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"ARRIVING ALIENS" AND ADJUSTMENT OF STATUS: WHAT IS THE IMPACT OF THE GOVERNMENT'S INTERIM RULE OF MAY 12, 2006?

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Practice Advisory[1]
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This practice advisory is one of three which discuss interim regulations that give USCIS jurisdiction over the adjustment application of an "arriving alien" parolee who is in removal proceedings.[2] These regulations were adopted jointly by the Executive Office of Immigration Review (EOIR) and the U.S. Citizenship and Immigration Services (USCIS). 71 Fed. Reg. 27585 (May 12, 2006). Significantly, with the issuance of these interim regulations, EOIR and USCIS also repealed former 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). *See* 71 Fed. Reg. 27585 (2006). These two former regulations barred all "arriving aliens" – including parolees – from adjusting to permanent resident status if they were in removal proceedings.

The repeal of this former regulatory bar provides an opportunity for parolees in proceedings who are otherwise eligible for adjustment to apply for this benefit. This practice advisory will provide a brief history leading up to the interim regulation, will define key terms and will discuss the impact of the interim regulation and suggest steps that a parolee can take to benefit from the interim rule.

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[1] Readers are cautioned to check for additional or new cases and legal developments after the date of this advisory. This advisory is written and intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[2] The other two practice advisories are: "USCIS Adjustment of Status of 'Arriving Aliens' With An Unexecuted Final Order of Removal" and "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case." *See* http://www.ailf.org/lac/lac_pa_index.shtml.

BACKGROUND

What is the background behind the interim regulation?

Prior to passage of IIRIRA in 1996, there were two major types of proceedings to expel a non-citizen from the United States: exclusion proceedings, which were brought against individuals who had never made an entry into the United States; and deportation proceedings, brought against individuals who had entered the United States. Under this former model, "arriving aliens" were subject to exclusion proceedings. A non-citizen in exclusion proceedings was not barred from applying for adjustment of status. Generally, however, only the former INS had jurisdiction over the adjustment applications of individuals in exclusion proceedings; with one limited exception, immigration judges did not have jurisdiction over these applications. *Matter of Castro*, 21 I&N Dec. 379 (BIA 1996). Moreover, an individual remained eligible to adjust even when there was a final order of exclusion against him. *See Matter of C—H—*, 9 I&N Dec. 265 (INS 1961).

With the passage of IIRIRA, Congress did away with exclusion and deportation proceedings and instead created removal proceedings. In 1997, the former INS adopted a regulation that barred all "arriving aliens" who were in removal proceedings from adjusting status. *See former* 8 C.F.R. § 245.1(c)(8); § 1245(c)(8).[3] At the same time, INS also for the first time adopted a regulation defining the term "arriving alien." After the adoption of this regulation, "arriving aliens" who were in removal proceedings were prohibited from applying for adjustment of status on any basis and in any forum – that is, before either an immigration judge or the immigration service. The regulation defining an arriving alien is broad and includes the majority of individuals paroled into the United States. As a result, under former 8 C.F.R. § 245.1(c)(8) and § 1245.1(c)(8), almost all parolees in removal proceedings were barred from adjustment of status.

These former regulations were challenged in litigation throughout the country. Four federal courts of appeals struck down the regulations after finding that they violated the adjustment of status statute, while two other courts upheld the regulations.[4] The interim rule was specifically adopted in response to this litigation. *See* 71 Fed. Reg. 27587.

What is an "arriving alien" and does the interim rule change this definition?

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[3] 8 C.F.R. § 245.1(c)(8) applied to cases before INS (subsequently USCIS), while § 1245.1(c)(8) applied to cases before immigration judges.

[4] The courts that struck down the regulations were: *Scheerer v. Attorney General*, 445 F. 3d 1311 (11th Cir. 2006) (*Scheerer I)*; *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). The courts that upheld the regulations were: *Momin v. Gonzales*, 447 F.3d 447 (5th Cir.), *vacated and remanded*, 2006 U.S. App. LEXIS 21923 (5th Cir. Aug. 25, 2006) and *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir.), *vacated and remanded*, 126 S. Ct. 2964 (2006). AILF appeared as *amicus curiae* or otherwise assisted with the briefing in each of these cases. *See* http://www.ailf.org/lac/lac_lit.shtml.

