The Green Card

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

Larry Burman, Section Chair

While the ILS does some amazing things (such as the annual Immigration Seminar in Memphis), I recognize the fact that many of our section members, who can't attend our CLEs, may believe that benefits of section membership are lacking. This is now changing.

This e-publication is the official newsletter of the Immigration Law Section. This is your newsletter, and an important part of your membership in the section. I will serve as the editor for a while; and it is my hope that one of you will step up to the plate and take the newsletter to new heights. My objective is to produce a monthly newsletter that provides pertinent immigration news and information that is not available from other sources.

Because this is your newsletter, I invite you to participate. Ideally the newsletter would be similar to Wikipedia and edit itself. We are looking for the following participants:

1. **Circuit correspondents** to keep us up to date on immigration case developments in each judicial circuit.

2. **Reporters**, from each city, to inform us of personnel changes, such as new immigration judges, new DHS officials, district court decisions, and the local immigration news generally.

3. A **BIA correspondent** to summarize recent and significant board decisions and practices.

4. An **NGO correspondent** to tell us who's in and who's out, and what is transpiring in this important part of the immigration world.

5. **Writers** to produce brief columns and longer articles on subjects of interest. Here is your chance to make your name known to your peers.

During he beginning stages of the newsletter, we will accept most types of content, including– classified ads, requests and offers for special expertise, etc. Although there may charges for these postings in the future, please take advantage of this free service now. Are you looking for a job in a certain city? Do you want to write appellate briefs? If so, let section members know through our newsletter.

Along with this newletter and CLE events, I would also like to see the section plan social gatherings to offer section members a chance to meet each other at a local restaurant and discuss current immigration news and other topics.

Don't be shy; feel free to participate in any way that is possible for you. We are open to your contributions and suggestions. Please submit your article, ad, suggestion or questions to me at Lburman@aol.com or (703) 235-2487.

◆◆◆

News You Can Use

MINNESOTA—DHS Chief Counsel Barry Chait has been selected as an immigration judge in Stewart, Ga.

CHICAGO—The immigration court has moved. Its new address is 525 West Van Buren St., Suite 500, Chicago, IL 60607.

Send your "News You Can Use" notices to Larry Burman at lburman@aol.com.

In This Issue

Lauri Steven Filppu: A Recollection with Appreciation

HON. PAUL WICKHAM SCHMIDT

The immigration world lost a great intellectual leader when Lauri Steven Filppu died of leukemia on Oct. 30, 2011. For three decades, as an appellate judge on the Board of Immigration Appeals (BIA) and, prior to that, as the deputy director of the Office of Immigration Litigation (OIL) in the Civil Division of the U.S. Department of Justice, this "gentle giant" helped shape U.S. immigration law. Lauri loved reason, scholarship, precise use of language and grammar, and spirited deliberative dialogue.

Lauri began his career in 1973 under the Attorney General's Honors Program as an attorney advisor with the BIA on the 11th floor of the old (long since demolished) International Safeway Building at 12th and F St., NW, in Washington, D.C. When I arrived in August 1973, we shared an office (the converted typing pool). We had the only operable window on the floor, and we opened it on warm summer days, allowing the aroma of greasy smoke from nearby burger joints to waft in. As the junior staff members, Lauri and I were often dispatched to the Safeway store below to buy the supplies for office parties.

At that time, there were five board members, a staff of nine attorneys (including now retired Judge Joan (Arrowsmith) Churchill and current Arlington practitioner Barry Schneiderman), and a chief attorney examiner/alternate board member. The late Maury Roberts was the chairman, and the senior board member was Louisa Wilson, who had been appointed during the Truman Administration.

Lauri and I were happy to be in Washington during such exciting times. In October 1973, we stood just outside the door to an overflowing Great Hall at the Justice Department when Elliot Richardson met with department employees following his famous resignation over the "Saturday Night Massacre." In August 1974, Lauri and I took time out from drafting opinions and walked down to the fence outside the back lawn of the White House to see the lift off of the helicopter carrying Richard Nixon away for good.

Chairman Roberts taught us passion for immigration law, the importance of encyclopedic knowledge, and how to construct and vigorously defend legal positions. Board member Wilson provided a strong dose of humane practicality derived from her long years of appellate judging and mediating disputes among her colleagues.

There were no computers, Westlaw, or Virtual Law Library at that time. Indeed, the extent of automation was such that Lauri and I felt lucky to have scrounged up two abandoned IBM Selectric typewriters for drafting decisions. This, in turn, endeared us to the secretaries, who struggled with some of our colleagues' handwritten drafts and detested the old time "floppy belt" dictating machines.

