

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

GIUSEPPE SPINA, :  
 :  
 Petitioner, :  
 :  
 V. : CASE NO. 3:04CV763 (RNC)  
 :  
 DISTRICT DIRECTOR - OFFICE :  
 OF HOMELAND SECURITY, :  
 :  
 Respondent. :

RULING AND ORDER

Petitioner, a native of Sicily, is in the custody of the Connecticut Department of Correction serving a twenty year sentence for manslaughter. He has been under a final order of removal since 1997. He brings this habeas petition pursuant to 42 U.S.C. § 2241, claiming that the Bureau of Immigration Appeals ("BIA") erred in concluding that he is statutorily ineligible for discretionary relief from removal under § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Under applicable law, the BIA's decision is clearly correct. Accordingly, the petition must be dismissed.

Petitioner was convicted of manslaughter, an aggravated felony under immigration law, in 1994. See 8 U.S.C. § 1101(a)(43). Based on his conviction, immigration proceedings were commenced against him by issuance of an order to show cause in October 1995. Under the law then in effect, a non-citizen could apply for a discretionary waiver of removal under § 212(c), but no waiver could be given to one who

had been convicted of an aggravated felony and served a term of imprisonment of five years or more. See 8 U.S.C. § 1182(c). The immigration judge decided that this statutory bar to eligibility for § 212(c) relief applies to petitioner. In May 2000, the BIA affirmed.

Petitioner contends that he is not barred from seeking 212(c) relief because, at the time the order to show cause was issued in 1995, he had not yet served five years. However, "[t]he time an alien spends in prison during the course of a hearing, including up until the BIA issues a decision on a pending appeal, can be considered for the purposes of rendering an alien ineligible for section 212(c) relief." Brown v. Ashcroft, 360 F.3d 346, 354 (2d Cir. 2004), citing Buitrago-Cuesta v. I.N.S., 7 F.3d 291, 292 (2d Cir. 1993). At the time the BIA affirmed the immigration judge's decision, petitioner had served more than five years in prison. Clearly, then, he is ineligible for § 212(c) relief.<sup>1</sup>

Accordingly, the petition is hereby dismissed. The Clerk may close the file.

So ordered.

Dated at Hartford, Connecticut this 21st day of May 2004.

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<sup>1</sup> Because petitioner would have been ineligible for a § 212(c) waiver under the law as it existed before the passage of § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, it is unnecessary to consider his claim that the BIA erred in applying § 440(d) retroactively to him.

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Robert N. Chatigny  
United States District Judge