

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

MANUEL GARCIA-PLASCENCIA,	)	
	)	
Petitioner,	)	CV 04-1067-PA
	)	
v.	)	
	)	
JOHN ASHCROFT, Attorney General	)	<b>ORDER</b>
of the United States; TOM RIDGE,	)	
Secretary of the Department of	)	
Homeland Security of the United	)	
States; OFFICER IN CHARGE,	)	
Portland District Director,	)	
Immigration and Customs	)	
Enforcement; DAVE DANIEL or	)	
Officer in charge, SHERIFF,	)	
Josephine County, Oregon,	)	
	)	
Respondents.	)	

**PANNER, J.**

Manuel Garcia-Plascencia brings this petition for habeas relief under 28 U.S.C. § 2241, seeking relief from a final order of removal. I grant the petition and order that respondents hold

a hearing within thirty days to consider whether petitioner should receive relief from removal.

#### **BACKGROUND**

Petitioner is a native and citizen of Mexico, now thirty-nine years old. He has lived in the United States since 1983, and became a lawful permanent resident in 1990.

On March 27, 1996, petitioner delivered about eight grams of methamphetamine in Jefferson County, Oregon.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect. Section 440(d) of the AEDPA amended § 212(c) of the Immigration and Naturalization Act (8 U.S.C. § 1182(c)), so that aliens with aggravated felony or drug convictions would no longer be eligible for discretionary relief from deportation. See Mohammed v. Reno, 205 F. Supp. 2d 39, 40 & n.1 (E.D.N.Y. 2002).

On June 18, 1996, petitioner pleaded guilty in state court to delivery of a controlled substance for consideration. On July 5, 1996, petitioner was sentenced to thirty days in jail, drug evaluation, community service, and three years' probation. Petitioner successfully completed probation and enrolled in college.

In March 2003, the Bureau of Immigration and Customs Enforcement (BICE), initiated removal proceedings against

petitioner based on his criminal conviction.

On June 3, 2003, the immigration judge granted the agency's motion to "pretermite" (i.e., not consider) petitioner's application for relief from removal. The immigration judge ruled that petitioner was not eligible for relief under § 212(c) because petitioner had pleaded guilty after the effective date of AEDPA § 440(d). The judge ordered that petitioner be removed.

Petitioner appealed the immigration judge's ruling to the Board of Immigration Appeals (BIA), contending that the immigration judge had improperly refused to consider relief from removal under § 212(c). In July 2004, the BIA affirmed without opinion the immigration judge's decision. Petitioner then filed this action.

Since July 2003, petitioner has worked as a substance abuse counselor. He also volunteers as a counselor at a migrant workers' health clinic.

Petitioner lives with a son who is a United States citizen. Petitioner's other two children, also United States citizens, live with their mother in Portland. In June 2004, petitioner graduated from college with an associate's degree in human services and substance abuse.

#### **DISCUSSION**

Although relief under § 212(c) is discretionary, loss of

eligibility for relief is legally significant because "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." INS v. St. Cyr, 533 U.S. 289, 325 (2001). Before the enactment of the AEDPA, the INS had been granting about half of the requests for relief under § 212(c). Id. at 296 n.5.

#### **I. Deciding Whether a Statute Applies Retroactively**

In deciding whether a statute applies retroactively, the court first determines congressional intent. Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Here, Congress did not indicate an intent to apply AEDPA § 440(d) retroactively.

Without a clear statement of intent, the court must determine whether applying the statute in question "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Landgraf, 511 U.S. at 280. There is a "presumption against retroactive application of ambiguous statutory provisions," which here is "'buttressed by the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" St. Cyr, 533 U.S. at 320 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

The court should weigh "familiar considerations of fair

notice, reasonable reliance, and settled expectations."

Landgraf, 511 U.S. at 270. The court should use "a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id.

## **II. Section 440(d) Should Not Be Applied Here**

In St. Cyr, the Court held that AEDPA § 440(d) could not be applied to an alien who had pleaded guilty to an aggravated felony before the effective date of the statute. Because of the timing of the alien's guilty plea, the Court in St. Cyr did not need to address whether an alien's criminal conduct could be considered the past relevant event for the retroactivity analysis. The petition here squarely presents that issue because AEDPA § 440(d) took effect after petitioner committed the crime but before he pleaded guilty.

I agree with petitioner that the criminal conduct is the past relevant event. The Court in Landgraf relied on the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.'" 511 U.S. at 265 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law

imposes additional burdens based on conduct that occurred in the past." Landgraf, 511 U.S. at 282 n.35.

Although the Court in St. Cyr emphasized the alien's probable reliance on the state of the law at the time he pleaded guilty, 533 U.S. at 325, Landgraf does not require such reliance. "We neither expect nor require actual knowledge of those laws [that govern conduct], or actual reliance on them." Mohammed, 205 F. Supp. 2d at 48. Cf. Thom v. Ashcroft, 369 F.3d 158, 168 n.2 (2d Cir. 2004) (Underhill, J., dissenting) ("if it is, indeed, absurd to suggest that a person contemplating the commission of a crime considers the potential consequences of criminal conduct, then Congress and the Sentencing Commission surely are misguided in their attempts to deter crime through increased sentences. I respectfully suggest that it is far from absurd to believe the prospect of certain deportation, rather than possible deportation, might well deter a significant number of aliens from committing aggravated felonies.").

Respondents cite Domond v. INS, 244 F.3d 81 (2d Cir. 2001), which ruled that the agency could apply AEDPA § 440(d) to an alien under circumstances similar to those here. The Second Circuit reasoned that although "the underlying criminal conduct is crucial to the conviction, it is not the conduct that bars relief under the statutory scheme." 244 F.3d at 86 (footnote

omitted). However, as the court noted in Mohammed, "[t]he new laws regarding deportation were intended to affect aliens who commit crimes, not judges or juries who pronounce them guilty." 205 F. Supp. 2d at 46.

#### CONCLUSION

The petition for writ of habeas corpus (#1) is granted. Respondents are ordered to hold a hearing within thirty days to consider whether petitioner is eligible for relief from removal under § 212(c).

IT IS SO ORDERED.

Dated this 26 day of September, 2004.



Owen M. Panner  
United States District Judge