No. _____

In the
Supreme Court of the United States

MIGUEL ANDRES LARA-UNZUETA,
Petitioner,

v.

United States of America,
Respondent.

APPENDIX

/s/ ATMORE L. BAGGOT
Appointed CJA Counsel for Petitioner
1615 N. Delaware Drive, SPC 144
Apache Junction, Arizona 85120
(480) 983-9394
Counsel of Record

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APPENDIX "A"

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File No.: A 90 929 508 August 14, 1997

In the Matter of		
MIGUEL LARA UNZUETA	)	IN DEPORTATION PROCEEDINGS
Respondent	)	
CHARGE:		I&N Act - Section 241(a)(2)(A)-(iii) - Convicted of an aggravated felony
APPLICATIONS:		A waiver of deportability under Section 212(c) of the Act

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Yolanda Haces, Esquire 33 North Dearborn Suite 1850 Chicago, Illinois 60602	Daniel Plain, Esquire Assistant District Counsel 10 West Jackson Boulevard Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 20-year-old single male alien, native and citizen of Mexico. The respondent obtained permanent resident status on April 29, 1988. On March 1st, 1996, the respondent was convicted in the circuit court of Cook county, Chicago, Illinois for the offenses of attempted first degree murder and armed violence in violation of the Illinois criminal code.

At a deportation hearing concluded on August 14, 1997, the respondent, through counsel, admitted each of the allegations

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of fact contained in the Order to Show Cause but denied the charge of deportability. Counsel for the respondent argued that the respondent's convictions did not constitute aggravated felonies under the Immigration and Nationality Act. The Government attorney, in order to establish the charge of deportability, offered a certified statement of conviction from the circuit court of Cook county which was stipulated to by the respondent's counsel as relating to the respondent. Based upon the respondent's admissions through counsel and upon the Court's review of the conviction record, I find that deportability has been established by evidence which is clear, convincing, and unequivocal. The respondent's conviction for attempted first degree murder and armed violence clearly fall within the definition of aggravated felony under Section 101(a)(43) of the Immigration and Nationality Act.

In lieu of deportation, the respondent's counsel seeks to apply for a 212(c) waiver of deportability on the respondent's behalf and for an indefinite continuance to await changes in the Immigration laws. However, the respondent is statutorily ineligible for a waiver of deportability under Section 212(c) of the Act based upon the amended Immigration statute that went into effect with the passage of the Anti-Terrorist and Effective Death Penalties Act of April 24th, 1996. Under that change in law, an alien convicted of a criminal offense that falls within the definition of an aggravated felony and Section 241(a)(2)(A)(iii)

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is subject to deportation and ineligible for a 212(c) waiver. Accordingly, the respondent's request must be denied and the only order that can be entered in his case is an order of deportation.

ORDER

IT IS ORDERED that respondent's permanent resident status be terminated.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

ROBERT D. VINIKOOR
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of

File A 90 929 508

MIGUEL LARA UNZUETA
Respondent

IN DEPORTATION PROCEEDINGS

Transcript of Hearing

Before ROBERT VINIKOOR, Immigration Judge

Date: August 14, 1997

Place: Chicago, Illinois

Transcribed by DEPOSITION SERVICES, INC. At Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Daniel Plain, Esquire	Yolanda Haces, Esquire

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JUDGE FOR THE RECORD

For the record, this is a continued deportation hearing being held August 14th, 1997 before Immigration Judge Robert D. Vinikoor at the Immigration Court sitting at Chicago. This hearing relates to respondent Miguel Andres Lara Unzueta, File A 90 929 508. We're waiting for this respondent to come into the hearing room at the Pontiac Correctional Center but we have in Chicago with the Judge the respondent's attorney, Yolanda Haces and the Government attorney, Daniel Plain (phonetic sp.). Also, the Spanish interpreter Almay Alvarez.

JUDGE TO MS. HACES

Q. Ms. Haces, would you identify yourself again for the record, please?

A. Yes. For the record, I am Yolanda Haces.

JUDGE TO MR. PLAIN

Q. And, Mr. Plain, would you identify yourself?

A. Dan Plain for the INS, Your Honor.

JUDGE TO MS. HACES

Q. Ms. Haces, we continued the case to give you an opportunity to go over the Order to Show Cause with your client. Can you enter a pleading as to those allegations today?

A. Ah, yes, Your Honor.

Q. Okay. How would you pled as to the factual allegations?

A. We admit the allegations in Paragraph 1, 2, 3, 4, 5, 6

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and 7.

Q. Okay. The respondent is charged with deportability under Section 241(a)(2)(A)(iii). Would you admit or deny that ground of deportation?

A. We admit, Your Honor.

Q. The Government attorney has filed with the Court a certified record of conviction from the circuit court in Cook county which was marked as Exhibit 2 for identification. Would you stipulate that that record relates to your client?

A. It relates to my client and I would like to request a copy to be sent to me, please.

Q. Okay. Well, ah, we did serve a copy on your client previously.

JUDGE TO MR. PLAIN

Q. Mr. Plain, could you - -

A. I'll send a copy to Ms. Haces, Your Honor.

Q. Do you have her notice of appearance in your file?

A. I don't believe I have a G-28 from her.

JUDGE TO MS. HACES

Q. Well, after the hearing, if you would give Mr. Plain your address and then he can have one of his secretaries make a copy of the conviction - -

MR. PLAIN TO JUDGE

Q. That would be me, Your Honor.

JUDGE TO MS. HACES

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Q. - - Conviction record and send it to you.

