No. 99-1789

In the Supreme Court of the United States

DIEGO ALFARACHE, PETITIONER

v.

RICHARD CRAVENER, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which made aliens convicted of certain criminal offenses ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), may be applied to an alien whose conviction predated the enactment of AEDPA.

2. Whether 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of AEDPA, violates constitutional principles of equal protection because it precludes discretionary relief only for aliens convicted of certain offenses who are placed in deportation proceedings in the United States, and not also aliens convicted of similar crimes who are placed in exclusion proceedings when returning from a trip abroad.

3. Whether the courts of appeals' varying interpretations regarding the temporal scope of Section 440(d) of AEDPA violates constitutional principles of equal protection because aliens are eligible (or ineligible) for discretionary relief from deportation based upon where they reside.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 203 F.3d 381. The order of the district court (Pet. App. 7-8) is unreported. The orders of the Board of Immigration Appeals (App., *infra*, 14a-21a) and the immigration judge (App., *infra*, 1a-7a, 8a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2000. The petition for a writ of certiorari was filed on May 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Nation's immigration laws. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation. Two enactments by Congress are pertinent to this case: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA), see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[1]

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[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had been interpreted, in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976), also to permit the Attorney General to waive grounds of deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 &

In 1996, Congress twice restricted the eligibility of criminal aliens for discretionary relief from deportation. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens who were deportable because they had been convicted of aggravated felonies or controlled substance offenses. See 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994).

Second, on September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed Section 1182(c) on a prospective basis, and replaced it with a new form of discretionary relief known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. IV 1998). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern petitioner's case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For deportation proceedings commenced prior to April 1, 1997, including petitioner's case, IIRIRA retained Section 1182(c)—including the amendment made by Section 440(d) of AEDPA that made certain classes of criminal aliens ineligible for relief under Section 1182(c).

b. After the enactment of these changes to the immigration laws, two questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA. First, the question arose as to whether Section 440(d) applies to aliens who were either convicted of the disqualifying offenses or were placed in deportation

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n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

proceedings based on those offenses before the enactment of AEDPA. On June 27, 1996, the Board of Immigration Appeals (BIA) initially decided that AEDPA Section 440(d) applies to all aliens placed in deportation proceedings before or after AEDPA was enacted, regardless of the date of conviction, except that it should not be applied to aliens who had already filed applications for Section 1182(c) relief before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (B.I.A. June 27, 1996).

On September 12, 1996, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the BIA's opinion in *Soriano* and certified for her decision the question whether AEDPA Section 440(d) applies to applications filed before the date of its enactment. On February 21, 1997, the Attorney General concluded in *Soriano* that Section 440(d) does apply in all deportation proceedings commenced before or after AEDPA's date of enactment, regardless of the date of the alien's conviction, including those proceedings in which aliens had already submitted applications for Section 1182(c) relief as of the date of enactment. *In re Soriano,* Int. Dec. No. 3289 (A.G. Feb. 21, 1997).

Second, the question arose whether AEDPA Section 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad, seek admission to the United States, and are placed in exclusion proceedings, as well as to criminal aliens in the United States who are placed in deportation proceedings. The BIA concluded in *In re Fuentes-Campos,* Int. Dec. No. 3318 (May 14, 1997), and *In re Gonzalez- Camarillo,* Int. Dec. No. 3320 (June 19, 1997), that AEDPA Section 440(d) bars relief only for criminal aliens placed in deportation proceedings in the United States.

2. Petitioner is a native and citizen of Mexico who entered the United States in 1974 as a non-immigrant and adjusted his status to that of a lawful permanent resident on December 7, 1990. On August 19, 1994, after entering a guilty plea, petitioner was convicted of the felony offense of conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d). The conspiracy involved "the conduct of the affairs of an enterprise which promoted and facilitated the importation, acquisition, possession and distribution of cocaine." App., *infra*, 6a. Petitioner was sentenced to 48 months' imprisonment for that offense. *Id.* at 2a.

On September 26, 1995, the Immigration and Naturalization Service (INS) issued an Order to Show Cause, charging petitioner with deportability under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (conviction of an aggravated felony) and 8 U.S.C. 1251(a)(2)(B)(i) (1994) (conviction of a controlled substance offense).[2] On February 14, 1996, petitioner filed an application for bond, indicating his intent to apply for relief under Section 1182(c). See Mot. for Bond Redetermination at 1. Petitioner's next substantive deportation hearing was not held until January 9, 1997, after AEDPA had been enacted into law. At that hearing, petitioner again indicated an intent to apply for relief under Section 1182(c), but the immigration judge (IJ) expressed uncertainty whether he was still eligible. See 1/9/97 Tr. 24. On April 16, 1997, the IJ found that petitioner was deportable as an

[2] Under the Attorney General's regulations, a deportation proceeding was formally "commenced" when the Order to Show Cause was filed with the immigration court. See 8 C.F.R. 3.14(a) (1996). The record in this case does not indicate the date on which the Order to Show Cause was filed, but it was plainly before February 14, 1996, when an immigration judge held a bond hearing in this case, and so was also before the enactment of AEDPA.

alien convicted of an aggravated felony and a controlled substance offense. App., *infra*, 4a-6a. On March 25, 1998, petitioner filed a formal application for Section 1182(c) relief. The IJ subsequently concluded that petitioner was not eligible for Section 1182(c) relief. See *id.* at 10a. The BIA agreed with the IJ that petitioner was deportable and ineligible for Section 1182(c) relief, and dismissed petitioner's appeal. *Id.* at 18a-19a, 21a.

3. Petitioner then filed a petition for a writ of habeas corpus in district court, invoking the court's jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241. The district court denied the petition, finding none of petitioner's claims meritorious. Pet. App. 7-8.

