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## The Unforeseen Costs of Going to Trial: The Vitality of 212(C) Relief for Lawful Permanent Residents Convicted by Trial

Mark J. DiFiore

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# THE UNFORESEEN COSTS OF GOING TO TRIAL: THE VITALITY OF 212(C) RELIEF FOR LAWFUL PERMANENT RESIDENTS CONVICTED BY TRIAL

Mark J. DiFiore\*

*Before 1996, a Lawful Permanent Resident (LPR) who was made deportable by a criminal conviction could apply for discretionary relief from deportation under section 212(c) of the Immigration and Nationality Act. This relief, commonly known as “212(c) relief,” was repealed in 1996. In 2001, the Supreme Court confronted the issue of whether an LPR with a pre-1996 deportable conviction could apply for 212(c) relief in his later post-repeal removal proceedings. The Court decided that an LPR who pleaded guilty to his pre-1996 conviction could still apply for 212(c) relief following the 1996 repeal. The status of those LPRs who were convicted of their pre-1996 offense after a trial remained unclear. Today, the courts of appeals are split on whether LPRs convicted at trial before the repeal of section 212(c) have access to this relief from deportation in their post-1996 removal proceedings stemming from that conviction.*

*This Note examines and synthesizes the different approaches and resolutions of the courts of appeals. This Note then undertakes an analysis of whether the repeal of 212(c) relief is impermissibly retroactive as to LPRs subject to post-1996 removal proceedings for pre-1996 convictions at trial. Finally, this Note argues that 212(c) relief should remain available to all LPRs in post-1996 removal proceedings stemming from their pre-1996 convictions, whether the conviction was by plea agreement or by trial.*

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## INTRODUCTION

An immigrant is admitted to the United States as a lawful permanent resident (LPR)<sup>1</sup> in 1977. In 1986, a jury convicts her of possessing and intending to distribute thirty grams of cocaine, an offense that makes her deportable from the United States. Had the Immigration and Naturalization Service (INS) promptly instituted deportation proceedings against her, she would have been eligible to apply for a waiver of deportation under section 212(c) of the Immigration and Nationality Act (INA).<sup>2</sup> This relief is commonly known as “212(c) relief.” However, the INS does not charge the LPR as being deportable due to her conviction until 1998. In the meantime, section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>3</sup> repeals 212(c) relief in its entirety.<sup>4</sup> Therefore, in the 1998 removal proceedings,<sup>5</sup> 212(c) relief is no longer available to save the LPR from removal. However, since she could have applied for 212(c) relief at the time of her conviction, is it possible for her to utilize it during her post-repeal removal proceedings? That is, does the repeal of 212(c) relief have an impermissible retroactive effect<sup>6</sup> as to LPRs in her situation?

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1. A lawful permanent resident (LPR) is a noncitizen authorized to live and work in the United States permanently. See Immigration and Nationality Act (INA) § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 9 (4th ed. 2005). As proof of this status, an individual is issued a permanent resident card that is widely known as a “green card.” *Green Card (Permanent Residence)*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow “Green Card (Permanent Residence)” hyperlink) (last updated Sept. 1, 2009). LPRs are interchangeably referred to as “legal permanent residents.” For a further discussion on what it means to be an LPR and the various ways to obtain this status, see *infra* section I.B.2.a.

2. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)); see *id.* § 212(c), 66 Stat. at 187 (codified as amended at 8 U.S.C. § 1182(c) (1994) (repealed 1996)).

3. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

4. *Id.* § 304(b), 110 Stat. at 3009-597.

5. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, consolidated exclusion and deportation proceedings, the two main procedures that were used to keep individuals out of the United States, into one procedure called “removal” proceedings, see *id.* §§ 304, 308, 110 Stat. at 3009-587, 3009-614. Thus, after 1996, procedures keeping an individual out of the United States are all “removal” proceedings. However, this Note continues to speak in terms of “deportation,” even for post-1996 proceedings, for convenience and clarity alone. See *infra* notes 47–54 and accompanying text.

6. For a discussion of what makes a statute impermissibly retroactive, see *infra* notes 170–88188 and accompanying text. Essentially, a retroactive law is one that looks backwards to change the consequences of an act that has already occurred. See BLACK’S LAW DICTIONARY 1432 (9th ed. 2009). The U.S. Supreme Court has defined an impermissibly retroactive law as one that “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions . . . already past.” *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); see *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (1997) (citing to *Wheeler* for the definition of impermissible retroactivity).

These are the facts of the case of Sandra Ferguson.<sup>7</sup> The Supreme Court in *INS v. St. Cyr*<sup>8</sup> came close to answering her questions in holding that the repeal did in fact have an impermissible retroactive effect as to those LPRs who pleaded guilty to their pre-repeal deportable offense.<sup>9</sup> Thus, an LPR who pleaded guilty to a deportable offense before the repeal of section 212(c) and who otherwise would have been eligible for 212(c) relief can still utilize the deportation waiver even though the relief is not applied for until after the repeal, when removal proceedings are commenced.<sup>10</sup> However, Ferguson—and many others like her—did not plead guilty to her offense; she was convicted after a trial.

Several U.S. courts of appeals have decided that this distinction makes a great difference and hold that LPRs like Ferguson are not eligible for 212(c) relief.<sup>11</sup> Other U.S. courts of appeals believe the distinction makes no difference and apply the rule of *St. Cyr*<sup>12</sup> to all those convicted of a deportable offense before the repeal of section 212(c), regardless of the mode of conviction.<sup>13</sup> Still other U.S. courts of appeals allow some LPRs convicted at trial to remain eligible for 212(c) relief after its repeal, contingent on the LPR showing some sort of reliance on the continuing existence of the relief before its repeal.<sup>14</sup>

The issue of whether and how reliance should factor into the retroactivity analysis of the repeal of 212(c) also divides the circuit courts of appeals. Some courts require no reliance at all to make the repeal of 212(c) impermissibly retroactive. Other courts require an LPR to prove that he individually relied on the continuing existence of 212(c) relief in order to make the repeal of the relief impermissibly retroactive. Still others are satisfied if the individual proves that he or others similarly situated could have objectively and reasonably relied on the continuing existence of the relief.

Unfortunately for Ferguson, her case arose in the U.S. Court of Appeals for the Eleventh Circuit, where all LPRs convicted of their deportable offense at trial are held to be ineligible for 212(c) relief when removal proceedings are not commenced until after the repeal.<sup>15</sup> Had her case arisen in the U.S. Courts of Appeals for the Third or Eighth Circuits, she undoubtedly would have been eligible to apply for

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7. *Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010).

8. 533 U.S. 289 (2001).

9. *Id.* at 326.

10. *Id.* It is standard procedure for an LPR not to file an application for 212(c) relief until after deportation proceedings are commenced. *See* 1 NAT'L IMMIGRATION PROJECT, NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 8:41 n.1, at 8-91 (3d ed. 2010); *infra* note 95 and accompanying text.

11. *See infra* Part II.C.

12. *See supra* notes 8–10 and accompanying text.

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010).

212(c) relief.<sup>16</sup> By virtue of this division, Ferguson was denied the opportunity to stay in the United States—an opportunity she would have had were she tried in another circuit. This Note examines the differing approaches the circuit courts take in deciding whether an LPR convicted at trial of a deportable offense before the repeal of 212(c) relief can still rely on this relief after the repeal.

The availability of relief, repealed about fourteen years ago, is still relevant today for several procedural and practical reasons.<sup>17</sup> First, appeals of removal decisions may lead to various procedural steps that can take many years. Ferguson's removal, which began in 1998,<sup>18</sup> is a good example. An immigration judge (IJ) ordered her removed in 1999, but a series of appeals and remands in light of new Supreme Court law significantly slowed the progression of the case to the Eleventh Circuit.<sup>19</sup> This procedural posture extended the case to 2009, an illustration of how the availability of 212(c) relief is a live issue for federal courts today.

In addition, LPRs with old, pre-repeal convictions are still subject to removal proceedings today because immigration officials are often slow to learn of an LPR's status as removable until the LPR takes some other action bringing this fact to their attention.<sup>20</sup> For example, a removable LPR may not be exposed as such until he leaves the country and presents himself for inspection on return<sup>21</sup> or when he applies for naturalization.<sup>22</sup>

Old convictions are also frequently coming to light because of increasingly invasive techniques used by Immigration and Customs Enforcement (ICE). Home raids and workplace raids initially aimed at seeking out violent immigrant gang members, or those unauthorized to work in the United States, often result in removal proceedings against other

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16. See *Atkinson v. Attorney Gen. of the U.S.*, 479 F.3d 222, 230 (3d Cir. 2007) (holding that the repeal of section 212(c) is impermissibly retroactive as to all individuals who were made deportable by conviction by a jury before the relief's repeal); see also *Lovan v. Holder*, 574 F.3d 990, 993 (8th Cir. 2009) (following the Third Circuit's decision in *Atkinson*); Jeff Joseph et al., *The Importance of Finding the "Right" Circuit for Your Immigration Case*, IMMIGR. BRIEFINGS, Apr. 2009, at 1, 4 (explaining that a practitioner whose noncitizen client seeks 212(c) relief will want to litigate his case in the Third Circuit).

17. See Brief of Amici Curiae Immigration Defense Project et al. in Support of Petitioner at 3–4, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010) (No. 09-263), 2009 WL 3155387 at \*3–4 (explaining that the continuing availability of 212(c) relief remains important for thousands of individuals and their families).

18. *Ferguson*, 563 F.3d at 1256–57.

19. See *id.* at 1257–58. The new Supreme Court law, *INS v. St. Cyr*, 533 U.S. 289 (2001), held that 212(c) relief remained available for LPRs convicted by plea bargain of a deportable offense pre-repeal, even though removal proceedings had not begun until after the repeal, *id.* at 326. For a complete discussion on the decision in *St. Cyr*, see *infra* notes 206–14 and accompanying text.

20. See generally Brief of Amici Curiae Immigration Defense Project et al. in Support of Petitioner, *supra* note 17, at 6–13 (describing how LPRs with pre-1996 deportable convictions are only coming to immigration officials' attention now).

21. See, e.g., *Wilson v. Gonzales*, 471 F.3d 111, 113 (2d Cir. 2006).

22. See, e.g., *Lovan v. Holder*, 574 F.3d 990, 992 (8th Cir. 2009); *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 931 (9th Cir. 2007).

non-violent LPRs, who may be removable for a prior criminal conviction.<sup>23</sup> Ferguson is an example of such an individual with an old, deportable conviction who was discovered through a workplace raid targeted to find unauthorized workers. Though she was authorized to work in the United States, questioning by ICE agents during the raid led to the discovery of her very old conviction and subsequent removal proceedings.<sup>24</sup> Although these enforcement methods, which were ascendant during the Bush presidency, have tapered off under President Obama's leadership,<sup>25</sup> they will continue to lead to the discovery of pre-1996 criminal convictions.

The government also likely brings removal proceedings for LPRs whose pre-1996 convictions make them deportable because, before 1996, officials predicted that these LPRs were likely to be granted 212(c) relief. The process of initiating deportation proceedings was pointless until the relief was later repealed.<sup>26</sup>

Regardless of the precise reason why 212(c) relief still makes its way into courts today, it is indisputable that the relief is still widely relied upon. From 2004 to 2008, almost 7000 applications for 212(c) relief were granted to LPRs.<sup>27</sup> During that time period, 212(c) relief accounted for almost one third of the relief from removal granted to LPRs, other than grants of asylum.<sup>28</sup> Thus, "212(c) relief is still available and does matter."<sup>29</sup> Furthermore, as the Obama administration continues to make removal of

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23. See Nina Bernstein, *Immigrant Workers Caught in a Net Cast for Gangs*, N.Y. TIMES, Nov. 25, 2007, § 1, at 41; Editorial, *The Shame of Postville, Iowa*, N.Y. TIMES, July 13, 2008, at WK11.

24. Brief of Amici Curiae Immigration Defense Project et al. in Support of Petitioner, *supra* note 17, at 12–13.

25. See, e.g., Ginger Thompson & David M. Herszenhorn, *Obama Set for First, Tentative Step Today on Immigration Overhaul*, N.Y. TIMES, June 25, 2009, at A16; Ginger Thompson, *Immigration Agents to Turn Their Focus to Employers*, N.Y. TIMES, Apr. 30, 2009, at A19.

26. See Patricia S. Mann, § 212(c) Litigation: *The Afterlife Of a Waiver*, CYRUS D. MEHTA & ASSOCIATES, PLLC – IMMIGRATION UPDATES (Mar. 10, 2008), [http://www.cyrusmehta.com/news.aspx?Main\\_Idx=ocyrus200591724845&SubIdx=&Page=4&Year=2008&Month=3](http://www.cyrusmehta.com/news.aspx?Main_Idx=ocyrus200591724845&SubIdx=&Page=4&Year=2008&Month=3); see also Gordon, 17 I. & N. Dec. 389, 392 (B.I.A. 1980) (Appleman, A.L.J., concurring) (“[An Immigration and Naturalization Service (INS)] District Director has every right, in fact, a duty, to exercise his prosecutive judgment whether or not to institute a deportation proceeding against an alien who appears to be illegally in the United States. If, in screening the file of, and possibly after consultation with, such an alien, it appears to him that a deportation proceeding would surely result in a grant of section 212(c) relief . . . it would be pointless to institute an expensive, vexatious, and needless deportation proceeding.”); *Thom v. Ashcroft*, 369 F.3d 158, 166 (2d Cir. 2004) (suggesting that the scenario raised by the concurrence in *Gordon* is a likely one).

27. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK R3 (2009), available at <http://www.justice.gov/eoir/statspub/fy08syb.pdf>.

28. See *id.*

29. Philip Levin, *Cancellation of Removal for Permanent Resident Aliens*, in 1 AM. IMMIGRATION LAWYERS ASS'N, IMMIGRATION AND NATIONALITY LAW HANDBOOK 625, 632 (R. Patrick Murphy et al. eds., 1999–2000 ed. 1999). Although this quotation is about ten years old, its force is not lost. As long as cases continue to take many years to get to the circuit courts, 212(c) relief will remain available and relevant.

the criminally convicted a key priority,<sup>30</sup> the importance of this relief will only escalate.

This Note attempts to resolve the differing approaches the courts take when confronted with situations similar to Ferguson's. That is, it endeavors to answer whether an LPR convicted at trial of a deportable offense before the repeal of 212(c) relief should be able to rely on this waiver of deportation even though deportation proceedings were not commenced until after the 1996 repeal of this relief. Part I of this Note discusses the relevant immigration laws, 212(c), and retroactivity jurisprudence necessary to understand the current circuit conflict. Part II analyzes the differing approaches the circuit courts take in deciding whether an LPR convicted at trial of a deportable offense before the repeal of section 212(c) can still rely on this relief after its repeal. This analysis places special emphasis on the role each circuit assigns to reliance in its retroactivity analysis. Part III argues that reliance should not be the determinative factor in 212(c) retroactivity analysis. Rather, the proper resolution is to categorically allow all LPRs convicted of their deportable offense before the repeal of 212(c) to apply for such relief, regardless of the mode of their conviction.

#### I. THE A, B, CS OF 212(C) RELIEF

Some background information on immigration law and section 212(c) of the INA is necessary to understand the different approaches the courts of appeals take in deciding whether LPRs can still use this repealed relief today. Part I.A discusses general immigration law and procedure to trace how cases involving 212(c) relief appear in federal courts long after its repeal. Part I.B explores the history of 212(c) relief, including its origin and enactment, how it operated, and how it was amended and eventually repealed. Finally, Part I.C first provides background information on retroactivity analysis in general and then explains how the Supreme Court has handled the issue of the retroactivity of section 212(c).

##### A. *Fundamentals of Immigration Law*

Congress has plenary power to make rules governing the admission of aliens<sup>31</sup> and to exclude aliens of its choosing.<sup>32</sup> Congress granted the authority to administer immigration laws to the executive branch.<sup>33</sup> The executive branch contains several agencies that carry out this responsibility.<sup>34</sup> A familiarity with these agencies, especially those responsible for deportation proceedings, is important to understand how

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30. See Miriam Jordan, *Feds Target Illegal Immigrants with Criminal Pasts*, WALL ST. J., Dec. 12–13, 2009, at A4.

31. An "alien" is defined in the INA as "any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006). Thus, LPRs are "aliens," as they are not citizens of the United States.

32. See *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).

33. ROBERT C. DIVINE & R. BLAKE CHISAM, IMMIGRATION PRACTICE § 2-1, at 2-2 (2009–2010 ed. 2009).

34. *Id.*

LPRs seeking 212(c) relief make their way into federal courts. It is also critical to understand the distinction between exclusion and deportation and the procedural aspects of the latter.

### 1. Administrative Structure of Federal Immigration Power

In 1952, Congress enacted the McCarran-Walter Act, the INA, which became the framework for modern immigration law.<sup>35</sup> The INA consolidated the previously scattered immigration laws into one organized and comprehensive statute.<sup>36</sup> This act delegated most immigration matters to the head of the Department of Justice (DOJ), the Attorney General.<sup>37</sup> The Attorney General delegated this authority to the INS, a part of the DOJ.<sup>38</sup> However, the Homeland Security Act of 2002<sup>39</sup> dissolved the INS effective March 1, 2003 and distributed many of its duties to the newly created Department of Homeland Security (DHS) while leaving the adjudicative function of immigration affairs in the DOJ.<sup>40</sup>

The Attorney General, as the head of the DOJ, still retains a great deal of authority over immigration matters, even after the creation of the DHS, through his power to direct and regulate the DOJ's Executive Office for Immigration Review (EOIR).<sup>41</sup> The EOIR is responsible for the majority of decisions involving the removal of noncitizens.<sup>42</sup> Within the EOIR, the Office of the Chief Immigration Judge oversees U.S. immigration courts and immigration judges<sup>43</sup> and the Board of Immigration Appeals (BIA) decides all appeals from decisions made in immigration court.<sup>44</sup> Also, the Attorney General remains the "ultimate authority for interpreting 'all questions of law' in immigration matters."<sup>45</sup> This is done through his

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35. *See generally* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)); RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 8 (Stephanie L. Browning ed., 2006).

36. DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE: IN A NUTSHELL* 15 (5th ed. 2005); *see also* *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow "Laws" hyperlink; then follow "Immigration and Nationality Act" hyperlink) (last visited Oct. 23, 2010).

37. *See* DIVINE & CHISAM, *supra* note 33, § 2-2, at 2-2.

38. *Id.*

39. Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

40. DIVINE & CHISAM, *supra* note 33, § 2-2, at 2-2 to 2-3. The Department of Homeland Security encompasses three agencies: U.S. Citizen and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). BOSWELL, *supra* note 35, at 2.

41. *See* DIVINE & CHISAM, *supra* note 33, § 2-2(b), at 2-30 ("The [DOJ] still has plenty to do with immigration policy and mechanics."). *See* 8 C.F.R. pt. 1003 (2010) for an overview of the organization and procedures of the EOIR. *See also* U.S. DEPARTMENT OF JUST. – EXECUTIVE OFF. FOR IMMIGR. REV., <http://www.justice.gov/eoir/> (last visited Oct. 23, 2010).

42. BOSWELL, *supra* note 35, at 3.

43. *See* DIVINE & CHISAM, *supra* note 33, § 2-2(b)(1)(A), at 2-31.

44. *See id.* § 2-2(b)(1)(B), at 2-33.

45. Anthony Distinti, Note, *Gone But Not Forgotten: How Section 212(c) Relief Continues To Divide Courts Presiding Over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2814 (2006) (quoting ROBERT C. DIVINE & R. BLAKE CHISAM, *IMMIGRATION PRACTICE* § 2-2, at 2-3 n.6 (2005–2006 ed. 2005)).

power to review, amend, and overturn individual decisions of the BIA, which then become binding on all IJs across the United States.<sup>46</sup>

## 2. Removal: Exclusion and Deportation

The cases before IJs, the BIA, and the federal courts that involve 212(c) relief usually stem from the government's attempt to remove an LPR from the United States. Before the enactment of IIRIRA, there were two separate processes for control of immigrants—"exclusion" and "deportation."<sup>47</sup> Deportation pertained to individuals who had already "entered" the United States, whether they had entered legally or illegally, while exclusion applied only to those who had not "entered" the United States.<sup>48</sup> IIRIRA changed this formal distinction from one of "entry" to one of "admission": currently, if a noncitizen has not been admitted, whether or not he is physically present in the United States, he faces exclusion, while one legally admitted faces deportation.<sup>49</sup> The only people who are now technically deported, then, are those who are in the United States legally; everyone else is excluded.

IIRIRA also created a single formal proceeding—to be used regardless of whether the noncitizen was technically being excluded or deported—called a removal proceeding.<sup>50</sup> Although the formal distinction between exclusion and deportation was eliminated, IIRIRA preserved the fundamental distinction, listing separate grounds of inadmissibility for noncitizens seeking admission to the United States,<sup>51</sup> and grounds of deportability for noncitizens already admitted to the United States.<sup>52</sup> Also, the availability of some reliefs from removal, namely 212(c) relief, hinge on which set of grounds apply to the noncitizen.<sup>53</sup>

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46. See LEGOMSKY, *supra* note 1, at 4.

47. See *id.* at 496.

48. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 25 (1982); LEGOMSKY, *supra* note 1, at 496.

49. See LEGOMSKY, *supra* note 1, at 496; see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 301(a), 110 Stat. 3009-546, 3009-575 (codified as amended at *Immigration and Nationality Act* § 101(a), 8 U.S.C. § 1101(a) (2006)) (substituting a definition for "admission" for a definition of "entry"); 5 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 63.01[3], at 63-7 to 63-8, § 64.01[2], at 64-6 to 64-7 (rev. ed. 1966) (explaining IIRIRA's changes to terminology). "Admission" is defined as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Immigration and Nationality Act* § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A). The main difference in the change of terminology is that now, a noncitizen who has "entered" the United States, but has done so without inspection—that is, he has not been "admitted"—will be "inadmissible," rather than "deportable" under prior law. See 5 GORDON ET AL., *supra*, § 63.01[3], at 63-7.

50. See 8 U.S.C. § 1229a.

51. See *id.* § 1182(a). "Inadmissible" is also the new term that functions as the equivalent of what was previously "excludable." See LEGOMSKY, *supra* note 1, at 496.

52. See 8 U.S.C. § 1227(a).

53. See *infra* Part I.B.2.d (explaining that 212(c) relief is only available as a waiver of deportation if the grounds for deportation have a comparable ground for exclusion).

Essentially, then, the traditional distinction between exclusion and deportation remains, although it is now referred to as a distinction between inadmission and deportation, and all proceedings are referred to as removal proceedings.<sup>54</sup> Even though this Note deals primarily with proceedings initiated after IIRIRA, rendering them all removal proceedings, the terms “exclusion” and “deportation” remain useful in distinguishing between the grounds for removal relied upon and the types of discretionary relief available. Thus, for convenience alone, this Note continues to use the terms “exclusion” and “deportation” for proceedings that are actually removal proceedings.

### 3. The Basics of Deportation

Certain crimes—such as “crimes of moral turpitude,” “aggravated felonies,” controlled substance offenses, certain firearm offenses, and crimes of domestic violence, stalking, or child abuse—make a noncitizen deportable.<sup>55</sup> Deportation proceedings are “quasi-judicial, adversarial, civil proceedings in which an alien may attempt to challenge the government’s allegations and/or seek relief from removal.”<sup>56</sup> The DHS acts through one of its branches, ICE, to prosecute noncitizens in these proceedings.<sup>57</sup> For LPRs, the government bears the burden of proving by “clear, unequivocal, and convincing evidence” that the individual is deportable.<sup>58</sup> The proceedings are conducted in an immigration court before an IJ.<sup>59</sup> Significantly, IJs have the authority to consider and decide on claims for discretionary relief from removal,<sup>60</sup> such as 212(c) relief.<sup>61</sup> At the conclusion of a removal hearing, an IJ typically rules immediately, deciding whether the noncitizen is removable and whether she is eligible for any forms of discretionary relief for which she may have applied.<sup>62</sup>

Either party then has the right to appeal the IJ’s decision to the BIA,<sup>63</sup> the “highest administrative body for interpreting and applying immigration

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54. LEGOMSKY, *supra* note 1, at 496.

55. *See* 8 U.S.C. § 1227(a)(2). This list is not exhaustive. *See id.*

56. DIVINE & CHISAM, *supra* note 33, § 11-1, at 11-2; *cf.* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984) (characterizing deportation hearings as purely civil actions). Although the proceedings are civil and not criminal, and thus, the respondent does not enjoy all of the protections that apply in a criminal trial, *id.* at 1038, the respondent is the beneficiary of full procedural due process, including the right to a fair trial, *see* *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982). However, there is no constitutional right to counsel in deportation proceedings. Carreen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 583 (2009). For a discussion of the problems this poses, *see* generally Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623 (2009) and Shannon, *supra*.

57. DIVINE & CHISAM, *supra* note 33, § 11-1, at 11-3.

58. *Woodby v. INS*, 385 U.S. 276, 286 (1966).

59. *See* BOSWELL, *supra* note 35, at 38–39.

60. 8 C.F.R. § 1240.11 (2010).

61. *Id.* § 1212.3(e).

62. *See* BOSWELL, *supra* note 35, at 39.

63. 8 C.F.R. §§ 1003.3, 1003.38.

laws.”<sup>64</sup> Decisions of the BIA are binding on all immigration courts, but the Attorney General or a federal court may modify or overturn them.<sup>65</sup> Although Congress has divested the federal courts of jurisdiction to review final orders of removal in many circumstances,<sup>66</sup> nothing precludes judicial review of constitutional claims or questions of law brought to the appropriate circuit court of appeals.<sup>67</sup> Thus, a noncitizen who raises a pure question of law—such as whether the repeal of 212(c) relief is impermissibly retroactive—is entitled to judicial review in the appropriate court of appeals.<sup>68</sup> It is through this progression that 212(c) relief, which usually has its beginnings in removal proceedings, makes its way into the federal court decisions that this Note discusses and analyzes.

### B. *The Life and Death of Section 212(c)*

This section provides background on the specific provision of the INA that is at issue in this Note, section 212(c). Former section 212(c) of the INA provided relief from exclusion for certain LPRs meeting its statutory criteria.<sup>69</sup> Section 212(c) essentially allowed LPRs who were made deportable by a criminal conviction to have this deportation waived at the discretion of the Attorney General.<sup>70</sup> Granting relief terminates the deportation proceedings, and the noncitizen remains an LPR.<sup>71</sup> This section explores the history of this form of relief, from its beginnings, to its use in practice, to its amendments and eventual repeal.

#### 1. Origins and Enactment

Throughout the history of immigration law, Congress has created different standards for admission to and deportation from the United States, on the premise that what might be a good reason to deny a newcomer entry may not also be a good reason to expel an LPR with roots in the United States.<sup>72</sup> However, under the “entry” standard before IIRIRA, an LPR who

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64. *Board of Immigration Appeals*, U.S. DEPARTMENT OF JUST. – EXECUTIVE OFF. FOR IMMIGR. REV., <http://www.usdoj.gov/eoir/biainfo.htm> (last visited Oct. 23, 2010).

65. *Id.*

66. *See, e.g.*, Immigration and Nationality Act § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2006) (establishing that no court has jurisdiction to review a final order of removal of a noncitizen who is removable for conviction of an aggravated felony, a controlled substance offense, or certain firearm offenses, among others).

67. 8 U.S.C. § 1252(a)(2)(D).

68. *See, e.g.*, *Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254, 1259 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010); *Garcia-Padron v. Holder*, 558 F.3d 196, 199 (2d Cir. 2009); *Blake v. Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007).

69. *See* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

70. *See id.*; *see also supra* note 55 and accompanying text (discussing which criminal offenses make an LPR deportable).

71. *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

72. *See Abebe v. Gonzales*, 493 F.3d 1092, 1096 (9th Cir. 2007) (explaining that it is rational to turn away a noncitizen with a contagious disease seeking entry while at the same time allowing noncitizens who contract the same disease while living in the United States to

gained entry and developed ties to the United States, temporarily left the country, and attempted to return would be placed in the same position as a first-time entrant in the eyes of the law; he is just another noncitizen seeking entry to the United States.<sup>73</sup> Thus, an LPR who was convicted of an excludable offense while living in the United States who then temporarily left the country and tried to reenter was excluded from reentry. This upset the rationales underpinning the exclusion/deportation distinction and made even the shortest of overseas travel dangerous for LPRs.<sup>74</sup>

To give effect to the preferential treatment to long-term residents, and to make the immigration consequences of brief travel overseas for them less dangerous, Congress enacted a precursor to 212(c) relief, the Seventh Proviso of section 3 of the 1917 Immigration Act.<sup>75</sup> The Seventh Proviso operated as a waiver of grounds of exclusion for “aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years.”<sup>76</sup> Taken literally, this relief was applicable only to those LPRs returning to the United States, not those being deported; that is, it applied only to exclusions.<sup>77</sup> However, the BIA and the Attorney General applied this Proviso to the deportation context because fairness dictates that if an LPR can rely on this relief when returning from a temporary stay abroad, he should be entitled to rely on it without having traveled abroad.<sup>78</sup> The Attorney General reasoned that “judgment ought not to depend upon the technical form of the proceedings.”<sup>79</sup>

Before the enactment of the INA, the Senate Judiciary Committee criticized the Seventh Proviso and recommended that relief be restricted to noncitizens: (1) lawfully admitted for permanent residence, (2) who had

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remain), *superseded by* *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

73. *See id.* at 1096.

74. *See id.* at 1096–97 (explaining that an LPR who gains entry to the United States and builds ties to this country may then commit a crime that does not justify uprooting all these longstanding ties to the country; however, such an offense may justify exclusion of a newcomer from the United States, and this LPR will be subjected to this heightened scrutiny upon a brief excursion abroad and attempt to reenter the United States). To clarify, take the case of an LPR who was lawfully admitted, established a home in the United States, and then was convicted of a minor crime many years later. Assume this crime is an excludable, but not a deportable, offense. He thus would not be deportable for this conviction, but would be excludable upon an attempted reentry after a brief visit abroad. *See* S. REP. NO. 81-1515, at 382 (1950). The Seventh Proviso of section 3 of the 1917 Immigration Act, the precursor to 212(c) relief, was enacted to resolve this inequity. *See* S. REP. NO. 63-355, at 6 (1914) (adding a seventh provision to section 3 of the 1917 Immigration Act).

75. *See* S. REP. NO. 63-355, at 6 (“[I]t seems only just and humane to invest the Secretary of Labor with authority to permit the readmission to the United States of aliens who have lived here for a long time and whose exclusion after a temporary absence would result in peculiar or unusual hardship.”); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 689 (3d ed. 1995).

76. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 878 (repealed 1952)).

77. *See* *Francis v. INS*, 532 F.2d 268, 270 (2d Cir. 1976); ALEINIKOFF ET AL., *supra* note 75, at 689; Sarah Koteen Barr, Comment, *C is for Confusion: The Tortuous Path of Section 212(c) Relief in the Deportation Context*, 12 LEWIS & CLARK L. REV. 725, 729 (2008).

78. L-, 1 I. & N. Dec. 1, 5–6 (Att’y Gen. Op. 1940).

79. *Id.* at 5.

departed from the United States voluntarily and not under order of deportation, and (3) who were not excludable on subversive charges.<sup>80</sup> The main concern was that an alien could enter the United States illegally, commit a crime, leave the country, and then still be able to use the Seventh Proviso to obtain permanent resident status.<sup>81</sup> Also troublesome to the Senate was the possibility that an LPR could be deported and still eligible for relief under the Seventh Proviso upon an attempt at reentry.<sup>82</sup> In 1952, Congress adopted these recommendations in enacting the INA and effectively replaced the Seventh Proviso with section 212(c).<sup>83</sup>

Much like the Seventh Proviso, section 212(c) was only available to noncitizens in exclusion proceedings.<sup>84</sup> However, the BIA continued its policy of extending this type of relief from the exclusion context to the deportation context.<sup>85</sup> Initially though, 212(c) relief was only extended to the deportation proceedings of an LPR who had previously left the country and reentered.<sup>86</sup>

Thus, by 1956, a deportable LPR who left the country, reentered without incident, and later had deportation proceedings commenced against him, was eligible to apply for 212(c) relief.<sup>87</sup> However, a deportable LPR who never left the country was not eligible for 212(c) relief solely because he had not “temporarily proceeded abroad.”<sup>88</sup> In 1976, though, the U.S. Court of Appeals for the Second Circuit in *Francis v. INS*<sup>89</sup> extended 212(c) relief to LPRs in deportation proceedings who had never left the country after

80. See S. REP. No. 81-1515, at 384 (1950).

81. See *id.* at 383–84.

82. See *id.*

83. See *Francis v. INS*, 532 F.2d 268, 270–71 (2d Cir. 1976); ALEINIKOFF ET AL., *supra* note 75, at 690. For legislative history, see S. REP. No. 82-1137, at 12 (1952).

84. See Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (“Aliens lawfully admitted for permanent residence 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 . . .”).

85. See *G-A-*, 7 I. & N. Dec. 274 (B.I.A. 1956); see also ALEINIKOFF ET AL., *supra* note 75, at 690 (discussing the case of *G-A-*); Michael M. Waits, Note, “*In Like Circumstances, but for Irrelevant and Fortuitous Factors*”: The Availability of Section 212(c) Relief to Deportable Legal Permanent Residents, 51 ARIZ. L. REV. 465, 476 (2009) (same).

86. See *G-A-*, 7 I. & N. Dec. at 275–76 (focusing on the fact that the applicant previously left and reentered the country). The reason for allowing 212(c) relief for an individual in deportation proceedings who had reentered the country since his conviction was a fairness concern. Had 212(c) relief not been available to these individuals, the government would have had a simple way to circumvent 212(c) relief: it could decline to exclude a returning noncitizen convict and then, after his reentry, institute deportation proceedings that would not afford him the benefit of 212(c) relief. Cf. ALEINIKOFF ET AL., *supra* note 75, at 690 (“[T]he [212(c)] waiver should be available in the deportation proceeding when it could have been exercised at time of re-entry and would have wiped out the deportation ground.”). This concern would only be realized if the LPR’s conviction made him both excludable and deportable. Therefore, 212(c) relief is available only for deportations for which there is a comparable ground of exclusion. See *supra* Part I.B.2.d.

87. See *Francis*, 532 F.2d at 269.

88. See Immigration and Nationality Act § 212(c); *Francis*, 532 F.2d at 269; see also Waits, *supra* note 85, at 477.

89. 532 F.2d 268 (2d Cir. 1976).

being convicted of an excludable offense.<sup>90</sup> The Second Circuit held that “fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.”<sup>91</sup>

The BIA quickly adopted *Francis* that same year, holding that LPRs are eligible to apply for 212(c) relief regardless of whether they temporarily proceeded abroad or not.<sup>92</sup> Similarly situated permanent residents, the BIA reasoned, should be treated equally with respect to applications for 212(c) relief.<sup>93</sup> This was the law for 212(c) relief until its repeal in 1996.<sup>94</sup>

## 2. 212(c) Relief in Action

This Note addresses those LPRs convicted of a deportable criminal offense who do not file an application for 212(c) relief until deportation proceedings have been initiated.<sup>95</sup> In these cases, an LPR submits an application on Form I-191 (Application for Advance Permission to Return to Unrelinquished Domicile) to the IJ presiding over the deportation proceedings, who then rules on the application.<sup>96</sup> The text of section 212(c) lays out the requirements an individual has to meet to be eligible for the relief.<sup>97</sup> The statute requires that the noncitizen (1) is an LPR; (2)

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90. *See id.* at 273. It was still understood after this decision that 212(c) relief was only available in deportation proceedings where the grounds for deportation had an analogous ground in the exclusionary context. *See* ALEINIKOFF ET AL., *supra* note 75, at 697; *see also infra* Part I.B.2.d.