JUDGE FOR THE RECORD

I'm going to strike the identification marks and receive the record into the, ah, court file as Exhibit 2.

JUDGE TO MS. HACES

Q. Ms. Haces, is there any relief that your client would be seeking in lieu of deportation?

A. Ah, yes, Your Honor. WE are asking for a waiver of deportation under 212(c) as the, ah, there is a question as to whether this is an aggravated felony.

Q. Well, why would you argue that it's not an aggravated felony?

A. Ah, Your Honor, from the, ah, certified conviction that I just had an opportunity to review, it appears that there was a group of young men that got involved in a fight and, ah, all of them were meeting another young man that appears to be a part of the gang.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Let the record reflect that the respondent has now entered the hearing room at the Pontiac Correctional Center.

JUDGE TO MR. LARA

Q. Mr. Lara, would you state your name, please?

A. Lara.

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Q. Ah, your full name?

A. Miguel Lara.

Q. Thank you. Mr. Lara, your attorney, Ms. Haces, has admitted on your behalf that you are a citizen of Mexico, that you first entered the United States in 1980, that you became a permanent resident in 1988, that in 1996, you were convicted of the offenses of attempted first degree murder and armed violence. Ms. Haces has admitted that you are subject to deportation as charged in the Order to Show Cause. She has requested, however, that you not be deported, that you be allowed to apply for a waiver of your deportation under Section 212(c) of the Act. And, there's a question in your case whether you are eligible to apply for that waiver or not.

JUDGE TO MS. HACES

Q. Now, Ms. Haces, you were arguing that the respondent's conviction would not constitute an aggravated felony?

A. Yes, Your Honor, and also - -

Q. So then you would deny the charge of deportability because he's charged with being deportable as someone who has been convicted of an aggravated felony. So, would you deny the charge of deportability?

A. Well, then, I will deny the charges. Yes.

Q. So I'll show that you deny the charge of deportability.

JUDGE TO MR. PLAIN

Q. Mr. Plain, what's your position as to whether

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respondent's convictions constitute an aggravated felony?

A. Your Honor, I think it's obvious that attempted murder with intent to kill or cause injury and armed violence are undoubtedly the classic aggravated felonies, regardless of whether it's this man's name or, as well as a hundred other men's name on the conviction. This respondent was convicted of these offenses. He's sitting in jail for them right now and he needs to be deported for them.

Q. Okay.

JUDGE TO MS. HACES

Q. Ms. Haces, ah, I'm satisfied that the crimes of attempted first degree and armed violence cónstitute crimes of violence under the United States code and they fall within the definition of an aggravated felony in Section 101(a)(43). The Immigration and Nationality Act was amended last year on April 24th, 1996 by the Anti-Terrorist and Effective Death Penalties Act and under the amended Immigration Act, a person who is found deportable for having been convicted of an aggravated felony is no longer eligible to apply for a 212(c) waiver. So, I would find your client ineligible to apply for a 212(c) waiver. Is there anything else that he would apply for?

A. Well, Your Honor, there are several decisions going down now but, ah, regarding the (indiscernible). Mr. Lara has been in this country since he was 3 years old. He has never gone to Mexico. He doesn't speak Spanish well. So in view of all

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these, ah, changes that, ah, are taking place, I think that they are, this law is being reconsidered and there has been already a, I think it's a proposal from Janet Reno regarding this matter regarding the division of families that is taking place because of this decisions.

JUDGE TO MR. LARA

Q. Mr. Lara - -

A. Yes.

Q. How old are you, sir?

A. I'm 20.

Q. And are you single or married?

A. I'm single.

Q. And what family do you have in the United States?

A. My parents.

Q. Do you have any brothers and sisters here?

A. Yes (indiscernible) two sisters and one brother.

Q. Mr. Lara, under the immigration, ah, are your parents citizens or permanent residents?

A. I think they permanent residents.

Q. Under the, ah, Immigration Act as amended, you do not qualify to remain in the United States under any provision of law. So, what I'm going to do is dictate a short decision and enter an order of deportation in your case terminating your residence. Your attorney has argued that there may be some court decisions in the future that will allow you to apply the old law

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at the time that the law was in effect at the time of your conviction rather than the current law or they may pass a new immigration act that would allow you to come back to the United States in the future. Well, that's only speculative. I don't really know what the law in the future will say so I have to apply the law that's in effect now.

A. Okay.

Q. So what I'm going to do is enter a decision and then I'll advise you of your rights to appeal that decision.

A. Yes, please, when (indiscernible) right now when you were talking, right, as I heard it right, you said '96. I got convicted, I got convicted in, ah, '95.

Q. Well, your sentencing was in March of '96, wasn't it?

A. No. It was in March '95 I believe so.

Q. Well, I have the record showing the sentencing was in March of '96 but the law didn't change till the month after, April of '96 so you do have an argument there. This - -

JUDGE TO MR. PLAIN

Q. Mr. Plain, anything else for the record?

A. No, Your Honor.

JUDGE TO MR. LARA

Q. This is going to be the decision in your case, sir.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. LARA

Q. Mr. Lara, that will constitute the decision in your

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Q. Okay.

JUDGE FOR THE RECORD

This hearing stands closed on the conditions stated.

