PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 33 | Issue 1 Article 7

11-6-2013

Raising the Standard: Judulang v. Holder Condemns the Use of Arbitrary and Capricious Policies When Determining Eligibility for the Section 212(c) Waiver

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By Adjoa Anim-Appiah

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I. INTRODUCTION

For the past several decades, the United States has been faced with important questions concerning its immigration policies.[1] Although current discussion covers many areas of immigration, the deportation of criminal aliens is one of the most hotly debated.[2] Daniel Kanstroom notes that the U.S. is undergoing a "massive deportation experiment that is exceptionally sweeping and harsh by virtually any historical or comparative measure."[3] Department of Homeland Security (DHS) records reveal that there have been more than twenty-five million deportation events in the past twenty-five years.[4] Further evidence of the explosive number of deportations is

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[1] *See, e.g.*, Daniel Kanstroom, *"Passed Beyond Our Aid:" U.S. Deportation, Integrity, and the Rule of Law*, 35 FLETCHER F. WORLD AFF. 95, 95 (2011). Kanstroom acknowledges the reality of "more than eleven million undocumented people living and working" within the United States. *Id.* at 96–97. He focuses on some of the questions that specifically have to do with the deportation of those who hold green cards, arguing that it is important to critically examine how the system is working. *Id.* at 98. Some of the questions he presents are: "What are the real policy goals of this form of deportation? Should a long-term lawful permanent resident with substantial U.S. family ties be deported for petty crimes, such as the possession of a marijuana cigarette? Is the system working in a fair and just way?" *Id.* at 99.

[2] *See, e.g.*, Kanstroom, *supra* note 1; Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

[3] Kanstroom, *supra* note 1, at 97; Daniel Kanstroom, *Immigration Law: Current Challenges and the Elusive Search for Legal Integrity*, *in* IMMIGRATION PRACTICE MANUAL 0101, § 1.1 (2nd ed. 2012) [hereinafter *Current Challenges*]. *See also* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011) ("By every objective measure, deportation has never before been such a pervasive feature of American society and never before been so connected to the criminal process.").

[4] Kanstroom, *supra* note 1, at 97; *Current Challenges*, *supra* note 3, at § 1.1 (citing Table 36 of DHS OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS 95 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf; DHS OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2010 (2011), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

the estimated backlog of 300,000 deportation cases.[5] The system struggles to accommodate the large number of pending cases, as there are only 272 immigration judges available to handle the cases.[6] Coupled with, and perhaps fueling, the influx in deportations is the U.S. public's perception of immigrants.[7] Americans generally view immigrants as criminals and lump undocumented (or "illegal") immigrants in the same category as immigrants who were lawfully admitted to the country.[8] Deportation campaigns initiated by the government refer to "criminal aliens" and place emphasis on targeting the "worst of the worst" aliens.[9] The truth is that many of those who are deported are legal permanent resident aliens (permanent residents), also known as "green card" holders.[10] They were lawfully admitted to the U.S., have grown up in the U.S., and have fully integrated with the culture and members of the population.[11] For these individuals, deportation means that they will

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[5] *See* Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 772 (2012).

[6] *Id.*

[7] *See* Markowitz, *supra* note 3, at 1348–49. Markowitz notes that:

> [P]ublic perception increasingly and unambiguously conflates deportable offenses and crimes. This is true on both sides of the ideological spectrum—whether it is the liberal who is shocked to learn that detained immigrants do not receive appointed lawyers or the conservative talk show caller who declares all "illegal immigrants are criminals." Indeed, Americans increasingly view undocumented immigrants in particular, and immigrants in general, as criminals. This is so even though deportation proceedings continue to enjoy the formal "civil label" and even though the great weight of empirical evidence demonstrates that immigrants are less prone to criminal activity than native-born populations.

Id.

[8] *See id.*

[9] *See, e.g.*, Associated Press, *Record Number of Criminals Deported, Many Based on Traffic Violations*, FOXNEWS.COM (July 22, 2011), http://www.foxnews.com/politics/2011/07/22/traffic-violations-make-up-bulk-offense-among-deported-criminals/.

[10] *See, e.g.*, *Current Challenges*, *supra* note 3, at § 1.1.

[11] *Id.*

be removed from the country and separated from all that they have ever known, including family, friends, and a familiar lifestyle.[12] They are taken to places outside of the U.S. where they do not know anyone, do not understand the culture and, perhaps, do not even know the local language.[13] They are not permitted to re-enter the U.S., even for a short visit to see family members left behind.[14] Further, although many of the permanent residents who are deported have committed crimes, they can hardly be collectively described as the "worst of the worst" criminal offenders.[15] Instead, statistics show that many permanent residents are deported for committing relatively minor offenses.[16]

Permanent residents who commit deportable offenses often face more severe consequences than aliens who entered the country illegally.[17] Further, permanent residents have been seriously impacted by reforms in immigration law.[18] Particularly in the 1990s, acts of terrorism such as the bombing of the World Trade Center in 1993 and the Oklahoma City Bombing in 1996 fueled the negative public perception of immigrants and encouraged U.S. policymakers

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[12] *Id.*

[13] *Id.* A palpable example of a case where an alien is sent "back" to a country he has virtually no association with is drawn from the case of a boy named Joao Herbert. *See* Meneses, *supra* note 5, at 774. Herbert was an alien who was adopted from Brazil by two United States citizens. *Id.* He was never naturalized, but was raised by his adoptive parents in the U.S. *See id.* During high school, Herbert was arrested for selling marijuana. *Id.* He was then deported and sent to Brazil, where he was unable to adapt to the language and culture. *Id.* at 774–75. Later, Herbert was shot and killed in the slums. Meneses, *supra* note 5, at 775.

[14] *Id.* David Sullivan writes that given the harsh consequences of deportation, it comes as no surprise that the Supreme Court has referred to deportation as "a 'drastic measure' that is 'the equivalent of banishment or exile.'" Dennis M. Sullivan, *Immigration: The Consequences of a Criminal Conviction*, 63 WIS. LAW. 16, 16 (1990) (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

[15] *See* Meneses, *supra* note 5, at 774.

[16] *Id.* ("The crimes triggering deportation of lawful permanent residents are often minor offenses, but are lumped together with far more serious crimes by overly broad categories."). *See also Current Challenges*, *supra* note 3, at § 1.1 (explaining that "the vast majority of criminal deportees stand accused of relatively minor offenses.").

[17] Meneses, *supra* note 5, at 773.

[18] *See* Morawetz, *supra* note 2, at 1936.

to create legislation reflecting the concern for national security.[19] Two such pieces of legislation—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—expanded the reach of removal laws and drew criticism from the policy, professional, and government sectors.[20] The 1996 laws may actually make it more likely that a permanent resident convicted of a criminal offense will face deportation.[21]

The effect of these laws, which will be discussed in more detail *infra*,[22] is particularly important to the realm of administrative law, where administrative review is crucial to ensuring that decisions made on the administrative level will not have arbitrarily negative and irreversible effects upon deported aliens. There is evidence that an increased number of immigration cases decided at the administrative level[23] are being appealed to the courts of appeals.[24]

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[19] *See* Anthony Distinti, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2821 (2006); Kanstroom, *supra* note 1, at 95.

[20] Kanstroom, *supra* note 1, at 95. These laws

> dramatically (and retroactively) expanded many grounds for exclusion and deportation, creating mandatory detention for may classes of non-citizens; inventing new "fast-track" deportation systems; eliminating judicial review of certain types of deportation (removal) orders; discarding some and limiting other discretionary "waivers" of deportability; vastly increasing possible state and local law enforcement involvement in deportation; and even permitting the use of secret evidence for non-citizens accused of "terrorist" activity. As a direct result of these laws, hundreds of thousands of people have been excluded and deported from the United States who—under prior laws—would have been allowed to become legal permanent residents and (probably) naturalized citizens.

Id. at 95–96.

[21] Morawetz, *supra* note 2, at 1937.

[22] *See infra* notes 28–34, 58–62, 91–121 and accompanying text.

[23] It is important to understand the structure of the administrative system governing deportation cases. In the 1920s, Congress created the Immigration Board of Review as a part of the Bureau of Immigration and Naturalization. Rick Fang-Chi Yeh, *Today's Immigration Legal System: Flaw and Possible Reforms*, 10 RUTGERS RACE & L. REV. 441, 445 (2009). In the 1940s, Congress replaced the

The courts of appeals often reverse and openly criticize immigration judges' decisions.[25] However, critics of the administrative review process have argued that, "administrative and judicial review of deportation cases has been severely limited for many years."[26] The lack of judicial review has resulted in mistakes that have not been noticed.[27] On top of this, AEDPA and IIRIRA have arguably decreased aliens' access to the judicial process by limiting the availability of hearings for aliens.[28]

The enactment of AEDPA and IIRIRA has clearly expanded the potential for administrative error in at least one area: the application of what was formerly known as the section 212(c) waiver.[29] Before AEDPA and IIRIRA were passed, section 212(c) of the Immigration and Nationality Act (INA) gave the Attorney General the discretion

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Immigration Board of Review with the Board of Immigration Appeals (BIA) within the Department of Justice (DOJ). *Id.* In 1983, the BIA was combined with the Immigration Trial Court, a branch of the former Immigration and Naturalization Service (INS). *Id.* Together, these two bodies became the Executive Office for Immigration Review (EOIR), which currently stands as the agency that controls U.S. immigration adjudication. *Id.* at 445–46. The Director of the EOIR reports to the U.S. Attorney General. *Id.* at 446. The Attorney General appoints hundreds of immigration judges to sit as administrative judges in various immigration trial courts throughout the country. *Id.* at 446–47. Within the EOIR, the BIA remains the highest administrative appellate body for immigration cases. *Id.* at 447–48. It has appellate jurisdiction to hear all immigration appeals. *Id.* at 448.

[24] *Id.* at 441–42 ("In recent years, the number of immigration cases petitioned from the immigration administrative agencies to the United States Court of Appeals . . . has increased sharply even though immigration cases filed at the administrative and appellate level increased at a normal pace.") (parenthesis omitted).