91. *Francis*, 532 F.2d at 273.

92. *See* Silva, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

93. *Id.*

94. *See* INS v. St. Cyr, 533 U.S. 289, 295–97 (2001) (discussing the application of 212(c) relief to deportation proceedings, until 1996).

95. An LPR has the possibility of filing a 212(c) application affirmatively, before any deportation or exclusion proceedings commenced. *See* 8 C.F.R. § 212.3(b) (2010). However, the traditional strategy was to wait for deportation or exclusion proceedings to begin before applying for relief, so as not to affirmatively call the noncitizen and his deportability to the attention of the INS. *See* 1 NAT'L IMMIGRATION PROJECT, *supra* note 10, § 8:41 n.1, at 8-91. Thus, Most 212(c) applications are filed “defensively”—that is, by non-citizens who had already been formally placed in removal proceedings—with the immigration judge (IJ) presiding over the removal proceedings. *See* Stephen H. Legomsky, *Forum Choices for Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1358 (1986).

96. *See* 6 GORDON ET AL., *supra* note 49, § 74.04[3][b], at 74-61.

97. The text of the last version of the statute reads:

Aliens lawfully admitted for permanent residence 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)). . . . This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

temporarily proceeded abroad voluntarily, not under an order of deportation; (3) has an unrelinquished domicile of at least seven consecutive years; and (4) is not subject to a bar for specific criminal convictions.<sup>98</sup> In addition, the noncitizen's ground for deportation must have a comparable ground of exclusion,<sup>99</sup> and the Attorney General still must decide to exercise his discretion favorably in the particular noncitizen's case.<sup>100</sup> Accordingly, several requirements must be met for an individual even to be eligible to apply for 212(c) relief. This part discusses each of these requirements in turn.

*a. Lawfully Admitted for Permanent Residence*

According to the INA, "lawfully admitted for permanent residence" means having been granted the privilege of residing permanently in the United States as an immigrant.<sup>101</sup> A lawful permanent resident is sometimes referred to as a "green card" holder.<sup>102</sup>

In order to obtain permanent resident status, the noncitizen usually must obtain an immigrant visa from a consul abroad and present it for inspection at a designated U.S. port or place of entry.<sup>103</sup> After this inspection and admission, the noncitizen is now a lawful permanent resident.<sup>104</sup> There are several ways that a noncitizen obtains the necessary visa.<sup>105</sup> First, and most commonly, noncitizens with a familial relationship to a U.S. citizen or LPR can seek admission on the basis of this relationship.<sup>106</sup> A noncitizen can also obtain a visa through employment in the United States,<sup>107</sup> or through a "diversity" lottery.<sup>108</sup> Each year, 55,000 admissions are granted for noncitizens applying for this lottery, with preference for noncitizens from countries that have a low representation for admission in the United States

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*See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (amending Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996)).

98. *See* 8 U.S.C. § 1182(c) (1994) (repealed 1996).

99. *See* Hernandez-Casillas, 20 I. & N. Dec. 262, 286-87 (Att'y Gen. Op. 1991); *supra* note 86 and accompanying text.

100. *See* 8 U.S.C. § 1182(c) (1994) (repealed 1996) (stating that relief may be granted "in the discretion of the Attorney General").

101. Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2006).

102. RANDALL MONGER & NANCY RYTINA, U.S. LEGAL PERMANENT RESIDENTS: 2008 1 (2009), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf).

103. 1 GORDON ET AL., *supra* note 49, § 1.03[2][f][i], at 1-36.3.

104. *See* BOSWELL, *supra* note 35, at 126.

105. *Id.* at 123-24.

106. *See id.* at 123; *see also* 8 U.S.C. § 1153(a) (giving the allocation of visas based on the closeness of the familial relationship); MONGER & RYTINA, *supra* note 102, at 3, Table 2 (calculating that about 64.5% of all LPR admissions from fiscal years 2006 to 2008 were through family sponsorship); Jayme A. Feldheim, Note, *Ending the Widow Penalty: Why Are Surviving Alien Spouses of Deceased Citizens Being Deported?*, 77 FORDHAM L. REV. 1873, 1878-81 (2009) (explaining how a family member of a U.S. citizen obtains LPR status).

107. *See* 8 U.S.C. § 1153(b).

108. *See generally id.* § 1153(c).

over the preceding five years.<sup>109</sup> Alternatively, an individual may receive LPR status through admission as a refugee or through a grant of asylum.<sup>110</sup>

Finally, a noncitizen who is lawfully in the United States as a nonimmigrant<sup>111</sup> can apply for “adjustment of status” to obtain lawful permanent residency.<sup>112</sup> An adjustment application is much like the process for an immigrant visa, except that the application is pursued through U.S. Citizenship and Immigration Services (USCIS) from within the United States, rather than through a consulate abroad.<sup>113</sup>

*b. Temporarily Proceeded Abroad Voluntarily and Not Under an Order of Deportation*

As previously discussed, the literal language of section 212(c) makes the statute applicable only to noncitizens returning from a temporary absence abroad.<sup>114</sup> However, after subsequent case law extended this relief to individuals in deportation proceedings and not just exclusion proceedings,<sup>115</sup> the requirement that the individual had temporarily proceeded abroad was eradicated.<sup>116</sup>

The requirement that the individual did not leave the country under an order of deportation was added at the insistence of the Senate at the time of the INA’s drafting.<sup>117</sup> Even further, if the LPR was in a situation where he was returning to the United States, he must have left voluntarily.<sup>118</sup> For example, a noncitizen who was repatriated to an enemy nation during World War II did not depart “voluntarily” and was thus not eligible for 212(c) relief.<sup>119</sup>

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109. *See id.* §§ 1151(e), 1153(c).

110. *See id.* § 1159(a)–(b).

111. A “nonimmigrant” is one who falls within one of several specifically enumerated categories of typically temporary entrants. LEGOMSKY, *supra* note 1, at 9. The most common examples are tourists, business visitors, students, and temporary workers. *Id.* To qualify for admission as a nonimmigrant, the noncitizen must fit one of the statutory categories, most of which requires intent to leave the country at the end of the authorized period, and the noncitizen must not fall within any “inadmissibility” grounds, such as those relating to health, criminal convictions, or national security. *Id.*; *see also* 8 U.S.C. § 1182(a) (discussing “inadmissibility”).

112. *See generally* 8 U.S.C. § 1255.

113. *See* BOSWELL, *supra* note 35, at 148–49; *see also* 8 U.S.C. § 1255.

114. *See supra* notes 86–88 and accompanying text.

115. *See supra* notes 85–87 and accompanying text.

116. *See supra* notes 88–93 and accompanying text.

117. *See supra* notes 80–83 and accompanying text.

118. *See* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

119. *See* T-, 6 I. & N. Dec. 778, 781 (B.I.A. 1955) (holding that appellant, a Japanese immigrant, who was repatriated to Japan during World War II, had no choice but to return to Japan, and thus did not depart the United States “voluntarily” and therefore is ineligible for 212(c) relief).

*c. Lawful Unrelinquished Domicile of Seven Consecutive Years*

212(c) relief is only available to LPRs with a lawful unrelinquished domicile of seven consecutive years.<sup>120</sup> Although the INA does not define the term “lawful domicile,”<sup>121</sup> at least one court has held that a “lawful domicile” for purposes of 212(c) relief means lawful physical presence and the intent to remain in the United States indefinitely.<sup>122</sup> This is not necessarily the test that every court must follow for determining domicile, however; there is much debate about how broadly the term “domicile” should be read.<sup>123</sup> This Note assumes that the noncitizen simply must have been domiciled in the United States for seven years to be eligible for 212(c) relief.

*d. Deportable Based on Conviction for an Offense for Which a Comparable Ground for Inadmissibility Exists*

Only those noncitizens that are deportable on grounds that have a comparable ground of exclusion may benefit from 212(c) relief.<sup>124</sup> This requirement is likely connected to the extension of 212(c) relief to deportations. The extension of relief to deportations prevented the inequity of deporting a specific group of LPRs without the possibility of 212(c) relief. These were LPRs with a conviction that made them both excludable and deportable, and left the country and reentered without exclusion proceedings. Had exclusion proceedings been commenced, 212(c) relief would have been available; if the government allowed reentry and then brought deportation proceedings, 212(c) relief would not have been available.<sup>125</sup> As noted, the LPR must have been both excludable and deportable for his criminal conviction for this inequity to have arisen. Thus, in order to qualify for 212(c) relief, a ground for exclusion must exist that is comparable to the ground for deportation.<sup>126</sup>

*e. Criminal Bars to 212(c) Relief*

The last version of section 212(c) before its repeal stated that the relief was not available to those noncitizens made deportable for committing an aggravated felony,<sup>127</sup> a controlled substance violation other than a single offense for possession of less than thirty grams of marijuana for one’s own

120. Immigration and Nationality Act § 212(c).

121. *Graham v. INS*, 998 F.2d 194, 195 (3d Cir. 1993).

122. *See Melian v. INS*, 987 F.2d 1521, 1524 (11th Cir. 1993); *cf. Rosario v. INS*, 962 F.2d 220, 224 (2d Cir. 1992) (holding that domicile requires a “fixed, permanent and principal home and to which, whenever absent [the noncitizen] always intend[s] to return”).

123. *See generally* Nadine Wettstein, *Lawful Domicile for Purposes of INA § 212(c): Can It Begin with Temporary Residence?*, 71 INTERPRETER RELEASES 1273 (Sept. 26, 1994); Mark A. Hall, Comment, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. CHI. L. REV. 771 (1980).

124. *See Hernandez-Casillas*, 20 I. & N. Dec. 262, 286–87 (Att’y Gen. Op. 1991).

125. *See supra* note 86.

126. *Hernandez-Casillas*, 20 I. & N. Dec. at 286–87.

127. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006).

use,<sup>128</sup> certain firearms offenses,<sup>129</sup> or several other miscellaneous crimes, including those for espionage, sabotage, treason, and sedition.<sup>130</sup>

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) enacted this version of 212(c).<sup>131</sup> This amendment effectively limited relief to those noncitizens who had committed a single crime of moral turpitude that did not amount to an aggravated felony.<sup>132</sup> The relief was not always restricted so severely: before AEDPA was written into law, only noncitizens convicted of aggravated felonies for which five years imprisonment had actually been served were ineligible for relief,<sup>133</sup> and before the Immigration Act of 1990 (IMMACT),<sup>134</sup> only noncitizens convicted from a list of limited offenses were ineligible for relief.<sup>135</sup> Besides removing the five-year requirement, which made all noncitizens convicted of an aggravated felony ineligible for 212(c) relief, AEDPA also significantly expanded the definition of an “aggravated felony,” making the latest version of section 212(c) more restrictive than it had ever been.<sup>136</sup>

*f. In the Discretion of the Attorney General*

In addition to proving eligibility with respect to all of the previously mentioned factors,<sup>137</sup> the noncitizen must also prove that she deserves a favorable exercise of the Attorney General’s discretion in granting the 212(c) application to save her from deportation.<sup>138</sup> Relief is granted if a

128. *See id.* § 1227(a)(2)(B).

129. *See id.* § 1227(a)(2)(C).

130. *See id.* § 1227(a)(2)(D). The text of repealed section 212(c) mandates that it shall not apply to any alien who is “deportable by reason of having committed any criminal offense covered in section 1227(a)(2)(A)(iii), (B), (C), or (D) of this title . . . .” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (amending Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996)). Noncitizens deportable by reason of two or more crimes of moral turpitude arising out of different incidents are also not eligible for 212(c) relief so long as the crimes were committed within five years of admission and the sentence for each crime was one year or longer. *See id.* (disallowing relief for aliens covered by section 1227(a)(2)(A)(ii) of title 8); *see also* 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (2006).

131. Pub. L. No. 104-132, 110 Stat. 1214 (1996); *see id.* § 440(d), 110 Stat. at 1277 (codified at Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996)).

132. 6 GORDON ET AL., *supra* note 49, § 74.04[2][f], at 74-50.

133. *See* Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

134. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

135. *See infra* notes 152–58 and accompanying text.

136. *See* 6 GORDON ET AL., *supra* note 49, § 74.04[2][f][i], at 74-52 to 74-53; *see generally* Antiterrorism and Effective Death Penalty Act of 1996 § 440(e) (expanding the offenses that qualify as an aggravated felony). For a discussion on the complex and related question of the retroactivity of AEDPA’s new restrictions on 212(c) relief, *see* 6 GORDON ET AL., *supra* note 49, § 74.04[4][a], at 74-62 to 74-66.1.

137. The noncitizen applying for 212(c) relief bears the burden of proving her eligibility. *See* Julie K. Rannik, Note, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 134 (1996).

138. *See* Marin, 16 I. & N. Dec. 581, 587 (B.I.A. 1978) (“A respondent . . . bears the burden of demonstrating that discretionary relief should be exercised in his behalf.”).

balancing of adverse factors against “social and humane” considerations shows that doing so is in the best interests of the United States.<sup>139</sup> The Attorney General has delegated the discretion to decide 212(c) applications to the appropriate immigration officer or judge.<sup>140</sup>

The case which most clearly states the relevant factors is *Marin*.<sup>141</sup> Adverse factors for 212(c) adjudication include the gravity of the underlying offense, the existence of other significant violations of United States immigration laws, the nature, recency, and seriousness of any existing criminal record, and “the presence of other evidence indicative of a respondent’s bad character or undesirability as a permanent resident of this country.”<sup>142</sup> The “social and humane considerations”—or favorable factors for an applicant—include familial ties within the United States, a long duration of residence in the United States, evidence of hardship to the noncitizen and her family should deportation occur, service in the United States Armed Forces, a history of employment within the United States, the existence of business or property ties within the United States, evidence of value and service to the community, proof of genuine rehabilitation should a criminal record exist, and other evidence attesting to the noncitizen’s good character.<sup>143</sup>

For applications for relief for convicted LPRs, IJs are to balance these factors, evaluating them on a case-by-case basis.<sup>144</sup> Further, as the negative factors became more serious, the noncitizen has to demonstrate additional favorable factors, which in some cases, such as those involving conviction of a serious drug offense, may have required a showing of “unusual or outstanding equities.”<sup>145</sup> Such a showing does not automatically ensure a grant of 212(c) relief, but only satisfies the threshold test that these noncitizens must pass to even be eligible for 212(c) relief.<sup>146</sup>

### 3. Restricting the Relief: Amendments and Eventual Repeal

Convicted LPRs under orders of deportation relied strongly upon 212(c).<sup>147</sup> Significantly, between 1989 and 1995, 212(c) relief was granted to about 51.5% of applicants for which a final decision was reached, for a

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139. *See id.* at 584.

140. 8 C.F.R. §§ 212.3(a), 1212.3(a) (2010); *see also supra* note 60 and accompanying text.

141. 16 I. & N. Dec. 581 (B.I.A. 1978).

142. *Marin*, 16 I. & N. Dec. at 584 (citations omitted).

143. *Id.* at 584–85.

144. Rannik, *supra* note 137, at 136.

145. *See Edwards*, 20 I. & N. Dec. 191, 195 (B.I.A. 1990); *Marin*, 16 I. & N. Dec. at 585.

146. *See, e.g., Guillen-Garcia v. INS*, 999 F.2d 199, 203–04 (7th Cir. 1993); *Hazzard v. INS*, 951 F.2d 435, 438 (1st Cir. 1991).

147. *See INS v. St. Cyr*, 533 U.S. 289, 295–96 (2001) (“[T]he class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large . . . .”); Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in *IMMIGRATION STORIES* 279, 281 (David A. Martin & Peter H. Schuck eds., 2005) (“Under [pre-1996] law, relief under section 212(c) of the INA served as the principal defense for LPRs who faced deportation due to a criminal conviction.”).

total of over 10,000 instances of relief granted.<sup>148</sup> Even when applications were denied, courts of appeals reviewing those decisions vacated those denials “on a nontrivial number of occasions.”<sup>149</sup>

However, throughout the 1990s, national resentment toward noncitizens in the United States grew.<sup>150</sup> This resulted in a wave of amendments to 212(c) relief aimed at limiting its availability and facilitating the deportation of criminal LPRs.<sup>151</sup> First, in 1990, IMMACT amended 212(c) to preclude from relief any noncitizen convicted of an aggravated felony for which a term of imprisonment of at least five years was served.<sup>152</sup>

On April 24, 1996, Congress enacted AEDPA.<sup>153</sup> This bill was in part motivated by early beliefs that the bombing of the federal building in Oklahoma City the previous year was orchestrated by noncitizen terrorists.<sup>154</sup> Accordingly, section 440 of the act greatly reduced the rights of noncitizens with criminal convictions.<sup>155</sup> Section 440(d) of AEDPA stripped 212(c) eligibility from all noncitizens who were deportable for committing an aggravated felony (regardless of the length of the sentence), a controlled substance violation, a firearms offense, or multiple crimes involving moral turpitude.<sup>156</sup> AEDPA also recategorized many more crimes as aggravated felonies, thereby eliminating 212(c) relief “for all but the most minor criminal offenses.”<sup>157</sup> As a result, 212(c) relief remained available only for those who committed a single crime involving moral turpitude that did not qualify as an aggravated felony.<sup>158</sup> AEDPA also specifically provided that the new definitions for aggravated felonies

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148. *See St. Cyr*, 533 U.S. at 296 & n.5 (citing Rannik, *supra* note 137, at 150 n.80).