HEARING CLOSED

APPENDIX "B"

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB #1105-0065
Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge

1. List Name(s) and "A" Number(s) of all Applicant(s)/Respondent(s):

LARA-UNZUETA, Miguel Andres
A90-90-929-508

For Official Use Only

! **WARNING TO ALL APPLICANT(S)/RESPONDENT(S):** Names and "A" Numbers of everyone appealing the order must be written in Item #1.

2. Applicant/Respondent is currently ☒ DETAINED ☐ NOT DETAINED.

3. Appeal from the Immigration Judge's decision dated August 14, 1997.

4. **State in detail the reason(s) for this appeal. You are not limited to the space provided below; use more sheets of paper if necessary. Write your name(s) and "A" number(s) on every sheet.**

! **WARNING:** The failure to specify the factual or legal basis for the appeal may lead to summary dismissal without further notice, unless you give specific details in a timely, separate written brief or statement filed with the Board.

1. Miguel Lara came to the United States in 1980 when he was only two ye old. His parents, brothers and sisters are either residents or U. S. citizens. He has uncles and aunts in the State of Illinois and in California who also are either residents or citizens.

2. Miguel Lara has never gone out of the United States, does not speak Spanish well, and has no close relatives in Mexico.

3. He went to school in Chicago, as shown in the attached reports from School and Graduated in June 16, 1992. In September of 1992 he sta high school and attended until December 1993. Copy of letter attac

4. In high school because of peer pressure became engaged with a grou of teenagers and he and other four teenagers were arrested. He was 17 years old and in he and the other four teenagers were convicted March 1996 of attempted murder because of beating another teenager
5. There is the issue as to whether Mr. Lara's charge is a felony whe considering his age and the circumstances of the occurrence.
6. We pray that this Honorable Court reverse the Immigration Judge de and grant Mr. Lara a waiver under Section 212(c). This case shoul considered under the law in effect before April 24, 1996.
7. Mr. Lara's deportation would create a great family hardship by di the family and sending a young man to a country where he has neve

Respectfully submitted,

Yolanda Haces

Staple Check or Money Order Here.
Include your name(s) and "A" number(s)

(Use sheets if necessary)

(Form continues on back)

APPENDIX “C”

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A90 929 508 - Joliet

Date: MAR 30 1998

In re: MIGUEL ANDRES LARA-UNZUETA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Yolanda Haces, Esquire
33 North Dearborn, Suite 1850
Chicago, Illinois 60602

APPLICATION: Waiver of inadmissibility

We have jurisdiction over this timely appeal pursuant to 8 C.F.R. § 3.1(b). The respondent argued on appeal that he is not an aggravated felon. He also has requested consideration for relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). See Matter of Silva, 16 I&N Dec. 26 (BIA 1976). The appeal is dismissed.

The respondent argued on appeal that his convictions for attempted first degree murder and aggravated battery are not aggravated felonies because he was only 17 years old at the time of the occurrence, and lacked the intention to commit the crime. The Board, however, cannot go behind the judicial record to determine the guilt or innocence of the alien. Matter of Polanco, 20 I&N Dec. 894 (BIA 1994); Matter of Fortis, 14 I&N Dec. 576, 577 (BIA 1974); see Trench v. INS, 783 F.2d 181 (10th Cir.), cert. denied, 479 U.S. 961 (1986); Avila-Murrieta v. INS, 762 F.2d 733 (9th Cir. 1985); Zinnanti v. INS, 651 F.2d 420 (5th Cir. 1981) (per curiam); Chiaramonte v. INS, 626 F.2d 1093 (2d Cir. 1980) (foreign conviction); Longoria-Castenada v. INS, 548 F.2d 233 (8th Cir.), cert. denied, 434 U.S. 853 (1977); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); Matter of Danesh, 19 I&N Dec. 669 (BIA 1988); Matter of Khalik, 17 I&N Dec. 518 (BIA 1980). The record contains certified records of the respondent's convictions for the above stated offenses (see Exh. 2). Consequently, we find that the respondent has been convicted of aggravated felony offenses, and was correctly found deportable by the Immigration Judge.

Turning to the respondent's contention that he should be afforded consideration for a waiver of inadmissibility under section 212(c) of the Act, we find that he is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in 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 covered by section 241(a)(2)(A)(i)." See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) § 440(d); Matter of Soriano, Interim Decision 3289 (A.G., Feb. 21, 1997).

A90 929 508

In reaching our decision, we have considered the respondent's argument that AEDPA violates the equal protection clause of the Constitution because the provisions on section 212(c) only apply in deportation proceedings and not in exclusion proceedings. We find, however, that our decision in Matter of Fuentes-Campos, Interim Decision 3318 (BIA 1997) is dispositive of the issue. See also Matter of C-, 20 I&N Dec. 529 (BIA 1992).

Accordingly, the respondent's appeal is dismissed.

ORDER: The appeal is dismissed.

Michael J. Bull

FOR THE BOARD

APPENDIX “D”

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, v. Miguel Andres Lara-Unzueta, Defendant.	No. CR-19-00552-001-PHX-MTL **ORDER**

On May 14, 2019, Defendant Miguel Andres Lara-Unzueta was indicted for illegal reentry in violation of 8 U.S.C. §1326(a) and (b)(1). (Doc 15.) He now moves to dismiss the indictment on grounds that the underlying order of removal violated his due process rights. (Doc. 23 at 1.) The Government filed a response and supplemental exhibits. (Doc. 29.) The Court heard oral argument on October 29, 2019. For the following reasons, Defendant's motion is denied.

