No. 07-820

In the Supreme Court of the United States

FRANCISCO C. ZAMORA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

As a result of 1996 amendments, aliens convicted of certain offenses were made statutorily ineligible for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994). In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that it would be impermissibly retroactive to apply the 1996 amendments to an alien convicted of an aggravated felony on the basis of a plea agreement made at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is:

Whether, in light of *St. Cyr*, it is impermissibly retroactive to apply the 1996 repeal of Section 212(c) to an alien who was convicted of a disqualifying offense after a trial and who does not claim to have relied in any way on the potential availability of discretionary relief under Section 212(c).

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 240 Fed. Appx. 150. The amended order of the Board of Immigration Appeals (Pet. Supp. App. 1-5) and the oral decision of the immigration judge (App., *infra*, 1a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2007. The petition for a writ of certiorari was filed on October 15, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed

1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from being excluded from the country. By its terms, Section 212(c) "was literally applicable only to exclusion proceedings," but it was construed as applying to deportation proceedings as well. *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether, see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a more-limited form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes ineligible for discretionary relief aliens who have been convicted of aggravated felonies. 8 U.S.C. 1229b(a)(3). It also requires an alien who is a lawful permanent resident seeking such discretionary relief to have "resided in the United States continuously for 7 years after having been admitted in any status," 8 U.S.C. 1229b(a)(2), and it cuts off that period of "continuous residence" whenever the alien commits, *inter alia*, a crime involving moral turpitude. 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of an agreement to

plead guilty that was made at a time when the resulting conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Mexico who entered the United States as a lawful permanent resident of the United States in 1985. Pet. App. 2. In 1990, he pleaded guilty to, and was convicted of, possessing a stolen motor vehicle. Pet. App. 2; Pet. C.A. Br. 3. In 1995 he was convicted of possession of cocaine, after pleading not guilty and going to trial. Pet. App. 2-3. In November 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against him after he attempted to re-enter the United States after a trip to Mexico.[1] It alleged that petitioner was removable because the first offense was a crime involving moral turpitude and the second was a controlled-substance offense. *Ibid.* 2-3; App., *infra*, 2a; see 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II).

At petitioner's removal hearing, the immigration judge (IJ) found petitioner removable on both of the charged grounds. App., *infra*, 3a. Petitioner sought discretionary relief from removal under Section 212(c).[2] The IJ ruled that Section 212(c) relief is unavailable to an alien convicted before the 1996 amendments if the alien was convicted at trial. Because petitioner did not plead guilty to the 1995 cocaine charge, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 2-3; App., *infra*, 3a.

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[1] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

[2] Petitioner did not apply for cancellation of removal under Section 240A. Pet. App. 5; Pet. 2.

Petitioner appealed to the Board of Immigration Appeals (BIA), contesting, *inter alia*, his ineligibility for Section 212(c) relief. The BIA issued a decision on May 16, 2006, and then issued amended decisions on May 24 and 25, 2006. Pet. Supp. App. 2, 5 n.1. The BIA determined that, because petitioner's controlled-substance conviction did not result from a guilty plea, petitioner is ineligible for Section 212(c) relief, and "there is nothing in [*St. Cyr*] which indicates that its reasoning applies to aliens who failed to enter a plea of guilty or nolo contendere." *Id.* at 4. In support of its conclusion, the BIA cited decisions from the Seventh Circuit and other courts of appeals. *Id.* at 4-5.

3. Petitioner then filed a petition for review of the BIA's decision with the United States Court of Appeals for the Seventh Circuit. Pet. App. 2. In the court of appeals, petitioner explained that, "[a]lthough it was never discussed in the proceedings below," he is "not eligible for relief under the current law of cancellation of removal at § 240A" because his 1990 conviction for an offense involving moral turpitude precludes him from establishing the seven years of continuous residence required for discretionary relief by 8 U.S.C. 1229b(a)(2). Pet. C.A. Br. 3-4; see also 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005) (terminating "period of continuous presence" upon alien's commission of certain offenses).[3]

