

Cancellation of Removal and 212(c)

Because IIRIRA came into effect such a long time ago, April 1, 1997, by this time most of the clients practitioners will encounter will be in removal proceedings and will most often be seeking Cancellation of Removal relief. Seeking 212(c) relief will only come about if there are pre-AEDPA and IIRIRA convictions that cannot be forgiven by Cancellation of Removal. For example, suppose an alien became a permanent resident through immigration in 1985 and was convicted of possessing a controlled substance two separate times, once in 1990 and once in 2005. He cannot obtain Cancellation of Removal relief for the 1990 possession crime because he lacks the seven years of continuous residence because of the stop-time rule.¹ The conviction stops his continuous residence at five years. One might expect that he could seek 212(c) relief for the pre-IIRIRA 1990 possession crime and Cancellation of Removal for the 2005 drug possession crime. However this is not the case as courts² have held that an alien cannot obtain both Cancellation of Removal and 212(c) at the same removal hearing based on a statute³ which states that an alien cannot obtain cancellation of removal relief if he has previously received cancellation of removal, the former suspension of removal relief, or 212(c) relief.

The same result, however, does not apply if the alien is in deportation or exclusion proceedings. In such a case, courts⁴ have held that the alien can seek 212(c) relief for the pre-IIRIRA and post-IIRIRA

¹INA § 240A(d).

²*Munoz-Yepez v. Gonzales*, 465 F.3d 347 (8th Cir. 2006), *Garcia-Jimenez v. Gonzales*, 488 F.3d 1082 (9th Cir.2007).

³INA § 240A(c)(6).

⁴*Enriquez-Gutierrez v. Holder*, 612 F.3d 400 (9th Cir. 2010); *Garcia-Padron v. Holder*, 558 F.3d 196 (2nd Cir. 2009); *Pascua v. Holder*, No. 08-71636, No. 08-72705, 2011 U.S. App.

convictions. The reason is that the transition rules⁵ for the implementation of IIRIRA state that the IIRIRA abrogation of 212(c) does not apply to aliens already in exclusion or deportation proceedings. This transition rule, the courts have held, trumps a regulation⁶ which states that 212(c) is only available for convictions that followed plea agreements reached before IIRIRA's effective date. While this line of cases may be of limited benefit because there are so few aliens still in pending deportation or exclusion proceedings and who have not already been deported, it may be of substantial use in prosecutions for illegal re-entry⁷ for aliens found ineligible for 212(c) relief in deportation or exclusion proceedings because of post-IIRIRA removable offenses.

LEXIS 5914 (9th Cir. Mar. 23, 2011).

⁵IIRIRA § 309(c), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

⁶8 CFR § 1212.3(h)(3).

⁷INA § 276.