

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

REYNALDO SANDOVAL, :  
Petitioner/Plaintiff, :  
 :  
v. : Civil No. 97-7298  
 :  
JANET RENO, Attorney General; :  
DORIS MEISSNER, Commissioner of :  
Immigration and Naturalization :  
Service; IMMIGRATION AND :  
NATURALIZATION SERVICE; DEPARTMENT :  
OF JUSTICE; and J. SCOTT BLACKMAN, :  
Acting District Director of :  
Immigration and Naturalization :  
Service, :  
Respondents/Defendants. :

M E M O R A N D U M

Cahn, C.J.

December \_\_\_\_\_, 1997

This case presents difficult and important questions of statutory interpretation. At issue are the court's jurisdiction, the scope of the Attorney General's authority, the apparent intent of Congress, and the right of certain aliens facing deportation to seek a waiver of deportation before their removal from this country. For the reasons that follow, the court finds that it has subject matter jurisdiction over this case, and that recent amendments to the Immigration and Nationality Act ("INA"), 8 U.S.C.A. §§ 1101-1645 (West 1970 & Supp. 1997), do not render Petitioner<sup>1</sup> ineligible to apply for a waiver of deportation

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<sup>1</sup> The court refers to Petitioner/Plaintiff as "Petitioner," and Respondents/Defendants as "Respondents."

pursuant to INA § 212(c), 8 U.S.C.A. § 1182(c). Accordingly, the court directs Respondents to reopen Petitioner's case, and consider and rule on the merits of Petitioner's application for § 212(c) relief. The court also enjoins Respondents from deporting Petitioner, if at all, until after the administrative and judicial appellate process with regard to Respondents' ruling is exhausted.

## **I. BACKGROUND**

Petitioner is a Mexican national who has lived in the United States for over ten years. He is married to a lawful permanent resident ("LPR") of the United States, and his four children are United States citizens. He owns a business in Reading, Pennsylvania.

Petitioner entered the United States through San Ysidro, California on September 30, 1986. On October 27, 1987, Petitioner filed for, and presumably was granted, lawful temporary residence in the United States under INA § 210, 8 U.S.C.A. § 1160, which provides amnesty for aliens qualifying as "Special Agricultural Workers" ("SAW").<sup>2</sup> On December 1, 1990,

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<sup>2</sup> Congress created the SAW program to benefit some of the many undocumented aliens who, until then, had been living in the U.S. illegally, but led productive lives and had family and community ties in the U.S. Under the program, the Attorney General first confers lawful temporary-resident status on an alien qualifying as a SAW, and barring the intervening commission of a disqualifying act by the alien, the Attorney General later adjusts such status to LPR status. See generally 8 U.S.C.A. § 1160; see also Ortega de Robles v. INS, 58 F.3d 1355, 1359-61 &

pursuant to the SAW program, Petitioner's lawful temporary-resident status was adjusted to LPR status.

Sometime after Petitioner attained LPR status, police arrested him for selling illegal drugs to an undercover officer. Petitioner was one of approximately thirty individuals arrested as part of a long-term investigation conducted by the Reading police department. The authorities charged Petitioner with seven different offenses, including possession of approximately one pound of marijuana. On November 5, 1993, Petitioner pleaded guilty to one count of marijuana possession in the Court of Common Pleas, Berks County, Pennsylvania. The authorities dropped the other charges, and the court sentenced Petitioner to one year probation.

On November 24, 1993, Respondent Immigration and Naturalization Service ("INS") issued to Petitioner an order to show cause why he should not be deported under, inter alia, INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i), which provides in relevant part:

Any alien who at any time after entry has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . is deportable.

Petitioner contested deportability at his deportation hearing on June 14, 1994, and asked the presiding immigration judge ("IJ") to continue the hearing until October, 1994.

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n.5 (9th Cir. 1995) (discussing similar program).

Petitioner believed that in October he would become eligible to apply for a waiver of deportation under INA § 212(c), and consequently might avoid the automatic-deportation provision of INA § 241(a)(2)(B)(i). At the time, § 212(c) provided in relevant part:

Aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . .

Petitioner's belief arguably had merit for three reasons. First, although § 212(c) applied on its face only to "excludable" aliens, aliens trying to get into the country, and not to "deportable" aliens, aliens trying to stay in the country, the Third Circuit Court of Appeals extended § 212(c) to apply to deportable aliens as well. See Katsis v. INS, 997 F.2d 1067, 1070 (3d Cir. 1993) (citing Francis v. INS, 532 F.2d 268, 272-73 (2d Cir. 1976) (holding that distinction between lawfully-admitted aliens who temporarily left the country and those who never left violated equal protection because it was "wholly unrelated to any legitimate governmental interest")); see also Morel v. INS, 90 F.3d 833, 837 & n.3 (3d Cir. 1996).

Second, in October Petitioner likely would have met the § 212(c) requirement of "lawful unrelinquished domicile of seven consecutive years." In Graham v. INS, 998 F.2d 194, 196 (3d Cir. 1993), the court suggested that in order to meet this

requirement, an alien needed only a lawful intent to remain in the country, which he could possess despite lacking LPR status. The court noted that an alien on a temporary worker visa cannot form such an intent because the INA requires such an alien to possess “residence in a foreign country which [he has] no intent of abandoning.” See id. at 196 (quoting 8 U.S.C.A. § 1101(a)(15)(H)(ii)). An alien qualifying as a SAW, however, arguably can form a lawful intent to remain in the country because SAWs are not on temporary-worker visas and because, as noted above, the SAW program contemplates that SAWs with lawful temporary-resident status will eventually secure LPR status. See Ortega de Robles, 58 F.3d at 1360 (discussing similar program).

