Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3, 212, and 240

[EOIR No. 130I; AG Order No. 2607–2002]

RIN 1125–AA33

Executive Office for Immigration Review; Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the regulations of the Executive Office for Immigration Review (EOIR) and the Immigration and Naturalization Service (INS) by establishing procedures for lawful permanent residents (LPRs) with certain criminal convictions arising from plea agreements reached prior to a verdict at trial to apply for relief from deportation or removal pursuant to former section 212(c) of the Immigration and Nationality Act. It also sets forth procedures and deadlines for filing special motions to seek such relief before an Immigration Judge or the Board of Immigration Appeals for LPRs currently in proceedings or under final orders of deportation or removal.

DATES: Written comments must be submitted on or before October 15, 2002.

ADDRESSES: Please submit written comments to Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041. E-mail comments may be submitted to the following e-mail address: <*212crule@usdoj.gov*>.

FOR FURTHER INFORMATION CONTACT: *For matters relating to the Executive Office for Immigration Review:* Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041, telephone (703) 305–0470 (not a toll-free call). *For matters relating to the Immigration and Naturalization Service:* Daniel S. Brown, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street, NW., Room 6100, Washington, DC. 20536, telephone (202) 514–2895 (not a toll-free call).

SUPPLEMENTARY INFORMATION: This proposed rule would permit certain lawful permanent residents (LPRs) who have pleaded guilty or nolo contendere to crimes before April 1, 1997, to seek relief, pursuant to former section 212(c) of the Immigration and Nationality Act (INA or Act), from being deported or removed from the United States on account of those pleas. Under the proposed rule, eligible LPRs currently in immigration proceedings or former LPRs under a final order of deportation or removal could file a request to apply for relief under former section 212(c) of the Act, as in effect on the date of their plea, regardless of the date the plea was entered by the court.

Until the recent Supreme Court decision in *INS* v. *St. Cyr,* 533 U.S. 289 (2001), the Department had relied upon the date on which the alien was placed into deportation or removal proceedings to determine whether or not an LPR was eligible to apply for section 212(c) relief, not the date of the alien's conviction. This proposed rule would allow aliens with prior criminal pleas to apply for waivers under former section 212(c), under the law as it existed at the time of their pleas, in light of the Court's interpretation of the law in *St. Cyr.* The Department would continue to treat convictions entered as the result of a trial as it had prior to *St. Cyr.* Former LPRs who are under a final order of deportation or removal would also be eligible to apply for relief under former section 212(c) of the INA as it existed at the time of their pleas. This proposed rule is applicable only to certain eligible aliens who were convicted by pleas made prior to April 1, 1997.

What Is the Historical Background of This Rule?

Former section 212(c) of the INA. Since 1996, section 212(c) of the INA has undergone two major changes, the first one made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214, and the second by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3009–546. The first amendment narrowed the availability of the waiver by making LPRs with certain kinds of criminal convictions ineligible. The second amendment eliminated the section 212(c) waiver entirely for LPRs placed into removal proceedings on or after April 1, 1997, and substituted a somewhat similar form of relief known as cancellation of removal. See INA § 240A(a), 8 U.S.C. 1229b.

These amendments of section 212(c) generated extensive litigation, as discussed below, culminating in the Supreme Court's recent decision in *St. Cyr.* This rule consolidates the Department's interpretation of the availability of the section 212(c) waiver for LPRs in light of this litigation.

Before the comprehensive revision of the INA by IIRIRA and AEDPA, section 212(c) provided that LPRs who temporarily proceeded abroad voluntarily and not under an order of deportation, and who were returning to a lawful unrelinquished domicile in the United States of seven consecutive years, could be admitted to the United States in the discretion of the Attorney General. 8 U.S.C. 1182(c) (1994). This form of relief was discretionary, but, if granted, allowed the LPR to remain in the United States notwithstanding the prior conviction. Judicial interpretation of former section 212(c) permitted the waiver of certain grounds of deportability as well as certain grounds of excludability (now known as inadmissibility).

Litigation on eligibility for section 212(c) relief. In AEDPA, Congress significantly restricted the availability of discretionary relief from deportation under section 212(c). Section 440(d) of AEDPA made aliens ineligible for relief under section 212(c) if they were deportable because of convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, or more than one crime of moral turpitude.

