

(hereinafter INA). Petitioner posted a bond, and was released pending his deportation hearing. Canales-Martinez failed to appear at his May 8, 1989, deportation hearing and the Immigration Judge ordered the case administratively closed.

Petitioner's whereabouts are unaccounted for from 1989 until he was arrested on February 19, 1992. Petitioner plead guilty to attempted robbery in the first degree in Nassau County Court, State of New York on February 8, 1993. Petitioner was sentenced to a term of imprisonment from two to six years, but he served fourteen months of his sentence. Petitioner's whereabouts are also unaccounted for from the time he was released from prison until shortly before May 1, 2003, when Canales-Martinez was arrested by the Pennsylvania State Police. The record is clear that Canales-Martinez married a United States citizen on January 8, 2000, and subsequently had two United States citizen children.

On May 1, 2003, ICE filed a Notice of Intent to Issue a Final Administrative Removal Order charging that Canales-Martinez was deportable pursuant to INA § 237 (8 U.S.C. § 1227 (a)(2)(A)(iii)) as an alien convicted of an aggravated felony—the 1993 guilty plea of attempted robbery. Canales-Martinez's is now eligible for expedited removal under INA § 238(b) (8 U.S.C. § 1228(b)), and on June 4, 2003, the ICE filed a Motion to Recalendar and Terminate Proceedings pursuant to 8 C.F.R. 238.1(e), which would terminate the 1988 proceeding that was administratively closed.

On June 17, 2003, an Immigration Judge granted ICE's Motion to Recalendar and Terminate Proceedings and terminated Canales-Martinez's INA § 240 proceedings. Canales-Martinez appealed the Immigration Judge's decision to the Board of Immigration Appeals; the appeal is currently pending. ICE issued a Final Administrative Removal

Order pursuant to INA § 238(b).

DISCUSSION

Canales-Martinez raises two issues in his petition for Writ of Habeas Corpus: (1) whether ICE may terminate the removal proceeding under INA § 240 (hereinafter section 240) without a hearing or opportunity for petitioner to be heard; and (2) whether ICE is precluded from initiating an INA § 238 (hereinafter section 238) removal proceeding while a section 240 removal proceeding is pending against the same party. Each issue will be discussed in turn.

1) Jurisdiction

Pursuant to 28 U.S.C. § 2241, a habeas corpus petition is appropriate to raise an issue that the Immigration and Naturalization Service has violated the Constitution, see *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000); see also *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), or that it has violated the statutory law governing immigration. *INS v. St. Cyr*, 533 U.S. 289 (2001).

2) Grounds for Canales-Martinez's Removal

Respondent initiated removal proceedings pursuant to INA § 237(a)(2)(A)(iii), which permits the removal of any alien convicted of an aggravated felony. Canales-Martinez is also subject to expedited removal under section 238(b), which permits the Attorney General to expedite removal of an alien convicted of an aggravated felony who is not lawfully admitted for permanent residence. Petitioner is also subject to removal under section 240, which permits removal of any alien: (1) who is inadmissible at the time of entry into the United States; or (2) who is present in the United States and in violation

of any law. Canales-Martinez entered the United States without inspection and failed to appear at his deportation hearing, making him eligible for removal under section 240.

3) Termination of Removal Proceeding Pursuant to Section 240

In 1989, Respondent initiated deportation (now called removal) proceedings pursuant to section 240. Petitioner contends that ICE may not terminate removal proceedings under section 240 without a hearing or opportunity to be heard because Petitioner acquired certain inchoate rights when he entered the United States, and those rights may not be taken from him without a hearing. Petitioner argues that once section 240 proceedings were commenced, terminating the proceeding deprives him of vested substantive due process rights, including certain forms of relief, namely INA § 212(h) (8 U.S.C. § 1182(h)) and former INA § 212(c) (former 8 U.S.C. § 1182(c)).

Under INA § 212(h) relief, the Attorney General has discretion to waive removal if the removable alien is the spouse, son, daughter, or parent of a United States citizen or legal permanent resident and the alien's denial of admission would result in "extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien." 8 U.S.C. § 1182(h)(1)(B). This discretionary relief is available to nonresident aliens, such as Canales-Martinez, as long as he is subject to removal in a proceeding under section 240. "However, a nonresident alien is not eligible for any discretionary relief or waiver of removal if he is subject to removal in an expedited proceeding under INA § 238(b)." *Barton v. Ashcroft*, 171 F. Supp. 2d 86, 91 (D. Conn. 2001).