I. BACKGROUND

A. Factual and statutory background

Defendant is a native and citizen of Mexico. (Doc. 29 at 1.) He was previously a lawful permanent resident alien of the United States. (Doc. 23 at 2; Doc. 29 at 1.) On March 1, 1996, Defendant pleaded guilty to charges of attempted first-degree murder and armed violence in the Circuit Court of Cook County, Illinois. (*Id.*) Because these charges were "aggravated felonies" under the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1101(a)(43), Defendant was eligible for deportation pursuant to

8 U.S.C. § 1227(a)(2)(A)(iii). At the time of his conviction, however, § 212(c) of the INA permitted a person subject to deportation for committing an "aggravated felony" to apply for discretionary relief from removal in certain circumstances. 8 U.S.C. § 1182(c) (1994) (repealed).

Congress enacted two changes to § 212(c) relief while Defendant was serving a six-year sentence for the state court convictions. First, on April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which eliminated § 212(c) discretionary relief for deportable aliens convicted of aggravated felonies. *See* Pub. L. No. 104-132, 110 Stat. 1214, 1277 (1996). Second, on September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which repealed § 212(c) relief in its entirety. *See* Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-597 (1996).

B. Removal proceedings

Defendant's removal proceedings arising from his state court convictions commenced in January 1997. (Doc. 29 at 2.) During his removal hearing on August 14, 1997, Defendant admitted removability but requested a hearing for discretionary relief from removal under § 212(c) on grounds that his convictions were not "aggravated felonies" under the INA. The Immigration Judge ("IJ") rejected this argument and concluded that Defendant was not eligible for discretionary § 212(c) relief following the AEDPA's enactment. (Doc. 23 at 3.) The IJ terminated Defendant's permanent resident status and ordered him removed. (*Id.*)

Defendant timely appealed to the Board of Immigration Appeals ("BIA"), which affirmed the IJ's decision on March 30, 1998. (*Id.*) Defendant was removed from the United States on June 25, 1998. (*Id.*) In the nearly three months between the BIA's ruling and his removal, Defendant did not challenge the BIA's order by filing a writ of habeas corpus pursuant to 28 U.S.C. § 2241, or by appealing to the appropriate Court of Appeals (in this case, the Seventh Circuit). (*Id.*)

Following his removal, the U.S. Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289,

326 (2001), that the AEDPA did not apply to aliens, like Defendant, who pleaded guilty to a criminal charge before the AEDPA and IIRIRA were enacted. Defendant and the Government agree that the IJ and BIA therefore erred in determining that Defendant was precluded from seeking discretionary relief under § 212(c). (Doc. 23 at 3; Doc. 29 at 3.)

C. Subsequent reentries and legal proceedings

Defendant was again arrested in Illinois on October 3, 2002, this time for armed robbery and attempted armed robbery. (Doc. 29 at 3.) He was subsequently indicted for illegal reentry in violation of 8 U.S.C. § 1326(a) & (b)(2). (*Id.*) As in the present case, Defendant moved to dismiss the indictment, arguing that he was denied due process when the IJ and BIA denied him a hearing for potential relief under § 212(c). (*Id.*)

The District Court for the Northern District of Illinois denied the motion, concluding that Defendant could not meet at least two of the three prongs required by 8 U.S.C. § 1326(d) to collaterally attack his underlying removal. *See United States v. Lara-Unzueta*, 287 F. Supp. 2d 888, 891–92 (N.D. Ill. 2003) (cited in Doc. 29-1 at 7). On April 7, 2004, Defendant was convicted at trial of illegal reentry and sentenced to 65-months' imprisonment. (Doc. 29 at 4.)

Defendant appealed the denial of the motion to dismiss to the Seventh Circuit Court of Appeals. *See United States v. Lara-Unzueta*, No. 04-1954 (7th Cir. May 24, 2005) (cited in Doc. 29-2). On May 24, 2005, the Seventh Circuit affirmed the denial on the same grounds as the District Court. *Id.* at 6. The Seventh Circuit also remanded for a discrete sentencing issue. *Id.*

In connection with the armed robbery charges, Defendant also filed a habeas petition pursuant to 28 U.S.C. § 2241 to challenge his 1998 removal. *See Lara-Unzueta v. Monica*, No. 03 C 6083, 2004 WL 856570 (N.D. Ill. Apr. 20, 2004) (cited in Doc. 29-3). The District Court for the Northern District of Illinois denied his petition on procedural grounds. (*Id.*) Defendant did not appeal. (Doc. 29 at 4.) He was ultimately removed to Mexico for a second time on August 30, 2007. (*Id.*)

In July 2011, Defendant was again indicted for illegal reentry in violation of

8 U.S.C. § 1326(a). *See United States v. Lara-Unzueta*, No. 11 CR 495, 2012 WL 2359350, (N.D. Ill. June 20, 2012), *aff'd*, 735 F.3d 954 (7th Cir. 2013) (cited in Doc. 29-4). He again moved to dismiss the indictment on grounds that his 1998 removal violated his due process rights. The District Court for the Northern District of Illinois denied the motion on June 20, 2012. *See id.* In addition to substantive rulings, the District Court also found that Defendant was collaterally estopped from "presenting the same issue before this court that was already resolved in his prior criminal action." *Id.* at *3. This time, Defendant did not appeal to the Seventh Circuit. (Doc. 29 at 5.) Defendant was removed from the United States for a third time on or about June 28, 2017. (Doc. 15.)

