No. 10-694

IN THE

Supreme Court of the United States

JOEL JUDULANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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, and who did not depart and reenter the United States between the conviction and the commencement of removal proceedings, is categorically foreclosed from seeking discretionary relief from removal under former Section 212(c) of the Immigration and Nationality Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 2

STATEMENT 2

A. The Agency Grants Discretionary Relief From Deportation Before Section 212(c) 4

B. Congress Enacts Section 212(c) Without Changing The Agency's Practice 6

C. The Agency Grants Section 212(c) Relief To LPRs Who Have *Not* Traveled Abroad, Provided They Are Deportable For A Conviction That Would Also Render Them Excludable 11

D. Congress Expressly Recognizes The Availability Of Section 212(c) Relief From Deportation 14

E. The BIA Recognizes That LPRs Deportable For "Aggravated Felony" Convictions, Including "Crimes Of Violence," Are Eligible For Relief 17

F. Agency Regulations "Codify" *St. Cyr*, Leaving Section 212(c) Eligibility Unchanged For LPRs Who Pled Guilty Before 1996 20

TABLE OF CONTENTS—Continued

Page

G. The BIA Retroactively Changes The Law 22

H. Proceedings Below 24

SUMMARY OF ARGUMENT 26

ARGUMENT 28

I. SECTION 212(C) RELIEF IS AVAILABLE IN DEPORTATION PROCEEDINGS 28

II. THE BIA'S NEW POLICY ANNOUNCED IN *BLAKE* AND *BRIEVA-PEREZ* IS ARBITRARY AND CAPRICIOUS 31

A. The BIA's Change In Law Was Impermissibly Retroactive 31

1. The BIA's *Blake* and *Brieva-Perez* decisions retroactively changed the law 32

2. There was no adequate reason for the BIA's retroactive change in law 38

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits 44

C. The BIA's Distinction Based On Travel History Raises Serious Equal Protection Concerns 51

D. At A Minimum, The BIA Failed To Consider The Appropriate Factors Under The APA 53

CONCLUSION 55

TABLE OF CONTENTS—Continued

Page

APPENDIX

8 U.S.C.
§1101 ..... 1a
§1182 ..... 5a
§1182(c) (1988) 9a
§1182(c) (1994) 10a
§1182(c) (Apr. 24, 1996) 10a
§1227 ..... 11a

8 C.F.R.
§212.3 (1992) 14a
§1212.3 ..... 17a

Department of Homeland Security U.S. Citizenship and Immigration Services Form 1-191, Application for Advance Permission to Return to Unrelinquished Domicile (excerpts) 22a

Department of Homeland Security U.S. Citizenship and Immigration Services Instructions for Form 1-191, Application for Advance Permission to Return to Unrelinquished Domicile (excerpts) 24a

TABLE OF AUTHORITIES

CASES

Page(s)

Abebe v. *Mukasey*, 554 F.3d 1203, *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) ..... *passim*

Ablang v. *Reno*, 52 F.3d 801 (9th Cir. 1995) 52

ARA Services, Inc. v. *NLRB*, 71 F.3d 129 (4th Cir. 1995) 40

Arias-Uribe v. *INS*, 466 F.2d 1198 (9th Cir. 1972) 12

Azizi v. *Thornburgh*, 908 F.2d 1130 (2d Cir. 1990) 52

Blake v. *Carbone*, 489 F.3d 88 (2d Cir. 2007) 24

Boeing Co. v. *United States*, 537 U.S. 437 (2003) 31

Bowen v. *Georgetown University Hospital*, 488 U.S. 204 (1988) 40, 54

Breyer v. *Meissner*, 214 F.3d 416 (3d Cir. 2000) 52

Cabasug v. *INS*, 847 F.2d 1321 (9th Cir. 1988) 11, 22, 36, 52

Campos v. *INS*, 961 F.2d 309 (1st Cir. 1992) 14

Carachuri-Rosendo v. *Holder*, 130 S. Ct. 2577 (2010) 43, 47

Cato v. *INS*, 84 F.3d 597 (2d Cir. 1996) 14

Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 44

Clark v. *Martinez*, 543 U.S. 371 (2005) 51

TABLE OF AUTHORITIES—Continued

Page(s)

De Araujo v. *Gonzales*, 457 F.3d 146 (1st Cir. 2006) 18

De la Rosa v. *United States Attorney General*, 579 F.3d 1327 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) 23, 41

Drax v. *Reno*, 338 F.3d 98 (2d Cir. 2003) 14

Edelman v. *Lynchburg College*, 535 U.S. 106 (2002) 31

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 53

Farquharson v. *United States Attorney General*, 246 F.3d 1317 (11th Cir. 2001) 14

Fiallo v. *Bell*, 430 U.S. 787 (1977) 52

Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976) ..... *passim*

Gjonaj v. *INS*, 47 F.3d 824 (6th Cir. 1995) 14

Heckler v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984) 38

Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 18

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

J.L. Foti Construction Co. v. *OSHA Review Commission*, 687 F.2d 853 (6th Cir. 1987) 40

James v. *Strange*, 407 U.S. 128 (1972) 52

Johnson v. *Whitehead*, 2011 WL 1998333 (4th Cir. May 24, 2011) 52

Judulang v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Kim v. *Gonzales*, 468 F.3d 58 (1st Cir. 2006).....50

Komarenko v. *INS*, 35 F.3d 432 (9th Cir. 1994).....14

Laborers' International Union v. *Foster Wheeler Corp.*, 26 F.3d 375 (3d Cir. 1994).....40

Landgraf v. *USI Film Products*, 511 U.S. 244, 270 (1994).....17, 38

Leal-Rodriguez v. *INS*, 990 F.2d 939 (7th Cir. 1993).....14

Lehman v. *Burnley*, 866 F.2d 33 (2d Cir. 1989).....40

Lorillard v. *Pons*, 434 U.S. 575 (1978).....29

Mathews v. *Diaz*, 426 U.S. 67 (1976).....52

Matter of A-, 3 I. & N. Dec. 168 (BIA 1948).....6

Matter of A-A-, 20 I. & N. Dec. 492 (BIA 1992).....10, 18, 32

Matter of Arias-Uribe, 13 I. & N. Dec. 696 (BIA 1971).....11

Matter of Ashley, 2003 WL 23521830 (BIA Nov. 4, 2003).....19

Matter of Balderas, 20 I. & N. Dec. 389 (BIA 1991).....10, 47, 49

Matter of Banuelos-Delena, 2006 WL 901335 (BIA Mar. 2, 2006).....23

Matter of Blake, 23 I. & N. Dec. 722 (2005).....*passim*

Matter of Brieva-Perez, 23 I. & N. Dec. 766 (2005).....*passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Burbano, 20 I. & N. Dec. 872 (BIA 1994) 19

Matter of Cardona, 2005 WL 3709244 (BIA Dec. 27, 2005) 23, 32, 38, 53

Matter of Caro-Lozano, 2004 WL 1398661 (BIA Apr. 22, 2004) 18

Matter of Dimopoulos, 2011 WL 2261207 (BIA May 17, 2011) 54

Matter of Edwards, 10 I. & N. Dec. 506 (BIA 1963) 7

Matter of Esposito, 21 I. & N. Dec. 1 (BIA 1995) 14, 36, 37

Matter of F-, 6 I. & N. Dec. 537 (BIA 1955) 7

Matter of G-A-, 7 I. & N. Dec. 274 (BIA 1956) ..... *passim*

Matter of Gomez-Perez, 2006 WL 901334 (BIA Mar. 1, 2006) 23

Matter of Granados, 16 I. & N. Dec. 726 (BIA 1979) 13, 14, 22, 36

Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (Att'y Gen. 1991) 13, 14, 22, 33, 36

Matter of Hussein, 2004 WL 1059601 (BIA Mar. 15, 2004) 18, 19

Matter of Jimenez-Santillano, 21 I. & N. Dec. 567 (BIA 1996) 13, 34

Matter of K-, 9 I. & N. Dec. 585 (BIA 1962) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of L-, 1 I. & N. Dec. 1 (Att'y Gen. 1940) ..... *passim*

Matter of L-, 3 I. & N. Dec. 767 (BIA 1949) 6

Matter of Loney, 2004 WL 1167256 (BIA Feb. 10, 2004) 18

Matter of M-, 5 I. & N. Dec. 598 (BIA 1954) 7

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 44

Matter of Martinez, 2004 WL 1167082 (BIA Feb. 18, 2004) 18

Matter of Mascorro-Perales, 12 I. & N. Dec. 228 (BIA 1967) 8, 35, 49

Matter of Meza, 20 I. & N. Dec. 257 (BIA 1991) ..... *passim*

Matter of Montenegro, 20 I. & N. Dec. 603 (BIA 1992) 14, 19

Matter of Munoz, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) 18, 34

Matter of Orrosquieta, 2003 WL 23508672 (BIA Dec. 19, 2003) 18

Matter of Rangel-Zuazo, No. A90-640-428 (BIA May 25, 2005) 23

Matter of Reyes Manzueta, 2003 WL 23269892 (BIA Dec. 1, 2003) 18

Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (BIA 1992) 18, 32

TABLE OF AUTHORITIES—Continued

Page(s)

Matter of Rodriguez-Symonds, 2004 WL 880246 (BIA Mar. 9, 2004) 19

Matter of Rowe, No. 37-749-964 (BIA May 9, 2003) 19

Matter of S-, 6 I. & N. Dec. 392 (BIA 1954) 7, 29

Matter of S-Lei, No. A38-139-424 (BIA May 27, 2004) 18

Matter of Silva, 16 I. & N. Dec. 26 (BIA 1976) ..... *passim*

Matter of Smith, 11 I. & N. Dec. 325 (BIA 1965) 9

Matter of Tanori, 15 I. & N. Dec. 566 (BIA 1976) 7

Matter of Umer, 2010 WL 1606998 (BIA Mar. 31, 2010) 23

Matter of V-, 2 I. & N. Dec. 340 (BIA 1945) 6

Matter of V-I-, 3 I. & N. Dec. 571 (BIA 1949) 6

Matter of Wadud, 19 I. & N. Dec. 182 (BIA 1984) 14

Mayo Foundation for Medical Education & Research v. *United States*, 131 S. Ct. 704 (2011) 44

Microcomputer Technology Institute v. *Riley*, 139 F.3d 1044 (5th Cir. 1998) 40

Microsoft Corp. v. *i4i Ltd. Partnership*, 131 S. Ct. 2238 (2011) 31

Miguel-Miguel v. *Gonzales*, 500 F.3d 941 (9th Cir. 2007) 40

TABLE OF AUTHORITIES—Continued

Page(s)

Motor Vehicle Manufacturers Ass'n of United States, Inc. v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) 51, 55

Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 42

NLRB v. *Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974) 29, 39

NLRB v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) 39, 41

NLRB v. *Wayne Transportation*, 776 F.2d 745 (7th Cir. 1985) 40

Padilla v. *Kentucky*, 130 S. Ct. 1473 (2010) 42

Paulo v. *Holder*, 2011 WL 1663572 (9th Cir. May 4, 2011) 33

Qwest Services Corp. v. *FCC*, 509 F.3d 531 (D.C. Cir. 2007) 44

Retail, Wholesale & Department Store Union v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972) 40

Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 52

Ryan Heating Co. v. *NLRB*, 942 F.2d 1287 (8th Cir. 1991) 40

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 25

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 27, 39, 55

Society for Propagation of the Gospel v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) 38

Stewart Capital Corp. v. *Andrus*, 701 F.2d 846 (10th Cir. 1983) 40

TABLE OF AUTHORITIES—Continued

Page(s)

Toia v. *Fasano*, 334 F.3d 917 (9th Cir. 2003).....25

United States v. *Mead Corp.*, 533 U.S. 218 (2001).....44

United States v. *Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004).....19

United States v. *Rutherford*, 442 U.S. 544 (1979).....31

United States v. *Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004).....18

Valere v. *Gonzales*, 473 F.3d 757 (7th Cir. 2007).....33

Vue v. *Gonzales*, 496 F.3d 858 (8th Cir. 2007).....33

Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001).....45

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886).....52

DOCKETED CASES

Paulo v. *Holder*, No. 07-71198 (9th Cir.).....32

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS

U.S. Const.
amend. V.....2
amend. XIV.....2

Administrative Procedure Act, 5 U.S.C. §706(2)(A).....44, 51

TABLE OF AUTHORITIES—Continued

Page(s)

Immigration and Nationality Act, 8 U.S.C.
§1101(a)(43) 37
§1101(a)(43)(A) 19
§1101(a)(43)(F) 17, 46
§1182(a) 4
§1182(a)(2)(A) 45
§1182(a)(2)(A)(i)(I) 13
§1182(a)(2)(C) 46
§1182(c) (1952) 6
§1182(c) (1994) 30
§1182(c) (Apr. 24, 1996) 30
§1227(a) 4
§1227(a)(2)(A)(iii) 15, 17, 34, 37
§1252b(e) (1991) 30
§1252b(e)(5) (1991) 14
§1432(a) (1988) 43

18 U.S.C. §16 ..... 17, 46

28 U.S.C. §1254(1) 2

Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 4

Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 ..... 6, 46

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 15

Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ..... 14, 15, 17

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TABLE OF AUTHORITIES—Continued

Page(s)

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8 C.F.R.
§212.3 9
§212.3(a) 10, 50
§212.3(d) 50
§212.3(e) 50
§212.3(e)(1) 10
§1212.3 29
§1212.3(a) 9, 10, 34, 50
§1212.3(b) 9
§1212.3(d) 10, 47, 50
§1212.3(e) 10, 34, 50
§1212.3(e)(1) 10
§1212.3(f)(4)(ii) 25
§1212.3(f)(5) 22, 54

23 Fed. Reg. 140 (Jan. 8, 1958) 9

30 Fed. Reg. 14,525 (Nov. 20, 1965) 9

56 Fed. Reg. 50,033 (Oct. 3, 1991) 14, 30

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LEGISLATIVE MATERIALS

136 Cong. Rec.
S6586 (May 18, 1990) 15
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TABLE OF AUTHORITIES—Continued

Page(s)

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OPINIONS BELOW

The court of appeals' decision is unpublished but available at 249 F. App'x 499. Pet. App. 1a-4a. The order denying rehearing and rehearing en banc is unreported. *Id.* 21a.

