1-1-1993

Matter of A-A: The Board of Immigration Appeals' Statutory Misinterpretation Denies Discretionary Relief to Aggravated Felons

Brian N. Hayes

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol34/iss1/7
MATTER OF A-A-: THE BOARD OF IMMIGRATION APPEALS' STATUTORY MISINTERPRETATION DENIES DISCRETIONARY RELIEF TO AGGRAVATED FELONS

I. INTRODUCTION

The United States Constitution contains few examples of express enumeration of federal powers regarding immigration matters. Yet, since 1798, Congress has passed an increasingly complex set of laws dealing with the expulsion of aliens whom Congress deems undesirable. Numerous Supreme Court decisions since that time have recognized that Congress has virtual plenary power to regulate the influx and expulsion of aliens from the United States territories.

1. A summary of these provisions can be found in Stephen H. Legomsky, Immigration Law and Policy 8-11 (Foundation Press, Inc. ed., 1992) (citing U.S. Const. art. I, § 8, cl. 3 (the Commerce Clause); U.S. Const. art. I, § 8, cl. 4 (the Naturalization Clause); U.S. Const. art. I, § 8, cl. 11 (the War Clause); U.S. Const. art. I, § 9, cl. 1 (the Migration and Importation Clause)).

2. The Court of Appeals for the Second Circuit has commented that: "Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle." Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

3. Those who have "entered" the country, that is, those who have been inspected and admitted, or who have successfully crossed the border surreptitiously, are removed through deportation proceedings. See Charles Gordon & Stanley Mailman, Immigration Law & Procedure, § 1.03(2)(b) (1992). Individuals apprehended while attempting to enter the country and thus subjected, initially or continuously, to official restraint are removed through exclusion proceedings. Id.


6. See, e.g., Fong Yue Ting v. United States, 149 U.S. 698 (1893) (stating that the right of a nation to expel or deport unnaturalized foreigners is absolute and unqualified); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (stating that the power to exclude foreigners from the country whenever the govern-
One group Congress decided deserved such attention was aliens convicted of aggravated felonies. The Anti-Drug Abuse Act of 1988 (ADAA)\(^7\) first introduced the term "aggravated felony" to the Immigration and Nationality Act of 1952 (INA).\(^8\) Section 7342 of the ADAA defined an aggravated felony as murder, drug or firearms trafficking, or any conspiracy or attempt to commit such acts.\(^9\)

The Immigration Act of 1990 (IA90) significantly expanded the definition of aggravated felony.\(^10\) Section 501(a) of IA90 added specific violent crimes, illicit trafficking in any controlled substance, and money laundering to the definition of aggravated felony.\(^11\) Additionally, Section 501(a) extended the aggravated felony definition to violations of federal and state law, as well as to certain foreign convictions.\(^12\)

Currently, conviction of an aggravated felony encumbers an alien with a wide range of disabilities.\(^13\) For example, pursuant to section 212(c) of the INA,\(^14\) an alien\(^15\) in deporta-
tion proceedings,\textsuperscript{16} already convicted of an aggravated felony and who has served five years imprisonment, is barred from seeking a discretionary waiver of deportability from the Attorney General.\textsuperscript{17} Many statutes barring forms of relief to aliens convicted of aggravated felonies state \textit{when} the underlying conviction must occur for a disability to attach.\textsuperscript{18} The bar to relief under section 212(c) of the INA, however, does not. Thus, it is unclear when the alien's conviction for an aggravated felony must have occurred in order for the alien to be disqualified from a discretionary waiver of deportability.

This question arose in a case decided by the Board of Immigration Appeals (BIA)\textsuperscript{19} on May 15, 1992.\textsuperscript{20} In \textit{Matter of A-A-}, the United States Immigration and Naturalization Service (INS) instituted deportation proceedings against a permanent, legal resident alien convicted of murder in 1985.\textsuperscript{21} Forms of relief from deportation sought by the respondent included section 212(c) discretionary relief.\textsuperscript{22} The presiding immigration judge denied relief. The judge believed that the respondent's conviction was not an aggravated felony, as the

\textsuperscript{16} Although § 212(c) of the INA appears on its face to apply only to the exclusion of aliens, § 212(c) relief is also available in deportation proceedings. \textit{See infra} text accompanying notes 101-12.

\textsuperscript{17} See INA, \textit{supra} note 8. References throughout this comment to the Attorney General also include reference to those such as the immigration judges or the Board of Immigration Appeals (BIA), who are acting with the authority delegated to them by the Attorney General pursuant to 8 U.S.C. § 1103(a) (1988), 8 C.F.R. §§ 2.1, 3.0 (1993).

\textsuperscript{18} \textit{See infra} text accompanying notes 48-51.


\textsuperscript{21} \textit{Id.} at 4.

\textsuperscript{22} \textit{Id.} at 3. The respondent also sought, but was found ineligible for, asylum and withholding of deportation. \textit{Id.}
conviction occurred before the enactment of the ADAA.\textsuperscript{23} Although the respondent qualified to apply for 212(c) relief, the judge denied the relief in the exercise of judicial discretion.\textsuperscript{24} On appeal, the BIA stated that the aggravated felony definition applied retroactively to all ADAA-defined aggravated felonies, and that as such, the bar to 212(c) relief also applied to all such convictions.\textsuperscript{25}

\textit{Matter of A-A-} was the first decision by the BIA to hold that the aggravated felony definition applied retroactively to all convictions of ADAA-defined crimes. Therefore, any conviction, whether entered before, on, or after enactment of the ADAA, barred 212(c) relief.\textsuperscript{26} It is worth noting that the respondent in \textit{Matter of A-A-} was represented \textit{pro se}.\textsuperscript{27} Thus, the BIA was not fully briefed on the disputed issues.

This comment analyzes the BIA's decision in \textit{Matter of A-A-}. First, Section II of the comment discusses the evolution of the relevant sections of immigration law, the introduction of the term "aggravated felony"\textsuperscript{28} to immigration law, and the availability of 212(c) relief in deportation proceedings.\textsuperscript{29} Next, Section II summarizes in detail the BIA's decision in

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 4-5.
\item \textsuperscript{24} \textit{Id.} at 3.
\item \textsuperscript{25} \textit{Matter of A-A-}, Int. Dec. 3176, at 18 (BIA 1992).
\item \textsuperscript{26} The BIA did note that the Ninth Circuit Court of Appeals confronted the temporal applicability of the aggravated felony definition in the context of a bar of the automatic stay of deportation pending judicial review of a final deportation order (enacted by IA90, \textit{supra} note 10, § 513).\textsuperscript{24} \textit{Ayala-Chavez} v. INS, 945 F.2d 288 (9th Cir. 1991). \textit{Ayala-Chavez} held that the definition did not apply retrospectively to bar an automatic stay pending judicial review in deportation proceedings. \textit{Id.} at 293. However, the BIA interpreted the holding of \textit{Ayala-Chavez} as superseded by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) to IA90 § 513, (relying on \textit{Arthurs} v. INS, 959 F.2d 142 (9th Cir. 1992) and \textit{Ignacio} v. INS, 955 F.2d 295 (5th Cir. 1992)), which amended IA90 § 513 to apply to convictions entered "before, or after" November 29, 1990. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991) (codified as amended at 8 U.S.C. § 1101 note (Supp. III 1991)) [hereinafter MTINA]. As such, the BIA asserted that "[the Ninth Circuit Court's] theory of the case [regarding temporal applicability] is now of questionable validity." \textit{Matter of A-A-}, Int. Dec. 3176, at 13-14 (BIA 1992). At least one commentator questioned the development's relevance to the validity of the Ninth Circuit's analysis of temporal applicability of the aggravated felony definition. 69 INTERPRETER RELEASES, 784-85 (June 29, 1992).
\item \textsuperscript{27} \textit{Matter of A-A-}, Int. Dec. 3176, at 2.
\item \textsuperscript{28} See infra text accompanying notes 39-94.
\item \textsuperscript{29} See infra text accompanying notes 97-125.
\end{itemize}
Matter of A-A-. 30 Section III presents considerations overlooked by the BIA in the respondent's favor 31 and offers specific criticisms of the BIA's analysis in Matter of A-A-. 32 This comprehensive analysis indicates that a discretionary waiver of deportability pursuant to section 212(c) of the INA is available to aggravated felons convicted of ADAA-defined aggravated felonies prior to the date of enactment of the ADAA. 33 Finally, Section IV demonstrates the importance of this issue. 34 In the absence of clear statutory authority, the BIA eliminated the possibility of discretionary relief from deportation for a large class of aliens. 35 In addition, the BIA's disregard of precedential decisions in favor of aliens is discussed. 36 Section IV also offers a proposal to settle the issue adequately and thus end further dispute regarding the availability of 212(c) relief in these cases. 37

II. BACKGROUND

To better understand the issues in Matter of A-A-, this section presents a history of the “aggravated felony” concept in immigration law and the consequences aliens face when convicted of such offenses. Next, a description of the evolution of the availability of discretionary relief in deportation proceedings pursuant to section 212(c) of the INA is provided. Finally, this section outlines the decision of the BIA in Matter of A-A-.