149. *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996).

150. *See, e.g.*, H.R. REP. NO. 104-518, at 119 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 944, 952 (explaining that the explicit goal of 1996’s AEDPA legislation was to enhance “the ability of the United States to deport criminal aliens”); Morawetz, *supra* note 147, at 279 (noting that new laws limiting the rights of criminally convicted LPRs were motivated by hunches that noncitizens were responsible for the Oklahoma City bombing); Ella Dlin, Comment, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 55–59 (1998) (discussing general anti-immigration sentiment in the United States in the 1990s).

151. *See Barr*, *supra* note 77, at 731.

152. Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 4978, 5052 (codified at Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (Supp. II 1991) (repealed 1996)).

153. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 29, 40, and 42 U.S.C.).

154. *See Morawetz*, *supra* note 147, at 279.

155. *Id.*

156. *See Abebe v. Gonzales*, 493 F.3d 1092, 1099–1100 (9th Cir. 2007), *superseded by Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010); Michael Boyle, *Cancellation of Removal and INA §212(c) Relief for Permanent Residents*, in I AM. IMMIGRATION LAWYERS ASS’N, IMMIGRATION AND NATIONALITY LAW HANDBOOK 112, 117 (Randy P. Auerbach et al. eds., 2003–2004 ed. 2003).

157. Rannik, *supra* note 137, at 129; *see also* Anthony Lewis, Op-Ed., *Abroad at Home: Mr. Smith Tells a Tale*, N.Y. TIMES, Mar. 10, 1997, at A15 (“One would think . . . that the term ‘aggravated felons’ meant murderers, rapists and the like. In fact, the new immigration law includes many minor, nonviolent crimes in the definition.”).

158. Boyle, *supra* note 156, at 117.

applied to all convictions entered on or after its April 24, 1996 enactment.<sup>159</sup>

Though AEDPA was meant to simplify the deportation of criminal noncitizens, it instead created problems relating to the enforcement and efficiency of deportation proceedings.<sup>160</sup> For example, it inadvertently created loopholes that allowed some noncitizens to “thwart enforcement of the immigration laws.”<sup>161</sup> In other circumstances, AEDPA made some noncitizens deportable where deportation was not appropriate.<sup>162</sup> In response to these problems, Congress enacted IIRIRA just a few months later on September 30, 1996.<sup>163</sup> IIRIRA repealed 212(c) relief altogether,<sup>164</sup> replacing it with a newly created form of discretionary relief called “Cancellation of Removal,” located in section 240A(a) of the INA.<sup>165</sup>

The current cancellation of removal relief is much narrower than older versions of section 212(c), as it denies the Attorney General the discretion to cancel removal for any noncitizen convicted of an aggravated felony.<sup>166</sup> IIRIRA further limits this relief by redefining the term “aggravated felony” to encompass many new offenses, including misdemeanors and low-level felonies.<sup>167</sup> Most criminal LPRs in exclusion or deportation proceedings are thus rendered “statutorily ineligible to apply for relief.”<sup>168</sup> By creating this new, much narrower form of relief, 212(c) remains the only option for many LPRs placed in removal proceedings. In many cases, an LPR will be

159. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(f), 110 Stat. 1214, 1278.

160. See Distinti, *supra* note 45, at 2821–22. “Even President Bill Clinton acknowledged that AEDPA made ‘major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.’” *Id.* (quoting Yen H. Trinh, Note, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 GA. J. INT’L & COMP. L. 543, 549–50 (2005)).

161. *Kwon v. Comfort*, 174 F. Supp. 2d 1141, 1143 (D. Colo. 2001)

162. See 142 CONG. REC. 27,216 (1996) (statement of Sen. Hatch) (“[T]here might be certain rare circumstances we had not contemplated, when removal of a particular criminal alien might not be appropriate.”).

163. See generally *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

164. See *id.* § 304(b), 110 Stat. at 3009-597.

165. *Immigration and Nationality Act* § 240A(a), 8 U.S.C. § 1229b(a) (2006). The repeal and enactment were both made effective on April 1, 1997. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* § 309(a).

166. See 8 U.S.C. § 1229b(a)(3); Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 749 (2006).

167. See Am. Immigration Lawyers Ass’n, *IIRAIRA Reform*, AILA INFONET, <http://www.aila.org/content/default.aspx?bc=3545> (last visited Oct. 23, 2010) (“Under IIRAIRA, crimes as minor as shoplifting now constitute aggravated felonies.”); see also *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* § 321 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)). Further, this new definition of “aggravated felony” applied retroactively; that is, a noncitizen who committed a misdemeanor many years ago that was not an “aggravated felony,” and was thus not originally deportable, could now be deported without being eligible for cancellation of removal. See Am. Immigration Lawyers Ass’n, *supra*.

168. Waits, *supra* note 85, at 483.

clearly ineligible for an exercise of favorable discretion of cancellation of removal, but should he be deemed eligible to apply for the repealed 212(c) relief, a favorable exercise of discretion that allows the LPR to remain in the United States is a real possibility.<sup>169</sup>

### C. *Retroactivity and 212(c) Relief*

The changes made to section 212(c) instigated a “‘tidal wave’ of judicial interpretation” over whether the amendments and eventual repeal retroactively eliminated a noncitizen’s eligibility for 212(c) relief.<sup>170</sup> That is, if an LPR was convicted of a deportable offense before 212(c)’s repeal, was she eligible for this relief if deportation proceedings were not commenced until after the repeal? This is the problem of the retroactive application of a statutory change. There is a wealth of Supreme Court precedent on retroactivity analysis in general, as well as a developing body of case law dealing specifically with the retroactivity of 212(c)’s amendments and repeal.

#### 1. *Landgraf* and the Modern Framework for Civil Retroactivity

Justice Joseph Story offered an influential definition of “retrospectivity,” or retroactivity—a now fundamental precept in statutory analysis—which the Supreme Court has since adopted<sup>171</sup>: “Upon principle every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.”<sup>172</sup> A presumption against retroactively attaching new legal consequences to acts already committed is deeply rooted in United States law and history.<sup>173</sup> This is because retroactive statutes raise particular concerns, namely, that the legislature will use its powers to suddenly

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169. Cf. Brief of Amici Curiae Immigration Defense Project et al. in Support of Petitioner, *supra* note 17, at 13–18 (explaining that the availability of 212(c) remains “critical” for thousands of LPRs).

170. See 6 GORDON ET AL., *supra* note 49, § 74.04[4], at 74–62 (quoting *Catney v. INS*, 178 F.3d 190, 191 (3d Cir. 1999)).

171. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268–69 (1994) (quoting Justice Joseph Story’s definition and citing several Supreme Court cases which have since relied on Justice Story’s definition).

172. *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156).

173. See generally Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489 (2003) (tracing anti-retroactivity sentiment and laws from Roman times, through England, to early America and the Constitution); see also *Landgraf*, 511 U.S. at 265 (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842–44, 855–56 (1990) (Scalia, J., concurring); *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. Sup. Ct. 1811); Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936))).

“sweep away settled expectations . . . as a means of retribution against unpopular groups or individuals.”<sup>174</sup>

While retroactivity is constitutionally impermissible in the context of criminal cases under the Ex Post Facto Clause,<sup>175</sup> retroactive civil laws are not necessarily impermissible.<sup>176</sup> Nevertheless, there is still a presumption against retroactive application in the civil context.<sup>177</sup> Notably, deportation proceedings are a civil remedy, even if the underlying deportation stems from a criminal conviction.<sup>178</sup> Thus, the repeal of 212(c) relief is not governed by the Ex Post Facto Clause, but by the modern framework for retroactivity in civil cases that the Supreme Court set out in *Landgraf v. USI Film Products*.<sup>179</sup>

*Landgraf* laid out a two-part test to determine whether a civil law has an impermissible retroactive effect.<sup>180</sup> First, the court must determine whether Congress expressly prescribed the statute’s temporal reach.<sup>181</sup> If Congress made the scope of the statute clear, the inquiry may end: Congress’s intent only need be carried out.<sup>182</sup>

If, however, Congress has not expressly prescribed temporal reach, the court must move to a second step to determine whether applying the statute to past acts would constitute impermissible retroactivity.<sup>183</sup> If applying the statute retroactively “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed,” then the traditional presumption against retroactive application would make such application impermissible.<sup>184</sup> These are merely sufficient, rather than necessary, factors for invoking the presumption against retroactivity.<sup>185</sup> The inquiry

174. *Landgraf*, 511 U.S. at 266. Notably, immigrants at the time of the enactment of IIRIRA were an unpopular group of individuals. See *supra* notes 150–51 and accompanying text.

175. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (holding that the Ex Post Facto Clause prohibits retroactive criminal laws).

176. See *Calder*, 3 U.S. (3 Dall.) at 391 (holding that the Ex Post Facto Clause does not make impermissible retroactive civil laws).

177. See *INS v. St. Cyr*, 533 U.S. 289, 324 (2001) (citing *Landgraf*, 511 U.S. at 272); see also Van Wyke, *supra* note 166, at 753 (noting that retroactivity is “heavily disfavored in the civil context”).

178. See *supra* note 56 and accompanying text; see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–95 (1952) (holding that the Ex Post Facto Clause does not apply to the civil remedy of deportation).

179. 511 U.S. 244 (1994); see also *St. Cyr*, 533 U.S. at 314–26 (relying on *Landgraf* to analyze the permissibility of the retroactivity of the repeal of section 212(c)); *Ponnappula v. Ashcroft*, 373 F.3d 480, 490 (3d Cir. 2004) (citing to *Landgraf* as the controlling framework for assessing the retroactivity of a civil law).

180. *Landgraf*, 511 U.S. at 280.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*; see also Van Wyke, *supra* note 166, at 758.

185. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (1997). In various cases, the Supreme Court has adopted varying tests and focused on different factors in invoking the presumption against retroactivity. See *Chambers v. Reno*, 307 F.3d

essentially amounts to whether new legal consequences have attached to past conduct.<sup>186</sup> The Court has subsequently accepted and utilized the *Landgraf* framework on several occasions.<sup>187</sup> In doing so, it has repeatedly counseled that the judgment as to “whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.”<sup>188</sup>

## 2. *St. Cyr* and Applying Retroactivity to Section 212(c)

The retroactive application of the repeal of 212(c) relief has controlled and continues to control the fates of thousands of noncitizens.<sup>189</sup> Although courts were first faced with the retroactive application of AEDPA’s restrictive amendments to 212(c) relief,<sup>190</sup> this Note is most concerned with the retroactivity of IIRIRA’s repeal of 212(c) relief.<sup>191</sup> In 2001, the Supreme Court considered the retroactivity of 212(c)’s repeal in *INS v. St. Cyr*.

Enrico St. Cyr was a citizen of Haiti admitted as an LPR to the United States in 1986.<sup>192</sup> On March 8, 1996, before the effective date of both AEDPA and IIRIRA, St. Cyr pleaded guilty to selling a controlled substance in violation of Connecticut state law.<sup>193</sup> This conviction made St. Cyr deportable,<sup>194</sup> but under pre-AEDPA law he would have been eligible to apply for 212(c) relief.<sup>195</sup> However, St. Cyr’s removal proceedings did not commence until April 10, 1997, after both AEDPA and IIRIRA had gone into effect.<sup>196</sup> By the Attorney General’s interpretation of these amendments, St. Cyr no longer had the opportunity to file for the relief for which he was once eligible.<sup>197</sup>

St. Cyr did in fact seek to prevent his removal by applying for 212(c) relief.<sup>198</sup> An IJ denied St. Cyr’s application and the BIA dismissed his appeal, concluding that IIRIRA’s repeal of section 212(c) rendered him

284, 292 (4th Cir. 2002) (“[T]he Supreme Court has not limited its examination of a statute’s retroactive effect to one single, rigid test.”).

186. See *Hughes Aircraft*, 520 U.S. at 947–48; *Landgraf*, 511 U.S. at 269–70; see also Van Wyke, *supra* note 166, at 760, 762.

187. See, e.g., *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37–38 (2006); *Martin v. Hadix*, 527 U.S. 343, 352 (1999); *Hughes Aircraft*, 520 U.S. at 946.

188. *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (quoting *Martin*, 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270)) (internal quotation marks omitted).

189. See *supra* notes 27–29 and accompanying text.

190. See generally 6 GORDON ET AL., *supra* note 49, § 74.04[4][a][i][A], at 74–64 to 74–65. For a discussion on AEDPA’s restrictive amendments to 212(c), see *supra* notes 155–58 and accompanying text.

191. See *supra* notes 163–69 and accompanying text.

192. *St. Cyr*, 533 U.S. at 293.

193. *Id.*

194. See Immigration and Nationality Act § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i) (1994) (current version at 8 U.S.C. § 1227(a)(2)(B)(i) (2006)).

195. *St. Cyr*, 533 U.S. at 293.

196. *Id.*

197. *Id.*

198. *St. Cyr v. INS*, 229 F.3d 406, 409 (2d Cir. 2000), *aff’d*, 533 U.S. 289 (2001).

ineligible for relief.<sup>199</sup> St. Cyr then filed a habeas corpus petition in the United States District Court for the District of Connecticut, arguing that AEDPA and IIRIRA should not be retroactively applied to preclude him from 212(c) relief, since his deportable conviction occurred prior to the enactment of both statutes.<sup>200</sup> The district court agreed with St. Cyr, concluding that the law that was in effect at the time of the commission of the crime should govern the removal proceedings.<sup>201</sup> The Second Circuit then utilized the Supreme Court's *Landgraf* framework to decide the issue itself.<sup>202</sup> The court concluded that Congress did not express any clear intent as to whether AEDPA and IIRIRA should apply retroactively, and thus reached *Landgraf*'s second step.<sup>203</sup> The court then decided that AEDPA and IIRIRA, as applied to deportable convictions by guilty or *nolo contendere* pleas that pre-date the statutes' enactments, have an impermissible retroactive effect because the legal effect of prior conduct would be changed.<sup>204</sup> The INS petitioned for a writ of certiorari, which was granted by the Supreme Court.<sup>205</sup>

In *INS v. St. Cyr*, the Supreme Court held that 212(c) relief remains available for otherwise eligible noncitizens who pleaded guilty to a deportable offense before 212(c)'s repeal.<sup>206</sup> The Court utilized its own *Landgraf* analysis, and first found that Congress did not affirmatively call for retroactive application of IIRIRA's repeal of 212(c) relief.<sup>207</sup> Whereas Congress expressly called for retroactive application of other provisions of IIRIRA, it was completely silent as to the retroactivity of section 304(b), which repealed 212(c).<sup>208</sup> In the second step of the analysis, the Court then held that "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.'"<sup>209</sup>

The Court reasoned that LPRs pleading guilty to deportable offenses were engaging in a quid pro quo with the Government.<sup>210</sup> In exchange for

199. *Id.*

200. *Id.*

201. *Dunbar v. INS*, 64 F. Supp. 2d 47, 54 (D. Conn. 1999), *aff'd sub nom. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001).

202. *St. Cyr*, 229 F.3d at 412–13, *aff'd*, 533 U.S. 289.

203. *Id.* at 413–17.

204. *Id.* at 418–19.

205. *INS v. St. Cyr*, 531 U.S. 1107 (2001).

206. *St. Cyr*, 533 U.S. at 326.

207. *Id.* at 320.

208. *See id.* at 318–20 & n.43 (citing to multiple sections of IIRIRA where Congress explicitly proscribed that specific amendments to the INA were to be applied retroactively); *see, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321(c), 110 Stat. 3009-546, 3009-628 (codified at 8 U.S.C. § 1101 (2006)) (mandating that new definitions for aggravated felonies "shall apply to actions taken on or after the date of the enactment of [IIRIRA], regardless of when the conviction occurred").

209. *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994)); *accord id.* at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

210. *Id.* at 321–22.

some perceived benefit—the continuing availability and eligibility for 212(c) relief—the LPR waived his constitutional right to a jury trial and gave the government tangible benefits, namely prompt closure of the case without the expenditure of prosecutorial resources.<sup>211</sup> Because individuals like *St. Cyr* “almost certainly” relied on the availability of 212(c) relief in deciding to forgo a trial, IIRIRA’s elimination of any possibility of relief has an “obvious and severe retroactive effect.”<sup>212</sup> Thus, 212(c) relief was held to remain available to those noncitizens, like *St. Cyr*, whose deportable conviction was obtained through a guilty plea before the repeal, and who otherwise would have been eligible for such relief at the time of their plea under the law then in effect.<sup>213</sup> The DOJ later codified this ruling.<sup>214</sup>

The case of *Enrico St. Cyr* sufficiently demonstrates the importance of this new rule. After the Supreme Court rendered its decision, *St. Cyr* had a hearing before an IJ and received relief under section 212(c).<sup>215</sup> He would have been removed had the Supreme Court not held that he was eligible to apply for 212(c) relief, but as a result of this ruling, he could stay in the United States.<sup>216</sup> Countless others in *St. Cyr*’s situation had similar hearings and were granted 212(c) relief.<sup>217</sup>

However beneficial this decision may have been to those LPRs who had pleaded guilty to their deportable offense before repeal, it did not address how to treat LPRs who did not plead guilty.<sup>218</sup> Instead, those convicted of a deportable offense after a trial were without a clear answer. The remainder of this Note deals with the question of whether an LPR convicted at trial of a deportable offense before IIRIRA repealed 212(c) relief can still rely on this waiver even though deportation proceedings are not commenced until after the relief’s repeal. Part II addresses and analyzes the different ways the federal courts approach and resolve this issue.