4. The court of appeals affirmed. Pet. App. 1-6. The court first concluded (*id.* at 2), as it had in a prior decision, *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999), that the district court had jurisdiction under 28 U.S.C. 2241 to entertain challenges to the merits of a final order of deportation, where the habeas petitioner contended that the INA itself (Section 1182(c), as amended by AEDPA Section 440(d)) was unconstitutional and that the application of Section 440(d) to his case was outside the proper temporal scope of that statute.[3]

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[3] The government argued below, as it argued in *Requena-Rodriguez*, that AEDPA and IIRIRA had divested the district courts of any authority under 28 U.S.C. 2241 to review the merits of final orders of deportation. The court of appeals concluded in *Requena-Rodriguez* that, in cases where judicial review is governed by the "transition rules" of IIRIRA—*i.e.*, cases in which deportation proceedings were commenced before IIRIRA's general effective date, April 1, 1997—Congress had not divested the district courts of that authority. 190 F.3d at 304-306. The court expressly limited its ruling, however, to cases governed by the

The court of appeals then concluded (Pet. App. 2-4), also based on its decision in *Requena-Rodriguez*, that AEDPA Section 440(d) may be applied to bar relief for an alien who was convicted of a disqualifying crime before AEDPA was enacted. The court stated that "pre-AEDPA convictions can trigger AEDPA Section 440(d), at least when an application for [§ 1182(c)] relief was not pending on the date that AEDPA took effect." Pet. App. 2-3 (internal quotation marks and citation omitted). Because (according to the court) petitioner filed his application for relief under Section 1182(c) after the effective date of AEDPA, the court ruled that

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transition rules, and made clear that it did "not determine whether any habeas jurisdiction remains under IIRIRA's permanent provisions." *Id.* at 309. Since that time, the Fifth Circuit has held that the permanent provisions of IIRIRA did divest the district courts of habeas corpus jurisdiction to review the merits of final orders of removal. See *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000); but see *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1143 (9th Cir. 2000) (holding that district courts retain such authority under permanent rules); *Liang* v. *INS*, 206 F.3d 308, 313-323 (3d Cir. 2000) (same).

There is a conflict in the circuits as to whether the district courts retain habeas corpus jurisdiction under IIRIRA's transition rules to review the merits of deportation orders. Compare, *e.g.*, *Requena-Rodriguez*, *supra*, with *LaGuerre* v. *Reno*, 164 F.3d 1035, 1039 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000). Nonetheless, this Court has denied a number of certiorari petitions raising the question whether such habeas corpus jurisdiction remains under IIRIRA's transition rules. See *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999).

AEDPA Section 440(d) prohibits him from obtaining discretionary relief under Section 1182(c).[4]

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[4] Although the court of appeals stated that petitioner did not apply for Section 1182(c) relief until after AEDPA was enacted, it is not entirely clear that that statement is correct. As noted above, although petitioner did not make a formal application for Section 1182(c) relief until after AEDPA was enacted, he noted in a motion for bond redetermination filed before its enactment that he intended to seek relief under Section 1182(c). Petitioner has not, however, argued in his certiorari petition that the court of appeals erred on that point, nor did he raise that point in a petition for rehearing.

In addition, petitioner appears not to have argued in the lower courts that AEDPA Section 440(d) was inapplicable to his case on the ground that his deportation proceedings were commenced before AEDPA was enacted. Several other aliens in the Fifth Circuit have raised that contention, but that issue has not yet been decided by that court. A number of other courts of appeals, however, have concluded that AEDPA Section 440(d) does not apply to any alien who was placed in deportation proceedings before AEDPA was enacted, and in so doing have rejected the Attorney General's construction of AEDPA Section 440(d) in *Soriano*. See *Goncalves* v. *Reno*, 144 F.3d 110, 126-133 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 129-130 (2d Cir. 1998), cert. denied *sub nom*. *Reno* v. *Navas*, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 241 (3d Cir. 1998); *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000); *Pak* v. *Reno*, 196 F.3d 666, 675-676 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1301-1304 (11th Cir. 1999). The Seventh Circuit, by contrast, has upheld the Attorney General's decision in *Soriano* and concluded that AEDPA Section 440(d) applies to all aliens placed in deportation proceedings before or after AEDPA was enacted. *LaGuerre*, 164 F.3d at 1040-1041. This Court has denied four certiorari petitions presenting issues about the temporal scope of AEDPA Section 440(d). See *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); *LaGuerre* v. *Reno*, *supra*; *Reno* v. *Goncalves*, *supra*; *Reno* v. *Navas*, *supra*.

The court also rejected petitioner's claim that Section 440(d) of AEDPA violates his right to equal protection because it precludes aliens in deportation proceedings, but not exclusion proceedings, from obtaining Section 1182(c) relief. Pet. App. 3. Again based on its decision in *Requena-Rodriguez*, the court concluded that AEDPA Section 440(d) is rational because it creates an incentive for deportable criminal aliens to leave the United States, by affording them the opportunity to seek a waiver should they seek to return to this country and by doing so trigger exclusion proceedings. *Id.* at 3-4.

The court next rejected petitioner's contention that AEDPA Section 440(d) violated his due process rights because he might have received relief, prior to AEDPA's amendment of Section 1182(c), if either the INS had commenced proceedings sooner or his case had proceeded more expeditiously. Pet. App. 4. The court

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In response to the division among the circuits about the temporal scope of AEDPA Section 440(d), the Department of Justice has recently published a proposed rule for notice and comment. 65 Fed. Reg. 44,476 (2000). The proposed rule would permit aliens who were placed in deportation proceedings before the effective date of AEDPA and who received final orders of deportation denying Section 1182(c) relief based on *Soriano* to move to reopen their deportation proceedings in order to reapply for relief under Section 1182(c). See *id.* at 44,478. The proposed rule would apply, moreover, regardless of the date on which the alien applied to an IJ for Section 1182(c) relief. Thus, if a final rule is issued in substantially the same form as the proposed rule, it would appear that petitioner would be eligible to move to reopen his proceedings to reapply for relief under Section 1182(c). We have been informed by the INS that, in light of the publication of the proposed rule, it has placed an administrative "hold" on the deportation of aliens who *prima facie* would appear to be eligible to move to reopen their proceedings under the proposed rule.