A. Introduction and Evolution of the Aggravated Felony in Immigration Law, and Concomitant Consequences

A relatively recent addition to the INA, the “aggravated felony” concept is nonetheless deeply embedded in the statutes dealing with the deportation and exclusion of aliens. 38 Apart from grounds for deportation 39 or exclusion, 40 an aggravated felon is barred from many forms of relief and is sub-

30. See infra text accompanying notes 126-66.
31. See infra text accompanying notes 172-96.
32. See infra text accompanying notes 197-230.
33. See supra text accompanying notes 31-32.
34. See infra text accompanying notes 35-36.
35. See, e.g., infra note 233 and accompanying text.
36. See infra text accompanying notes 236-38.
37. See infra text accompanying notes 239-44.
38. See infra notes 39-42.
ject to sanctions not applicable to other aliens. In addition, an aggravated felon is subject to increased penalties for violations of provisions applicable to all aliens. These disabilities are a result of two acts and one amendment described below.

1. The Anti-Drug Abuse Act of 1988

The Anti-Drug Abuse Act of 1988 (ADAA) first introduced the term “aggravated felony” to the INA. The ADAA defined an aggravated felony as: “[M]urder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act, committed within the United States.” The ADAA did not provide the effective date for the term. The legislative history behind the ADAA provides no guidance, because no Senate or House Report was submitted with the ADAA. The ADAA includes, however, provisions enumerating specific consequences attaching to aliens convicted of aggravated felonies and providing specific terms of temporal applicability. Three sections of the ADAA state that their provisions apply to aliens convicted of aggravated felonies on or after the date of enactment of the ADAA. First, section 7343 of the ADAA authorizes the Attorney General to take into custody aliens convicted of aggravated felonies on or after the date of enactment of the ADAA. Second,
section 7344 adds an aggravated felony conviction to grounds for deportation. 50 Finally, section 7347 creates expedited deportation proceedings for aliens convicted of aggravated felonies. 51 Each of these sections applies to aliens convicted of an aggravated felony after the enactment of the ADAA.

In contrast to the above sections, the temporal applicability of three other disability provisions in the ADAA does not depend on the date of the alien’s aggravated felony conviction. Instead, the three provisions focus on the date when another separate act was committed. First, section 7345, which increased the penalty for premature entry of aggravated felons after deportation, “appl[ies] to any alien who enters, attempts to enter, or is found in, the United States on or after the date of the enactment of [the ADAA].” 52 Second, section 7346 specifies penalties applicable to anyone who aids or assists aggravated felons to enter the country and is applicable to any aid or assistance occurring on or after enactment of the ADAA. 53 Finally, section 7349 increases the bar to re-entry to the United States for aggravated felons and is applicable to any alien convicted of an aggravated felony seeking admission to the United States on or after enactment of the ADAA. 54 Thus, at the enactment of the ADAA, each amendment with a disabling provision included a term of temporal applicability. None of these amendments, however, clearly indicate when a conviction must occur in order for the aggravated felony definition to be applicable.

2. The Immigration Act of 1990

The consequences to aliens convicted of aggravated felonies, as well as the definition of “aggravated felony” itself, were greatly expanded by the Immigration Act of 1990 (IA90). 55 When enacting the IA90, Congress was concerned

50. Id. § 7344, 102 Stat. at 4470-71.
51. Id. § 7347, 102 Stat. at 4471-72. The ADAA allows initiation of deportation proceedings while a convicted alien is incarcerated. However, due to the wording of INA section 212(c), an alien cannot be barred from 212(c) relief until he or she has served five years of prison time. INS promptness in initiating deportation proceedings or the likelihood that the alien will serve the required five years pursuant to the underlying sentence are not relevant to the statutory requirement. Matter of Ramirez-Somera, Int. Dec. 3185, at 4 (BIA 1992).
52. ADAA, supra note 7, § 7345, 102 Stat. at 4471.
53. Id. § 7346, 102 Stat. at 4471.
54. Id. § 7349, 102 Stat. at 4473.
55. IA90, supra note 10, 104 Stat. at 4978.
about the number of criminal aliens present in this country and the inability to provide for their summary deportation. Congress felt that aliens and their attorneys were taking advantage of the legal system by delaying deportation proceedings on meritless grounds.

As a result of these concerns, the IA90 both expanded the definition of aggravated felony and increased the disabilities for aliens convicted of aggravated felonies. In terms of violent crimes, the aggravated felony definition was previously limited to murder or attempted murder. Section 501 of the IA90 expanded the definition to include, in addition to murder, "any crime of violence ( . . . not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least [five] years." This change was not based on a concern over violent crime in general, but rather to target crimes of violence involving drug-related offenses.

In addition to expanding the list of violent crimes, the IA90 greatly expanded the range of drug offenses within the

56. H.R. REP. No. 681, 101st Cong., 2d Sess., pt. 1, at 145 (1990). ("The Committee is deeply disturbed that INS has not placed a higher priority on the criminal alien problem . . . . The Committee is convinced that among the classes of aliens deserving of deportation no class should receive greater attention than aliens convicted of serious criminal offenses.").

57. Id. ("Although the budget authority of INS in FY 1989 exceeded $1 billion, less than $50 million was expended on investigating, detaining, and deporting criminal aliens."). See also 136 CONG. REC. H8630 (daily ed. Oct. 2, 1990) ("[T]here have been only 22,000 aliens deported in the last 3 years out of 1.5 to 2 million that were eligible to be deported. From the time of apprehension, through the judge's decision and then through all the appeals the process can take years."")(statement of Rep. James H. Quillen (R-Tenn)).

58. See 136 CONG. REC. S17109 (daily ed. Oct. 26, 1990) ("The bill restructures our deportation procedures to bring them more in line with our Nation's rules of civil procedure. We were in a situation in deportation where the deportees had more due process than did an American citizen." (statement of Sen. Alan K. Simpson (R-Wyo)).

59. See supra text accompanying note 44.

60. IA90, supra note 10, § 501(a)(3), 104 Stat. at 5048. Section 16 of Title 18 defines a crime of violence as an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other felony that by its nature involves a substantial risk of the use of force against a person or property of another. 18 U.S.C. § 16 (1992).

61. See 136 CONG. REC. S6603 (daily ed. May 18, 1990) ("The need for this expansion of the term is to capture those egregious crimes of violence that are often concomitant with drug related crimes. This provision would . . . include crimes of physical force or threatened physical force . . . which are so often associated with drug crimes.").
aggravated felony definition. Previously limited to enumerated “drug trafficking crimes,” the IA90 added to the definition “any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act).” Section 102 of the Controlled Substances Act defines the term “controlled substance” with an exhaustive list of narcotics and other chemical compounds. Thus, all “illicit trafficking” offenses involving controlled substances are now within the ADAA list of “drug trafficking crimes” and, upon conviction, label the alien an aggravated felon.

The IA90 also increased the scope of the aggravated felony definition by adding new classes of crimes not previously included. Money-laundering crimes are now included in the definition. Also, Congress codified a BIA decision declaring that the aggravated felony definition included, in addition to federal law, crimes committed under state law. Additionally, the decision included within the aggravated felony definition “offenses . . . in violation of foreign law for which the

---

62. See supra text accompanying note 41.
63. IA90, supra note 10, § 501(a)(2), 104 Stat. at 5048.
64. The term “controlled substance” includes any substance which appears in one of five comprehensive schedules. 21 U.S.C. § 802(6) (1992).
65. This explanation of what drug offenses constitute an aggravated felony is rather general, especially considering that the IA90 codified the BIA’s decision in Matter of Barrett to include analogous state law offenses in the definition. See infra text accompanying notes 67-68. Fortunately, the BIA addressed this issue, explaining:

[W]here a state, federal, or qualified foreign conviction is a felony and involves [unlawful trading or dealing] . . . in any controlled substance as defined in section 102 of the Controlled Substances Act, a finding of aggravated felony is proper. . . . However, if the offense is not designated as a felony it may nonetheless be [an aggravated felony] if it is analogous to an offense punishable under one of the federal acts specified . . . and the offense to which it is analogous is a “felony” under federal law. . . . [Additionally], certain offenses which do not obviously involve unlawful trading or dealing in controlled substances] might nonetheless be [aggravated felonies] . . . [A]ny federal [drug] conviction . . . which is a felony, or pursuant to Barrett any federal, state, [or] specified foreign conviction analogous to such conviction [is also an aggravated felony].

