LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

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

By Mary Kenney

Practice Advisory[1]
Updated November 5, 2008

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). Successful implementation of these interim regulations requires at least some "minimal coordination" between these agencies or the "statutory opportunity to seek adjustment will be a mere illusion." *Ceta v. Mukasey*, 535 F.3d 639, 647 (7th Cir. 2008). To date, there have been problems with implementation by both agencies. As a result, some "arriving alien" parolees in removal proceedings who are eligible to adjust status have been unable to do so.

USCIS' role in implementation of the interim regulations is to decide adjustment applications of "arriving aliens who are in removal proceedings or under a final order of removal. The role of the Board of Immigration Appeals (BIA) and immigration judges is to consider – under applicable BIA precedent – motions to reopen, remand or continue

---

[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: "Arriving Aliens and Adjustment of Status: What Is the Impact of the Government's Interim Rule of May 12, 2006" and "USCIS Adjustment of Status of 'Arriving Aliens' With An Unexecuted Final Order of Removal." *See* http://www.ailf.org/lac/lac_pa_index.shtml.

removal proceedings so that USCIS can decide the adjustment application prior to entry of a final order.

The BIA has adopted a blanket policy of denying such motions. The BIA does not have to reopen the removal case in order for USCIS to exercise its jurisdiction and decide an adjustment application of an "arriving alien"; USCIS has the authority to grant such an adjustment application *even when there is a final order of removal.* However, as long as there is a final order of removal, the parolee is at risk of being removed before USCIS has time to decide the adjustment application. Once removed, the individual loses the opportunity to adjust. If the BIA granted the motion, there would be no final order and no risk of removal while USCIS decides the parolee's adjustment application.[3]

This practice advisory suggests arguments why the BIA should grant motions of "arriving alien" parolees who seek to reopen, remand or continue their removal cases while USCIS adjudicates their adjustment applications. The arguments suggested here can be made to the BIA to preserve the issue for federal court review and also can be presented to a federal court in a petition for review. To date, three courts of appeals have accepted some or all of these arguments and have held that the BIA abused its discretion in denying such motions. *Ceta v. Mukasey,* 535 F.3d 639 (7th Cir. 2008); *Kalilu v. Mukasey,* 516 F.3d 777 (9th Cir. 2008); *Ni v. BIA,* 520 F.3d 125 (2d Cir. 2008). However, the Eleventh Circuit has rejected them. *Scheerer v. U.S. Attorney General*, 513 F.3d 1244 (11th Cir.), *cert. denied,* No. 07-1555 (2008) (*Scheerer II).*

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

The BIA relies on its lack of jurisdiction over adjustment applications under the interim regulations to deny requests to reopen, remand and/or continue removal cases to allow USCIS time to adjudicate the adjustment application. With one exception, neither immigration judges (IJ) nor the BIA have jurisdiction over the adjustment application of an "arriving alien" parolee in removal proceedings. 8 C.F.R. § 1245.2(a)(1)(ii).[4] Instead, 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).

Almost uniformly, the BIA's decisions denying motions in these cases state: 1) that an IJ cannot consider an adjustment application of an "arriving alien"; 2) that the respondent can apply for adjustment before USCIS; and 3) without further explanation, that relief is denied because of the above two statements. *See, e.g., Kalilu,* 516 F.3d at 779; *Ni,* 520

---

[3] The risk is exacerbated by the fact that some USCIS offices erroneously refuse to adjudicate an adjustment application where the parolee is under an unexecuted final removal order. Also, some Immigration and Customs Enforcement (ICE) offices refuse to stay a removal while USCIS is deciding the adjustment application.

[4] The exception gives an IJ jurisdiction over the adjustment applications of advance parolees who are returning to pursue a previously filed adjustment application when certain regulatory criteria are met. *See* 8 C.F.R. § 1245.2(a)(1)(ii)(A)-(D).

F.3d at 127-129; *Ceta*, 535 F.3d at 643-644. These Board decisions ignore the fact that the movant is not asking the BIA or an IJ to decide the adjustment application but only seeking to stay proceedings while USCIS exercises its jurisdiction over the adjustment application.

