§ 301.98–6 Compliance agreements and cancellation.

(a) Any person engaged in growing, handling, or moving regulated articles may enter into a compliance agreement when an inspector determines that the person understands this subpart, agrees to comply with its provisions, and agrees to comply with all the provisions contained in the compliance agreement.[7]

(b) Any compliance agreement may be canceled, either orally or in writing, by an inspector whenever the inspector finds that the person who has entered into the compliance agreement has failed to comply with this subpart. If the cancellation is oral, the cancellation and the reasons for the cancellation will be confirmed in writing as promptly as circumstances allow. Any person whose compliance agreement has been canceled may appeal the decision, in writing, within 10 days after receiving written notification of the cancellation. The appeal must state all of the facts and reasons upon which the person relies to show that the compliance agreement was wrongfully canceled. As promptly as circumstances allow, the Administrator will grant or deny the appeal, in writing, stating the reasons for the decision. A hearing will be held to resolve any conflict as to any material fact. Rules of practice concerning a hearing will be adopted by the Administrator.

§ 301.98–7 Assembly and inspection of regulated articles.

(a) Any person (other than a person authorized to issue certificates or limited permits under § 301.98–5(c)) who desires to move a regulated article interstate accompanied by a certificate or limited permit must notify an inspector[8] as far in advance of the desired interstate movement as possible, but no less than 48 hours before the desired interstate movement.

(b) The regulated article must be assembled at the place and in the manner the inspector designates as necessary to comply with this subpart.

§ 301.98–8 Attachment and disposition of certificates and limited permits.

(a) A certificate or limited permit required for the interstate movement of a regulated article must, at all times during the interstate movement, be:

(1) Attached to the outside of the container containing the regulated article; or

(2) Attached to the regulated article itself if not in a container; or

(3) Attached to the consignee's copy of the accompanying waybill. If the certificate or limited permit is attached to the consignee's copy of the waybill, the regulated article must be sufficiently described on the certificate or limited permit and on the waybill to identify the regulated article.

(b) The certificate or limited permit for the interstate movement of a regulated article must be furnished by the carrier to the consignee listed on the certificate or limited permit upon arrival at the location provided on the certificate or limited permit.

(Approved by the Office of Management and Budget under control number 0579–0170)

§ 301.98–9 Costs and charges.

The services of the inspector during normal business hours (8 a.m. to 4:30 p.m., Monday through Friday, except holidays) will be furnished without cost. The user will be responsible for all costs and charges arising from inspection and other services provided outside normal business hours.

§ 301.98–10 Treatments.

Treatment schedules listed in the Plant Protection and Quarantine Treatment Manual to destroy the West Indian fruit fly are authorized for use on regulated articles. The Plant Protection and Quarantine Treatment Manual is incorporated by reference. For the full identification of this standard, see § 300.1 of this chapter, ''Materials incorporated by reference.'' The following treatments also may be used for the regulated articles indicated:

(a) *Soil within the dripline of plants that are producing or have produced the fruits and vegetables listed in § 301.98–2(a) of this subpart.* Apply diazinon at the rate of 5 pounds active ingredient per acre to the soil within the dripline with sufficient water to wet the soil to at least a depth of ½ inch.

(b) *Premises.* Fields, groves, or areas that are located within a quarantined area but outside the infested core area and that produce regulated articles may receive regular treatments with either malathion or spinosad bait spray as an alternative to treating fruits and vegetables as provided in the Plant Protection and Quarantine Treatment Manual. These treatments must take place at 6- to 10-day intervals, starting a sufficient time before harvest (but not less than 30 days before harvest) to allow for development of West Indian fruit fly egg and larvae. Determination of the time period must be based on the day degrees model for West Indian fruit fly. Once treatment has begun, it must continue through the harvest period. The malathion bait spray treatment must be applied by aircraft or ground equipment at a rate of 2.4 oz of technical grade malathion and 9.6 oz of protein hydrolysate per acre. The spinosad bait spray treatment must be applied by aircraft or ground equipment at a rate of 0.01 oz of a USDA-approved spinosad formulation and 48 oz of protein hydrolysate per acre. For ground applications, the mixture may be diluted with water to improve coverage.

Done in Washington, DC, this 12th day of January 2001.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 01–1618 Filed 1–19–01; 8:45 am]

BILLING CODE 3410–34–P

[7] Compliance agreement forms are available without charge from the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Invasive Species and Pest Management, 4700 River Road Unit 134, Riverdale, MD 20737–1236, and from local offices of the Plant Protection and Quarantine, which are listed in telephone directories.

[8] See footnote 4 to § 301.98–5(a).

DEPARTMENT OF JUSTICE

8 CFR Parts 3, 212, and 240

[EOIR No. 127P; AG Order No. 2358–2001]

RIN 1125–AA29

Executive Office for Immigration Review; Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule creates a uniform procedure for applying the law as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This rule allows certain aliens in deportation proceedings that commenced before April 24, 1996, to apply for relief pursuant to section 212(c) of the Immigration and Nationality Act (INA). In addition, this rule makes several technical amendments to an earlier regulation relating to the streamlining authority of the Board of Immigration Appeals.

EFFECTIVE DATE: This final rule is effective January 22, 2001.

FOR FURTHER INFORMATION CONTACT: Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION:

Why Is the Department Issuing This Final Rule?

Before the comprehensive revision of the INA by the Illegal Immigration

Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3009, section 212(c) of the INA, provided that aliens who were lawfully admitted for permanent residence, who temporarily proceeded abroad voluntarily and not under an order of deportation, and who were returning to a lawful unrelinquished domicile in the United States of seven consecutive years, could be admitted to the United States in the discretion of the Attorney General. 8 U.S.C. 1182(c) (1994). Although section 212(c) by its terms applied only to aliens in exclusion proceedings (*i.e.,* aliens seeking to enter at the border), it had been construed for many years also to allow aliens who were placed in deportation proceedings in the United States to apply for discretionary relief from deportation. *See Matter of Silva,* 16 I. & N. Dec. 26, 29–30 (BIA 1976); *Gonzalez* v. *INS,* 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS,* 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapica-Acuna* v. *INS,* 640 F.2d 223, 225 (9th Cir. 1981); *Francis* v. *INS,* 532 F.2d 268, 273 (2d Cir. 1976).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214, Congress significantly restricted the availability of discretionary relief from deportation under section 212(c). Section 440(d) of AEDPA amended section 212(c) of the INA to provide that section 212(c) ''shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).'' AEDPA section 440(d), as amended by IIRIRA section 306(d). The effect of section 440(d) of AEDPA was to render ineligible for relief under INA section 212(c) aliens deportable because of convictions for certain criminal offenses, including aggravated felonies, controlled substance offenses, certain firearms offenses, espionage, and multiple crimes of moral turpitude.

AEDPA did not contain a provision expressly stating whether section 440(d) was to be applied to criminal aliens who applied for section 212(c) relief, were placed in deportation proceedings, were convicted, or committed the crimes rendering them deportable before AEDPA was enacted. In *Matter of Soriano,* Interim Decision 3289 (BIA 1996), the Board of Immigration Appeals (Board) held that section 440(d) of AEDPA did not apply to aliens who had applied for section 212(c) relief before AEDPA was enacted, but did apply to all other aliens covered in the provision, including those whose proceedings commenced or whose criminal conduct or conviction occurred before AEDPA was enacted.

