The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

H. Raymond Fasano, Section Chair

Quote of the Month

"We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges."

—Chief Judge Irvin R. Kaufman, Second Circuit, *Lok v. INS*, 548 F. 2d 37, 38 (2d Cir. 1977)

Section news

WASHINGTON, D.C.: EOIR General Counsel Jeff Rosenblum addressed the Immigration Leadership Luncheon on July 9, 2014. This was a particularly timely event, as Mr. Rosenblum spoke on EOIR's efforts to address the Southern border emergency.

In This Issue

MEMPHIS, Tenn.: Our Section's main event, the Immigration Law Seminar, was held May 16-17, 2014. Here are some photos from the Mississippi Riverboat Cruise/buffet/awards dinner.

Barry Frager presents award to Prakash Khatri, Section board member and coordinator of the successful Immigration Leadership Luncheon program in DC

The ubiquitous Frager presents an award to Hon. Rebecca Holt, Immigration Judge in Memphis TN

DC attorney Larry Johnson engaging in odd behavior

Program coordinator Barry Frager presents award to Margaret (Peggy) McCormick, Secretary-elect of the Section, and President of the Chicago Chapter

Hungry attendees chowing down

Barry Frager present award to Hon. Dorothy Harbeck, Section board member, and Immigration Judge in Elizabeth NJ

Happy faces anticipate the exciting cruise

Just cruisin' in Memphis

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Immigration Muse

A Family Friendly Fourth Circuit

By Hon. Paul Wickham Schmidt

A trio of decisions originating in 2005 firmly establishes that the U.S. Court of Appeals for the Fourth Circuit will recognize certain family-based "particular social groups" for purposes of asylum and withholding of removal under the immigration laws. Those cases will be discussed below, along with some other recent developments that could make the Fourth Circuit a major forum in the continuing dialogue over the proper contours of the "particular social group" definition.

The Origins*: Lopez-Soto v. Ashcroft*

In *Lopez-Soto v. Ashcroft*,[1] the Fourth Circuit joined four of its sister circuits, and also cited the Board of Immigration Appeals ("BIA"),[2] in finding that "'family' constitutes a 'particular social group.'"[3] However, the respondents in that case lost on other grounds.

Moreover, the published decision was by a three-judge panel of the court. In an unusual procedural maneuver, the case was reheard en banc and the appeal was dismissed without further opinion on July 26, 2005. Although perhaps not readily apparent from the published text of the case, this had the effect of vacating the panel decision and eliminating any precedential effect.[4]

Family Revisited: *Crespin-Valladares v. Holder*

Six years later, the Fourth Circuit dealt again with the issue of a family-based particular social group. In *Crespin-Valladares v. Holder*,[5] the Immigration Judge approved a particular social group "'consisting of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses.'"[6] The BIA reversed the Immigration Judge on this issue. However, the Fourth Circuit reversed the BIA and approved the family-based particular social group, stating that the "BIA committed legal error by concluding to the contrary."[7] While the court acknowledged the earlier panel decision in *Lopez-Soto*, it noted that decision was vacated and accordingly re-analyzed the "family as a particular social group" issue.[8]

From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

Section Leadership

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Specifically, the Fourth Circuit faulted the BIA for (1) ignoring the "family" component of the respondent's proposed particular social group, and (2) failing to explain why this group did not meet the "particularity" test for a particular social group.[9] The Fourth Circuit agreed with the respondent that "the family provides 'a prototypical example of a "particular social group,"'" noting that all of the four other circuits to consider the question concurred.[10]

The Fourth Circuit found that the proposed family unit had "'particular and well-defined boundaries,'" and therefore satisfied the BIA's "particularity" test.[11] The court further found that the proposed family social group met the BIA's "social visibility" test because "we can conceive of few groups more readily identifiable than the family."[12] However, in doing so, the Fourth Circuit specifically *declined* to decide the validity of the BIA's "social visibility" requirement, noting in a footnote that the Seventh Circuit rejected that test.[13] Overall, the court concluded that the BIA's rejection of the respondent's family-based particular social group "was manifestly contrary to law."[14]

Significantly, however, the court did *not* grant the respondent's application for asylum. Rather, the court remanded the case for the BIA to determine whether the Immigration Judge's findings that respondent's past persecution was "'on account of'" his particular social group (nexus)[15] and that the Government of El Salvador was "unwilling or unable to control" the MS-13 gang persecutors were "clearly erroneous."[16]

The Trilogy Complete: *Zelaya v. Holder*

In *Zelaya v. Holder*,[17] the respondents proposed "a particular social group consisting of young Honduran males, who (1) refuse to join the Mara Salvatrucha gang (MS-13), (2) have notified the authorities of MS-13's harassment tactics, and (3) have an identifiable tormentor within MS-13."[18] The Immigration Judge denied the claim. The BIA dismissed the respondent's appeal, rejecting the proposed particular social group on the basis of its precedent *Matter of S-E-G-*.[19]

Before the Fourth Circuit, the respondent attempted to distinguish *S-E-G-* and relied on *Crespin-Valladares* to validate his proposed social group. However, the court disagreed with the respondent.

In an opinion written by Senior Circuit Judge Hamilton, the Fourth Circuit reaffirmed the reasoning of *Crespin-Valladares*, but found that it did not support the respondent's proposed social group. Judge Hamilton noted that the respondent's proposed social group lacked (1) "the immutable characteristic of family bonds," (2) "the self-limiting feature of the family unit," and (3) "the easily recognizable innate characteristic of family relationship."[20] In other words, in his view, it flunked the BIA's immutability, particularity, and social visibility tests. Judge Hamilton noted that the Fourth Circuit has never specifically approved "social visibility" as a criterion, but did not have to reach that issue in *Zelaya*.[21]

Significantly, Judge Hamilton stated "we made clear in *Crespin–Valladares* that the particular social group proposed by the alien family in that case did not include the family member who agreed to be the prosecutorial witness; rather, it only included the family members of such witness."[22] He stated that the critical defect in the respondent's proposed group is the lack of "particularity."[23] Although the respondent's claims for asylum and withholding of removal under the Immigration and Nationality Act failed, the court remanded the case for the BIA to reconsider its denial of the respondent's claim under the Convention Against Torture, which does not require a nexus to a particular social group or any other protected ground.

Complaining Witnesses: *Is Family Necessary?*

As noted above, the *Zelaya* opinion written by Judge Hamilton went to great pains to point out that the approved particular social group in *Crespin-Valladares* included the *family* of the witness, but *not* the witness himself. Nevertheless, the other two *Zelaya* panel members, Judge Floyd, joined by Judge Davis, filed a separate concurring opinion addressing this apparent anomaly.[24]

Judge Floyd stated that, in his view, *Crespin-Valladares* should be read as indicating that "'prosecution witnesses against gangs'" satisfies both the "particularity" and the "social visibility" requirements imposed by the BIA.[25] In doing so, he specifically associated himself with the views of two Ninth Circuit Judges in a case involving a prosecution witness against gangs.[26]

Judge Floyd stated that if prosecution witnesses fail to qualify as a particular social group, it would have to be for a reason *other* than lack of particularity or social visibility.[27] He also pointed out, as did *Crespin-Valladares*, that the Fourth Circuit has not taken a position on the validity of the "social visibility" requirement.[28]

Conclusion

Family is now well established as a potential ingredient of a qualifying "particular social group" within the Fourth Circuit. Indeed, the court recently reaffirmed the reasoning of *Crespin-Valladares* in *Temu v. Holder*.[29] That does *not* mean, however, that all "family-based" particular groups will succeed in the Fourth Circuit. The respondent still must demonstrate actual inclusion in the family-based group and, most important, that there is a *nexus* between that group and the actual or feared persecution.

Moreover, the related issues of whether prosecution or other witnesses (as opposed to the family of such witnesses) can be a particular social group and whether "social distinction" (formerly known as "social visibility") is a valid requirement for a particular social group remain in flux within the Fourth Circuit. ◆

NOTE: These are my views, and they do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, the Federal Bar Association, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the

future. They also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals. I was the Immigration Judge in Crespin-Valladares.

Endnotes

[1]*Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004).

[2]*See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *overruled on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

[3]*Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

[4]*See Crespin-Valladares v. Holder*, 632 F.3d 117, 124 n.4 (4th Cir. 2011).

[5]*Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), hereafter cited as *Crespin-Valladares*.

[6]*Id*. at 120-21.

[7]*Id*. at 125.

[8]Id. at 124 n. 4.

[9]*Id*. at 125.

[10]*Id*. (citations omitted).

[11]*Id*.

[12]*Id*. "Social visibility" recently was superseded by the term "social distinction." *See Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

[13]*Crespin-Valladares, supra,* at 125 n. 5, citing *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) and *Gatimi v. Holder,* 578 F.3d 611 (7th Cir. 2009).

[14]*Crespin-Valladares, supra*, at 126.

[15]To meet the requirement that persecution be "on account of" a particular social group, or any other protected ground under the "refugee" definition, INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), the respondent must show that the particular social group is "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

[16]*Crespin-Valladares, supra*, at 129. The court had also found erroneous the BIA's reversal of the Immigration Judge's finding that the respondent had a reasonable (well-founded) fear of future persecution by the MS-13. *Id.* at 126-27.

[17]*Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012), hereafter cited as "*Zelaya*.".

[18]*Id*. at 162.

[19]*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (young Salvadoran males who resist gang recruitment are not a particular social group).

[20]*Zelaya, supra,* at 166.

[21]*Id.* at 165 n.4.

[22]*Id*. at 166.

[23]*Id*.

[24]*Id*. at 169.

[25]*Id*.

[26]*Id*. citing *Henriquez–Rivas v. Holder,* No. 09–71571, 449 Fed.Appx. 626, 2011 WL 3915529 (9th Cir. Sept. 7, 2011) (unpublished). More recently, the en banc Ninth Circuit reversed and remanded *Henriquez* on the basis "that the BIA misapplied its own precedent in holding that witnesses who testify against gang members may not constitute a particular social group due to a lack of social visibility." *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013). Also, the Second Circuit found that "persons who witnessed . . . alleged [war] crimes and cooperated with international investigators" could be a particular social group. *Gashi v. Holder*, 702 F.3d 130, 132 (2d Cir. 2012).

[27]*Zelaya, supra,* at 169

[28]*Id.* at 169 n. *. *See also Martinez v. Holder*, 740 F.3d 902, 913 n. 4 (4th Cir. 2014).

[29]*Temu v. Holder*, 740 F.3d 887, 894 (4th Cir. 2014) ("There is no doubt under BIA or federal case law that kinship ties can serve as the basis for a particular social group.").

A Work In Progress: Mental Competency Issues In Immigration Practice

By Cyrus D. Mehta

It is already hard enough for an immigration lawyer to represent a foreign national client in an immigration proceeding, given the language and other cultural barriers, along with the fact that immigration law can be extremely complex and unforgiving. On top of this, an immigration lawyer who represents a foreign national client with mental competency issues faces even greater challenges, including ethical conundrums.