Lauri and I treasured law books, the tools of our new trade. We walked to the Government Printing Office to purchase new copies of the Administrative Decisions under the Immigration Laws of the United States for our home libraries. We studied immigration law with "the guru," Charlie Gordon, former general counsel of the Immigration and Naturalization Service ("INS") at Georgetown Law School. We purchased and maintained our own copies of "Gordon & Rosenfield," the leading immigration treatise, then a mere two volumes.

Later, Jean Lujan also shared the office with Lauri and me. The three of us were buddies, and we had a great time together debating the big issues of the day, immigration and otherwise. Occasionally, the late Board member Irv Appleman would wander in to join the fray. Lauri and I more or less became Jean's social secretaries, as her phone, attached to a jack in the middle of the floor, rang about twenty times for every call Lauri and I got. We three were among the founding members of the BIA employees' union, headed by Joan Churchill. On weekends, Lauri, Barry Schneiderman, and I periodically got together for pick-up touch football or basketball (exciting athletic contests responsible for Barry's meeting his future wife, Jan).

Outside work, my wife Cathy and I became great friends with Lauri and his wonderful wife, Sandy. We shared the experiences and pleasures of hiking and camping in the sun, wind, rain, and sand. We had a number of pizza parties where Lauri indulged his legendary love of ice cream. Later, as our families grew, Lauri taught me the rudiments of youth soccer coaching.

After several years at the BIA, Lauri and I had learned our lessons well enough to move on with our careers. Lauri joined the Criminal Division, which then had the responsibility for immigration litigation, and I went to the INS General Counsel's Office. We continued to work together on important court cases, including several that eventually went to the U.S. Supreme Court. In the early 1980s, we both were involved in the process that created OIL to improve the defense of immigration cases, and Lauri became OIL's first deputy director.

After an absence of more than seven years in private practice, I returned to government in 1995 as the chairman of the newly expanded BIA. One of my most important achievements that summer was persuading a somewhat hesitant Lauri to give up his deputy director position at OIL and accept Attorney General's Janet Reno's offer of a BIA appointment.

Although the record shows that Lauri's and my views sometimes diverged on published precedents, we remained friends, and our dialogue was always fluid. Lauri listened with an open mind, thoughtfully considered my views, and often made helpful suggestions on my drafts even when we ultimately disagreed. I always felt I had the best chance of

winning over my colleagues when Lauri and I were working together.

Lauri was totally conscientious. He was a semi-perfectionist operating within a highly imperfect system. Although always a gentleman, he had a low tolerance for "inadequate tabbing of records," typographical errors, and incorrect citations of any kind. He valued correct results over quick results at a time when judicial performance was coming to be measured by the number of decisions made rather than by the justness or analytical excellence of the final product.

Lauri was a truly brilliant lawyer with an incisive, inquiring mind and a subtle sense of humor, a great judge with a strong sense of fairness, and, most of all, a wonderful personal friend and colleague. He was also a mentor and role model for many of the "next generation" of immigration professionals. His death is a great loss to his friends and family and to all of us who have been committed to, and involved in, the field of immigration. As well stated by my good friend and colleague, Judge Larry Burman, Lauri "had many friends and no enemies."

We live in an age where the immigration debate has become increasingly acrimonious and irrational, and some "experts" curiously advise the next generation that the key to professional success, in any field, is to be feared rather than loved (a retread of the Durocher theory: "nice guys finish last"). Lauri, by contrast, showed all of us how to be a major player in the deliberative process vital to robust democracy while earning love and respect from those of all viewpoints. In other words, Lauri was a "nice guy who finished first." That is Lauri's legacy, and we will all miss him. ◆

Hon. Paul Wickham Schmidt is a U.S. immigration judge in Arlington, Va. Author's 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, 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.

The Green Card is published by the Federal Bar Association's Immigration Law Section, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 fax.
For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

Article

Cancellation of Removal: When Is Exceptional and Extremely Unusual Hardship a Question of Law?

NINA ELLIOT AND GRETA HENDRICKS

INTRODUCTION

Cancellation of removal for nonpermanent residents (non-LPR cancellation) allows qualifying individuals with no ability to adjust status via family or employment the means to obtain permanent residence in the United States. To become eligible for non-LPR cancellation, an applicant must establish, among other qualifications, that his or her removal would cause exceptional and extremely unusual hardship to a qualifying relative. Traditionally, the federal circuits courts of appeals have declined to exercise jurisdiction over these hardship determinations. However, in the past few years, some circuit courts have found that in certain instances, the determination whether an alien has established exceptional and extremely unusual hardship can present a legal question over which the court has jurisdiction. This article examines the circumstances in which circuit courts have found they have jurisdiction to review hardship determinations in non-LPR cancellation cases and the rationales upon which this acceptance of jurisdiction is premised.

