No. 06-66

In the Supreme Court of the United States

MARIO ALBERTO RICHARDS-DIAZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996) and 8 U.S.C. 1229b.

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OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 2a-4a) is not published in the *Federal Reporter* but is reprinted in 171 Fed. Appx. 10. The order of the Board of Immigration Appeals (Pet. App. 5a) and the opinion and order of the immigration judge (Pet. App. 6a-12a) are unreported. Prior opinions of the court of appeals are reported at 233 F.3d 1160 and 273 F.3d 916. Prior orders of the Board of Immigration Appeals (Pet. App. 18a-19a, 22a-23a) and a prior decision of the immigration judge (Pet. App. 13a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2006. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a). The petition for a writ

of certiorari was filed on July 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988), which was repealed in 1996, authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. Although, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. Subsequently, 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 types of offenses, including an aggravated felony or a controlled-substance offense, without regard to the amount of time spent in prison. Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that same year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), 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 form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes ineligible for relief any alien who has been convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3).

Section 240A also makes ineligible for relief any alien who has previously obtained relief under Section 240A or Section 212(c). 8 U.S.C. 1229b(c)(6).

2. Petitioner is a native and citizen of Mexico. In April 1975, he entered the United States as an immigrant. In February 1996, he pleaded guilty in California court to transportation of methamphetamine. He was sentenced to 270 days of imprisonment. In June 1997, the Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner.* It alleged that he was removable under 8 U.S.C. 1227(a)(2)(A)(iii) because transportation of methamphetamine is an aggravated felony. Admin. R. 330, 363; Gov't C.A. Br. 4-5; Pet. App. 14a.

3. In October 1997, an immigration judge (IJ) found petitioner removable as charged, denied his applications for relief from removal, and ordered him removed to Mexico. Pet. App. 13a-17a. The IJ ruled that petitioner was ineligible for discretionary relief from removal under Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), because that provision was repealed before removal proceedings were commenced, and that petitioner was ineligible for cancellation of removal under Section 240A of the INA because he had been convicted of an aggravated felony. Pet. App. 16a. The Board of Immigration Appeals (BIA) reached the same conclusion and dismissed petitioner's appeal. *Id.* at 18a-19a.

Petitioner thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California. Gov't C.A. Br. 6. The

* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

district court denied the petition. *Ibid*. The court of appeals vacated the district court's decision in part, however, and remanded for a determination of whether petitioner had specifically relied on the availability of discretionary relief from removal when he entered his guilty plea in February 1996, four months before AEDPA's effective date. *Richards-Diaz* v. *Fasano*, 233 F.3d 1160 (9th Cir. 2000). This Court then granted the government's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *St. Cyr*, *supra*. *Fasano* v. *Richards-Diaz*, 533 U.S. 945 (2001). *St. Cyr* 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 through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

On remand, the court of appeals held that, in light of *St. Cyr*, petitioner was eligible to apply for discretionary relief from removal under Section 212(c). *Richards-Diaz* v. *Fasano*, 273 F.3d 916 (9th Cir. 2001). It therefore vacated the judgment of the district court and remanded the case with directions to remand the case to the BIA for consideration of petitioner's application for Section 212(c) relief. *Ibid*. The BIA subsequently reopened the proceedings and remanded the case to the IJ so that petitioner could apply for relief under Section 212(c). Pet. App. 22a-23a.

While the case was pending before the IJ, the government became aware that, in March 1997, petitioner had pleaded guilty in California court to using and being under the influence of methamphetamine, for which he served 120 days in jail. In October 2002, the INS filed

an additional charge of removability on the basis of that conviction. It alleged that petitioner was removable under 8 U.S.C. 1227(a)(2)(B)(i) because using and being under the influence of methamphetamine is a controlled-substance offense. Admin. R. 66, 71; Gov't C.A. Br. 5, 7; Pet. App. 8a-9a.