To what extent can a lawyer represent a client who may not even have the capacity to consent or to comprehend the fact that there is a lawyer who can assist him or her? This client may be discovered in immigration custody while in the middle of complex removal proceedings. The lawyer may also encounter a client with mental competency issues who may need to file for immigration benefits such as adjustment of status or naturalization. This issue has gained even more importance in light of the mandatory appointment of counsel for unrepresented respondents in immigration custody who have mental disorders.

While clients with diminished mental capacity also include children, this article focuses on the challenges that lawyers face in representing clients with mental disorders. The first breakthrough with respect to the development of safeguards came about in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), where the Board of Immigration Appeals held that for an alien to be competent to participate in an immigration proceeding, he or she must have a rational and factual understanding of the nature and object of the proceeding and a reasonable opportunity to exercise the core rights and privileges afforded by the law. The decisive factors are whether the respondent understands the nature and object of the proceedings, can consult with the attorney or representative, and has a reasonable opportunity to examine adverse evidence, present favorable evidence and cross examine government witnesses. Further guidance relating to *Matter of M-A-M-* can be found in the excellent practice advisory of the Litigation Action Center of the American Immigration Council.[1]

Subsequently, in *Franco-Gonzales v. Holder*, No. 10-02211 (C.D. Cal Apr. 23, 2013), a class action law suit, the court ordered that non-citizen detainees with severe mental disabilities in Arizona, California and Washington be provided qualified legal representatives at government expense in removal and bond proceedings. The court also ordered bond redetermination hearings for those detained more than 180 days. The EOIR on December 13, 2013 issued guidelines to provide enhanced procedural protection to unrepresented detained respondents with mental disorders.[2] These guidelines are more robust than the principles set forth in *Matter of M-AM-*, and require an assessment of eight competencies in order to determine whether the respondent is competent to represent him- or herself:

A rational and factual understanding of:
- The nature and object of the proceeding;
- The privilege of representation, including but not limited to, the ability to consult with a representative if one is present;
- The right to present, examine, and object to evidence;
- The right to cross-examine witnesses; and
- The right to appeal

A reasonable ability to:
- Make decisions about asserting and waiving rights;
- Respond to the allegations and charges in the proceedings; and
- Present information and respond to questions relevant to eligibility for relief.

If a detained respondent is unable to perform any one of the above functions, then he or she is unable to represent him-or herself. An Immigration Judge is required to detect facts suggesting incompetency, conduct a judicial inquiry, and follow up with a competency review. If the Immigration Judge determines that a respondent is not competent to represent him-or herself, the EOIR may provide a qualified representative who is found to be incompetent to represent him-or herself. While this elaborate process to determine whether a respondent is competent or not is a good first step, one wonders why this process is conducted on behalf of a respondent without the presence of a lawyer. This writer believes that the respondent should have a legal representative earlier in the process, when his or her competency is being evaluated.

Even when a lawyer is appointed by the court to represent a respondent who is not found to be competent, there is a potential for conflict of interest as the appointment will generally only last while the client is detained. If the client is bonded out, the lawyer will no longer be paid by EOIR after the client is released. This creates an ethical dilemma.[3] If the client desperately needs the assistance of a lawyer who is paid by the government, he or she can only be represented by counsel at government expense while in immigration custody. Would it be in the client's best interest to be released but not to have appointment counsel, or rather to have appointed counsel while in custody? This might be easier to resolve if the client could make decisions and provide informed consent, but clients with severe mental disabilities might be unable to make informed decisions.

On the other hand, there are no safeguards relating to non-citizens applying for immigration benefits outside a custodial setting. Practitioners representing clients with mental disorders should advocate for the application of the safeguards enunciated in *Matter of M-A-M* even outside a removal hearing, which include:

- Legal representation
- Identification of close friends or family members who can assist
- Docketing/managing case to give time for legal representation or medical treatment
- Participation of a guardian in the proceedings
- Continuance or administrative closure
- Closing hearing to the public
- Waiving respondent's appearance
- Assistance with development of record
- Reserving appeal rights

Lawyers must also consult ABA Model Rule 1.14, and its analog in a state bar ethics rule, which relates to representing a client with diminished mental capacity. Rule 1.14 instructs a lawyer to maintain a normal lawyer-client relationship as far as possible. Thus, to the extent that an impaired client is capable of making competent decisions, the lawyer must follow them. A lawyer may seek help from a family member or others in communicating with a client with a mental disorder, while at the same time taking into consideration whether the presence of others would affect the attorney-client privilege.

This writer has represented clients for benefits applications, and has found it extremely useful to communicate with the client through trusted family members. A client with a mental disorder may have moments of lucidity, and it is important for the lawyer to ascertain how best to work with such a client through a professional diagnostician. At the benefits interview, counsel must insist that the USCIS generously provide accommodations for a client, including having the presence of a family member during the interview and to only ask the most basic questions, while relying on documentary evidence to determine eligibility for the immigration benefit. Note that 8 CFR §103.2(a)(2) allows a legal guardian to sign a form for a person with mental disabilities.

With respect to applying for naturalization, the law has developed favorably towards persons with disabilities. Applicants who are physically or developmentally disabled, or have mental impairment are exempt from the English as well as civics/history test.[4] Applicants may also seek a waiver of the oath requirement if they are unable to comprehend it.[5] Designated representatives can complete the Form N-400, such as a guardian, surrogate, US citizen spouse, parent, son, daughter or sibling.[6] It is thus potentially possible for a lawful permanent resident who is comatose on a respirator to be able to apply for and obtain US citizenship, and sponsor a qualifying spouse through an I-130 petition, who in turn files his or her own adjustment application for lawful permanent residence.

Rule 1.14 also allows a lawyer to take reasonably protective action when a client is at risk of harm by either consulting with individuals or entities, and in appropriate cases, seek the appointment of a guardian or guardian ad litem. The lawyer may be impliedly authorized to reveal information protected by Rule 1.6, but only to the extent reasonably necessary to protect the client's interests. While resorting to the appointment of a guardian may appear to be an obvious step on behalf of one who is unable to comprehend the nature of the proceedings or consent to the representation, it may also be a traumatic and expensive process, and may undermine the autonomy that the client is required to have under Rule 1.14. The guiding principles, as much as possible, are that the client determines the ends while the lawyer has control over the means. According to Comment 7 to Model Rule 1.14, "In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."

To the extent that a client with mental disorders can provide informed consent, the lawyer's role is made that much easier. The challenge lies with a client who is unable to consent at all. Under these circumstances, should the lawyer still play an activist role and represent the client? Is counsel then always required to seek the appointment of a guardian? Or are there less restrictive alternatives such as seeking the assistance of family members in determining the client's best interests. If counsel has been appointed by an immigration judge, how relevant is the client's incapacity to consent if the lawyer believes it is still in the client's best interests to have a legal representative? 8 CFR §§1292.1(a)(1) &(a)(4) state, without reference to consent, that attorneys are entitled to appear in removal hearings. An attorney can play a crucial role on behalf of a client who is unable to consent. Indeed, if the goal is for the respondent to remain in the United States (but that may only be assumed if the client is unable to comprehend the nature of the immigration proceeding), the very fact that a respondent may have a mental disorder may prompt an immigration judge to consider granting asylum, or related relief such as withholding of removal or protection under the Convention Against Torture, if the respondent will be removed to a country that is unable or unwilling to protect its citizens with mental disorders.[7] An immigration judge may also grant cancellation of removal pursuant to INA §240A(b) if the documentation is able to demonstrate eligibility, such as 10 years of physical presence, good moral character and the qualifying relatives, who may be US citizens or permanent residents, are able to demonstrate exceptional and extremely unusual hardship. There may be times, especially with clients who cannot seek relief, to advocate for administrative closure of the case or even termination. Again, when the client is unable to consent, would administrative closure or termination be in the client's best interest over being removed from the United States and being with close family members abroad?

There is much work that needs to be done to develop standards and provide clearer guidance. In the meantime, the lawyer must grapple with emerging standards from the courts and EOIR, as well as interpret Rule 1.14 within the immigration context, although not all states have adopted this rule. While representing non-citizen clients with mental competency issues can pose additional challenges, obtaining a successful outcome for the client under difficult circumstances can be extremely rewarding to the immigration lawyer. ◆

"The test of our progress is not whether we add to the abundance of those who have much. it is whether we provide enough to those who have little."

—Franklin D. Roosevelt

Endnotes

[1]*See Representing Clients With Mental Competency Issues Under Matter of M-A-M-*, Practice Advisory, Legal Action Center, American Immigration Council, available at www.americanimmigrationcouncil.org/newsroom/release/lac-issues-practice-advisory-representing-clients-mental-competency-issues.

[2]*See Phase 1 of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders*, available on LexisNexis Legal Newsroom Immigration at *www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2014/01/01/phase-i-of-plan-to-provide-enhanced-procedural-protections-to-unrepresented-detained-respondents-with-mental-disorders.aspx*.

[3]Appointed counsel in such situations must consult with their state ethical rule analogs to ABA Model Rule 1.7(b) regarding obtaining informed consent in the event of a conflict if the lawyer believes s/he can provide competent and diligent representation; and Model Rule 1.8(f), which provides that a lawyer shall not accept compensation for representing a client from a third party where such arrangement "interfere[s] with the lawyer's independence of professional judgment or with the client-lawyer relationship."

[4]*See* INA §312(b)(1); 8 CFR §312.1(b)(3); 8 CFR §312.2(b)(1).

[5]*See* INA §337(a).

[6]*See* USCIS Policy Manual, pt. J, ch. 3 (updated as of May 30, 2014), available at www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartJ-Chapter3.html; Memo, Yates, Acting. Assoc. Director, USCIS, *Procedures for Implementing the Waiving of the Oath of Renunciation and Allegiance for the Naturalization of Aliens having Certain Disabilities*, HQISD 70/33 (June 30, 2003), published on AILA InfoNet at Doc. No. 03071544 (posted July 15, 2003).

[7]*See e.g. Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008).

Waivers of Inadmissibility for Lawful Permanent Residents Under Section 212(h) of the Act

By Christina Greer

Generally more protections and opportunities for relief are afforded to lawful permanent residents ("LPRs") at risk of removal than to nonimmigrants and aliens[1] who have entered the United States without inspection. For example, in removal proceedings, the burden is on the Department of Homeland Security ("DHS") to prove by clear and convincing evidence that an alien who has been admitted to the United States is removable. Section 240(c)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(A). An unadmitted alien, on the other hand, bears the burden of demonstrating that he is lawfully present pursuant to a prior admission and is admissible to the United States. Section 240(c)(2) of the Act. Thus, Congress has provided more protections in removal proceedings to aliens who have been admitted to the United States than it has to unadmitted aliens.