[25] *See id.* at 442. Fang-Chi Yeh attributes the high reversal rates to the DOJ's immigration policy reforms, arguing that the reforms do not work because they fail to address the more structural deficiencies of the immigration adjudication. *Id.* at 442–43. He states that "[t]he underlying flaw is the system's foundation, which is not built to successfully handle the current number of immigration cases while ensuring fair and impartial trial outcomes." *Id.* at 443.

[26] Kanstroom, *supra* note 1, at 101.

[27] *Id.*

[28] *See* R. Andrew Chereck, *The Deportation of Criminal Immigrants*, 9 L. & BUS. REV. AM. 609, 611 (2003).

[29] *See* Distinti, *supra* note 19, at 2811 (stating that "AEDPA and IIRIRA created confusion in criminal reentry cases where the [BIA] or an [immigration judge] failed to consider a potentially eligible alien for section 21(c) relief during his deportation.").

to waive the deportation of permanent residents who had committed crimes for which they could be deported.[30] If the waiver was granted, the alien could retain permanent resident status and remain in the U.S.[31] Section 248 of IIRIRA replaced section 212(c) with a new section called "cancellation of removal."[32] However, the Supreme Court has held that the section 212(c) waiver still applies to aliens who would have been eligible for the waiver at the time they pled guilty to the deportable offense.[33] Where the Board of Immigration Appeals (BIA) or an immigration judge mistakenly fails to allow an alien discretionary relief under the waiver, issues of fairness in the administrative review process come into play.[34]

Avoiding errors associated with section 212(c) is especially important because errors in deportation cases may prove to be irreversible.[35] Even where the Supreme Court has reviewed removal

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[30] *Id.* at 2819.

[31] *Id.* at 2820.

[32] Chereck, *supra* note 28, at 611. The Cancellation of Removal provision was codified under INA section 240(a). Distinti, *supra* note 19, at 2822. Another major change in brought about by the 1996 legislation was AEDPA's amendment of section 212(c), which made it so that the waiver could not apply to aliens who were convicted of aggravated felonies. *See* Fernandes Pereira v. Gonzales, 417 F.3d 38, 40 (1st Cir. 2005).

[33] Distinti, *supra* note 19, at 2822–23 (citing *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 326 (2001)).

[34] *See* Distinti, *supra* note 19, at 2828–32. Both the Ninth and Second Circuits have held that "failure to consider an alien for section 212(c) relief can constitute fundamental unfairness." *Id.* at 2832. To prove unfairness, the alien has to show that the failure prejudiced him or her in some way. *Id.* at 2838.

[35] *See* Kanstroom, *supra* note 1, at 101–02. In the case *Fernandes Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005), the First Circuit held that "nunc pro tunc relief is unavailable to remedy an agency's erroneous interpretation of the law." Corey M. Dennis, *Immigration Law—Nunc Pro Tunc Relief Unavailable Where Erroneous Legal Interpretation Rendered Alien Ineligible for Deportation Waiver—Pereira v. Gonzales, 417 F.3d 38 (1st Cir. 2005)*, 40 SUFFOLK U. L. REV. 1049, 1049 (2007). *See also Pereira*, 417 F.3d at 47. Nunc pro tunc is "an avenue of discretionary relief historically available to aliens who, but for a judicial error, would have been eligible for a deportation waiver." Dennis, *supra* note 14, at 1051. The respondent in Pereira had been convicted of an aggravated felony and sentenced to thirty years' imprisonment. *Pereira*, 417 F.3d at 40; Dennis, *supra* note 14, at 1051. The court reasoned that this took him out of the running for relief under the waiver because "section 212(c)'s plain language indicates Congress's intent to render discretionary relief unavailable to aliens incarcerated for at least

decisions and found errors in reasoning, a deported alien has virtually no remedy and the burden and consequences of the mistake fall solely on the alien.[36] Arguably, the BIA and immigration judges may consider a removed alien's motion to reopen or reconsider the case.[37] Such motions are discretionary tools that might be presumed to

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five years on aggravated felony offenses." Dennis, *supra* note 14, at 1051*; see also Pereira*, 417 F.3d at 48. Dennis argues that although the First Circuit came to the correct conclusion in *Pereira*, it did not give due deference to the fact that nunc pro tunc relief has been available to correct mistakes in immigration cases for a long time and that Congress has not prevented the BIA from awarding relief under section 212(c) for more than sixty years. Dennis, *supra* note 14, at 1054. Dennis also argues that "the court failed to recognize that [nunc pro tunc] relief is necessary to mitigate the harsh consequences of deportation laws." *Id.*

[36] Kanstroom, *supra* note 1, at 101–02. Kanstroom argues that the uncaught mistakes should not be taken lightly. *Id.* at 102.

> All of these facts add up to a powerful indictment of the accuracy, integrity, justice, and fairness of the deportation system. It indicates that many thousands of deportees may reasonably claim that they should still be in the United States, living with their families. The full scope of this problem can probably never be accurately measured. But we can try.
> Consider the many millions of people who have been deported in the last fifteen years, and then imagine a miniscule—maybe one or two percent—error rate. Even assuming such a small error rate, we are still talking about some 80,000 to 100,000 mistakes over the past several years alone, including refugees, asylum-seekers, and many thousands of long-term legal residents.

Id. Some might be surprised that the mistakes do not only affect non-U.S. citizens. Mistakes made in deportation cases have also lead to the deportation of U.S. citizens. *Id.* at 100 (referencing the case of Pedro Guzman, a cognitively disabled, U.S. citizen born in California who was arrested for trespassing and mistakenly deported to Mexico). Kanstroom describes Guzman's case as follows:

> Mr. Guzman was transferred to ICE custody, which transported him by bus to the streets of Tijuana. No attorney or family members were ever present during the removal process. Mr. Guzman had virtually no money and could not contact his family. He wandered the streets for three months, eating out of garbage cans and bathing in the Tijuana River while his terrified family desperately searched for him.

Id. at 100–01.

[37] *See id.* at 102.

provide the safety net that removed aliens who think their case was decided erroneously may utilize to have their case re-heard.[38] However, this is not true in practice as the BIA has held that removed aliens have "passed beyond [its] aid," a statement that carries the weight of defeat for many who could have benefitted from another shot at the system.[39]

Where mistakes in legal theory and reasoning made in removal cases are not caught, the results can be devastating for the aliens such mistakes affect.[40] The Supreme Court's recent decision in *Judulang v. Holder*[41] recognized this, and condemned any standard of review regarding the section 212(c) waiver that would facilitate error through arbitrary and capricious application.[42] *Judulang* addresses the issues that are important in today's immigration climate, answering some of the difficult questions that were raised concerning the administrative review of removal cases after the enactment of the AEDPA and IIRIRA.[43] The case also clears up questions concerning how criminal aliens should be viewed within the current system and

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[38] *See id.*

[39] *See id.* Kanstroom describes the BIA's conclusion that removed aliens are beyond help:

> Deportation . . . is a "transformative event that fundamentally alters the alien's posture under the law." Thus, the consequence of a deportee's removal—even if it was done in error—is "not just physical absence from the country, but also a nullification of legal status, which leaves him in no better position after departure than any other alien who isoutside the territory of the United States." That is to say, in this legal limbo, the deportee fundamentally lacks rights.

Id. Kanstroom criticizes the BIA's approach by asserting that, "[t]his rigid, formalist approach means that countless mistakes have likely gone undiscovered, let alone rectified." *Id.*

[40] *See supra* notes 12–14 and accompanying text. *See also* Allen C. Ladd, *Protecting Your Non-Citizen Client from Immigration Consequences of Criminal Activity*, S.C. LAW., May 2004, at 38, 40 (stating that, "the consequences [of criminal convictions for non-citizens] are often severe: forcible removal from the United States . . . and a bar to lawful admission . . . in the future.").

[41] 132 S. Ct. 476 (2011).

[42] *See* discussion *infra* Part IV.

[43] *See* discussion *infra* Part IV.

narrows the margin of error in removal cases where section 212(c) may be applied.[44] Although *Judulang* does not answer all of the questions currently facing the United States immigration system, it could potentially temper the number of mistakes made during the removal process by admonishing immigration courts and the BIA to utilize sound reasoning in deciding which aliens will ultimately be considered deportable.[45]

This note examines *Judulang* and its impact on review standards for determining section 212(c) eligibility. Part II of this note will focus on the impact that AEDPA and IIRIRA have had on the availability of relief for permanent residents who have been slated for removal and how the administrative review process has confronted these changes.[46] Specifically, that part addresses the historical availability of the section 212(c) waiver and how the 1996 legislation affected permanent residents convicted of crimes prior to the enactment date of the new laws.[47] It will address the struggle that courts engaging in the administrative review process have had in deciding cases involving the waiver and the various approaches the circuit courts have taken in an attempt to define the correct standard for deciding which classes of aliens the waiver may apply to.[48]

Part III of the note summarizes *Judulang*'s factual and procedural background.[49] Part IV engages in a step-by-step analysis of Justice Elena Kagan's unanimous opinion and addresses the Court's treatment of the arbitrary and capricious standards utilized by the BIA to make removal decisions.[50] Part V of the note addresses the impact *Judulang* has had on immigration law, both generally and with respect to administrative law.[51] The note concludes that even though *Judulang* fails to neatly answer every question that arises on this subject, it does take a step in the right direction.[52] *Judulang*'s

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[44] *See* discussion *infra* Parts IV and V.
[45] *See* discussion *infra* Parts IV and V.
[46] *See infra* Part II.
[47] *See infra* Part II.
[48] *See infra* Part II.
[49] *See infra* Part III.
[50] *See infra* Part IV.
[51] *See infra* Part V.
[52] *See infra* Parts V and VI.

holding is particularly significant in an area of law where the standards used to decide immigration cases upon appeal have been varied and, at times, difficult to interpret.[53] The holding also ensures a certain level of procedural due process for permanent residents who have committed minor offenses in the past and upon whom deportation would have a devastating effect.[54]

II. HISTORICAL BACKGROUND

Historically, the fact that an alien is eligible for deportation has not meant conclusively that the alien will be deported.[55] Immigration

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[53] *See infra* Parts V and VI.

