

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

<b>SHAHERYAR SALIM,</b>	:	
<b>Petitioner;</b>	:	<b>CIVIL ACTION NO.</b>
	:	
	:	
v.	:	
	:	
<b>JANET RENO, UNITED STATES</b>	:	
<b>ATTORNEY GENERAL, et al.,</b>	:	<b>2000-CV-4603</b>
<b>Respondents.</b>	:	

**MEMORANDUM AND ORDER**

**SCHILLER, J.**

**January 16, 2000**

Before this court is Shaheryar Salim’s Petition for Habeas Corpus. I deny his petition because I conclude that: (1) Mr. Salim’s plea to first degree arson is an aggravated felony for the purposes of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.* (1999); (2) his guilty but mentally ill judgment (“GBMI”) is a conviction under the INA; (3) a discretionary waiver is not available to Mr. Salim because deportation proceedings against him began after Congress revoked the waiver for aggravated felons; (4) the lack of a discretionary waiver does not violate the due process clause; and (5) the provision revoking the waiver accords with the equal protection component of the Fifth Amendment.

**I. Factual and Procedural History**

Mr. Salim is a native of Pakistan who entered the United States in 1987 as a lawful permanent resident. He lived most of his life in the U.S. with his family. However, he remains a

Pakistani citizen.

In 1994, Mr. Salim was convicted of two theft offenses<sup>1</sup> in Delaware. On August 15, 1994, Mr. Salim pled guilty and was found “guilty but mentally ill” of first degree arson, DEL. CODE ANN. tit. 11, § 803 (1995) in Delaware Superior Court. The court sentenced him to five years in the custody of the Delaware Department of Corrections. A portion of his sentence was suspended, and he was entrusted to Delaware State Hospital pursuant to Delaware’s provisions for those found guilty but mentally ill. See DEL. CODE ANN. tit. 11, § 408 (1995). The court later ordered that he be released from the hospital and confined to his home subject to a mental health treatment plan. His probation was later revoked.<sup>2</sup>

On January 31, 1997, the Immigration and Naturalization Service (“INS”) issued an “Order to Show Cause” (OSC) to initiate deportation proceedings against Mr. Salim. Under the INA, Mr. Salim could be removed for either the commission of multiple crimes involving moral turpitude (“CIMTs”) or for committing an aggravated felony. The OSC listed the two theft offenses and arson as CIMTs, rendering Mr. Salim deportable under 8 U.S.C. § 1227(a)(2)(ii) (1999) (establishing deportability of aliens who commit two or more crimes involving moral turpitude). Acting pursuant to a recent amendment to the INA, the INS filed a Notice to Appear (“NTA”) on April 22, 1997, and changed the deportation action to one for ‘removal.’ The INS amended its charge on July 7, 1998 and categorized the arson conviction as an ‘aggravated

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<sup>1</sup>Mr. Salim was convicted of shoplifting, DEL. CODE ANN. tit. 11, § 840 (1995), on May 7, 1994, and of petit theft, criminal mischief, and conspiracy in violation of NEWARK, DEL., CODE ch. 22 §§ 0043, 0041, 0013, respectively, on December 28, 1994.

<sup>2</sup>Counsel for the government informs the court that Mr. Salim’s probation was revoked on June 20, 2000.

felony’ as well as a CIMT. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (1999) (rendering aliens removable for committing an aggravated felony).

An immigration judge held a hearing and found Mr. Salim deportable as both a multiple CIMT offender and as an aggravated felon. Because he was an aggravated felon, the immigration judge also found him ineligible for a discretionary waiver (which was later repealed by Congress). *See* 8 U.S.C. § 1182(c) (repealed) (affording discretionary relief from removal to lawful long term resident aliens). The Board of Immigration Appeals (“BIA”) affirmed, and issued a final order of removal on August 7, 2000. In its opinion, the BIA noted that Mr. Salim had chosen not to contest the judge’s finding that he had committed multiple CIMTs.

Mr. Salim then filed the instant habeas corpus petition. Given the gravamen of Mr. Salim’s arguments and the great harm he would suffer if he were removed to Pakistan, I issued a stay pending the outcome of these proceedings.