Third, although § 212(c) relief, which at the time was meant to benefit aliens for whom exclusion or deportation would constitute an unusual hardship, see Morel, 90 F.3d at 841, is discretionary, an applicant nonetheless stood a good chance of securing such relief. One court noted that, “[d]uring the fiscal years 1989 through 1994, over half of the total number of applications for section 212(c) relief decided by the Executive Office for Immigration Review (comprised of Immigration Judges and the [Board of Immigration Appeals]) were granted.” Mojica v. Reno, 970 F. Supp. 130, 178 (E.D.N.Y. 1997) (Weinstein, J.).

Whatever the merits of Petitioner’s request for a continuance, the IJ denied the request. The IJ found Petitioner

deportable as an alien convicted of a controlled-substance violation, determined that Petitioner was ineligible for relief from deportation because he had not met the continuous-residence requirement under § 212(c), and ordered him deported to Mexico.

On June 22, 1994, Petitioner filed an appeal of the IJ's decision with the Board of Immigration Appeals ("BIA"). While Petitioner's appeal was pending, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-546.

Congress passed the AEDPA on April 24, 1996. AEDPA § 440(a) amended INA § 106, 8 U.S.C.A. 1105a(a)(10), to read as follows:

Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in [INA § 241](a)(2)(A)(iii), (B), (C), or (D) . . . shall not be subject to review by any court.<sup>3</sup>

AEDPA § 440(d) added the following language to INA § 212(c):

[This subsection shall not apply to an alien who] is deportable by reason of having committed any criminal offense covered in [INA § 241](a)(2)(A)(iii), (B), (C), or (D). . . .

A question arose concerning the effective date of § 440(d). On February 21, 1997, the Attorney General concluded that § 440(d) applied to applications for § 212(c) relief pending on the

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<sup>3</sup> Congress subsequently repealed INA § 106. See infra p. 8.

date of the AEDPA's enactment. In re Soriano, 16 Immigr. Case Rep. B1-239, 240.1 (Op. Att'y Gen. Feb. 21, 1997) (MB 1997). In her decision, which followed her vacation of a contrary decision of the BIA, see id. at 240.1 n.4, the Attorney General applied the retroactivity analysis set forth in Landgraf v. USI Film Prods., 511 U.S. 244 (1994), and determined that the application of § 440(d) to pending § 212(c) cases "would not be retroactive." Soriano, 16 Immigr. Case Rep. at B1-240.5. To address the concern that some aliens may have conceded deportability prior to the AEDPA's enactment in anticipation of being able to apply for § 212(c) relief, however, the Attorney General directed the Executive Office for Immigration Review "to reopen cases upon petition by an alien who conceded deportability before the effective date of the AEDPA for the limited purpose of permitting him or her to contest deportability." Id.

The scope of § 440(d) also became the subject of litigation. Respondent INS contended that § 440(d) eliminated § 212(c) relief for both deportable and excludable aliens who committed enumerated offenses. The BIA disagreed. On May 14, 1997, the BIA determined that although § 440(d) eliminated § 212(c) relief for certain deportable aliens, the plain language of the amendment left § 212(c) relief available to excludable aliens. See In re Fuentes-Campos, Int. Dec. No. 3318, at 4 (BIA May 14, 1997). The BIA noted that because the wording of § 440(d) was

clear, the BIA could not "refer[] to the statute's legislative history to support a contrary construction of the law." Id. at 7. The BIA recognized that "the failure to bar relief for excludable criminal aliens [may well be] simply a legislative oversight," but stated that even if this were true, it "lack[ed] the authority to rewrite the otherwise plain language of the statute." Id. at 8 (emphasis in original). As for the INS's argument that the BIA's interpretation of § 440(d) violated equal protection, the BIA found that it lacked jurisdiction to rule on, let alone remedy, alleged constitutional infirmities in the statute. Id. at 10. The BIA also found the facts of the case distinguishable from those in Francis, see supra p. 4. Id.

Congress passed the IIRIRA on September 30, 1996. IIRIRA § 306(b) prospectively repealed INA § 106. IIRIRA § 309(c) contained a series of "transitional provisions" governing cases in which deportation proceedings commenced before April 1, 1997.<sup>4</sup>

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<sup>4</sup> IIRIRA § 309 provides in relevant part:

**SEC. 309. EFFECTIVE DATES; TRANSITION.**

. . .

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of [April 1, 1997]—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

Of these transitional provisions that govern Petitioner's case and are not codified in the United States Code, IIRIRA § 309(c)(4)(G), a successor provision to AEDPA § 440(a), is of particular significance. It provides:

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. In the case [of an alien who is in exclusion or deportation proceedings as of April 1, 1997] in which a final order of exclusion or deportation is entered [after October 30, 1996], notwithstanding any provision of [INA § 106 as in effect as of September 30, 1997] to the contrary—

. . .

(G) there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed a criminal offense covered in section . . . 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of [September 30, 1997]). . . .