CANCELLATION OF REMOVAL FOR NONPERMANENT RESIDENTS

Acquiring non-LPR cancellation requires an applicant to establish four statutory elements: (A) physical presence in the United States for a continuous period of 10 years; (B) good moral character during that period of time; (C) no convictions for certain criminal offenses; and (D) exceptional and extremely unusual hardship to the applicant's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. Section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The statute states that if these requirements are met, the "Attorney General *may* cancel removal of … an alien who is inadmissible or deportable from the United States." *Id.* (emphasis added).

Deciding whether an applicant can demonstrate that a qualifying relative would suffer exceptional and extremely unusual hardship may be difficult for adjudicators, given that there are only three decisions published by the Board of Immigration Appeals (BIA) to guide them. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). In denying the respondent's application for non-LPR cancellation in *Matter of Monreal*, the BIA determined that the hardship the respondent's children would face if the respondent were removed to Mexico would not rise to the level of exceptional and extremely unusual hardship. The BIA noted that the children were in good health, that the oldest child could speak, read, write, and understand Spanish, and that they would be reunited with family upon their return. Similarly, in *Matter of Andazola*, the BIA denied the application of a 30-year-old Mexican single mother of two United States citizen children. The mother had been in the United States for 16 years, had no family in Mexico, and expressed concerns about discrimination and the limited opportunities she and her children would face if removed. In vacating the decision of the immigration judge granting her application, the BIA stated that "the hardships the respondent … outlined are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Matter of Andazola*, 23 I&N Dec. at 324.

By contrast, *Matter of Recinas*, 23 I&N Dec. at 470, identified "the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." In finding that the Mexican respondent had shown the requisite level of hardship, the BIA highlighted the fact that the respondent was a 39-year-old single mother of six children, four of whom were U.S. citizens. In addition, the respondent's family had been in the United States for 14 years, and her entire family, including her siblings, resided lawfully in the United States. Further, the children spoke little Spanish, the respondent relied heavily upon her family to care for the children while she worked, and no similar support existed in Mexico. The BIA emphasized that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." *Id.*

JUDICIAL REVIEW OF NON-LPR CANCELLATION DECISIONS

Section 242(a)(2)(B)(i) of the act, 8 U.S.C. § 1252(a)(2)(B)(i), states that, notwithstanding other provisions of the law, courts have no jurisdiction to review "any judgment regarding the granting of relief under" several provisions of the act, including § 240A, which governs cancellation of removal. In addition, § 242(a)(2)(B)(ii) bars courts from reviewing "any other decision or action of the Attorney General … the authority for which is specified under this title to be in the discretion of the Attorney General," except for asylum. However, judicial review of legal and constitutional, as opposed to factual, determinations is permitted under § 242(a)(2)(D), which states that no provision of the act "shall be construed as precluding review of constitutional claims or questions of law."

In general, circuit court decisions reviewing the merits of non-LPR cancellation determinations have been rare. The BIA has characterized non-LPR cancellation as a discretionary

form of relief from removal. *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 774 (BIA 2009). In addition, *every* circuit court has held that in at least certain instances, the determination whether an alien has met his or her burden to establish the requisite hardship is considered a discretionary determination outside of a circuit court's jurisdiction to review. *See, e.g.*, *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009); *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 38-39 (2d Cir. 2008); *Zacarias-Velasquez v. Mukasey*, 509 F.3d 429, 434 (8th Cir. 2007); *Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1222-23 (11th Cir. 2006); *Bencosme de Rodriguez v. Gonzales*, 433 F.3d 163, 164 (1st Cir. 2005); *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005); *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005); *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005); *Rueda v. Ashcroft*, 380 F.3d 831, 831 (5th Cir. 2004); *Leyva v. Ashcroft*, 380 F.3d 303, 305-06 (7th Cir. 2004); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 179 (3d Cir. 2003).

