No. 10-

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For more than 25 years, the Board of Immigration Appeals (BIA) held that a legal permanent resident (LPR) who is deportable due to a criminal conviction could seek a discretionary waiver of removal under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. §1182(c), provided that the conviction also would have constituted a waivable basis for exclusion. In 2005, the BIA abruptly changed course, adding a requirement that the LPR be deportable under a statutory provision that used "similar language" to an exclusion provision. Deportable LPRs who departed and reentered the United States after their conviction, however, may seek Section 212(c) relief under a longstanding "*nunc pro tunc*" procedure that does not turn on similar language between deportation and exclusion provisions. Thus, under the BIA's current view, an LPR who pled guilty to an offense that renders him both deportable and excludable, but under provisions that use dissimilar phrasing, will be eligible for Section 212(c) relief from deportation if he departed and reentered the United States after his conviction, but ineligible if he did not depart. The circuits are split three ways on the lawfulness of the BIA's new interpretation.

The question presented is:

Whether a lawful permanent resident who was convicted by guilty plea of an offense that renders him deportable and excludable under differently phrased statutory subsections, but who did *not* depart and reenter the United States between his conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the INA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Judulang respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' decision is unreported but available at 2007 WL 2733726. App. 1a-4a. The order dated August 26, 2010 denying rehearing and rehearing en banc is unreported. App. 21a.

The oral decision of the Immigration Judge (IJ) ordering Petitioner removed from the United States is unreported. App. 11a-20a. The decision of the Board of

Immigration Appeals (BIA) affirming the IJ's order is unreported but available at 2006 WL 557842. App. 5a-9a.

JURISDICTION

The court of appeals' judgment was entered on September 17, 2007. App. 1a. Rehearing was denied on August 26, 2010. App. 21a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall … be deprived of life, liberty, or property, without due process of law[.]"

2. The following provisions of the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq.*, are set forth in relevant part in the Appendix hereto:

a. 8 U.S.C. §1101(a)(43) (App. 23a);

b. 8 U.S.C. §1182(a) (App. 23a-24a);

c. 8 U.S.C. §1182(c) (1996) (repealed Apr. 1, 1997) (App. 24a-25a); and

d. 8 U.S.C. §1227(a) (App. 25a-26a).

3. 8 C.F.R. §1212.3(f)(5) is reproduced at App. 27a.

INTRODUCTION

This case presents an important question of immigration law on which the courts of appeals have split three ways. Prior to 2005, the BIA had repeatedly held that individuals in Petitioner's position could seek discretionary relief from removal under former Section

212(c) of the Immigration and Nationality Act (INA).[1] That year, however, reacting to this Court's reaffirmance of the availability of Section 212(c) relief to certain aliens (*see INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001)), the BIA sought to curtail Section 212(c) relief in a way that disqualified numerous previously eligible individuals, including Petitioner. Purporting to interpret a 2004 regulation promulgated to implement *St. Cyr*, the BIA ruled that deportable lawful permanent residents (LPRs) who had *not* traveled abroad after their convictions could only seek discretionary relief if the government charged them under a deportation provision in the INA that used *similar language* to an exclusion provision. *Matter of Blake*, 23 I. & N. Dec. 722 (BIA 2005). The BIA has acknowledged that *Blake* was a "change in law." *E.g.*, *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb. 22, 2008).

The practical result was suddenly to foreclose Section 212(c) relief for large numbers of LPRs whose attachment to the United States was so strong that they had not left the country following their conviction.

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[1] Before April 1, 1997, the INA distinguished between deportation proceedings, applicable to individuals already present in the United States, and exclusion proceedings, applicable to individuals seeking to enter the United States. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, §304, 110 Stat. 3009-548, 3009-589 (1996) (IIRIRA), replaced both with "removal" proceedings and replaced the term "excludable" with "inadmissible." Nonetheless, the statutory distinction between the two categories of individuals remains. *Compare* 8 U.S.C. §1182(a) (defining class of inadmissible individuals) *with* 8 U.S.C. §1227(a) (defining class of deportable individuals). The terms "deportation" and "exclusion" and their variants are used where necessary to the analysis under former Section 212(c).

Meanwhile, under an established BIA practice that Congress has long accepted, Section 212(c) relief remained available to similarly situated LPRs who *did* leave the country following their conviction, reentered the United States, and were subsequently charged as deportable. Under 60-year-old precedents, such individuals may seek Section 212(c) relief "*nunc pro tunc*," as long as they are deportable for an offense that would have rendered them inadmissible upon reentry.

The circuits are split three ways as to the lawfulness of the BIA's new approach. The Second Circuit has correctly rejected the BIA's new position as resting on an irrational distinction. The Ninth Circuit, in a sharply divided en banc decision, ruled that Section 212(c) does not apply to deportable LPRs at all—a position that neither the BIA nor the government has ever endorsed and that directly conflicts with *St. Cyr*. Eight other circuits have affirmed the BIA's new approach.

Although Section 212(c) was repealed in 1996, it remains of critical importance to numerous longstanding residents of this country, many of whom—like Mr. Judulang—have worked hard for many years, have the support of U.S. citizen family members who in turn depend on them for support, have U.S. citizen children, and have made valuable contributions to their communities. The BIA would now deny these individuals the right to apply for relief that previously was available and that this Court reaffirmed in *St. Cyr*, based solely on the arbitrary nature of their travel history. Moreover, the three-way circuit split means that eligibility for relief currently depends on which circuit hears the appeal.

Although this question was twice presented last Term, neither case proved an adequate vehicle, perhaps because Justice Kagan acted as counsel for the government in both cases. This case poses no such problem. Accordingly, this Court should grant certiorari to review the judgment of the Ninth Circuit and bring much-needed uniformity to this important question.

STATEMENT

A. Availability Of Discretionary Relief Before 2005

Prior to its repeal, Section 212(c) provided: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" 8 U.S.C. §1182(c).

Although the terms of Section 212(c) envision relief only for *excludable* LPRs, it has long been applicable to persons who, like Mr. Judulang, are *deportable* due to convictions that would also render them excludable.

1. Section 212(c)'s predecessor was the Seventh Proviso to Section 3 of the Immigration Act of 1917, which permitted a discretionary waiver of exclusion for "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years." Pub. L. No. 64-301, 39 Stat. 874, 878. "Although that provision applied literally only to exclusion proceedings, and although the deportation provisions of the statute did not contain a similar provision, the INS relied on [the Seventh Proviso] to grant relief *in deportation proceedings* involving aliens who had departed and returned to this country after the ground for de-

portation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added). The law treated the deportable LPR as if he had been placed in exclusion proceedings upon reentry, such that relief was available "*nunc pro tunc*." *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940).

2. Section 212 of the Immigration and Nationality Act of 1952 "replaced and roughly paralleled §3 of the 1917 Act." *St. Cyr*, 533 U.S. at 294. Its discretionary relief provision, Section 212(c), closely tracked the Seventh Proviso. The BIA soon ruled that Section 212(c) permitted relief for LPRs in deportation proceedings who had departed and reentered after a criminal conviction and before being placed in deportation proceedings. *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). The BIA also made clear that, if Section 212(c) "is exercised to waive a ground of inadmissibility based upon a criminal conviction, a deportation proceeding cannot thereafter be properly instituted based upon the same criminal conviction." *Id.* at 275.

The BIA initially refused to permit deportable LPRs who had *not* traveled abroad after conviction to seek Section 212(c) relief. *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 697-698 (BIA 1971), *aff'd*, 466 F.2d 1198 (9th Cir. 1972) (per curiam). In 1976, the Second Circuit rejected that approach, ruling that LPRs who had traveled abroad and those who had not were "in like circumstances, but for irrelevant and fortuitous factors," and therefore equal protection required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). The Second Circuit noted that the government had proffered no reason to distinguish between LPRs based on a "failure to travel abroad following … conviction" and concluded that "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed

after his initial entry should receive at least as much consideration as an individual who may leave and return[.]" *Id.* The BIA and all courts of appeals followed *Francis*.[2]

Although *Francis* made Section 212(c) relief available to many deportable LPRs, it did not apply to LPRs who were deportable for convictions that *did not* make them inadmissible. Persons in that situation would not have been eligible for Section 212(c) relief *nunc pro tunc* even if they *had* departed and reentered, and there was accordingly no irrational distinction in denying relief in such cases. *See, e.g.*, *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (stating that Section 212(c) relief was not available "to an alien in deportation proceedings when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead").

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[2] *See St. Cyr*, 533 U.S. at 295; *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976); *see also Anwo* v. *INS*, 607 F.2d 435, 436 n.3 (D.C. Cir. 1979) (per curiam); *Lozada* v. *INS*, 857 F.2d 10, 11 n.1 (1st Cir. 1988); *Katsis* v. *INS*, 997 F.2d 1067, 1070 (3d Cir. 1993); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 248 n.1 (4th Cir. 1981); *Carrasco-Favela* v. *INS*, 563 F.2d 1220, 1221 n.3 (5th Cir. 1977) (per curiam); *Rodriguez-Reyes* v. *INS*, 1993 WL 8150, at *2 (6th Cir. Jan. 15, 1993) (unpublished); *Variamparambil* v. *INS*, 831 F.2d 1362, 1364 n.1 (7th Cir. 1987); *Varela-Blanco* v. *INS*, 18 F.3d 584, 586 (8th Cir. 1994) (per curiam); *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981), *overruled*, *Abebe* v. *Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied sub nom. Abebe* v. *Holder*, 130 S. Ct. 3272 (2010); *Vissian* v. *INS*, 548 F.2d 325, 328 nn.2-3 (10th Cir. 1977); *Yeung* v. *INS*, 76 F.3d 337, 340 n.4 (11th Cir. 1995); *accord Tapia-Acuna* v. *INS*, 449 U.S. 945 (1980) (vacating and remanding in light of Solicitor General's change of position); *Abebe*, App. 85a (Thomas, J., dissenting) (noting government's concession in *Tapia-Acuna* that *Francis* was correct).

That limitation came to be known as the "statutory counterpart" rule: Section 212(c) relief was available in removal proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion provision. Because most crimes that are grounds for deportation are also grounds for exclusion, the statutory counterpart rule was satisfied by all but a limited group of LPRs—generally, only those deportable for certain firearms convictions[3] and entry without inspection.[4] The Attorney General stated as much in 1991, when he identified only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms offenses. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993); *see also* Aleinikoff, Martin, & Motomura, *Immigration: Process & Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations.").

3. In 1996, Congress repealed Section 212(c). Illegal Immigration Reform and Immigrant Responsibility

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[3] *See, e.g.*, *Drax* v. *Reno*, 338 F.3d 98, 101, 108-109 (2d Cir. 2003); *Cato* v. *INS*, 84 F.3d 597, 600 (2d Cir. 1996); *Gjonaj* v. *INS*, 47 F.3d 824, 825, 827 (6th Cir. 1995); *Campos* v. *INS*, 961 F.2d 309, 311-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 9-10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Matter of Granados*, 16 I. & N. Dec. 726, 728-729 (BIA 1979).

[4] *See, e.g.*, *Farquharson* v. *Attorney Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 281, 286-287 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993).

Act, Pub. L. No. 104-208, §304(b), 110 Stat. 3009-548, 3009-597 (1996) (IIRIRA). In 2001, this Court held that the repeal was prospective only and that LPRs who were deportable on account of convictions obtained through guilty pleas prior to April 1, 1997 (IIRIRA's effective date) could still seek Section 212(c) relief. *See St. Cyr*, 533 U.S. at 326.

In 2004, the Department of Justice (DOJ) promulgated a regulation implementing *St. Cyr* and setting out the criteria for Section 212(c) relief. The regulation included a statutory counterpart requirement. 8 C.F.R. §1212.3(f)(5) ("An application for relief under former section 212(c) of the Act shall be denied if … [t]he alien is deportable … on a ground which does not have a statutory counterpart in section 212 of the Act.").

4. Up to and including 2004, the BIA repeatedly held that persons deportable for certain "aggravated felonies" (*see* 8 U.S.C. §1227(a)(2)(A)(iii)) satisfied the "statutory counterpart" requirement, generally because the crime of conviction was also a "crime involving moral turpitude" (CIMT) that would render the LPR inadmissible under Section 212(a)(2)(A)(i). Although the provisions governing inadmissibility did not list aggravated felonies as a basis for exclusion, the BIA held that a Section 212(c) waiver was "not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, 'convicted of an aggravated felony.' " *Matter of Meza*, 20 I. & N. Dec. 257, 259 (BIA 1991). The BIA accordingly ruled that LPRs could seek waivers of deportation for aggravated felony convictions, including "crimes of violence" under 8 U.S.C.

§1101(a)(43)(F)[5] and "sexual abuse of a minor" under §1101(a)(43)(A).[6] The courts of appeals likewise noted

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[5] *See, e.g., Matter of Rodriguez-Cortes*, 20 I. & N. Dec. 587, 590-591 (BIA 1992) (LPR convicted of attempted murder "is not barred from applying for section 212(c) relief"); *Matter of A-A-*, 20 I. & N. Dec. 492, 500-501 (BIA 1992) (LPR convicted of murder was not disqualified from seeking Section 212(c) relief on that basis); *Matter of S-Lei*, No. A38139424 (BIA May 27, 2004) (App. 57a-58a) (affirming grant of Section 212(c) relief to LPR convicted of attempted robbery, a crime of violence); *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003) (affirming Section 212(c) waiver of conviction for voluntary manslaughter, a crime of violence); *see also Matter of Caro-Lozano*, 2004 WL 1398661 (BIA Apr. 22, 2004) (reaching merits of Section 212(c) application in crime of violence case); *Matter of Hussein*, 2004 WL 1059601 (BIA Mar. 15, 2004) (remanding for consideration of Section 212(c) relief where conviction was a crime of violence); *Matter of Martinez*, 2004 WL 1167082 (BIA Feb. 18, 2004) ("[I]t does appear that Section 212(c) could waive the burglary offense[.]"); *Matter of Loney*, 2004 WL 1167256 (BIA Feb. 10, 2004) (LPR convicted of crime of violence was "not precluded" from seeking Section 212(c) relief where crime was also a CIMT); *Matter of Orrosquieta*, 2003 WL 23508672 (BIA Dec. 19, 2003) (recognizing that petitioner deportable for extortion, a crime of violence, would be "entitled" to seek Section 212(c) relief); *Matter of Munoz*, No. A35279774, 28 Immig. Rptr. B1-1 (BIA Aug. 7, 2003) (App. 45a-55a) (remanding for consideration of Section 212(c) relief where the crime of violence was also a CIMT); *Matter of Rowe*, No. 37749964 (BIA May 9, 2003) (App. 41a-44a) (rejecting government's argument that crime of violence was not waivable).

[6] *See, e.g., Hussein*, 2004 WL 1059601 (LPR convicted of indecency with a child was eligible for Section 212(c) relief because he could have been excluded due to a CIMT); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether LPR convicted of lewd act upon child was eligible for Section 212(c) relief because conviction was also CIMT); *Matter of Ashley*, 2003 WL 23521830 (BIA Nov. 4, 2003) (noting apparent Section 212(c) eligibility for LPR convicted of sexual offense against a child).

the availability of Section 212(c) relief in such cases. *See e.g.*, *Hem* v. *Maurer*, 458 F.3d 1185, 1187-1189 (10th Cir. 2006) (crime of violence); *De Araujo* v. *Gonzales*, 457 F.3d 146, 154-155 (1st Cir. 2006) (crime of violence); *United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042, 1051 (9th Cir. 2004) (burglary). This Court also recognized the importance of Section 212(c) in aggravated felony "crime of violence" cases. *St. Cyr*, 533 U.S. at 295-296 & n.4.

B. The BIA Changes Course In 2005

In 2005, the BIA abruptly changed the rules. In *Blake*, the BIA decided that an LPR who was deportable for a "sexual abuse of a minor" aggravated felony was categorically ineligible for Section 212(c) relief, regardless of whether the crime would provide a basis for inadmissibility as a CIMT. 23 I. & N. Dec. at 727-728. Without addressing its numerous decisions upholding discretionary waivers in similar circumstances, the BIA held that the "statutory counterpart" requirement could only be satisfied if the LPR was deportable under a subsection of INA §237 that was *phrased* similarly to an inadmissibility subsection in INA §212(a). *Id.* at 728. The BIA barred the LPR in *Blake* from applying for relief because the words "sexual abuse of a minor" do not appear in any inadmissibility provision. *Id.* at 728-729. The BIA did not consider whether Blake's conviction would have rendered him excludable and therefore eligible to seek Section 212(c) relief *nunc pro tunc* had he left the country and reentered. The BIA later applied the same reasoning to "crime of violence" aggravated felonies. *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (BIA 2005).

The BIA acknowledged that *Blake* was a retroactive change in its Section 212(c) jurisprudence—a fact that was confirmed by its later reversal of decisions to grant relief under the prior (correct) approach to Section 212(c). In one case, the BIA itself had affirmed an IJ's decision granting relief, but then vacated its decision on the government's motion, referring to *Blake* as "a *change in law* that appears to preclude a grant of 212(c) relief." *Cardona*, 2005 WL 3709244 (emphasis added); *see also Matter of Gomez-Perez*, 2006 WL 901334 (BIA Mar. 1, 2006) (vacating IJ's decision to grant Section 212(c) waiver because LPR is "no longer eligible for relief"), *appeal docketed*, No. 07-72569 (9th Cir. June 27, 2007); *Matter of Rangel-Zuazo*, No. A90640428 (BIA May 25, 2005) (App. 59a-61a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"), *appeal docketed*, No. 07-72316 (9th Cir. June 11, 2007); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing grant of Section 212(c) relief and citing "intervening Board precedent"); *Matter of Umer*, 2010 WL 1606998 (BIA Mar. 31, 2010) (referring to rule "announced in" *Brieva-Perez*), *appeal docketed*, No. 10-60342 (5th Cir. Apr. 19, 2010); *cf. De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009) (calling *Blake* a "watershed moment in [Section] 212(c) jurisprudence"), *cert. denied*, 130 S. Ct. 3272 (2010).

