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USCIS ADJUSTMENT OF STATUS OF "ARRIVING ALIENS" WITH AN UNEXECUTED FINAL ORDER OF REMOVAL

By Mary Kenney

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" [2] parolee who is in removal proceedings.[3] Additionally, USCIS has the authority to adjudicate an adjustment application by an "arriving alien" with an unexecuted final order of removal. USCIS instructed the field that an unexecuted final order of removal, in and of itself, is not a bar to admissibility and therefore not a bar to adjustment. *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.

However, some local USCIS offices erroneously have refused to decide these applications, saying they have no jurisdiction because of the final removal order. Additionally, some local offices have denied these adjustment applications, erroneously finding that the individual is not eligible for adjustment because of the final order.

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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] An "arriving alien" is defined at 8 C.F.R. §§ 1.1(q) and 1001.1(q).

[3] The other two practice advisories are: "Arriving Aliens and Adjustment of Status: What Is the Impact of the Government's Interim Rule of May 12, 2006" 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.

Moreover, the BIA has a policy of refusing to reopen cases where the noncitizen is eligible to adjust under the interim regulations, on the basis that USCIS, not EOIR, has jurisdiction over the adjustment applications.[4] While reopening of removal proceedings is not required for USCIS to decide an adjustment application,[5] it can prevent a parolee under a final order of removal from being prematurely removed before USCIS has decided the adjustment application. This BIA policy combined with the erroneous denials by some local USCIS offices, has placed some arriving alien parolees with final orders in a "catch 22:" although they may be eligible under the interim regulations to adjust status, the local USCIS office may refuse to decide the adjustment application because of the final order, while the BIA will refuse to reopen the case – which would eliminate the final order – because only USCIS has jurisdiction over the adjustment application. As a result, the interim regulations have not been implemented in these cases and eligible parolees have been deprived of the opportunity to adjust.

This practice advisory explains why USCIS has jurisdiction over these adjustment applications notwithstanding the final unexecuted order of removal. The analysis here applies to a parolee who has not actually left the U.S. subsequent to the final removal order. The practice advisory also outlines the arguments why such a parolee remains eligible for adjustment notwithstanding an unexecuted final order of removal.

1. Practical considerations.

The intent of the interim regulations is to give "arriving alien" parolees an opportunity to apply for adjustment even if they are in removal proceedings. *See* 71 Fed. Reg. 27585 (May 12, 2006). This is also what four courts of appeals concluded was required under the statute, which in turn prompted the adoption of the interim regulations. *Scheerer v. U.S. Attorney General*, 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I)*; *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); and *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005). The January 12, 2007 USCIS memo recognizes that parolees with a final removal order also should have this opportunity. Consequently, adjustment applications filed by arriving alien parolees with a final order should be decided by USCIS. USCIS should not simply call in ICE to enforce the removal order.

Of course, any noncitizen with a final removal order is always at risk of removal. As in all cases, the client and attorney can evaluate the risks before making strategy decisions,

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[4] *See, e.g.*, "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) (remanding where BIA refused to reopen case); *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 General*, 513 F.3d 1244 (11th Cir.), *cert. denied*, No. 07-1555 (2008) (*Scheerer II)* (affirming BIA denial of a motion).

[5] 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).

including the decision whether to apply for adjustment. Moreover, in some cases there may be additional steps that can be taken to protect the client from removal while the adjustment application is pending with USCIS. For example, ICE can be asked to stay the removal while USCIS decides the adjustment application.

2. USCIS has jurisdiction under the interim regulations.

On May 12, 2006, the Attorney General (through the Executive Office for Immigration Review (EOIR)) and the Secretary of the Department of Homeland Security (through DHS) jointly issued an interim rule that 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. Additionally, the interim rule set forth new regulations governing the jurisdiction of both EOIR and USCIS over adjustment applications in general and the adjustment applications of "arriving aliens" in particular.