observed that "an alien in deportation proceedings has no constitutional right to a speedy proceeding." *Ibid.* Furthermore, the court reasoned, relief pursuant to Section 1182(c) was a matter of "grace" and "conferred no status." *Ibid.*

Finally, the court rejected petitioner's claim that the BIA erred in concluding that he had been convicted of an aggravated felony, as defined by the INA. Pet. App. 5. Petitioner maintained that his racketeering-conspiracy offense was not an "aggravated felony" as defined in the INA at the time his deportation proceedings were commenced. The court observed, however, that Congress had extended the statutory definition of "aggravated felony" to include petitioner's offense while petitioner's deportation proceedings were pending, and that Congress also had made clear that this expanded definition was to be applied to proceedings based on convictions "before, on, or after the date of [AEDPA's] enactment." *Ibid.*[5] Relying on

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[5] The court of appeals stated (Pet. App. 5) that AEDPA expanded the definition of "aggravated felony" as pertinent here and also directed that the expanded definition be applied regardless of the date of conviction. In fact, those changes were enacted into law by IIRIRA, not AEDPA. Before IIRIRA, the definition of "aggravated felony" had included a racketeering offense "for which a sentence of 5 years' imprisonment or more may be imposed." 8 U.S.C. 1101(a)(43)(J) (1994). IIRIRA amended that provision to cover a racketeering offense "for which a sentence of one year imprisonment may be imposed." IIRIRA § 321(a)(4), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(J) (Supp. IV 1998). In addition, IIRIRA § 321(b) provided that the term "aggravated felony" applies "regardless of whether the conviction was entered before, on, or after" the date of enactment of IIRIRA (September 30, 1996). 110 Stat. 3009-628; 8 U.S.C. 1101(a)(43) (flush paragraph) (Supp. IV 1998). The amendments in Section 321 of IIRIRA were also expressly made applicable to "actions taken on or after the

those statutory amendments, including the explicit effective date, the court concluded that the BIA had correctly applied the new definition of "aggravated felony" to petitioner's case. *Id.* at 6.

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that Section 440(d) of AEDPA is properly applied to bar relief from deportation under 8 U.S.C. 1182(c)(1994) to an alien who is subject to deportation based on a criminal conviction entered before AEDPA was enacted. He also argues that, so applied, Section 1182(c) as amended by AEDPA violates equal protection because it bars relief only for aliens placed in deportation proceedings and not also aliens placed in exclusion proceedings. Petitioner's challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court over a year ago in *Reno* v. *Goncalves*, 526 U.S. 1004 (1999), and *Reno* v. *Navas*, 526 U.S. 1004 (1999), as well as the certiorari petitions filed by aliens and denied by this Court more recently in *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000), and *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000).[6] There is no basis in this case for a different result. Like those cases, this case concerns

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date of the enactment of" IIRIRA. IIRIRA § 321(c), 110 Stat. 3009-628. As the BIA concluded in this case (App., *infra*, 18a), the IJ's and the BIA's considerations of this case were "actions taken" after September 30, 1996, and therefore petitioner was subject to the expanded definition of "aggravated felony."

[6] Related contentions about the temporal scope and constitutionality of AEDPA Section 440(d) are also raised in pending certiorari petitions in *Lechuga* v. *Perryman*, No. 99-2082 (filed June 27, 2000), *Smith* v. *Reno*, No. 99-9096 (filed Apr. 12, 2000), *De Horta-Garcia* v. *United States*, No. 99-9140 (filed Apr. 11, 2000), and *Almon* v. *Reno*, No. 99-9214 (filed Apr. 20, 2000).

substantive issues of eligibility for relief from deportation that arise under 8 U.S.C. 1182(c) (1994), as amended by AEDPA Section 440(d). Section 1182(c) was prospectively repealed by Congress in IIRIRA, and so the issues presented in this case have minimal ongoing significance. In addition, petitioner may be eligible to reapply for administrative relief from deportation under a proposed rule that has been published for notice and comment by the Attorney General. Further review is therefore not warranted.

1. Petitioner first argues (Pet. 6-24) that the court of appeals erred in concluding that Section 440(d) of AEDPA applies to his case, notwithstanding that his criminal convictions preceded the enactment of AEDPA. He notes, in support of that argument, that the courts of appeals have reached differing conclusions about the temporal scope of AEDPA Section 440(d).

The courts of appeals have reached divergent views about the temporal scope of AEDPA Section 440(d). Most circuits have concluded that AEDPA Section 440(d) does not bar relief for an alien against whom deportation proceedings were commenced before the date on which AEDPA was enacted.[7] The First and Ninth Circuits have also held that AEDPA Section 440(d) would not apply to an alien who was convicted before AEDPA was enacted, but only if the alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under

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[7] See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 128-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675-676; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304.

Section 1182(c).[8] The Fourth Circuit has gone further and held that AEDPA Section 440(d) does not apply in the case of any alien (such as petitioner) who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted.[9] The Third, Fifth, and Tenth Circuits have held that AEDPA Section 440(d) does apply to aliens who were convicted before AEDPA was enacted but placed in deportation proceedings after its enactment.[10] And the Seventh Circuit has held that AEDPA Section 440(d) applies even to aliens who were already in deportation proceedings on the date of AEDPA's enactment.[11]

Despite that disagreement among the courts of appeals, petitioner's challenge to the application of AEDPA Section 440(d) in his case does not warrant this Court's review. That contention relates only to the availability of relief under a provision that Congress has prospectively repealed. Further, the issue has now been settled in most circuits, and the issue is inherently restricted to transitional cases that were commenced administratively more than three years ago, before the April 1, 1997, effective date of IIRIRA's permanent provisions. This Court has denied review of four other petitions raising issues concerning the temporal scope

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[8] See *Mattis* v. *Reno*, 212 F.3d 31, 36-41 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. Petitioner has not contended that he pleaded guilty in specific reliance on the state of the law at the time of his guilty plea.

