

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SALVATORE SCIGLITANO,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	No. 00-0083
	:	
M. FRANCES HOLMES,	:	
ACTING DISTRICT DIRECTOR,	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE,	:	
Respondent.	:	

MEMORANDUM-ORDER

GREEN, S.J.

May 23, 2000

Presently before the court is the Petition For Writ of Habeas Corpus of Petitioner, Respondent's Response, and Petitioner's Reply Brief. For the reasons set forth below, Petitioner's petition will be granted in part.¹

I. BACKGROUND

In 1972, the Petitioner, a native and citizen of Italy, lawfully entered the United States at the age of twenty-two. Petitioner adjusted his status to permanent resident in April 1986. On September 25, 1995, Petitioner was convicted in the Northern District of New York of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846 (1995). He was sentenced to sixty-three (63) months imprisonment.

On November 29, 1995, while Petitioner was still incarcerated, the Immigration and Naturalization Service ("INS") issued and served an Order to Show Cause on Petitioner, and charged that he was deportable under the Immigration & Nationality Act of 1952, as amended ("INA"), 8 U.S.C. §1101 *et seq.*, as one convicted of an

¹ Petitioner's writ of habeas corpus will be granted to the extent that he seeks to enjoy his deportation pending further administrative and judicial review .

aggravated felony. The INS, however, never filed the Order to Show Cause with the Immigration Court. The government now contends that Petitioner's deportation proceedings did not commence with the issuance and service of the Order to Show Cause in 1995 because under the administrative rule promulgated by the Attorney General, the filing of the Order to Show Cause with the Immigration Court is a prerequisite for the commencement of deportation proceedings. See 8 C.F.R. § 3.14 (1999).²

Thereafter, on May 4, 1996, the INS issued a warrant of detainer notifying the prison officials that Petitioner was to be turned over to the INS after his period of incarceration ended. While Petitioner remained incarcerated in the Allenwood prison complex, Congress amended the INA with the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996) (enacted and effective April 24, 1996) and the Illegal Immigrant Removal and Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, Div. c., 110 Stat. 30009-546 (enacted on September 30, 1996 and effective on April 1, 1997). Section 440(d) of the AEDPA eliminated a waiver of deportation (under § 212(c) of the INA) for aliens like the Petitioner who were deportable as aggravated felons while section 309(c)(2) of the IIRIRA authorized the Attorney General to proceed under the IIRIRA in any deportation case in which no evidentiary hearing had been held prior to April 1, 1997.

On February 1, 1999, an INS officer assigned to the Allenwood prison complex

² In 1995, the regulation provided: "Every proceeding to determine the deportability of an alien in the United States, . . . is commenced by the filing of an order to show cause with the Office of the Immigration Judge." 8 C.F.R. 242.1(1995) (repealed)

issued a “Notice to Appear” (“NTA”) to Petitioner alleging that he was deportable based on his conviction.³ The NTA was then filed with the Immigration Court on February 17, 1999. Removal proceedings were held on May 11, 1999, before an Immigration Judge who ordered the Petitioner deported after finding him statutorily ineligible for any type of relief (i.e., waivers and judicial review). The Immigration Judge ruled that Petitioner’s case did not commence until February 17, 1999, when the NTA was filed with the Immigration Court because the Order to Show Cause issued and served in 1995 was never filed with the Immigration Court. The Board of Immigration Appeals denied Petitioner’s appeal on November 26, 1999 and affirmed the Immigration Judge’s ruling that Petitioner’s case was not pending as of the effective date of the AEDPA, April 24, 1996.

Petitioner filed the instant petition for a writ of habeas corpus, claiming that because the INS issued and served an Order to Show Cause in 1995, his deportation case was pending as of the effective date of the AEDPA. As such, Petitioner avers that Respondent’s application of the AEDPA § 440 (d) is retroactive in violation of substantive due process under the Fifth Amendment to the United States Constitution. Respondent contends that under the pertinent regulation, a deportation/removal case is initiated when the Order to Show Cause/NTA is filed with the Immigration Court. Since Petitioner’s NTA was not filed with the Immigration Court until February 1999, the Respondent argues that Petitioner’s proceedings did not commence until that date.