The decision of the Immigration Judge is unreported. Pet. App. 11a-20a. The decision of the Board of Immigration Appeals is unreported but available at 2006 WL 557842. Pet. App. 5a-9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). The court of appeals' judgment was entered on September 17, 2007. Pet. App. 1a. Rehearing was denied on August 26, 2010. *Id.* 21a. The petition for certiorari was filed on November 24, 2010, and granted on April 18, 2011.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

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 Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State … deny to any person within its jurisdiction the equal protection of the laws."

3. Section 212(c) of the Immigration and Nationality Act (INA) and other pertinent statutory and regulatory provisions are set forth in the appendix hereto. App. 1a-21a.

STATEMENT

For nearly a century, the immigration law has allowed the Attorney General to admit longstanding resident aliens to the United States notwithstanding convictions that would otherwise render them excludable. And for over 70 years, the Executive's implementation of those provisions has recognized that relief is available not only to those seeking admission to the country, but also to those seeking to avoid deportation. The availability of this relief from deportation—found

most recently in former INA Section 212(c)—is confirmed in decisions of the Attorney General and the Board of Immigration Appeals, agency regulations, and subsequent acts of Congress.

As this Court ruled in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the availability of Section 212(c) relief from deportation has been critical to lawful permanent residents (LPRs) accused of crimes and considering guilty pleas because it often represents their best or only chance to remain in their longstanding homes. Accordingly, after Congress repealed Section 212(c) in 1996, this Court held that application of that repeal to those who pled guilty under the previous regime would create a severe retroactive effect. Absent evidence that Congress clearly intended such a disfavored measure, this Court held that Section 212(c) remained available to such LPRs.

Nevertheless, the BIA decided shortly thereafter to impose a similarly severe retroactive effect itself. As explained below, the BIA's decisions in *Matter of Blake*, 23 I. & N. Dec. 722 (2005), and *Matter of Brieva-Perez*, 23 I. & N. Dec. 766 (2005), adopted a novel, broad restriction on Section 212(c)'s availability in deportation proceedings, departing from established agency practices and regulations and rendering newly ineligible a broad class of LPRs who pled guilty prior to repeal. The BIA offered no justification for its new position and did not account for the reliance interests undermined by the retroactive effect it created. In fact, it did not even admit at the time that it had changed its policy, although it has since acknowledged that it did.

The new policy announced in *Blake* and *Brieva-Perez* cannot pass muster. It is impermissibly retroactive; it is arbitrary and capricious; it at least raises se-

rious constitutional questions (and, indeed, is unconstitutional); and it was unaccompanied by sufficient explanation. It should be reversed.

A. The Agency Grants Discretionary Relief From Deportation Before Section 212(c)

Section 3 of the Immigration Act of 1917, which excluded several classes of aliens from admission to the United States, contained the following "Seventh Proviso":

> [A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.

Pub. L. No. 64-301, §3, 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 deportation arose." *St. Cyr*, 533 U.S. at 294 (emphasis added).[1]

In 1940, then-Attorney General Robert H. Jackson extended Seventh Proviso relief to a deportable LPR in the first published immigration decision, *Matter of L-*, 1 I. & N. Dec. 1 (Att'y Gen. 1940). L- was a permanent resident who, in 1924, was convicted of larceny, a

[1] In 1996, Congress replaced deportation and exclusion proceedings with a single "removal" proceeding, but the statutory distinction between admissibility, 8 U.S.C. §1182(a), and deportability, *id.* §1227(a), remains.

"crime involving moral turpitude" (CIMT) that rendered him excludable. He later traveled to Yugoslavia and was readmitted without incident; months afterward, he was placed in deportation proceedings. *Id.* at 4.

L- applied for Seventh Proviso relief from deportation. Attorney General Jackson recognized that "[t]he seventh proviso … appears in … the exclusionary section of the act of 1917. In terms, it applies only to exclusion cases. No corresponding proviso appears in … the deportation section." *L-*, 1 I. & N. Dec. at 5. But the Attorney General questioned "whether respondent is in a worse position because he was admitted without challenge in 1939, so that his appeal to discretion must be presented in deportation rather than in exclusion proceedings." *Id.* He continued:

> I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion. Granted that respondent's departure in 1939 exposed him on return to the peril of a fresh judgment as to whether he should be permitted to reside in the United States, such judgment ought not to depend upon the technical form of the proceedings. No policy of Congress could possibly be served by such irrational result. … [Respondent] should be permitted to make the same appeal to discretion that he could have made if denied admission in 1939, or that he could make in some future application for admission if he now left the country. To require him to go to Canada and reenter will make him no better resident of this country.

Id. at 5-6. Attorney General Jackson thus concluded that a "later, corrective exercise of the authority" to grant relief was proper and that "[s]uch action, *nunc pro tunc*, amounts to little more than a correction of a record of entry, which is a frequent and indispensable practice." *Id.* at 6.

Seventh Proviso relief was subsequently granted to other LPRs in deportation proceedings. *See, e.g.*, *Matter of L-*, 3 I. & N. Dec. 767, 768-769 (BIA 1949); *Matter of V-I-*, 3 I. & N. Dec. 571, 571-573 (BIA 1949); *Matter of A-*, 3 I. & N. Dec. 168, 172 (BIA 1948); *Matter of V-*, 2 I. & N. Dec. 340, 345 (BIA 1945).

B. Congress Enacts Section 212(c) Without Changing The Agency's Practice

In 1952, Congress enacted the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163. INA Section 212, relating to exclusion, contained a discretionary relief provision that tracked the Seventh Proviso:

> 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[.]

INA §212(c), 66 Stat. at 187, codified at 8 U.S.C. §1182(c).

Section 212(c), like the Seventh Proviso, referred only to LPRs seeking to be "admitted" and not to LPRs in deportation proceedings. But as the BIA soon recognized, Congress had conducted a "comprehensive study" of the Seventh Proviso before enacting Section

212, and "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, 394-396 (BIA 1954); *see also* S. Rep. No. 81-1515, at 383 (1950) (reflecting awareness of *L-*). Indeed, although the Senate committee crafting Section 212(c) made several recommendations designed to limit relief, all of which were adopted, the committee never recommended limiting relief to exclusion proceedings. S. Rep. No. 81-1515, at 384; *see also* S. Rep. No. 82-1137, at 12 (1952).

Accordingly, the BIA repeatedly granted Section 212(c) relief to deportable aliens who had departed the country and reentered between their conviction and the commencement of deportation proceedings. As in *L-*, the BIA referred to this as "*nunc pro tunc*" relief from inadmissibility that also operated to relieve deportability. *E.g.*, *Matter of Tanori*, 15 I. & N. Dec. 566, 567-568 (BIA 1976); *Matter of K-*, 9 I. & N. Dec. 585, 586 (BIA 1962); *Matter of F-*, 6 I. & N. Dec. 537, 538 (BIA 1955); *Matter of M-*, 5 I. & N. Dec. 598, 600 (BIA 1954); *see also Matter of Edwards*, 10 I. & N. Dec. 506, 509-511 (BIA 1963); *Matter of G-A-*, 7 I. & N. Dec. 274, 276 (BIA 1956). This relief was granted as a matter of course to LPRs in deportation proceedings who would have been eligible had they been excluded upon entry. *See Matter of Silva*, 16 I. & N. Dec. 26, 27 (BIA 1976) ("We have consistently held that a waiver of the ground of inadmissibility under section 212(c) of the Act may be granted nunc pro tunc in deportation proceedings.").

Importantly, the BIA held that a Section 212(c) waiver of inadmissibility based on a criminal conviction was not limited to waiving exclusion, but also provided relief from deportation based on the same conviction. As the BIA stated in 1954, 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*." *G-A-*, 7 I. & N. Dec. at 275 (emphasis added). This doctrine is "an implementation of the waiver provision, necessary to make it an effective remedy," *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967): it avoids the absurd result that an LPR could be admitted based on a Section 212(c) waiver of a conviction but then immediately deported based on the same conviction. *See G-A-*, 7 I. & N. Dec. at 275-276 ("[W]hen relief has been granted in accordance with the authorization of Congress, it would be clearly repugnant to say that the respondent remains deportable because of the same conviction.").

Section 212(c) has thus long been applied to grant "admi[ssion] with freedom from deportation," without regard to the forum in which relief is sought. *G-A-*, 7 I. & N. Dec. at 276 (quotation marks omitted); *see also Silva*, 16 I. & N. Dec. at 27-28 ("[W]e have interpreted section 212(c) of the Act to mean that a waiver of the ground of inadmissibility may be granted in a deportation proceeding when, at the time of the alien's last entry, he was inadmissible because of the same facts which form the basis of his deportability."); *Mascorro-Perales*, 12 I. & N. Dec. at 230 (describing *G-A-* as holding that "if a single act can be the basis of both excludability and deportability, and excludability is waived by the Attorney General, then that act, without more, cannot be the basis of a deportation charge").

Agency regulations codified this approach to Section 212(c), particularly its availability outside of exclusion proceedings. In 1958, the agency promulgated a regulation providing that "[a]n application for the exercise of discretion under section 212(c) of the act shall be submitted on Form I-191 to the district director …

prior to, at the time of, or *at any time subsequent to the applicant's arrival*." 23 Fed. Reg. 140, 141 (Jan. 8, 1958) (creating 8 C.F.R. §212.3) (emphases added). The regulation further provided that if the district director denied the request, "the denial shall be without prejudice to renewal of the application in the course of" later exclusion or deportation proceedings. *Id.*; *see also Matter of Smith*, 11 I. & N. Dec. 325, 327 (BIA 1965) (1958 regulation allowed "an application for relief under section 212(c) to be adjudicated in a deportation proceeding").

In 1965, the agency further clarified that a Section 212(c) application "may be submitted by the applicant to a special inquiry officer [now immigration judge] in the course of proceedings before him under sections 235, 236, and 242 of the Act and this chapter [*i.e.*, exclusion and deportation proceedings], … regardless of whether the applicant has made such application previously to the district director." 30 Fed. Reg. 14,525, 14,526 (Nov. 20, 1965). Thus, by 1965, agency regulations expressly provided that Section 212(c) relief could be sought for the first time in deportation proceedings.

The regulations in force today continue to provide that a Section 212(c) waiver of inadmissibility may be sought outside of exclusion proceedings and, if granted, operates to waive deportation based on the same conviction. Section 212(c) applications are still made using Form I-191, entitled "Application for Advance Permission to Return to Unrelinquished Domicile." App. 22a-23a; 8 C.F.R. §1212.3(a) ("An application by an eligible alien for the exercise of discretion under former section 212(c) … shall be submitted to the immigration judge by filing Form I–191[.]"). Form I-191 can be filed with an immigration district director even before proceedings begin. 8 C.F.R. §1212.3(b); App. 25a (instructing

filing of Form I-191 with immigration service center). Form I-191 can also be submitted to an IJ for the first time in an exclusion or deportation proceeding. *See* 8 C.F.R. §1212.3(a), (e).