68. IA90, supra note 10, § 501(a)(5), 104 Stat. at 5048.
The term "aggravated felony" means murder, any illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, any offense described in section 1956 of Title 18 (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of Title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. Such term applies to offenses described in the previous sentence whether in violation of Federal or State law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years.

As mentioned previously, the IA90 dramatically increased the range of disabilities imposed on aliens convicted of aggravated felonies. Of particular significance is that the discretionary waiver of deportability contained in section 212(c) was rendered unavailable to "an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." In addition, the IA90: (1) shortened the period during which an aggravated felon may petition a federal court of appeal to review a final deportation order from sixty to thirty days; (2) clarified the law concerning mandatory INS detention of aggravated felons upon release from custody; (3) included similar change regarding the detention of aggravated felons in exclusion proceedings; (4) eliminated the ability of an aggravated felon to avoid de-
portation by presidential or gubernatorial pardon;\(^{75}\) (5) eliminated the ability of a trial judge or prosecutor to request the deportation of the aggravated felon before completion of the sentence;\(^{76}\) (6) dictated that any alien aggravated felon lacked "good moral character"\(^{77}\) and was thus precluded from such benefits as voluntary departure,\(^{78}\) suspension of deportation,\(^{79}\) registry,\(^{80}\) and naturalization;\(^{81}\) (7) eliminated the automatic stay of deportation pending judicial review for aliens convicted of aggravated felonies;\(^{82}\) (8) lengthened the ban for re-entry of aggravated felons subsequent to deportation from ten to twenty years;\(^{83}\) (9) barred aliens convicted of aggravated felonies from applying for, or being granted, asylum;\(^{84}\) and (10) declared that for the purpose of a withholding deportation, aliens convicted of aggravated felonies are considered to have committed particularly serious crimes.\(^{85}\)

\(^{75}\) Id. § 506(a), 104 Stat. at 5050. Effective upon enactment of the IA90, November 29, 1990. Id.

\(^{76}\) Id. § 505(a), 104 Stat. at 5050. Effective upon enactment of the IA90, November 29, 1990. IA90. Id.

\(^{77}\) Id. § 509(a), 104 Stat. at 5051. Effective upon enactment of the IA90, November 29, 1990, and applicable to convictions occurring on or after such date. Id.

\(^{78}\) INA, supra note 8, § 1254(e)(1).

\(^{79}\) Id. § 1254(a)(1).

\(^{80}\) Id. § 1259.

\(^{81}\) Id. § 1427(a).

\(^{82}\) IA90, supra note 10, § 513(a), 104 Stat. at 5052. Effective for petitions to review filed more than 60 days after enactment of the IA90. Id.

\(^{83}\) Id. § 514(a), 104 Stat. at 5053. Effective upon admissions occurring on or after January 1, 1991. Id.

\(^{84}\) Id. Applies to applications made on or after enactment of the IA90, November 29, 1990. Id.

\(^{85}\) Id. Effective upon enactment of the IA90, November 29, 1990. Id. The effect of this statute is the subject of an ongoing controversy. The position of the BIA is that an alien who has committed a "particularly serious crime" in the context of an 8 U.S.C. § 1253 application for withholding of deportation \textit{a priori} is a danger to the community and is thus ineligible for withholding of deportation. Matter of K-, Int. Dec. 3163 (BIA 1991). However, Senator Edward M. Kennedy (D-Mass.), Chairman of the Subcommittee on Immigration and Refugee Affairs, and a sponsor of the IA90, stated in a letter to David Milhollan, Director of the Executive Office for Immigration Review, that there was a misunderstanding or misinterpretation regarding IA90 § 515. In that letter, Senator Kennedy notes:

[W]e clearly stated that aggravated felons "may not apply for or be granted asylum," [and that w]hile we had the option of making a similar statement regarding withholding of deportation . . . we rejected that option . . . [and] deliberately left undisturbed the responsibility of the Attorney General to determine whether such an alien also "constitutes a danger to the community of the United States."
3. **Miscellaneous and Technical Immigration and Naturalization Amendments of 1991**

The final relevant amendment to the INA is the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA). Principally enacted to correct technical errors in the IA90, the MTINA also included "a number of technical amendments." The MTINA amended the definition of aggravated felony to correct a typographical error. In addition, some important changes were made. Previously, section 212(c) stated that an alien was ineligible for 212(c) relief where the alien was convicted of an aggravated felony and served more than five years of incarceration. The MTINA amended the language that barred 212(c) relief for aggravated felons to allow for the aggregation of time served pursuant to separate aggravated felony convictions. Thus, where previously an alien needed to be convicted of a crime serious enough to warrant a sentence of five years' imprisonment to bar 212(c) relief, multiple convictions of lesser offenses that result in five years' imprisonment are now sufficient to disqualify an alien from such relief.

Additionally, the MTINA made important changes to the provisions of the IA90 that bar aggravated felons from automatic stays of deportation pending judicial review, availability of asylum, and withholding of deportation. The IA90 previously omitted explicit language regarding when the conviction must occur for these disabilities to attach. The MTINA amended these sections of the IA90 to apply to convictions for aggravated felonies entered "before, on, or after the date" of their effectiveness.

---


88. MTINA, supra note 86, § 306(a)(1), 105 Stat. at 1751. (which substituted a period for ",," after "commit any such act").

89. IA90, supra note 10, § 511(a), 104 Stat. at 5052.

90. MTINA, supra note 86, § 306(a)(10), 105 Stat. at 1751.

91. See supra note 82 and accompanying text.

92. See supra note 84 and accompanying text.

93. See supra note 85 and accompanying text.

94. MTINA, supra note 86, §§ 306(11)(B), 306(13), 105 Stat. at 1751-52. Section 306(11)(B) states that it shall apply to aggravated felony convictions...
With the explanation of the dramatic expansion of the aggravated felony definition and its consequences complete, this comment next focuses on section 212(c) of the INA.

B. Availability of Discretionary Relief Pursuant to Section 212(c) of the INA in Deportation Proceedings

Section 212(c) of the INA authorizes the discretionary relief sought by the respondent in Matter of A-A-. The discussion below encompasses the introduction of section 212(c) to immigration law and its evolution to current application for aggravated felons in deportation proceedings.

1. Introduction to Immigration Law

Since 1917, the Attorney General has had the authority to permit the re-entry of aliens otherwise excludable from the United States. This authority is now provided in section 212(c) of the INA. The predecessor of section 212(c) was the Seventh Proviso of Section 3 of the Immigration Act of 1917, which read: "[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 Attorney General, and under such conditions as he may prescribe." When the INA was enacted in 1952, section 212(c) was added to provide a means of discretionary authority for the Attorney General comparable to the old law.

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

"entered before, on, or after" enactment of the IA90. Id. § 306(11)(B), 105 Stat. at 1751. Section 306(13) amends two sections of the IA90 to apply to "convictions entered before, on, or after" the enactment of the IA90. Id. § 306(13), 105 Stat. at 1752. It does not necessarily follow that these sections attach to convictions entered before the creation of the aggravated felony definition. Cf. id. § 306(a)(7), 105 Stat. at 1751 (attaching disability to murder convictions "regardless of the date of conviction").

96. See infra note 97 and accompanying text.
97. Francis v. INS, 532 F.2d 268, 270 (2d Cir. 1976).
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.100

2. Expansion to Deportation Proceedings

Facially, the Seventh Proviso of Section 3 of the Immi-
gration Act of 1917 and section 212(c) of the INA appears to
apply only to aliens in exclusion proceedings.101 Nonetheless,
the history of the application of these provisions reveals fre-
quent expansion as basis for relief in deportation proceedings
where an alien had at some point left the country.102 This
expansion was typically based on a recognition of the unfair-
ness in providing a form of relief to aliens trying to reapply
for admission while denying that form of relief to aliens who
had re-entered the country.103

A comprehensive expansion of 212(c) relief to aliens in
deportation proceedings occurred in 1976 in the Second Cir-
cuit Court of Appeals decision in INS v. Francis.104 In Fran-
cis, the court declared that providing relief to aliens who had
temporarily left the country, while denying relief to aliens in
similar circumstances who had never left, violated the Equal
Protection Clause of the Fourteenth Amendment and con-
flicted with the Due Process Clause of the Fifth Amendment,
because it was unrelated to any legitimate governmental in-
terest.105 Following Francis, the BIA adopted similar reason-
ing in Matter of Silva,106 declaring that "it is our position that
no distinction shall be made between permanent resident

