



# Immigration Law Advisor

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## The Meaning of "Admission" and "Admitted" in the Immigration and Nationality Act

by Sarah K. Barr

### Introduction

More than a decade has passed since Congress fundamentally altered the landscape of the immigration laws by replacing the formerly separate processes of "exclusion" and "deportation" with a single "removal" proceeding. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). The new regime shifted the central emphasis of removal proceedings to focus on an alien's "admission" to the United States rather than on the alien's "entry." To effectuate this new focus, IIRIRA substituted the concepts of "admitted" and "admission" for those of "entry" and "exclusion" throughout the Immigration and Nationality Act. Although IIRIRA eliminated the statutory definition of "entry," the statute preserved the concept of "entry" in the new statutory definitions of "admission" and "admitted," which mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A). The phrase "lawful entry" is not defined in the Act.

Despite the seemingly straightforward import of the terms, the meanings of "admission" and "admitted" have created perplexing interpretation challenges for the Immigration Courts and appellate bodies. The sweeping substitution of these terms throughout the Act unwittingly infused the statute with substantial ambiguities that the Executive Office for Immigration Review ("EOIR") is charged with resolving.

The impact of these ambiguities is far reaching. For example, the concept of admission determines which charges of removal apply to a particular alien (grounds of deportation versus grounds of inadmissibility), whether an alien is removable by virtue of events occurring after admission (such as an aggravated felony committed at any time after admission or

a crime involving moral turpitude committed within 5 years after the date of admission), and whether an alien is eligible for certain forms of relief (such as adjustment of status, waivers, or cancellation of removal for permanent residents).

This article will survey decisions by the Board of Immigration Appeals and the Federal circuit courts of appeals interpreting the terms “admission” and “admitted” in those sections of the Act that most frequently raise interpretation challenges for adjudicators. The article will also briefly address the Board and circuit court decisions interpreting the phrases “lawfully admitted for permanent residence” and “seeking admission.” Particular emphasis will be placed on the interplay between the concepts of admission and adjustment of status. The goal of this article is not to advocate for any particular definition of these terms and phrases, but rather to illuminate the current jurisprudence in order to assist adjudicators who are confronted with these issues.

### **The Concepts of “Entry” and “Admission”**

Prior to IIRIRA, an alien was placed into exclusion or deportation proceedings depending on whether he or she had “entered” the United States. The Act defined “entry” in part as “any coming of an alien into the United States from a foreign port or place or from an outlying possession, whether voluntary or otherwise.” Section 101(a)(13) of the Act (1994). The Board interpreted “entry” to “involve[] (1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer; or (3) actual and intentional evasion of inspection at the nearest inspection point; coupled with (4) freedom from restraint.” *Matter of Pierre*, 14 I&N Dec. 467, 468 (BIA 1973) (citations omitted).

The term “entry” centrally references a physical event—the act of crossing into the United States. Accordingly, under pre-IIRIRA law, an alien was generally deemed to have “entered” the United States if he or she was physically in the country. This presence meant the alien would be placed in deportation, rather than exclusion, proceedings, and could benefit from the greater procedural rights afforded in deportation proceedings. Gerald Seipp, *Law of “Entry” and “Admission”: Simple Words, Complex Concepts*, 05-11 Immigr. Briefings 1, 6 (Nov. 2005) (stating that “aliens applying for entry or

in parole status were subjected to exclusion proceedings, whereas aliens who had achieved an entry were entitled to deportation hearings with attendant benefits, such as enhanced due process, eligibility for bond, and potential eligibility for suspension of deportation”). The creation of a unified removal proceeding under IIRIRA was intended in large part to eliminate this incentive toward unlawful entry. *See id.* at 16; Larry M. Eig, Congressional Research Service, *Immigration: New Consequences for Illegal Presence* 1 (1997).

Although exclusion and deportation proceedings were abolished under IIRIRA, Congress retained two sets of grounds for removal that are distinguished by the presence or absence of an alien’s “admission.” The application of each category is relevant to burdens of proof in removal proceedings and the availability of various forms of relief from removal. An alien who has not been admitted to the United States is subject to the inadmissibility grounds under section 212(a) of the Act, 8 U.S.C. § 1182(a). On the other hand, under section 237(a) of the Act, 8 U.S.C. § 1227(a), “[a]ny alien . . . in and admitted to the United States” is subject to the deportation grounds enumerated in that section. The express text of this section requires an admission to have occurred for an alien to be deemed deportable. The first class of deportable aliens listed under this section consists of aliens who were “[i]nadmissible at the time of entry or of adjustment of status.” Section 237(a)(1) of the Act. This language is noteworthy in two primary ways. First, it retains the term “entry” rather than using the word “admission.” Second, it distinguishes the concepts of “entry” and adjustment of status through disjunctive phrasing.

While “entry” is no longer defined in the Act, the term was retained as part of the definition of “admission.” There is no indication that Congress intended to change the long-standing meaning of “entry” when it incorporated the term into the admission definition. *See, e.g., Matter of Rosas*, 22 I&N Dec. 616, 625 (BIA 1999) (Rosenberg, concurring and dissenting) (noting that “admission” continues to convey the same concept that “entry” formerly conveyed; only now, an entry must be lawful). The insertion of the word “lawful” to modify “entry” with regard to the definition of “admission” and “admitted” may suggest congressional intent to clarify the intended scope of “entry” for purposes of establishing whether an admission has occurred. In particular, because the term “entry” relates to the physical act of

crossing into the United States, courts have begun to examine whether the word “lawful” is meant to convey the requirement that an alien be substantively admissible at the time he or she crosses the border with inspection and authorization. Some commentators, however, argue that such an interpretation would render section 237(a)(1)(A) of the Act superfluous, because “if the entry were deemed unlawful there would have been no ‘admission’ and the alien would be considered an applicant for admission and removed under the INA § 212(a) grounds of inadmissibility directly.” Seipp, *supra*, at 4. The ambit of the phrase “lawful entry” has not been conclusively decided, as we shall see below.

### A Brief History of Adjustment of Status

Adjustment of status is a process designed to allow aliens who are already in the country to become lawful permanent residents without having to depart first. Prior to the establishment of the adjustment process, an alien in the United States who sought permanent residence was required to procure an immigrant visa from an American consulate, most often in the alien’s home country. The alien could then return to the United States as a lawful permanent resident. The adjustment of status program was created to eliminate the financial and emotional hardship on the alien, as well as the significant administrative burden on the Government, caused by the burdensome consular processing requirement for aliens already present in the United States. See Ilyce Shugall, *Case Note: Orozco v. Mukasey, When an Entry May Not be an “Admission” and the Fundamental Problems with the Ninth Circuit’s Analysis*, 35 Wm. Mitchell L. Rev. 68, 77 (2008).

Under section 245(a) of the Act, 8 U.S.C. § 1255(a), the Attorney General may adjust the status of an alien “who was inspected and admitted or paroled into the United States” to that of an “alien lawfully admitted for permanent residence.” Notably, having been “admitted” is a prerequisite for adjustment eligibility, which suggests that the concept of “admission” carries a meaning separate and distinct from adjustment of status. On its face, then, section 245(a) of the Act would seem to exclude adjustment of status from the scope of “admission.” To understand the term “admission” as used in this section, it is helpful to examine how the concept has evolved, beginning before the term was defined in IIRIRA.

In a pre-IIRIRA decision, the Board found that a permissible “entry” occurs when an alien presents himself or herself for inspection at the border and is authorized to pass. *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980). *Areguillin* involved an alien who entered the United States without any travel documents, but who was permitted by a border official to pass into the United States. The Board concluded that upon these facts, the alien “was inspected and admitted within the contemplation of the law.” *Id.* at 310. Rejecting the idea that an alien’s entry must comply with substantive exclusion grounds to be valid, the Board found “no basis for concluding that Congress, in first imposing the requirement that an alien be ‘inspected and admitted’ or paroled into the United States as a condition for establishing eligibility for relief under section 245, intended to depart from the long-settled construction of that term in favor of [an interpretation requiring that the admission be substantively “lawful” in order to qualify for adjustment of status].” *Id.* Accordingly, the Board held that the alien had been “admitted,” and was eligible to adjust status, because he had completed an “entry” despite being excludable at the time of entry for lacking the requisite travel documents.

Similarly holding strictly to the “entry” concept in pre-IIRIRA cases, the Board repeatedly held that adjustment of status does not constitute an entry but “is merely a procedural mechanism by which an alien is assimilated to the position of one seeking to enter the United States.” *Matter of Rainford*, 20 I&N Dec. 598, 601 (BIA 1992); see also *Matter of Connelly*, 19 I&N Dec. 156, 159 (BIA 1984) (“[A]s the respondent was not coming into the United States from a foreign port or place or from an outlying possession when he applied for adjustment of status, he was not making an entry at that time” but rather had already entered and was instead “assimilated to the position of an alien who is making an entry” for the purpose of determining whether he meets the requirement of section 245(a) of the Act that the alien be admissible.); *Matter of Smith*, 11 I&N Dec. 325, 326-27 (BIA 1965) (“An applicant for adjustment of status under section 245 stands in the same position as an applicant who seeks to enter the United States with an immigration visa for permanent residence. Such an applicant must under the regulations submit to all of the tests as if he were an applicant at a port of entry . . .”). In other words, the Board concluded that adjustment of status is not an “entry” because it does not involve the physical crossing into the United States. However, legal

fiction places an applicant for adjustment of status in the position of one seeking “entry” for purposes of being inspected and determined not excludable.

