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Adjustment of Status of “Arriving Aliens” Under the Interim Regulations: Challenging the BIA’s Denial of a Motion to Reopen, Remand, or Continue a Case

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**Practice Advisory¹
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This practice advisory is the third in a series about the interim regulations, adopted May 12, 2006, which give USCIS jurisdiction over the adjustment applications of an “arriving alien” parolee who is in removal proceedings.² For additional background on the purpose and impact of the interim regulations, please see the earlier practice advisories.

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). Successful implementation of these interim regulations requires the cooperation of both of these agencies. To date, this cooperation has been lacking, with the result that some arriving alien parolees in removal proceedings who are eligible to adjust status have been unable to do so.

This practice advisory will focus on the role of the Board of Immigration Appeals (BIA) and what the BIA should do to implement the interim regulations in accordance with the adjustment statute and prevailing case law. The arguments suggested here can be made to

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² The first two practice advisories were: “Arriving Aliens and Adjustment of Status: What Is the Impact of the Government’s Interim Rule of May 12, 2006,” http://www.aifl.org/lac/lac_pa_index.shtml; and “USCIS Adjustment of Status of ‘Arriving Aliens’ With An Unexecuted Final Order of Removal,” http://www.aifl.org/lac/lac_pa_060308_arraliens.pdf.

the BIA to preserve the issues for federal court review and also can be presented to a federal court in a petition for review.³

The BIA has adopted a blanket policy of denying motions to reopen, remand or continue cases to allow adjustment before USCIS under the interim regulations.⁴ As a result, a parolee in removal proceedings who is eligible to adjust before USCIS may receive an administratively final order of removal – and physically could be removed – before USCIS decides the adjustment application. Moreover, some USCIS offices erroneously refuse to adjudicate an adjustment application where the parolee is under a final removal order. Also, some Immigration and Customs Enforcement (ICE) offices refuse to stay a removal until USCIS has decided the adjustment application. Consequently, parolees with adjustment applications pending before USCIS under the interim regulations have been removed before USCIS has decided the adjustment application.

If the BIA reopened and/or continued these cases, there would be many fewer “final order” cases with adjustment applications pending before USCIS. The BIA is unlikely to change its policy unless ordered to do so by a federal court. AILF has appeared as amicus curiae in several pending petitions for review raising this issue in courts of appeals throughout the country.

This advisory does not substitute for individual legal advice supplied by a lawyer familiar with a client’s case.

How is the issue presented to the BIA?

There are generally four procedural circumstances in which the BIA may apply its policy of not reopening or remanding a case while USCIS is considering the adjustment application:

- *Appeal from an IJ decision:* The issue can arise in an appeal to the BIA from an IJ denial of a motion to reopen and/or continue a removal case to allow the parolee to apply for adjustment before USCIS.⁵
- *Case on direct appeal to the BIA:* The issue can first come up during the direct appeal of a case to the BIA, where, for example, a parolee becomes eligible and

³ This practice advisory focuses on the BIA, rather than on immigration judges (IJ), because of the BIA’s clear, adverse policy with respect to this issue. The arguments set forth here can also be used with an IJ.

⁴ See, e.g., cases cited in footnotes 5-8; see also “AILA-EOIR Agenda Questions and Answers” (Oct. 18, 2006), <http://www.usdoj.gov/eoir/statspub/eoiraila101806.pdf> (BIA instructed its staff to only grant a motion under the interim regulations if both parties agree to such a motion).

⁵ See, e.g., *In re Ernesto Napoleon Fernandez Moreta A.K.A. Rigoberto Santana*, 2006 WL 3485812 (BIA Oct. 30, 2006) (Respondent’s motion for continuance denied); *In re Natavarbhai Patel*, 2006 WL 3088700 (Sep. 21, 2006) (vacating IJ’s decision to grant Respondent’s motion to terminate to pursue adjustment of status).

applies for adjustment with USCIS while his or her removal case is on appeal at the BIA.⁶

- *BIA has dismissed an appeal*: The issue also can arise for the first time following the BIA's dismissal of an appeal on other grounds, where adjustment relief becomes available to the parolee after the BIA has dismissed an appeal.⁷
- *Remand from a court of appeals*: The issue also can arise in a federal court case that has been remanded to the BIA for a new decision in light of the interim regulations.⁸

What is the basis for the BIA's blanket denial of motions in these cases?

The interim regulations purport to strip the BIA and IJs of jurisdiction over the adjustment application of an arriving alien parolee who is in removal proceedings. 8 C.F.R. § 1245.2(a)(1)(ii).⁹ Under the interim regulations, only USCIS has jurisdiction over these applications. 8 C.F.R. 245.2(a)(1) (granting USCIS jurisdiction over all adjustment applications over which an IJ does not have jurisdiction).