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[3] Before the IJ and the BIA, the parties apparently assumed that the 1995 conviction for possession of cocaine was an "aggravated felony" that precluded cancellation of removal by virtue of 8 U.S.C. 1229b(a)(3). After petitioner filed his petition for review in the court of appeals, but before he filed his supporting brief, this Court held that a state conviction for mere possession of an amount of cocaine too small to distribute did not constitute an "aggravated felony" under the INA, see *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). Petitioner thus claimed in the court of appeals that he was not ineligible for Section 240A relief on the basis

Although petitioner claimed that his 1990 conviction bars him from receiving a discretionary grant of cancellation of removal under current law, his argument in the court of appeals—like his retroactivity argument before the IJ and the BIA—was necessarily focused on IIRIRA's retroactive effect in repealing former Section 212(c) *vis-à-vis* his 1995 conviction, which had followed a trial rather than a guilty plea. Pet. App. 3; Pet. C.A. Br. 7-10. Thus, petitioner argued that *St. Cyr* does not require him to demonstrate reliance on Section 212(c). Pet. App. 3.

4. The court of appeals denied the petition for review. Pet. App. 1-8. It rejected petitioner's argument that *St. Cyr* does not require any showing of reliance. It described this Court's analysis in *St. Cyr* as being based upon: (1) the retroactive effect that followed from the "'almost certain[]'" reliance by those pleading guilty upon the likelihood of receiving Section 212(c) relief in deciding to forgo their right to a trial; and (2) "the *quid pro quo* involved in plea agreements," whereby those pleading guilty gave up their right to a trial and the government benefitted. Pet. App. 5 (quoting *St. Cyr*, 533 U.S. at 325). The court also noted that its own precedent had already "foreclosed the possibility of § 212(c) relief for an alien who did not plead guilty to an aggravated felony prior to IIRIRA, reasoning that he 'did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief.'" *Ibid*. (quoting *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004)).

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of any aggravated felony, Pet. C.A. Br. 3 & n.1, and the government did not dispute that conclusion, Pet. App. 4.

The court of appeals observed that "the vast majority of [other] circuits" agreed with its view. Pet. App. 5-6. It did, however, note three courts that contemplate a showing of reliance from something other than a guilty plea in certain circumstances: *Restrepo* v. *McElroy*, 369 F.3d 627, 634-635 (2d Cir. 2004) (aliens can demonstrate reliance, despite pleading not guilty, by showing they delayed applying for Section 212(c) relief to "build a stronger case of rehabilitation"); *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 494 (3d Cir. 2004) (aliens going to trial may show reliance if they turn down a plea agreement); and *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006) (because of "objectively reasonable reliance on prior law," the repeal of Section 212(c) does not apply to aliens who contest an aggravated felony charge but forgo their right to appeal). Pet. App. 6. After observing that petitioner did not argue that he could show any of those forms of reliance, the court stated that "[o]nly the Fourth Circuit" had accepted petitioner's view and "wholly foresworn a reliance requirement." *Id.* at 7 (citing *Olatunji* v. *Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004)). Finally, the court concluded that petitioner's formulation would allow "all aliens convicted of crimes prior to IIRIRA" to remain eligible for relief, and thus render moot "virtually all of [this Court's] analysis in *St. Cyr*." *Id.* at 7-8. Accordingly, it affirmed the BIA's denial of relief and denied the petition for review. *Id.* at 8.

ARGUMENT

Petitioner contends (at 11-18) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), has been misinterpreted by the majority of the courts of appeals and that it does not require any showing of reliance as the basis for a finding of impermissibly retroactive effect. His case, however,

does not squarely present that question, because the conviction that precludes him from seeking discretionary relief from removal after the 1996 repeal of Section 212(c)—*i.e.*, the discretionary relief of cancellation of removal under Section 240A, 8 U.S.C. 1229b, which replaced former Section 212(c)—is not his 1995 conviction for cocaine possession (which was not an aggravated felony, see note 3, *supra*), but rather his 1990 conviction for a crime involving moral turpitude (which petitioner conceded below prevents him from accruing the necessary period of continuous physical presence, see p. 4, *supra*). Because petitioner's submission in this Court is based on the asserted application of IIRIRA to his 1995 conviction, the petition should be denied on this ground alone.