4. Following the remand and the filing of the additional charge, the IJ again found petitioner removable, again denied his applications for relief from removal, and again ordered him removed to Mexico. Pet. App. 6a-12a. The IJ ruled that petitioner was ineligible for discretionary relief from removal under Section 212(c) of the INA because he had pleaded guilty to using and being under the influence of methamphetamine after the effective date of AEDPA, which made ineligible for Section 212(c) relief any alien convicted of a controlled-substance offense. *Id.* at 10a. The IJ rejected petitioner's contention that, under the BIA's decision in *In re Gabryelsky*, 20 I. & N. Dec. 750 (1993), he "could combine the Section 212(c) waiver with a cancellation of removal under Section 240A[] relief and have all the convictions waived." Pet. App. 10a. The IJ reasoned that *Gabryelsky* "dealt with adjustment of status and Section 212(c)," not cancellation of removal and Section 212(c). *Ibid.* The IJ also explained that, for two reasons, Section 240A "precludes using the cancellation remedy to cancel the ground of removability based on the 1997 conviction": first, the remedy is not available to aliens who have been convicted of an aggravated felony, and petitioner was convicted of the aggravated felony of transportation of methamphetamine in 1996; second, the remedy is not available to aliens who have been granted Section 212(c) relief, and petitioner's *Gabryelsky* argument

depends on his obtaining Section 212(c) relief with respect to his 1996 conviction. *Id.* at 10a-11a.

The BIA affirmed the IJ's decision without opinion. Pet. App. 5a.

5. The court of appeals denied petitioner's petition for review in an unpublished memorandum. Pet. App. 2a-4a. The court held that, even if petitioner was eligible for Section 212(c) relief in connection with his 1996 conviction, he was ineligible for Section 212(c) relief in connection with his 1997 conviction and was ineligible for cancellation of removal under Section 240A. *Id.* at 3a. The court concluded that petitioner was ineligible for Section 212(c) relief in connection with his 1997 conviction because the conviction postdated AEDPA's effective date, AEDPA made aliens convicted of a controlled-substance offense ineligible for Section 212(c) relief, and petitioner's 1997 conviction was for a controlled-substance offense. *Id.* at 3a-4a. The court concluded that petitioner was ineligible for cancellation of removal under Section 240A because aliens previously convicted of an aggravated felony are ineligible for such relief and petitioner's 1996 conviction was for an aggravated felony. *Id.* at 4a.

ARGUMENT

Relying on *In re Gabryelsky*, 20 I. & N. Dec. 750 (B.I.A. 1993), petitioner contends (Pet. 6-15) that he was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the INA. The IJ, BIA, and court of appeals all correctly rejected that contention, and further review is unwarranted.

1. *In re Gabryelsky* involved an alien who had been convicted of two offenses—a drug offense and a firearms offense—and wished to obtain two types of re-

lief—discretionary relief from deportation under Section 212(c) of the INA and adjustment of status under Section 245 of the INA, 8 U.S.C. 1255. The problem for the alien was this: On the one hand, Section 212(c) "may be used to waive [deportation] for * * * drug offenses," but Section 212(c) relief "is barred where the applicant has a firearms conviction." *Drax* v. *Ashcroft*, 178 F. Supp. 2d 296, 304 (E.D.N.Y. 2001) (Weinstein, J.). That is because Section 212(c) applies only when "the ground of deportability charged is * * * also a ground of [exclusion]," *Gabryelsky*, 20 I. & N. Dec. at 754, and, while a conviction of a drug offense is listed as a ground of exclusion in Section 212(a) of the INA, 8 U.S.C. 1182(a)(2)(A)(i)(II), "there is no exclusion ground corresponding to the deportation ground for conviction of a firearms offense," *Gabryelsky*, 20 I. & N. Dec. at 753-754. On the other hand, Section 245 "may be used to adjust the status of a lawful permanent resident, removing [firearms] offenses from their record for purposes of immigration hearings," but Section 245 "may not be used where the applicant has a record of drug offenses." *Drax*, 178 F. Supp. 2d at 304. That is because Section 245 requires that an alien be "admissible," 8 U.S.C. 1255(a), and, while an alien convicted of a firearms offense is admissible, *In re Rainford*, 20 I. & N. Dec. 598 (B.I.A. 1992), an alien convicted of a drug offense is "inadmissible," 8 U.S.C. 1182(a)(2)(A)(i)(II).

