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St. Cyr Rule Affording Relief to Certain Criminal Aliens

Q1. What is the purpose of the rule?

A1. This proposed rule implements the U.S. Supreme Court's decision in *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). It sets forth procedures for certain lawful permanent residents to apply for discretionary relief from deportation or removal under former section 212(c) of the Immigration and Nationality Act (INA).

Background:
The *St. Cyr* case resulted from five years of litigation involving the application of two statutes that Congress enacted in 1996. The first statute -- the Antiterrorism and Effective Death Penalty Act (AEDPA) enacted on April 24, 1996 -- barred section 212(c) relief for permanent resident aliens with very serious criminal convictions. The second statute -- the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted six months later -- eliminated section 212(c) relief altogether.

Under the government's interpretation of AEDPA and IIRIRA, eligibility for section 212(c) relief was determined based upon the date the alien applicant was placed in deportation or removal proceedings. The government had also argued that the bar to relief applied to aliens with relief applications that were pending on the date of AEDPA's enactment.

In *St. Cyr*, however, the Supreme Court disagreed with the government's interpretation. The Court held that Congress did not clearly intend to apply the AEDPA amendments to aliens who were placed in deportation proceedings before the statute's enactment, or to aliens with relief applications pending on the date of enactment. The Court further held that applying the statute to these aliens may attach unexpected consequences to their past criminal conduct -- that is, it would deprive them of the opportunity to apply for section 212(c) relief for which they were eligible at the time of their convictions by plea agreement. Thus, the Court concluded that, notwithstanding AEDPA and IIRIRA, aliens whose convictions were obtained through plea agreements could still apply for section 212(c) relief, if those aliens, notwithstanding those convictions, would have been eligible for section 212(c) relief under the law that was in effect at the time of their pleas.

Q2. Who will benefit from the *St. Cyr* rule?

A2. Consistent with the *St. Cyr* decision, only aliens who entered into plea agreements prior to the enactment of AEDPA or IIRIRA will be eligible to apply for section 212(c) relief. The rule does not benefit aliens who were found guilty as a result of a trial because the *St. Cyr* decision focused primarily on an alien's reliance on section 212(c) relief as an inducement for entering into a plea agreement.

Under the rule, aliens who pleaded guilty to crimes prior to the enactment of AEDPA on April 24, 1996, may apply for section 212(c) as it existed prior to that date. Section 212(c), as it existed prior to April 24, 1996, was available to most lawful permanent residents who had resided in the United States for at least seven years. It was not available to aliens who had been convicted of one or more aggravated felonies and had served a term of imprisonment of at least five years.

Aliens who pleaded guilty to crimes after April 24, 1996, but prior to IIRIRA's effective date of April 1, 1997, may apply for section 212(c) relief as it existed during that time period. The version of section 212(c) that existed during that time period was the version modified by AEDPA. AEDPA restricted the availability of section 212(c) relief and made it unavailable to aliens who were deportable by reason of their convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, or more than one crime of moral turpitude.

Aliens who pleaded guilty to crimes on or after April 1, 1997, would remain ineligible for section 212(c) relief because section 212(c) was repealed as of that date.

Q3. What are the eligibility requirements for section 212(c) relief?

A3. The basic requirements for section 212(c) relief are established by statute and by case law. These requirements were modified to comport with the *St. Cyr* decision. They are:

- The alien is now a lawful permanent resident (or was a lawful permanent resident prior to receiving a final order of deportation or removal).

- The alien is returning to a lawful, unrelinquished domicile of seven consecutive years (or was a lawful permanent resident who had established a lawful, unrelinquished domicile of seven consecutive years prior to receiving a final order of deportation or removal).

- The alien is not subject to deportation or removal on the grounds of terrorism or national security. In addition, the alien must not be unlawfully present in the United States after a previous immigration violation, or have been convicted of a firearms offense, or have been convicted of an aggravated felony offense (or offenses) for which he served at least five years in prison.

This rule does not apply to aliens who have departed and are currently outside the United States, aliens who have illegally returned to this country after deportation or removal, and aliens who are present in the United States without having been admitted or paroled. These aliens are not eligible to apply for section 212(c) relief under the rule. For additional information, see Question 8.