Moreover, even assuming that petitioner's request for relief turns on the extent to which reliance matters to retroactivity analysis, the unpublished decision of the court of appeals correctly rejected petitioner's claims, and this Court has already denied petitions urging a similar extension of *St. Cyr* in at least four prior cases. See *Hernandez-Castillo* v. *Gonzales*, 127 S. Ct. 40 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005). The application of Section 212(c) is of diminishing prospective significance.

1. The question presented turns on the interaction between this Court's decision about retroactivity in *St. Cyr* and petitioner's decision to "exercise[] his right to trial in a criminal case in 1995" by choosing not to "enter[] a plea of guilty." Pet. ii. But petitioner's 1995 conviction at trial for possessing cocaine is not what precludes him from being eligible for the discretionary relief from removal that he seeks. As petitioner concedes,

he is "ineligible for cancellation of removal" under current law (Section 240A(a) of the INA, 8 U.S.C. 1229b(a)), "because his *1990 offense* [for possessing a stolen car] * * * break[s] the" seven-year period of continuous residence necessary to be eligible for such relief. Pet. 2 (emphasis added); see also Pet. App. 4-5. Petitioner noted in the court of appeals that he pleaded guilty to the 1990 offense. Pet. C.A. Br. 3. Thus, notwithstanding the focus of the court of appeals, which followed the focus of the arguments in petitioner's petition for review of the BIA's decision, this case does not present the opportunity to address the decisions of a majority of the courts of appeals to "den[y] relief" under Section 212(c) "absent a plea of guilty." Pet. 11.

Moreover, the analysis necessary to determine IIRIRA's retroactive effect on petitioner's 1990 guilty plea would differ from that employed by the decisions that petitioner describes as disagreeing about the retroactive effect of the repeal of Section 212(c). That analysis would depend on whether the provision stopping the period of continuous residence upon the commission of certain crimes, 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005), known as the "stop-time rule," applies retroactively to petitioner's 1990 conviction. As the First Circuit explained at length in *Peralta* v. *Gonzales*, 441 F.3d 23, 26-28 (2006), the transitional provisions in Section 309(c)(5) of IIRIRA, 110 Stat. 3009-627, as amended by the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(a), 111 Stat. 2196, applied the stop-time rule to immigration proceedings that began "before, on, or after the date of enactment" of IIRIRA. *Peralta* thus held that "Congress has expressly mandated that [the stop-time rule] be applied retroactively" to crimes that occurred before 1996. 441 F.3d at 30; see

also *Okeke* v. *Gonzales*, 407 F.3d 585, 588 (3d Cir. 2005) (applying stop-time rule to conviction from 1983 without discussing retroactivity). The Fifth Circuit has expressly extended that analysis to immigration proceedings (like petitioner's) that "do not fall under [IIRIRA's] transitional rule" because they were "commenced after" IIRIRA became fully effective in 1997. *Heaven* v. *Gonzales*, 473 F.3d 167, 174-176 (2006); but see *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1201 (9th Cir. 2006) (holding that "the permanent stop-clock rule contained in part B of § 1229b(d)(1) is ambiguous * * * with respect to its retroactive application to a conviction obtained pursuant to a guilty plea").

As even this cursory overview shows, determining whether IIRIRA retroactively forbids petitioner from being eligible for discretionary relief from removal involves several considerations that were neither pressed nor passed upon in the court of appeals, because petitioner conceded below that his 1990 conviction rendered him ineligible for cancellation of removal and has instead focused on his 1995 conviction, which did *not* render him ineligible for cancellation of removal. The petition should be denied on this ground alone.

2. a. Even assuming that this case properly turns on the retroactive effect of the bare repeal of Section 212(c), the court of appeals' decision is correct. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the

years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies (at 11-16) on a series of retroactivity cases: *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), *Martin* v. *Hadix*, 527 U.S. 343 (1999), *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), and *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006). The last of those decisions, however, explicitly discussed *St. Cyr* and confirmed the importance of reliance in the Court's analysis. The Court stated that in *St. Cyr* "we emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 2431-2432 (internal quotation marks omitted). Distinguishing the situation of *Fernandez-Vargas* from that of *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 2432 n.10. Similarly, as petitioner himself concedes

(at 13-14), "the consideration [of reliance] was clearly important to [the Court's] deliberations" in *Martin*, and reliance was discussed in *Altmann*.

b. As petitioner acknowledges (at 11), the Seventh Circuit is not the only court of appeals that has declined to extend the holding of *St. Cyr* generally to aliens convicted at trial, precisely because of *St. Cyr*'s emphasis on the showing of reliance provided by a guilty plea. At least six others have done so as well.[4] See *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002);[5] *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S.