100. INA, supra note 8, § 212(c), 8 U.S.C. § 1182(c) (1992).
101. An exclusion proceeding is the hearing determining whether an alien
who has not been lawfully admitted to the United States and who has been
detained by the INS prior to gaining entry into the United States may be al-
102. See Francis v. INS, 532 F.2d 268, 270-71 (2d Cir. 1976) (discussing ex-
pansion of the discretionary waiver of excludability).
104. 532 F.2d 268 (2d Cir. 1976).
105. Id. at 272-73.
aliens who temporarily proceed abroad and nondeparting permanent resident aliens."\(^{107}\)

The extent to which 212(c) relief may be extended to aliens in deportation proceedings was clarified by subsequent decisions. The BIA ruled that 212(c) may not be invoked to waive all grounds of deportability.\(^{108}\) Only when an alien's behavior is a ground for exclusion\(^{109}\) or grounds substantially equivalent to grounds of excludability\(^{110}\) may deportation be waived pursuant to 212(c). The limited availability of 212(c) relief was recently confirmed when the Attorney General\(^{111}\) overturned a BIA decision to extend 212(c) to all grounds of deportation in *Matter of Hernandez-Casillas*.\(^{112}\)

3. **Applicability to Aggravated Felons**

The availability of 212(c) relief to aggravated felons has been the subject of recent administrative decisions by the BIA. In *Matter of Meza*,\(^{113}\) the respondent, convicted of an aggravated felony, challenged an immigration judge's decision that 212(c) relief was unavailable because commission of an aggravated felony is not grounds for inadmissibility.\(^{114}\) The BIA noted that since the aggravated felony definition "refers to several types or categories of offenses . . . [that] clearly could also form the basis for excludability under section 212(a)(23), [the respondent] is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony."\(^{115}\) Additionally, the BIA determined that the legislative history of the IA90 demonstrated that 212(c) relief was available to aggravated felons,\(^{116}\) and quoted the Congressional Record, which stated, "[s]ection

---

107. *Id.* at 30.
111. While the Attorney General delegated authority for adjudicating these cases to the immigration judges and the BIA, decisions by the BIA may be reviewed by the Attorney General upon certification pursuant to 8 C.F.R. § 3.1(h) (1992).
114. *Id.* at 2.
212(c) provides relief from exclusion and by court decision from deportation . . . . This discretionary relief is obtained by numerous excludable and deportable aliens, including aliens convicted of aggravated felonies."

Section 212(c) relief is not indiscriminately granted upon a showing of eligibility, but is a discretionary matter within the purview of the Attorney General. There must be "a balancing of the social and humane considerations presented in an alien's favor against the adverse factors evidencing his undesirability as a permanent resident." Favorable considerations may include family ties within the United States, residence of long duration in this country, evidence of hardship to the respondent and family if deportation occurs, service in this country's armed forces, evidence of value and service to the community, proof of a genuine rehabilitation, and other evidence attesting to good character. Negative factors may include the nature and circumstances of the underlying offense, the presence of additional significant violations of the United States immigration laws, existence of a criminal record, and other evidence of bad character or undesirability as a permanent resident. The commission of an aggravated felony is an adverse factor for aliens hoping for 212(c) relief. Aggravated felons may, however, demonstrate equities compelling a grant of relief, and they are not required to make heightened showings merely because the underlying offense meets the aggravated felony definition.

Nevertheless, an alien convicted of an aggravated felony may have difficulty convincing the Attorney General that a grant of discretionary relief is appropriate. The conviction of a violent crime or serious drug offense ordinarily requires a showing of unusual or outstanding circumstances in order to warrant discretionary relief pursuant to 212(c). Additionally, some showing of rehabilitation is usually required.

117. Id. (citing 136 Cong. Rec. S6586, S6604 (daily ed. May 18, 1990)).
120. See id.; see also Matter of Marin, 16 I. & N. Dec. at 584-85.
While it is difficult for an incarcerated alien to satisfactorily demonstrate rehabilitation, incarceration will not prevent the BIA or immigration judge from considering rehabilitation as a discretionary factor.\footnote{125} Discretionary relief pursuant to 212(c) is available to an aggravated felon in deportation proceedings; an alien, however, will have a difficult time demonstrating that such relief is warranted in his or her particular case.

With the introduction of the aggravated felony definition to the INA and the evolution of section 212(c) fully explained, it is now possible to examine the BIA's decision in \textit{Matter of A-A-} regarding the availability of 212(c) relief to aliens convicted of aggravated felonies who serve five years' imprisonment.

C. \textit{Matter of A-A-}

1. \textit{Background}

In \textit{Matter of A-A-}, the BIA considered whether an alien convicted of an ADAA-defined aggravated felony prior to the enactment of the ADAA and who has served five years in prison was ineligible for discretionary relief from deportation pursuant to Section 212(c).\footnote{126} The respondent in \textit{Matter of A-A-} was a forty-eight-year-old citizen and native of El Salvador.\footnote{127} He was admitted to the United States as a lawful permanent resident on May 7, 1982.\footnote{128} The respondent was convicted of murder on June 20, 1985 in Texas and sentenced to twenty years in prison with credit for 185 days served.\footnote{129} On November 28, 1988, during his incarceration, the INS initiated deportation proceedings against the respondent.\footnote{130} During three deportation hearings conducted in 1991, it was undisputed that the respondent was subject to deportation based on commission of a crime involving moral turpitude committed within five years after his date of entry to the United States.\footnote{131}
The immigration judge determined the respondent, as a result of his criminal conviction, was ineligible for both asylum and withholding of deportation.\textsuperscript{132} The judge, however, permitted the respondent to apply for a waiver of deportability pursuant to section 212(c) of the INA.\textsuperscript{133} The INS contended that the respondent was ineligible for 212(c) relief due to conviction of an aggravated felony and more than five years served in prison.\textsuperscript{134} The immigration judge determined that since the conviction was entered before enactment of the ADAA, it was not an aggravated felony and thus did not render the respondent ineligible for 212(c) relief.\textsuperscript{135} Nonetheless, on September 13, 1991, the judge denied respondent relief and ordered his deportation to El Salvador.\textsuperscript{136}

The respondent appealed the decision to the BIA, and on May 15, 1992, the BIA dismissed the appeal.\textsuperscript{137} The BIA, unlike the immigration judge, found the respondent ineligible for 212(c) relief. The BIA determined that despite the fact that the respondent's conviction was entered prior to enactment of the ADAA, he would nonetheless be labeled an aggravated felon and was thus ineligible for 212(c) relief.\textsuperscript{138}

2. \textit{BIA's Decision and Analysis}

a. \textit{The Aggravated Felony Definition Attaches to Pre-ADAA Convictions}

The BIA began by considering whether criminal convictions entered before enactment of the ADAA could be labeled aggravated felonies. The BIA determined that, as is the case in all questions of statutory construction, the starting point of its analysis would be the statute itself, with the assumption that legislative purpose is expressed in the ordinary meaning of the words chosen by Congress.\textsuperscript{139} As the court noted, however, the ADAA definition for aggravated felony did not explicitly state the date on which a conviction must have occurred for the definition to attach.\textsuperscript{140} The BIA next stated

\begin{itemize}
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id. at 3.
  \item \textsuperscript{137} Matter of A-A-, Int. Dec. 3176, at 3 (BIA 1992).
  \item \textsuperscript{138} Id. at 4-5.
  \item \textsuperscript{139} Id. at 5.
  \item \textsuperscript{140} Id. at 6.
\end{itemize}
that the ADAA attached specific consequences to aliens convicted of aggravated felonies, and declared that these provisions showed "by necessary implication" that the definition applied retroactively to convictions entered before enactment of the ADAA.\textsuperscript{141}

According to the BIA's decision, three provisions of the ADAA indicated that the aggravated felony definition applied retroactively, as any other interpretation would render these provisions inapplicable to anyone on the date of enactment.\textsuperscript{142} Section 7345 of the ADAA, which enhanced the penalties for premature reentry of aliens convicted of aggravated felonies, applied to "any alien who enters, attempts to enter, or is found in, the United States on or after the date of enactment of [the ADAA]."\textsuperscript{143} Section 7346 of the ADAA, which broadened the class of persons subject to criminal sanctions to include those who aid or assist entry of aliens convicted of aggravated felonies to the United States, applied to "any aid or assistance which occurs on or after [November 18, 1988]."\textsuperscript{144} Section 7349 of the ADAA, which increased the bar to entry after deportation for aliens convicted of aggravated felonies from five to ten years, was applicable to any aggravated felon "who seeks admission to the United States on or after the date of the enactment of [the ADAA]."\textsuperscript{145} The BIA reasoned that these provisions implicitly recognized convictions occurring before the date of enactment, as it would be virtually impossible for the provisions to apply to anyone on the date of enactment of the ADAA if the disabilities did not attach to pre-ADAA convictions.\textsuperscript{146} For example, in the absence of retroactive application of the aggravated felony definition, section 7345 of the ADAA could not be applied to an alien on the date of its enactment unless the alien was caught entering the United States illegally as well as being convicted of an aggravated felony on the first day of the statute's effectiveness.

