"ARRIVING ALIENS" AND ADJUSTMENT OF STATUS

Practice Advisory[1]
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Prior to 2006, Department of Homeland Security (DHS) regulations barred a noncitizen from adjusting to permanent resident status if he or she was 1) an "arriving alien"; *and* 2) in removal proceedings. Four courts of appeals struck down these regulations because they violated the adjustment of status statute, INA § 245.[2] In response to these decisions, United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) rescinded the regulatory bar on adjustment and replaced it with interim regulations which, with one exception, gave USCIS sole jurisdiction over the adjustment applications of "arriving aliens" in removal proceedings.[3] These interim regulations remain in effect.

The interim regulations provide an avenue for parolees in removal proceedings who are otherwise eligible to adjust their status.[4] However, because neither the regulations, nor EOIR require that an immigration judge continue or administratively close an individual's removal case while the adjustment application is pending with USCIS, the applicant is at risk of being removed before the adjustment application is decided. This practice advisory explains the impact of the interim regulations and their implementation, defines key concepts, and suggests strategies to ensure that parolees in removal proceedings who are eligible to adjust status are able to do so before they are removed.

Who is an "arriving alien"?

The regulations define an "arriving alien" as:

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[2] *See Scheerer v. Attorney General,* 445 F. 3d 1311 (11th Cir. 2006); *Bona v. Gonzales,* 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales,* 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *but see Momin v. Gonzales,* 447 F.3d 447 (5th Cir.), *vacated and remanded,* 2006 U.S. App. LEXIS 21923 (5th Cir. Aug. 25, 2006) (upholding regulations) and *Mouelle v. Gonzales,* 416 F.3d 923 (8th Cir.), *vacated and remanded,* 126 S. Ct. 2964 (2006) (same).

[3] 8 C.F.R. §§ 245.2(a)(1) (USCIS) and 1245.2(a)(1) (EOIR); *see also* 71 Fed. Reg. 27587 (explaining the agencies' motivation for replacing the former regulations with the interim regulations).

[4] For other eligibility requirements and bars, *see* INA §§ 245(a) *et seq.*; 8 C.F.R. § 245.1.

> [A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after such parole is terminated or revoked.[5]

Thus, an "arriving alien" is either someone who attempted an entry at a port of entry but was not admitted or someone who is interdicted at sea. Parolees fall within this definition because, at a port of entry, they are permitted to enter but are not admitted.[6] Additionally, lawful permanent residents (LPR) are classified as "arriving aliens" if DHS determines that they are "seeking admission" under the definition for the term "admission."[7] In contrast, a noncitizen who entered without inspection is *not* an "arriving alien" because he or she did not seek to enter at a port of entry. Similarly, a noncitizen who was admitted after inspection is not an "arriving alien," even if that person subsequently falls out of status.[8]

How can I determine if my client is an "arriving alien"?

DHS will allege whether a noncitizen is an "arriving alien" on the Notice to Appear (NTA). Specifically, at the top of the NTA there is a section in which the immigration officer must indicate whether the person is alleged to be an "arriving alien"; someone present in the United States who was not admitted or paroled; or someone who was admitted and now is subject to removal. These designations appear immediately before the factual allegations on the NTA.

Your client can tell you how he or she entered the United States and thus can confirm or refute an "arriving alien" designation. If the client's entry was not through a port of entry, then an "arriving alien" allegation on the NTA is incorrect. Such a designation not only affects which agency has jurisdiction over an adjustment application, it could adversely impact your client's ability to gain release from detention.[9] In a case in which

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[5] 8 C.F.R. §§ 1.2 and 1001.1(q).

[6] *See* INA § 101(a)(13)(B) (specifying that a noncitizen who is paroled is not considered "admitted"); INA § 212(d)(5) (same).

[7] *See* INA § 101(a)(13)(C) (specifying that a returning LPR is not seeking admission unless one of six exceptions exists).

[8] For more on this topic, *see* the Council's practice advisory, Inspection, Entry and Admission.

[9] ICE takes the position that an "arriving alien" is not eligible for bond even if the individual has been placed in regular rather than expedited proceedings, and instead is eligible only for parole at ICE's discretion. *See* ICE Directive No. 11002.1, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," Dec. 8, 2009 (hereinafter ICE Directive), available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-

a client relates facts indicating that the designation is incorrect, you can contest the allegation of "arriving alien" just as you might contest a factual allegation or charge of inadmissibility or deportability. If the individual is not an "arriving alien," the immigration judge would have jurisdiction over any adjustment application that your client might file while in removal proceedings.

What do the interim regulations do?

