

September 1, 2000

Charles Adkins-Blanch
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Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2400
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Re: EOIR No. 127P,
Proposed Rule on §212(c) Relief for Certain Aliens
in Deportation Proceedings Before April 24, 1996
65 Fed. Reg. 44,476 (July 18, 2000)

Dear Mr. Adkins-Blanch:

The undersigned organizations and individuals submit these comments in response to the proposed rule for restoring §212(c) relief to certain noncitizens. We represent a broad and diverse range of communities, groups, and individuals concerned with the fair administration of the laws governing deportation of long-time lawful permanent residents and the separation of U.S. citizen family members. Through our collective work, we have provided legal representation or information to thousands of individuals whose opportunity to apply for §212(c) relief was taken away by the Board of Immigration Appeals' 1996 and the Attorney General's 1997 decisions in *Matter of Soriano*, Int. Dec. 3289. We offer these comments based on our first-hand experience in dealing with the individual lives caught up in this process, as well as the legal issues that have been the subject of extensive litigation throughout the country over the last four years.

As you know, relief under former §212(c) of the Immigration and Nationality Act (INA) has long served as a vital way to achieve fairness for lawful permanent residents and their families. In §212(c) — and now, in cancellation of removal under INA §240A(a) — Congress recognized the substantial and compelling equities that noncitizens have built up over many years of residence in the United States, as well as the interests of U.S. citizens who would be severely hurt if their permanent resident fathers, mothers, children, brothers, or sisters were taken away from them and deported.

By eliminating the opportunity of many lawful permanent residents to apply for §212(c) relief, the *Soriano* decisions caused grave harm to many of these families. We commend the Department of Justice for proposing a rule that strives to ameliorate this harm by achieving a greater measure of uniformity and fairness than does current Department policy toward §212(c).

We are deeply concerned, however, that the proposed rule would fail in significant ways to

achieve the uniformity that is one of its stated purposes. More fundamentally, we are deeply troubled that the proposed rule does little or nothing to achieve substantive fairness by helping the many permanent residents who, because of the *Soriano* decisions, were denied the chance to pursue these claims. In the remainder of these comments, we explain our concerns, first by addressing matters of general approach, and then by going section-by-section through the proposed rule to point out difficulties and to suggest needed revisions.

GENERAL COMMENTS

We understand that a basic objective of the proposed rule is greater uniformity in light of the various court decisions interpreting the reach of §440(d) of AEDPA. Such uniformity serves one aspect of fairness by assuring that eligibility for relief does not turn on a noncitizen's place of residence or place of hearing, or on how long an individual's case takes in the administrative process. We also recognize that the proposed rule strives to be efficient. Further, the Supplementary Information sets out a goal of substantive fairness: "a mechanism for such aliens who now have a final order of deportation to reopen their immigration proceedings if they would have been eligible to apply for §212(c) relief but for the *Soriano* decision." 65 Fed. Reg. 44,478 (July 18, 2000). Measured against these goals, however, the current draft is flawed in key respects, both substantive and procedural.

Substantively, the proposed rule unduly restricts eligibility for §212(c) relief. First, the proposed rule does not take into account the rulings of several federal circuits that recognize §212(c) eligibility for permanent residents who entered guilty pleas in reliance on the availability of relief. Second, by conditioning relief on whether deportation proceedings had formally "commenced" before an Immigration Court before April 24, 1996, the proposed rule is not even faithful to the federal circuit court decisions in which it purports to acquiesce. Third, the proposed rule does nothing for a sizeable group adversely affected by *Soriano*: noncitizens who were deported under *Soriano* or who left the country believing that *Soriano* made them ineligible for §212(c) relief. In these three ways, the proposed rule falls short of the stated goal of uniformity, and it fails to eliminate the basic problem — an unfairly narrow reading of §212(c) — that the federal appeals courts have almost unanimously identified in rejecting *Soriano*.

Procedurally, the proposed rule places unnecessary obstacles in the way of those that it is meant to help. In practice, many noncitizens who are now eligible for §212(c) relief will never hear about this rule, or hear about it too late, or be unable to pursue remedies that this rule should afford. One procedural problem is the absence of a procedure for identifying and notifying affected noncitizens. Another procedural problem is requiring a motion to reopen within ninety days. A third procedural problem is the absence of an automatic stay provision. For many of the noncitizens adversely affected by *Soriano*, it is a far more efficient and equitable procedure for EOIR to identify and notify the affected individuals, and to reopen their cases sua sponte, with an automatic stay in effect.

As explained more fully below in section-by-section comments, we urge that the proposed rule be revised so that (1) it achieves greater uniformity; (2) it makes §212(c) relief available to

those who, according to almost all federal circuits, should have been allowed to apply four years ago; and (3) it adopts procedures that make the availability of §212(c) meaningful in practice.

SECTION-BY-SECTION COMMENTS

I. The proposed rule defines too narrowly the group of noncitizens who are eligible to apply for §212(c) relief.

A. 8 C.F.R. §§3.44(b)(1), 212.3(g):

The final rule should more broadly define the group of eligible noncitizens inside the United States.

Under the proposed rule, eligibility to apply for §212(c) relief requires that “deportation proceedings before Immigration Court commenced before April 24, 1996,” the AEDPA enactment date. For two principal reasons, this reliance on “commencement” of proceedings is unduly narrow and should be broadened in the final rule.

1. The final rule should be consistent with broader eligibility definitions adopted by the several federal circuits.

The proposed rule fails to reach the stated goal of uniform nationwide application of AEDPA §440(d). The reason is that the proposed rule conflicts with holdings in four federal circuits that recognize a larger group eligible for §212(c) relief.

According to these federal appeals courts, certain persons whose deportation cases were not yet pending on April 24, 1996, are still eligible for §212(c) relief after the enactment of AEDPA.¹ For example, the Seventh Circuit very recently joined the First, Fourth, and Ninth Circuits in holding that lawful permanent residents may still apply for §212(c) relief, if they were in deportation proceedings before April 1, 1997, and they pled guilty to criminal charges in reliance on their §212(c) eligibility. See *Jideonwo v. INS*, ___, No. 99-3242, 2000 WL 1105004 (7th Cir. August 23, 2000) following *Mattis v. Reno*, 212 F.3d 31, 35-40 (1st Cir. 2000). For a similar decision, see *Magana-Pizano v. INS*, 200 F.3d 603, 610-11 (9th Cir. 1999). The Fourth Circuit went further in *Tasios v. Reno*, 204 F.3d 544, 550-52 (4th Cir. 2000), by holding that no individualized proof of reliance is required. Rather, Fourth Circuit found that “AEDPA §440(d), if applied to guilty pleas or to concessions of deportability made before AEDPA's effective date, would upset reasonable, settled expectations and change the legal effect of prior conduct. *Id.* at

¹ In effect, these decisions and those discussed in note 2 rejected the Board of Immigration Appeals' 1996 *Soriano* decision, as well as the Attorney General's 1997 decision. The Board's decision held that only those individuals whose § 212(c) applications were pending on April 24, 1996 could pursue that relief. Many individuals were harmed by the Board's 1996 decision. Their cases were dismissed by the Board or their applications were pretermitted by Immigration Judges, even before the Attorney General's 1997 decision. Those people should be covered by this proposed rule, but as it is presently written, they are not. Consequently, throughout these comments, we suggest that the ameliorative measures proposed herein apply to individuals adversely affected by the Board's 1996 decision as well as by the Attorney General's 1997 decision.

552.

The federal circuits may further broaden §212(c) eligibility. In *Mattis*, the First Circuit expressly reserved deciding whether it would allow §212(c) applications not only from noncitizens in proceedings prior to April 1, 1997, but also from noncitizens who entered guilty pleas in reliance on §212(c) eligibility, regardless of when they were put in proceedings. See *Mattis*, 212 F.3d at 35 n.9.

The logic underlying these decisions from the First, Fourth, Seventh, and Ninth Circuits is sound. The date on which the Immigration and Naturalization Service (INS) put a noncitizen into proceedings reflects a broad range of fortuitous circumstances. In many cases, the INS ignored noncitizens with minor convictions. These individuals were put into proceedings only after they traveled abroad or applied for U.S. citizenship. As several federal circuits have recognized, it is utterly arbitrary to bar these noncitizens from relief today just because the INS took longer to place them in proceedings. See *Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999); *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1309-10 (11th Cir. 2000).

As these holdings will still govern in the First, Fourth, Seventh and Ninth Circuits, the proposed rule is too narrow in coverage to achieve nationwide uniformity. Similarly, the proposed rule is too narrow to restore noncitizens to the eligibility for §212(c) relief that they would have had but for the *Soriano* decision.

The only way for the proposed rule to achieve both greater uniformity and fairness is to recognize as §212(c) eligible not only any noncitizen in deportation proceedings as of April 24, 1996, but also any noncitizen whose deportability is based on a criminal conviction before April 24, 1996.

2. The final rule should more broadly define when proceedings were “commenced” before Immigration Court.

The proposed rule is not faithful to the federal circuit court decisions in which it purports to acquiesce. These decisions found that the Congress did not intend for AEDPA §440(d) to apply in cases that were “pending” when AEDPA was enacted.² Yet, the proposed rule refers

² See *Goncalves v. Reno*, 144 F.3d 110, 126-33 (1st Cir. 1998) (finding AEDPA § 440(d) inapplicable to “pending applications” or “pending cases”), *cert. denied*, 526 U.S. 1004 (1999); *Wallace v. Reno*, 194 F.3d 279, 285-88 (1st Cir. 1999) (clearly extending the First Circuit’s earlier *Goncalves* holding to “pending cases,” even if there was no application pending yet); *Henderson v. INS*, 157 F.3d 106, 130 (2d Cir. 1998) (finding that “the provision of the AEDPA that limits the availability of § 212(c) waivers does not apply retroactively to aliens whose deportation or exclusion proceedings were pending on the date of its enactment”), *cert. denied*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225, 242 (3d Cir. 1999) (finding that “Congress did indeed express an intent that AEDPA’s amendment to INA § 212(c) should not apply to cases pending on the date of enactment”); *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir. 1999) (“By excluding retroactivity language from § 440(d) we presume that Congress

not to “pending” cases, but rather to “proceedings before the Immigration Court commenced” before April 24, 1996. See proposed 8 C.F.R. §§212.3(g) and §3.44(b)(1). Elsewhere, current Department regulations define “commence” as follows: “proceedings before an Immigration Judge commence ... when a charging document is filed with the Immigration Court by the Service.” 8 C.F.R. §3.14(a). Therefore, the proposed rule’s reference to “commenced” rather than “pending” may limit eligibility to only those “pending” cases in which the INS filed a charging document with the Immigration Court before April 24, 1996.