Whether the issue is raised in a motion to reopen, to remand or to continue, the BIA relies on this lack of jurisdiction over the adjustment application to deny relief. The following is an example of the boilerplate language that the BIA is using in these decisions:

The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision.... The amended regulations clarify that an Immigration Judge does not have jurisdiction to adjudicate an adjustment of status filed by an arriving alien in removal proceedings Since the respondent is an arriving alien, reopening is not warranted in this case. The respondent must pursue any application for adjustment of status with the United States Citizenship and Immigration Services (USCIS) independent of these removal proceedings....

How can a parolee preserve the issue for federal court review?

⁶ See, e.g., *In re Rebeca Siddal*, 2006 WL 3485824 (BIA Oct. 11, 2006).

⁷ See, e.g., *In re Hak Kim Kyung Ja Kim Jee Sun Kim Jay Hyok Kim*, 2006 WL 2427853 (BIA (July 17, 2006).

⁸ See, e.g., *In re Mohamad Hasan El Tomahi*, 2007 WL 275742 (BIA Jan. 19, 2007) (remanded by Second Circuit Court of Appeals); *In re Raquel Balajadia Anteojo*, 2006 WL 3922191 (BIA Dec. 12, 2006) (remanded by Fifth Circuit Court of Appeals); *In re Frisner Noradin*, 2006 WL 3203688 (BIA Aug. 31, 2006) (remanded by Eleventh Circuit Court of Appeals); *In re Ermelinda Poci A.K.A. Barbara Ropic*, 2006 WL 3203630 (BIA Aug. 29, 2006) (remanded by Seventh Circuit Court of Appeals).

⁹ There is a limited exception to this bar on jurisdiction with respect to certain advance parolees who are returning to pursue a previously filed adjustment application. See 8 C.F.R. § 1245.2(a)(ii)(A)-(D).

In this practice advisory, AILF argues that the BIA can and should be reopening and/or remanding these cases with instructions that the immigration judges continue the cases until USCIS has decided the adjustment application. In order to ensure that these arguments are preserved for federal court review, a parolee can request the following relief from the BIA:

- Where the case is on direct appeal, a remand to the IJ;
- Where the appeal has been completed, that the case be reopened¹⁰ and remanded to the IJ;
- In both of the above situations, that upon remand, the IJ be instructed to continue the case until USCIS has decided the adjustment application.

With this relief, the parolee would not be subject to a final order unless and until USCIS denied the adjustment application. Moreover, by requesting this relief from the BIA, parolees will have preserved the issue for federal court review.

What arguments can be made as to why the BIA should grant relief in these cases?

The following is a summary of the arguments that can be made to the BIA to preserve the issues for federal court review. These also are the arguments that can be made in a petition for review of the BIA's denial of a motion/dismissal of an appeal under the interim regulations.

1. The BIA has jurisdiction over the motion pending before it.

Contrary to the implication in the BIA's boilerplate decisions, the issue is not a lack of BIA jurisdiction. The BIA has jurisdiction over the motion that is pending before it – whether that motion is one to reopen, to remand or to continue the removal proceedings. *See, e.g.*, 8 C.F.R. §§ 1003.1(d)(1); 1003.2(c). The BIA may lack jurisdiction over the adjustment application pursuant to the interim regulations, but these regulations do not deprive it of jurisdiction over the motion to reopen, remand and/or continue.

The parolee is not asking the BIA to decide the adjustment application – over which it admittedly has no jurisdiction. Instead, in most cases, the parolee will have filed the adjustment application with USCIS. In the removal proceeding, the parolee simply is asking the BIA to reopen, remand, and/or continue the removal case long enough for USCIS to adjudicate the adjustment application, as that decision may impact the individual's ultimate removability.

2. The adjustment statute requires that parolees in removal proceedings be able to apply for adjustment and have their applications actually decided.

¹⁰ Note that there are time and number limits on filing motions to reopen, 8 C.F.R. § 1003.2(c), unless both parties agree to the motion. 8 C.F.R. § 1003.2(c)(iii).

EOIR and USCIS amended the regulations to “acquiesce” to the four courts of appeals that held that the prior regulatory bar on an arriving alien in proceedings adjusting status violated 8 U.S.C. § 1255, the adjustment statute. 71 Fed. Reg. at 27587. The agencies recognized that the former regulation was unenforceable in four circuits – covering 18 states – and that it was not in the public interest to allow this conflict in the law to continue. 71 Fed. Reg. at 27590. Thus, the intent of the interim regulations was to bring the regulations into compliance with the decisions in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); and *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006).