On February 21, 1997, former Attorney General Janet Reno concluded that section 440(d) applied to (and thereby rendered ineligible for section 212(c) relief) all aliens who had committed one of the specified offenses and who had not finally been granted section 212(c) relief before the date

AEDPA was enacted, including those who were already in deportation proceedings or who had already applied for section 212(c) relief at the time of the AEDPA's enactment. *See Matter of Soriano,* 21 I. & N. Dec. 516 (BIA 1996, A.G. 1997).

The *Soriano* issue gave rise to widespread litigation in almost every circuit on several time and reliance-related eligibility issues. These issues included the possible relevance of various other dates in determining whether or not a particular alien was eligible to apply for section 212(c) relief: the date the alien was placed into proceedings; the date the alien applied for section 212(c) relief; the date any relevant crimes were committed; and the date any relevant pleas or convictions were entered. *See* 66 FR 6436, 6437–38 (Jan. 22, 2001) for a more detailed summary of this litigation.

Most of the courts of appeals held that, despite the changes made by AEDPA, aliens who had filed applications for section 212(c) relief before the enactment of AEDPA were still eligible for that relief. One court further held that AEDPA did not apply to aliens who had been placed into deportation proceedings before the enactment of AEDPA, even if they did not actually request section 212(c) relief until after AEDPA was enacted.

With respect to aliens who were first put into proceedings after the enactment of AEDPA, several courts held that AEDPA section 440(d) foreclosed section 212(c) relief for those aliens, even if their criminal convictions occurred before the enactment of AEDPA. Some other courts, however, had concluded that AEDPA should not be interpreted to foreclose section 212(c) relief, at least with respect to aliens who had pleaded guilty and were convicted of crimes prior to AEDPA in reliance on the existing immigration laws—at a time when those convictions did not disqualify the alien from eligibility to apply for section 212(c) relief.

The Department's Soriano regulation. In response to this extensive litigation, the Department issued a rule creating a uniform procedure for applying the law, as amended by AEDPA, with respect to aliens who had been placed into proceedings before that law was enacted (April 24, 1996). *See* 66 FR 6436 (Jan. 22, 2001) (codified at 8 CFR 3.44) (the Soriano rule). That rule allowed all eligible LPRs who had been placed into proceedings prior to April 24, 1996, to apply for relief under section 212(c), under the pre-AEDPA standards, and also provided a 180-day period for aliens with final orders of deportation who were adversely affected by the Attorney General's ruling in Soriano to move to reopen their proceedings. That 180-day period for motions to reopen ended on July 23, 2001.

The Supreme Court's Decision. On June 25, 2001, the Supreme Court issued its decision in *INS* v. *St. Cyr,* 533 U.S. 289 (2001), which held that ''§ 212(c) relief remains available for aliens * * * whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.'' 533 U.S. at 326. As a matter of statutory construction, based on concerns about the retroactive application of IIRIRA to aliens who may have negotiated plea agreements in reliance on the continued availability of section 212(c) relief, the Court concluded that Congress had not made clear in IIRIRA an intent to deny such aliens the opportunity to seek such relief once they were placed into proceedings. Thus, the Court looked to the law as of the date of the alien's plea agreement to determine whether the alien was eligible to apply for section 212(c) relief, rather than the date the deportation or removal proceedings commenced. Although the Supreme Court addressed only the IIRIRA amendment and not the AEDPA limitation on section 212(c) relief, the reasoning of *St. Cyr* applies equally to section 440(d) of AEDPA. Indeed, the Supreme Court's above-quoted statement of the holding is best read to encompass section 440(d) of AEDPA. *See, e.g., Attwood* v. *Ashcroft,* 260 F.3d 1, 3 (1st Cir. 2001) (holding that, in light of the Supreme Court's decision in *St. Cyr,* an alien who pleaded guilty prior to the date of AEDPA's enactment and was placed into proceedings before IIRIRA is eligible to apply for section 212(c) relief).

Why Is the Department Issuing This Proposed Rule?

In light of the recent Supreme Court decision in *St. Cyr,* this proposed rule would provide procedures for eligible aliens to apply for section 212(c) relief before an Immigration Judge or the Board of Immigration Appeals. Because this proposed rule would revise the Department's interpretation of the availability of section 212(c) relief in light of *St. Cyr,* the Department also will modify the provisions of § 3.44 as adopted in January 2001 (the Soriano rule) to provide that this rule will govern the adjudication of relief applications filed by aliens who fall within the ambit of the *St. Cyr* decision. This proposed rule provides an important opportunity for LPRs covered by the Court's decision to apply for relief from deportation or removal or otherwise achieve finality in their immigration matters.

