

No. 95-939

In the Supreme Court of the United States
OCTOBER TERM, 1995

IMMIGRATION AND NATURALIZATION SERVICE, *Petitioner*,

v.

MOHAMMED BAHER ELRAMLY, *Respondent*.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals (BIA) may require an alien who meets each of the eligibility requirements of Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 212(c), to show “unusual or outstanding equities” before the BIA will even consider whether the alien individually qualifies for a waiver of deportation based upon all of the relevant factors identified by the BIA, including the nature, recency and seriousness of the alien's deportable offense.

2. Whether the Court of Appeals correctly held that the BIA abused its discretion in denying respondent a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 212(c), without considering each of the factors previously identified by the BIA as relevant under § 212(c), including the nature, recency and seriousness of respondent's single 1982 drug offense.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-7a) is reported at 49 F.3d 535. The court of appeals' superseding opinion (Br. In Opp. App. 1a-8a) is reported at 73 F.3d 220. The decisions of the Board of Immigration Appeals (Pet. App. 8a-17a) and Immigration Judge (*id.* at 18a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1995. A petition for rehearing was denied on August 15, 1995. Pet. App. 26a. On November 3, 1995, Justice O'Connor extended the time in which to file a petition for a writ of certiorari to and including December 13, 1995. The petition for a writ of certiorari was filed on

December 13, 1995, and was granted on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (as in effect at all times relevant to this case), provides 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 subsection (a) of this section (other than paragraphs (3) and (9)(C)) * * *. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

STATEMENT

1. Respondent Mohammed Baher Elramly is a native of Egypt who lawfully entered the United States on November 24, 1976 at the age of 24. Pet. App. 18a. Respondent previously obtained a bachelor's degree in geophysical engineering, and later partially completed a master's degree program at the University of Michigan. R. 76-77. In 1979, respondent married a United States citizen and on February 18, 1981 became a lawful permanent resident. Between 1980 and 1988, respondent and his wife became parents to three United States-born daughters. R. 72. Respondent has no immediate

family in Egypt; his only brother is a United States permanent resident. R. 84-85.

On March 21, 1983, respondent pled guilty to two counts of delivery of \$100 of hashish to an undercover police officer. Br. In Opp. App. 2a. Respondent testified that he was merely using the hashish with the undercover officer but that the drugs belonged to his brother-in-law. No sale of any drugs took place. R. 88. Since 1983, respondent has neither used nor sold any drugs, or consumed any alcohol (for religious reasons). Pet. App. 12a-13a, 21a; R. 94-95, 160. Respondent was fined \$2,700, given a 3-year suspended sentence, and sentenced to 90 days in jail and 3 years probation. Pet. App. 12a. In sentencing respondent, the court found that he “was not likely again to engage in a criminal course of conduct.” R. 226. Respondent served only 60 days of his sentence for good behavior. R. 85. Since that time, respondent has been gainfully employed as a carpenter and contractor. R. 194, 210.

On February 9, 1990, petitioner issued an Order to Show Cause charging respondent with deportability under § 241(a)(11) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1251(a)(11), based solely on respondent’s single drug conviction seven years earlier. R. 270. After a hearing to confirm his deportability, respondent applied for a waiver of deportability under § 212(c).

The immigration judge, although finding that “this is a very difficult case” (R. 173), and “[t]he positive and negative equities in this case * * * extremely close,” denied respondent’s application. Pet. App. 24a. As factors favoring § 212(c) relief, the immigration judge cited respondent’s long-standing residence and family ties in the United States, including three U.S. citizen daughters whom he supports, his continuous employment and level of education, his volunteer work within the Muslim community, evidence of his rehabilitation, and the absence of

any immediate family in Egypt. *Id.* at 22a-24a. Balanced against these positive factors, the immigration judge noted, without elaboration, that “[o]n the other hand, Respondent was convicted of a very serious drug offense.” *Id.* at 24a.

2. On March 4, 1993, the BIA dismissed respondent’s appeal. The BIA “agree[d] with the immigration judge’s assessment that the respondent’s length of residence in this country and presence of three United States citizen children are substantial equities. It appears that the respondent enjoys a close relationship with his daughters. Further, the respondent’s activities in the Moslem community, membership in a sportsman’s club, and the affidavits of friends and former employers which are positive and supportive, reveal some effort towards rehabilitation.” Pet. App. 15a.

Like the immigration judge, however, the BIA held that because “the respondent stands convicted of a very serious drug offense,” he would be required to demonstrate “‘unusual or outstanding’ counter-vailing equities before a favorable exercise of discretion will be considered.” Pet. App. 11a, 16a. The BIA’s opinion did not address the nature, recency or seriousness of respondent’s 1983 drug conviction. Instead, it simply noted that “[t]he immigration judge weighed the respondent’s equities against the seriousness of his criminal conviction in reaching her conclusion that a waiver of inadmissibility under section 212(c) of the Act is not warranted.” *Id.* at 16a. The BIA then concluded by stating that it “agree[d] with the immigration judge’s assessment of the equities and the adverse factors and with the immigration judge’s conclusion that the respondent does not merit a 212(c) waiver in the exercise of discretion.” *Id.* at 16a-17a.

3. Respondent filed a timely appeal with the Ninth Circuit, challenging the BIA’s decision denying him § 212(c) relief on the grounds that the BIA abused its discretion by failing to take into

account the actual nature, circumstances and lack of recency of his single 1982 drug offense. The court of appeals agreed, vacating and remanding the BIA's decision "[b]ecause the [BIA] failed to examine the particular nature of Elramly's drug offense and categorically concluded that it was a 'serious drug offense.'" Br. In Opp. App. 2a-3a.

The court of appeals explained that in applying § 212(c), "the BIA must balance the social and humane factors favorable to Elramly against the adverse factors that show his undesirability as a permanent resident. So that we may evaluate the BIA's application of section 212(c), the BIA must also 'indicate how it weighed the factors involved and how it arrived at its conclusion.'" Br. In Opp. App. 4a (quoting *Yepes-Prado v. INS*, 10 F.3d 1363, 1365-66, 1370 (9th Cir. 1993)).

Although finding that the BIA had properly considered "all of Elramly's equities" which supported § 212(c) relief, the court of appeals held that the BIA failed to properly consider the relevant adverse factors—in particular, the "seriousness" of his 1983 drug conviction:

In weighing the negative factors, the BIA should have considered Elramly's drug conviction "on an individual basis rather than in a blanket fashion." Rather than considering the particular nature of Elramly's drug offense, however, the BIA automatically treated the offense as a "very serious drug offense." This was error. Delivering \$100.00 worth of hashish is not the same as conspiring to distribute \$50,000 worth of cocaine. By treating Elramly's offense categorically as a "very serious drug offense," the BIA incorrectly

lumped together a disparate range of drug offenses. Even drug offenses come in degrees of seriousness.

Br. In Opp. App. 5a (citing *Yepes-Prado*, 10 F.3d at 1371; *Matter of Coelho*, Interim Decision 3172, at 2 (BIA 1992)).

The court of appeals held that the BIA's decision to automatically require respondent to make a showing of "unusual or outstanding" equities * * * was an error of great consequence" since "overcoming the 'outstanding' equities requirement has proven to be an extremely difficult hurdle." Br. In Opp. App. 5a-6a. In this regard, the court noted that the Sixth Circuit previously had "expressed concern" over the BIA's apparent "*de facto* policy of denying § 212(c) relief to aliens convicted of a drug offense." The Ninth Circuit concluded that because

classification as "serious" leads to a requirement of "unusual" or "outstanding" equities, that categorization is not to be imposed in a rigid manner inevitably compelling the denial of relief; it is still essential that the seriousness of the petitioner's particular conduct be assessed individually in determining its weight as an adverse factor. *Yepes-Prado*, 10 F.3d at 1371. The proper approach is "to balance the positive and negative factors of an *individual* case when making a discretionary determination under section 212(c) of the Act." *Matter of Burbano* at 8, 1994 WL 520994 (emphasis added).

Br. In Opp. App. 6a n.4 (emphasis in original). Because of the relatively minor nature of respondent's drug conviction and the fact that it occurred 7 years earlier, the Ninth Circuit held that the BIA's failure

to consider respondent's adverse factors was not "harmless" error, and constituted an abuse of discretion:

[H]ad the BIA taken into account the actual nature of Elramly's drug offense, it may well have reached a different result. * * * It is true that there were some other negative factors, but the BIA's decision clearly indicates that the drug offense was decisive. The BIA thus clearly erred by failing to consider the particular nature of Elramly's offense and its reflection on his undesirability as a permanent resident.

Br. In Opp. App. 7a & n.7. The Ninth Circuit vacated and remanded the BIA's decision for a re-determination of respondent's eligibility for § 212(c) relief. *Id.* at 8a.

