

**Immigration Law**—Nunc Pro Tunc Relief Unavailable Where Erroneous Legal Interpretation Rendered Alien Ineligible for Deportation Waiver—*Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005)

An alien convicted of an aggravated felony is deportable from the United States.<sup>1</sup> Under former section 212(c) of the Immigration and Nationality Act (INA), however, certain classes of lawful permanent residents convicted of deportable offenses are eligible to apply for a waiver of deportation.<sup>2</sup> In *Pereira v. Gonzales*,<sup>3</sup> the First Circuit Court of Appeals considered, for the first time, whether an alien who was erroneously denied the opportunity to apply for section 212(c) relief may be entitled to nunc pro tunc relief to rectify an error in immigration proceedings.<sup>4</sup> The court held that nunc pro tunc relief is unavailable to remedy an agency's erroneous interpretation of law.<sup>5</sup>

Ramiro Fernandes Pereira, a citizen of Portugal, entered the United States as a lawful permanent resident in 1969.<sup>6</sup> On July 14, 1995, he pled nolo contendere to sexual assault and child molestation in Rhode Island Superior Court, and was sentenced to thirty years of imprisonment.<sup>7</sup> In response to Pereira's aggravated felony convictions, the Immigration and Naturalization Service (INS) instituted deportation proceedings against him in October of 1995, and an immigration judge (IJ) held a hearing in October of 1996.<sup>8</sup> Based

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1. 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (outlining classes of deportable aliens). An "aggravated felony" is defined to include, inter alia, "a crime of violence . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F) (2000). Congress frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable. See 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 74.04 [1][b] (rev. ed. 2006) (explaining changes brought about by 1996 amendments); Sara A. Martin, Note, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 694-96 (1999) (describing expanded definition of aggravated felony). See generally Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589 (1998) (criticizing expanded aggravated felony definition).

2. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (providing relief from deportation under appropriate circumstances) (repealed 1996).

3. 417 F.3d 38 (1st Cir. 2005).

4. *Id.* at 40 (considering whether nunc pro tunc relief appropriate). "A *nunc pro tunc* order is an order that has retroactive legal effect." *Patel v. Gonzales*, 432 F.3d 685, 693 (6th Cir. 2005) (citing BLACK'S LAW DICTIONARY 1097 (7th ed. 1999)) (defining nunc pro tunc).

5. 417 F.3d at 47 (stressing plain language of section 212(c) dictated result). The Second Circuit reached the opposite conclusion in the prior year. *Edwards v. INS*, 393 F.3d 299, 312 (2d Cir. 2004) (holding nunc pro tunc relief available as justice requires). The *Pereira* court, however, rejected the Second Circuit's approach, creating a circuit split. 417 F.3d at 46-47.

6. *Id.* at 40.

7. *Id.* at 40-41 (reviewing Pereira's criminal convictions).

8. *Id.* at 40-41. As of March 1, 2003, the INS ceased to exist and its enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement within the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. 107-296, § 471, 116 Stat. 2135, 2205 (2002).

on *In re Soriano*,<sup>9</sup> where the Board of Immigration Appeals (BIA) held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applied retroactively, the IJ determined that Pereira was statutorily ineligible for a section 212(c) waiver.<sup>10</sup> As a result, Pereira was ordered to be deported.<sup>11</sup> On appeal, the BIA affirmed the IJ's order, rejecting Pereira's argument that the AEDPA did not apply retroactively.<sup>12</sup>

The First Circuit Court of Appeals subsequently reversed *Soriano*, holding that aliens in deportation proceedings prior to the AEDPA's enactment remain eligible for a section 212(c) waiver.<sup>13</sup> Several months later, the United States Supreme Court reached a similar result.<sup>14</sup> Upon Pereira and the INS jointly filing a motion to reopen, the IJ and the BIA acknowledged their previous legal error, but concluded that Pereira was nevertheless statutorily ineligible for the waiver because he served over five years' imprisonment for the aggravated felony conviction.<sup>15</sup> In May of 2003, the United States District Court for the District of Rhode Island denied Pereira's petition for writ of habeas corpus.<sup>16</sup> Pereira then appealed to the First Circuit Court of Appeals, which affirmed the denial of the habeas petition, holding that nunc pro tunc relief may not be used to rectify the erroneous legal interpretation that rendered Pereira statutorily ineligible for section 212(c) relief.<sup>17</sup>