[54] *See infra* Parts V and VI. The due process considerations related to deportation proceedings are complex. Part of the issue is that because deportation proceedings are considered civil rather than criminal proceedings, they are not afford the same level of due process protections as criminal proceedings. *See* Meneses, *supra* note 5, at 769–70. Shaneela Khan describes the situation Legal Permanent Residents (LPR) face this way:

> Imagine coming to the United States as a legal resident, but only imagine that you have come right after kindergarten, when you barely understand the difference between being a citizen and being a legal resident. From childhood to adulthood, you have known no other home than America, and consider yourself nothing else but an American. So when you commit a crime, you expect to be convicted through due process, and then sentenced to jail, like any other American. However, imagine instead that after you have committed a crime, your punishment may entail being kicked out of this country and having to return to the country you were born in, one that you barely remember and have had no connection to since you were a baby. Further, imagine that before your removal hearing, you are imprisoned. As an American, you would have had the right to a hearing before being imprisoned, and perhaps have been able to post bail and get released. However, since you are a legal permanent resident, you have no such rights and your freedom can be taken prior to a removal hearing, without judicial review.

Shaneela Khan, *Alienating Our Nation's Legal Permanent Residents: An Analysis of* Demore v. Kim *and its Impact on America's Immigration System*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 113, 113–14 (2004).

[55] *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 750 (7th ed. 2012).

law has provided several venues through which even aliens who have been convicted of deportable offenses can seek relief from removal.[56] The reasoning behind allowing a criminal alien to remain in the United States relates to the significant impact removal has on noncitizens and their families.[57] The enactment of AEDPA and IIRIRA in 1996 changed the way in which at least some of these waivers work.[58]

Understanding the impact that AEDPA and IIRIRA have had on a permanent resident's eligibility for a waiver requires an overview of how the governing law has changed over the past several decades.[59] Historically, immigration has been governed by the Immigration and Nationality Act of 1952 (INA).[60] Before the AEDPA and IIRIRA

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[56] *Id.*

[57] *Id.* *See also supra* notes 13–14 and accompanying text. Aleinikoff et al. write that

> [t]he longer a noncitizen has lived in the United States—legally or illegally—the greater the ties she is likely to have established and the greater the hardship that removal will entail. The burdens do not fall solely on the noncitizen: family and friends may be deprived of significant personal relationships, employers may lose productive employees, and neighborhoods may lose valued residents. Not surprisingly, then, a number of avenues of relief are available to noncitizens, especially those who have lived in the United States for a substantial period of time and have close relatives who are U.S. citizens or permanent residents.

ALEINIKOFF ET AL., *supra* note 55, at 750.

[58] *See id.* at 754.

[59] *See infra* notes 60–135 and accompanying text.

[60] Chereck, *supra* note 28, at 609. As described in *Landon v. Plasencia*, the Act allowed the Immigration and Naturalization Service (INS) to

> examine "all aliens" who [sought] "admission or readmission to" the United States and empower[ed] immigration officers to take evidence concerning the privilege of any persons suspected of being an alien "to enter, reenter, pass through, or reside" in the United States, and to detain for further inquiry "every alien" who [did] not appear "to be clearly and beyond a doubt entitled to" enter. Under [section] 236(a), if an alien [was] so detained, the officer [was] directed to determine whether the alien "shall be allowed to enter or shall be excluded and deported."

were added as amendments to the INA in 1996, there were separate procedural tracks for deportation and exclusion cases.[61] One aspect that truly differentiated deportation proceedings from exclusion proceedings was that aliens slated for exclusion could apply to the Attorney General for discretionary relief under the INA's section 212(c), while aliens placed in deportation proceedings could not.[62]

Relief under section 212(c) granted an excludable alien re-entry into the United States as long as two conditions were met.[63] First, the alien must have resided lawfully in the United States for a minimum of seven years before temporarily leaving the country.[64] Second, the alien could not be excludable on two specific grounds.[65] The two non-applicable grounds included (1) aliens who threatened national security and (2) aliens guilty of the international abduction of children.[66] In deciding whether an alien qualified for relief, the immigration judge balanced various factors such as the severity of the crime(s) and rehabilitation.[67] The alien's sentence could not exceed five years, and the alien had to show that his or her relatives would face "hardship" if he or she were deported.[68]

Although section 212(c) did not originally apply to deportable aliens, this changed when the BIA was called on to decide the case,

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459 U.S. 21, 21 (1982).

[61] *See* Judulang v. Holder, 132 S. Ct. 476, 479 (2011). Exclusion cases are cases in which an alien is seeking entry or re-entry to the United States, while deportation cases are cases in which an alien is already within United States borders. *See id.* (citing *Landon*, 459 U.S. at 25). For a detailed description of the statutory grounds for deporting or excluding an alien from the U.S., *see infra* note 97 and accompanying text.

[62] *Judulang*, 132 S. Ct. at 479–80.

[63] *Id.* at 480.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 480 n.1. The provision preventing the Attorney General from waiving exclusion for aliens who were excludable on these two grounds was codified in INA section 1182(c), but has been repealed. *See id.* at 479–80. The two excludable grounds—aliens posing a threat to national security and aliens guilty of international child abduction—are found in INA section 1182(a)(3) and section 1182(a)(9)(C), respectively. *Id.* at 480 n.1.

[67] Chereck, *supra* note 28, at 610.

[68] *Id.*

Matter of L-----.[69] In this case, the BIA conceded that the deportation sections of the Immigration Act of 1917 did not provide for relief, and that, historically, relief was only granted in exclusion cases.[70] The BIA struggled with the question of whether to extend the provision to deportation cases, noting that the case "involve[d] a question of difficulty."[71] Finally, the BIA referred the question to the Attorney General, who reasoned that Congress did not intend for the immigration laws to operate in such a way as to preclude deportation cases from the reach of the statute.[72] Therefore, the Attorney General

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[69] *Judulang*, 132 S. Ct. at 480. *See* Matter of L-----, 1 I. & N. Dec. 1, 7 (BIA 1940). The case *Matter of L*----- marked the first time an immigration court applied section 212(c) to a deportation case. *Judulang*, 132 S. Ct. at 480. In that case, the respondent was a Yugoslavian national who came to the United States in 1909. *Matter of L*-----, 1 I. & N. Dec. at 1. In 1924, he was convicted of larceny and received a one-year probation. *Id.* The respondent left the United States in 1939 for a short two-month visit to Yugoslavia, and thereafter was re-admitted to the country. *Id.* at 2. Upon re-entry, the respondent failed to present the record of his 1924 conviction at the immigration inspector as he had been previously instructed to do. *Id.* Later, he was brought before the BIA to face deportation proceedings on the basis of his 1924 conviction. *Id.* at 1. The Board noted that if the respondent had not left the country, he would not have faced deportation proceedings based on the larceny conviction, "first, because the crime was not committed within 5 years of the respondent's entry into the United States, and second, because the respondent was not sentenced to imprisonment for a term of 1 year or more." *Id.* at 2. His re-entry made him eligible for deportation because larceny is a crime that involves moral turpitude. *Id.* For an explanation of what is meant by "moral turpitude," *see infra* note 76.

[70] *Matter of L*-----, 1 I. & N. Dec. at 2–3. The sections of law this case refers to were later replaced by INA section 212(c). *See* Francis v. INS, 532 F.2d 268, 270–71 (2d Cir. 1976).

[71] *Matter of L* -----, 1 I. & N. Dec. at 3.

[72] *Id.* at 5. The substance of this part of the Attorney General's argument was as follows:

> I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion. Granted that respondent's departure in 1939 exposed him on return to the peril of a fresh judgment as to whether he should be permitted to reside in the United States, such judgment ought not to depend upon the technical form of the proceedings. No policy of Congress could possibly be served by such irrational result.

Id.

found that the provision could apply to deportation cases and instructed future decisions to follow the same line of reasoning.[73]

After *Matter Of L*-----, the BIA's new policy of applying section 212(c) to deportation as well as exclusion proceedings was pretty well set in stone.[74] The BIA applied *Matter of L*-----'s reasoning to another case called *Matter of S*-----.[75] In that case, the BIA found that the respondent's request for section 212(c) relief from deportation should be granted despite the fact that he had been inadmissible to the country based upon having committed crimes of moral turpitude.[76] The BIA reasoned that the INA allowed for relief where: (1) the petitioning alien had been lawfully admitted to the U.S. as a permanent resident, and (2) had temporarily left the country on a voluntary basis rather than as the result of deportation proceedings.[77] The respondent met these two criteria since he was admitted into the country as a permanent resident in 1917 and had temporarily left the country of his own volition a number of times.[78] In reaching the determination that the respondent should be granted relief, the BIA noted that the respondent had resided in the U.S. for

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[73] *Id.*

[74] *See Judulang*, 132 S. Ct. 476 at 480.

[75] *Id. See also* Matter of S-----, 6 I. & N. Dec. 392 (BIA 1954). In that case, the respondent was a national of Spain. *Matter of S*-----, 6 I. & N. Dec. at 392. He gained U.S. permanent residency in 1917, after which time he left the United States on several occasions. *Id.* He was convicted of petit larceny four times between the years 1935 and 1936. *Id.* Apart from this, he was also convicted for "unlawfully operating a coin box receptacle" on two occasions in 1933 and 1937, and was arrested in 1945 for gambling. *Id.* at 393.

[76] *Matter of S*-----, 6 I. & N. Dec. at 397. The crime of moral turpitude committed here was petit larceny. *See id.* Crimes of moral turpitude are crimes "done contrary to justice, honesty, principle, or good morals." Michael D. Greenberg, *Consequences of Criminal Convictions for the Noncitizen*, IMMIGRATION PRACTICE MANUAL 1901, § 19.4.1 (Massachusetts Continuing Legal Educ., Inc., 2012). It has been defined as "[a]n act of baseness, vileness or depravity in the private and social duties which a man owes his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Id.* (citing Matter of Franklin, 20 I. & N. Dec. 87, 868 (BIA 1994)). This category of crimes is rather broad and complex. *See id.* Crimes that have been held to fall within the category include shoplifting, petty theft, and aggravated assaults. *Id.*

[77] *Matter of S*-----, 6 I. & N. Dec. at 393.

