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THE DEPORTATION OF CRIMINAL IMMIGRANTS

R. Andrew Chereck*

I. INTRODUCTION: THE DEVELOPMENT OF THE UNITED STATES DEPORTATION POLICY

IN the last fifty years the United States' policy regarding the deportation of legal aliens with criminal convictions has changed significantly.¹ In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), and less than a year later enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).² The most recent changes to the United States' deportation policy are presently awaiting approval.³ Federal Bill 1452, which would abolish the provisions of the AEDPA that prohibits aliens who are convicted of aggravated felonies from gaining relief from deportation, is in the last stages of approval as it awaits final mark-ups in the House Judiciary Committee.⁴ Additionally, the Executive Office for Immigration Review (EOIR) is attempting to codify recent judicial interpretations of the AEDPA and IIRIRA with its recent proposed rule concerning deportation procedures of criminal aliens.⁵

A. DEPORTATION POLICY BEFORE 1996

Before 1996 the Immigration and Nationality Act of 1952 (INA) was the law in the United States concerning immigration and, specifically, de-

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1. Compare 8 U.S.C.A. § 1229(b) (West Supp. 1996), with 8 U.S.C.A. § 1182(d) (West Supp. 1996), and Family Reunification Acts, H.R. 1452, 107th Cong. (1st Sess. 2001), and Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. 6436 (Jan. 22, 2001) (to be codified at 8 C.F.R. pts. 3, 212, 240).
2. 8 U.S.C.A. § 1229(b); 8 U.S.C.A. § 1182(d).
3. See Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52,627 (proposed Aug. 13, 2002) (to be codified at 8 C.F.R. pts. 3, 212, 240), and H.R. 1452.
4. Press Release, Federation for American Immigration Reform, *Criminal Alien Relief Bill Headed for Vote By House Judiciary Committee* (May 14, 2002), available at <http://www.fairus.org/html>.
5. Press Release, U.S. Justice Dep't, *Proposed Rule Published to Implement Supreme Court's St. Cyr Decision* (Aug. 13, 2002), available at <http://www.usdoj.gov> [hereinafter *Proposed Rule*].

portation of legal aliens with criminal convictions.⁶ The INA allowed lawful permanent residents with seven years of residence to seek a waiver of their criminal convictions and deportation under section 212(c).⁷ In deciding whether to allow such a waiver, the presiding judge only had to balance factors such as the severity of the crimes committed against positive factors such as rehabilitation.⁸ Before 1996 there was not a “cancellation of removal” clause in the INA.⁹ A legal permanent resident merely had to prove that his sentence was for not more than five years and that a relative would endure hardship if the resident was deported.¹⁰

B. IMMIGRATION REFORM IN 1996 AND 1997

“As a somewhat belated reaction to the February 26, 1993, bombing of the World Trade Center, Congress passed very enforcement-minded immigration legislation three years later called the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996.”¹¹ Less than six months later the same Congress passed the IIRIRA, which went into effect on April 1, 1997.¹²

1. *The Anti-Terrorism and Effective Death Penalty Act of 1996*

The AEDPA was enacted with the intent “to deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.”¹³ The result was strict changes to the deportation policies of aliens with criminal histories.¹⁴ The amendments to the INA prohibited most criminal aliens from seeking a section 212(c) waiver of their criminal convictions and declared that final orders of deportation for aliens who committed violent criminal acts were no longer reviewable by any court.¹⁵ Aliens who were deportable for convictions such as aggravated felonies, controlled substance offenses, and certain firearms offenses were now ineligible for section 212(c) relief.¹⁶

6. Juan Mann, *Immigration Law Enforcement: A Legal Review: Congress Giveth, the EOIR Ignoreth, the ACLU and AILA Attacketh, and the federal Courts Taketh Away* (Apr. 18, 2002) at 1, at <http://www.geocities.com/deportaliens/legalreview.html>.

7. Press Release, U.S. Justice Dep’t, *Department of Justice Publishes Final Rule to Restore Eligibility for 212(c) Criminal Waiver to Certain Lawful Permanent Resident Aliens* (Feb. 1, 2001), available at <http://www.usdoj.gov> [hereinafter *Department of Justice*].