## **II. Legal Analysis**

Because the deportation order is based on a conviction for an aggravated felony, this court has no jurisdiction to directly review the BIA’s conclusions. *See* 8 U.S.C. § 1252(a)(2)(C); *Liang v. INS*, 206 F.3d 308, 310 (3d Cir. 2000); *Morel v. INS*, 144 F.3d 248, 250-51 (3d Cir. 1998). This court does, however, possess habeas corpus jurisdiction to review statutory and constitutional challenges to the deportation order which is predicated on Mr. Salim’s conviction for an aggravated felony. *See Steele v. Blackman*, No. 00-3116, 2001 U.S. App. LEXIS 9, at \*5-6 (3d Cir. Jan. 2, 2001); *DeSousa v. Reno*, 190 F.3d 175, 180-83 (3d Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 235 (3d Cir. 1999).

Mr. Salim advances five ways in which the immigration judge and the BIA ran afoul of

statutory and constitutional law. First, he contests the BIA's conclusion that arson is an aggravated felony. Second, he posits that his guilty but mentally ill conviction ("GBMI") does not constitute a conviction under the INA. Alternatively, he argues the rehabilitative sentence he received is not 'imprisonment' or a 'sentence.' Third, he insists that, despite the Third Circuit's holding in *DeSousa*, 190 F.3d at 185-87, aliens such as Mr. Salim have a right to a hearing under 8 U.S.C. § 1182(c) for discretionary relief. Fourth, he claims that stripping Mr. Salim of the right to a hearing would violate due process. Finally, he contends that disparate treatment of 'excludable' and 'removable' aliens is invalid on equal protection grounds. I will address each contention in turn.

**A. Arson is an aggravated felony for the purposes of the INA**

Based on his arson conviction, Mr. Salim is subject to removal as an aggravated felon. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (1999). Aggravated felonies include "crime[s] of violence (as defined by section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(f) (1999). A crime of violence is defined by 18 U.S.C. § 16 (2000) as either:

- (a) an offense that has as an element the use, attempted use, or threatened use of *physical force against the person or property of another*, or
- (b) any other offense that is a felony and that, by its nature, involves *a substantial risk that physical force against the person or property of another* may be used in the course of committing the offense.

8 U.S.C. § 1101(a)(43)(F) (1999) (emphasis added).

Plaintiff contends that arson, as defined by Delaware statute,<sup>3</sup> does not involve physical

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<sup>3</sup>Delaware's first degree arson statute reads:

A person is guilty of arson in the first degree when the person intentionally damages a building by starting a fire or causing an explosion and when:

force against the person or property of another because one may be convicted for setting one's own property aflame. Further, he argues that the risk posed by the fire should not be traced to the arsonist because the *actus reus* (wrongful act) consists of nothing more than striking a match.

I disagree. The arson statute requires at least a "reasonable possibility" that a person is imperiled. Furthermore, common sense dictates that arson is a crime of violence. It matters little whether the property set ablaze belongs to the arsonist or another. Fires spread,<sup>4</sup> endangering not only the arsonist's direct target but also nearby persons and property. Also at risk are local firefighters and emergency workers whom the community calls to service. Courts have unanimously construed arson as a crime of violence. *See United States v. Mitchell*, 23 F.3d 1, 2 n.3 (1st Cir. 1994) (finding arson is crime of violence within meaning of Bail Reform Act); *United States v. Marzullo*, 780 F. Supp. 658, 663 (W.D. Mo. 1991) (same); *United States v. Shaker*, 665 F. Supp. 698, 702 (N.D. Ind. 1987) (same); *In re Palacios-Pinera*, Int. Dec. 3373,

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- (1) The person knows that another person not an accomplice is present in the building at the time; or
  - (2) The person knows of circumstances which render the presence of another person not an accomplice therein a reasonable possibility.

Arson in the first degree is a class C felony.

DEL. CODE ANN. tit. 11, § 803 (1995).

<sup>4</sup>As Emily Dickinson couched it:

You cannot put a Fire out —  
A Thing that can ignite  
Can go, itself, without a Fan —  
Upon the slowest Night.

THE COMPLETE POEMS OF EMILY DICKINSON 259 (Thomas H. Johnson, ed. 1961). Her sentiment is shared by the bard:

A little fire is quickly trodden out,  
Which, being suffer'd, rivers cannot quench.

WILLIAM SHAKESPEARE, THE THIRD PART OF KING HENRY THE SIXTH act 4, sc. 8.

1998 WL 911545 (B.I.A. 1999) (finding arson is crime of violence under INA). Thus, Mr. Salim's first argument is unavailing.

**B. Mr. Salim has been convicted and sentenced**

**1. Guilty but mentally ill is a conviction for immigration purposes**

I also find no merit in Mr. Salim's argument that a GBMI judgment is not a conviction for the purposes of the INA. The issue appears to be one of first impression. However, a review of the statutory history of the INA shows that Congress meant to define 'conviction' broadly enough to encompass a GBMI judgment.