The interim regulations detail which agency (USCIS or EOIR) has jurisdiction over an adjustment application filed by an "arriving alien." The regulations specify, at 8 C.F.R. § 245.2(a)(1), that USCIS has jurisdiction over the adjustment application of any noncitizen "unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1)." Thus, USCIS has jurisdiction over *all* adjustment applications except those over which an immigration judge has jurisdiction.

In turn, 8 C.F.R. § 1245.2(a)(1) states that an immigration judge does not have jurisdiction over an adjustment application of an "arriving alien" in removal proceedings, with one exception. Under this exception, an immigration judge has jurisdiction over the adjustment application of an "arriving alien" in removal proceedings if:

- the individual properly filed an adjustment application with USCIS while in the U.S.;
- the individual departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed adjustment application;
- the application for adjustment of status was denied by USCIS; and
- DHS placed the parolee in proceedings either upon the individual's return to the U.S. pursuant to the advance parole or after USCIS denied the adjustment application.[10]

The interim regulations do not place any limits on USCIS' exercise of discretion. While the rule invited public comment about whether, *in the future*, there should be limits on a judge's favorable exercise of discretion in these cases, no restrictions were included in the interim regulations. Consequently, as the supplementary information preceding the interim regulations makes clear, USCIS adjudicators must apply the same standards to these adjustment applications as they would to any other adjustment application; specifically, they must apply the standards that have been developed by Board and federal court case law.[11]

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parole_of_arriving_aliens_found_credible_fear.pdf. Moreover, under the regulations, there is no review of these parole decisions by an immigration judge. 8 C.F.R. §§ 236.1(c)(11)(i); 1003.19(h)(2)(i).

[10] 8 C.F.R. § 1245.2(a)(1)(ii); see also ICE Directive, *supra*.

[11] 71 Fed. Reg. at 27590.

Why was this rule adopted?

USCIS and EOIR rescinded the prior regulatory bar on adjustment of status by "arriving aliens" in removal proceedings in response to federal court decisions which struck down this bar and held that there must be some forum in which an "arriving alien" in removal proceedings is given the opportunity to apply for adjustment.

In deciding upon the forum in which "arriving aliens" in removal proceedings would be able to adjust, the agencies adopted the model that existed prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub.L. 104–208, 110 Stat. 3009-546 (IIRIRA). At that time, there were two major types of proceedings to expel a noncitizen from the United States: exclusion proceedings, which were brought against individuals who had never made an entry into the United States; and deportation proceedings, brought against individuals who had entered the United States. Under this former model, "arriving aliens" were subject to exclusion proceedings. A noncitizen in exclusion proceedings was not barred from applying for adjustment of status. Generally, however, only the former INS had jurisdiction over the adjustment applications of individuals in exclusion proceedings; immigration judges did not have jurisdiction over these applications, with one limited exception.[12] Moreover, an individual remained eligible to adjust even when he or she had a final order of exclusion, as long as this order had not been executed.[13]

Does USCIS have jurisdiction to decide an adjustment application if the "arriving alien" is under a final order of removal?

Yes, USCIS has jurisdiction over these adjustment applications even when a removal order has become administratively final, as long as the order has not been executed—that is, as long as the individual has not departed, whether voluntarily or not, after the removal order was issued.

A noncitizen who is inadmissible is not eligible for adjustment. Significantly, as explained in a USCIS memorandum, "[t]he removal order, itself, does not make the [noncitizen] inadmissible until it is executed."[14] Thus the removal order is not a bar to

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[12] *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996). The current exception allowing for immigration judge jurisdiction parallels the exception that existed in exclusion proceedings. *See supra* at 3.

[13] *See Matter of C—H—*, 9 I&N Dec. 265 (Reg. Comm'r 1961) ("Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled"); *see also Matter of Garcia,* 16 I&N Dec. 653 (BIA 1978) (INS had a policy of "refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the visa petition would make the beneficiary immediately eligible for adjustment of status").

[14] *See* USCIS Memorandum, "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007),

adjustment. However, it is still important to consider whether the underlying ground upon which the removal order is based continues to render the noncitizen inadmissible and therefore ineligible for adjustment. In many cases, this will not be a problem, because the removal order will be based upon INA § 212(a)(7), the inadmissibility ground for individuals who, at the time of admission, did not have a valid visa or other entry document. In *Matter of C.—H.—*, 9 I&N Dec. 265 (Reg. Comm'r 1961), the noncitizen was found inadmissible and ordered excluded because she was not in possession of a valid immigrant visa. Before the exclusion order was executed, she applied for adjustment of status with the former INS. In a precedent decision, the Regional Commissioner held that the exclusion order did not render her ineligible for adjustment. Although she was inadmissible for lack of a valid visa at the time the exclusion order was issued, she subsequently became eligible for a visa (the basis for her adjustment application) and thus was no longer inadmissible on this ground. The reasoning of *Matter of C—H—* is equally applicable to a case involving a final order of removal rather than exclusion.