Former INA § 212(c) (hereinafter 212(c)) provided the Attorney General with discretion to waive deportation for deportable aliens. 212(c) relief required that the alien

be a lawful permanent resident and have seven years of lawful unrelinquished domicile in the United States. 8 U.S.C. § 1182(c). 212(c) was repealed in 1997 by the Illegal Immigration Reform and Immigrant Responsibility Act (hereinafter IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, and replaced by INA § 240A, which gives the Attorney General authority to cancel removal of a deportable alien if the alien: “(1) has been an alien lawfully admitted for permanent residence for not less than five years; (2) has resided in the United States continuously for seven years after having been admitted in any status; and (3) has not been convicted of any aggravated felony.” 8 U.S.C. § 1229b.

A. St. Cyr Decision

Canales-Martinez contends that repealing 212(c) has an impermissible retroactive effect prohibited by the Constitution and he should be eligible for such relief under *INS v. St. Cyr*. 533 U.S. 289 (2001). In *St. Cyr*, a lawful permanent resident plead guilty to an aggravated felony that made him deportable. *St. Cyr* was eligible for a waiver of deportation because he plead guilty prior to 212(c) being repealed; however, removal proceedings were commenced after IIRIRA’s effective date. *St. Cyr* challenged the Board of Immigration Appeals finding that he was ineligible to apply for 212(c) relief from deportation.

The United States Supreme Court held that 212(c) relief remains available for aliens who plead guilty and who, notwithstanding the conviction, would have been eligible for 212(c) relief under the law when the guilty plea was entered. *St. Cyr*, 533 U.S. at 326. The Court examined whether repealing 212(c) had an impermissible retroactive effect. *Id.* at 315. The Court first addressed whether Congress had directed with the requisite

clarity that the law be applied retrospectively. *Id.* at 316. The Court found that Congress did not indicate unambiguously its intention to apply its repeal of 212(c) relief retroactively. *Id.* at 320. The second step of the Court’s retroactivity analysis was to “determine whether depriving removable aliens of consideration for 212(c) relief produces an impermissible retroactive effect for aliens who . . . were convicted pursuant to a plea agreement at a time when their plea would not have rendered them ineligible for 212(c) relief.” *Id.*

“The judgment whether a particular statute acts retroactively ‘should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.’” *Id.* at 321 (citations omitted). The Court found that IIRIRA’s elimination of 212(c) relief attached a new disability to past transactions or considerations for those aliens who entered guilty pleas with the expectation that such relief would be later available. *Id.* The Court noted that prior to the repeal of 212(c), aliens had a significant likelihood of receiving 212(c) relief, which was a crucial factor and principal benefit sought by alien defendants in determining whether to forgo their right to a trial. *Id.* at 323, 325. Therefore, the Court concluded, eliminating 212(c) relief for those who relied on it and plead guilty while 212(c) was still in effect has an “obvious and severe retroactive effect.” *Id.* at 325.

B. Applicability of 212(c) Relief to Petitioner

Canales-Martinez asserts that he should be eligible for 212(c) relief because depriving him of that relief has an impermissible retroactive effect under *St. Cyr*. I disagree. *St. Cyr* is inapplicable to the current matter for several reasons. First, 212(c)

relief was available only to lawful permanent residents – a status never attained by Canales-Martinez. Petitioner entered the country without inspection and then failed to appear at his deportation hearing, only to commit an aggravated felony less than five years after entering the United States. At no time has Canales-Martinez ever become a lawful permanent resident, which is a condition precedent to requesting 212(c) relief, along with seven years of lawful unrelinquished residency. Moreover, using the principles of fair notice, reasonable reliance, and settled expectations, as instructed by the *St. Cyr* Court for a retroactivity analysis, Canales-Martinez could not have relied on, nor expected 212(c) relief, because he has never been eligible to receive such relief.

Second, Canales-Martinez's intentional acts, namely, failing to appear at his deportation hearing and committing an aggravated felony, are the reasons why he never received 212(c) relief. Petitioner had plenty of opportunities to follow the proper procedures necessary to become eligible for 212(c) relief, but instead chose to disobey the law. Had Petitioner followed the law, he may have received 212(c) relief. The *St. Cyr* Court noted that "the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *St. Cyr*, 533 U.S. at 296. However, Canales-Martinez did not follow the law and, as a result, lost the opportunity to receive this relief. Accordingly, I find that depriving Canales-Martinez of 212(c) relief does not have an impermissible retroactive effect.