Next, the BIA noted that three other provisions — section 7344, rendering aggravated felons deportable;\textsuperscript{147} section

\begin{itemize}
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Matter of A-A-, Int. Dec. 3176, at 6-8 (BIA 1992).
  \item \textsuperscript{143} Id. at 6.
  \item \textsuperscript{144} Id. at 7.
  \item \textsuperscript{145} Id. at 7-8.
  \item \textsuperscript{146} Id. at 6-8.
  \item \textsuperscript{147} Matter of A-A-, Int. Dec. 3176, at 8 (BIA 1992).
\end{itemize}
7343, mandating detention of aggravated felons pending deportation, and section 7347, implementing expedited deportation proceedings for aggravated felons — were all applicable to aliens convicted of aggravated felonies on or after the date of enactment of the ADAA. Thus, the BIA asserted that Congress' inclusion of the language indicated an intent for retroactive effect of the aggravated felony definition. If this were not the case, stated the BIA, it would be redundant to specifically state in these provisions that they applied to convictions entered after the enactment of the ADAA. Additionally, the BIA declared that these provisions demonstrated Congress knew how to limit retroactive application, indicating Congress could have limited the aggravated felony definition in this manner had it wished to do so.

Thus, the BIA stated, under the ADAA, a crime meeting the aggravated felony criteria set forth in section 7342 of the INA (an "ADAA aggravated felony") is a proscribed aggravated felony no matter when conviction occurred. The BIA noted, however, that each of the specific disabling provisions included an effective date. Therefore, the BIA concluded that, while an ADAA aggravated felony is defined as an aggravated felony regardless of the date of conviction, its immigration consequence is determined by the effective date of the specific disabling provision. Furthermore, the BIA continued, unless Congress explicitly states otherwise, those provisions are interpreted to include all such convictions, regardless of when the conviction occurred.

The BIA then contrasted the interpretation regarding aggravated felonies as defined by the ADAA with the criminal grounds added to the aggravated felony definition by the IA90 (the "IA90 aggravated felonies"). The IA90 provides that convictions of the enumerated crimes of money-launder-

---

148. Id. at 9.
149. Id.
150. Id. at 8-9.
151. Id. at 13.
152. Id. at 9-10.
154. Id. at 11.
155. Id.
156. Id.
157. Id.
ing, nonpolitical crimes of violence, and certain crimes in violation of foreign laws are considered aggravated felonies "only if committed on or after the date of enactment of [the 1990] Act." In addition to this limiting language, the BIA noted that the temporally unlimited language of the original ADAA aggravated felony definition was not amended. The BIA determined that these facts supported the conclusion that if Congress intended to limit the retroactive application of the aggravated felony definition, it would have done so as it did in the IA90, or it would have made a conforming amendment in the IA90.

b. The Bar to 212(c) Relief Applies to Pre-ADAA Convictions

After this determination, the BIA examined the availability of 212(c) relief for the respondent. The BIA noted that the IA90 amended section 212(c) of the INA to render ineligible aliens convicted of aggravated felonies who serve a five-year term of imprisonment. This section of the IA90 applied to applications for relief entered after the date of enactment of the IA90 (November 29, 1990). Next, the BIA noted that this section of the IA90 was amended by the MTINA, allowing for the aggregation of time served for convictions when calculating the five-year standard barring relief to aggravated felons. This amendment was "made effective as if included in the enactment of [the IA90]."

After noting that neither the IA90 nor the MTINA contained any specification regarding when a conviction must occur to be classified as an aggravated felony for the purpose of section 212(c), the BIA stated that:

as the aggravated felony definition applies retroactively — except as it relates to the newest crimes added by the 1990 Act which have their own time limitation — the ag-

159. Id. at 13.
160. Id. at 14-18.
161. Id. at 15 (citing IA90, supra note 10, § 511(a), 104 Stat. at 5052). 162. IA90, supra note 10, § 511(b), 104 Stat. at 5052. The language of § 511(b) speaks of "admissions" occurring after the enactment of the IA90. As used in the IA90, "admissions" applies to all applications for relief pursuant to § 212(c), including application to an immigration judge during deportation proceedings. 56 Fed. Reg. 50033 (1991).
164. Id. at 15.
The examination in Section III reveals the BIA's disregard for relevant judicial and administrative precedents, as well as a line of reasoning insufficient to support the BIA's conclusion in Matter of A-A-.

III. Analysis

Before beginning its analysis in Matter of A-A-, the BIA summarized the immigration judge's interpretation from the earlier hearing finding the respondent eligible for 212(c) relief.167 The BIA then stated, "[w]e disagree and are thus presented with an opportunity to address the issue."168 For the BIA, a better opportunity to address the issue is hard to imagine, as the respondent in Matter of A-A- was not represented by counsel.169

Why the BIA promulgated a standard with nationwide applicability on an issue of first impression in a case in which the respondent was not represented cannot be determined from the record. Further, the decision reveals absolutely no consideration by the BIA of obvious arguments in the respondent's favor.170 In fact, the BIA's decision did little more than

165. Id. at 17 (emphasis added).
166. Id. at 18.
167. Id. at 4-5.
169. Id. at 2.
170. Given the contrary interpretations and criticism of the decision of the BIA by immigration law commentators, it is hard to imagine that these arguments were all too obscure or unwarranted to justify consideration by the BIA in its decision. See, e.g., 69 INTERPRETER RELEASES 782, 787-88 (June 29, 1992); (criticizing BIA's interpretation of the plain meaning of the statute, its lack of recognition of presumption of prospective application, and its failure to interpret ambiguity in deportation statutes in favor of aliens); HELEN A. SKLAR AND STUART I. FOLINSKY, NATIONAL IMMIGRATION PROJECT, THE IMMIGRATION ACT OF 1990 HANDBOOK 12-4 (1992) (noting "major flaws" in the BIA's analysis, including: BIA ignores presumption of prospective operation, BIA ignores language of the statute, and INS initially interpreted aggravated felony definition prospec-
effectuate the legal opinion of the INS General Counsel issued on February 22, 1991. Amazingly, the BIA ignored long-standing principles of statutory construction favorable to the respondent in Matter of A-A-: the general rule against retroactive application of statutes unless clearly and explicitly providing for such, and the tradition of interpreting immigration statutes dealing with deportation in an alien's favor. The following analysis first focuses on the presumption against retroactivity.

A. Presumption Against Retroactivity

The general rule against interpreting statutes retroactively was cited by the Supreme Court as early as the nineteenth century, and is often stated in very strong terms. For example, the Supreme Court stated in 1913 that "the
first rule of construction is that legislation must be considered as addressed to the future, not to the past." 174 This rule governs unless the words of a statute "are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." 175 This rule is uniformly followed by the federal circuit courts of appeal 176 and was recently reaffirmed by the Supreme Court in most conclusive terms: "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 177

The presumption against retroactive application of statutes and amendments has been relied upon by the courts in immigration matters. 178 In fact, the BIA recently employed this principle by rejecting an alien's attempt to enjoy retroactive application of a statute. 179 Just over a year before its decision in Matter of A-A-, the BIA declared in In re Morris 180 that "absent the special considerations present when a case is pending and a statute is enacted or changed, the rule is that statutes and amendments to statutes operate prospectively only." 181 In In re Morris, where retroactive application of the statute would have bolstered the respondent's case, the BIA employed the statutory canon disfavoring retroactivity in

175. United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806) (emphasis added).
176. See, e.g., Puget Sound Power & Light Co. v. Fed. Power Comm'n, 557 F.2d 1311, 1314 (9th Cir. 1977) ("Retroactive operation will not be given to a statute unless such is the manifest intention of the legislature."); Sea-Land Service, Inc. v. United States 493 F.2d 1357, 1369 (Ct. Cl. 1974) ("The governing rule, however, is that Congress is presumed to have intended statutes or amendments to operate prospectively unless there is clear statutory expression or legislative history to the contrary."); Farmington River Power Co. v. Fed. Power Comm'n, 455 F.2d 86, 90 (2d Cir. 1972) ("Absent unequivocal expression to the contrary, the courts give only prospective application to statutes."); Gibbons v. Pan American Petroleum Corp., 262 F.2d 852, 855 (10th Cir. 1958) ("[A] substantive statute will not be construed to operate retroactively unless that intention has been manifested by clear and unequivocal expression.").
178. See Del Guercio v. Gabot, 161 F.2d 559, 561 (9th Cir. 1947) ("The law does not favor the retrospective application of statutes.").
179. See infra text accompanying notes 180-82.
181. Id. at 3 (emphasis added).
order to reject the respondent’s interpretation.\textsuperscript{182} Curiously, in \textit{Matter of A-A-}, when the same statutory canon was to the respondent’s benefit, consideration of this long-standing principle was absent from the BIA’s opinion.