In the instant action, the Government charges that, on or about March 17, 2019, Defendant again reentered the United States in violation of 8 U.S.C. § 1326(a) and (b)(1). (Doc. 1.) On May 14, 2019, he was indicted for illegal reentry. (Doc. 15.) Defendant moves to dismiss the indictment.

II. LEGAL STANDARD

It is a crime for a deported or removed alien to enter, attempt to enter, or be found in the United States without the express consent of the Attorney General. 8 U.S.C. §1326(a).[1] A defendant charged with illegal reentry pursuant to 8 U.S.C. § 1326 may "bring a collateral attack challenging the validity of his underlying removal order, because that order serves as a predicate element of his conviction." *United States v. Ochoa*, 861 F.3d 1010, 1014 (9th Cir. 2017).

Congress has "strictly limited an alien's ability" to challenge a removal order. *United States v. Vidal-Mendoza*, 705 F.3d 1012, 1014–15 (9th Cir. 2013). Defendant must meet the three-part test established under 8 U.S.C. § 1326(d) to successfully challenge his underlying deportation order:

> [A]n alien may not challenge the validity of the deportation order. . . unless

[1] 8 U.S.C. § 1326(b)(1), for which Defendant is also charged, imposes penalties for those aliens whose removal was subsequent to a conviction for commission of three or more misdemeanors in certain circumstances, or for a felony.

the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

8 U.S.C. § 1326(d).

III. ANALYSIS

A. Defendant's collateral attack of the 1998 removal order

Defendant's present indictment cites his immediately prior June 28, 2017 removal. (Doc. 15.) However, Defendant argues that his underlying 1998 removal order, which "has been reinstated a number of times and forms the basis for defendant's prior illegal entry convictions," was obtained in violation of his due process rights. (Doc. 23 at 1.) He asserts that it therefore cannot form the basis for the pending illegal reentry charge. (*Id.*) The Ninth Circuit has held that any "valid reinstatement of a[n] invalid removal order cannot transform the prior order into a valid predicate for an illegal reentry conviction." *United States v. Arias-Ordonez*, 597 F.3d 972, 981 (9th Cir. 2010). The Court therefore assesses Defendant's 1998 removal order as the ultimate predicate of the pending illegal reentry charge.

This Court agrees with the (at least) three federal courts to previously order that Defendant cannot successfully challenge his 1998 removal order. He cannot satisfy all three requirements for collaterally challenging his underlying deportation proceedings.

1. Exhaustion of administrative remedies

The Government does not argue that Defendant failed to exhaust his administrative remedies pursuant to 8 U.S.C. § 1326(d)(1). (Doc. 29 at 3.) The Court recognizes that Defendant appealed the IJ's ruling to the BIA, seemingly exhausting his administrative remedies. (Doc. 23 at 3.) That said, in its 2003 ruling, the Northern District for the District

of Illinois suggested without ruling that Defendant had not, in fact, exhausted his administrative remedies because he did not specifically argue to the IJ and BIA that "his case should be considered under the law in effect prior to the AEDPA and IIRIRA." *Lara-Unzueta*, 287 F. Supp. 2d at 891 (cited in Doc. 29-1 at 7). Those underlying records are not presently before the Court, however. Regardless, this Court need not rule on the exhaustion of administrative remedies because Defendant cannot meet the second prong of 8 U.S.C. § 1326(d).

2. Deprivation of opportunity for judicial review

The Ninth Circuit has held that a "defendant must show an actual or constructive inability to seek judicial review, related to an alleged error or obstacle in the deportation proceedings, to satisfy 1326(d)(2)." *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1133 (9th Cir. 2013). Defendant neither directly appealed the BIA's ruling to the Seventh Circuit, nor filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. (Doc. 29 at 4.) He does not claim that he was unable to do so. Defendant has therefore not demonstrated that "the deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review" as required by 8 U.S.C. § 1326(d)(2).

Defendant heavily relies on *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir. 2004), in which the Ninth Circuit held that a defendant was deprived of the "opportunity for meaningful review because the IJ did not inform him of his right to appeal his deportation order."[2] *Id.* at 1050. That case is readily distinguishable. For one, the IJ "did not inform Ubaldo-Figueroa in English or in Spanish that he had the right to appeal the Immigration Judge's decision." *Id.* at 1049. Defendant does not argue that the same was true in his case—and, in fact, he timely appealed to the BIA. (Doc. 29 at 3.) In addition,

[2] In briefing and at oral argument, Defendant appears to conflate U.S.C. § 1326(d)(1), which requires that an alien "exhausted any administrative remedies," and (d)(2), which requires that the alien be "deprived...of the opportunity for judicial review." The Government does not argue that Defendant failed to exhaust his administrative remedies under U.S.C. § 1326(d)(1). (Doc. 29 at 5.) The Court generally understands Defendant's references to "exhaustion" to refer to his argument that he was deprived of the opportunity for judicial review.

this case is distinguishable from *Ubaldo-Figueroa* because "the IJ did not inform [Ubaldo-Figueroa] that he was eligible for relief from deportation" under the former § 212(c). *Id.* Here, however, Defendant was clearly aware of the potential for § 212(c) relief, given that the IJ denied his request for it. (Doc. 23 at 3.) The Court agrees with the Government that *Ubaldo-Figueroa* is distinguishable and does not support Defendant's argument that he was denied an opportunity for meaningful judicial review.