However, circuit courts have found jurisdiction to review certain legal determinations with respect to applications for cancellation of removal. *See, e.g.*, *Garcia v. Holder*, 584 F.3d 1288, 1289 n.2 (10th Cir. 2009) (concluding that the alien's conviction for third-degree assault rendered him ineligible for cancellation of removal); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1157 (9th Cir. 2009) (remanding from a determination that the alien's crimes rendered him ineligible for cancellation of removal); *Vasquez-Martinez v. Holder*, 564 F.3d 712, 717-19 (5th Cir. 2009) (holding that the alien's Texas conviction for possession of cocaine with intent to deliver was for an aggravated felony, rendering the alien ineligible for cancellation of removal); *Obi v. Holder*, 558 F.3d 609, 612 (7th Cir. 2009) (holding that § 240A(b)(1)(C) of the act is not impermissibly retroactive when applied to a conviction that occurred prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546); *Mejia-Rodriguez v. Holder*, 558 F.3d 46 (1st Cir. 2009) (finding the alien not eligible for the petty offense exception and therefore ineligible for cancellation of removal); *Augustin v. Att'y Gen. of U.S.*, 520 F.3d 264 (3d Cir. 2008) (finding that the BIA did not err in refusing to impute the father's years of continuous residence to his son for purposes of establishing the requisite continuous residence for cancellation of removal); *Mbea v. Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007) (finding that the malicious burning of property in violation of the D.C. criminal code is a crime of violence, rendering the alien ineligible for cancellation of removal); *Singh v. Gonzalez*, 451 F.3d 400, 406-07 (6th Cir. 2006) (remanding after the BIA imputed to the minor petitioners certain fraudulent actions of their parents).

In addition, several cases have recently emerged where circuit courts have found jurisdiction to examine an immigration judge's determination of whether a qualifying relative will suffer exceptional and extremely unusual hardship if the petitioner is removed. The following summaries provide examples of some recent noteworthy cases where this issue was considered. As explained below, in many of these cases, courts have found jurisdiction to examine whether the immigration judge or the BIA either: (1) used an incorrect legal standard in this determination; or (2) misapplied the BIA's precedent.

Mireles v. Gonzales

In *Mireles v. Gonzales*, 433 F.3d 965 (7th Cir. 2006), the petitioner argued that the immigration judge made a legal error in understanding the meaning of exceptional and extremely unusual hardship. The U.S. Court of Appeals for the Seventh Circuit determined that it retained jurisdiction to review the petitioner's argument. It then quickly disposed of the argument by saying only that "the IJ used the right legal standard" and that the court cannot review how the immigration judge exercised discretion. *Id.* at 969. Once it determined that the immigration judge applied the correct legal standard, the court completed its review of the case and did not evaluate how the immigration judge weighed the hardship factors in the petitioner's case.

Gomez-Perez v. Holder

In *Gomez-Perez v. Holder*, 569 F.3d 370, 371 (8th Cir. 2009), the petitioner, a native and citizen of Guatemala, argued before the immigration court that his removal would result in exceptional and extremely unusual hardship to his U.S. citizen children. In denying the petitioner's application, the immigration judge noted that the hardship to the children would be largely economic, since the petitioner said his children would remain with their mother in this country. On appeal, the petitioner claimed that the immigration judge erred by applying an incorrect standard in determining whether his children would suffer exceptional and extremely unusual hardship. The petitioner argued that the immigration judge looked at the children's *present* circumstances, instead of looking to *future* hardship. The Eighth Circuit held that whether an immigration judge has applied the correct legal standard is a question of law within the court's jurisdiction to review. In concluding that the immigration judge applied the proper legal standard, the court looked to the language of the immigration judge's decision, explaining that he had correctly evaluated whether the petitioner's removal *would* result in future hardship.

The petitioner also claimed that the immigration judge and the BIA "applied an incorrect legal standard by failing to adequately consider certain factors [regarding hardship] that have been considered relevant in other BIA decisions." *Id.* at 373. However, the Eighth Circuit declined to review the specific factors weighed by the immigration judge, noting that the petitioner was essentially arguing that the immigration judge improperly weighed the evidence, a discretionary determination that the circuit courts are prohibited from reviewing.

Figueroa v. Muksaey

In *Figueroa v. Muksaey*, 543 F.3d 487, 491-92 (9th Cir. 2008), the petitioner argued that the immigration judge applied an incorrect legal standard in evaluating the hardship for non-LPR cancellation, in that he required petitioners to

show hardship that was "unconscionable." The petitioners also argued that the immigration judge further erred in only considering the *present* medical conditions (Attention Deficit Hyperactivity Disorder, depression, ocular disorder, astigmatism) experienced by the petitioner's children and failed to analyze whether the children would suffer *future* hardship.

