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Mandatory Deportation of Criminal Aliens: Proposed Relief for Long-Term Residents

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Summary

Several bills introduced during the 106th Congress would ease restrictions that deny aliens with criminal records a chance to have their ties to the U.S. considered before being deported. One of these bills, H.R. 5062, passed the House September 19, 2000.

Since the 1980s, Congress has made discretionary relief from deportation increasingly unavailable to aliens who have engaged in serious criminal conduct. In 1996, however, Congress broadened the automatic disqualification from relief to cover a much wider range of criminal activity than had been covered before. Furthermore, the expanded disqualification now covers previously non-disqualifying activities that occurred before the 1996 changes were enacted.

Generally, the proposals pending before Congress would ease current relief restrictions without restoring pre-1996 standards in full. Some would apply their standards to long-term residents who were denied relief because of the "retroactivity" of the 1996 changes. This report will be updated as legislative developments warrant.

Introduction. In setting rules for which aliens may enter the U.S. and the conditions of their stay here, the Immigration and Nationality Act of 1952 (INA), as amended, (8 U.S.C. §§ 1101 *et seq.*) both lists classes of undesirable aliens and provides possible relief from removal for certain aliens within those classes.

Various categories of *criminal aliens* — aliens who have engaged in criminal activity — have long been among the classes of undesirable aliens who may be denied admission into, and removed from, the U.S. In the 1980s, Congress designated specified crimes as *aggravated felonies* under the INA and singled out aliens who commit such crimes as an immigration enforcement priority.

The INA softens its deportation provisions by allowing aliens who have long resided here to have their community and family ties taken into account before being forcibly removed. Historically, this discretionary relief from removal has been most broadly

available to aliens who have been admitted for permanent residence — also known as legal permanent residents (LPRs) or "green card" holders.

However, two laws enacted in 1996 have made it more difficult for long-term aliens facing removal, including LPRs, to have their ties here taken into account in the removal process. These two laws, the Antiterrorism and Effective Death Penalty Act (AEDPA) (P.L. 104-132) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) (Division C of P.L. 104-208), especially affect those who have committed crimes. Since AEDPA and IIRIRA were enacted, there have been many stories in the press on LPRs and other long-term residents becoming subject to mandatory removal on the basis of crimes some regard as insufficiently serious to bar all consideration of an alien's position in the community. Some of these accounts pertain to aliens whose crimes occurred well before AEDPA and IIRIRA became law.

Several bills introduced during the 106th Congress seek to reverse the 1996 restrictions, at least in part. Some would also apply their standards both prospectively and to aliens already affected by the 1996 changes.

Cancellation of removal; background. Prior to 1996, discretionary relief based on long-term presence included "§ 212(c)" relief, which was limited to LPRs, and "suspension of deportation." In order to be considered for either of these, an alien had to (1) meet durational presence requirements and (2) not fall within specified disqualifying classes. Additionally, an alien seeking *suspension of deportation* had to show that a specified degree of hardship would result from his or her removal.

More specifically, to be considered for *212(c) relief*, an alien had to be an LPR and

- have been maintaining an unrelinquished domicile in the U.S. for at least seven years; and
- not (i) be in either the national security or child abduction classes of inadmissible aliens or (ii) have **served** at least five years in prison for one or more *aggravated felonies.*

Before the 1996 amendments, an alien who was deportable on criminal, fraud, or security grounds was nonetheless eligible to be considered for *suspension of deportation* if

- the alien had been physically present for 10 years,
- the alien had good moral character — which, by statute and case law, is precluded by certain criminal activity, and
- the alien's deportation would result in exceptional and extremely unusual hardship to the alien or to the alien's citizen or permanent resident spouse, child, or parent.

Less strict standards — 7 years' presence and "extreme hardship" — existed for aliens who were deportable on other grounds, while even more eased standards existed for certain abused spouses and children.

1996 amendments. AEDPA and IIRIRA together tightened the eligibility for *212(c) relief* and *suspension of deportation* and consolidated them into a new form of relief known as *cancellation of removal*.

As stated above, *212(c) relief* had been unavailable to certain child abductors, national security risks, and convicts, regardless of the length and depth of their presence. Enacted in April 1996, AEDPA greatly expanded the category of criminal aliens who were barred from applying for *212(c) relief* to include all aliens who were deportable on criminal grounds, as opposed to only barring those aliens who had served five years for one or more aggravated felonies. Congress nominally eased these AEDPA restrictions in IIRIRA, which became law on September 30, 1996, when it restricted the bar to aliens who had been convicted of an aggravated felony. Nevertheless, IIRIRA concurrently narrowed the scope of this change by significantly expanding the number of crimes that constitute *aggravated felonies*. Also, IIRIRA imposed new limits on what periods of time spent in the U.S. may be included in counting toward the requisite physical presence. Meanwhile, IIRIRA restricted what had formerly been suspension of deportation through, among other changes, adoption of longer and stricter presence requirements and more demanding hardship standards.