C. The Circuit Split

The courts of appeals have divided three ways in response to *Blake*. Although the BIA claimed to base *Blake* on Second Circuit precedent, that court reversed the BIA in *Blake* itself. *Blake* v. *Carbone*, 489 F.3d 88, 103 (2d Cir. 2007). In 2009, the Second Circuit heard

more than 21% of the total number of appeals from the BIA. *See* Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, Table B-3 (2010), *at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinespdfversion.pdf (*2009 Annual Report*).

Eight other courts of appeals, which together heard over 30% of all appeals from the BIA (*2009 Annual Report* at Table B-3), have affirmed the BIA's *Blake* rule.[7] Finally, the Ninth Circuit, which heard over 44% of the appeals from the BIA (*id.*), recently ruled that Section 212(c) relief is unavailable to all deportable LPRs. Neither the government nor the BIA advocated that position, which was announced in a fractured en banc ruling that overturned more than a quarter-century of Circuit precedent. *Abebe* v. *Mukasey*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam) (App. 63a-94a), *cert. denied*, 130 S. Ct. 3272 (2010). Seven judges dissented from the Ninth Circuit's denial of full court rehearing, asserting that "[i]f ever a case merited full court en

[7] *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006); *Caroleo* v. *Gonzales*, 476 F.3d 158, 167-168 (3d Cir. 2007); *Vo* v. *Gonzales*, 482 F.3d 363, 368-369 (5th Cir. 2007); *Koussan* v. *Holder*, 556 F.3d 403, 412-414 (6th Cir. 2009), *reh'g and reh'g en banc denied* (May 29, 2009); *Valere* v. *Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007); *Vue* v. *Gonzales*, 496 F.3d 858, 862-863 (8th Cir. 2007); *Falaniko* v. *Mukasey*, 272 F. App'x 742, 746-748 (10th Cir. 2008) (unpublished); *De la Rosa*, 579 F.3d at 1337.

banc consideration, this one did." *Abebe* v. *Holder*, 577 F.3d 1113 (9th Cir. 2009) (Berzon, J., dissenting).[8]

Petitions for certiorari were filed in *Abebe* and *De la Rosa*, an Eleventh Circuit case raising the same issue. *De la Rosa* was relisted twice; *Abebe* was relisted once. On May 10, 2010, the President announced the nomination to this Court of then-Solicitor General Kagan, who was counsel for the government in *Abebe* and *De la Rosa*. Both petitions were denied at the subsequent Conference. *De la Rosa* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-594); *Abebe* v. *Holder*, 130 S. Ct. 3272 (2010) (No. 09-600).

D. Proceedings Below

Petitioner Joel Judulang, a native of the Philippines, entered the United States in 1974 at the age of eight. He has continuously resided in this country for thirty-six years, returning to the Philippines only once to attend his grandmother's funeral more than twenty years ago.

Mr. Judulang and his family have lengthy and close connections with the United States. His grandfather

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[8] The Ninth Circuit in *Abebe* suggested that deportable LPRs could still seek relief under the 2004 regulation (*see* App. 69a-70a), and the BIA has agreed (*Matter of Moreno-Escobosa*, 25 I. & N. Dec. 114, 116-117 (BIA 2009)). The Ninth Circuit's own application of the holding in *Abebe* has been inconsistent, however. *Compare Flores-Pelayo* v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010) (rejecting ineffective assistance of counsel claim based on section 212(c) because *Abebe* rendered LPR in deportation proceedings "statutorily ineligible") *and Sito* v. *Holder*, 2010 WL 2782852 (9th Cir. July 13, 2010) *with Aguilar-Ramos* v. *Holder*, 594 F.3d 701, 706 (9th Cir. 2010) (applying statutory counterpart rule pursuant to 8 C.F.R. §1212.3).

served in the U.S. military in the Philippines between 1923 and 1948 (App. 29a-30a) and became a U.S. citizen as a result. His parents both naturalized as well. App. 36a-37a. He has a 14-year-old daughter who is also a native-born citizen of the United States, as are his four nephews and two nieces. His two sisters are U.S. citizens and his older brother is an LPR. Unfortunately, Mr. Judulang's parents did not seek to obtain citizenship for him before he turned 18.[9]

In 1988, when Mr. Judulang was 22 years old, he was involved in a fight in which another person shot and killed someone. Although Mr. Judulang was not the shooter, he was charged as an accessory. He pled guilty to voluntary manslaughter under Cal. Penal Code §192(a). App. 31a-32a. Due to his minor involvement in the crime and his cooperation with authorities, Mr. Judulang was given a suspended sentence of six years. *Id.* He was released on probation immediately following his plea.

On June 10, 2005, the government commenced deportation proceedings against Mr. Judulang. The IJ found Mr. Judulang deportable based *inter alia* on his conviction for voluntary manslaughter, which is an aggravated felony "crime of violence." App. 15a-16a; *see also* 8 U.S.C. §§1101(a)(43)(F), 1227(a)(2)(A). The IJ informed Mr. Judulang that Section 212(c) "could have been applied to your manslaughter conviction," but believed that the length of his sentence disqualified him

[9] Had Mr. Judulang's mother naturalized before Mr. Judulang turned 18, he would have become a U.S. citizen by operation of law. 8 U.S.C. §1432(a) (1988). She naturalized when he was 18 years and 11 months old. App. 36a-37a.

from Section 212(c) relief. App. 38a. The IJ stated that the sentence issue was "litigatable." *Id.*[10]

The BIA affirmed the deportation order, though it did not affirm the IJ's reasoning. Instead, it ruled that because Mr. Judulang was removable for a "crime of violence" aggravated felony, he was categorically ineligible for a Section 212(c) waiver under *Brieva-Perez*. App. 8a.

A panel of the Ninth Circuit denied Mr. Judulang's petition for review. App. 4a. His petition for rehearing and rehearing en banc was held in abeyance pending resolution of *Abebe* and ultimately denied on August 26, 2010. App. 21a. Justice Kennedy stayed the judgment of the Ninth Circuit pending the filing of a petition for certiorari. App. 39a.

While his case was pending in the Ninth Circuit, Mr. Judulang was released on bond from immigration custody following an order of the United States District Court for the Southern District of California. *Judulang* v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008). Mr. Judulang lives with his elderly mother, a U.S. citizen, in Los Angeles and has been working to support himself and his family.

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[10] As Mr. Judulang argued on appeal, the IJ's view that his six-year sentence disqualified him from Section 212(c) relief was erroneous. *See* Pet. C.A. Br. 36 n.17. Although the IJ also found Mr. Judulang deportable on account of a second conviction for grand theft over $400, neither the BIA nor the Ninth Circuit relied on that theory, and it is not before the Court. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Mr. Judulang has a substantial argument, preserved below, that he cannot be deported for the theft conviction should he be granted Section 212(c) relief regarding his manslaughter conviction. Pet. C.A. Br. 37-40.

REASONS FOR GRANTING THE PETITION

Section 212(c) continues to be an important source of relief for numerous legal permanent residents. *See INS* v. *St. Cyr*, 533 U.S. 289, 296 n.6 (2001). In the five and one-half years since *Blake*, the issue presented here has arisen in over 160 cases—including more than 30 appellate decisions this year—and produced published opinions in almost every circuit. App. 95a-105a (listing representative cases in which *Blake* or its progeny have been addressed). The circuits are irreconcilably split three ways on the proper application of Section 212(c) to LPRs deportable as a result of an aggravated felony conviction. This Court's guidance is urgently needed to restore a uniform application of Section 212(c).

The BIA's novel and unprecedented reinterpretation of the statutory counterpart test in *Blake*—ostensibly based on a 2004 regulation designed to implement this Court's ruling in *St. Cyr*—was in fact an evident effort to undermine *St. Cyr* and accomplish through agency and judicial decision what Congress had *not* done through legislation. The BIA's new approach creates an arbitrary and capricious distinction that is inconsistent with the settled interpretation of Section 212(c) and resurrects the unconstitutional practice of discriminating between similarly situated LPRs on the irrelevant basis of travel history. It also improperly gives retroactive effect to an (erroneous) interpretation of the 2004 regulation.

The Ninth Circuit's position is even more extreme, as it rejects three decades of consistent agency practice permitting deportable LPRs to seek discretionary relief under Section 212(c), regardless of travel history—a practice Congress unquestionably approved for dec-

ades. The Court should grant certiorari, reverse the judgment of the Ninth Circuit, and rule that Mr. Judulang may pursue Section 212(c) relief on the merits.

I. THE APPLICATION OF SECTION 212(c) TO DEPORTABLE LPRS HAS FULLY PERCOLATED AND PRODUCED AN INTRACTABLE THREE-WAY CIRCUIT SPLIT

Since the BIA's 2005 decision in *Blake*, ten courts of appeals have considered whether and under what circumstances an LPR who is deportable on the basis of an "aggravated felony" conviction is eligible for Section 212(c) relief. In answering this question, the courts of appeals have split three ways. *See Abebe*, App. 78a (Clifton, J., concurring in the judgment) (acknowledging "three-way circuit split"); *De la Rosa* v. *Attorney Gen.*, 579 F.3d 1327, 1335 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

First, the Second Circuit has recognized that the BIA's decision in *Blake* revived the equal protection problem—first identified in *Francis*—of giving *worse* treatment to LPRs who had *not* departed the United States. *Blake* v. *Carbone*, 489 F.3d 88, 102-104 (2d Cir. 2007). To cure the BIA's constitutional violation, the Second Circuit restored the law to its pre-2005 posture: Section 212(c) relief is available if the "particular offense" that rendered the LPR deportable "would render a similarly situated [LPR] excludable." *Id.* at 103. As the Second Circuit observed, "what makes one alien similarly situated to another is his or her act or offense, which is captured in the INA as either a ground of deportation or exclusion." *Id.* at 104 (explaining that equal protection principles "require[] [the court] to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status"). The Second Circuit left to the BIA in the first

instance the task of determining whether a particular aggravated felony would render an LPR excludable. *Id.*[11]

Second, eight other courts of appeals have affirmed the BIA's formulaic approach in *Blake*. Instead of determining whether the underlying offense would also make the deportable LPR inadmissible, those circuits compare only the words used in the particular deportation provision charged by the government to the words used in the inadmissibility provisions of Section 212(a). *See, e.g.*, *Caroleo* v. *Gonzales*, 476 F.3d 158, 164-165 (3d Cir. 2007). Under this "rather mechanical reading of the law," *Kim* v. *Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006), Section 212(c) relief is only available if one of the inadmissibility provisions uses language that is substantially identical to the deportation provision charged. *E.g.*, *De la Rosa*, 579 F.3d at 1338-1339. Because the inadmissibility provisions do not use the words "sexual abuse of a minor" or "crime of violence," LPRs who are charged as deportable under those provisions are held categorically ineligible for Section 212(c) relief, even if the underlying criminal conviction would render them inadmissible for having committed a "crime involving moral turpitude." *See, e.g., Caroleo*, 476 F.3d at 164-165.

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[11] Judges in the Ninth Circuit and elsewhere have praised the Second Circuit's reasoning. *See, e.g., Abebe*, App. 83a-94a (Thomas, J., dissenting); *Vue* v. *Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (Bye, J., concurring); *Abebe* v. *Gonzales*, 493 F.3d 1092, 1108-1109 (9th Cir. 2007) (Berzon, J., concurring), *vacated*, *Abebe* v. *Mukasey*, 514 F.3d 909 (9th Cir. 2008).

However, if LPRs with such convictions leave the country, they *can* seek Section 212(c) relief—either upon reentry if they are charged as inadmissible or *nunc pro tunc* if they are charged as deportable—as long as their conviction is for a crime that would make them inadmissible, such as a CIMT. *See Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956); *see also Lovan* v. *Holder*, 574 F.3d 990, 996 & n.5 (8th Cir. 2009) (noting that under the *nunc pro tunc* analysis, "the focus is on whether the [LPR] when he returned from a trip abroad was in fact excludable *for any reason*, including prior conviction of a crime involving moral turpitude").[12]

Third, the Ninth Circuit, in the fractured *Abebe* decision that also determined the outcome of Mr. Judulang's case, overruled decades of agency decisions and its own precedent to hold that Section 212(c) does not apply to deportable LPRs at all. App. 70a. Under that view, Section 212(c) relief should not even be available as a *nunc pro tunc* correction for deportable LPRs who traveled abroad between their convictions and the initiation of deportation proceedings. As the concurring and dissenting opinions in *Abebe* noted, the Ninth Circuit majority failed to observe *stare decisis*, ignored consistent agency practice applying Section 212(c) relief to deportable LPRs, and disregarded Congress's acceptance of that settled construction of the statute. *See* App. 72a-78a (Clifton, J., concurring in the judgment); App. 83a-94a (Thomas, J., dissenting). Moreover, the Ninth Circuit's position is irreconcilable with

[12] Although eight circuits have adopted *Blake*, those circuits heard less than 31% of the total number of petitions for review from the BIA in 2009, whereas the Second Circuit *alone* heard more than 21%. *See 2009 Annual Report* at Table B-3.

this Court's decision in *St. Cyr*, which arose out of the well-established availability of Section 212(c) relief to deportable LPRs like Messrs. St. Cyr and Judulang. *St. Cyr*, 533 U.S. at 293-296*; see also Abebe* v. *Holder*, 577 F.3d 1113, 1114 (9th Cir. 2009) (Berzon, J., dissenting from denial of full court rehearing) (Ninth Circuit's decision "conflict[s] with the necessary assumption" made by the Supreme Court in *St. Cyr*).[13]

II. THE NINTH CIRCUIT'S AND BIA'S DECISIONS INCORRECTLY AND UNCONSTITUTIONALLY RESTRICT THE SCOPE OF SECTION 212(C) RELIEF

Since 1956, the BIA has made Section 212(c) relief available *nunc pro tunc* to deportable LPRs who reentered after travel abroad, if the LPR was deportable for conduct that also made him excludable. *See G-A-*, 7 I. & N. Dec. at 276. The Ninth Circuit's *sua sponte* abandonment of that congressionally-accepted agency practice was error. And since 1976, deportable LPRs could seek relief provided their crime of conviction would have rendered them inadmissible had they left the country and reentered. *See Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976). The BIA's abandonment of that practice was not only error, but produced an unconstitutionally irrational distinction based on travel history.

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[13] The Fourth and D.C. Circuits have yet to address the question presented, but those courts hear only a tiny fraction of the total number of petitions for review from the BIA. Between September 30, 2005 and September 30, 2009, the Fourth Circuit heard less than 2.8% of all BIA appeals, and the D.C. Circuit heard only one in 2009. *See 2009 Annual Report* at Table B-3.

1. The Ninth Circuit did not even acknowledge the lengthy history of agency decisions granting relief from deportation under Section 212(c) and its predecessor, the Seventh Proviso to Section 3 of the Immigration Act of 1917. *See St. Cyr*, 533 U.S. at 294; *supra* pp. 5-6. The Ninth Circuit also ignored Congress's acquiescence in that practice: Section 212(c) was enacted in 1952, long after the Attorney General's decision in *Matter of L-*, 1 I. & N. Dec. 1, 5-6 (Att'y Gen. 1940), which applied the Seventh Proviso to provide relief to a deportable LPR who had previously traveled abroad, just as it would have applied if he had been placed in exclusion proceedings at the border. Congress is presumed to have been aware of that interpretation of the discretionary waiver as applicable to deportable LPRs. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

As the BIA explained shortly after Section 212(c)'s enactment, Congress conducted a "comprehensive study" of the Seventh Proviso before enacting Section 212, "[y]et there is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1955). Congress thus "effectively ratified" the BIA's practice of granting discretionary relief from deportation as well as from exclusion. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *see also Boeing Co.* v. *United States*, 537 U.S. 437, 456-457 (2003) (Congress's failure to override a seven-year-old regulation when amending relevant statutory provisions "serves as persuasive evidence that Congress re-

garded that regulation as a correct implementation of its intent").[14]

The Ninth Circuit's complete abandonment of Section 212(c) relief in all deportation cases is manifestly contrary to Congress's intent to continue in Section 212(c) the relief from *deportation* available under the Seventh Proviso, as well as to decades of agency and judicial application of Section 212(c). Indeed, under the Ninth Circuit's view, Mr. St. Cyr himself would have been ineligible for Section 212(c) relief.

2. The Court should also reject the BIA's novel approach in *Blake* and *Brieva-Perez*, which has been adopted in the majority of circuits. Before 2005, the BIA consistently held that an LPR deportable on the basis of an aggravated felony conviction for "sexual abuse of a minor" or a "crime of violence" was eligible for Section 212(c) relief if the underlying conviction would have been a basis for inadmissibility (*e.g.*, as a "crime involving moral turpitude" under INA §212(a)(2)(A)(i)). *See supra* nn.5-6. As recently as 2003, the BIA affirmed a grant of Section 212(c) relief to an LPR convicted of voluntary manslaughter, ruling that "a conviction for first degree manslaughter is considered to be a crime involving moral turpitude" and that

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[14] Although Congress imposed limits on Section 212(c) relief prior to its 1996 repeal, Congress never sought to limit it to excludable LPRs only. *See* Immigration Act of 1990, Pub. L. No. 101-649, §511, 104 Stat. 4978, 5052 (providing that LPRs convicted of aggravated felonies could seek Section 212(c) relief only if they did not serve a term of imprisonment of five years or more); 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990) (statement of Sen. Dole) ("Section 212(c) provides relief from exclusion, and by court decision from deportation[.] This discretionary relief is obtained by numerous excludable and *deportable* aliens[.]" (emphasis added)).

the LPR was accordingly *not* precluded from seeking Section 212(c) relief. *Matter of Reyes Manzueta*, 2003 WL 23269892 (BIA Dec. 1, 2003).

In *Blake*, however, the BIA sought to eliminate Section 212(c) relief retroactively for most deportable LPRs by creating a new eligibility requirement: that the charged deportation provision use "similar language" to an inadmissibility provision. The BIA thus categorically foreclosed numerous previously eligible individuals from seeking Section 212(c) relief, even though relief *is* available *nunc pro tunc* to similarly situated persons who have left the country and reentered before the removal proceeding began.

