I. INTRODUCTION

Prior to the Anti-terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration and Immigrant Responsibility Act (IIRIRA), applications under §212(c) of the Immigration and Nationality Act (INA) waived most grounds of inadmissibility and related grounds of deportability, and enabled the legal permanent resident to preserve his or her resident status. The §212(c) waiver evolved from an earlier waiver of excludability in the Immigration Act of 1917[1], and remained intact until 1990 when Congress barred legal residents who had been convicted of an aggravated felony and had served at least five years in prison.[2] In April 1996 Congress passed AEDPA, which amended §212(c) to limit relief to only those few legal residents who had been convicted of minor offenses.[3] INA §212(c) was repealed altogether when Congress passed IIRIRA and replaced it with cancellation of removal for legal residents under INA §240A(a), relief which is unavailable to aggravated felons. AEDPA and IIRIRA ended a long history of ameliorative relief for most legal residents convicted of crimes and deprived them of an opportunity to present evidence of rehabilitation, long and prosperous residence in the United States, and close family ties to U.S. citizen and legal residents.

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[1] The 1917 Act provided for the exclusion of individuals who had committed crimes of moral turpitude and narcotics trafficking offenses, but also created a discretionary waiver of inadmissibility. The Seventh Proviso of §3 of the Immigration Act of 1917 provided relief for those "returning after a temporary absence to an un-relinquished United States domicile of seven consecutive years". The 1952 Immigration and Nationality Act codified the waiver in §212(c).

[2] The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978

[3] AEDPA precluded relief to non-citizens "deportable by reason of having committed" any aggravated felony, controlled substance offense, firearms violation, and multiple crimes of moral turpitude. However, in *Matter of Fuentes-Campos,* 21 I&N Dec. 905 (BIA 1997) the Board ruled that the plain language of the statute preserved relief for individuals charge with inadmissibility and placed in exclusion proceedings.

The Attorney General determined that AEDPA applied retroactively and barred all pending applications under §212(c).[4] Then, in 2001, the Supreme Court in *INS v. St. Cyr*[5] addressed the retroactivity questions raised in AEDPA and IIRIRA. The Court concluded that §212(c) remained available to legal residents who were eligible to apply prior to AEDPA and IIRIRA. In 2004, the Department of Justice promulgated regulations governing post-*St. Cyr* §212(c) applications. This paper reviews the administrative and judicial decisions interpreting §212(c), addresses the rules for post-*St. Cyr* cases, and considers the recent decisions which threaten to seriously undermine the ability of long term legal residents to maintain their legal status.

II. BASIC ELIGIBILITY AND HISTORY

Section 212(c) provides,

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation and who are returning to a lawful unrelinguished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General… [the waiver] shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of a least five years.

§212(c), 8 U.S.C. §1182(c). The language of the statute raises many issues of statutory interpretation and has resulted in conflicting administrative and judicial decisions.[6]

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[4] *Matter of Soriano,* 21 I&N Dec. 516 (A.G. 1997).
[5] 121 S.Ct. 2271 (2001).
[6] The difficulties in interpretation and the conflicting circuit decisions relating to §212(c) were aptly described in *Butros v. INS,* 990 F.2d 1142 (9th Cir. 1993). Judge Trott, in the dissenting decision opined that the Supreme Court should address the inconsistencies, "or maybe the INS will take this to Congress for repair. Time will tell". 990 F.2d at 1153. With IIRIRA, Congress did redraw relief for permanent residents, and crafted a statute which is straightforward and avoids much of the confusion generated by §212(c).

By its terms § 212(c) applies to residents returning from abroad and waives grounds of inadmissibility. Despite the plain language of the statute, courts extended relief to residents facing deportation, but stopped short of a broad reading of the statute to waive grounds of deportability which were not substantially equivalent to a ground of inadmissibility. The applicant must have been lawfully accorded resident status to be eligible for the waiver. The statute requires seven years of "lawful unrelinquished domicile", a term which is subject to different interpretations, including when "domicile" begins and when it ends. Following the 1990 amendment, the statute also barred relief to those legal residents who were convicted of one or more aggravated felonies and served at least five years in prison.[7]

A. Immigants in Exclusion and Deportation Proceedings

The waiver was clearly intended to benefit legal residents who are returning from abroad and are in exclusion proceedings, but courts early on recognized the inequity of providing relief to individuals returning from abroad, but not to legal residents who face deportation proceedings, and may or may not have departed the United States. In *Matter of Tanori*[8], the Board addressed the availability of §212(c) to waive a marijuana conviction for a legal resident who had made one departure following his conviction and returned prior to the initiation of deportation proceedings. Because there was no relief available to him in deportation proceedings, the Board relied on precedent established under the 1917 Act and ruled that §212(c) could be applied *nunc pro tunc* to waive the

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However, §240A(a) cancellation of removal for legal residents denies relief to all legal residents convicted of aggravated felonies, without regard to their length of residence or family ties.

[7] The Fifth Circuit ruled in *Ignacio v. INS,* 955 F.2d 295 (5th Cir. 1992) that the 1990 amendment retroactively applied to bar aggravated felons who had served five years regardless when the conviction occurred. *But see* §III, A *infra* and the new post-*St, Cyr* regulations at 8 CFR §1212.3(f)(4)(i). DOJ now concedes that a resident who plead to an aggravated felony prior to the 1990 Act is eligible for 212(c) despite having served a five year prison term.

[8] 15 I&N Dec. 566 (BIA 1976).

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