SUMMARY OF ARGUMENT

I. Section 212(c) of the INA was enacted by Congress as a humanitarian measure to ameliorate the harsh consequences of deportation to long-standing lawful permanent residents of the United States, including separation from children and other family members lawfully resident in the United States. To address these concerns, Congress created broad eligibility criteria to ensure that all eligible permanent residents could seek a waiver of deportability based upon the particular circumstances of their case. In § 212(c), Congress also identified the various categories of aliens who, by virtue of having committed certain criminal offenses, should be barred from seeking relief.

In this and other cases, the BIA has engrafted an *additional* eligibility condition onto § 212(c)—requiring aliens who commit a "serious drug offense" (*i.e.*, any drug offense other than simple possession for personal use) to show "unusual or outstanding equities" before

the BIA will even *consider* exercising its discretion under § 212(c). Under the BIA's rule, if an alien cannot demonstrate unusual or outstanding equities, the alien's request for a 212(c) waiver is summarily denied regardless of the nature, recency, or seriousness of his or her deportable offense, even though the BIA itself has held such factors to be relevant under § 212(c). See Pet. Br. 14. Applying that rule in this case, the BIA denied respondent's application for a § 212(c) waiver for failing to demonstrate unusual or outstanding equities, and without considering the relatively minor and isolated nature of respondent's 1982 drug offense.

In short, by requiring unusual or outstanding equities as a condition to the exercise of its discretion, the BIA has dramatically altered the scope of § 212(c) by appending a new eligibility requirement that Congress never included. In § 212(c)—the only relief provision limited to lawful permanent residents—Congress deliberately fashioned broad eligibility criteria to ensure a flexible exercise of case-specific discretion in order to achieve the humanitarian objectives the statute was meant to foster. Instead of exercising that discretion, the BIA has *narrowed* the class of aliens that Congress has said are eligible to seek relief under § 212(c). In particular, even though Congress determined in § 212(c) that aliens convicted of aggravated felonies are eligible to seek relief under its terms so long as they have not served 5 years or more in prison for such felonies, the BIA has decided that Congress did not go far enough, and that “serious” drug offenders should not be eligible to seek relief under § 212(c) unless they can show unusual or outstanding equities. That is not a judgment the BIA was empowered to make.

The text of § 212(c), particularly when viewed in its context within the INA, confirms that Congress reserved to itself the exclusive authority to determine who should be eligible to seek a discretionary waiver of deportation and who should not. The INA also makes clear

that where Congress has intended to impose hardship or heightened equities requirements as a condition of eligibility, it has said so explicitly. Its failure to require such a showing in § 212(c) “was no simple accident of draftsmanship.” *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). Moreover, as this Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Attorney General cannot artificially limit the scope of her own discretion by simply ratcheting up the eligibility criteria set by Congress for seeking relief from deportation. That, however, is precisely what the Attorney General has done once again.

II. The Government's defense of the BIA's rule must be rejected. For instance, its attempt to characterize the BIA's rule as an exercise of the Attorney General's rulemaking powers fails since even the BIA has acknowledged that § 212(c) requires case-by-case adjudication, and thus is ill-suited to the sort of rigid adjudicative rulemaking that the Government now is asking this Court to bless. The Government's request for deference similarly misses the point since Congress specifically has spoken to the eligibility of drug offenders under § 212(c) and left no gaps for the BIA to fill. Most importantly, though, the BIA's rule must be rejected because it does not reflect a reasonable construction of § 212(c) and arbitrarily lumps together aliens like respondent who have committed relatively minor drug offenses with aliens who have committed far more serious offenses, and treats them identically by rendering them all ineligible for relief unless they can show unusual or outstanding equities.

The BIA's rule also cannot be justified (as the Government claims) as an attempt simply to make it more difficult for drug offenders to obtain § 212(c) relief, since the BIA already has taken care of that by adopting a “sliding scale” approach under which the quantity of equities an alien must demonstrate to merit § 212(c) relief is tailored to, among other things, the nature, seriousness and recency of the alien's

offense. The point is *not* that aliens convicted of serious drug offenses cannot be required to make a greater showing of equities under the BIA's "sliding scale" in order to merit relief under § 212(c). It is that every eligible alien is entitled to *step* onto that "scale."

III. In the final analysis, it is undisputed that the BIA denied respondent's application for a waiver of deportability under § 212(c) without considering the relatively minor and isolated nature of his 1982 drug offense. The BIA's own decisions, however, make clear that the nature, recency and seriousness of an alien's offense are relevant to the exercise of discretion under § 212(c). Thus, this Court's administrative law decisions make clear that the BIA's failure to consider such factors constituted an apparent abuse of its discretion. The court of appeals properly vacated and remanded the BIA's decision on that basis, and should be affirmed by this Court.

ARGUMENT

I. THE BIA'S "UNUSUAL OR OUTSTANDING EQUITIES" REQUIREMENT IRRECONCILABLY CONFLICTS WITH THE TEXT AND PLAIN MEANING OF § 212(c).

A. The Text Of § 212(c) And The BIA's Own Decisions Require A Flexible Exercise Of Case-Specific Discretion By The Attorney General.

1. Section 212(c) of the INA, 8 U.S.C. § 1182(c), provides that the Attorney General, in her discretion, may waive certain grounds of deportability for permanent resident aliens who have been continuously present in the United States for at least 7 years.¹ Section 212(c)

¹ *Amicus curiae* Washington Legal Foundation argues that because § 212(c) refers only to grounds of excludability, it does not apply to deportation

originally was enacted as the Seventh Proviso to Section 3 of the Immigration Act of 1917, ch. 29, 39 Stat. 874, which provided “[t]hat aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the [Attorney General], and under such conditions as he may prescribe.” The statute was enacted as a humane provision to lessen the harshness of separating long-standing residents of the United States from their families and other loved ones due to an excludable offense.²

The Seventh Proviso was criticized after its passage because aliens who had entered the United States illegally, or who had been de-

proceedings. In fact, the applicability of § 212(c) (and its predecessor) to deportation cases has been accepted uniformly by every circuit, by commentators and by the BIA for more than 50 years. See, e.g., *Goncalves v. INS* 6 F.3d 830, 836 (1st Cir. 1993) (Breyer, C.J.) (“[a]lthough on its face [§ 212(c)] applies only to resident aliens who have temporarily left the United States and seek readmission, case law has extended its application to resident aliens who have not left the United States”); *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976); *Matter of L*, 1 I. & N. Dec. 1 (BIA 1940); *Matter of A*, 2 I. & N. Dec. 459 (BIA 1946), approved by Atty. Gen. (1947); 3 C. Gordon, S. Mailman & S. Yale-Loehr, IMMIGRATION LAW & PROCEDURE § 74.04[2][f], at 74-49 (1995) (collecting cases). Congress also routinely has acknowledged the applicability of § 212(c) in deportation proceedings (see, e.g., 136 Cong. Rec. S6604 (May 18, 1990) (“Section 212(c) provides relief from exclusion, and by court decision from deportation”) (Stmt. of Sen. Dole); H. Rep. No. 101-681, 101st Cong., 2d Sess., at 151 (1990); 140 Cong. Rec. S2291 (Mar. 2, 1994) (Stmt. of Sen. Simpson)), as has the Attorney General. See 8 C.F.R. §§ 212.3(b), 212.3(e)(1). The Government now too concedes this point. See Pet. Br. 3.

² See S. Rep. No. 355, 63d Cong., 2d Sess., at 6 (1914) (“it seems only just and humane to invest the Secretary of Labor with authority to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship”); S. Rep. No. 352, 64th Cong., 1st Sess., at 6 (1916) (same). See also *Francis*, 532 F.2d at 270 (summarizing legislative history).

ported and thereafter sought re-entry, also were eligible to seek a waiver. See S. Rep. No. 1515, 81st Cong., 2d Sess. 384 (1950). Thus, it was recommended that the Seventh Proviso be modified to limit eligibility only to those aliens lawfully admitted for permanent residence, who departed from the United States voluntarily and not under an order of deportation, and who were not excludable on “subversive” charges. The Seventh Proviso was then re-codified in 1952 as § 212(c), borrowing the “unrelinquished domicile of seven consecutive years” requirement from the Seventh Proviso, but requiring that eligible aliens be “lawfully admitted for permanent residence.”

Unlike other forms of relief in the 1952 Act, like suspension of deportation (§ 244), withholding of deportation (§ 243(h)), and political asylum (§ 208), § 212(c) does not specify criteria to guide the Attorney General's discretion in deciding whether to grant relief. This omission was deliberate so that the Attorney General would be “left with sufficient discretionary authority to admit *any* lawfully resident aliens returning from a temporary visit abroad to a lawful domicile of seven consecutive years.” S. Rep. No. 1515, 81st Cong., 2d Sess., at 384 (emphasis added).³

³ See also *Francis*, 532 F.2d at 272 (“Congress was concerned that there be some degree of flexibility to permit worthy returning aliens to continue their relationships with family members in the United States despite a ground for exclusion”); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (noting that § 212(c) “was enacted by Congress to provide the Attorney General the flexibility and discretion to permit worthy aliens to continue their relationship with family members in the United States despite a ground for exclusion”); *White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (“By creating the § 212(c) waiver process, Congress authorized the Attorney General to protect aliens with close ties to this country from suffering extreme hardship as a result of deportation”).

