IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4033

JOEL HERNANDEZ-CASILLAS,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A17 963 863)

(January 4, 1993)

Before KING, WILLIAMS and SMITH, Circuit Judges.

JERRE S. WILLIAMS, CIRCUIT JUDGE:[*]

Petitioner, Joel Hernandez-Casillas, seeks review of a final order of deportation entered by the Board of Immigration Appeals ("BIA") and urges us to find him eligible to seek discretionary relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. § 1182(c). Our authority to review such orders arises from § 106(a)(1) of the

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

INA, 8 U.S.C. § 1105a(a)(1). Finding that the BIA's decision was proper and wholly within its discretion, we deny the petition and affirm the BIA's deportation order.

I. FACTS AND PRIOR PROCEEDINGS

Hernandez-Casillas is a native and citizen of Mexico and a long-time permanent resident of the United States. In April 1985, Border Patrol agents observed Hernandez-Casillas assisting eight Mexican nationals to enter the country illegally across the Rio Grande River near Del Rio, Texas. He was arrested and ultimately convicted of violating 8 U.S.C. § 1325, which proscribes entry into the United States "at any time or place other than as designated by immigration officers" and forbids evasion of "examination or inspection by immigration officers."

The Immigration and Naturalization Service ("INS") immediately began deportation proceedings and ordered Hernandez-Casillas to show cause why he should not be deported pursuant to § 241(a)(2) of the INA, 8 U.S.C. § 1251(a)(2), which mandates the deportation of any alien who has "entered the United States without inspection."[1]

[1] While petitioner's case maneuvered through proceedings below, Congress enacted the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990)("IMMACT"), which, among other things, recodified and renumbered the grounds for deportation listed in § 241. It also reorganized the text of § 212(c) without modifying the substantive law. Id. at § 602(d)(IMMACT's major revision of grounds for deportation in INA § 241(a), 8 U.S.C. § 1251(a), "shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991").

In the interests of clarity and consistency, this opinion

At his deportation hearing, Hernandez-Casillas sought discretionary relief under § 212(c), 8 U.S.C. § 1182(c), which at that time provided as follows:

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

The immigration judge denied Hernandez-Casillas's application for a § 212(c) discretionary waiver on the ground that this relief was unavailable to an alien who is deportable under § 241(a)(2) of the Act for having entered the country without inspection. That is, because the basis asserted for deportation -- uninspected entry -- did not also constitute a basis for exclusion, the judge concluded that Hernandez-Casillas was therefore ineligible for discretionary relief under § 212(c).[2]

---

will, unless otherwise noted, cite to the pre-1990 INA insofar as this version was utilized throughout the prior proceedings.

[2] By its literal terms, § 212 authorizes the Attorney General to permit a permanent resident alien to reenter the United States after a brief trip abroad, even though the resident would otherwise fall within certain enumerated grounds for exclusion from the country (*i.e.*, grounds upon which the INS must otherwise forbid an alien from entering the United States).

The grounds for exclusion (33 total) overlap substantially with those for deportation (20). *Compare* 8 U.S.C. § 1182(a) *with* § 1251(a). Two offenses that merit deportation, however, have no corresponding analogue in the grounds for exclusion. Illegal entry is one of these conspicuous offenses; conviction of illegal possession of certain firearms is the other. 8 U.S.C. § 1251(a)(2) and (14), respectively.

Even though § 212(c)'s express language only mentions discretionary relief from grounds for *exclusion*, the Board and various courts, as set out more fully below, have issued a series of decisions extending parallel relief from grounds for *deportation* (*i.e.*, grounds upon which the INS must remove an

On appeal to the BIA, Hernandez-Casillas argued that the INS should be required to charge him under § 241(a)(13) of the Act with the more serious underlying offense of assisting another alien to enter the country illegally, a crime that is a basis for both exclusion and deportation. Such a prosecution would render him eligible for § 212(c) relief. *See* 8 U.S.C. §§ 182(a)(31) and 1251(a)(13). He further urged the BIA to hold that where an alien is deportable under two grounds stemming from the same incident, § 212(c) permits the waiver of a ground not listed if the "more serious" ground would be waivable under that section.

The BIA rejected Hernandez-Casillas's reasoning but nonetheless reversed the immigration judge. In so doing, the Board brushed aside its own 1979 decision in Granados, which heeded four decades of BIA precedent in refusing to increase the statutory grounds to which § 212(c) could apply.[3] 16 I. & N. Dec. at 728.

