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ST. CYR REGULATIONS AND STRATEGIES FOR APPLICANTS WHO ARE BARRED FROM SECTION 212(c) RELIEF UNDER THE REGULATIONS

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*This practice advisory is the fifth in a series of advisories following up on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). The information in this advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case.*

I. INTRODUCTION AND SUMMARY

The Department of Justice (DOJ) published its final rule on procedures for applying for section 212(c) relief pursuant to the Supreme Court's decision *INS v. St. Cyr*, 533 U.S. 289 (2001). The final rule adopts without substantial changes the proposed rule.³ The regulations are effective on October 28, 2004. This practice advisory describes who can apply for section 212(c) relief under the regulations and discusses strategies and arguments to assist individuals who are barred under the regulations.

The regulations allow only persons who *pled guilty or nolo contendere before April 1, 1997* to apply for relief. Under the regulations, persons who were convicted after a trial are not eligible. The eligibility requirements and bars to section 212(c) relief, *as they existed at the time of the plea agreement*, will apply. In a change from the proposed rule, the final regulations say that applicants who entered pleas prior to November 20, 1990 are not subject to the bar for five year sentences for an aggravated felony.

Special motions to reopen to apply for section 212(c) relief must be filed by **April 26, 2005**. This deadline applies only to motions to reopen and does not affect eligibility to

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³ See Department of Justice, Executive Office for Immigration Review; Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69 Fed. Reg. 57826 (Sept. 28, 2004) (codified at 8 C.F.R. Parts 1003, 1212, and 1240). This rule was proposed initially in August 2002. See 67 Fed. Reg. 52627-52633 (proposed Aug. 13, 2002).

apply for relief in any new or pending cases. Under the regulations, individuals who were deported or departed the United States and/or who illegally returned are not eligible to apply for section 212(c) relief.

Additional categories of people may be eligible to apply for relief, but they are not covered by the new regulations. For example, in the Third Circuit, applicants who were *convicted after* a trial are eligible to apply for section 212(c) relief. Furthermore, some circuits have not addressed this issue, and there are untested arguments even in those courts that have decided the issue adversely.

II. WHO CAN APPLY FOR SECTION 212(C) RELIEF UNDER THE REGULATIONS?

The regulations allow lawful permanent residents (LPRs) and former LPRs to apply for section 212(c) relief. The applicant must show that he or she meets the following criteria:

- The applicant is an LPR or was an LPR until he or she received a final order of deportation or removal.
- The applicant pled guilty or nolo contendere to an offense rendering him or her deportable or removable pursuant to a plea agreement made before April 1, 1997.⁴ The triggering date for section 212(c) eligibility is the date on which the plea was agreed to by the parties.
- The applicant had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal or, if the person does not have a final order, by the time that he or she applies for 212(c) relief.
- The applicant was otherwise eligible to apply for section 212(c) relief *at the time the plea was made*. The applicant must be removable or deportable on a ground that has a corresponding counterpart in INA § 212. (But see Section IV of the practice advisory for further discussion.)

III. WHICH VERSION OF SECTION 212(C) APPLIES?

Under the regulations, different versions of section 212(c) apply. To determine which version applies, DOJ will look to the date that the applicant pled guilty.

⁴ The new regulations do not provide any relief for individuals who were convicted after a trial. However, 8 C.F.R. § 1212.13(g) – part of the “*Soriano* rule,” 66 Fed. Reg. 6436 (Jan. 22, 2001) – continues to apply. This provision allows a person who was placed in deportation proceedings prior to April 24, 1996 to apply for 212(c) relief, regardless of whether the conviction was by plea or trial. However, the deadline to file a motion to reopen was June 23, 2001. 8 C.F.R. § 1003.44(f) 2004) (amended by 69 Fed. Reg. at 57833). DOJ will apply the *Soriano* rule to any pending *Soriano* motions.