Congress first set out a statutory definition of 'conviction' as part of a series of amendments to the INA known as the Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-629 ("IIRIRA"):

(A) The term "conviction" means, with respect to an alien, *a formal judgment of guilt* of the alien entered by a court or, if adjudication of guilt has been withheld, where--

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

IIRIRA § 322(a)(1)(48)(A) (codified at 8 U.S.C. § 1101(a)(48)) (emphasis added).<sup>5</sup> The IIRIRA conference report explains Congress added the new section because:

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<sup>5</sup>This provision applies to Mr. Salim's 1995 arson conviction because Congress declared "[t]he amendments made by [new subsection (a)(48)] shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act." IIRIRA § 322(c), Pub. L. No. 104-208, 110 Stat. 3009-629, *reprinted in* 8 U.S.C.S. § 1101 (note).

there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered “convicted” have escaped the immigration consequences normally attendant upon a conviction.

H.R. CONF. REP. No. 104-828, at 224 (1996). Thus, Congress meant to *broaden* the definition of conviction to any adjudication of guilt despite any amelioration of the sentence. *See generally, Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (discussing history of definition of conviction under INA).

Under Delaware law, Mr. Salim has been formally found guilty. A GBMI verdict or plea establishes that a defendant factually committed the offense with which he or she is charged. *See Sanders v. State*, 585 A.2d 117, 124 (Del. 1990). The court may substitute a judgment of GBMI for a judgment of guilt only if the fact finder further concludes that:

at the time of the conduct charged, defendant suffered from a psychiatric disorder which substantially disturbed such person’s thinking, feeling, or behavior and/or that such psychiatric disorder left such a person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable.

DEL. CODE ANN. tit. 11, § 401(b) (1995). GBMI pleas and verdicts are appropriate where the defendant could appreciate the wrongfulness of his actions but the defendant’s willpower to resist criminal conduct is decreased by mental illness. *See Collingwood v. State* 594 A.2d 502, 506 n.6 (Del. 1991).<sup>6</sup> Where a court renders a GBMI judgment, “the person *so convicted* is sentenced

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<sup>6</sup>GBMI stands in contrast to an acquittal based on insanity, where a defendant is so overwhelmed by mental illness that he or she cannot appreciate the wrongfulness of his or her actions. In such cases, the offender is hospitalized until he or she can safely reenter society. For those found insane, the court does not mete out a sentence; rather the offender is held only as long as the mental illness persists. *See Collingwood*, 594 A.2d at 506, n.6; *see also Sanders*, 585 A.2d at 124-34 (detailing distinction between findings of GBMI and not guilty by reason of insanity).

under the criminal law.” See *Daniels v. State*, 538 A.2d 1104, 1109 (Del. 1988) (quoting H.R. 567, 131st Del. Gen. Assembly, at 4 (Del. 1982)) (emphasis added). A defendant found GBMI may receive the same sentence as any other defendant. See DEL. CODE. ANN. tit. 11, § 408(b) (1995); *Collingwood*, 594 A.2d at 506, n.4; *Sanders*, 585 A.2d at 128.

The law recognizes that those found guilty but mentally ill require both punishment and treatment. See *Sanders*, 585 A.2d at 126. Accordingly, a GBMI offender may be hospitalized or incarcerated, depending on which venue is in the offender’s best interest. See *State v. Fotakos*, 599 A.2d 753, 756 (Del. Super. Ct. 1991). Although a GBMI judgment usually provides rehabilitation to the offender, it remains a “conviction” and a “formal adjudication of guilt” for the purposes of the INA. See 8 U.S.C. § 1101(a)(48) (1999).

**2. The hospitalization of Mr. Salim was a sentence as defined by the INA**

Mr. Salim also argues that the mandatory hospitalization imposed upon him due to his GBMI conviction does not qualify as a “sentence” or a “term of imprisonment” under the INA. See 8 U.S.C. § 1101(a)(43)(f) (1999). He relies on *Holzapeel v. Wyrsh*, 259 F.2d 890 (3d Cir. 1958) for the proposition that penal statutes which provide for rehabilitation do not provide for ‘sentences’ or ‘imprisonment’ within the meaning of the INA. See *id.* at 893. However, the INA section which the Third Circuit interpreted in *Holzapeel* has been superseded by the IIRIRA:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

8 U.S.C. § 1101(a)(48)(B) (1999). The INA, as amended by IIRIRA, looks to the period of incarceration ordered by the court regardless of any suspension of the sentence and other

mechanisms which ameliorate the effects of a conviction. *See United States v. Graham*, 169 F.3d 787 (3d Cir. 1999) (suspension of sentence); H.R. CONF. REP. NO. 104-828, at 224 (amelioration of effects of conviction). *See generally, Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999) (discussing history of definition of conviction under INA).