Regardless of the forum, applicants seeking Section 212(c) relief must state: "I believe I may be inadmissible to the United States for the following reasons." App. 23a. The agency specifically instructs that, "if the application is made because you may be inadmissible due to a conviction of a crime, state in the application the designation of the crime, the date and place of its commission and of the conviction therefor[], and the sentence or other judgment of the court." App. 24a. The regulations provide that Section 212(c) relief is "valid indefinitely" as to the "specific grounds of excludability, deportability, or removability that were described in the application." 8 C.F.R. §1212.3(d). This provision "reflect[s] [the agency's] concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including *both deportation and exclusion proceedings*." *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991) (emphasis added). The regulations also make plain that the waiver sought for the first time in a deportation proceeding is the same ("[s]uch application") as the waiver sought in advance from the district director or in exclusion proceedings. 8 C.F.R. §§212.3(a), (e)(1), 1212.3(e)(1); *see also Matter of A-A-*, 20 I. & N. Dec. 492, 502 n.22 (BIA 1992) ("[A]n application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States.").

Thus, under longstanding regulations still in force today, an LPR is eligible for Section 212(c) relief if his or her conviction could have been waived by the grant

of an Application for Advance Permission to Return submitted on Form I-191. And to state a valid basis for relief on Form I-191, the LPR—in addition to meeting the residency requirements—need only have a conviction that could be a waivable "reason[]" why he or she is "inadmissible to the United States." App. 23a.

C. The Agency Grants Section 212(c) Relief To LPRs Who Have *Not* Traveled Abroad, Provided They Are Deportable For A Conviction That Would Also Render Them Excludable

Initially, the BIA took the position that only LPRs who had actually departed and reentered after an excludable criminal conviction—and could therefore ask for *nunc pro tunc* relief—could seek a Section 212(c) waiver in deportation proceedings. As a result, identically situated LPRs who had *not* traveled abroad were treated as ineligible for relief. *E.g.*, *Matter of Arias-Uribe*, 13 I. & N. Dec. 696, 698 (BIA 1971).

In 1976, the Second Circuit ruled that deportable LPRs who had not traveled abroad and deportable LPRs who had were "in like circumstances, but for irrelevant and fortuitous factors," and that equal protection thus required that they be "treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). As the court put it, "[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." *Id.*; *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (it would violate equal protection "to distinguish between aliens who had committed the same crime on the basis of whether they traveled abroad").

Although the Second Circuit's decision in *Francis* created a split with the Ninth Circuit, *see Arias-Uribe* v. *INS*, 466 F.2d 1198 (9th Cir. 1972) (per curiam), the Solicitor General decided not to seek certiorari. *Silva*, 16 I. & N. Dec. at 29-30. The BIA then adopted, nationwide, the "position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens." *Id.* at 30; *see also St. Cyr*, 533 U.S. at 295. All regional circuits approved that interpretation. *See* Pet. 7 n.2 (citing cases).

Although *Silva* eliminated distinctions based on travel history, it did not make Section 212(c) available to all deportable LPRs. Rather, it simply ruled that three categories of Section 212(c) applicants would be treated identically: (1) LPRs with excludable convictions who sought relief in exclusion proceedings or in advance from the district director; (2) LPRs with similar convictions who left the country, reentered, and sought relief *nunc pro tunc* in deportation proceedings (*e.g.*, *L-*, *G-A-*); and (3) LPRs with similar convictions who did *not* leave the country and sought relief in deportation proceedings (*Francis*, *Silva*). The eligibility predicate for all three categories was that the LPRs have a conviction that rendered them *excludable* under the INA's exclusion provision, Section 212(a). In other words, if a conviction rendered an LPR deportable, relief under Section 212(c) was available only if that same conviction would also have triggered inadmissibility.

This limitation on Section 212(c) eligibility came to be known as the "statutory counterpart" rule: relief was only available in deportation proceedings if the LPR was deportable for a conviction that fell under a "counterpart" exclusion provision that was waivable, not if the LPR was deportable for a reason that did not

render him or her excludable. In the first application of the rule, the BIA held that an LPR convicted of possession of a sawed-off shotgun was ineligible for relief because "[c]onviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable under section 212(a)(9) of the Act." *Matter of Granados*, 16 I. & N. Dec. 726, 728 (BIA 1979).

This limitation is consistent with the regulatory scheme under which all applicants for Section 212(c) relief—even those petitioning for the first time in deportation proceedings—file the same Form I-191, requiring them to state a reason why they are "inadmissible to the United States." App. 23a; *see also Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996) (Section 212(c) relief is 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").

Importantly, the set of deportable LPRs who lacked a "statutory counterpart" was limited because most crimes that trigger deportability also trigger inadmissibility, usually as a "crime involving moral turpitude." 8 U.S.C. §1182(a)(2)(A)(i)(I). Attorney General Richard L. Thornburgh stated as much in 1991, identifying only "two grounds for deportation [that] have no analogue in the grounds for exclusion," namely entry without inspection and firearms convictions. *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 282 n.4 (Att'y Gen. 1991); *see also* Aleinikoff et al., *Immigration: Process and Policy* 703-704 (3d ed. 1995) ("The two most significant deportation grounds without comparable exclusion grounds are entry without inspection and firearms violations."). Accordingly, only LPRs deport-

able for such offenses were deemed categorically ineligible for Section 212(c) relief.[2]

D. Congress Expressly Recognizes The Availability Of Section 212(c) Relief From Deportation

Although Congress has considered and enacted various restrictions on Section 212(c), it has never disapproved the availability of such relief in deportation proceedings regardless of travel history.

In 1990, Congress provided that aliens in deportation proceedings who "fail[ed] to appear" at certain hearings or as otherwise required were not entitled to "relief under section 212(c)." Immigration Act of 1990, Pub. L. No. 101-649, §545, 104 Stat. 4978, 5064-5065 (creating 8 U.S.C. §1252b(e)(5) (1991)). As the agency explained shortly thereafter, Congress's addition of that provision "explicitly recognized the applicability of section 212(c) relief to deportation proceedings." 56 Fed. Reg. 50,033, 50,033 (Oct. 3, 1991). At the same time, Congress rendered Section 212(c) inapplicable to "an alien who has been convicted of an aggravated fel-

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[2] For firearms offenses, see *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); *Komarenko* v. *INS*, 35 F.3d 432, 434-435 (9th Cir. 1994); *Campos* v. *INS*, 961 F.2d 309, 312-314 (1st Cir. 1992); *Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995); *Matter of Montenegro*, 20 I. & N. Dec. 603, 605-606 (BIA 1992); *Granados*, 16 I. & N. Dec. at 728-729. For entry without inspection, see *Farquharson* v. *U.S. Att'y Gen.*, 246 F.3d 1317, 1325 (11th Cir. 2001); *Leal-Rodriguez* v. *INS*, 990 F.2d 939, 948, 952 (7th Cir. 1993); *Hernandez-Casillas*, 20 I. & N. Dec. at 281, 287-288; *see also Matter of Wadud*, 19 I. & N. Dec. 182, 185 (BIA 1984) (aiding and abetting fraudulent procurement of a visa).

ony and has served a term of imprisonment of at least 5 years." Immigration Act of 1990, §511, 104 Stat. at 5052. That amendment presupposed that Section 212(c) relief was available to LPRs in deportation proceedings, since "convicted of an aggravated felony" is a basis for deportation only, not inadmissibility. *See* 8 U.S.C. §1227(a)(2)(A)(iii) (added by Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7344, 102 Stat. 4181, 4470-4471); *Matter of Meza*, 20 I. & N. Dec. 257, 261 (BIA 1991) (Heilman, Board Member, concurring) (relief is "available to aggravated felons in deportation proceedings under the 1990 amendment to section 212(c) of the Act").

The legislative record of the 1990 Act likewise reflects awareness of the agency's grant of Section 212(c) relief in deportation proceedings. *See* 136 Cong. Rec. S6586, S6604 (May 18, 1990) (Senator 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)); *id.* S11,879, S11,942 (Aug. 2, 1990) (Senator D'Amato) ("[C]riminal aliens can seek a *waiver of deportation* if they can show 7 years of unrelinquished domicile in the United States under section 212(c)." (emphasis added)).[3]

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[3] Subsequent congressional statements reflect this same understanding. *See* 139 Cong. Rec. E749 (Mar. 24, 1993) (Senator McCollum) (introducing a bill providing that "the only aggravated felon aliens *who could avoid deportation* would be those who have been permanent resident aliens for at least 7 years and who were sentenced to less than 5 years imprisonment" (emphasis added)); 140 Cong. Rec. S3068, S3071 (Mar. 16, 1994) (Senator Roth) ("Under section 212(c) … a criminal alien who has been a permanent resident in the U.S. for seven years and has not served over 5

In 1996, Congress further limited the situations in which Section 212(c) relief was available to an alien who "*is deportable* by reason of having committed" certain enumerated offenses, including aggravated felonies. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §440(d)(2), 110 Stat. 1214, 1277 (AEDPA) (emphasis added). This once again suggested that the provision of Section 212(c) relief to *other* deportable aliens was consistent with congressional intent. *Cf.* 142 Cong. Rec. S4592, S4599 (May 2, 1996) (Senator Abraham) (noting that, even after AEDPA, some deportable aliens "will still be able to … request 212(c) relief from the order of deportation").

Congress later repealed Section 212(c) as part of comprehensive changes to the immigration law. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §304(b), 110 Stat. 3009-546, 3009-597 (IIRIRA). But in *St. Cyr*, this Court ruled that, consistent with the presumption against retroactive legislation, the 1996 repeal was prospective only, such that Section 212(c) remained available to otherwise-eligible LPRs who were convicted by guilty plea of a waivable offense before repeal. 533 U.S. at 326. This Court ruled that, in light of the expectations surrounding those guilty pleas, "it would surely be contrary to 'familiar considerations of fair notice, reasonable reliance, and settled expectations,' to hold that …

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years for a felony offense may be granted relief from deportation."); 141 Cong. Rec. H1586, H1589 (Feb. 10, 1995) (Representative Conyers) ("H.R. 668 would amend the [INA] to extend a restriction that exists on the Attorney General's discretion to provide relief from deportation—under INA section 212(c)—for lawful permanent residents who have committed an 'aggravated' felony.").

subsequent restrictions deprive them of any possibility of [Section 212(c)] relief." *Id.* at 323-324 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

E. The BIA Recognizes That LPRs Deportable For "Aggravated Felony" Convictions, Including "Crimes Of Violence," Are Eligible For Relief

After first providing in 1988 that LPRs convicted of an "aggravated felony" were deportable, Congress significantly broadened the set of convictions that qualified as aggravated felonies. *See St. Cyr*, 533 U.S. at 295 & n.4. Of particular relevance here, the 1990 Act added convictions for a "crime of violence (as defined in section 16 of Title 18, … [but] not including a purely political offense)." Immigration Act of 1990, §501, 104 Stat. at 5048 (codified at 8 U.S.C. §1101(a)(43)(F)). Nothing in the 1990 Act suggested, however, that LPRs deportable for a "crime of violence" conviction would be categorically ineligible for Section 212(c) relief.

Indeed, the BIA soon confirmed that aggravated felons were not categorically disqualified from relief under the "statutory counterpart" analysis simply because they were charged under a deportation subsection that used different terminology from any exclusion subsection. In 1991, the BIA held that "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,' as in [8 U.S.C. §1227(a)(2)(A)(iii))]." *Meza*, 20 I. & N. Dec. at 259. Because most (perhaps all) offenses that rendered LPRs deportable for "crimes of violence" also rendered them excludable for CIMTs, numerous judicial and BIA decisions—both before and

after *St. Cyr*—found LPRs deportable for crimes of violence eligible for Section 212(c) relief; often, these decisions specifically noted that the LPRs satisfied the statutory counterpart requirement. *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"); *A-A-*, 20 I. & N. Dec. at 500-501 & n.19 (LPR convicted of murder, an aggravated felony, was deportable under a provision "analogous" to the exclusion provision for CIMT, so LPR was "not disqualified from relief under section 212(c)" for that reason); *see also 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. *Ubaldo-Figueroa*, 364 F.3d 1042, 1050-51 (9th Cir. 2004) (burglary).[4] After 1996, when Congress ex-

[4] *See Matter of S-Lei*, No. A38-139-424 (BIA May 27, 2004) (Pet. App. 57a-58a) (affirming Section 212(c) relief for 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 voluntary manslaughter conviction, 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 for 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 conviction was also 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*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 45a-55a) (remanding for consideration of Section 212(c) relief where crime of violence was also CIMT);

panded the aggravated felony definition to include "sexual abuse of a minor," 8 U.S.C. §1101(a)(43)(A), the BIA similarly allowed LPRs convicted of such crimes to seek Section 212(c) relief, provided the crime of conviction was waivable in exclusion proceedings.[5]

Of course, Section 212(c) relief remained discretionary; if the crime was very serious, the applicant—though eligible—was unlikely to receive relief. *See, e.g.*, *Matter of Burbano*, 20 I. & N. Dec. 872, 878 (BIA 1994) ("[I]f an individual has been convicted of a particularly heinous murder, that fact in itself may be dispositive of the discretionary issue."). Nonetheless, even LPRs convicted of such serious crimes were *eligible*. *See Matter of Montenegro*, 20 I. & N. Dec. 603, 610 (BIA 1992) (Heilman, Board Member, concurring) ("If [applicant] had been found guilty of murder or manslaughter alone, he would be eligible for a section 212(c) waiver."); 6 Gordon et al., *Immigration Law and Procedure* §74.04[1][a], [2][g] (2011) (murder and rape convictions can be waived, though a heightened showing of worthiness is required).