As noted above, IIRIRA linked the concepts of “admission” and “entry” by defining the term “admission” as “the lawful entry of the alien into the United States.” Significantly, Congress included the word “lawful” to modify the meaning of “entry” but did not define the phrase “lawful entry” in the Act. As a result, post-IIRIRA courts must interpret the term “lawful entry” to determine the meaning of “admission.” The United States Court of Appeals for the Ninth Circuit is the only circuit court to have decided the meaning of “admission” within section 245(a) of the Act in a post-IIRIRA case, in *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008). This case was subsequently vacated and remanded to the Board upon the joint motion of the parties. See *Orozco v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008). *Orozco* involved an alien who entered the United States with a false green card, but who was permitted to enter the country after inspection at the border. The Ninth Circuit contemplated whether the term “admitted” within section 245(a) of the Act, and thus the phrase “lawful entry,” requires both substantive and procedural compliance upon entry. In other words, is an alien “admitted” when he presents himself for inspection and is authorized to enter even though his documents are fraudulent? Or does admission also require propriety in the substantive basis upon which an alien is authorized to enter? In initially finding that an alien must comply with substantive inadmissibility grounds in order to effect a “lawful entry,” the court rejected *Areguillin* as irrelevant pre-IIRIRA law.

However, a Second Circuit decision interpreting an entirely different section of the statute—the battered spouse exception under section 212(a)(6)(A)(ii) of the Act, for aliens present without being admitted or paroled—supports a different understanding of “lawful entry” and therefore of “admission.” *Emokah v. Mukasey*, 523 F.3d 110 (2d Cir. 2008). In *Emokah*, the alien was found to be removable for willfully misrepresenting a material fact in obtaining the nonimmigrant visa that she used to enter the country. The alien argued that if the court determined that she obtained her visa through misrepresentation, it must also conclude that she is “present in the United States without being admitted” under section 212(a)(6)(A)(i) of the Act, thus rendering her eligible to seek the battered spouse exception. The court disagreed,

explaining that the definition of “admission” as a “lawful entry . . . after inspection and authorization” indicates that “an alien who enters the United States after inspection and authorization has been ‘admitted’ even if he was, ‘at the time of entry . . . within one or more of the classes of aliens inadmissible by the law.’” *Id.* at 118 (quoting section 237(a)(1)(A) of the Act). The court concluded that “[t]he manner in which [the alien] procured her admission rendered her inadmissible at the time of entry . . . but does not change the fact that she was, indeed, admitted.” *Id.* This interpretation is similar to *Areguillin*’s pre-IIRIRA conclusion that a valid “entry” occurs when an alien is inspected and authorized to pass, even if the alien was substantively excludable at the time of entry.

### **Selected Grounds of Removal Involving the Term “Admission”**

#### *Aggravated Felony Conviction Under Section 237(a)(2)(A)(iii) of the Act*

Under section 237(a)(2)(A)(iii) of the Act, an “alien who is convicted of an aggravated felony at any time after admission is deportable.” In *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999), the Board held that “admission” for purposes of the aggravated felony ground of removal includes adjustment of status. *Rosas* involved an alien who entered without inspection and who later adjusted her status to that of lawful permanent resident.<sup>1</sup> Adjustment of status was therefore the only lawful immigration process effected by the alien. She was convicted of an aggravated felony subsequent to her adjustment. After conceding that adjustment of status “does not meet the literal terms of the definition of ‘admission’ or ‘admitted’” because adjustment does not involve an “entry,” the Board determined that it must look outside the statutory definition to decide whether adjustment of status constitutes an admission under the facts of this case. *Id.* at 617.

The Board first noted that the Act consistently reflected a dual approach to admission—by inspection and authorization at the border and by adjustment of status while in the United States. The Board next considered the interplay between the language in sections 237(a) and 237(a)(1)(A) of the Act, noting that section 237(a) recognizes that at least some aliens who have adjusted status have been “admitted,” since the grounds of deportation apply only to admitted aliens and since section

237(a)(1)(A), the very first ground of deportation, covers aliens who were inadmissible at the time of entry or adjustment of status. Citing to the new ground of inadmissibility enacted by IIRIRA in section 212(a)(6)(A)(i) of the Act (alien present without admission or parole), the Board further determined that “admission” must rationally include aliens who adjusted status. Otherwise, aliens who became permanent residents through adjustment of status rather than through consular processing would be relegated to the position of entrants without inspection facing grounds of inadmissibility rather than deportability—a “drastic shift in the treatment of a significant number of permanent resident aliens” that Congress could not have intended. *Id.* at 621. Finally, the Board found that the separate burdens of proof applied to “applicant[s] for admission” versus aliens “lawfully present . . . pursuant to a prior admission” indicate that adjustment of status must be an “admission” because section 101(a)(13) generally does not regard an alien lawfully admitted for permanent residence as seeking admission unless certain exceptions apply.

In a very brief decision involving the same issue as *Rosas*, the Ninth Circuit also held that adjustment of status constitutes an “admission” for purposes of the aggravated felony deportation ground in circumstances where the alien adjusted status under section 245A of the Act after entering the country without inspection. *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133 (9th Cir. 2001). The court expressed its disbelief that Congress “would create a loophole in the removal laws” in which aliens who adjust status after entering the country lawfully are removable while aliens who adjust status after entering unlawfully are not. *Id.* at 1135. The Fourth Circuit has cited both *Rosas* and *Ocampo-Duran* with approval in an unpublished decision. *Iguade v. Ashcroft*, 78 Fed. Appx. 918 (4th Cir. 2003).

*Crimes Involving Moral Turpitude Under Section  
237(a)(2)(A)(i) of the Act*

Section 237(a)(2)(A)(i) of the Act renders deportable any alien “who is convicted of a crime involving moral turpitude within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j) of this title) after the date of admission.” This ground of deportation sets the temporal trigger for deportability *as the date* of admission rather than *any time after* admission. *See, e.g., Shivaraman v. Ashcroft*, 360 F.3d

1142, 1147, 1148 (9th Cir. 2004) (concluding that “there can be only one ‘the’ date” of admission and declining to adopt an interpretation of the statute “whereby an IJ may pick and choose, without guidance, and at his apparent whim, among several dates of admission for purposes of determining removability [under the section]”).

The Board and several circuit courts have each interpreted this section in factually similar cases involving aliens who lawfully entered the United States and later adjusted status to that of permanent resident and who were subsequently convicted of crimes involving moral turpitude committed within 5 years of their adjustment but more than 5 years after their initial entry. No court has issued a published opinion on this section in the context of an alien who adjusted status after entering *unlawfully* and who committed a crime involving moral turpitude within 5 years of the date of adjustment. It is reasonable to presume that the courts would simply apply the holding of *Rosas*—that adjustment constitutes an admission—to such an analogous factual situation. However, the circuits to have considered the issue have unanimously rejected the application of *Rosas* to a factual scenario where an alien adjusted status subsequent to a lawful entry. *See Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007); *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005); *Shivaraman*, 360 F.3d 1142.

In those circuits that have yet to rule on this issue, the Board’s decision in *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), controls. In *Shanu*, the Board extended the holding of *Rosas* to conclude that adjustment of status triggers deportability under section 237(a)(2)(A)(i) of the Act, even where the alien had previously executed a lawful entry after inspection. Notably, *Shanu* involved an alien who had entered the United States as a lawful nonimmigrant and lapsed out of status prior to adjusting to permanent resident status, although the Board did not identify this lapse as relevant to its decision. Citing *Rosas*, the Board explained:

[W]e have determined that section 101(a)(13)(A) does not provide an exhaustive definition of the term “admission,” and that an alien present in the United States who has been accorded the privilege of lawful permanent residence is also deemed to have been “admitted”

*continued on page 16*

# FEDERAL COURT ACTIVITY

## CIRCUIT COURT DECISIONS FOR SEPTEMBER 2009

*by John Guendelsberger*

The United States courts of appeals issued 325 decisions in September 2009 in cases appealed from the Board. The courts affirmed the Board in 277 cases and reversed or remanded in 48, for an overall reversal rate of 14.8% compared to last month's 8.1%. There were no reversals from the Fourth, Fifth, Seventh, and Tenth Circuits.

The chart below provides the results from each circuit for September 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total cases	Affirmed	Reversed	% reversed
First	6	4	2	33.3
Second	101	90	11	10.9
Third	27	21	6	22.2
Fourth	10	10	0	0.0
Fifth	21	21	0	0.0
Sixth	5	4	1	20.0
Seventh	6	6	0	0.0
Eighth	2	1	1	50.0
Ninth	121	96	25	20.7
Tenth	4	4	0	0.0
Eleventh	22	20	2	9.1
<b>All circuits:</b>	<b>325</b>	<b>277</b>	<b>48</b>	<b>14.8</b>

Ten of the 25 reversals in the Ninth Circuit involved asylum claims. Four of these found fault with a credibility determination; two others involved insufficient analysis of the Convention Against Torture claim. Six reversals involved criminal grounds of removal. Four of these addressed application of the modified categorical approach. Three cases addressing motions to reopen were reversed for insufficient reasons to support denial. Another three reversals came in cancellation of removal denials. Two of these involved imputation of a parent's permanent resident status to a minor for section 240A(a) cancellation of removal.

The Second Circuit reversed in 11 cases, including 3 credibility determinations, nexus, level of harm for

past persecution, and the persecutor bar. Two others involved motions to reopen based on changed country conditions.

The six reversals from the Third Circuit involved past persecution, well-founded fear, particular social group, a remand based on poor quality of transcription, and a motion to reopen based on changed country conditions.

The First Circuit, which had reversed only one case in the first 8 months of this year, reversed two cases this month. One of the reversals found error in calculation of the 1-year bar for asylum. The other found fault with an adverse credibility determination.