8. *Id.* at 1.

9. See 8 U.S.C.A. § 1229(b) (West Supp. 1996).

10. Stephen Dinan, *Immigration Bill Offers Felons a Second Chance*, WASH. TIMES, July 17, 2002, at 1, available at <http://asp.washtimes.com>.

11. Mann, *supra* note 6, at 2.

12. *Id.*

13. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 107-132, 110 Stat. 1214.

14. 8 U.S.C.A. § 1182(d) (West Supp. 1996).

15. *Id.* § 1105(a).

16. Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. at 52,628.

2. *The Illegal Immigration Reform and Immigrant Responsibility Act*

A few months after Congress enacted the AEDPA, they replaced section 212(c) of the INA entirely with section 248 of IIRIRA.¹⁷ The new section substituted a “cancellation of removal” policy for the waivers.¹⁸ Any legal, permanent resident alien could apply for cancellation of removal if he or she had been a permanent resident for a minimum of five years, had resided continuously in the United States for at least seven years, and had not been convicted of an aggravated felony.¹⁹ To the contrary, the previous relief granted under section 212(c) was available even to aggravated felons.²⁰

For non-permanent residents, cancellation of removal required an additional three years of physical presence in the United States and “a showing that the removal would result in “‘exceptional and extremely unusual hardship to the alien’s permanent resident or citizen spouse, parent or child.’”²¹ Furthermore, the petitioner’s sentence could not exceed one year.²²

II. DEPORTATION AFTER THE AEDPA AND IIRIRA

The AEDPA and IIRIRA restricted the availability of hearings for aliens and presented new issues for all three branches of the government.²³ The AEDPA and IIRIRA did not specify effective dates, and, as a result, the question remained whether the amendments were to apply to cases pending before the date of enactment.²⁴ The government believed that eligibility for section 212(c) was barred for all deportation cases, including any case that was pending when the amendments were enacted.²⁵ The government published this interpretation in the *Matter of Soriano* (“*Soriano*”).²⁶

A. SORIANO

Janet Reno’s opinion in *Soriano* created confusion in the courts and resulted in “widespread litigation.”²⁷ The issues created by *Soriano*

17. Farhad Sethna, *The Pendulum Swings Back: Supreme Court Decisions Offer Relief to Immigrants* (2001), at <http://www.immigration-america.com/pendulum.html> (last visited Mar. 22, 2003).

18. 8 U.S.C.A. § 1229(b).

19. Sethna, *supra* note 17.

20. 8 U.S.C.A. § 1229(b).

21. Sethna, *supra* note 17 (citing 8 U.S.C.A. § 1229).

22. Dinan, *supra* note 10, at 2.

23. 8 U.S.C.A. § 1229(b); 8 U.S.C.A. § 1182(d).

24. *Department of Justice, supra* note 7.

25. *Id.*; see also Press Release, U.S. Justice Dep’t, *Questions & Answers: St. Cyr Rule Affording Relief to Certain Criminal Aliens* (Aug. 13, 2002), available at <http://www.usdoj.gov/eoir/press> [hereinafter *Questions & Answers*].

26. See Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. at 6436.

27. Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. at 52,628.

included:

The possible relevance of various other dates in determining whether or not a particular alien was eligible to apply for section 212(c) relief: the date the alien was placed into proceedings; the date the alien applied for section 212(c) relief; the date any relevant crimes were committed; and the date any relevant pleas or convictions were entered.²⁸

The majority of the courts held that the amendments were not to be applied retroactively; therefore, aliens who filed for relief before the enactment of the AEDPA were eligible for relief.²⁹ However, some courts concluded that aliens were not allowed relief under 212(c). This was held even if they committed their crimes before April 24, 1996, which was the enactment date of the AEDPA.³⁰

B. THE SORIANO RULE

Due to this widespread litigation, the Department of Justice issued a rule creating "a uniform procedure for applying the law as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)."³¹ Under the *Soriano Rule*, the amendments are not applied retroactively.³² Therefore, legal aliens can apply for section 212(c) relief if they had been placed into proceedings prior to April 24, 1996.³³

