

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH N. BOSQUET, :
 :
 Petitioner, : 00 Civ. 6152 (GBD) (AJP)
 :
 – against – :
 : REPORT AND RECOMMENDATION
 IMMIGRATION AND NATURALIZATION :
 SERVICE, :
 :
 Respondent. :
 :
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ANDREW J PECK, United States Magistrate Judge:

To the Honorable George B. Daniels, United States District Judge:

Petitioner Joseph N. Bosquet petitions for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, against the Immigration and Naturalization Service ("INS"), asserting that the Board of Immigration Appeals ("BIA") erred when it held that AEDPA § 440(d) rendered him ineligible for INA § 212(c) discretionary relief from deportation, since his conviction and application for § 212(c) relief predated the AEDPA's enactment. (Dkt. No. 1: Pet. ¶ 17.)

For the reasons set forth below, Bosquet's petition should be granted to the extent of remanding to the BIA for further proceedings consistent with this Report and Recommendation.

FACTS

Bosquet is a native and citizen of Haiti who was admitted to the United States on March 28, 1987 as a lawful permanent resident. (See Dkt. No. 8: 6/28/01 Letter of A.U.S.A. O'Brien, INS Return, Certified Administrative Record ["R."] at 407: Immigrant Visa and Alien Registration; see also Pet. ¶ 7.) In January 1994, Bosquet was convicted and sentenced to eight to twenty-four years imprisonment, based on his guilty plea to two different first degree robbery offenses, in violation of N.Y. Penal Law § 160.15. (R 383-84, 392-93, 398-99, 406; see also Pet. ¶¶ 5-6.)

The INS commenced deportation proceedings against Bosquet by filing an order to show cause and notice of hearing dated December 9, 1994, charging that Bosquet's robbery convictions rendered him deportable under INA § 241(a)(2)(A)(ii), 8 U.S.C. § 1251(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. (R. 426-33: Order to Show Cause.)

After removal hearings (R. 131-307), by decision dated February 6, 1997, an Immigration Judge ("IJ") ordered Bosquet deported from the United States as charged by the INS (R. 101-30.) The IJ also found Bosquet legally eligible for § 212(c) discretionary relief since his application for such relief predated the AEDPA's enactment (R. 105-08), but held that, in light of "the severity of his criminal history involving multiple armed robberies," Bosquet did not merit relief pursuant to INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996),

which provided for discretionary relief from removal for aliens in the United States for seven years or more. (R 108-30.) Bosquet appealed the IJs decision to the BIA. (R 96-99.)

On March 16, 1998, the BIA denied Bosquet's appeal. (R 10.) The BIA determined that AEDPA § 440(d) – which provides that specified categories of deportable criminal aliens are not eligible for § 212(c) relief – rendered Bosquet ineligible for a discretionary waiver of deportation. (R 10.) In reaching this determination, the BIA relied on the Attorney General's decision in Matter of Soriano, 21 I & N Dec. 516, 1996 WL 426888 (BIA 1997), that AEDPA § 440(d) applies to aliens, like Bosquet, whose § 212(c) applications were pending on the AEDPA's April 24, 1996 enactment date. (R 10.) The BIA did not make an alternative ruling on the merits.

On September 18, 1998, in Henderson v. INS, 157 F.3d 106, 128-31 (2d Cir. 1998), cert. denied, 526 U.S. 1004, 119 S. Ct. 1141 (1999), the Second Circuit rejected the Attorney General's interpretation in Soriano of AEDPA § 440(d), and held that AEDPA § 440(d) does not apply to aliens whose deportation proceedings were pending on the AEDPA's enactment date.

Bosquet filed his habeas petition, dated July 16, 2000, asserting that he is entitled to habeas relief in light of Henderson. (See Dkt. No. 1: Pet. ¶ 17.)

