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DISCRETIONARY WAIVERS AND REOPENING OF APPLICATIONS BEFORE A FINAL ORDER OF DEPORTATION UNDER § 212(c) OF THE IMMIGRATION AND NATIONALITY ACT

I. INTRODUCTION

Many aliens in the United States are under threat of deportation for a variety of reasons. Among these aliens are those who have committed drug offenses and against whom the Board of Immigration Appeals ("BIA") have begun deportation proceedings. Many of these aliens have resided in this country for a number of years and have acquired the status of lawful permanent residents before they committed the drug crimes. In their defense against deportation they may invoke waivers and exclusionary provisions and attempt to show evidence of rehabilitation. Additionally, they may later seek to reopen their deportation hearings because changes and circumstances have arisen, subsequent to the hearings, that may have an impact on any decisions already rendered, as well as on the aliens' futures in the United States.

Section 212(c) of the Immigration and Nationality Act¹ ("INA") is the most expansive waiver available in the INA and the only waiver available in drug cases.² It was enacted in 1952 as a revision of the immigration and naturalization laws of the INA. Section 212(c) provides that

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 section³

For an alien to be eligible for § 212(c) relief, therefore, five conditions must be met: 1) the alien must have acquired Legal Permanent Residence; 2) any departure from the United States, subsequent to having acquired residency, must not have been under an order of deportation; 3) the alien is seeking to re-enter; 4) the alien has established an unrelinquished domicile of at least seven years; and 5) the alien is excludable, i.e., the alien is not eligible for suspension of deportation or other relief as a result of one or more criminal convictions.⁴

The purpose of § 212(c) is to permit waiver of deportation for eligible aliens who developed strong ties to this country and who would suffer hardships if deported.⁵ Until 1976, § 212(c) was not invoked often because of the relatively small num-

1. 8 U.S.C.A. §§1101-1557 (1970 & Supp. 1994).

2. *Deportation, Exclusion, Discretionary Relief, and Waivers*, C505 A.L.I.-ABA 337 (1990).

3. 8 U.S.C.A. §1182(c) (1970 & Supp. 1994).

4. Carlina Tapia-Ruano, *Recent Developments in 212(c) Cases*, PLI Litig. & Admin. Practice Course Handbook Series No. 422, 1991.

5. Mark A. Hall, Note, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. Chi. L. Rev. 771, 791 (1979-80).

ber of permanent resident aliens who committed excludable offenses and then temporarily left after seven years of domicile in this country.⁶ However, the interpretation of § 212(c) was expanded in 1976 in the Second Circuit case of *Francis v. INS*,⁷ which held that the Equal Protection Clause of the Constitution mandates that § 212(c) be available to aliens who face deportation but have not traveled abroad.⁸ Although the legislative history of § 212(c) is scant, its origins can be traced to the controversial "Seventh Proviso,"⁹ which "[w]as intended to give discretionary power to the proper government official to grant relief to aliens who were re-entering the United States after a temporary absence who came in the front door, were inspected, lawfully admitted, established homes here, and remained for seven years before they got into trouble."¹⁰ However, the legislative history of the Seventh Proviso is no more complete than that of § 212(c), and it has been argued that "Congress accords the judiciary vast discretion in determining the appropriate termination date of lawful permanent status under § 212(c)."¹¹

In *In Re Lok*,¹² the leading administrative decision with respect to deportation, the Board of Immigration Appeals held the optimum date to terminate an alien's lawful permanent resident status is when the administrative order of deportation becomes final.¹³ This so-called cut-off date allegedly preserves an alien's right of appeal and provides the courts with an ascertainable date.¹⁴ Cut-off dates terminating status prior to an administrative appeal ignore the alien's right of appeal to the BIA, while cut-off dates subsequent to the BIA's chosen date would encourage frivolous appeals.¹⁵

While numerous courts have adopted the *Lok* termination date of the final administrative order of deportation, the issue of assessing a termination date pursuant to § 212(c) has been a confusing and stinging source of circuit conflict. Related to this conflict is the eligibility of the alien to *reopen* his § 212(c) application for waiver of deportation when he (1) petitioned for § 212(c) relief before the issuance of a final administrative order of deportation, and (2) has satisfied the seven year domicile requirement.¹⁶

6. *Id.* at 774.