Under former INA section 212(c), an alien who had been a lawful permanent resident for at least seven years could request discretionary relief from deportation, provided the alien served less than five years in prison.<sup>18</sup> In 1996, the AEDPA's enactment rendered all aggravated felons statutorily ineligible for

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9. 21 I. & N. Dec. 516 (1997).

10. 417 F.3d at 40-41. The AEDPA rendered section 212(c) relief unavailable to aliens convicted of aggravated felonies. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996) (codified as amended at 8 U.S.C. § 1182 (2000)). The IJ applied the AEDPA retroactively. 417 F.3d at 41.

11. *Id.* at 40-41.

12. *Id.* Pereira argued against the retroactive application of the AEDPA because his convictions occurred prior to the statute's enactment. *Id.*

13. See *Wallace v. Reno*, 194 F.3d 279, 286-87 (1st Cir. 1999) (holding AEDPA not retroactive); see also 417 F.3d at 41 (acknowledging *Wallace* effectively reversed *Soriano*).

14. See *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (concluding aliens formerly eligible for section 212(c) relief may still seek such relief).

15. 417 F.3d at 41 (discussing the BIA's decision). Section 511(a) of the Immigration Act of 1990 (IMMACT), which was codified at former section 212(c), bars any alien who has served five years of imprisonment for an aggravated felony from seeking a section 212(c) waiver. Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990) (repealed 1996). The IJ and BIA reached this conclusion despite the fact that Pereira accrued five years of imprisonment prior to applying for section 212(c) relief due to their erroneous legal determinations. 417 F.3d at 41-42.

16. *Id.* at 42.

17. *Id.* at 47 (concluding nunc pro tunc relief unavailable to correct "defect in a judgment, order, or decree"). Following the First Circuit's denial of his habeas petition, Pereira filed a petition for rehearing and a petition for rehearing en banc, both of which were denied. *Pereira v. Gonzales*, 436 F.3d 11, 11 (1st Cir. 2006) denying *reh'g en banc* of 417 F.3d 38 (1st Cir. 2005).

18. Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

section 212(c) relief.<sup>19</sup> Later that year, Congress repealed section 212(c), replacing it with a new form of discretionary relief referred to as “cancellation of removal.”<sup>20</sup>

The AEDPA’s enactment generated significant litigation addressing its effect on aliens with convictions pre-dating the statute’s existence.<sup>21</sup> The INS took the position that section 440(d) of the AEDPA applied retroactively, and the Attorney General agreed.<sup>22</sup> In 2001, however, the United States Supreme Court rejected that analysis.<sup>23</sup> Following the Supreme Court’s ruling prohibiting the AEDPA’s retroactive application, it became unclear whether aliens erroneously barred from applying for section 212(c) relief may be entitled to equitable relief, such as nunc pro tunc consideration, to rectify the errors.<sup>24</sup>

Nunc pro tunc consideration is an avenue of discretionary relief historically available to aliens who, but for a judicial error, would have been eligible for a deportation waiver.<sup>25</sup> In *Edwards v. INS*,<sup>26</sup> where the petitioners were

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19. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996) (codified as amended at 8 U.S.C. § 1182 (2000)).

20. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(b), 110 Stat. 3009, 548 (1996) (current version at Immigration and Nationality Act, 8 U.S.C. § 1229b (2000)). “Removal” is a term of art that is synonymous with “deportation.” See *Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004) (discussing changes in nomenclature). Cancellation of removal, a form of relief unavailable to aliens convicted of aggravated felonies, is generally more difficult to obtain than section 212(c) relief. See generally Paul B. Hunker III, *Cancellation of Removal or Cancellation of Relief?—The 1996 Iirira Amendments: A Review and Critique of Section 240A(A) of the Immigration and Nationality Act*, 15 GEO. IMMIGR. L.J. 1 (2000) (providing analysis and critique of cancellation of removal). The AEDPA and the IIRIRA, both passed in 1996 and aimed at alleviating the negative public response to America’s growing population of illegal immigrants, drastically reformed United States’ immigration policy. See William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885, 885 (1997) (stating IIRIRA passed to “address . . . public backlash”).

21. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 965-67 (1998) (describing 1996 legislation and litigation resulting from it).

22. *In re Soriano*, 21 I. & N. Dec. 516, 519, 540 (1997) (holding AEDPA’s amendments eliminating section 212(c) relief for aggravated felons fully retroactive).

23. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (ruling section 212(c) amendments not retroactive); see also *Wallace v. Reno*, 194 F.3d 279, 286-87 (1st Cir. 1999) (holding AEDPA not retroactive).

24. See *Edwards v. INS*, 393 F.3d 299, 309-11 (2d Cir. 2004) (analyzing whether nunc pro tunc relief available to rectify erroneous legal interpretation); *De Cardenas v. Reno*, 278 F. Supp. 2d 284, 295-96 (D. Conn. 2003) (determining appropriateness of granting equitable relief to correct judicial error). Nunc pro tunc relief allows a court sitting in equity to give a legal action retroactive effect where the circumstances are appropriate. See *Edwards v. INS*, 393 F.3d 299, 308-13 (2d Cir. 2004) (describing circumstances where nunc pro tunc relief appropriate); see also *Mitchell v. Overman*, 103 U.S. 62, 65 (1881) (holding nunc pro tunc available as justice requires).

25. See *Edwards v. INS*, 393 F.3d 299, 308-11 (2d Cir. 2004) (setting forth history of nunc pro tunc doctrine in immigration cases); see also *Iavorski v. INS*, 232 F.3d 124, 130 n.4 (2d Cir. 2000) (noting consistent use of nunc pro tunc relief in immigration proceedings). The BIA has awarded nunc pro tunc relief in appropriate circumstances for over sixty years, and Congress has not attempted to eliminate this practice. See *Edwards v. INS*, 393 F.3d 299, 308-11 (2d Cir. 2004) (discussing BIA’s use of nunc pro tunc relief and Congress’s acquiescence); *In re S-*, 6 I. & N. Dec. 392, 394-96 (1955) (concluding legislative history indicates no intent on Congress’s part to preclude nunc pro tunc awards); *In re A-*, 3 I. & N. Dec. 168, 172-73 (1948) (reasoning award of section 212(c) waiver nunc pro tunc appropriate); *In re L-*, 1 I. & N. Dec. 1, 6-7 (1940)

statutorily ineligible for section 212(c) relief due to erroneous retroactive applications of the AEDPA, the Second Circuit held that nunc pro tunc relief may, in appropriate circumstances, be awarded to rectify errors in immigration proceedings.<sup>27</sup> The court indicated that such relief is necessary to mitigate the potentially harsh results of immigration laws.<sup>28</sup> The court noted that an erroneous denial of the opportunity to apply for relief from deportation may amount to a due process violation entitling the petitioner to relief, but based its decision solely on the nunc pro tunc issue.<sup>29</sup>

In *Pereira v. Gonzales*, the First Circuit Court of Appeals considered whether a court may award nunc pro tunc relief to an alien who was previously denied the opportunity to apply for section 212(c) relief due to an agency's erroneous legal interpretation.<sup>30</sup> The court adhered to *Fierro's* holding, concluding that nunc pro tunc relief is unavailable to remedy a defective "judgment, order, or decree" made in good faith that expressed the intention of

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(holding alien may seek relief under section 212(c)'s predecessor statute, nunc pro tunc).