Q4. Because a conviction for an aggravated felony can render a lawful permanent resident ineligible for section 212(c) relief, how does the expansion of the definition of aggravated felony by IIRIRA affect this rule?

A4. The current definition of aggravated felony is much broader today than it was prior to the enactment of IIRIRA, which expanded the categories of crimes considered to be aggravated felonies. The Supreme Court in *St. Cyr* did not address the application of the expanded aggravated felony definition to pending cases, because it was not at issue. But Congress did provide in IIRIRA that the expanded definition shall be applied to "all actions taken on or after" the date of IIRIRA's enactment (September 30, 1996), "regardless of when the conviction occurred."

Therefore, any lawful permanent resident, regardless of the date of his plea agreement, is subject to the expanded definition of aggravated felony, but the alien will only be rendered ineligible for section 212(c) relief if the basis for his deportation or removal from the United States is a conviction for an aggravated felony.

Q5. How does a lawful permanent resident who has a final order of deportation or removal but is eligible under this rule apply for section 212(c) relief?

A5. A lawful permanent resident who is the subject of a final order of deportation or removal must file a "special motion to seek 212(c) relief" with the Immigration Court or the Board of Immigration Appeals (BIA), whichever last had his case. Even if the alien has previously filed a motion to reopen or a motion to reconsider with the Immigration Court or the Board on other grounds, he must now file a separate "special motion to seek 212(c) relief."

If the alien previously filed an application for section 212(c) relief, he or she must file a copy of that application or a copy of a new application and supporting documents with the motion. If the alien has not previously filed an application for section 212(c) relief, the alien must submit a copy of his or her completed application and supporting documents with the motion. If the motion is granted, the alien must file the application and pay the required filing fee. An alien who previously paid the fee and filed an application for section 212(c) relief (Form I-191) will not be required to pay a new filing fee. An alien may file only one "special motion to seek 212(c) relief" for purposes of establishing eligibility under this rule.

Q6. How does a lawful permanent resident who is currently in a deportation or removal proceeding and is eligible under this rule apply for section 212(c) relief?

A6. A lawful permanent resident who is currently in a deportation or removal proceeding before an Immigration Judge should file a section 212(c) application pursuant to this rule, or request a reasonable period of time to submit an application pursuant to this rule. If the alien has previously filed an application, he or she may file a supplement to the existing section 212(c) application.

Q7. How does a lawful permanent resident who currently has an appeal pending before the Board of Immigration Appeals (BIA) apply for section 212(c) relief?

A7. In order to file a section 212(c) application, a lawful permanent resident with a pending appeal should file with the BIA a motion for remand to the Immigration Court, or a motion to supplement his or her existing section 212(c) application on the basis of his eligibility for such relief pursuant to this rule. If the alien appears to be statutorily eligible for relief under this rule, the BIA will remand the case to the Immigration Court for adjudication, unless the BIA chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

Q8. Why can't aliens who have been deported apply for this relief from overseas?

A8. As stated earlier, this rule does not apply to:

- Aliens who have departed the United States and are currently outside the country, or
- Aliens who have illegally returned to this country after deportation or removal, or
- Aliens who are present in the United States without having been admitted or paroled. These aliens are not eligible to apply for section 212(c) relief under the rule.

During the five-year litigation period, the government took steps to avoid deporting any aliens who could establish eligibility for relief under the law in effect at the time their applications were adjudicated. Generally, if an alien was denied 212(c) relief on eligibility grounds and appealed, deportation would be stayed pending further review of the case by the BIA or by a federal court.

INS and EOIR also instituted a "hold" policy at various periods of time, during which the BIA held in abeyance cases of aliens in anticipation of a precedent-setting decision by a federal circuit court or by the U.S. Supreme Court.

These policies enabled aliens to remain in the United States while they continued exhausting the avenues of relief available to them. As a result, we believe that aliens who are covered by *St. Cyr* are still in the country, while those who are not -- i.e., aliens who were clearly ineligible for section 212(c) relief under the pre-1996 law, or aliens who were denied section 212(c) relief after a full hearing on the merits, or aliens who did not contest the denial of section 212(c) relief -- have been deported. We do not believe

that these deported aliens would have a valid claim to relief under *St. Cyr* and, therefore, they should not be permitted to apply for such relief from overseas.