

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

MARCOS ANTONIO PENA	:	CIVIL ACTION
	:	
v.	:	
	:	
GILBERT WALTER, et al.	:	NO. 01-0114
	:	
O'NEILL, J.	:	OCTOBER , 2001

MEMORANDUM

On July 9, 2001 I adopted the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells, (“R&R”), denying Marcos A. Pena’s petition for a writ of habeas corpus. Before me now is Pena’s motion to reconsider this Order in light of the Supreme Court’s decision in Immigration and Naturalization Serv. v. St. Cyr, 121 S. Ct. 2271 (2001).

BACKGROUND

Pena was admitted to the United States as an immigrant from the Dominican Republic in August 1992. Sometime thereafter he was granted lawful permanent resident status. In March, 1995 Pena was arrested on drug related charges. Following the entry of a number of guilty pleas, on September 9, 1996 he was convicted of multiple counts of delivery of controlled substances (cocaine and crack-cocaine) and criminal conspiracy to deliver controlled substances. (R&R at 1). Pena was sentenced to seven years of imprisonment, with five additional sentences to run concurrently. On October 17, 1996 the Immigration and Naturalization Service initiated

proceedings to have him deported as an “aggravated felon” and alien convicted of controlled substances pursuant to §§ 241(a)(2)(A)(iii) and 241(a)(2)(B)(i) of the Immigration and Nationality Act.<sup>1</sup> On August 12, 1997 the Immigration Judge concluded that Pena was ineligible for a waiver of deportation and ordered him deported upon his release. Pena filed a petition for habeas corpus on January 9, 2001, alleging that case law subsequent to his September 11, 1997 deadline for challenging the Immigration Judge’s deportation order demonstrates that he was in fact eligible under the INA to apply for a waiver of deportation. Adopting the recommendation of Judge Wells, I rejected Pena’s petition on July 9, 2001. His estimated release date is April, 2002.

#### DISCUSSION

Prior to April 24, 1996, § 212(c) of the INA provided that any lawful permanent resident alien, who had seven years of lawful continuous residence, and had been convicted of a crime that rendered him/her deportable, was eligible to apply for a waiver of deportation to be granted at the discretion of the Attorney General.<sup>2</sup> However, on April 24, 1996 the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132 § 440(d), amended § 212(c) of the INA to read in relevant part: “This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D), of

---

<sup>1</sup> Currently codified at 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (a)(2)(B)(i).

<sup>2</sup> The INA is presently codified at 8 U.S.C. § 1101 *et seq.*, however § 1182(c), the most recent codification of § 212(c) has since been repealed. See Pub. L. 104-208 § 304(b).

this title . . .<sup>3</sup> This amendment added drug offenses to the list of deportable offenses that made aliens ineligible for a waiver under § 212(c). On September 30, 1996 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, further modified the INA. Section 304(b) of IIRIRA repealed section 212(c) of the INA and replaced it with a new section granting the Attorney General the authority to waive deportation only for a narrow class of deportable aliens. See 8 U.S.C. § 1229b. Aliens convicted of “any aggravated felony” are specifically excluded from this class. See 8 U.S.C. § 1229b(a)(3). In the wake of AEDPA and IIRIRA an immigrant such as Pena convicted of an aggravated felony<sup>4</sup> is no longer eligible for a waiver of deportation.

Relying on Sandoval v. Reno, 166 F.3d 225, 242 (3d Cir. 1999)(holding that AEDPA’s amendment to the INA should not apply to deportation proceedings pending on April 24, 1996, the date AEDPA was enacted), Pena claimed in his habeas petition that he was eligible for a § 212(c) waiver of deportation. In ruling against Pena I adopted Judge Wells’ reasoning that since Pena’s deportation proceedings were initiated on October 17, 1996, the provisions of AEDPA controlled. Further, I agree with Judge Wells that “even if the date of Petitioner’s conviction (September 9, 1996) . . . were used to determine eligibility for the waiver provision, [Pena] still would not qualify for waiver of deportation,” as this event also clearly post-dates the enactment of the AEDPA. (R&R at 5.) In recommending that I reject Pena’s petition Judge Wells also pointed out that prior to AEDPA and IIRIRA eligibility for a waiver under § 212(c) was

---

<sup>3</sup> Section 1251 has been recodified at 8 U.S.C. § 1227. Section 1227(a)(2)(A)(iii) states: “Any alien who is convicted of an aggravated felony is deportable.”