Scope of section 212(c) relief. This proposed rule is intended to further eliminate the disparity among the courts of appeals on the variety of issues relating to section 212(c) relief. Accordingly, this proposed rule would codify the Supreme Court's holding.

Conforming changes to the existing regulations. Because IIRIRA had repealed section 212(c) (which applied to exclusion and deportation proceedings) and substituted different forms of relief for purposes of removal proceedings commenced on or after April 1, 1997, this proposed rule would also make several necessary technical conforming changes in §§ 212.3 and 240.1 of the existing regulations to take account of the circumstances in which aliens would be able to apply for section 212(c) relief with respect to pleas made prior to April 1, 1997, even if they were placed into removal proceedings on or after that date.

The Department notes that former section 242B(e) of the Act, 8 U.S.C. 1252b (1994), barred certain aliens who were ordered deported in absentia from receiving specific forms of discretionary relief for a period of 5 years after the barring act. This statutory provision was repealed by section 308(b)(6) of IIRIRA. The regulatory provision implementing former section 242B(e) is found at 8 CFR 212.3(f)(5). Because section 242B(e) of the Act was repealed by the IIRIRA, § 212.3(f)(5) will be striken from the regulation.

Who Is Eligible To Apply for Section 212(c) Relief Pursuant to This Proposed Rule?

An applicant must, at a minimum, meet the following criteria to be considered for a waiver under section 212(c):

- The alien is now an LPR (or was an LPR prior to receiving a final order of deportation or removal);
- The alien is returning to a lawful, unrelinquished domicile of seven consecutive years (or is a former LPR who had established a lawful, unrelinquished domicile of seven consecutive years prior to a final order of deportation or removal);
- The alien is admissible in the discretion of the Attorney General without regard to section 212(a) (other than paragraph (3) (terrorism and security grounds) or paragraph (9)(C) (unlawfully present after previous immigration violations);
- The alien is deportable or removable on a ground that has a

corresponding ground of exclusion or inadmissibility; and

• The alien would have not have been barred from applying for section 212(c) relief with respect to his or her pleas based on the law as it existed at time of the pleas, unless the alien has been charged and found to be removable based on a crime that is an aggravated felony as defined in section 321(a) of IIRIRA, regardless of the date the alien's plea was made.

This proposed rule would not apply to aliens who have departed, and are currently outside the United States; aliens who were subject to a final order of deportation or removal and who have illegally returned to this country; and aliens who are present in the United States without having been admitted or paroled.

Aliens who have been deported or have departed under an order of deportation or removal will not be eligible for relief under the regulation. This policy is consistent with the Soriano rule. *See* 66 FR 6436 (Jan. 22, 2001) (codified at 8 CFR 3.44). As a general rule, aliens who have been deported or departed, and for whom the period of time for filing a petition for review of their removal orders in the court of appeals has closed (or if a petition has been filed, it has been denied), may not challenge their prior immigration proceedings. *See* 8 U.S.C. 1231(a)(5); 8 CFR 3.2(d).

The Department's decision to draw a line between those aliens who are in the United States and those aliens who have been deported is reasonable and consistent with the plenary authority of the political branches of the government in the immigration area. *See Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 80–82 (1976). Aliens whose final orders of removal or deportation have been executed, and for whom the period of time for filing a petition for review of their removal orders in the court of appeals has closed (or if a petition has been filed, it has been denied), are not situated similarly to those aliens who are present in the United States with removal orders because the deportation process for the former class of aliens has been completed. They are barred from reentering the United States for a period of at least five years (except with the permission of the Attorney General), and if they do reenter illegally, the Service may re-execute their prior order. *See* 8 U.S.C. 1231(a)(5). Thus, these aliens stand in a different position from an alien who is present in the United States. *Cf. Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (''It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders''). Moreover, refusing to allow aliens who have been deported from the United States to obtain relief under the regulation is consistent with Congress's intent as demonstrated by the language in former section 212(c), which makes relief available to aliens ''lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and *not under an order of deportation*. * * *'' 8 U.S.C. 1182(c) (1994) (emphasis added).

Furthermore, the distinction is reasonable because it is logically related to the orderly administration of this country's immigration laws. Allowing aliens who have been deported to seek relief under the regulation would create certain verification problems relating to the applicant's identity and criminal history. Aliens who were denied 212(c) relief pursuant to AEPDA, and who were deported years ago, may have been convicted of crimes abroad that would disqualify them from relief under the regulation, but which would be difficult, if not impossible, for the INS to discover and verify. Restricting relief to aliens in the United States eliminates this burden. Finally, the Department's distinction is reasonable and fair because aliens who have been deported had a sufficient opportunity to challenge the denial of their applications for 212(c) relief in administrative and judicial proceedings.