\subsection*{B. Interpreting Deportation Statutes in Aliens’ Favor}

In addition to the rule favoring prospective interpretation of statutes, the BIA also ignored the legal tradition of resolving doubts about deportation statutes in aliens’ favor.\textsuperscript{183} Although deportation is a civil matter\textsuperscript{184} and is not “punishment,”\textsuperscript{185} the courts understand the severity of deportation’s impact upon individuals,\textsuperscript{186} and courts seek to interpret statutes concerning deportation narrowly.\textsuperscript{187} The Supreme Court stated that where deportation statutes are involved, because “the stakes are considerable for the individual, we will not assume that Congress meant to trench on [an alien’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.”\textsuperscript{188} Further, the Court has recognized “the long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien.”\textsuperscript{189} For example, in \textit{Costello v. INS},\textsuperscript{190} where the language of a deportation statute and the absence of legislative history left the Court doubting the statute’s meaning, the Supreme Court stated that it was “nonetheless constrained by accepted principles of statutory construction . . . to resolve the doubt in favor of the [alien].”\textsuperscript{191} Similarly,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{182} Id.
\item \textsuperscript{183} See \textit{Gordon}, supra note 3 § 71.01[4][b](1992).
\item \textsuperscript{184} Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).
\item \textsuperscript{185} Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).
\item \textsuperscript{186} See, e.g., Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (“[Deportation] may result . . . in loss of both property and life or all that makes life worth living.”); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (“Deportation is always a harsh measure.”); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (“Deportation is a sanction which in severity surpasses all but the most Draconian criminal penalties.”).
\item \textsuperscript{187} See \textit{infra} text accompanying notes 188-92.
\item \textsuperscript{189} \textit{Cardoza-Fonseca}, 480 U.S. at 449 (emphasis added); INS v. Errico, 385 U.S. 214, 225 (1966) (“Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien”).
\item \textsuperscript{190} 376 U.S. 120 (1964).
\item \textsuperscript{191} Id. at 128 (emphasis added).
\end{itemize}
\end{footnotesize}
this rule of interpretation is employed by the federal circuit courts of appeal in explicit terms.192

The rule of favoring aliens in matters of statutory interpretation regarding deportation is often used by the BIA. Indeed, in its second published decision following Matter of A-A-, the BIA employed this tool to determine whether an attempted firearms offense constituted grounds for deportation, stating:

[W]e reference . . . the canon of statutory interpretation uniquely applicable to the immigration laws, which requires any doubts in construing those statutes to be resolved in favor of the alien due to the potentially drastic consequences of deportation . . . . [Therefore, any] remaining questions regarding the intent of Congress . . . [are] decided in favor of the respondent.193

Matter of A-A- never mentioned this statutory canon. Thus, the BIA inexplicably failed to weigh an important consideration in the respondent's favor.

The tradition providing for application of deportation statutes in a manner most favorable to aliens is particularly relevant when applied to statutes designed to provide relief for aliens. Section 212(c), designed to allow for "flexibility to permit worthy . . . aliens to continue their relationship with family members in the U.S,"194 is a statute where this principle is "especially pertinent."195 Indeed, the history of the application of section 212(c) demonstrates that the class of aliens eligible for relief has been steadily expanded throughout its existence, primarily through generous readings of the statute and avoidance of strict interpretation of its applica-

192. See, e.g., Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975) ("It is settled doctrine that deportation statutes must be construed in favor of the alien."); United States v. Kershner, 228 F.2d 142, 147 (6th Cir. 1955) ("[I]f there be deemed to exist any reasonable doubt as to whether Congress intended to make an alien deportable, that doubt should be resolved in [the alien's] favor.").
194. Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976). See also Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (citing and approving Francis).
195. Lok, 548 F.2d at 39:
The recognition of this principle is especially pertinent in a case where the alien seeks to avoid deportation through the expedient of Section 212(c), which was enacted by Congress to provide the Attorney General the flexibility and discretion to permit worthy aliens to continue their relationships with family members in the [U.S.].

Id.
bility.\textsuperscript{196} It is difficult to imagine why such an applicable principle of statutory construction was not even mentioned by the BIA.

C. The BIA's Analysis Does Not Present Evidence of Congressional Intent for Retroactive Interpretation Sufficient to Override the Canons of Statutory Construction

The two canons of statutory interpretation discussed above would have been very strong, if not determinative, arguments in favor of the respondent's position in \textit{Matter of A-A-}. Thus, to support the BIA's position, extremely convincing evidence of legislative intent to retroactively bar 212(c) relief to aliens convicted of ADAA aggravated felonies should have been required. Even in the absence of those statutory canons, the BIA's analysis of the relevant statutes was weak, and certainly does not withstand scrutiny in light of the full range of relevant considerations.

The bulk of analysis undertaken by the BIA in \textit{Matter of A-A-} to determine whether the respondent was barred from seeking 212(c) relief evaluated the temporal applicability of the aggravated felony definition to a murder conviction (which applies equally to the other ADAA aggravated felonies).\textsuperscript{197} The BIA's analysis relied largely upon the fact that in order to attach, three of the ADAA disabling provisions require action on the part of, or aid rendered to, aggravated felons.\textsuperscript{198} Therefore, the BIA reasoned that the definition must be given retrospective application, or it is nearly impossible that these provisions would apply to anyone on the date of enactment of the ADAA.\textsuperscript{199} In other words, it is almost impossible that an alien would be convicted of an aggravated felony and would be caught committing another prohibited act on the first day of ADAA's effectiveness, thereby mandating that the definition be read to attach retroactively.

Unfortunately, the BIA failed to explain why it found Congress intended these provisions to immediately ensnare a class of aliens from the first day of its effectiveness.\textsuperscript{200} There

\begin{flushleft}
\textsuperscript{196} See supra notes 101-12 and accompanying text.
\textsuperscript{198} See supra notes 142-45 and accompanying text.
\textsuperscript{199} See supra note 146 and accompanying text.
\textsuperscript{200} Matter of A-A-, Int. Dec. 3176, at 6-8.
\end{flushleft}
is no language in the statute or legislative history indicating such an intent.\textsuperscript{201} It is clear, however, that other immigration statutes enacted in the past did not immediately confer their benefits on, or exact their punishments from, aliens. For example, the Immigration Marriage Fraud Amendment of 1986 (IMFA)\textsuperscript{202} amended the INA to allow for petitions to grant aliens immediate relative status or preference status in order to obtain family-based immigrant visas, by reason of a marriage entered into during exclusion or deportation proceedings.\textsuperscript{203} This benefit is only available, however, to aliens who lived outside the United States for two years after the date of the marriage.\textsuperscript{204} The effective date of the IMFA stated that “this section shall apply to marriages entered into on or after the date of enactment of this Act.”\textsuperscript{205} Thus, no alien could be granted immediate relative or preference status pursuant to this section on the first date of its enactment. Even if one were married on the first day of its effectiveness, the IMFA required a two-year period to pass before conferral of any Act benefits. Any argument that marriages entered into two years before enactment of the IMFA qualified for IMFA’s benefits on its first day of effectiveness is ridiculous.

Like the IMFA, the Alien Registration Act of 1940\textsuperscript{206} did not immediately exact punishments upon aliens. The Alien Registration Act required all aliens fourteen years of age or older, “now or hereafter in the United States,” who remain in the United States for thirty days or longer, and who have not previously done so, to apply for registration and to be fingerprinted before the expiration of thirty days.\textsuperscript{207} An enforcement provision\textsuperscript{208} provided for a fine, imprisonment, or both for a willful failure to comply with the Act.\textsuperscript{209} Because the enforcement provision became effective upon enactment of

\textsuperscript{201} See supra text accompanying notes 7, 46.
\textsuperscript{203} INA, supra note 8, § 1154(g) (originally enacted as the IMFA, supra note 202, § 5(b), 100 Stat. at 3543).
\textsuperscript{204} Id.
\textsuperscript{205} IMFA, supra note 202, § 5(c), 100 Stat. at 3543.
\textsuperscript{207} The Alien Registration Act of 1940, § 31(a), 54 Stat. at 673-74 (current version at 8 U.S.C. § 1302(a) (1988)).
\textsuperscript{208} Id. § 36(a), 54 Stat. at 675 (current version at 8 U.S.C. § 1306(a) (1988)).
\textsuperscript{209} Id.
1993] IMMIGRATION AND AGGRAVATED FELONS 275

the Alien Registration Act,\(^2\) and because a violation of the registration requirement could not occur until at least thirty days after its enactment, the enforcement provision could not be invoked against anyone on the first day of its enactment.\(^2\)

As these statutes demonstrate, immigration laws that do not impose penalties or confer benefits on a class of individuals from the first date of effectiveness are not unusual and do not compel an interpretation requiring retroactive application. Thus, an interpretation of the ADAA recognizing prospective application of the aggravated felony definition would not create an unacceptable anomaly in U.S. immigration law. With neither a demonstration of congressional intent for the ADAA provisions to immediately affect a class of aliens, nor a showing that prospective operation of immigration statutes is unusual, the BIA’s case for retroactivity of the aggravated felony definition is unconvincing. Accordingly, the delayed effectiveness of these provisions of the ADAA do not compel retroactive application.