On July 16, 1997, the BIA dismissed Petitioner's appeal, rendering the IJ's deportation order administratively final. In re Sandoval, No. A90 562 282 (Philadelphia) (BIA Jul. 16, 1997). The BIA determined that Petitioner was not deprived of a full and fair hearing before the IJ, and that the IJ acted within his discretion in denying Petitioner's request for a continuance. See id. at 3. In a footnote, the BIA noted that in light of AEDPA § 440(d) and Soriano, Petitioner was now statutorily ineligible for § 212(c) relief, see id. at 3 n.2.<sup>5</sup>

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<sup>5</sup> The BIA also dismissed Petitioner's appeal with respect to Petitioner's privilege against self-incrimination. See id. at 1-2. This issue is not before the court.

On October 14, 1997, Petitioner filed with the BIA a motion to reopen and an application for § 212(c) relief. Petitioner also requested that the BIA ask the Attorney General to reconsider her decision in Soriano. Petitioner argued that the holdings in Hughes Aircraft Co. v. U.S., -- U.S. --, 117 S. Ct. 1871 (1997), and Lindh v. Murphy, -- U.S. --, 117 S. Ct. 2059 (1997), two cases decided after Soriano, require the conclusion that AEDPA § 440(d) does not apply to applications for § 212(c) relief pending on, or with respect to crimes committed before, the date of the AEDPA's enactment. To date, the BIA has not ruled on Petitioner's motion.

On November 24, 1997, Petitioner requested a stay of deportation from Respondent INS. By letter dated November 25, 1997, Respondent INS denied the stay and ordered Petitioner to surrender to Respondent INS on December 1, 1997. The letter also instructed Petitioner to be "completely ready for deportation."

Petitioner was taken into custody by Respondent INS and filed the instant action on December 1, 1997, seeking a writ of habeas corpus under 28 U.S.C. § 2241 "to review the lawfulness of his final order of deportation and to stay his deportation." (Pet. at 1.) Petitioner asks the court to declare that § 440(d) does not apply to applications for § 212(c) relief pending on, or with respect to crimes committed before, the date of the AEDPA's enactment. Petitioner argues that as a matter of statutory

interpretation, Soriano is inconsistent with Supreme Court precedent. In the alternative, Petitioner claims that even if the court declines to grant declaratory relief and Soriano survives his challenge, the application of § 440(d) in the wake of Fuentes-Campos constitutes the same equal protection-violation identified in Francis. Accordingly, Petitioner wants the court to direct the BIA to consider and rule on the merits of Petitioner's application for INA § 212(c) relief. In addition, Petitioner requests injunctive relief in the form of a stay of deportation until: (1) the BIA rules on his motion to reopen and his application for § 212(c) relief; (2) the Attorney General reconsiders her decision in Soriano, in the event the BIA resubmits to her the issue of AEDPA § 440(d)'s effective date; and (3) the court, independent of the BIA, rules on Petitioner's claims for relief from the operation of § 440(d). Finally, Petitioner seeks costs and attorney's fees.

On December 1, 1997, with the parties' consent, Judge Van Antwerpen, the emergency judge, temporarily restrained Respondents from deporting Petitioner until December 8, 1997, when this court could hold a hearing. Upon learning at the December 8 hearing that Petitioner's counsel is currently litigating three other cases in this district that raise

questions similar to those raised by Petitioner,<sup>6</sup> the court suggested that all four cases be consolidated and decided by a panel consisting of the four judges involved. Respondents declined the court's invitation. Respondents argued that the court lacks jurisdiction to hear Petitioner's case by virtue of the IIRIRA's amendments to the INA.<sup>7</sup> Respondents did not consent to the court's suggestion that it exercise jurisdiction for the limited purpose of extending the temporary restraining order long enough to allow the parties to fully brief the issue of jurisdiction.<sup>8</sup>

The court decided the merits of Petitioner's claims. The court held that, notwithstanding the AEDPA's and the IIRIRA's amendments to the INA, the court had jurisdiction to hear Petitioner's case. The court then held that, notwithstanding AEDPA § 440(d) and Soriano, Petitioner remained eligible for a waiver of deportation under INA § 212(c). Accordingly, by order

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<sup>6</sup> The other cases are: Easy v. Reno, No. 97-CV-6572 (Reed, J.); Edwards v. Reno, No. 97-CV-6776 (Fullam, J.); and Galvis v. Reno, No. 97-CV-6777 (Yohn, J.).

<sup>7</sup> In support of their argument, Respondents cited INA §§ 242(a)(2)(C) and 242(f)-(g), 8 U.S.C.A. §§ 1252(a)(2)(C) and 1252(f)-(g), as amended by IIRIRA § 306. The court, however, found that IIRIRA § 309(c)'s transitional provisions, not the amendments under IIRIRA § 306, govern Petitioner's case. See supra p. 9 and note 4; see also infra p. 14.

<sup>8</sup> Respondents, however, did allow the court to take judicial notice of their brief in the Easy matter, as did Petitioner.

dated December 8, 1997, the court, inter alia: (1) stayed the deportation until after Respondents consider and rule on the merits of Petitioner's application for INA § 212(c) relief; and (2) denied all of Petitioner's other requests for habeas corpus and other relief.<sup>9</sup> This memorandum explains the basis for, and amends, the court's December 8 order.