- **Pleas/Nolo Contendere Before November 29, 1990 (the date of enactment of the 1990 amendment to the INA)**

Section 212(c) as it existed prior to the 1990 amendment will apply. Thus, applicants are eligible for 212(c) relief even if they served a sentence of five years or more for the aggravated felony conviction(s). ***This is a change from the proposed rule.*** In making this change, DOJ acquiesced in the Ninth Circuit's decision in *Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003). See 69 Fed. Reg. at 57830. In *Toia*, the court held that a 1990 amendment to the INA barring the availability of section 212(c) relief for aggravated felons who served a sentence of at least five years does not apply retroactively to individuals who entered into plea agreements before the date of enactment, November 29, 1990.

- **Pleas/Nolo Contendere On or After November 29, 1990 and Before April 24, 1996 (the date of enactment for the Antiterrorism and Effective Death Penalty Act (AEDPA))**

Section 212(c) as it existed prior to AEDPA will apply. Thus, the applicant must have served a term of less than five years imprisonment if the conviction is an aggravated felony.

Some respondents who, before *St. Cyr* was issued, were erroneously deprived of the opportunity to apply for section 212(c) relief now have served more than five years in prison. However, not all of these people had served five years at the time that they were denied relief by the immigration judge. Several district courts have held that they are eligible to apply for section 212(c) relief now. See, e.g., *De Cardenas v. Reno*, 278 F. Supp. 2d 284 (D. Conn. 2003); *Hartman v. Elwood*, 255 F. Supp. 2d 510 (E.D.P.A. 2003); see also *Velez-Lotero v. Achim*, 312 F. Supp. 2d 1097 (E.D. Ill. 2004) (petitioner eligible because he had not served five years at the time he entered into a plea agreement in criminal court).

Not all courts have looked to the date of the immigration judge's decision to determine if the applicant served five years. The First Circuit has said that the relevant date is when the BIA issues its decision. *Gomes v. Ashcroft*, 311 F.3d 43 (1st Cir. 2002) (denying relief where petitioner served more than five years when the BIA dismissed appeal). Likewise, the Second Circuit has indicated that the time in prison continues to accrue until the BIA issues a decision, *Brown v. Ashcroft*, 360 F.3d 346, 354 (2d Cir. 2004). However, in *Brown*, the section 212(c) applicant had served more than five years even prior to the immigration judge's decision – other cases may be distinguishable based on this fact.

- **Pleas/Nolo Contender After April 24, 1996 but before April 1, 1997 (the effective date of IIRIRA)**

Section 212(c) as it was modified by AEDPA will apply. Thus, the following individuals are *not* eligible: LPRs 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 years after entry and for which the sentence is one year or longer.

IV. DEPORTABILITY CHARGES MUST HAVE INADMISSIBILITY “COUNTERPART”

The final rule added a provision specifying that where the respondent is charged under INA § 237 or former INA § 241, the removability or deportability charge must have a “statutory counterpart” in INA § 212 (grounds of inadmissibility). *See* 8 C.F.R. § 1212.3(f)(5); 69 Fed. Reg. at 57831-32 (citing *Matter of Granados*, 16 I&N Dec. 726, 728 (BIA 1979), *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988), *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991)). This provision is consistent with a long line of precedents holding, generally, that section 212(c) is available in deportation proceedings only where the deportability ground has a comparable excludability ground.⁵

Because “aggravated felony” is a ground of deportability (INA § 237(a)(2)(A)(iii)), but not a ground of inadmissibility, respondents charged with aggravated felonies should be aware that the government *may* contend that they are not eligible for section 212(c) relief. Respondents with aggravated felony convictions, however, are eligible for relief, as evidenced by the Supreme Court’s decision in *St. Cyr*.⁶ Likewise, the BIA has found that respondents with aggravated felonies may apply for section 212(c) relief. *See Matter of Meza*, 20 I&N Dec. 257 (BIA 1991). In *Matter of Meza*, the Board looked to the specific category of aggravated felony at issue – illicit trafficking in a controlled substance – and found that the conviction also could form the basis for excludability under former INA § 212(a)(23) (1988) (trafficking offenses). Thus, because there was a comparable excludability ground, the respondent was eligible to apply for section 212(c) relief.

