



entitlement to a hearing before an immigration judge.<sup>2</sup>

### **1. Factual Background**

Petitioner Giuseppe Romano, age 29, was born in Italy in 1972. Two years later, in 1974, he entered the United States with his mother. He remained in the U.S. without lawful status until 1988 when he became a lawful temporary resident under the amnesty program incorporated in the Immigration Reform and Control Act (IRCA) of 1986 (Pub.L. No. 99-603, 100 Stat. 3359) (codified in various sections of 8 U.S.C.). He has now lived here continuously for more than 27 years.

For a number of years before January 2002, when he was detained by INS, petitioner resided in the Philadelphia area, most recently with his U.S. citizen fiancée and their U.S. citizen child, who is less than a year old. His other immediate family members, including his parents and two siblings, are either U.S. citizens or lawful permanent residents.

INS reports that in 1989, when petitioner was sixteen, he was adjudicated delinquent. “The incident involved a traffic accident where a pedestrian was struck and killed . . .” Resp. Exh. 2. He was charged in the Bucks County Juvenile Court, with leaving the scene of an accident and was committed to a 28-day Outward Bound program and placed on indefinite probation, which was terminated in 1990.<sup>3</sup>

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<sup>2</sup> Petitioner’s argument that a lawful temporary resident should be accorded the same defenses to removal as a lawful permanent resident is rejected. Infra at 4-6.

<sup>3</sup> A letter from his probation officer states: “[H]is only criminal act was leaving the scene of the accident. He was not criminally responsible for the accident. . . . While on probation, Joseph was employed on a full-time basis and he followed all the rules and regulations of his probation to the letter. As a matter of fact, Joseph was the most cooperative client that I have ever dealt with.” Resp. exh. 2.

In November 1990, petitioner applied to INS for an adjustment of status to become a lawful permanent resident. On the application form he stated that he had never been arrested. On May 1, 1991, petitioner appeared for an interview with counsel and signed a revised application form that disclosed the prior juvenile court prosecution. INS deferred processing the application pending a review of his juvenile records. The INS case history shows that at least four interviews were scheduled and later postponed from May, 1991 to March 2, 1992.<sup>4</sup> No explanation is given why petitioner's application for adjustment of status was not acted on - or why, according to petitioner, he continued to receive annual work authorization extensions from INS until January, 2002.<sup>5</sup>

On October 26 and November 18, 1994, again in Bucks County, petitioner was arrested on drug trafficking charges. In conformity with an agreement with the prosecutor, he pleaded guilty to conspiracy, possession, and possession with intent to deliver a controlled substance (cocaine) and was sentenced to four years probation.<sup>6</sup> In 2001, petitioner attempted to renew his application for adjustment of status and the INS performed a criminal background check. On January 15, 2002, he appeared at the INS office in Philadelphia for "what he believed to be the final [i]nterview and approval for his

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<sup>4</sup> INS asserts that one interview was deferred in order to permit petitioner to repeat the English exam. However, the letter acknowledging receipt of his application states: "The application indicates that the requirements relating to minimal understanding of the history and government of the United States have been satisfied by satisfactorily pursuing a course of study recognized by the Attorney General. Please bring appropriate documentation to support this to your interview." Resp. exh. 4. INS records also include a copy of petitioner's elementary school diploma. Resp. exh.3.

<sup>5</sup> The facts set forth in this paragraph are as represented by INS and are not in dispute.

<sup>6</sup> Ostensibly, his lenient sentence was the result of his peripheral involvement and his cooperation with law enforcement authorities. Pet. brief at 2.

adjustment to permanent resident status”<sup>7</sup> and was detained; since then, he has been in custody in York County Prison. The INS subsequently served him with a “Notice of Intent to Issue a Final Administrative Removal Order” based on his conviction of the drug offense, an aggravated felony. On January 28, 2002, the Deputy Assistant District Director for Detention and Removal issued a “Final Administrative Removal Order.” INA § 238 (b), 8 U.S.C. § 1228 (b).<sup>8</sup>

On February 20, 2002, petitioner filed this habeas petition, and on February 22, 2002, an order was issued staying INS proceedings.

The petition does not deny that the drug conviction constitutes an “aggravated felony.”<sup>9</sup> Instead, petitioner contends that the expedited removal provisions were not intended to apply to lawful temporary residents and that otherwise they are unconstitutional as violations of due process of law. He requests a hearing before an immigration judge. In addition, he maintains that mandatory detention under 8 U.S.C. § 1231 (a)(2)(1999) does not pertain to him and that INS should therefore release him on bond.