At the request of the Immigration and Naturalization Service (INS), the Attorney General vacated the Board's decision in *Soriano* and certified the question to herself. On February 21, 1997, the Attorney General concluded that section 440(d) applied to (and thereby rendered ineligible for section 212(c) relief) all aliens who had committed one of the specified offenses and who had not finally been granted section 212(c) relief before AEDPA was enacted, including those who were already in deportation proceedings or who had already applied for section 212(c) relief at the time of AEDPA's enactment.

How Have the Federal Courts Ruled on the Issue?

Following the Attorney General's decision in *Soriano,* the Board and the Immigration Courts denied applications for relief under section 212(c) filed by aliens who fell within the categories identified in AEDPA section 440(d), regardless of the date of the crime, conviction, deportation proceedings, or application for section 212(c) relief. Numerous aliens challenged their final orders of deportation in both district courts and courts of appeals, arguing that AEDPA section 440(d) should not be applied ''retroactively'' to their cases, and that the Attorney General had erred in her construction of AEDPA section 440(d) in *Soriano.*

The *Soriano* issue has given rise to widespread litigation in almost every circuit. Only the D.C. Circuit has yet to decide a case on the *Soriano* issue. Eight circuits—the First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits—have now disagreed with the Attorney General's holding in *Soriano.* Seven of the eight circuits have held that section 440(d) of AEDPA does not apply to aliens who filed applications for section 212(c) relief before AEDPA was passed. *See Goncalves* v. *Reno,* 144 F.3d 110, 126–33 (1st Cir. 1998), *cert. denied,* 526 U.S. 1004 (1999); *Henderson* v. *INS,* 157 F.3d 106, 128–30 (2d Cir. 1998), *cert. denied sub nom. Reno* v. *Navas,* 526 U.S. 1004 (1999); *Sandoval* v. *Reno,* 166 F.3d 225, 239–42 (3d Cir. 1999); *Tasios* v. *Reno,* 204 F.3d 544, 547–52 (4th Cir. 2000); *Pak* v. *Reno,* 196 F.3d 666, 674–76 (6th Cir. 1999); *Shah* v. *Reno,* 184 F.3d 719, 724 (8th Cir. 1999); *Magana-Pizano* v. *INS,* 200 F.3d 603, 610–11 (9th Cir. 1999; *Mayers* v. *INS,* 175 F.3d 1289, 1301–04 (11th Cir. 1999) *superceded by statute in Richardson* v. *Reno,* 180 F.3d 1311 (11th Cir. 1999).

The First Circuit has gone further and held that AEDPA section 440(d) likewise does not apply to aliens who were placed in deportation proceedings before AEDPA was passed, even if they did not actually request section 212(c) relief until after AEDPA was passed. *See Wallace* v. *Reno,* 194 F.3d 279, 285–88 (1st Cir. 1999). Other circuits have either likewise so held or strongly implied in their reasoning. *See Henderson,* 157 F.3d at 129–31; *Sandoval,* 166 F.3d at 241–42; *Mayers,* 175 F.3d at 1304; *see also Shah,* 184 F. 3d at 724 (adopting reasoning of *Goncalves, Henderson,* and *Mayers*).

By contrast, and at the time of the publication of the proposed Soriano rule, the Seventh Circuit held, consistent with the Attorney General's conclusion in *Soriano,* that section 440(d) of AEDPA applies even to aliens who were in deportation proceedings and had applied for section 212(c) relief when AEDPA was enacted. *See Turkhan* v. *Perryman,* 188 F.3d 814, 824–28 (7th Cir. 1999); *see also LaGuerre* v. *Reno,* 164 F.3d 1035, 1040–41 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000). However, the Seventh Circuit has recently held that an alien's due process rights were violated by the retroactive application of section 440(d) of AEDPA where there was significant evidence that the availability of a section 212(c) waiver influenced the alien's decision to plead guilty. *See Jideonwo* v. *INS,* 224 F.3d 692, 699–701 (7th Cir. 2000).

Aliens have also argued that persons who were placed in deportation proceedings *after* AEDPA was enacted, but who committed their crimes and were convicted before that date, should be eligible for section 212(c) relief, and that AEDPA section 440(d) would be impermissibly retroactive if applied to them.

Three circuits—the Third, Fifth and Tenth—have affirmatively held that AEDPA section 440(d) *does* foreclose section 212(c) relief for aliens who were placed in proceedings after AEDPA was enacted, even if their criminal offenses were committed before the enactment of AEDPA. *See DeSousa* v. *Reno,* 190 F.3d 175, 185–87 (3d Cir. 1999); *Requena-Rodriguez* v. *Pasquarell,* 190 F.3d 299, 306–08 (5th Cir. 1999); *Jurado-Gutierrez* v. *Greene,* 190 F.3d 1135, 1147–52 (10th Cir. 1999), *cert. denied sub nom Palangas-Suarez* v. *Greene,* 120 S. Ct. 1539 (2000). The Seventh Circuit has necessarily adopted that position as well. *See Turkhan,* 188 F.3d at 824–28 (holding that section 440(d) bars relief for *all* criminal aliens who had not been

granted section 212(c) relief at the time AEDPA was enacted, necessarily including all those whose convictions occurred prior to AEDPA but whose deportation proceedings were initiated after enactment of AEDPA).

The Ninth Circuit has concluded that aliens who are deportable based on a qualifying criminal conviction entered prior to AEDPA but after a full trial are properly covered by AEDPA section 440(d) and therefore ineligible for section 212(c) relief. *See Magana-Pizano,* 200 F.3d at 610–11. The Ninth Circuit also held, however, that because of concerns about retroactivity and reliance, it could not exclude the possibility that section 440(d) should not be applied to an alien who pleaded guilty or nolo contendere to his disqualifying criminal offense and who can show that the plea ''was entered in reliance on the availability of discretionary waiver under § 212(c).'' *Id.* at 613. The Court therefore remanded the case to the district court to determine whether the alien could show such reliance. *See id.* at 609. The First Circuit has issued a similar ruling, holding that section 440(d) does not apply in a case where an alien pleaded guilty to and was convicted of a qualifying offense before AEDPA was enacted but was placed in proceedings afterwards, if the alien could show that he entered his guilty plea in reliance on the state of the law before AEDPA's enactment. *Mattis* v. *Reno,* 212 F.3d 31, 35–40 (1st Cir. 2000). The First Circuit found no evidence of such reliance in that case, however. *See id.* at 39.

Additionally, the Fourth Circuit held that the statute is inapplicable, because of perceived retroactivity concerns, to an alien who pleaded guilty and was convicted before AEDPA was enacted even if his deportation proceedings were commenced after enactment of AEDPA. The court reasoned that the alien had detrimentally relied upon the availability of discretionary relief from deportation when he entered his guilty plea prior to the enactment date. *See Tasios,* 204 F.3d at 550–52.

More recently, the Second Circuit has held that section 440(d) of AEDPA is not applicable in the case of an alien in removal proceedings who entered a guilty plea before April 24, 1996, the effective date of AEDPA. *See St. Cyr* v. *INS,* 229 F.3d 406, 418 (2d Cir. 2000). The Office of the Solicitor General filed a petition for certiorari in *St. Cyr* on November 13, 2000. Additionally, the Ninth Circuit has recently ruled that Congress intended that the repeal of section 212(c) apply to all proceedings commenced after April 1, 1997. However, the Ninth Circuit also remanded this case for a determination whether the alien based his pre-AEDPA guilty plea in reliance upon the availability of section 212(c) relief, in accordance with the court's reasoning in *Magana-Pizano, supra. Richards-Diaz* v. *Fasano,* 233 F.3d 1160 (9th Cir. 2000).

