LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

Practice Advisory - Proposed St. Cyr Regulations[1]

by

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August 29, 2002

More than a year after the Supreme Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001), the Department of Justice (DOJ) has finally issued a proposed rule codifying its interpretation of the decision. See Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 67 Fed. Reg. 52627-52633 (proposed Aug. 13, 2002) (to be codified at 8 C.F.R. pt. 3, 212, and 240). Comments must be filed on or before October 15, 2002. The American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) will be submitting comments to the proposed rule, but we also encourage everyone to file his or her own comments.

This is a proposed rule and is therefore not yet in effect. The rule will not become effective until a final rule is issued some time after the close of the comment period. The interim or final rule may differ from the proposed rule.

This practice advisory summarizes the proposed rule. In addition, it discusses arguments and strategies to help those who are not eligible for 212(c) relief under the proposed rule, namely lawful permanent residents (LPRs) who were convicted after a trial and LPRs who were deported or removed before the Supreme Court issued its decision in St. Cyr.

Q: Who would be eligible to apply for 212(c) relief under the proposed rule?

A: The proposed rule would allow LPRs or former LPRs to apply for 212(c) relief if they meet the following criteria:

- The applicant must be an LPR or was an LPR until s/he received a final order of deportation or removal.

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- If the LPR has not been in deportation or removal proceedings previously, s/he must have accrued at least seven years of lawful unrelinquished domicile by the time that the s/he applies for 212(c) relief. If the LPR has already been through deportation or removal proceedings, then s/he must have accrued at least seven years of lawful unrelinquished domicile by the time that s/he received a final order of deportation or removal. Please note that the "stop-time rule," §240A(d)(1) of the Immigration and Nationality Act (INA), does *not* apply to accrual of lawful unrelinquished domicile for 212(c) relief.

- The applicant is not excludable or inadmissible based on INA §212(a)(3)(A), (B), (C), or (E) (security and related grounds) or INA §212(10)(C) (international child abduction).[2]

- For those who pled guilty or nolo contendere on or before April 24, 1996 (the date of enactment for the Antiterrorism and Effective Death Penalty Act (AEDPA)), INA §212(c) as it existed prior to AEDPA will apply. In other words, the applicant must meet the above criteria and have served less than five years of his or her sentence if the conviction at issue is an aggravated felony.

- For those who pled guilty or nolo contendere after April 24, 1996 but before April 1, 1997 (the effective date of IIRIRA), INA §212(c) as it was modified by AEDPA will apply. In other words, LPRs who were convicted of an aggravated felony, controlled substance offenses, certain firearms offenses, espionage or treason, or two or more crime involving moral turpitude committed within five year after entry and for which sentence is one year or longer, are *not* eligible to apply for 212(c).

Q: I have clients who have unexecuted final orders of deportation or removal who would be eligible to apply for 212(c) relief under the proposed rule. Should I file a motion to reopen now or wait until the final rule is issued?

If the individual already has a final order of deportation or removal but has not been deported or removed pursuant to that order, do *not* wait to file a motion to reopen. If s/he does not have at least a pending motion to reopen and an accompanying motion for stay of deportation or removal, then you will have no way to stop his or her physical removal from the United States if the INS attempts to execute the deportation or removal order. If the individual is deported or removed from the United States, then s/he will not be

[2] The proposed rule states that the 212(c) applicant may not be excludable or inadmissible under INA §212(a)(9)(C) (unlawfully present after previous immigration violation), but this is an error. While the now-repealed INA §212(c) did list INA §212(a)(9)(C) as a ground of exclusion that is not waivable under §212(c), the ground of excludability/inadmissibility that it refers to is international child abduction. The DOJ failed to take into account that the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) moved this ground of excludability/inadmissibility from §212(a)(9)(C) to §212(a)(10)(C) in 1996. In order to implement the former INA §212(c) correctly, the final rule should be corrected to indicate that it is LPRs who are excluable or inadmissible under INA §212(a)(10)(C), rather than §212(a)(9)(C), who are not eligible to apply for 212(c).

eligible to reopen his or her case once the final rule is issued, even though s/he is otherwise eligible to apply for 212(c) relief. The BIA and the Immigration Courts have been routinely granting motions to reopen based on St. Cyr since the Supreme Court issued its decision last year. Please note that filing the motion to reopen does not automatically stay the person's deportation or removal. The motion should be accompanied by an application for stay of deportation or removal.

Q: Who would *not* be eligible to apply for 212(c) relief under the proposed rule? Does that mean that they are not eligible to apply for 212(c) relief at all?

A: AILF believes that the proposed rule erroneously excludes two classes of LPRs or former LPRs who should be eligible to apply for 212(c) relief: 1) those who were convicted after trial (as opposed to plea agreement), and 2) those who were deported or removed from the United States prior to the Supreme Court's decision in St. Cyr. However, they may nonetheless have a claim for 212(c) relief based on constitutional and statutory retroactivity grounds. While the arguments that need to be made in these cases are complex and depend on the facts of the individual case, following is a brief discussion of some issues that should be explored in these cases.

