

**FILED**

February 16, 2005

Charles R. Fulbruge III  
Clerk

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 04-50590  
Summary Calendar

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ANDRES ALEJANDRO-GONZALEZ,

Petitioner-Appellant,

versus

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL; RUDY FRANCO, Warden  
of Reeves County Detention Center; DISTRICT DIRECTOR OF  
IMMIGRATION & NATURALIZATION SERVICE, Immigration and  
Naturalization Service of Houston, Texas; BUREAU OF IMMIGRATION  
AND CUSTOMS ENFORCEMENT,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 3:04-CV-29-FM

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Before JONES, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:\*

Andres Alejandro-Gonzalez ("Alejandro"), federal prisoner #14330-179, appeals from the district court's order construing his 28 U.S.C. § 2241 petition as a motion for relief pursuant to 28 U.S.C. § 2255 and dismissing the constructive 28 U.S.C. § 2255 motion without prejudice for lack of jurisdiction. Alejandro moves for a stay of deportation pending resolution of his appeal; his motion is **DENIED** as moot.

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Alejandro contends solely that the current version of section 241(a)(5) of the Immigration and Naturalization Act should not have been applied retroactively to the reinstatement of the original order of removal against him. According to Alejandro, that provision became effective on April 1, 1997, after he reentered the United States in April 1996. He argues that the retroactive application of § 241(a)(5) and its accompanying administrative regulations deprives him of due process rights he might otherwise enjoy.

We do not address the merits of Alejandro's contentions at this time. The district court should not have sua sponte recharacterized Alejandro's 28 U.S.C. § 2241 petition as a 28 U.S.C. § 2255 motion (Alejandro's first 28 U.S.C. § 2255 motion) without first notifying Alejandro and warning him "that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provid[ing him] an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has." Castro v. United States, 124 S. Ct. 786, 792 (2003). We express no opinion regarding whether or not a recharacterization would be proper following the notice and opportunity required by Castro.

**VACATED AND REMANDED.**