The chart below shows the combined numbers for the months of January through September 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total cases	Affirmed	Reversed	% reversed
Ninth	1450	1186	264	18.2
Third	222	183	39	17.6
Seventh	65	55	10	15.4
Eighth	54	48	6	11.1
Sixth	134	122	12	9.0
Eleventh	239	222	17	7.1
Second	1118	1055	63	5.6
First	61	58	3	4.9
Fifth	176	169	7	4.0
Tenth	35	34	1	2.9
Fourth	135	133	2	1.5
<b>All circuits:</b>	<b>3689</b>	<b>3265</b>	<b>424</b>	<b>11.5</b>

Last year at this point there were 3379 total decisions and 467 reversals for a 13.8% overall reversal rate.

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## Immigration in the Supreme Court: The October 2009 Term

by Edward R. Grant

In these times of Endless Everything, due credit must be given to the Supreme Court of the United States. Its Term begins like clockwork on the First Monday in October and ends, dependably, before the first barbecues are fired up for the Fourth of July. (The rare exceptions include this year's September argument on the question whether *Hillary: The Movie* is protected speech under the First Amendment, and on the 1974 dispute over the fruits of President Nixon's unique home audio system. *Citizens United v. Federal Election Comm'n*, 129 S. Ct. 2893 (2009) (Mem.) (June 29, 2009, decision restoring the case to oral argument calendar on Sept. 9, 2009); *United States v. Nixon*, 418 U.S. 683 (1974)). The Court begins argument at the civilized hour of 10:00 a.m., and there is always a break for a proper lunch. Finally, when the red light goes on to end oral argument, it's over. No overtime, no shootouts, no "injury time."

Contrast this to the world of sports. As we go to press, the World Series soldiers on in the midst of college and professional football, basketball, hockey, and even the New York City Marathon. In 1956, Don Larsen pitched the only perfect game in World Series history on October 8th. This year, October 8th marked the *first game* of the *first* round playoff series between Boston and Los Angeles. Oh, and Larsen's game took 2 hours 6 minutes, ending at about 3:00 in the afternoon, Eastern time. The Boston-LA game—a shutout in which a mere five "Sawx" reached first base—clocked in at a sprightly (by today's standards) 3 hours 9 minutes, and ended at 2:15 a.m. Eastern.

Other sports fare no better. The NFL lags on into February, with plans to push further on toward March. "March Madness," which now begins when the old NCAA tournament used to end, risks becoming "April Apathy." Meanwhile, the near-meaningless regular seasons in the NBA and NHL precede rounds of playoffs that last for 2 months. College football beats them all, however, playing dozens of 4-hour bowl games with no credible scheme for crowning a national champion.

My wife, a tolerant sports widow, is forever asking: "What exactly is the significance of *this* game?" One must concede her point. The odds are far better that I will successfully explain the significance of the immigration

cases pending on the Supreme Court's docket for the October 2009 term. To which we now turn, followed by a discussion of the immigration-related court of appeals decisions of the newest Associate Justice, Sonia Sotomayor.

### Is Bad Immigration Advice a Violation of the Sixth Amendment Right to Counsel?

*Padilla v. Kentucky*, argued on October 13th, does not address immigration law or proceedings per se, but may greatly impact a circumstance that arises frequently in immigration proceedings: efforts by respondents to vacate their criminal convictions because they pled guilty without full advisals or knowledge of the immigration consequences. *Padilla v. Kentucky*, 129 S. Ct. 1317 (2009) (Mem.).

The petitioner, a 40-year lawful permanent resident and Vietnam veteran, pled guilty in 2001 to trafficking in marijuana after drugs and paraphernalia were found in the cab of his truck and a large quantity of marijuana was found hidden in the trailer. Prior to entering his plea of guilty, he asked his criminal defense attorney whether there would be immigration consequences and was advised that there would not. In truth, the conviction made him deportable as an aggravated felon with no eligibility for discretionary relief.

The Kentucky Supreme Court rejected Padilla's claim for post-conviction relief, ruling that since there is no Sixth Amendment right to effective counsel in immigration proceedings, *Padilla* was not entitled to accurate advice on the immigration consequences of his plea. *Commonwealth v. Padilla*, 253 S.W.3d 482 (Ky. 2008), *cert. granted*, *Padilla v. Kentucky*, 129 S. Ct. 1317 (2009). The Kentucky court found no distinction between Padilla's claim of "affirmative misadvice" by his counsel and a mere failure to advise of immigration consequences. *See Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005). Since "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] incorrectly provides no basis for relief." *Padilla*, 253 S.W.3d at 485.

Two issues are before the Court in *Padilla*:

- (1) Whether the mandatory deportation consequences that stem from a plea to

trafficking in marijuana, an “aggravated felony” under the Act, are “collateral consequences” of a criminal conviction, which relieve counsel from any affirmative duty to investigate and advise; and

(2) Assuming immigration consequences are “collateral,” whether counsel’s gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea that was induced by that faulty advice.

These issues, however, do not arrive on a clean slate. More than half the states currently require trial judges, as part of the plea colloquy, to advise foreign-born defendants of the potential immigration consequences of a conviction. Alleged violations of these rules undergird most of the “conviction vacated” orders received by Immigration Courts and the Board. *Padilla* will not affect the legitimacy of these rules or the post-conviction relief granted thereunder.

In contrast, Rule 11 of the Federal Rules of Criminal Procedure imposes no such requirement, signifying that nothing in the Constitution mandates such advisals to be given from the bench. *Padilla* contends, however, that counsel has a higher obligation than a judge in ensuring that clients are aware of collateral consequences as serious as deportation. Counsel is thus under a duty to investigate and advise on such issues. Even if no such affirmative duty exists, counsel is obligated not to misinform a defendant regarding such consequences.

Assuming that *Padilla* is correct on the latter point—and that Kentucky is incorrect in holding that the Sixth Amendment is not implicated by affirmative *misadvice* on serious collateral matters—*Padilla* may still have a high bar to cross. Under the United States Constitution, in order to set aside a jury verdict in a criminal trial on the basis of ineffectiveness of counsel, the errors must be so serious that counsel was not functioning as the “counsel” guaranteed to defendants under the Sixth Amendment. Moreover, those errors must have been so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

*Padilla* counters *Strickland* by contending that a lawyer’s tactical decisions and recommendations during

trial—the issue before the Court in *Strickland*—differ from the process of advising a client whether or not to plead guilty. A plea, unlike a tactical decision at trial, results in direct imposition of criminal liability. For this reason, the decision to plead rests entirely with the defendant, and incomplete or deficient advice on collateral matters unduly prejudices the defendant’s right to make an informed decision.

The Solicitor General entered *Padilla* as amicus curiae in support of Kentucky, but not in support of the position that the Sixth Amendment right to counsel is not implicated by affirmative misadvice. The Solicitor General opposes *Padilla*’s first argument that the right to counsel creates an affirmative obligation to provide advice beyond the scope of the criminal proceeding, such as immigration consequences. However, the brief accepts *Padilla*’s second argument, that incompetent legal advice that undermines a client’s decision-making capacity may constitute deficient performance.

The Solicitor General contends that *Padilla*’s claim must fail because he cannot show prejudice: had he chosen to go to trial, he had no realistic chance of being acquitted. *Padilla* was lawfully stopped at a truck weigh station and arrested after law enforcement officers found marijuana and drug paraphernalia in the cab. He consented in writing to a search of the trailer, where officers found approximately 1000 pounds of marijuana. In the face of such “overwhelming evidence” of guilt, the Solicitor General contends that the alleged misadvice on collateral consequences could not have affected the decision to plead guilty to *Padilla*’s detriment.

Handicapping Supreme Court decisions based on oral argument is a game even the legendary Ladbroke’s, a sports gaming service, will not touch. The October 13th argument, however, revealed strong concern on two questions. First, if *Padilla*’s argument were accepted, what limits, if any, could be placed on the range of “collateral consequences” for which competent criminal defense counsel must render sound advice, or at least avoid giving improper advice. Second, if Kentucky’s argument were accepted, does this mean that a lawyer is free to remain absolutely silent, or even to give bad advice, regarding matters collateral to the questions of guilt or innocence on the criminal charge?

The Solicitor General’s brief may offer a path to resolve these and other questions raised by *Padilla*. It



remains to be seen whether the Court's decision will offer insights into the level of effectiveness that criminal lawyers must render on collateral immigration matters.

### **Motions to Reopen: Is There Jurisdiction to Review?**

*Kucana v. Holder*, 129 S. Ct. 2075 (2009) (Mem.), presents a rare, if not first-time, circumstance in immigration law: the United States agrees with the petitioner that the court of appeals wrongly decided that it lacked jurisdiction to review the Board's denial of a motion to reopen an asylum case, thus leading the Court to appoint counsel to brief and argue the case as amicus curiae in support of the decision below. *Kucana v. Holder*, No. 08-911, 2009 WL 2256230 (U.S. July 30, 2009) (Mem.); *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008). The resulting 3-way argument on November 10th comes as no surprise. The Government took the same position before the Seventh Circuit, i.e., that the court did have jurisdiction to review the denial of the motion to reopen, and the circuit panel split three ways, with only Judge Easterbrook contending that a decision on a motion to reopen is precisely the type of "discretionary" determination shielded from judicial review by section 242(a)(2)(B)(ii) of the Act, as amended by the REAL ID Act of 2005.

The key argument by the petitioner and the United States is statutory: the reference in section 242(a)(2)(B)(ii) to decisions "specified [by the Act] to be in the discretion of the Attorney General" cannot apply to motions to reopen because the provisions of the Act relating to motions do not specify that motions decisions are within the "discretion" of the Attorney General. See section 240(c)(7) of the Act. Rather, section 242(a)(2)(B)(ii) applies only to decisions taken under those provisions of the Act that specifically refer to the discretion of the Attorney General, such as cancellation of removal, and waivers under sections 212(h), 212(i), and 237(a)(1)(H). The petitioner and the Solicitor General also argue that the availability of judicial review of motion to reopen denials has always been presumed, and thus that only a statutory limitation specific to motions to reopen could curtail such review.