7. 532 F.2d 268 (2d Cir. 1976). The petitioner in *Francis* argued that the differentiation between continually residing aliens and those who traveled abroad lacked, under section 212(c), any rational relation to a legitimate government interest and thus deprived Francis his equal protection rights. *Id.* at 269-70.

8. See Hall, *supra* note 5, at 774.

9. The Seventh Proviso of § 3 provides:

That 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. This Proviso applies only to aliens who have lived previously in the United States and are returning to a permanent domicile here.

S. Rep. No. 1515, 81st Cong., 2d Sess. 381 (1950) (citing Act of February 5, 1917, ch. 29 §3, 39 Stat. 878 (repealed 1952)).

10. *Id.* at 382.

11. Jane M. O'Sullivan, Book Note, *Deportation: Marti-Xiques v. INS*, 741 F.2d 350 (11th Cir. 1984), 9 Suffolk Transnat'l L.J. 409, 415 (1985) (contrasting circuit court applications of § 212(c)).

12. 548 F.2d 37 (2d Cir. 1977).

13. O'Sullivan, *supra* note 11, at 416.

14. *Id.*

15. *Id.*

16. 8 C.F.R. §3.2 (1993), entitled "Reopening or reconsideration," allows motions to reopen in deportation proceedings subject to the discretion of the BIA:

Motions to reopen in deportation proceedings shall not be granted unless it appears to

A multi-circuit split currently exists on the issue of an alien's eligibility in reopening § 212(c) applications and on whether the BIA must consider a reopened application. The First, Second, Seventh, and Ninth Circuits all hold that an alien who satisfies the seven year domicile requirement and petitions for § 212(c) relief prior to a final administrative order of deportation is subsequently eligible to reopen his § 212(c) application to show evidence of changed circumstances. In contrast, the Third and Fifth Circuits deny the alien a motion to reopen his § 212(c) application. These circuits view such a motion as a *new* petition for § 212(c) relief and therefore brought after an order of deportation has become administratively final, when an alien's status is no longer that of being lawfully admitted for permanent residence. This article will address the split in these circuits and will propose a resolution to this split.

II. SPLIT AMONG THE CIRCUITS

A. Motion to Reopen § 212(c) Application Allowed: *Henry v. INS*¹⁷

1. *Elston A. Henry*

A native of Antigua, Elston A. Henry was admitted to the United States as a lawful permanent resident in 1976.¹⁸ In 1986, Henry was convicted of distributing a substance containing cocaine, a felony under Illinois law, and was placed on probation. Subsequently, Henry was charged with possession with the intent to deliver between one and fifteen grams of cocaine. Before his probation was revoked, the INS commenced deportation proceedings. Henry conceded deportability but moved for a § 212(c) waiver, which was denied by the immigration judge. The BIA dismissed Henry's appeal and held that Henry failed to show the requisite outstanding equities under § 212(c) to qualify for relief.¹⁹ Henry subsequently filed two motions to reopen, the second of which claimed evidence of changed circumstances, i.e. Henry's father had recently died and his mother had cancer. The BIA denied Henry's motion to reopen solely on the ground that he was statutorily ineligible to seek § 212(c) relief, as a final order of deportation had already been entered.²⁰ He sought relief from the Seventh Circuit which consolidated his appeal with that of another immigrant, Nikola Akrap.

2. *Nikola Akrap*

Akrap had also become subject to a final administrative deportation order (for a

the Board that evidence sought to be offered is material and was not available and could not have been presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefore was afforded him at the former hearing unless that relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

17. 8 F.3d 426 (7th Cir. 1993). The case consolidated two lower court cases. The facts of each are discussed here.

18. *Id.* at 429.

