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BIA's Reliance on Interim Regulations to Deny Reopening Held an Abuse Of Discretion

Last updated February 09, 2009

In *Kalilu v. Mukasey*, 548 F.3d 1215 (9th Cir. 2008), the Ninth Circuit Court of Appeals held that the BIA abused its discretion when it denied the motion to reopen of an "arriving alien" who sought to apply for adjustment of status with USCIS. The BIA's sole reason for denying the motion was that it lacked jurisdiction over an adjustment application under the "interim regulations." See 71 Fed. Reg. 27585-592 (May 12, 2006) (amending 8 C.F.R. §§ 245.2 and 1245.2) (For more on the interim regulations, see the Legal Action Center's [practice advisories](#)).

The Ninth Circuit specifically held that BIA's denial of the motion to reopen "rendered worthless" the opportunity the interim regulations afforded an arriving alien in removal proceedings to establish eligibility for adjustment of status based on a bona fide marriage. The Court stated that without reopening or a continuance, the individual would be subject to final removal despite a prima facie valid I-130 and a pending adjustment application with USCIS. The Court also found that the denial of the motion to reopen was contrary to the BIA's own precedent decisions.

The Eleventh Circuit Court of Appeals reached the opposite conclusion, upholding a denial of a motion to reopen on this basis. *Scheerer v. Chertoff*, 513 F.3d 1244 (11th Cir. 2008).

For more on how to present these arguments to a court of appeals in a petition for review, see the Legal Action Center's practice advisory ["Adjustment of Status of an 'Arriving Alien' Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case."](#) If you have one of these cases pending at a court of appeals, please contact Mary Kenney at mkenney@immcouncil.org.