The BIA's *Blake* decision creates an irrational distinction between deportable LPRs who have traveled abroad and reentered and deportable LPRs who have not, contrary to Section 212(c) as it has consistently been interpreted and contrary to equal protection. Following the Second Circuit's 1976 decision in *Francis*, the BIA and all of the courts of appeals agreed that deportable LPRs who had *not* departed and reentered were constitutionally entitled to the same treatment under Section 212(c) as LPRs who had. *Francis*, 532 F.2d at 273 (ruling that LPRs who had not traveled abroad were "in like circumstances, but for irrelevant and fortuitous factors," to LPRs who had and therefore should be "treated in a like manner"); *see supra* n.2. The BIA implemented *Francis* using the "statutory counterpart" test, which meant that Section 212(c) relief was available to LPRs who were deportable for a *conviction* that fell under a "counterpart" exclusion provision.

Section 212(c) relief was widely available to LPRs charged with being deportable on the basis of aggravated felony convictions, including convictions for

"crimes of violence," because most such convictions are also grounds for exclusion—"crimes involving moral turpitude" under INA §212(a)(2)(A)(i). The BIA and numerous circuit decisions recognized the proper application of Section 212(c) relief in such aggravated felony cases. *See supra* nn.5-6. Although Congress amended the INA after *Francis*, it has not cast doubt on that consistent interpretation of Section 212(c). *See supra* n.14; *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (explaining that it would violate equal protection "to distinguish between *aliens who had committed the same crime* on the basis of whether they traveled abroad recently" (emphasis added)).

After the repeal of Section 212(c), the BIA attempted to apply the repeal retroactively to LPRs who had pled guilty before the repeal was enacted. *E.g.*, *St. Cyr* v. *INS*, 229 F.3d 406, 409 (2d Cir. 2000) (observing that the BIA denied St. Cyr's application for Section 212(c) relief "specifically" because IIRIRA repealed that provision), *aff'd*, 533 U.S. 289 (2001). After this Court reversed that practice in *St. Cyr*, the BIA tried another tack, claiming for the first time that eligibility "turns on whether Congress has employed *similar language* to describe substantially equivalent categories of offenses." *Matter of Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005) (emphasis added). While acknowledging that "there may be considerable overlap" between deportation provisions like "sexual abuse of a minor" and inadmissibility provisions like "crime[] involving moral turpitude," the BIA claimed that the "two categories of offenses [were] not statutory counterparts." *Id.*

The BIA has admitted that this was "a change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005), *appeal docketed*, No. 08-70736 (9th Cir. Feb.

22, 2008). It was also contrary to the settled interpretation of Section 212(c) acknowledged in the BIA's own decisions. The BIA never attempted to explain why differences in the wording of deportation and inadmissibility provisions—most of which were independently amended at different times—should control whether an LPR is eligible for Section 212(c) relief. *See Blake* v. *Carbone*, 489 F.3d at 102 ("Congress did not employ similar terms when writing the grounds of exclusion and grounds of deportation because it had no need to, making it an exercise in futility to search for similar language to gauge whether equal protection is being afforded."). Indeed, the BIA held decades ago that a waiver of *exclusion* based on a particular criminal conviction also waived any basis for *deportation* based on "the same criminal conviction," without regard to the language of the statutory subsections. *G-A-*, 7 I. & N. Dec. at 275; *see Abebe*, 493 F.3d at 1109 (Berzon, J., concurring).

The BIA's new approach draws an arbitrary and irrational line based on recent travel abroad. Deportable LPRs who pled guilty to a pre-1997 offense that qualifies as both a "crime of violence" aggravated felony and a "crime involving moral turpitude" may still seek Section 212(c) relief by invoking the *nunc pro tunc* procedure, provided they departed the country and reentered. But under *Brieva-Perez*, identically-situated LPRs who did *not* depart and reenter are categorically ineligible for relief. Making Section 212(c) relief turn on whether a person has or has not left the country, in the face of consistent and contrary judicial and agency decisions before 2005, is arbitrary and capricious. *See* 5 U.S.C. §706(2)(A). That is particularly the case given that Section 212(c) is designed to *favor* those LPRs who have strong ties to the United States. *See Francis*, 532

F.2d at 273; *see also Rosario* v. *INS*, 962 F.2d 220, 225 (2d Cir. 1992) (noting the government's position that Section 212(c)'s purpose is to provide relief to "aliens who have developed such strong ties to this country that exclusion or deportation would be unjustly harsh" (internal quotation marks omitted)).[15]

The BIA's new approach is also inconsistent with the guarantee of equal protection in the Due Process Clause of the Fifth Amendment, which protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). The BIA may not make discretionary waivers of deportation available only to a subcategory of similarly situated deportable LPRs on the basis of an irrational classification, such as travel history. *See City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation … will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886) ("Though the law itself be fair on its face … if it is applied and

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[15] *Blake* is also arbitrary and capricious in that it gives the government an exclusive right to determine whether Section 212(c) relief will be available in many cases. A criminal conviction can often render an individual deportable under more than one provision—here, for instance, Mr. Judulang's manslaughter conviction was charged as both a "crime involving moral turpitude" (waivable under *Blake*) and a "crime of violence" (not waivable under *Blake* and *Brieva-Perez*). App. 33a-34a. The BIA's new rule places Section 212(c) eligibility entirely under the government's control; in some cases, LPRs who would have been eligible for a Section 212(c) waiver if the government had chosen to assert a criminal conviction as a CIMT are deemed ineligible because the government opts to charge it as an aggravated felony. *See Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 122 (1st Cir. 2007); *see also Kim*, 468 F.3d at 62-63.

administered by public authority … so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

The Second Circuit's approach, by contrast, is faithful to the BIA's longstanding and accepted interpretation of Section 212(c), and it avoids the irrational distinction inherent in the BIA's new approach. As the Second Circuit held, an LPR should be eligible to apply for Section 212(c) relief "if his or her particular aggravated felony offense could form the basis of exclusion under §212(a) as a crime of moral turpitude." *Blake* v. *Carbone*, 489 F.3d at 104.

That approach, which the BIA and the courts followed for nearly thirty years under *Francis*, does not create any distinction based on departure from the United States. Rather, it simply continues the long-accepted rule that an LPR who would be entitled to seek relief *nunc pro tunc* from deportation, had he departed, remains eligible if he did not depart. *See, e.g.*, *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 913 (BIA 1997) ("In *Francis* … [the Second Circuit] concluded that the Board violated the constitutional requirement of equal protection when it permitted one alien in deportation proceedings to apply for a waiver but denied permission to another alien in deportation proceedings, based solely on the fact that one had departed and returned prior to the deportation proceedings while the other had not.").[16]

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[16] The Ninth Circuit suggested that a rational distinction existed between deportable LPRs and inadmissible LPRs. *Abebe*, App. 67a-68a. But that is the wrong comparison. The correct

The Second Circuit accordingly directed the BIA to determine whether the LPR's conviction was a "crime involving moral turpitude" that would have been waivable *nunc pro tunc* had he departed the United States and reentered and, if it was, to consider the Section 212(c) application on the merits. *Blake* v. *Carbone*, 489 F.3d at 105. The BIA's failure to do likewise in Mr. Judulang's case was arbitrary and capricious, inconsistent with the settled interpretation of Section 212(c), and unconstitutional.[17]

3. The BIA's *Blake* decision was also an improper retroactive application of an erroneous interpretation of the 2004 DOJ regulation, which sought to implement *St. Cyr*, not to confine it. The regulation provides that Section 212(c) relief "shall be denied if … [t]he alien is deportable under former section 241 of the Act or removable under [S]ection 237 of the Act on a ground which does not have a statutory counterpart in [S]ection 212 of the Act." 8 C.F.R. §1212.3(f)(5). On its face, this regulation is consistent with the BIA's prior rulings that an LPR deportable for an aggravated felony conviction was eligible for Section 212(c) relief if the *conviction* would also fall under a counterpart inadmissibility provision.

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comparison is between two groups of *deportable* LPRs: one group that has left the country and reentered following conviction, and one that has not. *Blake* v. *Carbone*, 489 F.3d at 95; *Francis*, 532 F.2d at 273. To Petitioner's knowledge, neither the government nor the BIA has ever suggested any rational basis for treating the latter group *less* favorably than the former group.

[17] On remand from the Second Circuit, an IJ found Mr. Blake eligible for a Section 212(c) waiver and granted relief. The government did not appeal.

In *Blake*, the BIA purported to interpret the regulation differently, not based on anything in the regulation itself, but on an anonymous commenter's opinion, cited in the preamble to the final regulation, that Section 212(c) relief should be denied " 'if there is no comparable ground of inadmissibility for the specific *category* of aggravated felony charged. … [F]or example, the rule should not apply to aggravated felons charged with deportability under specific types or categories of aggravated felonies such as "*Murder, Rape, or Sexual Abuse of a Minor*" or "*Crime of Violence*" aggravated felonies.' " 23 I. & N. Dec. at 726 (quoting 69 Fed. Reg. 57,826, 57,831 (Sept. 28, 2004)).

The commenter misinterpreted the statutory counterpart test by focusing on the category of aggravated felony charged rather than the underlying offense. The commenter did not identify a single decision forbidding an LPR with a conviction in any of the identified aggravated felony categories from seeking Section 212(c) relief. As noted above, the statutory counterpart rule affected LPRs with convictions for firearms offenses or entry without inspection. *See supra* nn.3-4; *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991), *aff'd without op.*, 983 F.2d 231 (5th Cir. 1993). And contrary to the commenter's assertion, Section 212(c) can be used to waive deportation for crimes such as murder and rape, although such serious offenses require a heightened showing in order to warrant a favorable exercise of discretion. *See* 6 Gordon, Mailman & Yale-Loehr, *Immigration Law & Procedure* §74.04[1][a], [2][g] (2007).[18]

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[18] The DOJ, in the "supplementary information" accompanying the final regulation, agreed that " 'an alien who is deportable or

But even if the commenter's interpretation were correct and constitutional (and it is neither), the BIA cannot use an adjudicatory proceeding to apply a regulation retroactively, when no statutory or regulatory language envisions retroactive application. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988) ("[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result.… Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.").

III. This Case Presents An Issue Of Exceptional And Continuing Importance To Numerous Legal Permanent Residents

The LPRs most affected by the BIA's decision in *Blake* include many who have strong claims for a discretionary waiver of removal. As this Court has observed, Section 212(c) relief is granted based on criteria including "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." *St. Cyr*, 533 U.S. at 296 n.5 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)). Mr. Judulang's immediate family, including his daughter, two sisters, and elderly mother are U.S. citizens and live in Southern California. He

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removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.' " *Blake*, 23 I. & N. Dec. at 726-727 (quoting 69 Fed. Reg. at 57,831). It did not, however, take any position on the commenter's enumeration of the various offenses that the commenter believed lacked a statutory counterpart.

has continuously resided in this country since the age of eight. Since his release on bond, Mr. Judulang has continued to work to support himself and his family.

Mr. Judulang is not alone. Because deportable "aggravated felony" offenses have been defined broadly and "without regard to how long ago they were committed[,] … the class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for §212(c) relief have been granted." *St. Cyr*, 533 U.S. at 295-296 (noting that from 1989 to 1995, "§212(c) relief was granted to over 10,000 aliens"). Despite its repeal in 1996, Section 212(c) continues to provide critical relief to numerous LPRs who were convicted of a crime long ago, but are otherwise deserving members of their local United States communities. *See id.* at 296 n.6 (noting increased importance of Section 212(c) relief following 1996 expansion of "aggravated felony" definition to include "more minor crimes which may have been committed many years ago"). The pernicious effects of *Blake* are most obvious in cases where Section 212(c) relief was first granted, then rescinded after *Blake*. *See supra* p. 12.

Petitioner does not contend that he has a legal *right* to relief; Section 212(c) remains and has always been a discretionary provision. But he does have a right to have the agency exercise that discretion following an evidentiary hearing on the merits—a hearing that he was entitled to prior to the BIA's retroactive "change in law." *Cardona*, 2005 WL 3709244. Absent this Court's intervention, numerous deserving legal immigrants like Mr. Judulang will be unlawfully denied relief from removal based only on an accident of geography—the jurisdiction in which their immigration pro-

ceedings happen to be held. *See* App. 95a-105a (non-exhaustive list of cases affected by BIA's decision in *Blake*).

Although this issue has been presented in recent petitions for certiorari, they have proven to be unsuitable vehicles. At the time of the petition in *Gonzalez-Mesias* v. *Holder*, 129 S. Ct. 2042 (2009), the Eleventh Circuit had not yet addressed the issue and the Ninth Circuit was still considering the petition for full court rehearing in *Abebe*. The petitions in *De la Rosa* and *Abebe* would have triggered Justice Kagan's recusal under 28 U.S.C. §455(b)(3), which counseled against certiorari. *See, e.g.*, *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 1303 (2000) (statement of Rehnquist, C.J.) (in cases of recusal, "[n]ot only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court"). This case raises none of these issues and is accordingly a proper vehicle for resolving this pressing question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2010

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOEL JUDULANG, AKA JOEL ALEGRE JUDULANG,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

No. 06-70986
Argued June 4, 2007
Filed Sept. 17, 2007

On Petition for Review of an Order of the
Board of Immigration Appeals, Agency No. A34-461-941

Before: HALL and CALLAHAN, Circuit Judges, and ROBART,[*] District Judge.

MEMORANDUM[**]

Joel Judulang was born on June 26, 1966 in the Philippines, but claims that he obtained derivative citizenship through his parents. The parties are familiar

[*] The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

[**] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

with the facts, and we do not repeat them except where necessary to render our decision. We deny Judulang's petition on his claim of derivative citizenship.

In removal proceedings, the DHS has the burden of proving removability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 277 (1966). Judulang's birth in the Philippines creates a rebuttable presumption of alienage, and the burden shifted to Judulang to prove his citizenship. *See Scales v. INS*, 232 F.3d 1159, 1163 (9th Cir. 2000).

The DHS produced Judulang's birth certificate at his hearing, and Judulang did not dispute that he was born on June 19, 1966 in the Philippines. At the hearing, the DHS also introduced into evidence that Judulang's father naturalized on September 22, 1978, and Judulang's mother naturalized on June 21, 1985. Judulang failed to introduce any evidence that his mother naturalized before his 18th birthday, meaning he did not obtain derivative citizenship under Immigration and Naturalization Act ("INA") § 321 as it read in 1984, 8 U.S.C. § 1432(a) (1988).

The evidence Judulang offered to support his claim of derivative citizenship consists of a copy of his grandfather's military record, and a declaration of intention filed by his father in 1958. These were submitted on appeal to the BIA. Even assuming this evidence was admissible, it does not show that Judulang's father was a United States citizen prior to Judulang's birth in 1966.[1]

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[1] Congress eliminated the declaration of intention as a prerequisite to becoming a citizen by passing the INA in 1952. 66 Stat. 163, 254-55 (1952). Declarations of intention became optional

Before this court, Judulang argues that the BIA made a legal error by concluding that, assuming Judulang's father became a citizen in 1958, he did not meet the ten-year residency requirement for transmission of U.S. citizenship to his son in 1966. Judulang contends that the Philippines was one of the "outlying possessions" of the United States, so Judulang's father satisfied the physical presence requirement under INA § 301(a)(7) by living for over ten (10) years in the Philippines. This argument fails because after 1952, INA § 101(a)(29) stated that: "The term 'outlying possessions of the United States' means American Samoa and Swains Island." 66 Stat. 170; 8 U.S.C. § 1101(a)(29) (1952). Because the Philippines were not "outlying possessions" of the United States within the meaning of the INA, the BIA did not commit legal error in concluding that Judulang's father did not meet the physical presence requirement of § 301(a)(7). *Petition for Naturalization of Garces*, 192 F.Supp. 439, 440 (N.D. Cal. 1961).

Even assuming that Judulang's father was a citizen in 1958, for Judulang to receive automatic citizenship under 8 U.S.C. § 1431(a) as it existed in 1984, his mother had to naturalize before his eighteenth birthday. As noted by the IJ, Judulang's mother did not naturalize until Judulang turned nineteen (19), so Judulang did not receive automatic derivative citizenship

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documents used to preserve certain rights under state laws that did not confer citizenship rights. *See United States v. Menasche*, 348 U.S. 528, 535-39, 536 n.4 (1955); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 938 n.1 (9th Cir. 2004). Only completion of the naturalization process, and obtaining a certificate of naturalization confers citizenship on the alien. *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 966-72 (9th Cir. 2003).

through his parents. Therefore, on the record before the IJ, and the BIA, Judulang failed to create a genuine issue of material fact regarding his claim of citizenship.

Judulang further argues that he is eligible for a waiver of deportation under former INA § 212(c). Judulang was convicted of voluntary manslaughter in 1989. Judulang contends that he is eligible for relief from his aggravated felony crime of violence conviction under former INA § 212(c). The BIA, however, held that there was no substantially similar statutory counterpart for aggravated felony crimes of violence in the grounds for exclusion in former INA § 212(a), and therefore Judulang was ineligible for a waiver under § 212(c).

Judulang's argument is foreclosed by our decision in *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007). In *Abebe*, we concluded that lack of a substantially identical statutory counterpart in § 212(a) for aggravated felony sexual abuse of a minor among the grounds for exclusion rendered the alien ineligible for § 212(c) relief. *Id.* *Abebe* is controlling. The aggravated felony/crime of violence ground for deportation is not substantially similar to any ground for exclusion in the former § 212(a). *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 772-73 (B.I.A. 2005). Therefore, Judulang was not eligible for a § 212(c) waiver. *Abebe*, 493 F.3d at 1095-96; *Caroleo v. Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007).

DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A34 461 941 - El Centro Date: FEB 03 2006

In Re: JOEL JUDULANG a.k.a. Joel Alegre Judulang

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Debra Robinson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] –
Convicted of aggravated felony (as defined in section 101(a)(43)(G))

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] –
Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] –
Convicted of aggravated felony (as defined in section 101(a)(43)(F))

APPLICATION: Termination of removal proceedings; waiver of deportability

ORDER:

PER CURIAM. We affirm the Immigration Judge's September 28, 2005, decision ordering the respondent removed from the United States to the Philippines. Specifically, we conclude that the record does not support the respondent's claim of United States citizenship. Furthermore, the respondent is removable from the United States as an alien convicted of an aggravated felony, *see* section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), and is ineligible for a waiver of deportability under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1988).