Why Is the Attorney General Promulgating a Rule of Uniform Implementation of AEDPA for Aliens Seeking Section 212(c) Relief?

Issues concerning the construction of AEDPA section 440(d) affect a large number of aliens and are of considerable importance to the Department of Justice, including the INS and the Executive Office for Immigration Review (EOIR). Approximately 800 aliens who have been found deportable by the Immigration Court and the Board have filed challenges to *Soriano* in federal district court. In addition, a number of cases in which the application of *Soriano* may be dispositive are still pending before the Immigration Court and the Board.

There is an important public interest in the uniform administration of the immigration laws. The Constitution grants Congress the power to establish ''an uniform Rule of Naturalization,'' U.S. Const. art. I, § 8, cl. 4, and it is generally desirable as well that immigration rules be consistent throughout the country, to minimize distinctions among aliens based solely on geographical factors. There is also an important public interest in the completion of proceedings involving criminal aliens. The Department of Justice therefore sought to have the Supreme Court definitively resolve the *Soriano* issue during the October Term 1998 by petitioning for a writ of certiorari from the First Circuit's decision in *Goncalves* and the Second Circuit's decision in *Henderson.* On March 8, 1999, the Supreme Court denied those certiorari petitions.

In light of the Supreme Court's denial of certiorari in *Goncalves, Henderson/Navas,* and *LaGuerre* in February 2000, the decisions of eight circuits rejecting the decision in *Soriano,* and the large number of aliens who are affected by the issue, the Attorney General has considered whether the government's interest in the uniform administration of the immigration laws, avoiding unnecessary delays in the completion of proceedings involving criminal aliens, and the reasoning of the courts that have rejected her construction of AEDPA section 440(d) in *Soriano,* warrant a change in the Department's application of AEDPA section 440(d). In the interest of the uniform and expeditious administration of the immigration laws, the Attorney General acquiesces on a nationwide basis in those appellate decisions holding that AEDPA section 440(d) is not to be applied in the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted.

In particular, the Attorney General acquiesces in the courts' conclusion, as a matter of statutory construction, that Congress intended that section 440(d) of AEDPA not be applied to deportation proceedings that had been commenced before AEDPA was enacted into law. In reaching that conclusion, the courts generally have applied the first step of the two-step retroactivity analysis set forth by the Supreme Court in *Landgraf* v. *USI Film Products,* 511 U.S. 244 (1994). In the first step of that analysis, the courts inquire whether Congress has specifically addressed the temporal application of a statute. The courts that have rejected *Soriano* have generally relied on two factors to reach the conclusion that Congress specifically addressed the temporal application of AEDPA section 440(d). First, they have observed that Congress expressly made other provisions of AEDPA, such as section 413(f), applicable to pending deportation proceedings, and they have drawn a negative inference from the fact that Congress did not intend section 440(d) to be applied to pending proceedings. Second, examining the legislative history of AEDPA, they have noted that an earlier version of AEDPA in Congress would have applied what became section 440(d) to pending cases, but that provision was deleted by the conference committee. *Magana-Pizano,* 200 F.3d at 611; *Pak,* 196 F.3d at 676; *Shah,* 184 F.3d at 724; *Mayers,* 175 F.3d at 1302–03; *Sandoval,* 166 F.3d at 241; *Henderson,* 157 F.3d at 129–30; *Goncalves,* 144 F.3d at 128–33.

These factors are specific to AEDPA and concern only the first step of the *Landgraf* analysis. They do not concern the question of whether the application of section 440(d) to pending deportation proceedings would be regarded as retroactive under the second step of the *Landgraf* analysis. As to that question, the Attorney General maintains the Department of Justice's longstanding position that questions about an alien's deportability or eligibility for discretionary relief from deportation are matters inherently prospective in nature.

In the absence of contrary circuit precedent, the Attorney General will continue to apply AEDPA section 440(d) in the cases of aliens whose deportation proceedings were commenced after AEDPA was enacted into law, even if the alien committed his crime or was

convicted of the crime before that date. The Attorney General continues to believe that matters affecting deportation and relief from deportation are inherently prospective in nature, and that the presumption against retroactive application of federal statutes does not apply in such circumstances. The Attorney General is currently presenting that position to the U.S. Supreme Court in *INS* v. *St. Cyr,* No. 00–767, a case involving the temporal scope of the repeal of section 212(c) in IIRIRA. Therefore, the Department declines to extend nationwide the decisions of the First, Second, Fourth, and Ninth Circuits holding AEDPA section 440(d) inapplicable to aliens who were placed in proceedings after the date of enactment of AEDPA based on guilty pleas entered before that date. The Department will, however, follow circuit precedent on the temporal scope of AEDPA section 440(d).

The interpretation of AEDPA that would be changed by this rule has, of course, affected many aliens whose deportation proceedings were commenced before enactment of AEDPA but who were unable to obtain section 212(c) relief in those proceedings because of the *Soriano* decision. This rule provides a mechanism for such aliens who now have a final order of deportation to reopen their immigration proceedings if they would have been eligible to apply for section 212(c) relief but for the *Soriano* decision.

The Attorney General has considered the important interest in avoiding delays in deportation proceedings and, on balance, has decided to define the class of aliens eligible for reopening under this rule in categorical terms. For aliens who have a final order of deportation, based on established principles requiring exhaustion of all available administrative remedies, this rule could properly be written to limit relief on reopening only to those aliens who can show that they had affirmatively applied for relief under section 212(c) in their prior immigration proceedings and had appealed an immigration judge's adverse decision to the Board of Immigration Appeals. However, this rule does not require that eligible aliens make a specific factual showing that they previously applied for section 212(c) relief notwithstanding the *Soriano* decision, or appealed an immigration judge's adverse decision to the Board. Instead, this rule is drafted in order to relieve both the government and the alien of the burdens of litigating such factual issues in each case at the motion to reopen stage. In light of the highly unusual circumstances of the *Soriano* litigation, the interest in expeditious enforcement of the immigration laws will be more effectively served by focusing attention on the merits of the claims for discretionary relief from deportation with respect to aliens in the defined class who otherwise would have been eligible to seek section 212(c) relief in their immigration proceedings but for the *Soriano* precedent.

Who Is Eligible To Apply for Section 212(c) Relief?

Under this rule, eligible aliens in pending deportation proceedings may apply for section 212(c) relief if the proceedings were commenced prior to the enactment of AEDPA. This rule also provides a 180-day period for a defined class of aliens who had been adversely affected by the *Soriano* decision to file a motion to reopen in order to apply for section 212(c) relief. This special reopening rule would cover aliens who:

(1) Had deportation proceedings before the Immigration Court commenced before April 24, 1996;

(2) Are subject to a final order of deportation;

(3) Would presently be eligible to apply for section 212(c) relief if proceedings were reopened and section 212(c) as in effect on April 23, 1996, were applied; and

(4) Either,

(i) Applied for and were denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Soriano* (or its rationale), and not any other basis;

(ii) Applied for and were denied section 212(c) relief by the Immigration Court and did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale); or

(iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Soriano* (or its rationale).

This rule is not intended to apply to an alien who filed an application for section 212(c) relief that was denied by an immigration judge or the Board for reasons other than *Soriano* or its rationale. For example, an alien whose section 212(c) application was denied on the merits or before the AEDPA statute was enacted is not covered by this rule.

This rule is also not intended to apply to aliens outside the United States or aliens with final orders of deportation who have returned to the United States illegally. Moreover, this rule does not provide a basis for such aliens to seek or secure admission or parole into the United States to file a section 212(c) application.

