IMMIGRATION JUDGE BENCHBOOK

Waiver of Inadmissibility under former INA Section 212(c)

Former section 212(c) of the Act provides that an alien lawfully admitted for permanent residence who temporarily proceeds abroad voluntarily and not under an order of deportation, and who is returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General despite the applicability of certain grounds of exclusion specified in INA Section 212(a). This waiver was expanded to also be available to lawful permanent residents who did not proceed abroad, but risked losing their LPR status due to charges of deportability or removability. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Matter of Silva, 16 I&N Dec. 26 (BIA 1976). However, section 212(c) relief applies only to charges of deportability or removability for which there are comparable grounds of exclusion or inadmissibility. 8 C.F.R. Section 1212.3(f)(5); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990; A.G. 1991); see, e.g., Matter of Wadud, 19 I&N Dec. 182 (BIA 1984); Matter of Granados, 16 I&N Dec. 726 (BIA 1979).

On November 29, 1990, the Immigration Act of 1990 ("IMMAct") amended section 212(c) to ban aggravated felons from applying for relief under Section 212(c) if they had served a term of imprisonment of at least five years. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. On April 24, 1996, section 212(c) was amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which further reduced the class of aliens eligible for relief from removal. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214. Section 440(d) of AEDPA made the following classes of aliens ineligible for Section 212(c) relief: (1) aggravated felons; (2) those convicted of controlled substance offenses; (3) those convicted of firearm offenses; (4) those convicted of certain miscellaneous crimes, such as espionage; and (5) those convicted of multiple CIMTs. AEDPA Section 440(d); see also INA Section 212(c) (1995). Section 212(c) was subsequently repealed by section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA").

In 2001 the United States Supreme Court rendered a decision in INS v. St. Cyr, holding that section 212(c) relief remains available to aliens, irrespective of when they were put into proceedings, if their "convictions were obtained through plea agreements [prior to April 1, 1997] and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect." INS v. St. Cyr, 533 U.S. 289, 326 (2001). Employing the retroactivity analysis formulated in Landgraf v. USI Film Products, et al, 511 U.S. 244 (1994), the Supreme Court in St. Cyr determined that section 304(b) of IIRIRA, when applied to aliens who had entered into plea agreements in reliance on the availability of such relief, caused an impermissible retroactive effect. Id. Thus, section 304(b) of IIRIRA could not be applied retroactively in such cases. Id.; see also 8 C.F.R. Sections 1003.44, 1212.3, 1240.1.

Therefore, to be eligible for section 212(c) relief if placed in proceedings after April 24, 1996, an alien must have entered a plea agreement prior to April 1, 1997, when section 212(c) was effectively repealed by IIRIRA. St. Cyr, 533 U.S. at 326. An alien also must have maintained lawful, unrelinquished domicile in the United States for a period of seven consecutive years. INA Section 212(c) (1995). In addition, an alien who has been convicted of an aggravated felony or felonies is ineligible to seek relief under section 212(c), except as provided in 8 C.F.R. Section 1212.3(f)(4).8 C.F.R. Section 1003.44(c).

In addition to establishing statutory eligibility for an INA Section 212(c) waiver, the applicant also bears the burden of demonstrating that his application merits a favorable exercise of discretion. See Matter of Marin, 16 I&N Dec. 581, 584-585 (BIA 1978). Each case must be judged on its own merits and both adverse and positive factors should be considered. Id.; Matter of Edwards, 20 I&N Dec. 191, 196 (BIA 1990). Adverse factors may include the existence of a criminal record and its nature, recency, and seriousness; the nature and underlying circumstances of the ground leading to removal and additional significant violations of the immigration laws; and other evidence indicative of the alien's bad character or undesirability as a lawful permanent resident. Matter of Marin, 16 I&N Dec. at 584-585. Positive factors include family ties within the United States, residence of long duration in this country, hardships to the alien and his family if he is deported, property ownership or business ties, demonstrated value and service to the community, genuine rehabilitation if a criminal record exists, and any other evidence attesting to the alien's good character. Id. The severity of adverse factors in a particular case may require the alien to introduce additional offsetting favorable evidence which may involve "unusual" or "outstanding" equities. Id.; see also Matter of Edwards, 20 I&N Dec. 191, 196 (BIA 1990); Matter of Buscemi, 19 I&N Dec. 628, 633 (BIA 1988) (the gravity of the offense per se must be examined). An alien who demonstrates unusual or outstanding equities merely satisfies the threshold test for having a favorable exercise of discretion considered. See Matter of Buscemi, 19 I&N Dec. at 634. Such demonstration does not compel that discretion be favorably exercised. Id.

RETURN TO GENERIC ORAL DECISION FORMAT

Return to top of the page

Return to Index

Updated February 5, 2015