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211. *Id.* The LPR’s benefit from pleading guilty to a deportable offense, for example, could be “to ensure that he got less than five years to avoid what would have been a statutory bar on 212(c) relief.” *Id.* at 323 (quoting *Jideonwo v. INS*, 224 F.3d 692, 699 (7th Cir. 2000) (internal quotation marks omitted)).

212. *See St. Cyr*, 533 U.S. at 325. Specifically, before the repeal of 212(c), there was a rather strong likelihood that an individual like *St. Cyr* would garner a favorable exercise of discretion. *See supra* notes 147–49 and accompanying text. Now that the likelihood of such relief would be zero should the Supreme Court have held the other way, there were obvious retroactive effects of the repeal. *See St. Cyr*, 533 U.S. at 321 (holding that “IIRIRA’s elimination of any possibility of § 212(c) relief” clearly has a retroactive effect).

213. *St. Cyr*, 533 U.S. at 326.

214. *See* 8 C.F.R. § 1212.3(h) (2010).

215. *See Morawetz, supra* note 147, at 306.

216. *See supra* note 71 and accompanying text.

217. *Morawetz, supra* note 147, at 306. However, thousands of others were deported before the decision in *St. Cyr*, and were thus denied the benefit of this ruling. *Id.* at 280. These individuals were denied the opportunity to come back and reap the benefit of *St. Cyr*, as the government issued regulations allowing for reopening only for those who had yet to be deported. *Id.*

218. *See Nancy Morawetz, Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743, 1748 (2003) (explaining that *St. Cyr* was limited to persons who had entered plea agreements).

## II. EXPLORING THE APPROACHES: POST-REPEAL 212(C) ELIGIBILITY FOR LPRs CONVICTED AT TRIAL

*St. Cyr* made clear that those LPRs who had pleaded guilty to their deportable offenses pre-repeal could still attain 212(c) relief,<sup>219</sup> but left uncertain the fates of LPRs who had obtained their convictions after a trial. Part II of this Note analyzes the retroactive effect of the repeal of section 212(c) on those LPRs who did not plead guilty, but were instead convicted of a deportable offense at trial. Such LPRs did not engage in the overt conduct reflecting an intention to preserve eligibility for 212(c) relief that those accepting a plea bargain presumably did.<sup>220</sup> However, it is unsettled whether these LPRs should be altogether denied 212(c) relief for this difference.

The circuit courts differ in deciding when an LPR convicted at trial can still rely on section 212(c).<sup>221</sup> The courts are split in two different ways: whether these LPRs are eligible for 212(c) relief and how reliance on the prior availability of 212(c) factors into reaching this determination.<sup>222</sup> This part groups the circuit courts according to whether they allow LPRs convicted after a trial to apply for 212(c) relief and whether they permit relief on a categorical basis. The Third and Eighth Circuits have held that all LPRs convicted by trial pre-repeal can still rely on this relief post-repeal.<sup>223</sup> On the other hand, the U.S. Courts of Appeals for the Second, Fifth, and Tenth Circuits hold that some LPRs convicted at trial may remain eligible for 212(c) relief, depending on a showing of reliance on the continuing existence of the relief before its repeal.<sup>224</sup> Finally, the U.S. Courts of Appeals for the First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits categorically bar LPRs convicted by trial pre-repeal from applying for 212(c) relief post-repeal.<sup>225</sup>

Additionally, within these three categories, the courts are further divided on whether, and to what extent, they should consider in the retroactivity analysis an LPR's reliance on the prior state of the law. Thus, within each of these sections, the courts are divided among those that do not require an LPR to have relied on the prior availability of 212(c) to make its repeal impermissibly retroactive, those that require an objectively reasonable reliance, and those that require a subjective, individualized showing of

219. *See supra* Part I.C.2.

220. *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003).

221. Petition for Writ of Certiorari at 5–7, *Ferguson v. Holder*, 130 S. Ct. 1735 (2010) (No. 09-263), 2009 WL 2842077 at \*6–7.

222. *See Hem v. Maurer*, 458 F.3d 1185, 1191 (10th Cir. 2006).

223. *See Lovan v. Holder*, 574 F.3d 990, 994 (8th Cir. 2009); *Atkinson v. Attorney Gen. of the U.S.*, 479 F.3d 222, 231 (3d Cir. 2007).

224. *See Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 206 n.6 (5th Cir. 2007); *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Hem*, 458 F.3d at 1189.

225. *See Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010); *Mbea v. Gonzales*, 482 F.3d 276, 281–82 (4th Cir. 2007); *United States v. Zuñiga-Guerrero*, 460 F.3d 733, 738 & n.2 (6th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002).

reliance. Part II.A first discusses the circuits that categorically allow the relevant LPRs to apply for 212(c) relief. Part II.B discusses those that allow relief, dependent on a showing of reliance, and Part II.C discusses those that categorically bar these LPRs from 212(c) relief. Threaded throughout this part is a discussion of the role of reliance in each of these respective approaches.

*A. Categorical Section 212(c) Eligibility: Third and Eighth Circuits*

Both the Third and Eighth Circuits have held that IIRIRA's repeal of 212(c) relief has no consequence on any pre-enactment convictions of deportable offenses, regardless of the specific mode of conviction.<sup>226</sup> That is, even an LPR convicted of a deportable offense by trial pre-repeal is still eligible for 212(c) relief. Neither court requires any showing of reliance on the continuing existence of 212(c) relief for these LPRs to remain eligible for relief post-repeal.<sup>227</sup> Further, the rules of the two circuits do not differ in any meaningful way, as the Eighth Circuit expressly follows the approach of the Third Circuit.<sup>228</sup> Therefore, this Note only discusses the Third Circuit's approach.

The Third Circuit first dealt with this issue in *Ponnapula v. Ashcroft*.<sup>229</sup> There, it held that noncitizens that turned down a plea agreement and proceeded to trial had a reliance interest in the availability of 212(c) relief.<sup>230</sup> Specifically, as in *Ponnapula's* case, an LPR could have decided to go to trial because it was very likely that if he were convicted, he would only receive a short term of imprisonment, which would keep him statutorily eligible for 212(c) relief at the time.<sup>231</sup> In dicta, however, the court said that it highly doubted that noncitizens that went to trial without being offered a plea agreement have a reliance interest that renders the repeal impermissibly retroactive, because they had no opportunity to change their course of conduct throughout the criminal process in reliance on the availability of such relief.<sup>232</sup>

Later, in *Atkinson v. Attorney General of the U.S.*,<sup>233</sup> the Third Circuit held that the repeal of 212(c) relief cannot be applied retroactively, even to a noncitizen convicted of a deportable offense by trial.<sup>234</sup> A judge below believed that *Atkinson* had to show reasonable reliance on the preexisting state of the law (the availability of 212(c) relief) to render the repeal

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226. See *Lovan*, 574 F.3d at 993–94; *Atkinson*, 479 F.3d at 229–30.

227. *Lovan*, 574 F.3d at 994; *Atkinson*, 479 F.3d at 231.

228. See *Lovan*, 574 F.3d at 993.

229. 373 F.3d 480 (3d Cir. 2004).

230. *Id.* at 494, 496.

231. See *id.* at 484; see also Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996) (barring relief to noncitizens convicted of an aggravated felony for which a term of imprisonment of at least five years is served).

232. See *Ponnapula*, 373 F.3d at 494; see also *Atkinson*, 479 F.3d at 231 (classifying as dicta the language in *Ponnapula* that doubts that an LPR convicted by a jury can prove that the repeal of 212(c) is impermissible).

233. 479 F.3d 222 (3d Cir. 2007).

234. *Id.* at 231.

impermissibly retroactive.<sup>235</sup> Because Atkinson failed to do this, the lower court denied him the opportunity to apply for 212(c) relief.<sup>236</sup>

The Third Circuit then analyzed the Supreme Court's retroactivity jurisprudence, as espoused in *Landgraf* and its progeny, and ultimately disagreed with the district court's conclusion that reliance on the prior state of the law was required to make the repeal impermissibly retroactive.<sup>237</sup> The panel held that whether the individual

actually relied on the prior state of the law is not the conclusive factor in determining whether the amendment as a whole is to be applied retroactively or prospectively. Impermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law.<sup>238</sup>

The court observed that the Supreme Court never made reliance the *sine qua non* of the retroactivity inquiry.<sup>239</sup> The *Landgraf* test is one of statutory construction, not of reliance by individual parties.<sup>240</sup> Therefore, the Third Circuit focuses on whether IIRIRA "attached new legal consequences to Atkinson's conviction."<sup>241</sup> The court held that new legal consequences were indeed attached, since prior to IIRIRA's enactment Atkinson could apply for 212(c) relief, but he lost that right after its enactment.<sup>242</sup> The new legal consequence attached to the event already past, Atkinson's conviction, was "the certainty—rather than the possibility—of deportation."<sup>243</sup>

The law in the Third and Eighth Circuits, then, is that no reliance on the continuing existence of 212(c) relief needs to be shown for an LPR convicted of a removable offense pre-repeal to remain eligible after the repeal.<sup>244</sup> In essence, these circuits extend the Supreme Court's rule in *St. Cyr* to all LPRs convicted of a removable offense pre-repeal, not just those convicted by a plea bargain. They reason that "nothing in the *Landgraf* line of cases supports the theory that the limits of permissible retroactivity are

235. *Id.* at 225.

236. *Id.*

237. *See id.* at 226–29.

238. *Id.* at 229; accord Morawetz, *supra* note 218, at 1750–58 (arguing that reliance is a consideration for retroactivity analysis in cases involving economic transactions, but has no proper application for laws that govern wrongful conduct).

239. *Atkinson*, 479 F.3d at 231.

240. Van Wyke, *supra* note 166, at 758.

241. *Atkinson*, 479 F.3d at 230.

242. *Id.* Atkinson, in his brief, makes a successful argument relating to this point:

The fact that the INS was inefficient in commencing proceedings against deportable aliens in a timely fashion should not be rewarded by giving the government the benefit of the change of the law that puts it in a better position with regard to effecting expulsion from the United States than if the government had located Mr. Atkinson [before the repeal].

Brief of Petitioner at 27, *Atkinson*, 479 F.3d 222 (No. 05-1099), 2005 WL 5988286, at \*27.

243. *Atkinson*, 479 F.3d at 230; accord Morawetz, *supra* note 218, at 1744 (explaining that *St. Cyr* recognized that an increased possibility of deportation can constitute a "new legal consequence" for purposes of retroactivity analysis).

244. *See Atkinson*, 479 F.3d at 231 (holding that reliance is only one consideration in determining whether a statute is impermissibly retroactive, not the *sine qua non* of such an inquiry); *see also* *Lovan v. Holder*, 574 F.3d 990, 994 (8th Cir. 2009).

different for one group—those who accept . . . a plea agreement—than they are for another—those who exercise their constitutional right to a trial.”<sup>245</sup>

Allowing all LPRs convicted pre-repeal to apply for relief also comports with the standard rationale in retroactivity cases involving wrongful conduct.<sup>246</sup> The consequences for the wrongful conduct should be measured by the law in effect at the time of the wrongful conduct,<sup>247</sup> and the law in effect at the time of the wrongful conduct for LPRs with convictions before IIRIRA allowed for the possibility of 212(c) relief, not certainty of deportation.<sup>248</sup>

Thus, post-*St. Cyr*, two circuit courts of appeals have concluded that the repeal of section 212(c) is impermissibly retroactive as to all convicted LPRs—not just those convicted by plea bargain—without any showing of reliance on the continuing availability of the relief. Several circuits, however, do require such a showing. Some require the LPR to belong to a group of individuals who could have reasonably relied on the continuing existence of 212(c), while others require each LPR to make an individualized showing of reliance.

#### *B. Requiring a Showing of Reliance on the Continuing Existence of Section 212(c)*

The Second, Fifth, and Tenth Circuits agree that the repeal of section 212(c) can have an impermissible retroactive effect on convictions, regardless of whether the convictions are obtained by plea or trial.<sup>249</sup> However, these three circuits do not categorically allow eligibility for such relief—they require some showing of reliance on the continuing existence of 212(c) relief in deciding to forgo filing an application before the repeal. With respect to a showing of reliance, in the Second and Fifth Circuits, the LPR must make an individualized showing of reliance on the relief’s continuing existence.<sup>250</sup> In the Tenth Circuit, the individual need only show that he belongs to a class for whom reliance on the continuing availability of section 212(c) would be “objectively reasonable.”<sup>251</sup>

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245. *Atkinson*, 479 F.3d at 231; *accord Lovan*, 574 F.3d at 994 (“[A] determination that a statute has an impermissible retroactive effect ‘is applied across the board.’” (quoting *Atkinson*, 479 F.3d at 227)).

246. See Morawetz, *supra* note 218, at 1753.

247. See *id.* at 1753, 1755; see also *supra* note 201 and accompanying text.

248. See generally *supra* Part I.B.

249. See, e.g., *Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007); *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Hem v. Maurer*, 458 F.3d 1185, 1191 (10th Cir. 2006); *Restrepo v. McElroy*, 369 F.3d 627, 638 n.18 (2d Cir. 2004) (“[A] guilty plea is not the only kind of reliance that would make the abolition of 212(c) have an impermissible retroactive effect . . .”).

250. See *Carranza-de Salinas*, 477 F.3d at 205–06 (noting that the Fifth Circuit requires that an applicant demonstrate actual, subjective reliance on the continuing existence of 212(c) to reap its benefits); *Wilson*, 471 F.3d at 122 (holding that petitioners arguing for the ability to apply for 212(c) relief “must make an individualized showing of reliance”).

251. See *Hem*, 458 F.3d at 1200.

### 1. Requiring an Individualized Showing of Reliance: Second and Fifth Circuits

Both the Second and Fifth Circuits hold that an LPR convicted at trial can be eligible for 212(c) relief if he makes an individualized showing that he relied on the continuing existence of 212(c) relief.<sup>252</sup> Since their approaches or results do not differ, this Note discusses only the Second Circuit's analysis.

The Second Circuit's foray into the question of how to deal with deportable LPRs convicted at trial after the *St. Cyr* decision came in *Rankine v. Reno*.<sup>253</sup> This case consolidated the appeals of three different petitioners who were in similar circumstances.<sup>254</sup> Each faced the scenario very familiar to the conflict in this Note: they were convicted at trial of a deportable offense before the repeal of section 212(c), but removal proceedings did not begin until after the repeal.<sup>255</sup>

The Second Circuit emphasized that *St. Cyr* does not control the petitioners' situations; LPRs who chose to go to trial instead of pleading guilty are different than noncitizens like *St. Cyr* in two important ways.<sup>256</sup> First, they did not detrimentally change position in reliance on the continuing availability of 212(c) relief.<sup>257</sup> Second, they engaged in no conduct reflecting an intention to preserve their 212(c) eligibility by going to trial.<sup>258</sup> Those LPRs pleading guilty presumably participated in the kind of quid pro quo with the government that the *St. Cyr* court contemplated, giving rise to a reliance interest in the continuing availability of 212(c) relief.<sup>259</sup> The Second Circuit reasoned that this reliance is what produced the impermissible retroactive effect in *St. Cyr*.<sup>260</sup> Without altered conduct in reliance on the availability of relief, the repeal of IIRIRA cannot be impermissibly retroactive as applied to these LPRs convicted at trial.<sup>261</sup> Thus, the Second Circuit made it clear that it would focus on the concept of detrimental reliance in analyzing the retroactivity of IIRIRA as to individuals like the petitioners in *Rankine*.<sup>262</sup>

252. See *Carranza-de Salinas*, 477 F.3d at 205; *Wilson*, 471 F.3d at 122.

253. 319 F.3d 93 (2d Cir. 2003).

254. *Id.* at 95–97.

255. See *id.*

256. *Id.* at 99.

257. See *id.* (“Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt—thereby immediately rendering themselves deportable—in reliance on the availability of the relief offered prior to IIRIRA.”); see also *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (explaining that LPRs who enter guilty pleas to their deportable offense give up their right to a trial to preserve their eligibility for 212(c) relief).

258. *Rankine*, 319 F.3d at 100.

259. See *id.*; see also *supra* note 211 and accompanying text.

260. *Rankine*, 319 F.3d at 100.

261. *Id.*

262. See, e.g., *Martinez v. INS*, 523 F.3d 365, 375 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1314 (2009); *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Restrepo v. McElroy*, 369 F.3d 627, 633 (2d Cir. 2004).

The Second Circuit refined its law in the 2004 case *Restrepo v. McElroy*.<sup>263</sup> The court held that those LPRs convicted at trial sacrificed something, albeit different than the right to a jury trial that the noncitizen in *St. Cyr* sacrificed: the opportunity to obtain 212(c) relief immediately by filing an application at the time of conviction, when it was still available, to increase the chance of obtaining this relief at a later date.<sup>264</sup> The sudden disappearance of this relief as applied to *Restrepo* would, in the language of *Landgraf*, upset his “settled expectations.”<sup>265</sup> Thus, the changes AEDPA made to 212(c) may be impermissibly retroactive.<sup>266</sup>

The new rule, then, was that the repeal of 212(c) could be improperly retroactive as to an LPR convicted at trial who then “decide[d] to forgo the immediate filing of a 212(c) application based on the considered and reasonable expectation that he would be permitted to file a stronger application for 212(c) relief at a later time.”<sup>267</sup> Essentially, *Restrepo* changed the timing of the LPR’s reliance. *Rankine* held that an LPR did not detrimentally rely on the continuing availability of 212(c) relief in deciding to go to trial, but *Restrepo* held that an LPR may have detrimentally relied on the continuing availability of 212(c) relief in deciding to delay his application to build stronger grounds for a favorable exercise of discretion.<sup>268</sup> The court, however, did not at that time decide whether an applicant would need to make

an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date . . . , or whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate.<sup>269</sup>

The Second Circuit decided this issue two years later in *Wilson v. Gonzales*.<sup>270</sup> There, the court held that the LPR needs to make an individualized showing of reliance on the continued availability of 212(c) relief to determine that IIRIRA is impermissibly retroactive.<sup>271</sup> Further, that a potential applicant could have filed an application before its repeal does

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263. 369 F.3d 627 (2d Cir. 2004). Although this case deals directly with the retroactivity of AEDPA, and not IIRIRA’s repeal of 212(c), the retroactivity analysis the court uses is the same as it would be with IIRIRA. See, e.g., *Wilson*, 471 F.3d at 122 (relying on *Restrepo*’s analysis in a case involving IIRIRA’s repeal of 212(c) relief).