For almost 40 years after its re-codification in 1952, § 212(c) remained untouched by Congress. In the Immigration Act of 1990, however, Congress narrowed § 212(c)'s eligibility criteria and barred relief for any alien “convicted of an aggravated felony who has served a term of imprisonment of at least 5 years.” Pub. L. No. 101-649, §§ 511, 601(d), 104 Stat. 4978, 5052, 5075-76. In the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, Congress further narrowed § 212(c) to require aggregation of prison time for different aggravated felonies for purposes of the 5-year bar. It also barred § 212(c) relief for aliens convicted of child abduction, terrorist activities, Nazi war crimes and other offenses. See 8 U.S.C. §§ 1182(c), (a)(3) & (a)(9).

2. Because § 212(c) does not list the factors which the Attorney General must consider in exercising her discretion, the BIA has identified a host of favorable and adverse factors that must be considered in each case. As explained in *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978), “[i]n order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether section 212(c) relief should be granted as a matter of discretion. * * * The standards provided in this area have of necessity been general in nature.” These various factors were summarized by the BIA in *Matter of Buscemi*, 19 I. & N. Dec. 628 (1988) as follows:

Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country’s armed forces, a

history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. Among the factors deemed adverse to an alien are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, *the existence of a criminal record and, if so, its nature, recency, and seriousness*, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

Id. at 633 (citing *Marin*) (emphasis added). See also *Matter of Coelho*, Interim Decision 3172, at 5 (BIA 1992); *Matter of Edwards*, Interim Decision 3134, at 6 (BIA 1990); *Matter of Burbano*, Interim Decision 3229, at 5 (BIA 1994); *Matter of Cerna*, Interim Decision 3161, at 8 (BIA 1991).

The BIA balances these favorable and adverse factors in each case using a "sliding scale":

The equities that an applicant for section 212(c) relief must bring forward to establish that favorable discretionary action is warranted will depend in each case on the nature and circumstances of the ground of exclusion sought waived and on the presence of any additional adverse matters. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some

cases may have to involve unusual or outstanding equities.

Marin, 16 I. & N. Dec. at 585. In opting for this case-specific balancing approach, the BIA chose not to “adopt[] an inflexible test for an immigration judge to use to determine as a conclusory matter whether section 212(c) relief should be granted as a matter of discretion. The undesirability and `difficulty, if not impossibility, of defining any standard in discretionary matters of this character which may be applied in a stereotyped manner' has long been recognized. Instead, * * * each case must be judged on its own merits.” *Id.* at 584 (citation omitted). See also *Buscemi*, 19 I. & N. Dec. at 633 (same).

3. Against this backdrop of flexible case-specific discretion, the BIA has adopted a rule that “unusual or outstanding equities” are “required when an alien has been convicted of a serious drug offense, particularly one relating to the trafficking or sale of drugs.” *Buscemi*, 19 I. & N. Dec. at 633. As described by the Government (Pet. Br. 14):

Although the BIA generally weighs each eligible applicant's positive and negative equities in an individualized manner, it has as a matter of longstanding policy requiring applicants whose grounds for deportation entail conviction of what it deems to be serious criminal offenses (which include any drug-trafficking offenses⁴) to make a showing of

⁴ The definition of “drug trafficking” for these purposes is not limited to traditional “trafficking” offenses, but rather extends to *all* state or federal narcotics offenses that would be considered a felony under federal law. See *In re L.G.*, Interim Decision 3254 (BIA 1995) (explaining that “aggravated felony” under § 101(a)(43) includes any “drug trafficking crime” as defined in 18 U.S.C. § 924(c)(2), which in turn encompasses “any felony punishable under” the

unusual or outstanding equities in order to merit further consideration.

Under this rule, the BIA does not even *consider* the nature, recency or seriousness of an alien's deportable offense—factors the BIA itself has identified as relevant under § 212(c) (*Buscemi*, 19 I. & N. Dec. at 633)—unless and until the alien first demonstrates “unusual or outstanding equities.” “Rather, once the alien has made such a showing, the BIA will weigh the positive and negative factors, taking into account at that point the nature, recency, and degree of seriousness of the criminal offense, to determine whether a waiver is warranted.” Pet. Br. 5.

Because unusual or outstanding equities are required as an added condition of *eligibility*, the BIA has emphasized that such a showing does not entitle an alien to relief. Instead, as explained in *Buscemi*, 19 I. & N. Dec. at 634, “an alien who demonstrates unusual or outstanding equities, as required, merely satisfies the threshold test for having

Controlled Substances Act, the Controlled Import and Export Act, or the Maritime Drug Enforcement Act). In short, “[a] `drug trafficking crime' under 18 U.S.C. § 924(c)(2) is therefore any felony violation of the federal drug laws, *i.e.*, any offense under those laws where the maximum term of imprisonment authorized exceeds 1 year.” *Id.* at 9.

a favorable exercise of discretion considered in his favor.”⁵ It is this rule that the Government now asks this Court to uphold.

B. In Requiring Unusual Or Outstanding Equities, The BIA Improperly Has Altered The Statutory Eligibility Requirements Of § 212(c).

The BIA's rule requiring aliens convicted of a “serious drug offense” to show “unusual and outstanding equities” as a condition of eligibility under § 212(c) cannot be squared with the plain language or meaning of the statute. In § 212(c), like the other forms of discretionary relief in the INA, Congress reserved for itself—not the Attorney General—the determination of who should and should not be eligible to seek discretionary relief from deportation, including drug offenders.⁶ Congress also intended that all eligible aliens would be entitled to individualized consideration of their applications for relief based on the

⁵ See also *Matter of Roberts*, 20 I. & N. Dec. 294, 299 (BIA 1991) (“an alien who demonstrates unusual or outstanding equities, as required, does not compel a favorable exercise of discretion; rather, absent such equities, relief will not be granted in the exercise of discretion”); *Edwards*, Interim Decision 3134, at 12 (Morris, J., concurring) (“the fact that an alien has demonstrated unusual or outstanding equities does not compel a favorable exercise of discretion. Rather, we held [in *Buscemi*] that an alien with a serious criminal record who failed to make a showing of unusual or outstanding equities had not met a threshold test to be considered for relief under section 212(c)”).

⁶ For this reason, the Government's reliance on *Carlson v. Landon*, 342 U.S. 524 (1951) and *INS v. National Center For Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) is misplaced. In each of those cases, Congress was *silent* as to the eligibility of aliens for the relief being sought, *i.e.*, release on bond, and thus delegated broad policy-making authority to the Attorney General to determine which aliens should be released on bond and under what conditions. See *Carlson*, 342 U.S. at 527-28 n.5; *NCIR*, 502 U.S. at 184. Here, by contrast, Congress clearly has articulated the eligibility requirements for relief under § 212(c).

particular facts and circumstances of their cases. The BIA's rule requiring unusual or outstanding equities has unacceptably altered the congressional balance embodied in § 212(c), and should be rejected.

In construing the INA, “[t]his Court has noted on numerous occasions that in all cases involving statutory construction, ‘our starting point must be the language employed by Congress,’ * * * and we assume ‘that the legislative purpose is expressed by the ordinary meaning of the words used.’” *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991). Thus, “if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity * * * we are not free to replace it with an unenacted legislative intent.” *Cardoza-Fonseca*, 480 U.S. at 452-53. In addition, as this Court recently held in *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1066 (1995), it is “our duty to construe statutes, not isolated provisions.” The INA, “like every Act of Congress, should not be read as a series of unrelated and isolated provisions.” *Id.* at 1067 (quoting *Department of Revenue of Oregon v. ACF Indus.*, 114 S. Ct. 843, 845 (1994)).

In this case, it is evident that Congress deliberately omitted from § 212(c) any hardship or heightened equities requirement as a condition of eligibility so as to broaden the availability of such relief. Indeed, “[d]espite the limitations enacted in 1990 and 1991, section 212(c) remains the most extensive waiver provision of U.S. immigration law.” Gordon and Mailman, § 74.04[1], at 74-39. The breadth of § 212(c) is also understandable, since it remains the only form of discretionary relief in the INA reserved exclusively to lawful permanent

resident aliens—a class consistently accorded special protection under the law.⁷

Throughout the INA, where Congress has intended to require aliens to demonstrate hardship or other heightened equities as a condition of eligibility, it has done so expressly. For instance, an alien seeking a waiver of deportation under § 212(h)(1)(B) must establish “that the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse.” 8 U.S.C. § 1182(h)(1)(B). Similarly, an alien seeking suspension of deportation under § 244(a)(1) must show that deportation would “result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1254(a)(1). And aliens convicted of offenses described in §§ 241(a)(2), (3) or (4) who seek suspension of deportation must show that deportation would “result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1254(a)(2).

