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Comment Submitted by Brooklyn Defender Services

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Comment

Attached please find Brooklyn Defender Services' comment in response to the U.S. Citizenship and Immigrant Services' Agency Information Collection Activities relating to Form I-191, Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act, published on January 4, 2023, OMB Control Number 1615-0016, USCIS Docket ID USCIS-2006-0070.

Attachments 1



USCIS-2006-0070_BDS_Public_Comment_2023_03_07_FINAL

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Via Federal e-Rulemaking Portal

Samantha L. Deshommes
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Office of Policy and Strategy
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Department of Homeland Security
5900 Capital Gateway Drive
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Re: Agency Information Collection Activities; Revision of a Currently Approved Collection:
Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act
88 Fed. Reg. 1087 (Jan. 4, 2023)
OMB Control Number: 1615-0016, Docket ID USCIS-2006-0070, Doc. No. 2003-00004

Dear Samantha Deshommes,

Brooklyn Defender Services (“BDS”) submits this comment in response to the U.S. Citizenship and Immigrant Services’ (“USCIS”) Agency Information Collection Activities relating to Form I-191, Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act, published on January 4, 2023, Docket ID USCIS-2006-0070. *See* 88 Fed. Reg. 1087. For the reasons set forth below, BDS supports the changes USCIS proposes to Form I-191 because they will make the form easier to complete. However, BDS also encourages USCIS to consider using its regulatory authority to provide deferred action—and/or to coordinate with DHS to provide prosecutorial discretion—to individuals who would be eligible for relief under former § 212(c) but for the date of their conviction.

BDS is a public defense office in Brooklyn, New York, that provides multi-disciplinary and client-centered criminal defense, family, and defense, and civil legal services, along with social work and advocacy support. BDS represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled, advised, or represented more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn’s criminal court system. About a quarter of BDS’ criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore are at risk of losing the opportunity to obtain lawful immigration status as a result of criminal or family defense cases. Our criminal-immigration specialists provide support and expertise on thousands of such cases. In addition, BDS is one of three New York Immigrant Family Unity Project (“NYIFUP”) providers and has represented more

than 1,700 people in detained deportation proceedings since the inception of the program in 2013. BDS represents noncitizens in non-detained removal proceedings in New York's immigration courts, in petitions for review before the U.S. Circuit Court of Appeals for the Second and Third Circuits, and in writs of mandamus and habeas corpus in U.S. district courts.

BDS thanks USCIS for the opportunity to comment on its changes to Form I-191 and to provide suggestions for broadening the use of the principles behind former § 212(c) that allows certain lawful permanent residents to apply for discretionary relief from inadmissibility or deportation after certain criminal convictions.

A. BDS supports several revisions made to Form I-191 because they promote administrative efficiency and reduce unnecessary burdens on applicants.

The revisions in Part 9 of Form I-191 ("Contact Information, Certification, and Signature") and the corresponding instructions should be adopted because they minimize the burden to applicants by eliminating confusing language. They further promote administrative efficiency by concentrating on the applicant's information, and by collecting information that is both useful and necessary for capturing the signature and contact information of the applicant or guardian.

For example, the removal of the applicant's statement regarding the interpreter and preparer reduces the burden on the applicant since there is already language about the interpreter and the preparer elsewhere on the form. Removing redundant language saves time for applicants and those assisting them in filing Form I-191. The revision is clearer and easier to understand.

Similarly, the revisions to Part 10 of Form I-191 ("Interpreter's Contact Information, Certification, and Signature") and the corresponding instructions should be adopted because they also minimize the burden on applicants by eliminating the requirement to include a mailing address and are clearer than the existing language. There is no reason to require an interpreter's mailing address on a form requesting a USCIS benefit.

Finally, BDS also support the revisions to Part 11 of Form I-191 ("Preparer's Mailing Address"). The revisions make it clearer to the preparer where to sign. As in Part 10, the removal of the mailing address requirement should be adopted because the information is unnecessary.

B. USCIS should propose new regulations or guidance incorporating former §212(c) in order to provide relief to lawful permanent residents with convictions after April 1, 1997.

In addition to revising Form I-191, USCIS should propose new regulations or create new guidance that adopts the language of former section 212(c), which would create a much-needed opportunity for relief for noncitizens who were convicted of or pled to a crime after April 1, 1997.

