IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

YAKI ELBAUM, Petitioner,	)	
v.	)	3:99-CV-1717-D
WILLIAM HARRINGTON, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE AND JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, Respondents.	)	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Under the provisions of Title 28, United States Code, Section 636(b) and an Order of the Court of implementation thereof, the subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions, and recommendation of the Magistrate Judge, as evidenced by her signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type of Case: This is a petition for habeas corpus relief brought pursuant to the provisions of Title 28, United States Code, Section 2241.

Parties: Petitioner, Yaki Elbaum ("Elbaum"), is an alien who is subject to a final order of deportation from the United States. Elbaum is not presently detained by the Immigration and Naturalization Service ("INS").

Respondents ("government") are William Harrington, District Director of the Dallas Office of the INS, and Janet Reno, Attorney General of the United States.

Statement of the Case: On July 30, 1999, Elbaum filed the instant petition for writ of

habeas corpus challenging a final order of deportation entered against him after he was convicted of an aggravated felony. His specific objection to the deportation order is that he is entitled to a discretionary waiver pursuant to § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, as will be discussed below, because the permanent provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 apply to this case, this Court has no jurisdiction to entertain Elbaum's petition. Accordingly, for the reasons that follow, this Court recommends that Elbaum's petition be denied in its entirety.

Factual Background: The underlying facts here are not in dispute. Elbaum is a citizen of Israel, who entered the United States on February 9, 1990 and was granted conditional permanent resident status on July 9, 1990. **Govt.'s Resp. Exhibit 6**. On December 23, 1992, he became a lawful permanent resident of the United States. **Id.** On September 5, 1996 he was convicted of "Fraud and Related Activity with Access Devices", in violation of 18 U.S.C. § 1029(a)(5), in the United States District Court for the Western District of Texas, Austin Division. **Id., Exhibits 2 & 6.** He was sentenced to a term of twenty-four months imprisonment and ordered to pay restitution in the amount of $12, 925.76. **Id., Exhibit 2 at 2, 5.** Based on his conviction, on March 30, 1998, the INS issued a Notice to Appear ("NTA") to Elbaum ordering him to appear and show cause why he should not be removed from the United States. **Id., Exhibit 6.** The NTA charged that Elbaum was subject to removal under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA")(codified at 8 U.S.C. § 1227(a)(2)(A)(iii)), due to his conviction for an aggravated felony as defined in amended Section 101(a)(43)(M)(codified at 8 U.S.C. § 1101(A)(43)(M)).[1] **Id.**

[1] The definition of "aggravated felony" under the INA was amended--for convictions entered on or after October 25, 1994--to include offenses involving fraud or deceit in which the loss to the victim exceeded $200,000. *See* Immigration and Nationality Technical Corrections

On November 19, 1998 Elbaum was ordered deported to Israel. **Id., Exhibit 8**. The Board of Immigration Appeals ("BIA") dismissed Elbaum's appeal on June 4, 1999. **Govt.'s Resp. Ex. 10.** Thereafter, the INS ordered him to report for removal to Israel on August 9, 1999. **Pet., Exhibit 2; Govt.'s Resp. at 4**. He filed the instant petition on July 30, 1999 whereupon the government rescinded its order that he report for immediate removal. **Id.**

In the instant § 2241 petition, Elbaum challenges his final deportation order claiming that because his crime predated the enactment of Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA")[2] and the Antiterrorist and Effective Death Penalty Act of 1996 ("AEDPA")[3], that he is eligible for a "waiver of excludibility" under repealed 8 U.S.C. § 1182(c).[4] **Pet. at 4.** He

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Act of 1994, Pub.L. No. 103-416, § 222(a), 108 Stat. 4305 (1994). In 1996 the INA was further amended by the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA") to the reduce the threshold victim loss amount to $10,000. *See* IIRIRA, Pub.L. No. 104-208, § 321(a)(7), 110 Stat. 3009 (1996) (reducing victim loss amount to $10,000); 8 U.S.C. § 1101(a)(43)(M)(i) (reflecting these amendments); *See also Zgombic v. Farquharson*, 89 F.Supp.2d 220, 226 (D. Conn. 2000)(citing § 321 and 8 U.S.C. § 1101(a)(43)(M)(i)).

[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009 was signed into law on September 30, 1996.

[3] The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214 was enacted on April 24, 1996.