264. *Restrepo*, 369 F.3d at 634–35. An LPR would want to wait as long as possible to file his 212(c) application because he could show “longer residence in the United States, deeper community ties, and, perhaps most significantly, stronger proof of rehabilitation.” See *id.* at 634; see also *supra* note 143 and accompanying text (discussing positive factors in the discretionary adjudication of a 212(c) application); *infra* notes 274–79 and accompanying text (discussing how an LPR may want to delay applying for relief to strengthen his application).

265. *Restrepo*, 369 F.3d at 635.

266. See *id.* at 638 (holding that *Restrepo*’s retroactivity argument is valid).

267. *Id.* at 634.

268. See *Wilson*, 471 F.3d at 120; see also *Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 206 n.6, 209–10 (5th Cir. 2007).

269. *Restrepo*, 369 F.3d at 639.

270. 471 F.3d 111 (2d Cir. 2006).

271. *Id.* at 122.

not mean that he intended to do so.<sup>272</sup> Similarly, mere knowledge of the continuing availability of 212(c) is not akin to affirmative reliance.<sup>273</sup> After *Wilson*, a potential 212(c) applicant in the Second Circuit must show that he knew of 212(c) and desired to apply for such relief, but decided to put off applying with the understanding that his chance of obtaining relief would gain strength over time.<sup>274</sup> Presumably, then, the Second Circuit requires LPRs seeking to apply for 212(c) relief to show that they were individually participating in positive activities, and/or limiting exposure to negative activities, to strengthen their applications for relief before IIRIRA's repeal took away this possibility of relief.<sup>275</sup>

The positive and negative activities that strengthen and weaken an application for 212(c) relief, respectively, are best articulated through *Marin*'s listing of positive and negative factors for deciding if a 212(c) application will be granted.<sup>276</sup> Accordingly, an application can be improved simply by waiting to file after conviction because one can show longer residence in the United States, deeper community ties, stronger proof of rehabilitation, and a more substantial history of employment in the United States.<sup>277</sup> A stronger 212(c) application would also seem to result from limiting the adverse discretionary factors listed in *Marin*.<sup>278</sup> Notably, an application can be improved by waiting to file because one adverse factor is recency of conviction.<sup>279</sup>

Thus, both the Second and Fifth Circuits allow an LPR convicted at trial to apply for 212(c) relief, contingent upon a sufficient showing of reliance on the continuing availability of the relief.<sup>280</sup> The reliance demonstrated must be subjective, or actual and specific to the individual applicant, in both

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272. *Id.*

273. *Id.*

274. *See* *Walcott v. Chertoff*, 517 F.3d 149, 155 (2d Cir. 2008) (discussing the state of the circuit case law after *Restrepo* and *Wilson*); *see also* Gordon, 17 I. & N. Dec. 389, 392 (B.I.A. 1980) ("Common sense and prudence suggest that a recently convicted alien should prefer to let a considerable time elapse before offering to demonstrate rehabilitation."). The Fifth Circuit specifically held that delaying an application could create an impermissible retroactive effect because the BIA encouraged waiting until removal proceedings were initiated before filing an application by favoring factors for discretion that required more time between conviction and application. *Carranza-de Salinas*, 477 F.3d at 209. Thus, disrupting this strategy would run contrary to "fair notice, reasonable reliance, and settled expectations," the touchstone considerations of impermissible retroactivity. *Id.* (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1999)) (internal quotation marks omitted).

275. *See Wilson*, 471 F.3d at 122 (holding that an individual must make an individualized showing of reliance to prove that he "delayed filing an affirmative § 212(c) application to build a stronger case warranting granting of that relief, believing such relief will continue to be available").

276. *See supra* Part I.B.2.f.

277. *See Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978); *see also Restrepo v. McElroy*, 369 F.3d 627, 634, 635 n.14 (2d Cir. 2004).

278. *See Marin*, 16 I. & N. Dec. at 585 (explaining that in deciding whether or not to grant 212(c) relief, an IJ is required to balance the negative factors against positive factors).

279. *See supra* note 142 and accompanying text.

280. *See supra* notes 252–79 and accompanying text.

the Second and Fifth Circuits.<sup>281</sup> The Tenth Circuit, however, allows only an objective form of reliance on the continuing availability of 212(c) relief.<sup>282</sup>

## 2. Requiring a Showing of Objectively Reasonable Reliance: Tenth Circuit

The Tenth Circuit considered this Note's familiar scenario in *Hem v. Maurer*.<sup>283</sup> The court looked to the Supreme Court's retroactivity cases—namely *Landgraf* and its progeny, *Hughes Aircraft Co. v. United States ex rel. Schumer*<sup>284</sup> and *Martin v. Hadix*<sup>285</sup>—finding that in none of these cases was a showing of actual reliance dispositive in determining impermissible retroactivity.<sup>286</sup> Although reliance figured prominently in *St. Cyr*'s retroactivity analysis,<sup>287</sup> this reliance was attributed to the whole group of LPRs “who took guilty pleas before the effective date of IIRIRA—irrespective of any showing that St. Cyr himself actually relied on the availability of § 212(c) relief.”<sup>288</sup> The Court there characterized this reliance as objective, not subjective, because St. Cyr was deemed to be relying on the continuing existence of 212(c) relief just by virtue of being part of the group of LPRs who pleaded guilty to their offense, without any inquiry into his subjective mindset in pleading guilty.<sup>289</sup>

Thus, the Tenth Circuit concluded that only objective reliance on the prior state of the law is necessary to make the repeal of 212(c) impermissibly retroactive.<sup>290</sup> Specifically, it held that such objective reliance exists for the group of LPRs that proceeded to trial but abandoned their right to appeal when 212(c) relief was available.<sup>291</sup> This is so because such LPRs could have chosen not to appeal a conviction for fear of being sentenced to more than five years imprisonment on appeal, which would render them ineligible for 212(c) relief.<sup>292</sup> If any member of a larger group,

281. See *Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007); *Wilson*, 471 F.3d at 122.

282. See *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006) (“We now hold . . . that objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim.”).

283. 458 F.3d 1185 (10th Cir. 2006).

284. 520 U.S. 939 (1997).

285. 527 U.S. 343 (1999).

286. See *Hem*, 458 F.3d at 1197 (“[I]n none of the recent retroactivity cases . . . did the Supreme Court confer dispositive weight upon the petitioner’s actual strategic decisions.”).

287. See *id.*

288. *Id.*

289. See *id.* at 1199 (characterizing the *St. Cyr* decision as never requiring any actual, or subjective, reliance and concluding that the decision “established an objective, categorical scheme for determining if a statute has impermissible retroactive effects”); see also *Van Wyke*, *supra* note 166, at 764–65.

290. See *Hem*, 458 F.3d at 1189.

291. See *id.* at 1199.

292. See *id.*; see also *supra* note 152 and accompanying text. Under *Hem*, though, an LPR does not show objective reliance by simply foregoing the right to appeal. The LPR must also show that a successful appeal would place him “at risk of being sentenced to a sentence longer than 5 years . . . making him ineligible for § 212(c) relief.” *Hem*, 458 F.3d at 1199 (citing *North Carolina v. Pearce*, 395 U.S. 711, 719 (1969); *State v. Grey Owl*, 316 N.W.2d 801, 803–04 (S.D. 1982)).

such as this one, ran “a hypothetical risk of having her expectations upset, then applying the new law to the past conduct of any class members would amount to the attachment of new legal consequences to past acts,” and thus impermissible retroactivity.<sup>293</sup>

Thus, the Second, Fifth, and Tenth Circuits hold that an LPR convicted by trial before the repeal of section 212(c) must have relied on this relief’s continuing existence to reap its benefits post-repeal. The Second and Fifth Circuits require a showing of individualized, subjective, reliance. The Tenth Circuit requires only an objective reliance as manifested by membership in a group that could have reasonably relied on the relief’s continuing existence. Several other circuit courts of appeals hold that LPRs with pre-repeal convictions by trial are categorically ineligible for 212(c) relief.

### C. Denial of 212(c) Eligibility to All LPRs Convicted After Trial

Six circuits have developed tests that result in the functional equivalent of a categorical denial of 212(c) relief to LPRs convicted by trial pre-repeal. The First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits have held that an LPR convicted after trial of a removable offense is ineligible for 212(c) relief because he cannot demonstrate sufficient reliance on the continuing existence of the relief to make the repeal impermissibly retroactive.<sup>294</sup> Again, these courts split on what kind of reliance must be used in this analysis. The First, Seventh, and Eleventh Circuits use an individualized reliance standard to categorically deny 212(c) relief from LPRs convicted of their pre-repeal deportable offense by a trial.<sup>295</sup> The Sixth and Ninth Circuits use an objective reliance test to categorically deny these LPRs 212(c) relief.<sup>296</sup> Finally, the Fourth Circuit is a model example of the confusion engendered by the retroactivity of 212(c) relief, with cases in the Fourth Circuit having vacillated between the relevance and irrelevance of reliance in retroactivity analysis.<sup>297</sup>

#### 1. Requiring a Showing of Individualized Reliance: First, Seventh, and Eleventh Circuits

Using an individualized reliance standard to categorically deny 212(c) relief seems contradictory. The circuits taking this approach, though, essentially require each LPR convicted at trial pre-repeal to show individualized reliance on the continuing existence of 212(c) relief. At the same time, the courts hold that it is impossible for all LPRs convicted at

293. Van Wyke, *supra* note 166, at 765.

294. Ferguson v. U.S. Attorney Gen., 563 F.3d 1254, 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1735 (2010); Mbea v. Gonzales, 482 F.3d 276, 281–82 (4th Cir. 2007); United States v. Zuñiga-Guerrero, 460 F.3d 733, 738 & n.2 (6th Cir. 2006); Montenegro v. Ashcroft, 355 F.3d 1035, 1037 (7th Cir. 2004); Dias v. INS, 311 F.3d 456, 458 (1st Cir. 2002); Armendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121 (9th Cir. 2002).

295. See *infra* Part II.C.1.

296. See *infra* note 318 and accompanying text.

297. See *infra* Part II.C.3.

trial to make such a showing,<sup>298</sup> resulting in the functional equivalent of a categorical denial.

The First and Seventh Circuits take a very similar approach in categorically denying 212(c) relief to LPRs convicted by a trial. The courts hold that the repeal of section 212(c) does not have an impermissible retroactive effect for those LPRs convicted of a deportable offense after trial.<sup>299</sup> Reliance was the key factor in making these decisions.<sup>300</sup>

These circuits thus require an individual seeking 212(c) relief to prove that he individually relied on the continuing existence of 212(c) relief.<sup>301</sup> However, these courts hold that LPRs proceeding to trial cannot prove this individual reliance.<sup>302</sup> The result is the functional equivalent of a categorical denial of 212(c) relief to LPRs convicted at trial. Thus, because, in these circuits' views, LPRs going to trial were not relying on immigration law as it existed at that time, these individuals were not

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298. See, e.g., *Dias*, 311 F.3d at 458 (“[H]aving been convicted after a trial where there was not, and could not have been, reliance by the defendant on the availability of discretionary relief, [the applicant] may not argue that the statute has impermissible retroactive effect as to him.”). To compare, an objective reliance standard would automatically qualify an individual for relief just for belonging to a particular group, such as the group of LPRs who are convicted by a jury but forego their right to appeal. See, e.g., *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004). The individualized reliance standard used by the First, Seventh, and Eleventh Circuits would still require each individual in a group to prove their personal reliance on the existence of 212(c) relief, but such reliance is deemed impossible for those proceeding to trial. See *infra* notes 301–02, 310–12 and accompanying text.

299. See *Montenegro*, 355 F.3d at 1037; *Dias*, 311 F.3d at 458 (“[A]pplication of the new statutory limitations on discretionary relief does not have an impermissible retroactive effect on those aliens who would have been eligible for discretionary relief when they were convicted of a felony after trial.”). Although the specific facts of *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002), involve the retroactivity of AEDPA’s broadening of the criminal offenses that make an LPR ineligible for 212(c) relief, *id.* at 457, the holding is applied to IIRIRA’s repeal of 212(c) as well, see *Nadal-Ginard v. Holder*, 558 F.3d 61, 70 (1st Cir. 2009) (characterizing *Dias* as controlling the issue of whether IIRIRA’s repeal of 212(c) is impermissibly retroactive as to an LPR convicted at trial).

300. See *Montenegro*, 355 F.3d at 1037 (reasoning that LPRs who choose to go to trial cannot take advantage of 212(c) relief because they “did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief” (citing *Rankine v. Reno*, 319 F.3d 93, 100–02 (2d Cir. 2003); *Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001))); *Dias*, 311 F.3d at 458 (holding that because petitioner was convicted by a jury, he could have relied on the availability of relief and thus cannot argue that the statute amending relief is impermissibly retroactive).

301. See *Martinez v. INS*, 523 F.3d 365, 385 (2d Cir. 2008) (Straub, J., concurring), *cert. denied*, 129 S. Ct. 1314 (2009). The Seventh Circuit actually goes further, and requires even those LPRs who pleaded guilty to their pre-repeal offense to prove that they decided to plead guilty in reliance on the continuing possibility of 212(c) relief. See *United States v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), *cert. denied*, 129 S. Ct. 489 (2008).

302. See *Montenegro*, 355 F.3d at 1036–37 (holding that any exceptions allowing an LPR to apply for 212(c) relief after its repeal do not apply to the post-repeal removal proceedings of an LPR convicted by trial); *Dias*, 311 F.3d at 458 (holding that there cannot be any reliance shown by an LPR convicted by a jury); see also *Canto v. Holder*, 593 F.3d 638, 644 (7th Cir. 2010) (holding that LPRs who went to trial cannot have relied on the availability of 212(c) relief), *cert. denied*, 79 U.S.L.W. 3015 (U.S. Oct. 4, 2010) (No. 09-1333).

subjected to the same inequities of those pleading guilty, and therefore should not be afforded the same opportunity to apply for 212(c) relief.<sup>303</sup>

The rule in the Eleventh Circuit differs slightly from that of the First and Seventh Circuits. The Eleventh Circuit did not reach the issue of an LPR convicted at trial of a deportable offense pre-IIRIRA until the 2009 case, *Ferguson v. U.S. Attorney General*.<sup>304</sup> The court, however, noted that it had come close to the issue on two previous occasions and had all but said that *St. Cyr*'s holding did not apply to noncitizens convicted at trial, leaving those noncitizens ineligible for 212(c) relief.<sup>305</sup> The *Ferguson* court held that "reliance is a core component of *St. Cyr*'s retroactivity analysis as it applies to aliens challenging the application of IIRIRA's repeal of § 212(c)."<sup>306</sup> The court reasoned that since the Supreme Court has not adopted a single test for determining whether a statute is impermissibly retroactive,<sup>307</sup> it is most reasonable to focus on and follow the framework set out by *St. Cyr* because the same statutory change—the repeal of 212(c)—was at issue.<sup>308</sup> This framework emphasized reliance.<sup>309</sup>

Thus, the Eleventh Circuit declined to extend *St. Cyr* to LPRs who—instead of pleading guilty—were convicted at trial. Instead, it categorically denied all such LPRs 212(c) relief for their lack of reliance on the relief's continuing existence in deciding to go to trial.<sup>310</sup> This court adopted an individualized, subjective reliance requirement in doing so.<sup>311</sup> The Eleventh Circuit also held that deciding to go to trial is not in itself sufficient individualized reliance on the availability of 212(c) relief.<sup>312</sup> This almost equates to a categorical denial of 212(c) relief to LPRs convicted at trial.<sup>313</sup> However, the circuit specifically did not express a view on whether an LPR convicted at trial can successfully make an individualized showing of reliance by proving that he chose to wait to file his 212(c) application to build a better application.<sup>314</sup> While Eleventh Circuit law currently

303. See *Montenegro*, 355 F.3d at 1037; *Dias*, 311 F.3d at 458.

304. 563 F.3d 1254 (11th Cir. 2009), cert. denied, 130 S. Ct. 1735 (2010); see *id.* at 1256 (referring to the issue of the retroactivity of IIRIRA's repeal of 212(c) relief before it as "an issue of first impression" for the court).

305. See *id.* at 1267–69 (discussing *Alexandre v. U.S. Attorney Gen.*, 452 F.3d 1204 (11th Cir. 2006); *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002)).

306. *Id.* at 1269–70.

307. See *supra* note 185 and accompanying text.

308. *Ferguson*, 563 F.3d at 1270–71; see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (directing lower courts to follow the most analogous Supreme Court precedent when determining what authority directly controls).

309. See *supra* note 212 and accompanying text. The Eleventh Circuit also felt that if it ignored all of the *St. Cyr* analysis that involved reliance, it would impermissibly render this discussion in *St. Cyr* a "gratuitous academic exercise." *Ferguson*, 563 F.3d at 1270.