[9] *Tasios*, 204 F.3d at 550-552.

[10] See *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 306-308; *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1152-1155 (10th Cir. 1999), cert. denied *sub nom*. *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000).

[11] See *Turkhan* v. *Perryman*, 188 F.3d 814, 827-829 (1999); *LaGuerre*, 164 F.3d at 1040-1041.

of AEDPA Section 440(d), and there is no reason for a different result here. See pp. 11-12, *supra*.

In addition, the Department of Justice has recently published for notice and comment a proposed rule responding to the circuits that have rejected the Attorney General's construction of the temporal scope of AEDPA Section 440(d). See 65 Fed. Reg. 44,476 (2000). That proposed rule would essentially acquiesce in the determination, by the majority of the circuits, that Congress intended AEDPA Section 440(d) not to apply in the cases of aliens who were placed in deportation proceedings before AEDPA was enacted. *Id.* at 44,478. It would, however, maintain the Attorney General's current position that AEDPA Section 440(d) is properly applied to bar relief for aliens who were placed in proceedings after AEDPA was enacted, even if the conviction forming the basis of the deportability charge was entered before that date of enactment. *Ibid.* The rule would therefore allow an alien who was placed in deportation proceedings before AEDPA was enacted and was denied Section 1182(c) relief based on *Soriano* to move to reopen his proceedings in order to reapply for relief under Section 1182(c), notwithstanding AEDPA Section 440(d). *Ibid.*

The proposed rule provides a further reason for denial of this petition, because petitioner may well be eligible to reapply for administrative relief under the rule. Petitioner's deportation proceedings were commenced before AEDPA was enacted. Petitioner did not argue below that AEDPA Section 440(d) was inapplicable to his case for that reason, but if the rule is issued as a final rule in substantially its present form, it should permit petitioner to seek to reopen his deportation proceedings. Meanwhile, we have been informed by the INS that it has placed an administrative hold on the

deportation of aliens who were placed in deportation proceedings before AEDPA was enacted and who would appear *prima facie* to be eligible to reapply for relief under the proposed rule.

2. Petitioner's first equal-protection claim, that Section 440(d) is irrational because it applies only to aliens placed in deportation proceedings in the United States and not also to aliens placed in exclusion proceedings when they seek to return from abroad, also does not warrant further review. First, as is true of the issue of the temporal scope of AEDPA Section 440(d) discussed above, the equal-protection issue is of minimal prospective importance because Congress has repealed Section 1182(c), and the claim by its nature concerns only transitional cases. Second, there is no conflict among the circuits on the issue. Every other circuit that has addressed the equal-protection challenge to Section 440(d) has also rejected it.[12]

Third, the court of appeals' rejection of petitioner's equal-protection claim is correct. Congress had a rational basis for precluding certain criminal aliens placed in deportation proceedings in the United States from obtaining Section 1182(c) relief, even while allow-

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[12] See *Almon* v. *Reno*, 192 F.3d 28, 31-32 (1st Cir. 1999), petition for cert. pending, No. 99-9214; *DeSousa*, 190 F.3d at 184-185; *Jurado-Gutierrez*, 190 F.3d at 1152-1153; *LaGuerre*, 164 F.3d at 1041. The Ninth Circuit has concluded that AEDPA Section 440(d) is not limited to deportable aliens and does in fact bar relief under Section 1182(c) for excludable aliens as well. See *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (1999), petition for cert. pending, No. 99-10166. That decision, however, would afford petitioner no benefit, because in the Ninth Circuit, as well as in the circuits that have addressed the distinction, a deportable alien covered by AEDPA Section 440(d) could obtain no relief under Section 1182(c).

ing criminal aliens seeking to return to the United States from a trip abroad to remain eligible for such relief. Cf. *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977) (in light of Congress's plenary power over immigration, statutory classification must be upheld if it is based upon any "facially legitimate and bona fide reason"). The court of appeals observed that Congress's distinction encourages deportable aliens to leave the country —"which is after all the goal of deportation"—by providing them with an opportunity to apply for Section 1182(c) relief in exclusion proceedings if they attempt to return. Pet. App. 3.

Petitioner's reliance (Pet. 25-26) on *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976), is misplaced. *Francis* addressed a distinction that the BIA had drawn (for purposes of eligibility for Section 1182(c) relief) between two classes of aliens placed in deportation proceedings in the United States, based solely on whether the alien had previously taken a temporary trip abroad. See *Requena-Rodriguez*, 190 F.3d at 308-309 (explaining *Francis*); p. 2 n. 1, *supra*. Petitioner's claim challenges an entirely different distinction, between aliens placed in deportation proceedings in the United States and aliens placed in exclusion proceedings at the border or a port of entry. That distinction has been fundamental to many aspects of the INA. See *Landon* v. *Plasencia*, 459 U.S. 21, 25-28 (1982). Given the quite different purposes of the two kinds of proceedings and the different ways in which they operate, Congress is entitled to make different judgments about the kinds of claims for discretionary relief that may be considered in deportation and exclusion proceedings.

3. Petitioner's final claim (Pet. 27-30) is that the divergent appellate decisions about the temporal scope of AEDPA Section 440(d) violate equal protection be-

cause aliens are eligible (or ineligible) for discretionary relief under Section 1182(c) depending upon where they reside. That argument simply recasts petitioner's claim of a conflict among the circuits about the temporal scope of Section 440(d) of AEDPA. While a split in circuit authority is a potential reason for granting a petition for a writ of certiorari, the difference of opinions among the circuits on the temporal scope of AEDPA Section 440(d) does not merit this Court's review, for the reasons we have given above. Moreover, no court of appeals has concluded that the existence of divergent opinions among the courts of appeals gives rise to a constitutionally-based equal protection claim for an alien against the INS or the Attorney General. Cf. *Berroteran-Melendez* v. *INS*, 955 F.2d 1251, 1258 (9th Cir. 1992) (mere fact that one alien received a different decision than another alien does not raise an equal protection claim).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
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AUGUST 2000

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

File No: A90-474-082

IN THE MATTER OF DIEGO ALFARACHE
RESPONDENT

IN DEPORATION PROCEEDINGS

[Apr. 16, 1997]

ON BEHALF OF RESPONDENT

Max L. Christenson, Esq.
314 N. Texas
Odessa, TX 79761

ON BEHALF OF SERVICE

Benjamin D. Somera
Assistant District Counsel
Houston, TX

DECISION OF THE IMMIGRATION JUDGE

Respondent is a 29-year-old native and citizen of Mexico. Respondent entered the United States on or about 1974 as a nonimmigrant and adjusted his status to that of a lawful permanent resident on December 7, 1990.