If counting circuit court noses were all that mattered, *Kucana* would have all the suspense of the increasingly lopsided scores in too many NFL games. Every other circuit to have considered the question has effectively agreed with the position now taken by the

Government and held that section 242(a)(2)(B)(ii) of the Act does not apply to decisions to deny a motion to reopen. *Singh v. Mukasey*, 536 F.3d 149, 153-54 (2d Cir. 2008); *Miah v. Mukasey*, 519 F.3d 784, 789 n.1 (8th Cir. 2008); *Jahjaga v. Att'y Gen.*, 512 F.3d 80, 82 (3d Cir. 2008); *Zhao v. Gonzales*, 404 F.3d 295, 302-03 (5th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361-62 (10th Cir. 2004); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528-29 (9th Cir. 2004).

Any doubts on this position would likely arise from the inherent discretionary element in rulings on motions to reopen. The regulations explicitly state this, as does Board precedent. 8 C.F.R. § 1003.2(a); see also *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007). Circuit court decisions review denials of motions to reopen under an "abuse of discretion" standard. In fact, the Seventh Circuit observed in *Kucana* that denial of the petitioner's second and many-years-late motion to reopen would be affirmed under this standard, and the Solicitor General's brief concurs. The issue, then, is not whether grants and denials of motions can be based on the exercise of discretion, but whether such decisions are the *type* of discretionary determinations to which the specific provisions of section 242(a)(2)(B)(ii) of the Act apply. Oral argument on November 10th may provide a glimpse of the Court's view.

### **Does a Crime of Violence Require "Violent" Force?**

Ironically, the case with perhaps the largest potential impact on immigration matters before the Court this term is not classified as an immigration case at all. *Johnson v. United States* will address whether, under the Armed Career Criminal Act ("ACCA"), the petitioner's conviction for battery under Florida law constitutes a "violent felony" conviction mandating, in conjunction with convictions for other violent felonies, a mandatory minimum sentence under the ACCA. The Eleventh Circuit held that it did, the Court granted certiorari, and heard oral argument on October 6th. *United States v. Johnson*, 528 F.3d 1318 (11th Cir. 2008), *cert. granted*, 129 S. Ct. 1315 (2009) (Mem). Since the definition of a "violent felony" under the ACCA is similar (and in some respects identical) to the definition of a "crime of violence" in 18 U.S.C. § 16(b), the Court's determination regarding the Florida battery statute—which is similar in turn to 27 other broadly written State definitions of "battery"—could affect the ability to bring aggravated felony charges based on a wide array of such convictions.

For example, the first prong of the ACCA's definition of a "violent felony" is virtually identical to the definition of a "crime of violence" at 18 U.S.C. § 16(a): a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B); *cf.* 18 U.S.C. § 16(a) (including "or property" after "person"). In construing § 16(a), circuit courts have issued a somewhat confusing array of decisions on whether simple assault, battery, or assault and battery convictions meet the standard. *See, e.g., Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336 (11th Cir. 2008) (Georgia simple battery is a § 16(a) crime of violence); *Lopes v. Keisler*, 505 F.3d 58, 61-63 (1st Cir. 2007) (simple assault and battery under Rhode Island law is a crime of violence under § 16(a)); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006) (California simple battery is not a crime of violence); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003) (Indiana battery under a statute that only requires touching is not a crime of violence). The arguments in *Johnson* parallel the divisions among the circuits. The petitioner contends that the Florida statute—which provides that a person commits battery when he "actually and intentionally touches or strikes another person against the will of the other"—covers mere nonconsensual touchings that do not implicate the use of force. The Government contends that the definition of a "violent felony" is intended to include the traditional, common-law understanding of battery as a crime that involves either direct injury or the risk of escalation resulting in such injury.

The immigration cases cited here, which is just a sampling, played no apparent role in the oral argument of *Johnson*. However, *Johnson* is destined to indicate, if not resolve, whether broadly worded assault and battery statutes that cover instances of "offensive" or "rude" touching can be considered "crimes of violence," and thus aggravated felonies, at least under the "categorical" approach. The eventual decision may appear to be limited to the definition of a "violent felony" under the ACCA. But it is difficult to imagine the result not reverberating loudly in the world of immigration law.

### **The New Ref: Justice Sotomayor on Immigration**

The Second Circuit hears close to 25 percent of all immigration cases before the Federal courts of appeals. Not surprisingly, therefore, Justice Sotomayor had written or participated in several landmark decisions affecting the work of Immigration Judges and the Board. Her

immigration decisions reflect a narrow approach to legal issues but also impose strict requirements for establishing removability based on criminal grounds or finding fraud in asylum applications, and they often remand cases to the Board for more definitive rulings on discrete issues of law and fact.

Her narrow approach to legal issues is reflected in her concurring opinion in *Bah v. Mukasey*, 529 F.3d 99 (2d Cir. 2008). There, she emphasized her agreement with the decision of the en banc majority to not address whether female genital mutilation constitutes a form of "continuing persecution." She stated that since withholding of removal is a prospective form of relief and the presumption of future persecution based on past harm is purely a creature of regulation, the Government should not be presumptively barred from establishing the unlikelihood of future harm. "[B]ecause deciding the continuing persecution issue is (i) unnecessary to our disposition of these tandem cases, (ii) may never need to be decided after our instructions on remand are complied with, and (iii) could have far reaching implications in other types of cases where ongoing physical or emotional harm from a prior persecutory act is alleged, I think it is imprudent for us now to decide the issue one way or the other." *Id.* at 124 (Sotomayor, J., concurring); *see also Matter of A-T-*, 24 I&N Dec. 617, 620, n.3 (A.G. 2008) (declining to address the issue of "continuing persecution").

Judge Sotomayor adopted a narrow, jurisdictional approach in reversing perhaps the most far-reaching district court immigration ruling of recent years: Judge Jack Weinstein's holding that, under customary international law, which, he determined, included the U.N. Convention on the Rights of the Child, the father of two U.S. citizen children had to be given the opportunity to apply for a waiver under section 212(h) of the Act, despite his statutory ineligibility (as an aggravated felon) for that form of relief. *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), *rev'g Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002). The respondent had not applied for a section 212(h) waiver before the Immigration Judge or the Board; Judge Weinstein (ruling on a habeas petition) nevertheless considered his eligibility for this and other forms of relief for which he did not apply. Judge Sotomayor, writing for the Second Circuit, held that since the respondent had not raised these issues previously, he had not exhausted his remedies, and thus that the district court lacked jurisdiction to consider the

section 212(h) issue. Her ruling thus did not address the merits of Judge Weinstein’s inventive rationale that customary international law trumps the specific eligibility requirements enacted by Congress.

Other Sotomayor decisions expressed some reluctance to enforce the jurisdiction-stripping provisions of the Act, including on issues where her judicial colleagues have found no jurisdiction to exist. See *Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005) (holding that jurisdiction-stripping provisions do not bar judicial review of determinations of threshold eligibility for cancellation of removal and adjustment of status). In *Mendez v. Mukasey*, 525 F.3d 216 (2d Cir. 2008), Judge Sotomayor’s decision for the panel acknowledged prior circuit precedent precluding judicial review of the Board’s determination of “exceptional and extremely unusual hardship” in applications for cancellation of removal. But she then noted:

We find Petitioner’s arguments to be persuasive. Were we operating on a new slate, we would be inclined to hold that the question of whether an alien has established “exceptional and extremely unusual hardship” is a determination for which we have jurisdiction to review similar to the other eligibility requirements for cancellation of removal.

*Id.* at 221.

The *Mendez* panel subsequently granted a motion for reconsideration and issued a revised decision holding that the Immigration Judge, by failing to consider evidence key to the question of hardship, had committed an error of law. *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009) (“*Mendez II*”). *Mendez II* held that there is no jurisdiction over hardship determinations “except in those rare cases where the BIA decision on whether this kind of hardship exists is made ‘without rational justification or based on an erroneous legal standard,’” and found that this case presented one of those “rare” circumstances. *Id.* at 322 (quoting *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 39 (2d Cir. 2008)). *Mendez II* likely represented an extension of *Barco-Sandoval*: that prior decision clearly reaffirmed the nonreviewability of hardship claims, referenced a narrow exception for constitutional and legal claims, and warned against the use of the “rhetoric” of a “constitutional claim” or “question of law” to disguise “what is essentially a quarrel about fact-finding or the exercise of discretion.”

*Barco-Sandoval*, 516 F.3d at 39 (quoting *Xiao Ji Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 330 (2d Cir. 2006)). *Mendez II* will no doubt prompt more litigation on the extent of judicial review of hardship claims, and perhaps issues of discretion as well.

On questions of criminal law, Judge Sotomayor’s decisions reflected the general trend in the Second Circuit to narrow the types of evidence that may be considered in establishing that an alien’s criminal conviction is grounds for removal. The leading case, perhaps, was *Dulal-Whiteway v. U.S. Dep’t of Homeland Sec.*, 501 F.3d 116 (2d Cir. 2007), holding that information in an alien’s presentence report could not be used to establish that the amount of loss resulting from his conviction for fraud exceeded \$10,000.00. The holding was abrogated by the Supreme Court’s decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009). In a similar vein, Judge Sotomayor’s opinion in *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007), found that the respondent’s conviction for third-degree burglary did not constitute a crime involving moral turpitude because although he had admitted in his plea colloquy to an intent to commit larceny, he did not specifically indicate that he intended a “permanent taking” of the victim’s property. See also *Dickson v. Ashcroft*, 346 F.3d 44 (2003) (stating that even if a presentence report is part of the record of conviction, a factual narrative in the report cannot be used to determine if an alien’s conviction under a divisible statute is for an aggravated felony). In other cases, she has voted to find that other criminal offenses constitute aggravated felonies. See *Blake v. Gonzales*, 481 F.3d 152 (2007) (holding that a Massachusetts conviction for assault and battery against a police officer is for a crime of violence); *Richards v. Ashcroft*, 400 F.3d 125 (2d Cir. 2005) (finding that even though a Connecticut statute punished mere possession of forged instruments and sweeps broader than common-law forgery, the crime of forgery is nevertheless an offense “related to forgery” and thus an aggravated felony).