How is the issue presented to the BIA?

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

- *Following denial by an IJ:* The issue can arise in an appeal to the BIA from an IJ denial of a motion to reopen or continue a removal case to allow an "arriving alien" parolee to pursue adjustment before USCIS.
- *While case pending at the BIA:* The issue first can come up during an appeal to the BIA, where, for example, an "arriving alien" parolee becomes eligible and applies for adjustment with USCIS while his or her removal case is on appeal at the BIA.
- *After BIA has dismissed appeal:* The issue also can arise for the first time following the BIA's dismissal of an appeal on other grounds, where adjustment relief first becomes available to the parolee at this time and where the parolee moves to reopen the removal proceedings.
- *Upon remand from a court of appeals:* The issue also can arise in a case that has been remanded to the BIA by a court of appeals for a new decision in light of the interim regulations.

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

The BIA can and should be reopening and/or remanding these cases with instructions that 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 reopened[5] 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. Be sure to make clear that the parolee is not seeking to have the IJ decide the adjustment application (unless the regulatory exception applies, 8 C.F.R. § 1245.2(a)(1)(ii)(A)-(D)) but rather is seeking a continuance so that no removal order is entered until after USCIS has had a chance to decide the adjustment application, and then only if such application is denied.

[5] Note that there are time and number limits on filing motions to reopen, unless both parties agree to the motion or the BIA exercises its sua sponte authority to reopen. *See* 8 C.F.R. §§ 1003.2(a) and (c).

Why is this relief from the BIA important?

If the BIA were to grant the relief discussed above, a parolee would not be subject to a final order while USCIS decides his or her adjustment application. The existence of an administratively final removal order is not a bar to USCIS deciding an adjustment application, so long as it remains unexecuted.[6] The government agrees that USCIS has jurisdiction to decide an adjustment application of an "arriving alien" even after there is an unexecuted final removal order issued against the individual. *See, e.g., Ni*, 520 F.3d at 131 (quoting brief of respondents BIA, USCIS and Attorney General to this effect). In fact, USCIS has 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. [7]

Once a removal order is *executed*, however, (that is, the person is removed or departs), he or she loses eligibility for adjustment. *Ceta*, 535 F.3d at 646. There is always a risk of removal once a final order has been issued. Thus, the only sure safeguard against such removal is to secure a continuance or reopening of the removal proceedings until USCIS decides the adjustment application. *See Ceta, Id.; Kalilu*, 516 F.3d at 780.

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

Because the Seventh and Ninth Circuits have now ruled favorably on several of the arguments below, cases arising before the BIA in those circuits should no longer be denied based upon a lack of BIA/IJ jurisdiction over the adjustment application, but instead should be considered on the merits of the motions, applying the standards from BIA precedent in *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) and *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

The Second Circuit did not go as far as either the Seventh or the Ninth Circuits, but instead held that the BIA's rationale for denying the motions – its lack of jurisdiction over the adjustment applications – was non-responsive to the motions and thus an abuse of discretion. *Ni*, 520 F.3d at 129-30. As a result, in the Second Circuit and in all other circuits except the Eleventh,[8] arguments summarized below can be made to the BIA to preserve the issue for federal court review. These same arguments can be made in a

---

[6] 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).

[7] For more on this topic, *see* "USCIS Adjustment of Status of 'Arriving Aliens' With An Unexecuted Final Order of Removal," at http://www.ailf.org/lac/lac_pa_index.shtml.

[8] *See Scheerer v. Attorney General*, 513 F.3d 1244 (11th Cir.), *cert. denied*, No. 07-1555 (2008) (*Scheerer II*).

petition for review of the BIA's denial of a motion or dismissal of an appeal that raised the issue.

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 does lack jurisdiction over the adjustment application pursuant to the interim regulations, but that is not the relief sought. Instead, 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 a grant of adjustment would eliminate the basis for removal.[9]

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

   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 (citing *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) (*Scheerer I)).* The agencies recognized that the former regulation was unenforceable in these 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 these four decisions which held "that the Attorney General must provide an opportunity for "arriving aliens" in removal proceedings to apply for adjustment on the basis of a valid immigrant visa petition." *Kalilu,* 516 F.3d at 780 (citations omitted).