Congress also made certain forms of relief, such as cancellation of removal, more accessible to LPRs than it has to non-LPRs, irrespective of whether a non-LPR has been admitted. For instance, an otherwise eligible LPR only has to show 7 years of continuous residence in the United States to be eligible for cancellation of removal. But a non-LPR must show 10 years of continuous physical presence and exceptional and extremely unusual hardship to a qualifying relative. *Compare* sections 101(a)(33) and 240A(a)(2) of the Act, 8 U.S.C. §§ 1101(a)(33) and 1229b(a)(2), *with* sections 240A(b)(1)(A) and (2)(B) of the Act.[2] *But see* sections 240A(b)(2)(A)(ii) and (v) of the Act (providing cancellation of removal to certain battered spouses and children, irrespective of their LPR or non-LPR status, if they establish, inter alia, that they have 3 years of continuous physical presence in the United States and that their removal would cause extreme hardship to a qualifying relative).

However, LPRs seeking to waive certain grounds of inadmissibility through a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), are subject to stricter requirements than non-LPRs. In fact, in some circuits, certain aliens who are admitted as LPRs at a port of entry may be ineligible for such a waiver while similarly situated aliens who adjusted to LPR status in the United States are eligible. There has also been confusion regarding the applicability of the section 212(h) waiver to LPRs in other situations. For example, is a section 212(h) waiver available nunc pro tunc to an LPR who traveled abroad and was readmitted after the commission of an offense giving rise to inadmissibility? Can a waiver under

section 212(h) be used to waive criminal bars to cancellation of removal? Can an LPR obtain such a waiver without concurrently applying for admission or adjustment of status under section 245 of the Act, 8 U.S.C. § 1255?

It is unclear what reasons Congress may have had when it drafted section 212(h) for distinguishing between LPRs and non-LPRs and arguably distinguishing between aliens admitted at a port of entry as LPRs and those who adjusted to LPR status. In any case, these classes of aliens have been treated differently through the way the statute has been interpreted, applied, and amended since its enactment, which, in one instance, has led to conflicting case law.

Overview

Section 212(h) of the Act provides for a waiver of certain criminal grounds of inadmissibility for both LPRs and non-LPRs, including grounds relating to crimes involving moral turpitude (section 212(a)(2)(A)(i)(I)); certain controlled substance offenses (section 212(a)(2)(A)(i)(II)); two or more criminal convictions for which the aggregate sentences of confinement are 5 years or more (section 212(a)(2)(B)); and prostitution and commercialized vice (section 212(a)(2)(D)).

The section 212(h) waiver is generally available to aliens in two circumstances. *See Matter of Mendez*, 21 I&N Dec. 296, 299 (BIA 1996). First, the waiver is available if the offense that renders the alien inadmissible occurred more than 15 years "before the date of the application for a visa, admission, or adjustment of status"; the alien's admission would not be contrary to the national welfare, safety, or security of the United States; the alien has been rehabilitated; and a waiver is warranted as a matter of discretion. Section 212(h)(1)(A) of the Act. Second, the waiver is available, irrespective of the time of the offense, if the alien can demonstrate that a denial of his or her admission to the United States would cause extreme hardship to a qualifying relative and that a visa, admission, or adjustment of status is warranted as a matter of discretion. Section 212(h)(1)(B) of the Act. These are the only requirements for non-LPRs applying for a section 212(h) waiver. LPRs, however, are subject to additional restrictions.

In addition to these requirements for section 212(h) eligibility, the statute adds the following the exclusionary provision relative to LPRs:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

These prohibitions raise several questions. First, it is unclear whether the bars apply to all LPRs applying for a waiver or only to those LPRs who were admitted to the United States as LPRs at a port of entry. Second, section 212(h) does not specify whether an LPR must apply for a waiver in conjunction with an application for adjustment of status or whether it can be sought in conjunction with an application for another waiver or for cancellation of removal. Finally, there is an issue as to whether an LPR who has traveled abroad after the commission of an offense triggering inadmissibility can apply for a "stand alone" waiver under section 212(h) in removal proceedings if he or she was not placed in proceedings upon reentry into the United States.

Over the past 5 years, Board and circuit court precedent has better defined the limits and applicability of section 212(h) to LPRs. This article discusses that precedent and provides a guide for understanding the current state of the law relating to waivers for LPRs under section 212(h) of the Act. It will first provide background on the origin and development of the waiver since its enactment in 1957. Then, the article will discuss recent developments in Board precedent regarding the applicability of section 212(h) in certain situations—such as when an LPR is eligible for the waiver in removal proceedings and whether the waiver may be used with other forms of relief. Next, the article will detail whether the exclusionary provision of section 212(h) applies to LPRs who entered the country subsequent to a procedurally regular, but substantively unlawful, admission. It will also discuss the circuit split and the split between the Board and six circuit courts regarding whether the exclusionary provision applies to aliens who adjusted to LPR status. The article concludes with a summary of the current state of the law and a discussion of the potential for future developments.

Background

Section 212(h) of the Act began as section 5 of the Act of September 11, 1957, Pub. L. No. 85-316, 71 Stat. 639, 640. As originally enacted, section 5 permitted the waiver of excludability grounds relating to crimes involving moral turpitude, convictions for two or more crimes for which the aggregate sentences to confinement actually imposed were 5 years or more, and prostitution. 8 U.S.C. § 1182b (1958).[3] To be eligible for the waiver, an otherwise admissible applicant had to demonstrate that his or her exclusion would cause extreme hardship to a qualifying relative; that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States; and that the applicant warranted a favorable exercise of discretion. *Id.* The waiver also required that the Attorney General consent "to the alien's applying or reapplying for a visa and for admission to the United States." *Id.* The statute did not draw any distinctions between LPRs and non-LPRs.

Congress subsequently amended section 212(h) of the Act in 1990, and technical changes were made by an amendment in 1991. Immigration Act of 1990 ("IMMACT 90"), Pub. L. No. 101-649, § 601(d)(4), 104 Stat. 4978, 5076-77 (effective Nov. 29, 1990), *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 307(f), 105 Stat. 1733, 1755 (effective as if included in IMMACT 90). The enactment of these two laws greatly changed the scope of the section 212(h) waiver. First, a provision was added that allowed waivers for certain individuals excludable for conduct stemming from prostitution-

related activity or other excludable activity, regardless of hardship to a qualifying relative, if that activity occurred more than 15 years before the application. This provision also required an applicant to show that his or her admission would not be contrary to the national welfare, safety, and security of the United States; that he or she had been rehabilitated; and that a favorable exercise of discretion was warranted. 8 U.S.C. § 1182(h)(1)(A) (1994). Second, these amendments added a provision barring aliens from being granted waivers if they had committed or admitted committing acts that constituted "murder or criminal acts involving torture." Third, they added a requirement that the Attorney General, in the exercise discretion, consent to the alien's application to adjust status, thus extending the application of section 212(h) of the Act to aliens applying for adjustment of status in addition to those applying or reapplying for a visa and for admission to the United States.

Finally, section 348(a) of the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639, added a provision to the end of section 212(h) restricting the availability of the waiver. This exclusionary provision, discussed in the overview above, bars certain LPRs who have been convicted of an aggravated felony or who have not accrued 7 years of continuous residence in the United States from receiving the waiver.

When Can an LPR Apply for a Section 212(h) Waiver?

The Board interpreted a previous version of section 212(h) as allowing for waivers nunc pro tunc to aliens in deportation proceedings who were inadmissible at the time of their most recent entry into the United States and were subsequently placed in proceedings. *See Matter of P-*, 7 I&N Dec. 713 (BIA 1958). The Board recently reconsidered that rule in light of statutory changes to section 212(h) and the Supreme Court's decision in *Judulang v. Holder*, 132 S. Ct. 476 (2011), and found that nunc pro tunc waivers are no longer authorized under section 212(h) of the Act. *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). Additionally, the Board's decisions have emphasized that section 212(h) waivers are only available to LPRs and non-LPRs who are seeking a visa, admission to the United States, or adjustment of status. *See id.*.at 131 (citing section 212(h)(2) of the Act); *Matter of Y-N-P-*, 26 I&N Dec. 10, 12 (BIA 2012); *Matter of Bustamante*, 25 I&N Dec. 564, 567 (BIA 2011); *Matter of Abosi*, 24 I&N Dec. 204, 205 (BIA 2007),

Nunc Pro Tunc Waivers Under Section 212(h) of the Act

In 1958, less than a year after section 5 of the Act of September 11, 1957, became law, the Board held that LPRs in deportation proceedings (as opposed to exclusion proceedings) could obtain waivers under section 5 nunc pro tunc to cure a ground of inadmissibility that existed at an alien's time of reentry into the United States if the alien was otherwise admissible and the reentry occurred after the statute's effective date. *Matter of P-*, 7 I&N Dec. at 714. When *Matter of P-* was decided, the language of the waiver required that the Attorney General consent "to the alien's applying or reapplying for a visa and for admission to the United States." 8 U.S.C. § 1182b (1958). Based on this language, the Board found that a special inquiry officer (now an Immigration Judge) had nunc pro tunc authority to grant a waiver as of the alien's most recent reentry and thus to deem him or her to have been lawfully admitted as of that entry. *See also Matter of Sanchez*, 17 I&N Dec. 218, 222 (BIA 1980) (citing *Matter of P-* for the proposition that a waiver under section 5 can be granted nunc pro tunc to an LPR in deportation proceedings to cure a ground of inadmissibility that existed at the time of the alien's entry); *Matter of Millard*, 11 I&N Dec. 175, 177 (BIA 1965) (same).

In *Matter of Rivas*, 26 I&N Dec. at 134, the Board overruled *Matter of Sanchez* and *Matter of P-*, holding that aliens in removal proceedings could *not* seek a waiver under section 212(h) of the Act nunc pro tunc. Rivas was admitted to the United States as an LPR on August 11, 1998. He was later convicted of two theft offenses and conceded that he was removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii). Rivas applied for a "stand alone" waiver under section 212(h) of the Act, which the Immigration Judge granted. The Immigration Judge determined that because Rivas departed and reentered the United States after his convictions, he was inadmissible at the time of his most recent reentry into the United States and would have qualified for a section 212(h) waiver at the time of that reentry. The Immigration Judge therefore granted the waiver nunc pro tunc to cure Rivas' inadmissibility at the time of his most recent reentry per *Sanchez*.

The DHS appealed, arguing that LPRs, like non-LPRs, can apply for section 212(h) waivers only when also applying for admission or adjustment of status. The Board agreed and overruled *Matter of Sanchez* based on the changes in the statute instituted by IMMACT 90 and IIRIRA, which amended the requirements for a section 212(h) waiver. The Board found that these new requirements differed from those in effect for section 5 relief when *Sanchez* was decided and concluded that the amended language no longer supported the reasoning of that decision.