Furthermore, in *Matter of Meza*, the Board noted that the 1990 amendment to section 212(c) specifically bars noncitizens who had served more than five years for an aggravated felony; this amendment implies that relief is available to respondents convicted of aggravated felonies. In fact, the concurrence in *Matter of Meza* rested solely on this basis. *Matter of Meza*, 20 I&N Dec. 257, 260-61 (BIA 1991) (Heilman, Board Member, concurring). The concurring BIA member reasoned that because there is no

⁵ *See, e.g., Matter of Jimenez*, 21 I&N Dec. 567 (BIA 1996); *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991), *aff’d* 983 F.2d 231 (5th Cir. 1993); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991); *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984); *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979). The courts of appeals have upheld these decisions. *See, e.g., Rodriguez-Padron v. INS*, 13 F.3d 1455 (11th Cir. 1994); *Rodriguez v. INS*, 9 F.3d 408 (5th Cir. 1993); *Campos v. INS*, 961 F.2d 309 (1st Cir. 1992); *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988).

⁶ Mr. St. Cyr was convicted of a drug trafficking crime, an aggravated felony, and charged as removable under INA § 237(a)(2)(A)(iii). *St. Cyr v. INS*, 229 F.3d 406, 408 (2d Cir. 2000).

ground of excludability based on conviction of an aggravated felony, the fact that Congress amended section 212(c) to bar relief to certain persons convicted of aggravated felonies must mean that 212(c) applies to deportable offenses. The concurrence also concluded that the BIA's previous cases requiring a comparable ground of deportability are no longer relevant:

It appears that this amendment renders irrelevant the holdings in such cases as *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984), and *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), *aff'd*, 624 F.2d 191 (9th Cir. 1980), as far as aggravated felonies are concerned. ... Congress has now given a statutory basis for an application for section 212(c) relief in deportation proceedings, where previously this relief had only been available through administrative and judicial interpretation.

In subsequent cases, the BIA has indicated that *Matter of Meza* is limited to the issue of section 212(c) eligibility in the case of a conviction of a drug trafficking aggravated felony. See *Matter of Esposito*, 21 I&N Dec. at 9-10; *Matter of Montenegro*, 20 I&N Dec. 603, 606 (BIA 1992). *Matter of Meza*, however, need not be read so narrowly. At a minimum, respondents convicted of aggravated felonies can argue that the specific category of aggravated felony, see INA § 101(a)(43), has a comparable ground of inadmissibility. It also is noteworthy that the most recent cases on the issue of "comparable grounds" have dealt with non-aggravated felony grounds of deportability.⁷ The argument presented in the concurrence of *Matter of Meza* lends additional support to respondents removable based on an aggravated felony conviction.

V. SPECIAL MOTION TO SEEK 212(C) RELIEF

Under the new regulations, former LPRs who are subject to an administratively final order of deportation, exclusion or removal may file a "special motion to seek section 212(c)." 8 C.F.R. § 1003.44. The deadline for filing the motion is April 26, 2005. This deadline applies only to motions to reopen and does not affect eligibility to apply for relief in any new or pending cases. Noncitizens placed in removal proceedings at a future date will be able to apply for section 212(c) relief if they are eligible under these regulations; they will not need to file a special motion.

A. Procedures (8 C.F.R. § 1003.44(e) - (j))

Venue: The motion should be filed with the immigration judge or the Board of Immigration Appeals (Board or BIA), whichever last held jurisdiction. Typically, this means that the motion should be filed with whichever body last made a decision on the case.

⁷ The most recent cases found that section 212(c) relief was not available to respondents charged under former sections 241(a)(3)(B)(iii) (document fraud conviction), 241(a)(2)(C) (firearms conviction) and 241(a)(2) (entered without inspection) of the INA. *Matter of Jimenez*, 21 I&N Dec. 567 (BIA 1996); *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; AG 1991)

Fee: There is no filing fee for the motion, but the applicant must pay the section 212(c) application fee if the motion is granted (assuming it has not been paid previously).

Contents and Format: The motion must be accompanied by the Form I-191 application (on the web at <http://uscis.gov/graphics/formsfee/forms/files/i-191.pdf>) and supporting documents. The motion must contain the notation, “special motion to seek section 212(c) relief.”

DHS Response: DHS has 45 days from the date of filing to respond to the motion.

Reopened Proceedings: If the motion is granted, the case is reopened solely for the purpose of applying for section 212(c) relief, unless a motion to reopen on other grounds is granted. If the Board has jurisdiction and grants the motion, it will remand the case to the immigration judge for adjudication of the section 212(c) application.