In marked contrast, § 212(c) contains no hardship or heightened equities requirement. This cannot be viewed as a “simple accident of draftsmanship.” *Phinpathya*, 464 U.S. at 191. To the contrary, “it is generally presumed that Congress acts intentionally and purposely

⁷ See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 107 n.30 (1976) (“[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society”) (quoting *In re Griffiths*, 413 U.S. 719, 722 (1973)); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Bernal v. Fainter*, 467 U.S. 216, 219-20 (1984); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977).

when it includes particular language in one section of a statute but omits it in another.” *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1761 (1994) (internal quotation marks & citation omitted). Yet, by requiring all aliens convicted of a nontrivial offense to demonstrate “unusual or outstanding equities,” the BIA has nullified Congress’ choice and dramatically narrowed the class of aliens Congress deemed eligible to seek discretionary relief under § 212(c). As this Court’s decisions make clear, the Attorney General cannot unilaterally limit the scope of the discretion that Congress has delegated to her. “Congress designs the immigration laws, and it is up to Congress to temper the laws’ rigidity if it so desires.” *Phinpathya*, 464 U.S. at 196.

In *INS v. Cardoza-Fonseca*, for example, this Court held that the Attorney General could not alter the asylum eligibility requirements of § 208 by requiring aliens to prove that it was more likely than not they would be persecuted if returned to their homeland (the stricter standard applicable to withholding of deportation under § 243(h)):

[W]e reject the Government’s contention that the § 243(h) standard, which requires an alien to show that he is more likely than not to be subject to persecution, governs applications for asylum under § 208(a). Congress used different, broader language to define the term “refugee” as used in § 208(a) than it used to describe the class of aliens who have a right to withholding of deportation under § 243(h). * * * “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”

480 U.S. at 423-24, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). See also *id.* at 452 (Scalia, J., concurring) (“I agree with the Court that the plain meaning of ‘well-founded fear’ and the structure of the [INA] clearly demonstrate that the ‘well-founded fear’ standard and the ‘clear probability’ standard are not equivalent”).

In *Cardoza-Fonseca*, this Court ultimately held that the Attorney General could not artificially limit her own discretionary authority by imposing new eligibility criteria that do not appear in the statute.⁸ Instead, the Court made clear the Attorney General must discharge her delegated authority by actually exercising her discretion on a case-by-

⁸ Following *Cardoza-Fonseca*, the courts of appeals repeatedly have rejected attempts by the BIA to engraft additional eligibility criteria for relief from deportation. See, e.g., *White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (“[a]dopting the INS’s interpretation would restrict the Attorney General’s ability to exercise this important discretion by restricting the class of persons eligible for relief”) (citation omitted); *Dulane v. INS*, 46 F.3d 988, 999 (10th Cir. 1995) (reversing denial of asylum where “the Board falsely injected proof of nationality as a requirement for establishing refugee status”); *Romero v. INS*, 39 F.3d 977, 980-81 (9th Cir. 1994) (striking down regulation that extended grounds of exclusion and deportation to immaterial misrepresentations because “Congress did not intend to allow the INS to deport aliens for nonmaterial misrepresentations * * * [T]he regulation’s extension to furnishing ‘nonmaterial’ information irrelevant to status or benefits is inconsistent with the statutory scheme”); *Rosario v. INS*, 962 F.2d 220, 221, 223 (2d Cir. 1992) (“We think in this case [the INS] * * * has added conditions to eligibility not found in the statute, and consequently has exceeded its delegated authority. * * * [I]t seems plain that Congress’ policy, at least as regards waiver eligibility, is tolerant rather than strict, and accordingly does not envision barriers in addition to those already found in § 212(c)"); *Guillen-Garcia v. INS*, 999 F.2d 199, 205 (7th Cir. 1993) (vacating denial of § 212(c) relief based solely on absence of rehabilitation because “while rehabilitation is an important factor to be considered in the exercise of discretion * * * it is not an absolute prerequisite to section 212(c) relief, and therefore cannot be the sole factor considered in assessing an alien’s application for a waiver of deportation”), cert. denied, 116 S. Ct. 775 (1996).

case basis with respect to every alien who meets the eligibility criteria of the statute. The Court also flatly rejected the notion now advanced once again by the Government that the Attorney General has the discretionary power to narrow the statutory eligibility requirements for relief from deportation:

This vesting of discretion in the Attorney General is quite typical in the immigration area * * * If anything is anomalous, it is that the Government now asks us to restrict its discretion to a narrow class of aliens. *Congress has assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.*

* * * *

Our holding today increases [the Attorney General's] flexibility by rejecting the Government's contention that the Attorney General may not even consider granting asylum to one who fails to satisfy the strict § 243(h) standard. Whether or not a “refugee” is eventually granted asylum is a matter which Congress has left for the Attorney General to decide. But is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported.

480 U.S. at 444-45, 449-50 (emphasis added).

As *Cardoza-Fonseca* confirms, Congress was keenly aware of its legislative choices when it crafted the various forms of discretionary relief contained in the INA. See 480 U.S. at 448. See also *Phinpathya*, 464 U.S. at 189, 190 (holding that § 244(a)(1) requires continuous physical presence in the United States, and noting that “when Congress in the past has intended for a ‘continuous physical presence’ requirement to be flexibly administered, it has provided the authority for doing so * * * Congress knew how to distinguish between actual ‘continuous physical presence’ and some irreducible minimum of ‘non-intermittent’ presence”); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991) (interpreting scope of jurisdiction under INA § 210(e) based on “Congress’ choice of statutory language”).

Had Congress intended to limit the eligibility of aliens who commit “serious drug offenses” for relief under § 212(c), it plainly knew how to say so. Section 243(h) of the Act, for instance, provides that aliens who commit a “particularly serious crime” are ineligible for withholding of deportation. The absence of such language in § 212(c) must be given effect if its presence in § 243(h) is to have any meaning. *Cardoza-Fonseca*, 480 U.S. at 424.

In the INA, Congress reserved to itself the determination of who should and should not be eligible to seek discretionary relief from deportation, and carefully defined the scope of the Attorney General’s discretion. See H. Rep. No. 1365, 82 Cong., 2d Sess., reprinted in 1952 U.S.C.C.A.N. 1653, 1705 (noting that “any discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action *and that the discretionary authority should be surrounded with strict limitations*”) (emphasis added). As the Government itself concedes (INS Cert. Reply Br. at 7), “Con-

gress * * * makes the rules respecting statutory eligibility” while “the Executive Branch * * * determines, in its discretion, whether to afford asylum to those individuals who are statutorily eligible for relief.” See also *Goncalves v. INS*, 6 F.3d at 831 (same). As this Court noted in *Phinpathya*, 464 U.S. at 195, with respect to suspension of deportation, “Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation proceedings. Congress drafted § 244(a)(1)'s provisions specifically to restrict the opportunity for discretionary administrative action.”

Section 212(c) likewise defines “the entire class” of aliens who are eligible to seek relief. *Cardoza-Fonseca*, 480 U.S. at 444.⁹ Section 212(c) identifies not only those aliens who *are* eligible to seek a § 212(c) waiver, *i.e.*, lawful permanent residents continuously present in the United States for at least 7 years, but also explicitly lists those categories of aliens who are *not* eligible. For instance, § 212(c) excludes aliens who have committed one or more aggravated felonies and have been sentenced to 5 years or more in prison. It also bars aliens convicted of certain offenses such as child abduction and terrorism from seeking relief. But in sharp contrast to other forms of relief from deportation like asylum (§ 208(d)) and voluntary departure (§ 244(e)), § 212(c) does *not* exclude all aliens convicted of an aggravated felony. In fact, in 1990 Congress rejected a bill that would have eliminated § 212(c) relief for all aggravated felons. See 136 Cong. Rec. S11941 (Aug. 2, 1990).

⁹ See, *e.g.*, *Goncalves*, 6 F.3d at 831 (“the INA lists a host of grounds for excluding or deporting aliens, including conviction of a drug-related crime. The Act also says that a certain class of these ‘deportable’ aliens—those who have lived here for seven years as aliens ‘lawfully admitted for permanent residence’—can ask the Attorney General * * * to exercise a kind of equitable discretion that would permit them to remain here even though they have, for example, committed a drug crime. *The Act defines the class of those eligible for this relief*”) (emphasis added).

The Government claims, however, that the BIA's rule "is wholly consistent with Congress's own treatment of drug-trafficking offenders under the INA." Pet Br. 22-23. To the contrary, Congress explicitly addressed the question of whether aliens convicted of a "serious drug offense" should be allowed to seek a discretionary waiver of deportation under § 212(c), and excluded only those aliens who have served 5 years or more in prison. "Congress could have decided to deny discretionary relief to all persons convicted of serious drug offenses, but it explicitly chose not to do so." *Yepes-Prado v. INS*, 10 F.3d 1363, 1371 (9th Cir. 1993). Accord *Lok v. INS*, 548 F.2d 37, 40-41 (2d Cir. 1977) ("[i]f Congress ultimately had determined that such constriction of the class of aliens entitled to the beneficial consideration available under [§ 212(c)] was warranted, it could have expressed its intention explicitly, as it did on other occasions * * * The fact that the legislators did not so limit Section 212(c), coupled with the obvious purpose of the statute to mitigate the hardship that deportation poses for those with family ties in this country, impel us to grant the petition").