What Is Required To Be Statutorily Eligible for Section 212(c) Relief?

The alien must be a lawful permanent resident, returning to a lawful, unrelinquished domicile of seven consecutive years, who may be admitted in the discretion of the Attorney General without regard to section 212(a) (other than paragraphs (3) and (9)(C)), who is deportable on a ground that has a corresponding ground of exclusion, and who has not been convicted of one or more aggravated felonies for which he or she has served an aggregate term of imprisonment of at least five years. *See* INA § 212(c), 8 U.S.C. § 1182(c) (1994); *In re Davis,* Interim Decision 3439 (BIA 2000); *Matter of Hernandez-Casillas,* 20 I. & N. Dec. 262 (A.G. 1991).

How Is 7 Years Lawful, Unrelinquished Domicile in the United States Defined in This Rule?

The alien must have lived in the United States as either a lawful permanent resident or a lawful temporary resident pursuant to section 245A or section 210 of the INA for at least seven years, as defined in 8 CFR 212.3(f). For purposes of this rule, an alien begins accruing time as of the date of entry or admission as either a lawful permanent resident or lawful temporary resident and the accrual of time ceases when there is a final administrative order in the alien's case, as defined in 8 CFR 240.52 and 3.1(d)(2). When a motion to reopen is filed pursuant to this rule, the alien must have accrued seven years of lawful unrelinquished domicile as of the date of his or her final administrative order which the alien seeks to reopen.

Is There a Fee for Filing This Application?

If the alien has already filed a section 212(c) application and only needs to update the application, no fee is required. If the alien has not filed a section 212(c) application and has a final administrative order, he or she must file a motion to reopen. If the motion to reopen is granted, he or she must pay the fee required by 8 CFR 103.7(b)(1) for Form I–191 (currently $170). *See* 8 CFR 103.7.

An alien in deportation proceedings who has not filed an application shall submit the Form I–191 to the Immigration Court with the appropriate fee receipt attached.

If the case is pending before the Board, the alien must file a copy of the application with the motion and if the motion is granted and the case is remanded to the Immigration Court, the alien must then file the application with the appropriate fee. Nothing in this rule changes the requirements and procedures in 8 CFR 3.31(b), 103.7(b)(1), and 240.11(f) for paying the application fee for a section 212(c) application after a motion to reopen is granted if such an application was not previously filed. Fees must be submitted to the local office of the Immigration and Naturalization Service in accordance with 8 CFR 3.31. An applicant who is eligible for section 212(c) relief and is unable to pay the filing fee may request a fee waiver in accordance with 8 CFR 103.7(c).

What Is the Procedure for an Applicant Who Is Currently in Deportation Proceedings Before the Immigration Court or the Board of Immigration Appeals?

Immigration Court. An eligible alien who has a deportation proceeding pending before the Immigration Court should file a section 212(c) application pursuant to this rule, or request a reasonable period of time to submit an application pursuant to this rule. If the alien already has an application on file, he or she may file a supplement to the existing section 212(c) application.

Board of Immigration Appeals. An eligible alien who has a deportation proceeding pending before the Board should file with the Board a motion to remand to the Immigration Court to file a section 212(c) application or to supplement his or her existing section 212(c) application on the basis of his or her eligibility for such relief pursuant to this rule. If the alien appears to be statutorily eligible for relief under this rule, the Board shall remand the case to the Immigration Court for adjudication, unless the Board chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

What If An Applicant Is the Subject of a Final Order of Deportation?

Aliens who have final administrative orders. An alien who is the subject of a final order of deportation who is eligible to apply for section 212(c) relief pursuant to this rule must file a motion to reopen with the Immigration Court or the Board of Immigration Appeals, whichever last held jurisdiction. The front page of the motion and any envelope containing the motion should include the notation ''Special 212(c) Motion.'' The fee for motions to reopen (currently $110) will be waived for aliens eligible for section 212(c) relief pursuant to this rule. The waiver of the fee is only applicable to motions to reopen seeking section 212(c) relief pursuant to this rule. The reopening and remand will be limited to issues concerning the alien's eligibility for relief under section 212(c) and may not address the alien's deportability or any other basis for relief from deportation, unless the Board is also reopening under other applicable provisions of law, in which case the issues may be consolidated for hearing as appropriate and all appropriate motions fees will apply.

If the alien previously filed an application for section 212(c) relief, he or she must file a copy of that application or a copy of a new application and supporting documents with the motion to reopen. If the motion to reopen is granted, an alien who previously filed an application will not be required to pay a new filing fee for the section 212(c) application, Form I–191.

If the alien has not previously filed an application for section 212(c) relief, the alien must submit a copy of his or her completed application and supporting documents with the motion to reopen. If the motion is granted, the alien must then file the application with the appropriate fee.

Cases remanded to the board. If a case has been remanded to the Board by a federal court based on a judicial decision rejecting the Attorney General's decision in *Soriano,* the Board will comply with the order of the district or circuit court.

What Happens if an Applicant Currently Has a Motion to Reopen or Motion to Reconsider Pending Before the Immigration Court or the Board?

Immigration court. If an alien has a pending motion to reopen or reconsider filed with the Immigration Court, other than a motion to reopen to apply for section 212(c) relief, he or she must file a new motion to reopen with the Immigration Court to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

Board of immigration appeals. If an alien has a pending motion to reopen or reconsider filed with the Board, other than a motion to reopen to apply for section 212(c) relief, the alien must file a new motion to reopen with the Board to apply for section 212(c) relief on the basis of his or her eligibility pursuant to this rule.

New motion to reopen. An alien may file only one motion to reopen for purposes of establishing eligibility under this rule. A new motion to reopen filed pursuant to this rule either before the Immigration Court or the Board, as appropriate, must specify whether the alien has any pending motions before the Immigration Court or the Board. All motions to reopen to apply for section 212(c) relief filed pursuant to this rule are subject to the restrictions specified in this rule. The usual time and number restrictions on motions, as articulated in 8 CFR 3.2 and 3.23, shall apply to all other motions.

Is an Alien With a Final Administrative Order of Deportation Required To File a Motion To Reopen Under This Rule Within the 180 day Period in Order To Seek Section 212(c) Relief?

This rule is intended to provide a single, straightforward process for the defined class of aliens who were adversely affected by *Soriano* to reopen their immigration proceedings based on the interpretive change announced in this rule.

Accordingly, 8 CFR 3.44 is intended to provide the sole process for eligible aliens who have a final administrative order of deportation to reopen their cases on account of the change in the governing law announced in this rule in order to apply for section 212(c) relief. However, the existing reopening rules in 8 CFR 3.2 and 3.23 allow aliens to seek to reopen their cases notwithstanding the time limits on certain other grounds unrelated to a change in the law. As provided in 8 CFR 3.44(h), this rule would not prevent an alien from filing a motion to reopen under the existing rules based on any other basis or exception.

Does the Filing of an Application for Section 212(c) Relief Stay the Execution of a Final Order?

The mere filing of a motion to reopen to apply for section 212(c) relief with the Immigration Court or the Board does not stay the execution of the final order of deportation. To request that execution of the final order be stayed by the Immigration and Naturalization Service, the alien must file an Application for Stay of Removal (Form I–246), following the procedures set forth in 8 CFR 241.6. To request that execution of the final order be stayed by the Immigration Courts or the Board, the alien must comply with the procedures outlined in 8 CFR 3.2(f) and 3.23(b)(v).

What Happens if an Application Is Denied by the Immigration Court?