In these four decisions, the courts held that the fact that a parolee was in removal proceedings could not interfere with his or her eligibility under the statute to apply for adjustment of status. As the Eleventh Circuit explained:

By its language, then, § 1255 plainly contemplates that paroled aliens may apply for adjustment of status, though the Attorney General need not grant it. The vast majority of aliens paroled into the United States will, however, be in removal proceedings by virtue of the statutory scheme. We thus conclude that by allowing parolees, as a class, to apply for adjustment of status in § 1255, Congress did not intend the mere fact of removal proceedings would render an alien ineligible to apply for adjustment of status. *Scheerer*, 445 F. 3d at 1322.

To comply with these four decision – and the adjustment statute itself – the interim regulations, as implemented, must actually afford arriving alien parolees the opportunity to have their adjustment applications adjudicated. The BIA’s denial of motions under the interim regulations interferes with this opportunity in that it leaves the parolee subject to an administratively final order of removal, and thus vulnerable to actual removal, before the adjustment application is decided by USCIS. *See, e.g., Subhan v. Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004) (noting that an adjustment application cannot be pursued once the alien has been removed from the U.S.); *see also Haswanee v. U.S. Attorney General*, 471 F.3d 1212, 1214 (11th Cir. 2006) (petitioner argues that the immigration judge’s denial of a continuance jeopardizes his eligibility for adjustment because he will become ineligible if he leaves the U.S.)

3. The BIA’s policy contradicts the clear intent of the interim regulations, as evidenced at the time that they were adopted.

In briefs in federal court, the government is arguing that the BIA’s decisions in these cases represent the agency’s interpretation of its own regulations that should be accorded deference. It is well-settled, however, that an agency’s intent at the time a regulation is adopted is key to a subsequent interpretation of the regulation. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, ___, 126 S.Ct. 904, 916 (2006)

(declining to defer to an agency interpretation that, *inter alia*, “runs counter to the ‘intent at the time of the regulation’s promulgation’”) (*quoting Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)). Here, the denial of all motions under the interim regulations runs counter to the agency’s intent for the regulations as expressed at the time that they were adopted.

EOIR intended, at the time that it adopted the interim regulations, that continuances would be granted under the standards set forth in *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), and *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002). As explained in the introductory comments to the interim regulation:

[I]t will ordinarily be appropriate for an immigration judge to exercise his or her discretion *favorably* to grant a continuance or motion to reopen in the case of an alien who has submitted a *prima facie* *approvable visa petition and adjustment application* in the course of a deportation hearing,..... [*citing Garcia and Velarde*]. In this specific instance, the Secretary and the Attorney General invite public comment on whether rules limiting the exercise of discretion or implementing a presumption against favorably exercising discretion should be established. . . . In the meantime, USCIS, the immigration judges, and the BIA will continue to apply the discretionary factors in accordance with the general principles noted above, and guided by *prior decisions*.

71 Fed. Reg. 27, 589-590 (May 12, 2006) (emphasis added).

These introductory comments reveal that EOIR: 1) understood that the current applicable law for continuances was found in *Garcia* and *Velarde*¹¹; 2) was considering changes to this applicable law by regulation, and therefore inviting public comment; and 3) specifically stated and intended that, “in the meantime” (that is, until new regulations are promulgated following comments by the public), IJs and the BIA would continue to apply *Garcia* and *Velarde*. Without explanation, the BIA has now departed from the intent of the interim regulations and is failing altogether to apply *Garcia* and *Velarde*. No deference should be accorded the BIA’s blanket policy and the decisions resulting from it.

4. The BIA is violating its own binding precedent with respect to motions to reopen for an adjustment of status.

The BIA has long held that a motion to reopen is proper when a noncitizen becomes eligible for relief from removal, in the form of adjustment of status,

¹¹ While these introductory comments focus on continuances, the same principles apply to motions to reopen or remand since the same standards apply to these motions as to continuances. In fact, *Garcia* and *Velarde* actually involve motions to reopen rather than motions to continue.

subsequent to an order of removal. *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978). Where the adjustment eligibility is based upon a marriage that was entered into prior to initiation of removal proceedings, the movant need only submit a prima facie approvable visa petition and adjustment application to secure a reopening. *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978). Where the noncitizen marries while in proceedings, *Matter of Velarde* sets forth the requirements that must be met for a reopening by the BIA. 23 I&N Dec. 253 (BIA 2002). In fact, in *Velarde*, the BIA revised its prior precedent to be “consistent with Congress’ legislative intent in amending the marriage fraud provisions: that aliens who marry after proceedings have been initiated, and who seek adjustment of status, should be afforded one opportunity to present clear and convincing evidence that their marriage is bona fide.” 23 I&N Dec. at 257.¹²

Under this precedent, the BIA is obligated to review the *Garcia* and *Velarde* criteria and consider a parolee’s motion on the merits. Although the cases cited above all deal with situations in which an IJ ultimately has jurisdiction over the adjustment application, there is nothing in the statute, the regulations, or case law that prohibits the BIA from granting a motion to reopen, remand or continue a case in order for USCIS to decide an adjustment application as potential relief from removal.