Judge Sotomayor also wrote or joined several decisions remanding cases to the Board with direction to issue a precedential decision on ambiguous statutory terms. See *Mendis v. Filip*, 554 F.3d 335 (2d Cir. 2009) (remanding for issuance of precedent on “ambiguous” provisions of the Act regarding selection of the country to which an alien can be removed); *Mei Juan Zheng v. Mukasey*, 514 F.3d 176 (2d Cir. 2008) (remanding for precedent on whether an Immigration Judge has discretion on the question whether an asylum application is “frivolous”);

*Jiang v. Bureau of Citizenship and Immigration Services*, 520 F.3d 132 (2d Cir. 2008) (remanding on whether participation in the forced insertion of an IUD raises the “persecutor bar” to a grant of asylum, and urging “consistency” on whether forced IUD insertion constitutes persecution); *Mirzoyan v. Gonzales*, 457 F.3d 217 (2d Cir. 2006) (remanding for precedent on when the severity of economic harm rises to the level of “persecution”).

On asylum matters, Judge Sotomayor authored several significant decisions, perhaps most notably *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004), holding that the Board can rely on answers provided during an “airport interview” in determining credibility, and affirming an adverse credibility determination based on discrepancies between that interview and later testimony. The case also held that the adverse credibility finding could not be used as a preemptive base to deny the alien’s claim under the Convention Against Torture. Characteristically, Judge Sotomayor sketched out a four-part test for assessing the reliability of an airport interview, including a requirement that responses be recorded verbatim, as opposed to summarized. In one of the most noted Second Circuit asylum cases in recent years, Judge Sotomayor dissented from the en banc ruling that the spouses of those who have been subject to a forced abortion or sterilization do not thereby establish eligibility for asylum. *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296 (2d Cir. 2007).

Finally, Judge Sotomayor authored a critical decision involving the termination of parental marriage as a precondition to deriving citizenship. The alien in *Brissett v. Ashcroft*, 363 F.3d 130 (2d Cir. 2004), contended that his parents had “legally separated” when his mother brought him to the United States, and thus that he derived citizenship when she naturalized before his 18th birthday. However, the court held that the derivative naturalization provisions of former section 321 of the Act required a formal, legal act either terminating the marriage or recognizing the separation of the parties; mere voluntary separation of the parties was not sufficient. The court thus rejected the alien’s claim to citizenship.

### Conclusion

Barring further grants of certiorari, the current Supreme Court term is likely to be relatively quiet on fundamental questions of immigration law. The rulings

in *Padilla* and *Johnson* will affect, albeit indirectly, the removability of criminal aliens. *Kucana* will either ratify the understanding of the parties (and most of the circuits) that jurisdiction does exist to review denials of motions to reopen, or in failing to so ratify, invite such appeals to be reviewed as questions of law. The Supreme Court is not often closely divided on questions of immigration law, so the confirmation of Justice Sotomayor upsets no ideological balance on this issue. Justice Sotomayor does, however, bring to the Court more experience in ruling on immigration matters than most or all of her colleagues. Time will tell whether hers becomes a distinctive voice in the Court’s resolution of these matters.

*Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998.*

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## RECENT COURT OPINIONS

### **Supreme Court:**

*Afanwi v. Holder*, \_\_S. Ct.\_\_, 2009 WL 3161844 (Oct. 5, 2009): The Supreme Court summarily remanded to the Fourth Circuit in a case involving the question whether the Board’s discretion to reopen proceedings extends to claims of ineffective assistance of counsel based on conduct occurring after the entry of the Board’s final order of removal. Although the Fourth Circuit’s 2008 decision in this matter upheld the Board’s determination that it lacked such jurisdiction, the Solicitor General’s brief stated that the Attorney General’s subsequent decision in *Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) (“*Compean II*”) made clear that the Board does have such authority. The matter was thus remanded for consideration in light of *Compean II*.

### **Second Circuit:**

*Guo Qi Wang v. Holder*, \_\_F.3d\_\_, 2009 WL 3152051 (2d Cir. Oct. 2, 2009): The Second Circuit denied an asylum-seeker’s petition for review of an Immigration Judge’s decision denying asylum from the People’s Republic of China but granting deferral of removal under the Convention Against Torture. The court upheld the Immigration Judge’s determination that the respondent was ineligible for asylum based on his participation in China in a scheme to sell human organs (which were extracted from executed prisoners) for a profit on the black market. The court agreed with the Immigration Judge’s conclusion, which was affirmed by the Board, that such actions constituted a serious nonpolitical crime.

*Yan Yan Lin v. Holder*, \_\_F.3d\_\_, 2009 WL 3273236 (2d Cir. Oct. 14, 2009): The Second Circuit agreed with an asylum-seeker from China who challenged the Immigration Judge's determination that she was statutorily barred from relief as one who had engaged in the persecution of others. The respondent was employed for several years in the OB/GYN department of a hospital, where she assisted in performing ultrasound and other prenatal examinations and provided recovery care to women who had undergone forcible abortions. On one occasion, she helped a woman escape from the hospital and avoid this procedure. The court compared the respondent's actions to those of aliens in two prior decisions standing at opposite ends of the persecution spectrum, *Xie v. INS*, 434 F.3d 136 (2d Cir. 2006), and *Weng v. Holder*, 562 F.3d 510 (2d Cir. 2009). The court found that the respondent's actions were closer to those addressed in *Weng* (where the alien's actions were not found to constitute persecution) than to those in *Xie* (where persecution was found). According to the court, its conclusion that the respondent's actions were merely tangential, and therefore not sufficiently direct, active, or integral to the administering of forced abortions as to amount to participation in persecution, was bolstered by her "redemptive act." The matter was therefore remanded.

#### **Third Circuit:**

*Jean-Louis v. Att'y Gen. of U.S.*, \_\_F.3d\_\_, 2009 WL 3172753 (3d Cir. Oct. 6, 2009): The Third Circuit granted the respondent's petition for review of the Immigration Judge's ruling, as affirmed by the Board, that he was ineligible for the relief of cancellation of removal for lawful permanent residents because he was convicted of simple assault against a child under 12 years of age in Pennsylvania before he established 7 years of continuous residence in the U.S. The court concluded that the Immigration Judge erred in finding the respondent's offense to be a crime involving moral turpitude. Determining that the applicable State statute did not require knowledge of the victim's age, the court found that the least culpable conduct that could lead to a conviction under the statute (i.e., a reckless driver striking a vehicle bearing a child occupant) would not implicate moral turpitude. The court bolstered its conclusion with language from the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), stating that knowledge of the victim's age may bear on the depravity of the conduct. Noting that it had applied the modified categorical approach, the court further concluded that

it did not owe deference to *Silva-Trevino's* alternative "realistic probability" test, which the court found to be premised on an impermissible reading of a statute, which, the court believed, "speaks with requisite clarity."

#### **Fifth Circuit:**

*Alvarado de Rodriguez v. Holder*, \_\_F.3d\_\_, 2009 WL 3234691 (5th Cir. Oct. 9, 2009): The Fifth Circuit reversed the Board's decision sustaining the DHS's appeal from an Immigration Judge's grant of a hardship waiver, under section 216(c)(4) of the Act, of the requirement that the respondent file a timely joint petition for removal of the conditional basis of his lawful permanent resident status. According to the court, although the Board claimed to find clear error in the Immigration Judge's factual and credibility findings, in fact, it engaged in impermissible de novo review. The court stated that the Board "all but ignored" significant testimony and documentary evidence that was determined to be credible by the Immigration Judge and instead relied on a hearsay document disregarded by the Immigration Judge, which, in the court's opinion, did not necessarily lead to an "adverse inference" about the nature of the respondent's marriage. The matter was remanded for further proceedings.

#### **Seventh Circuit:**

*Lagunas-Salgado v. Holder*, \_\_F.3d\_\_, 2009 WL 3255191 (7th Cir. Oct. 13, 2009): The Seventh Circuit denied the petition for review of a lawful permanent resident who was found inadmissible upon return from Mexico as one convicted of a crime involving moral turpitude, and whose application for cancellation of removal was denied. The court rejected the respondent's argument that his conviction under 18 U.S.C. § 1028(a)(2) for fraud in connection with identity documents was not a crime involving moral turpitude. The respondent had argued that: (1) he was not convicted of intending to deceive the Government; and (2) in selling false social security and alien registration cards he did not deceive his customers, who knew the documents they were buying were fake. The court found the Board was justified in relying on its precedent decision in *Matter of Flores*, 17 I&N Dec. 225 (BIA 1980), to conclude that the respondent's actions "inherently involve[] a deliberate deception of the government and an impairment of its lawful functions."

#### **Eleventh Circuit:**

*Shkambi v. U.S. Att'y Gen.*, \_\_F.3d\_\_, 2009 WL 3190810 (11th Cir. Oct. 7, 2009): The Eleventh Circuit denied an

Albanian asylum applicant's petition for review challenging the Immigration Judge's denial of relief, which had been affirmed by the Board. The court upheld the Immigration Judge's adverse credibility finding, which largely relied on material omissions of material fact from his airport statement (in which he claimed to have never been arrested) and his credible fear interview. The court found that the Immigration Judge provided specific, cogent reasons for his credibility finding, and that the respondent's excuse of fear for the omissions did not compel a conclusion that he was credible. The court distinguished the facts in this case from those found in its recent decision in *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270 (11th Cir. 2009), noting that unlike in *Tang*, the respondent's airport statement was not merely a less-detailed version of his later claim but rather omitted entire material incidents that were also missing from his credible fear interview. Furthermore, the statement directly contradicted his asylum application in claiming that he was never arrested.