## **2. Section 212 (c) relief: INS v. St. Cyr**

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<sup>7</sup> Pet. brief at 2.

<sup>8</sup> In these proceedings, an alien is entitled to notice of the charges, legal representation at no cost to the government, and a reasonable opportunity to inspect and rebut the evidence - but no relief from removal. 8 U.S.C. § 1228 (b) (4), (5) (1999) (“No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General’s discretion.”).

<sup>9</sup> Under 8 U.S.C. § 1101 (a)(43)(B)(1999), an aggravated felony includes “illicit trafficking in a controlled substance (as defined in section 802), including a drug trafficking crime (as defined in 924 (c) of Title 18).” Petitioner pleaded guilty to a charge that, in violation of 35 PA CSA 780-113 (a)(30) F, he “unlawfully and knowingly or intentionally deliver[ed] a counterfeit controlled substance and/or controlled substance classified in schedule II of the Controlled Substance, Drug, Device and Cosmetic Act, to wit, Cocaine . . .” Resp. Exh. 6. This offense is an “aggravated felony” for immigration purposes. Germier v. Holmes, 280 F.3d 297, 299 (3rd Cir. 2002).

Even if petitioner were entitled to a hearing before an immigration judge, he would not, in his present status, have an avenue of relief. INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) does not control this case, given petitioner's status of temporary resident. In that decision, the Court found that aliens in removal proceedings are eligible for a § 212 (c) waiver of deportation<sup>10</sup> if their convictions pre-dated IIRIRA's April 1, 1997 effective date and were the subject of a plea agreement. Unlike cancellation of removal under IIRIRA,<sup>11</sup> §212 (c) was available to aliens convicted of aggravated felonies who served terms of imprisonment of less than five years. Since petitioner's conviction pre-dates IIRIRA, it would not bar him from § 212 (c) relief. However, to be eligible for the waiver, the alien must also have been admitted for permanent residence. INA § 212 (c), 8 U.S.C. § 1182 (c).

Petitioner cites 8 C.F.R. § 212.3 (f)(2) for the proposition that a lawful temporary resident who has maintained a domicile in the United States for seven consecutive years

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<sup>10</sup> INA § 212 (c), 8 U.S.C. § 1182 (c), which was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 304 (b) (1996), provided:

(c) Nonapplicability of subsection (a) [regarding grounds of inadmissibility]

Aliens lawfully admitted for permanent resident[sic] who temporarily proceeded 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 without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

<sup>11</sup> Cancellation of removal for a permanent resident convicted of a crime not an aggravated felony is set forth in INA §240A, 8 U.S.C. § 1229b(a)(1999). This provision replaced INA § 212 (c).

immediately preceding his application is eligible for a § 212 (c) waiver.<sup>12</sup> However, length of residence is but one of five eligibility criteria. In the absence of any of them, “a district director or Immigration Judge *shall deny* an application. . . .” 8 C.F.R. § 212.3 (f) (emphasis added). Moreover, the first requirement is unequivocal: An application shall be denied if “[t]he alien has not been lawfully admitted for permanent residence. . . .” 8 C.F.R. § 212.3 (f)(1). While petitioner’s years as a lawful temporary resident count toward the residency requirement, lacking permanent residency status, he is explicitly ineligible for the waiver.<sup>13</sup>

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<sup>12</sup> 8 C.F.R. § 212.3 Application for the Exercise of Discretion under 212 (c):

- (f) Limitations on discretion to grant an application under section 212(c) of the Act. A district director or Immigration Judge shall deny an application for advance permission to enter under section 212(c) of the Act if:
- (1) The alien has not been lawfully admitted for permanent residence;
  - (2) The alien has not maintained lawful permanent resident status in the United States for at least seven consecutive years immediately preceding the filing of the application;
  - (3) The alien is subject to exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) of section 212(a) of the Act;
  - (4) The alien has been convicted of an aggravated felony, as defined by section 101(a)(43) of the Act, and has served a term of imprisonment of at least five years for such conviction; or
  - (5) The alien applies for relief under section 212(c) within five years of the barring act as enumerated in one or more sections of section 242B(e) (1) through (4) of the Act.