Matter of Rowe, No. 37-749-964 (BIA May 9, 2003) (Pet. App. 41a-44a) (rejecting government's argument that crime of violence was unwaivable).

[5] *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 for CIMT conviction); *Matter of Rodriguez-Symonds*, 2004 WL 880246 (BIA Mar. 9, 2004) (remanding for consideration of whether LPR's conviction for lewd act upon child was CIMT and therefore eligible for relief); *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); *see also United States* v. *Ortega-Ascanio*, 376 F.3d 879, 886-887 (9th Cir. 2004) (sexual battery).

F. Agency Regulations "Codify" *St. Cyr*, Leaving Section 212(c) Eligibility Unchanged For LPRs Who Pled Guilty Before 1996

Shortly after this Court's decision in *St. Cyr*, the Department of Justice proposed a rule that "would codify the Supreme Court's holding" and "consolidate[] the Department's interpretation of the availability of the section 212(c) waiver for LPRs in light of this litigation." 67 Fed. Reg. 52,627, 52,627-52,628 (Aug. 13, 2002). In the Supplementary Information accompanying the rule, the government acknowledged that Section 212(c) "applied to exclusion and deportation proceedings." *Id.* at 52,628; *see also id.* at 52,630 ("An eligible alien who is the subject of a pending deportation or removal proceeding before an Immigration Judge should file a section 212(c) application pursuant to this rule[.]").

Although the proposed rule did not expressly reference the statutory counterpart requirement, the agency's explanation indicated that it would apply as before. *See* 67 Fed. Reg. at 52,628-52,629 (requiring applicant to be "deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility"). The government nowhere stated that it intended to alter the statutory counterpart requirement to disqualify applicants who pled guilty to "crime of violence" aggravated felonies.

After receiving 60 comments, the agency issued a final rule in 2004. *See* 69 Fed. Reg. 57,826, 57,827 (Sept. 28, 2004). It explained that the final rule "adopts the proposed rule without substantial change" and reiterated that it "described procedures implementing the Supreme Court's decision." *Id.* at 57,826. The agency also "reiterate[d] and adopt[ed] the Supplementary In-

formation in the proposed rule … as explaining the final rule." *Id.* at 52,827.

With respect to the statutory counterpart requirement, the agency noted:

> One commenter stated that the proposed rule should clarify that an alien charged and found deportable as an aggravated felon is not eligible for section 212(c) relief "if there is no comparable ground of admissibility for the specific category of aggravated felony charged." The commenter continues, "[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."

69 Fed. Reg. at 57,831. The quoted "commenter" language appears in two nearly identical letters that Petitioner obtained by FOIA request. The letters cite no authority for the assertion quoted above, nor do they address the BIA's prior statements and practice (*supra* pp. 17-19 & nn.4-5) finding LPRs convicted of aggravated felonies eligible for Section 212(c) relief. *See* Comment on *St. Cyr* Rule No. 51 at 1 (Oct. 9, 2002); *see also* Comment on *St. Cyr* Rule No. 55 at 1 (Oct. 11, 2002).[6]

In response, the agency agreed that the rule "should clarify" that the statutory counterpart test remained applicable and added a subsection to that effect.

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[6] The commenters served as assistant district counsel for the Department of Homeland Security; at least one was active in litigating Section 212(c) cases.

See 69 Fed. Reg. at 57,831-57,832; 8 C.F.R. §1212.3(f)(5). In so doing, however, the agency indicated no intention to alter the established scope of the statutory counterpart requirement, nor did it embrace the commenters' assertion that "'Murder, Rape, or Sexual Abuse of a Minor' or 'Crime of Violence' aggravated felonies" lacked statutory counterparts. On the contrary, every authority cited involved firearms convictions or illegal entry, which had long been ineligible for Section 212(c) relief. *See* 69 Fed. Reg. at 57,831-57,832 (citing *Granados*, *Cabasug*, and *Hernandez-Casillas*).

G. The BIA Retroactively Changes The Law

In 2005, the BIA abruptly changed course. In *Blake*, 23 I. & N. Dec. at 722, an IJ granted Section 212(c) relief under *St. Cyr* to an LPR deportable for an aggravated felony conviction that constituted "sexual abuse of a minor." The BIA reversed, ruling for the first time that "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed *similar language to describe substantially equivalent categories of offenses*." *Id.* at 728 (emphasis added). 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; it distinguished drug-related aggravated felonies, such as those at issue in *St. Cyr* and *Meza*, because "the language used in describing the drug-related aggravated felony provision covered substantially the same category of drug-related offenses addressed in the exclusion ground." *Id.* at 729.

Although it purported to rely on prior decisions "and the newly promulgated regulatory provision,"

23 I. & N. Dec. at 724, the BIA offered no explanation why a disparity in language between the deportation and exclusion provisions should determine Section 212(c) eligibility. Nor did it acknowledge its numerous decisions granting relief to other applicants with "sexual abuse" convictions. *See supra* pp. 18-19 & n.5. The BIA later applied the same reasoning to LPRs deportable for "crime of violence" convictions, *Brieva-Perez*, 23 I. & N. Dec. at 766—again without addressing the numerous indistinguishable cases in which Section 212(c) relief had been granted. *See supra* pp. 17-18 & n.4.

Only later did the BIA acknowledge that *Blake* and *Brieva-Perez* represented a sea change in its Section 212(c) jurisprudence—a fact confirmed by its reversal of decisions to grant relief under the prior approach. 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." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam) (emphasis added). Numerous other BIA decisions recognized the novelty of *Blake*.[7]

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[7] *See 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"); *Matter of Rangel-Zuazo*, No. A90-640-428 (BIA May 25, 2005) (Pet. App. 59a-61a) (reversing IJ's decision to grant relief because "intervening precedent renders the respondent statutorily ineligible for section 212(c) relief"); *Matter of Banuelos-Delena*, 2006 WL 901335 (BIA Mar. 2, 2006) (reversing grant of Section 212(c) relief, citing "intervening Board precedent"); *Matter of Umer*, 2010 WL 1606998 (BIA Mar. 31, 2010) (referring to rule "announced in" *Brieva-Perez*); *cf. De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) (calling *Blake* a "watershed moment in [Section] 212(c) jurisprudence").

The Second Circuit rejected *Blake*'s "emphasis on similar language" as "strange," noting that Congress "never contemplated that its grounds of deportation would have any connection with the grounds of exclusion," much less determine the availability of Section 212(c) relief. *Blake* v. *Carbone*, 489 F.3d 88, 102 (2d Cir. 2007). Rather, Section 212(c) eligibility turned on whether an LPR's "particular aggravated felony offense could form the basis of exclusion," not "the language Congress used to classify his or her status." *Id.* at 104.

Most other circuits accepted the BIA's position in *Blake*. The Ninth Circuit took an approach that neither the BIA nor the government endorsed: contrary to longstanding agency and judicial precedent, it ruled that Section 212(c) did not apply in deportation proceedings at all. *Abebe* v. *Mukasey*, 554 F.3d 1203 (en banc) (per curiam), *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010).

H. Proceedings Below

Petitioner Joel Judulang, a native of the Philippines, entered the United States in 1974 at age eight. He has continuously resided in this country for 36 years.

Petitioner's grandfather served in the U.S. military in the Philippines between 1923 and 1948 (Pet. App. 29a-30a) and became a U.S. citizen as a result. Petitioner's parents both naturalized as well. *Id.* 36a-37a. Petitioner has a 15-year-old daughter who is a native-born U.S. citizen, as are his four nephews and two nieces. His two sisters are U.S. citizens and his older brother is an LPR. Petitioner's parents did not pursue citizenship for him because they "d[id] not know the in-

tricacies of immigration law." Certified Administrative Record 131.

In 1988, when Petitioner was 22, he was involved in a fight in which another person shot and killed someone. Petitioner was not the shooter; he was charged as an accessory. Due to his minor involvement and cooperation with authorities, Petitioner was allowed to plead to voluntary manslaughter and received a six-year suspended sentence. Pet. App. 31a-32a. He served fewer than two years in county jail and was released on probation immediately after his plea.

In 2005, the government commenced deportation proceedings. The IJ found Petitioner deportable based *inter alia* on his conviction for voluntary manslaughter, an aggravated felony crime of violence. Pet. App. 15a-16a. The IJ informed Petitioner that Section 212(c) "could have been applied to your manslaughter conviction," but erroneously believed that a six-year suspended sentence disqualified him from relief, such that he was unable to submit an application. *Id.* 38a.[8]

The BIA affirmed on different grounds, ruling that Petitioner was categorically ineligible for a Section 212(c) waiver under *Brieva-Perez*. Pet. App. 8a. The

[8] As Petitioner explained below (C.A. Br. 36 n.17), the IJ's ruling was doubly wrong. The bar on Section 212(c) relief for LPRs who served "a term of imprisonment of at least five years" was added in 1990 and does not apply to Petitioner's 1989 conviction. 8 C.F.R. §1212.3(f)(4)(ii); *Toia* v. *Fasano*, 334 F.3d 917, 918 (9th Cir. 2003). Even if it did, the 1990 Act refers only to time *served*, and Petitioner served fewer than two years. Pet. App. 32a. Although the IJ also found Petitioner deportable for a second conviction, neither the BIA nor the Ninth Circuit relied on that theory, and it is not before the Court. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

Ninth Circuit denied Petitioner's petition for review and denied rehearing. *Id.* 1a-4a, 21a. Justice Kennedy granted a stay of judgment pending this Court's review. *Id.* 39a.

Petitioner was released from immigration custody on bond pending appeal. *Judulang* v. *Chertoff*, 535 F. Supp. 2d 1129 (S.D. Cal. 2008). He lives in Los Angeles with his elderly mother, a U.S. citizen, and works to support himself and his family.

SUMMARY OF ARGUMENT

Although the history of Section 212(c) is complex, its application before the BIA's 2005 decisions in *Blake* and *Brieva-Perez* was straightforward, especially with regard to aggravated felonies and "crimes of violence." Previously, an LPR deportable for an aggravated felony conviction that also rendered him or her inadmissible was entitled to apply for Section 212(c) relief—an application that could be made in exclusion proceedings, deportation proceedings, or directly to the immigration authorities outside proceedings. BIA decisions and agency regulations made clear that a Section 212(c) waiver of inadmissibility operated as relief from deportation based on the particular conviction. The BIA's retreat from this consistent practice in 2005—and the en banc Ninth Circuit's even more radical retreat in 2009—cannot be sustained.

The Ninth Circuit's suggestion that Section 212(c) does not apply in deportation proceedings at all is contrary to years of congressionally approved agency practice. Congress has consistently acknowledged that Section 212(c) provides relief from deportation as well as exclusion, and even the government has not contended

otherwise. Accordingly, the Ninth Circuit's approach offers no basis for affirming the judgment below.

The BIA's new policy announced in *Blake* and *Brieva-Perez* is also invalid under basic principles of administrative law and equal protection.

First, *Blake* and *Brieva-Perez* represent an improperly retroactive change in the BIA's preexisting policies. The BIA fundamentally transformed the statutory counterpart requirement from a test satisfied by nearly all, if not all, LPRs deportable for a "crime of violence" to a test satisfied by *no* such LPR. This new policy cannot be squared with the agency's prior regulations and holdings and works a severe retroactive effect. This retroactive change does not pass muster under the balancing test of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947): the change is too abrupt; the reliance on the old regime is too significant; the effect on private interests is too severe; and any statutory interest in retroactivity is attenuated at best.