## BIA PRECEDENT DECISIONS

**I**n *Matter of G-D-M-*, 25 I&N Dec. 82 (BIA 2009), the Board considered the circumstances under which an alien is considered to have entered as a crewman for purposes of determining eligibility for cancellation of removal pursuant to section 240A(c)(1) of the Act, 8 U.S.C. § 1229b(b)(1). In this case, the respondent did not have employment on a ship when he entered the United States, and he was never employed as a crewman. The respondent's Form I-94 classified him as a C-1 nonimmigrant in transit, and his passport included a "C-1/D" visa, indicating he had been accorded "alien crewman" status under section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D). The respondent had a Seaman's Service Record Book issued by the Philippine Coast Guard, and he identified himself as a crewman in an asylum application filed shortly after he entered. The respondent testified that he intended to work on a ship, but he did not have a license for employment aboard a specific ship. In making the determination whether the respondent should be considered a crewman, the Board examined his visa and the circumstances surrounding his entry into the United States. The Board concluded that because the respondent received his visa and entered the United States in pursuit of employment as a crewman, he was ineligible for cancellation of removal as an alien crewman.

In *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009), the Board found that Immigration Judges have no jurisdiction to adjudicate an application filed by an arriving alien seeking adjustment of status pursuant to 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(1)(ii) (2009), with the limited exception of an alien who has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application. In granting adjustment of status, the Immigration Judge had relied on a decision of the Ninth Circuit in *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005). In *Bona*, the court found that the previous regulations regarding adjustment of status for arriving aliens were invalid because they barred adjustment for these aliens, a result that conflicted with the statute. The Board found that *Bona* is not controlling because the amended regulations addressed the concerns expressed in that decision. Arriving aliens may now apply for adjustment before the Department of Homeland Security ("DHS"). The Board remanded the case to permit the respondent to pursue any other relief and to consider whether to stipulate to administrative closure while he pursues adjustment before the DHS.

In *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009), the Board held that where an alien has properly filed an application to ameliorate the terms of release from DHS custody, Immigration Judges have jurisdiction to review and modify the condition placed on the alien's release that he participate in the Intensive Supervision Appearance Program ("ISAP"). The respondent was placed in the ISAP program by the DHS the same day he was arrested. He timely filed a motion for a custody redetermination hearing, requesting that he be allowed to post a monetary bond as an alternative to participating in the ISAP. The Immigration Judge found that she had jurisdiction to consider more than just the amount of bond, but she denied the request because the respondent did not meet his burden of proof to demonstrate that he should be relieved of the conditions imposed by the DHS. The DHS appealed. The Board found that 8 C.F.R. § 1236.1(d)(1) gives Immigration Judges broad authority to review and modify the terms imposed by the DHS on an alien's release from custody. The Board rejected the DHS's argument that the Immigration Judge's jurisdiction is limited by a statement in the regulation providing that an Immigration Judge may only "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the alien may be

released.” The Board concluded that this sentence relates to the Immigration Judge’s authority regarding review of the District Director’s decision to retain an alien in DHS custody, not the portion of the regulation governing aliens released from DHS custody. The Board further found that section 236(a) of the Act, 8 U.S.C. § 1226(a), gives authority to the Attorney General and the DHS to place conditions on an alien’s release from custody when setting a bond, and the authority must apply conversely to relieve those conditions. The Board dismissed the DHS’s appeal.

In *Matter of Carrillo*, 25 I&N Dec. 99 (BIA 2009), the Board considered the admission date rollback provision of the Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (“Cuban Adjustment Act”), and its relation to removability grounds. The respondent in this case had been admitted pursuant to the Cuban Adjustment Act but was charged with having been convicted of a crime involving moral turpitude committed within 5 years after his “date of admission” for removability under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i). Under the Cuban Adjustment Act, upon approval of an application for admission, the Attorney General creates a record of the alien’s admission for permanent residence as of the date 30 months prior to the filing of the application, or the date of the alien’s last arrival into the United States, whichever is later. The Immigration Judge found that this provision, known as the rollback provision, applies only in the citizenship context. The Board disagreed, finding that the Cuban Adjustment Act specifically defines the date of admission for aliens whose status was adjusted pursuant to that provision. The Board distinguished *Matter of Carrillo-Gutierrez*, 16 I&N Dec. Dec. 429 (BIA 1977), which declined to apply the rollback provision in rescission proceedings, because rescission proceedings challenge the alien’s statutory eligibility for adjustment of status on the date the application is approved, whereas removability concerns the period of time after which an alien has been admitted. The Board has also applied the rollback provision in other contexts outside of naturalization, such as for waiver eligibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c). In this case, the respondent’s date of admission under the rollback provision was more than 5 years prior to the date he committed his crimes involving moral turpitude, and the Board terminated proceedings.

In *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), the Board addressed the question of motions, in this

case in the context of an untimely motion to reopen to pursue adjustment of status filed by an arriving alien. The respondent acknowledged that the Department of Homeland Security’s U.S. Citizenship and Immigration Services (“USCIS”) had exclusive jurisdiction to adjudicate her adjustment application because she was an arriving alien, but she requested sua sponte reopening because the USCIS had rejected her application. The parties agreed in supplemental briefing, and the Board clarified, that the USCIS has jurisdiction over the adjustment application of an arriving alien regardless of whether there is an unexecuted removal order, with the exception of a class of aliens not at issue in this case. The Board reiterated its longstanding view that administratively final exclusion, deportation, or removal proceedings should not be reopened for matters over which neither the Immigration Judge nor the Board has jurisdiction. The Board noted that some courts of appeals have remanded similar cases for further analysis, which it interpreted as requesting a determination whether its proceedings should be used as a vehicle to, in effect, “stay” execution of the administratively final order while the adjustment application is resolved by the USCIS. The Board concluded that its authority to grant stays did not extend to reopening administratively final orders of removal to allow an alien to pursue matters over which the Board has no authority. Stay requests more appropriately rest with the agency or court that has jurisdiction over the matter, and in this case the USCIS had a process for granting stays. Finally, the Board found that reopening such cases is not warranted as a matter of discretion, noting the heavy administrative cost in maintaining an open case to await adjudication by an outside authority. In this case, the USCIS advised in supplemental briefing that the respondent’s adjustment application had been granted, so the matter was ultimately resolved as envisioned under the regulations. The Board denied the respondent’s motion but reopened upon the USCIS’s motion for the purpose of terminating the proceedings.

## REGULATORY UPDATE

**74 Fed. Reg. 55, 726**

DEPARTMENT OF HOMELAND SECURITY  
8 CFR Parts 1001, 1208, 1209, et al.

**Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands; Interim Final Rule**

AGENCY: U.S. Citizenship and Immigration Services, DHS; Executive Office for Immigration Review, DOJ.  
ACTION: Interim final rule.

SUMMARY: The Department of Homeland Security (DHS) and the Department of Justice (DOJ) are implementing conforming amendments to their respective regulations to comply with the Consolidated Natural Resources Act of 2008 (CNRA). The CNRA extends the immigration laws of the United States to the Commonwealth of the Northern Mariana Islands (CNMI). This rule amends the regulations governing: asylum and credible fear of persecution determinations; references to the geographical “United States” and its territories and possessions; alien classifications authorized for employment; documentation acceptable for Employment Eligibility Verification; employment of unauthorized aliens; and adjustment of status of immediate relatives admitted under the Guam- CNMI Visa Waiver Program. Additionally, this rule makes a technical change to correct a citation error in the regulations governing the Visa Waiver Program and the regulations governing asylum and withholding of removal. The purpose of this rule is to ensure that the regulations apply to persons and entities arriving in or physically present in the CNMI to the extent authorized by the CNRA.  
DATES: Written comments must be submitted on or before October 14, 2009.

**74 Fed. Reg. 55, 278**

DEPARTMENT OF STATE

**In the Matter of the Review of the Designation of al-Qa’ida in the Islamic Maghreb (a.k.a. AQIM, a.k.a. Tanzim al-Qa’ida fi Bilad al-Maghrib al-Islamiya) as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended**

SUMMARY: Based upon a review of the Administrative Records assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (“INA”), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2004 redesignation of the aforementioned organization, formerly known as the Salafist Group for Call and Combat, as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation

of the designation. Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained. This determination shall be published in the Federal Register.  
Dated: October 16, 2009.

**74 Fed. Reg. 52, 385**

**Presidential Document**

**Fiscal Year 2010 Refugee Admissions Numbers And Authorizations of In-country Refugee Status Pursuant To Sections 207 And 101(A)(42), Respectively, of the Immigration And Nationality Act, And Determination Pursuant To Section 2(B)(2) of the Migration And Refugee Assistance Act, As Amended**

SUMMARY: In accordance with section 207 of the Immigration and Nationality Act (the “Act”) (8 U.S.C. 1157), as amended, and after appropriate consultations with the Congress, I hereby make the following determinations and authorize the following actions: The admission of up to 80,000 refugees to the United States during Fiscal Year (FY) 2010 is justified by humanitarian concerns or is otherwise in the national interest; provided that this number shall be understood as including persons admitted to the United States during FY 2010 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below. The 80,000 admissions numbers shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided that the number of admissions allocated to the East Asia region shall include persons admitted to the United States during FY 2010 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100–202 (Amerasian immigrants and their family members):  
Dated: October 13, 2009.