The January 12, 2007 USCIS memo states that USCIS can decide an adjustment application of a parolee with a final order under these interim regulations. This is a correct statement, for the following reasons:

- Under the amended jurisdictional provisions of the interim regulations, USCIS has been given jurisdiction over the adjustment applications of *all* arriving aliens regardless of whether they are in removal proceedings, with a limited exception for certain advance parolees not relevant to this practice advisory.[6]

- Specifically, the amended regulations grant USCIS "jurisdiction to adjudicate an application for adjustment of status filed by 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). The regulations strip an immigration judge of jurisdiction over the adjustment application of an "arriving alien" in proceedings. 8 C.F.R. § 1245.2(a)(1). Consequently, since the immigration judge does not have jurisdiction over such applications, USCIS does, in accord with this regulation. *See also* 92 Fed. Reg. at 27587 (explaining that one purpose of the amendments to the regulations is to make clear that USCIS has jurisdiction over the adjustment applications of "arriving aliens" in proceedings).

- The interim regulations do not define whether a noncitizen remains "in proceedings" while under an unexecuted final order of removal.[7] Either way it is

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[6] An immigration judge has jurisdiction over the adjustment applications of certain advance parolees in removal proceedings who are returning to complete previously filed adjustment applications. *See* 8 C.F.R. § 1245.2(a)(1)(ii)(A)-(D).

[7] However, *see* 8 C.F.R. § 245.1(c)(9)(ii) defining when proceedings terminate for purposes of an alien seeking adjustment based upon a marriage that occurred while the individual was "in proceedings." Under this regulation, an individual would be considered to remain "in proceedings" while under an unexecuted final order of removal.

defined, however, USCIS would retain jurisdiction in the case of an arriving alien: 1) if the arriving alien still is considered to be "in proceedings," USCIS would have jurisdiction because it has jurisdiction over arriving aliens in proceedings; 2) if the arriving alien no longer is considered to be in proceedings – because the removal order is final, – USCIS would have jurisdiction because it has jurisdiction over adjustment applications of *all* aliens not in proceedings.

- Thus, a USCIS office that refuses to adjudicate the adjustment application of an arriving alien under an unexecuted final order, claiming lack of jurisdiction, is simply wrong. Where this occurs, USCIS's refusal can be challenged either by a motion to reconsider or in a district court action in federal court. If your local USCIS office misunderstands its jurisdiction in such a case, please let AILF know by contacting mkenney@ailf.org.

3. An unexecuted final order of removal is not a bar to adjustment for an arriving alien and it does not render the individual ineligible for adjustment.

Some USCIS offices may refuse to adjudicate adjustment applications of arriving aliens under an unexecuted final order (or deny such applications) because they erroneously have determined that the final removal order renders the individual ineligible for adjustment. The following outlines why an unexecuted final order of removal, in and of itself, does not render a parolee ineligible under the adjustment criteria or inadmissible under the general admissibility criteria.

Individuals with a final order of exclusion, rather than removal: For those individuals with an unexecuted final order of exclusion, an INS precedent decision holds that the final order of exclusion does not render the individual ineligible for adjustment. *See Matter of C—H—,* 9 I&N Dec. 265, 266 (Regional Commissioner 1961) ("Although the applicant has been ordered excluded and deported from the United States, she is not precluded by that order from now establishing that she is eligible to receive an immigrant visa and that she is admissible to the United States as an immigrant…"). This decision remains binding precedent on USCIS with respect to exclusion orders. *See* 8 C.F.R. § 103.3(c).

Individuals with a final order of removal: The reasoning behind *Matter of C—H—* is applicable to final orders of removal as well as exclusion. Moreover, analysis of the statutory requirements for adjustment of status demonstrates that an unexecuted final order of removal – in and of itself – is neither a bar to adjustment nor a basis for a finding of ineligibility. Each of these arguments is discussed below.

a. *Matter of C—H—*, 9 I&N Dec. 265, 266 (Regional Commissioner 1961).

In *Matter of C—H—,* the noncitizen applied for admission and was placed in exclusion proceedings. She was found inadmissible and ordered excluded on the basis that she was not in possession of a valid, unexpired immigrant visa.

Before the exclusion order was executed, she applied for adjustment of status under INA § 245(a) before the INS. In a precedent decision, the INS Regional Commissioner held that the final order of exclusion did not preclude her from establishing eligibility for adjustment of status. The Commissioner found that she was eligible for a visa and that a visa was immediately available. He also found that she was admissible to the U.S., specifically noting that the order of exclusion was based solely on the finding that she was not in possession of proper entry documents at the time of the hearing. Because—at the time of adjustment – the noncitizen was eligible for a visa, this ground of inadmissibility was no longer applicable to her.[8] Thus, the Regional Commissioner found that she met the statutory requirements for adjustment of status.