[78] *See id.*

most of his life and had not committed any more crimes in the years following his initial convictions.[79] The BIA also seemed to be influenced by the fact that the respondent's employer and neighbors thought well of him.[80]

In 1976, the Second Circuit decided *Francis v. INS*, a case that quickly revealed a serious problem with the manner in which the BIA was deciding deportation cases under section 212(c).[81] In *Francis*, the Petitioner appealed the BIA's decision not to allow him section 212(c) relief because, although he was lawfully admitted to the United States, he had failed to leave the country temporarily since his conviction.[82] The Second Circuit held that the BIA's method of applying section 212(c) to deportation cases violated the Equal Protection Clause because it treated members of the group of deported aliens differently: "[d]eportable aliens who had traveled abroad and returned could receive Section 212(c) relief, while those who had never left could not."[83] The court noted that the Equal Protection Clause applies to aliens just as it applies to citizens, even where the alien has been placed in deportation proceedings.[84] It applied a "minimal scrutiny test" to the BIA's policy under which "distinctions between different classes of persons 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[85] After this case, a deportable alien no longer had to leave the country before petitioning for relief under section 212(c).[86]

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[79] *Id.*

[80] *Id.* at 397.

[81] Judulang v. Holder, 132 S. Ct. 476, 480 (citing Francis v. INS, 532 F.2d 268 (2d Cir. 1976)). The petitioner in this case had been convicted of a marijuana offense. *Francis*, 532 F.2d at 269. The petitioner did not dispute the fact that he was deportable, but argued that he should be entitled to relief under 212(c). *Id.* at 270.

[82] *See Francis*, 532 F.2d at 269.

[83] *Judulang*, 132 S. Ct. at 480. (citing *Francis*, 532 F.2d at 273).

[84] *Francis*, 532 F.2d at 272 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886); Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975)).

[85] *Id.* (citing Stanton v. Stanton, 421 U.S. 7, 14 (1975); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

[86] *See Judulang*, 132 S. Ct. at 480.

In the next case in the series, *Matter of Silvia*, the BIA affirmed the principle laid down in *Francis*, holding that a deportable permanent resident could find relief under section 212(c) without first leaving the country.[87] The BIA acknowledged that some of its prior holdings required voluntary departure as a prerequisite for obtaining the section 212(c) waiver.[88] However, it stated that in light of the equal protection arguments made in *Francis*, it would "withdraw" from the "contrary position" it expressed in the past.[89] In his concurring opinion, Justice Appleman stated that the requirement that an alien temporarily leave the country and then return to the U.S. in order to be eligible for relief "no longer seem[ed] relevant."[90]

The reach of section 212(c) was altered drastically when AEDPA was enacted in 1996.[91] Section 401 of AEDPA set up a large category of crimes to which the section 212(c) waiver did not apply, restricting the number of aliens who could find relief under the waiver.[92] Shortly after AEDPA was enacted, IIRIRA repealed section 212(c) in its entirety.[93] Section 212(c) was replaced with a new remedy called "cancellation of removal."[94] The government

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[87] See *id.*; Matter of Silvia, 16 I. & N. Dec. 26, 31–32 (BIA 1976). The respondent was convicted of possessing marijuana with the intent to distribute. *Silvia*, 16 I. & N. Dec. at 26. He was sentenced to five years imprisonment, two years of special parole, and a $500 fine. *Id.* He had been a lawful permanent resident since 1954. *Id.* at 27.

[88] *See Silvia*, 16 I. & N. Dec. at 28–30.

[89] *Id.* at 29–30. Interestingly, one might detect a hint of reluctance in the court's concession. *See id.* The court prefaced the concession by stating that it had been informed that the Solicitor General would not seek certiorari for the holding in *Francis*. *Id.* One might wonder if the BIA would have continued to apply the voluntary departure standard if it had not seemed like it was fighting a losing battle.

[90] *Id.* at 32–33 (Appleman, Irving A., member, concurring).

[91] *See* INS v. St. Cyr, 533 U.S. 289, 289 (2001).

[92] *See id.*

[93] *See, e.g.*, *Judulang*, 132 S. Ct. at 480. *See also St. Cyr*, 533 U.S. at 289.

[94] Chereck, *supra* note 28, at 611. The cancellation of waivers section provided that

> [a]ny legal, permanent resident alien could apply for cancellation of removal if he or she had been a permanent resident for minimum of five years, had resided continuously in the United States for at least seven years, and had not been convicted of an aggravated felony. To the contrary, the previous relief granted

also unified exclusion and deportation actions into a procedure called "removal proceeding."[95] Even though the two actions have been unified into one proceeding, the statutory bases for the two actions remained different.[96] There are separate lists of substantive grounds for deportation and exclusion proceedings.[97]

Public outcry arose concerning the question of whether IIRIRA would apply retroactively to permanent residents who had been

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> under section 212(c) was available even to aggravated felons. For non-permanent residents, cancellation of removal required an additional three years of physical presence in the United States and "a showing that the removal would result in 'exceptional and extremely unusual hardship to the alien's permanent resident or citizen spouse, parent, or child.'" Furthermore, the petitioner's sentence could not exceed one year."

Id.

[95] *Judulang*, 132 S. Ct. at 479.

[96] *Id.*

[97] *Id.* 8 U.S.C. § 1182(a) lays out the grounds for excluding an alien from the United States. *Id. See* 8 U.S.C. § 1182(a)(1)–(10) (2006). Inadmissible aliens include those who (1) are excludable on health-related grounds, (2) are excludable on criminal related grounds, (3) are excludable on security related grounds, (4) are likely to become a public charge, (5) are seeking to enter the U.S. to undertake skilled or unskilled labor, (6) are entering illegally and those who have immigration violations, (7) are unable to meet the documentation requirements, (8) are not eligible to become citizens, (9) have been removed from the United States in the past, (10) or are part of a category of miscellaneous individuals including polygamists, guardians accompanying helpless aliens, child abductors, those who have violated federal, state, or local voting laws, and former U.S. citizens who gave up their citizenship to avoid being taxed. *See id.*

8 U.S.C. § 1227(a) lists the classes of deportable aliens. *Judulang*, 132 S. Ct. at 479. *See* 8 U.S.C. § 1227(a)(1)–(7) (2006). Deportable aliens include (1) those who are inadmissible at the time they enter the United States or are inadmissible at the time their immigration status is adjusted or who violate their immigration status; (2) those who commit criminal offenses including those who are convicted of crimes of moral turpitude, have more than one criminal convictions, commit aggravated felonies, are involved in "high speed flight from an immigration checkpoint," fail to register as sex offenders, those who are convicted of violations of laws regulating controlled substances, and those who are convicted of certain offenses involving firearms; (3) those who have failed to register or have falsified entry documents; (4) those who are engaged in any activity that would threaten the security of the United States, (5) those who have become a public charge within five years of entry; (6) and those who have violated federal, state, or local voting laws. *See id.*

convicted of crimes before IIRIRA came into force.[98] The Federal Government's position on the issue was that the laws did apply retroactively, and section 212(c) relief was therefore impossible for all cases, including those pending when the legislation came into force.[99] The government's opinion on these issues, presented by Janet Reno in the *Matter of Soriano*, "created confusion in the courts and resulted in 'widespread litigation.'"[100] Although the opinion addressed the possibilities of which dates the legislation would apply to, it did not provide any conclusive answers.[101] In response to the litigation that arose out of the *Soriano* opinion, the Department of Justice (DOJ) came out with a rule that created a uniform method for applying AEDPA.[102] Under this rule, AEDPA did not apply retroactively and aliens who had been placed into deportation proceedings before April 24, 1996 could still apply for section 212(c) relief.[103]

Despite the DOJ's guidance on the issue, "[t]he issues surrounding AEDPA and IIRIRA were not completely settled by the *Soriano* Rule."[104] The circuit courts were split over the question of retroactivity.[105] This circuit split was not resolved until the Supreme

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[98] Baldini-Potermin, *Lessons From a "Coin Flip": The U.S. Supreme Court and § 212(c) (Again)*, 89 NO. 6 INTERPRETER RELEASES 293, 294 (2012). *See also* Chereck, *supra* note 28, at 611.

[99] *See* Chereck, *supra* note 28, at 611.

[100] *Id.* at 611–12.

[101] *See id.* at 612. The issues created by Soriano included:

> The possible relevance of various other dates in determining whether or not a particular alien was eligible to apply for section 212(c) relief: the date the alien was placed into proceedings; the date the alien applied for section 212(c) relief; the date any relevant crimes were committed; and the date any relevant pleas or convictions were entered.

Id. at 611–12.

[102] *Id.* This is known as the "Soriano Rule." *Id.*

[103] *Id.*

[104] *Id.*

[105] *See* Baldini-Potermin, *supra* note 98, at 294.

Court decided *INS v. St. Cyr* in 2001.[106] In that case, the INS argued that the respondent was removable because the new IIRIRA legislation affirmed his eligibility for removal.[107] Further, the INS claimed that the IIRIRA was intended to apply to all removal proceedings initiated after its enactment and that the provisions had a prospective rather than retrospective effect.[108]

In considering whether IIRIRA had retroactively repealed section 212(c), the Court acknowledged the presumption against retroactive legislation.[109] It noted that, despite this presumption, Congress has the power to give laws retroactive effect as long as its intent do so is clear.[110] The Court found that there was no clear indication that Congress intended to apply IIRIRA's repeal of section 212(c) retroactively, since nothing in IIRIRA's legislative history even mentioned the effect that the legislation would have on "proceedings based on pre-IIRIRA convictions that [were] commenced *after* its

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[106] *See id.* (citing INS v. St. Cyr, 533 U.S. 289, 316–25 (2001)). In that case, the respondent was a national of Haiti who became a U.S. permanent resident in 1986. *St. Cyr*, 533 U.S. at 292. In 1996, the respondent pleaded guilty to sale of a controlled substance, which meant he was subject to deportation. *Id.* In light of the recent changes to the law, it was clear that the respondent would have been eligible for section 212(c) relief at the time he was convicted, although he was not eligible for the waiver by the time removal proceedings began in 1997. *Id.*

[107] *St. Cyr*, 533 U.S. at 315.