On August 19, 1994 Respondent was convicted in the United States District Court for the Southern District of Texas for the felony offense of "[c]onspiracy to parti-

cipate in a racketeering enterprise" in violation of 18 U.S.C. § 1962(d), for which he received a sentence of 48 months imprisonment with supervised release for a term of 3 years. (*See* Service's Trial Ex. C.)

By Order to Show Cause (OSC) issued on September 26, 1995, the Immigration and Naturalization Service (Service) charged Respondent with deportability pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (Act), as an alien who entered the United States without inspection, section 241(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance offense, and section 241(a)(2)(A)(iii), as an alien convicted of an aggravated felony.

In a deportation hearing held on April 10, 1996 Respondent admitted the truth of certain factual allegations in the OSC. The Service alleged and Respondent, while represented by counsel, admitted that Respondent is neither a citizen or a national of the United States, but is instead a native and citizen of Mexico whose status was adjusted to that of a lawful permanent resident on or about December 7, 1990. (*See* Ex. 1, allegations #1, 2, 5.) In addition, the Service alleged and Respondent admitted that on August 9, 1994, Respondent was convicted in the United States District Court Southern District of Texas for the offense of conspiracy to participate in a racketeering enterprise. (*See* Ex. 1, allegation 6.) The Respondent's admissions establish these allegations by clear, convincing, and unequivocal evidence.

The third and fourth allegations submitted by the Service, which are that on or about 1968 at or near Houston, Texas, Respondent entered the United States and was not then inspected by an immigration officer,

and all charges of deportability were denied by Respondent. At the conclusion of the hearing held on April 10, 1996 the court continued the proceedings to allow the Service to submit a brief in support of its charges of deportability. On May 7, 1996, the Service submitted the "Service's Memorandum-Brief" in support of their argument that Respondent's conviction renders him deportable as an alien convicted at any time after entry of an aggravated felony and of a violation of any law relating to a controlled substance. On May 29, 1996, Respondent filed his "Brief Showing Cause for Termination of Deportation Proceedings." Respondent, in his brief, contends that his conviction occurred after the definition of aggravated felony at section 101(a)(43) of the Act was amended to include 18 U.S.C. § 1962 offenses and that the amended definition should not apply "retroactively" to his conviction. In addition, Respondent contends that his conviction is not a conviction for a violation of a law "relating to a controlled substance."

On June 14, 1996 the Service lodged an additional charge against Respondent, charging that he is subject to deportation pursuant to section 241(a)(1)(B) of the Act in that Respondent is an alien who is in the United States in violation of the Act or any other law of the United States. At the conclusion of the hearing, the court continued the proceedings to allow Respondent to examine the new charge of deportability.

In a deportation hearing held on January 9, 1997, the court found that the third and fourth allegations, which are that Respondent entered the United States on or about 1968 at or near Houston, Texas, without inspection, and the charge of deportability related to entry

without inspection were not sustained. The third allegation was amended to state that Respondent entered the United States on or about 1974 at or near Houston, Texas as a nonimmigrant with an "A-2" visa, which the Respondent admitted.

At the conclusion of the hearing held on January 9, 1997, the court continued the proceedings to examine the record and to issue a written decision on the issue of deportability in Respondent's case. For the reasons that follow, the court finds that Respondent is deportable as the Service has charged under section 241(a)(2)(A)(iii) of the Act, as an alien who has been convicted of an aggravated felony, and under section 241(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance offense.

DISCUSSION

On September 30, 1996, while this matter was pending, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) enacted as Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009. Section 321 of the IIRIRA broadens the definition of "aggravated felony" under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under section 101(a)(43)(J) of the Act, as amended by section 321(a)(4) of the IIRIRA, an aggravated felony is defined to include "an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations) . . . for which a sentence of one year imprisonment or more may be imposed." *See* INA § 101(a)(43)(J), 8 U.S.C. § 1101(a)(43)(J).

Section 321(b) of the IIRIRA eliminates all temporal limitations previously assigned to the "aggravated felony" definition. *See In re Noble*, Int. Dec. 3301 at 19 n.12 (BIA 1997). The IIRIRA added the following new sentence to the statutory definition of "aggravated felony": "Nothwithstanding any other provision of law (including any effective date), the term ["aggravated felony"] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." 8 U.S.C. § 1101(a)(43). Therefore, the amended definition of "aggravated felony" applies to convictions entered before, on, or after the date of enactment. *See* IIRIRA § 321(b); *In re Yeung*, Int. Dec. 3297 at 3 (BIA 1996). With one exception not applicable to this matter, the amendments made by section 321 of the IIRIRA "apply to actions taken on or after the date of the enactment" of IIRIRA, "regardless of when the conviction occurred." IIRIRA § 321(c).

The next issue is whether Respondent's conviction under section 1962(d) of title 18 for conspiracy to participate in a racketeering enterprise is a conviction for a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i). Respondent has admitted that he was convicted of conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d). "Racketeering activity" is defined in "Chapter 96—Racketeer Influenced and Corrupt Organizations" of title 18 to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical

(as defined in section 102 of the Controlled Substances Act)." 18 U.S.C. § 1961(1).