## II. DISCUSSION

This case presents the following issues: (1) whether the court has jurisdiction under 28 U.S.C. § 2241 despite the amendments to the INA set forth in IIRIRA § 309(c)(4)(G); and (2) if the court has jurisdiction, whether AEDPA § 440(d) applies to applications for § 212(c) relief pending on the date of the AEDPA's enactment in light of Soriano.<sup>10</sup> If the court resolves the foregoing issues in Petitioner's favor, the court then must determine if injunctive relief, in the form of a stay of

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<sup>9</sup> The court denied Petitioner's request for release. Petitioner currently remains in the custody of Respondent INS.

<sup>10</sup> Because the court rules in Petitioner's favor on the basis of Petitioner's statutory interpretation claim, the court need not address Petitioner's equal protection claim. The court notes, however, that at least two district courts have upheld similar equal protection challenges for the reasons cited in Francis. See Vargas v. Reno, 966 F. Supp. 1537, 1545 (S.D. Cal. 1997) (criticizing the Fuentes-Campos decision as absurd and ironic); Jurado-Gutierrez v. Greene, 977 F. Supp. 1089, 1094 (D. Colo. 1997). The Jurado-Gutierrez court remedied the constitutional violation by directing the BIA to consider and rule on the petitioner's application for INA § 212(c) relief, "without regard to the effect of AEDPA and IIRIRA." 977 F. Supp. at 1095.

deportation, is appropriate. As the court more fully explains below, the court finds that it has jurisdiction, that AEDPA § 440(d) does not apply with respect to conduct predating the AEDPA's enactment, and that injunctive relief is appropriate.

**A. IIRIRA's Transitional Provisions Apply to This Case**

As a threshold matter, the court reiterates its finding that the IIRIRA's transitional provisions, set forth in IIRIRA § 309(c), see supra note 4, govern Petitioner's case, because Petitioner was in deportation proceedings as of April 1, 1997. Therefore, the IIRIRA provision that Respondents relied on at the December 8 hearing, i.e. IIRIRA § 306, see supra note 7, does not apply here. Section 309(c)(1)(A) provides that, with respect to cases in which an alien "is in exclusion or deportation proceedings as of [April 1, 1997] . . . the amendments made by this subtitle [including § 306] shall not apply." Because Petitioner's final order of deportation became administrative final after October 30, 1996, the prohibition against appeals set forth in IIRIRA § 309(c)(4)(G) applies here, see supra p. 9, as opposed to the similar prohibition against judicial review set forth in its predecessor, i.e. AEDPA § 440(a), see supra p. 6.

**B. Jurisdiction Under 28 U.S.C. § 2241**

The language of IIRIRA § 309(c)(4)(G) suggests that Congress intended to streamline the deportation process by severely curtailing judicial review in certain deportation cases

involving, inter alia, the commission of specified controlled-substances offenses. Faced with the statute and the apparent intent of Congress, the court must decide if it retains jurisdiction under 28 U.S.C. § 2241 to hear Petitioner's case. The court holds that it does.

28 U.S.C. § 2241 provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or . . .

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

. . .

The right to seek a writ of habeas corpus, codified in § 2241 and elsewhere, is not lightly disturbed. As the Supreme Court observed long ago, "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." Ex parte Yerger, 75 U.S. 85, 95 (1868); see also Mojica, 970 F. Supp. at 153 ("[T]he writ of habeas corpus is part of the very core of constitutional liberties that protect those within our borders."). Taking the foregoing into consideration, the question is whether, in the absence of any explicit mention, let alone repeal of, the court's jurisdiction under § 2241, the language "[t]here shall be no appeal," IIRIRA §

309(c)(4)(G), is sufficient to revoke the court's power to issue the writ of habeas corpus in the deportation context. In other words, the court must decide whether there has been a repeal of its § 2241 jurisdiction by implication.<sup>11</sup>

The Third Circuit Court of Appeals has yet to consider this question directly. However, two decisions of the Supreme Court, Yerger and Felker v. Turpin, -- U.S. --, 116 S. Ct. 2333 (1996), suggest that § 2241 jurisdiction is available in this case.

The issue in Yerger was whether an act passed by Congress in 1868 that limited the Supreme Court's jurisdiction to review by appeal decisions of lower courts in habeas cases, which jurisdiction Congress had expanded in 1867, also revoked the Court's power to issue writs of habeas corpus under section 14 of the Judiciary Act of 1789.<sup>12</sup> See 75 U.S. at 103. The Court noted that the jurisdiction-limiting language of the 1868 Act referred solely to the 1867 expansion of the Court's jurisdiction, and made no mention of the Court's habeas jurisdiction under the 1789 Act. See id. at 105. Stating that "[r]epeals by implication are not favored," the Court held that

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<sup>11</sup> Because the court finds that Congress did not sufficiently express an intent to revoke the court's habeas power in this context, the court need not consider whether such a revocation would be an unconstitutional suspension of the writ. See U.S. Const. art. I, § 9, cl. 2.

<sup>12</sup> "Section 14 [of the Judiciary Act of 1789] is the direct ancestor of 28 U.S.C. § 2241, subsection (a). . . ." Felker, -- U.S. --, 116 S. Ct. at 2338 & n.1.

it retained habeas jurisdiction under the 1789 Act. See id. at 106 (“[T]he repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.”).