ANALYSIS^{1/}

Bosquet correctly asserts that under the Second Circuit's decision in Henderson v. INS, 157 F.3d 106, 128-31 (2d Cir. 1998), cert. denied, 526 U.S. 1006, 119 S. Ct. 1141 (1999), the BIA's determination that AEDPA § 440(d) rendered him ineligible for § 212(c) relief was erroneous. Indeed, the Government does not attempt to support the BIA's holding, but rather contends that there is another reason why Bosquet's petition should be denied. (Dkt. No. 8: 6/28/01 A.U.S.A. O'Brien Letter at 3-4.) The Government contends that because Bosquet has now served more than five years in prison for his first degree robbery convictions, the BIA would be required to deny him relief as a matter of the law in effect prior to the AEDPA, and as such, remand would be futile. (See id.) The Court disagrees and believes a remand of this case is appropriate.

The law in effect at the time Bosquet applied for discretionary relief – and thus the legal standard that the BIA must utilize on remand -- was INA § 212(c), 8 U.S.C. § 1182(c) (1992, repealed 1996), which provided that aliens lawfully admitted who temporarily proceed

^{1/} The Supreme Court recently held that neither AEDPA nor IIRIRA repealed general federal habeas jurisdiction under 28 U.S.C. § 2241 to entertain challenges to INS removal decisions raising pure questions of law. INS v. St. Cyr, 121 S. Ct. 2271, 2278-87 (2001). Citing "the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas" of pure questions of law, coupled with the substantial constitutional questions such preclusion would raise, the Supreme Court concluded that § 2241 habeas jurisdiction was not repealed by AEDPA and IIRIRA. Id. at 2287. Accordingly, this Court has jurisdiction over Bosquet's § 2241 habeas petition.

abroad voluntarily and who have lived in the United States for seven years "may be admitted in the discretion of the Attorney General."^{2/} Section 212(c) as then in effect continued:

The first sentence of this subsection 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 at least five years.

8 U.S.C. § 1182(c) (1992, repealed 1996) (emphasis added). This five year eligibility bar "turns not on the sentence imposed but on the period of actual incarceration." United States v. Ben Zvi, 242 F.3d 89, 99 (2d Cir. 2001); see also, e.g., Rabi u v. INS, 41 F.3d at 883; Matter of Ramirez-Somera, No. A-38780688, 20 I & N Dec. 564, 566, 1992 WL 301623 (BIA Aug. 11, 1992) ("The plain language of section 212(c) of the Act, as amended, now bars such relief to any alien who has been convicted of an aggravated felony or felonies and 'has served,' not merely been sentenced to, a term of imprisonment of at least 5 years for his aggravated felony or felonies. At the time of his [I] hearing, the respondent had not served 5 years in prison based on his aggravated felony conviction; therefore, he was not by that reason statutorily ineligible for relief under § 212(c).").

In January 1994, Bosquet was convicted of robbery, which is an aggravated felony, 8 U.S.C. § 1101(a)(43)(F); United States v. Fermin, 252 F.3d 102, 105 n.2 (2d Cir.

^{2/} Although § 212(c) "on its face applies only to permanent resident aliens who have resided in the United States for at least seven years and who have temporarily left the country," the Second Circuit has "held, however, that fundamental fairness requires that the statute be applied as well to such aliens who have not left the country and are facing deportation." Rabi u v. INS, 41 F.3d 879, 883 (2d Cir. 1994).

2001) (petitioner's New York State "first-degree robbery conviction was an 'aggravated felony' under 8 U.S.C. § 1101(a)(43)"), and sentenced to eight to twenty-four years imprisonment. (R. 383, 392-93, 398-99, 406.) Thus, Bosquet's time in prison passed the five year mark in January 1999, after the IJ and BIA rendered their decisions, but before Bosquet filed the instant habeas petition (and, obviously, before any future BIA decision on remand).

The Second Circuit has held that prison time served as of the date the IJ renders its decision should be counted towards the § 212(c) five year eligibility bar. See Buitrago-Cuesta v. INS, 7 F.3d 291, 294 (2d Cir. 1994) (five year bar applied to alien who had served four years and eleven months at time of § 212(c) application, but had served more than five years at time of IJ's decision).^{3/} However, neither the BIA nor the Second Circuit has determined whether time served in prison after an initial erroneous BIA decision is reversed should count toward the five year bar.