Second, the BIA's new policy is arbitrary and capricious on its own merits, even apart from retroactivity concerns. The BIA has made eligibility for Section 212(c) relief turn on semantic differences in the exclusion and deportation provisions—differences that have no connection whatsoever to congressional intent regarding eligibility for Section 212(c) relief. And they resurrect a distinction based on the "irrelevant and fortuitous factor[]" of a deportable LPR's recent travel history—a distinction the agency has avoided for decades since *Silva*.

Third, the distinction among deportable LPRs based on travel history violates equal protection or, at a minimum, raises serious equal protection concerns. There is no rational basis for distinguishing between

LPRs who traveled abroad and returned before being placed in deportation proceedings and those who did not. The Court should either construe Section 212(c) to avoid that constitutional difficulty or else rule the BIA's new policy unconstitutional and, in either event, restore the agency's pre-2005 practice under which relief did not turn on such an irrational distinction.

In the alternative, and at a minimum, the BIA's retroactive policy change must be remanded because the agency failed the minimal requirement of identifying the change in policy and providing a reasoned explanation for its decision that considers the appropriate factors, most importantly reliance. Here, the BIA not only failed to identify or defend its change in position, but also based its decision on a regulation that did not purport to have—and indeed could not have had—a retroactive effect.

ARGUMENT

I. SECTION 212(C) RELIEF IS AVAILABLE IN DEPORTATION PROCEEDINGS

The en banc Ninth Circuit appeared to rule that Section 212(c) provides "relief only from *inadmissibility* not deportation." *Abebe* v. *Mukasey*, 554 F.3d 1203, 1205 (en banc) (per curiam) (footnote omitted), *full court reh'g denied*, 577 F.3d 1113 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010). Even the government has not advocated that position, and for good reason: Congress has plainly accepted the longstanding judicial

and administrative interpretation of Section 212(c) as available in deportation proceedings.[9]

When Congress enacted Section 212(c) in 1952, it acknowledged the years of consistent agency interpretation of the Seventh Proviso as permitting relief *nunc pro tunc* to aliens in deportation proceedings. *See supra* pp. 6-7. Congress's inclusion in Section 212(c) of language identical in relevant part to the Seventh Proviso, without "revis[ing] or repeal[ing] the agency's interpretation[,] is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974); *see also Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) (Congress presumptively adopts a longstanding administrative "interpretation when it re-enacts a statute without change"); *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954) ("[T]here is nothing to indicate that Congress wished to cut off this unique relief in deportation proceedings.").

In fact, Congress has taken express action predicated on the availability of Section 212(c) relief in deportation proceedings. In 1990, Congress disqualified deportable LPRs from Section 212(c) relief if they "fail[ed] to appear" for certain hearings or as otherwise

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[9] The Ninth Circuit curiously made its ruling of little or no consequence by holding that, even if Section 212(c) does not itself entitle LPRs to relief in deportation proceedings, "nothing we say today casts any doubt on the regulation," which does apply in deportation. *Abebe*, 554 F.3d at 1207 (citing 8 C.F.R. §1212.3). If that regulation is valid—as the Ninth Circuit suggested—then the Ninth Circuit's interpretation of Section 212(c) has no apparent effect on any LPR's eligibility for relief, including Petitioner's. It thus provides no basis to avoid considering the arbitrariness and irrationality of *Blake* and *Brieva-Perez*.

required, 8 U.S.C. §1252b(e) (1991), or if they served more than five years' imprisonment for an "aggravated felony" (8 U.S.C. §1182(c) (1994)). In 1996, Congress provided that Section 212(c) "shall not apply to an alien *who is deportable* by reason of having committed" certain enumerated offenses. 8 U.S.C. §1182(c) (Apr. 24, 1996) (as amended by AEDPA §440(d), 110 Stat. at 1277) (emphasis added). Yet neither Act purported to eliminate Section 212(c) relief from deportation for other LPRs.

If the Ninth Circuit were correct that Congress did not wish *any* deportable alien to receive Section 212(c) relief, it would have been senseless to impose such conditions on the grant of relief to *some* deportable aliens. The agency has admitted as much: "Congress explicitly recognized the applicability of section 212(c) relief to deportation proceedings." 56 Fed. Reg. 50,033 (Oct. 3, 1991); *see also Matter of Meza*, 20 I. & N. Dec. 257, 261 (BIA 1991) (Heilman, Board Member, concurring).

Congress has likewise failed to modify the agency's longstanding position—adopted nationwide in 1976, after the Solicitor General declined to seek certiorari in *Francis*—that Section 212(c) relief is available to deportable aliens regardless of whether or not they left the country. *See Matter of Silva*, 16 I. & N. Dec. 26, 29-30 (BIA 1976). This interpretation, adopted by every regional circuit, is also explicit in the agency's regulations, which have long made clear that Section 212(c) is available to deportable LPRs on the same terms as to excludable LPRs. *See supra* pp. 8-11. Mr. St. Cyr himself was deemed eligible for Section 212(c) relief in his deportation proceeding with no indication that he had left and reentered after his conviction. *INS* v. *St. Cyr*, 533 U.S. 289, 326 (2001).

Because Congress "has not sought to alter [the agency's] interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *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 regarded that regulation as a correct implementation of its intent."); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002) ("By amending the law without repudiating the regulation[s], Congress suggests its consent to the [agency's] practice." (quotation marks omitted)). The availability of Section 212(c) relief in deportation proceedings regardless of travel history has thus "gone untouched" for decades despite other amendments. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011).

This unequivocal legislative record—which the *Abebe* majority did not even address—confirms the incorrectness of the Ninth Circuit's view. We accordingly turn from the Ninth Circuit's erroneous approach to the BIA's.

II. THE BIA'S NEW POLICY ANNOUNCED IN *BLAKE* AND *BRIEVA-PEREZ* IS ARBITRARY AND CAPRICIOUS

A. The BIA's Change In Law Was Impermissibly Retroactive

Petitioner submits that this case may be decided on the narrow basis that the BIA acted arbitrarily and capriciously in applying its *Blake* and *Brieva-Perez* decisions to attach new consequences to guilty pleas entered in reliance on the prior regime. While the new policy *itself* is also arbitrary and unconstitutional (*see*

infra Parts II.B-C), the Court need not address those issues if it rules that the *Blake/Brieva-Perez* approach cannot be imposed so as to create a retroactive effect.

1. The BIA's *Blake* and *Brieva-Perez* decisions retroactively changed the law

There can be no question that the BIA's 2005 rulings in *Blake* and *Brieva-Perez* were a "change in law." *Matter of Cardona*, 2005 WL 3709244 (BIA Dec. 27, 2005) (per curiam); *see supra* n.7 (citing cases). Indeed, the government itself recently recognized that "the Board's decisions in *Blake* and *Brieva* … constituted an intervening change in the law." Resp. Br. 16, *Paulo* v. *Holder*, No. 07-71198 (9th Cir. Nov. 12, 2010).[10]

Even without these admissions, it is plain that, prior to *Blake* and *Brieva-Perez*, the BIA and the federal courts held that LPRs could seek waivers of aggravated felony convictions, including "crimes of violence," in deportation proceedings. *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 would be eligible for Section 212(c) relief but for length of sentence); *supra* pp. 17-18 & n.4 (citing cases).

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[10] Admitting that *Blake* and *Brieva-Perez* changed the law benefited the government in *Paulo* because it meant that a prior court ruling that a "crime of violence" aggravated felony was eligible for a Section 212(c) waiver was not res judicata. The government maintained that position at oral argument, even after filing its brief in opposition in this case.

The government has ventured that *Blake* and *Brieva-Perez* were not changes in policy because the BIA has consistently held that deportable LPRs seeking Section 212(c) relief must meet the "statutory counterpart" requirement. *E.g.*, Opp. 2-3, 17. The government confuses the *existence* of a "statutory counterpart" requirement—which Petitioner has never disputed—with the radically-different *application* of that rule announced for the first time in *Blake*.[11]

Prior to *Blake*, the "statutory counterpart" requirement ensured that the conviction for which the applicant sought a waiver was not solely a deportable offense, but also a waivable basis for inadmissibility. This requirement reflected the recognition that "an alien subject to deportation must have *the same opportunity to seek discretionary relief* as an alien who has temporarily left this country and, *upon reentry, been subject to exclusion*." *Matter of Hernandez-Casillas*,

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[11] In certain appellate decisions that rejected retroactivity challenges to *Blake*, the challenge was likewise framed as an argument that the statutory counterpart requirement was new in 2005, which is incorrect. *E.g.*, *Paulo* v. *Holder*, 2011 WL 1663572, at *8 (9th Cir. May 4, 2011) ("The statutory counterpart rule has existed for at least thirty years."); *Vue* v. *Gonzales*, 496 F.3d 858, 863 (8th Cir. 2007) (the 2004 regulation "merely codifies established law"); *Valere* v. *Gonzales*, 473 F.3d 757, 761-762 (7th Cir. 2007) (rejecting petitioner's retroactivity argument because the statutory counterpart "rule itself is not new"). The statutory counterpart requirement *in general* has long been recognized; Petitioner has never argued otherwise. The point is that, before 2005, the requirement was *satisfied* by any LPR deportable for an aggravated felony conviction that also triggered exclusion, regardless of any difference in the language of deportation or exclusion provisions. *See Meza*, 20 I. & N. Dec. at 259; *supra* nn.4-5 (citing cases).

20 I. & N. Dec. 262, 287 (Att'y Gen. 1991) (emphasis added). Conversely, a deportable alien was not entitled to relief "when that same alien would not have occasion to seek such relief were he in exclusion proceedings instead." *Matter of Jimenez-Santillano*, 21 I. & N. Dec. 567, 575 (BIA 1996). The agency regulations and forms implement this requirement by directing that Section 212(c) applicants—whether in deportation or exclusion proceedings or requesting relief affirmatively from the district director—identify the "reasons" why they "may be inadmissible to the United States." *See* App. 23a (Form I-191); *see also* 8 C.F.R. §1212.3(a), (e) (directing the filing of Section 212(c) requests on Form I-191 regardless of forum).

The agency thus made clear before *Blake* that a deportable LPR could satisfy the statutory counterpart requirement even where the LPR was deportable under a subsection of the INA's deportation provision that was phrased differently from any subsection of the INA's exclusion provision, such as the "aggravated felony" subsection, which appears in the deportation provision but not the exclusion provision. Although the government initially argued that "aggravated felony" had no statutory counterpart, the BIA rejected that view, ruling that "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,' as in [8 U.S.C. §1227(a)(2)(A)(iii)]." *Meza*, 20 I. & N. Dec. at 259. Rather, what mattered was whether the aggravated felony "*conviction* … could also form the basis for excludability." *Id.* (emphasis added); *see also Matter of Munoz*, 28 Immigr. Rep. B1-1 (BIA Aug. 7, 2003) (Pet. App. 52a) ("[W]e 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)" (emphasis added)).

These rulings comport with the BIA's longstanding recognition that, if Section 212(c) relief waives *exclusion* based on a particular criminal conviction, it also waives *deportation* based on the same conviction. *E.g.*, *Matter of G-A-*, 7 I. & N. Dec. 274, 275 (BIA 1956) ("[I]f [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 conviction[.]"); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 230 (BIA 1967) ("[I]f a single act can be the basis of both excludability and deportability, and excludability is waived by the Attorney General, then *that act, without more, cannot be the basis of a deportation charge*." (emphasis added)).

The statutory counterpart requirement thus ensured that deportable LPRs were not refused the opportunity to seek relief based on the "irrelevant and fortuitous factor[]" of having never departed and reentered following their conviction. *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). If the LPR would have been eligible for relief had he or she left the country and been placed in exclusion proceedings upon return (under the plain text of Section 212(c)), or eligible for relief *nunc pro tunc* in deportation proceedings begun after reentry (under *G-A-*), or eligible before leaving the country on an affirmative petition to the district director (under agency regulations), then there was no legitimate reason to treat the LPR as ineligible simply because he or she failed to depart before proceedings began.