The fact that the racketeering statute under which Respondent was convicted proscribes other forms of interstate criminal activity does not mean that "it is not also, in appropriate cases, a law relating to controlled substances." *Johnson v. INS*, 971 F.2d 340, 342 (9th Cir. 1992) (holding that violation of a federal racketeering statute prohibiting interstate travel in aid of business enterprises involving, inter alia, controlled substances was, under the circumstances before the court, a crime relating to controlled substances).

Respondent pleaded guilty to the charge that he conspired to conduct and participate, directly and indirectly and through a pattern of racketeering activity, the conduct of the affairs of an enterprise which promoted and facilitated the importation, acquisition, possession and distribution of cocaine. (*See* Service's Trial Ex. D.) Therefore, Respondent's conviction is for a crime relating to controlled substances and is properly a basis for deportation under section 241(a)(2)(B)(i).

Based on the foregoing, the court concludes that Respondent's deportability pursuant to sections 241(a)(2)(A)(iii) and 241(a)(2)(B)(i) of the Act has been established by clear, unequivocal, and convincing evidence. *See Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a).

The Service's lodged charge of deportability based on the Respondent's presence in the United States in violation of the Act or any other law of the United States is not sustained. The Service, in the Form I-261, neither amended the factual allegations set forth in the

OSC nor added additional factual allegations to the OSC. (*See* Ex. 6.) The allegations contained in the OSC do not support the lodged charge of deportability.

At the hearing scheduled for December 23, 1997, Respondent must be prepared to proceed regarding identifying form(s) of relief from deportation and his eligibility for such forms of relief.

4/16/97 /s/ CLAREASE MITCHELL RANKIN
CLAREASE MITCHELL RANKIN
U.S. Immigration Judge

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

File No: A90-474-082

IN THE MATTER OF DIEGO ALFARACHE
RESPONDENT

IN DEPORATION PROCEEDINGS

[June 30, 1998]

***CHARGES*:**

Section 241(a)(1)(B) of the Immigration and Nationality Act, for having entered the United States without inspection; § 241(a)(2)(A)(iii) of the Immigration and Nationality Act, for having been convicted of an aggravated felony; § 241(a)(2)(B)(i) of the Immigration and Nationality Act, for having been convicted of a violation of a conspiracy attempt to violate any law or regulation of a state, the United States or a foreign country relating to a controlled substance.

APPLICATIONS:

Section 212(c) and political asylum and withholding of deportation in the alternative.

ON BEHALF OF RESPONDENT

Max L. Christenson, Esq.
314 N. Texas
Odessa, TX 79761

ON BEHALF OF SERVICE

Benjamin Somera, Esq.
Assistant District Counsel
Houston, TX

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent in this case is a native and citizen of Mexico. He entered the United States in or about 1974 as a non-immigrant and he adjusted his status to that of a lawful permanent resident on December 7th, 1990. On August 19th, 1994, the Respondent was convicted in the United States District Court for the Southern District of Texas for the felony offense of conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. Section 1962(d), for which he received a sentence of 48 months of imprisonment, with a supervised released [*sic*] for a term of three years.

Subsequently, the Immigration and Naturalization Service issued an Order to Show Cause on September the 26th, 1995, charging the Respondent with being deportable pursuant to Section 241(a)(1)(B) of the Immigration and Nationality Act as an immigrant who entered the United States without inspection, Section 242(b)(1) of the Act as set forth above, and Section 241(a)(2)(A)(ii) as set forth above. The Respondent was placed in deportation proceedings. At the master calendar hearing, the Respondent admitted the truth of the factual allegations 1, 2, and 3, denied allegation 4, admitted allegation 5, admitted allegation number 6, denied the 241(a)(1)(B) charge, and denied

241(a)(2)(A)(iii), and denied 241(a)(2)(B)(i). The Respondent was given an opportunity to provide pleadings to support his denial of the charges. The Service submitted conviction records and documentation in support of the charges. There were several pleadings filed, and finally the Court issued an order in response to the Respondent's request to be allowed to apply for 212(c) relief and asylum, indicating that the Court found that the 241(a)(1)(B) charge would not be sustained. There was no proof that the Respondent had entered without inspection. But the 241(a)(2)(A)(iii) charge was in fact found to be true by the Court. The Respondent had been convicted as an aggravated felon. And in addition, the 241(a)(2)(B)(i) charge was sustained. The Court found that the Respondent had been convicted of a law in violation of the Controlled Substances Act. The Court denied the Respondent's request to apply for 212(c) relief, and upheld the Service's argument that the Respondent was not eligible for 212(c) relief. See Exhibit number 7 for a detailed rationale of the decision of the Immigration Judge.

The Court ordered the Respondent to appear and be prepared to proceed to identify any forms of relief that it might be eligible to apply for. The Respondent argued that it was eligible to apply for withholding of deportation, as the charges, since they were conspiracy, were not a particularly serious crime, and in addition the Respondent argued if the charges were found to be particularly serious, based on the Torture Convention, the Respondent should be allowed to avoid deportation to the country of Mexico. The Court scheduled a hearing on the Respondent's argument for June 30th, 1998 at 1:30. On that date, the Respondent appeared prepared to go forward on the arguments in support of his

not being convicted of a particularly serious crime. The Respondent appeared with David Lemoyne, who is a Federal Bureau of Investigation Special Agent, Theodore Cummins, an agent from the Drug Enforcement Agency, Ed Gleason, Probation Officer, Robert Simpson, a former coworker of the Respondent, Bulimio Alfarache and Consuelo Alfarache, the parents of the Respondent, to testify regarding the full rehabilitation of the Respondent, and Melinda Sherman, also to testify regarding the full rehabilitation of the Respondent. The Court allowed each Respondent to identify themselves, and ruled that the only witnesses whose testimony would be relevant would be the agents from the FBI and the Drug Enforcement Agency.