310. See *Ferguson*, 563 F.3d at 1271.

311. See *id.* (basing its decision to deny the petitioner 212(c) eligibility on her personal failure to plead guilty or personally point to any other transactions or considerations already past on which she relied); *Joseph et al.*, *supra* note 16, at 4 (characterizing the requirement of *Ferguson* to be one of individualized reliance on the continuing availability of 212(c) relief).

312. See *Ferguson*, 563 F.3d at 1271.

313. See *id.* (holding that 212(c) relief is not available to LPRs convicted after a trial).

314. See *Ferguson*, 563 F.3d at 1271 & n.28. Allowing such a showing to result in 212(c) relief is the approach of the Second and Fifth Circuits. See *supra* Part II.B.1. The court did

categorically denies 212(c) relief to LPRs convicted at trial, the possibility remains that a future panel may decide that a sufficient showing of individualized reliance can be demonstrated by an LPR who waited to file his application to improve its strength.

## 2. Requiring a Showing of Objectively Reasonable Reliance: Sixth and Ninth Circuits

The U.S. Courts of Appeals for the Sixth and Ninth Circuits largely take the same approach. They hold that the repeal of section 212(c) is not impermissibly retroactive for individuals who were convicted after a trial.<sup>315</sup> The courts limit the holding of *St. Cyr* to the context of guilty pleas alone.<sup>316</sup> The courts also emphasize reliance, explaining that “[u]nlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about” forthcoming statutory bars to 212(c) relief.<sup>317</sup> The reliance that the Sixth and Ninth Circuits require is objective reliance.<sup>318</sup> These circuits, however, have not found any group of LPRs convicted at trial to meet this standard.<sup>319</sup> In comparison, the Tenth Circuit requires the same objective reliance, but has found those LPRs convicted by trial who abandoned their rights to appeal when 212(c) relief was available to have objectively relied

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not express an opinion on this issue because Ferguson did not claim such reliance. *Ferguson*, 563 F.3d at 1271 n.28.

315. See *United States v. Zuñiga-Guerrero*, 460 F.3d 733, 738 & n.2 (6th Cir. 2006) (holding that LPRs rejecting a plea agreement and going to trial did not reasonably rely on the continuing availability of 212(c) relief); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (holding that application of AEDPA’s increased criminal bars to relief does not have a retroactive effect as to LPRs convicted at trial); see also *Saravia-Paguada v. Gonzales*, 488 F.3d 1122, 1132 (9th Cir. 2007) (explaining that the retroactivity analysis for all statutes barring 212(c) eligibility, whether under AEDPA or IIRIRA for example, is the same), *cert. denied*, 128 S. Ct. 2499 (2008).

316. See *Kellermann v. Holder*, 592 F.3d 700, 707 (6th Cir. 2010); *Saravia-Paguada*, 488 F.3d at 1131.

317. *Armendariz-Montoya*, 291 F.3d at 1121; *accord Zuñiga-Guerrero*, 460 F.3d at 738.

318. See *Hernandez de Anderson v. Gonzales*, 497 F.3d 927, 941 (9th Cir. 2007) (holding that an LPR demonstrates reliance on the continuing existence of 212(c) relief if it would have been “objectively reasonable” to rely on the continuing availability of relief); *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (“[U]nder *St. Cyr*, [a] petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose [actions] ‘were likely facilitated’ by their continued eligibility for § 212(c) relief.” (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001))); see also *Martinez v. INS*, 523 F.3d 365, 384 (2d Cir. 2008) (Straub, J., concurring) (characterizing the Sixth and Ninth Circuits as requiring a showing of “objectively reasonable reliance” on the prior state of the law in order to make statutory bars to 212(c) relief impermissibly retroactive), *cert. denied*, 129 S. Ct. 1314 (2009).

319. See *Saravia-Paguada*, 488 F.3d at 1131 (reaffirming a narrow reading of *St. Cyr* in the circuit’s jurisprudence and explaining that it excludes “categorically claims for § 212(c) relief outside the guilty plea context” (citing *Armendariz-Montoya*, 291 F.3d at 1122)); *Zuñiga-Guerrero*, 460 F.3d at 738–39. *But cf.* *Haque v. Holder*, 312 F. App’x 946, 947 (9th Cir. 2009) (implying that after being convicted by a jury, an LPR entering into a plea agreement still pre-IIRIRA in which he gives up a criminal appeal, may have objectively relied on 212(c) relief so as to make the repeal impermissibly retroactive).

on the continuing availability of 212(c) relief.<sup>320</sup> By not finding any groups to meet the standard, the Sixth and Ninth Circuits' result is the functional equivalent to a categorical denial of 212(c) relief to all LPRs convicted by trial.

### 3. A Case Study in Confusion: Fourth Circuit

The U.S. Court of Appeals for the Fourth Circuit has a conflicting line of cases on the retroactivity of 212(c)'s repeal for LPRs convicted by trial.<sup>321</sup> First, in *Chambers v. Reno*<sup>322</sup> the court categorized the *St. Cyr* decision as dependent upon an LPR's reasonable reliance on the continuing availability of 212(c) relief.<sup>323</sup> The court then held that an LPR who, like the petitioner, did not plead guilty but instead was convicted by a jury, does not have a reliance interest comparable to that of the petitioner in *St. Cyr* because there was no quid pro quo exchange.<sup>324</sup> Thus, the Fourth Circuit concentrated on the petitioner's lack of reliance on the prior availability of 212(c) relief in categorically denying 212(c) relief to all LPRs convicted by trial.<sup>325</sup>

The court muddled the reliance issue in the 2004 decision *Olatunji v. Ashcroft*.<sup>326</sup> While *Chambers* dealt with the provision of IIRIRA that repealed 212(c) relief,<sup>327</sup> *Olatunji* considered an entirely different provision of IIRIRA.<sup>328</sup> Nevertheless, the court in *Olatunji* spoke in generalities—not specifics to the non-212(c) provision at issue—in holding that reliance is irrelevant to retroactivity analyses.<sup>329</sup> Instead, all that is needed is the fact that IIRIRA attaches new legal consequences to a pre-repeal action.<sup>330</sup> This conclusion was based on the fact that no Supreme Court retroactivity case explicitly required a showing of reliance.<sup>331</sup> While the *Chambers* decision focused on reliance in holding that 212(c)'s repeal was not impermissibly retroactive,<sup>332</sup> here, reliance in any form was cast aside as totally irrelevant to any retroactivity inquiry.<sup>333</sup>

320. See *supra* Part II.B.2.

321. See, e.g., *Lovan v. Holder*, 574 F.3d 990, 993 n.1 (8th Cir. 2009) (noting that the Fourth Circuit's position on the subject is "unclear"); *Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254, 1264 n.18 (11th Cir. 2009) (explaining the tension between cases in the Fourth Circuit), *cert. denied*, 130 S. Ct. 1735 (2010); *Hem v. Maurer*, 458 F.3d 1185, 1192 n.4 (10th Cir. 2006) (same).

322. 307 F.3d 284 (4th Cir. 2002).

323. *Id.* at 288–90.

324. See *id.* at 290; see also *supra* notes 210–11 and accompanying text.

325. See *Chambers*, 307 F.3d at 290–93.

326. 387 F.3d 383 (4th Cir. 2004).

327. See *Chambers*, 307 F.3d at 286.

328. See *Olatunji*, 387 F.3d at 386 (explaining that the case deals with a provision of IIRIRA that rendered the petitioner "inadmissible" because of a previous conviction).

329. See *id.* at 388 ("[W]e hold that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity . . ."); *id.* at 394 ("[W]e believe that the consideration of reliance is irrelevant to statutory retroactivity analysis.").

330. See *id.* at 389.

331. *Id.* at 394.

332. See *Chambers*, 307 F.3d at 290–92 (discussing the petitioner's lack of a "reliance interest").

333. *Olatunji*, 387 F.3d at 396.

In 2007, the Fourth Circuit was again faced with the retroactive effect of the repeal of 212(c) for LPRs convicted at trial.<sup>334</sup> Without any mention of *Olatunji*, the court held that *Chambers* squarely governed the outcome.<sup>335</sup> Thus, the court reaffirmed the holding that 212(c)'s repeal does not have an impermissible retroactive effect as to all LPRs convicted after trial.<sup>336</sup> Reliance made its way back into the Fourth Circuit's retroactivity analysis: the court held that IIRIRA was not impermissibly retroactive as to the LPR specifically because the LPR did not abandon any rights in reliance on the prior state of the law.<sup>337</sup>

The best way to reconcile this indecisiveness on the issue of reliance in 212(c) retroactivity analysis is to recognize that the *Chambers* decision dealt with the provision of IIRIRA repealing 212(c), while *Olatunji* considered a different provision of the statute.<sup>338</sup> Thus, it is likely that in the Fourth Circuit, IIRIRA's repeal of 212(c) relief is not impermissibly retroactive as to all LPRs convicted at trial.<sup>339</sup> Because these LPRs cannot make an individualized showing of reliance, they are subject to the functional equivalent of a categorical denial to 212(c) relief.

Part II of this Note examined the current circuit split on whether an LPR convicted by trial of a deportable offense before 212(c)'s repeal can still rely on this relief when removal proceedings are commenced after the repeal. Integrated within this conflict is disagreement on whether objective, individualized, or no reliance at all on the prior availability of section 212(c) needs to be shown to make 212(c)'s repeal impermissibly retroactive. To summarize, the circuit courts of appeals essentially reach four different conclusions. First, two circuits hold that all LPRs convicted at trial pre-repeal remain eligible for 212(c) relief.<sup>340</sup> In reaching this conclusion, no showing of reliance on the prior availability of 212(c) is made necessary in the retroactivity analysis.<sup>341</sup> Two other circuits hold that an LPR convicted by trial may remain eligible for 212(c) relief if he can prove that he individually relied on the continuing existence of 212(c) relief before its repeal.<sup>342</sup> A similar result, reached by a single circuit, is that some subset of LPRs convicted at trial may remain eligible for 212(c) relief,

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334. *See* *Mbea v. Gonzales*, 482 F.3d 276, 278 (4th Cir. 2007).

335. *Id.* at 281–82.

336. *See id.*

337. *Id.* at 282.

338. *See supra* notes 327–28 and accompanying text. Nevertheless, the broad language of *Olatunji* still seems like it is made to apply to all retroactivity analyses concerning any provision of IIRIRA, or any statute for that matter. *See supra* note 329 and accompanying text.

339. *See, e.g.,* *Ferguson v. U.S. Attorney Gen.*, 563 F.3d 1254, 1264 & n.18 (11th Cir. 2009) (characterizing *Chambers* as the Fourth Circuit's controlling law and only noting the tension that *Olatunji* creates), *cert. denied*, 130 S. Ct. 1735 (2010); *Hem v. Maurer*, 458 F.3d 1185, 1192 & n.4 (10th Cir. 2006) (same).

340. *See supra* Part II.A.

341. *See supra* notes 237–45 and accompanying text.

342. *See supra* Part II.B.1.

if it would have been objectively reasonable for the LPRs in the group to rely on the continuing existence of relief.<sup>343</sup>

Finally, six circuits apply tests that result in the functional equivalent of a categorical denial of 212(c) relief to all LPRs convicted pre-repeal by trial.<sup>344</sup> Although the result is the same for these six circuits, they differ on the role of reliance in their retroactivity analyses. Some require an individualized showing of reliance on the continuing existence of 212(c), yet simultaneously hold that it is impossible for an LPR convicted at trial to prove such reliance.<sup>345</sup> Others require that it would have been objectively reasonable for a group of LPRs to rely on 212(c) relief's continuing existence, but have not found such reliance for any group of LPRs convicted at trial.<sup>346</sup> Both approaches result in the functional equivalent of a categorical denial of 212(c) relief to LPRs convicted at trial.

Part III discusses whether LPRs convicted at trial before 212(c)'s repeal should remain eligible for relief post-repeal. It also considers the proper role of reliance in this analysis. Throughout, Part III addresses the various jurisprudential and practical concerns raised by the differing circuit approaches.

### III. ENDING THE UNFORESEEN COSTS OF GOING TO TRIAL

Part III argues that because new legal consequences attach to past actions, the repeal of 212(c) relief is impermissibly retroactive as to all LPRs with pre-repeal convictions, regardless of the mode of conviction.<sup>347</sup> This is the result of a proper retroactivity analysis, using the Supreme Court's *Landgraf* framework, where no strict requirement of reliance is added. The courts that categorically deny 212(c) relief to all LPRs convicted of their deportable offense at trial, and those that require an individualized showing of reliance on the continuing existence of the relief, place an undue emphasis on reliance in their retroactivity analyses. As the Third and Eighth Circuits have held, reliance is but one consideration of many in analyzing the impermissible retroactivity of a statute; it should not be the deciding factor in such a decision.<sup>348</sup>

This part therefore argues that no showing of reliance is necessary for the repeal of section 212(c) to be impermissibly retroactive for all LPRs convicted of their deportable offense by trial. Part III.A engages in an independent *Landgraf* analysis to conclude that the repeal of 212(c) is impermissibly retroactive for all LPRs with pre-repeal convictions. Part III.B then confronts the alternative resolutions, and focuses on how these alternatives place an undue emphasis on reliance.

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343. See *supra* Part II.B.2.

344. See *supra* Part II.C.

345. See *supra* Part II.C.1. The Fourth Circuit is also likely grouped in this category. See *supra* Part II.C.3.

346. See *supra* Part II.C.2.

347. This is the approach of the Third and Eighth Circuits. See *supra* Part II.A.

348. See *supra* Part II.A; see also *supra* note 185 and accompanying text.

### A. Resolution Through Landgraf's Analysis

To resolve whether LPRs convicted of their deportable offense by trial can still rely on 212(c) relief after its repeal, one must analyze the retroactive effect of IIRIRA's repeal. As most circuit courts of appeals have attempted to do, this Note decides whether the repeal is impermissibly retroactive by following the Supreme Court's retroactivity jurisprudence. *Landgraf* presents the standard for this analysis.<sup>349</sup>

First, has Congress, in section 304(b) of IIRIRA where 212(c) is repealed,<sup>350</sup> expressly indicated whether it intended for the repeal to apply retroactively for these particular LPRs?<sup>351</sup> If so, then the inquiry is over, and Congress's intentions only need be carried out.<sup>352</sup> If Congress was not clear in its intentions, the question becomes: will the repeal of 212(c) have retroactive effect?<sup>353</sup> That is, will application of the repeal to these LPRs "impair rights [they] possessed when [they] acted, increase [their] liability for past conduct, or impose new duties with respect to transactions already completed"?<sup>354</sup> If so, courts should follow the traditional presumption against retroactive application, allowing the LPRs at issue to apply for 212(c) relief.<sup>355</sup> This section engages in this analysis and concludes that the approach of the Third and Eighth Circuits is truest to the Supreme Court's retroactivity jurisprudence. In refusing to make reliance the deciding factor, these circuits appropriately grant eligibility for relief to all LPRs convicted after a trial.

#### 1. *Landgraf* Step One: Congress Was Silent

The first step of the *Landgraf* analysis is highly uncontroversial. All courts of appeals undertaking this issue have appropriately decided that Congress was silent on whether the repeal of 212(c) was to apply retroactively.<sup>356</sup> In fact, this issue is essentially foreclosed by the Supreme Court in *St. Cyr*. There, applying its own *Landgraf* step one, the Court concluded that Congress was silent as to whether IIRIRA's repeal of 212(c) was to apply retroactively.<sup>357</sup> Since other sections of IIRIRA clearly stated that amendments were to be applied retroactively, and the section repealing 212(c) did not, Congress was silent as to the repeal's retroactivity.<sup>358</sup> Absent any Congressional intent, step two of *Landgraf* determines if the repeal of 212(c) can be applied to LPRs convicted at trial of their deportable offense before the repeal.

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349. See *supra* notes 179–88 and accompanying text.

350. See *supra* note 4 and accompanying text.

351. See *supra* note 181 and accompanying text.

352. See *supra* note 182 and accompanying text.

353. See *supra* note 183 and accompanying text.

354. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); see also *supra* note 184 and accompanying text.

355. See *supra* notes 184, 209–13 and accompanying text.

356. See generally *supra* Part II (discussing the approach of each circuit).

357. See *supra* note 207 and accompanying text.

358. See *supra* note 208 and accompanying text.

2. *Landgraf* Step Two: The Repeal of 212(c) Is Impermissibly Retroactive

The Supreme Court has set out varying tests to determine, as per step two of *Landgraf*, if a statute is in fact impermissibly retroactive.<sup>359</sup> In the language of *Landgraf*, the traditional presumption against retroactive application of a statute should be followed if applying the statute retroactively “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>360</sup> These are merely sufficient, rather than necessary, factors for invoking the presumption against retroactivity.<sup>361</sup>

Often, the retroactivity question boils down to whether the statutory change created new legal consequences for past actions for LPRs convicted by trial.<sup>362</sup> It is not clear which past action is the reference point for this retroactivity analysis: the conviction that makes the LPR deportable, or the actual commission of the underlying crime.<sup>363</sup> Whether the proper past act to which to refer is the conviction or the underlying criminal conduct, the repeal of 212(c) attaches new legal consequences, making the repeal of 212(c) impermissibly retroactive. *Landgraf*’s step two is now analyzed from the perspective of each of these possible past acts.