C. THE ST. CYR DECISION

The issues surrounding the AEDPA and IIRIRA were not completely settled by the *Soriano Rule*, and issues concerning the statutes came before the U.S. Supreme Court in 2001.³⁴ *INS v. St. Cyr* involved an alien who was appealing a decision by the Board of Immigration Appeals, which held that he could be deported because he pleaded guilty to an aggravated felony and was therefore ineligible to apply for relief.³⁵

After reviewing the AEDPA and IIRIRA, the Supreme Court concluded that the amendments were not intended to apply to deportation pleadings before the statutes' enactment or to aliens with applications pending on the date of enactment.³⁶ The Court's rationale was that any other reading would deprive many aliens of the opportunity to seek section 212(c) relief, even though this relief was available when they made

28. *Id.*

29. *Id.*

30. *Id.*

31. Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. at 6436.

32. *Department of Justice, supra* note 7, at 1.

33. Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. at 52,628.

34. *INS v. St. Cyr*, 533 U.S. 289 (2001).

35. *Id.* at 289.

36. *Id.* at 326.

their plea agreements.³⁷ Therefore, any alien who entered into a plea agreement before the enactment of AEDPA or IIRIRA is eligible for relief under section 212(c).³⁸ This ruling does not change section 212(c) or allow additional relief; aliens still must be eligible under the original terms of section 212(c).³⁹

According to the U.S. Department of Justice, the “decision affects thousands of pending cases in federal and Immigration Courts, as well as a potentially large number of individuals who have not yet come before Immigration Court.”⁴⁰ As a result of the Supreme Court’s decision, the Justice Department decided to publish a proposed rule to implement the *St. Cyr* decision.⁴¹

III. PROPOSED RULE TO IMPLEMENT *ST. CYR*

On August 13, 2002, the Executive Office for Immigration Review of the Department of Justice published a proposal in the Federal Register codifying the Supreme Court’s decision in *INS v. St. Cyr*.⁴² The rule establishes procedures for immigrants to apply for relief from deportation under former section 212(c). The rule will apply to aliens who meet the following standards:

The alien is now a lawful permanent resident (or was a lawful permanent resident prior to receiving a final order of deportation or removal).

The alien is returning to a lawful, unrelinquished domicile of seven consecutive years. . . .

The alien is not subject to deportation or removal on grounds of terrorism or national security. In addition, the alien must not be unlawfully present in the United States after a previous immigration violation, or have been convicted of a firearms offense, or have been convicted of an aggravated felony offense (or offenses) for which he served at least five years in prison.⁴³

Aliens who pleaded guilty before April 24, 1996 may apply for section 212(c) relief. Aliens who pleaded guilty after April 24, 1996 and before the enactment of the IIRIRA on April 1, 1997 can seek relief under section 212(c) as it existed during this period.⁴⁴

Many immigration proponents and interest groups have welcomed this part of the proposal.⁴⁵ However, the rule does not apply to aliens who

37. *Questions & Answers, supra* note 25, at 1.

38. *St. Cyr*, 533 U.S. at 326.

39. *Guner v. Reno*, No. 00 Civ. 8802(DC), 2001 WL 940576, at *1 (S.D.N.Y. Aug. 20, 2001).

40. *Proposed Rule, supra* note 5.

41. Suzanne Gamboa, *Justice Proposal Bars Convicted Immigrants’ Return to U.S.* (Aug. 27, 2002), available at <http://archive.ap.org>.

42. *Proposed Rule, supra* note 5.

43. *Questions & Answers, supra* note 25, at 2.

44. *Id.*

45. See generally Gamboa, *supra* note 41 (presenting views of different public interest groups).

have been deported and live outside the United States.⁴⁶ This exception has enraged many interest groups.⁴⁷ The ACLU believed that the *St. Cyr* decision included aliens already deported and responded with disgust to the proposed rule by stating “it’s another example of the attorney general [sic] trying to disregard Supreme Court decisions with which he disagrees, and he promised in his confirmation hearing to follow the law of the Supreme Court.”⁴⁸ The Justice Department supports the decision to separate aliens who are in the United States from those deported, saying it “is reasonable and consistent with the plenary authority of the political branches of the government in the immigration area.”⁴⁹

Additionally, aliens “who were deported years ago may have been convicted of crimes abroad that would disqualify them from relief [, and it]. . . “would be difficult, if not impossible, for the INS to discover and verify” these crimes.⁵⁰ The proposed rule was open to public suggestion until October 15, 2002 and will go into effect if passed by Congress.⁵¹ The proposal will likely pass as a result of the Republican majority in both the House of Representatives and the Senate.