The witness Special Agent David Lemoyne testified that the Respondent had been instrumental in assisting in their investigation of a special drug cartel. The Respondent had been arrested for being involved in the Colombian cocaine traffic from 1986 relating to their RICO investigation. Mr. Alfarache was a drug customer. That means he purchased drugs and sold drugs in the Austin area from the cartel. He served as a Government witness, and his fear is that he will be tortured for testifying against a Samuel Posada-Rios, who was the head of the drug cartel. Agent Lemoyne testified that Mr. Posada-Rios is the head of one of the *most dangerous organizations in Houston.* Agent Lemoyne testified that the cartel has been involved in at least twenty homicides and other atrocious acts. The Court did raise a question with the witness as to why the Respondent did not go into the witness protection program. The witness did not have an answer to that. In fact, the witness indicated that had he been the Respondent, he would have sought witness protection.

The witness also testified that there was possibly one Mexican federal official who may be involved in the drug cartel, but he was not sure that that was the case. That answer was given in response to the attorney for the Respondent raising that issue. The witness Agent Lemoyne testified that the Respondent's role in the offense was the most minor, but that this was also a most serious offense, and the Agent answered yes several times when he was asked whether or not this was a serious offense.

On cross examination, the witness indicated that the Respondent's helping the Government did not make this crime any less serious.

The next witness to testify on behalf of the Respondent was Special Drug Enforcement Agent Theodore Cummins. He testified that the Respondent was a purchaser and distributor of the drugs from the cartel, and that he did cooperate with the police in its investigation. He testified that the Respondent may be better off in the United States because he would have the protection of the United States Government, and in answer to the big question as to whether or not this was a particularly serious crime, and whether or not his cooperation with the Government made it any less serious, the witness testified that the Respondent's involvement was a particularly serious crime, and that no, his cooperation with the Government did not make it any less serious.

After listening to the testimony, the Court is satisfied that the Respondent does not qualify for withholding of deportation, as this is a particularly serious crime in which he has been involved, and the Court is satisfied that his cooperation does not make it any less serious.

As to the argument for withholding of deportation based upon the Torture Convention, the Court does not believe that it would be in violation of the role the United States is to play in the Torture Convention if the Respondent is to be deported to his native country of Mexico. In fact the Court, based upon the testimony of the first witness, believes it is possible that the Respondent may be better off in Mexico than in the United States, since Special Agent Lemoyne testified that Samuel Posada-Rios is the head of the drug cartel which is "the most dangerous organization in Houston."

Based upon the evidence presented and the pleadings submitted, the Court finds that the Respondent has been convicted of a particularly serious crime and thus is not eligible for withholding of deportation, nor is the Torture Convention applicable in this particular case.

Thus, it is ordered that the Respondent's application for withholding of deportation be denied, and that the Respondent be deported to his native country of Mexico.

/s/ CLAREASE MITCHELL RANKIN
CLAREASE MITCHELL RANKIN
U.S. Immigration Judge

APPENDIX C

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

Falls Church, Virginia 22041

DECISION OF THE
BOARD OF IMMIGRATION APPEALS

File: A90 474 082-HOUSTON Date: JAN 4, 1999

In re: DIEGO ALFARACHE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

ROBERT E. KAHN, ESQUIRE
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BELLAIRE, TEXAS 77401

ON BEHALF OF SERVICE:

BENJAMIN D. SOMERA
ASSISTANT DISTRICT COUNSEL

The respondent appeals from an Immigration Judge's decision ordering him deported from the United States to Mexico. The appeal will be dismissed.

The respondent, a native and citizen of Mexico, entered the United States sometime in 1974. His status was adjusted to that of a lawful permanent resident on December 7, 1990. On August 9, 1994, he was convicted of conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d). The Immigration and Naturalization Service filed an Order to Show Cause on October 18, 1995, charging that the respon-

dent was deportable pursuant to sections 241(a)(1)(B), (2)(A)(iii), and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(B), (2)(A)(iii), and (B)(i), as an alien who entered without inspection, and was convicted of an aggravated felony and drug violation. The Service subsequently lodged an additional ground of deportation, and charged the respondent with deportability pursuant to section 241(a)(1)(B) of the Act, as an alien in the United States in violation of the law. The respondent contested all the grounds of deportability. The Immigration Judge found the respondent deportable only pursuant to sections 241(a)(2)(A)(iii) and (B)(i) of the Act, pretermitted the respondent's applications for relief, and ordered the respondent deported from the United States to Mexico.

I. APPELLATE ARGUMENTS

On appeal, the respondent first contends that he is not deportable as an alien convicted of an aggravated felony. He asserts that the Order to Show Cause is defective because the Service failed to allege which subdivision of the definition of an aggravated felony under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), applies to the respondent. In the alternative, the respondent contends that his conviction is not an aggravated felony as defined in section 101(a)(43)(J) of the Act.

With respect to relief from deportation, the respondent contends that the Immigration Judge erred in pretermitting his request for a waiver of inadmissibility pursuant to section 212(c) of the Act, 8 U.S.C. § 1182(c). He further challenges the Immigration Judge's determination that he has been convicted of a particularly serious crime, and thus, is ineligible for withholding of deportation.

In response, the Service supports the Immigration Judge's findings that the respondent is not eligible for relief from deportation. The Service urges this Board to adopt the Immigration Judge's decision.

II. DEPORTABILITY

A. ORDER TO SHOW CAUSE

Initially, in *Matter of Raqueno*, 17 I&N Dec. 10 (BIA 1979), *aff'd*, 663 F.2d 555 (5th Cir. 1981), we noted that an Order to Show Cause is designed to inform an alien of charges against him with sufficient precision to allow him to properly defend himself. *See also Matter of Chery and Hasan*, 15 I&N Dec. 380 (BIA 1975). We find that the Order to Show Cause issued in this case was sufficient in that regard. There is no need, under the statute or the regulations, for allegations in Order to Show Cause to include the specific statutory subdivision as it relates to the definition of an aggravated felony in order to support the charge of deportability under section 241(a)(2)(A)(iii) of the Act.[13] The respondent was advised that the government believed that a conviction and sentence had been entered against him. If this information were erroneously stated, then the respondent had notice to allow him to contest the Service's position. The respondent was also advised that the conviction and sentence were being used to support the charge of deportability. Moreover, the respondent was advised by the charge of deportability that the government believed that the conviction was

[13] The respondent relies on section 239(a)(1)(D) of the Act, 8 U.S.C. 1229(a)(1)(D), in support of his argument that the Order to Show Cause is defective. However, this particular section pertains to removal proceedings. Since the respondent is in deportation proceedings, this provision is not applicable.

an aggravated felony as defined under section 101(a)(43) of the Act. We do not find that the Order to Show Cause in this case was vague.