Can All Convictions Entered Prior to April 1, 1997 Be Waived Under This Proposed Rule?

Under this rule, aliens whose pleas were made before April 24, 1996, regardless of when they were entered by the court, will be eligible to apply for section 212(c) relief without regard to the amendments made by AEDPA. Thus, an LPR who has not served an aggregate term of at least five years for aggravated felonies may apply for section 212(c) relief, if otherwise eligible, with respect to any criminal convictions arising from a plea made before April 24, 1996. *See* former INA § 212(c), 8 U.S.C. 1182(c) (1994). Nothing in this proposed rule would affect the applicability of the bar to 212(c) relief for aliens who have served sentences of five years or more for aggravated felonies, regardless of whether the conviction occurred before that bar's enactment in 1990. The Supreme Court in *St. Cyr* addressed only the bars enacted by AEDPA and IIRIRA, not the 1990 amendments. As to the latter, the courts have uniformly held that the bar for aggravated felons imprisoned for five years or more applies without regard to the date of the conviction. *See, e.g., Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3rd Cir. 1996); *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *Asencio* v. *INS*, 37 F.3d 614, 617 (11th Cir. 1994); *Campos* v. *INS*, 16 F.3d 118, 122 (6th Cir. 1994); *De Osorio* v. *INS*, 10 F.3d 1034, 1041 (4th Cir. 1993); *Buitrago-Cuesta* v. *INS*, 7 F.3d 291, 294 (2nd Cir. 1993); *Barreiro* v. *INS*, 989 F.2d 62, 64 (1st Cir. 1993); Ignacio v. INS, 955 F.2d 295, 299 (5th Cir. 1992).

Section 440(d) of AEDPA amended section 212(c) of the INA to provide that section 212(c) ''shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by [former] section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by [former] section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by [former] section 241(a)(2)(A)(i).'' AEDPA § 440(d), as amended by IIRIRA § 306(d).

The effect of section 440(d) of AEDPA was to render an alien ineligible for relief under section 212(c) if he or she was deportable because of convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, and multiple crimes of moral turpitude. This narrower version of section 212(c) relief is available to aliens who made pleas on or after April 24, 1996, and before April 1, 1997, regardless of when the plea was entered by the court. Section 212(c) relief is unavailable to aliens who made pleas on or after April 1, 1997, the effective date of IIRIRA, which eliminated this form of relief.

Which Definition of an ''Aggravated Felony'' Should Be Used To Determine Eligibility for Section 212(c) Relief?

The definition of an aggravated felony is contained in section 101(a)(43) of the Act. 8 U.S.C. 1101(a)(43). Congress has amended this definition over time, to add additional crimes to the list of aggravated felonies. Thus, some aliens have been convicted of crimes in the past that were not defined as aggravated felonies at the time of conviction, but are now among the listed crimes that are aggravated felonies under current law.

The definition of aggravated felony, as amended by IIRIRA, applies to convictions entered before, on, or after the date of enactment of IIRIRA. *See* INA § 101(a)(43), 8 U.S.C. 1101(a)(43); IIRIRA § 321(b). This definition applies to determine whether an alien is deportable on account of having

committed an aggravated felony. This definition also applies to determine the eligibility for section 212(c) relief in those cases where an alien is deportable as an aggravated felon. *See Matter of Fortiz*, 21 I. & N. Dec. 1199 (BIA 1998). Thus, if an alien pleaded guilty to a crime before the enactment of IIRIRA, and his or her crime became an aggravated felony after the enactment date of IIRIRA, the alien could be charged as an aggravated felon and be ineligible for section 212(c) relief. However, aliens who have not been charged and found deportable as aggravated felons would not be affected by section 321 of IIRIRA.

How Is 7 Years Lawful, Unrelinquished Domicile in the United States Defined in This Proposed Rule?