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**The Meaning of “Admission”** *continued*

as of the date of adjustment, even if the alien has never been “admitted” within the meaning of section 101(a)(13)(A).

*Id.* at 756.



The Board found that section 237(a)(2)(A)(i) of the Act is ambiguous because the Act does not specify which of an alien’s multiple “admission” dates applies to determine deportability. To extract Congress’s intent, the Board pointed to the ground’s parenthetical provision which expressly addresses those aliens who gained permanent residence through section 245(j), which relates to criminal informants. As interpreted by the Board, because section 245(j) is an adjustment of status section, the text of the deportation ground clearly contemplates that an alien’s adjustment date constitutes a date of admission for purposes of this section. The Board additionally noted the historical practice of the Board and Federal courts under prior law to consider any entry as a permissible trigger date in determining deportability—not simply the first or last entry made by the alien.

*Matter of Shanu* has been rejected either explicitly or implicitly by every circuit court to consider the issue. The Fourth Circuit expressly overturned *Matter of Shanu* in *Aremu*, 450 F.3d 578. While “trouble[d]” that its ruling might perversely benefit aliens who fall out of status prior to adjusting their status over aliens who properly depart the country and later reenter as permanent residents—since entry by the latter group would clearly constitute an “admission” triggering the deportation ground—the circuit felt “obliged to give effect to the statutes as they are written and enacted.” *Id.* at 583 n.6.

The Fourth Circuit invoked the principles of statutory construction to hold that the plain meaning of the statute did not include “adjustment of status” as an admission. The court carefully limited the reach of its holding, expressing “no opinion on whether adjustment of status may properly be considered ‘the date of admission’ where the alien sought to be removed has never been ‘admitted’ within the meaning of [section 101(a)(13)(A) of the Act].” *Id.* at 583. The court emphasized the importance of avoiding absurd results, explaining that “[i]n such a situation, a conclusion that the date of adjustment of status qualifies as a ‘date of admission’ might be justified through application of the settled rule that a court must, if possible, interpret statutes to avoid absurd results.” *Id.*

The Sixth, Seventh, and Ninth Circuits have also found that the statute unambiguously excludes adjustment of status from the reach of section 237(a)(2)(A)(i) of the Act where the alien had effected a

lawful entry prior to adjusting status. *Zhang v. Mukasey*, 509 F.3d 313; *Abdelqadar*, 413 F.3d 668; *Shivaraman v. Ashcroft*, 360 F.3d 1142. The courts similarly limited the holding of *Rosas*, finding that the anomalous legal effect in the specific factual context of that case justified the Board’s departure from the unambiguous terms of the statute. In other words, where the alien entered the country unlawfully prior to adjusting, thus rendering adjustment of status the only lawful immigration process effected by the alien, the Board was justified in seeking to avoid the absurd result that would otherwise arise from a literal reading of the statute: that aliens who entered lawfully and later adjusted status could be found removable while aliens who adjusted status after entering unlawfully were not removable because no traditional “entry” had occurred. The courts found that such a departure from the plain meaning of the text is not justified when interpreting a different deportation ground under circumstances in which an alien adjusted status following an earlier lawful entry.

*Aliens Unlawfully Present Under Section  
212(a)(9)(B)(i)(II) of the Act*

The phrase “seeks admission” in section 212(a)(9)(B)(i)(II) of the Act raises questions regarding the applicability of the inadmissibility ground to aliens who seek adjustment of status rather than entry from outside the United States. This section renders inadmissible any alien who “has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of [the] alien’s departure or removal.” The Board has suggested that this section applies as a ground of inadmissibility both to aliens who seek admission at the border and to those who seek adjustment of status from within the United States. *Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006). However, the reach of this suggestion may be limited by two factors. First, the statement is made as dicta, as it is not a basis for the Board’s holding in the decision. Second, the decisions cited by the Board in support of its suggestion—*Matter of Shanu* and *Matter of Rosas*—have been either overturned by the circuit courts or restricted to the distinct context in which those cases arose, as previously described.

The interplay of sections 212(a)(9)(B)(i)(II) and (C)(i)(I) of the Act may be helpful in deciphering the meaning of “seeks admission” for purposes of section 212(a)(9)(B)(i)(II). The Board has found that these two

sections share a unified theme in seeking “to compound the adverse consequences of immigration violations by making it more difficult for individuals who have left the United States after committing [certain] violations to be lawfully readmitted thereafter.” *Rodarte*, 23 I&N Dec. at 909. However, the two sections are textually distinct in that section 212(a)(9)(B)(i)(II) prohibits admission to an alien who “seeks admission” after accruing 1 year of unlawful presence, whereas section 212(a)(9)(C)(i)(I) precludes admission to an alien “who enters or attempts to reenter the United States” after accruing 1 year of unlawful presence. (Emphasis added.)

In *Matter of Lemus*, 24 I&N Dec. 373, 378 (BIA 2007), the Board found “no reason to distinguish between aliens who are inadmissible under [these two sections]” for purposes of determining an alien’s eligibility to adjust status under section 245(i) of the Act. However, the Seventh Circuit recently held that the Board acted improperly in *Lemus* by “equat[ing] the unlawful re-entrant with someone who is ‘seeking admission.’” *Lemus-Losa v. Holder*, 576 F.3d 752, 758 (7th Cir. 2009).

Given the unsettled scope of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, adjudicators might logically conclude that the only rational way to maintain the distinction established by Congress between an alien who “seeks admission” versus an alien who “enters or attempts to enter” is to presume that section 212(a)(9)(B)(i)(II) applies to aliens who accrue 1 year of unlawful presence, depart, then seek admission from outside the United States, while section 212(a)(9)(C)(i)(I) applies to aliens who accrue 1 year of unlawful presence, depart, then reenter or attempt to reenter the United States unlawfully. As a result, these two grounds of inadmissibility are mutually exclusive—after all, an alien cannot “seek admission” from outside the United States if he or she has entered or already attempted to enter unlawfully. Section 212(a)(9)(B)(i)(II) would therefore apply only to aliens who “seek admission” via “lawful entry” from outside of the United States, but not to aliens who seek to adjust status from within the country.

Such an interpretation would appear to align with the separate treatment that Congress has given these two provisions for purposes of waiver eligibility. As might be expected, an alien who accrues unlawful presence and then commits or attempts to commit a second unlawful

entry is treated more harshly than an alien who accrues unlawful presence but then “seeks admission” through lawful means after departing. An alien in the former category is permanently inadmissible and may seek permission to reapply for admission only after 10 years have expired since the date of his or her last admission. See section 212(a)(9)(C)(ii) of the Act; *Matter of Briones*, 24 I&N Dec. 355, 358-59 (BIA 2007); see also *Matter of Torres-Garcia*, 23 I&N Dec. 866, 873 (BIA 2006). An alien in the latter category is inadmissible for 10 years following his or her departure but may seek a hardship waiver to waive inadmissibility prior to this time. See section 212(a)(9)(B)(v) of the Act.

Questions regarding these two grounds of inadmissibility often arise in the context of an alien seeking to adjust status under section 245(i) of the Act. Interestingly, although the grounds would appear to be mutually exclusive, they share the same disqualifying effect on an alien seeking adjustment of status under section 245(i). An alien inadmissible under section 212(a)(9)(B)(i)(II) would be ineligible to adjust under section 245(i) because he or she is not currently unlawfully present in the United States as required under the statute; rather, the alien is “seeking admission” from outside the United States. An alien inadmissible under section 212(a)(9)(C)(i)(I) is ineligible to adjust status for the reasons articulated in *Matter of Briones*,<sup>2</sup> the Board’s precedent decision discussing section 245(i) relief.

### **Selected Relief from Removal Involving the Term “Admission”**

#### *Waiver Under Section 212(h) of the Act*

Section 212(h)(1) of the Act permits the Attorney General to waive certain criminal grounds of inadmissibility for rehabilitated aliens whose convictions occurred far in the past; for aliens whose removal would cause extreme hardship to a qualifying United States citizen or lawful permanent resident relative; or for aliens who are VAWA self-petitioners. The statute explicitly bars adjudicators from granting a section 212(h) waiver

in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of

an aggravated felony or the alien has not lawfully resided continuously in the United States [for 7 years prior to the proceedings].

Section 212(h)(2) of the Act; *see also* *Matter of Michel*, 21 I&N Dec. 1101, 1104 (BIA 1998); *Matter of Yeung*, 21 I&N Dec. 610, 611 (BIA 1996, 1997).

The Fifth Circuit recently clarified that the statutory bar to relief under section 212(h) of the Act applies only to aliens who originally entered the country as lawful permanent residents, but not to aliens who became lawful permanent residents through adjustment. *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008). *Martinez* involved an alien who adjusted his status after lawfully entering as a nonimmigrant visitor. He was subsequently found removable for an aggravated felony conviction. The Fifth Circuit overturned the Board's conclusion that the section 212(h) statutory bar applied, holding instead that the alien was not barred from seeking relief because he had not entered the United States in the status of a lawful permanent resident. The court expressly stated that the holding in *Matter of Rosas*—that adjustment of status constitutes an “admission” within the meaning of the aggravated felony deportation ground—does not control in the context of section 212(h) relief.

Referring to the statutory definition of the term “admitted” under section 101(a)(13)(A) of the Act as well as the language in section 212(h), the court determined that the statute unambiguously disqualifies only those aliens who were inspected and admitted upon entry as lawful permanent residents. The court noted that the phrase “lawfully admitted for permanent residence” is an independent term of art distinct from the term “admitted.” Because the bar under section 212(h) refers to an alien “who has *previously been admitted* . . . as an alien lawfully admitted for permanent residence,” the text effectively denies waivers only to those aliens who were inspected and permitted to enter the country in the original status of lawful permanent resident. Section 212(h)(2) of the Act (emphasis added).