In contrast, a removal order issued in absentia will render the noncitizen ineligible for adjustment, unless the order was issued more than ten years ago. An in absentia order—if issued with proper notice—carries a ten-year bar to adjustment.[15]

Finally, it is important to keep in mind that any noncitizen with a final order of removal is always at risk of being removed. As in all cases, the client and the attorney must evaluate this risk before the client decides whether to apply for adjustment.

What strategies are there to prevent a removal order from being issued—and executed—before USCIS decides the adjustment application?

Under the interim regulations, the removal hearing and the adjustment application proceed on two independent tracks—the first under the jurisdiction of EOIR and the second, of USCIS. As a result, there is always the risk that a removal order will be issued and executed before USCIS decides the adjustment application. If the noncitizen is removed before the adjustment application is decided, he or she will have lost the opportunity to adjust.

Unfortunately, EOIR has not issued any instructions to immigration judges that would ensure that removal proceedings do not outpace the adjustment application, and the BIA

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http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/adjuststatus011207.pdf ("The removal order, itself, does not make the alien inadmissible until it is executed."); *Matter of C—H—, supra* ("Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled"); *see also Matter of Yauri*, 25 I&N Dec. 103, 106-107 (BIA 2009) (relying on statements by counsel for DHS and concluding that USCIS retains jurisdiction over the adjustment application of an "arriving alien" even when there is a final order of removal).

[15] INA § 240(b)(7). In limited circumstances, an in absentia order of removal may be reopened. INA § 240(b)(5)(C).

has not issued a precedent decision to this effect. To the contrary, as discussed below, the BIA has held that, generally, it will not reopen removal cases where the request is based upon a pending adjustment application before USCIS.[16] In the absence of more favorable guidance, the following strategies may lessen the risk of removal facing noncitizens in this situation:

1. **When removal proceedings are pending before the immigration judge.**

If removal proceedings remain pending before an immigration judge, you can seek administrative closure until USCIS reaches a decision on the adjustment application. Administrative closure is a procedural mechanism used to temporarily remove a case from the immigration court's calendar.[17] A motion for administrative closure can be brought jointly or by the respondent alone. An immigration judge can grant administrative closure even if DHS opposes it.[18] In evaluating such a motion, the immigration judge should consider all relevant factors including, the reason for administrative closure; the basis of any opposition; the likelihood the respondent will succeed on any petition or application being pursued outside removal proceedings; the anticipated duration of the closure; the responsibility of either party for any delay; and the likely outcome of removal proceedings once the case is re-calendared.[19]

2. **When an appeal is pending before the BIA.**

The BIA has the authority to order that a case be administratively closed. Consequently, a respondent can request that the Board remand a pending appeal to the immigration judge with instructions that the case be administratively closed. Any such request should address the factors from *Matter of Avetisyan*, discussed above. The BIA's reluctance to *reopen* these cases, after a final order has been issued, should not carry over to a case in which there is no final order of removal because the appeal remains pending, and the request instead is for administrative closure. In fact, one of the factors for administrative closure in a pending case is the likelihood that a respondent will succeed on an application for relief *being pursued outside of the removal proceeding*.[20]

3. **When there is a final order of removal but the noncitizen is still within the United States.**

If an administratively final removal order has been issued, the respondent can move to reopen proceedings and then seek to have them administratively closed. Any such motion must be filed with the immigration judge or the BIA—whichever last had the case. The regulations specify that there can be only one motion to reopen and that it must

[16] *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009).

[17] *Matter of Avetisyan*, 25 I&N Dec. 688, 690 (BIA 2012).

[18] *Id.* at 690, 692-93, 697.

[19] *Id.* at 696.

[20] *Id.* (emphasis added).

be filed within 90 days of the final order.[21] The time and number limitations on a motion to reopen do not apply if all parties agree to the motion and file it jointly.[22] Consequently, a first step is always to ask the DHS attorney to agree to the motion and to a joint filing.