An eligible alien must have lived in the United States as either an LPR, or a lawful temporary resident pursuant to INA section 245A, 8 U.S.C. 1255a, or INA section 210, 8 U.S.C. 1160, for at least seven years, as defined in 8 CFR 212.3(f)(2). For purposes of this rule, an alien begins accruing time as of the date of entry or admission as either a lawful permanent resident or lawful temporary resident and the accrual of time ceases when there is a final administrative order in the alien's case, as defined in 8 CFR 240.52 and 3.39. Accordingly, if an alien is the subject of a final order of removal, the alien who files a motion for section 212(c) relief pursuant to this proposed rule must have accrued seven years of lawful, unrelinquished domicile as of the date of his or her final administrative order. The Board of Immigration Appeals has long held that lawful domicile ends at the issuance of a final administrative order of deportation or removal. *See Matter of Cerna*, 20 I. & N. Dec. 399 (BIA 1991).

What Are the Procedures for Filing for Section 212(c) Relief?

The procedure to follow depends on whether the alien is currently in proceedings. Aliens who are currently in proceedings before an Immigration Judge or the Board of Immigration Appeals must follow different procedures than those aliens who have administratively final orders.

1. *Aliens not currently in proceedings who are seeking a 212(c) waiver prior to temporarily leaving the United States*: This rule does not change the practice, pursuant to 8 CFR 212.3(a)(1), of allowing an alien to apply directly to a district director for section 212(c) relief if he or she qualifies for the waiver.

2. *Aliens in pending deportation or removal proceedings*: An eligible alien who is the subject of a pending deportation or removal proceeding before an Immigration Judge should file a section 212(c) application pursuant to this rule, or request a reasonable period of time to submit an application pursuant to this rule. If the alien has previously filed an application, he or she may file a supplement to the existing section 212(c) application.

3. *Aliens with an appeal pending before the Board*: An eligible alien who has an appeal pending before the Board should file with the Board a motion for remand to the Immigration Court in order to file a section 212(c) application, or a motion to supplement his or her existing section 212(c) application on the basis of eligibility for such relief pursuant to this rule. If the alien appears to be statutorily eligible for relief under this rule, the Board will remand the case to the Immigration Court for adjudication, unless the Board chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

4. *Aliens under a final order of deportation or removal*: An alien who is the subject of a final order of deportation or removal who is eligible to apply for section 212(c) relief pursuant to this rule must file a ''special motion to seek 212(c) relief'' with the Immigration Court or the Board, whichever last held jurisdiction, as provided in § 3.44 as added by this rule. The front page of the motion and any envelope containing the motion should include the notation ''special motion to seek 212(c) relief.'' Even if the alien has previously filed a motion to reopen or a motion to reconsider with the Immigration Court or the Board on other grounds, pursuant to 8 CFR 3.23 or 3.2, an eligible alien who is the subject of a final order must file a separate ''special motion to seek 212(c) relief'' under § 3.44 in order to receive the benefits of this rule.

Any proceeding arising from grant of the special motion under § 3.44 will be limited to issues concerning the alien's eligibility for relief under section 212(c), and may not address the alien's deportability, excludability, removability, or any other basis for relief from deportation or removal unless the Immigration Judge or the Board has reopened the case for other reasons under other applicable provisions of law, in which case the issues may be consolidated for hearing as appropriate and all appropriate motions fees will apply.

If the alien previously filed an application for section 212(c) relief, he or she must file a copy of that application or a copy of a new application and supporting documents with the motion. If the motion is granted, an alien who previously paid a filing fee and filed a Form I–191 application for section 212(c) relief will not be required to pay a new filing fee.

If the alien has not previously filed an application for section 212(c) relief, the alien must submit a copy of his or her completed application and supporting documents with the motion. If the motion is granted, the alien must then file the application with the appropriate fee pursuant to 8 CFR 103.7.

An alien may file only one ''special motion to seek 212(c) relief'' for purposes of establishing eligibility under this proposed rule. A motion filed pursuant to this proposed rule either before the Immigration Court or the Board, whichever last had jurisdiction, must specify whether the alien has any pending motions before the Immigration Court or the Board. All ''special motions to seek 212(c) relief'' filed pursuant to this rule are subject to the restrictions specified in this proposed rule. The usual time and number restrictions on motions, as articulated in 8 CFR 3.2 and 3.23, shall apply to all other motions, but are not applicable to a ''special motion to seek 212(c) relief'' under this proposed rule.

Are Aliens Who Were Eligible To Seek Section 212(c) Relief Under the Department's Soriano Rule Eligible To Seek Section 212(c) Relief Under This Rule?

Eligible aliens who have already filed a motion under the Soriano rule (the current version of § 3.44) would not need to file a motion under this proposed rule because they would have already been provided the opportunity to seek relief. Aliens who did not file a motion under the Soriano rule, if they are otherwise eligible under this proposed rule, would be able to file under this rule.