Apparently discontented with the scope of its authority under the INA (just as it was in *Cardoza-Fonseca*), the Government asks the Court to restrict the Attorney General's discretion in granting § 212(c) relief more narrowly than Congress has provided. Again, however, just as in *Cardoza-Fonseca*, nothing in § 212(c) even remotely supports that result. Through § 212(c), "Congress has assigned to the Attorney General and his delegates the task of making these hard individualized decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible [aliens] should be denied [discretionary relief]." *Cardoza-Fonseca*, 480 U.S. at 444-45. In short, the BIA's unusual or outstanding equities rule cannot stand, for it remains a cen-

tral and essentially indisputable tenet of administrative law that an agency can neither rewrite the statute it is called upon to apply, nor tailor the scope of its own authority to suit its taste.

II. THE BIA'S UNUSUAL OR OUTSTANDING EQUITIES REQUIREMENT CANNOT BE DEFENDED AS AN EXERCISE OF THE ATTORNEY GENERAL'S DELEGATED AUTHORITY.

In defending the BIA's rule of requiring unusual or outstanding equities as a condition of eligibility under § 212(c), the Government essentially raises two arguments. *First*, the Government contends that “because relief under Section 212(c) is a matter of discretion, not of right, the BIA could lawfully deny relief to certain categories of applicants altogether.” Pet. 11. And *second*, it suggests that the BIA's rule constitutes an exercise of the Attorney General's “rulemaking” power to guide her discretion “through the formulation and application of general principles.” Pet. Br. at 15-16. As we demonstrate below, neither of these arguments can withstand scrutiny.

A. The BIA Lacks The Authority To Withhold Its Discretion Under § 212(c) From Any Eligible Alien.

The Government strenuously suggests that because the Attorney General purportedly has “plenary authority to grant or withhold relief from deportation,” the BIA can “categorically” withhold discretionary relief under § 212(c) relief from groups of aliens who are otherwise statutorily eligible. Pet. Br. 12-13, 21 (citing *Jay v. Boyd*, 351 U.S. 345, 361 (1956)).¹⁰ In fact, as this Court's decisions make clear, that

¹⁰ The government's reliance on the Court's 5-4 decision in *Jay* reveals the extreme nature of its position. As Judge Friendly explained in *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966) (cited with approval in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)), “[d]espite

is precisely what the Attorney General may *not* do. “Even discretion * * * has its legal limits.” *INS v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., joined by Stevens and Souter, JJ., concurring).

In an attempt to prove its point, the Government hypothetically proposes that the BIA could, if it chose, categorically deny § 212(c) relief to all aliens convicted of murder. Pet. Br. 21 & n.10 (citing *Matter of Burbano*, Slip op. at 10). In fact, that is the sort of policy judgment that only Congress can make. Indeed, taking the Government's own example, where Congress has intended to exclude aliens convicted of murder from eligibility for relief from deportation, it has done so explicitly. See, e.g., § 212(h) (“[n]o waiver shall be provided under this subsection in the case of an alien who has been convicted of * * * *murder* or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture”) (emphasis added). However difficult it may be for an alien convicted

language in *Jay v. Boyd*, [351 U.S.] at 353-356, that could be read as supporting unreviewability of the ultimate exercise of discretion, the contrary view is implicit in *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 (1957), where the Court reviewed the discretionary denial of suspension and affirmed the agency decision because it did not represent an abuse of discretion and the reasons on which it was based were neither “capricious nor arbitrary.” Consistent with this view, this Court often has refused the government's invitation to grant what “would in effect be blank checks drawn to the credit of some administrative officer or board.” *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671 (1986) (citation omitted). See also, e.g., *Hampton*, 426 U.S. at 101 (rejecting the Government’s “primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens”); *United States v. Witkovich*, 353 U.S. 194, 200 (1957) (refusing to grant the Attorney General “seemingly limitless power” to demand information from aliens).

of murder to merit relief, there is no murder exclusion in § 212(c); it is not within the power of the BIA to put one there.

It is well established that discretion is abused where it is never exercised.¹¹ See *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 113 S. Ct. 1967, 1978 (1993) (Scalia, J., joined by Souter, J., concurring in judgment) (noting that it is an “abuse of discretion” for an agency to “fail[] to exercise any discretion at all”). Indeed, “if the word ‘discretion’ means anything in a statutory or administrative grant of power, it means that the recipient *must* exercise his authority according to his own understanding and conscience.” *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67, 268 (1954) (emphasis added) (also noting that the BIA abuses its discretion if it “fail[s] to exercise its own discretion”).¹²

¹¹ For this very reason, the court of appeals below expressed the concern, also raised by other circuits, that the repeated failure of the BIA to grant § 212(c) relief in drug cases suggests a *de facto* policy never to grant relief in such cases. Br. In Opp. App. 6a. See also *De Gonzalez v. INS*, 996 F.2d 804, 810 (6th Cir. 1993) (expressing concern over BIA’s apparent “policy of not granting a 212(c) waiver in a case where an alien has been convicted of a serious drug offense,” and noting that “[s]uch a policy, if it does exist, appears to be an unauthorized assumption by the INS of a position properly to be made by the Congress”). The government all but confirms this policy by pointing out that in the last four and a half years the BIA has granted only *nine* § 212(c) applications by aliens convicted of drug offenses (Pet. Br. at 25, n.13), while in fiscal year 1995 *alone* the BIA issued final orders of deportation in 1300 such cases.

¹² See also *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943) (“All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board”); *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (holding that the “most obvious manifestation” of an abuse of discretion “is in a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion”) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978)); *De*

The BIA recognized long ago in *Marin*, 16 I. & N. Dec. at 582-83, that § 212(c) cases cannot be adjudicated in a broadbrush fashion: “Section 212(c) * * * does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Instead, the Attorney General or his delegate is *required* to determine as a matter of discretion whether an applicant warrants the relief sought.” (Emphasis added). “There *must* be a balancing of the social and humane considerations presented in an alien’s favor against the adverse factors evidencing his undesirability as a permanent resident.” *Coelho*, at 5 (emphasis added). That is all that the court of appeals below required.

The Government's defense of the unusual or outstanding equities rule confuses the actual granting of relief—a decision that rests with the Attorney General—with eligibility to seek that relief, which was set by Congress. When Congress enacted the predecessor to § 212(c), it fully expected that “[i]f it should be found that [an alien] was returning to an unrelinquished domicile in the United States of 7 years, he would then be *entitled* to have his case considered for exercise of the seventh proviso.” S. Rep. No. 1515, 81st Cong., 2d Sess., at 382 (1950) (emphasis added). Congress did not authorize the Attorney General to decide what categories of aliens are eligible for discretionary consi-

Gonzalez, 996 F.2d at 810-11 (“Courts and administrative agencies are given discretionary power in order to individualize the application of law, make it flexible and adaptable to circumstances. * * * The BIA's failure to exercise its discretion may well be an abuse of discretion”). See also *Carlson v. Landon*, 342 U.S. 524, 558 (1952) (Frankfurter, J., dissenting) (“If the Attorney General * * * had made a general ruling that thereafter he would not allow bail to any alien against whom deportation proceedings were started and who was then a member of the Communist Party—an indiscriminating, unindividualized class determination—it would disregard the clear direction of Congress for this Court not to hold that the Attorney General had exceeded the limits of his discretion”).

deration under § 212(c)—the statute itself defines eligibility for that consideration. Under § 212(c), it is the Attorney General's “responsibility to decide the proper weight to give the various factors involved in 212(c) petitions involving narcotics offenses. What it may not do is categorically deny 212(c) relief to drug offenders who have served less than five years incarceration.” *Yepes-Prado*, 10 F.3d at 1371.

Of course, no alien is ultimately *entitled* to receive § 212(c) relief under the BIA's “sliding-scale.” However, the statute requires that every eligible alien have the relevant facts and circumstances of his or her case individually considered, including the nature, recency and seriousness of the offense for which the alien seeks forgiveness. In this case, by the Government's own admission, the BIA failed to do that. The BIA therefore abused its discretion as a matter of law.