Defendant also asserts that he did not appeal the BIA's decision because "appellate courts, for years after AEPDA, denied defendants from seeking Section 212(c) relief even if they had pleaded guilty before AEPDA." (Doc. 23 at 5.) This assumed futility, however, does not demonstrate that Defendant was "improperly deprived" of the opportunity for judicial review. As the District Court for the Northern District of Illinois previously recognized when rejecting the same argument from Defendant, "the law would never change if litigants did not request the responsible tribunals to reconsider earlier rulings." *Lara-Unzueta*, 287 F. Supp. 2d at 892 (internal citation omitted) (cited in Doc. 29-1 at 8).

The Court notes that at oral argument on the motion to dismiss, Defendant's counsel raised two cases in support of his futility argument. Those cases, too, are readily distinguishable. In the first case, *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004), the defendant collaterally attacked his underlying removal order, arguing that the IJ did not inform him of his eligibility for potential § 212(c) relief. The defendant appealed to the BIA two years later. *Id.* at 65. He was shortly thereafter deported, and the BIA dismissed his appeal as moot. *Id.* The defendant was subsequently arrested for illegal reentry and moved to dismiss his indictment. *Id.*

The *Copeland* decision is not helpful to Defendant. First, Defendant conflates the first and second prongs of 8 U.S.C. § 1326(d). In *Copeland*, the Second Circuit examined whether the defendant "exhausted" his administrative remedies for the purposes of § 1326(d)(1)—which the Government does not argue in the pending case. (Doc. 29 at 5.) Even if it were relevant, however, the Second Circuit's holding is actually counterproductive for Defendant. The Second Circuit stated that, with one exception that

is inapplicable here, "there is no futility exception…[s]tatutory exhaustion requirements such as Section 1326(d)(1) are mandatory, and courts are not free to dispense with them." *Id.* at 66–67 (internal citation omitted). Moreover, the opinion's discussion of the opportunity for judicial review prong of 8 U.S.C. § 1326(d) does not help Defendant, either. The court noted that the *Copeland* defendant could not appeal his deportation directly to a federal court for reasons not present in the pending case. *Id.* at 67–68; *see also Lara-Unzueta*, 287 F. Supp. 2d at 892 ("[Defendant] could have sought a direct appeal to the Seventh Circuit from the decision of the BIA.") (cited in Doc. 29-1 at 8). And with respect to habeas review pursuant to 28 U.S.C. § 2241, the *Copeland* court held that, "where habeas review is technically available, judicial review will be deemed to have been denied if resort to a habeas proceeding was not realistically possible." *Copeland*, 376 F.3d at 68. Habeas review was not realistically possible in *Copeland* because the BIA did not rule on the defendant's appeal before he was deported, therefore prohibiting any meaningful opportunity to seek habeas review. *Id.* at 69. The same was not true in the pending case, however, in which Defendant had nearly three months between the BIA's ruling and his removal during which to file a habeas petition. (Doc. 29 at 3.) *Copeland* is not persuasive regarding Defendant's futility argument.

The second case that Defendant's counsel raised at oral argument, *Zara v. Ashcroft*, 383 F.3d 927 (9th Cir. 2004), is not on point. That case held that the requirement that an alien raise particular issues on appeal to the BIA in order to exhaust remedies also applies in the case of "streamlined" decisions, in which a single member of the BIA affirms an IJ's decision without opinion. *Id.* at 931. The *Zara* opinion could not reasonably be construed as waiving the judicial review requirement of 8 U.S.C. § 1326(d)(2) in any context, including for perceived futility of appeal.

In the present case, Defendant unpersuasively argues that he was "effectively" denied the opportunity for meaningful judicial review because further appeal would have been futile. (Doc. 23 at 5.) Crucially, he has not argued that the IJ or BIA failed to inform him of his right to appeal, nor that they prevented him from doing so. Rather, "[h]e freely

admits that he was able to (and did) appeal the IJ's deportation order to the BIA, and he identifies no impediment to his ability to appeal the BIA's decision to a federal court." *United States v. Gonzalez-Villalobos*, 724 F.3d at 1133 (*citing United States v. Adame-Orozco*, 607 F.3d 647, 652 (10th Cir. 2010)). For this independent reason, Defendant's collateral attack on his underlying 1998 removal order fails.

3. Fundamentally unfair

Because Defendant failed to establish that his 1998 proceedings improperly deprived him of the opportunity for judicial review, this Court need not decide whether the underlying removal order was "fundamentally unfair." *See* 8 U.S.C. § 1326(d)(3). Nonetheless, the Court next turns to this requirement.

An underlying removal order is "fundamentally unfair" if: "(1) [a defendant's] due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Zarate–Martinez,* 133 F.3d 1194, 1197 (9th Cir. 1998), *cert. denied,* 525 U.S. 849, 119 S.Ct. 123 (1998).

The Court finds that this case is factually distinct from *Ubaldo-Figueroa* and others that have found a due process violation where that the defendant was never *made aware* of the possibility of relief from removal. *See, e.g., Ubaldo-Figueroa*, 364 F.3d at 1050 ("The requirement that the IJ inform an alien of his or her ability to apply for relief from removal is mandatory, and [f]ailure to so inform the alien [of his or her eligibility for relief from removal] is a denial of due process that invalidates the underlying deportation proceeding.") (internal quotations omitted); *see also United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir. 2001) ("Therefore, when the record before the Immigration Judge 'raises a reasonable possibility' of relief from deportation under this provision, it is a denial of due process to fail to inform an alien of that possibility at the deportation hearing.") (internal citation omitted); *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (finding a due process violation where "the IJ should have known" that the defendant was eligible for relief from removal, but "never mentioned the § 212(h) waiver or any other possible mechanism to obtain relief from deportation.") As previously noted, Defendant

was clearly aware of the possibility of § 212(c) relief. (Doc. 23 at 3.)