If the Immigration Court denies the section 212(c) application of an alien in deportation proceedings before the Immigration Court, the decision may be appealed to the Board along with, and

under the same procedures as apply to, other issues, if any, properly before the Board on appeal.

What Happens if an Alien Fails To Appear for a Hearing Before the Immigration Court on a Section 212(c) Application?

An alien must appear for all scheduled hearings before an Immigration Court, unless his or her appearance is waived by the Immigration Court. An alien who is in deportation proceedings before the Immigration Court, and who fails to appear for a hearing regarding a section 212(c) application, will be subject to the applicable statutory and regulatory *in absentia* procedures (*i.e.,* section 242B of the Act as it existed prior to amendment by IIRIRA, and applicable regulations).

When Was the Proposed Rule Published and When Were Comments Received?

The Department of Justice (Department) published in the **Federal Register** a proposed rule at 65 FR 44476 on July 18, 2000, which created a uniform procedure for applying the law as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Department requested comments from the public for a period of 30 days, ending on August 17, 2000. In response to requests from the public, and to ensure the public ample opportunity to fully review and comment on the proposed rule, the Department published a notice in the **Federal Register** on October 11, 2000, extending the public comment period to October 11, 2000 (65 FR 60384).

How Many Comments Were Received From Interested Parties During the Comment Period?

In response to the proposed rulemaking, the Department received 169 comments from various organizations, attorneys, and other interested individuals. Each Member of Congress, representative or member of a non-governmental organization (NGO), interested individual, or private attorney was counted separately as a ''commenter.'' Commenters included 10 Members of Congress, one Division of a State Department of Criminal Justice, 91 representatives of a number of NGOs, 11 private attorneys or legal professionals, and 56 interested individuals. Included in that number were eight letters submitted individually by eight separate NGOs. Five NGOs submitted identical form letters. One commentary was jointly submitted by a group of 10 NGOs and four legal professionals not affiliated with any of the NGOs, while another commentary was submitted by a group of 38 NGOs. Finally, identical form letter commentaries were separately submitted by 30 individual members of a single NGO. The Department appreciates the contributions of all individuals and groups who submitted comments.

What Were the Specific Comments and How Is the Department Amending the Rule as a Result?

The issues raised by the commenters generally fell into five categories: (1) Procedural requirements; (2) eligibility; (3) nationwide uniformity; (4) parole; and (5) miscellaneous issues. The number of commenters raising issues pertaining to procedural requirements totaled 151 and those raising eligibility concerns totaled 158. Commenters who raised issues pertaining to parole totaled 123, while only 20 commenters were concerned with uniformity issues. Five commenters addressed miscellaneous issues. Comments in each of these areas are discussed in further detail below.

1. Issues Pertaining to Procedural Requirements

Concerns regarding various procedural requirements were raised by 151 commenters. All but two representatives from NGOs made suggestions concerning procedural issues, and 48 out of 56 interested individuals made similar suggestions.

Comment: One hundred forty-six commenters expressed concern that the proposed rule lacks a mechanism to inform the public of available relief. These commenters suggested that the Department undertake the responsibility to notify each alien who appeared to be potentially eligible to file a motion to reopen, since it would be unlikely that an eligible, unrepresented alien would be aware of the relief available to him or her under the rule. Further, this group of commenters suggested that the Department provide public notice of the relief in appropriate venues and languages reaching the largest number of individuals both in and outside of the United States.

Response: Notification of the availability of section 212(c) relief under this rule will be provided in the same manner and form as notification for other forms of relief. Final rules are always published in the **Federal Register** and are available on the Federal Register website. In addition, the Department will issue a press release announcing the effective date of the final rule and outlining the eligibility requirements. The Department has received, and will likely continue to receive, numerous telephone inquiries regarding the availability of section 212(c) relief pursuant to this rule from interested individuals and has directed them to the **Federal Register** for further updates.

Comment: A group of 10 NGOs suggested that all individuals currently in proceedings should be notified, in person or via certified mail, of their possible eligibility for relief.

Response: Because the regulation includes individuals who are potentially eligible for relief even though they have not yet filed a section 212(c) application, it would be difficult for the Department to identify the class of potentially eligible individuals with any accuracy. Moreover, in view of the administrative burdens involved in such a notification initiative, the Department has concluded that the traditional means of notification through the **Federal Register** is sufficient, particularly in combination with the press release the Department is issuing on this subject.

Comment: These same commenters, speaking as a group, stated that although aliens presently in proceedings before the Immigration Court or the Board are intended to be covered by the proposed rule, the rule itself does not contain language which specifically includes such aliens.

Response: 8 CFR 212.3(g) includes all eligible aliens whose deportation proceedings commenced before April 24, 1996. Nothing in the rule excludes otherwise covered aliens whose proceedings are pending as of the effective date of this final rule.

Comment: The same group of 10 NGOs provided additional suggestions: (1) Eliminating the requirement of a motion to reopen altogether; (2) requiring the Board and the Immigration Courts to reopen *sua sponte* each case in which an individual may be eligible for relief under the rule, and (3) providing notice to the alien of such potential eligibility. An additional 129 commenters endorsed the *sua sponte* reopening of cases. Thirty commenters also suggested that no remand should be required for cases currently pending before the Board. Instead, they suggested that any appeal by the INS deemed without merit by the Board be dismissed and the decision of the Immigration Judge granting the section 212(c) waiver be reinstated.

Response: Pursuant to 8 CFR 3.2 and 3.23, *sua sponte* reopening of any case may occur at the discretion of the Board or an Immigration Judge, but such reopening is not mandated by this rule. The burden of establishing eligibility for section 212(c) relief, as with any other request for relief from deportation, is

upon the alien, and it is incumbent upon any alien subject to a final order of deportation who wishes to pursue relief in proceedings to do so in a diligent and timely fashion, under the provisions of this rule. The Department cannot, as a practical matter, undertake the enormous burden of examining past cases that resulted in a final order of deportation for possible *sua sponte* reopening. Such a burden would result in inordinate delays in adjudicating cases currently pending before the Board and the Immigration Courts.

With regard to INS appeals of section 212(c) applications that are presently pending before the Board, these cases will be adjudicated in the same manner as any other pending appeal subject to a superseding regulation or change in the law. The Board will continue to exercise its appellate authority to affirm the decision of the Immigration Judge, remand the case for an additional hearing, or adjudicate the appeal by applying the provisions of section 212(c) as promulgated prior to AEDPA.

Comment: One commenter writing on behalf of an NGO suggested that the Department adopt a ''streamlined'' motion to reopen procedure using a simple, one-page fill-in or check-off form.

Response: In view of the widely varying circumstances in each case, and the traditional requirement that persons seeking to reopen completed proceedings carry a burden of establishing, among other things, prima facie eligibility for relief upon reopening, the Department declines to adopt a ''one-size-fits-all'' form and will adhere to the normal requirements concerning motions to reopen, except as specifically modified by the rule.

Comment: Twenty-one commenters suggested that aliens filing motions to reopen should not be required to file any legal documents previously submitted to the INS or to the Immigration Court.

Response: In cases where an alien is filing a motion to reopen his or her proceedings based upon alleged eligibility for a form of relief from removal or deportation, the alien has the burden of establishing prima facie eligibility for that form of relief. This rule is not intended to alter that fundamental legal principle. In accordance with 8 CFR 3.23(b)(3), ''[a]ny motion to reopen for the purpose of acting upon an application for relief must be accompanied by the appropriate application for relief and all supporting documents.'' Because the files maintained by the INS often vary from those maintained by the Immigration Courts and the Board, a policy at variance from the regulations would cause aliens to operate on the mistaken assumption that the Immigration Court, the Board, and the INS maintain duplicate files while considering eligibility for relief. In addition, if an alien filed a motion to reopen without attaching supporting documents, but with the expectation that the Immigration Judge or Board would rely on certain documents the alien believes were already in the file in adjudicating that motion, that alien may not necessarily make a prima facie case for relief.