B. The BIA's Unusual Or Outstanding Equities Requirement Could Not Be Accomplished Through Rulemaking.

Throughout its brief, the Government contends that the unusual or outstanding equities rule is simply an example of adjudicative rulemaking, citing this Court's holding in *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211, 228 (1991), that an “agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration,” and that “‘general factual issue[s] may be resolved as fairly through rulemaking’ as by considering specific evidence when the questions under consideration are ‘not unique’ to the particular case.” (quoting *Heckler v. Campbell*, 461 U.S. 458, 468 (1983)). See Pet. Br. 14-15. To the contrary, *Mobil Oil* and *Heckler* make clear that the

Attorney General's rulemaking powers cannot take the place of the case-by-case consideration required under § 212(c).¹³

In *Mobil Oil*, the natural gas industry challenged certain pricing orders of the Federal Energy Regulatory Commission. The statute in question “gave the Commission the authority to regulate prices in the intrastate market as well as the interstate market” (498 U.S. at 217), and provided that FERC “may, by rule or order, prescribe a maximum lawful ceiling price” for natural gas. *Id.* at 218. Section 7(b) of the Natural Gas Act required a “due hearing” for any request by a natural gas producer to abandon its contractual service obligations in a particular area. Instead of conducting individualized proceedings for each producer, however, FERC adopted a regulation permitting abandonments subject to specified conditions. *Id.* at 227. In adopting the regulation, FERC issued specific findings that “preauthorized abandonment . . . would generally protect purchasers by allowing them to buy at market rates elsewhere” and involved “matters common to all abandonments.” *Id.* at 227-228. In upholding the regulation, this Court explained that:

[Section] 7(b) does not compel the agency to make “specific findings” with regard to every abandonment when the issues involved are general. As we held in the context of disability proceedings under the Social Security Act, “general factual issue[s] may be resolved as fairly through rulemaking” as by considering specific evidence when the questions under consideration are not

¹³ Notably, 8 C.F.R. § 212.3(f), which sets forth the “[l]imitations on discretion to grant an application under section 212(c) of the Act,” contains no reference at all to any unusual or outstanding equities requirement, but instead merely tracks the statutory eligibility requirements of § 212(c).

unique' to the particular case. * * * The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that *do not require case-by-case consideration*.

498 U.S. at 228 (emphasis added) (quoting *Heckler*, 461 U.S. at 467-68).

Similarly, *Heckler* involved a challenge to HHS guidelines adopted through regulation to assist administrative law judges in making social security disability determinations. In upholding the guidelines, this Court distinguished those issues requiring individualized adjudication from those that could properly be addressed through rulemaking:

The Secretary must assess each claimant's individual abilities and then determine whether jobs exist that a person having the claimant's qualifications could perform. *The first inquiry involves a determination of historic facts, and the regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing.* We note that the regulations afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them. The second inquiry requires the Secretary to determine an issue *that is not unique to each claimant--the types and numbers of jobs that exist in the national economy. This type of general factual issue may be resolved as fairly through rulemaking as by introducing the*

testimony of vocational experts at each disability hearing.

Id. at 467-68 (emphasis added). In *Heckler*, the Court again pointed out “that even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues *that do not require case-by-case consideration.*” *Id.* at 467 (emphasis added).

Mobil Oil and *Heckler* thus confirm that agencies may *not* act through rulemaking when it comes to matters requiring “case-by-case consideration.” That being the case, it is difficult to imagine a decision more inherently case and fact-specific than the question of whether the particular equities of an alien’s case merit relief from deportation. Indeed, the BIA repeatedly has acknowledged that “section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis.” *Coelho*, at 6.¹⁴ See also *In re Arreguin de Rodriguez*, Interim Decision 3247, at 4 (BIA 1995) (“Section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis”); *Edwards* (same). Accord *Yepes-Prado*, 10 F.3d 1363 at 1371 (“by providing that 212(c) relief will remain available to persons * * * who have served less than five years imprisonment on account of a narcotics conviction, Congress demonstrated its intent that the Attorney General should consider these applications on a case by case basis, while carefully weighing all pertinent considerations, including the particulars of the petitioner’s criminal conduct”). Cf. *Cardoza-Fonseca*, 480 U.S. at 450 (Blackmun, J., concurring) (noting that Congress dele-

¹⁴ As explained long ago by the BIA in *Matter of DEG*, 8 I. & N. Dec. 325, 331-32 (1959), “[c]ases arising under the immigration laws present unusual and varied factual situations. The greatest degree of administrative flexibility is required to deal with such situations equitably and fairly. * * * It would seriously hamper the ability of the Board to minimize hardship if its hands were tied by rigid concepts.”

gated the task of deciding asylum applications “to the `process of case-by-case adjudication' by the INS”).¹⁵

In *Sullivan v. Zebley*, 493 U.S. 521 (1990), this Court squarely held that rulemaking cannot be used as a substitute for individualized consideration of issues that demand case-by-case adjudication. In *Sullivan*, the Court invalidated social security regulations that allowed child disability claimants to recover benefits only if they could prove an impairment of “comparable severity” to that of adult claimants, while denying child claimants the opportunity to show that they were disabled if they did not suffer from a listed impairment. As this Court explained, because “[t]he Secretary explicitly ha[d] set the medical criteria defining the listed impairments at a higher level of severity than the statutory standard” * * * “there [were] several obvious categories of claimants who would not qualify under the listings, but who nonetheless would meet the statutory standard.” *Id.* at 532, 534.

In striking down these regulations, the Court in *Sullivan* emphasized the sheer impossibility of adjudicating child disability cases through rulemaking without individualized consideration for each claimant:

[N]o set of listings could ensure that child claimants would receive benefits whenever their impairments are of “comparable severity” to ones that

¹⁵ Because § 212(c) indisputably calls for case-by-case adjudication, the Government's reliance on *American Hospital Ass'n v. NLRB*, 499 U.S. 606 (1991), is misplaced. In *American Hospital*, the Court addressed the question of whether the NLRA's requirement that a hearing be held “in each case” required individualized adjudication of the size of employee bargaining units for acute care hospitals. The Court held that such adjudication was unnecessary given “the extensive record developed during the rulemaking proceedings” and the NLRB's “`considered judgment' that `acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units.’” *Id.* at 618.

would qualify an adult for benefits under the individualized, functional analysis contemplated by the statute and provided to adults by the Secretary. No decision process restricted to comparing claimants' medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof, the varying impact of such conditions due to the claimant's individual characteristics, and the constant evolution of medical diagnostic techniques.

493 U.S. at 539.

The Court's holding in *Sullivan* applies with equal force to applications for discretionary relief under § 212(c), for the question of which eligible aliens are qualified to receive such relief likewise is one that can only be accomplished “through a process of case-by-case adjudication.” *Cardoza-Fonseca*, 480 U.S. at 448. Under the “sliding scale” model of discretion adopted by the BIA in *Marin*, the level of equities an alien must show to merit a waiver of deportability necessarily “will depend in each case on the nature and circumstances of the ground of exclusion sought waived and on the presence of any additional adverse matters.” 16 I. & N. Dec. at 585. Under *Mobil Oil*, *Heckler* and *Sullivan*, it is clear that the Attorney General cannot use her rulemaking powers as a substitute for the case-specific consideration of these circumstances and factors.

C. The BIA's Decision To Require Unusual Or Outstanding Equities In All Cases Involving A “Serious Drug Offense” Is Not Entitled To Deference.

The Government claims that the BIA's unusual or outstanding equities rule is entitled to deference because of “the breadth of the Attorney General's discretion with regard to the provision of relief from deportation.” Pet. Br. 13. Yet, there is simply no support or justification for the notion that an unusually great degree of deference is required in immigration cases. As explained by Judge Breyer in *Ananeh-Firempong v. INS*, 766 F.2d 621, 624 (1st Cir. 1985), “if the INS means that the cases it cites reach beyond ordinary principles of administrative law to require a special judicial mood of extraordinary caution in all immigration cases, we do not agree. To be more specific, we do not believe that the cases it cites require so extreme and unusual a judicial attitude when courts review a purely factual determination under the statute now before us.” As this Court made clear in *Cardoza-Fonseca*, 480 U.S. at 445-46, the question of deference in the area of immigration is governed by the traditional framework articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Under *Chevron*, the first inquiry “always, is the question whether Congress has directly spoken to the precise question at issue. 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.” 467 U.S. at 842-43. See also *Cardoza-Fonseca*, 480 U.S. at 445 & n.29. In this case, as explained in Section I(B), *supra*, Congress has spoken directly to the question of which aliens are eligible to seek § 212(c) relief and which are not. Thus, “there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference.” *Id.* at 453 (Scalia, J., concurring). See also *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (“administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference”).

The next inquiry under *Chevron* is whether an agency's rule is designed “to fill any gap left, implicitly or explicitly, by Congress.” *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Here, there is no ambiguity or gap in § 212(c) that the Attorney General or BIA has even purported to fill. For instance, there are no ambiguous terms in § 212(c) which the BIA has attempted to define or clarify. Cf. *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam) (deferring to BIA interpretation of “extreme hardship” in § 244 because “[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction”); *INS v. Rios-Pineda*, 471 U.S. 444, 451 (1985) (“Administering the 7-year requirement [of § 244(a)(1)] in this manner is within the authority of the Attorney General. The Act commits the definition of the standards in the Act to the Attorney General and his delegate in the first instance”).

As the Government itself acknowledges, the BIA's rule here is a “policy decision” to limit further the eligibility of drug offenders for relief from deportation under § 212(c) based on its perception of “Congress's own treatment of drug-trafficking offenders under the INA.” Pet. Br. 22-23. What the Government forgets is that Congress never delegated any authority to the Attorney General to make that “policy decision,” but instead only granted her the authority to adjudicate individual § 212(c) applications. As this Court explained in *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1079 (1995), “policy considerations `cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result `so bizarre' that Congress could not have intended it.”