Number Limitations: This motion has no effect on the number limitations on motions to reopen.

B. Rules when a motion to reopen already was filed with the immigration judge or Board (8 C.F.R. § 1003.44(g))

If there is a pending motion unrelated to section 212(c) relief: The applicant must file a separate special motion, and note that there currently is another motion pending.

If there is a pending motion for section 212(c) relief based on *St. Cyr*: The applicant is not required to file a separate motion, but may supplement the previous motion.

If there is a pending motion for section 212(c) relief based on the prior regulations (*Soriano* rule): The applicant is not required to file a separate motion. The immigration judge or Board will apply the *Soriano* rule and the new regulation.

If a motion filed under the *Soriano* rule was denied: The applicant may file a new special motion for section 212(c) relief, but he or she must meet the eligibility requirements under this regulation.

If a motion filed under *St. Cyr* was denied: The immigration judge or Board will not grant a motion where the applicant already has filed a motion to reopen under *St. Cyr*, and it was denied (unless the motion was denied as untimely or over the motion to reopen number limit).

C. Other Bars to Special Motions for section 212(c) Relief

- Previously Denied Relief – A person who was previously denied section 212(c) relief on discretionary grounds will not be allowed to reopen his or her case. 8 C.F.R. § 1003.44(d).

- Deported or Departed – The immigration judge or Board will not grant a motion filed by a person who has departed the United States, is currently outside the United States, who illegally returned to the United States, or who has not been admitted or paroled. 8 C.F.R. § 1003.44(k).

VI. STRATEGIES FOR APPLICANTS WHO ARE BARRED FROM APPLYING FOR RELIEF UNDER THE REGULATION

The regulations exclude many LPRs or former LPRs who may be otherwise eligible to apply for section 212(c) relief, including: 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* (June 25, 2001). Despite their ineligibility under the regulations, these LPRs may have claims for section 212(c) relief based on constitutional and/or statutory retroactivity grounds.

A. LPRs Who Were Convicted After Trial

Although 25% of the comments received by DOJ in response to the proposed *St. Cyr* rule recommended that individuals who were convicted as result of a *trial* be allowed to apply for relief, DOJ declined to adopt this recommendation. It noted that the “issue has been heavily litigated in the federal courts,” and erroneously said that “every circuit that has addressed the question has held that an alien who is convicted after trial is not eligible for 212(c) relief...” 69 Fed. Reg. at 57828. The Third Circuit, however, held that people who were convicted by a trial prior to IIRIRA’s enactment date, April 1, 1997, may apply for section 212(c) relief. *See Ponnappula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004). Thus, LPRs and former LPRs in the Third Circuit who were convicted after trial may ask the BIA or the immigration court to reopen their proceedings to apply for section 212(c) relief notwithstanding the new regulations.⁸ Petitioners in circuits where the issue has not been decided should ask the courts to follow the Third Circuit, and petitioners in other circuits with adverse decisions may request rehearing en banc in light of *Ponnappula*.

Another favorable circuit court decision to note is *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004). In this case, the Second Circuit indicated that some LPRs with pre-AEDPA trial convictions may be eligible for section 212(c) relief. The Second Circuit dissent in *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004), offers additional arguments for LPRs with trial convictions. Moreover, the Sixth Circuit has decided in favor of a petitioner who was convicted of two crimes of moral turpitude, the first of which was a trial conviction and the second of which was a plea agreement. *See Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004). *Ponnappula*, *Restrepo*, *Thom*, and *Thaqi* are discussed in more detail below and may be consulted if litigating this issue in the courts.

⁸ The Board is bound to follow a circuit court’s precedent in cases arising in that circuit. *See, e.g., Matter of Salazar*, 23 I&N Dec. 223, 235 (BIA 2002); *Matter of Cazares*, 21 I&N Dec. 188, 192 (BIA 1997); *Matter of K-S-*, 20 I&N Dec. 715, 717-18 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989).

The following is a representative list of the circuit court cases to address whether LPRs with trial convictions are eligible for section 212(c) relief. The case law is still developing. Also, not all of these cases address all arguments in support of allowing LPRs with trial convictions to apply for section 212(c) relief, and so there may be untested arguments in each circuit.