Thus, for example, the BIA denied relief to an LPR convicted of a firearms offense because a "*[c]onviction* for possession of a concealed sawed-off shotgun is not *a specified section 212(a) ground of excludability*, nor *a crime involving moral turpitude* that would render the respondent excludable." *Matter of Granados*, 16 I. & N. Dec. 726, 728 (BIA 1979) (emphases added); *see also Cabasug* v. *INS*, 847 F.2d 1321, 1327 (9th Cir. 1988) (Wallace, J., concurring) (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)). As a result, only LPRs whose deportable convictions were not also excludable—a small category—failed to satisfy the statutory counterpart rule. *Hernandez-Casillas*, 20 I. & N. Dec. at 282 n.4 (identifying only possession of firearms convictions and illegal entry as ineligible for Section 212(c) waiver under statutory counterpart analysis).[12]

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[12] The Attorney General identified only these two narrow categories—firearms and illegal entry—even *after* aggravated felonies in general, and crimes of violence in particular, were added as bases for deportation. In discussing these two categories alone, the BIA's invocation of the term "grounds" has been inconsistent. *Compare Granados*, 16 I. & N. Dec. at 728, 729 (conviction for sawed-off shotgun possession "does not come within the *grounds* of excludability" where it is not "a crime involving moral turpitude that would render the respondent excludable" (emphasis added)), *with Matter of Esposito*, 21 I. & N. Dec. 1, 10 (BIA 1995) ("[R]espondent is ineligible for relief under section 212(c) of the Act because he has been found deportable under a ground of deportation which does not *itself* have a comparable ground of exclusion." (emphasis added)). That inconsistent usage is irrelevant because the *regulations* have consistently provided that an LPR convicted of a CIMT could apply for a waiver of inadmissibility in deportation or exclusion proceedings (or affirmatively apply to the district director), and while a grant of relief was technically called

The government has never identified a pre-2005 decision, regulation, or policy statement suggesting that LPRs deportable for "crime of violence" or "sexual abuse of a minor" aggravated felony convictions are categorically barred from relief under the statutory counterpart requirement. By contrast, many cases and authorities held the contrary. *See supra* pp. 17-19 & nn.4-5.

Blake and *Brieva-Perez* changed all this. While those decisions did not create the statutory counterpart requirement, they certainly altered its fundamental character. Instead of determining whether the deportable conviction triggered inadmissibility—a test that LPRs deportable for a "crime of violence" conviction would generally and perhaps invariably satisfy—the BIA focused the inquiry on a search for an exclusion provision that used similar *language* to the charged deportation category. And the relevant comparator was not the deportation provision's own term—"aggravated felony," 8 U.S.C. §1227(a)(2)(A)(iii)—but rather the language describing the separate *subcategories* of aggravated felony, which are found in the INA's general definition section, *id.* §1101(a)(43).

So reformulated, the inquiry could not be met by *any* LPR convicted of a "crime of violence" aggravated

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a waiver of inadmissibility, it would not only protect the LPR from "grounds" of exclusion, but also from "ground[s]" of deportation based on the same "conviction." *G-A-*, 7 I. & N. Dec. at 275; *supra* pp. 8-11. And as to the aggravated felony "ground" of deportation in particular, the BIA's position before *Blake* and *Brieva-Perez* was unambiguous: Section 212(c) is "not unavailable" to LPRs deportable on that "ground." *Meza*, 20 I. & N. Dec. at 259; *see also Esposito*, 21 I. & N. Dec. at 9 (distinguishing *Meza* as "based on the specific amendment … regarding aggravated felonies").

felony. This was plainly a change that made many previously eligible LPRs permanently ineligible for Section 212(c) relief—a fact demonstrated most starkly by the BIA's reversal of grants of relief in pending cases due to the "change in law." *See Cardona*, 2005 WL 3709244; *supra* n.7.

Applying this change in course to LPRs who pled guilty under the preexisting regime unquestionably works a "retroactive" effect in the sense of "'attach[ing] a new disability, in respect to transactions or considerations already past.'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994) (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (Story, J.)). Indeed, this Court has already held that "the elimination of any possibility of §212(c) relief" "has an obvious and severe retroactive effect" on those who pled guilty under a prior scheme that would have afforded the possibility of such relief. *St. Cyr*, 533 U.S. at 321, 325.

The question, then, is whether there was an adequate reason for the BIA to impose that severe retroactive effect. There was not.

2. There was no adequate reason for the BIA's retroactive change in law

While agencies are not foreclosed from reconsidering their substantive positions, "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984). This Court has thus approved new policies announced through adjudication, but only where no "new liability [would] be imposed on individuals for past actions

which were taken in good-faith reliance on Board pronouncements" and where no "fines or damages [were] involved." *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 295 (1974). Retroactive changes in law through agency adjudication are disfavored; because an agency can always "make new law prospectively" through rulemaking, "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through th[e] quasi-legislative promulgation of rules to be applied in the future." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); *see also NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.) (recognizing the "rather pointed hint" in *Chenery* and noting that retroactive reversals of policy "raise[] judicial hackles considerably more" than mere extensions of policy to questions of first impression).

Thus, when an agency seeks to change the law retroactively, the "ill effect" of "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Chenery*, 332 U.S. at 203; *see also* Breyer et al., *Administrative Law and Regulatory Policy* 466 (6th ed. 2006) (*Chenery* "suggests that … a balancing approach is appropriate," which would involve "courts attempt[ing] to evaluate and balance the justifications for an adjudicatory policy change against the harm to expectation interests that it would cause"). Although this Court has not yet had occasion to elaborate on *Chenery*'s balancing approach, the courts of appeals generally consider five factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void

> in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale & Dep't Store Union v. *NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). This Court has recognized this approach in passing, *see Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 207-208 (1988), and every circuit to consider the issue has followed it or a very close variant, including in immigration cases, *e.g.*, *Miguel-Miguel* v. *Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007).[13]

1-2. The first two considerations—whether the case is one of "first impression" and whether it represents an "abrupt departure from well established practice"—cut against applying the BIA's *Blake* and *Brieva-Perez*

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[13] *See also Lehman* v. *Burnley*, 866 F.2d 33, 37 (2d Cir. 1989); *Laborers' Int'l Union* v. *Foster Wheeler Corp.*, 26 F.3d 375, 392 (3d Cir. 1994); *ARA Servs., Inc.* v. *NLRB*, 71 F.3d 129, 135 (4th Cir. 1995); *Microcomputer Tech. Inst.* v. *Riley*, 139 F.3d 1044, 1050-51 (5th Cir. 1998) (recognizing *Retail, Wholesale* as the "most oft-cited approach" and applying a similar test); *J.L. Foti Constr. Co.* v. *OSHA Review Comm'n*, 687 F.2d 853, 858 & n.5 (6th Cir. 1987); *NLRB* v. *Wayne Transp.* 776 F.2d 745, 751 & n.8 (7th Cir. 1985); *Ryan Heating Co.* v. *NLRB*, 942 F.2d 1287, 1289 (8th Cir. 1991) (applying three-factor test and recognizing that *Retail, Wholesale* "employ[s] [a] similar combination[] of factors"); *Stewart Capital Corp.* v. *Andrus*, 701 F.2d 846, 848-850 (10th Cir. 1983); *see generally* 2 Pierce, *Administrative Law Treatise* 1126 (5th ed. 2010) (*Retail, Wholesale* is an "important decision" that "can be especially useful" in determining the reasonableness of retroactive application of new agency policy).

decisions retroactively. As Judge Friendly observed, "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression." *Majestic Weaving*, 355 F.2d at 860. As described above, the application of the statutory counterpart requirement to aggravated felony crimes of violence was well-settled through multiple published and unpublished BIA and court decisions, as well as in authoritative treatises. *See supra* pp. 17-19 & n.4. In fact, many BIA decisions specifically rejected the very approach to the statutory counterpart requirement later adopted in *Blake*. *See supra* pp. 17-19 & nn.4-5.[14]

Blake was certainly an "abrupt departure" from prior practice. *E.g.*, *De la Rosa* v. *U.S. Att'y Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3272 (2010) (a "watershed moment in [Section] 212(c) jurisprudence"). Numerous decisions had ruled, contrary to *Blake*, that an LPR deportable for a "crime of violence" or "sexual abuse of a minor" aggravated felony was eligible for Section 212(c) relief. *Cf. Majestic Weaving*, 355 F.2d at 861 ("In this case, we might well conclude that where for fifteen years the Board" followed the contrary position, "'the ill effect of the retroactive application of a new standard' so far outweighs any demonstrated need for immediate application to past conduct as to render the action 'arbitrary.'" (citation omitted)).

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[14] The fact that some decisions are unpublished confirms that the previous rule had become uncontroversial. The BIA abstains from publishing its opinions where they do not involve the "alteration, modification, or clarification of an existing rule of law." *BIA Practice Manual* §1.4(d)(i)(A) (rev. July 30, 2004), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf.

In short, this was not a situation in which the agency encountered a previously unknown threat to adequate enforcement or had to apply an evolving line of decisions to a new factual situation. Instead, it adopted a policy inconsistent with the holdings of numerous prior adjudications and diverged from previous statements of its policy.

3. The third consideration—the extent of the party's reliance on the prior policy—also counsels against permitting retroactive application here. As this Court recognized in *St. Cyr*, plea agreements represent a "*quid pro quo* between a criminal defendant and the government" and the availability of Section 212(c) relief notwithstanding the guilty plea is an important part of that bargain for an LPR. 533 U.S. at 321, 322-324. As in *St. Cyr*, the BIA's ruling here retroactively altered the terms of that bargain. This is especially so because Section 212(c) relief is granted with relative frequency to eligible LPRs, *id.* at 296 & n.5, and immigration consequences are among the most palpable concerns of LPRs accused of potentially deportable offenses, *id.* at 322-323 & n.48. Moreover, a plea agreement entered in reliance on the previous regime deserves particular recognition because the government *benefits* from the LPR's detrimental reliance through the guilty plea. *See id.* at 322-324.

4. The burden of retroactivity visited on Petitioner is unquestionable: deportation "may result … in loss of both property and life, or of all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922); *see also Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010). The consequences of mandatory deportation are especially severe in the case of otherwise-eligible Section 212(c) applicants. By definition, each is an LPR of long residence; many, like Petitioner, have

resided in the United States since early childhood. Their connection to the United States is powerful and they would be particularly harmed by removal from a country that is, in every meaningful sense, their home. Indeed, the lack of U.S. citizenship may, as in Petitioner's case, result from nothing more than a parent's unknowing nonfeasance.[15]

5. Finally, and perhaps unusually, the fifth factor—the statutory interest in applying policy retroactively—does not support the agency's position here. As detailed in Part II.B below, neither the BIA nor the government has ever identified a coherent reason for making Section 212(c) relief turn on semantic discrepancies between the deportation and exclusion provisions. Nor is there any reason to treat LPRs who did not leave the country before the inception of deportation proceedings differently from LPRs convicted of the same crime who left and reentered and can thus seek relief *nunc pro tunc* under *G-A-*, 7 I. & N. Dec. at 275-276.

More importantly, however, refusing retroactive application to *Blake* and *Brieva-Perez* ultimately does no harm to the enforcement scheme because actual relief on the merits remains *discretionary*. *Cf. Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010) (noting limited practical effect of rejecting government's view because, although alien "may now … avoid the harsh consequence of mandatory removal[,] …

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[15] Petitioner's parents could have sought citizenship for him, but did not. Had Petitioner's mother naturalized before he turned 18, he would have become a citizen by operation of law. 8 U.S.C. §1432(a) (1988). She naturalized when he was 18 years and 11 months old. Pet. App. 36a-37a.

[a]ny relief he may obtain depends upon the discretion of the Attorney General"). All that Petitioner seeks is that an IJ *consider* his application under the agency's established standards for Section 212(c) relief. *E.g.*, *Matter of Marin*, 16 I. & N. Dec. 581, 584-585 (BIA 1978). The Department has very little (if any) "statutory interest" in refusing to do even *that*.

Moreover, retroactive application is not necessary here to deter parties from seeking loopholes in existing rules. Nor is there any "equal and opposite loss that non-retroactivity would inflict on" any counterparties. *Qwest Servs. Corp.* v. *FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). The only counterparty is the agency itself, and in any case where public policy legitimately so requires, the agency can deny relief as a matter of discretion.

B. *Blake* And *Brieva-Perez* Are Arbitrary And Capricious On Their Own Merits

Even absent a severe retroactive effect, the BIA's new policy would still be arbitrary and capricious for three related reasons.[16]

First, there is no reason to make relief under Section 212(c) turn on linguistic disparities between the deportation and exclusion provisions. While the 1990 Act made aliens convicted of a "crime of violence" aggravated felony deportable, Congress nowhere sug-

[16] Whether understood under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or under the second step of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984), the standard is the same: whether the BIA's policy is "arbitrary or capricious in substance." *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001)).

gested that its use of that phrase was also intended to disqualify all LPRs deportable under that provision from seeking Section 212(c) relief. Had Congress wished to impose such a radical change, it would have said so expressly. "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions[.]" *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Indeed, when Congress imposed other limitations on Section 212(c) relief in the 1990 and 1996 Acts, it did say so expressly. *See supra* pp. 14-16. And what it said in the 1990 Act was that aggravated felons serving sentences over five years would be ineligible for a Section 212(c) waiver, strongly signaling its understanding that *other* aggravated felons—including the "crime of violence" class it *simultaneously* created—remained eligible for relief. *See Meza*, 20 I. & N. Dec. at 260-261 (Heilman, Board Member, concurring).