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[4] Petitioner identifies (at 8) *Patel* v. *Ashcroft*, 401 F.3d 400 (6th Cir. 2005), as a case "refusing to permit § 212(c) relief to any aliens except those who, prior to IIRIRA, entered pleas of guilty." But, after determining that Patel was an aggravated felon, the Sixth Circuit dismissed the case for lack of jurisdiction, and did not reach the Section 212(c) issue. See *id.* at 402, 407, 411.

[5] In *Chambers*, the Fourth Circuit affirmed the BIA's denial of eligibility for Section 212(c) relief to an alien convicted pre-IIRIRA of an aggravated felony after trial. 307 F.3d at 287, 293. The court held that his "reliance interests" were not the same as those of an alien like St. Cyr who had pleaded guilty. *Id.* at 290-292. The court further stated that "an alien's failure to demonstrate reliance on pre-IIRIRA law might not foreclose" a retroactivity claim. *Id.* at 293. It determined, however, that, "[e]ven if that is so," IIRIRA's repeal did not change the impact of his "decision to go to trial on his immigration status" and therefore did not have an improper retroactive effect on him. *Ibid.*

902 (2003) (citing *United States* v. *Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000)).[6]

3. In addition, the conflict among the circuits on the general question of whether reliance is necessary to show a retroactive effect is narrower than petitioner claims. Petitioner points (at 8-10) to two cases holding that reliance is not necessary to show a retroactive effect. But the Fourth Circuit's decision in *Olatunji*, although mentioned by the court below (Pet. App. 7), does not conflict with the decision below. The retroactivity issue in *Olatunji* involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, 387 F.3d at 396, rather than loss of access to Section 212(c) relief. In fact, *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers*, which did involve Section 212(c). See 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293).

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[6] As the Seventh Circuit observed, some of the courts requiring reliance have found that it can be demonstrated by circumstances other than a guilty plea. Petitioner gives (at 17-18) further examples of such cases. See *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 942-944 (9th Cir. 2007) (retroactivity found where lawful permanent resident who applied for naturalization 18 months prior to IIRIRA reasonably relied on access to suspension relief); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) (if alien can demonstrate on remand that she "affirmatively decided to postpone" applying for Section 212(c) relief to increase the likelihood of getting it, she would establish a reasonable "reliance interest" sufficient to show improper retroactivity); *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (same). After the petition for a writ of certiorari was filed, the Second Circuit further clarified its view, explaining that "an alien can never [hope to] make the showing of detrimental reliance that *Wilson* requires if he did not actually apply for § 212(c) relief before he became ineligible pursuant to the statute under which he seeks to have his eligibility evaluated." *Singh* v. *Mukasey*, No. 07-1688-ag, 2008 WL 658239, at *5 (Mar. 13, 2008).

Even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument—continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (2007).

Nevertheless, the Third Circuit's decision in *Atkinson* v. *Attorney General*, 479 F.3d 222 (2007), does conflict with the decisions discussed above. *Atkinson* dealt with whether an alien who had not been offered a plea bargain (unlike the alien in the Third Circuit's prior decision in *Ponnapula*) and who had been convicted of an aggravated felony at a pre-IIRIRA trial was eligible for Section 212(c) relief. *Id.* at 229-230. The Third Circuit, holding that a showing of reliance was not required, stated that it was "not troubled by [its] *dictum* in *Ponnapula* casting doubt on whether an alien in Atkinson's situation could demonstrate a reasonable reliance interest necessary to demonstrate a retroactive effect." *Id.* at 231. The court found that IIRIRA attached new legal consequences to the alien's conviction and resulting sentence such that the BIA could not preclude Section 212(c) relief "because IIRIRA's repeal of that section cannot be applied retroactively." *Ibid.*

4. Quite aside from the fact that seven circuits have reached a result contrary to *Atkinson*, further review would not be warranted for two additional reasons—even if, contrary to our submission on point 1, *supra*, this case properly presented the issue. First, the question presented in the petition necessarily has diminishing prospective significance, because it affects only removal proceedings for aliens convicted at trials before IIRIRA was enacted in 1996.