Comment: One hundred thirty-five commenters requested either that the 90-day time limit on motions to reopen be eliminated and that no time limit whatsoever be imposed, or that the time period for filing a motion to reopen be extended from 90 days to 1 year commencing on the date of actual notice to the alien. They noted that it could prove difficult for aliens and their representatives to gather the necessary documentation to support their motions to reopen during the currently allotted 90-day time period.

Response: The Department recognizes the difficulty that aliens and/or their representatives may experience in assembling adequate documentation to establish prima facie eligibility under this rule. The Department also recognizes that in cases where the order of deportation became final many years ago, aliens and/or their representatives might need to request copies of conviction records from Federal or State authorities. The Department recognizes that it may be difficult for many bona fide applicants to become informed of available relief, obtain counsel, gather all necessary documents and file a motion to reopen within the currently allotted 90 days time period. Accordingly, the Department is adopting this suggestion to a limited extent, and is extending the period of time during which motions to reopen may be filed to 180 days commencing on the effective date of this rule. The Department feels that this time period strikes a reasonable balance between the litigative difficulties for aliens filing motions and the administrative need for a finite and workable program.

Comment: Sixty-five percent (65%) of the commenters suggested that an automatic stay of deportation be provided in conjunction with the filing of a motion to reopen under this rule, effective upon filing of the motion.

Response: With very limited exceptions, the prevailing rule in immigration jurisprudence is that the mere filing of an application, motion, or petition does not automatically stay execution of a deportation order. Were it otherwise, individuals subject to a final order of deportation could thwart or delay deportation through meritless filings with the Service, Immigration Court, or Board. The Department will adhere to the traditional approach in this rule. Aliens who believe they are eligible for relief under this rule are free to request a discretionary stay of deportation from the Service, the Immigration Court, or the Board as appropriate.

2. Issues Pertaining to Eligibility

One hundred fifty-four commenters raised concerns regarding the determination of eligibility for relief under the proposed rule.

Comment: One hundred forty-eight commenters felt that using the date of ''commencement'' of proceedings to determine eligibility for section 212(c) relief was arbitrary, because commencement of proceedings is affected by various extraneous factors. For example, approximately 20 commenters suggested that individuals who had been served with Orders to Show Cause (OSCs) at any time, whether before or after April 24, 1996, should be eligible to apply for relief under the proposed rule, regardless of whether they had already filed a section 212(c) waiver application. An equal number of commenters suggested that aliens who had committed or been convicted of offenses prior to April 24, 1996, be afforded an opportunity to apply for relief under the proposed rule. One commenter suggested that section 212(c) be amended to include post-April 1996 convictions.

Response: The well-established rule in immigration law, as stated in 8 CFR 3.14(a), is that ''[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service.'' Up until the point of filing, the Service can cancel a charging document. *See* 8 CFR 239.2(a). After that point, it must request that the Immigration Court terminate proceedings. *See* 8 CFR 239.2(c). Hence, filing of the charging document with the Immigration Court is the critical event as regards the initiation of deportation proceedings.

Because many other legal determinations depend on whether proceedings have commenced, the need for a bright-line rule as to the time of commencement is clear. The Department will adhere to its well-established regulatory scheme as regards commencement of proceedings, and will not rely on some other event such as the issuance or service of the charging

document as determining whether proceedings have begun.

Some circuits have looked to the service of a charging document as the critical event for purposes of ''retroactivity'' analysis. The Department disagrees with the reasoning of these courts, and declines to adopt it in this rule. In any such circuit, however, the Department will regard AEDPA section 440(d) as inapplicable to aliens whose charging documents were served before AEDPA's enactment if required to do so by circuit precedent. A circuit's adoption of a ''retroactivity'' analysis based on service of the charging document does not compel the further conclusion that proceedings commence with the service of a charging document. The latter conclusion flatly contradicts well-settled law.

Comment: In adjudicating motions to reopen, one commenter suggested that when determining eligibility for section 212(c) relief in proceedings, only evidence available before April 24, 1996, be considered.

Response: Applications for relief from deportation are considered to be ongoing, and the Board assesses eligibility for relief as of the time of its decision. *See In re Yeung,* Interim Decion 3297 (BIA 1997); *Matter of U-M-*, 20 I. & N. Dec. 327, 332 (BIA 1991), *aff'd sub nom. Urbina-Mauricio* v. *INS,* 989 F.2d 1085 (9th Cir. 1993). To abandon this long-standing view would put the Department in the position of granting permanent U.S. status to persons presently ineligible for such status under applicable statutes. The Department declines to adopt such an approach. It should be noted that this rule often operates to the advantage of the respondent in proceedings, for example, by allowing for consideration of equities gained up until the date of the application.

Comment: Approximately *five* commenters felt that the *Soriano* decision deprived many aliens of a full and fair opportunity to pursue their applications for relief from deportation under section 212(c). These commenters cited examples where aliens were not permitted to file section 212(c) waiver applications because they were found ineligible on statutory grounds and their applications were pretermitted. Two Members of Congress joined in this view, noting that absent section 440(d) of the AEDPA, an alien would have been permitted to litigate issues of statutory eligibility. Additionally, thirty-one percent of commenters felt that affected aliens should be returned to their position prior to the issuance of the *Soriano* decision by the Attorney General. One hundred forty commenters suggested that the language in proposed 8 CFR 3.44(b)(4)(i), which currently states, *inter alia,* that:

> A motion to reopen proceedings to seek section 212(c) relief under this section must establish that the alien: * * * (4) Either—(i) Applied for and was denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in Matter of Soriano (or its rationale), *and not any other basis* (emphasis added); be changed to read as follows:

> A motion to reopen proceedings to seek section 212(c) relief under this section must establish that the alien: * * * (4) Either—(i) Applied for and was denied section 212(c) relief *in whole or in part on the basis of the Attorney General's 1997 decision in Soriano.* (Emphasis added.)

One commenter suggested that the rule contain examples illustrating the meaning of ''on the basis of * * * [*Soriano*] and not any other basis.''

Response: The purpose of this rule is to provide a uniform interpretation of AEDPA section 440(d) and to provide a remedy for certain aliens subject to a final order based on proceedings commenced before AEDPA's enactment who are eligible presently (*i.e.,* at the time of decision) for section 212(c) relief and would have been eligible to apply at the time of their final orders but for the *Soriano* decision. The ''not any other basis'' language ensures that persons who were ineligible for or denied relief on some other basis, and thus were not affected by *Soriano*, do not improperly benefit from the rule.

Comment: Presenting the opposite view that the proposed *Soriano* rule should be construed as narrowly as possible, another commenter suggested deleting proposed 8 CFR 3.44(b)(4)(iii) altogether, which permits aliens who did not apply for section 212(c) relief but would have been eligible for such relief ''but for'' the Attorney General's decision in *Soriano*. This commenter also recommended that the final condition imposed in 3.44(b)(4)(i), which restricts eligibility to those aliens whose section 212(c) applications were denied ''on the basis'' of *Soriano* ''and not any other basis,'' be added to 3.44(b)(4)(ii). Another commenter agreed with the proposed rule as written, stating that section 212(c) applications denied for reasons other than *Soriano* should be excluded from the coverage of the rule.