19. *Id.* at 430. The BIA found that Henry had not lived in the U.S. that long, that he was not close to his children, that he had not upheld his child support obligations, that his deportation would not cause hardship to his girlfriend and his children, that his parents and siblings still resided in Antigua, and that Henry displayed no sign of rehabilitation. *Id.*

20. *Id.* at 431.

cocaine conviction) in 1991 and was denied a § 212(c) waiver in 1992. Akrap, like Henry, filed two motions to reopen. The second of these motions requested that the BIA consider additional evidence regarding the deteriorating health of Akrap's father and the political unrest in Croatia and Yugoslavia.²¹ The BIA redesignated Croatia as Akrap's country of deportation but denied the motion to reopen, holding that Akrap's status as lawful permanent resident had changed with the final order of deportation.²²

The Seventh Circuit agreed with the Second Circuit case of *Vargas v. INS* that *Lok* is not applicable to the facts presented, as *Lok* is "limited to the initial accrual of seven years' unrelinquished domicile"²³ The Seventh Circuit rejected the BIA's decision and upheld the right of the alien to reopen proceedings to present new evidence. The court likened the petitioners' motions to reopen to Federal Rules of Civil Procedure 60(b), where parties can seek relief from final judgment to present new evidence.²⁴ Furthermore, the court pointed out that the BIA's own regulation (8 C.F.R. § 3.2) does not foreclose this avenue.²⁵

Additionally, the Seventh Circuit rejected arguments that aliens could manufacture and manipulate inequities to support their waiver applications. While the court conceded that some evidence relevant to § 212(c) may be subject to manipulation, there are circumstances that change despite the alien's action or inaction.²⁶ The court, for example, stated that neither did Akrap manufacture the conflict in Croatia or his father's death, nor did Henry manufacture his father's death and his mother's illness.²⁷ Therefore, changed circumstances such as these are not precluded from presentation in a motion to reopen.

Furthermore, in agreement with *Vargas v. INS*, the Seventh Circuit held that a motion to reopen "merely revives the earlier § 212(c) application and does not constitute an entirely new request for discretionary relief."²⁸ The court supplemented this holding by claiming that the BIA does not itself require a new application or payment of a new filing fee when a motion to reopen an earlier § 212(c) application is submitted.²⁹ In light of these findings, the Seventh Circuit further held the BIA's position "strained and unreasonable," and that both Henry and Akrap were eligible to reopen proceedings to submit new evidence to the BIA for consideration.³⁰ This position by the *Henry* court has found support in other circuits.³¹

21. *Id.*

22. *Id.*

23. *Id.* at 435.

24. *Id.* at 438. The Seventh Circuit rejected that notion of the BIA's ruling as operating like a statute of limitations because the petitioners had already filed for waiver of deportation before a final entry of deportation order was entered. Therefore, even if the BIA ruling acted as a statute of limitations, the petitioners have satisfied it and are merely reopening their earlier applications.

25. *Id.*

26. *Id.* at 437-38.

27. *Id.* at 438. The court does not treat the possibility of manufactured evidence as a serious concern, as the issue of whether evidence was manufactured may be considered by the BIA in deciding whether to reopen proceedings. The court's emphasis here is that the BIA should at the very least, as established in its own regulations, consider whether to reopen section 212(c) applications. *Id.*

28. *Id.*

29. See *id.* n. 18.

30. *Id.* at 439. The Seventh Circuit's decision does not mandate that the BIA must reopen petitioners' § 212(c) applications, but only that petitioners' new evidence should be considered by the BIA in deciding whether to reopen. *Id.*

31. The First Circuit in *Goncalves v. INS*, 6 F.3d 830 (1st Cir. 1993) held the BIA offered no justifiable reason for denying *Goncalves*' motion to reopen and rendering *Goncalves*' earlier deportation

B. Motion to Reopen § 212(c) Application Denied: *Katsis v. INS*³²

Stavros Katsis, a native of Greece, was admitted to the United States as a lawful permanent resident in 1983.³³ In 1988, he was convicted of a drug violation and served a two-year prison term. In 1989, the INS commenced deportation proceedings; Katsis conceded deportability and applied for a § 212(c) waiver of deportability. Although the immigration judge found Katsis eligible for a § 212(c) waiver, the waiver was denied because the judge determined Katsis' drug conviction outweighed any considerations in favor of permitting him to stay in the country.³⁴ In 1990, Katsis appealed to the BIA, which affirmed the denial of § 212(c) waiver. In 1992, Katsis filed a motion to reopen proceedings in order to present new evidence; this motion was denied by the BIA as a matter of law because it found that Katsis was statutorily ineligible for waiver, as Katsis was no longer a lawful permanent resident.³⁵