³ The Notice To Appear is the new charging document (replacing the Order to Show Cause) in what is now termed “removal” (deportation) proceedings pursuant to 8 C.F.R. § 239.1 (1998).

II. DISCUSSION

All parties agree that the precise issue before the court is whether Petitioner's case was pending before or as of the effective date of the AEDPA, April 24, 1996. If so, Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999), makes relief under section 212(c) potentially available to the Petitioner. If not pending, Petitioner is precluded from judicial review of his removal order. See AEDPA § 440(a) ("Any final order of deportation against an alien who is deportable by reason of having committed [certain drug -related] criminal offense[s] . . . , shall not be subject to review by any court.")

Waivers of deportation under section 212(c) of the INA were previously available at the discretion of the Attorney General for aliens who meet certain qualifications including seven years of residency in the United States. See Sandoval, 166 F.3d at 228 (outlining the requirements for section 212(c) relief). However in 1996, Congress with the passage of the AEDPA and IIRIRA (amendments to the INA) limited the Attorney General's authority to waive deportation for certain felonies and curtailed judicial review, especially for this same class of felons. See Sandoval, 166 F.3d at 228-33; Wallace v. Reno, 194 F.3d 279, 281 (1st Cir. 1999); Canela, 64 F.Supp.2d at 457. Under the new INA, as amended by section 440(d) of the AEDPA, section 212(c) waivers could not be granted to an alien convicted of certain felony drug offenses. See AEDPA § 440(d). In Sandoval, the United States Court of Appeals for the Third Circuit held that 212(c) relief is still available to those aliens whose cases were "pending" as of the date of the enactment of the AEDPA, April 24, 1996. See Sandoval, 166 F.3d at 229,242. Thus, as previously stated, the issue turns on whether Petitioner's case was pending as of April 24, 1996.

In the Government's Response to the Petition for Writ of Habeas Corpus, the Respondent argues that removal proceedings did not commence until February 17, 1999, when the INS filed the NTA with the Immigration Court. Since the INA does not define when a deportation case commences, Respondent relies on 8 C.F.R. § 239.1(a) in support of its argument. Section 239.1 provides that: "Every removal proceeding conducted under . . . [the INA] to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the Immigration Court." 8 C.F.R. § 239.1(a). Respondent further avers the regulation was effected to address the administrative backlog of cases before the Immigration Court and was not designed to either benefit or encumber a deportable alien.

Moreover, Respondent argues that the Attorney General's regulation is entitled to deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Respondent contends that because the INA is silent as to the date on which a deportation case commences, the court must defer to the INS's regulation if it is based on a permissible construction of the statute. See id. at 843. The Third Circuit, however, in Sandoval states that "Chevron appears to speak to statutory interpretation in those instances where Congress delegated rule-making power to an agency and thereby sought to rely on agency expertise in the formulation of substantive policy." Sandoval, 166 F.3d at 225. Since the date at which the regulation considers a case to have commenced is essentially random, the date of commencement does not implicate agency expertise in a meaningful way. See Canela, 64 F.Supp.2d at 458. Accordingly, Chevron deference is not required in the instant matter when "such weighty substantive results flow from an essentially clerical regulation . . ." Id.

The Respondent further relies on certain cases which in different factual contexts simply refer to the regulation without any substantive analysis. See e.g. Howell v. Imm. & Natz. Svc., 72 F.3d 288, 290 (2d Cir. 1995); Dokic v. Imm. & Natz. Svc., 899 F.2d 530, 531-32 (6th Cir. 1990); Mansoori v. Imm. & Natz. Svc., 32 F.3d 1020, 1023 (7th Cir. 1999). These cases neither address the issue at bar nor interpret the pertinent regulation.