<sup>13</sup> Petitioner’s other arguments - that as a lawful temporary resident he is entitled to the same procedural rights and relief as a lawful permanent resident - are not persuasive. Many of the provisions cited by him, in contrast to section 212(c), expressly provide that temporary and permanent residents are to receive the same treatment. For example, Aguilera-Medina v. INS, 137 F.3d 1401 (9<sup>th</sup> Cir. 1998), found that lawful temporary residents, like permanent residents, can benefit from the Fleuti doctrine. That doctrine holds that an alien who travels abroad for a “brief, casual, and innocent” trip will not be deemed to have made an “entry” upon his return. Rosenberg v. Fleuti, 374 U.S. 449, 461, 83 S.Ct. 1804, 1811, 10 L.Ed.2d 1000 (1963). The temporary resident in Aguilera-Medina v. INS had been admitted through the Special Agricultural Worker (SAW) program. INA § 210 (a)(4), which established the program, provides: “During the period an alien is in lawful temporary resident status . . . the alien has the right to travel abroad . . . and shall be granted authorization to engage in employment in the United States . . . in the same manner as for aliens lawfully admitted for permanent residence.” 8 U.S.C. § 1160 (a)(4). Unlike the present case, the statute at issue in Aguilera-Medina v. INS unambiguously accorded the same travel rights to temporary and permanent residents.

Nor is petitioner’s case helped by INA §(a)(5): “Except as otherwise provided in this subsection, an alien who acquires the status of an alien lawfully admitted for temporary residence . . . is considered to be an alien lawfully admitted for permanent residence . . . other than under any provision of the immigration laws.” INA §240(a)(5), 8 U.S.C. § 1160(a)(5). This provision applies specifically to temporary residents under the SAW program. More importantly, it excludes immigration benefits from the equal treatment that temporary residents and permanent residents otherwise are to receive.

### **3. Estoppel**

The record does not demonstrate that petitioner is entitled to retroactive adjustment from temporary to permanent resident status. To succeed on the basis of estoppel, one must show (1) affirmative INS misconduct, INS v. Miranda, 459 U.S. 14, 18, 103 S.Ct. 281, 283, 74 L.Ed.2d 12 (1982); and (2) that the requested equitable relief does not contravene “a public policy established by Congress,” INS v. Panglinan, 486 U.S. 875, 882, 108 S. Ct. 2210, 2215, 100 L.Ed.2d 882 (1988). Two Courts of Appeal have held that INS delay or neglect is not sufficient. Santamaria-Ames v. INS, 104 F.3d 1127, 1133 (9<sup>th</sup> Cir. 1996); Wang v. Meese, 823 F.2d 1273, 1277 (8<sup>th</sup> Cir. 1987). St. Cyr, on the other hand, arguably answers the public policy contravention issue in the negative.

Here, there is evidence that INS seemingly procrastinated processing and ultimately did not act on petitioner’s application for adjustment of status when it should have done so, albeit some of the delay may be attributable to petitioner and the questionable accuracy of his original application. Moreover, it is correct, as petitioner contends, that there are a number of equitable considerations in his favor - his lengthy, almost lifelong residence, extensive family ties, the non-felony nature of his sentence, and the evidence of his purported rehabilitation. However, unless INS can and should be required to treat him as a lawful permanent resident, he has no basis to receive a discretionary hearing before an immigration judge.<sup>14</sup> Because INS has not satisfactorily accounted for its prolonged failure to act on petitioner’s request for status adjustment - and given the harshness of the consequences - a hearing will be held to determine whether what occurred amounts to more

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<sup>14</sup> St. Cyr’s rationale is that a lawful permanent resident who pleaded guilty pursuant to a plea agreement and who was otherwise qualified for § 212 (c) relief should not be penalized by the subsequent enactment of IIRIRA.

than mere “neglect” or “delay” and could be deemed to be “affirmative misconduct” or some other justification for an estoppel.

#### **4. Detention**

Petitioner urges that he is not subject to mandatory detention because the expedited removal proceedings are improper in his case and he is eligible for relief.<sup>15</sup> Given the undetermined merit of his underlying premise, that argument cannot succeed at this stage.<sup>16</sup>

#### **5. Due Process**

A decision on petitioner’s due process claim will be deferred until a hearing is held on the status of his residency.

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Edmund V. Ludwig, J.

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<sup>15</sup> 8 U.S.C. § 1231 (a)(2) states: “During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found . . . deportable under section 237 (a)(2) . . .”

<sup>16</sup> Petitioner also argues that he cannot be deported until his adjustment of status application is adjudicated. INA § 245A (e)(2), 8 U.S.C. § 1255a (e)(2), states that “in the case of an alien who presents a prima facie application for adjustment of status under subsection (1) of this section during the application period, and until a final determination on the application has been made in accordance with this section, the alien -- (A) may not be deported.” However, this section refers to adjustment to *temporary* resident status not to *permanent* resident status. 8 U.S.C. § 1255a(a). Inasmuch as a final determination has already been made on petitioner’s application for temporary residence, this provision does not authorize a further stay of his removal.