---

alien from the United States). *See, e.g.*, Matter of Granados, 16 I. & N. Dec. 726, 728 (BIA 1979)(holding that discretionary relief under
§ 212(c) may be utilized in deportation cases "if [the] ground for deportation is also a ground of [exclusion]" that may be waived by the Attorney General under § 212(c)).

[3] Indeed, 40 years have passed since the Board's first decision concerning the availability of § 212(c) relief to an alien charged with illegal entry. Matter of T-, 5 I. & N. Dec. 389, 390 (BIA 1953). The Board held: "In view of the specification in section 212(c) of the particular sections to which this discretion may be directed, we do not believe that a ground not enumerated therein can be the object of this form of discretionary relief. We therefore find that section 212(c) is inappropriate to waive the ground of deportability set forth in warrant of arrest[.]" A year later, in Matter of M-, 5 I. & N. 642, 647 (BIA 1954), the Board concluded similarly that "section 212(c) does not contain authority to waive the respondent's entry

Notwithstanding this wealth of precedent and the statute's clarity, the Board noted the "generous spirit" of § 212(c), which it termed a "forgiveness statute," and opted for a "cleaner, simpler" approach that extended discretionary relief in *all* deportation cases, except those situations where the Attorney General is specifically forbidden to exercise discretion (*i.e.*, cases involving subversives and war criminals). Matter of Hernandez-Casillas at 4 (BIA, January 11, 1990)("Hernandez-Casillas I"). This limitation parallels the grounds for exclusion specifically excepted from the reach of § 212(c). INA § 212(c), 8 U.S.C. § 1182(c). The BIA appealed to notions of fairness and lamented that the anomalous limitation imposed by its prior decisions "can result in the total unavailability of relief from deportation for longtime resident aliens who, like the present respondent, may not have committed offenses nearly as serious as those of other aliens who are eligible for the section 212(c) waiver." Hernandez-Casillas I at 3-4. Applying its new approach, the Board concluded that Hernandez-Casillas was eligible for relief under § 212(c) because the ground asserted for deportation was not expressly placed beyond the Attorney General's discretionary powers.

In April 1990 the INS referred the case to the Attorney General pursuant to 8 C.F.R. § 3.1(h)(1)(iii). In March 1991, following extensive briefing, the Attorney General issued a

---

without inspection, which is a ground of deportation under section 241(a)(2) but not a ground of excludability."

thorough opinion that reversed the Board's decision and held that § 212(c) relief is available in deportation proceedings only when a corresponding, statutorily-referenced ground for exclusion exists. Matter of Hernandez-Casillas, Int. Dec. Att. Gen. March 18, 1991 ("Hernandez-Casillas II"). The Attorney General emphasized the "disruption to the statutory scheme" that would flow from the BIA's expansive reading of § 212(c) and held that, "[a]bsent some supervening affirmative justification based upon a requirement of the Constitution or other applicable law, neither the Board nor I may depart -- or, in this instance, extend an earlier departure -- from the terms of the statute we are bound to enforce." Id. at 9, 11. Refusing to "wrench away even further from the statutory text," he remanded the case for further proceedings consistent with his opinion. Id. at 11, 17.

Upon remand and in light of the Attorney General's decision, the Board dismissed Hernandez-Casillas's appeal, holding that he was ineligible for discretionary relief because entry without inspection is not a ground for deportation that can be waived. The BIA found no basis to warrant reconsideration of Hernandez-Casillas's deportability and rejected his contention that limits must be imposed on INS's prosecutorial discretion in selecting deportation charges.

Hernandez-Casillas timely petitioned this Court for review of the Board's decision.

II. DISCUSSION

Hernandez-Casillas's appeal reduces to a single issue: whether the BIA properly concluded that he was ineligible for discretionary relief under § 212(c) because he was charged with uninspected entry, a ground of deportation for which there is no comparable ground of exclusion that permits waiver.