Second, it would in any event be premature for this Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony at trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA barring Section 212(c) relief apply to aliens who were convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination was reflected in the amended regulations, which took effect on October 28, 2004. See *id.* at 57,833-57,835; 8 C.F.R. 1212.3(h) (2007) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204 (11th Cir. 2006), and *Atkinson* itself did not reflect consideration of them. Even if the issue might otherwise warrant review by this Court at some point, review would be premature until the effect of the regulations has been further considered by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2008

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 38 884 655

IN THE MATTER OF: FRANCISCO ZAMORA

Filed: Apr. 5, 2005

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT: Royal F. Berg

ON BEHALF OF DHS: Joseph M. Yeung

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico, who applied for admission into the United States on July 24, 2001, at Chicago's O'Hare International Airport by presenting a resident alien card in his name. The respondent's inspection was deferred based upon some criminal matters reflected in his record.

[Specifically,] on December 27, 1990, the respondent had been convicted in the State of Illinois, Circuit Court of Cook County, for possession of a stolen motor vehicle and had been sentenced to 24 months probation. On August 14, 1994, the respondent had been convicted in

the State of Illinois, Circuit Court of Cook County, for possession of a controlled substance, and had been sentenced to 24 months probation. The respondent was deemed inadmissible and a Notice to Appear was issued against [him] dated November 15, 2001 (Exhibit 1) charging him with removability under Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as an alien convicted of a crime involving moral turpitude, and under Section 212(a)(2)(A)(i)(II) of the Act, in that he is an alien who has been convicted of an offense constituting a controlled substance offense.

The respondent, through his attorney, denied all the allegations contained in the Notice to Appear, on March 21, 2003, and subsequently submitted a motion to this Court, which has been entered into the record as Exhibit 6, seeking among other things the suppression of certain documentation submitted by the Government, as well as termination and for this Court's recusal. Rather than issue a hasty oral decision, this Court prepared a lengthy written decision, which has been entered into the record as Exhibit 7, addressing in detail the respondent's motions, basically denying them and I incorporate herein, by reference, the written decision dated March 25, 2005, addressing each of the respondent's arguments.

The respondent, in Exhibit 7, was ordered to present to this Court any [application for] relief from removal that he might be eligible for, at his hearing scheduled on April 5, 2005. On said date, the respondent submitted to the Court an application for advance permission to return to unrelinquished domicile on Form I-191. This document has been entered into the record as Exhibit No. 8. However, this Court determines that the respondent is statutorily ineligible for a waiver under Section

212(c) of the Immigration and Nationality Act, in that the conviction record, found at Exhibit 3, shows that the respondent had pled not guilty on February 8, 1995, to possession of a controlled substance, and that the respondent then had been in fact convicted and sentenced to probation and other conditions on April 11, 1995.

The respondent has objected to the admission into the record of this conviction [record] from the Circuit Court of Cook County, Illinois, however, my decision admitting it into the record has been addressed in my [prior] written decision, which is found at Exhibit 7. Having found that the respondent did not plead guilty, he cannot avail himself of the Supreme Court decision in *St. Cyr v. INS*, citation omitted, [ruling] that someone who had pled guilty based on a belief that he might be eligible for a waiver under Section 212(c) of the Act might still be able to seek a waiver before the Immigration Courts to date. Having found that the respondent did not enter a plea of guilty but rather proceeded on a plea of not guilty, and allowed the [Criminal] Court to make its ultimate finding of guilty, he cannot seek 212(c) relief to date, under the Supreme Court's holding in *St. Cyr*.

Therefore, I must pretermit the respondent's application found at Exhibit 8, and there being no other avenue of relief available to the respondent I hereby order the respondent removed to Mexico on the charges contained in the Notice to Appear, and on the basis stated

above, as well as in my written decision, which has been incorporated herein.

/S/ JENNIE L. GIAMBASTIANI *
JENNIE L. GIAMBASTIANI
United States Immigration Judge

[* Pen and ink corrections made by Immigration Judge and relate to transcriber errors.]