In Felker, the Court reiterated the presumption against repeals of habeas jurisdiction by implication. There, the Court had to decide whether Title I of the AEDPA, which limited the Court’s power to review, either by appeal or by writ of certiorari, certain decisions of the courts of appeals, similarly limited the Court’s power to entertain original habeas petitions under 28 U.S.C. § 2241. See -- U.S. --, 116 S. Ct. at 2337. Title I contained no mention of the Court’s authority to entertain original habeas petitions. See id. at 2338. Noting the parallels to Yerger, the Court wrote:

[a]s we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then, we decline to find a similar repeal of § 2241 of Title 28--its descendant . . . --by implication now.

Id. at 2339 (footnote omitted).

Yerger and Felker stand for the proposition that only through “a clear statutory statement--a specific, express and unambiguous directive--can a court conclude that Congress meant to repeal an independent avenue of habeas jurisdiction.” Mojica, 970 F. Supp. at 159. Given the absence of such a directive from the jurisdiction-limiting provisions of the AEDPA and the IIRIRA, several district courts have concluded, on the strength of Yerger

and Felker, that the AEDPA's and IIRIRA's amendments to the INA have not repealed courts' jurisdiction under § 2241. See, e.g., Yesil v. Reno, 958 F. Supp. 828, 837-39 (S.D.N.Y. 1997) ("Yesil 1") (holding that AEDPA § 440(a) did not repeal the court's jurisdiction under § 2241); Mojica, 970 F. Supp. at 152-164 (holding that, "in the wake of the AEDPA and the IIRIRA, section 2241 remains a viable basis for habeas jurisdiction"). This court joins the Yesil 1 and Mojica courts, as well as the other courts that have found § 2241 jurisdiction available in the deportation context notwithstanding the AEDPA and the IIRIRA.<sup>13</sup> In view of the presumption against repeals of habeas jurisdiction by implication, the historical and constitutional significance of habeas relief, and the foregoing case law, this court holds that, despite the language of IIRIRA § 309(c)(4)(G), jurisdiction under 28 U.S.C. § 2241 is available in this case.<sup>14</sup>

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<sup>13</sup> See, e.g., Dunkley v. Perryman, No. 96-C-3570, 1996 WL 464191, at \*3 (N.D. Ill. Aug. 9, 1996); Jurado-Gutierrez, 977 F. Supp. at 1091; Mbiya v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996); Ozoanya v. Reno, 968 F. Supp. 1, 5-7 (D.D.C. 1997); Powell v. Jennifer, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996); Vargas, 966 F. Supp. at 1542; Veliz v. Caplinger, No. 96-1508, 1997 WL 61456, at \*2 (E.D. La. Feb. 12, 1997); but see, e.g., Mustata v. U.S. Dept. of Justice, 979 F. Supp. 536, No. 1:96-CV-903, 1997 WL 622773, at \*2-3 (W.D. Mich. Jul. 11, 1997) (dismissing for lack of jurisdiction, noting split of authority regarding availability of § 2241 jurisdiction).

<sup>14</sup> The court notes that its holding is consistent with two recent decisions of the Third Circuit Court of Appeals. In Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996), the court held that AEDPA § 440(a) eliminated the court of appeals' jurisdiction to hear petitions for review of final deportation orders, but

**1. "In Custody" Requirement of 28 U.S.C. § 2241**

28 U.S.C. § 2241 provides, inter alia, that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody." A petitioner may satisfy the "in custody" requirement in several different ways, one being that "[h]e is in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). In this case, at the time he filed the instant action, Petitioner was in the custody of Respondent INS. See supra p. 10. He remains there today. See supra note 9. Accordingly, the court holds that Petitioner has met the "in custody" requirement of 28 U.S.C. § 2241.

**2. Scope of Review Under 28 U.S.C. § 2241**

The court notes that some district courts that have found § 2241 jurisdiction available notwithstanding the AEDPA and the IIRIRA have limited their review under § 2241 to situations in which deportation would result in "a fundamental miscarriage of

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noted that habeas relief might still be available. See id. at 311 ("[W]e do not foreclose judicial review of all claims by aliens arising in the course of deportation proceedings. . . . To the extent . . . that constitutional rights applicable to aliens may be at stake, judicial review may not be withdrawn by statute.") (citing Felker). In In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997), the court held that the AEDPA's new "gatekeeping" provisions with respect to 28 U.S.C. § 2255 did not affect jurisdiction under § 2241, because "the AEDPA did not amend the 'safety-valve' clause in § 2255 that refers to the power of the federal courts to grant writs of habeas corpus pursuant to § 2241." Id. at 249. The court cited Yerger and Felker in support of its holding, and also noted the Yesil 1 court's reliance on these two cases. See id. at 249 & n.2.

justice," see Mbiya, 930 F. Supp. at 613, or where the petitioner identifies "a grave constitutional error," see Powell, 937 F. Supp. at 1252-53. Although the language of § 2241 contains no such limitations, these courts have imposed them in an effort to balance Congress' apparent intent to severely curtail judicial review in certain deportation cases with the constitutional problems that would result from the complete deprivation of habeas relief from deportable aliens. See Yesil 1, 958 F. Supp. at 839. At least one court has criticized this approach.<sup>15</sup> The court need not resolve this issue, however, because the court finds that in any event, its review is necessary in this case. Petitioner's claims, if accurate, establish that his deportation would constitute a fundamental miscarriage of justice and violate due process.

