated that motions to reconsider and reopen may be based upon "circumstances which have arisen subsequent to the hearing." *Id.* Thus, the Court viewed the BIA's interpretation as an effective amendment to the regulation. *Id.*

The Seventh Circuit in *Henry* employed the same line of reasoning. That Court found injustice in the BIA's interpretation because it denied the petitioners in

In a recent First Circuit case,[147] the deportable alien moved to reopen the deportation proceeding after the BIA rejected a request for discretionary relief and affirmed the Immigration Judge's denial of the § 212(c) application.[148] Pursuant to this disposition by the BIA, the alien's deportation order became "final."[149] However, the alien moved to reopen the deportation proceeding under 8 C.F.R. § 3.2. The alien wished to present letters and an employment record which, in his view, amounted to new evidence of his rehabilitation sufficient to change the outcome of the BIA's discretionary determination.[150] Consistent with its prior decisions, the BIA denied the motion to reopen the § 212(c) application due to the petitioner's statutory ineligibility for such relief.[151] The First Circuit set aside the BIA's ruling as arbitrary. The Court held that the BIA failed to adequately justify its rule barring motions to reopen deportation proceedings under 8 C.F.R. § 3.2 for discretionary relief under INA § 212(c).[152]

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that case the opportunity to make the necessary showings for a motion to reopen or reconsider on the ground that they are subject to administratively final orders of deportation. The Court cited the decision by the Second Circuit in *Vargas* and agreed that the BIA's interpretation served effectively as an amendment to the regulation. Henry v. INS, 8 F.3d at 438-39.

147. Goncalves v. INS, 6 F.3d 830 (1st Cir. 1993). The case also involved a permanent resident alien who has committed serious crimes, including drug crimes. *Id.* at 832. The INS ordered Goncalves deported and he asked the Attorney General to exercise equitable discretion in his favor under § 212(c). *Id.*

148. *Id.*

149. 8 C.F.R. § 243.1 (1993).

150. Goncalves v. INS, 6 F.3d at 832.

151. *Id.*

152. *Id.* at 835. The First Circuit stated that:

> [w]e stress, and we well understand, that the exigencies of the practical world in which the board must work require that we do not, and we will not, expect the Board to answer every potentially relevant question regarding its procedures. Here, however, the problem goes beyond the fact that the Board has left obvious questions unanswered. More fundamentally, the Board *has not focused directly* on the basic question of whether or not the particular procedure is desirable, nor has it clearly explained its position. Further, it has instead unnecessarily relied on a logical syllogism involving a theoretical analysis of its own cases interpreting a statute of only marginal relevance to the problem, rather than squarely facing the practical question of whether the procedural exception is good or bad. Finally, it has acted in the face of a regulation that seems rather clearly to authorize the very kind of "reopening" motion that its cases then deny. *Taking all these circumstances together*, we find the practice insufficiently justified. That is to say, we find no legally adequate explanation of why the Board has departed from the rule set forth in its own regulation.

C. The Borderline Circuit: The Ninth

The Ninth Circuit has also rejected the BIA's interpretation of 8 C.F.R. § 3.2 regarding § 212(c) relief.[153] Indeed, many commentators and practitioners feel that the Ninth Circuit is uniquely sympathetic to the claims of aliens when compared to the other circuit courts.[154] The Ninth Circuit alone applies a *de novo* standard of review[155] to reach the conclusion that "as long as the Board may reconsider or reopen the case, the status of the petitioner in that case for purposes of § 212(c) relief has not been finally determined for purposes of action by the Board."[156] The dissent in *Butros v. INS*, however, argued that both the standard of review applied and result reached by the Ninth Circuit were improper in light of Supreme Court decisions.[157] It cites the conspicuous absence of *Chevron* from the majority opinion in rejecting a *de novo* standard of review as improper in this "bread and butter area of appellate jurisprudence."[158] Judge Trott further stated that "[i]f we needed an example to validate *Chevron* and to highlight the mischief of de novo review in this area, this is it."[159] He further described the federal appellate establishment as obsessed with micromanaging the INS to the point of disinterest in the national result. On this issue, he stated:

> The importance of this case, however, is not so much that Butros is still here, but that we perpetuate an approach by the federal judiciary to the work of the Immigration and Naturalization Service that renders it impotent in many instances to accomplish part of its statutory mission: the appropriate removal from our nation of persons who have forfeited

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Id. at 837 (emphasis in original).

153. Butros v. INS, 990 F.2d 1142 (9th Cir. 1993).

154. *See* Schuck and Wang, *supra* note 71, stating that they "found, consistent with conventional wisdom, that the Ninth Circuit Court of Appeals was generally more favorable to aliens than other circuit courts . . . " *Id.* at 168. *See also* Loue, *supra* note 71.

155. Butros v. INS, 990 F.2d at 1144 ("We review de novo the Board's determination of purely legal questions regarding the requirements of the Immigration and Nationality Act").

156. *Id.* at 1145.

157. *Id.* at 1148. (Trott, J., dissenting).

158. *Id.*

159. *Id.* at 1153.

> the privilege of residing here. In the main, the majority opinion stands as yet another foray by 'the least dangerous' branch of government, The Federalist No. 78 (A. Hamilton), onto the turf of its co-equal neighbors.[160]

Given this strong and well-reasoned dissent, it is uncertain whether the Ninth Circuit will remain with the majority circuits. A subsequent ruling on this issue may incorporate the *Chevron* standard and yield an altogether different result.

VI. CONCLUSION

The BIA has steadily applied its well-reasoned decision in *Lok* that an alien's lawful resident status changes as defined in 8 U.S.C. § 1101(a)(20) once an order of deportation becomes administratively final. Moreover, the BIA's construction of the statutory scheme entrusted to its administration is entitled to considerable deference.[161] The Supreme Court has elaborated that "[i]f this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[162]

The Third and Fifth Circuits have not disturbed the BIA's reasonable interpretation, while the First, Second, Seventh, and Ninth Circuits have attacked it. Given the legislative intent and the Supreme Court's ruling on the matter, the BIA's interpretation of recent amendments to immigration law is correct and should be adopted in all circuits.

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160. *Id.* at 1147.
161. Chevron, 104 S.Ct. at 2782.
162. *Id.* at 2783.

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