In removal proceedings, evidence of foreign birth gives rise to a rebuttable presumption of alienage, shifting the burden of going forward on that issue to the respondent. *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001). The respondent does not dispute that he was born in the Philippines, and therefore he bears the burden of presenting evidence in support of his claim to United States citizenship. The Immigration Judge determined that the respondent could not have derived citizenship through the naturalization of his parents under former section 321(a)(1) of the Act, 8 U.S.C. § 1432(a)(1) (1984), because his mother did not naturalize until after his 18th birthday. The respondent does not challenge this determination on appeal, but instead asserts that his father may have become a United States citizen in 1958, approximately 8 years prior to the respondent's birth in 1966. Yet even were we to assume that the respondent's father did become a United States citizen in 1958, we fail to understand how

this fact would tend to prove that the respondent is a citizen. At the time of the respondent's birth in 1966, former section 301(a)(7) of the Act, 8 U.S.C. § 1401(a)(7) (1952), conferred United States citizenship at birth upon an individual born outside the United States of parents one of whom is an alien, and the other a citizen of the United States, if, prior to the birth of the individual, the United States citizen parent had been physically present in the United States for an aggregate period of not less than 10 years, at least 5 of which were after the United States citizen parent attained the age of 14 years. By his own admission, the present respondent was born less than 10 years after 1958—the year when his father commenced his period of physical presence in the United States. Accordingly, the respondent was not a United States citizen at birth under the law in effect in 1966.[1] Given the absence of any evidence to suggest that the respondent can satisfy the core requirements for citizenship under former sections 301(a)(7) and 321(a)(1) of the Act, we will not disturb the Immigration Judge's determination that the respondent is an "alien" within the meaning of section 101(a)(3) of the Act. As such, he is subject to the jurisdiction of the Immigration Court and this Board.

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[1] Pursuant to section 12 of the Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3655, 3657, current section 301(g) of the Act (the statutory successor to former section 301(a)(7)) now requires that the United States citizen parent have been physically present in the United States for an aggregate period of only 5 years, at least 2 of which must have been after attaining 14 years. However, this shorter period applies only to the parents of children born after November 14, 1986, the effective date of the 1986 Act. *See* section 8(r) of the Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.

On September 18, 1989, the respondent was convicted in California of the offense of voluntary manslaughter in violation of CAL. PENAL CODE § 192(a), for which he was sentenced to a term of imprisonment of 6 years. The respondent does not challenge the Immigration Judge's determination that this conviction renders him removable from the United States as an alien convicted of an "aggravated felony"; to wit, a crime of violence under 18 U.S.C. § 16 for which the term of imprisonment imposed was at least 1 year. *See* section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F).[2] Instead, he argues that he is eligible for a waiver of deportability under former section 212(c) of the Act, 8 U.S.C. § 1182(c), pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001). We do not agree. The respondent's ineligibility for section 212(c) relief derives not from the retroactive application of the 1996 amendment and 1997 repeal of former section 212(c), but rather from the fact that the "crime of violence" aggravated felony category has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act. *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005). Neither the Immigration Judges nor this Board have jurisdiction to grant section 212(c) relief to an alien who is deportable under section 237(a) of the Act on a ground that has no statutory counterpart in the grounds of inadmissibility under section 212(a). 8 C.F.R. § 1212.3(f)(5) (2005).

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[2] Although the aggravated felony definition in effect at the time of the respondent's 1989 conviction did not encompass "crimes of violence" under 18 U.S.C. § 16, subsequent statutory amendments both added crimes of violence to the aggravated felony definition and made that amended definition explicitly retroactive. *See, e.g., United States v. Maria-Gonzalez*, 268 F.3d 664, 669 (9th Cir. 2001); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000).

In conclusion, the respondent has not adduced evidence to support his claim to United States citizenship. Furthermore, the respondent's voluntary manslaughter conviction renders him removable as an alien convicted of an aggravated felony under section 101(a)(43)(F), a ground of deportability that cannot be waived under former section 212(c) of the Act. Because the respondent's manslaughter conviction is sufficient, standing alone, to render him removable and ineligible for relief, we need not determine at this time whether his 2003 grand theft conviction would also constitute a valid factual predicate for deportability.

Accordingly, the appeal is dismissed.

/s/ Patricia A. Cole
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION COURT
El Centro, California

File A 34 461 941 September 28, 2005

Proceeding in the Matter of:

JOEL JUDULANG,)
)
Respondent)

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended—in that any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

ADDITIONAL CHARGES FILED UNDER LODGED CHARGE:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act—in that any time after admission you have been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct;

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended by the Immigration Act of 1990—in that you were convicted of an aggravated felony as

defined in Section 101(a)(43)(F) of the Illegal Immigration and Immigrant Responsibility Act of 1996—any time after entry.

APPLICATIONS:
None submitted; no eligibility established.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Pro Se	Deborah Robinson, Esquire Immigration and Customs Enforcement 1115 North Imperial Avenue El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department of Homeland Security issued the Notice to Appear June 10, 2005 setting forth the above ground of deportability as the basis for the respondent's removal.

On June 10, 2005, the Notice to Appear was served upon the respondent and it was filed with the Immigration Court on June 15, 2005. The respondent was ordered to appear before the Immigration Court the following day, June 16, 2005.

The respondent appeared before the Immigration Court on that date.

The respondent appeared before the Immigration Court which was sitting in Imperial, California by televideo conference to Calipatria State Prison in Calipatria, California. That is an institution of the Califor-

nia Department of Corrections wherein the respondent was an inmate.

The Government counsel appeared along with the Court staff at the Immigration Court in Imperial, California. Both of those locations are under the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The respondent was placed under oath to tell the truth in the proceedings.

The respondent was advised of the purpose of the proceedings and why he was in court. He was advised of each of the rights to which he is entitled in this proceeding. The allegations were read to the respondent, and the charge of deportability explained to him.

The respondent stated that he understood the purpose of the hearing, the rights that he was advised of, the allegations filed against him, and the charge of deportability.

The respondent confirmed that he had in fact received a copy of the Notice to Appear and was before the Court under his true name.

The respondent confirmed that he'd received the list of legal services working in the area and the form setting forth his appeal rights.

The respondent requested a continuance to be able to retain counsel. That request was granted.

As a matter of fact, the Court continued the matter on several occasions to give the respondent the opportunity to be able to retain counsel, as it appeared that he was working on obtaining counsel.

The respondent appeared before the Court on today's date, his case having been continued from

June 16, 2005 until today's date to give an opportunity to be able to retain counsel. He had not done so. He indicated that they had talked to an attorney and the attorney was reviewing his case at this time.

The Court required that the respondent proceed without counsel. He was advised that he could bring an attorney into his case at any point and time as long as this matter was still continued.

The respondent admitted that he's not a citizen or national of the United States.

The respondent admitted that he is a native and citizen of the Philippines. The respondent testified that his mother is a United States citizen, having become a citizen in 1985. She's married to his father who became a citizen in 1978.

The respondent admitted that he has been admitted to the United States since July 4, 1974 through Honolulu, Hawaii.

The respondent admitted that on February 18, 2003 he was convicted in the Superior Court of California, County of Los Angeles, for the offense of grand theft of property over $400 in violation of Section 487(a) of the California Penal Code.

The respondent admitted that for that offense he was sentenced to confinement for a period of two years and eight months.

The respondent stated that no appeal was filed with the Court of Appeals on that conviction.

The Government lodged a charge in this case when they filed their prehearing submission. The respondent acknowledged receipt of that and it's part of a packet of information. The respondent admitted that he had

been convicted September 18, 1989 in the Superior Court of California, County of Los Angeles West Judicial District for the offense of manslaughter. The respondent denied that for that offense he was sentenced to confinement for a period of six years suspended with 684 days of jail as a condition of probation.

The respondent submitted a packet of information dealing with the potential citizenship issue which was admitted as Exhibit 2 in its entirety.

The respondent's mother submitted some documents to the Court. Those were provided so Government counsel could review those. They were admitted into evidence as Exhibit 3.

The Government's prehearing submission was admitted as Exhibit 4.

The respondent stated that he'd had an opportunity to review the conviction records and they appeared to be accurate information.

The Court's had an opportunity to review the conviction records and the Court finds that the respondent's grand theft conviction meets the modified categorical approach being an aggravated felony as charged by the Government, a theft offense for which the term of imprisonment is at least one year.

Based upon the evidence of record, the exhibits and the admissions of the respondent, the Court likewise finds that allegation 10 is true; that the respondent has been sentenced to six years, which was suspended, and he was sentenced to 684 days in jail as a condition of probation.

Based upon a review of the conviction documents, the respondent's admissions, the Court finds that the respondent is subject to deportation on the two addi-

tional charges filed against him in the lodged charge. At this point in time, all of the allegations have been proven by evidence that's clear and convincing evidence and the respondent is subject to removal from the United States.

The court would note, if anybody is concerned about the citizenship issue, that the respondent testified that his date of birth is June 26, 1966. The respondent would have become 18 years of age on June 26, 1984. The respondent's father naturalized and became a citizen September 27, 1978. His father is married to his mother. She became a citizen on June 21, 1985. The respondent was over 18 years of age at the time.

The respondent gains no citizenship benefit through the naturalization of his parents based upon the information before the Court.

The respondent designated the Philippines as the country for removal should that become necessary and the Court accepts that designation.

The only remaining issue in the case is whether the respondent qualifies to be considered for any avenue of relief. The respondent's statutorily ineligible based upon his convictions and the sentences imposed therefore to be considered for cancellation of removal under Subsection A or B.

The respondent's statutorily ineligible to be considered for adjustment of status to lawful permanent residency even if a petition was filed to immigrate him because he no longer qualifies for the necessary 212(h) waiver to waive these crimes involving moral turpitude.

He's statutorily ineligible to be considered for asylum, withholding, and withholding under Article 3 of the Convention Against Torture.

He's statutorily ineligible to be considered for voluntary departure in either of its forms, Section 212(c) of the Immigration and Nationality Act relief, Section 249 registry, and there is no Section 209(c) issue in this case.

The respondent was queried by the Court if he had any concerns that he would be tortured if returned to the Philippines and he responded, "No".

The Court's analyzed the various issues in this case. All the allegations have been proven. The charges of deportability have been sustained by the proper standard. He is not eligible for any forms of relief for the reasons stated. The following order issues.

ORDER

The respondent is hereby ordered removed from the United States to the Republic of the Philippines.

/s/ Dennis R. James
DENNIS R. JAMES
United States Immigration Judge
September 28, 2005

IMMIGRATION COURT
2409 LA BRUCHERIE ROAD
IMPERIAL, CA 92251

In the Matter of

Case No.: A34-461-941

*S-JUDULANG, JOEL
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Sep 28, 2005. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to PHILIPPINES.
~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to PHILIPPINES
or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to PHILIPPINES.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under Section 240A(b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under Section 240A(b) (2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Sep 28, 2005

/s/ Dennis R. James
DENNIS R. JAMES
Immigration Judge

Appeal: Waiver/Reserved Appeal Due By: Oct 28, 2005

Respondent

ALIEN NUMBER: 34-461-941 ALIEN NAME: *S-JUDULANG, JOEL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [X] ALIEN c/o Custodial Officer
[ ] ALIEN'S ATT/REP [X] INS

DATE: 9/28/05 BY: COURT STAFF /S/

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOEL JUDULANG, AKA JOEL ALEGRE JUDULANG,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

No. 06-70986
Agency No. A034-461-941
[STAMP: FILED AUG 26 2010]

ORDER

Before: HALL and CALLAHAN, Circuit Judges, and ROBART, District Judge.*

Judge Hall, Judge Callahan, and Judge Robart vote to deny the petition for rehearing. Judge Callahan votes to deny the petition for rehearing en banc, and Judge Hall and Judge Robart so recommend. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX E

STATUTORY PROVISIONS

8 U.S.C. §1101(a)(43) provides in relevant part:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

* * *

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

Section 212(a) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(a), provides in relevant part:

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following para-

graphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

Former Section 212(c) of the Immigration and Nationality Act, codified at 8 U.S.C. §1182(c) (1996), repealed April 1, 1997, provides in relevant part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section[.] … The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has

served for such felony or felonies a term of imprisonment of at least 5 years.

Section 237 (formerly Section 241) of the Immigration and Nationality Act, codified at 8 U.S.C. §1227, provides in relevant part:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and re-

gardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

APPENDIX F

REGULATORY PROVISION

8 C.F.R. § 1212.3(f)(5) provides in relevant part:

An application for relief under former section 212(c) of the Act shall be denied if:

* * *

(5) The alien is deportable under former Section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.

APPENDIX G

INFORMATION RELEASABLE UNDER THE FREEDOM OF INFORMATION ACT

Name
JUDULANG, JANUARIO

Branch of Service and Serial/Service Number(s)
ARMY OF THE UNITED STATES/ PS 6 735 336

Dates of Service
JULY 1, 1946 TO MARCH 31, 1948
JUNE 8, 1945 TO JUNE 30, 1946
MAY 28, 1923 TO MAY 27, 1935

Duty Status
DISCHARGED

Rank/Grade
STAFF SERGEANT/1948
CORPORAL/1946
PRIVATE FIRST CLASS/1935

Salary
N/A

Source of Commission
NONE

Promotion Sequence Number
N/A

Assignments and Geographical Locations
SERVICE COMPANY 45TH INFANTRY REGIMENT APO 613
COMPANY D 8TH MP BATTALION
BATTERY D 2013 AAA WEAPONS BATTALION

Military Education
N/A

Decorations and Awards

AMERICAN DEFENSE SERVICE MEDAL; ASIATIC-PACIFIC THEATER MEDAL; DISTINGUISHED UNIT BADGE; PHILIPPINE LIBERATION RIBBON; PHILIPPINE DEFENSE RIBBON; PHILIPPINE-INDEPENDENCE RIBBON; WORLD WAR II VICTORY MEDAL; GOOD CONDUCT MEDAL; WORLD WAR II SERVICE LAPEL BUTTON

Transcript of Court-Martial Trial

NOT IN FILE

Photograph

N/A

Place of Entry

BASE M, LUZON, PHILIPPINES

Place of Separation

CAMP O'DONNELL, CAPAS, TARLAC, P.I.

FOR DECEASED VETERAN ONLY

Place of birth

PAOAY, ILOCOS NORTE, PHILIPPINES

Date of Death

N/A

Location of Death

N/A

Place of Burial

N/A

NOTE: N/A denotes information is not available in the veteran's records

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

NA FORM 13164 (Rev. 02-02)

APPENDIX H

[PLACEHOLDER—FOLD OUT PAGES]

[2 IMAGES…FRONT AND BACK]

APPENDIX I

U.S. Department of Justice
Immigration and Naturalization Service

Additional Charges of Inadmissibility/Deportability

In: X Removal proceedings under section 240 of the Immigration and Nationality Act

Z Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act

In the Matter of:

Alien/Respondent: **JUDULANG, Joel**

File No: **A34 461 941**
Address: **1115 N. Imperial Ave., El Centro, CA 92243**

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

Additional charge:

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, in that, at any time after admission, you have been convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, by the Immigration Act of 1990, in that you were convicted of an aggravated felony as defined in § 101(a)(43)(F) of the Illegal Immigration and

Immigrant Responsibility Act of 1996 (IIRIRA) anytime after entry.

In Support of the additional charge(s) there is submitted the following factual allegation(s) X in addition to Z in lieu of those set forth in the original charging document:

Additional allegations:

09. You were, on September 18, 1989, convicted in the Superior Court of California, County of Los Angeles, West Judicial District, for the offense of Manslaughter.

10. For that offense, you were sentenced to confinement for a period of six years suspended 684 days in Jail as a condition of probation.

Date: 8/16/05 /s/ [illegible]
(signature of Service Counsel)

Form I-261(Rev 4/1/97)N

APPENDIX J

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Matter of JOEL JUDULANG,
Respondent

File A 34 461 941

IN REMOVAL PROCEEDINGS
Transcript of Hearing

Before DENNIS R. JAMES, Immigration Judge

Date: September 28, 2005

Place: El Centro, California

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

Language:

For the Department of Homeland Security:	For the Respondent:
Deborah Robinson, Esquire	Pro Se

JUDGE FOR THE RECORD

This is Immigration Judge Dennis R. James. I'm on the record today, September 28, 2005. The Court is

sitting in El Centro, California calling the matter of Joel Judulang, A 34 461 941. He is present in court today without counsel. The Government is represented by their attorney Deborah Robinson.

* * *

Q. Are you a citizen or national of the United States?

A. No.

Q. Pardon?

A. No.

Q. Are you a native and citizen of the Philippines?

A. Yes.

Q. Can't hear you.

A. Yes.

Q. Can't hear you.

A. Yes.

Q. Either one of your parents a United States citizen?

A. Yes.

Q. Which one?

A. My mother and my father.

Q. Okay. And when did your mother become a citizen?

A. 1985.

Q. And when did your father become a citizen?

A. I think 1978.

JUDGE TO MS. ROBINSON

Q. And Ms. Robinson, do you have any confirmation information on that?

A. We have his father, 9/1/1978; his mother, 6/21/1985.

Q. Okay.

JUDGE TO MR. JUDULANG

Q. What's your date of birth, sir?

A. 6/26/66

Q. 6/26 —

A. '66

Q. '66. Okay, so you would have been over the age of 18 when your parents became United States citizens, correct? Your father? I mean when your mother did?

A. Yes.

Q. Your parents married?

A. Yes.

Q. So at the time that your mother became a citizen you were over the age of 18, correct?

A. (Indiscernible.)

Q. So you gain no citizenship benefit as a result thereof. Have you been a lawful permanent resident since July 4, 1974 through Honolulu, Hawaii?

A. Yes.

* * *

Q. Sir, here's the situation in your case. With your convictions and the time that you've been sentenced to, you do not qualify for cancellation of removal

in either of its forms. You do not qualify for adjustment of status to try to reimmigrate to the United States because these are crimes involving moral turpitude. And because you've been convicted of an aggravated felony after your admission you're no longer eligible for a 212(h) waiver to try and waive these convictions to reimmigrate to the United States, so [sic] are bars at this time. You're not eligible for asylum or withholding or withholding under the Torture Convention because of the convictions and the sentences imposed. You have no viable claim to be asserted for protection called deferral under Article 3 of the Convention Against Torture. You're not eligible to be considered for voluntary departure in either of its forms.