[108] *Id.*

[109] *Id.* at 315–16.

> [This] presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."

Id. at 316 (quoting Kaiser Aluminum & Chemical Corp v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

[110] *Id.* ("Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.") (quoting Landgraf v. USI Film Products, 511 U.S. 244, 268 (1994)).

effective date."[111] Further, the effective date of IIRIRA itself could not be considered evidence that Congress intended to create a retroactive effect.[112] The Court coupled the presumption against retroactivity of an ambiguous statute with "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," to come to the conclusion that Congress did not in fact determine that IIRIRA would apply retroactively.[113]

The next step in the Court's inquiry was determining whether refusing to allow section 212(c) relief to removable aliens would produce an "impermissible retroactive effect" for aliens who had entered guilty pleas before section 212(c) was repealed.[114] The Court reasoned that to determine whether a statute has retroactive effect, it must be decided whether the statute "attaches new legal consequences to events completed before its enactment."[115] It is important to determine whether retroactive application allows for fair notice and reasonable reliance.[116]

The Court found that, in the case at hand, the application of IIRIRA clearly attached new legal consequences to the state of affairs

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[111] *Id.* at 318. The Court also pointed out that Congress had made an effort to specify sections of IIRIRA that did have retroactive effect. *Id.* at 318–19. The fact that it did this for certain provisions but not for the provisions that replaced section 212(c) showed that it did not intend to decide how IIRIRA would apply to convictions that were entered before IIRIRA was enacted. *Id.* at 319-20.

[112] *St. Cyr*, 533 U.S. at 317. The Court noted that,

> [t]he mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce. For that reason, a "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date."

Id. (citing *Landgraf*, 511 U.S. at 257).

[113] *Id.* at 320 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

[114] *Id.*

[115] *Id.* at 321 (citing Martin v. Hadix, 527 U.S. 343, 357–58 (1999) ("A statute has retroactive effect when it '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.")).

[116] *Id.* (citing *Martin*, 527 U.S. at 358).

that existed before the statute was enacted.[117] The aliens who entered guilty pleas before IIRIRA was enacted did so believing that entering such pleas would allow them to qualify for section 212(c) relief.[118] It did not matter that section 212(c)'s relief was discretionary, and therefore not guaranteed.[119] It was sufficient that aliens in a situation similar to the respondent were highly likely to have received relief under the statute and were likely to have relied upon such relief.[120] Having drawn these conclusions, *inter alia*, the Court held that despite section 212(c)'s repeal, the waiver would still apply to removable aliens who had entered guilty pleas before section 212(c)'s repeal and would have been eligible for section 212(c) relief at the time the plea was entered.[121]

The Court's decision in *INS v. St. Cyr* fueled a series of legal reactions from the various agencies and courts wielding jurisdiction over the applicable issues.[122] For example, the DOJ issued a regulation requiring deportation charges to correspond to a ground for excluding an alien for admission into the country.[123] Further, the BIA decided in a series of cases that deportable aliens convicted of aggravated felonies could not invoke relief under section 212(c).[124] The circuits split once again, this time concerning the issue of what approach to use to determine whether an alien qualified for the section 212(c) waiver.[125]

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[117] *St. Cyr*, 533 U.S. at 321.

[118] *Id.* at 322–23. "Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323.

[119] *Id.* at 325.

[120] *Id.*

[121] *Id.* at 326.

[122] *See* Baldini-Potermin, *supra* note 98, at 294.

[123] *See id.*

[124] *Id.* These cases were *In re of Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005) and *In re Brieva-Perez*, 23 I. & N. Dec. 766 (B.I.A. 2005). *Id.* However, the BIA used these cases to emphasize that section 212(c) did not apply to aggravated felons. *Id.* Exceptions to that rule were allowed for "drug possession and drug-trafficking convictions and where a lawful permanent resident was eligible to apply for adjustment of status in conjunction with a § 212(c) waiver." *Id.*

[125] Judulang v. Holder, 132 S. Ct. 476, 483 (2011); Baldini-Potermin, *supra* note 98, at 294.

The Second Circuit applied an offense-based statutory approach.[126] This approach evaluated the "underlying offense of a[] [permanent resident]'s deportation charge" to determine whether the permanent resident displayed the same characteristics as someone who could be excluded from the United States.[127] Based on the court's approach in *Francis*,[128] this approach has been criticized by at least one scholar, who argued that it "impermissibly expanded the reach of *Francis*, creating the unnecessary step of evaluating a petitioner's underlying offense."[129]

The First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeal favored the "comparable grounds approach."[130] The comparable grounds approach relies on determining whether the statutory ground for deportation charged has an equivalent in the statutory grounds for exclusion.[131] If the ground for deportation is "substantially equivalent" to one of the grounds for exclusion, the alien being considered for removal may seek relief under section 212(c).[132] If the ground for deportation does not correspond with one of the grounds for exclusion, the alien may not seek relief under section 212(c).[133] Although the Ninth Circuit

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[126] *Discretionary Waiver of Deportation in Absence of Voluntary Departure*, U.S. SUP. CT. ACTIONS 1 (2011).

[127] Sara Fawk, *Immigration Law—Eligibility for Section 212(c) Relief from Deportation: Is it the Ground or the Offense, the Dancer or the Dance?*, 32 W. NEW ENG. L. REV. 417, 421 (2010).

[128] Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

[129] Fawk, *supra* note 127, at 421.

[130] *Id.* at 441.

[131] Judulang v. Holder, 132 S. Ct. 476, 481–82 (2011).

[132] *Id.*

[133] *Id.* at 482. This approach is possible because as stated previously, the statutory grounds for deportation and exclusion are different. The following examples provided by the Court in *Judulang v. Holder* may help to illustrate how this comparison works:

> Take first an alien convicted of conspiring to distribute cocaine, whom DHS seeks to deport on the ground that he has committed an "aggravated felony" involving "illicit trafficking in a controlled substance." 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). Under the comparable-grounds rule, the immigration judge would look to see if that deportation ground covers substantially the same offenses as an exclusion ground.

initially also followed the comparable grounds approach, it eventually became wary of the comparable grounds approach and rejected it in its decision in *Abebe v. Mukasey*.[134] It opted instead for a rationality-based test and presented a legitimate government interest argument for treating aliens who leave the country voluntarily differently from those who do not when determining which aliens are eligible for section 212(c) relief.[135]

III. FACTS

Joel Judulang's story begins much like that of the countless other immigrants whose cases come before an immigration judge or other court of review. Judulang immigrated to the United States from the Philippines in 1974 when he was eight years old.[136] Various members of Judulang's family became U.S. citizens, including his

> And according to the BIA in *Matter of Meza*, 20 I. & N. Dec. 257 (1991), the judge would find an adequate match—the exclusion ground applicable to aliens who have committed offenses "relating to a controlled substance," 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and (a)(2)(C).
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> Now consider an alien convicted of first-degree sexual abuse of a child, whom DHS wishes to deport on the ground that he has committed an "aggravated felony" involving "sexual abuse of a minor." §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii). May this alien seek § 212(c) relief? According to the BIA, he may not do so—not because his crime is too serious (that is irrelevant to the analysis), but instead because no statutory ground of exclusion covers substantially the same offenses. To be sure, the alien's own offense is a "crime involving moral turpitude," 8 U.S.C. § 1182(a)(2)(A)(i)(I), and so fits within an exclusion ground . . . . But on the BIA's view, the "moral turpitude" exclusion ground "addresses a distinctly different and much broader category of offenses than the aggravated felony sexual abuse of a minor charge . . . ." And the much greater sweep of the exclusion ground prevents the alien from seeking discretionary relief from deportation.

Id.

[134] Fawk, *supra* note 127, at 445–46; *see also* Abebe v. Mukasey (Abebe II), 554 F.3d 1203 (9th Cir. 2009).

[135] *See* Fawk, *supra* note 127, at 446–47.

[136] Brief for Petitioner at 24, Judulang v. Holder, 132 S. Ct. 476 (2011) (No. 10-694), 2011 WL 2678268, at *24.

parents and two sisters.[137] Judulang's daughter was also a U.S. citizen by birth.[138] However, Judulang never naturalized.[139] His parents stated that they did not put Judulang through the naturalization process because they "d[id] not know the intricacies of immigration law."[140] Judulang lived continuously in the U.S. as a lawful permanent resident for thirty-six years.[141]

Despite the fact that Judulang was raised in the United States, his status as a permanent resident did not shield him from facing removal from the U.S.[142] On the contrary, two separate criminal convictions placed Judulang on the path to deportation.[143] In 1988, Judulang pled guilty to voluntary manslaughter after taking part in a fight in which someone was killed.[144] Because Judulang was not the killer, he was charged as an accessory and was sentenced to six years in prison for this crime.[145] He served less than two years of the sentence before being released on probation.[146] In 2005, Judulang pled guilty to a crime involving theft.[147] DHS began deportation proceedings based

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[137] *Id.* It is also notable that Judulang's grandfather became a U.S. citizen by virtue of serving in the U.S. military in the Philippines. *Id.*

[138] *Id.*

[139] *Id.*

[140] Brief for Petitioner, *supra* note 136, at 24–25.