[4] Former INA § 212(c), 8 U.S.C. § 1182(c) provided: "Aliens lawfully admitted for permanent residence who temporarily [go] abroad ... and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General...."). Before it was amended, § 212(c) gave the Attorney General discretion to waive deportation for some long-time legal permanent residents. *See Requena-Rodriguez v. Pasquarell*, 190 F. 3d 299, 302 (5th Cir. 1999)(citing INA § 212(c), 8 U.S.C. § 1182(c)). INA § 212(c) was repealed effective 1 April 1997. *See* IIRIRA, Pub.L. No. 104-208, § 304(b), 110 Stat. 3009-597 (1996). Under § 304(b), criminal aliens are ineligible for waivers of exclusion. *See* INA § 240A, 8 U.S.C. § 1229b (replacing INA § 212(c)).

maintains that denying him the opportunity for a hearing to determine his entitlement to a waiver under § 1182(c) constitutes a denial of due process. **Pet. at 7, 10.** He asks the Court to enjoin the INS from deporting him and for "reasonable bail."[5] **Id. at 8.**

Before the Court can address the merits of Elbaum's request for a § 1182(c) waiver hearing, it must assess its jurisdiction over his § 2241 petition. Since the passage of IIRIRA in 1996, two sets of rules govern federal habeas jurisdiction. ***See Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 302-03 (5th Cir.1999).** IIRIRA's transitional rules govern deportation proceedings that commenced before April 1, 1997, IIRIRA's effective date, and conclude more than thirty days after IIRIRA's passage on September 30, 1996. ***Id.*(citing IIRIRA § 309(c)(1), (4), 110 Stat. 3009-625, -626).** IIRIRA's permanent rules govern deportation proceedings commenced after April 1, 1997. ***See Max-George v. Reno*, 205 F.3d 194, 197 n.3 (5th Cir. 2000)(citing *Requena-Rodriguez*, 190 F.3d at 302–03).**

The Fifth Circuit has found that habeas jurisdiction exists for cases governed by IIRIRA's transitional rules, explaining in *Requena-Rodriguez*:

> We conclude that § 2241 habeas jurisdiction continues to exist under IIRIRA's transitional rules in cases involving final orders of deportation against criminal aliens, and that habeas jurisdiction is capacious enough to include constitutional and statutory challenges if those challenges cannot be considered on direct review by the court of appeals.
> ...
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> The transitional provisions in IIRIRA § 309(c)(4) declare only that "there shall be no appeal " of decisions about discretionary relief or in criminal aliens' cases. IIRIRA §

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[5] Because the government rescinded its order that Elbaum report for immediate removal after he filed the instant petition, this Court presumes that his request for injunctive relief is moot or at the very least subsumed by the relief requested in this § 2241 petition.

> 309(c)(4)(E), (G), 110 Stat. 3009-626 (emphasis added). These provisions refer to direct appeals to the circuit courts, see Lerma de Garcia, 141 F.3d at 216-17, rather than to habeas jurisdiction in the district courts.
> ***Requena-Rodriguez*, 190 F.3d at 305.**

However, in *Requena-Rodriguez*, the Fifth Circuit also noted that the "jurisdiction-stripping" provisions of IIRIRA's permanent provisions were significantly more explicit and suggested that habeas review might not be available under IIRIRA's permanent rules. ***Requena-Rodriguez*, 190 F. 3d at 305-06 (citing 8 U.S.C. §§ 1252(a)(2)(B) and 1252(a)(2)(C) and 1252(g)).** Later, in *Max-George*, the Circuit explicitly found that § 1252(a)(2)(C)[6] of IIRIRA's permanent provisions, which applies to certain criminal aliens, eliminated habeas jurisdiction for cases falling under within its purview. ***Max-George*, 190 F. 3d at 199 ("....IIRIRA's permanent provisions eliminate § 2241 habeas corpus jurisdiction for those cases that fall within § 1252(a)(2)(C)")**. In sum, under the transitional rules, the Court has jurisdiction over Elbaum's petition; under the permanent rules, it does not.

Elbaum's case falls under the permanent rules because his deportation proceedings did not commence until March 30, 1998, the date the INS issued its NTA ordering Elbaum to appear and show cause why he should not be deported. ***See generally Prichard-Ciriza* v. *INS*, 978 F.2d 219, 224 n. 9 (5th Cir.1992)(the INS commences deportation proceedings when the order to**

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[6] § 1252(a)(2)(C) provides, in pertinent part:
Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section (a)(2) or 1227(a)(2)(A)(iii) ["aggravated felony"], (B) ["controlled substances"], (C) ["certain firearm offenses"], or (D) ["miscellaneous crimes"] of this title, or any offense covered by section 1227(a)(2)(A)(ii) ["crimes of moral turpitude"] of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(I) of this title. *Max-George*, 205 F. 3d at 198(quoting 8 U.S.C. § 1252(a)(2)(C)).

show cause is issued); *see also* Govt.'s Resp. Exhibit 6 (NTA)). Moreover, his conviction for an aggravated felony falls squarely under § 1252(a)(2)(C) of IIRIRA's permanent provisions, found by the Fifth Circuit in *Max-George* to have eliminated habeas jurisdiction for cases falling within its reach. Because Elbaum's case falls under § 1252(a)(2)(C) of IIRIRA's permanent provisions, his petition must be dismissed for lack of jurisdiction.

RECOMMENDATION:

For the reasons set forth above, the undersigned Magistrate Judge **RECOMMENDS** that Elbaum's petition for writ of habeas corpus brought pursuant to Title 28, United States Code, Section 2241, be **DISMISSED for lack of subject matter jurisdiction**.

JANE J. BOYLE
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions, and recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions, and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, and recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. Failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. ***Douglass v. United States Auto Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996)(*en banc*).**

UNITED STATES MAGISTRATE JUDGE