Specifically, the Board held that IMMACT 90's change to section 212(h) clarified the waiver's applicability and rendered nunc pro tunc waivers incongruous with the plain language of the statute. Prior to IMMACT 90, waivers were available when the Attorney General "consented to the alien's *applying or reapplying for a visa and for admission* to the United States." 8 U.S.C. § 1182(h) (1988). IMMACT 90 added the phrase "or adjustment of status" to the end of this provision. Although slight, this change was nonetheless significant because it clarified the situations in which waivers are available—where the applicant is seeking admission or where he is an applicant for adjustment of status. The Board found that the revision rendered the provision "far more precise regarding the eligibility criteria for a section 212(h) waiver." *Matter of Rivas*, 26 I&N Dec. at 133.

The Board also found the Supreme Court's holding in *Judulang* instructive in determining whether a section 212(h) waiver was available nunc pro tunc. 132 S. Ct. 476 (regard-

ing the availability of relief under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed 1996)). In *Judulang*, the Supreme Court discussed the Attorney General's decision in *Matter of L-*, 1 I&N Dec. 1 (BIA, A.G. 1940). There, the Attorney General determined that he could exercise discretion to grant a section 212(c) waiver of inadmissibility nunc pro tunc to an alien who committed an offense giving rise to inadmissibility before departing from and reentering the United States if the alien would have qualified for the waiver as of his or her most recent reentry. Granting the waiver nunc pro tunc placed the alien back into the position of an arriving alien seeking admission and waived the inadmissibility as of the most recent admission. In the context of section 212(c) relief, the Supreme Court in *Judulang* found that this approach violated equal protection because eligibility for a section 212(c) waiver would depend on nothing more than whether an alien had traveled abroad after committing an offense giving rise to inadmissibility. 132 S. Ct. at 480 (citing *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976)).

In contrast to the Attorney General's interpretation of former section 212(c), section 212(h) of the Act itself distinguishes between LPRs seeking admission to the United States and those who have already been admitted. Specifically, absent an application for adjustment of status, the *language* of section 212(h) only makes a waiver available to the former class of aliens, not the latter. Based on this language and the Supreme Court's holding in *Judulang*, the Board held that section 212(h) permissibly distinguishes between these classes of aliens and does not raise equal protection concerns because the distinction it creates is not the result of an administrative policy, as was the case in *Matter of L-*, 1 I&N Dec. 1. Instead, the distinction is "inherent in the statutory scheme created by *Congress*." *Matter of Rivas*, 26 I&N Dec. at 133-34 (emphasis added) (quoting *Matter of Gonzalez-Camarillo*, 21 I&N Dec. 937, 942 (BIA 1997)). Additionally, the Board found that after the amendments to section 212(h), eligibility for a waiver does not depend on international travel; rather it turns on whether the application for a waiver is made while the alien is seeking admission or when the DHS is seeking to remove the alien.

The Board's decision in *Matter of Rivas* establishes that LPRs can only apply for a waiver under section 212(h) of the Act when they are "seeking an admission into the United States" within the meaning of section 101(a)(13)(C) of the Act or in conjunction with an application for adjustment of status. *See* 8 C.F.R. § 1245.1(f) (providing that an application for adjustment of status under section 245 of the Act is the sole method for requesting a section 212(h) waiver as it relates to the inadmissibility of an alien "in the United States"). Therefore, a "stand alone" 212(h) waiver is no longer available nunc pro tunc to an LPR who was readmitted to the United States after the commission of an offense giving rise to inadmissibility.

Availability of a Section 212(h) Waiver in Other Situations

Before *Matter of Rivas*, the Board issued a number of precedent decisions addressing the availability of section 212(h) waivers in other contexts. In *Matter of Abosi*, 24 I&N Dec. 204, the Board acknowledged that 8 C.F.R. § 1245.1(f) does not prevent LPRs who are "seeking an admission" and are charged with a criminal ground of inadmissibility from applying for a section 212(h) waiver without simultaneously filing an application for adjustment of status. The Board held that the regulation applies only to aliens *in the United States* who are seeking to overcome a ground of inadmissibility. The respondent in *Matter of Abosi* was seeking admission into the United States and already had LPR status. Thus, he was not bound by 8 C.F.R. § 1245.1(f) because he was not considered to be "in the United States." The Board held that returning LPRs who are treated as seeking an admission under section 101(a)(13)(C) of the Act and are attempting to overcome a ground of inadmissibility in removal proceedings can apply for a waiver under section 212(h) of the Act without concurrently filing an application for adjustment of status.

In *Matter of Bustamante*, 25 I&N Dec. 564, the Board held that an applicant for cancellation of removal cannot use a section 212(h) waiver to overcome a mandatory bar to relief under section 240A(b)(1)(C) of the Act based on conviction for an offense specified in section 212(a)(2) or 237(a) (2) or (3). The Board found that this was the case even when the conviction was for an offense that triggered a ground of inadmissibility that could be waived under section 212(h). The Board reasoned that the language of section 212(h) specifically waives the application of "grounds" of inadmissibility and not the underlying conduct that would trigger that ground. Furthermore, the cancellation of removal statute bars a grant of relief where an individual has been convicted of crimes *referenced* in certain inadmissibility provisions, but that bar is not contingent on the applicability of the ground of removability. The fact of conviction is sufficient. Because section 212(h) waives only the ground of inadmissibility and not the fact of conviction, the Board concluded that the waiver is inapplicable to cancellation of removal.

In *Bustamante*, the Board contrasted the language in section 240A(b)(1)(C) of the Act, which bars anyone "convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act" from a grant of cancellation of removal, with the bar to special rule cancellation for certain battered spouses and children, which refers to aliens who are "inadmissible or deportable" under certain *grounds* listed in section 240A(b)(2)(A)(iv) of the Act. While the Board noted this disparate language, which could suggest that an applicant for special rule cancellation of removal could waive his or her *inadmissibility* with a section 212(h) waiver, the Board did not address this issue in *Matter of Bustamante*. *See also Matter of Y-N-P-*, 26 I&N Dec. at 17 & n.7 (citing *Matter of Bustamante*, 25 I&N Dec. at 568 & n.2). Instead, the Board addressed this issue a year later in *Matter of Y-N-P-*, 26 I&N Dec. 10.

In *Matter of Y-N-P-* the Board looked to the language of the Act and examined the authority of the Attorney General and the instances in which Congress has provided for the availability of section 212(h) waivers. First, the Board reasoned that section 212(h) grants the Attorney General the discretion to waive a ground of inadmissibility but does not grant the authority to cancel removal. Section 240A of the Act does grant the Attorney General that authority, but when an alien

has committed or been convicted of certain offenses, the authority is limited. Although the special rule cancellation provision refers to aliens who are "inadmissible" on account of certain criminal grounds that are waivable under section 212(h), the Board concluded that nothing in section 212(h) "grants the Attorney General authority to consent to cancellation of the removal of an alien who is present in the United States and does not otherwise satisfy the basic eligibility requirements for that relief." *Matter of Y-N-P-*, 26 I&N Dec. at 14.

Second, the Board noted that section 212(h) of the Act specifically provides for a waiver where "the Attorney General 'has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.'" *Id.* at 12 (emphasis omitted) (quoting section 212(h)(2) of the Act). The Board observed that the respondent did not fit into any of these categories because she was not applying for either admission or adjustment of status. Although the Board recognized that section 240A(b) of the Act is entitled "Cancellation of Removal *and Adjustment of Status* for Certain Nonpermanent Residents," it found that an application for cancellation of removal and adjustment of status does not involve a separate application for admission or adjustment. *Id.* at 14-15 (emphasis added). Instead, the Board found that the adjustment of status of an alien who is granted cancellation of removal occurs as a matter of course. "Such an alien is not required to file an application for adjustment of status, establish his or her admissibility (as is required to adjust status under section 245(a) of the Act), or otherwise satisfy any eligibility criteria beyond those included in section 240A(b)(2)." *Id.* at 15 (citing *Matter of Bustamante*, 25 I&N Dec. at 569). "Rather, lawful permanent resident status is granted solely as a consequence of the cancellation of removal." *Id.* (footnote omitted). The Board further observed that 8 C.F.R. § 1245.1(f) requires an applicant in the United States to apply for a section 212(h) waiver concurrently with an application for adjustment of status under section 245 of the Act or one of the other provisions included in that regulation. Notably, section 240A(b) is not listed under 8 C.F.R. § 1245.1(f).

Based on this analysis, the Board concluded that neither the statute nor the regulations allow for the use of a section 212(h) waiver in conjunction with an application for cancellation of removal. Thus, the Board held that an applicant for special rule cancellation of removal cannot apply for a section 212(h) waiver to overcome criminal offenses that render the applicant ineligible for that form of relief.

Conclusion

The Board has clarified the circumstances in which aliens in removal proceedings can apply for waivers under section 212(h) of the Act. *Matter of Rivas* was decided a year after *Matter of Y-N-P-* and built off its reasoning, as well as that provided in *Matter of Abosi* and *Matter of Bustamante*. The common thread throughout these decisions is that the Attorney General, and thus the Board and Immigration Courts, are bound by the plain language of the statute. Therefore, section 212(h) waivers are only available in certain well-defined circumstances, and because the language of the statute explicitly provides the instances in which waivers are available—when applying or reapplying for a visa, admission, or adjustment of status—the Attorney General is without the authority to expand its availability. In the case of LPRs, such waivers are only available in removal proceedings to those who are treated as seeking an admission under section 101(a)(13)(C) of the Act or to applicants for adjustment of status under section 245. Thus, section 212(h) relief is expressly unavailable to applicants for cancellation of removal and to LPRs charged with removability under section 237(a) who have not filed for the waiver in conjunction with an application for adjustment of status, regardless of any prior foreign travel.

Which LPRs Are Subject to the Aggravated Felony Bar and Presence Requirement of Section 212(h) of the Act?

While the Board's recent decisions have firmly established that the IMMACT 90 amendments to section 212(h) of the Act limit the availability of a waiver under this provision, the Board and circuit courts diverge on their interpretations of the exclusionary provision added by the IIRIRA. As noted, this provision limits the availability of a section 212(h) waiver by making such waivers unavailable to aliens who have "previously been admitted to the United States as an alien lawfully admitted for permanent residence" if either (1) since "the date of such admission" the alien has been convicted of an aggravated felony, or (2) the alien has not lawfully resided continuously in the United States for not less than 7 years immediately preceding the date of initiation of removal proceedings. Section 212(h) of the Act. Adjudicators interpreting this exclusionary provision have encountered two questions. First, does the exclusionary provision apply to an individual who was admitted as an LPR unlawfully? Second, does the phrase "admitted to the United States as an alien lawfully admitted for permanent residence" mean that the aggravated felony bar and the residence requirement apply only to those who were admitted as LPRs at a port of entry and not to those who adjusted to LPR status post-entry? While the first question has been conclusively answered, the second remains a contested issue, which has given rise to a circuit split and a split between six circuits and the Board.