By disqualifying drug offenders from seeking § 212(c) relief unless they can show unusual or outstanding equities, the BIA improperly has relied upon its view of congressional “policy” to change the law Congress enacted. While it may be, as the Government claims,

that “Congress has categorically visited upon aliens convicted of aggravated felonies several legal disabilities not shared by aliens convicted of other crimes” (Pet. Br. 23), the point is that Congress purposely did *not* impose the “disability” now added by the BIA. “Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate.” *NLRB v. Brown*, 380 U.S. 278, 291 (1965). As this Court warned in *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965), “[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.”

The Government defends the BIA's policy decision by pointing out that nothing in § 212(c) requires “that the Attorney General must treat aggravated felons who have served fewer than five years' imprisonment the same as non-aggravated-felon applicants” (Pet. Br. 21), and by arguing that the Attorney General must be allowed to adopt rules “to structure and guide the exercise of the broad discretion that Congress has vested in her.” *Id.* at 26-27. Yet, both of these objectives *already* are served by the BIA's “sliding scale,” which gives the BIA complete flexibility to determine the appropriate level of equities an alien must demonstrate to merit relief in each case—*after* taking into account the nature, recency and seriousness of the alien's offense as well as other relevant factors.

Simply put, the flaw in the BIA's rule of requiring *all* aliens convicted of a “serious drug offense” to show unusual or outstanding equities is that it “takes in almost all drug-related offenses” (Pet. 4 n.1), particularly since “drug trafficking” “covers the entire universe of drug transactions and results in the lumping in of the one-time sale of a small amount of marijuana with the organized distribution of large amounts of drugs.” *Matter of Roberts*, 20 I. & N. Dec. 294, 303-04 (BIA

1991) (Heilman, dissenting). Indeed, given the massive range of drug offenses that are classified by the BIA as “serious,” the BIA itself has recognized that within that broad universe “[t]here are drug offenses of varying degrees of seriousness.” *Cerna*, at 8.¹⁶ The unusual or outstanding equities rule simply cannot be reconciled with the broad range of offenses to which it automatically applies.

In the very same way as the social security regulations invalidated by this Court in *Sullivan*, the BIA's rule of requiring unusual or outstanding equities in all drug cases improperly leaves no room for aliens who have committed relatively minor or isolated drug offenses to show that the degree or vintage of their particular offense merit different consideration. This is especially troubling because in “extremely close” (Pet. App. 24a) cases such as this, the nature, recency or seriousness of the offense in question may well prove decisive. As explained by Judge Easterbrook in *Hengan v. INS*, 79 F.3d 60, 63 (7th Cir. 1996), “the fact that a case is on the cusp between opposing decisions also means that the intrusion of inappropriate or irrelevant considerations can upset the balance.”

In this case, as the court of appeals found, “had the BIA taken into account the actual nature of Elramly’s drug offense, it may well have reached a different result.” Br. In Opp. App. 7a. The Government has not contested this finding. To the contrary, the Government actually complains that if the BIA “engage[s] in case-specific determi-

¹⁶ For this reason, the Government's reliance on *Reno v. Flores*, 507 U.S. 292 (1993), is misplaced, since the Court there determined that it was “reasonable” for the INS to presume that it was unsuitable to release alien juveniles to “custodians other than parents, close relatives, and guardians” pending their deportation hearings. *Id.* at 313-14. Here, on the other hand, the BIA's own decisions confirm that such categorical judgments cannot be made, that all drug offenders are *not* the same, and thus cannot simplistically be treated as having committed offenses of equal seriousness.

nations of the relative severity of each applicant's particular drug-trafficking crime,” this will lead to an increase in the number of § 212(c) waivers granted. Pet. 8.¹⁷ If that is true—and it is—it is only because aliens like respondent who have committed a relatively minor and isolated drug offenses could well be qualified for a waiver of deportability without unusual or outstanding equities. Under § 212(c), aliens like respondent are entitled to find out.

It may well be that, under the sliding scale, the nature and circumstances of a given offense in a particular case could require that the alien show unusual or outstanding equities. It is arbitrary and unreasonable, however, to require *all* drug offenders to make this showing without regard to the nature, recency or seriousness of their offense.¹⁸ As this Court explained in *INS v. Rios-Pineda*, the Attorney

¹⁷ The Government's prediction is supported by the BIA's decision in *In re Arreguin de Rodriguez*, Interim Decision 3247 (1995), the first published case decided by the BIA granting § 212(c) relief to a drug offender since 1978. In that case, the alien was convicted of importing more than 78 kilograms of marijuana (*thousands* of times more than was involved in this case). Nevertheless, after reviewing the particulars of the alien's conviction and finding that she had “played a minor role in the offense,” that this was the alien's only criminal conviction, and that deportation “would bring great hardship” on the alien's children, the BIA granted § 212(c) relief “based upon the totality of the circumstances.” *Id.* at 6-8. Such a case-specific balancing should be the norm—not the exception.

¹⁸ For instance, in the area of sentencing, Congress and this Court have recognized the unfairness of treating individuals who commit substantially different crimes the same. See *e.g.*, *Neal v. United States*, 116 S. Ct. 763, 767 (1996) (noting that the Sentencing Reform Act was enacted to establish “a regime of individualized sentencing” and to “eliminate unwarranted disparities in punishment of similar defendants who commit similar crimes”); *Mistretta v. United States*, 488 U.S. 361, 366 (1989) (explaining that the same Act was prompted by “the great variation among sentences imposed by different judges upon similarly situated offenders”). It is no less arbitrary or unfair to treat aliens

General cannot be precluded from considering the nature and degree of the actual offense committed in each case: “While all aliens illegally present in the United States have, in some way, violated the immigration laws, it is untenable to suggest that the Attorney General has no discretion to consider their individual conduct and distinguish among them on the basis of the flagrancy and nature of their violations.” 471 U.S. at 451. Here, however, the BIA’s rule treats petty drug offenders the same as large-scale traffickers who regularly import large quantities of drugs into the United States, placing them both in the identical spot on the “sliding scale.” “The term ‘arbitrary’ does not have a very precise content, but it is precise enough to cover this.” *Doherty*, 502 U.S. at 343.

In the end, regardless of how it is characterized, the BIA’s unusual or outstanding equities rule reduces to nothing more than a vehicle for short-circuiting applications for discretionary relief by eligible aliens simply to avoid “the necessity of engaging in *ad hoc*, case-by-case analyses” (Pet. Br. 12)—a result the Government justifies by complaining that individualized consideration “would significantly hamper the BIA’s ability to promote a uniform interpretation and application of the law.” *Ibid.* Whatever the BIA’s commitment to uniform decision-making may be, it cannot achieve that “uniformity” by simply ignoring the relevant facts and circumstances of its cases.¹⁹ As

who commit substantially different offenses the same in judging the deportation consequences of those offenses.

¹⁹ See J. Romig, *Administrative Review of Cases Involving the Exercise of Discretion Under Section 212(c): Should the Board of Immigration Appeals Adopt An “Abuse of Discretion” Standard?*, 9 GEO. IMMIG. L.J. 63, 71-72 (1995) (“Each section 212(c) case is unique, involving a myriad of discretionary factors. * * * While uniformity of decision-making remains a laudable goal for the BIA, it does not seem attainable in the section 212(c) context”).

explained by the Seventh Circuit in *Henry v. INS*, 8 F.3d 426, 438 n.17 (1993), “[w]hen a matter as serious as deportation from this country is at issue, we should not focus on ease of application, for ‘easy’ rules often preclude any inquiry into individual equities, which is what section 212(c) is all about.”

For almost a century, this Court has emphasized that an alien's interest in avoiding deportation “is, without question, a weighty one. She stands to lose the right to stay and live and work in this land of freedom. . . .’ Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual.” *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). Accord *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922) (deportation “obviously deprives [an alien] of liberty * * * [and] may result also in loss of both property and life, or of all that makes life worth living”). Section 212(c) was enacted with this in mind, and out of the recognition that the circumstances that justify relief from deportation are incapable of generalization, and defy the sort of rigid decisionmaking reflected in the BIA's decision below.

III. THE COURT OF APPEALS PROPERLY VACATED THE BIA'S DECISION AS AN ABUSE OF DISCRETION.

An agency decision “may be set aside if found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting 5 U.S.C. § 706(2)(A)). See also *INS v. Doherty*, 502 U.S. at 330 (Scalia, J., joined by Stevens and Souter, JJ., concurring) (BIA decisions are reviewable for “an abuse of discretion according to those standards of federal administration embodied in what we have described as the ‘common law’ of judicial review of agency action. * * * If it was such an abuse of discretion, courts are commanded by the

judicial review provisions of the Administrative Procedure Act * * * to * * * set [it] aside”) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); 5 U.S.C. § 706(2)); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Goncalves*, 6 F.3d at 832 (“The Administrative Procedure Act provides * * * that the Board may not act arbitrarily or ‘abuse’ its ‘discretion’”) (quoting 5 U.S.C. § 706(2)(A)).