The Court believes that the best course is to remand to the BIA, which, because of its erroneous disposition on AEDPA retroactivity grounds, never reached the IJ's determination that Bosquet was not, as a matter of discretion, eligible for § 212(c) relief. If the

^{3/} See also, e.g., Copes v. McElroy, 98 Civ. 2589, 2001 WL 830673 at * 5-6 (S.D.N.Y. July 23, 2001) (five year bar applied to alien who had served four years and six months when INS issued order to show cause, but had served more than five years "by the time she was served with the order to show cause . . . , by the time the order to show cause was filed with the Immigration Court . . . , by the time the petitioner appeared before the IJ . . . , and by the time the IJ ordered the petitioner deported"); Mezrioui v. INS, No. 3:00CV109, 2001 WL 753806 at * 2-5 (D. Conn. June 4, 2001) (five year bar applied to alien who passed five year mark during pendency of hearings before IJ).

BIA on remand affirms on the basis of the IJs discretion-based decision, then neither the BIA nor a reviewing court would need to reach any issue as to the five year bar. See INS v. Rios-Pineda, 471 U.S. 444, 449, 105 S. Ct. 2098, 2102 (1985) ("We have also held that if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met.").^{4/} If, on the other hand, the BIA on remand decides that Bosquet is statutorily ineligible for § 212(c) relief because he now has served over five years imprisonment, that determination would be subject to judicial review in a subsequent § 2241 habeas petition. With the benefit of an agency decision on point,^{5/} the Court would be in a better position to decide the issue.^{6/}

^{4/} On remand, the BIA will also be able to decide whether it may take into consideration the fact that Bosquet has now served five years in prison in determining whether, as a discretionary matter, he should be granted § 212(c) relief.

^{5/} "When reviewing a determination by the BIA, the Second Circuit has instructed lower courts to 'accord substantial deference to the [BIA's] interpretations of the statutes and regulations that it administers.'" Mezrioui v. INS, 2001 WL 753806 at *4 (quoting Michel v. INS, 206 F.3d 253, 262 (2d Cir. 2000) (citing INS v. Cardoza-Forseca, 480 U.S. 421, 448, 107 S. Ct. 1207, 1221 (1987))).

^{6/} The Court notes that in an unpublished opinion in Lara v. INS, No. 3:00CV24 (D. Conn. Nov. 30, 2000), Judge Squatrito held that where petitioner passed the five year mark after the IJ erroneously denied his application for § 212(c) relief on the basis that AEDPA applied retroactively to preclude him from seeking such relief, the INS should not, on remand, apply the five year ineligibility bar. Id., slip op at p. 5-7. Judge Squatrito therefore remanded to the BIA solely "for discretionary considerations of the merits of the petitioners' individual applications for relief under § 212(c) as it existed on the dates of their respective guilty pleas." Id., slip op at p. 7; see also Snajder v. INS, 29 F.3d 1203, 1208 n.12 (7th Cir. 1994) (in remanding the case to the IJ for a new
(continued...)

CONCLUSION

For the reasons set forth above, Bosquet's § 2241 habeas corpus petition should be granted to the extent of remanding to the BIA for further proceedings, consistent with this Report and Recommendation, concerning Bosquet's request for § 212(c) discretionary relief.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable George B. Daniels, 40 Foley Square, Room 410, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Daniels. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO

^{6/}(...continued)

hearing, noting that "[i]f at the time that Mr. Snajder's [original] appeal to the BIA was denied, Mr. Snajder still was eligible for [§ 212(c) relief because he had not yet served five years imprisonment], the IJ should take this into account at the new deportation hearing"). These cases support the view that the BIA on remand cannot rely on the five year bar as a matter of law, because Bosquet had not served five years in prison at the time of the prior erroneous BIA decision. This Court, however, need not decide that question now.

Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
September 6, 2001

Respectfully submitted,

Andrew J. Peck
United States Magistrate Judge

Copies to: Joseph N. Bosquet
Kathy Marks, Esq.
Judge George B. Daniels