None of the circuit court decisions permitting §212(c) applications in “pending” cases limit their holdings in this formalistic and arbitrary way. Instead, several courts in these circuits have found that a case is “pending” on AEDPA’s enactment date if the charging document has been served or issued, notwithstanding the definition of “commencement” at 8 C.F.R. §3.14. These courts have deemed a case “pending” as of the date that the Order to Show Cause (OSC) was issued or served on the respondent, not the date that it was filed in the Immigration Court. For example, the First Circuit said in *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999): “when an order to show cause is served on the alien, the deportation process has effectively begun.” 194 F.3d at 287. Similarly, in *Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1309-10 (11th Cir. 2000), the Eleventh Circuit held that §212(c) is available to noncitizens “in proceedings.” If a noncitizen is subject to a warrant of detainer, he or she is in proceedings when the OSC is served, not when it is filed. Numerous federal district court decisions are in accord.³

3. Greater uniformity can be achieved only if the final rule includes all noncitizens whose convictions predate AEDPA.

Greater uniformity and fairness in administration of §212(c) can be achieved only if the final rule recognizes as §212(c) eligible not only any noncitizen in deportation cases as of April

did not intend for § 440(d) to apply to pending cases”); *Magana-Pizano v. INS*, 200 F.3d 603, 611 (9th Cir. 1999) (“Given our own analysis, and the weight of authority from other circuits, we conclude that AEDPA § 440(d) cannot be applied to deportation cases pending on the date AEDPA became law”); *Mayers v. INS*, 175 F.3d 1289, 1304 (11th Cir. 1999) (finding that “Congress intended that AEDPA § 440(d)’s amendment of INA § 212(c) should not apply to pending cases”).

³ See *Bury v. Reno*, 101 F. Supp.2d 296, 299-300 (E.D. Pa. 2000) (“I am unpersuaded that the filing of the order to show cause with the immigration court is the salient event for the purpose of determining the retroactivity of § 440(d) of the AEDPA I agree with the numerous courts that have held that a case in which the order to show cause issued prior to the enactment of the AEDPA was ‘pending,’ for the purpose of retroactivity, prior to the AEDPA”); *Sciglitano v. Holmes*, — F. Supp. —, 2000 WL 675696, *3 (E.D. Pa. May 23, 2000) (“I conclude that once the INS issued and served the Order to Show Cause, Petitioner’s case was constructively pending”); *Pena-Rosario v. Reno*, 83 F. Supp.2d 349, 363 (E.D.N.Y. 2000) (“Since Pena-Rosario was served with an order to show cause before enactment of the 1996 amendments, his case was pending then”); *Canela v. U.S. Dept. of Justice*, 64 F. Supp. 2d 456, 458 (E.D. Pa. 1999) (“[T]he court finds that Mr. Canela’s case was pending as of the date he received the OSC, which was prior to AEDPA’s enactment”); *Dunbar v. INS*, 64 F. Supp. 2d 47, 52 (D. Conn. 1999); *Mercado-Amador v. Reno*, 47 F. Supp. 2d 1219, 1224 (D. Or. 1999) (“The defendants’ argument that [petitioner] was not in deportation proceedings until the order to show cause was filed with the immigration court [is unpersuasive] From a due process standpoint, Mercado was subject to the deportation power of the INS as of the time the show cause order issued”).

24, 1996, but also any noncitizen whose deportability is based on a criminal conviction before April 24, 1996.

Accordingly, delete the proposed text of 8 C.F.R. §3.44(b)(1) and substitute:

(1) Is deportable based on a criminal conviction before April 24, 1996;

Also, delete the proposed text of 8 C.F.R. §212.3(g) and substitute:

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportability is based on a criminal conviction before April 24, 1996.

In the event that the final rule does not include the language to include criminal convictions before April 24, 1996, then 8 C.F.R. §§3.44(b)(1) and 212.3(g) in the final rule should provide that AEDPA §440(d) shall not apply in cases where deportation proceedings were “pending” before April 24, 1996, instead of only cases “commenced before the Immigration Court” before April 24, 1996.

Accordingly, delete the proposed text of 8 C.F.R. §3.44(b)(1) and substitute:

(1) Had deportation proceedings pending on April 24, 1996;

Also, delete the proposed text of 8 C.F.R. §212.3(g) and substitute:

Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportability proceedings were pending on April 24, 1996.

Alternatively, if 8 C.F.R. §3.44(b)(1) and 212.3(g) may remain unamended in the final rule, then add as both new 8 C.F.R. §3.44(b)(5) and a new second sentence of 8 C.F.R. §212.3(g):

For purposes of 8 C.F.R. §3.44(b)(1) and 212.3(g), deportation proceedings are deemed to commence upon the issuance or service of an Order to Show Cause.

B. 8 C.F.R. §§3.44(i):

The final rule should allow noncitizens who left the United States to file applications for §212(c) relief.

The proposed rule excludes from coverage: “(1) Aliens who have departed the United

States; (2) Aliens with a final order of deportation who have illegally returned to the United States ...” 8 C.F.R. §3.44(i). There is no justification for these exclusions. Among the many noncitizens adversely affected by *Soriano*, those who were deported, or who left the country believing they were ineligible for §212(c) relief, are a highly significant group.

Some of these individuals would have had very meritorious claims under §212(c), based on powerful equities such as service in the armed forces, strong family ties and a history of being taxpaying, contributing members of society. Some who departed never spent a day in jail in their criminal cases. Many of them left because they were unable to afford the court battles about the scope of §440(d), because the discouraging words of lawyers and judges wore them down, or because they could not face the prospect of indefinite detention. Although they are out of the country, their American citizen and legal resident family members continue to suffer — indeed, all the more so because their noncitizen spouse, child, brother, or sister is no longer here. To exclude noncitizens who left the United States from the proposed rule’s coverage is a serious omission.

We understand the EOIR’s valid concerns with the practical mechanism for affording those who have been deported or who left the United States the chance to apply for §212(c) relief. In Part B of these comments, which addresses procedural issues, we make concrete suggestions for providing them this opportunity while addressing the EOIR’s concerns for the integrity of the process and administrative efficiency.

1. 8 C.F.R. §3.44(i)(1):

The proposed rule unjustifiably denies relief to noncitizens who accepted their final orders of deportation.

The proposed rule leads to an unacceptable anomaly: it makes relief available to noncitizens who refused to comply with final deportation orders, while it denies relief to noncitizens who did obey such orders. There is no rational basis for this disparate treatment, especially when one of the government’s enforcement priorities is to promote voluntary compliance with deportation and removal orders. The proposed rule’s distinction between noncitizens inside and outside the United States is precisely the sort of distinction that creates strong incentives for delayed compliance and noncompliance.

Moreover, the proposed rule’s failure to include noncitizens outside the United States conflicts with an important principle that Congress adopted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 106-208 (1996). In enacting a new scheme for judicial review, now set out in INA §242, Congress deleted a provision (in former INA §106(c)) that had kept noncitizens from seeking judicial review of exclusion or deportation orders if they departed the United States after issuance of the order. The purpose of the 1996 amendment was to promote compliance with exclusion and deportation orders by allowing noncitizens to pursue judicial review from outside the United States. The underlying principle is that the final disposition of a noncitizen’s case should not depend on whether he or she left the United States. For this proposed rule to penalize noncitizens because they complied with deportation orders and left the country is directly contrary to this principle.

Moreover, a long history of precedent supports such relief for noncitizens outside the United States. In many cases, federal courts have ordered the INS, or the INS has agreed voluntarily, to return individuals who were wrongfully deported. In class action litigation, the INS has been ordered to allow noncitizens outside the country to reopen deportation orders that were entered erroneously. Thus, in *Walters v. Reno*, 145 F.3d 1032, 1050-51 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999) the federal appeals court upheld the district court's injunction requiring the INS to "parole or make other arrangements" to allow class members outside the United States to attend their hearings. *See also Singh v. Waters*, 87 F.3d 346, 347-49 (9th Cir. 1996) (INS ordered to permit noncitizen to return to the United States after having been unlawfully deported despite stay order); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 512 (9th Cir. 1985) (INS agreed to arrange and pay for noncitizen to return to the United States after having erroneously deported noncitizen); *Mendez v. INS*, 563 F.2d 956, 958-59 (9th Cir. 1977) (INS ordered to return alien deported without notice to counsel).

Accordingly, 8 C.F.R. §3.44(i)(1) should be deleted in the final rule.

2. 8 C.F.R. §3.44(i)(2):

The proposed rule unjustifiably denies relief to noncitizens with a final order of deportation who have unlawfully reentered the United States.

As a matter of basic principle, the reason for the final rule to include noncitizens outside the United States is the recognition that deportation from the United States based on the *Soriano* decisions should not stand in the way of §212(c) relief. Just as this principle means that noncitizens should be permitted to seek §212(c) relief from outside the United States, it also should not matter whether a noncitizen has reentered the United States after being deported under an order based on *Soriano*. As corollary, deportation orders based on *Soriano* — whether or not those orders are "erroneous" in some formal sense — should be disregarded for collateral purposes. For example, such orders should be disregarded in determining whether a noncitizen has unlawfully reentered the United States, see INA §276, as well as whether a prior deportation makes a noncitizen inadmissible, see INA §212(a)(9)(A).

Accordingly, 8 C.F.R. §3.44(i)(2) should be deleted in the final rule. The final rule also should say that *Soriano*-based deportation orders are disregarded in determining whether a noncitizen has unlawfully reentered the United States, and whether a prior deportation makes a noncitizen inadmissible.

3. 8 C.F.R. §3.44(i)(1):

The proposed rule unjustifiably denies relief to noncitizens who left under threat of deportation believing that *Soriano* made them ineligible for §212(c) relief.

All of the reasons to include noncitizens who complied with final deportation orders also apply to noncitizens who left the United States under threat of deportation, believing that *Soriano* made them ineligible to apply for §212(c) relief. Again, excluding this group leads to two consequences that the government has striven to avoid: it undermines self-enforcement of

the immigration laws, and it creates strong incentives for delayed compliance and noncompliance. Similarly, excluding this group conflicts with the basic principle, adopted by Congress in 1996, that disposition of a noncitizen's case should not depend on whether he or she left the United States. And, including this group is consistent with the federal court decisions that have called for the government to facilitate the return of noncitizens who were deported pursuant to a misunderstanding of law.

Accordingly, 8 C.F.R. §3.44(i)(1) should be deleted in the final rule.

C. 8 C.F.R. §3.44(b)(2)

The final rule should include a statement that it affords relief to noncitizens in proceedings pending in Immigration Court or at the Board.

The Supplementary Information states that noncitizens presently in proceedings before the Immigration Judge or before the Board, *i.e.*, not subject to final orders, may benefit from the proposed rule by requesting time to file a §212(c) application (in the case of proceedings before the Immigration Judge) or requesting a remand (in the case of proceedings before the BIA). *See* 65 Fed. Reg. 44,479 (July 18, 2000).