[141] Judulang v. Holder, 132 S. Ct. 476, 482 (2011); Brief for Petitioner, *supra* note 136, at 24. This case's procedural record reveals some confusion regarding Judulang's immigration status. *See* Judulang v. Gonzales, 249 F. App'x 499 (9th Cir. 2007). In the earlier proceedings, the Ninth Circuit rejected Judulang's claim to derivative citizenship based on his parents' citizenship status. *Id.* at 501. Although Judulang argued that both of his parents had been naturalized in the United States, the court could not find conclusive evidence that both of Judulang's parents naturalized before he turned eighteen. *Id.* at 501–02. Accordingly, the court held that Judulang failed to meet the burden required to overcome the rebuttable presumption of alienage created by his birth in the Philippines. *See id.* at 501.

[142] *See infra* notes 143–48 and accompanying text.

[143] *See infra* notes 144–47 and accompanying text.

[144] Judulang v. Holder, 132 S. Ct. 476, 482–83 (2011).

[145] Brief for Petitioner, *supra* note 136, at 25.

[146] *Id.*

[147] *Judulang*, 132 S. Ct. at 483.

on the charge of "aggravated felony" involving a "crime of violence," based on the manslaughter conviction from 1988.[148]

The immigration judge presiding over the case found that Judulang would have been eligible for section 212(c) if not for the six-year sentence he was given for the crime, which disqualified him.[149] The BIA "affirmed on different grounds," holding that Judulang could not apply for relief under section 212(c) because the "crime of violence" ground for deportation had no equivalent in the statutory scheme for exclusion.[150] The Ninth Circuit denied

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[148] *Id.*

[149] Brief for Petitioner, *supra* note 136, at 25.

[150] *See id.*; *Judulang*, 132 S. Ct. at 483. The BIA's holding was based on the holding in the case *Brieva-Perez v. Gonzales*, 23 I. & N. Dec. 766 (2005). Brief for Petitioner, *supra* note 136, at 25. In *Brieva-Perez*, the respondent was a native of Columbia who came to the U.S. as an LPR in 1980. *Brieva-Perez*, 23 I. & N. Dec. at 767. He pled guilty to "unauthorized use of a motor vehicle," in 1993. *Id.* After respondent was convicted, the INS placed him in removal proceedings based on the charge of "aggravated felony 'crime of violence.'" *Id.* An immigration judge found that the INS properly categorized the respondent's offense and also held that the respondent was not eligible for relief under section 212(c) since the offense did not match a comparable exclusionary ground. *See id.* On appeal, the BIA was asked to decide whether the respondent's crime had properly been categorized. *See id.* The BIA held that unauthorized use of a motor vehicle was properly categorized as a crime of violence because "[a]n unauthorized driver is likely to use physical force to gain access to a vehicle and to drive it." *Brieva-Perez*, 23 I. & N. Dec. at 770. Because this correct classification meant that the respondent qualified as "an alien convicted of an aggravated felony," he was declared to be removable. *Id.* Further, the BIA found that the immigration judge correctly denied the respondent's eligibility for a 212(c) waiver because the respondent's crime did not match closely enough with any of the statutory grounds for exclusion. *Id.* at 772–73. The BIA reasoned that,

> although there need not be perfect symmetry in order to find that a ground of removal has a statutory counterpart in section 212(a), there must be a closer match than that exhibited by the incidental overlap between 101(a)(43)(F) (crime of violence) and section 212(a)(2)(A)(i)(I) (crime involving moral turpitude). The distinctly different terminology used to describe the two categories of offenses and the significant variance in the types of offenses covered by these two provisions lead us to conclude that they are not "statutory counterparts" for purposes of section 212(c) eligibility.

Id. at 773.

Judulang's petition for review, opting to rely on circuit precedent affirming the comparable grounds approach.[151] The Supreme Court granted certiorari.[152]

Judulang's main arguments upon receiving certiorari were threefold.[153] First, he argued that the BIA's decisions in the cases *Matter of Blake*[154] and *Brieva-Perez v. Gonzales*[155] changed the BIA's previous policy of granting section 212(c) waivers in deportation cases, resulting in an impermissible retroactive effect.[156] Second, he argued that the BIA's new policy of determining section 212(c) relief eligibility was arbitrary and capricious because it depended on "semantic differences in the exclusion and deportation provisions" and depended on the "irrelevant and fortuitous factor[]" of a permanent resident's travel history.[157] Third, Judulang argued that the BIA's approach violated equal protection since there was "no rational basis for distinguishing between [permanent residents] who traveled abroad and returned before being placed in deportation proceedings and those who did not."[158]

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[151] Judulang v. Holder, 132 S. Ct. 476, 483 (2011).

[152] *Id.*

[153] Brief for Petitioner, *supra* note 136, at 26–28.

[154] *In re* Blake, 23 I. & N. Dec. 722 (B.I.A. 2005).

[155] Brieva-Perez v. Gonzales, 23 I. & N. Dec. 766 (B.I.A. 2005).

[156] Brief for Petitioner, *supra* note 136, at 26–27. In his brief, Judulang took issue with the Ninth Circuit's position on the waiver, stating that the

> suggestion that Section 212(c) does not apply in deportation proceedings at all is contrary to years of congressionally approved agency practice. Congress has consistently acknowledged that Section 212(c) provides relief from deportation as well as exclusion, and even the government has not contended otherwise. Accordingly, the Ninth Circuit's approach offers no basis for affirming the judgment below.

Id.

[157] *Id.* at 27.

[158] *Id.* at 27–28.

IV. ANALYSIS OF OPINION

The question presented to the Court was "whether the BIA's policy for applying § 212(c) in deportation cases is 'arbitrary [or] capricious' under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A)."[159] From the outset, Justice Kagan[160] stressed that the law governing this case is very straightforward.[161] An administrative agency must give a reasonable explanation for the policy it sets.[162] This is a firm standard, although it is not a difficult one to meet.[163] When examining a policy to see if it is arbitrary and capricious, the Court exercises a narrow scope of review, giving deference to the agency's judgment in implementing the policy.[164] The Court looks to see "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[165]

Justice Kagan began her opinion presenting a brief outline of the history of section 212(c), focusing on the differences between the

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[159] Judulang v. Holder, 132 S. Ct. 476, 483 (2011).

[160] Justice Kagan wrote on behalf of a unanimous court. *See id.* Justice Kagan is the newest justice sitting on the Supreme Court, and previously served as the U.S. solicitor general. Paul Wickham Schmidt, *Answering Questions About the Supreme Court's Judulang Decision*, 59 FED. LAW. 18 (2012).

[161] *Judulang*, 132 S. Ct. at 479.

[162] *Id.*

[163] *Id.*

[164] *Id.* at 483.

[165] *Id.* at 484 (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). In *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, the Court laid out the following criteria for determining whether an agency policy is arbitrary and capricious:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc., 463 U.S. at 43.

justifications used for exclusion and deportation proceedings.[166] She explained how two separate lists—one identifying the crimes that make an alien excludable and the other identifying the crimes that make an alien deportable—overlap and diverge in various ways.[167] She also noted how, historically, section 212(c) relief only applied to excludable aliens.[168] Justice Kagan highlighted the difficulties that started to arise when the BIA began to apply section 212(c) to deportation proceedings, and the conflicting results that came out of the BIA's decision in the case *Matter of L-----* that discretionary relief would only be granted to deportable aliens that left and reentered the country.[169]

Justice Kagan then briefly discussed the Second Circuit's holding in *Francis* that allowing discretionary relief only to aliens who first left the country violated the Equal Protection Clause.[170] She noted how this decision encouraged the BIA to forego the use of an alien's travel history in determining section 212(c) eligibility.[171] Justice Kagan then discussed section 212(c)'s repeal and explained her own Court's holding in its decision in *INS v. St. Cyr* that the waiver should still be available to those aliens who entered guilty pleas before the waiver was repealed.[172] She emphasized that in coming to this decision, the Court was concerned with how it could best preserve "familiar considerations of fair notice, reasonable reliance, and settled expectations."[173]

After concluding this historical review, Justice Kagan proceeded to lay out the specifics of the process the BIA utilizes to apply the section 212(c) waiver to current cases.[174] She noted that applying the waiver to exclusion cases is straightforward because all the BIA has to do is check the statutory ground upon which DHS bases the

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[166] *Judulang*, 132 S. Ct. at 483.

[167] *Id.* at 479.

[168] *Id.* at 479–80.

[169] *Id.* at 480. For a discussion of the facts and holding of *Matter of L-----*, *see supra* notes 69–73 and accompanying text.

[170] *Judulang*, 132 S. Ct. at 480. For a discussion of the facts and holding of *Francis v. INS*, *see supra* notes 81–86 and accompanying text.

[171] *Judulang*, 132 S. Ct. at 480.

[172] *Id.* at 480–81.

[173] *Id.* at 481 (citing INS v. St. Cyr, 533 U.S. 289, 323 (2001).

[174] *Id.* at 481–82.

exclusion decision.[175] As long as the statutory ground is not one of the two grounds that make an alien ineligible for the waiver, the alien will be considered for relief.[176] If the alien is eligible, the BIA simply decides whether to grant relief by focusing on a variety of factors including how long the alien has lived in the U.S., the alien's family background, and the seriousness of the crime committed.[177]

Justice Kagan noted that despite the straightforward nature of the exclusion analysis, there is a noticeable difference in the level of difficulty when ascertaining waiver eligibility if the alien in question has been slated for deportation.[178] To illustrate how complex the process for determining eligibility for the waiver is in a deportation case, Justice Kagan described the two approaches the BIA has employed over time to accomplish the task.[179] She noted that the first approach, which the BIA used in the past, is much like the method it utilizes for exclusion cases.[180] The BIA first looked to see whether the crime for which the alien was being deported fell within one of the statutory exclusion grounds.[181] If it did, the BIA applied the same kind of factors-based test used in exclusion cases.[182]

Justice Kagan then moved on to the second approach that the BIA had been using to determine waiver eligibility in deportation cases since 2005—the comparable grounds approach.[183] She likened the comparable grounds approach to a Venn diagram: "Within one circle are all the criminal offenses composing the particular ground of deportation charged. Within other circles are the offenses composing the various exclusion grounds. When, but only when, the

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[175] *Id.*

[176] *Judulang*, 132 S. Ct. at 481–82.