The reasoning of *C—H—* is equally applicable to a case involving a final order of removal rather than exclusion. In fact, in adopting the interim regulations which give USCIS jurisdiction over adjustment applications of arriving aliens in removal proceedings, DHS made it clear that it was replicating the 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. It was under this system that *C—H—* was decided.

b. There is no statutory or regulatory bar to the adjustment of status of an individual with a final order of removal. As USCIS correctly notes in its January 12, 2007 memo to the field, *supra*, an arriving alien parolee must meet all eligibility requirements for adjustment under either INA §§ 245(a) or (i).[9] Both the INA and the implementing regulations contain certain bars to adjustment of status. *See, e.g.*, 8 U.S.C. § 1255(c) and 8 C.F.R. §§ 245.1(b) and (c). However, none of these provisions bars an individual from adjusting status because the individual is under a final order of removal. Thus, there is no outright bar to adjustment due to the existence of the final order of removal.

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[8] For the majority of arriving alien parolees, the final order of removal likely will be based on a lack of proper entry documents, as was the case with *C—H—*. *See* 8 U.S.C. § 1182(a)(7) (inadmissibility grounds based on lack of proper entry documents). In these cases, the noncitizen's subsequent eligibility for a visa for purposes of adjustment will essentially cure this ground of inadmissibility, just as it did in *C—H—*. Should an arriving alien be subject to an additional ground of inadmissibility, however, he or she may remain ineligible for adjustment on that basis. As in all adjustment cases, all potential grounds of inadmissibility and/or bars to adjustment eligibility must be explored with the client. Note, however, that in such a case, it is not the final order of removal that would make the person inadmissible, but rather the underlying inadmissibility that supported the removal order.

[9] Certain of the most common INA § 245(a) bars to adjustment are inapplicable to "immediate" relatives adjusting through a family-based immigrant visa petition. Thus, this category of family-based petitioners (and those eligible for 245(i) due to either a family or employment-based visa petition) will be those most likely to benefit from the interim regulations.

c. A final unexecuted order of removal is not, itself, a basis for ineligibility for adjustment. Under INA § 245(a), a non-citizen who has been inspected and admitted or paroled is eligible to adjust status to that of lawful permanent resident status if he or she meets three eligibility requirements. 8 U.S.C. § 1255(a). These include that the individual have made an adjustment application; that the individual be eligible for a visa and admissible; and that a visa be immediately available.

An unexecuted order of removal does not impact any of these eligibility requirements. However, some INS offices have reportedly denied adjustment applications on the erroneous basis that an unexecuted final order of removal renders the applicant inadmissible and therefore ineligible to adjust.

A review of the statutory grounds of inadmissibility shows that this is not correct. None of these grounds renders an individual inadmissible solely because he or she is under an unexecuted final order of removal.[10] USCIS agrees that an unexecuted final order does not render an individual inadmissible. In its instruction memo to the field, it stated:

> [N]ot all aliens who are subject to a final order of removal are inadmissible to the United States. An alien may be eligible for a waiver or consent to reapply notwithstanding the removal order. The removal order, itself, does not make the alien inadmissible until it is executed.

"Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status," at 3, http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

Note that, just because the unexecuted removal order itself does not constitute a ground of inadmissibility, this is not the end of the analysis. The underlying basis for removability upon which the order is based may include a ground of inadmissibility that would continue to apply. If so, it must be determined whether a waiver of this ground of inadmissibility is available. Otherwise, the adjustment application could be denied on the merits.

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[10] Once the removal order has been executed, the individual's return to the U.S. might implicate inadmissibility grounds. See, e.g., INA §§ 212(a)(9), 8 U.S.C. § 1182(a)(9). However, these provisions only apply after a noncitizen has departed or been removed and then returns to the United States. Thus, they are not applicable where there is an unexecuted final order of removal. *See* INS Memorandum, "Processing of Section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications" (May 1, 1997) (stating that 8 U.S.C. § 1182(a)(9) "applies only if the alien has departed or been removed from the United States subsequent to issuance of an order"). AILA InfoNet Doc. No. 97050191 (posted May. 1, 1997).

If you run into a problem with a local USCIS office refusing to decide an adjustment application of an arriving alien parolee because of an unexecuted final order, or denying an application solely because of the existence of a final order, please contact AILF at mkenney@ailf.org.