Current requirements. Under current § 240A(a) of the INA, an LPR who is otherwise inadmissible or deportable may nevertheless be allowed to retain permanent residency status if:

- **!** the alien has been an LPR at least five years;
- **!** the alien has resided in the U.S. continuously at least seven years after having been admitted in a legal status (though not necessarily in LPR status, *e.g.,* in a student nonimmigrant status); and
- **!** has not been convicted of an aggravated felony.

Both the presence requirements and criminal disqualifications under current law are more restrictive than their pre-1996 counterparts. First, the requirement that an alien have been an LPR for a minimum period (in addition to having had an unrelinquished domicile for at least seven years and being an LPR when applying) is new. Second, while the aggravated felony ground for disqualification is narrower than the short-lived AEDPA restrictions, it is far broader than the pre-1996 ground that only those aliens who **served** at least five years were disqualified.

IIRIRA provisions on *aggravated felonies* and tolling presence further narrow relief. *Aggravated felonies*, a term added to immigration law in the late 1980s to target serious criminals, was originally limited to murder and trafficking in drugs or firearms. After IIRIRA, *aggravated felonies* includes 19 types of federal, state, or foreign offenses, among them all thefts or crimes of violence for which the term of imprisonment is at least **one year**. Although the generic classes "crimes of violence" and "theft crimes" were used in defining categories of *aggravated felonies* prior to 1996, only those "crimes of violence" and "theft crimes" for which at least **five years** imprisonment was imposed were included. Beyond significant reductions in the imprisonment threshold for disqualifying crime, IIRIRA also added a provision to the INA (§ 101(a)(48)(B)) that requires that all references to terms of imprisonment in the INA be counted by including any period of imprisonment that was suspended.

In addition to broadening the class of *aggravated felonies*, IIRIRA also restricts eligibility for discretionary relief through its "time-stop" provisions. Prior to IIRIRA, the period of physical presence required for relief could be accumulated even during the pendency of administrative or judicial removal proceedings (though delay to acquire the requisite time could be taken into account to deny relief in the exercise of discretion).

IIRIRA, however, added a statutory "time-stop" provision that stops the continuous presence clock at the time removal proceedings are initiated or when the alien commits a deportable offense.

Regarding *suspension of deportation*, comparable relief under cancellation of removal (§ 240A(b)) now requires that the alien

- ! be physically present in the U.S. continuously for a least 10 years immediately preceding the application for relief,
- ! have been a person of good moral character during that period,
- ! not have been convicted of an offense within the grounds of inadmissibility or removal, and
- ! establish that removing him or her would result in exceptional and extremely unusual hardship to the alien's citizen or LPR spouse, parent, or child.

Thus, current law generally applies the steeper presence and hardship requirements that previously applied to criminal aliens who sought relief, while now making criminal aliens themselves generally ineligible for relief under any circumstances. Also, the same "time-stop" rules that now apply to former *212(c) relief* also apply here, and no degree of hardship to the alien himself or herself (as opposed to hardship to close relatives) may be considered.

Retroactivity of current provisions — post-IIRIRA cases. In general, changes made in IIRIRA, including those on cancellation of removal, apply in removal cases begun after the "IIRIRA effective date" — April 1, 1997. Nevertheless, determining eligibility for cancellation of removal in these new cases — with its presence and good behavior requirements — necessarily involves assessing past activities. IIRIRA appears to make clear that its standards are to be used in assessing these past activities, even though standards for immigration relief may have been significantly different when the activities occurred. Thus, an LPR who entered the U.S. in 1984 and pled guilty in 1990 to a theft felony carrying a two-year sentence could, arguably, now be doubly ineligible for relief — on "time-stop" grounds and aggravated felony grounds — regardless of whether the LPR would have been eligible for relief under 1990 standards.

Judicial opinions that have addressed the merits of retroactive application have tended to disfavor attaching new immigration disqualifications to past criminal pleas. A growing number of U.S. Courts of Appeals have held that the post-1996 "any aggravated felony" disqualification cannot be applied to LPRs who pled guilty to crimes that did not disqualify them from relief on "aggravated felony" grounds under the law as it existed at the time of the plea. For example, the U.S. Court of Appeals for the Second Circuit held on September 1, 2000, that post-1996 relief standards cannot apply to such pre-1996 pleas. Caselaw in the Fourth Circuit is to similar effect. Panels of the First, Ninth, and Seventh Circuits have found retroactive application impermissible if it can be shown that a criminal alien entered a plea knowing that the plea entered would not preclude an application for immigration relief under then existing law.

Retroactivity of current provisions — "time-stop" provisions. As stated above, IIRIRA generally applies only in cases begun on or after April 1, 1997 (with limited authority being given to the Attorney General to apply IIRIRA standards on a case-by-case basis in cases pending on that date). Therefore, aliens seeking discretionary relief in cases started prior to April 1997 seek *212(c) relief* or *suspension of deportation*, not *cancellation of removal*. Nevertheless, IIRIRA, as clarified in the Nicaraguan Adjustment and Central American Relief Act (NACARA) (title II of P.L. 105-100), contains one significant deviation from this "effective date" rule. The "time-stop" rules under IIRIRA apply to discretionary relief applications made in cases carried over from the pre-IIRIRA period. Thus, for example, an alien who entered in 1989 and put in deportation proceedings in 1995 would be considered as having only six years' of continuous presence for relief purposes.