[177] *Id.* The specific list of factors that Justice Kagan includes are, "the seriousness of the offense, evidence of either rehabilitation or recidivism, the duration of the alien's residence, the impact of deportation on the family, the number of citizens in the family, and the character of any service in the Armed Forces.'" (citing INS v. St. Cyr, 533 U.S. 289, 296 (2001)).

[178] *Id.* at 481.

[179] *Id.* at 481–82.

[180] *Id*. at 481.

[181] *Id.*

[182] *Judulang*, 132 S. Ct. at 481.

[183] *Id.*

'deportation circle' sufficiently corresponds to one of the 'exclusion circles' may an alien apply for [section] 212(c) relief."[184]

Although Justice Kagan recognized the authority that federal agencies have over their statutes, she emphasized that the Court cannot turn a blind eye to suspect policies.[185] Courts are responsible for making sure that agencies make policies that are reasonable.[186] Courts must look to see whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[187] Justice Kagan then stated that the BIA had failed the test of reasonableness by deciding whether an alien qualified for section 212(c) relief by relying on a "chance correspondence" between the various deportation and exclusion categories.[188] Such an inquiry could not determine whether an alien should be allowed to remain in the United States.[189]

Justice Kagan took note of the parties' disagreement over whether the waiver should be applied equally in both exclusion and deportation cases.[190] While Judulang argued that it should, the Government argued that immigration law has always treated exclusion and deportation cases differently and that the Government has valid reasons for doing so because applying section 212(c) uniformly to both types of cases might cause aliens to effectively use that type of discretionary relief as a crutch.[191] Justice Kagan declined to reach these arguments, stating that the dispute between the two

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[184] *Id.* at 482.

[185] *See id.* at 483–84.

[186] *See id*.

[187] *Judulang*, 132 S. Ct. at 484 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

[188] *Id*.

[189] *Id.* In fact, the only reason why Judulang was refused section 212(c) relief by the BIA was that the deportable crime of violence he had been charged with did not have a corresponding exclusionary basis. *Id.* Judulang's argument was that if he would have qualified for relief in an exclusion case (which he would have based on his previous crime of voluntary manslaughter, a crime of moral turpitude covered by an exclusion ground), then he should also be able to seek section 212(c) in the instant deportation case. *See id.* (citing Brief for Petitioner, *supra* note 136, at 47–51).

[190] *Id.*

[191] *Id.* at 484–85.

parties was irrelevant.[192] She made it clear that the Court did not question the BIA's policy preferences for limiting the extent of section 212(c) relief, noting that it may have legitimate reasons for doing so.[193] The Court's only concern was whether the BIA was applying its chosen policy reasonably.[194]

Justice Kagan then went on to explain why the use of the comparable grounds rule does not meet the reasonability requirement, likening the usefulness of the inquiries it measures to that of flipping a coin.[195] The approach does not consider the actual merits of the case.[196] It fails to examine the factors that might be important to establishing whether or not an alien should be eligible for section 212(c) relief.[197] Instead, it bases the entire decision of eligibility "on an irrelevant comparison between statutory provisions."[198] Justice Kagan argued that although the Court would not decide whether Judulang should be entitled to relief, the fact that his case failed under the comparable grounds approach did not make him less deserving of the relief.[199] Justice Kagan also expressed the Court's concern that the outcome of the comparable grounds approach may depend on how a particular immigration official decided to charge the alien in question.[200] Depending on how the

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[192] *Judulang*, 132 S. Ct. at 485.

[193] *Id.*

[194] *See id.*

[195] *Id.* at 485–86.

[196] *See id.* at 486.

[197] *Judulang*, 132 S. Ct. at 487.

[198] *Id.* at 485.

[199] *See id.* at 485–86.

[200] *Judulang*, 132 S. Ct. at 486. Justice Kagan noted that,

> the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials are exercising their charging discretion with § 212(c) in mind . . . . So at base everything hangs on the fortuity of an individual official's decision. An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country.

Id. (citation omitted).

alien is charged, his or her conviction may fall in various deportation grounds that may or may not correspond to specific exclusion grounds.[201]

Next, Justice Kagan identified and rejected the government's three arguments defending the comparable grounds approach.[202] The government's first argument was that the comparable grounds rule is in keeping with section 212(c)'s language.[203] Justice Kagan's response to this argument was that the government's description of the statute was incorrect; it only directs the Attorney General to "admit any excludable alien, except if the alien is charged with two specified grounds."[204] Furthermore, the statute is not aimed at deportation cases in the first place, so it is inapplicable anyway; it only instructs how to deal with exclusion cases.[205] The government's second argument was that the comparable grounds rule is valid because it has been utilized over the years.[206] The Court's response was that the BIA's approach was not in fact consistent, but varied throughout the years.[207] This variance is evidenced by the BIA's approaches in *Matter of T-----*,[208] *Matter of Granados*,[209] and *Matter of Hernandez-Casillas*.[210] Lastly, the government argued that the

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[201] *See id.*

[202] *Id.* at 487–90.

[203] *Id.* at 487.

[204] *Id.*

[205] *Judulang*, 132 S. Ct. at 488.

[206] *See id.*

[207] *Id.*

[208] Matter of T-----, 5 I. & N. Dec. 389, 390 (BIA 1953). In this case, the BIA denied section 212(c) relief to an alien who had entered the U.S. without inspection and by making false representations. *Id.* at 389–90. The BIA emphasized that section 212(c) discretion is limited to the deportation grounds fond in the INA. *Id.* at 389.

[209] Matter of Granados, 16 I. & N. Dec. 726, 728 (BIA 1979). In this case, the BIA found that section 212(c) relief could not waive deportability based on a "conviction of possession of an unregistered sawed-off shotgun." *Id.* at 726. Because possession of such a shotgun was not a ground of excludability, it was not covered by section 212(c). *Id.* at 728. The BIA emphasized that although its decision in *Francis* extended the reach of section 212(c)'s applicability, it "did not increase the statutory grounds to which section 212(c) relief may be applied." *Id.*

[210] *Judulang*, 132 S. Ct. at 488–89. *See* Matter of Hernandez-Casillas, 20 I. & N. Dec. 262, 266 (BIA 1990). The case involved a Mexican citizen who was charged with entering the U.S. without inspection. *Id.* at 263. In discussing the

comparable grounds rule "saves time and money."[211] The Court responded to this argument by stating that although cost is an important consideration, low cost is not a means for overcoming an arbitrary and capricious policy.[212] The Court also noted that the

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respondent's eligibility for a section 212(c) waiver, the BIA cited *Matter of Granados*, 16 I. & N. Dec. 726, *inter alia*, for the proposition that the waiver was only available to aliens whose deportation ground corresponded with a "comparable ground of exclusion." *Id.* at 264–65. The BIA found that requiring corresponding deportation and exclusion grounds presented an "anomalous situation," and stated that it would change its approach to extend section 212(c) to all deportability grounds except a few specific grounds related to "subversives and war criminals." *Id.* at 265. It reasoned as follows:

> It is . . . evident that section 212(c) has . . . been expanded to encompass many aliens not originally contemplated by the statute. We have concluded that the same fundamental fairness/equal protection arguments made in *Francis v. INS* . . . can and should be invoked to make section 212(c) relief available to aliens deportable under any ground of deportability except those where there is a comparable ground of exclusion which has been specifically excepted from section 212(c). . . . Having made the section 212(c) waiver, a form of relief ostensibly available only in exclusion proceedings, available in deportation proceedings, we find no reason not to make it applicable to all grounds of deportability with the exception of those comparable to the exclusion grounds expressly excluded by section 212(c), rather than limiting it, as now, to grounds of deportability having equivalent exclusion provisions.

Id. at 266. The BIA conceded that this new expansion conflicted with its prior holdings in cases like *Granados*. *Id.* It chose to turn from *Granados* and similar decisions that "limited the availability of section 212(c)." *Id.* at 267. In keeping with its new approach, the BIA remanded the respondent's case to allow the respondent an opportunity to apply for the section 212(c) waiver. *Id.* at 269.

[211] *Judulang*, 132 S. Ct. at 489. The Government's exact argument was that the current approach of comparing deportation grounds to exclusion grounds was more simple than the approach Judulang was advocating since it could "be accomplished in just a few 'precedential decisions'" which could be applied to multiple cases. *Id.* Judulang's approach would be more cumbersome because it would inherently require the Government to look at each conviction and decide whether it fell within one of the grounds for exclusion. *Id.* In other words, the Government's argument was essentially that the current approach allowed the Government to do less work and also lowered the number of aliens who qualified for relief. *See id.*

[212] *Id.* at 490.

comparable grounds rule probably didn't save as much money as the government argued it did.[213] In reality, Judulang's approach would be very similar to what has been done in the past, which would allow for use of existing precedent.[214]

In conclusion, the Court stated that it must reverse a policy when it cannot find a reason for the policy.[215] Justice Kagan emphasized that in this case, the BIA's comparable grounds rule was not reasonably connected to "the purposes and concerns of the immigration laws."[216] She also emphasized that deportation decisions cannot be left to chance.[217] Since the government could not successfully argue that the comparable grounds rule should be applied, it could not "pass muster under ordinary principles of administrative law."[218] For these reasons, the Ninth Circuit's

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[213] *Id.*

[214] *Id.* The Court also noted that if the Government's interest was cost and time effectiveness, it could come up with an alternative policy that would be economically efficient as long as the policy complied with the instant decision and the Court's decision in *St. Cyr*. *Id.*

[215] *Id.*

[216] *Judulang*, 132 S. Ct. at 490. Specifically, the comparable grounds rule "allows an irrelevant comparison between statutory provisions to govern a matter of the utmost importance–whether lawful resident aliens with longstanding ties to this country may stay here." *Id.* In a passionate critique of the methodology behind the rule, Justice Kagan wrote,

> recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes the alien's prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Id. at 485.

[217] *Id.* at 487.