However, nothing in the proposed rule includes such individuals. Proposed 8 C.F.R. §3.44 covers only noncitizens with final deportation orders. Perhaps the reason for this omission is that the proposed rule is designed around a motion to reopen requirement, and only noncitizens with final deportation orders would need the mechanism of a motion to reopen to apply for 212(c). But the proposed rule's failure to address persons with non-final orders denies protection to a class of individuals the proposed regulation is intended to protect.

To remedy this, the final rule should make clear that persons whose proceedings are still pending and who are therefore not subject to final deportation orders shall be granted a reasonable period of time to file an application for relief under §212(c).

Accordingly, the final rule should include a new 8 C.F.R. §3.45, to read as follows:

(a) Noncitizens described in 8 C.F.R. §3.44(b) who are in deportation proceedings before the Immigration Court shall be notified that they may have a right proceed under this rule. The Immigration Court shall permit noncitizens described in 8 C.F.R. §3.44(b) to file a §212(c) application pursuant to 8 C.F.R. §3.44 or to request a reasonable time to submit such an application. If the noncitizen has an application for §212(c) relief on file with the Immigration Court, he or she may file a supplement to the existing application.

(b) Noncitizens described in 8 C.F.R. §3.44(b) who have a deportation proceeding pending with the Board of Immigration Appeals shall be notified that they may have a right to proceed under this rule and that they may:

- (1) move the Board to adjudicate any pending §212(c) application; and/or
- (2) move the Board to remand any pending deportation proceeding to the Immigration Court for adjudication of any pending §212(c) application or for submission of a §212(c) application;
- (3) supplement the application.

D. 8 C.F.R. 3.44(b)(3), (4)

The final rule should delete requirements that unrealistically assume it is possible to determine in retrospect why any particular noncitizen did not obtain relief under §212(c).

It is unrealistic to separate out reasons why any particular noncitizen was denied §212(c) relief. The effects of the *Soriano* decisions on the course of any individual case were pervasive and therefore very difficult to reconstruct, especially years after the proceedings in question. As we explain momentarily, the proposed rule rests upon this misguided premise when it limits coverage to noncitizens who were denied relief because of *Soriano* “and not on any other basis,” and when it requires eligibility to apply for §212(c) relief either “at the time of the deportation order became final” or “presently.”

1. 8 C.F.R. §3.44(b)(4)(i)

The proposed rule unreasonably limits relief to denials of 212(c) relief that were based on *Soriano* “and not on any other basis.”

Some noncitizens were denied the opportunity to apply for a §212(c) waiver in part because of the Board of Immigration Appeals’ or the Attorney General’s decision in *Soriano* and in part for other reasons. For example, the immigration judge, the Board, or a court may have made reference to other issues related to statutory eligibility for a §212(c) waiver. In such a case, an immigration judge may have seemed to find that the noncitizen did not meet the “lawful domicile” requirement, or had not been “admitted” as a permanent resident. Or a decisionmaker may have said that, absent *Soriano*, the noncitizen would have been denied a §212(c) waiver on discretionary grounds.

Under the final rule, such discussions of other issues of eligibility should not be determinative in deciding eligibility for §212(c) relief. Absent AEDPA §440(d), a noncitizen could always have sought review of statutory eligibility questions and discretionary denials of relief. But because of the Board of Immigration Appeals' and the Attorney General's *Soriano* decisions, these noncitizens never had a chance to have these issues fully heard. The final rule should not burden these noncitizens with these preliminary, tentative, or untested references to other issues of eligibility.

Accordingly, delete the proposed text of 8 C.F.R. §3.44(b)(4)(i) and substitute:

Applied for and was denied §212(c) relief on the basis, in whole or in part, of the Board's 1996 *Soriano* decision or the Attorney General's 1997 *Soriano* decision (or their rationale);

2. 8 C.F.R. §§3.44(b)(4)(ii) and (iii)

The proposed rule unreasonably requires eligibility to apply for §212(c) relief at the time the deportation order became final.

A related problem arises in connection with the requirement in proposed 8 C.F.R. §3.44(b)(4)(ii) and (iii) that noncitizens "would have been eligible to apply" for §212(c) relief at the time the deportation order became final, but for the Attorney General's 1997 *Soriano* decision. The *Soriano* decisions caused certain lawful permanent residents to withdraw other legitimate bases of appeal before they accrued seven years. Regulations at 8 C.F.R. §§3.2(c)(1) and 3.23(b)(4) allow lawful permanent residents to reopen proceedings to apply for §212(c) relief if they accrued seven years of lawful unrelinquished domicile prior to the entry of an administratively final order of deportation or exclusion. These individuals that would have accrued seven years but for the *Soriano* decisions should be allowed to apply for §212(c) relief.

Again, fairness requires that a lawful permanent resident be put back to the position she or he would have been in had *Soriano* never been issued. Noncitizens who had their domicile cut short because they abandoned legitimate issues on appeal as a result of the Board of Immigration Appeals' or the Attorney General's *Soriano* decision should be allowed to reopen their proceedings to apply for §212(c) relief.

Accordingly, 8 C.F.R. §3.44(b)(4)(ii) should be revised to read:

3.44(b)(4)(ii). Did not appeal to the Board a denial of §212(c) relief, or withdrew an appeal.

And 8 C.F.R. §3.44(b)(4)(iii) should be revised to read:

3.44(b)(4)(iii). Did not apply for §212(c) relief but any such application would have been denied or pretermitted on the basis, in whole or in part, of the Board of Immigration Appeals' or the Attorney General's *Soriano* decisions.

3. 8 C.F.R. 3.44(b)(3)

The proposed rule unreasonably requires present eligibility to apply for section 212(c) relief.

Yet another related problem arises in connection with the requirement in proposed 8 C.F.R. 3.44(b)(3) that noncitizens "would presently be eligible to apply" for 212(c) relief. Again, this requirement may have the unfair effect of excluding eligibility for individuals who would have been eligible to apply but for the *Soriano* decisions. For example, as presently drafted, the proposed rule might be deemed to exclude an individual who was eligible at the time of his incorrectly pretermitted application for 212(c) relief, but who "presently" has not had a lawful unrelinquished domicile of seven years in the United States.

Accordingly, 8 C.F.R. 3.44(b)(3) should be revised to delete the word "presently."

II. The proposed rule places unnecessary procedural obstacles in the way of eligible applicants and unjustifiably omits a provision for an automatic stay of deportation.

Procedurally, the proposed rule inadequately addresses the practical problem of reaching the persons — both inside and outside the United States — who were adversely affected by the Board of Immigration Appeals and Attorney General's *Soriano* decisions. The final rule should require the EOIR to identify, notify, and reopen sua sponte the cases of adversely affected noncitizens. Even if a motion to reopen requirement is retained, the time deadline and the procedural requirements for the motion should be revised in the final rule. The final rule should also provide an automatic stay of deportation.

A. Identification and notice: the final rule should require the EOIR to identify adversely affected noncitizens and notify them that they may apply for §212(c) relief.

The basic procedural flaw in the proposed rule is that it puts the burden on affected noncitizens to reopen their cases when many of them will have no notice of their eligibility for §212(c) relief. Nothing in the proposed rule addresses the need to notify these immigrants who could easily have no idea — some four years after the passage of AEDPA — that they may still have an opportunity to maintain or reinstate their permanent residency. This problem is compounded by the very short time deadline for filing motions to reopen, and by unnecessarily cumbersome paperwork requirements. It would be far more efficient, uniform, and fair for all concerned for the EOIR to identify, notify, and reopen cases sua sponte. This approach seems especially appropriate in the context of the federal circuit decisions, almost all of which have rejected the Attorney General's or the Board of Immigration Appeals' *Soriano* decisions.

The proposed rule pays inadequate attention to significant differences in the circumstances of various affected individuals. It thus includes procedures that might work well for some, but which are inefficient or unfair for many others. The noncitizens adversely affected by *Soriano* fall into several groups posing different circumstances that influence what is the most efficient,

uniform, and fair approach to identification, notice, and reopening. For example, we urge that the motion to reopen requirement be deleted from the final rule, because it is inefficient for a significant group of affected noncitizens, while it is unfair for another significant group.

1. Identification: the final rule should require that the EOIR identify those who may now apply for §212(c) relief.

Most noncitizens with final deportation orders have received decisions from immigration judges and the Board of Immigration Appeals stating that they are ineligible for §212(c) relief. They have no reason to question this statement. Especially if they are in detention and thus have only limited access to legal counsel (but even if they are not in detention), these noncitizens are unlikely to have ongoing contact with counsel who will learn of this proposed rule and inform them. Absent such notification by counsel, the only hope that the final rule will benefit these noncitizens is that the EOIR identifies the cases affected by the rule and notifies the noncitizen and counsel, if any.

The EOIR has the most complete database of individuals affected by the *Soriano* decisions. The Supplementary Information reflects this record keeping. For example, it states that approximately 800 affected persons have filed challenges to *Soriano* in federal district court. 65 Fed. Reg. 44,477 (July 18, 2000). Much of the affected class is identifiable: those in proceedings before April 24, 1996, who were either ordered deported since that date or whose proceedings remain pending at the immigration court or at the Board. For those currently in proceedings before immigration judge or the Board of Immigration Appeals, identification should be accomplished through review of the current docket. For all affected noncitizens, whether final deportation orders have issued or proceedings are still pending, the charging document itself will typically identify almost all noncitizens adversely affected by *Soriano* who would now be eligible to file an application for §212(c) relief. EOIR records indicate not only the immigration status of the individual in removal proceedings but also the dates on which the person obtained lawful resident status and the ground of deportability.

Another group of noncitizens consists of those who would be eligible for cancellation of removal under current INA §240A(a). These would include individuals, for example, who have convictions for crimes that are not aggravated felonies. For them, the issuance of a Notice to Appear to initiate removal proceedings would eliminate the problem that *Soriano* created.

Accordingly, the final rule should include a new 8 C.F.R. §8.46(a), to read as follows:

The EOIR shall identify all noncitizens adversely affected, directly or indirectly, by the Board of Immigration Appeals' 1996 or Attorney General's 1997 decision in *Matter of Soriano*, Int. Dec. 3289.

2. Notice: the final rule should require that the EOIR notify those who may now apply for §212(c) relief.

Given that many of the noncitizens who can now apply for §212(c) relief can be identified using EOIR records, the proposed rule should be revised to require the EOIR to notify these noncitizens. Litigation concerning eligibility for §212(c) after the enactment of AEDPA §440(d) has been ongoing for over four years. Many affected noncitizens are likely to be unaware that the EOIR published a rule in the Federal Register to adopt a uniform nationwide procedure for applying AEDPA §440(d) four years after it became law. This need for notice is acute for those noncitizens who have remained in the United States during this period. It is all the more acute for noncitizens who were deported, or who left the United States under threat of deportation believing that they were ineligible for §212(c) relief.

