UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAMELA PATRICIA GORDON,	:	
	:	
Petitioner,	:	CIVIL NO. 3:03CV01699(AWT)
	:	
v.	:	
	:	
IMMIGRATION AND NATURALIZATION SERVICE,[1]	:	
	:	
	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Pamela Patricia Gordon was ordered removed by an Immigration Judge under 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the "INA") for having been convicted of an aggravated felony; the Immigration Judge rejected the petitioner's argument that she was eligible for relief under former Section 212(c) of the INA. The petitioner appealed, and the Board of Immigration Appeals (the "BIA") concluded she is not eligible for such relief from removal because of her conviction of an aggravated felony. This court agrees and concludes that

[1] The petitioner should have named as the respondent the Bureau of Immigration and Customs Enforcement (the "BICE"). On March 1, 2003, the Immigration and Naturalization Service ("INS") was abolished and its functions transferred to three bureaus within the Department of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2178. The enforcement functions of the INS were transferred to BICE while its service functions were transferred to the Bureau of Citizenship and Immigration Services.

her petition should be denied.

PART I. FACTUAL BACKGROUND

Petitioner Pamela Patricia Gordon (also known as Pamela Superville) is a native and citizen of Trinidad and Tobago who entered the United States as a visitor in 1981. On October 29, 1990, Gordon's status was adjusted to that of a lawful permanent resident. On October 30, 2001, Gordon was convicted, by guilty plea, in the United States District Court for the Eastern District of Pennsylvania of theft of more than $36,000 from her employer, Temple University, an organization receiving federal funds, in violation of U.S.C. § 666.[2] Gordon was sentenced to serve 14 months in prison followed by a three-year term of supervised release, and she was ordered to pay restitution in the amount of $36,500 to the University.

As a consequence of Gordon's conviction, the former INS initiated removal proceedings against her, serving her with a notice to appear that charged her with being removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, specifically, a

[2] According to the indictment against Gordon (then known as Superville) and her co-defendant, Marcell Wilson, during the seven-year period from 1994 through 2000, Gordon embezzled approximately $149,925 from Temple University. The scheme involved Gordon forging cash advance authorizations in her capacity as business manager of the University's International Programs, and causing the University to issue unauthorized tuition reimbursement checks to her co-defendant, Wilson.

theft offense under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G). After several hearings were continued to allow the petitioner to retain counsel, on December 4, 2002, an Immigration Judge in Hartford, Connecticut, found the petitioner removable as charged and ordered her removed. The petitioner timely appealed the removal order to the BIA, claiming she should be granted relief from removal based on her serious medical/dental condition and personal hardship. On August 27, 2003, the BIA dismissed the petitioner's appeal.

PART II. DISCUSSION

The petitioner argues that the BIA erred in denying her request for relief from removal based on her medical/dental condition and the personal hardship that would result from her removal from the United States. The BIA correctly concluded that the petitioner is statutorily ineligible for such relief.

Prior to 1990, under former Section 212(c) of the INA, the Attorney General was authorized to grant a discretionary waiver of exclusion or deportation (now collectively referred to as "removal") to certain lawful permanent resident aliens who had previously lawfully resided for seven consecutive years in the United States, based on family hardship and other factors.[3] See

[3] In September 1996, Congress eliminated the primary distinctions between "deportation" and "exclusion" proceedings, in favor of unitary "removal" proceedings. See Henderson v. INS, 157 F.3d 106, 111 n.5 (2d Cir. 1998) (discussing distinction between exclusion and deportation proceedings).

Lovell v. INS, 52 F.3d 458, 461 (2d Cir. 1995) (discussing Section 212(c) discretionary factors); 8 U.S.C. § 1182(c)(1990) (repealed 1996).[4] In 1990, however, Congress amended the INA to substantially limit the availability of Section 212(c) relief. Through Section 511 of the Immigration Act of 1990 ("IMMACT"), Congress eliminated the grant of Section 212(c) relief for "an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." IMMACT, Pub. L. 101-649, § 511(a), 104 Stat 4978 (Nov. 29, 1990).[5]

On April 24, 1996, in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress further amended Section 212(c) to bar relief to any alien convicted of an aggravated felony, regardless of the length of time served in prison for the conviction. See AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat.