Unlawful Admission as an LPR

In *Matter of Ayala*, 22 I&N Dec. 398, 399 (BIA 1998), the Board considered whether the aggravated felony bar and the residence requirement of section 212(h) of the Act applied to an alien convicted of conspiracy to defraud the United States by making false statements to a Department of the United States Government in violation of 18 U.S.C. § 371. Ayala's conviction related to his activities as the vice president of a firm that prepared fraudulent asylum applications to obtain employment authorization for the firm's "clients." Ayala had not accrued 7 years of residence between his 1991 admission and the initiation of deportation proceedings in 1996 and so would not be eligible for a section 212(h) waiver if the exclusionary provision applied to him. Ayala argued that the residence requirement did not apply to him because his admission was not lawful—that is, he was inadmissible at the time of entry because the conspiracy began prior to his 1991

admission as an LPR.

The Board disagreed, finding that the phrase "previously been admitted" under section 212(h) distinguished between aliens previously admitted for permanent residence and those who have not been admitted. However, section 212(h) did not distinguish between aliens whose admissions were lawful and those whose admissions were not. The Board determined that the *fact* of the respondent's previous admission as an LPR was sufficient to trigger the residence requirement under section 212(h) of the Act because there was no requirement in the statute that the previous admission be substantively lawful. This is distinct from the requirement for LPR cancellation of removal that an applicant have "been an alien *lawfully* admitted for permanent residence for not less than 5 years." Section 240A(a)(1) of the Act (emphasis added). The Board has held that the language in the cancellation of removal statute requires that an alien obtain permanent resident status in a substantively lawful manner. *Matter of Koloamatangi*, 23 I&N Dec. 548, 552 (BIA 2003).

The difference in language is evident. Section 212(h) requires that an LPR must have been "previously . . . admitted," while section 240A(a)(1) requires that an LPR must have been "*lawfully* admitted." (Emphasis added.) An individual can be "admitted as" an LPR without that admission being substantively lawful. *See Matter of Areguillin*, 17 I&N Dec. 308, 309-11 (BIA 1980) (requiring procedural regularity, rather than substantive lawfulness, for an individual to effect an "admission" for purposes of adjustment of status); *see also Matter of Quilantan*, 25 I&N Dec. 285, 292-93 (BIA 2010) (reaffirming *Matter of Areguillin* notwithstanding the enactment of section 101(a)(13)(A) of the Act). The Board concluded that because the admission as an LPR need not be substantively lawful to trigger the exclusionary provision, Ayala was subject to the provision. Because he could not establish that he had the requisite 7 years of continuous residence, he was ineligible for a section 212(h) waiver.[4]

The circuit courts that have considered this issue have followed the Board's decision in *Matter of Ayala*, 22 I&N Dec. 398. *See Martinez v. Att'y Gen. of U.S.*, 693 F.3d 408, 415 (3d Cir. 2012) (applying the aggravated felony bar under section 212(h) of the Act to an LPR present pursuant to a fraudulent admission); *Hing Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010) (same); *Onwuamaegbu v. Gonzales*, 470 F.3d 405, 409 (1st Cir. 2006) (finding that the 7-year residence requirement applied to an LPR who obtained admission through fraud). Accordingly, it is well settled that the residence requirement and the aggravated felony bar under section 212(h) apply to an LPR present in the United States pursuant to a prior admission, irrespective of whether that admission was substantively lawful.

LPRs Through Adjustment of Status

While the previous issues may be settled, there remains an area of uncertainty and disagreement regarding the application of section 212(h) of the Act. The language of the exclusionary provision of section 212(h) regarding to whom the aggravated felony bar and the 7-year residence requirement apply has caused a split between several circuit courts and the Board and between the circuit courts themselves. The Board has found the term "admitted" in section 212(h) to be ambiguous and interprets that phrase broadly, an approach to which the Eighth Circuit has accorded deference. Six other circuit courts have found the term "admitted" in section 212(h) to be unambiguous and have declined to defer to the Board's interpretation. These six circuit courts have applied the definition of "admission" in section 101(a)(13)(A) of the Act strictly and, in effect, have interpreted the term "admission" narrowly. As a result of this split, whether an LPR is eligible to apply for a waiver under section 212(h) may depend on the circuit in which the case arises.

The aggravated felony bar and 7-year residence requirement in section 212(h) apply to aliens who have been "admitted to the United States as an alien lawfully admitted for permanent residence." This phrase contains two terms expressly defined in the Act. Section 101(a)(13)(A) defines "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Section 101(a)(20) defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." When these definitions are substituted for their corresponding phrases, the exclusionary provision of section 212(h) applies to aliens who have previously lawfully entered "into the United States after inspection and authorization by an immigration officer" as an alien "lawfully accorded the privilege of residing permanently in the United States." Sections 101(a)(13)(A), (20) of the Act.

By referring only to those aliens who have been "admitted" as LPRs, section 212(h), on its face, does not apply to aliens who adjusted to LPR status while in the United States, because an adjustment of status does not require an entry after inspection and authorization pursuant to section 101(a)(13)(A) of the Act.[5] However, since the IIRIRA replaced the term "entry" in the Act with the terms "admitted" and "admission," the Board has determined in several instances that these terms are ambiguous. For example, the Board has found that the terms "admitted" and "admission" are ambiguous with regard to aliens who have adjusted to LPR status in the United States after entering the country without inspection and authorization by an immigration officer.

The Board first considered whether adjustment of status constituted an "admission" as defined in section 101(a)(13)(A) of the Act in *Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999) (en banc). Rosas entered the United States without inspection and then adjusted to LPR status. She was later convicted of a controlled substance offense. Based on that conviction, the Immigration and Naturalization Service—the predecessor to the DHS—instituted removal proceedings and charged Rosas with being subject to removal under section 237(a)(2)(A)(iii) of the Act, which provides that "[a]ny alien who is convicted of an aggravated felony at any time *after admission* is deportable." Section 237(a)(2)(A)(iii) of the Act) (emphasis added). The question before the Board was whether Rosas' adjustment of status constituted an "admission" within the meaning of section 237(a)(2)(A)(iii), despite the fact that she had not been inspected and admitted at a port of entry as described

in section 101(a)(13)(A). If Rosas' adjustment of status was not an "admission," then Rosas would avoid deportation because she would not have been convicted of an aggravated felony "after admission." The Board determined that "aliens 'lawfully admitted for permanent residence' through the adjustment process are considered to have accomplished an 'admission' to the United States" for purposes of determining their removability under section 237(a)(2)(A)(iii) of the Act. *Rosas*, 22 I&N Dec. at 619.

Nine years later, in *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), the United States Court of Appeals for the Fifth Circuit reversed the Board's finding that Martinez, an alien who was admitted to the United States as a nonimmigrant and later adjusted to LPR status, was ineligible for a waiver under section 212(h) because he was convicted of an aggravated felony. The Board had applied the exclusionary provision of section 212(h) to Martinez, finding that *Matter of Rosas* was controlling. In doing so, the Board determined that the term "admitted" in section 212(h) was ambiguous and included adjustment of status within the United States. The Fifth Circuit considered the definitions of "admitted" and "lawfully admitted for permanent residence" under sections 101(a)(13)(A) and (20) of the Act and concluded that for the aggravated felony bar under section 212(h) to apply "when the alien is granted permission, after inspection, to enter the United States, he must then be admitted as an LPR." *Id.* at 544. The court therefore found the language "admitted . . . as an alien lawfully admitted for permanent residence" to be unambiguous and held that under the plain language of section 212(h), the aggravated felony bar and 7-year residence requirement apply to aliens who were admitted at a port of entry *as LPRs* and not to aliens who adjusted to LPR status post-entry. Because the statutory language was unambiguous, the court found that it need not defer to the Board's interpretation of "admission."

In response to the Government's argument that excluding an adjustment of status from the definition of "admission" would cause absurd results, the Fifth Circuit found that Congress could have had a rational basis for distinguishing between those who are admitted as LPRs and those who adjust to that status. The court specifically noted that Congress could have been taking a first step in an incremental approach to achieving the goal of removing criminal aliens by starting with aliens admitted as LPRs. As additional support for its decision, the court noted that Congress considered a bill that would have amended the definition of "admission" and "admitted" to include adjustment of status, but the bill did not pass. *Id.* The court stated that the failure of this amendment was "perhaps out of recognition that limited enforcement resources should be devoted to attacking the problem in stages." *Id.* at 545.

In *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), the Board applied the same reasoning it had adopted in *Matter of Rosas* to interpret the term "admission" under section 212(h) of the Act. Koljenovic, unlike the alien in *Martinez*, entered the United States without inspection and subsequently adjusted to LPR status in 2001. The Board held that Koljenovic's 2001 adjustment was an "admission" so he was subject to the residence requirement of section 212(h).

The Board supported its conclusion by looking to the Conference Report accompanying the IIRIRA which states: "The managers intend that the provisions governing continuous residence set forth in INA section 240A . . . shall be applied as well for purposes of waivers under INA section 212(h)." *Id.* at 222 (quoting H.R. Rep. 104-828, at 228 (1996) (Conf. Rep.) (Joint Explanatory Statement)). The continuous residence requirement in section 240A of the Act (necessitating 7 years of continuous residence after admission in any status) applies to both those who are admitted as LPRs at a port of entry and those who adjusted to LPR status. The Board found that an interpretation of section 212(h) that exempted aliens who adjusted to LPR status from the 7-year residence requirement under that section would frustrate this legislative purpose. Under such an interpretation, an alien who is removable for a conviction, who adjusted to LPR status, and who has not resided continuously in the United States for 7 years would be ineligible for cancellation of removal under section 240A but would remain eligible for a section 212(h) waiver. The Board concluded that the legislative history did not support this result and thus an "admission" under section 212(h) must include an adjustment of status.

Finally, the Board emphasized that *not* construing an adjustment of status to be an "admission" under section 212(h) of the Act would lead to absurd results for other aliens who obtained LPR status through adjustment. For instance, aliens who entered without inspection and who later adjusted to LPR status would be ineligible for relief under sections 212(c) and 240A(a) of the Act because both sections require that the applicant be "admitted" for permanent residence. Thus, the Board found its interpretation of section 212(h) of the Act, which treated an adjustment of status as an admission, was the most consistent with the overall structure of the Act regarding the eligibility of aliens for relief.

It is important to note that the alien in the Fifth Circuit's decision in *Martinez*, entered the United States lawfully with a nonimmigrant visa before adjusting to LPR status. Thus, the Fifth Circuit's decision in *Martinez* did not squarely discuss section 212(h)'s applicability to an alien who entered the United States *without inspection* and then later adjusted to LPR status, as was the case in *Matter of Koljenovic*, 25 I&N Dec. 219. As a result, although the Board applied the rule in *Martinez* in all section 212(h) cases akin to *Martinez* arising in the Fifth Circuit, it applied its interpretation of section 212(h) in *Matter of Koljenovic* to Fifth Circuit cases in which the alien had adjusted to LPR status after entering the country without inspection. *See Arellano-Acosta v. Holder*, 478 F. App'x 228, 229 (5th Cir. 2012) (reversing the Board's determination that *Martinez* did not apply in cases where the alien entered without inspection and later adjusted).