Petitioner's principal claim is that the Attorney General committed an error of law when she determined in Soriano that AEDPA § 440(d) should apply to applications for INA § 212(c) relief pending on the date of the AEDPA's enactment. This alleged error rendered Petitioner ineligible under amended INA § 212(c) for a waiver of deportation which, as borne out by

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<sup>15</sup> See Mojica, 970 F. Supp. at 163 ("'Accommodation' of general policy goals based on 'suggest[ions]' of congressional intent are . . . not appropriate in this context. Fidelity to Felker and Yerger and the requirements of the clear statement rule militates against reading such limitations into the scope of section 2241.") (modification in original).

statistical data, see supra p. 5, he otherwise stood a realistic chance of securing. In depriving Petitioner of an opportunity to secure § 212(c) relief, the alleged error, if not remedied by the court, will unquestionably result in Petitioner's deportation.

To an alien who has lawfully made this country his home, "there are few things more important than his ability to remain or more devastating than banishment by deportation." Yesil 1, 958 F. Supp. at 840. An alien facing deportation "has a substantial liberty interest at stake." Marroquin-Manriquez v. INS, 699 F.2d 129, 134 (3d Cir. 1983). As the Supreme Court observed, deportation entails "as great a hardship as the deprivation of the right to pursue a vocation of calling. . . . [It] may result in the loss of all that makes life worth living." Bridges v. Wixon, 326 U.S. 135, 147 (1945) (internal quotation marks and citations omitted). This is especially true where, as in Petitioner's case, deportation potentially would require separation from one's spouse and children, because "the family and relationships between family members . . . are a fundamental part of the values which underlie our society," Bastidas v. INS, 609 F.2d 101, 105 (3d Cir. 1979) (vacating order denying suspension of deportation and remanding to BIA for consideration of "the non-economic, emotional hardship which would result from the separation of [the petitioner] and his young son from each other").

Given the extremely severe consequences of deportation, it is clear that when automatic deportation results from legal error, there has been a fundamental miscarriage of justice. This is precisely the threat presented here. Moreover, the court finds that this situation presents a potential violation of the due process guaranteed under the Fifth Amendment to LPR aliens in deportation proceedings.<sup>16</sup> See Yesil 1, 958 F. Supp. at 840 (“If [the petitioner] is being deprived of the right to be considered for relief from deportation because of an error of law, due process requires that the error be corrected [through judicial review].”) The court’s exercise of § 2241 jurisdiction is thus appropriate.

**C. Application of AEDPA § 440(d)**

The court now must determine whether, in light of Soriano and as a matter of statutory interpretation, AEDPA § 440(d)’s amendment to INA § 212(c) applies to Petitioner’s case. As described above, Petitioner argues that Soriano is inconsistent with Supreme Court precedent. He claims that, properly construed, § 440(d) does not apply to conduct, including criminal behavior, that predates the AEDPA’s enactment. Respondents, on the other hand, argue that in Soriano, the Attorney General correctly determined that § 440(d) applies to applications for §

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<sup>16</sup> See Reno v. Flores, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”) (citation omitted).

212(c) relief pending on the date of the AEDPA's enactment, given her findings that: (1) Congress did not express its intent regarding § 440(d)'s effective date; and (2) the application of § 440(d) to pending § 212(c) applications would not have retroactive effect. After reviewing the AEDPA and the case law, the court finds that Congress did not intend § 440(d) to apply to conduct predating the AEDPA's enactment.

**1. Deference to Agency Interpretation of § 440(d) as Expressed in Soriano**

The court first must determine whether to defer to Respondents' interpretation of § 440(d). Considerable weight is given to an agency's construction of a statutory scheme that it is charged with implementing, insofar as the interpretation "has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (internal quotation marks and citations omitted). In contrast, "a pure question of statutory construction [is] for the courts to decide," INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987). It is also well established that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."

Chevron, 467 U.S. at 843 n.9 (citations omitted). The court finds that the question regarding when § 440(d) takes effect is a pure question of statutory construction. The court also finds, as discussed more fully below, that Congress intended to apply § 440(d) in a way that conflicts with the Attorney General's construction of the statute. See infra p. 27 and note 18. Therefore, the court holds that the Attorney General's interpretation of § 440(d) as described in Soriano is not entitled to deference.

## 2. Landgraf Analysis

In Landgraf, the Court acknowledged the inherent tension between the deeply rooted "presumption against retroactive legislation" and the observation "that, in many situations, a court should apply the law in effect at the time it renders its decision." 511 U.S. at 265, 273 (internal quotation marks and citation omitted). The Court then set forth the proper analysis for determining the reach of a newly-enacted federal statute. The Court explained that a court's first obligation is to apply the express command of Congress concerning the statute's proper reach. Id. at 280. Absent such a command, a court applies the default rules regarding retroactivity. The court must determine whether application of the statute to pending matters would constitute retroactive effect. See id. If so, then the presumption against retroactivity serves to bar retroactive

application "absent clear congressional intent favoring such a result." Id. If not, for example, if the statute affects only procedural or jurisdictional issues, then the statute applies to pending matters, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id. at 277 (internal quotation marks and citation omitted).

