

**FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

PALEPALE ULUAKI FUA FINAU,  
Petitioner,

No. 00-70238

v.

BIA No.  
A-41-812-646

IMMIGRATION AND NATURALIZATION  
SERVICE; JOHN ASHCROFT,\*  
Attorney General, United States  
Department of Justice,  
Respondents.

ORDER AND  
AMENDED  
OPINION

On Petition for Review of a Decision of the  
Board of Immigration Appeals

Argued and Submitted  
July 12, 2001--San Francisco, California

Filed October 31, 2001  
Amended January 18, 2002

Before: William C. Canby, Jr., Michael Daly Hawkins, and  
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

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\*John Ashcroft is substituted for his predecessor, Janet Reno, as Attorney General for the United States Department of Justice. Fed. R. App. P. 43(c)(2).





## **COUNSEL**

Dominic E. Capeci, Law Office of Dominic E. Capeci, San Francisco, California, for the petitioner.

A. Ashley Tabaddor, Office of Immigration Litigation, Civil Division, Department of Justice, Washington, D.C., for the respondents.

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## **ORDER**

The Opinion filed October 31, 2001 and appearing at 270 F.3d 859 (9th Cir. 2001), is hereby amended. The Amended Opinion and this Order shall be filed simultaneously.

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## **OPINION**

HAWKINS, Circuit Judge:

Petitioner Palepale Uluaki Fua Finau ("Finau") contends that 8 U.S.C. § 1182(h) violates the Equal Protection Clause of the Fifth Amendment because it provides discretionary relief to otherwise-barred aliens seeking entry or adjustment of status, but does not afford such relief to removable lawful permanent residents of the United States. We disagree with the contention and deny the petition.

## FACTS AND PROCEDURAL HISTORY

Finau, a native Tongan, has lived in the United States as a lawful permanent resident since 1988. In 1989 and 1992, he was convicted in California state court of petty theft. These two convictions rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(ii), which provides for removal of lawful permanent residents convicted of two or more crimes involving moral turpitude which do not arise out of a single scheme of criminal misconduct. In 1998, Finau was served with a Notice to Appear and placed in removal proceedings.

The immigration judge ("IJ") ordered Finau's removal, which Finau appealed to the Board of Immigration Appeals ("BIA"), claiming eligibility for voluntary departure and for a waiver under 8 U.S.C. § 1182(h).<sup>1</sup> The BIA sustained Finau's

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<sup>1</sup> Section 1182(h) provides for discretionary admission of certain otherwise inadmissible aliens if:

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that --

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien . . . .

8 U.S.C. § 1182(h)(1998).

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voluntary departure claim and remanded, noting that Finau

should be given an opportunity to apply for the Section 1182(h) waiver.

On remand, the IJ found Finau was statutorily ineligible for relief under Section 1182(h) because he was a removable lawful permanent resident. The IJ noted she did not have jurisdiction over Finau's argument that the Equal Protection Clause required that lawful permanent residents be given the benefit of Section 1182(h). Finau appealed the decision to the BIA again, which affirmed the IJ and rejected the Equal Protection claim. Finau then appealed to this court.<sup>2</sup>

## STANDARD OF REVIEW

We review the constitutionality of a statute de novo. Confederated Tribes of Siletz Indians v. United States, 110 F.3d 688, 693 (9th Cir. 1997).

### I. Section 1182(h)

**Section 1182(h) provides discretionary relief for aliens** seeking to enter the United States who would ordinarily be statutorily excluded for a reason such as criminal history. Because an adjustment of status to that of lawful permanent resident is viewed as an "entry" into the United States, this relief also extends to aliens who are physically present in the

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<sup>2</sup> An earlier panel dismissed Finau's petition for lack of jurisdiction on the basis of 8 U.S.C. § 1252(a)(2)(C). This was an improper ground for dismissal, however, because Finau's two petty theft convictions, punishable by a maximum of six months imprisonment, do not fall within the jurisdictional bar of Section 1252(a)(2)(C). The prior panel granted Finau's petition for rehearing, and the case was ultimately reassigned to this panel. Although this court generally lacks jurisdiction to review a decision of the Attorney General to grant or deny a waiver under Section 1182(h), we do have authority to entertain Finau's constitutional challenge to the statute as it presents a purely legal issue and not an exercise of discretion. Accordingly, we have jurisdiction. See 8 U.S.C. § 1252.

country (such as aliens with visas and illegal aliens) who are seeking to become lawful permanent residents. See 8 U.S.C. §§ 1255; 1182(h)(2).

Discretionary relief is available in two circumstances.