After *Matter of Koljenovic*, the Fourth and Eleventh Circuits joined the Fifth Circuit in holding that an alien who is not admitted as an LPR at a port of entry, but who adjusts post-entry instead, has not "previously been admitted to the United States as an alien lawfully admitted for permanent residence" as the exclusionary provision of section 212(h) requires. *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Lanier*

v. Att'y Gen., 631 F.3d 1363 (11th Cir. 2011). Both of these decisions mirror the Fifth Circuit's reasoning in *Martinez*. *Bracamontes* dealt with an alien who had been admitted as a temporary resident and later adjusted status. However, unlike *Bracamontes* and *Martinez*, the Eleventh Circuit's decision in *Lanier* squarely held that an alien who entered *without inspection* and later adjusted status was eligible for a section 212(h) waiver despite having been convicted of an aggravated felony after her adjustment.

Two years after its decision in *Matter of Koljenovic*, the Board issued a companion decision addressing these circuit court decisions. In *Matter of E.W. Rodriguez*, 25 I&N Dec. 784, 786 (BIA 2012), the Immigration Judge had found that Rodriguez, whose status was adjusted to that of an LPR after entering without inspection, was subject to the exclusionary provision under section 212(h) of the Act and ineligible for a waiver because of an aggravated felony conviction. *Matter of E.W. Rodriguez* arose in the Fifth Circuit, and Rodriguez argued that the Immigration Judge erred in not applying the Fifth Circuit's decision in *Martinez* to his case. Initially, the Board dismissed Rodriguez's appeal, considering his case to be distinguishable from *Martinez* because Rodriguez, unlike Martinez, entered the United States *without inspection* prior to adjusting his status. On a motion to reconsider, the Board reviewed its decision and determined that the Fifth Circuit's decision in *Martinez* was binding precedent in cases arising in that circuit. Likewise, the Board concluded that the Fourth and Eleventh Circuits' decisions were also binding precedent and that it would apply them in removal proceedings arising in those jurisdictions.

Nevertheless, the Board maintained that its decision in *Matter of Koljenovic* was correct and that the language of section "212(h) is ambiguous when understood in the context of the statute taken as a whole." *Id.* at 789. The Board acknowledged that adjustment of status does not fit within the definition of "admission" set forth in section 101(a)(13)(A) of the Act. However, the Board explained that it was constrained to interpret adjustment of status as an admission "in order to preserve the coherence of the statutory scheme and avoid absurdities." *Id.*

Since the Board's decision in *Matter of E.W. Rodriguez*, the Third, Seventh, and Ninth Circuits have adopted the same reasoning as the Fifth Circuit's decision in *Martinez*. *See Negrete-Ramirez v. Holder*, 741 F.3d 1047 (9th Cir. 2014); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Hanif v. Att'y Gen. of U.S.*, 694 F.3d 479 (3d Cir. 2012). These circuits find that the language in section 212(h) of the Act is unambiguous and thus the exclusionary provision applies only to aliens who have been admitted into the United States as LPRs at a port of entry.

Although the majority of circuits have not deferred to the Board's reasoning in *Matter of Koljenovic*, the Eighth Circuit recently deferred to the Board's interpretation of the term "admission" in section 212(h) of the Act. *See Roberts v. Holder*, 745 F.3d 928 (8th Cir. 2014). Roberts was admitted to the United States as a nonimmigrant and later adjusted to LPR status. He was convicted of an aggravated felony and placed in removal proceedings, where he sought to readjust his status under section 245(a) of the Act and apply for a waiver of inadmissibility under section 212(h). The Immigration Judge found Roberts subject to the aggravated felony bar, and the Board affirmed. The Eighth Circuit broke with the reasoning of the majority of its sister circuits and held that based on the Act as a whole, not only on sections 212(h) and 101(a)(3), the language of section 212(h) "is ambiguous as to the meaning of 'previously been admitted as an alien lawfully admitted to permanent residence.'" *Id.* at 932.

Specifically, the Eighth Circuit noted that the Act uses the terms "admission" and "admitted" inconsistently. Although the definition of "admission" and "admitted" in section 101(a)(13)(A) of the Act refers explicitly to inspection at a port of entry, "in other sections relevant to Robert's petition, 'admitted' is not so limited." *Id.* The court then surveyed several provisions relating to admissibility and inadmissibility as well as adjustment of status. The circuit court found it particularly notable that under section 245(b) of the Act, after an alien has adjusted to LPR status under section 245(a), "the Attorney General shall record the alien's lawful *admission* for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made" and that the number of visas shall be reduced accordingly. *Id.* at 933 (emphasis added) (quoting section 245(b) of the Act). The Government argued that section 245(b) established that an adjustment *was an admission* for all intents and purposes under the Act. The Third Circuit previously dismissed this argument in *Hanif*, 694 F.3d at 485, finding that section 245(b) of the Act was "a ministerial provision relating to the monitoring and control of the number of visas available in any given year, rather than an effort by Congress to amend the definition of 'admitted' and 'lawfully admitted for permanent residence' set forth in [section 101(a) of the Act]."

However, the Eighth Circuit in *Roberts* disagreed with the Third Circuit's reasoning and found that the treatment of adjustment as an admission in section 245(b) of the Act demonstrates that when the Act is taken as a whole, the statute "may be fairly read as treating post-entry adjustment as a substitute for port-of-entry inspection" and thus as an "admission." 745 F.3d at 933. The court further held that because the term "admission" under section 212(h) of the Act is susceptible to multiple interpretations, the statute is ambiguous and deference to the Board's reasonable interpretation is required. The court asserted that the circuits that have found the term to be unambiguous have read section 212(h) in isolation and did not consider the Act as a whole.

With the issuance of the Eighth Circuit's decision in *Roberts*, the circuits are now split as to whether deference is owed to the Board's determination that an adjustment is an admission for the purpose of determining whether the aggravated felony bar and 7-year residence requirement apply to LPRs seeking waivers under section 212(h) of the Act. Cases on this issue are currently pending in the Second and Sixth Circuits. *See Sampathkumar v. Holder*, No. 11-4342 (2d Cir. filed Oct. 20, 2011); *Stanovsek v. Holder*, No. 13-3279 (6th Cir. filed Mar. 8, 2013).

Conclusion

The issues created by the 1990 and 1996 amendments to section 212(h) of the Act have mostly been reconciled, and the applicability of the waiver is largely settled. First, *Matter of Rivas*, 26 I&N Dec. at 132-33, established that under the current version of the statute, a section 212(h) waiver is not available nunc pro tunc to LPRs and that LPRs may only apply for the waiver in conjunction with an application for adjustment of status or while seeking admission. *See also Matter of Abosi*, 24 I&N Dec. at 206. Second, a section 212(h) waiver cannot be used to waive criminal bars to cancellation of removal. *Matter of Bustamante*, 25 I&N Dec. at 564; *Matter of Y-N-P-*, 26 I&N Dec. at 16. Third, the aggravated felony bar and 7-year residence requirement in section 212(h) of the Act apply to aliens who obtained LPR status through substantively unlawful admissions, as long as their admissions were procedurally lawful. *See, e.g.*, *Matter of Ayala*, 22 I&N Dec. at 401-02.

Although most of the issues are settled, another remains in dispute. There is a circuit split regarding whether deference should be given to the Board's application of the aggravated felony bar and residence requirement to aliens who adjusted to LPR status and were not admitted as an LPR at a point of entry. *Compare Roberts*, 745 F.3d at 933 (finding the statute ambiguous and according deference to the Board's interpretation), *Matter of E.W. Rodriguez*, 25 I&N Dec. at 786 (finding section 212(h) to be ambiguous and applying this interpretation nationwide, except where binding circuit precedent provides otherwise), *and Matter of Koljenovic*, 25 I&N Dec. at 220-23 (finding that that the language of section 212(h) is ambiguous when understood in the context of the Act as a whole), *with Negrete-Ramirez*, 741 F.3d at 1054 (finding statute unambiguous and declining to defer to the Board's interpretation), *Papazoglou*, 725 F.3d at 794 (same), *Hanif*, 694 F.3d at 487-88 (same), *Bracamontes*, 675 F.3d at 390 (same), *Lanier*, 631 F.3d at 1367 (same), *and Martinez*, 519 F.3d at 546 (same). As a result of this circuit split and the split between the Board and six circuit courts, the exclusionary provision of section 212(h) applies only to aliens admitted as LPRs at a port of entry in the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits. In all other circuits, particularly the Eighth where deference was accorded to the Board, the rule in *Matter of Koljenovic* controls—the exclusionary provision applies with equal force to LPRs admitted to the United States in that status at a port of entry *and* to LPRs who adjusted to LPR status in the United States. Cases dealing with this final issue are pending in the Second and Sixth Circuits.

A resolution of this matter may require action by Congress or the Supreme Court. Not only does this issue present a nuanced question about the definition of a single word in a subsection of one statute, it is a continuation of a long-standing dispute regarding the interpretation of the term "admission" in the Act. It also raises generally applicable questions about agency deference, particularly with regard to how courts determine whether a statute is ambiguous. ◆

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Endnotes

[1]The word "alien" is defined in the Act as "any person not a citizen or national of the United States." Section 101(a)(3) of the Act, 8 U.S.C. § 1101(a)(3). This legal term of art will be used throughout this article to avoid ambiguity.

[2]In addition to demonstrating hardship and 10 years of continuous physical presence, a non-LPR must demonstrate that he has been a person of good moral character during the 10 years preceding the adjudication of his application and that he has not been convicted of certain crimes, including crimes involving moral turpitude, prostitution, controlled substance violations, and aggravated felonies. Sections 240A(b)(1)(A)-(D) of the Act; *see also Matter of Ortega-Cabrera*, 23 I&N Dec. 793, 797 (BIA 2005). LPR cancellation has no good moral character or hardship requirements, and an aggravated felony is the only disqualifying conviction for such relief. *See* section 240A(a)(3) of the Act.

[3]Section 5 of the Act of September 11, 1957, 71 Stat. at 640, was repealed by section 24 of the Act of September 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, 657, but, at the same time, virtually identical waiver provisions were added to the Immigration and Nationality Act as section 212(g). *See* section 14 of the Act of September 26, 1961, 75 Stat. at 655.

[4]The Board has since further held that the lawful residence requirement under section 212(h) only includes periods of residence in a lawful status and does not include any period during which the individual was an applicant for asylum or for adjustment of status. *Matter of Rotimi*, 24 I&N Dec. 567 (BIA 2008).

[5]However, the plain text of section 212(h) may apply to an alien who adjusted to LPR status and who later departed from the country and was readmitted at a port of entry after he or she was deemed to be seeking an admission under section 101(a)(13)(C) of the Act.