First Circuit	<i>Dias v. INS</i> , 311 F.3d 456 (1st Cir. 2002)
Second Circuit	<i>Rankine v. Reno</i> , 319 F.3d 93 (2d Cir. 2003); <i>Restrepo v. McElroy</i> , 369 F.3d 627 (2d Cir. 2004); <i>Thom v. Ashcroft</i> , 369 F.3d 158 (2d Cir. 2004)
Third Circuit	<i>Ponnapula v. Ashcroft</i> , 373 F.3d 480 (3d Cir. 2004)
Fourth Circuit	<i>Chambers v. Reno</i> , 307 F.3d 284 (4th Cir. 2002)
Sixth Circuit	<i>Thaqi v. Jenifer</i> , 377 F.3d 500 (6th Cir. 2004)
Seventh Circuit	<i>Montenegro v. Ashcroft</i> , 355 F.3d 1035 (7th Cir. 2004)
Ninth Circuit	<i>Armendariz-Montoya v. Sonchik</i> , 291 F.3d 1116 (9th Cir. 2002)
Eleventh Circuit	<i>Brooks v. Ashcroft</i> , 283 F.3d 1268 (11th Cir. 2002)

Retroactivity Analysis

When litigating whether an LPR with a trial conviction is eligible for section 212(c) relief, the primary issue is whether the repeal of section 212(c) can be applied retroactively. In *St. Cyr*, the Supreme Court analyzed this issue 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 (2001) (quoting *Martin v. Hadix*, 527 U.S. 343, 352 (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. In general, "[a] statute has retroactive effect when it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . .'" *St. Cyr*, 533 U.S. at 321 quoting *Landgraf*, 511 U.S. at 269.

The first step of the *Landgraf* analysis already has been answered in favor of the LPRs. *St. Cyr* said that Congress did not clearly express its intent to retroactively apply the repeal of section 212(c) relief to pre-AEDPA convictions.

Moving on to the second step of the analysis, LPRs who were convicted after trial need to show that applying the repeal of section 212(c) would produce an impermissibly retroactive effect. In making this showing, the "relevant past event" for purposes of the retroactivity analysis must be identified. The following events have been proposed:

1. the criminal conduct⁹
2. the agreement to plead guilty (*see* DOJ final rule)
3. the decision to go to trial (*see Ponnepula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004))
4. the conviction (*see Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (Underhill, J., dissenting))
5. the decision to forego the affirmative filing of a section 212(c) application based on the expectation that they would be permitted to file a stronger application later (*see Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004))

The Third Circuit's Decision in *Ponnepula*

In *Ponnepula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), the Third Circuit considered the case of an individual who, before the effective date of IIRIRA, turned down a plea agreement and who then sustained a trial conviction. The court held that he had a reasonable reliance interest in the availability of section 212(c) relief, regardless of whether such reliance was only one consideration of many in the decision to go to trial. The court said,

if it was reasonable in *St. Cyr* for an alien to rely on the attenuated availability of § 212(c) relief in accepting a plea agreement, we see no reason why it would be unreasonable for the same alien to likewise rely in declining a plea agreement. The reasonable reliance question turns on the nature of the statutory right and the availability of some choice affecting that right, not on the particular choice actually made.

The Third Circuit's decision discussed and criticized other courts' retroactivity analysis. First, according to the Third Circuit, the other circuit courts "erected too high a barrier to triggering the presumption against retroactivity." "Because the Supreme Court has repeatedly couched its holdings in this area in terms of a liberal presumption--albeit one that arises only conditionally, on a finding of retroactive effect--we read *Landgraf* and its progeny to hold that the presumption against retroactivity is easily triggered, though not