- *LPRs who were convicted after trial.* The preamble to the proposed rule does not explain why LPRs who were convicted after trial cannot apply for 212(c) relief under the rule. It merely states that DOJ "would continue to treat convictions entered as the result of a trial as it had prior to St. Cyr." 67 Fed. Reg. at 52627.

  Even though the Supreme Court's decision in St. Cyr only explicitly addressed the retroactivity of 212(c) repeal to those who had pled guilty or nolo contendere, the reasoning of the St. Cyr decision and the precedents that it cites support the conclusion that LPRs who were convicted after a trial should also be able to apply for 212(c) relief.

  In St. Cyr, the Supreme Court analyzed whether the repeal of INA 212(c) should be applied retroactively under the two-step retroactivity test of Landgraf v. USI Film Products, 511 U.S. 244 (1994), and its progeny. The first step of the Landgraf retroactivity test requires a court to determine "whether Congress had directed with the requisite clarity that the law be applied retrospectively." INS v. St. Cyr, 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (quoting Martin v. Hadix, 527 U.S. 343, 352, 119 S. Ct. 1998, 144 L. Ed. 2d. 347 (1999)). If Congress has clearly expressed its intent for the law to be applied retroactively, then the inquiry is at an end.

  However, if Congress did not clearly indicate whether the law is to be applied retroactively, then the second step of the Landgraf test requires the court to examine whether the retroactive application of the law in question "produces an impermissible retroactive effect" on those who are affected by the change in the law. St. Cyr at 320. Applying this test to LPRs who had pled guilty or nolo contendere prior to the repeal of 212(c), the Supreme Court held that 1) Congress

did not clearly express its intent to retroactively apply the repeal of 212(c) relief to pre-AEDPA convictions, and 2) applying the repeal of 212(c) relief to those who entered into plea agreements would have an impermissible retroactive effect. Id. at 320, 321-26.

Applying the Landgraf retroactivity test to LPRs who were convicted after trial, the first step of the analysis has already been answered in favor of the LPRs. The Supreme Court has already held in St. Cyr that Congress did not clearly express its intent to retroactively apply the repeal of 212(c) relief to pre-AEDPA convictions. Therefore, LPRs who were convicted after trial need only show that applying the repeal of 212(c) relief to them would produce an impermissible retroactive effect. For excellent arguments on what constitutes an impermissible retroactive effect under Landgraf and on the availability of 212(c) relief to those who were convicted after trial, please see Nancy Morawetz, "Practice Advisory - Who Should Benefit from St. Cyr" (American Immigration Law Foundation, August 1, 2001) at www.ailf.org/lac/2001/080101.htm, and the brief of the New York State Defenders Association (NYSDA) in Rankine v. Reno at www.nysda.org/Publications/Amicus_Briefs/RankineAmicusBrief.pdf.

You should be aware that some courts have summarily concluded that 212(c) relief is not available to LPRs who were convicted after trial. These courts concluded that the repeal of 212(c) does not have an impermissible retroactive effect on those who were convicted after a trial, because they could not have relied on the availability of 212(c) relief in deciding to go to trial. See, e.g. Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002) (Petition for panel and en banc rehearing pending); Janvier v. INS, 174 F. Supp. 2d. 430 (E.D. Va. 2001). However, the decisions to date have not fully analyzed this issue. In particular, they have not considered what constitutes impermissible retroactive effect under Landgraf or its progeny. Several courts are now considering or reconsidering the availability of 212(c) relief to those who were convicted after trial. It is to be hoped that these courts will fully deliberate this issue and will hold that those who were convicted after trial are also eligible to apply for 212(c) relief.

- *LPRs who were deported or removed from the United States without the opportunity to apply for 212(c) relief.* The proposed rule bars former LPRs who were eligible for 212(c) relief but were deported or removed from the United States from filing special 212(c) motions. This bar applies to the following groups: those who have departed the United States; those who were deported or removed but have illegally returned to the United States; and those who have not been admitted or paroled. 67 Fed. Reg. 52627, 52632 (proposed Aug. 13, 2002) (to be codified at 8 C.F.R. §3.44(k)).

  The preamble attempts to justify this bar in several ways. See 67 Fed. Reg. 52627, 52629. For example, the DOJ asserts that "aliens who have been deported had a sufficient opportunity to challenge the denial of their applications for 212(c)

relief in administrative and judicial proceedings." This statement is particularly disingenuous, given that INS opposed stays, moved for dismissals on jurisdiction and transfer of venue to less favorable courts, and generally fought vigorously to deprive LPRs of every opportunity to litigate on the merits their right to apply for 212(c) relief.

While these former LPRs may not be able to file special 212(c) motions under the proposed rule, they can still ask the BIA or the Immigration Court to exercise their sua sponte authority under 8 C.F.R. §3.2 or §3.23 to reopen their deportation or removal proceedings so that they can apply for 212(c) relief. Nothing in the proposed rule affects the legal basis of a motion to exercise sua sponte authority (ESSA).