The language of the exclusion and deportation provisions reflects Congress's concerns regarding who is excludable and deportable. There is no reason to believe that a comparison between the two provisions determines who should be eligible for relief under Section 212(c). To give those linguistic choices that effect is simply arbitrary.

That is especially true because, when Congress added crimes of violence and sexual abuse as deportable aggravated felonies, it had no reason to add them as bases for exclusion—aliens were already excludable for a CIMT punishable by over a year of incarceration. 8 U.S.C. §1182(a)(2)(A). Moreover, between the addition of "crimes of violence" in 1990 and crimes involving "sexual abuse" in 1996, the BIA was already extending Section 212(c) eligibility to aliens convicted of crimes of violence, *see supra* pp. 17-18 & n.4, and so Congress

would have had no reason to know that maintaining eligibility for relief required it to add a special, superfluous exclusion provision with matching language. Indeed, the matching language the BIA treats as preserving Section 212(c) waivers for aggravated felonies of drug trafficking, *see Meza*, 20 I. & N. Dec. at 259, only exists because it has been in the exclusion provision since the original INA and covers not only persons *convicted* of a trafficking crime, but the broader class of persons reasonably *believed* to be drug traffickers. *See* INA §212(a)(23), 66 Stat. 163, 184 (codified at §1182(a)(2)(C)).

The BIA's reasoning in *Blake* and *Brieva-Perez* is particularly irrational because it compares the language of the exclusion provision (INA §212(a)) not to the language of the relevant *deportation provision* itself (INA §237(a)), but to the *subcategory* of "aggravated felony" listed in the INA's general definitions provision (INA §101(a)(43)). *See Blake*, 23 I. & N. Dec. at 727. There is no reason whatsoever to believe that Congress phrased the subcategories of "aggravated felony"—subcategories that have changed significantly over time, *see St. Cyr*, 533 U.S. at 295-296 & n.4—with the view that Section 212(c) eligibility would turn on whether their language harmonized with or differed from exclusion provisions. Indeed, the "crime of violence" subcategory was chosen simply as a way to import a parallel concept from the criminal law, *see* 8 U.S.C. §1101(a)(43)(F) (incorporating definition from 18 U.S.C. §16).[17]

[17] Furthermore, even if Section 212(c) eligibility were properly determined through comparisons of entire deportation and exclusion subsections, rather than by asking whether the LPR was deportable for a conviction that also made him or her excludable, it

Second, the BIA's new doctrine recreates the arbitrary distinction based on travel abroad that the BIA abandoned years ago in *Silva*. There is no question that LPRs with excludable convictions who travel abroad and reenter are eligible for Section 212(c) relief *nunc pro tunc* in later-commenced deportation proceedings, nor is there any question that a grant of relief would protect such an LPR from deportation based on that conviction. *See G-A-*, 7 I. & N. Dec. at 276 (grant of Section 212(c) relief, *nunc pro tunc*, provides "admi[ssion] with freedom from deportation" (quotation marks omitted)); *see also* 8 C.F.R. §1212.3(d) ("Once an application is approved, that approval is valid indefinitely."); *Matter of Balderas*, 20 I. & N. Dec. 389, 393 (BIA 1991) ("Th[is] regulation[] reflect[s] our concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including both deportation and exclusion proceedings."). But the BIA's new approach once again denies the same eligibility to an LPR who never departed and reentered.

There is no justification for the BIA's current approach, and the government has so far articulated none.

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is hard to imagine that there are many *aggravated felonies* that are crimes of *violence* or *sexual abuse* of a *minor* that somehow involve no moral turpitude or are petty offenses. *See Carachuri-Rosendo*, 130 S. Ct. at 2585 ("A 'felony,' we have come to understand, is a 'serious crime usu[ally] punishable by imprisonment for more than one year or by death,' [and] [a]n 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime.'" (citation omitted)). To the extent there are any aggravated-felony crimes of violence that are not CIMTs, the set is very small, and the BIA has said that—even in its brave new world—there "need not be a perfect match." *Blake*, 23 I. & N. Dec. at 729; *see also* Opp. 14.

This is not a case in which Congress has "draw[n] lines on the basis of general categories of offenses as defined by statutes." Opp. 13. Rather, the BIA distinguishes between LPRs convicted of the *same* offense and charged under the *same* deportation subsection based solely on whether the LPR previously traveled abroad. The agency has never suggested that an LPR who took a short trip sometime in the past is somehow a more compelling case for discretionary mercy than an identically situated LPR who did not; as then-Attorney General Jackson put it: "[t]o require [Petitioner] to go to Canada and reenter will make him no better resident of this country." *Matter of L-*, 1 I. & N. Dec. 1, 6 (Att'y Gen. 1940). If anything, the law is to the contrary, favoring the LPR who evinces greater ties to the United States by staying here. *See* Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, 505 (1981) (Congress made clear that "the most highly approved immigrant was one who came with the intention of remaining permanently, becoming a citizen, and bringing his family or establishing it after arrival").[18]

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[18] The hypothesis that Congress meant to "create[] an incentive for deportable aliens to leave the country" in part so that LPRs who are denied Section 212(c) relief will be "outside our borders when they get the bad news," *Abebe*, 554 F.3d at 1206-1207 (quotation marks omitted), is refuted by what Congress actually did. First, Congress codified the agency's practice of granting relief *nunc pro tunc* to LPRs who previously departed but were then put into deportation proceedings *inside* our borders. *See supra* pp. 6-7. Second, despite many other revisions to Section 212(c), Congress left untouched the BIA's post-*Silva* practice of granting Section 212(c) relief to deportable LPRs inside the country regardless of whether they had left the country or not, as long as they would have been eligible for relief if there had been a prior departure. *See supra* Part I. And third, Congress let stand

Third, the BIA's new policy reopens the risk of a further absurd result that the agency has consistently avoided: that an LPR could obtain relief from inadmissibility for a particular conviction yet still be deported for the same underlying conduct. The BIA has long recognized that, "when relief has been granted in accordance with [Section 212(c)], it would be clearly repugnant to say that the respondent remains deportable because of the same conviction." *G-A-*, 7 I. & N. Dec. at 275-276; *see also Mascorro-Perales*, 12 I. & N. Dec. at 230. The implementing regulations "reflect [the agency's] concern that a waiver, once granted, should remain valid indefinitely for all proceedings, including both deportation and exclusion proceedings." *Balderas*, 20 I. & N. Dec. at 393. In this way, the BIA has avoided the absurd and unfair result of granting Section 212(c) relief from exclusion because of a conviction, only to turn around and deport the same person because of the same conviction.

Under *Blake* and *Brieva-Perez*, however, that absurd result is once again possible—perhaps even re-

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agency regulations that, to this day, make Section 212(c) relief available to waive exclusion, deportation, and removal as long as the underlying offense renders the LPR "inadmissible to the United States." App. 23a.

The Ninth Circuit's statement that, under its view, "[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*," 554 F.3d at 1206 (emphasis added), is strange, given that decades of judicial and agency precedent told LPRs exactly the opposite. There is no way for LPRs who are already in deportation proceedings to comply with the Ninth Circuit's *retroactively imposed* requirement that they travel abroad before deportation proceedings begin.

quired. For instance, an LPR with an assault conviction who obtains relief in exclusion proceedings for a "crime involving moral turpitude" would not be protected against a deportation charge of a "crime of violence" based on the same conviction and brought the very next day. *Cf. Kim* v. *Gonzales*, 468 F.3d 58, 62 (1st Cir. 2006) (under *Brieva-Perez*, "there is no waiver authority for one who is excluded as an 'aggravated felon' or one who commits a 'crime of violence'").

The BIA's approach is not only illogical but also contrary to the way the agency's own regulations describe the act of seeking Section 212(c) relief in deportation proceedings. Under 8 C.F.R. §1212.3(a), the applicant who files for Section 212(c) relief in a deportation proceeding follows the *exact same procedure* as applicants applying for relief in an exclusion proceeding or making an advance application to a district director, *see* 8 C.F.R. §§212.3(a), (e), 1212.3(a), (e), and *the exact same* substantive validity provision applies to each such request, *id.* §§212.3(d), 1212.3(d). Any one of these applicants can complete Form I-191 if he or she has a conviction for a CIMT because a CIMT conviction is a "reason[]" why the alien is "inadmissible to the United States." App. 23a. As described above, this regulation provides effective relief from exclusion *and* deportation to those who invoke it outside of deportation proceedings. But it applies by its terms to those in deportation proceedings as well, making it manifestly arbitrary to deny eligibility for that same relief to aliens like Petitioner who are equally covered by the regulation's text.

The BIA unquestionably has broad discretion in interpreting the INA. But it has shown no plausible reason for making relief from deportation turn on arbitrary linguistic differences that were never intended to determine Section 212(c) eligibility, particularly where

the only effect is to resurrect an unjustified distinction that the agency has rejected for decades. The BIA's new policy "relie[s] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," offered *no* explanation for drawing the distinctions drawn, and ultimately "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Accordingly, it should be set aside as arbitrary and capricious. 5 U.S.C. §706(2)(A).

C. The BIA's Distinction Based On Travel History Raises Serious Equal Protection Concerns

The doctrine of constitutional avoidance provides an additional basis for rejecting the BIA's position. Where a statute is susceptible to more than one plausible construction, one of which raises "serious constitutional doubts," the Court adopts the interpretation that avoids these doubts. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005); *St. Cyr*, 533 U.S. at 301 n.13. A plausible interpretation of Section 212(c), as accepted by Congress over several decades, is that it permits discretionary relief for all LPRs in deportation proceedings whose convictions would also render them excludable, regardless of whether the LPR previously traveled abroad. The BIA adopted that view in *Silva* to avoid equal protection concerns, and it was the agency's longstanding, consistent position before *Blake*. *Blake*, however, revived the distinction between LPRs in deportation proceedings who previously traveled abroad (who can seek relief *nunc pro tunc*) and LPRs who did not.

The Fourteenth Amendment's guarantee of equal protection, applicable to the federal government through the Due Process Clause of the Fifth Amendment, protects LPRs as well as citizens. *Mathews* v. *Diaz*, 426 U.S. 67, 77-78 (1976); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886). Equal protection "'imposes a requirement of some rationality in the nature of the class singled out.'" *James* v. *Strange*, 407 U.S. 128, 140 (1972) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-309 (1966)).[19]

The BIA's distinction in *Blake* is identical to the one discredited in *Francis*, a decision the government did not appeal and that the BIA followed for decades. *Francis* recognized that distinguishing between two LPRs deportable under the same deportation provision due to the same criminal conviction solely because one left the country and reentered is irrational and unrelated to any legitimate governmental interest. *See* 532 F.2d at 273. The irrationality is particularly stark because the BIA's policy gives worse treatment to those who did not leave and who therefore have stronger ties to this country. Neither the BIA nor the government has ever identified a rational basis for "such a distinction without a material difference." *Cabasug*, 847 F.2d at 1326.

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[19] Although this Court has referred to a "facially legitimate and bona fide reason" standard when examining initial admission decisions, *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977), that standard does not apply to longstanding residents and, at any rate, is "analytically equivalent" to rational basis review, *Breyer* v. *Meissner*, 214 F.3d 416, 422 n.6 (3d Cir. 2000); *see also*, *e.g.*, *Johnson* v. *Whitehead*, 2011 WL 1998333, at *5 (4th Cir. May 24, 2011); *Ablang* v. *Reno*, 52 F.3d 801, 804 (9th Cir. 1995); *Azizi* v. *Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990).

Accordingly—to the extent the Court does not reverse the BIA's new rule as impermissibly retroactive or arbitrary and capricious—it should construe it as contrary to Section 212(c), viewed in light of the avoidance canon. Alternatively, the Court should directly hold the BIA's approach unconstitutional as a violation of equal protection. Either way, the correct result is to construe the statute and regulations to permit grants of discretionary relief to LPRs like Petitioner, as the agency routinely did before *Blake*.

D. At A Minimum, The BIA Failed To Consider The Appropriate Factors Under The APA

In the alternative, and at a minimum, this Court should vacate and remand because the BIA has failed to meet the basic "requirement that an agency provide reasoned explanation for its action," which "would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Here, the BIA failed even this minimal test by denying that *Blake* and *Brieva-Perez* represented a change at all. When it later admitted the fact, it treated the change as a *fait accompli* that did not require further explanation. *Cardona*, 2005 WL 3709244.