The Court recognizes that Ninth Circuit authority also suggests that the improper *denial* of a request for § 212(c) relief constitutes a violation of due process. *See United States v. Leon-Paz*, 340 F.3d 1003, 1007 (9th Cir. 2003) (A removable alien, "like St. Cyr, was entitled to the continued protection of § 212(c), and the IJ erred when he told Leon that no relief was available. There was, therefore, a due process violation, and the district court erred when it held to the contrary."). Even accepting without specifically ruling that the IJ may have violated Defendant's due process rights, Defendant has not made a showing of prejudice. *Zarate–Martinez,* 133 F.3d at 1197.

To establish prejudice, a petitioner "does not have to show that he actually would have been granted relief. Instead, he must only show that he had a 'plausible' ground for relief from deportation." *Arrieta*, 224 F.3d at 1079 (internal citation omitted). This is notably a more generous standard than that which the Seventh Circuit applied when it held that Defendant's underlying removal order was not fundamentally unfair: "[Defendant] cannot show prejudice by speculating that there is existed a possibility—no matter how small—that he might have been granted relief. To show prejudice, he was required to establish that the IJ's awareness of his discretion under 212(c) 'would have yielded him relief from deportation.' That is a showing that even [Defendant] acknowledges he did not, and could not, make." *USA v. Lara-Unzueta*, No. 04-1954, at 6 (7th Cir. May 24, 2005) (cited in Doc. 29-2 at 7) (internal citation omitted).

Even applying this Circuit's standard, however, Defendant has not shown that he would have had a "plausible" ground for discretionary § 212(c) relief. In awarding § 212(c) relief, "[t]he IJ must balance the social and humane considerations presented on the alien's behalf against the adverse factors including the alien's undesirability as a permanent resident." *Kahn v. I.N.S.*, 36 F.3d 1412, 1413 (9th Cir. 1994). Positive factors include "the existence of family ties within the United States[,...] residence of long duration in this country, hardship to the alien and family if deported, history of employment, property or business ties, community service, and, when there is a criminal record, genuine

rehabilitation." *Id.* at 1413, n.1. Negative factors "include the nature of the ground for deportation, the presence of other violations of the immigration laws, the nature, recency, and seriousness of any criminal record, and the presence of any other evidence of the applicant's bad character or undesirability as a legal permanent resident of the United States." *Id.* Defendant has not presented the Court with a basis for assessing whether he had a "plausible" ground for relief in light of these factors. (Doc. 23 at 5.) Were it necessary, the Court would require additional information from the parties to assess whether Defendant suffered prejudice. Because the Court has concluded that Defendant was not deprived of the opportunity for meaningful judicial review under 8 U.S.C. § 1326(d)(2), however, this inquiry is not necessary. Even upon a showing of fundamental unfairness, Defendant would not be able to meet the three necessary statutory requirements to successfully collaterally attack his underlying removal order.

B. Issue preclusion

Independently, the Court agrees with the Government that Defendant's motion is barred by issue preclusion.[3] (Doc. 29 at 5.) The preclusive effect of a federal court judgment is determined by federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Issue preclusion, also known as collateral estoppel, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Id.* (*citing New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)) (internal quotations omitted). The doctrine protects parties from "the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor*, 553 U.S. at 892 (*citing Montana v. United States*, 440 U.S.

[3] The Government also suggests that the motion is barred by claim preclusion (or res judicata). (Doc. 29 at 5.) Claim preclusion requires "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (internal citation omitted). "The phrase 'final judgment on the merits' is often used interchangeably with 'dismissal with prejudice.'" *Id.* Because the denial of Defendant's prior motions to dismiss was not a final judgment on the merits, claim preclusion does not properly preclude review of Defendant's motion.

147, 153–154 (1979)) (alteration omitted).

At least three federal courts have rejected Defendant's motion to dismiss his then-pending indictment on grounds that his underlying 1998 removal order was legally insufficient. *See Lara-Unzueta*, 287 F. Supp. 2d at 891 (cited in Doc. 29-1 at 7); *Lara-Unzueta*, No. 04-1954 at 4 (7th Cir. May 24, 2005) (cited in Doc. 29-2 at 5); *Lara-Unzueta*, 2012 WL 2359350, at *2 (cited in Doc. 29-4 at 6–7). The last to do so, the District Court for the Northern District of Illinois, also concluded in 2012 that Defendant's motion to dismiss was barred by collateral estoppel:

> The record reflects that in the prior criminal case in the United States district court in 2003, when [Defendant] was arrested and convicted for illegal reentry, [Defendant] also filed a similar motion to dismiss the indictment as he has done in this case. In that case, which occurred after the ruling in *St. Cyr*, [Defendant] raised virtually the same arguments. The district court denied [Defendant's] motion to dismiss, finding that the collateral attack on the deportation order was barred under 8 U.S.C. 1326(d)....The Government has shown that [Defendant] is collaterally estopped from presenting the same issue before this court that was already resolved in his prior criminal action.

Lara-Unzueta, 2012 WL 2359350, at *3 (cited in Doc. 29-4 at 7). This Court agrees. Even if the Court did not independently conclude that Defendant's collateral attack on his 1998 removal failed, the doctrine of issue preclusion prevents it from overriding the three federal courts to previously decide as much. *Taylor*, 553 U.S. at 892.