Aliens who would be statutorily inadmissible or not entitled to adjustment of status may obtain discretionary relief if the triggering crime is sufficiently remote and the alien has been rehabilitated. 8 U.S.C. § 1182(h)(1)(A)(i)-(iii). Alternatively, relief may be available if the alien has significant familial ties to United States citizens or lawful permanent residents and denial of admission would result in "extreme hardship" for the alien's family. 8 U.S.C. § 1182(h)(1)(B). Relief is available so long as the Attorney General "in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." 8 U.S.C. § 1182(h)(2).

## **II. Equal Protection**

Finau contends that Section 1182(h) violates equal protection principles by making discretionary relief available to aliens who had committed similar crimes and who are seeking admission or adjustment of status, but not to those aliens who are already lawful permanent residents and seeking relief from removal. Aliens are entitled to the benefits of equal protection. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). However, Congress' power to regulate the exclusion or admission of aliens is extremely broad. Fiallo v. Bell, 430 U.S. 787, 792 (1977). In fact, "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (internal quotation omitted).

Our review, therefore, is very limited and highly deferential. A statute that limits the relief available to a certain class of aliens is "valid unless wholly irrational." Perez-Oropeza v. INS, 56 F.3d 43, 45 (9th Cir. 1995) (internal quo-

tation omitted). If there is any legitimate or plausible reason to treat the classes of aliens differently, the statute must be upheld, whether or not the justification advanced by the INS was in fact the reason that generated the legislative classification in the first instance. Friend v. Reno, 172 F.3d 638, 646 (9th Cir. 1999).

We agree with the Seventh and Eleventh Circuits that a rational basis exists for Congress' decision to deny Section 1182(h) relief to removable lawful permanent residents but not to other aliens. Moore v. Ashcroft, 251 F.3d 919, 925-26 (11th Cir. 2001); Lara-Ruiz v. INS, 241 F.3d 934, 947-48 (7th Cir. 2001). As these courts noted, lawful permanent residents enjoy substantial rights and privileges not shared by other aliens, and "it is arguably proper to hold them to a higher standard and level of responsibility than illegal aliens" or aliens seeking admission. Moore, 251 F.3d at 925; accord Lara-Ruiz, 241 F.3d at 947. Lawful permanent residents generally have closer and longer-standing ties to the United States through employment and family relationships, and yet those who offend have demonstrated that these ties and all of the privileges of lawful permanent resident status were not enough to deter them from committing serious crimes. Lara-Ruiz, 241 F.3d at 948. Therefore, Congress might have reasoned that removable lawful permanent residents "pose a higher risk for recidivism than illegal aliens who did not have all the benefits of legal permanent resident status to deter them from committing their crimes," Moore, 251 F.3d at 925, and thus were less deserving of a "second chance" than the other types of aliens. Lara-Ruiz, 241 F.3d at 948.

Furthermore, one of Congress' purposes in enacting IIRIRA was to expedite the removal of criminal aliens from the United States. Id. at 947. Eliminating the availability of Section 1182(h) relief for lawful permanent residents precludes such an alien from applying to adjust his status and seek re-"admission" to the United States while still within its borders, thus subverting Congress' intent to make such aliens

immediately removable. See id. While it might have been "wiser, fairer, and more efficacious" if Congress had also eliminated Section 1182(h) relief for non-lawful permanent residents, the course chosen by Congress was still a rational "first step" towards the legitimate goal of rapidly removing criminal aliens. Id.; see also McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969)("[A] legislature traditionally has been allowed to take reform`one step at a time' " and does not risk losing an entire remedial scheme "simply because it failed, . . . to cover every evil that might conceivably have been attacked.") (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)).

Finau also argues that under Section 1182(h) he is treated differently from even other lawful permanent residents, i.e., inadmissible former lawful permanent residents who have left the country and are seeking readmission. It is not altogether clear, however, that Section 1182(h) would permit a discretionary waiver to an otherwise inadmissible lawful permanent resident. See United States v. Estrada-Torres, 179 F.3d 776, 778-79 (9th Cir. 1999) (reading "deportable" in former version of Section 1182(c) to include both deportable and excludable lawful permanent residents), cert. denied, 531 U.S. 864 (2000), overruled on other grounds by United States v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2000). Even if we accept Finau's reading, however, his equal protection claim still fails because the INS has also advanced a rational explanation for the difference in treatment between inadmissible and removable lawful permanent residents: By requiring removable lawful permanent residents to voluntarily leave the United States first in order to be eligible for discretionary relief, the statute serves the purpose of getting unwanted and perhaps dangerous aliens out of the country quickly and voluntarily, and at a lower cost than that of full-blown removal proceedings. DeSousa v. Reno, 190 F.3d 175, 185 (3d Cir. 1999).

## CONCLUSION

**Our job is to determine the constitutionality, not the wisdom,** of Congress' decision to deny discretionary relief to removable lawful permanent residents. Because a rational basis exists for this treatment, Finau has not stated a viable equal protection claim.

PETITION DENIED.