Best Seat in the Courthouse: The Top Five Things I Learned as an Intern at the Arlington Immigration Court

By Christina Haines

My husband's grandfather tells a great story. Shortly after he graduated from law school in Texas in the early 1960s and joined the bar association, he received a small booklet in the mail. It was published by Bancroft-Whitney, and it was entitled "How to Find the Courthouse." How funny it was, he thought, that after all the time he had devoted to learning the law (while also working full-time and raising a family), he had yet to learn the most important thing of all – how to find the courthouse!

I took Granddad's story to heart. I decided that not only was I going to find the courthouse, I was going to spend my last semester of law school on the inside. Fortunately, my law school—Drexel University School of Law in Philadelphia—prides itself on promoting experiential learning. Drexel encourages its students to step outside the classroom by participating in a wide variety of co-ops in Philadelphia and various other cities around the country. For this reason, I was able to work full-time at the United States Immigration Court in Arlington, Virginia during my last semester of law school instead of taking additional classes.

During my internship, my primary responsibility was to research and draft decisions for the Arlington and Headquarters Immigration Courts under the guidance and supervision of the judicial law clerks (who, I'd be remiss not to mention, have the keenest editing eyes I've ever encountered and a knack for not making you feel like a failure even when they return your draft dripping with red ink). I also had the unique opportunity to be a fly on the wall. I observed master calendar and individual merits hearings and debriefed with the Immigration Judges afterwards. These moments provided valuable insight into the judicial function and also the characteristics and skills that make a good lawyer from a Judge's point of view.

I'd like to share some of the things I learned from my perch in the back row of the courtroom and at a desk just beyond the courtroom walls. These observations are, of course, my personal observations and in no way reflect the views of anyone with whom or for whom I worked at the Immigration Court. And I am afraid these observations will be old news to experienced immigration practitioners. However, I hope they will be of some use to others, like me, who are holding a freshly-minted law diploma in one hand and are hoping to open the door to the exciting world of immigration law with the other.

1. Know your numbers and know your issues. Many of us went to law school because we don't care much for math. But in immigration law, numbers really matter. How old is your client? What year did he first enter the U.S.? At what age? How many convictions, if any, does she have? When were they? What was the length of the sentence imposed? As I observed various hearings, it seemed to me that immigration counsel who knew their numbers had the advantage of appearing forthright and on the ball. They didn't waste the Court's time by shuffling through papers to find the answers, nor did they leave it up to the DHS Assistant Chief Counsel to point out convictions they had neglected to mention.

Likewise, it seemed to me that Immigration Judges appreciate counsel who know the issues upfront and can relay them quickly and easily. I jotted down notes for myself as I sat on the sidelines during a hearing: What are the issues from your perspective? What will the issues be from the Judge's perspective? From the Assistant Chief Counsel's perspective? Is the case all about the facts (for example, it will boil down to exceptional and extremely unusual hardship to the applicant's U.S. citizen children) or is it really about the law (for example, whether the applicant's conviction is for a crime of violence)?

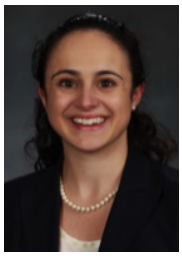
2. Don't forget the follow-up question. My trial advocacy professor insisted that when practicing direct examination we learn to "exhaust the topic" before moving on to a new topic. Some of the very talented lawyers I had the opportunity to observe seemed to embody this law school maxim, which is perhaps of special relevance to immigration hearings. Applicants seeking relief in Immigration Court may have told their story countless times before—perhaps to an asylum officer, and then to counsel, and then in written form in various affidavits and other filings. Some of their stories may be very difficult to talk about. As such, applicants may be inclined to omit rather than repeat some of the details they feel they have already relayed time and again. But the hearing is the main event. This is where the applicant's story needs to match up with the legal relief he is seeking. Often, an applicant must establish what his persecutor's motives were or what they would be, neither of which is easy to do. Simple follow-up questions like "why?" and "what happened next?" seemed to be really important to meeting the applicant's burden of proof, especially for establishing past persecution and/or a likelihood of future persecution. The attorneys I observed who asked these sorts of follow-up questions during the testimony seemed to be able to connect the dots more clearly and convincingly during their closing arguments.

3. Particular social groups can be particularly tricky. When an applicant is claiming asylum or withholding of removal based on membership in a "particular social group" or PSG, the way she defines her PSG seems to be crucial to the claim's success. I believe this is because PSGs are susceptible to a paradox: the more specifically a group is defined, the more likely it is to qualify as a PSG but the harder it is to establish nexus. That is, it becomes difficult to prove that any harm was or will be on account of the applicant's membership in that very specifically defined group, as opposed to some other factor or membership in a group defined more broadly. In other words, by deliberately casting the net narrowly to create a legally cognizable PSG, we are trapped by the net when we try to establish a nexus between the PSG and any harm the applicant is likely to face in the country of removal. As is the case with so much of the work lawyers do, the words really do matter when it comes to establishing a viable PSG claim.

4. It's a small world (after all). Perhaps the best advice I received during my internship is how important it is for a new lawyer to establish a reputation for being courteous, patient, and reliable because the world of immigration practitioners is very small. Unlike those who practice in other areas, immigration attorneys tend to see the same faces every day. This can be a significant advantage. I saw many examples of immigration counsel and local DHS Assistant Chief Counsel working together, whether in the form of prosecutorial discretion or simply figuring out the logistics of a case. This is inspiring. It is one of the reasons I am so excited to practice in this field.

5. Immigration Judges are just like everyone else, sort of. I have to admit that as a wide-eyed law student who is still rather awed by those who wear black robes, spending time with Immigration Judges was a bit like being back in second grade when you discovered your teacher at the supermarket buying milk and bread. You couldn't quite believe that your teacher was a real person who needed groceries. I soon found that, much like second grade teachers, Immigration Judges are at once ordinary and extraordinary. Just like everyone else, they run out for coffee, they forward interesting emails, and they look forward to Fridays. However, the Immigration Judges with whom I spent my last semester of law school are also unlike everyone else. They do not seem to be disheartened by the staggering backlog of immigration cases or the perpetual stalemate in Congress over immigration reform. They bear in mind that each case they adjudicate involves a real person, with hopes and fears, just as much as it involves relevant sections of the Immigration and Nationality Act. They express gratitude for the attorneys who appear before them and for the law clerks and legal assistants behind the scenes who make everything run as smoothly as possible. They take the time to nurture interns—to talk over cases with us, to reminisce about law school, and to offer candid advice about how to become an effective advocate and a happy lawyer.

I wouldn't have traded my seat in the courthouse for anything. I am grateful to all those at the Arlington Immigration Court who made my experience there so meaningful and so memorable. ◆



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Religious Repression of the Uyghurs in China

By Joseph K. Grieboski

In spite of the People's Republic of China's (PRC) official ideology, which recognizes the Uyghur people as equal citizens under the communist state, Uyghur Muslims have always had a troubled relationship with the central government authorities. The government's current public perception of the Uyghurs is that they are a part of the global radical Islamist threat. Many Uyghurs want more autonomy than what is currently allowed and some even desire a separate state. The Uyghur people are struggling for cultural survival, facing a Beijing-supported influx of Chinese migrants and harsh repression of political dissent and any expression of their distinct identity. The arbitrary arrest, torture, and "disappearance" of those considered as "separatists" are widespread amongst Uyghurs in Xinjiang and serve to infuse an overt fear into the population. Amidst a plethora of human rights abuses, Uyghur discontent to state-sanctioned discrimination is reaching a fever pitch, as radical Islamist believers have responded with violent, rogue attacks that have hijacked the interests of the mainstream Uyghur populace. Such attacks have allowed Beijing the opportunity justify its suppressive actions, jeopardizing the Uyghurs' nonviolent civil rights efforts against authorities who fail to distinguish between peaceful religious practices and radical criminal activities.

Background

The historical homeland of the Turkic-speaking Uyghur people is in the oil-rich, Silk Road Xinjiang region (also known as Eastern Turkestan) in northwest China. The area was conquered by the Qing Empire in the 18th century and inherited by the Republic of China that succeeded the Qing in 1912, though it was only after 1949 under the PRC that Beijing was able to re-exert firm control over the region.[1] Uyghurs are culturally and ethnically Turkic people, living in the area of Central Asia commonly known as East Turkestan, and account for 40 percent of the 19 million people currently living in Xinjiang.[2] They are predominantly Muslim, practicing a moderate form of Sufi Islam; although a very small fragment of Uyghurs have gravitated to an Islamist ideology that condemns Sufism and condones political violence.

Although the Xinjiang territory is technically designated an "autonomous region", control over the area from the central government has only increased since 1949 and the rights of the Uyghur people have steadily diminished. The minority has become increasingly fearful for the survival of their culture and way of life, as the Chinese government has led an internal migration drive which has moved well over 1.2 million ethnic Han settlers to the region in the last twenty years.[3]

Such institutionalization of in-migration only serves to delegitimize Uyghur claims of sovereignty in the region and has led to widespread discrimination in employment, housing, and educational opportunities, as well as curtailed religious freedom and political marginalization, according to Amnesty International.[4] Recently, under the guise of combating counterterrorism, religious extremism, and anti-separatism, the central government has heightened its politically-motivated ethnic discrimination. Thus, ethnic polarization and tension in the region are at an all-time high.[5]

Abuses and Discrimination Against Uyghurs

The construction of law, regulation, and policy in Xinjiang denies Uyghurs religious freedom, and by extension the freedom of association, assembly, and expression. Chinese policy and law enforcement stifle religious activity and thought even in school and at home. One official document goes so far as to say that "parents and legal guardians may not allow minors to participate in religious activities."[6]

The religious controls set forth by the state extend from organized religious activities and schools to the personal behavior and appearance of Uyghur individuals. These people experience harassment in their daily lives, as studying religious texts, celebrating religious holidays, and presenting one's religion through personal appearance is strictly forbidden at state-run institutions. The government even censors versions of the Koran and what is allowed to be preached by imams. Surveillance is conducted on mosques by authorities and any expressions of frustration with the government's policies are equated with "separatism", a state security crime that is punishable by death under Chinese law.

State authorities have restricted Uyghur weddings, funerals, and pilgrimages, including the hajj in Saudi Arabia. They have even banned the Uyghur language from schools, on false claims that it is a primitive language and unsuitable for China's "scientific development."[7] State-owned workplaces have even arranged mandatory lunches for their employees to force Uyghurs to eat during the Ramadan season, as part of a "good health" campaign against fasting (just as authorities have argued that veils and scarves cause Vitamin D deficiencies by blocking women's skin from the sun). This year for Ramadan, state authorities have ordered mosques to propagandize China's anti-terrorism policies and have increased surveillance in Uyghur Muslim neighborhoods and mosques.[8] Under the new Ramadan period directive, neighborhood-level officials are legally permitted to enter and search Uyghur homes to check that they are not conducting illegal religious activities.[9]

A report from the Uyghur Human Rights Project (UHRP)

even claims that Muslims in Xinjiang suffer government imposed internet restrictions, amounting to a virtual cage. "It is no surprise Chinese officials have placed unprecedented controls over the Uyghur Internet… they fear that an open online environment in East Turkestan will expose egregious human rights abuses committed against the Uyghur people under their administration," Alim Seytoff, of the UHRP said.[10] "The Chinese authorities can, at will, imprison Uyghurs who peacefully express dissent online and deny Uyghurs access to the internet at the flick of a switch." Such regulation of the internet has brought arrests, conviction, and harsh sentencing of Uyghur internet users, webmasters, and bloggers, according to the report.