[218] *Id.* at 490.

decision was reversed and the case was remanded.[219]

V. IMPACT

A. Judulang's Impact on Administrative Law

The arbitrary and capricious standard promotes method and order in immigration decisions. Immigration is a complex area and, in light of the current buzz surrounding this legal topic, it is important for courts deciding immigration cases to have a sound basis of law to work from instead of utilizing an *ad hoc* approach that has no basis in precedent. The demands of the arbitrary and capricious standard encourage adopting solid methodology. Although in *Judulang* the Court did not definitively state which method should be applied to deportation cases,[220] it did make it clear that methods such as the comparable grounds rule, which have no basis in reason, cannot be utilized to remove aliens from the country.[221]

In her opinion, Justice Kagan made the point that the arbitrary and capricious standard is designed to prevent decisions from being made based on chance.[222] As was evidenced through this note's discussion on the impact of the *Francis* holding, rules that are arbitrary can have consequences as severe as violations of constitutional equal protection rights.[223] When deportation cases are not decided upon chance, immigrants have greater access to due process and are able to avoid some of the severe consequences that come from being separated from their families and lives in the United States.

The arbitrary and capricious standard also promotes discipline in agencies that are required to make discretionary decisions while giving the agencies great deference in decision-making. In *Judulang*, the Court made it clear that the BIA can make its own decisions concerning the standards it uses to determine which aliens qualify for the section 212(c) waiver.[224] The Court was simply saying that the

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[219] *Id.*

[220] *See* Baldini-Potermin, *supra* note 98, at 294.

[221] *See supra* Part IV.

[222] *Judulang*, 132 S. Ct. at 487.

[223] *See supra* notes 81–86 and accompanying text.

[224] *Judulang*, 132 S. Ct. at 483, 485, 490.

BIA cannot establish whether or not aliens in Judulang's situation should be eligible for section 212(c) relief through the comparable grounds method, because there is no reason behind it.[225] Because the Court takes a narrow approach to adjudicating the soundness of agency policies under the Administrative Procedure Act, agencies can be assured of maintaining autonomy.[226] The Court only holds agencies accountable for being reasonable when making policy decisions.[227]

B. Judulang's Impact on Immigration Law

Judulang was arguably highly anticipated by the immigration law community.[228] It was expected that the case would answer important questions about whether section 212(c) relief would be available after the passage of IIRIRA and AEDPA.[229] Despite the fact that the case did not address every conceivable issue concerning deportation cases, *Judulang* represents a step in the right direction. In this case, we see the Court encouraging clarity in defining standards for deportation cases, where such standards have been missing in the past. Although on a smaller scale this case seems only to affect deportation cases, the Court's demand that the BIA meet a higher standard in decision-making in this one area may well affect other important immigration questions.

Perhaps most importantly, the Court in *Judulang* followed its *INS v. St. Cyr* ruling, affirming that section 212(c) relief does apply to those permanent residents who were convicted of crimes before AEDPA and IIRIRA came into effect.[230] Affirmation of what is arguably a generous extension of amnesty for aliens (dare say, even criminal aliens) may come as a shock to those who cast a wary eye on immigrants in general.[231] Although it would be incorrect to

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[225] *See id.* at 490.

[226] *Id.* at 483 (stating that, "a court is not to substitute its judgment for that of the agency.") (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[227] *Id.* at 484–85.

[228] *See, e.g.* ALEINIKOFF ET AL., *supra* note 55, at 754.

[229] *See id.*

[230] *See* Baldini-Potermin, *supra* note 98, at 294.

[231] *See supra* notes 7–9 and accompanying text.

assume that the *Judulang* Court was making a political statement about how aliens should be treated, the Court's decision might at least signify that removal of criminal aliens is not simply a race against the clock; but, rather, has powerful and important legal implications which require any methods employed to be utilized carefully rather than haphazardly.

Notably, the court also overruled the BIA's decisions in the cases *Matter of Blake* and *Matter of Brieva-Perez*, where the BIA found that aliens deportable on the basis of having committed aggravated felonies were barred from obtaining relief under section 212(c).[232] The Court found that the standards used to evaluate these cases were arbitrary and capricious.[233] *Blake*'s precedent was actually what the BIA had used to come to the conclusion that Judulang was not entitled to section 212(c) relief at the administrative level.[234] *Blake* embodied the comparable grounds rule, requiring that an alien's ground of deportability have a comparable ground of exclusion before allowing the alien relief under section 212(c).[235]

There is evidence that the *Judulang* holding has attracted attention in the legal field.[236] After the Court's decision was

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[232] *See* Baldini-Potermin, *supra* note 98, at 294–95.

[233] *Id.* at 295. *See also supra* note 124 and accompanying text. For a detailed discussion of the facts and holding in *Brieva-Perez*, *see supra* note 150.

[234] *See* Schmidt, *supra* note 160, at 18–19.

[235] *See id.* at 18.

[236] *See* Baldini-Potermin, *supra* note 98, at 296. After the case was decided, one immigration blog utilized the implications of its holding as a warning to resident aliens. *See Judulang v. Holder: Resident Aliens Beware!*, findanimmigrationattorney.com (Jan. 16, 2012 10:43 AM), http://www.findanimmigrationattorney.com/Featured-News/2012/Judalang-v-Holder-Resident-Aliens-Beware-.aspx.

> What began as a typical immigration/deportation issue has now become a nationally recognized deficit in government policy and procedure. If we cannot rely on the governing boards of our nation to practice sound, reasonable, and fair decision making processes, then just who or what can we trust?
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> . . . .
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> Too often, it would seem that the Board of Immigration Appeals' has ruled for deportation, or denial to appeal to the Attorney General for relief, when it has no rationale for doing so. The case of Judalang [sic] v. Holder may be one of hot contest at

released, a group of legally affiliated associations came out with a practice advisory that applied the *Judulang* holding to various aspects of immigration law.[237] The advisory also discussed motions to reopen the cases of permanent residents that were removed from the United States and provided sample motions that can be utilized by practitioners.[238] Although this might be considered a small development in the law, its implications may actually prove quite enormous for an area of the law where motions to reopen have virtually been unheard of in the past.[239]

Cases like *Judulang* may very well signify that important changes are coming to immigration law.[240] Adriane Meneses has noted that, "[r]ecent Supreme Court holdings seem to be calling for Congressional re-consideration of immigration laws, especially in areas in which criminal law intersects with immigration regulation."[241] In particular, Meneses writes that holdings such as *Judulang* "appear to be significant signs of a move away from unfettered expansion of excludability and deportability as well as on-going restriction or elimination of review and relief."[242]

> the moment, but it certainly begs questions such as, "How many like it came before; how many like it are still to come?"

Id.

[237] Baldini-Potermin, *supra* note 98, at 296. *See also* IMPLICATIONS OF JUDULANG V. HOLDER FOR LPRS SEEKING § 212(C) RELIEF AND FOR OTHER INDIVIDUALS CHALLENGING ARBITRARY AGENCY POLICIES, AMERICAN IMMIGRATION COUNCIL, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD & IMMIGRANT DEFENSE PROJECT (2012) [hereinafter IMPLICATIONS], *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Implications_%20of_Judalang_v_Holder.pdf.

[238] Baldini-Potermin, *supra* note 98, at 296. *See also* IMPLICATIONS, *supra* note 237. The Honorable Paul Wickham Schmidt has also suggested that immigration courts and the BIA may see motions to reopen the cases of aliens whose cases were decided under the BIA's decision in decision. *See* Schmidt, *supra* note 160, at 19. For more on Blake, *see supra* notes 124, 230–33 and accompanying text.

[239] *See supra* notes 35–39 and accompanying text.

[240] Meneses, *supra* note 5, at 785.

[241] *Id.*

[242] *Id.*

Whatever impact *Judulang* may have, it is important to note that any effects may not extend far into the future.[243] This is because "the number of deportable respondents who pleaded [sic] guilty before April 24, 1996—and thus could benefit from the Court's ruling in *Judulang*—is probably dwindling."[244] Once that generation of respondents fades out, the *Judulang* decision may no longer carry so much weight, since it will essentially be a moot point.[245]

VI. CONCLUSION

There has been much debate surrounding the deportation of criminal aliens. The 1996 immigration reforms embodied by AEDPA and IIRIRA have had a significant impact on the availability of certain forms of relief for permanent residents convicted of crimes that made them deportable. One of the most important impacts the legislation had was the removal of the section 212(c) waiver. Before AEDPA and IIRIRA were adopted in 1996, section 212(c) of the INA allowed permanent residents who pled guilty to certain crimes to file a petition with the Attorney General, who would then decide whether to allow the permanent resident relief from deportation.

After AEDPA and IIRIRA came into force, the section 212(c) waiver became a thing of the past. However, both administrative courts and the circuit courts struggled with questions of retroactivity and adopted varying approaches to how to deal with cases in which permanent residents who would have been eligible for the section 212(c) waiver before the legislation was enacted still sought some kind of relief from deportation. The confusion led to a series of appeals alleging flawed judicial reasoning in making determinations as to which aliens would be allowed to utilize the waiver even after its repeal.

This note focused on the Supreme Court's recent decision in *Judulang v. Holder*, the result of years of confusion concerning what standard the BIA should apply to cases where section 212(c) relief is still at issue. In this case, the Court found that the BIA's method of comparing the grounds established for an alien's deportation to the

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[243] *See* Schmidt, *supra* note 160, at 19.

[244] *Id.*

[245] *See id.*

statutory grounds for excluding an alien from the U.S. (the "comparable grounds" approach) was arbitrary and capricious, as it was not rooted in any reasonable theory.

Judulang has impacted both immigration law and administrative law by reinforcing the notion that standards for the review of immigration cases must be grounded in sound reasoning and cannot be invented on a whim. Although the case does not address every issue related to immigration law, it does take a step forward by resolving at least one issue in the area of the deportation of criminal aliens. As the number of deported aliens remains steady and, perhaps, increases, this decision promises to remain of particular importance for some time. If nothing else, it ensures that a portion of the population that is often viewed as "the worst of the worst" still has access to fairly adjudicated proceedings, a principle which is at the core of a properly functioning judicial system.