It is clear that Mr. Salim has been sentenced. The sentencing judge ordered him confined to Delaware State Hospital to undergo treatment. As with any GBMI offender, the Delaware Department of Corrections had primary custody over him and retained exclusive jurisdiction over security matters. *See DEL. CODE. ANN. tit. 11, § 408(b)* (1995); *Sanders*, 585 A.2d at 126. When he no longer required treatment while a portion of his five year sentence was outstanding, he could have been remanded to the Department of Corrections. *See DEL. CODE. ANN. tit. 11, § 408(c)* (1995). In short, Mr. Salim was sentenced and imprisoned within the meaning of the INA.

**C. The 8 U.S.C. 1182(c) waiver is no longer available to aliens in removal proceedings initiated after April 24, 1996**

Mr. Salim asks the court to revisit the Third Circuit's decision in *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999), and declare him eligible for a waiver of deportation. For the reasons discussed below, I have no choice but to decline the invitation.

Originally, 8 U.S.C. § 1182(c) allowed the Attorney General, at her discretion, to issue waivers to legal aliens who had traveled abroad and sought to reenter the United States but were "excludable" because of their prior convictions. *See* 8 U.S.C. 1182(c) (repealed). The Third Circuit extended the waiver to deportable aliens. *See DeSousa*, 190 F.3d at 178-79; *Katsis v. INS* 997 F.2d 1067, 1070 (3d Cir. 1993).

However, Congress pared down the number of aliens eligible for a section 1182 waiver. As part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (“AEDPA”), Congress abolished the waiver for deportable aliens who had been convicted of an aggravated felony or multiple CIMTs. AEDPA § 440(d).<sup>7</sup> In *DeSousa*, the Third Circuit decided that AEDPA § 440 applied to aliens placed in removal proceedings after the effective date of the act on April 24, 1996. *See DeSousa*, 190 F.3d at 185-86.

In the instant case, Mr. Salim’s deportation proceedings began when the INS issued an OSC on January 31, 1997. As of that date, AEDPA § 440(d) was already in effect for more than nine months. Because Mr. Salim was convicted of an aggravated felony, he is ineligible for a waiver under 8 U.S.C. § 1182. *See* AEDPA § 440(d); *DeSousa*, 190 F.3d at 182-83, 185-86.

Mr. Salim insists that *DeSousa* is either not binding precedent or wrongly decided. However, the Third Circuit recently reiterated its position in *DeSousa*, noted the parallel Congressional concerns behind AEDPA § 440(d) and IIRIRA § 304(b), and held the “availability of relief under section 1182(c) is categorically foreclosed.” *See Steele v. Blackman*, 2001 U.S. App. LEXIS 9, at \*11 (3d Cir. Jan. 2, 2001). District courts that have considered the issue have also found AEDPA § 440(d) to apply to removal proceedings initiated after its effective date. *See Amoroso v. INS*, No. 00-1449, 2000 U.S. Dist. LEXIS 7554, at \*11-12 (E.D. Pa. May 30, 2000) (Dalzell, J.); *Lee v. Reno*, No. 00-1568, 2000 U.S. Dist. LEXIS 7957, at \*8-9 (E.D. Pa. May 17, 2000) (Robreno, J.); *Padilla-Jiminez v. Reno*, 00-696, 2000 U.S. Dist. LEXIS 2533, at

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<sup>7</sup>AEDPA § 440(d) was modified by IIRIRA section 304(b), which abolished the discretionary waiver altogether effective April 1, 1997. *See* IIRIRA § 304(b). Because the BIA based its declaration that Mr. Salim was ineligible for the waiver on AEDPA § 440, I will not address the possible effects of the IIRIRA § 304(b) on Mr. Salim’s current petition.

\*5-6 (E.D. Pa. Mar. 9, 2000) (Yohn, J.); *Thompson v. INS*, No. 99-CV-5551, 2000 U.S. Dist. LEXIS 4436, at \*6-7 (E.D. Pa. Apr. 6, 2000) (Padova, J.); *Guy v. Reno*, No.99-3589, 1999 U.S. Dist. LEXIS 13932, at \*13-14 (E.D. Pa. Sept. 2, 1999) (Buckwalter, J.).