The INA, the regulations, and case law have long used the term "arriving alien." In 1997, for the first time, the INS defined this term in a regulation promulgated to implement IIRIRA. *See* 62 Fed. Reg. 444 (Jan. 3, 1997). The relevant portion of the current regulatory definition, as amended by the May 12, 2006 interim rule, is:

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

8 C.F.R. § 1.1(q).

Under this definition, an arriving alien is either someone who attempted an entry at a port-of-entry but was not admitted or someone who is interdicted at sea. Parolees fall within this definition because parole into the United States at a port of entry is not an admission. 8 U.S.C. §§ 101(a)(13)(B) and 1101(a)(13)(B). Consequently, a noncitizen who entered without inspection is *not* an arriving alien. Similarly, a noncitizen who was previously admitted after inspection is not an arriving alien, even if that person subsequently falls out of status.

Can I challenge DHS' characterization of my client as an "arriving alien"?

Yes. In any case in which DHS alleges that an immigration judge does not have jurisdiction over an adjustment application because the noncitizen is an arriving alien, you may contest whether your client meets the definition of an arriving alien. If the individual is not an arriving alien, then the immigration judge would have jurisdiction over any adjustment application that your client might file while in removal proceedings. *See* 8 C.F.R. § 1245.2(a)(1)(i) (May 12, 2006). So long as your client satisfies the requirements for adjustment of status, she would be eligible to adjust before the immigration judge.

Generally, an ICE officer will check a box at the top of the Notice To Appear (NTA) indicating the allegation that the person is an arriving alien. This box is separate from the "charges" portion of the NTA. If you decide to challenge the "arriving alien" allegation, it may be advisable to do so explicitly and independently of any denial of the charges that you may be making. In some cases, the "arriving alien" issue may not arise until well after the Master Calendar hearing. In a case in which the client and/or practitioner already admitted to the allegation of "arriving alien," you can move to withdraw this admission if it later becomes clear that the individual does not fit within the definition of an arriving alien.

THE MAY 12, 2006 INTERIM RULE

What does the interim rule consist of?

The interim rule consists of two parts. First, it includes changes to the regulations that are effective immediately. These changes are discussed in this advisory. Second, the rule suggests additional proposed changes to the regulations that may be made in the future. Without exception, the suggested future changes would limit the favorable exercise of discretion in the adjustment applications and removal proceedings of "arriving aliens" covered by the rule. The rule sought public comment on the suggested changes by June 12, 2006.[5] Because the suggested changes are suggestions only – and have not been, and may never be, adopted – they are not discussed here.

What does the interim rule do?

The interim rule makes the following changes to the regulations:

- The interim rule repeals former 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). These former regulations barred an "arriving alien," including a parolee, who was in removal proceedings from being eligible to file an adjustment of status application before either an immigration judge or USCIS. Several courts found that the majority of parolees were in removal proceedings and that these regulations thus barred most parolees from being able to adjust in proceedings. The courts found that this result violated the adjustment statute, which specifically states that parolees are eligible to adjust status. 8 U.S.C. § 1255(a); *Bona,* 425 F.3d at 669-670 (*quoting Succar,* 394 F.3d at 27)*; Scheerer I,* 445 F.3d at 1321-22; *Zheng,* 422 F.3d at 118.

  USCIS and EOIR repealed these regulations to resolve the split in the courts over the validity of the regulations. USCIS and EOIR explained that they decided to repeal the regulations because "having rules that apply nationwide is preferable to continuing to litigate the validity of the [regulations]." 71 Fed. Reg. 27587.

- The interim rule generally gives USCIS jurisdiction over the adjustment of status applications of parolees in removal proceedings. 8 C.F.R. § 245.2(a)(1), § 1245.2(a)(1)(ii). Thus, the fact that a parolee is in removal proceedings is no longer a bar to his or her filing an application for adjustment of status with USCIS. USCIS should also retain jurisdiction over an adjustment application of an "arriving alien" even when there is a final order of removal. *See Matter of C—H—*, 9 I&N Dec. 265 (INS 1961) ("Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled"]; USCIS Memorandum, "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment

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[5] AILF and AILA submitted comments strongly opposing the suggested future changes to the regulations. *See* http://www.ailf.org/lac/lit_issue_pages.shtml.

of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007), http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

- The interim rule provides one exception for immigration judge jurisdiction, allowing such jurisdiction over adjustment applications of certain "arriving aliens" who have been granted advance parole. 8 C.F.R. § 1245.2(a)(1)(ii).

What is the effective date of the interim rule and how long will it remain effective?

The interim rule was effective on May 12, 2006, the date that it was published. The interim rule will continue in effect until a final regulation is published, at which time the final regulation will take effect. There is no way to predict when a final regulation will be published or what, if any, changes will be included in a final regulation.

How is jurisdiction over the adjustment applications of arriving aliens divided between USCIS and immigration judges under the interim regulations?