⁹ If the criminal conduct is the "relevant past event" then the date of the actual conviction or plea agreement, as well as the type of conviction (plea vs. trial), is irrelevant. The Oregon district court recently focused on the date of the criminal conduct for purposes of the retroactivity analysis. *See Garcia-Plascencia v Ashcroft*, No. 04-1067 (D. Or. Sept. 28, 2004) (posted at <http://www.lexisnexis.com/practiceareas/immigration/pdfs/web624.pdf>); *see also Thom v. Ashcroft*, 369 F.3d 158, 168-69 & n. 17 (2d Cir. 2004) (Underhill, J., dissenting); *Restrepo v. McElroy*, 369 F.3d 627, 643 (2d Cir. 2004) (Calabresi, J., concurring); *Chambers v. Reno*, 307 F.3d 282, 293-298 (4th Cir. 2002) (Goodwin, J., dissenting); *but see Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (citing *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *Domond v. INS*, 244 F.3d 85-86 (2d Cir. 2001).

automatic." The *Ponnapula* court further concluded that the other circuit courts failed to apply the presumption against retroactivity, but rather treated "*Landgraf* as establishing a presumption in favor of retroactive application."

Second, the other circuits erred by requiring petitioners who sustained trial convictions to show actual reliance on the availability of section 212(c) relief, the court's opinion continued. The court held that "[t]he Supreme Court has never required actual reliance or evidence thereof in the *Landgraf* line of cases, and has in fact assiduously eschewed an actual reliance requirement." The court said: (1) in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court found that the statute could not be applied retroactively "without once referring to the defendant's conduct or the defendant's actual expectations"; (2) in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court found that the statute could not be applied retroactively "without reference to Hughes Aircraft's conduct or expectations"; (3) in *Martin v. Hadix*, 527 U.S. 343 (1999), the Supreme Court found that the statute could be applied retroactively, however, the Court's "discussion focus[ed] not on the bona fides of the attorneys' claimed actual reliance, but instead on whether reliance was (or would have been) reasonable"; and (4) in *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court found that the statute could not be applied retroactively and the Court's retroactivity analysis "avoided an 'actual reliance' formulation in favor of a 'reasonable reliance' formulation...."

Third, the *Ponnapula* court found that the other circuits erroneously have required petitioners to prove that their past conduct evidenced their intention to preserve section 212(c) relief by going to trial. The court noted it was "unable to locate [this evidentiary burden] in the *Landgraf* line." Furthermore, the court concluded that "[t]he *Landgraf* line also establishes that a change in law can be found impermissibly retroactive without establishing that some (or all) members of the group affected by the change in law relied on the prior state of the law."

Nonetheless, acknowledging the "constricted and questionable (but nonetheless prevailing) view" taken by other circuits on this issue, the court then proceeded to demonstrate that the retroactive application of IIRIRA's repeal of section 212(c) to petitioner would have an impermissibly retroactive effect notwithstanding those decisions. The court distinguished petitioner *Ponnapula*'s situation from the situation of the petitioners in those decisions. This part of the decision may help petitioners distinguish their cases from adverse precedents in other circuits.

The Second Circuit's Decisions in *Restrepo* and *Thom*

In *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), the Second Circuit held that AEDPA § 440(d) may have an impermissibly retroactive effect if applied to LPRs who sustained pre-AEDPA aggravated felony convictions following a jury trial. Significantly, the petitioner in *Restrepo* claimed that he decided to forego his opportunity to affirmatively file a section 212(c) application before AEDPA based on "the considered

and reasonable expectation that he would be permitted to file a stronger application for § 212(c) relief at a later time."

The court of appeals remanded the case to the district court to decide in the first instance whether the petitioner would have to make an individualized showing that he did not apply affirmatively for section 212(c) based on this expectation, or whether such reliance may be presumed in all such cases under a categorical approach.¹⁰ Although the court remanded on this important issue, it noted that the Supreme Court did not require an individualized showing in *St. Cyr*. The court said "the [*St. Cyr*] Court never suggested that all parties who claim that a statute has a retroactive effect must show the disruption of a *quid pro quo* exchange. And it would be out of keeping with the reasoning of *St. Cyr* II to read such a *quid pro quo* requirement into that opinion." Judge Calabresi's concurrence expressed his preference for the categorical approach.

The court also said that its holding was consistent with its prior decision in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003). In *Rankine*, the court had declined to extend *St. Cyr* to LPRs who were convicted after trial. The *Restrepo* court noted that

Rankine resolved the narrower question of whether an alien detrimentally relied on the continuing availability of 212(c) relief in deciding to go to trial rather than accepting a plea. Petitioner, by contrast, raises a separate and distinct reliance claim that *Rankine* did not have occasion to address since it arose outside of the plea bargaining context.