This notice must include noncitizens presently in proceedings. Because they are not subject to final deportation orders, they do not need to have their cases reopened. However, they, like noncitizens with final orders, desperately need notice that they may request time to file a §212(c) application before an immigration judge or a remand from the Board. The final rule should include a requirement that the EOIR provide this notice.

To notify all affected noncitizens who can be identified through reasonable effort is not only sensible policy based on efficiency and fairness. It is also what constitutional due process requires before these noncitizens' opportunity to preserve or reinstate their permanent resident status can be extinguished. The United States Supreme Court has made it plain that lawful permanent residents are afforded procedural due process under the U.S. Constitution. *See, e.g., Landon v. Plasencia*, 450 U.S. 21, 32-33 (1982). And with regard to notice, the Supreme Court has expressed grave misgivings about any failure to give notice to individuals affected by any legal proceedings when their names and addresses are known or can be learned with reasonable effort. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court explained:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id. at 314-15 (citations omitted). For the EOIR to have the information to identify and notify many affected noncitizens but decline to act is a serious if not unconstitutional flaw in the proposed rule. In *Mullane*, the Supreme Court explained:

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence

the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315 (citation omitted).

For these reasons, the EOIR should issue actual notice to each identifiable noncitizen to whom the final rule applies. Such notice should describe the final rule and the persons to whom it applies. Such notice should further indicate that the noncitizen's case is being reopened sua sponte to permit the filing of an application for §212(c) relief. (See *infra* for discussion of sua sponte reopening.)

Notice should be given to the noncitizen personally, or sent by certified mail to the noncitizen's last known address in the United States. Notice should also be given to the noncitizen's counsel, if any. Because so much time has passed since the enactment of AEDPA, many noncitizens may not be at their last known addresses, so the noncitizen's personal signature should be required for notice to be considered effective.

Accordingly, the final rule should include a new 8 C.F.R. §3.46(b)(1), to read as follows:

The EOIR shall notify noncitizens who were adversely affected by the Board of Immigration Appeals' 1996 or Attorney General's 1997 decision in *Matter of Soriano*, Int. Dec. 3289, that their cases will be reopened and/or rescheduled before the Immigration Court. Failure to receive such notice shall not prevent an eligible noncitizen from moving to reopen upon his/her own motion.

3. The final rule should require the EOIR to publish public notices to inform affected noncitizens of the change in Department of Justice policy regarding eligibility for §212(c) relief.

We explained above why the EOIR should identify and notify affected noncitizens. Inevitably, however, some affected noncitizens will not be identified, or they will be identified but not receive actual notice that they may file applications for §212(c) relief. In order to minimize the number of affected noncitizens who are not identified and notified, the final rule should require the EOIR to provide public notice to inform affected noncitizens of the new policy toward relief under §212(c). Such notice, including notice in foreign-language media, shall target groups in which affected noncitizens are most likely to be found.

Accordingly, the final rule should include a new 8 C.F.R. §8.46(b)(2), to read as follows:

The EOIR shall publish and broadcast information regarding this rule in venues and languages appropriate to reaching the widest number of affected individuals. Written materials shall include a sample motion to reopen or recalendar proceedings under this rule.

B. Reopening: the final rule should require the EOIR to reopen sua sponte the cases of affected individuals whom it can identify.

For the cases of noncitizens who are identified and notified under the procedures described above, the next issue is whether the burden should be on the noncitizen to file a motion to reopen (and if so, the deadline and procedure for such a motion), or alternatively, whether the EOIR should reopen their cases sua sponte. We believe that once these noncitizens are identified and notified, sua sponte reopening is a far better solution for the noncitizens and for the government, for several reasons.

1. Efficiency: the proposed rule's motion to reopen requirement is inefficient.

One reason for sua sponte reopening is efficiency. As the Supplementary Information explains:

In light of the highly unusual circumstances of the *Soriano* litigation, the interest in expeditious enforcement of the immigration laws will be more effectively served by focusing attention on the merits of the claim for discretionary relief from deportation with regards to aliens in the defined class who otherwise would have been eligible to seek 212(c) relief in their immigration proceedings but for the *Soriano* precedent.

The motion to reopen requirement adds an extra procedure, and thus it impedes the noncitizen's and the government's common interest in focusing on the "merits of the claim." To be sure, some of the noncitizens who are now eligible to apply for §212(c) relief will not do so, but that will become evident when a particular individual does not file the §212(c) application itself. The proposed rule adds unnecessary paperwork — and thus is inconsistent with intent of the Paperwork Reduction Act, 44 U.S.C. §§3501 et seq. — by imposing a motion to reopen requirement, when a mere requirement to file an application for §212(c) relief serves the same screening purpose. For these same reasons, the final rule should also require the Board to remand sua sponte the cases of any affected noncitizens pending before it, to allow the filing of an application for §212(c) relief.

These efficiency-based reasons to delete the motion to reopen requirement are valid even in cases in which applications for §212(c) were pretermitted based on *Soriano*, or in which noncitizens never filed such applications because the immigration judge or their own counsel advised them that they were ineligible. When we consider other groups of noncitizens adversely affected by *Soriano*, the efficiency-based reasons are even more compelling.

Consider the cases in which noncitizens applied for and were granted §212(c) relief, but then later had that relief rescinded under *Soriano*. In some of these cases, the Board of Immigration Appeals reversed initial grants of relief by immigration judges. In other cases, the BIA rescinds its own grants of relief after the Attorney General decided *Soriano*. In other cases, the immigration judge initially granted §212(c) relief, but that grant is under review at the BIA or

the Attorney General's office. Requiring a motion to reopen in any of these cases makes no sense. The proper disposition under the substantive provisions of the proposed rule is plain. These noncitizens should have their grants of §212(c) relief reinstated.

2. Uniformity: the proposed rule's motion to reopen requirement undermines uniformity.

The second principal reason to abandon the motion to reopen requirement is uniformity, which is one of the proposed rule's stated goals. A number of courts that have rejected *Soriano* have implemented their decisions by remanding these cases with final deportation orders back to the EOIR for reconsideration. See, e.g., *Jideonwo v. INS*, ___, No. 99-3242, 2000 WL 1105004, at *7 (7th Cir. August 23, 2000); *Wallace v. Reno*, 194 F.3d 279, 288 (1st Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 134(1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir. 1999). Although these individuals had a "final administrative order of deportation," they do not need a motion to reopen to have their cases reconsidered. It is already the order of the court. No motion to reopen requirement that the EOIR adopts now will supersede these federal appeals court orders. Under these circumstances, the only way to achieve greater uniformity is to reopen sua sponte the cases of all noncitizens identified (and notified) as having been adversely affected by *Soriano*.

3. Fairness: the proposed rule's motion to reopen requirement fails to achieve basic fairness.

The third reason to abandon the motion to reopen requirement is fairness. Individuals previously denied §212(c) relief (or the opportunity to seek such relief) under *Soriano* should not now face the additional burden of having to file a motion to reopen in order to be restored to their prior position. They will still need to file an application for relief. It undermines procedural fairness if these noncitizens — having already had their chance to apply for relief delayed for up to four years — are required to file an additional motion and supporting documents just to be in the same position that they would have been in (without a motion to reopen) before *Soriano*.

The fairness at issue here is not just the need to avoid a burdensome procedure. As set forth in the proposed rule, the motion to reopen requirement will be prohibitive in many cases, and its practical consequence — whether unintended or not — will be to prevent the filing of meritorious applications for §212(c) relief. For example, in many cases some or all of the "supporting documents" are in the possession of the INS or court. Individuals who have previously filed for §212(c) relief and been denied, or who had their applications for relief pretermitted, may have surrendered their only copies of the necessary documents when they filed.

The Board has the authority to reopen cases sua sponte in unique situations where it would serve the interest of justice, for example where there has been a significant change in the governing law. *In re X-G-W-*, Int. Dec. 3352 (BIA 1998). *Matter of J-J-*, Int. Dec. 3323 (BIA

1997); 8 CFR §3.2(a). Here, the proposed rule would change the Department of Justice's position on the availability of §212(c). If the Board of Immigration Appeals has the authority to reopen an individual case sua sponte for a significant change in governing law, then it has the authority to reopen these cases as a group, and the final rule should do so, in the interests of efficiency and fairness.

4. The final rule should provide for reopening of cases sua sponte.

For all three of these reasons, the proposed rule should be revised to require the sua sponte reopening of cases subject to the identification and notification requirements discussed above, to permit the filing of applications for §212(c) relief.

Accordingly, the final rule should include a new 8 C.F.R. §3.46(c), to read as follows:

(1) After notice to affected noncitizens described in 8 C.F.R. §3.46(b)(1), proceedings shall be reopened or remanded by the EOIR as described in this subsection. Failure to receive such notice shall not prevent a noncitizen from moving to reopen or remand the proceedings upon his/her own motion.

(2) Initial grants of relief under INA §212(c) that were rescinded under either the Board's 1996 or the Attorney General's 1997 decision in *Matter of Soriano*, Int. Dec. 3289, shall be reinstated, subject to any appeal rights that the INS would have had at the conclusion of the proceedings in which relief was granted;

(3) Any case described in 8 C.F.R. §3.44(b) that is pending before the Board of Immigration Appeals shall be remanded to permit the filing of an application for relief under §212(c); and

(4) Any case that has been remanded by a federal district court or court of appeals to the EOIR for reasons related in whole or in part to the Board of Immigration Appeals' 1996 decision or Attorney General's 1997 decision in *Matter of Soriano*, Int. Dec. 3289, shall be reopened or remanded to permit the filing of an application for relief under §212(c).

C. Under the final rule, these identification, notice, and reopening procedures should be open to all affected noncitizens, whether inside or outside the United States, and regardless of having been deported but later returned.

The prior discussion concerning the need for the EOIR to take the initiative and identify, notify, and sua sponte reopen the cases of affected noncitizens in the United States also applies to affected noncitizens who were deported. The constitutional underpinnings of a procedure to identify, notify, and reopen are the same for permanent residents whether they have left the United States or not. See *Landon v. Plasencia*, 459 U.S. 21, 33-34 (1982). The EOIR database

will permit identification of affected noncitizens through reasonable effort. Once identified, these noncitizens can be sent notice in the same manner, and their cases reopened sua sponte.

As a practical matter, this identification and notice procedure may be less effective for noncitizens who were deported than for noncitizens who were not. The identification and notice procedure will be even less effective for noncitizens who were never issued final orders of deportation, but who left under threat of deportation believing that they were not eligible for §212(c) relief.