26. 393 F.3d 299 (2d Cir. 2004).

27. *Edwards v. INS*, 393 F.3d 299, 312 (2d Cir. 2004) (holding nunc pro tunc relief available to remedy agency's error). In *Fierro v. Reno*, the First Circuit concluded that nunc pro tunc relief may only be used to correct inadvertent or clerical errors under Massachusetts state law. 217 F.3d 1, 4-6 (1st Cir. 2000) (holding such relief unavailable to remedy erroneous legal interpretation). In *Edwards*, however, the Second Circuit rejected this analysis and deemed it inappropriate in the immigration context. *Edwards v. INS*, 393 F.3d 299, 309 n.12 (2d Cir. 2004) (reasoning immigration cases have adopted different approach); see also *Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir. 1993) (concluding due process and fairness dictate accepting alien's case for nunc pro tunc consideration).

28. *Edwards v. INS*, 393 F.3d 299, 310 (2d Cir. 2004) (reasoning agency error would otherwise deprive alien of opportunity to seek relief). The United States Supreme Court and the circuit courts of appeals have noted the severity of immigration laws, and in particular, deportation laws. See, e.g., *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963) (referring to deportation as "drastic sanction"); *United States v. Copeland*, 376 F.3d 61, 72-73 (2d Cir. 2004) (emphasizing "serious consequences" of deportation); *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (noting "Draconian" nature of deportation laws). In addition, many commentators have criticized deportation laws. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1950-54 (2000) (discussing 1996 amendments' negative impacts on families of legal permanent residents convicted of crimes); James M. Czaplak, Note, *Removal of Judicial Review Under the Illegal Immigration Reform and Immigrant Responsibility Act: The Different Interpretations of 8 U.S.C. 1252(b)(3)(B)*, 38 SUFFOLK U. L. REV. 603, 610-12 (2005) (describing severe hardship deportation imposes on aliens and their families); Paige Krasker, Note, *Crimes of the Past Revisited: Legal Aliens Deported for Past Crimes Under the Retroactive Application of the Antiterrorism and Effective Death Penalty Act*, 22 SUFFOLK TRANSNAT'L L. REV. 109, 125 (1998) (observing harshness of deportation).

29. *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004) (declining to address due process argument); see also *United States v. Sosa*, 387 F.3d 131, 138 (2d Cir. 2004) (holding IJ's failure to inform of relief can, if prejudicial, be fundamentally unfair); *United States v. Copeland*, 376 F.3d 61, 70-71 (2d Cir. 2004) (concluding non-advisement of right to relief may result in fundamentally unfair procedural error); *Choeum v. INS*, 129 F.3d 29, 38-40 (1st Cir. 1997) (explaining deprivation of alien's procedural rights may constitute due process violation). But see *Smith v. Ashcroft*, 295 F.3d 425, 429-30 (4th Cir. 2002) (declaring no liberty or property interest in section 212(c) relief); *Oguejiofor v. Att'y Gen. of U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (holding no constitutional right to relief from deportation).

30. 417 F.3d at 40 (considering whether nunc pro tunc relief available to rectify error in immigration proceedings). This was an issue of first impression for the First Circuit. *Id.* at 26, 42. Indeed, the only circuit court to previously address the issue at the time was the Second Circuit in *Edwards*. *Id.* at 46.

the agency at the time it was made.<sup>31</sup> The court reasoned that section 212(c)'s plain language indicates Congress's intent to render discretionary relief unavailable to aliens incarcerated for at least five years on aggravated felony offenses.<sup>32</sup> Rejecting the analysis in *Edwards*, where the Second Circuit confronted the same issue, the court held that Pereira may not avail himself of nunc pro tunc relief.<sup>33</sup>