The fact that only Seventh Circuit courts have previously ruled on Defendant's underlying removal order does not, as Defendant's counsel suggested at oral argument, prevent the application of issue preclusion. Numerous courts have held as much. For example, in *Burlington N. R. Co. v. Hyundai Merch. Marine Co.*, 63 F.3d 1227, 1238–39 (3d Cir. 1995), the Third Circuit rejected an argument that issue preclusion was inapplicable because the relevant issue was previously litigated in the Ninth Circuit. "Having already litigated and lost this issue within the Ninth Circuit in *Atlantic Mutual*,

Burlington now attempts to institute another action raising the same issue within another federal circuit in the hopes that this court would reach a conclusion different from that previously reached. . . .Burlington cannot now relitigate this issue that it already contested and lost in *Atlantic Mutual*. Issue preclusion applies." *Id.*; *see also Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 258 (D.C. Cir. 1992) ("[T]he fact that the substantive law may be different in the two jurisdictions does not affect the application of issue preclusion"); *National Post Office Mail Handlers v. American Postal Workers Union*, 907 F.2d 190, 194 (D.C. Cir. 1990) ("The doctrine of issue preclusion counsels us against reaching the merits in this case, however, regardless of whether we would reject or accept our sister circuit's position.").

It is irrelevant for issue preclusion purposes that this is the first case in which a Ninth Circuit court would assess Defendant's underlying removal order. Independent from this Court's substantive analysis, this matter is barred by issue preclusion.

IV. CONCLUSION

Defendant's collateral attack on his 1998 deportation order does not satisfy at least the second prong of the three-part test set out in 8 U.S.C. §1326(d) and is therefore rejected. Separately, given that three federal courts (regardless of the fact that they were all in the Seventh Circuit) have also ruled that Defendant cannot successfully collaterally attack his 1998 removal order, issue preclusion bars this Court from allowing the same.

IT IS ORDERED that Defendant's Motion to Dismiss Indictment (Doc. 23) is **denied**. Excludable delay pursuant to 18 U.S.C. § 3161(h)(1)(D) is found to run from August 1, 2019.

Dated this 1st day of November, 2019.

Michael T. Liburdi

Michael T. Liburdi
United States District Judge

APPENDIX “E”

NOT FOR PUBLICATION

FILED

APR 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIGUEL ANDRES LARA-UNZUETA, Defendant-Appellant.	No. 20-10077 D.C. No. 2:19-cr-00552-MTL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Submitted April 13, 2021**
San Francisco, California

Before: THOMAS, Chief Judge, and R. NELSON and HUNSAKER, Circuit Judges.

Appellant Miguel Andres Lara-Unzueta appeals the district court's denial of his motion to dismiss his indictment for illegal reentry. *See* 8 U.S.C. § 1326(a),

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

(b)(2).[1] Lara-Unzueta argues that his underlying 1998 removal order was invalid because the Immigration Judge ("IJ") erroneously rejected his request for a § 212(c) hearing for discretionary relief. *See INS v. St. Cyr*, 533 U.S. 289, 326 (2001), *superseded by statute on other grounds as stated in Nasrallah v. Barr*, 140 S. Ct. 1683 (2020). But Lara-Unzueta has not demonstrated that the deportation proceedings "improperly deprived [him] of the opportunity for judicial review." 8 U.S.C. § 1326(d)(2). Thus, he cannot collaterally attack the underlying 1998 removal order.

To satisfy 8 U.S.C. § 1326(d)(2), a defendant "must show an actual or constructive inability to seek judicial review, related to an alleged error or obstacle in the deportation proceedings." *United States v. Gonzalez-Villalobos*, 724 F.3d 1125, 1133 (9th Cir. 2013). On appeal, however, Lara-Unzueta argues only that (1) the IJ erred; (2) the record as to his § 212(c) eligibility had not been developed because of the error; and (3) he did not understand the requirements for a § 1326 collateral attack at the time of his 1998 removal. None of these arguments demonstrate Lara-Unzueta was actually or constructively "foreclose[d]" from challenging the IJ's decision not to hold a § 212(c) hearing. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987), *adopted by statute as stated in United*

[1] We review de novo the denial of a motion to dismiss based on 8 U.S.C. § 1326(d). *United States v. Garcia-Martinez*, 228 F.3d 956, 960 (9th Cir. 2000) (citation omitted).

States v. Gonzalez-Flores, 804 F.3d 920 (9th Cir. 2015). Lara-Unzueta did, in fact, appeal the IJ's § 212(c) determination to the Board of Immigration Appeals and could have sought judicial review of the Board's decision affirming Lara-Unzueta's ineligibility for statutorily relief.

Without the requisite showing under 8 U.S.C. § 1326(d)(2), Lara-Unzueta cannot collaterally attack his 1998 removal order.[2]

AFFIRMED.

[2] Because we conclude Lara-Unzueta has not made the requisite showing under 8 U.S.C. § 1326(d)(2), we need not address the other arguments presented on appeal.

APPENDIX “F”

FILED

MAY 25 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIGUEL ANDRES LARA-UNZUETA, Defendant-Appellant.	No. 20-10077 D.C. No. 2:19-cr-00552-MTL-1 District of Arizona, Phoenix ORDER

Before: THOMAS, Chief Judge, and R. NELSON and FORREST, Circuit Judges.

Appellant's motion for panel rehearing is DENIED.