First, suppose the conviction after a trial is the appropriate “past act” to reference. As the Third Circuit reasons, new legal consequences attach to an LPR’s conviction of a deportable offense when 212(c) relief was repealed: the right to apply for a widely granted relief from deportation was taken away.<sup>364</sup> The legal consequence of the conviction pre-repeal was the possibility of deportation;<sup>365</sup> the legal consequence of the conviction after the repeal is a much greater possibility of deportation.<sup>366</sup> The clearest new legal consequence is for those LPRs who were eligible for 212(c) relief at their time of conviction, but are now ineligible for the replacement relief, cancellation of removal.<sup>367</sup> The repeal of 212(c) changed the consequence of their conviction to “the certainty—rather than the possibility—of deportation.”<sup>368</sup>

Also, if courts use the conviction of the deportable offense as the reference point, the repeal of 212(c) itself did not attach any different legal

359. See *supra* notes 184–88 and accompanying text.

360. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); see also *supra* note 184 and accompanying text.

361. See *supra* note 185 and accompanying text.

362. See *supra* notes 186, 241 and accompanying text.

363. See generally Van Wyke, *supra* note 166, at 775–86.

364. See *supra* notes 242–43 and accompanying text.

365. See *supra* notes 70–71 and accompanying text.

366. See *supra* notes 148–49 and accompanying text (explaining how 212(c) relief was granted to more than half of applicants before its repeal); *supra* notes 166–69 (explaining how 212(c)’s replacement is a much narrower form of relief). The repeal of a relief from deportation that was widely granted necessarily increases the possibility of deportation following a criminal conviction.

367. See *supra* notes 164–69 and accompanying text.

368. See *supra* note 243 and accompanying text.

consequences for convicted LPRs based on their mode of conviction. Both those who were convicted by plea bargain and those convicted at trial had the same new legal consequence: the impossibility of 212(c) relief substituted the rather strong possibility of relief. *St. Cyr* restored this relief for one group of LPRs—those convicted by plea—because of these new legal consequences.<sup>369</sup> Fairness and reason dictate that courts should restore this relief for all other LPRs who were subjected to the same legal consequences.<sup>370</sup>

Next, suppose the commission of the crime is the appropriate “past act” to which to refer. At the time of committing a pre-IIRIRA crime, an LPR had the comfort of knowing that his crime could not subject him to the certainty of deportation. He could always attempt to have his deportation waived by applying for 212(c) relief, as long as he was otherwise eligible.<sup>371</sup> The sudden repeal of 212(c) resulted in higher stakes for the commission of a crime. Without the possibility of the widely granted 212(c) relief,<sup>372</sup> the probability of deportation on criminal grounds necessarily increases. A greater possibility of deportation fits within the title of a “new legal consequence.”<sup>373</sup> The commission of a crime suddenly having greater legal consequence deprives an LPR of the ability to make an informed cost-benefit analysis before committing a crime. His settled expectations are upset because he may not have committed a crime had he known that it would subject him to the certainty of deportation.<sup>374</sup>

This notion of “settled expectations,” as well as that of “fair notice,” also guides retroactivity analysis.<sup>375</sup> Whether the LPR consciously thinks about the possibility of 212(c) relief at the time of committing a crime or not, there was certainly a “settled expectation” that such relief was available. Without “fair notice,” 212(c) relief was then repealed.<sup>376</sup> It is conceivable that with such notice of the repeal of 212(c), LPRs would be much more careful in their conduct, and would think longer and harder before engaging in actions that were likely to result in the commission of a crime.

Most importantly, though, if the commission of the crime is the past act for retroactivity analysis, there is no reason to distinguish between LPRs who were convicted of this crime by plea agreement and those convicted after a trial, because this distinction is not made until after the relevant point in time. Thus, if the repeal of 212(c) is impermissibly retroactive for those LPRs who pleaded guilty to their deportable offense, as *St. Cyr* held,<sup>377</sup> that is because the repeal attached new legal consequences to the commission of

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369. See *supra* note 209 and accompanying text.

370. See *supra* note 293 and accompanying text. It is argued, of course, that these groups differ based on their reasonable reliance on the prior availability of 212(c) relief. See *infra* Part III.B (addressing this purported difference based on reliance).

371. See generally *supra* Part I.B.2.

372. See *supra* notes 147–49 and accompanying text.

373. See *supra* notes 209, 212, 241–43 and accompanying text.

374. See *supra* notes 201, 246–47 and accompanying text.

375. See *supra* note 188 and accompanying text.

376. See *supra* notes 163–66 and accompanying text.

377. See *supra* notes 206–13 and accompanying text.

a crime. It is illogical to say that no new legal consequences attach to the commission of a crime for an LPR who later is convicted of this crime at trial. Because he commits a crime in the same fashion as one who happens to later plead guilty to it, fairness and reason dictate that the result should be the same.<sup>378</sup> Therefore, 212(c) is impermissibly retroactive as to those LPRs pleading guilty to their crimes as well.

Thus, because new legal consequences attach to past actions of LPRs convicted at trial, just as they do to convictions by plea agreement, the repeal of 212(c) should be deemed impermissibly retroactive as to both groups. This result is reached through an analysis that does not turn on reliance on the prior state of the law, true to the framework of *Landgraf*.<sup>379</sup> *Landgraf*, however, does mention that the analysis should be guided by, among other things, “reasonable reliance,”<sup>380</sup> and *St. Cyr* emphasizes such reliance.<sup>381</sup> Many courts of appeals emulate this emphasis, so this Note’s analysis is not complete until this undue emphasis on reliance is dispelled.

#### B. *Confronting the Alternatives: An Undue Emphasis on Reliance*

Nowhere in *Landgraf*’s test for impermissible retroactivity is reliance the deciding factor.<sup>382</sup> Nevertheless, the Court has counseled that retroactivity analysis “should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.”<sup>383</sup> It is notable that the Court only asks that retroactivity analyses be informed and guided by reasonable reliance, not determinant upon such reliance. The Second and Fifth Circuits, however, hinge the availability of 212(c) relief on the ability of an LPR convicted at trial to prove that he individually relied on the continuing availability of the relief before its repeal.<sup>384</sup> The First, Seventh, and Eleventh Circuits also require such an individualized showing of reliance, and at the same time hold that it is impossible for LPRs convicted by trial to prove such reliance, thereby foreclosing the possibility of relief from the entire group.<sup>385</sup> As stated above, nowhere in the Supreme Court’s various tests for retroactivity has reliance been made the single, deciding factor.<sup>386</sup>

Requiring an individualized showing of reliance on the continuing existence of 212(c) relief creates a significant practical problem. Courts like the Second and Fifth Circuits require an LPR convicted by trial to prove that he individually relied on the continuing existence of 212(c)

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378. See *supra* note 245 and accompanying text.

379. See *supra* notes 237–41 and accompanying text.

380. See *supra* note 188 and accompanying text.

381. See *supra* note 212 and accompanying text.

382. See *supra* note 238 and accompanying text.

383. See *supra* note 188 and accompanying text.

384. See *supra* Part II.B.1.

385. See *supra* Part II.C.1. The Fourth Circuit is also likely included in this group. See *supra* note 339 and accompanying text (characterizing the likely position of the Fourth Circuit as requiring individualized reliance while categorically denying such reliance to all LPRs proceeding to trial).

386. See *supra* notes 237–40 and accompanying text.

before it was repealed.<sup>387</sup> That is, he must show that he was affirmatively relying on the relief by strengthening his application, and it was suddenly pulled out from under him by IIRIRA.<sup>388</sup>

This standard is unworkable: the very nature of waiting to file for 212(c) relief strengthens the application, since one of the discretionary factors considered is length of time since any criminal conviction.<sup>389</sup> Thus, it must be true that all LPRs convicted of their deportable offense pre-repeal, whether by trial or not, are relying on the continuing existence of the relief just by waiting. It would seem that all an LPR would need to do is argue that he was convicted of his deportable offense and wanted to apply for 212(c) relief but decided to wait until the conviction was not so recent in order to strengthen his application, only to see IIRIRA repeal the relief without notice.<sup>390</sup> Waiting to file for 212(c) relief strengthens the application, and essentially becomes reliance by definition.

Such a simple argument demonstrates individualized reliance on the continuing existence of 212(c) relief, and is available for all LPRs convicted at trial. Thus, the approach of the circuits calling for an individualized showing of reliance should result in categorical 212(c) eligibility for the LPRs that are the subject of this Note. This practical problem of individualized reliance on the continuing existence of 212(c) relief renders the Second, Fifth, First, Seventh, and Eleventh Circuits' approach inconsistent. The First, Seventh, and Eleventh Circuits' approach is especially problematic, because they hold that reliance is impossible to prove for LPRs convicted at trial,<sup>391</sup> while, simultaneously, waiting to file an application necessarily demonstrates reliance.<sup>392</sup>

A final problem with requiring an individualized showing of reliance is that it inverts the traditional presumption against retroactivity.<sup>393</sup> By requiring an individual to make such a specific showing of reliance, which may be confusing, as explained above,<sup>394</sup> *Landgraf's* presumption against retroactive application is eradicated. Instead, a heightened showing to gain

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387. See *supra* Part II.B.1.

388. See *supra* notes 271–79 and accompanying text.

389. See *supra* notes 142, 264, 274 and accompanying text.

390. There actually was 180 days notice given for the repeal, but it was nevertheless settled practice to wait until deportation proceedings commenced to file for 212(c) relief. See *supra* notes 163, 165 and accompanying text (explaining that IIRIRA was enacted September 30, 1996, but the effective date of the repeal of 212(c) was not until April 1, 1997). An LPR would certainly not want to call his deportable status to the government's attention by filing for 212(c) relief when the government had been unaware of this status for many years. See *supra* note 95 and accompanying text.

391. See *supra* Part II.C.1.

392. Some of these courts phrase the reliance requirement as reliance on the availability of 212(c) relief in deciding to go to trial, or in deciding to commit a crime. At these times, it can be argued that an LPR did a cost-benefit analysis, and decided to commit the crime or go ahead to trial, in reliance on having 212(c) as his back-up plan. See *supra* note 231 and accompanying text; see also Van Wyke, *supra* note 166, at 777. However, if all that is necessary is reliance on the state of the law at some time before the repeal, the argument that waiting is reliance by definition fulfills this requirement.

393. See *supra* notes 173, 184 and accompanying text.

394. See *supra* notes 387–92 and accompanying text.

rights that should be presumed to be available is required. Essentially, in civil retroactivity, the potential for reliance on the prior state of the law is the reason for the presumption against retroactive application, not a qualifying test.<sup>395</sup>

Reliance, however, is often made a consideration, but never the *sine qua non* of whether a statute is impermissibly retroactive or not.<sup>396</sup> Even where reliance is taken into account in retroactivity analysis, it is an objectively reasonable reliance inquiry—not a subjective, individualized showing.<sup>397</sup> The Supreme Court, in *St. Cyr*, uses a form of objectively reasonable reliance to determine that the repeal of 212(c) is impermissibly retroactive as to all LPRs convicted by a plea agreement.<sup>398</sup> That is, the Court placed the petitioner in a group with all similarly situated 212(c) applicants. It then decided that it would be reasonable for any of them to rely on the continuing existence of 212(c) in making their plea agreement, without regard to whether any of them actually did so rely, and certainly without making any of them individually prove such reliance. Thus, even if some form of reliance were required, it would only be natural to make it the objectively reasonable reliance referred to in *St. Cyr* and utilized by the Sixth, Ninth, and Tenth Circuits. LPRs convicted of their offense at trial nevertheless display such an objectively reasonable reliance on the prior state of the law, just as those pleading guilty do, for two reasons.

First, the group of LPRs convicted at trial reasonably relied on the continuing availability of 212(c) relief by waiting to file their applications to make the applications stronger.<sup>399</sup> Because waiting can be reliance by definition for any individual in the group, it logically follows that waiting can reasonably be reliance by definition for the whole group.<sup>400</sup>

Next, suppose an LPR, before AEDPA was enacted, was charged with a crime that was then considered an aggravated felony. He would have been likely to retain counsel and quickly learn of the possible immigration consequences of a forthcoming aggravated felony conviction. At this point in history, if the conviction resulted in over five years of prison time, the LPR would have been ineligible for the very promising 212(c) waiver of deportation.<sup>401</sup> *St. Cyr* contemplated, and based its decision on, a situation in which the LPR pleaded guilty to his crime to ensure that he served fewer than five years so he could remain eligible for 212(c) relief.<sup>402</sup> This reasonable reliance on the relief remaining in existence compelled the Court to prevent depriving these individuals of relief.<sup>403</sup>

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395. See *supra* notes 173–74 and accompanying text.

396. See *supra* notes 184–88, 237–41 and accompanying text.

397. See *supra* notes 287–89 and accompanying text.

398. See *supra* notes 212–13 and accompanying text (discussing how *St. Cyr* decided the case for all individuals in the same group as *St. Cyr*, regardless of any specific individualized showings that each LPR could or could not make).

399. See *supra* notes 389–92 and accompanying text.

400. See *supra* note 293 and accompanying text.

401. See *supra* note 152 and accompanying text.

402. See *supra* notes 211–13 and accompanying text.

403. See *supra* note 212 and accompanying text.

Consider, however, an LPR who was counseled that he did not have to plead guilty to his offense to remain eligible for 212(c) relief because the sentence for his particular crime would surely be under five years even if the case went to trial. The LPR therefore chose to go to trial, relying on the fact that if he lost, at least he still would certainly have 212(c) relief to save him from deportation. This LPR made his decision in reliance on the continuing existence of 212(c) just as much as the one who decided to plead guilty. He also had no “fair notice” that his decision to go to trial would actually, down the road, prevent him from utilizing 212(c) relief, while a decision to plead guilty would result in a clear path to such relief. He had “settled expectations” that there would be no difference in his 212(c) eligibility based solely on his decision to go to trial versus pleading guilty because eligibility for the relief never made such a distinction. Thus, “[a] defendant, who goes to trial believing that his opportunity to seek § 212(c) relief is secure, is as equally disrupted in his reasonable and settled expectations as is a defendant who accepts a plea believing it to confer such a benefit.”<sup>404</sup>

It may be true that all LPRs deciding to go to trial did not in fact have these 212(c) considerations in mind. However, it is also likely that not all LPRs deciding to plead guilty to their deportable offense always had 212(c) considerations in mind. Some may have just wanted a lighter sentence. This did not stop the Court in *St. Cyr* from grouping together all LPRs pleading guilty to a deportable offense, regardless of their individualized motives, and allow them all the opportunity to apply for 212(c) relief.<sup>405</sup> It is only fair to apply such categorical grouping to those LPRs choosing to exercise their constitutional right to a jury trial, allowing them all the opportunity to apply for 212(c) relief because it was objectively reasonable for any group of them to decide to go to trial in reliance on the continuing availability of 212(c) relief.<sup>406</sup>

#### CONCLUSION

The retroactive application of the repeal of 212(c) relief for LPRs convicted at trial has confused the circuit courts.<sup>407</sup> Ideally, Congress would have made clear whether it intended the repeal of 212(c) relief to apply retroactively, as it did with other sections of the IIRIRA.<sup>408</sup> Indeed, the district judge presiding over Enrico St. Cyr’s case, consolidated with others contending that the repeal of 212(c) should not apply retroactively, astutely observed that:

[t]hese consolidated cases represent yet another example of the costly and unnecessary litigation that is spawned by Congress when it fails to indicate whether legislation should be applied retrospectively. A one line

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404. *Ponnappula v. Ashcroft*, 235 F. Supp. 2d 397, 404 (M.D. Pa. 2002), *aff’d*, 373 F.3d 480 (3d Cir. 2004).

405. *See supra* notes 212–13 and accompanying text.

406. *See supra* note 245 and accompanying text.

407. *See supra* Part II. Specifically, *see supra* Part II.C.3.

408. *See supra* note 208 and accompanying text.

sentence could have avoided these and many other cases currently pending before the courts of this Circuit and its sister Circuits.<sup>409</sup>

As the first step of a *Landgraf* retroactivity analysis reveals, however, Congress did not make its intentions clear.<sup>410</sup>

In continuing with *Landgraf*'s retroactivity analysis, the best rule is that reached by the Third and Eighth Circuits: the repeal of section 212(c) is impermissibly retroactive as to all LPRs convicted of their offense pre-repeal, regardless of whether the conviction was obtained by plea agreement or by trial. Other results reached by the circuit courts of appeals place an undue emphasis on reliance in their retroactivity analyses.<sup>411</sup>

Besides being the truest to the Supreme Court's retroactivity frameworks, the Third and Eight Circuits' approach dispenses with the judicial inefficiency created by the Second and Fifth Circuits, which require the LPR to make an individualized showing of reliance on the continuing existence of 212(c) relief. Absent such a requirement, there will be no need for an inquiry into whether a noncitizen was actually relying on the availability of 212(c) or not.

The result proposed by this Note also resolves the inequity created by the circuits categorically foreclosing 212(c) relief from all LPRs convicted at trial pre-repeal: all those who have new legal consequences attached to their pre-IIRIRA convictions—the new impossibility of 212(c) relief—have the relief restored, regardless of how the conviction came about.

There is no reason to punish an LPR who exercised his constitutional right to a jury trial with the comfort of knowing that if made deportable, he could always apply for 212(c) relief, while favoring an LPR who pleaded guilty to his offense for reasons that may have been totally unrelated to the availability of 212(c) relief. The majority of courts place an undue emphasis on reliance in their retroactivity analyses for LPRs convicted of a pre-repeal offense at trial. However, “the relevant question is whether IIRIRA attached new legal consequences to those aliens’ convictions and resulting sentences. The answer . . . is yes.”<sup>412</sup>

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409. *Dunbar v. INS*, 64 F. Supp. 2d 47, 55 (D. Conn. 1999), *aff'd sub nom.* *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001); *accord* *Brooks v. Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002).

410. *See supra* Part III.A.1.

411. *See supra* Part III.B.

412. *Atkinson v. Attorney Gen. of the U.S.*, 479 F.3d 222, 231 (3d Cir. 2007).