However, this rule does not allow an alien to relitigate the merits of a prior motion for section 212(c) relief. An alien who has previously been denied section 212(c) relief as a matter of discretion will not be able to get a second opportunity to apply for relief under this rule.

Is There a Time Limit for Filing a ''Special Motion To Seek 212(c) Relief''?

Yes. An alien must file a ''special motion to seek 212(c) relief'' 180 days from the effective date of the final rule.

Is There a Fee for Filing a ''Special Motion To Seek 212(c) Relief''?

There is no fee to file this motion. However, the usual fees apply to any other motions filed by the alien.

Is There a Fee To File a Section 212(c) Application?

Unless the alien has already filed a section 212(c) application and only needs to update the application, the alien must pay the fee required by 8 CFR 103.7(b)(1) for Form I–191 (currently $170). *See* 8 CFR 103.7. An alien currently in deportation or removal proceedings who did not previously file a section 212(c) application shall submit the Form I–191 to the Immigration Court with the appropriate fee receipt attached.

If the case is pending on appeal before the Board, the alien must submit a copy of the section 212(c) application with the motion to remand. If the motion to remand to the Immigration Court is granted, the alien must then file the application and the appropriate fee receipt with the Immigration Court at that time.

An eligible alien who is the subject of a final administrative order of deportation or removal is not required to pay a fee at the time of filing the ''special motion to seek 212(c) relief.'' However, if the motion is granted, he or she must file the section 212(c) application with the appropriate fee receipt.

Nothing in this proposed rule would change the requirements and procedures in 8 CFR 3.31(b), 103.7(b)(1), and 240.11(f) for paying the application fee for a section 212(c) application after a motion is granted if such an application was not previously filed. Fees must be submitted to the local office of the Service in accordance with 8 CFR 3.31. An applicant who is eligible for section 212(c) relief and is unable to pay the filing fee may request a fee waiver in accordance with 8 CFR 103.7(c).

Does the Filing of a ''Special Motion To Seek 212(c) Relief'' Stay the Execution of a Final Order?

The mere filing of a motion with the Immigration Court or the Board does not stay the execution of the final order of deportation or removal. To request a stay of the execution of the final order from the Service, the alien must file an Application for Stay of Removal (Form I–246), following the procedures set forth in 8 CFR 241.6. To request that execution of the final order be stayed by the Immigration Courts or the Board, the alien must file a request for a stay with either the Court or the Board. *See* 8 CFR 3.2(f) or 3.23(b)(1)(v).

What Happens If an Alien Fails To Appear for a Hearing Before an Immigration Judge on a Section 212(c) Application?

An alien must appear for all scheduled hearings before an Immigration Judge, unless his or her appearance is waived by the Immigration Judge. An alien who is in deportation or removal proceedings before an Immigration Judge, and who fails to appear for a hearing regarding a section 212(c) application, will be subject to the applicable statutory and regulatory in absentia procedures (*i.e.,* former section 242B of the Act as it existed prior to amendment by IIRIRA, 8 U.S.C. 1252b (1994), or section 240(a)(5) of the Act, 8 U.S.C. 1229a(a)(5), and applicable regulations).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule would provide a more uniform review process governing the eligibility of certain aliens to apply for 212(c) relief. This rule does not affect small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this rule has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041, telephone (703) 305–0470.

Paperwork Reduction Act

This rule will increase the use of Form I–191 but will not result in a material change in that form, and the INS is adjusting the total burden hours of the form accordingly. Prior to AEDPA and IIRIRA, approximately 4,900 applications for this waiver were considered annually. From the date of the amendments to section 212(c) by AEDPA and IIRIRA, approximately 30,000 LPRs were affected. Some unknown number of the affected LPR's will file either new or amended Form I–191.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 240

Administrative practice and procedure, Aliens, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. Revise § 3.44 and revise to read as follows:

§ 3.44 Special motion to seek section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes before April 1, 1997.

(a) *Standard for adjudication.* This section applies to certain aliens who formerly were lawful permanent residents, who are subject to an administratively final order of exclusion, deportation or removal, and who are eligible to apply for relief under former section 212(c) of the Act and § 212.3 of this chapter with respect to convictions obtained by plea agreements reached prior to a verdict at trial prior to April 1, 1997. A special motion to seek relief under section 212(c) of the Act will be adjudicated under the standards of this section and § 212.3 of this chapter.