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[4] Despite the textual limitation of Section 212(c) to aliens in "exclusion" proceedings (*i.e.*, aliens "who temporarily proceeded abroad . . . and who are returning"), beginning in 1976, the courts and the BIA construed Section 212(c) to also authorize hardship relief to aliens in "deportation" proceedings (*i.e.*, aliens already present in the United States and who do not depart and seek readmission). See Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976); St. Cyr v. INS, 229 F.3d 406, 410 (2d Cir. 2000), aff'd INS v. St. Cyr, 533 U.S. 289, 295 (2001).

[5] In 1991, Congress further amended the statute to make clear that the five-year term could be served for multiple convictions. See Miscellaneous Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §§ 306(a)(10), 310, 105 Stat. 1733, 1751 (replacing the phrase "an aggravated felony and has served" with "one or more aggravated felonies and has served for such felony or felonies," effective with the enactment of IMMACT).

1214, 1277 (Apr. 24, 1996). Finally, Congress subsequently repealed Section 212(c) for *all aliens* in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), enacted September 30, 1996. See Pub. Law. No. 104-208, § 304(b), 110 Stat. 3009-546 (Sept. 30, 1996). Section 212(c) was replaced with "cancellation of removal," a form of discretionary relief not available to any alien who has been convicted of an aggravated felony. See IIRIRA §§ 304(a)(3), 304(b); INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3).

The petitioner in this case is statutorily precluded from eligibility for discretionary hardship relief under former Section 212(c) by AEDPA § 440(d) and IIRIRA § 304(b). In INS v. St. Cyr, the Supreme Court affirmed the Second Circuit's holding that aliens who pleaded guilty to their qualifying crimes *prior* to the date of enactment of AEDPA and IIRIRA remain eligible for Section 212(c) relief if they would have been eligible for such relief at the time of their plea under the law then in effect. See St. Cyr, 533 U.S. at 324-26. However, the petitioner does not fall into the category of criminal aliens who remain eligible for Section 212(c) relief under St. Cyr because she pled guilty well after the enactment of AEDPA § 440(d) and the repeal of Section 212(c) by Section 304(b) of IIRIRA. Thus, the petitioner is statutorily ineligible for Section 212(c) relief.

Further, as noted above, although IIRIRA replaced Section 212(c) with a new form of discretionary relief for permanent resident aliens known as "cancellation of removal," see IIRIRA §§ 304(a)(3), 304(b), this form of relief is unavailable to aliens, like the petitioner, who have been convicted of an aggravated felony. INA § 240A (a)(3), 8 U.S.C. § 1229b(a)(3).[6]

Accordingly, the BIA correctly concluded that Gordon is not eligible for relief from removal, and her petition should be denied.

PART III. CONCLUSION

For the reasons set forth above, the instant petition for writ of habeas corpus (Doc. No. 1) is hereby DENIED.

The Clerk shall close this case.

It is so ordered.

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[6] Gordon raises in her petition the fact that in October 2002, she filed a petition under 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Pennsylvania seeking to withdraw her guilty plea based on alleged ineffective assistance of counsel. The § 2255 petition was denied in March 2005. It is unclear whether an appeal is pending. However, her conviction is nonetheless final for purposes of removal. See Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991) ("conviction is considered final and a basis for deportation when appellate review of the judgment--not including collateral attacks--has become final."). See also Johnson v. INS, No. 3:03CV96, 2003 WL 151381, *2 (D. Conn. Jan. 21, 2003) (Arterton, J.) (discussing finality of conviction for removal purposes even if under collateral attack); Plummer v. Ashcroft, 258 F. Supp. 2d 43, 45-46 (D. Conn. 2003) (same).

Dated this 2nd day of May 2005, in Hartford, Connecticut.

/s/AWT

Alvin W. Thompson
United States District Judge