4) Dual Removal Proceedings

Canales-Martinez asserts that ICE is precluded from initiating section 238 removal proceedings while a section 240 removal proceeding is pending. When Canales-Martinez entered the country without inspection, ICE immediately initiated deportation proceedings by filing an Order to Show Cause charging Canales-Martinez as deportable from the United States pursuant to INA § 241(a)(2). Canales-Martinez failed to appear at his 1989 deportation hearing and the Immigration Judge ordered the case administratively closed, but the judge did not terminate the proceedings. When Canales-Martinez was arrested in 2003, ICE initiated INA § 238 proceedings without first terminating the section 240 removal proceedings. After initiating section 238 removal proceedings, ICE requested, and the Immigration Judge granted, termination of Canales-Martinez's section 240 removal proceedings. Canales-Martinez asserts that ICE is prohibited from initiating a second, separate removal proceeding before terminating the section 240 removal proceeding. Therefore, ICE should be prohibited from bringing section 238 removal proceedings, according to Canales-Martinez.

Canales-Martinez relies on 8 C.F.R. § 238.1(e) (hereinafter 238.1(e)) to support the proposition that ICE may only have one removal proceeding pending at a time.

Section 238.1(e) provides:

Proceedings commenced under section 240 of the Act. In any proceeding commenced under section 240 of the Act which is based on deportability under section 237 of the Act, if it appears that the respondent alien is subject to removal pursuant to section 238 of the Act, the immigration judge may, upon the Service's request, terminate the case and, upon such termination, the Service may commence administrative proceedings under section 238 of the Act. However, in the absence of any such request, the immigration judge shall complete the proceeding commenced under section 240 of the Act.

Canales-Martinez contends that when ICE commenced the section 238 proceeding, it

should have first terminated the pending section 240 proceeding, which did not occur.

In 1988, ICE commenced section 240 deportation proceedings based upon Petitioner's entry into the United States without inspection; however, that proceeding was never completed because Petitioner failed to appear at his deportation hearing. In 2003, Respondent commenced section 238 removal proceedings based upon Petitioner's aggravated felony conviction in 1993, and not his entry into the United States without inspection. Petitioner's assertion that 238.1(e) prevents Respondent from commencing section 238 removal proceedings is mistaken because the section 238 proceeding that is currently pending is based upon the aggravated felony, which occurred subsequent to the initiation of the section 240 proceeding, rendering 238.1(e) inapplicable because the section 240 proceeding was not based upon the aggravated felony.

Additionally, ICE did not act in violation of 238.1(e) because it had two distinct bases for removing Canales-Martinez: (1) under section 240 as an alien who entered the United States without an inspection; or (2) under section 238 as an alien convicted of an aggravated felony. Having two distinct bases for removal permits ICE to decide which theory to effectuate removal of Canales-Martinez.

Section 238.1(e) does not direct ICE to proceed under section 240 when such a basis exists. The decision to request that the Immigration Judge terminate a section 240 removal proceeding rests in the discretion of ICE. Moreover, Canales-Martinez has not offered, nor has the Court located, any authority that compels ICE to proceed under section 240 when there is a separate, alternative basis from which to initiate removal proceedings.

Canales-Martinez can be removed under either section 240 for entering the United

States without an inspection, or under section 238, as an alien convicted of an aggravated felony. It is in the sole discretion of ICE to decide which theory of removal is best. ICE is not required to terminate a pending section 240 removal proceeding when removal is based on an independent and separate basis under section 238. Accordingly, I find that ICE is not precluded from initiating section 238 removal proceedings while a section 240 removal proceeding is pending so long as independent grounds exist for the 238 proceeding.

CONCLUSION

Petitioner's petition for a Writ of Habeas Corpus is denied. Petitioner was never eligible for 212(c) relief, thus, there can be no impermissible retroactive effect under *St. Cyr*. I also find that ICE is not precluded from initiating section 238 removal proceedings while a section 240 removal proceeding is pending because the bases for removal under each section are independent from one another.

An appropriate order will follow.

November 6, 2003

Date

/s/

A. Richard Caputo
United States District Judge