5. Case law from circuit courts provides additional support for granting reopening, remands and continuances.

In a parallel context, the Eleventh Circuit Court of Appeals has held that the BIA abused its discretion when it affirmed the denial of a continuance of a removal hearing to allow the noncitizen to apply for adjustment as authorized by statute. *See Haswanee v. U.S. Attorney General*, 471 F.3d 1212 (11th Cir. 2002); *Merchant v. U.S. Attorney General*, 461 F.3d 1375 (11th Cir. 2006); and *Bull v. INS*, 790 F.2d 869 (11th Cir. 1986). These cases establish that, where the noncitizen has made a prima facie showing of eligibility for adjustment (just as the BIA requires under *Garcia* and *Velarde*), it is an abuse of discretion for the immigration judge and/or the BIA to deny a request for a continuance.

Other courts agree and also have held that the BIA’s denial of a continuance of a removal proceeding would be an abuse of discretion where it precluded the noncitizen from applying for adjustment as authorized by the statute. For example, in *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005), the court

¹² With respect to cases in which the parolee has married while in proceedings, the parolee can argue that any implementation of the interim regulations that deprives him or her of an opportunity to apply for adjustment based upon a marriage to a U.S. citizen conflicts with clear Congressional intent that “aliens who marry after proceedings have been initiated, and who seek adjustment of status, should be afforded one opportunity to present clear and convincing evidence that their marriage is bona fide.” *Velarde*, 23 I&N Dec. at 257 (citing congressional history).

held that an immigration judge “cannot be permitted, by arbitrarily denying a motion for a continuance without which the alien cannot establish a ground on which Congress has determined that he is eligible to seek to remain in the country ... to thwart the congressional design.” The court reversed the denial of the continuance, finding that it “flew in the face of [the BIA’s own precedent], as well as in the face of Congress’s ‘intent [in enacting 8 U.S.C. § 1255] that eligible aliens be able to adjust status without having to leave the United States.’” *Id.* (quoting *Succar v. Ashcroft*, 394 F.3d 8, 22 (1st Cir. 2005)); see also *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004) (holding that BIA violated the adjustment statute when it denied a continuance without stating a reason consistent with the adjustment statute); *Ahmed v. Gonzales*, 465 F.3d 806, 809 (7th Cir. 2006) (reversing where petitioner was statutorily eligible to adjust status but BIA’s denial of a continuance effectively prevented him from doing so); *Thapa v. Gonzales*, 460 F.3d 323, 336 n.5 (2d Cir. 2006) (questioning whether a “system that specifically provides for cancellation of removal on the basis of employment certification [one step in the process for many employment-based adjustment cases] can escape being arbitrary and capricious where it does not afford adequate time for a petitioner to obtain such labor certification”).¹³

Significantly, in *Merchant*, the Eleventh Circuit found that the BIA abused its discretion in denying a continuance sought to allow USCIS time to adjudicate the adjustment application – exactly the facts presented by the interim regulations. The court did not find it significant that it was USCIS – and not an immigration judge – that was adjudicating the petitioner’s adjustment application. See, e.g., *Merchant*, 461 F.3d at 1379 n.6. The court still required the BIA to review the continuance motion under the standard set forth in BIA precedents.

Similarly, for purposes of motions under the interim regulations, it is insignificant that it is USCIS and not the immigration judge that will adjudicate the adjustment application. The BIA’s denial of these motions solely because USCIS has jurisdiction over the adjustment applications is contrary to the holdings in the above-cited cases.

Conclusion

If you have one of these cases pending at a court of appeals, please contact AILF at mkenney@ailf.org.

¹³ Federal courts do not always reverse the BIA’s denial of a continuance in this context. However, where the courts have upheld these denials, it usually has been because the noncitizen failed to demonstrate prima facie eligibility for adjustment. See, e.g., *Onyeme v. INS*, 146 F.3d 227, 234 (4th Cir. 1998); *Zafar v. U.S. Attorney General*, 426 F.3d 1330, (11th Cir. 2005); *Khan v. Attorney General*, 448 F.3d 226 (3d Cir. 2006). As noted, the BIA’s boilerplate denial of all motions under the interim regulations never looks at the merits of the noncitizen’s adjustment eligibility.