**3. Relevant Post-Landgraf Developments Regarding Retroactivity: Lindh and Skandier**

The Supreme Court itself recently applied Landgraf analysis in Lindh.<sup>17</sup> In that case, the Court had to determine whether certain amendments made by AEDPA §§ 101-06 to 28 U.S.C. chapter 153 applied to cases pending at the AEDPA's enactment. See -- U.S. --, 117 S. Ct. at 2061-62. AEDPA §§ 101-06 contained no language providing for their effective date. See id. at 2063-64. AEDPA § 107, however, which created a new 28 U.S.C. chapter 154, did contain such language. See id. at 2063 (quoting AEDPA § 107(c)); see also AEDPA § 107(c) ("EFFECTIVE DATE.— Chapter 154 of title 28, United States Code . . . shall apply to cases

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<sup>17</sup> The Court also applied Landgraf analysis in Hughes Aircraft, a companion case to Lindh. In Hughes Aircraft, the Court held that a 1986 amendment to the qui tam provision of the False Claims Act, 31 U.S.C. § 3730(b), did not apply to qui tam suits in which the information on which the suits were based was in the government's possession as of the amendment's enactment. The Court held that to apply the amendment to such cases would have a retroactive effect. See generally -- U.S. --, 117 S. Ct. at 1878-79.

pending on or after the date of enactment of this Act." ). The Court concluded that Congress deliberately omitted similar language from §§ 101-06, and held that the disparate treatment established, by negative implication, that Congress intended AEDPA §§ 101-06 to apply only to cases filed after the AEDPA's enactment. See -- U.S. --, 117 S. Ct. at 2063-65. The Court reasoned that "[n]othing, indeed, but a different intent explains the different treatment." Id. at 2064. Because the Court had thus identified an expression of congressional intent regarding the reach of §§ 101-06, the Court did not need to apply the default rules described in Landgraf.

The Third Circuit Court of Appeals recently applied the holding of Lindh in U.S. v. Skandier, 125 F.3d 178 (1997), a case which also involved the reach of certain AEDPA amendments to 28 U.S.C. chapter 153. The court described the "negative implication" relied on by the Supreme Court in Lindh, see 125 F.3d at 180, and on that basis held that Congress intended to apply the amendments in question prospectively. The court then noted:

Because we dispose of this case on the grounds of Congressional intent, as the Supreme Court itself has found it, we need not address the matters that would be predicate to determining applicability of the default rules [under Landgraf].

Id. at 182.

#### 4. Negative Implication of Congressional Intent Regarding § 440(d)

Turning to AEDPA § 440(d), and applying the analysis set forth in Landgraf, Lindh, and Skandier, it is clear that Congress did express its intent regarding the reach of § 440(d). More important, Congress intended to apply § 440(d) prospectively.<sup>18</sup>

When Congress intends to give provisions retroactive effect, it "has no trouble finding the words to do so." Mojica, 970 F. Supp. at 172. Numerous provisions in the AEDPA, among them §§ 401(f), 413(g), 421(b), 435(b), 440(f), and 441(b), contain language expressly providing for their application to pre-AEDPA conduct or events. See id. at 172-73; Yesil v. Reno, 973 F. Supp. 372, 380 (S.D.N.Y. 1997) ("Yesil 2"). In contrast, § 440(d) contains no such language. Thus, when § 440(d) is viewed against the backdrop of these other sections, the inescapable conclusion is that by negative implication, as in Lindh and Skandier, Congress expressed its intent to apply § 440(d) prospectively.

The foregoing analysis establishes that § 440(d) was never meant to govern applications for INA § 212(c) relief pending on the date of the AEDPA's enactment. By the same token, the court finds that in expressing an intent to apply § 440(d)

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<sup>18</sup> Although the court's finding on this point contradicts the finding of the Attorney General, the court notes that at the time she decided Soriano, the Attorney General could not draw upon the guidance of Lindh or Skandier.

prospectively, Congress also precluded the application of § 440(d) to conduct predating the AEDPA's enactment, irrespective of when an application for § 212(c) relief is filed. To hold otherwise would permit § 440(d) to operate retroactively by destroying settled expectations of the law.<sup>19</sup> For example, an alien's decision, prior to the AEDPA's enactment, to plead guilty to a particular crime may have hinged entirely upon his knowledge that he would be eligible for § 212(c) relief in subsequent deportation proceedings. Assuming that the AEDPA was enacted before the alien applied for § 212(c) relief, and that § 440(d) eliminated such relief for aliens convicted of the crime to which the alien pleaded guilty, § 440(d) would frustrate the sole reason for the alien's previous guilty plea. More important, the alien would not be able to reconsider other options that were previously available to him, and were now more attractive in light of § 440(d). See Mojica, 970 F. Supp. at 176 (illustrating similar principle with hypothetical example). The upshot is that such a result would run afoul of Congress' express intent, as found above, to apply § 440(d) not retroactively, but

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<sup>19</sup> "Retroactivity depends on when the crime is committed, and not on any later date. In a system of law, people have a right to know the possible consequences of their actions and to know that these consequences will not lightly be changed." Mojica, 970 F. Supp. at 175 (drawing an analogy to retroactive criminal statutes).

prospectively.<sup>20</sup>

#### **5. Section 440(d) Inapplicable to Petitioner's Case**

Because the conduct and conviction giving rise to Petitioner's deportation order predated the AEDPA's enactment, the court finds that § 440(d) does not apply to Petitioner's case.<sup>21</sup> The court therefore finds that the BIA erred in concluding that in light of Soriano and § 440(d), Petitioner was statutorily ineligible for § 212(c) relief. Accordingly, the court directs Respondents to reopen Petitioner's case, and consider and rule on the merits of Petitioner's application for § 212(c) relief.