(b) *General eligibility.* Generally, a special motion to seek section 212(c) relief must establish that the alien:

(1) Was a lawful permanent resident and is now subject to a final order of deportation or removal;

(2) Made a plea of guilty or nolo contendere on or before April 1, 1997, to an offense rendering the alien deportable or removable;

(3) Had seven consecutive years of lawful unrelinquished domicile in the United States prior to the date of the final administrative order of deportation or removal; and

(4) Is otherwise eligible to apply for section 212(c) relief under the standards that were in effect at the time the alien's plea was made, regardless of when the plea was entered by the court.

(c) *Aggravated felony definition.* For purposes of eligibility to apply for section 212(c) relief under this section and § 212.3 of this chapter, the definition of aggravated felony in section 101(a)(43) of the Act is that in effect at the time the special motion or the application for section 212(c) relief is adjudicated under this section. An alien shall be deemed to be ineligible for section 212(c) relief if he or she has been charged and found removable on the basis of a crime that is an aggravated felony. However, an alien whose plea pre-dates April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for a crime that is an aggravated felony.

(d) *Effect of prior denial of section 212(c) relief.* A motion under this section will be granted with respect to any conviction where an alien has previously been denied section 212(c) relief by an Immigration Judge or by the Board on discretionary grounds.

(e) *Scope of proceedings.* Proceedings shall be reopened under this section solely for the purpose of adjudicating the application for section 212(c) relief, but if the Immigration Judge or the Board grants a motion by the alien to reopen the proceedings on other applicable grounds under §§ 3.2 or 3.23 of this chapter, all issues encompassed within the reopened proceedings may be considered together, as appropriate.

(f) *Procedure for filing a special motion to seek section 212(c) relief.* An eligible alien shall file a special motion to seek section 212(c) relief with the Immigration Court or the Board, whichever last held jurisdiction over the case. An eligible alien must submit a copy of the Form I–191 application, and supporting documents, with the special motion. The motion must contain the notation ''special motion to seek 212(c) relief.'' The Service shall have 45 days from the date of filing of the special motion to respond. In the event the Service does not respond to the motion, the Service retains the right in the proceedings to contest any and all issues raised.

(g) *Relationship to motions to reopen or reconsider on other grounds.* (1) *Other pending motions.* An alien who has previously filed a motion to reopen or reconsider that is still pending before the Immigration Court or the Board, other than a motion for section 212(c) relief, must file a separate special motion to seek section 212(c) relief pursuant to this section. The new motion shall specify any other motions currently pending before the Immigration Court or the Board. Any motion for section 212(c) relief described in this section pending before the Board or the Immigration Courts on the date of publication of the interim rule in the **Federal Register** that would be barred by the time or number limitations on motions shall be deemed to be a motion filed pursuant to this section, and shall not count against the number restrictions for other motions to reopen.

(2) *Limitations for motions.* The filing of a special motion under this section has no effect on the time and number limitations for motions to reopen or reconsider that may be filed on grounds unrelated to section 212(c).

(h) *Deadline to file a special motion to seek section 212(c) relief under this section.* An alien subject to a final administrative order of deportation or removal must file a special motion to seek section 212(c) relief on or before 180 days from date of publication of the final rule. An eligible alien may file one special motion to seek section 212(c) relief under this section.

(i) *Fees.* No filing fee is required at the time the alien files a special motion to seek section 212(c) relief under this section. However, if the special motion is granted, and the alien has not previously filed an application for section 212(c) relief, the alien will be required to submit the appropriate fee receipt at the time the alien files the Form I–191 with the Immigration Court.

(j) *Remands of appeals.* If the Board has jurisdiction and grants the motion to apply for section 212(c) relief pursuant to this section, it shall remand the case to the Immigration Court solely for adjudication of the section 212(c) application unless the Board chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

(k) *Limitations on eligibility under this section.* This section does not apply to:

(1) Aliens who have departed the United States;

(2) Aliens with a final order of deportation or removal who have illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

3. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227; 8 CFR part 2.

4. Amend § 212.3 by revising paragraph (a)(2), the second to last sentence of paragraph (b), paragraph (d), the first sentence of paragraph (e)(1), and paragraphs (e)(3), (f)(3), (f)(4), and (g), and by removing paragraph (f)(5) to read as follows:

§ 212.3 Application for the exercise of discretion under section 212(c).

(a) * * *

(2) The Immigration Court if the application is made in the course of proceedings under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as it existed prior to April 1, 1997).