The First Circuit correctly concluded that the alien in this particular case was not entitled to nunc pro tunc relief.<sup>34</sup> The court's broad holding, however, improperly limits the availability of equitable relief to aliens who may present strong claims for such relief.<sup>35</sup> The court followed the approach in *Fierro*, where the First Circuit concluded that nunc pro tunc relief is unavailable to correct erroneous legal interpretations.<sup>36</sup> *Fierro*'s holding, however, only applies to Massachusetts state law; the court did not consider the scope of nunc pro tunc relief under immigration law.<sup>37</sup> In fact, the *Fierro* court explicitly limited its holding to the facts of the case, and cautioned against analyzing nunc pro tunc relief issues out of context.<sup>38</sup>

The *Pereira* court failed to recognize that, to maintain an equitable judicial system, nunc pro tunc relief must remain available in the context of

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31. *Id.* at 47 (citing *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir. 2000)) (determining availability of relief for aggravated felons having served five years of their sentence).

32. 417 F.3d at 45, 47 (concluding history of Congress's desire to expel convicted aggravated felons supports court's interpretation). The court interpreted the five-year time bar of IMMACT section 511(a), which was codified at section 212(c), as a "grace period intended primarily to screen out those convicted felons whose period of actual imprisonment turns out to be less than five years" and concluded that equitable relief was inappropriate. *Id.* at 47 n.6 (justifying denial of relief to petitioner); see also Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (1990) (repealed 1996).

33. *Id.* at 47 (declining to follow *Edwards* approach). The court also concluded that there was no due process violation entitling Pereira to relief. *Id.* at 45-47 (reasoning agency acted in good faith).

34. *Pereira v. Gonzales*, 436 F.3d 11, 16 (1st Cir. 2006) (Lipez, J., dissenting) (concluding, "as a matter of equity," Pereira undeserving of nunc pro tunc relief), *denying reh'g en banc* of 417 F.3d 38 (1st Cir. 2005). The equities did not support an award of nunc pro tunc relief because Pereira was convicted of child molestation and sexual assault. *Id.*

35. *Pereira v. Gonzales*, 436 F.3d 11, 13, 17 (1st Cir. 2006) (Lipez, J., dissenting) (criticizing broad holding of court) *denying reh'g en banc* of 417 F.3d 38 (1st Cir. 2005). Furthermore, the court erred by focusing on the good faith of the agency rather than the consequences of the flawed due process analysis. *Id.* at 17-19 (arguing denial of Pereira's due process claim correct, but court's due process analysis incorrect).

36. 417 F.3d at 47 (citing *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir. 2000)) (holding nunc pro tunc relief only available to correct inadvertent or clerical errors). The *Pereira* court declined to follow the Second Circuit's well-reasoned *Edwards* decision, which properly rejected the *Fierro* approach, deeming it inappropriate in the immigration context. *Id.* at 46-47 (citing *Edwards v. INS*, 393 F.3d 299, 309 n.12 (2d Cir. 2004)).

37. See *Fierro v. Reno*, 217 F.3d 1, 4-5 (1st Cir. 2000) (examining whether state court custody decree proper nunc pro tunc order "under state law"); see also *Pereira v. Gonzales*, 436 F.3d 11, 16 n.7 (1st Cir. 2006) (Lipez, J., dissenting) (explaining while *Fierro* involved immigration law, nunc pro tunc issue decided under state law), *denying reh'g en banc* of 417 F.3d 38 (1st Cir. 2005); *Edwards v. INS*, 393 F.3d 299, 309 n.12 (2d Cir. 2004) (stating *Fierro* holding inapplicable to immigration law).