   To comply with these four decisions – 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 opportunity that the Interim Rule affords for an arriving alien in removal proceedings to establish his eligibility for adjustment based on a *bona fide* marriage [or an approved labor certification] is rendered worthless where the BIA …. denies a motion to reopen (or continue) that is sought in order to provide time for USCIS to adjudicate a pending application." *Kalilu,* 516 F.3d at 780. Without relief from the BIA, the individual will be subject to a final order of

[9] The one exception to this may be a motion to reopen an in absentia final order, as the statute limits when such a motion may be granted. 8 U.S.C. § 1229a(b)(5)(C).

removal; if removed, he or she will no longer be eligible for adjustment. *Id.; see also Ceta*, 535 F.3d 646.

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

BIA precedent requires that the BIA review criteria set forth in *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), or *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), and consider a noncitizen's motion on the merits. 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, subsequent to an order of removal. *Garcia, supra*. Where adjustment eligibility is based upon a marriage entered into prior to removal proceedings, the movant need only submit a prima facie approvable visa petition and adjustment application to secure a reopening. *Garcia, supra.* Where the noncitizen marries while in proceedings, *Velarde* sets forth the requirements that must be met for a reopening. *Velarde, supra.*

Under this precedent, the BIA is obligated to review the *Garcia* and *Velarde* criteria and consider a noncitizen's motion on the merits. *Kalilu*, 516 F.3d at 780 (holding that the BIA abused its discretion when it denied the motion on grounds that were contrary to the above-cited precedent and remanding for BIA to consider *Velarde* criteria); *Ni*, 520 F.3d at 131 n.4 (ordering that if BIA denies the motions on remand, it must explain how doing so comports with its policy under *Garcia*).

In at least one unpublished decision, the BIA distinguished *Garcia* and *Velarde* from the present situation by stating that both cases deal with situations in which an IJ ultimately has jurisdiction over the adjustment application. In this unpublished decision, the BIA found that it did not have authority to grant relief (presumably meaning the motion to reopen or continue) based on a pending adjustment application over which it would never have jurisdiction. However, 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. *See Ceta*, 535 F.3d at 648 n. 14 ("the fact that Mr. Ceta's application …. will not be adjudicated by the immigration courts is not a sound or responsive reason for denying his continuance request"). Furthermore, there potentially is ultimate relief over which the immigration judge or the BIA will have jurisdiction: termination of the removal proceedings in cases in which the parolee is granted adjustment of status.

Additionally, in a parallel situation, immigration judges do have authority to continue or reopen a case based upon potential relief that only USCIS can adjudicate. Where an applicant applies for a U visa – over which USCIS exercises sole jurisdiction – an immigration judge has the authority to continue a case pending the USCIS' determination of the U visa application. *Ramirez*

Sanchez v. Mukasey, 508 F.3d 1254, 1256 (9th Cir. 2007); *see also* 8 C.F.R. § 214.14(c)(1); 72 Fed. Reg. 53014, 53022 n.10 ("While this rule specifically addresses joint motions to terminate, it does not preclude the parties from requesting a continuance of the proceedings."); 8 C.F.R. § 214.14(c)(2) (providing that a U visa petitioner who is subject to a final removal order may request a stay of removal).

4. The BIA's policy contradicts the clear intent of the interim regulations

The BIA's blanket denial of these motions under the interim regulations runs counter to the agency's intent for the regulations as expressed at the time that they were promulgated. In briefs in federal court, the government has argued that the BIA's denial of these motions represents an interpretation of the interim regulations and that this interpretation should be accorded deference. It is well-settled, however, that an agency's intent at the time a regulation is adopted is key to the interpretation of the regulation. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (declining to defer to an agency interpretation that "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)).

When it adopted the interim regulations, EOIR intended that continuances would be granted under the standards set forth in *Garcia* and *Velarde*. As explained in the introductory comments to the interim regulations:

> [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*] …. [T]he 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*[10]*;* 2) was

[10] 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.

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.

Conclusion

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