As Judge Weinstein has explained, the solution adopted by the BIA was this:

> *Gabryelsky* allows the [alien] to consolidate both the 212(c) and 245 discretionary hearings into a single hearing. This creates the assumption that the two hearings happen at the same moment. Because of this simultaneous determination, the immigration

> judge can consider the section 212(c) hearing as not barred by the weapons conviction, since the judge is at that exact moment deciding also whether to waive the weapons conviction. And he can consider the section 245 hearing as not barred by the drug conviction, since he is also concurrently determining whether to waive the drug charge. Only if the judge decides to waive both charges is the petitioner not deported.

178 F. Supp. 2d at 304.

In adopting that rule in *Gabryelsky*, the BIA relied on two regulations. See 20 I. & N. Dec. at 754-756. The first was 8 C.F.R. 242.17(a) (1993) (since redesignated as 8 C.F.R. 1240.49(a)), which provided, in part, that,

> [i]n conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes he meets the eligibility requirements for a waiver of the ground of inadmissibility, he may apply to the immigration judge for such waiver.

The second regulation was 8 C.F.R. 245.1(e) (1993), titled "Concurrent applications to overcome exclusionary grounds," which provided, in part, that "[a]ny applicant for adjustment under this part" (which governs adjustment of status) "may also apply for the benefits of section 212(c) of the [INA]." The BIA reasoned that, under Section 245.1(e), "there is no requirement that section 212(c) of the [INA] separately and independently waive all grounds of deportability in order for an applicant for adjustment of status to concurrently apply for relief under sections 245 and 212(c)." 20 I. & N. Dec. at 755.

The BIA also reasoned that "such a reading would render the regulation * * * meaningless, for there would be no need to concurrently apply for adjustment of status to overcome exclusionary grounds if a section 212(c) waiver would independently waive all grounds of inadmissibility." *Ibid.*

2. The regulations on which the BIA relied in *In re Gabryelsky* are not applicable to the situation here, and there are no comparable regulations that are. *Gabryelsky* therefore provides no basis for concluding that petitioner was eligible for "simultaneous" relief from removal under Sections 212(c) and 240A of the INA. Indeed, unlike the type of relief at issue in *Gabryelsky* (adjustment of status), which was inherently related to Section 212(c) relief, both by statute and by regulation, the type of relief at issue here (cancellation of removal) has *replaced* Section 212(c) relief.

Petitioner places considerable weight (Pet. 7-12) on the BIA's decision in *In re Azurin*, 23 I. &. N. Dec. 695 (2005). But that case merely reaffirmed that an alien may simultaneously apply for relief under Sections 212(c) and 245 despite a change in the regulations. The BIA observed that *Gabryelsky* had relied on the statement in 8 C.F.R. 245.1(e) (1993) that "[a]ny applicant for adjustment of status * * * may also apply for the benefits of section 212(c)," and that that language had been eliminated as of April 1, 1997, when Section 245.1(e) was redesignated as 8 C.F.R. 245.1(f). *In re Azurin*, 23 I. & N. Dec. at 697-698. The BIA explained, however, that that regulation "was not the exclusive basis for [its holding] in *Gabryelsky*," and that it had "also relied on language in former 8 C.F.R. § 242.17(a) (1993)," which "still exists in the current version of the regulation." *Id.* at 698. That language, the BIA said, "clearly indicates that

the various waivers of inadmissibility are intended to accompany an adjustment application." *Ibid*. As already mentioned, 8 C.F.R. 242.17(a) (1993) is not applicable to the situation here, and there are no comparable regulations that are.

3. Even if *In re Gabryelsky* applied beyond the context of adjustment of status, petitioner still would not be eligible for "simultaneous" relief from removal. As petitioner acknowledges (Pet. 7), the holding of *Gabryelsky* is that

> an alien * * * who
>
> > (i) on his *drug* conviction, is *eligible* for § 212(c) relief from deportation but *ineligible* for § 245(a) adjustment of status; yet
> >
> > (ii) on his *weapons* conviction, is *eligible* for § 245(a) adjustment of status but *ineligible* for § 212(c) relief from deportation,
>
> can simultaneously apply for both forms of relief.