Response: As noted in the proposed rule, this final rule is intended to provide a uniform interpretation of section 440(d) of AEDPA and to mitigate disagreements among the circuits regarding the scope of its application. If the Department were to delete 8 CFR section 3.44(b)(4)(iii), relief under this rule would be limited to those aliens who filed applications for 212(c) relief and would leave unresolved those cases where an alien's application for 212(c) relief was pretermitted. Therefore, the Department declines to adopt this suggestion.

Comment: A group of 10 commenters suggested that the word ''presently'' be deleted in proposed 8 CFR 3.44(b)(3). These commenters stated that, as currently written, the proposed rule would exclude individuals eligible for section 212(c) at the time of an incorrectly pretermitted application, but who ''presently'' have not had a lawful unrelinquished domicile of seven years in the United States.

Response: The Department chooses to retain the word ''presently'' in 8 CFR section 3.44(b)(3). As noted above, the rule does require eligibility (but for the *Soriano* decision) for section 212(c) relief at the time of the final deportation order. But the rule requires present eligibility for relief as well, because applications for relief are considered to be ongoing, and the Department's adjudicators assess eligibility for relief at the time of decision. This rule is not intended to change the statutory requirements for eligibility for section 212(c) relief, but is strictly limited to providing a uniform interpretation of the temporal scope of section 440(d) of AEDPA.

3. Issues Pertaining to Nationwide Uniformity

Nineteen commenters stated that the proposed rule is too narrow, and will not achieve the desired goal of nationwide uniformity due to the controlling case law in numerous circuits. These commenters cited the 1st, 4th, and 11th Circuit decisions holding that lawful permanent residents may apply for section 212(c) relief if they were in deportation proceedings before April 1, 1997, and pled guilty to criminal charges in reliance on eligibility for section 212(c) relief. *See, e.g. Mattis,* 212 F.3d at 35–40 (section 212(c) available to aliens in deportation proceedings who pled guilty to a crime in reliance upon availability of section 212(c) relief); *Wallace,* 194 F.3d at 287 (section 212(c) available to aliens in proceedings, deemed to commence when the OSC was served upon the alien, rather than filed with the Immigration Court); *Tasios,* 204 F.3d at 550–52 (section 212(c) available to aliens who pled guilty prior to the enactment of the AEDPA); *Alanis-Bustamante* v. *Reno,* 201 F.3d 1303,

1308–10 (11th Cir. 2000) (section 212(c) available to aliens in proceedings, deemed to commence when the OSC was served on the alien, rather than filed with the Immigration Court).

Response: By this rule, the Department only agrees to acquiesce on a nationwide basis in the decisions of those circuits that have ruled that Congress did not intend to apply AEDPA section 440(d) to the cases of aliens whose deportation proceedings were commenced before AEDPA was enacted. While uniformity is an important goal, and one of the principal motivations for this rule, there is no requirement that the Department adopt the view of the least restrictive circuit in order to achieve perfect uniformity, and it will not do so. Rather, the Department has adopted what it considers to be the soundest and best supported rule among the various approaches taken by the courts of appeals.

Comment: By contrast, one commenter stated that ''[n]one of the Article I constitutional powers to make ''uniform laws'' have been interpreted to require true or pure uniformity.'' Further, this commenter stated that at most ''geographical uniformity'' in a given location, rather than nationwide, is required by the Constitution and that ''uniformity among persons'' is not required.

Response: As noted above, the Department agrees that perfect uniformity is not required. Nevertheless, uniformity is an important goal, and the present rule is intended to achieve that goal within reasonable limits.

4. Issues Pertaining to Parole

Comment: One hundred twenty-three commenters suggested that lawful permanent residents who complied with their deportation orders and were deported from the United States be granted parole, thus enabling them to pursue motions to reopen and present cases on the merits of their section 212(c) waiver applications. One commenter believed that no filing deadline should be imposed for an alien who is currently outside of the United States and who asserts eligibility for relief under this rule.

One hundred four commenters stated that absent a provision to permit parole of aliens into the United States, such aliens will be summarily denied relief. Citing H.R. 5062, which was introduced in the 106th Congress, Second Session, these commenters indicated that in recently proposed legislation, the House of Representatives established that aliens unjustly removed from the United States should have the opportunity to return to the United States to have their claims considered.

Nonetheless, one commenter expressed support for the language in proposed 8 CFR 3.44(i), which excludes aliens who have departed, aliens who have a final order of removal and illegally returned, and aliens who have not been admitted or paroled into the United States. A group of 10 commenters felt that 3.44(i), in its entirety, should be deleted from the final rule.

Response: The Department's primary purpose in publishing this rule is to alleviate the inter-circuit conflicts regarding the temporal scope of section 440(d) of AEDPA. None of the circuits that have disagreed with the Attorney General's decision in *Soriano* have adopted a general view that aliens who were removed or departed the United States should be permitted to return. The Department has no method of identifying or discerning the location of aliens who departed on account of the *Soriano* decision and the commenters who offered this suggestion have provided none. The government's interest in finality, the considerable administrative burdens involved, and the risk of paroling persons ultimately determined not to be eligible for relief all counsel against providing for the parole of deported criminals back into the United States.

5. Miscellaneous Issues

Five commenters addressed miscellaneous issues. Three commenters expressed their general support for the proposed rule.

Comment: One commenter stated that overall, the proposed rule is not supported by legislative history. That commenter stated that the goal of Congress in amending and ultimately repealing section 212(c) relief was to enhance the ability of the United States to deport criminal aliens.

Response: While the Department acknowledges Congress' general intentions regarding the efficient removal of criminal aliens, it must also note the lack of perfect congressional clarity with regard to the applicability of AEDPA section 440(d) to cases pending at the time of AEDPA's enactment. This lack of clarity has led to costly litigation, sharp disagreements within the circuits, and a consequent lack of uniformity in the law on this question. The present rule seeks to ameliorate this situation by promoting uniformity in the law, within reasonable limitations, throughout the United States.

Comment: One commenter suggested that the policy reasons underlying the proposed rule apply equally to section 212(i) waivers. This commenter stated that the regulations should address and overturn the Board's ruling in *In re Cervantes-Gonzalez*, Interim Decision 3380 (BIA 1999), which addressed section 212(i) of the INA and its requirement that an alien establish extreme hardship to his or her U.S. citizen or permanent resident alien spouse or parent in order to qualify for a waiver of inadmissibility.

Response: The present rule seeks to promote uniformity by adopting a single rule for applying AEDPA section 440(d) nationwide (except where prohibited by the law of the circuit). The policy goals underlying this initiative do not exist with respect to section 212(i), which has not been the subject of similarly sharp or widespread interpretive disagreement within the circuits. The Department will not disturb the existing administrative jurisprudence regarding section 212(i).

What Technical Amendments Are Being Made to the Board of Immigration Appeals Streamlining Regulation?

8 CFR 3.1(d)(1–a) was redesignated as section 3.1(d)(2) in the Board of Immigration Appeals Streamlining final regulation published Monday, October 18, 1999 (64 FR 56135). Additionally, 8 CFR 3.1(d)(2) was redesignated as section 3.1(d)(3). Consequently, those paragraphs in 8 CFR which refer to section 3.1(1–a) or section 3.1(d)(2) are misleading and need to be amended.

Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule allows certain aliens to apply for INA section 212(c) relief; it has no effect on small entities such as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. 804. This rule will not result in an annual

effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a ''significant regulatory action'' under Executive Order 12866, section 3(f). Regulatory planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Plain Language Instructions

We try to write clearly. If you can suggest how to improve the clarity of these regulations, call or write Charles Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia 22041, telephone (703) 305–0470.