Likewise, you are not eligible for Section 212(c) relief. That's a form of relief that could have been applied to your manslaughter conviction but the problem is you were sentenced to six years there. That could be a litigatable problem; but more importantly, even if the 212(c) was granted on that conviction you can't use it to get to the most recent conviction that you've suffered which is the grand theft of property over $400. So Section 212(c) has been repealed, doesn't apply to the grand theft conviction. You're not eligible for cancellation because of the grand theft conviction. So Section 212(c) does not apply in your case either.

* * *

APPENDIX K

SUPREME COURT OF THE UNITED STATES

NO. 10A247

JOEL JUDULANG,

Applicant

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ORDER

UPON CONSIDERATION of the application of counsel for the applicant, and the response filed thereto,

IT IS ORDERED that the judgment of the United States Court of Appeals for the Ninth Circuit, case No. 06-70986, is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 16th
day of September, 2010.

APPENDIX L

U.S. Department of Justice

Decision of Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A37 749 964—New York Date: [STAMP: May 9 2003]

In re: DOUGLAS ANTHONY ROWE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Eileen Collins Bretz, Esquire

ON BEHALF OF SERVICE: George J. Ward, Jr.
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

The parties have filed cross appeals from the Immigration Judge's decision to consider and deny the merits of the respondent's request for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Both appeals will be dismissed.

The respondent asserts that the Immigration Judge erroneously denied his request for a waiver based on the unfounded conclusion that his equities do

not outweigh the adverse factors. The Immigration and Naturalization Service ("Service," now the Department of Homeland Security, DHS) asserts that the Immigration Judge erred in concluding that the respondent was eligible to apply for a section 212(c) waiver. The Service asserts that there is no comparable ground of inadmissibility available to an alien convicted of an aggravated felony, and that the respondent is therefore precluded from applying for a section 212(c) waiver. We will first address the Service's argument.

The Board has found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) where the conviction could also form the basis for an exclusion ground. *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). The Board rejected the principle that a 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *See id.* In *Matter of Meza*, the alien had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under section 212(a)(23) as result of the conviction. The Board found that, in light of the corresponding 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* sections 101(a)(43)(F) and (G) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). In addition, the respondent's conviction could have formed the basis for an inadmissibility charge pursuant to section 212(a)(2)(A)(i)(I) of

the Act, as amended, as an alien convicted of a crime involving moral turpitude. Thus, based on the precedent set forth in *Matter of Meza*, *supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief. We are not persuaded by the Service's appellate argument, which rests largely on the law stemming from cases where the alien was charged with a firearms offense. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato v. INS*, 84 F.3d 597 (2d Cir. 1996).

Turning to the respondent's claim that he should have been granted a waiver pursuant to section 212(c), we find that the Immigration Judge considered the relevant equities and adverse factors of record. The Immigration Judge applied the well-established standards for exercising discretion. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978); *see also Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Edwards*, 201 I&N Dec. 191 (BIA 1990). Following a full and detailed analysis, the Immigration Judge reasonably concluded that the equities do not outweigh the adverse factors (I.J. at 13-28). The Immigration Judge noted that the respondent has very significant equities, including a long period of residence in the United Stales and extensive family ties. However, the Immigration Judge concluded that the nature of the respondent's offense (robbery in the second degree) under circumstances involving a firearm and a car chase through New York City, and combined with unclear evidence of rehabilitation, outweighed the positive factors. We find insufficient basis for concluding otherwise.

Therefore, we will affirm the Immigration Judge's discretionary denial. Accordingly, we will enter the following orders.

ORDER: The appeal, filed by the Service, is dismissed.

FURTHER ORDER: The respondent's appeal is dismissed.

/s/ [illegible]
FOR THE BOARD

APPENDIX M

Matter of JUAN REYNALD DAVILA MUNOZ
a.k.a. Juan Reynaldo Davila

File: A35 279 774 -- Houston

Board of Immigration Appeals

28 Immig. Rptr. B1-1

AUG 07 2003

HOLDING

The BIA sustained respondent's appeal in part and dismissed it in part, finding that respondent did not obtain citizenship at birth but that he was eligible to apply for a waiver of inadmissibility under former § 212(c) of the INA. With regard to respondent's citizenship claim, the BIA found insufficient evidence to support the finding that respondent's father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth. With regard to respondent's eligibility for a waiver of inadmissibility, the BIA found that respondent fell squarely within the class of persons covered by *INS* v. *St. Cyr*, 533 U.S. 289 (2001) who are entitled to seek a waiver under former § 212(c) of the INA in removal proceedings. The BIA also found that the absence of a specific aggravated felony ground in § 212(a) of the INA did not preclude respondent from obtaining a § 212(c) waiver since there is a corresponding ground of inadmissibility to the crime of aggravated assault on a peace officer in § 212(a)(2)(A)(i)(I) of the INA, conviction of a crime involving moral turpitude. Although the BIA previously rejected this "corre-

sponding ground" analysis, it found it appropriate in this case, given the fact that Congress had allowed those aggravated felons who served less than 5 years in prison to be eligible for relief through former § 212(c) relief. Based on these findings, the BIA remanded the record to allow respondent to apply for a waiver of inadmissibility.

SUMMARY OF ISSUES

CITIZENSHIP: The BIA found that respondent did not automatically acquire citizenship at birth through his father since he was unable to present enough evidence to show that his father had lived in the U.S. for 5 years after he turned 16 but prior to the time of respondent's birth, elements necessary to prove citizenship by birth.

WAIVER OF INADMISSIBILITY: The BIA found that respondent, an aggravated felon who was convicted of aggravated assault on a peace officer, was eligible for a waiver of inadmissibility under former § 212(c) of the INA as a result of the Supreme Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001) and the fact that a corresponding ground of inadmissibility was present in § 212(a)(2)(A)(i)(I) of the INA.

FACTS

Respondent, a native and citizen of Mexico, entered the U.S. in 1976 as a lawful permanent resident. In 1991, he was convicted of aggravated assault on a peace officer. In 1998, DHS (formerly INS) initiated removal proceedings against him. Respondent denied the allegations against him, contending that he acquired U.S. citizenship at birth through his father. The IJ continued the case several times to allow DHS to consider respondent's Application for Certificate of Citizenship.

DHS denied the application, finding that respondent failed to present enough evidence to show that his father met the 10 year residency requirement. The IJ also found that respondent had not submitted enough evidence to establish that he acquired U.S. citizenship at birth. Last, the IJ found that respondent was ineligible for a waiver of inadmissibility under former § 212(c) of the INA because there was no corresponding ground of exclusion in § 212(a) for the aggravated felony ground with which he was charged. Respondent appealed.

CROSS-REFERENCES

Immigration Law and Procedure chaps. 1, 2, 74, 91, 98.

COUNSEL: COUNSEL: ON BEHALF OF RESPONDENT: Kaye Ellis Stone, Esquire

ON BEHALF OF DHS: Merilee Fong, Assistant District Counsel

Before: Patricia A. Cole, Board Member

OPINION BY: Cole, Board Member.

OPINION: On March 20, 2003, an Immigration Judge found that the respondent had failed to present sufficient evidence to show that he was a United States citizen and determined that the respondent was ineligible to apply for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent has appealed from this decision. The appeal will be sustained in part and dismissed in part, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order.

I. BACKGROUND

The respondent was born in Mexico on October 28, 1952 and was admitted to the United States as a lawful permanent resident on March 2, 1976. On July 1, 1991, he was convicted of aggravated assault on a peace officer. He was sentenced to 2 years in prison for this crime. In addition, on December 15, 1998, the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) initiated removal proceedings against him by filing a Notice to Appear with the immigration court. The respondent denied all of the allegations against him, including the allegation that he was not a citizen of the United States. The respondent claimed that his father was born in the United States and that his father had resided here for at least 10 years before the respondent's birth. The respondent therefore argued that he acquired United States citizenship automatically at birth through his father. *See* section 201 (g), Nationality Act of 1940, 8 U.S.C. § 1151(g)(1940).[1]

The Immigration Judge continued the respondent's case to allow him to file an Application for Certificate of Citizenship (N-600) with the DHS. The DHS, however, denied the application on April 3, 2000. The DHS found that the respondent had failed to present sufficient evi-

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[1] Because the respondent was born before December 24, 1952, he is subject to section 201(g) of the Nationality Act of 1940 rather than section 301 (g) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g), the more recent provision. Section 201(g) states that an alien's parent must have resided in the United States for 10 years before the alien's birth, 5 of which were after the alien's parent turned 16 before the alien can become a citizen at birth. *See* section 201(g) of the Nationality Act.

dence to show that his father met the 10 year residency requirement. *See* Exhibit 5. Nevertheless, the DHS granted the respondent's brother's Application for Certificate of Citizenship on April 25, 2003. *See* Exhibit 7A (documents obtained from DHS through Freedom of Information Act request). The respondent therefore attempted to have the DHS reconsider his application. Both the Immigration Judge and the DHS attorney at the respondent's hearing agreed that reconsideration was appropriate, and the Immigration Judge continued the respondent's case several times to allow the DHS to conduct its review (Tr. at 11-14, 17-18, 21-23).

After assessing the evidence the respondent's brother had submitted in support of his application, the DHS found no basis for reversing its original ruling in the respondent's case. *See* Exhibit 9 (Memorandum from Debra K. Lewis to File). The Immigration Judge also found that the respondent had not submitted enough evidence to establish that he acquired United States citizenship at birth (I.J. at 2-4). In addition, the Immigration Judge found that the respondent was ineligible for a waiver of inadmissibility under former section 212(c) of the Act because there was no corresponding ground of exclusion in section 212(a) of the Act for the aggravated felony ground in section 237(a) of the Act under which he was charged (I.J. at 4-5). The respondent has appealed from each of these findings.

II. CITIZENSHIP

In the case of an alien like the respondent who has been admitted to the United States, the burden is on the DHS to establish removability. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). This burden includes establishing alienage, and the DHS

met that burden in the respondent's case by establishing his foreign birth. *See* Exhibit 4A (respondent's birth certificate); *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977) (finding that evidence of foreign birth gives rise to a rebuttable presumption of alienage and shifts the burden to the respondent to produce some evidence of citizenship); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327 (BIA 1969). The respondent therefore must present some evidence of citizenship to overcome the DHS's proof of alienage. *See Matter of Leyva, supra*; *Matter of Tijerina-Villarreal, supra.*

The respondent claims on appeal that his evidence is sufficient to show that his father met the residence requirements of section 201(g) of the Nationality Act of 1940, but we disagree. Like the Immigration Judge, we find insufficient evidence in the record to show that the respondent's father resided in the United States for 5 years after he reached age 16 and before the respondent was born on October 28, 1952. The respondent's father testified during the respondent's brother's immigration proceeding and indicated that he left the United States in 1932 and then returned to this country to work in 1949 or 1950. *See* Exhibit 13, Transcript of Respondent's Brother's Proceedings, at 30, 32-33. In an affidavit, the respondent's father stated that he came to the United States for a few months each year between 1945 and 1951 to do seasonal agricultural work and then returned to this country almost full-time starting in 1951 or 1952. *See* Exhibit 7A, at 20-22. Under either of these scenarios, we cannot conclude that the respondent's father was in the United States for 5 years between 1943, the year he turned 16 years old, and October 28, 1952, the date the respondent was born. And the other evidence of record does not alter this conclu-

sion. *See, e.g.*, Exhibits 6, 7, 10B, 13; *see also Matter of Tijerina-Villarreal*, *supra*, at 330-31.

Moreover, the fact that the respondent's brother was able to obtain a certificate of citizenship does not necessarily establish that the respondent is eligible. The respondent's brother was born in 1960 and therefore is subject to slightly different requirements. *See* section 301(g) of the Act, 8 U.S.C. § 1401(g). In addition, he only had to show that his father was in this country for 5 years between 1941 and his birth in 1960. He therefore had an additional 8 years within which to establish his father's presence. In this case, it appears that the extra 8 years was critical to his case.

In light of the above, we find that the Immigration Judge was correct to conclude that the respondent's evidence is not sufficient to rebut the presumption of alienage in his case. We therefore affirm the Immigration Judge's ruling on this issue and find that the respondent is subject to removal.

III. SECTION 212(C) WAIVER

On the other hand, we find that the Immigration Judge erred in pretermitting the respondent's application for a waiver of inadmissibility under former section 212(c) of the Act. First, the respondent falls squarely within the class of persons covered by the United States Supreme Court's ruling in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). The respondent is a lawful permanent resident with well over 7 years' lawful domicile in this country and he pled guilty to his offense before Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of

Pub. L. No. 104-208, 110 Stat 3009-546 ("IIRIRA"). He therefore is entitled to seek a waiver under former section 212(c) of the Act in removal proceedings.

And the absence of a specific aggravated felony ground in section 212(a) of the Act does not prevent the respondent from obtaining a section 212(c) waiver. Generally, a waiver under former section 212(c) of the Act was only available to waive grounds of deportability that had corresponding grounds of inadmissibility in section 212(a) of the Act. *See Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (A.G. 1991). Nevertheless, we have found that an alien convicted of an aggravated felony may be eligible for a waiver under section 212(c) of the Act when the conviction could also lead to inadmissibility under section 212(a) of the Act *See Matter of Meza*, 20 I&N Dec. 257, 259 (BIA 1991). In *Meza*, *supra*, we rejected the principle that a section 212(c) waiver is unavailable to an alien convicted of an aggravated felony simply because no ground of exclusion expressly recites the words "convicted of an aggravated felony." *Id.* The alien in *Meza*, *supra*, had been convicted of a drug trafficking crime, an aggravated felony, and would have been inadmissible under then-section 212(a)(23) of the Act as result of the conviction. We found that, in light of the corresponding section 212(a)(23) ground of inadmissibility, the respondent was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of aggravated assault on a peace officer, an offense that currently qualifies as a crime of violence under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) and an aggravated felony. This offense also could make the respondent inadmissible under section 212(a)(2)(A)(i)(I) of the Act as an alien convicted of a crime involving

moral turpitude. Thus, there is a "corresponding" ground of inadmissibility for the respondent's offense, and, under the reasoning in *Matter of Meza*, *supra*, the respondent is not precluded from establishing eligibility for section 212(c) relief.

The Immigration Judge dismissed this type of "corresponding ground" analysis based on our ruling in *Matter of Wadud*, 19 I&N Dec. 182 (BIA 1984). In that case, we held that an alien who was deportable under then-section 241(a)(5) of the Act as an alien convicted under 18 U.S.C. § 1546 could not apply for a section 212(c) waiver because there was no corresponding ground of inadmissibility under section 212(a) of the Act. The respondent in that case argued that his offense was also a crime involving moral turpitude and therefore could make him inadmissible under one of the provisions in section 212(a), but we declined to follow this analysis. We found that not all offenses covered by section 241(a)(5) were crimes involving moral turpitude and that we therefore could not extend section 212(c) to cover this ground of deportability. *See Matter of Wadud*, *supra*, at 184-5.

The present case, however, is distinguishable from *Matter of Wadud*, *supra*, in a very significant way. The ground of removability in this case is the aggravated felony ground, section 237(a)(2)(A)(iii) of the Act rather than former section 241(a)(5) of the Act. And the language of former section 212(c) of the Act specifically acknowledged that some aliens convicted of aggravated felonies would be eligible to apply for relief. The last sentence of former section 212(c) read: "[t]he first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." *See* section 212(c) of

the Act. By eliminating this category of aliens from the class of persons eligible for section 212(c) relief, this provision also indicated that aliens who did not meet this requirement, namely aliens who were convicted of aggravated felonies but served less than 5 years in prison were allowed to apply for a section 212(c) waiver. These aliens, however, would only have been able to seek section 212(c) waivers if the rationale of *Matter of Meza*, *supra* was applied to their cases. Because it is doubtful that Congress would have added a provision addressing a category of individuals who were already ineligible for relief, it is only logical to conclude that aliens charged under the aggravated felony ground of deportability are eligible for section 212(c) waivers if their crimes fall under one of the grounds contained in section 212(a) of the Act. Because other grounds of deportability without corresponding grounds of inadmissibility were not specifically mentioned in section 212(c), this rationale does not apply to situations like the one presented in *Matter of Wadud*, *supra* or to cases involving aliens charged with deportability on the basis of firearms convictions. *See, e.g.*, *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *see also Cato* v. *INS*, 84 F.3d 597 (2d Cir. 1996). Accordingly, we do not find that our rulings in those cases are binding in this context.

Moreover, we note that the Supreme Court in *INS* v. *St. Cyr, supra*, accepted as a given that aliens convicted of aggravated felonies were able to apply for section 212(c) waivers. *See INS* v. *St. Cyr*, *supra*, at 295-298 (finding that section 212(c) waivers have great practical importance in deportation proceedings because the class of aliens who are deportable for crimes, particularly for aggravated felonies, is quite broad).

And many aliens, like the respondent, who were made eligible for section 212(c) waivers by *INS* v. *St. Cyr*, *supra*, were not even removable as aggravated felons until Congress expanded the definition of "aggravated felony" in the IIRIRA. The inclusion of these aliens in the class of individuals allowed to apply for section 212(c) relief therefore appears to be required under the reasoning of *INS* v. *St. Cyr*, *supra*, notwithstanding our ruling in *Matter of Meza*, *supra*.

The number of aliens affected by this ruling, however, is comparably small. Section 240A(a) of the Act, which has replaced former section 212(c) of the Act, makes any alien who has been convicted of an aggravated felony ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3). Thus, aliens in removal proceedings who do not meet the requirements of *INS* v. *St. Cyr*, *supra*, which will be most aliens, will be ineligible for relief if they have been convicted of an aggravated felony or felonies. And aliens who do qualify for section 212(c) under *INS* v. *St. Cyr*, *supra*, must still establish that they merit this form of relief in the exercise of discretion.