The Third Circuit upheld the BIA's determination in denying the motion to reopen. The court cited a United States Supreme Court case, *INS v. Doherty*³⁶, which frowned upon motions to reopen immigration proceedings. Furthermore, the Third Circuit gave substantial deference to the findings of the BIA pursuant to case law authority of another U.S. Supreme Court case, *Chevron U.S.A. v. Natural Resources Defense Council*.³⁷ Under *Chevron*, when Congress has implicitly delegated authority to an agency on a particular question, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."³⁸ According to the Third Circuit, the BIA had interpreted § 212(c) in a "permissible" way, and the BIA's regulations must be read "to conform to statutory mandates."³⁹ Additionally, the Third Circuit, in agreement with the BIA, felt that the introduction of new evidence in a reopened proceeding in effect constituted a new hearing with a different factual record.⁴⁰ Therefore, the BIA was to be accorded signifi-

order "final" and his status changed from that of being lawfully admitted for permanent residence. The BIA began deportation proceedings when Goncalves committed several drug crimes. The court found the BIA's regulation, 8 C.F.R. § 3.2, authorizes motions to reopen. *Id.* at 835.

Similarly, in *Vargas v. INS*, 938 F.2d 358 (2d Cir. 1991), the court found the BIA's refusal to reopen Vargas' § 212(c) motion constituted an amendment of 8 C.F.R. § 3.2 "without notice or opportunity for comment" and rendered the BIA's decision "arbitrary and capricious." *Id.* at 361. The court opined that a motion to reopen is not a request for a new decision but a reevaluation of the original motion. *Id.* The reevaluation of the original decision merely acts as an additional aid to the factfinder in resolving petitioner's claim on the merits.

The Ninth Circuit in *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993), criticized the BIA as engaging in self-contradiction when the latter refused to reopen § 212(c) proceedings, because 8 C.F.R. § 3.2 authorizes such a procedure. The court held that this regulation provides a "second round" to the alien and intimates that an alien's status determination is not truly "final" before invoking the regulations. "What is crystal-clear is that as long as the Board may reconsider or reopen the case, the status of the petitioner in the case for purposes of section 212(c) relief has not been finally determined for purposes of action by the Board." *Id.* at 1145.

32. 997 F.2d 1067 (3d Cir. 1993).

33. *Id.* at 1068.

34. *Id.*

35. *Id.* at 1069.

36. 112 S.Ct. 719 (1992).

37. 467 U.S. 837 (1984).

38. *Id.* at 844.

39. 997 F.2d at 1075.

40. *Id.* The Third Circuit established the BIA's interpretation as operating like a statute of limitations, the purpose of which is to discourage prolonged litigation and to limit the courts' exposure to

cant deference and its findings were to be undisturbed if it barred the reopening of a proceeding due to a change in the status of a lawful permanent resident.⁴¹

III. PROPOSAL TO RESOLVE THE CIRCUIT SPLIT

In resolving the circuit split presented above, it is important to consider the purpose and goal of § 212(c), which is to aid those aliens who have developed strong ties to this country and who would suffer hardship if forced to leave. The legislative history of § 212(c) therefore is ameliorative in nature. In keeping with this ameliorative aspect, the United States Supreme Court, in *INS v. Cardoza-Fonseca*, has asserted that "lingering ambiguities in deportation statutes must be construed in favor of the alien."⁴²

Although an argument may be made for deference to the BIA's decisions and practices, deference to a more favorable interpretation of deportation statutes such as § 212(c) of the INA will accord aliens a fair opportunity to present their situations and to defend themselves. Many, if not most, of these aliens, will have nowhere else to turn when faced with the threat of deportation; for many, circumstances in their personal lives will change through no fault of their own and for reasons outside of their control. These changes may adversely affect their lives if they are forced to leave this country without presenting the factfinder with these new circumstances.

The Supreme Court itself has asserted that although deportation is not a criminal punishment, it is a drastic measure and a harsh sanction with a "severe penal effect."⁴³

The circuit split seems to weigh in favor of allowing the alien to reopen his deportation proceeding in order to present new evidence of changed circumstances and rehabilitation. This may signal a trend in the courts to give effect to the purpose behind § 212(c) by giving the alien the benefit of the doubt and affording him a second chance at defending his claim to stay in this country.