In determining whether an agency's discretion has been abused, “the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). It is also “an axiom of administrative law that an agency's explanation of the basis for its decision must include a ‘rational connection between the facts found and the choice made.’” *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (citations omitted). See also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. ‘The administrative process will best be vindicated by clarity in its exercise’”) (citation omitted).

As these canons of administrative law demonstrate, it is an abuse of discretion for the BIA not to consider all of the factors that it has identified as relevant:

The BIA unquestionably has wide discretion in determining what circumstances warrant reopening a deportation proceeding * * * Broad as the BIA's discretion is, however, that tribunal may not act arbitrarily or irrationally. It may not proceed at whim, shedding its grace unevenly from case to

case. It must explain departures from settled policies, * * * and it may not unaccountably disregard on one day considerations it held relevant on another day.

Sang Seup Shin v. INS, 750 F.2d 122, 124-25 (D.C. Cir. 1984) (R.B. Ginsburg, J.). See also *Carlson v. Landon*, 342 U.S. 524, 532-33 (1952) (“Discretion does not mean decision upon one particular fact or set of facts. It means rather a just and proper decision in view of all the attending circumstances”); *Turri v. INS*, 997 F.2d 1306, 1309 (10th Cir. 1993) (“Failure to actually consider all the relevant factors constitutes an abuse of discretion”); Gordon & Mailman, § 74.04[3], at 74-57 n.54.87 (collecting cases).

The BIA also must reflect in its decision that it actually considered each of the relevant factors, since “[t]he reviewing court should not attempt itself to make up for such deficiencies: `We may not supply a reasoned basis for the agency's action that the agency itself has not given.” *Motor Vehicle Mfrs.*, 463 U.S. at 43 (quoting *Chenery*, 332 U.S. at 196). See also *Turri v. INS*, 997 F.2d at 1309 (“the Board must articulate its reasons for denying relief sufficiently for us, as the reviewing court, to be able to see that the Board considered all the relevant factors”); *Shahandeh-Peh v. INS*, 831 F.2d 1384, 1388-89 (7th Cir. 1987) (“A decision that does not reflect * * * consideration of important aspects of an individual’s claim is one made, for all a reviewing court can know, `without rational explanation”).²⁰

²⁰ See also *Henry v. INS*, 8 F.3d 426, 432 (7th Cir. 1993) (“The Board must review the applicant's evidence in light of these factors and provide a reasoned explanation for its discretionary decision, demonstrating that it considered the evidence supporting the application and enabling “a reviewing court to perceive that it has heard and thought and not merely reacted”) (quoting *Vergara-Molina v. INS*, 956 F.2d 682, 685 (7th Cir. 1992)); *Akinyemi v. INS*, 969 F.2d 285, 289-90 (7th Cir. 1992) (“A court of appeals `does not have the authority

In this case, the court of appeals properly vacated and remanded the decision of the BIA for “automatically treat[ing respondent’s] offense as a `very serious drug offense” without “considering the particular nature of Elramly’s drug offense” (Br. In Opp. App. 5a), and for failing to consider the nature, recency and seriousness of respondent’s offense—factors the BIA repeatedly has held to be relevant.²¹ See Pet. App. 11a. The Government does not deny that the BIA failed to

to determine the weight to afford to each factor.’ However, we do have the obligation to ensure that a Board determination has not inexplicably departed from established policies or rested on an impermissible basis”); *Goncalves*, 6 F.3d at 835 (vacating denial of 212(c) relief because “we find no legally adequate explanation of why the Board has departed from the rule set forth in its own regulation”).

²¹ Other circuits also have consistently vacated and remanded denials of discretionary relief by the BIA for failure to take into account the nature, recency and seriousness of an alien’s deportable offense. See, e.g., *Maashio v. INS*, 45 F.3d 1235, 1240 (8th Cir. 1995) (“In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and the underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community”) (quoting *Matter of Frenescu*, 18 I. & N. Dec. 244, 247 (BIA 1982)); *Tipu v. INS*, 20 F.3d 580, 584 (3d Cir. 1994) (“One of the factors listed in the *Marin* test to be weighed in consideration of an application for a § 212(c) waiver is the `nature, recency, and seriousness’ of any crimes committed by the applicant”); *Yepes-Prado*, 10 F.3d at 1371 (“convictions, including drug convictions, must be considered on an individual basis rather than in a blanket fashion. The IJ or the BIA must, as part of the balancing process required by *Edwards*, consider the relative seriousness of the particular conduct of which the petitioner was convicted”). See also R. Bartlett, *Failure To Delineate Standards For Convicted Aliens Seeking Waivers Of Deportation Renders Relief Illusory*, 17 SUFFOLK TRANSNAT’L L. REV. 551, 563-64 (1994) (“the BIA should assess each case individually without allowing the seriousness of the crime to outweigh automatically the alien’s equities and, in reviewing these cases, courts must ensure that the BIA has performed the necessary case-by-case analysis”).

consider these factors but instead defends that failure by suggesting that the BIA views “all drug-trafficking offenses [as] sufficiently serious to justify requiring those convicted of such offenses to prove heightened equities before the BIA will consider, on an individualized basis, their requests for extraordinary relief.” Pet. Br. 22 (emphasis omitted). The Government misses the point, for “individualized” consideration is precisely what the law demands for all aliens who meet the eligibility requirements of § 212(c). Here, the BIA failed to provide respondent with that measure of consideration. Its decision was properly vacated by the court of appeals as an abuse of discretion.²²

²² The court of appeals' decision to vacate and remand the BIA's ruling on this ground is consistent with that of every other circuit which has considered this question. See *Tipu v. INS*, 20 F.3d 580, 584 (3d Cir. 1994) (vacating denial of § 212(c) relief on the grounds that “[o]ne of the factors listed in the *Marin* test to be weighed in consideration of an application for a § 212(c) waiver is the ‘nature, recency, and seriousness’ of any crimes committed by the applicant. Nevertheless, the opinion of the BIA placed great emphasis on Tipu's conviction, emphasis that ascribes a seriousness to Tipu's crime that is out of proportion to the nature and recency of the offense”); *Martinez-Benitez v. INS*, 956 F.2d 1053, 1055 (11th Cir. 1992) (“the Board must evaluate the nature and underlying circumstances of the applicant's conviction in order to determine the weight it should accord to this adverse factor. * * * We find that the Board acted arbitrarily when it failed to consider the facts underlying petitioner's narcotics conviction in reaching its decision to deny petitioner's application for asylum”); *Guillen-Garcia v. INS*, 999 F.2d 199, 205 (7th Cir. 1993) (noting that the alien's “crimes were of a serious and violent nature, and, because they formed the basis of the deportation proceedings, the BIA was obligated to examine the gravity of this criminal activity”), cert. denied, 116 S. Ct. 775 (1996).

Finally, it bears mentioning that the BIA's failure to consider the relevant facts of this case is not an isolated occurrence. Indeed, the BIA's boilerplate decision-making in adjudication of applications for discretionary relief has long been criticized throughout the Circuits. As Chief Judge Posner recently lamented in *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995):

The proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality. The lodgment of this troubled Service in the Department of Justice of a nation that was built by immigrants and continues to be enriched by a flow of immigration is an irony that should not escape notice.

Id. at 449 (citing *Osaghae v. INS*, 942 F.2d 1160, 1163-64 (7th Cir. 1991) (“The Board's discussion is cryptic—in fact incomprehensible—and its lawyer's amplifications cannot fill the gaps”); *Osmani v. INS*, 14 F.3d 13, 14 (7th Cir. 1994); *Rodriguez-Barajas v. INS*, 992 F.2d 94, 97 (7th Cir. 1993); *Bastanipour v. INS*, 980 F.2d 1129, 1131, 1133 (7th Cir. 1992) (vacating BIA denial of asylum “on the basis of the Board’s scanty, illogical, and apparently ill-informed analysis of the record”); *Watkins v. INS*, 63 F.3d 844, 849-50 (9th Cir. 1995); *Osorio v. INS*, 18 F.3d 1017, 1028-30 (2d Cir. 1994)).²³

²³ See also, *e.g.*, *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992); *Espinoza v. INS*, 991 F.2d 1294 (7th Cir. 1993); *Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992); *Rodriguez-Gutierrez v. INS*, 59 F.3d 504 (5th Cir. 1995); *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991). See also generally M. Heyman, *Judicial Review Of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV.

In sum, the BIA's failure to consider the nature, recency and seriousness of respondent's single 1982 drug offense constituted a clear abuse of its discretion under this Court's well-established canons of administrative law. The decision of the court of appeals to vacate and remand the BIA's decision on that basis, while criticized by the Government as "unwarranted interference with the discretion of the BIA" (Pet. 13), actually *embodies* precisely what abuse of discretion review was meant to accomplish and to prevent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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861 (1994); M. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).