Drax v. *Reno*, 338 F.3d 98, 111 (2d Cir. 2003). By analogy, petitioner would have to show that, on his 1996 conviction for transportation of methamphetamine, he is eligible for Section 212(c) relief but ineligible for cancellation of removal, and that, on his 1997 conviction for using and being under the influence of methamphetamine, he is eligible for cancellation of removal but ineligible for Section 212(c) relief. Petitioner could not make that showing. As the court of appeals correctly held (Pet. App. 3a-4a), even if petitioner is eligible for Section 212(c) relief with respect to his 1996 conviction, he is not eligible for Section 212(c) relief *or* cancellation of removal with respect to his 1997 conviction.

As to Section 212(c) relief: Petitioner pleaded guilty to using and being under the influence of methamphetamine in March 1997, after AEDPA's effective date (April 24, 1996), see Pub. L. No. 104-132, 110 Stat. 1214. Under Section 212(c) as amended by AEDPA, an alien convicted of a controlled-substance offense is ineligible for discretionary relief from removal, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, and using and being under the influence of methamphetamine is a controlled-substance offense for those purposes, see 8 U.S.C. 1227(a)(2)(B)(i) (excluding from category of offense "relating to a controlled substance" only "a single offense involving possession for one's own use of 30 grams or less of marijuana").

As to cancellation of removal: An alien is ineligible for cancellation of removal if he has been "convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3). Because petitioner was convicted of transportation of methamphetamine in 1996, and because the definition of "aggravated felony" includes "illicit trafficking in a controlled substance," 8 U.S.C. 1101(a)(43)(B), petitioner has been convicted of an aggravated felony. Indeed, he does not contend otherwise. See, *e.g.*, Pet. App. 4a (decision below) (noting that petitioner "does not dispute" that he was convicted of an aggravated felony in 1996).

The 1996 conviction would be a bar to cancellation of removal even if one assumed that petitioner would be granted Section 212(c) relief with respect to that conviction. As the BIA has explained, "a grant of section 212(c) relief 'waives' the finding of excludability or deportability [but not] the basis of the excludability itself," such that "the crimes alleged to be grounds for excludability or deportability do not disappear from the aliens' record for immigration purposes." *In re Bal-*

deras, 20 I. & N. Dec. 389, 391 (1991). The Ninth Circuit has reached the same conclusion. See *Molina-Amezcua* v. *INS*, 6 F.3d 646, 647 (1993) (per curiam) ("A waiver of deportation gives the alien a chance to stay in the United States despite his misdeed, but it does not expunge the conviction. The blemish remains on his record, to be considered if and when the alien again gives the Attorney General cause to examine his deportability.").

4. No court of appeals has held that *In re Gabryelsky* applies to a case of this type. And the only court of appeals to address the question has held that it does not. In *Rodriguez-Munoz* v. *Gonzales*, 419 F.3d 245 (2005), the Third Circuit rejected the contention that an alien convicted of sale of drugs in 1992 and possession of drugs in 2000 "would be entitled to relief if permitted to simultaneously apply for a waiver of removal under § 212(c) and for cancellation of removal under § 240A." *Id.* at 247. The court found *Gabryelsky* inapposite, because, among other things, the BIA's holding in that case was based on "a regulation permitting combined § 245(a) and § 212(c) applications." *Id.* at 248. The court also found that the alien would not be entitled to "simultaneous" relief even if *Gabryelsky* applied outside the context of adjustment of status. The court reasoned that, even if the alien were eligible for Section 212(c) relief with respect to his 1992 conviction, he would be ineligible for cancellation of removal with respect to his 2000 conviction, because the 1992 conviction was for an aggravated felony, thereby disqualifying him from seeking cancellation of removal with respect to the 2000 conviction. *Ibid.*

Petitioner suggests (Pet. 14-15) that the Second Circuit and Seventh Circuit have extended the holding of

Gabryelsky to the situation at issue here. But the decisions on which he relies, *Drax*, 338 F.3d at 111-119, and *Snajder* v. *INS*, 29 F.3d 1203, 1208 (7th Cir. 1994), applied *Gabryelsky* to "simultaneous" applications for Section 212(c) relief and adjustment of status, the circumstances that were present in *Gabryelsky* itself. Those circumstances are not present here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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