38. See *Fierro v. Reno*, 217 F.3d 1, 4-7 (1st Cir. 2000) (describing nunc pro tunc as a "loose concept" and discouraging "categorical pronouncements"); see also *Pereira v. Gonzales*, 436 F.3d 11, 16 n.7 (1st Cir. 2006) (Lipez, J., dissenting) (explaining *Fierro* limited to its facts), *denying reh'g en banc* of 417 F.3d 38 (1st Cir. 2005).

immigration law.<sup>39</sup> Deportation is a drastic sanction with a potentially devastating impact on aliens and their families.<sup>40</sup> In fact, deportation has been described as “surpass[ing] all but the most Draconian criminal penalties” in severity.<sup>41</sup> Due to the harsh consequences of deportation, nunc pro tunc relief is often necessary to rectify errors in immigration proceedings where equities favor the alien petitioner.<sup>42</sup> Thus, the First Circuit erred in importing *Fierro*’s holding into the immigration context.<sup>43</sup>

The *Pereira* court reasoned that Congress intended to preclude aliens incarcerated for at least five years on aggravated felony offenses from seeking discretionary relief.<sup>44</sup> The court, however, ignored the fact that nunc pro tunc relief has long been available to remedy errors in immigration cases.<sup>45</sup> Moreover, the BIA has consistently awarded section 212(c) waivers nunc pro tunc for over sixty years, and Congress has not attempted to curtail this practice.<sup>46</sup>

In *Pereira v. Gonzales*, the First Circuit Court of Appeals considered whether an alien may be entitled to nunc pro tunc relief to rectify an agency’s erroneous legal determination. While the court correctly denied *Pereira* nunc pro tunc relief, the court failed to recognize that such relief is necessary to mitigate the harsh consequences of deportation laws. Consequently, the court improperly imported the *Fierro* holding into the immigration context, establishing precedent that may preclude deserving petitioners from obtaining any form of relief from deportation.

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39. See *Pereira v. Gonzales*, 436 F.3d 11, 15-16 (1st Cir. 2006) (Lipez, J., dissenting) (maintaining such relief necessary where equities favor petitioner), *denying reh’g en banc of 417 F.3d 38* (1st Cir. 2005); see also *Edwards v. INS*, 393 F.3d 299, 310-11 (2d Cir. 2004) (holding nunc pro tunc relief required where agency error results in deprivation of significant benefit); *Batanic v. INS*, 12 F.3d 662, 667-68 (7th Cir. 1993) (concluding nunc pro tunc consideration appropriate where procedural defect results in ineligibility for statutory relief).

40. See *supra* note 28 (emphasizing harshness of deportation laws and severe impact on immigrants and their families).

41. *Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (holding ambiguous deportation statutes, including section 212(c), construed in favor of aliens).

42. See *Pereira v. Gonzales*, 436 F.3d 11, 16-17 (1st Cir. 2006) (Lipez, J., dissenting) (explaining appropriateness of nunc pro tunc relief assessed on case-by-case basis), *denying reh’g en banc of 417 F.3d 38* (1st Cir. 2005).

43. See *Pereira v. Gonzales*, 436 F.3d 11, 16 n.7 (1st Cir. 2006) (Lipez, J., dissenting) (criticizing majority’s reliance on *Fierro*), *denying reh’g en banc of 417 F.3d 38* (1st Cir. 2005).

44. See 417 F.3d at 45-48 (concluding plain language of 212(c) demonstrates Congress’s intent to eliminate relief for such individuals).

45. See *Pereira v. Gonzales*, 436 F.3d 11, 14-15 (1st Cir. 2006) (Lipez, J., dissenting) (explaining repeated use of nunc pro tunc relief to prevent deportation where appropriate), *denying reh’g en banc of 417 F.3d 38* (1st Cir. 2005); see also *Edwards v. INS*, 393 F.3d 299, 308-11 (2d Cir. 2004) (describing long history of nunc pro tunc relief in immigration law).

46. See *Pereira v. Gonzales*, 436 F.3d 11, 14 (1st Cir. 2006) (Lipez, J., dissenting) (explaining Congress repeatedly “codified, recodified, and amended” section 212(c) without imposing jurisdictional requirements), *denying reh’g en banc of 417 F.3d 38* (1st Cir. 2005); *supra* note 25 and accompanying text (describing BIA’s history of using nunc pro tunc relief and Congress’s acquiescence).