The final rule therefore should permit noncitizens outside the United States or who were deported as a result of the *Soriano* decisions to file motions to reopen. If they show prima facie eligibility for §212(c) relief, the INS should grant them parole pursuant to 8 C.F.R. §212.5(b) to attend any hearing(s) on the merits of their applications for §212(c) relief. If they are granted §212(c) relief, then they are deemed to have been granted such relief as of the day before their prior deportation from the United States. If they are denied §212(c) relief, they may remain in the United States on parole and with employment authorization until the denial of §212(c) relief becomes administratively final.

Accordingly, we urge that proposed 8 C.F.R. §3.44(i), Limitations on eligibility for reopening under this rule, be deleted.

D. The final rule should provide that if a noncitizen does not appear in any case that is reopened by the EOIR sua sponte, the case should be administratively closed.

According to the Supplementary Information, an individual who is scheduled for a future hearing on a §212(c) application and fails to appear will be subject to statutory and regulatory “in absentia” provisions. 65 Fed. Reg. 44,480 (July 18, 2000). For the same reasons that the final rule should require the EOIR to identify and notify affected noncitizens, noncitizens who do not pursue their applications for §212(c) relief after sua sponte reopening by the EOIR should not be penalized by non-attendance. Many affected noncitizens had their cases completed several years ago, at the time when they had reason to believe — and indeed, were advised — that they were ineligible for §212(c) relief. At that time, they complied with the law’s requirements for court appearances, for filing timely applications for relief and appeals. Where, as here, the law has undergone substantial change over a long period of time since the original disposition of their cases, the normal in absentia rules should not be applied to noncitizens who do not respond after sua sponte reopening. Instead, these noncitizens should have their cases administratively closed.

Accordingly, the final rule should include a new 8 C.F.R. §3.46(d), to read as follows:

Any noncitizen who fails to appear after written notice pursuant to this rule shall have his/her proceedings administratively closed by the EOIR. Such administrative closure shall not prejudice the noncitizen in seeking relief under this rule and §212(c). Proceedings that have been administratively closed may be re-calendared upon the filing of a motion

to re-calendar.

E. The final rule should allow (but not require) reopening by request of any noncitizen.

We explained above the reasons for identification, individual notice, reopening sua sponte, and public notice. In spite of all best efforts, some affected noncitizens will receive no actual notice that they may file applications for §212(c) relief. To protect these individuals, and to protect all individuals in the time period before they are identified and notified, the proposed rule should be revised to allow (but not require) a motion to reopen by any noncitizen described in 8 C.F.R. §3.44(b), to allow the filing of an application for relief under §212(c).

Accordingly, we have suggested proposed language in new 8 C.F.R. §§3.46(b)(1) and 3.46(c), above, to permit individuals to move to reopen or recalendar their cases. In addition, the final rule should include a new 8 C.F.R. §3.44(i) to read as follows:

Any noncitizen adversely affected by the *Soriano* decisions shall have the right to file a motion to reopen proceedings under this rule.

F. The final rule should provide an automatic stay of deportation.

As the Supplementary Information notes, the proposed rule contains no provision for an automatic stay of deportation. Failing to provide for an automatic stay is entirely contrary to the proposed rule's stated intent: to permit noncitizens to apply for a §212(c) waiver if they were denied a chance under *Soriano*. Absent an automatic stay provision, the INS can deport noncitizens who have had their cases reopened (either sua sponte or by filing their own motions to reopen, see discussion supra). The INS can deport them even if they have a *prima facie* claim to eligibility for a §212(c) waiver.

Even if deported noncitizens could pursue their §212(c) applications from outside the United States, the omission of an automatic stay would be unreasonably harsh, because noncitizens would be taken away from their families, jobs, and communities while their applications for relief were pending. The omission of an automatic stay is even more troubling in the context of the proposed rule, which expressly excludes noncitizens outside the United States and noncitizens who were deported and reentered the United States unlawfully. By analogy, the pre-1996 INA provided an automatic stay in former §106(c) precisely because noncitizens who departed the United States could no longer pursue review in court. Here, where the proposed rule similarly excludes noncitizens who departed, an automatic stay provision is similarly essential.

The omission of an automatic stay is also troubling because the filing of a motion to reopen may identify noncitizens to the INS and thus expose them to removal. This is particularly true in the jurisdiction of the Seventh Circuit Court of Appeals (Illinois, Wisconsin and Indiana). There, even since the publication of this proposed rule, noncitizens have been issued "bag and

baggage” letters to report for deportation. Also, detained noncitizens in these three states who may be eligible for relief under the proposed rule are being told that they will be released from INS custody if they withdraw their appeals in the court of appeals or the district court. In this period before a final rule issues, no noncitizens should be placed in the precarious position of having to give up access to judicial review or habeas corpus in order to be considered for possible release. More generally, these policies create fear in the community and deters noncitizens from taking advantage of this proposed rule. These examples from the Seventh Circuit show why the final rule must include an automatic stay of deportation.

Accordingly, the final rule should include a new 8 C.F.R. §8.47, to read as follows:

The deportation of any noncitizen identified by the EOIR pursuant to 8 C.F.R. §3.46(a), and any noncitizen who has filed a motion to reopen pursuant to 8 C.F.R. §3.44 shall be stayed. This stay shall remain in effect until a final decision has been made on the noncitizen’s eligibility for relief under this rule and application for relief under §212(c). Detained noncitizens who have their cases reopened either sua sponte or on their own motion may appear before an immigration judge to consider their release on bond and reconsideration of bond previously set.

In the period before a final rule issues, the INS must not deport any noncitizens who may be covered not only by the proposed rule, but also by any broader coverage that may result from revisions under consideration. This is especially true where, as here, a number of federal circuits have defined the group of noncitizens who may apply for §212(c) more broadly than the proposed rule does.

G. If the proposed rule is not amended to eliminate the motion to reopen requirement, the final rule should make the requirement less onerous.

1. The final rule should extend the time deadline to one year.

If a motion to reopen is required, the deadline for filing such a motion must be reasonable. A ninety-day deadline is unreasonably short. In practice, it will render the intended protections of the proposed rule meaningless for a great many individuals. This is especially likely if, as under the proposed rule, the EOIR makes no effort to identify and notify affected noncitizens. Without notice, the entire ninety days will likely pass before noncitizens become aware of the change in law. This is especially true because immigration judges and counsel advised these noncitizens, in many cases several years ago, that they were ineligible for §212(c) relief, so that the notice regarding the proposed rule needs to overcome prior advice that turned out to be wrong.

Even assuming that the EOIR identifies and notifies any affected noncitizen, or that the affected noncitizen learns of the final rule through other means, the ninety-day deadline is

unreasonably short. Noncitizens need to be advised of the details of the change in law and how it affects their status under the immigration laws. No one should assume, as the EOIR seems to do, that affected noncitizens will learn of the final rule on the day it is published. Then, they will need to gather the required "supporting documents," which may be unavailable to the noncitizens, or difficult to obtain. Section §3.44(d) of the proposed rule, coupled with the existing regulations at 8 C.F.R. §3.2 and 3.23 (referenced in the proposed rule), place a heavy documentary burden on the noncitizen. Translations pose an additional obstacle in filing a motion to reopen within ninety days. All of these obstacles are further compounded if the noncitizen is in detention, especially if he or she is detained in a remote location, or if the noncitizen is unrepresented by counsel. These obstacles to timely filing of a motion to reopen are even more prohibitive if the noncitizen is outside the United States.

By way of comparison, various other immigration regulations routinely provide noncitizens with much longer periods to file applications for relief. For example, asylum applicants are given one year to file. That deadline may be extended under "extraordinary circumstances relating to the delay in filing the application," INA §208(a)(2)(D), including "serious illness or mental or physical disability of significant duration, a legal disability or ineffective assistance of counsel." 8 C.F.R. §208.4(a)(5)(i). Noncitizens with a final order of deportation had nine months under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-110 (1997), to file a motion to reopen with the Immigration Court or Board of Immigration Appeals. And noncitizens seeking relief under INA §245A (Immigration Reform and Control Act of 1986) were given a one-year period in which to apply.

A lawful permanent resident's interest in maintaining his or her status presents a situation at least as compelling as these. Those who meet the residency requirement and file applications for §212(c) relief have significant community ties and a considerable stake built up over years in the United States. While the ultimate grant of §212(c) is discretionary, about half of all applications for §212(c) relief before AEDPA were granted, *see, e.g., Tasios*, 204 F.3d at 551.

If a motion to reopen is required, the deadline should depend, first, on whether the affected noncitizen received actual notice of the final rule. The receipt of actual notice would be established only if the EOIR receives a return receipt signed by the addressee personally. If the EOIR receives the return receipt signed by someone other than the addressee personally, or if the EOIR receives no return receipt, then for purposes of this procedure actual notice shall be deemed not to have occurred. If the noncitizen receives actual individual notice and he or she is subject to a final deportation order, he or she would have one year from receipt of notice to file a motion to reopen. If the noncitizen receives actual notice, and proceedings are still pending, he or she may file a motion to remand with the Board of Immigration Appeals at any time. If the EOIR sent but the noncitizen did not receive actual individual notice, he or she would have two years from the date that the EOIR sent notice. A noncitizen should be allowed to file a motion to reopen after these deadlines if he or she can demonstrate exceptional circumstances for not filing in a timely manner, including serious illness, a legal disability, or ineffective assistance of counsel. If the EOIR did not identify a noncitizen individually or send a noncitizen actual individual notice, he or she should be allowed to file a motion to reopen at any time.

If the final rule retains a motion to reopen requirement and a ninety-day deadline, it should include a provision that deems the ninety-day period to commence upon the receipt of actual notice.

We repeat that it would be far more efficient, uniform, and fair if the proposed rule were revised to require the EOIR to reopen cases sua sponte. If, however, the final rule still requires a motion to reopen, these timing provisions give affected noncitizens a much more realistic opportunity to pursue the options that the proposed rule is intended to provide. Moreover, these timing provisions give the EOIR an appropriate incentive to identify individually and notify individually as many affected noncitizens as its records permit.

2. The final rule should limit the requirement that papers already in the EOIR's possession be filed with a motion to reopen.

Even assuming that the final rule requires each affected noncitizen to file a motion to reopen, and even assuming that final rule requires such a motion to be filed within ninety days, the proposed rule should still be revised to amend the procedure for filing a motion to reopen. The procedure in the proposed rule, 8 C.F.R. §3.44(d), is too cumbersome and fails to take practical obstacles into account. Specifically, the proposed rule requires the motion to reopen to include copies of papers that are in EOIR files and quite possibly not in the noncitizen's possession.