The interim regulation states that USCIS has jurisdiction to adjudicate an adjustment application of any alien "unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1)." 8 C.F.R. § 245.2(a)(1). Thus, USCIS has jurisdiction over *all* adjustment applications except those over which an immigration judge has jurisdiction.

The interim regulation also states that an immigration judge does not have jurisdiction over an adjustment application of an arriving alien placed in removal proceedings with one exception, discussed below. 8 C.F.R. § 1245.2(a)(1)(ii).

Under the interim regulations, when does USCIS have jurisdiction over an adjustment application of an "arriving alien" in removal proceedings?

USCIS now has jurisdiction over the adjustment applications of "arriving aliens," including parolees, who are in removal proceedings. 8 C.F.R. § 245.2(a)(1).[6] The fact that the individual is in removal proceedings is no longer a bar to the jurisdiction of USCIS over the adjustment application.

Similarly, an unexecuted final order of removal should not be a bar to USCIS' ability to adjudicate an adjustment application.[7] The interim regulations are modeled after the

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[6] The agency has always had jurisdiction over the adjustment application of an arriving alien who has *not* been placed in proceedings.

[7] The one exception may be an in absentia removal order issued less than ten years prior to the adjustment application, because such an order – if issued with proper notice – carries a ten year bar to adjustment. 8 U.S.C. § 1229a(b)(7). For more on the issue, *see* AILF's practice advisory "USCIS Adjustment of Status of 'Arriving Aliens' With An Unexecuted Final Order of Removal," http://www.ailf.org/lac/lac_pa_index.shtml.

system as it existed prior to IIRIRA when exclusion and deportation proceedings were distinct. At that time, there was no bar to an individual in exclusion proceedings (the equivalent of an "arriving alien" in removal proceedings now) adjusting before USCIS. Although the immigration judge did not have jurisdiction over an adjustment application of someone in exclusion proceedings, USCIS retained jurisdiction over such an application notwithstanding the exclusion proceedings. Moreover, USCIS continued to have jurisdiction even after a final order of exclusion was issued, at least as long as the individual remained in the United States. *See, e.g., See Matter of C—H—*, 9 I&N Dec. 265 (INS 1961) ("Exclusion order does not bar eligibility [for adjustment] when alien has been inspected and paroled"]; *see also Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (legacy INS had a policy of "refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the visa petition would make the beneficiary immediately eligible for adjustment of status").

The interim regulations also do not place any limits on the exercise of discretion over the adjustment application by USCIS decision-makers. While the rule *suggests* possible future limits on the exercise of USCIS discretion over these adjustment applications, the agency did not adopt any of these limits in the interim regulations. Thus, unless and until final regulations are issued that contain restrictions, USCIS decision-makers must apply the same standards to these adjustment applications as they would to any other adjustment application. The standards to be applied are those that have been developed by Board and federal court case law. *See* 71 Fed. Reg. at 27590.

When does an immigration judge have jurisdiction over the adjustment application of an "arriving alien" in removal proceedings?

In general, the interim regulations do not give an immigration judge or the BIA jurisdiction over an adjustment application of an "arriving alien." 8 C.F.R. § 1245.2(a)(1)(ii). Thus, with one exception discussed below, an immigration judge generally will not be able to decide an adjustment application of a parolee in proceedings. However, an immigration judge or the BIA can continue or reopen a removal case so that a parolee can file an adjustment application with USCIS. With this relief, the parolee can protect against actual removal before USCIS has time to decide the adjustment application. The regulations do not limit the exercise of discretion by immigration judges or the BIA over requests for continuances or motions to reopen, but instead indicate that immigration judges and the BIA must apply the same standards to these requests as they would to similar requests under the standards developed by BIA and federal court case law. *See* 71 Fed. Reg. at 27590.[8]

[8] For more on this issue, *see* AILF's practice advisory "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case," http://www.ailf.org/lac/lac_pa_index.shtml; *see also Ceta v. Mukasey*, 535 F.3d 639 (7th Cir. 2008) (adopting these arguments); *Kalilu v. Mukasey*, 516 F.3d 777 (9th Cir. 2008) (same); *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008) (same); *but see Scheerer v. U.S. Attorney*

The interim regulations, at 8 C.F.R. § 1245.2(a)(1)(ii), provide an exception allowing an immigration judge to exercise jurisdiction over the adjustment applications of an "arriving alien" in removal proceedings if:

- the individual properly filed an adjustment application with USCIS while in the U.S.;
- the individual departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed adjustment application;
- the application for adjustment of status was denied by USCIS; and
- DHS placed the parolee in proceedings either upon the individual's return to the U.S. pursuant to the advance parole or after USCIS denied the adjustment application.[9]

What steps can a practitioner take on behalf of a parolee in proceedings who seeks to adjust?