Just two months after the Second Circuit decided *Restrepo*, it issued another decision in a case involving a pre-AEDPA trial conviction, *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004). In *Thom*, the court held that *Rankine* governed and that the petitioner was ineligible for section 212(c) relief. The court distinguished *Thom* from *Restrepo* on the ground that the petitioner in *Restrepo* claimed that he relied on the fact that he would later have an opportunity to file a stronger application for relief. The *Thom* court said, "[b]ecause Petitioner does not claim any other basis for such a reliance or expectation, see, e.g., *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004), we hold that IIRIRA and the AEDPA may be applied retroactively to him."

Given the court's decision in *Thom*, petitioners in the Second Circuit may want to raise the *Restrepo* argument: the repeal of section 212(c) has an impermissibly retroactive effect on LPRs with pre-AEDPA trial convictions because they gave up their opportunity to affirmatively file an application for relief. Petitioners may also argue that the "categorical approach" should apply. Under the categorical approach, petitioners would not have to make an individualized showing that they relied on the expectation that they would apply for relief at a later time. In addition, petitioners who have evidence that they relied on the expectation of applying for relief may present that argument.

¹⁰ The briefing at the district court is scheduled to be completed Fall 2004.

The Sixth Circuit's Decision in *Thaqi*

In *Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004), the petitioner had two convictions involving moral turpitude: the first in 1994 by jury trial and the second in 1995 by guilty plea. The Sixth Circuit Court of Appeals found that he was eligible for section 212(c) relief because applying the repeal of section 212(c) to the petitioner would have an impermissibly retroactive effect. The court said, "the crime that rendered him ineligible for § 212(c) relief was also the result of a guilty plea -- it was his second conviction, in which he pleaded guilty to larceny, that made him guilty of two unconnected crimes of moral turpitude." Thus, the court reasoned that the petitioner, like the petitioner in *St. Cyr*, might have contested the larceny charge had he known that later legislation would deprive him of eligibility for section 212(c) relief.

Importantly, the court noted that *St. Cyr* does not require that a petitioner demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissibly retroactive effect. All that *St. Cyr* requires is that "petitioner is among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief." The court also distinguished decisions in the First, Second, Fourth and Ninth Circuits holding that there was no impermissibly retroactive effect where the petitioners had been convicted by a trial. The court found that those decisions were not applicable to petitioner's case because "[a]lthough [petitioner's] first conviction resulted from a jury trial, his second, the one which would render him ineligible for § 212(c) relief under AEDPA, resulted from a guilty plea."

B. LPRs who Departed the United States

The final rule bars former LPRs who were eligible for section 212(c) relief but were deported or removed from the United States from filing special 212(c) motions. 8 C.F.R. § 1003.44(k). 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;¹¹ and those who have not been admitted or paroled.

DOJ justifies this bar by noting that existing regulations, *see* 8 C.F.R. § 1003.2(d), "treat an executed deportation or removal order as administratively complete, thereby eliminating any possibility of challenging a proceeding that resulted in the departure of an alien." 69 Fed. Reg. at 57827. Furthermore, 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." *Id.* at 57827-28.

Although not all individuals who have been deported had a "sufficient opportunity" to challenge the denial of relief, past efforts to challenge the denial of motions to reopen for people who have departed the United States have been unsuccessful. *See Robledo-Gonzalez v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003); *Patel v. U.S. Atty. Gen.*, 334 F.3d

¹¹ Significantly, these individuals may be subject to summary removal if DHS reinstates their prior orders under INA § 241(a)(5). See AILF's web page (www.aifl.org) for the most recent practice advisory on reinstatement of removal.

1259 (11th Cir. 2003); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003). Nonetheless, most circuit courts have not addressed whether DOJ can bar motions filed from people who have left the United States. Further, even the courts that have upheld this bar have not addressed all of the arguments or challenges that may be presented. Attorneys with strong cases for relief, particularly where the petitioner did not have a “sufficient opportunity” to challenge the denial of relief may contact AILF’s Legal Action Center to discuss further options.