This is especially true for noncitizens who are (or were) detained or unrepresented, and even more true for noncitizens who are (or were) both detained and unrepresented. It is common for the INS to transfer detainees from one facility to another, with their court papers remaining behind. And unrepresented noncitizens may not have copies of court papers. The lack of access to required papers is also a significant problem for noncitizens who have been deported, or who left the United States under threat of deportation and believing that *Soriano* made them ineligible for §212(c) relief.

Accordingly, 8 C.F.R. §3.44(d) should be revised to read:

The EOIR and INS shall provide to the noncitizen, upon request, all documents in their possession that pertain to the noncitizen's eligibility for relief under this rule and relief under §212(c).

CONCLUSION

The proposed rule is a valiant attempt to address a complex situation that has occupied the EOIR, the federal courts, the INS, and a great many lawful permanent residents over the past four years. As its goals, the proposed rule sets out nationwide uniformity in light of a number of federal circuit decisions that have rejected the *Soriano* decisions, as well as "a mechanism for such aliens who now have a final order of deportation to reopen their immigration proceedings if they would have been eligible to apply for §212(c) relief but for the *Soriano* decision." 65 Fed.

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Reg. 44,478 (July 18, 2000).

For the reasons set out in these comments, however, the proposed rule falls short of these goals in several respects. Substantively, it unduly restricts eligibility for §212(c) relief, by (1) not taking into account the rulings of several federal circuits that more broadly recognize §212(c) eligibility for permanent residents; (2) by not even being faithful to the federal circuit court decisions in which it purports to acquiesce by conditioning relief on formal “commencement” of proceedings before an Immigration Court before April 24, 1996; (3) by excluding noncitizens who were deported under *Soriano* or who left the country believing that *Soriano* made them ineligible for §212(c) relief. Procedurally, the proposed rule places unnecessary obstacles in the way of those that it is meant to help. Because of (1) the lack of notice, (2) the requirement of a motion to reopen, (3) an unreasonably short time deadline, and (4) the failure to provide an automatic stay, many noncitizens that the proposed rule recognizes as eligible for §212(c) will never hear about this rule, hear about it too late, or will be unable to claim the relief for which the proposed rule purports to confer eligibility.

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SUBMITTED ON BEHALF OF:

American Immigration Law Foundation

American Immigration Lawyers Association

Citizens and Immigrants for Equal Justice

Criminal Defense Immigration Project, New York State Defenders Association

Immigration and Refugee Services of America

Legal Assistance Foundation of Metropolitan Chicago, Legal Services Center for Immigrants

National Asian Pacific American Legal Consortium

National Immigration Project of the National Lawyers Guild

National Immigration Law Center

Refugio del Rio Grande

FOR IMMEDIATE RELEASE
Tuesday, July 18, 2000

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**Immigration Lawyers: New Soriano Proposal a Good Down Payment;
Call on INS, Justice To Go Further**

July 18, 2000, WASHINGTON, D.C. — A new proposed regulation that would restore the rights of certain people to apply for relief from deportation is an important down-payment for further fixes that would benefit additional immigrants, according to the American Immigration Lawyers Association (AILA). This proposed regulation, published in today's *Federal Register*, overturns the Attorney General's previous ruling that legal permanent residents could be deported based on new laws even if their applications for relief had been filed before the new laws existed.

"This proposed regulation helps reaffirm a long-standing principle of American law: that you cannot change the rules in the middle of the game. While dealing with a legal technicality, we cannot lose sight that this issue affects real people who have been torn away from their families due to the law and the Department of Justice's incorrect interpretation of this harsh, unfair law," said Jeanne A. Butterfield, AILA's Executive Director. "This needs to be a first step. The Department of Justice also needs to consider the question of relief for other equally deserving immigrants, as well as people who already have been deported under the old *Soriano* interpretation. They should be allowed to apply for relief, since the government has changed the interpretation upon which their deportation was based. The Department of Justice also needs to step up to the plate and implement administrative remedies to other overly harsh provisions of the 1996 laws."

The *Soriano* case dates from June 1996, when the Board of Immigration Appeals held that immigrants who had filed waivers of deportation before April 24, 1996 (the effective date of the Anti-terrorism And Effective Death Penalty Act) could still have their applications adjudicated, even though the new law eliminated the waivers. But the Attorney General vacated that opinion and held that the new law should be applied retroactively, eliminating the right to apply for relief from deportation, no matter when an immigrant's application for relief was filed. Eight federal appellate courts subsequently rejected the Attorney General's interpretation, and two more Circuit courts have indicated they also would do so.

"We are pleased that the Justice Department has acquiesced to the interpretation of eight Circuit Courts of Appeal in the new regulation. It has taken nearly four years of litigation to convince the Justice Department to do the right thing and issue the regulation. We call upon President Clinton, Vice President Gore and the Attorney General to move quickly to implement additional administrative remedies and to reverse other equally harsh interpretations of the 1996 laws," Butterfield said.



65 FR 44476, *

FEDERAL REGISTER

Vol. 65, No. 138

Proposed Rules

DEPARTMENT OF JUSTICE (DOJ)

Executive Office for **Immigration** Review

8 CFR Parts 3 and 212

[EOIR No. 127P; AG Order No. 2315-2000]

RIN 1125-AA29

Executive Office for Immigration Review; Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996

65 FR 44476

DATE: Tuesday, July 18, 2000

ACTION: Proposed rule.

To view the next page, type .np* TRANSMIT.

To view a specific page, transmit p* and the page number, e.g. p*1

[*44476]

SUMMARY: This rule would create a uniform procedure for applying the law as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This rule would allow certain aliens in deportation proceedings that commenced before April 24, 1996, to apply for relief pursuant to section 212(c) of the **Immigration** and Nationality Act (INA).

DATES: Written comments must be submitted on or before August 17, 2000.

ADDRESSES: Please submit written comments, original and two copies, to Charles Adkins-Blanch, General Counsel, Executive Office for **Immigration** Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305-0470. Comments are available for public inspection at the above address by calling (703) 305-0470 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Charles Adkins-Blanch, General Counsel, Executive Office for **Immigration** Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305-0470.

SUPPLEMENTARY INFORMATION:

What has Happened to Aliens Seeking Section 212(c) Relief Since Enactment of AEDPA?

Before the comprehensive revision of the INA by the Illegal **Immigration** Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, section 212(c) of the INA provided that aliens who were lawfully admitted for permanent residence, who temporarily proceeded abroad voluntarily and not under an order of deportation, and who were returning to a lawful unrelinquished domicile in the United States of seven consecutive years, could be admitted to the United States in the discretion of the Attorney General. 8 U.S.C. § 1182(c) (1994). Although section 212(c) by its terms applied only to aliens in exclusion proceedings (*i.e.*, aliens seeking to enter at the border), it had been construed for many years also to allow aliens who were placed in deportation proceedings in the United States to apply for discretionary relief from deportation. See *Matter of Silva*, 16 I. & N. Dec. 26 (Board 1976); *Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby v. INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapica-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981); *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress significantly restricted the availability of discretionary relief from deportation under section 212(c). Section 440(d) of AEDPA amended section 212(c) of the INA to provide that section 212(c) "shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." AEDPA § 440(d), as amended by IIRIRA section 306(d). The effect of section 440(d) of AEDPA was to render ineligible for relief under INA section 212(c) aliens deportable because of convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, and multiple crimes of moral turpitude.

AEDPA did not contain a provision expressly stating whether section 440(d) was to be applied to criminal aliens who were placed in deportation proceedings, were convicted, or who committed the crimes rendering them deportable before AEDPA was passed. In *Matter of Soriano*, Interim Decision 3289 (Board 1996), the Board of **Immigration** Appeals (Board) held that section 440(d) of AEDPA did not apply to aliens who had applied for section 212(c) relief before AEDPA was passed, but did apply to all other aliens covered in the provision, even those whose criminal conduct or conviction occurred before AEDPA was issued.

At the request of the **Immigration** and Naturalization Service (INS), the Attorney General vacated the Board's decision in *Soriano* and certified the question to herself. On February 21, 1997, the Attorney General concluded that section 440(d) applied to (and thereby rendered ineligible for section 212(c) relief) all aliens who had committed one of the specified offenses and who had not finally been granted section 212(c) relief before AEDPA was passed. As construed in that decision, AEDPA section 440(d) rendered ineligible for section 212(c) relief even those aliens who were already in deportation proceedings and who had already applied for section 212(c) relief at the time AEDPA was passed.

How Have the Federal Courts Ruled on the Issue?

Following the Attorney General's decision in *Soriano*, the Board and **Immigration** Court denied applications for relief under section 212(c) filed by aliens who fell within the categories identified in AEDPA section 440(d), regardless of the date of the alien's crime, conviction, deportation proceedings, or application for section 212(c) relief. Numerous aliens challenged their final orders of deportation in

both district courts and courts of appeals, arguing that AEDPA section 440(d) should not be applied "retroactively" to their cases, and that the Attorney General had erred in her construction of AEDPA section 440(d) in *Soriano*.

The *Soriano* issue has given rise to widespread litigation in almost every circuit. Only the D.C. Circuit has yet to decide a case on the *Soriano* issue. Eight circuits-the First, Second, Third, [*44477] Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits-have now disagreed with the Attorney General's holding in *Soriano*. Seven of the eight circuits have held that section 440(d) of AEDPA does not apply to aliens who filed applications for section 212(c) relief before AEDPA was passed. See *Goncalves v. Reno*, 144 F.3d 110, 126-33 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225, 239-42 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544, 547-52 (4th Cir. 2000); *Pak v. Reno*, 196 F.3d 666, 674-76 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603, 610-11 (9th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999).

The First Circuit has gone further and held that AEDPA section 440(d) likewise does not apply to aliens who were placed in deportation proceedings before AEDPA was passed, even if they did not actually request section 212(c) relief until after AEDPA was passed. See *Wallace v. Reno*, 194 F.3d 279, 285-88 (1st Cir. 1999). Other circuits have either likewise so held or strongly implied in their reasoning. See *Henderson*, 157 F.3d at 129-31; *Sandoval*, 166 F.3d at 241-42; *Mayers*, 175 F.3d at 1304; *see also Shah*, 184 F.3d at 724 (adopting reasoning of *Goncalves*, *Henderson*, and *Mayers*).

By contrast, the Seventh Circuit has held, consistent with the Attorney General's conclusion in *Soriano*, that section 440(d) of AEDPA applies even to aliens who were in deportation proceedings and had applied for section 212(c) relief when AEDPA was enacted. See *Turkhan v. Perryman*, 188 F.3d 814, 824-28 (7th Cir. 1999); *see also LaGuerre v. Reno*, 164 F.3d 1035, 1040-41 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000).

Aliens have also argued that persons who were placed in deportation proceedings *after* AEDPA was enacted, but who committed their crimes and were convicted before that date, should be eligible for section 212(c) relief, and that AEDPA section 440(d) would be impermissibly retroactive if applied to them.