The following are suggested steps to take to assist your parolee client who is in proceedings with an adjustment application. These suggestions are based on reports that we have heard to date about how the regulation is being implemented as well as the one guidance memo issued to date by USCIS. *See* "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007), http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

In all cases, adjustment-eligible parolees should apply for adjustment with USCIS. No matter the stage of the removal proceeding (e.g., whether before the immigration judge, the Board, or on appeal at federal court) a client eligible to file an adjustment application can do so with USCIS. USCIS has not indicated that there will be different filing procedures for parolees in removal proceedings who are applying for adjustment under this interim rule. Thus, unless USCIS instructs differently, we suggest that you follow the instructions on the Form I-485 as to where to file. This will vary depending on the type of adjustment application being filed. Remember, however, that the interim regulations impact only a parolee's opportunity to apply for adjustment and agency jurisdiction over these applications. These regulations do not change the eligibility requirements for adjustment, which an "arriving alien" parolee still must meet in order to have an adjustment application granted.

General, 513 F.3d 1244 (11th Cir.), *cert. denied*, No. 07-1555 (2008) (*Scheerer II)* (rejecting these arguments).

[9] This exception is arguably broader than that contained in the former regulations. The former version of 8 C.F.R. § 1245.2(a)(1) stated that an advance parolee could "renew" an adjustment application before an immigration judge after it had been denied by USCIS if the parolee met the exception. There is an argument that, because the interim regulation deleted the word "renew," it is broader than the former regulations.

Perhaps the second most beneficial step that you can take on behalf of your client is to try and stay the removal proceedings so that your client is not actually removed prior to USCIS having an opportunity to adjudicate the adjustment application. Forestalling the entry of a final order, and certainly delaying execution of any final order that may be entered, can only increase your client's chances of succeeding with the adjustment application before USCIS. The following is a partial list of steps that can be taken to achieve the time necessary for USCIS to adjudicate the adjustment application.

- **If your client's case is on appeal at the federal court level:** In one circuit, attorneys were successful in getting cases put on a "suspended" docket pending issuance of the final regulations. In the interim, these attorneys filed adjustment applications for their clients with USCIS. If there are no other issues in the case, you also could try moving for a remand while your client applies for adjustment before USCIS. If you do this, be as specific as possible in the remand request with respect to what you are seeking. In addition to the remand, the relief you might seek could include a request for the case to be remanded to an immigration judge, where you could seek an administrative stay, an adjournment, a continuance or that the case otherwise be held in abeyance while the parolee's adjustment application is being adjudicated by USCIS. You could also seek to have the government agree to a stay of removal while the parolee's adjustment application is adjudicated.

- **If your client's case is on appeal at the Board:** You can move for a remand to an immigration judge where you could seek a continuance or that the case otherwise be held in abeyance while the parolee's adjustment application is being adjudicated by USCIS. In the alternative, you can ask the Board to continue the case pending USCIS' adjudication. *See* AILF's practice advisory "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case," http://www.ailf.org/lac/lac_pa_index.shtml

- **If your client's case is before an immigration judge:** You can seek a continuance of the removal proceedings while the adjustment application is adjudicated by USCIS.

- **If there is a administratively final order of removal:** If within the regulatory timeframes for reopening you could ask the BIA or the immigration judge (whoever last heard the case) to reopen the removal proceedings. You could also ask the government to stay removal while the parolee's adjustment application is adjudicated by USCIS.

AILF is interested in hearing of any problems that practitioners may have with either USCIS or EOIR in getting adjustment applications adjudicated for parolees under the interim rule. If you run into problems, please contact Mary Kenney at mkenney@ailf.org.

What remedy is there if USCIS denies the adjustment application?

The statute and regulations do not provide for an administrative appeal of a denial of an adjustment application by USCIS. Moreover, with the limited exception of certain advance parolees, under the new interim regulation an immigration judge does not have jurisdiction over the adjustment application of a parolee in removal proceedings. If an adjustment application can not be filed with the immigration judge, the denial of adjustment can not be appealed to the BIA and also can not be included as an issue in a Petition for Review of a final order of removal before a court of appeals.

The judicial review that might be available over USCIS's denial of an adjustment application is an action in federal district court under the Administrative Procedures Act. If you have questions about bringing such an action, contact Mary Kenney at mkenney@ailf.org.