Based upon the foregoing, we find that the respondent is entitled to apply for a waiver of inadmissibility under former section 212(c) of the Act. We therefore remand the record to the Immigration Judge to allow him to pursue this form of relief.

ORDER: The appeal is sustained in part and dismissed in part, and the record is remanded for further proceedings consistent with this order.

APPENDIX N

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A38-139-424-NEW YORK

Date: [STAMP: MAY 27 2004]

In re: *S-LEI, GUANG SHEN**

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bretz, Kerry W., Esquire

ON BEHALF OF DHS: Paul Halligan

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service, has appealed the Immigration Judge's decision to grant the respondent's application for a waiver of inadmissibility under section 212(c) of the immigration and Nationality Act.

The DHS notes that there is no comparable ground of inadmissibility available to one convicted of an aggravated felony, and that the respondent is therefore precluded form [sic] applying for that relief. We held in *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991), that a waiver under section 212(c) is not unavailable to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, "convicted of an aggravated felony." *Id.* at 259. The Board concluded in that case that, because the respondent was found to have been convicted of an aggravated felony based on a conviction for a drug trafficking crime, and because the respondent would have been inadmissible under section 212(a)(23) based on that crime, he was not precluded from establishing eligibility for section 212(c) relief.

In this case, the respondent was convicted of second degree attempted robbery, which presently could be considered an aggravated felony as either a crime of violence or a theft crime. *See* section 101(a)(43)(F) and (G) of the Act (Act), 8 U.S.C. § 1101(a)(43)(F) and (G). However, at the time of the respondent's conviction on September 11, 1995, he could have been charged with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, as amended, as one convicted of a crime involving moral turpitude. Accordingly, he would not be not precluded from establishing eligibility for section 212(c) relief. We further find no error in the Immigration Judge's decision to grant the waiver to the respondent in the exercise of discretion. Accordingly, the appeal is dismissed.

/s/ Anthony C. Moscato
FOR THE BOARD

APPENDIX O

U.S. Department Of Justice

Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A90 640 428-Seattle Date: [STAMP: MAY 25 2005]

In re: MANUEL ALEJANDRO RANGEL-ZUAZO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Manuel F. Rios, III, Esquire

ON BEHALF OF DHS: Patricia A. Duggan
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony as defined in section 101(a)(43)(A), I&N Act [8 U.S.C. § 1101(a)(43)(A)]

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the Immigration Judge's January 29, 2004, decision granting the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent has filed an opposition. The appeal will be sustained, and the record will be remanded.

The respondent is a native and citizen of Mexico. His status was adjusted to that of a lawful permanent resident in 1990. On January 8, 1993, the respondent was convicted in a Washington State court upon a plea of guilty to one count of first-degree rape of a child in violation of Wash. Rev. Code § 9A.44.073 (1986).

The DHS challenges the Immigration Judge's exercise of discretion to grant the respondent a section 212(c) waiver. We, however, will dispose of the appeal on other grounds because intervening precedent renders the respondent statutorily ineligible for section 212(c) relief. 8 C.F.R. § 1003.1(e)(5).

To be statutorily eligible for a section 212(c) waiver, the respondent must establish, *inter alia*, that section 212(a) of the Act, 8 U.S.C. § 1182(a), contains a ground of inadmissibility that is comparable to the grounds upon which he is removable, namely for having been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act. *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005); *Matter of Hernandez-Casillas*, 20 I&N Dec. 262 (BIA 1990; A.G. 1991), *aff'd*, 983 F.2d 231 (5th Cir. 1993); *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991); *see also* 8 C.F.R. § 1212.3(f)(5). In *Matter of Blake*, *supra*, the Board recently held that the aggravated felony ground of removal based on a conviction for sexual abuse of a minor has no statutory counterpart in section 212(a) of the Act. The same is true for the respondent's removability based on his conviction for first-degree rape of a child. In *Matter of Blake*, *supra*, the Board held that the test for determining whether a ground of removability has a statutory counterpart in section 212(a) of the Act "turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses." 23 I&N Dec. at 728. No provision in section

212(a) of the Act establishes inadmissibility for a rape that as a matter of law is sexual abuse of a minor. The fact that a conviction for rape of a child may often render an alien inadmissible under some provision of section 212(a) of the Act is not sufficient to meet the test for comparability. *Id.* at 729. Thus, section 212(a) of the Act does not contain a ground of inadmissibility that is comparable to the grounds upon which the respondent is removable. Accordingly, the respondent is not eligible for section 212(c) relief. We, thus, will sustain the DHS's appeal and will remand the record to the Immigration Judge for issuance of an order of removal pursuant to *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937 (9th Cir. 2004).

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

/s/ [illegible]
FOR THE BOARD

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YEWHALASHET ABEBE,
Petitioner,
v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,
Respondent.

No. 05-76201
Argued and Submitted March 25, 2008
Filed Jan. 5, 2009

On Petition for Review of an Order of the Board of Immigration Appeals, Agency No. A26-810-941

Before ALEX KOZINSKI, Chief Judge, HARRY PREGERSON, ANDREW J. KLEINFELD, SIDNEY R. THOMAS, BARRY G. SILVERMAN, RONALD M. GOULD, RICHARD C. TALLMAN, RICHARD R. CLIFTON, CONSUELO M. CALLAHAN, CARLOS T. BEA and N. RANDY SMITH, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge CLIFTON; Dissent by Judge THOMAS.

ORDER

The per curiam opinion that was filed November 20, 2008, was filed in error. The opinion accompanying this order is substituted as the opinion of the court.

The previously filed concurrence and dissent are unaffected by this order.

The petition for rehearing remains pending. Within 14 days, respondent shall file a response to the petition. Petitioner may reply within 14 days of the response; the reply shall not exceed the length permitted for the response. *See* 9th Cir. R. 40-1.

OPINION

PER CURIAM:

1. Petitioner became a lawful permanent resident in 1984 and, in 1992, pled guilty to lewd and lascivious conduct upon a child. Cal.Penal Code § 288(a). INS commenced removal proceedings on the ground that he was deportable as having committed an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii)—"sexual abuse of a minor," *id.* § 1101(a)(43)(A). The Immigration Judge (IJ) denied petitioner's asylum, withholding of removal and Convention Against Torture claims, and found petitioner ineligible for a discretionary waiver of deportation under former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).[1] On appeal to the Board of Immigration Appeals (BIA), petitioner argued that he's eligible for section 212(c) relief. The BIA affirmed, and Abebe petitions for review.

2. Petitioner argues that, by finding him ineligible for section 212(c) relief, the BIA denied him equal pro-

[1] Even though section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, the Supreme Court held that this repeal can't be applied retroactively to aliens, such as petitioner, who pled guilty to deportable crimes before IIRIRA took effect. *INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

tection. Relying on *Komarenko v. INS*, 35 F.3d 432, 434-35 (9th Cir. 1994), the three-judge panel held that petitioner isn't eligible for section 212(c) relief. *Abebe v. Gonzales*, 493 F.3d 1092, 1104-05 (9th Cir. 2007), *vacated*, 514 F.3d 909 (9th Cir. 2008). Under *Komarenko*, 35 F.3d at 434-35, a deportable alien can be eligible for section 212(c) relief only if his grounds for deportation are substantially identical to a ground for inadmissibility.[2] Here, petitioner is deportable for committing an "aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii), which the panel held isn't substantially identical to the most analogous ground for inadmissibility—committing a "crime involving moral turpitude," *id.* § 1182(a)(2)(A)(i)(I). *Abebe*, 493 F.3d at 1104-05. Petitioner claims that the rationale of *Komarenko* can't be squared with that of *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). He therefore asks us to overrule *Komarenko*, and hold that a deportable alien can only be eligible for section 212(c) relief if his *conviction* is substantially identical to a ground for inadmissibility. *See Abebe*, 493 F.3d at 1106 (Berzon, J., concurring).

Under its plain language, section 212(c) gives the Attorney General discretion to grant lawful permanent residents relief only from *inadmissibility*[3]—not depor-

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[2] Inadmissibility (or "exclusion" under pre-IIRIRA law) applies to an alien outside the United States who is not allowed to enter, 8 U.S.C. § 1182(a), whereas deportation applies to an alien who is already in the United States and is ejected, *id.* § 1227. *See Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1076 (9th Cir. 2005). Under IIRIRA, both inadmissible and deportable aliens go through the same process, called "removal proceedings." *Id.* (citing *Romero-Torres v. Ashcroft*, 327 F.3d 887, 889 (9th Cir. 2003)).

[3] IIRIRA changes somewhat the nomenclature applicable to immigration cases. What used to be "excludability" is now "inad-

tation. *See* 8 U.S.C. § 1182(c) (repealed 1996). *Tapia-Acuna*, though, followed *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976), and held that equal protection required us to extend section 212(c) relief to aliens facing deportation—if such aliens would have been eligible for section 212(c) relief from inadmissibility, had they left the United States and attempted to reenter. *Tapia-Acuna*, 640 F.2d at 225. In following *Francis*, *Tapia-Acuna* reasoned that there is no rational basis for granting additional immigration relief to aliens who temporarily leave the United States and try to reenter (i.e., aliens facing inadmissibility), and not to aliens who remain in the United States (i.e., aliens facing deportation). *Tapia-Acuna*, 640 F.2d at 225. According to *Francis* and *Tapia-Acuna*, it is wholly irrational for Congress to give *any* advantage to aliens outside the United States that it denies to similarly situated aliens within the United States.

We are not convinced that *Francis* and *Tapia-Acuna* accorded sufficient deference to this complex legislative scheme, and therefore reconsider this question, as we are authorized to do en banc. We note at the outset that the statute doesn't discriminate against a discrete and insular minority or trench on any fundamental rights, and therefore we apply a standard of bare rationality. *United States v. Barajas-Guillen*, 632 F.2d 749, 752 (9th Cir. 1980) (quoting *Alvarez v. Dist. Dir. of the U.S. INS*, 539 F.2d 1220, 1224 (9th Cir. 1976)). Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it

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missibility"; what used to be "deportation" is now "removal." We use these terms interchangeably.

legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens. *See Kleindienst v. Mandel*, 408 U.S. 753, 769-70, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Boutilier v. INS*, 387 U.S. 118, 123-24, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967); *Flemming v. Nestor*, 363 U.S. 603, 616, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Our task, therefore, is to determine, not whether the statutory scheme makes sense to us, but whether we can conceive of a rational reason Congress may have had in adopting it.[4]

We can: Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to "create[ ] an incentive for deportable aliens to leave the country." *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 1999) (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *see De-Sousa v. Reno*, 190 F.3d 175, 185 (3d Cir. 1999). A deportable alien who wishes to obtain section 212(c) relief will know that he can't obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise

[4] In making this determination, we do not look to the actual rationale for the legislation, as it is often very difficult or impossible to determine what a collective body, such as Congress, has in mind. The task would be particularly difficult in a case like ours where the statutory scheme now in force is the product of repeated layers of congressional enactments and judicial interpretations, so it is quite likely that no one anticipated the existing Byzantine structure. Our inquiry therefore focuses on whether a hypothetically rational Congress could have adopted the statutory scheme, not on whether Congress actually adopted the statute with that particular reason in mind.

devote to arresting and deporting these aliens. *See Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1153 (10th Cir. 1999), *abrogated in part by INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.

Our dissenting colleagues argue that the reason we attribute to Congress is not so rational after all because aliens who are "excludable yet potentially eligible for a section 212(c) waiver … [are] generally allowed to enter and to apply for waiver from within the country," and so the government will wind up having to deport those aliens anyway, if they are denied 212(c) relief. Dissent at 1215. But the fact that the government may choose, as a matter of grace, to admit aliens who seem very likely to be granted 212(c) relief does not mean that it won't exclude those it believes are less likely to obtain such relief. The rationality of the statute lies in giving that discretion, on a case by case basis, to an agency that can assess the likelihood of the alien's success and the cost of his removal.[5]

The dissent makes a similar error when it argues that it is inconsistent with the statutory scheme to assume "that a rational Congress would want these persons to leave the country." Dissent at 1216. The supposed irrationality here, as we understand it, would be in having people leave the country only to be readmitted after they are granted relief.

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[5] The dissent also claims that this will somehow "increase the number of removal proceedings, which would, in turn, spend *more* government resources," dissent at 1216, but it doesn't explain how or why this would be the case.

The dissent overlooks the fact that not all those who apply for relief ultimately receive it; many, perhaps most, will not. And as to those, it makes perfect sense to want them to be outside our borders when they get the bad news. At that point, they cannot rely on inertia to remain in the country despite the adverse decision, and force the government to chase them down and pay for their deportation. As Judge Posner noted in *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), "[t]o induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings." To what extent this will actually save the government resources is something we won't know until we try it, but it is hardly irrational to presume that a significant number of aliens may decide to depart in order to get a shot at 212(c) relief. Congress certainly is entitled to experiment, without interference from the judiciary.[6] For much the same reason, the dissent is

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[6] The dissent's citation to *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975), dissent at 1215 is misplaced. This case involved sex discrimination, and distinctions based on sex have been subjected to far more searching scrutiny for the last 4 decades or so. *See also Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Here we are not dealing with sex discrimination, or discrimination based on any other suspect category. And we're dealing with an area where federal power is at its zenith; indeed, the Supreme Court has instructed us that we must exercise "special judicial deference to congressional policy choices in the immigration context." *Fiallo v. Bell*, 430 U.S. 787, 793, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (footnote omitted). It would thus be a rare case, indeed, where we could find irrationality in a congressional decision to distinguish among classes of aliens (other than along suspect lines).

mistaken in arguing that we've undermined the validity of 8 C.F.R. § 1212.3(f)(5) under the rationale of *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Dissent at 1216. The INS may certainly choose to treat different classes of aliens the same, even though the statute does not, and nothing in *St. Cyr* prevents it from doing so. Of course, our ruling might cause the government to reconsider the regulation, and eventually repeal it as no longer necessary. But that's up to the government; nothing we say today casts any doubt on the regulation.

We thus overrule *Tapia-Acuna*'s holding that there's no rational basis for providing section 212(c) relief from inadmissibility, but not deportation. The BIA therefore didn't violate petitioner's right to equal protection by finding him ineligible for section 212(c) relief from deportation. Since petitioner was not eligible for section 212(c) relief in the first place, the BIA could not have committed an equal protection violation by denying him such relief. We affirm the BIA's section 212(c) ruling, and have no reason to reconsider *Komarenko*. Indeed, under our ruling today, *Komarenko* becomes a dead letter, as its only purpose was to fill a gap created by *Tapia-Acuna*.

3. Petitioner also argues that the IJ erred by denying his claim for withholding of removal. But petitioner didn't raise a withholding of removal claim in his brief before the BIA, and the BIA was therefore not required to consider it. *See, e.g., Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 535 n. 11 (3d Cir. 2007) (issues raised in the notice of appeal but not argued in appellant's principal brief are deemed abandoned). When a petitioner files no brief and relies entirely on the notice of appeal to make an immigration argument, as he may do before the BIA, *see* 8 C.F.R.

§ 1003.38(f), then the notice of appeal serves in lieu of a brief, and he will be deemed to have exhausted all issues raised therein. But when a petitioner does file a brief, the BIA is entitled to look to the brief for an explication of the issues that petitioner is presenting to have reviewed. Petitioner will therefore be deemed to have exhausted only those issues he raised and argued in his brief before the BIA. Here, petitioner did file a brief, which did not raise the withholding of removal issue. He therefore didn't exhaust that claim, and we lack jurisdiction to review it. *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) (citing 8 U.S.C. § 1252(d)(1)). To the extent *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000), is to the contrary, it is overruled.

PETITION DENIED IN PART and DISMISSED IN PART.[7]

[7] For the reasons given in the three-judge panel opinion, the BIA didn't erroneously or inconsistently apply 8 U.S.C. § 1182(c) (repealed 1996), or 8 C.F.R. § 1213(f). *Abebe*, 493 F.3d at 1101-04. Likewise, we reject petitioner's due process retroactivity argument. *Id.* at 1105.

CLIFTON, Circuit Judge, with whom Circuit Judges SILVERMAN and GOULD join, concurring in the judgment:

I concur in the judgment, denying in part and dismissing in part Yewhalashet Abebe's petition for review. I do not join most of the majority opinion,[1] however, because I believe it is both unnecessary and unwise to overrule our prior decision in *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981), to reach that result. The government has not advocated such a drastic step. The original decision by a three-judge panel of our court, *Abebe v. Gonzales*, 493 F.3d 1092 (9th Cir. 2007), reached the same result in this case as the majority reaches today, simply by applying our existing precedent, *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994). The en banc panel should do the same.

I share the concern expressed in the dissent with overruling more than sixty years of agency precedent and more than twenty-seven years of our own precedent. I also share the fear that the path taken by the majority puts into jeopardy the agency's ability to continue to grant discretionary relief in removal proceedings pursuant to 8 C.F.R. § 1212.3. Although the majority says otherwise, its interpretation of the statute appears to leave no room for that practice to continue. In addition, I would prefer to avoid aggravating a circuit split with the numerous other courts that have adopted the same balance we struck in *Komarenko*.

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[1] I do join in Part 3 of the majority opinion, because I agree that petitioner did not exhaust his withholding of removal claim before the agency.

I nevertheless concur in the judgment because I conclude that aliens who could have been, but were not, charged with removal on grounds equivalent to a ground for inadmissibility are not similarly situated to aliens who were actually so charged. Abebe's equal protection challenge therefore fails. Put another way, although I agree with most of Part I of the dissent, I disagree with Part II and do not believe we should overturn our decision in *Komarenko* and follow the Second Circuit's recent decision in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007). I would adhere to *Komarenko* and deny Abebe's petition accordingly.

I.