Three circuits-the Third, Fifth and Tenth-have affirmatively held that AEDPA section 440(d) *does* foreclose section 212(c) relief for aliens who were placed in proceedings after AEDPA was enacted, even if their criminal offenses were committed before the enactment of AEDPA. See *DeSousa v. Reno*, 190 F.3d 175, 185-87 (3d Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 306-08 (5th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1147-52 (10th Cir. 1999), *cert. denied sub nom Palaganas-Suarez v. Greene*, 120 S. Ct. 1539 (2000). The Seventh Circuit has necessarily adopted that position as well. See *Turkhan*, 188 F.3d at 824-28 (holding that section 440(d) bars relief for *all* criminal aliens who had not been granted section 212(c) relief at the time AEDPA was enacted, necessarily including all those whose convictions occurred prior to AEDPA but whose deportation proceedings were initiated after enactment of AEDPA).

The Ninth Circuit has concluded that aliens who are deportable based on a qualifying criminal conviction entered prior to AEDPA but after a full trial are properly covered by AEDPA section 440(d) and therefore ineligible for section 212(c) relief. See *Magana-Pizano*, 200 F.3d at 610-11. The Ninth Circuit also held, however, that because of concerns about retroactivity and reliance, it could not exclude the possibility that section 440(d) should not be applied to an alien who pleaded guilty or nolo contendere to his disqualifying criminal offense and who can show that the plea "was entered in reliance on the availability of discretionary waiver under § 212(c)." *Id.* at 613. The court therefore remanded the case to the district court to determine whether the alien could show such reliance. See *id.* at 609. The First Circuit has issued a similar ruling, holding that section 440(d) does not apply in a case where an alien pleaded guilty to and was convicted of a qualifying offense before AEDPA was enacted but was placed in proceedings afterwards, if the alien could show that he entered his guilty plea in reliance on the state of the law before AEDPA's enactment. See *Mattis versus Reno*, -F.3d-, 2000 WL 554957, at

*5-*9 (1st Cir. May 8, 2000). The First Circuit found no evidence of such reliance in that case, however. *See id.* at *9.

Additionally, the Fourth Circuit held that the statute is inapplicable, because of perceived retroactivity concerns, to an alien who pleaded guilty and was convicted before AEDPA was enacted even if his deportation proceedings were commenced after enactment of AEDPA. The court reasoned that the alien had detrimentally relied upon the availability of discretionary relief from deportation when he entered his guilty plea prior to the enactment date. *See Tasios*, 204 F.3d at 550-52.

Why is the Attorney General Implementing a Rule of Uniform Implementation of AEDPA for Aliens Seeking Section 212(c) Relief?

Issues concerning the construction of AEDPA section 440(d) affect a large number of aliens and are of considerable importance to the Department of Justice, including the INS and the Executive Office for **Immigration** Review (EOIR).

Approximately 800 aliens who have been found deportable by the **Immigration** Court and the Board have filed challenges to *Soriano* in federal district court. In addition, a number of cases in which the application of *Soriano* may be dispositive are still pending before the **Immigration** Court and the Board.

There is an important public interest in the uniform administration of the **immigration** laws. The Constitution grants Congress the power to establish "an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and it is generally desirable as well that **immigration** rules be consistent throughout the country to minimize distinctions among aliens based solely on geographical factors. There is also an important public interest in the completion of proceedings involving criminal aliens. The Department of Justice therefore sought to have the Supreme Court definitively resolve the *Soriano* issue October Term 1998 by petitioning for a writ of certiorari from the First Circuit's decision in *Goncalves* and the Second Circuit's decision in *Henderson*. On March 8, 1999, the Supreme Court denied those certiorari petitions.

In light of the Supreme Court's denial of certiorari in *Goncalves*, *Henderson/Navas*, and *LaGuerre* in February 2000, the decisions of eight circuits rejecting the decision in *Soriano*, and the large number of aliens who are affected by the issue, the Attorney General has considered whether the government's interest in the uniform administration of the **immigration** laws, avoiding unnecessary delays in the completion of proceedings involving criminal aliens, and the reasoning of the courts that have rejected her construction of AEDPA section 440(d) in *Soriano*, warrant a change in the Department's application of AEDPA section 440(d). In the interest of the uniform and expeditious administration of the **immigration** laws, the Attorney General proposes to acquiesce on a nationwide basis in those appellate decisions holding that AEDPA section 440(d) is not to be applied in the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted. [*44478]

In particular, the Attorney General proposes to acquiesce in the courts' conclusion, as a matter of statutory construction, that Congress intended that section 440(d) of AEDPA not be applied to deportation proceedings that had been commenced before AEDPA was enacted into law. In reaching that conclusion, the courts generally have applied the first step of the two-step retroactivity analysis set forth by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In the first step of that analysis, the courts inquire whether Congress has specifically addressed the temporal application of a statute. The courts that have rejected *Soriano* have generally relied on two factors to reach the conclusion that Congress specifically addressed the temporal application of AEDPA section 440(d). First, they have observed that Congress expressly made other provisions of AEDPA, such as section 413(f), applicable to pending deportation proceedings, and they have drawn a negative inference from that fact that Congress did not intend section 440(d) to be applied to pending proceedings. Second, examining the legislative history of AEDPA, they have noted that an earlier version of AEDPA in Congress would have applied what became section 440(d) to pending cases, but that provision was deleted by the conference committee. *See Magana-Pizano*, 200 F.3d at 611; *Pak*, 196 F.3d at 676; *Shah*, 184 F.3d at 724; *Mayers*, 175 F.3d at 1302-03; *Sandoval*, 166 F.3d at 241; *Henderson*, 157 F.3d at 129-30; *Goncalves*, 144 F.3d at 128-33.

These factors are specific to AEDPA and concern only the first step of the *Landgraf* analysis. They do not concern the question of whether application of section 440(d) to pending deportation proceedings would be regarded as retroactive under the second step of the *Landgraf* analysis. As to that question, the Attorney General maintains the Department of Justice's longstanding position that questions about an alien's deportability or eligibility for discretionary relief from deportation are matters inherently prospective in nature.

In the absence of adverse appellate precedent, the Attorney General will continue to apply AEDPA section 440(d) in the cases of aliens whose deportation proceedings were commenced *after* AEDPA was enacted into law, even if the alien committed his crime or was convicted of the crime before that date. The appellate decisions rejecting *Soriano* have concluded only that Congress did not intend to apply AEDPA section 440(d) to the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted, and do not (with the exception of the *Mattis*, *Tasios*, and *Magana-Pizano* decisions from the First, Fourth, and Ninth Circuits, respectively) question its applicability to cases commenced after that date.

The interpretation of AEDPA that would be changed by this proposed rule has, of course, affected many aliens whose deportation proceedings were commenced before enactment of AEDPA but who were unable to obtain section 212(c) relief in those proceedings because of the *Soriano* decision. This rule provides a mechanism for such aliens who now have a final order of deportation to reopen their **immigration** proceedings if they would have been eligible to apply for section 212(c) relief but for the *Soriano* decision.

The Attorney General has considered the important interest in avoiding delays in deportation proceedings and, on balance, has decided to define the class of aliens eligible for reopening under this proposed rule in categorical terms. For aliens who have a final order of deportation, based on established principles requiring exhaustion of all available administrative remedies, this rule could properly be written to limit relief on reopening only to those aliens who can show that they had affirmatively applied for relief under section 212(c) in their prior **immigration** proceedings and had appealed an **immigration** judge's adverse decision to the Board of **Immigration** Appeals. However, this rule does not require that eligible aliens make a specific factual showing that they previously applied for section 212(c) relief notwithstanding the *Soriano* decision, or appealed an **immigration** judge's adverse decision to the Board. Instead, this proposed rule is drafted in order to relieve both the government and the alien of the burdens of litigating such factual issues in each case at the motion to reopen stage. In light of the highly unusual circumstances of the *Soriano* litigation, the interest in expeditious enforcement of the **immigration** laws will be more effectively served by focusing attention on the merits of the claims for discretionary relief from deportation with respect to aliens in the defined class who otherwise would have been eligible to seek section 212(c) relief in their **immigration** proceedings but for the *Soriano* precedent.

Who is Eligible to Apply for Section 212(c) Relief?

Under this proposed rule, eligible aliens in pending **immigration** proceedings may apply for section 212(c) relief if their **immigration** proceedings were commenced prior to the enactment of AEDPA. This rule also provides a 90-day period for a defined class of aliens who had been adversely affected by the *Soriano* decision to file a motion to reopen in order to apply for section 212(c) relief. This special reopening rule would cover aliens who:

- (1) had deportation proceedings before the **Immigration** Court commenced before April 24, 1996;
- (2) are subject to a final order of deportation;
- (3) would presently be eligible to apply for section 212(c) relief if proceedings were reopened and section 212(c) as in effect on April 23, 1996 were applied; and
- (4) either,

- (i) applied for and were denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Soriano* (or its rationale), and not any other basis;
- (ii) applied for and were denied section 212(c) relief by the **Immigration** Court and did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale); or
- (iii) did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale).

This rule is not intended to apply to an alien who filed an application for section 212(c) relief that was denied by an **immigration** judge or the Board for reasons other than *Soriano* or its rationale. For example, an alien whose section 212(c) application was denied on the merits or before the AEDPA statute was enacted is not covered by this rule.

This rule is also not intended to apply to aliens outside the United States or aliens with a final order of deportation who have returned to the United States illegally. Moreover, this rule does not provide a basis for such aliens to seek or secure admission or parole into the United States to file a section 212(c) application.

What is Required to be Statutorily Eligible for Section 212(c) Relief?

The alien must be a lawful permanent resident, returning to a lawful, unrelinquished domicile of seven consecutive years, who may be admitted in the discretion of the Attorney General without regard to section 212(a) (other than paragraphs (3) and (9)(C)), who is deportable on a ground that has a [*44479] corresponding ground of exclusion, and who has not been convicted of one or more aggravated felonies for which he or she has served an aggregate term of imprisonment of at least five years. *See* INA section 212(c).

How is 7 Years Lawful, Unrelinquished Domicile in the United States Defined in this Rule?

The alien must have lived in the United States as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the INA for at least seven years, as defined in 8 CFR 212.3(f). For purposes of this rule, an alien begins accruing time as of the date of entry or admission as either a lawful permanent resident or lawful temporary resident and the accrual of time ceases when there is a final administrative order in the alien's case, as defined in 8 CFR 240.52 and 3.1(d)(2). When a motion to reopen is filed pursuant to this rule, the alien must have accrued seven years of lawful unrelinquished domicile as of the date of his or her final administrative order which the alien seeks to reopen.

Is There a Fee for Filing this Application?