The absence in the BIA's regulations of any language regarding whether an alien who (1) satisfies the seven year domicile requirement, and (2) seeks to reopen a timely § 212(c) application is in effect requesting a new hearing, suggests that the BIA does not view motions to reopen as an automatic taboo. Rather, the fact that 8 C.F.R. §3.2 exists shows the BIA has not ruled out requests for motions to reopen. If the BIA desired a strict prohibition against motions to reopen because the status of the alien had changed by virtue of a final administrative order of deportation, it would have specifically placed such a rule in its regulations or amended its current regulations in light of the seemingly growing number of § 212(c) motions to reopen cases. Additionally, the fact that the BIA does not require a new application or a payment of a filing fee upon filing a motion to reopen suggests that the BIA treats such motions to reopen

multiple filings. *Id.* at 1073.

41. The Fifth Circuit in *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), is in agreement with *Katsis v. INS* in upholding the BIA's decision not to reopen § 212(c) proceedings. The court determined that the BIA had not abused its discretion and rejected the idea of presenting new evidence of Ghassan's rehabilitation because this evidence was not initially presented to the immigration judge before it passed to the BIA on appeal. *Id.* at 638. The court further deemed motions to reopen as new hearings consisting of new facts, and supported the finality of deportability decisions when issued by the BIA, in that such decisions render an alien's permanent resident status terminated.

42. 480 U.S. 421, 449 (1987).

43. *Trop v. Dulles*, 356 U.S. 86, 98 (1958).

as extensions of the original § 212(c) application. By establishing the possibility of granting motions to reopen, the BIA's regulation (8 C.F.R. § 3.2) lends support to the ameliorative aspect behind § 212(c) of aiding those aliens subject to hardship if deported. The BIA should, at the very least, review new evidence offered to determine if this evidence even merits reopening the hearing.

In the interest of resolving the growing circuit split presented above and safeguarding the alien's right to have the opportunity to present new evidence that may change his fate, two steps should be taken. The BIA should add to 8 C.F.R. § 3.2 the following:

For purposes of this section, motions to reopen in deportation proceedings shall be deemed to relate back to, and be an extension of, the original hearing. If the alien has resided in this country for seven consecutive years, has applied for relief prior to an entry of a final administrative order of deportation, and later files a motion to reopen deportation proceedings pursuant to circumstances which have arisen subsequent to the hearing, such alien's status, whether as a lawful permanent resident or otherwise, shall be determined upon the motion to reopen.

Because the BIA is unlikely to amend its regulation (as the above cases in controversy seem to indicate), an addition should be made to § 212(c) of the INA:

(c)(1) An alien who a) files a timely application for waiver of deportation under this section and b) has resided in this country for seven consecutive years prior to an entry of a final administrative order of deportation, may file a motion to reopen deportation proceedings on the basis of changed circumstances that have arisen subsequent to the former hearing. Such new circumstances shall be taken into consideration to determine the appropriateness of reopening the deportation proceeding. For purposes of this section, a motion to reopen deportation proceedings shall relate back to the original hearing, and an alien's status upon the motion to reopen shall be the same as the status of the alien upon filing the original application for waiver of deportation, regardless of any issuance of an order of deportation.

In order to avoid the possibility of abuse by those aliens who repeatedly commit drug crimes and then claim new evidence that will prevent their deportation, a "three strikes" approach should be taken with respect to § 212(c) and motions to reopen. If the alien has been subject to deportation proceedings due to drug offenses on three separate occasions and on each occasion was successful in avoiding deportation after presenting evidence of changed circumstances in his/her motion to reopen proceedings, the alien will be barred from filing motions to reopen and presenting new evidence in any subsequent deportation proceedings for drug crimes. A section (c)(2), therefore, should be added to the above revision:

(c)(2) If the alien has been subject to deportation proceedings for drug offenses on three (3) separate occasions and on each occasion the alien was allowed to present evidence of changed circumstances in said alien's motion to reopen deportation proceedings, thus rendering the alien excluded from deportation, the alien will be automatically barred from filing a motion to reopen and presenting new evidence in any subsequent deportation hearing based on the alien's commission of a drug offense.

This approach will place a limit on the amount of protection given to aliens who engage in drug offenses and will convey the message that while motions to reopen deportation proceedings are available in the interest of the aliens and any ties they may

have to this country, motions to reopen are not a permanent safety net.

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