#### **D. Appropriateness of Injunctive Relief**

The court next considers Petitioner's request for injunctive relief. In particular, the court must determine whether permanent injunctive relief, in the form of a stay of deportation,<sup>22</sup> is appropriate. For the reasons described below, the court finds that the circumstances of Petitioner's case warrant the issuance of a stay of deportation.

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<sup>20</sup> As the court bases its ruling regarding the proper application of § 440(d) on Congressional intent, the court does not apply the default rules regarding retroactivity.

<sup>21</sup> The court notes that its holdings are dependent upon, and thus limited to, the facts of this case.

<sup>22</sup> Although the court equates the stay of deportation in this case with "permanent" injunctive relief, the stay is permanent only insofar as is required in accordance with the court's memorandum. See infra p. 32 and note 24.

To justify the issuance of a permanent injunction, a plaintiff must have actually succeeded on the merits of his underlying claims. See ACLU of New Jersey v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1477 n.3 (3d Cir. 1996) (citing CIBA-GEIGY Corp. v. Bolar Pharmaceutical Co., 747 F.2d 844, 850 (3d Cir. 1984)). The other requirements for a permanent injunction are the same as those for a preliminary injunction. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987). Therefore, a court must also consider: the extent of irreparable harm to the plaintiff absent injunctive relief; the extent of irreparable harm to the defendant from injunctive relief; and the public interest. See S&R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992) (setting forth standards for preliminary injunction).

All four factors described above favor the issuance of permanent injunctive relief in the form of a stay of deportation. First, Petitioner has prevailed on the merits. Second, notwithstanding Petitioner's success on the merits, if the court does not issue a stay of deportation, Respondent INS could deport Petitioner before reopening his case and ruling on the merits of his application for INA § 212(c) relief.<sup>23</sup> Should that occur, and if Petitioner later prevails on his § 212(c) application or

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<sup>23</sup> Respondent INS apparently intends to deport Petitioner soon, as evidenced by its instruction to Petitioner that he be "completely ready for deportation" as of December 1, 1997.

in exclusion proceedings, then Petitioner will have unnecessarily suffered the severe harm associated with deportation, for which there is no adequate remedy at law.

Third, issuing a stay of deportation will not irreparably harm Respondents. The court recognizes that "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature," and that "[t]he government's interest in efficient administration of immigration laws . . . is weighty." Landon v. Plasencia, 459 U.S. 21, 34 (1982). The court cannot conclude, however, that issuing a stay of deportation would do such violence to the efficient administration of immigration laws as to cause Respondents harm, let alone irreparable harm. One could argue that by potentially preventing the unnecessary deportation of Petitioner, a stay of deportation actually furthers the efficient administration of immigration laws. In any event, if Petitioner's application for § 212(c) relief is unsuccessful, Respondents can still deport him.

Finally, the public interest favors issuing a stay of deportation. As described above, if Petitioner ultimately secures § 212(c) relief, then the stay will have prevented his unnecessary deportation. If the Petitioner ultimately fails to secure § 212(c) relief, then the stay will have merely delayed his deportation. The court finds that under such circumstances,

the public's interest in deporting certain aliens at the earliest opportunity must yield to the public's greater interest in taking enough time to ensure that the harsh consequences of deportation are not visited upon the undeserving.

The court therefore issues a stay of deportation, permanently enjoining Respondents from deporting Petitioner, if at all,<sup>24</sup> until after: (1) Respondents reopen Petitioner's case; (2) Respondents consider and rule on the merits of Petitioner's application for INA § 212(c) relief in accordance with the court's memorandum in this case; and (3) the administrative and judicial appellate process with respect to Respondents' ruling is exhausted.

### **III. CONCLUSION**

Ours is a nation of immigrants. The strength and uniqueness of this country depend in large part on the steady influx of strangers who bring with them different outlooks, a willingness to work, and new ideas. Accordingly, the decision to remove certain groups from our midst, or to close our doors to them, must not be hastily made or summarily implemented.

Here, for the reasons described above, the court finds that jurisdiction is available under 28 U.S.C. § 2241, and that the

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<sup>24</sup> If Petitioner ultimately secures § 212(c) relief, Respondents shall be permanently enjoined from deporting Petitioner on the basis of his 1993 conviction for marijuana possession.

facts of this case warrant the exercise of such jurisdiction. The court also finds that Congress intended AEDPA § 440(d) to apply prospectively, and that § 440(d) therefore does not apply to conduct predating the AEDPA's enactment. The court directs Respondents to reopen Petitioner's case, and consider and rule on the merits of Petitioner's application for INA § 212(c) relief. The court also enjoins Respondents from deporting Petitioner, if at all, until after the administrative and judicial appellate process with regard to Respondents' ruling is exhausted.

An appropriate order follows, amending the court's order of December 8, 1997, in accordance with the court's memorandum.

BY THE COURT:

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Edward N. Cahn, Chief Judge