<sup>4</sup> “The term ‘aggravated felony’ means – . . . illicit trafficking in a controlled substance. . . .” 8 U.S.C. § 1101(a)(43)(B).

predicated upon the alien's completion of seven years of legal residence in the United States. Id. Even were I to agree with Pena that his case is governed by the law as it existed prior to the 1996 amendments, since Pena entered the United States in 1992, at the time of his conviction he was well short of the lawful residency requirement for those eligible to apply for a waiver of deportation.

In her recommendation that I reject Pena's petition Judge Wells relied in part on the Court of Appeals decision in DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999). In DeSousa, the Court held that it is the waiver law in effect at the time of the deportation proceeding, not the criminal conviction, that determines the appropriate statute to be applied to an alien's waiver application. Id. at 187. Pena's motion to reconsider is based on the Supreme Court's decision in INS v. St. Cyr, 121 S. Ct. 2271 (2001), a case seemingly at odds with DeSousa.

In St. Cyr, the habeas petitioner was a citizen of Haiti who was admitted to the United States as a lawful permanent resident in 1986. On March 8, 1996, he pled guilty to a charge of selling a controlled substance. As discussed above, under the pre-AEDPA law applicable at the time of his conviction he would have been eligible for a waiver of deportation at the discretion of the Attorney General. However, removal proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective. The issue before the Court was whether the restrictions on discretionary relief from deportation contained in AEDPA and IIRIRA apply where removal proceedings are brought against an alien who pled guilty to a deportable crime before these statutes were enacted. In finding in the petitioner's favor the St. Cyr Court focused on the cost-benefit analysis that an alien facing criminal charges must engage in before deciding whether or not to enter a guilty plea. Id. at 2291.

The potential for unfairness in the retroactive application of the IIRIRA § 304(b) to people like . . . St. Cyr is significant and manifest. Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in . . . St. Cyr's position agreed to plead guilty. Now that prosecutors have received the benefit of these plea agreements, agreements that were likely facilitated by the aliens' belief in their continued eligibility for § 212(c) relief, it would surely be contrary to 'familiar considerations of fair notice reasonable reliance and settled expectations' to hold that IIRIRA's subsequent restrictions deprive them of any possibility of such relief.

Id. at 2292 (citations omitted). In my view while this holding may substantially overrule the Court of Appeals' decision in DeSousa, it does nothing to strengthen Pena's contention that he was impermissibly denied an opportunity to apply for a waiver of deportation.

Pena maintains that his plea agreement was predicated on his understanding that he would not be deported and seeks an evidentiary hearing to establish that fact. In other words, Pena argues that like the petitioner in St. Cyr he relied on the availability of § 212(c) when he entered his guilty pleas. However, there is a crucial difference between Pena's position at the time he entered his pleas and that of the petitioner in St. Cyr: Pena entered his pleas on September 9, 1996, four months after the passage of AEDPA whereas the petitioner in St. Cyr entered his plea on March 8, 1996, a month and a half before AEDPA took effect. At the time of Pena's conviction therefore his status was governed by the provisions of AEDPA which prohibited aliens guilty of aggravated felonies from applying for deportation waivers under § 212(c).<sup>5</sup> Any advice he received to the contrary was not an accurate reflection of the current state of the law at the time of his conviction.

Furthermore, there is nothing in St. Cyr to indicate that Pena would be entitled to apply for a waiver of deportation even were I to find that his case is governed by pre-AEDPA law given

---

<sup>5</sup> The IIRIRA, repealing § 212(c) altogether, was not enacted until September 30, 1996.

§ 212(c)'s requirement that only resident aliens who have continuously and lawfully resided in the United States for seven years are eligible for such waivers. For the foregoing reasons, petitioner's motion to reconsider will be denied.

An appropriate Order follows.

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

MARCOS ANTONIO PENA

v.

GILBERT WALTER, et al.

:  
:  
:  
:  
:  
:  
:  
:

CIVIL ACTION

NO. 01-0114

**ORDER**

AND NOW, this            day of October, 2001, in consideration of petitioner Marcos A. Pena's motion to reconsider my July 9, 2001 Order approving and adopting the Report and Recommendation of United States Magistrate Judge Sandra Moore Wells and denying petitioner's writ of habeas corpus, petitioner's motion is DENIED.

---

THOMAS N. O'NEILL, JR., J.