Paperwork Reduction Act

This rule will increase the use of Form I–191 but will not result in a material change in that form, and the INS is adjusting the total burden hours of the form accordingly.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (Government agencies).

8 CFR 212

Administrative practice and procedure, Aliens, Passports and visas, Immigration, Reporting and recordkeeping requirements.

8 CFR 240

Administrative practice and procedure, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note; 8 U.S.C. 1103, 1252 note, 1324b, 1362, 28 U.S.C. 509, 510, 1746; sec. 2, Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002.

§ 3.1 [Amended]

2. In section 3.1(d)(2)(iii), references to ''paragraph (d)(1–a)(i)'' are revised to read ''paragraph (d)(2)(i).''

§ 3.3 [Amended]

3. In section 3.3(b), the reference to ''§ 3.1(d)(1–a)(i)'' is revised to read ''§ 3.1(d)(2)(i).''

4. Section 3.44 is added to subpart C to read as follows:

§ 3.44 Motion to reopen to apply for section 212(c) relief for certain aliens in deportation proceedings before April 24, 1996.

(a) *Standard for adjudication.* Except as provided in this section, a motion to reopen proceedings to apply for relief under section 212(c) of the Act will be adjudicated under applicable statutes and regulations governing motions to reopen.

(b) *Aliens eligible to reopen proceedings to apply for section 212(c) relief.* A motion to reopen proceedings to seek section 212(c) relief under this section must establish that the alien:

(1) Had deportation proceedings before the Immigration Court commenced before April 24, 1996;

(2) Is subject to a final order of deportation,

(3) Would presently be eligible to apply for section 212(c) as in effect on or before April 23, 1996; and

(4) Either—

(i) Applied for and was denied section 212(c) relief by the Board on the basis of the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale), and not any other basis;

(ii) Applied for and was denied section 212(c) relief by the Immigration Court, did not appeal the denial to the Board (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the time the deportation became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale); or

(iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale).

(c) *Scope of reopened proceedings.* Proceedings shall be reopened under this section solely for the purpose of adjudicating the application for section 212(c) relief, but if the Immigration Court or the Board reopens on other applicable grounds, all issues encompassed within the reopening proceedings may be considered together, as appropriate.

(d) *Procedure for filing a motion to reopen to apply for section 212(c) relief.* An eligible alien must file either a copy of the original Form I–191 application, and supporting documents, or file a copy of a newly completed Form I–191, plus all supporting documents. An alien who has a pending motion to reopen or reconsider before the Immigration Court or the Board, other than a motion for section 212(c) relief, must file a new motion to reopen to apply for section 212(c) relief pursuant to this section. The new motion to reopen shall specify any other motions currently pending before the Immigration Court or the Board that should be consolidated. The Service shall have 45 days from the date of service of the motion to reopen to respond. In the event the Service does not respond to the motion to reopen, the Service retains the right in the reopened proceedings to contest any and all issues raised. Any motion for section 212(c) relief pending before the Board or the Immigration Courts on January 22, 2001 that would be barred by the time or number limitations on motions shall be deemed to be a motion to reopen filed pursuant to this section.

(e) *Fee and number restriction for motion to reopen waived.* No filing fee is required for a motion to reopen to apply for section 212(c) relief under this section. An eligible alien may file one motion to reopen to apply for section 212(c) relief under this section, even if a motion to reopen was filed previously in his or her case.

(f) *Deadline to file a motion to reopen to apply for section 212(c) relief under this section.* An alien with a final administrative order of deportation must file a motion to reopen by June 23, 2001.

(g) *Jurisdiction over motion to reopen to apply for section 212(c) relief and remand of appeals.*

(1) Notwithstanding any other provisions, any motion to reopen filed pursuant to this section to apply for section 212(c) relief shall be filed with

the Immigration Court or the Board, whichever last held jurisdiction over the case.

(2) If the Immigration Court has jurisdiction, and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall adjudicate only the section 212(c) application.

(3) If the Board has jurisdiction and grants only the motion to reopen to apply for section 212(c) relief pursuant to this section, it shall remand the case to the Immigration Court solely for adjudication of the section 212(c) application (Form I–191), unless the Board chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

(h) *Applicability of other exceptions to motions to reopen.* Nothing in this section shall be interpreted to preclude or restrict the applicability of any other exception to the motion to reopen provisions of this part as defined in 8 CFR 3.2(c)(3) and 3.23(b).

(i) *Limitations on eligibility for reopening under this section.* This section does not apply to:

(1) Aliens who have departed the United States;

(2) Aliens with a final order of deportation who have illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

5. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

6. Paragraph (g) is added to section 212.3 to read as follows:

§ 212.3 Application for the exercise of discretion under § 212(c).

* * * * *

(g) *Relief for certain aliens who were in deportation proceedings before April 24, 1996.* Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

PART 240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

7. The authority citation for 8 CFR part 240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

§ 240.15 [Amended]

8. In § 240.15, the reference to ''§ 3.1(d)(1–a)'' is revised to read ''§ 3.1(d)(2).''

§ 240.21 [Amended]

9. In § 240.21(c), the reference to ''§§ 3.1(d)(2) and 3.39'' is revised to read ''§§ 3.1(d)(3) and 3.39.''

§ 240.53 [Amended]

10. In § 240.53(a), the reference to § 3.1(d)(1–a)'' is revised to read ''§ 3.1(d)(2).''

Dated: January 17, 2001.

Janet Reno,

Attorney General.

[FR Doc. 01–1785 Filed 1–19–01; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99–CE–75–AD; Amendment 39–12081; AD 2001–01–11]

RIN 2120–AA64

Airworthiness Directives; Rolladen Schneider Flugzeugbau GmbH Models LS 4 and LS 4a Sailplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to certain Rolladen Schneider Flugzeugbau GmbH (Rolladen Schneider) Models LS 4 and LS 4a sailplanes. This AD requires you to inspect the airbrake system for damage and proper rigging, with correction, repair, or replacement, as necessary. This AD also requires you to report any damage found to the Federal Aviation Administration (FAA). This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified by this AD are intended to detect and correct damage to the airbrake locking bracket caused by asymmetric loads. This condition could result in the pilot's inability to operate the airbrake controls, with consequent loss of sailplane control.

DATES: This AD becomes effective on March 9, 2001.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of March 9, 2001.

ADDRESSES: You may get the service information referenced in this AD from Rolladen-Schneider Flugzeugbau GmbH, Muhlstrasse 10, D–63329 Egelsbach, Germany; phone: ++ 49 6103 204126; facsimile: ++ 49 6103 45526. You may examine this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 99–CE–75–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW, suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Brian Hancock, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4143; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified FAA that an unsafe condition may exist on certain Rolladen Schneider Models LS 4 and LS 4a sailplanes. The LBA reports two occurrences of damaged airbrake locking brackets found on the above-referenced sailplanes. The damage was the result of improper rigging of the airbrake system. The asymmetric load that occurs over time with an improperly rigged airbrake system could result in cracks in the welding region of the airbrake tube and lateral deformation of the airbrake locking bracket.

What are the consequences if the condition is not corrected? Damage to the airbrake locking bracket, if not detected and corrected, could result in the pilot's inability to operate the airbrake controls with consequent loss of sailplane control.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Rolladen Schneider Models LS 4 and LS 4a sailplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on November 9, 2000 (65 FR 67315). The NPRM proposed to require you to inspect the airbrake locking bracket on the rear landing gear box for signs of