The government has refused to acknowledge any legitimacy of Uyghur grievances, labeling such criticisms as tactics that are meant to foster separatism, religious extremism, or terrorism in the region.[11] The official secularism in China is disproportionately enforced across the country, as Buddhists are allowed to practice their religion more freely and other Muslim groups, such as the Chinese-speaking Hui, are subjected to far less scrutiny and fewer restrictions than are the Uyghurs.[12] Such restrictions and discriminations have provoked factions of violent unrest amongst some Uyghur people and international Islamist groups, which effectively plays into the government's strategy.

Recent Escalations and Violence

After the September 11 terrorist attacks, Beijing implemented the Bush Administration's War of Terror rubric, relabeling East Turkestan "nationalist", "counter-revolutionaries", and "Pan-Turkist" separatists as "religious extremists" and "terrorists". The government declared that these people were pursuing jihadi religious motivations, rather than an ethno-national movement. In spite of the rebranding, the so-named "Uyghur Islamic terrorist threat" remained relatively quiet until 2008, where sporadic incidents between estranged, radical Muslims and security forces have occurred since the Beijing Olympics, such as the well-publicized bloody riot in Urumqi in July of 2009 that left nearly 200 Han people dead.[13]

The incident was portrayed by the government as "terrorism", however outside of Beijing it can be viewed more as a race riot due to the deepening tensions between Uyghurs and Hans. "The worldwide campaign against terrorism has given Beijing the perfect excuse to crack down harder than ever in Xinjiang," according to Brad Adams, the Asian director for Human Rights Watch. "Other Chinese enjoy a growing freedom to worship, but the Uyghurs, like the Tibetans, find that their religion is being used as a tool of control."[14]

The rapid development of the Xinjiang economy in recent years has brought millions of Han people to the region and there is a sense that Uyghurs get far less access to economic opportunities than Hans. For example, the state run Xinjiang Production and Construction Corps, which operates many commercial, industrial, and agricultural enterprises, has listed "Han ethnicity" as a requirement in job advertisement.[15]

Government propaganda regarding Uyghur terrorism is now leading to ethnic stereotyping that has spread fear and institutionalized anti-Uyghur sentiments among the Hans. Uyghurs who travel to other parts of China often face harassment by local police and are refused accommodation in hotels; while many are subjected to house visits and security checks far more often than Han. "Uyghurs are seen by Beijing as an ethno-nationalist threat to the Chinese state," said Sharon Hom, executive director of Human Rights in China. "As Islam is perceived as underpinning Uyghur ethnic identity, China has taken draconian steps to smother Islam as a means of subordinating Uighur nationalist sentiment."[16]

The past two years have seen incidents where security forces have used lethal force against crowds of unarmed protesters. Last year in Xinjiang, police fired live ammunition into peaceful crowds of Uyghurs, once during the protesting of a mosque closure and another time when preventing a group from going into a mosque to celebrate a religious festival.[17] Earlier this summer, authorities detained 380 Uyghurs in a "month-long crackdown on violence", according to Chinese state media.[18]

Recent spouts of violence by fanatic Islamists to combat the government's discriminatory policies of Muslims in Urumqi, the capital city of Xinjiang, including the North Park Street bombing on May 22, the Urumqi train station attack and the Kunming stabbings, have accounted for 80 deaths and over 200 injuries.[19] Such attacks have been condemned by the World Uyghur Congress (WUC)[20] and the Chinese government has argued that many of these violent attacks have been carried out by foreign-inspired religious extremists[21], saying the threat is external and unrelated to their policies.

Conclusion

The PRC has claimed that the Uyghur terrorist problem is foreign in origin, yet the government's efforts of fighting terrorism have been directed domestically at Uyghur cultural expression. Thus, Uyghurs have become the real victims of the foreign terrorism and radical separatists, and the repercussions have exacerbated the people's already dwindling civil rights. "At this time of heightened tensions, it is important the Chinese government deal with the incident rationally and not set about demonising the Uyghur people as state enemies," the WUC President, Rebiya Kadeer, said. "The fact remains that peaceful dissent against repressive government policies targeting Uyghurs is legitimate, so the Chinese government must not conflate this constructive criticism with [radical violence]."

The central government has taken systematic steps to suppress Uyghur Muslims in Xinjiang in order to fulfill a Beijing agenda looking to eliminate a threat of ethnic separatism and stifle unique, distinctive cultures that deviate with the idealized singular, national form that the Chinese Communist Party wishes to fulfill. The degree of the Chinese government's actions of select-discrimination and the restrictions that have been set on Uyghur freedom of conscience are appalling and must be checked by international actors. Urgent action and further attention, aid and political support is needed in order to defend these peoples' intrinsic rights and preserve their culture from forced extinction. ◆

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We're Gonna Need A Bigger Boat: What To Do About The Recent Wave Of Immigrant Children In The U.S.

By Rosie Milano

The American media has been flooded recently with stories regarding the influx of immigrant children to the southern border of the Unites States. These stories have elicited responses from the public and from politicians ranging from those who describe the surge as an "invasion," to others who refer to it as a "humanitarian crisis."[1] Regardless of how the situation is characterized, it has renewed the public debate over the need for comprehensive immigration reform and has also highlighted the tension between states and the federal government over what to do about our "immigration problem."

There has been a longstanding dispute between individual states and the federal government over how to handle the millions of undocumented people living and working in the U.S.[2] Sheriff Joe Arpaio from Maricopa County, Arizona has made headlines over the past few years for the controversial tactics he employed to combat unlawful immigration in his state.[3] More recently, there was widespread talk, and corresponding litigation, in several states over the issuance of driver's licenses to minors who were granted Deferred Action (DACA) by U.S. Citizenship and Immigration Service (USCIS), which resulted in some states revoking previously-issued licenses while other states granted the benefit.[4]

Almost every time a dispute arose, it led to litigation between the state and the federal government about who should handle the issue and what exactly should be done.[5] Years of such disputes finally led to the US Senate drafting a so-called "sweeping" immigration bill which endeavored to fix some of the problems in the immigration system and to hopefully end these jurisdictional battles.[6] While the Senate passed this bill, lawmakers in the U.S. House of Representatives have stalled its voting on this bill earlier this year.[7] After failing to see progress in Congress, President Obama recently asked the U.S. Department of Homeland Security's Secretary Jeh Johnson and Attorney General Eric Holder to give him a list of recommended actions that he can take unilaterally on immigration before the end of the summer.[8] Shortly thereafter, on July 17, 2014, Republican Representatives in Congress introduced H.R. 5137, the "Asylum Reform and Border Protection Act," a bill that would likely do more

harm than good for all those involved. Essentially, the bill mandates expedited removal and encourages detention, both of which would deprive these children of a meaningful opportunity to tell their stories to authorities and to be treated with the appropriate amount of care considering their age and situations.[9] This is particularly troubling since, according to a recent survey, the majority of the children crossing the border are likely eligible for relief from removal in some form.[10]

Amidst this political jockeying, we are now seeing states and the federal government tangle in a new battle: what to do about the hundreds of families and unaccompanied minors that have come to the country's southern border in the past few weeks. According to U.S. Customs and Border Protection (CBP), 52,193 unaccompanied children were apprehended at the southwest border between October 1, 2013, and June 15, 2014.[11] The largest percentage increase of individuals has come primarily from three Central American countries: Honduras, Guatemala and El Salvador.[12]

States are now struggling to determine whether or not to offer assistance to these children. In my home state of Massachusetts, Governor Deval Patrick has stated that the majority of the constituents who are contacting his office are in favor of opening a center in MA to house some of the unaccompanied minors that have come through border.[13] Other states such as California, Arizona and even northern Michigan have played host to massive protests against further immigration into their communities.[14] However, if and when a state agrees to accommodate these newest of immigrants, their next battle will be getting funding from the federal government in order to cover this added expense.

If some media reports are to believed, this recent spike in border crossings is a fluke and in no way represents a tipping point which would necessitate immediate action. The Associated Press reported in July 2014 that from 1990 to 2007, apprehension by U.S. Customs and Border Protection (CBP) of people crossing the border illegally averaged 1.17 million per year, but in 2012 that number had dropped to 365,000.[15] Other reports claim that the number of immigrants caught attempting to cross the border into the US is at "historic low levels."[16]

However, other sources state the number of children coming to the US has been growing steadily and suggest the number will keep rising. The Executive Office for Immigration Review (EOIR) established "juvenile dockets" throughout the country to facilitate consistency and better address needs of children after noticing an increase in the number of cases involving children. In 2008, only 10 courts in the nation had "juvenile dockets," however now every immigration court in the country has at least one and some have more than one.[17] [18] In addition, preliminary figures from Transactional Records Access Clearinghouse at Syracuse University (TRAC) indicate that the number of cases involving juveniles climbed to 41,640 in June 2014, which is up from the 6,900 cases in 2005.[19] These juvenile cases are only adding to the startlingly high number of backlogged cases before our nation's immigration courts.[20]

Regardless of whether the number of children attempting to immigrate to the US is rising or falling, we still need to find immediate solutions for the problems of where to house these kids and how to help our already overburdened immigration court system handle any increase in caseload. While I would have hoped this recent influx of children would lead to proposals which would at least attempt to solve our country's immigration crisis and end the conflict between the states and the federal government on this issue, the response of our legislature has been slow and ineffective. It is time to stop putting comprehensive immigration reform on the back burner. Our lawmakers need to work together to pass legislation that will make lasting, positive changes as we cannot afford to wait with baited breath for other countries to try and fix the root causes for migration.[21] We need real solutions, real fast otherwise our country will not only continue to have an unlawful immigration problem, but the tension between the states and federal government on this issue may end in a complete washout. ◆

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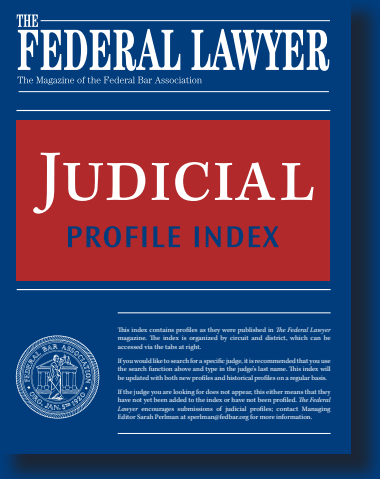

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