Our review of the BIA's decision is restricted. It is well settled that great weight will be given to an executive department's administrative interpretations. The Supreme Court has spoken clearly: "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S.Ct. 455, 461, 88 L.Ed.2d 90 (1985); *see also* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Heeding this deference to administrative specialization, the courts do not cavalierly supplant their own construction of a statutory provision for a reasonable interpretation made by the entrusted agency, even if the court would have reached a different interpretation. *See* Chevron, 467 U.S. at 844, 104 S.Ct. at 2782, 81 L.Ed.2d 694; *see also* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 910 (5th Cir. 1983)("Regardless of whether the court would have arrived at the same interpretation, if the agency's interpretation is reasonable the court must respect it."). In short, "unless there

are compelling indications that the Board's interpretation is wrong," we are loath to disturb it. Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir.), *cert. denied*, 484 U.S. 826, 108 S.Ct. 92, 98 L.Ed.2d 53 (1987). Nothing in the legislation before us persuades that Congress intended a contrary result.

Petitioner advances a number of arguments in his attempt to circumvent the overt language of § 212(c). In essence, Hernandez-Casillas urges us to rewrite § 212(c) by judicial action and broaden discretionary relief to include grounds of deportation that possess no comparable grounds of exclusion.

As mentioned above, § 212(c) on its face applies only to permanent resident aliens who have traveled abroad temporarily and, upon seeking to reenter the country, are excludable under certain enumerated provisions. The statute grants the Attorney General extensive discretion to waive these grounds of exclusion and allow the alien to reenter. Although expressly applicable only to *exclusion* proceedings aimed at returning aliens, the provision has been liberally (and confusingly) stretched over time through various administrative and judicial decisions to rescue aliens facing *deportation* as well.[4] But even under this more expansive

[4] In 1976, the Second Circuit held that the limitation of § 212(c) relief solely to aliens facing exclusion, but not deportation, was irrational and, thus, unconstitutionally discriminatory. Francis v. INS, 532 F.2d 268, 272-73 (2d Cir. 1976). The court concluded that the Fifth Amendment's equal protection clause demanded a generous interpretation of § 212(c) that extended discretionary relief to aliens facing deportation,

interpretation, which the INS itself now accepts as well-established policy, the Attorney General limits his discretion to allow waiver of deportation *only* if there exists a corresponding, statutorily-referenced basis for excludability. *See, e.g.*, Granados, 16 I. & N. Dec. at 728; *see also*, 3 CHARLES GORDON & STANLEY MAILMAN, Immigration Law and Procedure § 74.02[3][b], at 74-42 (1992).

The Attorney General acknowledged the long-standing tradition of extending § 212(c)'s waiver authority to deportations, but he discerned no persuasive reason to allow waiver if the referenced ground lacked a corresponding basis for excludability. Hernandez-Casillas II at 9. Indeed, the Attorney General observed that the Board lacked statutory authority to allow waiver in cases not explicitly mentioned by Congress in § 212(c). To expand further, he wrote, would flatly defy the statute, which steadfastly limits waiver to the grounds specifically referenced in § 212(a). Id.

---

even though the criteria for deportation detailed in § 241(a) were conspicuously different than that enumerated for exclusion under § 212(c). The INS adopted this generous construction of § 212(c) in Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) and Matter of Hom, 16 I. & N. Dec. 112 (BIA 1977).

This Circuit has expressly reserved its assessment of the reasoning and holdings in Francis, Silva, and their progeny. *See, e.g.*, Byus-Narvaez v. INS, 601 F.2d 879, 881 n. 5 (5th Cir. 1979). We have, however, recognized the widespread acceptance of the notion that the right to apply for discretionary relief under § 212(c) extends beyond the narrow, literal language of the statute. Id. The Service now concedes that § 212(c) relief is generally available to deportable as well as excludable aliens.

The Supreme Court has emphasized the Attorney General's generous administrative discretion in interpreting and implementing the various provisions of the INA. INS v. Stevic, 467 U.S. 407, 429 n. 22, 104 S.Ct. 2489, 2500 n. 22, 81 L.Ed.2d 321 (1984). We find the ruling clearly relies upon a reasonable and proper construction of the statute. This settles the matter.