Petitioner, on the other hand, relies on a line of cases that are factually similar to the instant case. See Wallace v. Reno, 194 F.3d 279, 281 (1st Cir. 1999), Alanis-Bustamante v. Reno, 201 F.3d 1303 (11th Cir. 2000); Canela v. U.S. Department of Justice, 64 F.Supp.2d 456 (E.D.Pa. 1999); Mercado-Amador v. Reno, 47 F.Supp.2d 1219 (D. Or 1999). I find these cases more persuasive. As the First Circuit makes clear in Wallace:

“In this case we are not concerned with INS’s internal time tables, starting points, due dates and the like but with the judicial questions of retroactivity. The question turns on considerations unrelated to the purpose of INS regulations - - primarily (in the absence of statutory guidance) with the evil congress sought to prevent and the realities of reasonable reliance or settled expectations on the parts of litigants. From this standpoint, we think that when an order to show cause is served on the alien, the deportation process has effectively begun . . .”
Wallace, 194 F.3d at 287.

I conclude that once the INS issued and served the Order to Show Cause, Petitioner’s case was constructively pending. To find otherwise would preclude the Petitioner from applying for 212(c) relief because of the INS’s administrative failure to

file the Order to Show Cause.

In its brief, Respondent argues that there are reasons other than negligence or inattention to duty, as discussed in Judge Katz's decision in Canella, to account for the failure to file the Order to Show Cause. See Canella 64 F.Supp.2d at 458. That is, Respondent contends that it has "no reason" to file the charging documents of aliens with the Immigration Court so long as voluntary departure remains a possibility. According to the INS, voluntary departure of the alien only remains an available option until the charging document is filed with the Immigration Court. Once the document is filed, the Immigration Court must conduct deportation proceedings. The INS avers that it has no power, without court authority, to cancel or withdraw the charging document after filing.⁴ I am not persuaded by the government's argument. Even under this theory, the Order to Show Cause provides legally significant notice to the alien that voluntary departure is a possible alternative to deportation proceedings, and indeed supports the conclusion that the notice commences proceedings.

I hold that for the purposes of determining whether Petitioner is entitled to apply for relief under section 212(c) his case was pending as of the date of the enactment of the AEDPA. Consequently, the Immigration Judge and the Bureau of Immigration Appeals should have considered the merits of Petitioner's application under 212(c). Therefore, I need not reach the question of whether the Respondent's application of the AEDPA § 440 (d) violates substantive due process.

⁴ In the instant case, the Order to Show Cause and the warrant of detainer were issued and served while the Petitioner was incarcerated. It is not clear from the record whether the Petitioner ever had the ability to exercise the option of voluntarily departing the United States.

III. CONCLUSION

With the serving of the Order to Show Cause in 1995 on the Petitioner, the INS constructively commenced his deportation proceedings. As such, Petitioner's case was pending as of 1995. Since the 1996 amendments of the INA do not apply retroactively, Petitioner's application for relief under section 212(c) must be considered on its merits. An appropriate order follows.

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SALVATORE SCIGLITANO,	:	CIVIL ACTION
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v.	:	No. 00-0083
	:	
M. FRANCES HOLMES,	:	
ACTING DISTRICT DIRECTOR,	:	
IMMIGRATION AND	:	
NATURALIZATION SERVICE,	:	

Respondent. :

ORDER

AND NOW, this day of May 2000, upon consideration of the Petition For Writ of Habeas Corpus of Petitioner, Respondent's Response, and Petitioner's Reply Brief, IT IS HEREBY ORDERED that:

1. Petitioner's writ of habeas corpus is GRANTED in part;
2. Respondent is directed to reopen Petitioner's case and consider Petitioner's claim for 212(c) relief on the merits.
3. Respondent is enjoined from deporting petitioner, if at all, until after the Petitioner is provided the opportunity to exhaust the available administrative and judicial appellate process.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.