If the alien has already filed a section 212(c) application and only needs to update the application, no fee is required. If the alien has not filed a section 212(c) application and has a final administrative order, he or she must file a motion to reopen. If the motion to reopen is granted, he or she must pay the fee required by 8 CFR 103.7(b)(1) for Form I-191 (currently \$ 170). *See* 8 CFR 103.7.

An alien in deportation proceedings who has not filed an application shall submit the Form I-191 to the **Immigration** Court with the appropriate fee receipt attached.

If the case is pending before the Board, the alien must file a copy of the application with the motion and if the motion is granted and the case is remanded to the **Immigration** Court, the alien must then file the application with the appropriate fee. Nothing in this rule changes the requirements and procedures in 8 CFR 3.31(b), 103.7(b)(1), and 240.11(f) for paying the application fee for a section 212(c) application.

after a motion to reopen is granted if such an application was not previously filed. Fees must be submitted to the local office of the INS in accordance with 8 CFR 3.31. An applicant who is deserving of section 212(c) relief and is unable to pay the filing fee may request a fee waiver in accordance with 8 CFR 103.7(c).

What is the Procedure for an Applicant who is Currently in Deportation Proceedings Before the Immigration Court or the Board of Immigration Appeals?

Immigration Court. An eligible alien who has a deportation proceeding pending before the **Immigration Court** should file a section 212(c) application pursuant to this rule, or request a reasonable period of time to submit an application pursuant to this rule. If the alien already has an application on file, he or she may file a supplement to the existing section 212(c) application.

Board of Immigration Appeals. An eligible alien who has a deportation proceeding pending before the Board should file with the Board a motion to remand to the **Immigration Court** to file a section 212(c) application or to supplement his or her existing section 212(c) application on the basis of his or her eligibility for such relief pursuant to this rule. If the alien appears to be statutorily eligible for relief and meets the other eligibility requirements defined in this rule, the Board shall remand the case to the **Immigration Court** for adjudication of the section 212(c) application.

What if an Applicant is the Subject of a Final Order of Deportation?

Aliens who have final administrative orders. An alien who is the subject of a final order of deportation who is eligible to apply for section 212(c) relief pursuant to this rule must file a motion to reopen with the **Immigration Court** or the Board of **Immigration Appeals**, whichever last held jurisdiction. The front page of the motion and any envelope containing the motion should include the notation "Special 212(c) Motion." The fee for motions to reopen (currently \$ 110) will be waived for aliens eligible for section 212(c) relief pursuant to this rule. The waiver of the fee is only applicable to motions to reopen seeking section 212(c) relief pursuant to this rule. The reopening and remand will be limited to issues concerning the alien's eligibility for relief under section 212(c) and may not address the alien's deportability or any other basis for relief from deportation, unless the Board is also reopening under other applicable provisions of law, in which case the issues may be consolidated for hearing as appropriate and all appropriate motions fees will apply.

If the alien previously filed an application for section 212(c) relief, he or she must file a copy of that application or a copy of a new application and supporting documents with the motion to reopen. If the motion to reopen is granted, an alien who previously filed an application will not be required to pay a new filing fee for the section 212(c) application, Form I-191.

If the alien has not previously filed an application for section 212(c) relief, the alien must submit a copy of his or her completed application and supporting documents with the motion to reopen. If the motion is granted, the alien must then file the application with the appropriate fee.

Cases remanded to the Board. If a case has been remanded to the Board by a federal court based on a judicial decision rejecting the Attorney General's decision in *Soriano*, the Board will comply with the order of the district or circuit court.

What happens if an applicant currently has a Motion to Reopen or motion to reconsider pending before the Immigration Court or the Board?

Immigration Court. If an alien has a pending motion to reopen or reconsider filed with the **Immigration Court**, he or she must file a new motion to reopen with the **Immigration Court** to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

Board of Immigration Appeals. If an alien has a pending motion to reopen or reconsider filed with the Board the alien must file a new motion to reopen with the Board to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

New Motion to Reopen. An alien may file only one motion to reopen for purposes of establishing eligibility under this rule. A new motion to reopen filed pursuant to this rule either before the **Immigration** Court or the Board, as appropriate, must specify whether the alien has any pending motions before the **Immigration** Court or the Board. All motions to reopen to apply for section 212(c) relief filed pursuant to this rule are subject to the restrictions specified in this rule. The usual time and number restrictions on motions, as articulated in 8 CFR 3.2 and 3.23, shall apply to all other motions.

Is an Alien with a Final Administrative Order of Deportation Required to File a Motion to Reopen under this Rule Within the 90-day Period in Order to Seek Section 212(c) Relief?

This rule is intended to provide a single, straightforward process for the defined class of aliens who were adversely affected by *Soriano* to reopen their **immigration** proceedings based on the interpretive change announced in this rule. [*44480]

Accordingly, 8 CFR 3.44 is intended to provide the sole process for eligible aliens who have a final administrative order of deportation to reopen their cases on account of the change in the governing law announced in this rule in order to apply for section 212(c) relief. However, the existing reopening rules in 8 CFR 3.2 and 3.23 allow aliens to seek to reopen their cases notwithstanding the time limits on certain other grounds unrelated to a change in the law. As provided in 8 CFR 3.44(h), this rule would not prevent an alien from filing a motion to reopen under the existing rules based on any other basis or exception.

Does the Filing of an Application for Section 212(c) Relief stay the Execution of a Final Order?

The mere filing of a motion to reopen to apply for section 212(c) relief with the **Immigration** Court or the Board does not stay the execution of the final order of deportation. To request that execution of the final order be stayed by the INS, the alien must file an Application for Stay of Removal (Form I-246), following the procedures set forth in 8 CFR 241.6.

What Happens if an Application is Denied by the Immigration Court?

If the **Immigration** Court denies the section 212(c) application of an alien in deportation proceedings before the **Immigration** Court, the decision may be appealed to the Board along with, and under the same procedures as apply to, other issues, if any, properly before the Board on appeal.

What Happens if an Alien Fails to Appear for a Hearing Before the Immigration Court on a Section 212(c) Application?

An alien must appear for all scheduled hearings before an **Immigration** Court, unless his or her appearance is waived by the **Immigration** Court. An alien who is in deportation proceedings before the **Immigration** Court, and who fails to appear for a hearing regarding a section 212(c) application, will be subject to the applicable statutory and regulatory *in absentia* procedures (*i.e.*, section 242B of the INA as it existed prior to amendment by IIRIRA).

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not, if promulgated, have a significant adverse economic impact on a substantial number of small entities. This rule allows certain aliens to apply for INA section 212(c) relief; it has no effect on small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of \$ 100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provision of the

Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804(2). This rule will not result in an annual effect on the economy of \$ 100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

The regulation will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section six of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for **Immigration** Review, Suite 2400, 5107 Leesburg Pike, Falls Church, VA 22041, telephone: (703) 305-0470.

Paperwork Reduction Act

This rule will increase the use of Form I-191 but will not result in a material change in the form, and the INS is adjusting the total burden hours of the form accordingly.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, **Immigration**, Organization and functions (Government agencies).

8 CFR Part 212

Administrative practice and procedure, Aliens, Passports and visas, **Immigration**, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3--EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 will continue to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 8 U.S.C. 1103, 1252 note, 1324b, 1362, 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002.

2. Section 3.44 is added to subpart C to read as follows:

§ 3.44 – Motion to reopen to apply for section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996.

(a) *Standard for Adjudication.* Except as provided in this section, a motion to reopen proceedings to apply for relief under section 212(c) of the Act will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) *Aliens eligible to reopen proceedings to apply for section 212(c) relief.* A motion to reopen proceedings to seek section 212(c) relief under this section must establish that the alien:

- (1) Had deportation proceedings before the **Immigration** Court commenced before April 24, 1996;
- (2) Is subject to a final order of deportation,
- (3) Would presently be eligible to apply for section 212(c) as in effect on or before April 23, 1996; and
- (4) Either-

(i) Applied for and was denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale), and not any other basis; [*44481]

(ii) Applied for and was denied section 212(c) relief by the **Immigration** Court, did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale); or (iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale).

(c) *Scope of reopened proceedings.* Proceedings shall be reopened under this section solely for the purpose of adjudicating the application for section 212(c) relief, but if the **Immigration** Court or the Board reopens on other applicable grounds, all issues encompassed within the reopening proceedings may be considered together, as appropriate.

(d) *Procedure for filing a motion to reopen to apply for section 212(c) relief.* An eligible alien must file either a copy of the original Form I-191 application, and supporting documents, or file a copy of a newly completed Form I-191, plus all supporting documents. An alien who has a pending motion to reopen or reconsider before the **Immigration** Court or the Board must file a new motion to reopen to apply for section 212(c) relief pursuant to this section. The new motion to reopen shall specify any other motions currently pending before the **Immigration** Court or the Board that should be consolidated. The Service shall have 45 days from the date of service of the motion to reopen to respond. In the event the Service does not respond to the motion to reopen, the Service retains the right in the reopened proceedings to contest any and all issues raised.

(e) *Fee and number restriction for motion to reopen waived.* No filing fee is required for a motion to reopen to apply for section 212(c) relief under this section. An eligible alien may file one motion to reopen to apply for section 212(c) relief under this section, even if a motion to reopen was filed previously in his or her case.

(f) *Deadline to file a motion to reopen to apply for section 212(c) relief under this section.* An alien with a final administrative order of deportation must file a motion to reopen within 90 days of the effective

date of the final rule.

(g) *Jurisdiction over motion to reopen to apply for section 212(c) relief and remand of appeals.*

(1) Notwithstanding any other provisions, any motion to reopen filed pursuant to this section to apply for section 212(c) relief shall be filed with the **Immigration** Court or the Board, whichever last held jurisdiction over the case.

(2) If the **Immigration** Court has jurisdiction, and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall adjudicate only the section 212(c) application.

(3) If the Board has jurisdiction and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall remand the case to the **Immigration** Court solely for adjudication of the section 212(c) application (Form I-191).

(h) *Applicability of other exceptions to motions to reopen.* Nothing in this section shall be interpreted to preclude or restrict the applicability of any other exception to the motion to reopen provisions of this part as defined in 8 CFR 3.2(c)(3) and 3.23(b).

(i) *Limitations on eligibility for reopening under this rule.* This special reopening rule does not apply to:

(1) Aliens who have departed the United States;

(2) Aliens with a final order of deportation who have illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.

**PART 212--DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS;
ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

3. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

4. Paragraph (g) is added to Section 212.3 to read as follows:

§ 212.3 -- Application for the exercise of discretion under section 212(c).

* * * * *

(g) *Relief for certain aliens who were in deportation proceedings before April 24, 1996.* Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the **Immigration** Court before April 24, 1996.

Dated: July 12, 2000.

Janet Reno,

Attorney General.

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