(b) * * * All material facts or circumstances that the applicant knows or believes apply to the grounds of excludability, deportability, or inadmissibility must be described in the application. * * *

* * * * *

(d) *Validity.* Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability, deportability, or inadmissibility that were described in the application. An applicant who failed to describe any other grounds of excludability, deportability, or inadmissibility, or failed to disclose material facts existing at the time of the approval of the application, remains excludable, deportable, or inadmissible under the previously unidentified grounds. If the applicant is excludable, deportable, or inadmissible based upon any previously unidentified grounds a new application must be filed.

(e) * * *

(1) An eligible alien may renew or submit an application for the exercise of discretion under former section 212(c) of the Act in proceedings before an Immigration Judge under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as it existed prior to April 1, 1997), and under this chapter. * * *

* * * * *

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the Immigration Judge of this application in accordance with the provisions of § 3.38 of this chapter.

(f) * * *

* * * * *

(3) The alien is subject to exclusion or inadmissibility from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) or (9)(C) of section 212(a) of the Act (8 U.S.C. 1182);

(4) The alien has been convicted of an aggravated felony or felonies, as defined by section 101(a)(43) of the Act. 8 U.S.C. 1101(a)(43). With respect to pleas made prior to April 24, 1996, the alien is ineligible only if he or she has served a term of imprisonment of at least five years for such aggravated felony or felonies.

(g) *Availability of section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes.* For purposes of this chapter, the date of the plea will be considered the date the plea was agreed to by the parties.

(1) *Pleas before April 24, 1996.* Regardless of whether an alien is in exclusion, deportation, or removal proceedings, section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 shall not apply to any pleas made before April 24, 1996.

(2) *Pleas between April 24, 1996 and April 1, 1997.* Regardless of whether an alien is in exclusion, deportation, or removal proceedings, an eligible alien who pleaded guilty or nolo contendere and whose plea was made on or after April 24, 1996, and before April 1, 1997, may apply for relief under section 212(c) of the Act, as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996.

(3) *Pleas on or after April 1, 1997.* Section 212(c) relief is not available with respect to pleas made on or after April 1, 1997.

PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

5. The authority citation for part 240 continues to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

6. In § 240.1, amend paragraph (a)(1)(ii) by adding at the end ‘‘, and former section 212(c) (as it existed prior to April 1, 1997);’’.

Dated: August 6, 2002.

John Ashcroft,

Attorney General.

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AE99

Small Business Size Standards; Size Standards by 2002 North American Industry Classification System

AGENCY: Small Business Administration (SBA).

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its Small Business Size Regulations by incorporating the Office of Management and Budget's (OMB) 2002 modifications of the North American Industry Classification System (NAICS) into its table of small business size standards. These modifications are limited to industries in six (6) NAICS Sectors. The modifications result in a small number of size standard changes to certain NAICS activities.

SBA believes that the subject of this proposed rule is noncontroversial and routine, and SBA anticipates no adverse comments to this proposal. Therefore, SBA is publishing concurrently in this issue of the **Federal Register** a direct final rule to achieve the same result, that is, to modify its Small Business Size Regulations as proposed here.

DATES: SBA must receive comments to this proposed rule on or before September 12, 2002.

ADDRESSES: Address all comments concerning this rule to Gary M. Jackson, Assistant Administrator for Size Standards, Office of Size Standards, 409 3rd Street, SW., Washington, DC 20416, via email to *sizestandards@sba.gov*, or via facsimile, (202) 205–6390. SBA will make all public comments available to any person or concern upon request.

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Office of Size Standards, at (202) 205–6618 or *sizestandards@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA adopted NAICS industry definitions as a basis for its table of small business size standards effective October 1, 2000. The final rule was published in the **Federal Register** on May 5, 2000 (65 FR 30836) and states the SBA Administrator's determination that the industry descriptions in NAICS shall be the basis for small business size standards.

OMB restructured and modified parts of NAICS effective January 1, 2002. This rule both incorporates the restructuring and modifications into SBA's table of size standards. NAICS 2002 is the same as NAICS 1997 for sixteen of the twenty industry sectors. Construction and wholesale trade are substantially changed. NAICS 2002 also modified a number of retail trade classifications and the organization of the information sector.

13 CFR 121.101(b) states ‘‘NAICS is described in the *North American Industry Classification Manual—United States, 1997* * * *.’’ At the time SBA published the final rule in the **Federal Register**, the only description of NAICS available was the NAICS 1997 manual. However, with OMB's 2002 modification of NAICS 1997, SBA believes that retaining a definition in its regulations based on a particular year is confusing and inconsistent with the