IV. HOUSE RESOLUTION 1452

House Resolution 1452 or “The Family Reunification Act of 2001” was introduced by Representative. Barney Frank (Democrat-Massachusetts) to address what he considered the unfair impact of the 1996 amendments.⁵² The bill restores the Attorney General’s ability to waive the deportation of some immigrants and to allow deported immigrants to request re-admission.⁵³ This bill, like all previous legislation concerning criminal aliens, has strong liberal support as well as stiff opposition from conservative groups.⁵⁴ Originally, the bill would have allowed permanent residents who had received less than five years in jail to request a waiver of their deportation, but due to strong opposition from House Republicans, a compromise was reached which provides relief only to those sentenced to less than four years for non-violent crimes and less than two years for violent crimes.⁵⁵

46. *Proposed Rule, supra* note 5.

47. *Gamboa, supra* note 41.

48. *Id.*

49. Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. at 52,628.

50. *Id.*

51. *Id.*

52. ‘Fix ‘96’ Passes House Panel, WEEKLY NEWS UPDATE ON THE AMERICAS, available at <http://www.americas.org/news> (last visited Sept. 19, 2003).

53. Family Reunification Act, H.R. 1452, 107th Cong. (1st Sess. 2001).

54. *Compare* Press Release, American Civil Liberties Union, *ACLU Endorses Bill Aimed at Protecting Vulnerable Immigrant Families From Unfair Deportations* (July 17, 2002), available at <http://www.aclu.org/news> [hereinafter *ACLU*], and Press Release, Federation for American Immigration Reform, *Criminal Alien Relief Bill Headed for Vote By House Judiciary Committee* (May 14, 2002), available at <http://www.fairus.org> [hereinafter *FAIR*].

55. *ACLU, supra* note 54.

One of the big opponents of the bill is Representative Lamar Smith (Republican-Texas).⁵⁶ The bill allows aliens convicted of child pornography, alien smuggling, and document fraud to request readmission or relief from deportation. Smith will not support a bill which makes it easier for drug traffickers and smugglers to enter the United States.⁵⁷ Conversely, the ACLU believes this bill only allows relief for those convicted of minor offenses, while offering those legal permanent residents who have been good citizens a fair chance to continue their productiveness.⁵⁸ Finally, the Federation for American Immigration Reform (FAIR) believes that although House Resolution 1452 is intended to undo the hardship previous laws have caused immigrant families, “[i]t undermines a fundamental principle of immigration policy that the people we allow to come here make a commitment to the rest of us that they will stay out of trouble.”⁵⁹ House Resolution 1452 was passed by the House Judiciary Committee this past summer and now awaits final mark-ups before coming to a vote in the House.⁶⁰

V. CONCLUSION: DEPORTATION TODAY

Immigration policies, which have shifted from liberal to conservative, now seem to be moving back to a moderate position.⁶¹ The events of September 11, 2001 will continue to affect immigration policies, and the results of the recent Congressional vote could make loosening the United States’ borders more difficult for the ACLU and other supporters of immigrant rights. However, due to the passionate views on both sides of the issue, the immigration policies of the United States will continue to play an important role in all three branches of government.

56. Dinan, *supra* note 10, at 1.

57. *Id.*

58. ACLU, *supra* note 54, at 1.

59. FAIR, *supra* note 54.

60. ‘Fix ‘96’ Passes House Panel, *supra* note 52.

61. Compare 8 U.S.C.A. § 1229(b) (West Supp. 1996), with 8 U.S.C.A. § 1182(d) (West Supp. 1996), and Family Reunification Act, H.R. 1452, 107th Cong. (1st Sess. 2001), and Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg. at 6436.