The BIA's failure to follow the APA's requirements for adequate consideration is important because agencies formulating retroactive policy changes must "take[] into account" the "serious reliance interests" engendered by the preexisting policy and provide "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 129 S. Ct. at 1811. Because the BIA failed even to admit to a change in policy, it failed this requirement as well, denying affected individuals any

accounting for the reliance interests it swept aside. Indeed, even if *Blake* and *Brieva-Perez* could be defended as theoretically appropriate for retroactive application or as substantively reasonable—and they are neither—the agency's failure to acknowledge the change and explain *why* retroactive application was appropriate remains a fatal flaw compelling a remand.

The BIA also relied on irrelevant factors. *Blake* and *Brieva* cited the 2004 regulation as supporting the BIA's decision, but that rulemaking both *did not* purport to alter the status quo, *see supra* pp. 20-22, and *could not* have altered it because Congress has not expressly authorized retroactive rulemaking to implement Section 212(c). *See Bowen*, 488 U.S. at 208. The BIA has since appeared to hold that "the Board's analysis in [*Blake* and *Brieva-Perez*] was expressly adopted by the Attorney General through the promulgation of 8 C.F.R. § 1212.3(f)(5)," which the BIA viewed as depriving it of the power to reconsider those decisions. *Matter of Dimopoulos*, 2011 WL 2261207 (BIA May 17, 2011). But the regulation cannot possibly have adopted *Blake*—the regulation *preceded* and was cited in *Blake*. Either way, however, the regulation did not and could not have changed the law retroactively; the BIA's mistaken invocation of it demonstrates the unprecedented and unjustified nature of *Blake* and *Brieva-Perez*.

Moreover, in invoking the one aspect of the regulations that was irrelevant, the BIA utterly failed to consider the rest of its preexisting regulations, and *those* regulations indicate that the requested relief should be available to LPRs such as Petitioner no less than other applicants. *See supra* pp. 8-11.

Because the BIA relied on inapposite considerations and failed to provide an adequate explanation for its change in position, the BIA's action must be set aside. *State Farm*, 463 U.S. at 43; *see also Chenery*, 332 U.S. at 196 ("If th[e] grounds [actually invoked by the agency] are inadequate or improper, the court is powerless to affirm the administrative action[.]").

CONCLUSION

The judgment of the court of appeals should be reversed with directions that the case be remanded to the Board of Immigration Appeals for further proceedings.

Respectfully submitted.

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APPENDIX

STATUTES, REGULATIONS, AND FORMS

8 U.S.C. §1101—Definitions

(a) As used in this chapter-—

* * *

(43) 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);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to fire-arms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(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[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peon-

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[1] So in original. Probably should be preceded by "is".

age, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[2]

[2] So in original. Probably should be followed by a semicolon.

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sen-

tence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

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.

8 U.S.C. §1182—Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

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

fense) 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.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to

which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

* * *

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

* * *

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

* * *

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

* * *

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

* * *

8 U.S.C. §1182(c) (1988)—Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under and 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 provision of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

8 U.S.C. §1182(c) (1994)—Nonapplicability of subsection (a) [as amended by Immigration Act of 1990]

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. 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.

8 U.S.C. §1182(c) (Apr. 24, 1996)—Nonapplicability of subsection (a) [prior to repeal]

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their com-

mission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

8 U.S.C. §1227—Deportable aliens

(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

regardless 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.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of 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), other than a single offense involving

possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C.

App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and[3]

(i) Domestic violence, stalking, and child abuse

* * *

(ii) Violators of protection orders

* * *

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

* * *

8 C.F.R. §212.3 (1992)—Application for the exercise of discretion under section 212(c)

(a) Jurisdiction. An application for the exercise of discretion under section 212(c) of the Act shall be submitted on Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile, to:

(1) The district director having jurisdiction over the area in which the applicant's intended or actual place of residence in the United States is located; or

[3] So in original.

(2) The Office of the Immigration Judge if the application is made in the course of proceedings under sections 235, 236, or 242 of the Act.

(b) Filing of application. The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts and/or circumstances which the applicant knows or believes apply to the grounds of excludability or deportability must be described. The applicant must also submit all available documentation relating to such grounds.

(c) Decision of the District Director. A district director may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section. The applicant shall be notified of the decision and, if the application is denied, of the reason(s) for denial. No appeal shall lie from denial of the application, but the application may be renewed before an Immigration Judge as provided in paragraph (e) of this section.

(d) Validity. Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability or deportability that were described in the application. An application who [sic] failed to describe any other grounds of excludability or deportability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable or deportable under the previously unidentified grounds. If at a later date, the applicant becomes subject to exclusion or deportation based upon these previously unidenti-

fied grounds or upon new ground(s), a new application must be filed with the appropriate district director.

(e) Filing or renewal of applications before an Immigration Judge.

(1) An application for the exercise of discretion under section 212(c) of the Act may be renewed or submitted in proceedings before an Immigration Judge under sections 235, 236, or 242 of the Act, and under this chapter. Such application shall be adjudicated by the Immigration Judge, without regard to whether the applicant previously has made application to the district director.

(2) The Immigration Judge may grant or deny an application for advance permission to return to an unrelinquished domicile under section 212(c) of the Act, in the exercise of discretion, unless otherwise prohibited by paragraph (f) of this section.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the Immigration Judge of this application in accordance with the provisions of section 3.36 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. A district director or Immigration Judge shall deny an application for advance permission to enter under section 212(c) of the Act if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful permanent resident status in the United States for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), or (3)(E) of section 212(a) of the Act;

(4) The alien has been convicted of an aggravated felony, as defined by section 101(a)(43) of the Act, and has served a term of imprisonment of at least five years for such conviction; or

(5) The alien applies for relief under section 212(c) within five years of the barring act as enumerated in one or more sections of section 242B(e) (1) through (4) of the Act.

8 C.F.R. §1212.3—Application for the exercise of discretion under former section 212(c)

(a) Jurisdiction. An application by an eligible alien for the exercise of discretion under former section 212(c) of the Act (as in effect prior to April 1, 1997), if made in the course of proceedings under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as in effect prior to April 1, 1997), shall be submitted to the immigration judge by filing Form I–191, Application for Advance Permission to Return to Unrelinquished Domicile.

(b) Filing of application. The application may be filed prior to, at the time of, or at any time after the applicant's departure from or arrival into the United States. All material facts or circumstances that the applicant knows or believes apply to the grounds of excludability, deportability, or removability must be described in the application. The applicant must also submit all available documentation relating to such grounds.

(c) [Reserved]

(d) Validity. Once an application is approved, that approval is valid indefinitely. However, the approval covers only those specific grounds of excludability, deportability, or removability that were described in the application. An applicant who failed to describe any other grounds of excludability, deportability, or removability, or failed to disclose material facts existing at the time of the approval of the application, remains excludable, deportable, or removable under the previously unidentified grounds. If the applicant is excludable, deportable, or removable based upon any previously unidentified grounds a new application must be filed.

(e) Filing or renewal of applications before an immigration judge.

(1) An eligible alien may renew or submit an application for the exercise of discretion under former section 212(c) of the Act in proceedings before an immigration judge under section 240 of the Act, or under former sections 235, 236, or 242 of the Act (as it existed prior to April 1, 1997), and under this chapter. Such application shall be adjudicated by the immigration judge, without regard to whether the applicant previously has made application to the district director.

(2) The immigration judge may grant or deny an application for relief under section 212(c), in the exercise of discretion, unless such relief is prohibited by paragraph (f) of this section or as otherwise provided by law.

(3) An alien otherwise entitled to appeal to the Board of Immigration Appeals may appeal the denial by the immigration judge of this application in

accordance with the provisions of § 1003.38 of this chapter.

(f) Limitations on discretion to grant an application under section 212(c) of the Act. An application for relief under former section 212(c) of the Act shall be denied if:

(1) The alien has not been lawfully admitted for permanent residence;

(2) The alien has not maintained lawful domicile in the United States, as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the Act, for at least seven consecutive years immediately preceding the filing of the application;

(3) The alien is subject to inadmissibility or exclusion from the United States under paragraphs (3)(A), (3)(B), (3)(C), (3)(E), or (10)(C) of section 212(a) of the Act;

(4) The alien has been charged and found to be deportable or removable on the basis of a crime that is an aggravated felony, as defined in section 101(a)(43) of the Act (as in effect at the time the application for section 212(c) relief is adjudicated), except as follows:

(i) An alien whose convictions for one or more aggravated felonies were entered pursuant to plea agreements made on or after November 29, 1990, but prior to April 24, 1996, is ineligible for section 212(c) relief only if he or she has served a term of imprisonment of five years or more for such aggravated felony or felonies, and

(ii) An alien is not ineligible for section 212(c) relief on account of an aggravated felony con-

viction entered pursuant to a plea agreement that was made before November 29, 1990; or

(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.

(g) Relief for certain aliens who were in deportation proceedings before April 24, 1996. Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

(h) Availability of section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes. For purposes of this section, the date of the plea agreement will be considered the date the plea agreement was agreed to by the parties. Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.

(1) Pleas before April 24, 1996. Regardless of whether an alien is in exclusion, deportation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, without regard to the amendment made by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996.

(2) Pleas between April 24, 1996 and April 1, 1997. Regardless of whether an alien is in exclusion, de-

portation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, as amended by section 440(d) of the Anti-terrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made on or after April 24, 1996, and before April 1, 1997.

(3) Pleas on or after April 1, 1997. Section 212(c) relief is not available with respect to convictions arising from plea agreements made on or after April 1, 1997.

DEPARTMENT OF HOMELAND SECURITY U.S. CITIZENSHIP AND IMMIGRATION SERVICES FORM 1-191, APPLICATION FOR ADVANCE PERMISSION TO RETURN TO UNRELINQUISHED DOMICILE (EXCERPTS)[4]

* * *

(1) I hereby apply for permission to return to the United States under the authority contained in Section 212(c) of the Immigration and Nationality Act.

MY NAME IS: *(First)* *(Middle)* *(Last)*		
DATE OF BIRTH: *(mm/dd/yyyy)*	PLACE OF BIRTH: *(City, Province, Country)*	I AM A CITIZEN/ NATIONAL OF: *(Country)*
PRESENT ADDRESS: *(Street and number, apt. no., city, state, country)*		

(2) I was lawfully admitted to the United States for permanent residence at:

PORT OF ENTRY/ DHS OFFICE:	DATE: *(mm/dd/yyyy)*	NAME OF VESSEL OR OTHER MEANS OF CONVEYANCE

[4] *Available at* http://www.uscis.gov/files/form/i-191.pdf.

* * *

(7) I _____ *(Intend to or have)* depart(ed) temporarily from the United States on or about _____ *(Date—mm/dd/yyyy)* and will remain in _____ *(Country)* approximately _____ *(Length of Time)*, for the purpose of _____; and expect to apply for admission at _____ *(Port)*

(8) I believe I may be inadmissible to the United States for the following reasons:

_____
_____
_____

I understand that the information may be used in any criminal or civil proceedings, including removal, hereafter instituted against me.

I certify that the statements above are true and correct to the best of my knowledge and belief.

_____
(Signature of Applicant)

* * *

DEPARTMENT OF HOMELAND SECURITY U.S. CITIZENSHIP AND IMMIGRATION SERVICES INSTRUCTIONS FOR FORM 1-191, APPLICATION FOR ADVANCE PERMISSION TO RETURN TO UNRELINQUISHED DOMICILE (EXCERPTS)[5]

* * *

General Instructions

Step 1. Fill Out the Form I-191

1. Type or print legibly in black ink.

2. If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.

3. Answer all questions fully and accurately. State that an item is not applicable with "N/A." If the answer is none, write "none."

4. List specifically and in detail your reasons for possible inadmissibility. For example, if the application is made because you may be inadmissible due to a conviction of a crime, state in the application the designation of the crime, the date and place of its commission and of the conviction therefore, and the sentence or other judgment of the court. In the case of a disease, mental or physical defect or other disability, give an exact description, duration thereof and the date and place last treated.

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[5] *Available at* http://www.uscis.gov/files/form/i-191instr.pdf.

5. If the applicant is mentally incompetent or is under 14 years of age, the application shall be executed by his parent or guardian.

6. When completing **Number 3** on the form, where absences have been numerous as a resident alien border crosser or as a seaman, it will be sufficient to give the approximate number of such absences during the years covered.

* * *

Where To File?

This form, when completely executed, must be mailed to one of the USCIS Texas Service Center facility addresses listed below.

For U.S. Postal Service (USPS) deliveries, use:

USCIC
Texas Service Center
P.O. Box 850965
Dallas, TX 75185

For Express mail and courier deliveries, use:

USCIC
Texas Service Center
4141 N. St. Augustine Road
Dallas, TX 75227

* * *