Selected Proposals. The following bills are among the proposals that would ease current eligibility standards.

H.R. 5062 (Representative McCollum). This bill is sponsored by a senior majority member of the House Subcommittee on Immigration & Claims and is cosponsored by several Members of both parties who had introduced earlier proposals on their own. On September 19, 2000, the House passed **H.R. 5062** by voice vote.

H.R. 5062 would ease some, but not all, of the effects of the 1996 changes in discretionary relief for LPRs whose criminal activity occurred before IIRIRA became law. For example "time stop" provisions that stop the "continuous residence" clock on the date a crime was committed would not apply to LPRs whose offenses occurred on or before September 30, 1996. (However, the "time stop" provisions that stop the continuous residence clock when removal proceedings are instituted would continue to apply.)

Regarding the current disqualification of all LPRs convicted of an aggravated felony, H.R. 5062 would generally retain both the expanded definition of "aggravated felony" and the standard that disqualifies all aliens convicted of any aggravated felony. Nonetheless, for those LPRs whose criminal activities occurred before the 1996 changes, only those crimes that were "aggravated felonies" under the INA on the date they were committed would be disqualifying.

Note, however, that H.R. 5062 would continue to apply the current "any aggravated felony" disqualification to pre-1996 conduct. Thus, an LPR who pled guilty in 1995 to a crime that was an "aggravated felony" when committed – a single firearms offenses, for example – in exchange for a suspended sentence might continue to be ineligible to be considered for relief even though the INA at the time of the guilty plea only disqualified LPRs who served at least 5 years for an aggravated felony. In such a circumstance, the caselaw discussed above on pre-1996 guilty pleas would be relevant.

H.R. 5062 would apply its eased standards "retroactively." It would allow all aliens who were made ineligible by the 1996 changes, but who would be eligible under H.R. 5062, a chance to have their cases reconsidered.

The relief proposed in H.R. 5062 is limited to LPRs seeking cancellation of removal under provisions that are comparable to former 212(c) relief. H.R. 5062 would not affect the 1996 changes to the former "suspension of deportation."

Other bills. On October 1, 1999, Representative Bill McCollum introduced legislation to allow certain long-term permanent residents to apply for discretionary relief from removal despite the 1996 amendments to the definition of the term *aggravated felony*. Under this bill, **H.R. 2999**, the "Fairness for Permanent Residents Act of 1999," legal permanent residents with criminal records could apply for discretionary relief for which they otherwise would be eligible but for changes in the *aggravated felony* definition enacted in 1996, with a limited exception.

A comprehensive reform bill introduced by Representative John Conyers on July 26, 2000, the "Restoration of Fairness in Immigration Law Act" **(H.R. 4966)**, addresses criminal alien issues more extensively, and in many instances its proposed changes would apply both to future and past conduct. H.R. 4966 would broadly adopt sentencing thresholds for many aggravated felonies that reflect pre-1996 standards – only aliens sentenced to 5 years would be covered for most crimes instead of the current 1 year threshold. Also, the Attorney General would be given new authority to waive the "aggravated felony" consequences in cases of crimes for which an alien served less than 1 year in prison. Furthermore, the bill would ease the current standards that tightly restrict the ability of immigration authorities to allow long-term aliens who commit crimes to remain here based on their community ties, family ties, and other equities. LPRs who were affected by the 1996 restrictions on relief could have their cases reconsidered.

The criminal alien proposals of the "Keeping Families Together Act" (**H.R. 3272**) introduced by Representative Bob Filner on November 9, 1999 are similar to, if somewhat more narrowly focused than, some of the provisions in H.R. 4966. Among its provisions, H.R. 3272 would adopt former INA standards to make it easier for certain criminal aliens, especially legal permanent resident aliens (LPRs), to have their community and family ties taken into account before they are deported.

On April 20, 1999, Representative Barney Frank introduced the "Family Reunification Act of 1999" (**H.R. 1485**), which also would allow certain criminal aliens to apply for relief from removal even though they would be disqualified from doing so under the 1996 changes. This legislation would not fully restore the pre-1996 standards for relief, but rather would impose standards that lie somewhere in between the pre- and post-1996 rules. H.R. 1485 also would revise rules for relief being sought in cases started before the general effective date of the 1996 reforms. Finally, the bill would create a new type of hardship relief for immigrants who otherwise would be ineligible on *aggravated felony* grounds.

In the Senate, legislation introduced by Senator Moynihan, **S. 173**, addresses relief for long-term residents. Immigrants would only be disqualified from seeking relief because of an aggravated felony conviction if the crime was punishable by imprisonment of at least 5 years. **S. 3120**, the "Immigration Fairness Restoration Act," was introduced by Senator Kennedy on September 27, 2000. In addition to its detention and review provisions, S. 3120 proposes to freeze the immigration consequences of a criminal act to those that existed on the date the crime was committed. The punishment thresholds for including certain crimes as *aggravated felonies* would be increased from 1 year to 5 years. Discretionary relief would be precluded only to those aliens who were sentenced to at least 5 years for an *aggravated felony*.