

FOR PUBLICATION

COUNSEL

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

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

ORDER

The Opinion filed October 31, 2001 and appearing at 270 F.3d 97 (9th, Cr., 200), is hereby affirmed. (TheAffirmed) Tj T* -0.9682 Tc 0.0682 Tw Opinion andthis Order

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FACTS AND PROCEDURAL HISTORY

Finau, a native Tongan, has lived in the United States as a lawful permanent resident since 1988. In 1989 and 1992, he was convicted in California state court of petty theft. These two convictions rendered him removable under 8 U.S.C. § 1227(a)(2)(A)(ii), which provides for removal of lawful per-

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

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

STANDARD OF REVIEW

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

I. Section 1182(h)

Section 1182(h) provides: "No alien shall be admitted to the United States for permanent residence who is inadmissible under this section."

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

Discretionary relief is available in two circumstances.

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

II. Equal Protection

Finau contends that Section 1182(h) violates equal protection 917 9078 fay making discretionary relief available to aliens who had committed similar crimes and who are seeking admission or adjustment of status, but not to those aliens who are already lawful permanent residents and seeking relief from removal. Aliens are entitled to the benefits of equal protection. Yick Wo v. Hopkins

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

We agree with the Seventh and Eleventh Circuits that

immediately removable. See id.