As the dissent points out, since at least 1940 the Executive Branch (now in the form of the Department of Homeland Security, or DHS, and formerly through the Immigration and Naturalization Service, or INS) has interpreted the Immigration and Nationality Act (INA) as granting it the discretion to afford relief from both deportation (of an alien inside the United States, a process now called removal) and exclusion (of an alien seeking admission to this country at the border, now described as inadmissibility). *See Matter of L.*, 1 I. & N. Dec. 1 (BIA 1940). Congress was aware of this practice when it drafted the 1952 amendments to the INA, including section 212(c). *See In the Matter of S.*, 6 I. & N. Dec. 392, 394-96 (BIA 1955) (examining the legislative history). Although the amendments made it harder for aliens to qualify for such discretionary relief, there is nothing in the legislative history, which catalogued other perceived abuses, to suggest that Congress disapproved of the government's use of the predecessor to section 212(c) to grant waivers in deportation proceedings. This is among the reasons that the Board of Im-

migration Appeals held, shortly after the amendments' passage, that the Attorney General retained the discretion under section 212(c) to grant relief in both deportation and exclusion proceedings. *Id.*

Initially, the government permitted aliens to apply for relief from deportation only if they had temporarily left the country such that they might have been subject to exclusion. In 1981, we held in *Tapia-Acuna* that there was no rational basis in the context of section 212(c) for discriminating against aliens who had remained in the United States. *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

Today, the majority holds that we were mistaken in *Tapia-Acuna* and that there is a legitimate basis for so limiting the availability of section 212(c) relief. Even assuming there are arguments in favor of that position, we rejected it twenty-seven years ago. There is no compelling reason to overturn that judgment now. No relevant circumstances have changed, and our decision has been on the books for nearly three decades without causing any mischief in the law. The majority may be animated by a desire to avoid future problems or more expansive conceptions of equal protection, such as that expressed by the Second Circuit in *Blake*, but that appears to me to be an empty fear. We haven't extended *Tapia-Acuna*'s rationale to other situations, and any putative harm in the future could more easily be avoided by continuing to limit that precedent to its context.

The majority doesn't quarrel with the legal rule of *Tapia-Acuna*, that the Equal Protection Clause prohibits irrational disparities in treatment. It simply disagrees with the application of that long-settled rule to a statutory provision that was repealed a dozen years

ago. It disagrees that the disparate treatment our court previously concluded was irrational is, in fact, irrational. Reasonable minds may always disagree over the outcome of a close case, however, and our prior conclusion is consistent with the conclusions of every other circuit. I see no justification for saying now that all of those decisions were incorrect, especially when the vitality of section 212(c), a statute long since repealed, has already diminished to near insignificance. There is no pressing need to pay so little heed to the weight of precedent and correct what, at most, is simply a misapplication of an agreed upon rule.

The "rational basis" the majority identifies in support of discriminating against aliens who failed to temporarily leave the United States after committing an offense that might qualify them for removal or inadmissibility relies on a tenuous chain of inferences. The majority hypothesizes that Congress anticipated that some aliens might decide to travel across the border based on knowledge that, under the immigration statute, they could be eligible for discretionary relief if they left the country and returned, but would not be so eligible if they did not leave the country. The majority further speculates that, from the group of aliens who left the country for this reason, some might be successfully stopped at the border upon their return and denied reentry, thereby saving the government the expense of having to later remove them. Perhaps. But it is not an accident that the majority opinion finds it necessary to acknowledge, at 217, n.4, that it is not seeking to identify the actual rationale for the legislation. I doubt that anyone believes that the majority's tortured construct was in the mind of anybody on Capitol Hill. Justifications for overruling one of our court's longstanding precedents should be made of sterner stuff.

We might just as well say that Congress simply preferred to let the agency grant discretionary relief only to those aliens who love international travel. We must place some rational bounds on what survives rational basis review if the constitutional right of equal protection is to have any meaning whatsoever outside the context of suspect classifications.[2]

Not only does the majority overrule our precedent, it casts doubt on DHS's power to grant section 212(c) relief in deportation or removal proceedings. It concludes that "[u]nder its plain language, section 212(c) only gives the Attorney General discretion to grant lawful permanent residents relief from *inadmissibility*—not deportation." Majority Op. at 1205 (emphasis in original). In doing so, the majority holds that sixty-eight years of agency practice was contrary to the will of Congress and in violation of the plain language of the statute the agency is charged with interpreting, and that countless otherwise deportable or removable aliens have remained in this country due to the agency's error.

Later, when addressing the dissent, the majority says otherwise and contends that nothing in the opinion undermines the validity of 8 C.F.R. § 1212.3(f)(5). That regulation codifies DHS's approach, which we approved of in *Komarenko*, of limiting the availability of section

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[2] Perhaps the majority believes that equal protection should have force only in cases involving some form of invidious discrimination, and that all laws should survive rational basis review, but this case is a particularly poor vehicle to stake out that position given the growing irrelevance of section 212(c) and the need to break away from all of our sister circuits and reverse our own precedent to do so.

212(c) relief in removal proceedings to aliens charged with removal on a ground that has a substantially identical statutory counterpart in the INA's inadmissibility provisions (the "statutory counterpart rule"). 8 C.F.R. § 1212.3(f)(5); *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994). But if the statute itself does not authorize DHS to grant section 212(c) relief in any removal proceedings whatsoever, as the majority holds, where does authority to grant similar relief from inadmissibility come from?

It is not an answer to say that the government may choose to treat different classes or aliens the same. The statute in question is one that authorizes INS (now DHS) to grant *discretionary* waivers to persons in exclusion proceedings. If the agency had the authority to grant discretionary waivers to everyone, including persons in deportation proceedings, whether or not the statute provides such authority, then there would be no reason for the statute in the first place. The whole thrust of the majority's reasoning is that Congress, in adopting the relevant statute, could rationally distinguish between deportation and exclusion proceedings and could limit the ability of INS to grant discretionary waivers only to those in exclusion proceedings. Under the reasoning of the majority, the agency does not have the authority to grant such waivers to aliens in deportation proceedings, and if that's the case, 8 C.F.R. § 1212.3(f)(5) serves no purpose.

Finally, not only has every circuit to consider the question accepted *Tapia-Acuna*'s conclusion that section 212(c) relief is available in deportation and removal proceedings regardless of whether an alien has left the country, but every circuit to consider the question except the Second Circuit, *see Blake*, 489 F.3d at 104, has also followed *Komarenko* and upheld the constitutional-

ity of DHS's statutory counterpart rule. *See Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3rd Cir. 2007); *f v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007); *Gjonaj v. INS*, 47 F.3d 824, 827 (6th Cir. 1995) ("Numerous courts have held there must be a comparable ground of exclusion for an alien in deportation proceedings to be eligible for [section] 212(c) relief. We decline to change this well-established rule."); *Valere v. Gonzales*, 473 F.3d 757, 762 (7th Cir. 2007) (holding that if "the removable alien's crime of conviction is not substantially equivalent to a ground of inadmissibility … then the removable alien is not similarly situated for purposes of claiming an equal protection right to apply for § 212(c) relief"); *Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1459 (11th Cir. 1994); *see also Zamora-Mallari v. Mukasey*, 514 F.3d 679, 691-92 (7th Cir. 2008) (rejecting the reasoning of the Second Circuit's decision in *Blake*); *Vue v. Gonzales*, 496 F.3d 858, 860-62 (8th Cir. 2007) (same). In overruling *Tapia-Acuna* and discarding *Komarenko* as a dead letter, the majority creates a three-way circuit split between those circuits that follow *Komarenko*, those that follow *Tapia-Acuna* but not *Komarenko*, and our court. Because I can discern no good reason to abandon our sister circuits after they have faithfully accompanied us down this now well-worn path, I cannot join the majority opinion.

II.

Turning to the merits of Abebe's equal protection challenge, the dissent states that "[i]n cases such as this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the gov-

ernment chooses to use to deport the aliens." Dissent at 1217. I disagree.

The government sought to remove Abebe on two independent grounds: (1) his two convictions for committing crimes involving moral turpitude (CIMTs) and (2) his conviction for committing an aggravated felony. Abebe argues that his aggravated felony conviction could also qualify as a CIMT and that, if the government had sought to remove him solely for CIMTs, which can also render an alien eligible for exclusion, then he would have been eligible for discretionary relief under section 212(c). He contends that DHS's statutory counterpart rule violates his right to equal protection under the Due Process Clause because it denies him the benefit of section 212(c) relief simply because the government chose to remove him as an aggravated felon instead of an alien who had committed CIMTs. Abebe asks that the court impose a rule under which an immigration judge would be forced to determine whether, given a particular conviction, the government *could* have sought to remove an alien on a ground equivalent to a ground for inadmissibility.

Abebe cannot demonstrate that he has been irrationally subjected to discriminatory treatment, however, because he cannot show that he was in the same position as an alien who was charged with removal on a substantially similar ground to a ground for inadmissibility. Put simply, two aliens who have been charged with removal on different statutory grounds are not similarly situated. That the underlying facts are such that the government could have charged them with removal under similar statutory grounds is not enough. If that rule were adopted, it would create a host of problems in countless situations, predictable and unpredictable, where the government is vested with, and

exercises, discretion. To take the most obvious example, imagine the quotidian circumstance of a prosecutor faced with the decision of what charges to bring against an individual based on a given set of facts. Each charge will carry different consequences, but a defendant cannot contest the charges actually brought against him by arguing that the government could have charged him with a different offense under a different statutory provision.

Congress has vested the executive branch with discretion in whether, when, and how to charge an alien with removal. How it exercises that discretion will have a serious impact on the life of a removable alien, whether it means forcible removal from the country or the availability of section 212(c) relief. To hold that the exercise of that discretion is unconstitutional where it is not exercised in the most advantageous way possible for a given alien under the circumstances would open the door to a torrent of claims. An alien is no more entitled to section 212(c) relief when charged with a ground of removal that has no statutory counterpart under the INA's inadmissibility provisions than a defendant is entitled to a sentencing range consistent with the least serious crime with which he could have been charged.

This is not to say that the executive branch's exercise of discretion is without constitutional limits. We have permitted claims to proceed against prosecutors whose decisions were allegedly made on the basis of sex, race, or religion. *United States v. Redondo-Lemos*, 955 F.2d 1296, 1300 (9th Cir. 1992), *overruled on other grounds by United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (en banc), *rev'd*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Absent evidence of discrimination against a suspect class, however, there is

no judicial remedy for even arbitrary charging or plea bargaining decisions, even though "such an arbitrary exercise of power would be a Due Process violation." *Morris v. U.S. Dist. Court*, 363 F.3d 891, 896 (9th Cir. 2004) (citing *Redondo-Lemos*, 955 F.2d at 1300). This is because judicial inquiry "into prosecutors' decision-making processes would entangle [courts] 'in the core decisions of another branch of government,' " raising separation-of-powers concerns. *Id.*

In *Komarenko*, this court provided additional, pragmatic reasons for denying section 212(c) relief to an alien charged with deportation under a subsection of the former deportation statute that was not "substantially identical" to a subsection of the former exclusion statute. Like Abebe, the petitioner in *Komarenko* argued that his underlying conviction could have qualified as a CIMT, a statutory ground for exclusion, which would have made him eligible for section 212(c) relief. The court held that the two grounds were "entirely dissimilar" and that "the distinction between the two classes is not arbitrary or unreasonable." 35 F.3d at 435 (citing *Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) ("We cannot say that it is absurd that for purposes of discretionary deportation review Congress chooses to treat different crimes differently.")). We declined to engage in speculation over whether a particular alien "*could have been* excluded under the moral turpitude provision," and noted that adopting the petitioner's proposed approach "would extend discretionary review to every ground for deportation that could constitute the essential elements of a crime involving moral turpitude." *Id.* (emphasis in original) (internal quotation marks omitted). The court concluded that "[s]uch judicial legislating would vastly overstep our limited scope of judicial inquiry into immigration legis-

lation, and would interfere with the broad enforcement powers Congress has delegated to the Attorney General." *Id.* (internal citations and quotation marks omitted). This reasoning applies with equal force today and, as discussed above, six of the seven other circuits to face the question have reached the same result.

This is not a situation, as the dissent contends, where two lawful permanent residents are being treated differently because one chose to "step across the border for a day." Dissent at 1213. It is a situation where two individuals are being treated differently because the charges against them are materially different, and different charges bring different consequences. This simple fact is as true in immigration proceedings as it is in criminal law. We cannot look only to the underlying conduct; rather, the consequences that ultimately flow from an individual's actions depend heavily on the government's exercise of its charging discretion.

Here, *Abebe* had a number of prior convictions. The government could have chosen to seek removal based on (1) his convictions for CIMTs, (2) his aggravated felony conviction, or (3) both. It chose option three, aggressively seeking removal on every available ground. The court should not put immigration judges in the business of second-guessing such charging decisions. In light of how the government chose to charge Abebe with removal, he was not similarly situated to an alien charged with being inadmissible, or an alien charged with removal on a ground with a statutory counterpart in the INA's inadmissibility provisions, and his equal protection challenge fails.

I therefore concur in the judgment of the court.

THOMAS, Circuit Judge, with whom PREGERSON, Circuit Judge, joins, dissenting:

Distilled to its essence, this case involves the irrationality of affording privileges to lawful permanent residents who step across the border for a day, but denying the same privileges to those who do not. The majority not only blesses this unequal treatment, but goes much further, overruling more than 60 years of precedent, approving an unconstitutional statutory scheme not even the Board of Immigration Appeals endorses, and implicitly declaring unconstitutional a federal regulation.

I respectfully dissent.

I

First, some background. Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996 ("IIRIRA"), there were separate procedures and substantive rules relating to (1) the deportation of persons already present in the United States, and (2) the exclusion of persons seeking entry. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1122 (9th Cir. 2002). The INA defined deportable aliens in § 241, 8 U.S.C. § 1251 (transferred to § 237, 8 U.S.C. § 1227), and excludable aliens in § 212(a), 8 U.S.C. § 1182. The exclusion procedures did not only apply to those seeking entry into the United States in the first instance. If a non-citizen residing in the United States temporarily left the country, he could be excluded from re-entry. Lawful permanent residents ("LPRs") are, of course, noncitizens who have successfully satisfied statutory requirements and earned the favorable exercise of discretion by the government to be allowed to reside in the United States permanently. Although a permanent

resident, an LPR still could be deported if he committed a qualifying crime. If he left the country temporarily, he could also be excluded upon return if he had committed a qualifying offense. An LPR, as a noncitizen seeking entry, would generally be subject to the same proceedings and grounds of exclusion if he traveled abroad and returned to the United States. *See* INA §§ 101(a)(3) & (13), 66 Stat. 166, 167 (1952). Facing a large volume of cases in which a waiver of exclusion was sought in compassionate cases involving LPRs, Congress afforded certain qualifying LPRs the protection of subsection (c):

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a).

INA § 212(c), 66 Stat. 187.

By its terms, former INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996), applies only to persons in exclusion proceedings. The Board of Immigration Appeals ("BIA") first recognized a problem with making section 212(c) relief available to excludables but not deportables in 1940, in the context of section 212(c)'s precursor statute.[1] *See Matter of L*, 1 I. & N. Dec. 1 (1940).

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[1] Section 212(c) grew out of the Seventh Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874. *See Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

In *Matter of L*, the BIA held that relief under section 212(c)'s precursor was available in a deportation proceeding where the alien had departed and returned to the United States after the ground for exclusion/deportation arose. To hold otherwise, the BIA noted, would render the statute "capricious and whimsical." *Id.* at 5. The Second Circuit took this interpretation to its logical extension in *Francis*, 532 F.2d 268, holding that section 212(c) relief must be available to all persons in deportation proceedings who would be excludable on the same grounds, not just those who had actually left the country and reentered. Immediately following *Francis*, the BIA embraced the *Francis* analysis. *Matter of Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976).

When the question then reached our Court, the matter had been so clearly determined that when we initially affirmed, in an unpublished disposition, a denial of section 212(c) relief to an alien in a deportation proceeding, the Supreme Court granted certiorari and remanded the case to us for reconsideration in light of the Solicitor General's position in its brief before the Supreme Court. The Solicitor General's Brief on Petition for a Writ of Certiorari asserted "the government's current position that those precedents [which limit section 212(c) to exclusion proceedings] are erroneous and should be overruled." Brief for the Respondent at 6, *Tapia-Acuna v. INS*, 449 U.S. 945, 101 S.Ct. 344, 66 L.Ed.2d 209 (1980). The Solicitor General further stated that "[i]n the government's view, the Ninth Circuit's position is without support in either the statutory language of [section 212(c)] or the case law on which the court of appeals has relied." *Id.* at 6. On remand, we followed *Francis* and held that "eligibility for [§ 212(c)] relief cannot constitutionally be denied to an otherwise

eligible alien who is deportable under [§ 241(a)(11) (narcotics conviction)], whether or not the alien has departed from and returned to the United States after the conviction." *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

To this date, every court to consider the issue has determined that due process requires that section 212(c) must be applied to deportation proceedings as well as exclusion proceedings. *See Blake v. Carbone*, 489 F.3d 88, 103-04 (2d Cir. 2007) (discussing cases).

A

Our sister circuits are right. The Supreme Court has long held that the constitutional promise of equal protection of the laws applies to aliens as well as citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Under the minimal scrutiny test, which is applicable in this case, 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." *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975). As the Second Circuit recognized in *Francis*, "[r]eason and fairness would suggest that an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time." 532 F.2d at 273.

Throughout this litigation, the government has been unable to provide a rational basis for this unequal treatment. The majority attempts to conjure one, urging that the rational basis for making section 212(c) re-

lief available only to aliens in exclusion proceedings is to encourage "self-deportation" and thus save government resources. There is no record support for this rationale, and the majority's reasoning contains two fundamental flaws. First, there is no support for the contention that encouraging "self-deportation," as described by the majority, would actually further the interest of saving government resources. Second, the rational reason the majority prescribes to Congress presumes an interest which is actually in conflict with the statute itself. While the majority correctly notes that we do not have to look to the actual rationale for the legislation, in order to be rational, the reason must be consistent.

When an LPR leaves and attempts to reenter the country and is deemed excludable yet potentially eligible for a section 212(c) waiver, the LPR is generally allowed to enter and to apply for the waiver from within the country. If the alien is ultimately denied the waiver, the government must remove him. No fewer government resources are exerted than if the alien applied for a § 212(c) waiver during a deportation proceeding. Moreover, if the statute were to actually function as the majority presumes and encourage aliens to voluntarily place themselves in this position—a contention which I find dubious—this would increase the number of removal proceedings, which would, in turn, spend *more* government resources.[2] There is no sup-

[2] The majority responds that the government may "exclude those it believes are less likely to obtain relief." If we are going to assume that LPRs will be fully informed, in advance, about the differing availabilities of relief in deportation and exclusion proceedings and will make rational, calculated decisions about voluntarily leaving the country in order to initiate an exclusion proceed-

port in the record for the assertion that treating returning LPRs differently from those who remain would save government resources.