Both the BIA and immigration judges have the authority to reopen a case *sua sponte* irrespective of the time and number limitations, and a respondent can request that they do so.[23] In *Matter of Yauri*, the BIA held that, with respect to time and number-barred motions to reopen, it generally would not exercise its discretion to reopen sua sponte "for an arriving alien to pursue adjustment of status before USCIS."[24] The BIA emphasized its lack of jurisdiction over the adjustment application and framed the motion to reopen as an effort to "stay" execution of the final order.[25]

Several courts have rejected the reasoning of the BIA in *Matter of Yauri*. For example, the Ninth Circuit refused to defer to *Matter of Yauri*, finding that it conflicted with the motion to reopen regulation.[26] Specifically, the court found that the stay regulation the BIA relied upon, which grants the BIA the authority to stay the execution of a removal order while a motion to reopen is pending, in no way restricts the BIA's authority to reopen a case. Thus, the court rejected the conclusion that the BIA had no authority under the regulations to reopen a case of an "arriving alien" in order to provide the noncitizen the opportunity to adjust before USCIS.[27] The Eighth Circuit similarly rejected the BIA's reasoning, explaining that once a case is reopened there no longer is a final order to "stay" while USCIS decides the adjustment application.[28]
As a practical matter, the most straightforward way to ensure that a client with a final order of removal remains within the United States until USCIS decides the adjustment is to obtain the cooperation of DHS wherever possible. This may involve asking DHS to

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[21] 8 C.F.R. §§ 1003.2(c)(2); 1003.23(b)(1).
[22] 8 C.F.R. §§ 1003.2(c)(3)(ii); 1003.23(b)(4)(iv).
[23] 8 C.F.R. §§ 1003.2(a); 1003.23(b)(1).
[24] 25 I&N Dec. 103 (BIA 2009).
[25] *Id.*
[26] *Singh v. Holder*, 771 F.3d 647, 652 (9th Cir. 2014).
[27] *Id.*
[28] *Clifton v. Holder*, 598 F.3d 486, 493-94 (8th Cir. 2010); see also *Freire v. Holder*, 647 F.3d 67, 70 (2d Cir. 2011) (reversing decision denying a continuance to allow USCIS the opportunity to decide the adjustment application of the respondent, who was an "arriving alien"); *Ceta v. Mukasey*, 535 F.3d 639, 647 (7th Cir. 2008) (explaining that successful implementation of the interim regulations required at least "minimal coordination" between EOIR and USCIS or the "statutory opportunity to seek adjustment will be a mere illusion."); *Kalilu v. Mukasey*, 548 F.3d 1215, 1218 (9th Cir. 2008) (stressing that the opportunity the interim regulations provide for an "arriving alien" to demonstrate eligibility for adjustment is "rendered worthless where the BIA … denies a motion to reopen … that is sought in order to provide time for USCIS to adjudicate a pending application.").

join a motion to reopen or asking it to stay removal until after the adjustment application is decided.[29]

Where an "arriving alien" under a final, unexecuted order of removal is adjusted by USCIS, are there any further steps that should be taken?

Upon adjustment, the applicant becomes an LPR. The grant of LPR status supersedes any removal order that previously had been issued. Unfortunately, however, DHS officials, and particularly officers at ports of entry, may not understand this if they see that a final order of removal remains in the noncitizen's record. Consequently, an "arriving alien" under a final order of removal who successfully adjusts his or her status before USCIS should move to reopen and terminate the removal proceedings. If the case is reopened and terminated, there will no longer be an administratively final order in the records. In turn, this could make return to the United States after a trip abroad less risky for the individual.

In *Matter of Yauri*, the BIA ultimately granted exactly this relief, finding that once the adjustment application had been granted, reopening solely for the purpose of terminating the removal proceedings was "warranted."[30]

What remedy is there if USCIS denies the adjustment application?

The statute and regulations do not provide for an administrative appeal of a denial of an adjustment application by USCIS. Moreover, because an immigration judge does not have jurisdiction over the adjustment applications of "arriving aliens," these individuals cannot renew their adjustment applications in proceedings. Therefore, the only available administrative relief is a motion to USCIS to reopen or reconsider the denial.

Alternatively, it may be possible to challenge the denial of an adjustment application in a federal district court under the Administrative Procedure Act (APA). For more on this topic, see the American Immigration Council's Practice Advisory, Immigration Lawsuits and the APA: the Basics of a District Court Action.

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[29] *See* 8 C.F.R. §§ 241.6, 1241.6.

[30] 25 I&N Dec. at 112. The BIA addressed two pending motions to reopen in *Matter of Yauri*. The first was the respondent's motion, filed while her adjustment application was pending with USCIS and seeking reopening and a continuance until USCIS decided the adjustment application. DHS opposed this motion. Before the BIA issued its decision, however, Ms. Yauri's adjustment application was granted. DHS then filed its own motion to reopen for the purpose of terminating proceedings. The Board addressed both motions, denying the respondent's (even though by the time the Board ruled, it had become moot), and granting the one filed by DHS.