The BIA claimed additional support for its argument by citing three provisions of the ADAA that restrict their application to persons convicted of aggravated felonies on or after the date of enactment and contrasted these with three provisions applicable to aggravated felons that do not.\(^2\) The BIA reasoned that Congress would have been redundant to state in these former sections that the disability applies to aliens convicted after enactment of the ADAA if the definition itself applied in like manner.\(^2\) A close examination of the ADAA, however, reveals that the BIA read these provisions too broadly. These applicability provisions are not intended to define when an alien becomes an aggravated felon and thus are not “surplusage” in the absence of retroactive interpretation. More precisely, these provisions define when the instrumental action of an alien must occur to incur disabilities pursuant to the ADAA. For example, section 7344 of the

\(^2\) 210. Id. § 38(b), 54 Stat. at 676.

\(^2\) 211. In fact, while § 38(b) became effective upon enactment of the Alien Registration Act, § 31 did not become effective until sixty days after its enactment. Id. Thus, § 38(b) could not have applied to anyone until ninety days after its enactment.


\(^2\) 213. Id. at 10.

\(^2\) 214. Id. at 9-10.
ADAA renders aliens convicted of aggravated felonies deportable; such conviction must occur after enactment of the ADAA for this provision to apply. Likewise, section 7345 of the ADAA enhanced the criminal penalties for premature entry after deportation for aliens convicted of aggravated felonies; such reentry must occur on or after enactment of the ADAA for this provision to apply.

Thus, each provision of the ADAA providing new or enhanced disabilities for aliens convicted of aggravated felonies requires a prohibited action after enactment of the ADAA. This pattern is indicative of an explicit intent to limit the application of the ADAA disabilities to post-enactment behavior rather than implicit legislative intent to instrument retrospective application of a separate, definitional section of the ADAA.

The BIA also argued that "had Congress intended to give the definitional provision of section 7342 of [the ADAA] a... prospective application, it clearly knew how to do so." Given the BIA's feigned ignorance of the traditional assumption of prospective application of legislation, this statement is not surprising. It is, however, surprising when one considers that the BIA also directly examined subsequent legislation amending the INA that did contain explicit directives for retroactive application. For example, sections 505(b) and 515(b) of the IA90 and sections 306(a)(11)(B) and 306(a)(13) of the MTINA include provisions relating to aggravated felons that apply to "convictions entered before, on, or after" the date of enactment. These statutes provide direct evidence that when Congress intends to give retroactive application to immigration statutes, it does so with explicit language indicating its desire. If one combines this evidence with the assumption that statutes are to have prospective application unless expressly stated otherwise, it is clear that had Congress intended retroactive application of the aggravated fel-

215. ADAA, supra note 7, § 7344(b), 102 Stat. at 4471.
216. Id.
218. See supra notes 161-64 and accompanying text.
219. See IA90, supra note 10, § 505(b), § 515(b)(2), 104 Stat. at 5050, 5053. See also MTINA, supra note 86, § 306(a)(13), 105 Stat. at 1751, 1752. In fact, the MTINA uses language indicative of retroactive intent attaching a disability to murder convictions "regardless of the date of conviction." Id. § 306(a)(7), 105 Stat. at 1751.
ony definition, it would have chosen a method more direct than the BIA's obscure manner of implication.

The BIA noted subsequent legislation on other points to support its interpretation of the temporal applicability of the ADAA, but these arguments are no more convincing than any of its others. The BIA observed that the IA90 was more explicit in the applicability of IA90 aggravated felonies, implying that since the ADAA was not as explicit, retroactive application must have been intended. The BIA offered, however, no rational basis for believing Congress intended to treat the ADAA aggravated felonies retrospectively, while treating certain IA90 aggravated felonies prospectively. This disparity just as easily strengthens the conclusion that Congress did not intend retroactive application for the ADAA aggravated felonies. The IA90, unlike the ADAA, contained a great deal of legislative history indicating extreme concern over the problem of criminal aliens. One must ask why Congress allegedly chose to limit itself to prospective application of the definition regarding many of the most serious IA90 aggravated felonies when recently enacting legislation (i.e., the ADAA) with a comprehensive retroactive effect. In the absence of any express indication to the contrary, it makes more sense to interpret the ADAA and the IA90 consistently, presuming prospective application of their provisions unless explicitly stating otherwise. With no explanation as to why Congress allegedly decided to treat these two classes of aggravated felonies differently, this line of reasoning is unconvincing evidence of an intent to apply the aggravated felony definition retroactively to ADAA aggravated felonies.

Secondly, the BIA noted that in the IA90 "the temporally unlimited language of the original [aggravated felony] definition . . . was left alone," implying Congress would have amended the ADAA definition of aggravated felony to apply prospectively in the IA90 if it intended this. Because the INS, the Executive Office for Immigration Review, and

---

221. Id.
222. See supra notes 56-58, 61 and accompanying text.
224. The only published interim regulation concerning the ADAA at this time included a rule for dealing with the enhanced ban for aggravated felons on re-entry after deportation, and provided for application to aggravated felons convicted after the enactment of the ADAA (November 18, 1988). 55 Fed. Reg.
many immigration practitioners\textsuperscript{226} were interpreting the ADAA definition to apply prospectively at the time of the Amendment, Congress, however, had little reason to change it. All concerned parties were interpreting the definition prospectively at the time the IA90 was enacted. Thus, it appears the BIA believed Congress' failure to amend the temporal applicability of the aggravated felony definition, in the face of interpretations contrary to its own, indicated a legislative effort to correct these "misinterpretations." This clearly makes no sense and also fails to support the BIA's analysis.

Thus, even in the absence of the two strong interpretive traditions discussed above, the temporal applicability of the aggravated felony definition is ambiguous at best. The BIA did not make a convincing argument that the absence of a statement of temporal applicability compels retroactive application of the aggravated felony definition. Even if one assumes that the aggravated felony definition can be attached

\begin{footnotesize}
\begin{enumerate}
\item[24859 (June 19, 1990). This conflicts with the interpretations of the INS and the BIA at the time of the Matter of A-A- decision. \textit{Matter of A-A-}, Int. Dec. 3176 at 7-8. Such contradictory interpretation of a statute by the administrative agency also weakens the potential argument that the agency's interpretation is entitled to substantial deference. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Watt v. Alaska, 451 U.S. 259, 273 (1981). Courts have expressed willingness to overcome this deference in questions of statutory interpretation that do not require case-by-case adjudication of a standard. See, e.g., \textit{Cardoza-Fonseca}, 480 U.S. at 448; Ayala-Chavez v. INS, 945 F.2d 288, 294 (9th Cir. 1991). Even the Supreme Court's strongest case for deference to agency interpretation is distinguishable based on the fact that no administrative determination is worthy of greater scrutiny than deportation, "a sanction which in severity surpasses all but the most Draconian criminal penalties." Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977). See also supra note 186 and accompanying text.

Even the most current form of the regulations does not explicitly state when a conviction must occur. Rather, the regulations state that the enhanced bar to reentry applies to aliens "convicted of an aggravated felony as defined in section 101(a)(43) of [INA]." 8 C.F.R. § 212.2 (1992). Similar language is employed throughout the regulations regarding disabilities for aggravated felons.