The administrative authority to waive certain categories of removability or inadmissibility related to criminal offenses for long-term residents—as former § 212(c) did—has a long history in United

States immigration law. The Immigration Act of 1917, for example, provided the exception to the exclusion of noncitizens who had been convicted of crimes involving moral turpitude: “[t]hat [noncitizens] returning after a temporary absence to an unrelinquished United States of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe.”¹ In the Immigration and Nationality Act of 1952 (“INA”), former § 212(c) granted the Attorney General broad discretion to admit “[LPRs] who temporary proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years.”²

Congress successively narrowed the categories of LPRs who came within § 212(c)’s ambit until finally repealing the provision entirely in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRAIRA”).³ In 2001, however, the Supreme Court held in *INS v. St. Cyr* that § 212(c) waivers remained available for LPRs in removal proceedings whose guilty pleas were before April 1, 1997.⁴ The Board of Immigration Appeals (“BIA”) then held in the *Matter of Abdelghany* that the same was true of convictions after a trial before April 1, 1997.⁵

For those to whom the case law has made it available, former § 212(c) relief has remained a lifeline of incomparable importance. Between 1989 to 1995, approximately 51.5 percent of applicants for § 212(c) relief were approved, resulting in over 10,000 people returning to LPR status.⁶ Between 2004 and 2008, a further 7,000 applications were granted.⁷ Significantly, in that four-year period, 212(c) relief accounted for around one third of all relief from removal granted to LPRs other than asylum.⁸

It is clear that, if § 212(c) were not repealed, it would now be benefitting thousands of people who could show that they merit the exercise of discretion that the statute enabled. These individuals are no differently situation than those who can currently apply for relief under former § 212(c) except for the date of their conviction. Their exclusion from this form of relief wastes the time of immigration judges who could more quickly dispose of their cases and causes serious hardship to

¹ Immigration Act of 1917, § 2, Pub. L. No. 64-301, 39 Stat. 878.

² INA, title II, ch. 2, Pub. L. No. 414, 66 Stat. 187.

³ IIRAIRA, § 304(b) Pub. L. No. 104-208, 110 Stat. 3009-597.

⁴ See *INS v. St. Cyr*, 553 U.S. 289.

⁵ See *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 214).

⁶ Mark J. DiFiore, *The Unforeseen Costs of Going to Trial: The Vitality of 212(c) Relief for Lawful Permanent Residents Convicted by Trial*, 79 FORDHAM L. REV. 649, 668 (2010).

⁷ See *id.*

⁸ See *id.*

family members of those with convictions after April 1, 1997, including people BDS counsels and represents.

Although USCIS cannot reinstitute this form of immigration relief without legislative action, it is within the agency's authority to exercise discretion to benefit people with convictions after April 1, 1997.

First, USCIS can provide the possibility of deferred action for people in removal proceedings or subject to a final order of removal who meet all other current requirements for § 212(c) relief except the date of their conviction.⁹ Deferred action is the longstanding practice by which DHS (and its predecessor agency) decides not to seek removal of a particular noncitizen for a certain period of time.¹⁰ Noncitizens granted deferred actions may apply for work authorization.¹¹

Granting deferred action on a case-by-case basis to LPRs who would be an unexceptional exercise of DHS' authority. In 1987, the Reagan administration offered deferred action to 1.5 million family members of spouses and children of individuals granted a means to regularize status by Congress in 1986.¹² The policy, which was expanded by the Bush administration in 1990, was born of the recognition that it would be unfair to provide to deport family members of new LPRs whom Congress had left out.¹³ DHS could grant deferred action based on the current § 212(c) regulations both to eligible LPRs in removal proceedings or those with a final order that DHS intends to execute.

Second, USCIS could consult with DHS to encourage the latter to exercise its enforcement discretion in cases where a person subject to immigration action would be eligible for § 212(c) relief except the date of their conviction. DHS currently considers whether to make favorable use of its prosecutorial discretion on a case-by-case basis.¹⁴ DHS could instruct Immigrations and Customs Enforcement ("ICE") attorneys to consider a favorable exercise of dispositions in cases where § 212(c) relief would be available but for the date of conviction.

⁹ See 8 C.F.R. § 1212.3 (describing procedure for applying for § 212(c) relief in removal proceedings; 8 C.F.R. § 1003.44 (describing procedure for applying § 212(c) relief when subject to a final order of removal).

¹⁰ See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (describing deferred action).

¹¹ See 8 U.S.C. §§ 1103(a)(3), 1224a(h)(3); 8 C.F.R. § 274a.12(c)(14).

¹² See, e.g., *Regents of the Univ. of California v. DHS*, 908 F.3d 476, 489 (9th Cir. 2018) (vacated in part and rev'd in part on other grounds) (describing Family Fairness program).

¹³ See *id.*

¹⁴ See Office of the Principal Legal Advisor, ICE, Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor (Sept. 12, 2022).

Actions such as these would promote the efficiency and fairness of the immigration system and remedy the arbitrary and unfair gap created by the repeal of former § 212(c).

* * *

BDS is encouraged that USCIS is making changes to Form I-191 that will make the form easier and more intuitive to file. BDS also hopes that USCIS will consider adopting a policy that closes the gap left by the repeal of former § 212(c).

Sincerely,

/s/ Lucas Marquez

S. Lucas Marquez

Director, Civil Rights and Law Reform

/s/ Kevin Siegel

Kevin Siegel

Staff Attorney, Civil Rights and Law Reform