Hernandez-Casillas advances some specific arguments in the attempt to overcome the Attorney General's rule. We consider them briefly in turn. He first argues that the Board's refusal to waive a ground of deportation that does not have a corresponding ground of exclusion "leads to absurd and unfair results." We recognize the sometimes anomalous results that flow from the statute's peculiar language. We emphasize, however, Congress's plenary power to legislate who may and may not enter the United States. Fiallo v. Bell, 430 U.S. 787, 796, 97 S.Ct. 1473, 1480, 52 L.Ed.2d 50 (1977)("[T]he conditions of entry for every alien, . . . the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control." (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 596-97, 72 S.Ct. 512, 522, 96 L.Ed. 586 (1952)(Frankfurter, J., concurring)); *see also* Fonseca-Leite v. INS, 961 F.2d 60, 62 (5th Cir. 1992)("The power of Congress to expel or exclude aliens is fundamental and plenary."). The Supreme Court has consistently refused to look behind the exercise of

discretion if a "facially legitimate and bona fide reason" supports the disputed immigration law. Kleindienst v. Mandel, 408 U.S. 753, 770, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972); *see also* Fiallo, 430 U.S. at 794-95, 97 S.Ct. at 1479.

Congress can be taken as placing tremendous importance on the requirement that all aliens seeking admission "shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe." INA § 235(a), 8 U.S.C. § 1225(a). The legislative history of the INA "reveals that Congress believed entry without inspection was one of `the more important grounds for deportation.'" Gunaydin v. INS, 742 F.2d 776, 778 (3d Cir. 1984)(quoting H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1715). When interpreting immigration statutes, which have provided for the inspection of entering aliens since 1875, courts have long recognized that inspection is a significant event and represents "a major policy of our immigration law." Bufalino v. INS, 473 F.2d 728, 731 (3d Cir.), *cert. denied*, 412 U.S. 928, 93 S.Ct. 2751, 37 L.Ed.2d 155 (1973). Indeed, as the instant case demonstrates, Congress has established criminal penalties for aliens who evade examination or inspection. 8 U.S.C. § 1325.

Congress drafted a specific statute that provides for the deportation of aliens who enter the country without inspection. For legitimate policy reasons, it did not provide in terms for the

exclusion of such aliens, exclusion that would thus qualify them for discretionary relief under § 212(c). There are no absurd and unfair results justifying disturbing the Board's literal reading of the statute.

Hernandez-Casillas next contends that the recent enactment of IMMACT requires that all grounds of deportation be waived, regardless of whether a comparable ground of exclusion exists, and therefore mandates our reversal of the BIA's decision. In November 1990, § 511(a) of IMMACT amended § 212(c) to preclude the Attorney General from granting relief to aliens "convicted of an aggravated felony and . . . [who have] served a term of imprisonment of at least 5 years." Hernandez-Casillas argues that since there is no comparable exclusion ground that references aggravated felons, this "evidences Congressional intent that Sec. 212(c) is a flexible remedial statute which makes relief available even if there is no comparable exclusion ground." In light of IMMACT, petitioner urges, it would be "sheer irrationality" to continue to insist that merely wading across the Rio Grande results in automatic deportation while certain aggravated felons "convicted of very serious and heinous crimes" may apply for § 212(c) relief.

Hernandez-Casillas, however, is simply unable to cite any express language of IMMACT or persuasive discernment of congressional intent to buttress his argument. The conspicuous absence of any change or enlargement in the grounds for exclusion

trumps any well-intentioned impulses to "patch up" Congress's plain language. We are not persuaded by the speculative argument that Congress has said one thing when it really meant another.

We do not "attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." United States v. Locke, 471 U.S. 84, 95, 105 S.Ct. 1785, 1793, 85 L.Ed.2d 64 (1985). For over a century now, Congress has sought to deter unlawful entry into the United States. We find no intention to extend § 212(c) relief to all deportation grounds absent affirmative congressional action or an overriding constitutional justification. Neither basis for modification exists here.

Hernandez-Casillas next argues that the BIA's decision is arbitrary per se because the Board's inconsistent rulings apply different standards to aliens similarly situated. *See* Diaz-Resendez, 960 F.2d at 497 ("The BIA acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation for doing so.")(quoting Israel v. INS, 785 F.2d 738, 740 (9th Cir. 1986)). Specifically, petitioner contends that the Board has inconsistently applied the Attorney General's standard denying § 212(c) relief when no corollary ground of exclusion exists that can be waived. Hernandez-Casillas cites Matter of Julien, A35 557 064 (BIA, October 17, 1991). In Julien, an unreported Board decision that carries no precedential value,

the Board granted relief to Julien for a weapons charge even though, like uninspected entry, the violation had no comparable ground of exclusion under § 212. Petitioner urges that these analogous transactions were accorded disparate treatment mandating reversal of the Board's decision.