Mr. Salim also argues that if the section 1182(c) waiver was not available to him after April 24, 1996, then he was prejudiced by INS failure to commence removal proceedings until after he was ineligible for the waiver. Even if there were prejudice, I have no jurisdiction over a matter committed to the discretion of the INS. Habeas review of removal orders is now limited to statutory or constitutional challenges. *Steele*, 2001 U.S. App. LEXIS 9, at \*5-6; *DeSousa*, 190 F.3d at 180-83. Mr. Salim has not pointed to any statute or case law requiring the INS to begin removal proceedings within a specified time after an alien's conviction for a removable offense. Thus, I have no jurisdiction to order the consideration of a waiver, even if delay by the INS resulted in the Salim's loss of eligibility for a section 1182(c) waiver. See *Alvidres-Reyes v. Reno*, 180 F.3d 199, 204-05 (5th Cir. 1999) (refusing mandamus relief to permit aliens to apply for section 1182(c) waivers where INS delayed removal proceedings); *Gray v. Reno*, 59 F. Supp.2d 188, 189-190 (D. Mass. 1999) (finding lack of habeas jurisdiction where INS began removal proceedings after effective date of AEDPA § 440(d) and alien had not yet applied for section 1182(c) waiver).

**D. The unavailability of the section 1182(c) waiver does not violate Due Process**

Mr. Salim also argues that the unavailability of a section 1182(c) waiver amounts to a denial of due process. Initially, he claims that the amendments to the section 1182(c) are impermissibly retroactive. The Third Circuit has already rejected this argument, and that is the end of the matter. See *DeSousa*, 190 F.3d 185-87.

He also argues that long term aliens have a right to have the equities in their case decided by a hearing, rather than being categorically denied a waiver on the basis of a conviction for an aggravated felony. In other words, Mr. Salim seeks to establish a right to apply for a waiver and to have a hearing on the substance of that waiver. However, one district court has already sustained the amendments to section 1182(c) against a procedural due process attack. *See Amoroso*, 2000 U.S. Dist. LEXIS 7554, at \*25-26. As that court noted, due process is provided because both an immigration judge and the BIA evaluate an alien's eligibility for a waiver. *See id.* Thus, Mr. Salim's due process challenges fail.

**E. Section 1182(c) does not violate Equal Protection**

Finally, Mr. Salim argues that 8 U.S.C. § 1182(c), as amended by AEDPA § 440(d), violates equal protection because it denies the waiver to aggravated felons who reside in the United States while it continues to allow excludable aliens who are aggravated felons to apply for the waiver. Whatever the merits of Mr. Salim's claim, his argument was rejected by the Third Circuit in *DeSousa*. *See DeSousa v. Reno*, 190 F.3d at 183-84; *Amoroso*, 2000 U.S. Dist. LEXIS 7554, at \*21-22; *Lee*, 2000 U.S. Dist. LEXIS 7957, at \*8-9.

**III. Conclusion**

I conclude that Mr. Salim's guilty but mentally ill adjudication for arson is a conviction for an aggravated felony under the Immigration and Nationality Act. As an aggravated felon, he was ineligible for an 8 U.S.C. § 1182(c) waiver as of the initiation of deportation and removal proceedings against him. Mr. Salim has not successfully attacked the removal order on either due process or equal protection grounds. Thus, Mr. Salim's petition must be denied and the final

order of removal must be sustained. An appropriate order follows.

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

<b>SHAHERYAR SALIM,</b>	:	
<b>Petitioner;</b>	:	<b>CIVIL ACTION NO.</b>
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<b>v.</b>	:	
	:	
<b>JANET RENO, UNITED STATES</b>	:	
<b>ATTORNEY GENERAL, et al.,</b>	:	<b>2000-CV-4603</b>
<b>Respondents.</b>	:	

**ORDER**

AND NOW, this    day of January, 2001, upon consideration of Mr. Salim's Petition for a Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, the Government's Response, and oral argument thereupon, it is hereby **ORDERED** that:

- (1) The Petition for Habeas Corpus is **DENIED**;
- (2) Deportation and removal proceedings **SHALL REMAIN STAYED** until the stay is lifted by the Third Circuit;
- (3) The Clerk of Court shall **CLOSE** this case.

BY THE COURT:

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Berle M. Schiller, J.