The Fifth Circuit rejected the complaint that such a construction unreasonably imputes to Congress an intent to distinguish between lawful permanent residents. The court explained: “Congress may well have been taking a ‘rational first step toward achieving the legitimate goal of quickly removing aliens who commit

certain serious crimes from the country.” *Martinez*, 519 F.3d at 545 (quoting *Lara-Ruiz v. INS*, 241 F.3d 934, 947 (7th Cir. 2001)). In addition, Congress “might rationally have concluded that adjusted-to-LPR-status aliens . . . are more deserving,” considering their likely stronger ties to the country and the additional scrutiny they faced in adjusting status. *Id.*

Interestingly, in enforcing the bar under section 212(h) of the Act, courts have construed the phrase “lawfully admitted for permanent residence” to require only procedural compliance from aliens in obtaining the status of permanent resident. Aliens who obtained such status despite an unknown or undisclosed underlying inadmissibility at the time the status was conferred remain subject to the bar as aliens “lawfully admitted for permanent residence.” *See, e.g., Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998) (finding that an alien had been “lawfully admitted for permanent residence” despite his asserted fraud at the time his status was conferred); *see also Onwuamaegbu v. Gonzales*, 470 F.3d 405 (1st Cir. 2006) (extensively citing *Ayala* in holding that an alien who failed to disclose a conviction on his application for adjustment of status remained “lawfully admitted for permanent residence” for purposes of the bar to section 212(h) relief).

Citing the definition of “lawfully admitted for permanent residence” in section 101(a)(20) of the Act and the text of section 212(h), the Board in *Ayala* explained that the statute “does not, either expressly or by implication, distinguish between those whose admission was lawful and those who were previously admitted for lawful permanent residence but are subsequently determined to have been admitted in violation of the law.” *Ayala*, 22 I&N Dec. at 401. The Board believed that “[t]o read such a distinction into the statute would be arbitrary and capricious,” noting that “[n]othing in the language of the statute supports the proposition that the respondent’s conviction for a crime involving moral turpitude can or should change the historical fact that, when he entered, it was in the status of a lawful permanent resident.” *Id.* at 402. The Board effectively emphasized the fact of entry via inspection and authorization, which met procedural regularity despite the absence of substantive compliance.

The interpretation of the phrase “lawfully admitted for permanent residence” under section 212(h) of the Act by the Board and the First Circuit would seem to conflict

with the Ninth Circuit's vacated interpretation of the term "admitted" within the context of section 245(a) in *Orozco*, 546 F.3d 1147. As previously described, the Ninth Circuit required substantive admissibility *and* procedural regularity in order for an "entry" to be lawful. The Board's and First Circuit's interpretation also conflicts with the prevailing meaning of "lawfully admitted for permanent residence" in the context of cancellation of removal and relief under former section 212(c) of the Act, where the Board and circuit courts have repeatedly held that an alien who obtains permanent residence through fraud, or whose inadmissibility was undetected by the Government at the time an application was approved, is not "lawfully admitted" because his or her status was granted in contravention of the substantive immigration laws. As explained by the Ninth Circuit in *Monet v. INS*, 791 F.2d 752 (9th Cir. 1986), an "[a]dmission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity . . . ." The provisions concerning deportation demonstrate that what is essential is lawful status, not regular procedure." *Id.* at 753-54 (quoting *Matter of Longstaff*, 716 F.2d 1439, 41 (5th Cir. 1983)); see also *Mejia-Orellana v. Gonzales*, 502 F.3d 13 (1st Cir. 2007) (holding that an alien who obtained status on the basis of fraud was ineligible for cancellation of removal); *De La Rosa v. U.S. Dep't of Homeland Sec.*, 489 F.3d 551 (2d Cir. 2007) (holding that an alien who obtained status on the basis of fraud was ineligible for former section 212(c) relief); *Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307 (11th Cir. 2006) (holding that an alien who obtained status on the basis of a mistake by the Immigration and Naturalization Service ("INS") was ineligible for former section 212(c) relief); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183 (8th Cir. 2005) (holding that an alien who obtained status on the basis of an INS mistake was not "lawfully admitted for permanent residence" and was ineligible for former section 212(c) relief, where the alien was not entitled to adjustment of status because of inadmissibility); *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003) (holding that an alien who obtained his status on the basis of fraud was ineligible for cancellation of removal).

#### *Waiver Under Section 237(a)(1)(H) of the Act*

Section 237(a)(1)(H) of the Act authorizes the Attorney General to waive the removal of an alien on the ground that he or she was "inadmissible at the time of admission" as an alien who committed

fraud or misrepresentation as described in section 212(a)(6)(C) (i) of the Act. Neither the Board nor the circuit courts appear to have directly considered whether section 237(a)(1)(H) applies to waive fraud committed in obtaining adjustment, rather than fraud committed in obtaining entry. However, several circuit court and Board decisions have considered a similar issue with respect to the previous version of the waiver under former section 241(f) of the Act, 8 U.S.C. § 1251(f) (1994), which waived the removal of an alien who was "excludable at the time of entry" on the basis of fraud or misrepresentation. Each decision denied waiver eligibility where the fraud was committed in the alien's adjustment but not in the alien's entry. See *Matter of Connelly*, 19 I&N Dec. 156 (BIA 1984) (holding that relief under former section 241(f) waives only those frauds committed in relation to entry, not fraud committed in relation to adjustment of status).

In *Ferrante v. INS*, 399 F.2d 98 (6th Cir. 1968), the Sixth Circuit deemed an alien ineligible for a waiver under former section 241(f) of the Act with respect to fraud committed in relation to the alien's adjustment. The court explained that the section "obviously applies to aliens who were excludable at the time of their entry by reason of some fraud or misrepresentation by which they gained entry. [This alien] entered the United States lawfully as a visitor without fraud or misrepresentation. He was not excludable at the time of his entry." *Id.* at 104. Similarly, the Ninth Circuit has held that former section 241(f) does not apply where the alien committed adjustment fraud, noting that "[t]here is a difference between fraud after entry and fraud to obtain entry." *Khadjenouri v. INS*, 460 F.2d 461, 462 (9th Cir. 1972). In *Pereira-Barbeira v. U.S. Dep't of Justice*, INS, 523 F.2d 503, 507 (2d Cir. 1975), the Second Circuit agreed with the Sixth and Ninth Circuits that "there is a difference between an entry and an adjustment of status and . . . Section 241(f) does not apply where the latter is obtained by fraud."

The Conference Report accompanying IIRIRA contains no indication that Congress intended to alter the substantive application of this section when it replaced the concept of exclusion with admission and recodified the section within the new removal scheme. As a result, the fraud waiver under section 237(a)(1)(H) of the Act presumably continues to apply only to waive fraud committed in relation to entry, not to adjustment of status. See H.R. Rep. No. 104-828, at 41-52, 70-82 (1996) (Conf. Rep).

It should be noted that section 212(i) of the Act, the parallel waiver of inadmissibility for fraud or material misrepresentation, does not textually limit availability of relief to aliens found “inadmissible at the time of admission,” as section 237(a)(1)(H) does. Rather, section 212(i) permits the Attorney General “to waive the application of [section 212(a)(6)(C)(i)] in the case of [an alien who meets certain conditions].” Section 212(i) of the Act. Accordingly, in some circumstances, it is possible that a deportable alien who is ineligible for a waiver under section 237(a)(1)(H) might still qualify for relief under section 212(i) to waive fraud related to the alien’s adjustment of status if the alien seeks to readjust status in removal proceedings. *See, e.g., Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996) (stating that “a section 212(i) waiver may be invoked in deportation proceedings only in conjunction with an application for adjustment of status”).

### Conclusion

Despite the seeming clarity of the statutory definition of the terms “admission” and “admitted,” they have seen different interpretations in various provisions of the Act. Phrases such as “lawfully admitted for permanent residence” and “seeks admission” additionally raise questions regarding the scope of the meaning of “admission” and “admitted.” In particular, courts have struggled to determine whether “admission” includes adjustment of status within a particular section of the Act. It is instructive to consider prior interpretations of these terms when grappling with their meaning in any particular section of the Act. However, caution is advised in applying a single interpretation across the statute as a whole, as the

propriety of direct transference is negated by the varying context between sections, as well as the history of the Act and its amendments. As noted by the Seventh Circuit:

[T]o accept that the term “admission” extends beyond the statutory definition in the context of one clause “is not . . . to imply that the word must have the same meaning” in another. “[T]he whole point of contextual reading . . . is that context matters—and the context of the word ‘admission’ in [one part of the statute] differs substantially from its context in [another].”

*Lemus-Losa*, 576 F.3d at 757 (citation omitted) (quoting *Abdelquador*, 413 F.3d at 673, 674).

*Sarah K. Barr is the Attorney Advisor at the Seattle Immigration Court.*

1. It should be noted that the alien in *Matter of Rosas* adjusted her status under section 245A of the Act, 8 U.S.C. § 1255a. Unlike section 245(a) of the Act, which provides that an alien must be “inspected and admitted or paroled,” and may therefore require a “lawful entry,” section 245A(a)(2)(A) of the Act states that an alien must establish continuous residence “in an unlawful status” since January 1, 1982. See also section 245(i), which provides relief to certain aliens who “entered the U.S. without inspection.”

2. *Matter of Briones* extensively discusses the changes to the Act brought by IIRIRA, the history of section 245(i) of the Act, the statutory text of section 212(a)(9)(C)(i)(I) of the Act in context, and the interplay of sections 245(i) and 212(a)(9)(C)(i)(I) of the Act within the overall statutory scheme to conclude that section 245(i) does not serve to waive the inadmissibility of an alien inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

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