B. AGGRAVATED FELONY

The definition of an aggravated felony is set forth at section 101(a)(43) of the Act. In this case, the focus is on subsection (J) of the Act, which was introduced to the definition of aggravated felony by section 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4321-22. At the time the respondent was placed in deportation proceedings, subsection (J) provided that "an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations) for which a sentence of 5 years' imprisonment or more may be imposed" was an aggravated felony. However, while his case was pending before the Immigration Judge, subsection (J) was twice amended. First section 440(e) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), inserted "an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses)" into the definition of an aggravated felony. Subsequently, section 321(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 ("IIRIRA"), removed the sentence of 5 years' imprisonment for a sentence of 1 year imprisonment or more may be imposed.

At the time the Order to Show Cause was filed, subsection (J) was only applicable to convictions entered on or after October 25, 1994. *See* section 222(b) of the Immigration and Nationality Technical Corrections Act

of 1994. However, as we noted in *Matter of Batista*, Interim Decision 3321 (BIA 1997), section 321(b) of IIRIRA expanded the scope of the aggravated felony definition by providing "[n]otwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." Moreover, the amendments made by section 321(a) and (b) of IIRIRA apply to "actions taken" on or after April 1, 1997, regardless of the date of the conviction. *See* section 321(c) of IIRIRA. We find that the Immigration Judge's decision and this Board's consideration of that decision constitutes an "action" within the meaning of section 321(c) of IIRIRA. *See Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997); *Matter of Batista, supra.* Therefore, contrary to the respondent's arguments that section 321(a) of IIRIRA should be applied prospectively, we find that he is subject to the current definition of the term aggravated felony, and that the Immigration Judge properly found him deportable.

III. WAIVER OF INADMISSIBILITY PURSUANT TO SECTION 212(C)

The respondent sought relief from deportation under section 212(c) of the Act. However, he is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214

("AEDPA") § 440(d); *Matter of Soriano,* Interim Decision 3289 (BIA 1996; A.G. 1997).

The respondent urges this Board to apply the approach adopted in *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (restrictions on section 212(c) relief added by AEDPA do not apply retroactively to applications pending on April 24, 1996), or the approaches taken by several district courts. *See Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. July 1997); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. July 3, 1997). However, this case arises out of the United States Court of Appeals for the Fifth Circuit, and the authority from one circuit is not binding in another. *See Matter of Cerna,* 20 I&N 399 (BIA 1991). Morever, the Board is not bound to follow the published decisions of a United States district court. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

The respondent also argues on appeal that AEDPA violates the Constitution. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g.*, *Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

IV. WITHHOLDING OF DEPORTATION

Regarding withholding of deportation, we note that the respondent's aggravated felony conviction is presumed to be a particularly serious crime, which may render him ineligible for withholding of deportation. *Matter of O-T-M-T-*, Interim Decision 3300 (BIA 1996). The Board also held, however, to overcome this presumption it must be determined whether there is an unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that his or her crime cannot rationally be deemed "particularly serious" in light of our treaty obligations under the

Protocol. *Id.* To make this determination, we look to the conviction records and sentencing information in the alien's case. In this analysis, we do not engage in the retrial of the alien's criminal case or go behind the record of conviction to determine his or her innocence or guilt. We look to the nature and circumstances of the crime to determine whether the alien, having been convicted of that crime, can be said to represent a danger to the community of the United States. *Id.*; *see, e.g., Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), at 360-61; *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Furthermore, in this examination, one must give significant weight to the decision of Congress to include that particular category of crime in the aggravated felony definition.

The record of conviction in this case reveals that the respondent was convicted of conspiracy to participate in a racketeering enterprise, and receive a 48-month prison sentence. The indictment and presentence report reveal that the respondent redistributed cocaine for an enterprise which was promoting and facilitating the importation, acquisition, possession and distribution of cocaine. Specifically, the respondent acted as a drug dealer for an 18-month period (August 1987—March 1989). The respondent received between 1 to 15 kilos of cocaine weekly from his supplier to be redistributed primarily to customers on the University of Texas' campus. During this time period, the respondent was using cocaine.

Although an FBI and DEA agent testified that the respondent cooperated with their investigation and provided testimony against other individuals, the Board has noted the serious problems this country faces due to the sale and consumption of such illegal

substances. We have also noted that the seriousness of these crimes has been consistently recognized by Congress. *Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994); *Matter of O-M-*, 20 I&N Dec. 327 (BIA 1991). We recognize the testimony of the two law enforcement agent [*sic*] that the respondent's participation in the enterprise was very minor. Nevertheless, we find that this does not discount the fact that the respondent redistributed a large amount of cocaine during an 18-month period. We find that his role as a drug dealer is a very serious crime. Thus, in the final analysis, we do not find any particular aspect of the respondent's case that would cause us to conclude that he does not pose a danger to the community and that this denial of withholding of deportation would cause us to be out of compliance with the Protocol.

V. SUMMARY

In sum, we find that the Order to Show Cause provided the respondent with sufficient notice to allow him to properly defend himself. We further find that the Immigration Judge properly concluded that the respondent is deportable as an alien convicted of an aggravated felony as defined in section 101(a)(43)(J) of the Act. *See* section 241 (a)(2)(A)(iii) of the Act. Finally, we find that the Immigration Judge properly pretermitted the respondent's requests to apply for section 212(c) relief and withholding of deportation.

Accordingly, the appeal will be dimissed.

ORDER: The appeal is dismissed.

/s/ LAUREN R. MATHON
LAUREN R. MATHON
FOR THE BOARD