Second, implicit in the majority's argument that a rational Congress would want to encourage aliens who are excludable but eligible for section 212(c) waiver to place themselves in exclusion proceedings is the assumption that a rational Congress would want these persons to leave the country. This is inconsistent with the fact that, by creating section 212(c) waiver, Congress explicitly identified this group of aliens as desirable for reentry to the country, subject to the Attorney General's discretion. This is not a group of aliens who, if they are identified, will necessarily be removed from the country. Rather, this is a group of aliens whom Congress has deemed worthy to remain in the country, in spite of having been convicted of particular crimes.[3] This is the group that is being sorted based on whether or not they have recently departed and reentered the country. There is simply no logical reason to discriminate between persons whom Congress has deemed worthy—subject to the discretion of the Attorney General—of remaining in the country based on whether or

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ing, we should also assume these individuals will take into account the likelihood of obtaining relief. Those unlikely to obtain relief are equally unlikely to take the risk of leaving the country. The majority's speculation does nothing to undermine the point that there is no support for the notion that encouraging "self-deportation" will save government resources.

[3] At the risk of stating the obvious, making section 212(c) relief available only in exclusion proceedings would not encourage aliens to leave the country permanently, but would only encourage them—again, if at all—to leave and immediately reenter so as to take advantage of section 212(c) waiver.

not they have recently departed the country.[4] As low a threshold as the rational basis test is, this statutory scheme does not pass.

B

The majority's dismissal of the constitutional problem in the text of section 212(c) also implicitly casts considerable doubt on the constitutionality of a federal regulation. After the Supreme Court held that IIRIRA does not apply retroactively to deny section 212(c) relief to aliens who plead guilty to a charge which would otherwise make them eligible for a section 212(c) waiver prior to the enactment of IIRIRA, *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the Department of Homeland Security ("DHS") promulgated 8 C.F.R. § 1212.3 to codify the holding in *St. Cyr*. That regulation provides that, assuming an alien in a deportation proceeding meets other requirements, the alien is eligible for section 212(c) relief unless "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the

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[4] The majority responds that "it makes perfect sense to want [an LPR] to be outside our borders when" he learns that he will not receive relief. However, as discussed above, an LPR who is stopped at the border for being excludable but who is also eligible for § 212(c) relief will generally be admitted and continue the relief application from within the country. Thus, if he is ultimately denied relief, he will, in fact, be inside our borders when he gets "the bad news."

The majority, I respectfully suggest, quotes Judge Posner out of context. Judge Posner was addressing the rationale for allowing the option of voluntary departure, which occurs *after* a deportation proceeding has been initiated. *See LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998).

Act on a ground which does not have a statutory counterpart in section 212 of the Act." 8 C.F.R. § 1212.3(f)(5).[5] The regulation thus proceeds on the long-standing assumption, which the majority has now overruled in our Circuit, that section 212(c) is applicable to both deportation and exclusion proceedings.

By holding that the statutory language of section 212(c) is clear and that *Francis* and *Tapia-Acuna* did not "accord[ ] sufficient deference" to Congress, the majority has implicitly questioned DHS's authority to enact the above regulation. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the agency, must give effect to the unambiguously expressed intent of Congress."). Under the majority rule, the regulation that has been applied in thousands of cases cannot survive. Those who were eligible to apply for relief yesterday under the regulation are on very uncertain ground today.

C

There is, in sum, no reason to depart from our long-established precedent, developed over many decades in this Circuit and every other. The BIA has acted in reliance on it, and the government has exercised its discretion based on this precedent to grant relief to thousands of individuals. There is no justification for casting the system aside now and throwing thousands of pending applications for section 212(c) relief into ques-

[5] The BIA relied on this regulation in affirming the denial of section 212(c) relief to Abebe.

tion, particularly when it is unnecessary to the resolution of this petition to do so.

II

Applying the constitutional analysis discussed in Part I to the present case, I would hold that Abebe is eligible for section 212(c) relief because the specific offense which makes him deportable would also make him excludable. Equal protection demands that we treat equally aliens similarly situated. In cases such as this, it is the act or offense itself that makes one alien similarly situated to another, not the grounds the government chooses to use to deport the aliens. To clarify our caselaw and to bring it into proper constitutional alignment, I would overrule *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994) (applying a comparable grounds test), and follow the lead of the Second Circuit's well-articulated opinion in *Blake*, 489 F.3d 88 (applying an offense-specific test).

As Judge Berzon explained in her thoughtful concurrence to the panel opinion in this case, the comparable ground approach adopted in *Komarenko* is irreconcilable with the equal protection analysis discussed in Part I, *supra*, and in *Tapia-Acuna*. Indeed, the comparable ground approach creates new problems. Just as the distinction between deportable aliens who are alike except that one temporarily left the country while the other did not is arbitrary, the comparable grounds test turns on equally arbitrary grounds.

Consider Alien A, who commits assault with a deadly weapon. He is deportable because his offense falls into the category "aggravated felonies." He is also excludable because that same offense falls into the category "crimes involving moral turpitude." In an ex-

clusion proceeding, his offense, as a "crime of moral turpitude," would make Alien A eligible for a § 212(c) waiver. If he ends up in deportation proceedings, however, he is not eligible for § 212(c) relief, under the comparable grounds test, because the category "aggravated felonies" is sufficiently different from the category of "crimes involving moral turpitude." Alien B, on the other hand, who commits a drug offense is also both deportable and excludable, but is eligible for § 212(c) relief in a deportation proceeding simply because drug offenses were described with similar words in the deportation and exclusion statutes.

This type of classification between aliens who are otherwise similarly situated violates equal protection unless it is rationally related to a legitimate government interest. *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 603 (9th Cir. 2002). Congress is surely informed by important policy considerations when making determinations about which *offenses* make an alien deportable or excludable. Decisions about the size, scope, and overlap of *categories* of deportable and excludable offenses have no rational relation to judgments about which aliens should be permitted to remain in our country and which should not.

As Judge Berzon pointed out, there is one additional inconsistency between the comparable grounds test and the way that section 212(c) relief functions as a practical matter. Once an alien receives a waiver of excludability under either section 212(c) or other waiver provisions, the alien cannot be deported or excluded in the future solely due to the offense on which he received the waiver. This is true even if there is a category of deportable crimes that applies to his offense which is different from the category that permitted the waiver. *See, e.g.*, *Matter of Balderas*, 20 I. & N. Dec.

389, 392 (BIA 1991). In other words, section 212(c) relief is itself offense-specific, not ground-specific.

III

Additionally, I respectfully dissent from the majority's holding that Abebe did not exhaust his claim for withholding of removal. Abebe raised this claim in his notice of appeal before the BIA. The purpose of the administrative exhaustion requirement is so that the "administrative agency [may] have a full opportunity to resolve a controversy or correct its own errors before judicial intervention." *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985). When a petitioner raises an issue in his notice of appeal, the BIA has a "full opportunity to resolve [the] controversy," particularly in light of the fact that the petitioner is not required to file an accompanying brief. *See* 8 C.F.R. § 3.38(f) (1999) ("Briefs *may* be filed by both parties...." (emphasis added)). *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000), was correctly decided. I would hold that Abebe exhausted his claim for withholding of removal and would thus remand to the BIA for consideration of the claim in the first instance.

IV

For all of these reasons, I would find Abebe eligible for section 212(c) relief. To classify aliens based on the happenstance of whether they have recently departed the country and reentered furthers no logical government interest. Similarly, to classify aliens in deportation proceedings whose deportable offense is also a ground for exclusion based on the agency-created category into which the offense happens to fall serves no legitimate government interest. I would hold, following the Second Circuit in *Blake*, 489 F.3d 88, that an alien

in a deportation proceeding is eligible for section 212(c) relief if the offense which makes him deportable would also render him excludable. Applying section 212(c) relief to deportation proceedings using an offense-based analysis is the only constitutional interpretation of the statute. In addition, I would hold that Abebe exhausted his claim for withholding of removal and allow him to pursue that claim on remand. *Tapia-Acuna*, 640 F.2d 223, and *Ladha*, 215 F.3d 889, were rightly decided. *Komarenko*, 35 F.3d 432, should be overruled.

Like the Second Circuit in *Blake*, 489 F.3d at 91, I find Judge Learned Hand's caution particularly apt here: "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947). There is no rational basis for treating a lawful permanent resident who steps across the border for a day better than one who does not.

For these reasons, I respectfully dissent.

APPENDIX Q

REPRESENTATIVE CASES ADDRESSING SECTION 212(C) ELIGIBILITY IN LIGHT OF *MATTER OF BLAKE*

FIRST CIRCUIT

Gonzalez-Mesias v. *Mukasey*, 529 F.3d 62 (1st Cir. 2008)

Dalombo Fontes v. *Gonzales*, 483 F.3d 115 (1st Cir. 2008)

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006)

Matter of Sanchez, 2008 WL 3919110 (BIA July 29, 2008)

Matter of Hercules, 2008 WL 3919079 (BIA July 23, 2008)

Matter of Jacques, 2007 WL 2463895 (BIA July 25, 2007), *pet. for review denied*, No. 09-1033 (1st Cir. Dec. 1, 2009)

Matter of Pimentel, 2006 WL 2803375 (BIA July 26, 2006)

SECOND CIRCUIT

Mignano v. *Holder*, 2010 WL 4187933 (2d Cir. Oct. 25, 2010)

Webster v. *Mukasey*, 259 F. App'x 375 (2d Cir. 2008)

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007)

Matter of Mejicanos-Estrada, 2008 WL 2517578 (BIA June 6, 2008), *remanded*, No. 06-2157 (2d Cir. Feb. 13, 2008)

Matter of Vargas-Gonzalez, 2008 WL 655900 (BIA Feb. 11, 2008)

Matter of Penalo-Almonte, 2007 WL 2463986 (BIA July 31, 2007), *aff'd*, No. 05-5218 (2d Cir. Feb. 8, 2007)

Matter of Shakeri, 2006 WL 901562 (BIA Mar. 10, 2006), *remanded*, No. 06-1625 (2d Cir. Oct. 22, 2007)

Matter of Bo Feng, 2006 WL 901498 (BIA Mar. 9, 2006)

Matter of Donaldson, 2005 WL 3802267 (BIA Nov. 28, 2005)

THIRD CIRCUIT

Bumbury v. *Attorney General*, 375 F. App'x 214 (3d Cir. 2010)

Francois v. *Mukasey*, 264 F. App'x 211 (3d Cir. 2008)

Sudol v. *Mukasey*, 300 F. App'x 157 (3d Cir. 2008)

Caroleo v. *Gonzales*, 476 F.3d 158 (3d Cir. 2007)

Birkett v. *Mukasey*, 252 F. App'x 516 (3d Cir. 2007)

Calderon-Minchola v. *Mukasey*, 258 F. App'x 425 (3d Cir. 2007)

Matter of Evelyn, 2007 WL 4711417 (BIA Dec. 21, 2007)

Matter of Colato, 2006 WL 448280 (BIA Jan. 25, 2006)

Matter of Singh, 2006 WL 448165 (BIA Jan. 18, 2006)

Matter of Martinez-Madrid, 2005 WL 1111829 (BIA Apr. 20, 2005)

FIFTH CIRCUIT

Rodriguez v. *Holder*, 2010 WL 4116810 (5th Cir. Oct. 19, 2010)

Castaneda-Sanchez v. *Holder*, 2010 WL 3824240 (5th Cir. Sept. 23, 2010)

Matter of Rodriguez Soto, 2010 WL 4035435 (BIA Sept. 16, 2010)

Matter of Valette, 2010 WL 3536705 (BIA Aug. 24, 2010)

Matter of Quinones, 2010 WL 3157442 (BIA July 27, 2010)

Matter of Umer, 2010 WL 1606998 (BIA Mar. 31, 2010)

Leon-Medina v. *Holder*, 2009 WL 3489616 (5th Cir. Oct. 29, 2009)

Popoca v. *Holder*, 320 F. App'x 252 (5th Cir. 2009)

Cantu v. *Mukasey*, 267 F. App'x 321 (5th Cir. 2008)

Ruiz v. *Mukasey*, 296 F. App'x 429 (5th Cir. 2008)

Felix v. *Mukasey*, 290 F. App'x 764 (5th Cir. 2008)

Firoozfar v. *Mukasey*, 292 F. App'x 371 (5th Cir. 2008)

Garza-Garcia v. *Mukasey*, 293 F. App'x 282 (5th Cir. 2008)

Melgar v. *Mukasey*, 294 F. App'x 174 (5th Cir. 2008)

Pham v. *Mukasey*, 297 F. App'x 335 (5th Cir. 2008)

Cruz-Marquina v. *Mukasey*, 303 F. App'x 243 (5th Cir. 2008)

Vo v. *Gonzales*, 482 F.3d 363 (5th Cir. 2007)

Avilez-Granados v. *Gonzales*, 481 F.3d 869 (5th Cir. 2007)

Brieva-Perez v. *Gonzales*, 482 F.3d 356 (5th Cir. 2007)

De la Paz Sanchez v. *Gonzales*, 473 F.3d 133 (5th Cir. 2006)

Matter of Villarreal-Perez, 2009 WL 1800073 (BIA June 5, 2009)

Matter of Bright, 2008 WL 5537804 (BIA Dec. 23, 2008)

Matter of Lozano-Torres, 2008 WL 5181736 (BIA Nov. 21, 2008)

Matter of Trevino-Hernandez, 2008 WL 5181797 (BIA Nov. 14, 2008)

Matter of Ramcharran, 2008 WL 4420107 (BIA Sept. 23, 2008)

Matter of Reyes-Huereca, 2008 WL 486877 (BIA Jan. 29, 2008)

Matter of Huynh, 2007 WL 4182297 (BIA Oct. 16, 2007)

Matter of Franco, 2007 WL 2074494 (BIA June 11, 2007)

Matter of Gardea-Perez, 2007 WL 275815 (BIA Jan. 18, 2007)

Matter of Castillo-Salinas, 2006 WL 3485843 (BIA Oct. 12, 2006)

Matter of Dominguez-Vega, 2006 WL 3088960 (BIA Sept. 8, 2006)

SIXTH CIRCUIT

Ikharo v. *Holder*, 614 F.3d 622 (6th Cir. 2010)

Matter of Heer, 2010 WL 1284439 (BIA Mar. 12, 2010)

Koussan v. *Holder*, 556 F.3d 403 (6th Cir. 2009)

Thap v. *Mukasey*, 544 F.3d 674 (6th Cir. 2008)

United States v. *Valencia-Perez*, 2005 WL 2436453 (W.D. Mich. Oct. 3, 2005)

Matter of Erb, 2007 WL 4699927 (BIA Dec. 11, 2007), *pet. for review denied*, 318 F. App'x 392 (6th Cir. 2009)

Matter of Cisneros-Garcia, 2006 WL 3712434 (BIA Nov. 28, 2006)

SEVENTH CIRCUIT

Mancillas-Ruiz v. *Holder*, 2010 WL 3156544 (7th Cir. Aug. 11, 2010)

De Leon v. *Holder*, 2009 WL 1811219 (7th Cir. June 25, 2009)

Zamora-Mallari v. *Mukasey*, 514 F.3d 679 (7th Cir. 2008)

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007)

Ryan v. *Gonzales*, 222 F. App'x 528 (7th Cir. 2007)

Matter of Baptiste, 2007 WL 4707376 (BIA Dec. 14, 2007), *pet. for review dismissed*, No. 08-1083 (7th Cir. Mar. 10, 2008)

Matter of Ghonim, 2007 WL 1794209 (BIA May 30, 2007)

Matter of Dominguez-Arizmendi, 2007 WL 1724850 (BIA May 22, 2007)

Matter of Arellano-Vasquez, 2006 WL 2008248 (BIA May 24, 2006)

EIGHTH CIRCUIT

Soriano v. *Gonzales*, 489 F.3d 909 (8th Cir. 2007)

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007)

Matter of Gonzales-Aguilar, 2007 WL 1676901 (BIA May 17, 2007)

NINTH CIRCUIT

Aguilar-Ramos v. *Holder*, 594 F.3d 701 (9th Cir. 2010)

Parada-Chicas v. *Holder*, 2010 WL 4561365 (9th Cir. Nov. 10, 2010)

United States v. *Cardoza-Fuentes*, 2010 WL 4386801 (9th Cir. Nov. 5, 2010)

Pedro v. *Holder*, 2010 WL 4366394 (9th Cir. Nov. 2, 2010)

Navarro v. *Holder*, 2010 WL 4366387 (9th Cir. Oct. 19, 2010)

Mondragon v. *Holder*, 2010 WL 3796422 (9th Cir. Sept. 29, 2010)

Romero-Aguilar v. *Holder*, 2010 WL 3825644 (9th Cir. Sept. 29, 2010)

Cather v. *Holder*, 2010 WL 3825452 (9th Cir. Sept. 27, 2010)

Del Villar v. *Holder*, 2010 WL 3825458 (9th Cir. Sept. 27, 2010)

De Avila-Barbosa v. *Holder*, 2010 WL 3825451 (9th Cir. Sept. 24, 2010)

Toledo v. *Holder*, 2010 WL 3825436 (9th Cir. Sept. 24, 2010)

Briseno-Gutierrez v. *Holder*, 2010 WL 3736094 (9th Cir. Sept. 23, 2010)

Grageola-Berumen v. *Holder*, 2009 WL 3818015 (9th Cir. Sept. 13, 2010)

Reyes-Perez v. *Holder*, 2010 WL 3825461 (9th Cir. Sept. 13, 2010)

Garcia-De la Rosa v. *Holder*, 2010 WL 3516417 (9th Cir. Sept. 7, 2010)

Flores-Pelayo v. *Holder*, 2010 WL 3469223 (9th Cir. Sept. 3, 2010)

Camarillo v. *Holder*, 2010 WL 3448577 (9th Cir. Aug. 31, 2010)

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