225. In a recent case, although the respondent had been convicted of attempted murder, and in spite of the protests of the INS that the alien had been sentenced to more than five years in prison, "the respondent's request for a waiver under Section 212(c) [was] denied in the exercise of discretion." \textit{Matter of Caba-Caba}, A-37-160-071 at 9 (September 23, 1991, unpublished decision). Unfortunately, the decision does not explicitly state that the respondent had served five years of his sentence at the time of the hearing. Therefore, it is possible that he was found eligible because he had not "served" five years, as required to bar aggravated felons in section 212(c). See \textit{Matter of Ramirez-Samosa}, Int. Dec. 3185 (BIA 1992). However, this seems unlikely, since this rule was not formerly stated by the BIA until 1992. \textit{Id.}

226. See supra note 170.
\end{enumerate}
\end{footnotesize}
retroactively, it does not necessarily follow that the ban to 212(c) relief contained in section 511 of the IA90 applies in a like manner. In terms of temporal applicability, section 511 states it will "apply to admissions occurring after the date of enactment of this Act."\(^{227}\) The BIA noted in Matter of A-A- that "[n]either [the IA90] nor [the MTINA], however, specified when a conviction must occur to be classified as an aggravated felony for purposes of this statutory bar."\(^{228}\) Thus, without an explicit statement indicating to which convictions this disability attaches, section 511 is temporally ambiguous regarding which convictions are saddled with the statutory bar. The BIA offered no justification for its interpretation that section 511 requires retroactive application to aliens convicted of ADAA aggravated felonies, merely stating that "it is our position... that as the aggravated felony definition applies retroactively... [section 511] is properly read as applying to all convictions deemed within the original aggravated felony definition..." so long as they were filed after the effective date of IA90.\(^{229}\) When, however, one considers that the IA90, as amended by the MTINA, includes four sections employing explicit language to indicate retroactive application,\(^{230}\) it is difficult to imagine Congress intended the sort of retroactive application-by-omission advocated by the BIA. When the traditions of assuming prospective application of statutes and interpreting deportation statutes in favor of aliens are added to the equation, the BIA's interpretation of section 511 becomes untenable.

IV. Proposal

A satisfactory resolution of the BIA's misinterpretation of the statutory framework implicated in Matter of A-A- is important for two reasons. First, while one may question the wisdom of refusing to judge the merits of every alien's case for discretionary relief from deportation, Congress clearly chose to do so in cases regarding aliens recently convicted of

\(^{227}\) IA90, supra note 10, § 511, 104 Stat. at 5052.


\(^{229}\) Id.

\(^{230}\) See supra note 94 and accompanying text. The relevant MTINA amendments were effective as if originally included in the IA90. MTINA, supra note 86, § 301, 105 Stat. at 1759.
aggravated felonies.\textsuperscript{231} In contrast, it has \textit{not} done so regarding past aggravated felony convictions.\textsuperscript{232} In undertaking these appeals for discretionary relief without clear statutory authority, the BIA has foreclosed a remedy to individuals truly warranting relief: aliens who have stayed out of trouble for years since their last conviction for a deportable offense.\textsuperscript{233} The courts have long recognized that deportation can be a particularly harsh measure.\textsuperscript{234} Yet the BIA's current interpretation of the aggravated felony definition and section 212(c) allows the INS to reach back to convictions entered years ago and deport aliens without an opportunity for consideration of the degree to which they may have reformed since that time. In the absence of clear statutory authority for such an interpretation, this is precisely the sort of arbitrary application of the immigration laws that the courts sought to avoid using the statutory canons described above.\textsuperscript{235}

Second, the BIA's refusal to acknowledge judicial and administrative precedents in the respondent's favor clearly cannot go unchecked. The immigration law is full of confusion for immigrants and immigration attorneys alike,\textsuperscript{236} and the immigration judges and BIA are on the front lines of the adjudication process. Relevant precedents should not be arbitrarily recognized in one case and ignored in the next,\textsuperscript{237} and

\begin{footnotes}
\item[231] See ADAA, \textit{supra} note 7, IA90 \textit{supra} note 10.
\item[233] A recent case on point is that of Sal Castiglia. Mr. Castiglia emigrated with his parents from Italy more than 34 years ago when he was eight years old. \textit{See} Fernando Quintero, \textit{Deportation is Put on Hold for Third Time}, \textit{San Jose Mercury News}, Aug. 18, 1992, at B1. A Vietnam veteran, Mr. Castiglia became a drug addict while overseas and carried his drug habit back home when he returned from service. \textit{Id.} Convicted of murder in 1973 and heroin trafficking in 1984, Mr. Castiglia has been free since 1988. While holding a full-time job to help maintain his family, Mr. Castiglia's supporters say he has become an inspiration to the community through his work, counseling and speaking to groups of veterans, children, and substance abusers. \textit{Id.} See also E. A. Torriero, \textit{INS to Deport Altruistic Ex-Con}, \textit{San Jose Mercury News}, April 15, 1992, at B1. Under the BIA's current interpretation of the aggravated felony definition and section 212(c), an individual such as Mr. Castiglia who now seeks to avoid deportation would not be allowed to present evidence of his rehabilitation and value to the community, no matter how long ago he was last convicted of a crime.
\item[234] See \textit{supra} text accompanying note 186.
\item[235] See \textit{supra} text accompanying notes 172-96.
\item[236] See \textit{supra} note 2 and accompanying text.
\item[237] See, \textit{e.g.}, \textit{supra} notes 173-80, 193 and accompanying text.
\end{footnotes}
appeal to a federal circuit court of appeals should not be required to guarantee their application to any particular case. Lack of recognition of these principles is not only unfair to the individual involved but also wastes time by requiring appeal to effectuate judgments based on the full range of relevant considerations.\footnote{Recent interpretations of the aggravated felony definition and INA, however, make it unlikely that most aggravated felons will have the opportunity to appeal such decisions. INA § 106(a)(3) provides for an automatic stay of deportation in cases where an alien appeals a deportation order to a federal court of appeals. INA, supra note 8, § 1105(a)(3) (1992). The IA90 eliminated the automatic stay for aggravated felons for petitions filed on or after January 29, 1990. IA90, supra note 10, § 513, 104 Stat. at 5052. However, the MTINA clarified the temporal applicability of § 513, stating that it applies "to convictions entered before, on, or after such date." MTINA, supra note 86, § 306(a)(11)(B), 105 Stat. at 1751. The Courts of Appeals for the Ninth and Fifth Circuits both ruled that these amendments to the INA should be read as barring the automatic stay of deportation to aggravated felons regardless of the date of conviction. See Ignacio v. INS, 955 F.2d 295 (5th Cir. 1992); Arthurs v. INS, 959 F.2d 142 (9th Cir. 1992). The court may still grant a stay in its discretion. INA, supra note 8, § 106(a)(3) (1992). However, it appears unlikely the court will do so in the absence of compelling circumstances. See, e.g., Ignacio, 955 F.2d at 298-99.}{"sectionstart":false,"sectionend":false}

This comment proposes resolution of the dispute over the temporal applicability of section 511 of the IA90 through legislative action. Although it is generally understood that legislation is presumed to have prospective application,\footnote{See supra text accompanying notes 172-73.} the history of this dispute indicates that Congress must explicitly state that the ban to section 212(c) relief for aggravated felons applies only to convictions entered after enactment of the IA90 in order to ensure its application in such a manner.\footnote{See supra note 173 and accompanying text.} Thus, Congress should amend the "effective date" provision of section 511 to read:

\begin{quote}
\textbf{(b) EFFECTIVE DATE}

- The amendment made by subsection (a) shall apply to admissions occurring after the enactment of this Act and shall apply to convictions occurring after the enactment of this Act.
\end{quote}

An amendment to the aggravated felony definition is not the best solution for two reasons. First, an amendment to the "aggravated felony" definition contained in the ADAA would still leave an ambiguity regarding the application of the IA90 section 511 to convictions entered on or after enactment of...
the ADAA but before enactment of the IA90. Second, and perhaps most importantly, this comment has focused on the subject of 212(c) relief for aliens convicted of the ADAA aggravated felonies prior to enactment of the ADAA. As demonstrated above, the label of aggravated felon saddles an alien with a host of disabilities. An alteration of the date of applicability of the aggravated felony definition would have effects on other sections of immigration law that this comment has not attempted to evaluate. While an all-encompassing amendment is a possibility, such a proposal goes beyond the scope of this comment. The amendment to the IA90 section 511 as proposed will adequately resolve the issue of 212(c) relief for aliens convicted of aggravated felonies prior to enactment of the ADAA and the IA90 without altering the relation of the aggravated felony definition to other issues of immigration law.

In the absence of legislative action on this issue, this comment proposes that the BIA, or any higher judicial authority reviewing a BIA decision, reevaluate the issue presented in Matter of A-A- to include the full range of relevant considerations.

V. CONCLUSION

This comment reviews the legal issue of whether aliens convicted of the ADAA aggravated felonies prior to the enactment of the ADAA who have served five years in prison are eligible for a discretionary waiver of deportability pursuant to section 212(c) of the INA. The BIA concluded that such aliens are not eligible for 212(c) relief. Two important traditions, however, in statutory interpretation ignored by the BIA weigh heavily in the alien's favor. The BIA's arguments in favor of a contrary interpretation are not convincing to override these strong traditions. To remedy this situation, Congress should amend the INA to clearly indicate the availability of 212(c) relief for such aliens. In the absence of legislative action, the BIA or any higher judicial authority

241. See supra text accompanying notes 139-57.
242. See supra note 26 and accompanying text.
243. See supra notes 39-42 and accompanying text.
244. See supra notes 168-230 and accompanying text.
should review the decision in *Matter of A-A-*, taking into account the full range of relevant considerations.

Brian N. Hayes