We note that the BIA's decision in Julien was issued in October 1991, seven months after the Attorney General's decision in Hernandez-Casillas II. Absent additional information and in light of the Attorney General's conclusive decision in Hernandez-Casillas II, it appears likely that Julien was erroneously decided. The Government so urges. But if there is misapplication of the law, it occurred in Julien. The soundness and controlling nature of the Attorney General's earlier decision in Hernandez-Casillas II represents the INS's official and unabandoned position.

The Attorney General's opinion was administratively dispositive, and it displayed fidelity to Congress's express language. Upon remand from the Attorney General, the BIA based its decision wholly on his controlling determination. We cannot say that, in the instant case, the agency abused its discretion by "inexplicably depart[ing] from established policies," or that, in the instant case, it rendered its decision "without rational explanation." Diaz-Resendez, 960 F.2d at 495. In the case before us, the Board comported precisely with established precedent, the Attorney General's decision in Hernandez-Casillas II. The Board's

possible misapplication in Julien of the controlling rule of Hernandez-Casillas II does not demonstrate arbitrary and capricious behavior in Hernandez-Casillas's case that compels a remand to the Board.

Finally, Hernandez-Casillas urges us to abandon our focus on "comparable grounds" and instead engage in an analysis that centers on "underlying conduct." He asks us to constrain INS's ability to select deportation charges and force the agency to charge him with smuggling aliens, a deportable offense that enjoys a corollary ground of exclusion that can be waived under § 212(c). He decries INS's "outcome determinative" approach that deliberately tries to skirt discretionary relief by charging non-waivable offenses. He refers us to Marti-Xiques v. INS, 713 F.2d 1511 (11th Cir. 1983), *vacated on rehearing*, 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984).

In that factually similar case, an alien was charged with uninspected entry and smuggling aliens, two grounds for deportability that arose out of the same incident. The court held in a decision later vacated that since § 212(c) relief was available for the more serious smuggling charge, it should also be extended to the charge of entry without inspection, even though uninspected entry was not eligible for waiver. The court, however, limited its holding to cases where the charges arise from the same incident. Marti-Xiques was charged with both alien smuggling *and*

uninspected entry. Because he was eligible for relief for the smuggling charge, he was also deemed eligible for waiver for the illegal entry charge. Hernandez-Casillas has never been charged with anything other than uninspected entry.

Even if the case were a continuing authority, we would not be persuaded. In Johns v. Dep't of Justice, 653 F.2d 884, 893 (5th Cir. 1981), we stated that the INS's prosecutorial discretion is "immune from review in the courts." [footnote omitted]. Also in Perales v. Casillas, 903 F.2d 1043, 1047-48 (5th Cir. 1990), we held that agency action is exempt from "abuse of discretion" review if there are no statutory or regulatory provisions that impose constraints on the agency's discretion.

The commentators on immigration law also stress that the law is settled as to prosecutorial discretion. "It often happens that an alien may be deportable on several charges. The enforcement officials may select one or more of these charges, each an independent basis for deportation. And the respondent ordinarily cannot complain because other charges were not brought against him." 3 GORDON & MAILMAN, Immigration Law & Procedure, § 72.03[1][c], at 72-67. As the BIA noted in its decision upon remand, "when the Service chooses to initiate proceedings against an alien and to prosecute those proceedings to a conclusion, the immigration judge is obligated to order deportation if the evidence supports a finding of deportability on the ground charged." Matter

of Hernandez-Casillas at 3 n. 2 (BIA, December 19, 1991)(citing Guan Chow Tok v. INS, 538 F.2d 36 (2d Cir. 1976); Matter of Roussis, 18 I. & N. Dec. 256, 258 (BIA 1982), and the cases cited therein). Petitioner's deportability as an entrant without inspection was established by unequivocal evidence, and he did not appeal the immigration judge's finding on this issue.

III. CONCLUSION

We hold that Hernandez-Casillas is deportable as charged for uninspected entry, an offense that cannot be waived under § 212(c). Although his other deportable conduct (aiding aliens in illegal entry into the U.S.) has a comparable exclusion ground that would offer the possibility of discretionary relief under § 212(c), we hold the Attorney General's decision and the subsequent BIA opinion were correct and wholly within their considerable discretion. We will not disturb their decisions. The petition for review must be denied and the deportation order is affirmed.

AFFIRMED.