In a matter of first impression, the Ninth Circuit looked to the Seventh Circuit's decision in *Mireles v. Gonzales*, described above, for guidance on whether to assume jurisdiction. The Ninth Circuit also looked to other areas of immigration law where a circuit court has jurisdiction over the analysis of a legal issue, even when the overarching decision is a discretionary one. For example, the court noted that it has jurisdiction to consider whether an immigration judge applied the correct legal standard in finding a crime to be a "particularly serious crime" even though it lacks jurisdiction to review an immigration judge's ultimate discretionary decision as to whether or not an offense is a "particularly serious crime." *Figueroa*, 543 F.3d at 495 (citing *Afridi v. Gonzales*, 442 F.3d 1212, 1217-21 (9th Cir. 2006)). In finding that it had jurisdiction to review the hardship determination, the Ninth Circuit stated in *Figueroa* that even if an immigration judge's decision is discretionary, it is not outside a circuit court's power to review the agency's decision if the agency misapplies the law. *Id.* at 495-96 (citing *Hernandez v. Ashcroft*, 345 F.3d 824, 846-47 (9th Cir. 2003) (stating that the BIA "must exercise its discretion within the constraints of the law")).

The court also distinguished the petitioners' argument in this case from the often-proffered argument that an immigration judge has legally erred by misapplying the facts of the case to the law: a disagreement with the outcome of a discretionary determination that a petitioner cloaks as a legal question. In this respect, the court stated that the petitioners here "do not argue that the IJ made a legal error by misapplying the facts of their case to the applicable law; rather, they argue that the IJ made legal errors in understanding the meaning of 'exceptional and extremely unusual hardship.'" *Id.* at 495.

In the end, the court did not evaluate how the immigration judge weighed the particular hardship factors but merely determined that the "unconscionable" standard for hardship was incorrect and remanded to the BIA for further consideration.

Mendez v. Holder

In *Mendez v. Holder*, 566 F.3d 316 (2d Cir. 2009), the Second Circuit declined to find the hardship determination reviewable as a matter of law but remanded the case to the BIA on account of other legal errors, as described below. In its decision, the court referenced two prior Second Circuit cases, *Rodriguez v. Gonzales*, 451 F.3d 60, 62 (2d Cir. 2006), and *Sepulveda v. Gonzales*, 407 F.3d 59, 62-62 (2d Cir. 2005), which described the adjudication of a non-LPR cancellation application as a two-part process. That is, the immigration judge must first determine whether an individual is statutorily eligible for the relief and, second, he or she must determine whether the alien merits that relief as an exercise of discretion. In *Rodriguez*, the court found it had jurisdiction to evaluate whether the petitioner had committed certain crimes that would render him ineligible for non-LPR cancellation. Similarly, in *Sepulveda*, the court took jurisdiction to consider whether a petitioner had met his burden of showing that he was a person of good moral character. Citing to *Rodriguez* and *Sepulveda*, the petitioner in *Mendez* argued that the circuit court retains jurisdiction to review all the determinations contained in the first step, namely, those involving whether physical presence and good moral character have been established, whether the alien committed certain crimes, and whether the alien's removal would result in exceptional and extremely unusual hardship to his or her qualifying relatives. *Mendez*, 566 F.3d at 320-21.

The *Mendez* court rejected the petitioner's argument, finding that it was bound by its prior precedent decision in *De La Vega*, 436 F.3d 141 (2d Cir. 2006), which held that the determination whether a petitioner's removal would result in exceptional and extremely unusual hardship to a qualifying relative was a discretionary decision over which the circuit court lacked jurisdiction. But interestingly, the court noted that had this question been presented in the first instance, it "would be inclined to hold" that the determination of exceptional and extremely unusual hardship was a matter of statutory eligibility, over which the court would have jurisdiction. *Mendez*, 566 F.3d at 322.

Nonetheless, the court found that it retained jurisdiction to review the petitioner's application because the immigration judge erred as a matter of law in analyzing his claim. Specifically, the court determined that the immigration judge failed to address certain evidence presented by the petitioner, including: (1) the specialized piece of medical equipment the petitioner's U.S. citizen daughter used; (2) the number of asthma attacks the daughter experienced yearly; (3) the long-term prognoses of the daughter's asthma; (4) the specialized medical doctor the petitioner's son visited annually; (5) the unavailability of a specialized medical doctor for the petitioner's son in Mexico; and (6) the petitioner's ability to pay for highly specialized care in Mexico. The court found that the immigration judge failed to evaluate all the evidence submitted and therefore did not appropriately address whether the petitioner's removal would result in exceptional and extremely unusual hardship to his two United States citizen children. The court stated:

> We readily acknowledge that the agency does not commit an "error of law" every time an item of evidence is not explicitly considered or is described with imperfect accuracy, but where, as here, some facts important to the subtle determination of "exceptional and extremely unusual hardship" have been totally overlooked and others have been seriously mischaracterized, we conclude that an error of law has occurred.

Id. at 323.

At the conclusion of its opinion, the court noted that the immigration judge had not made an adverse credibility finding and stated that it was "not confident that, after taking the overlooked evidence into account and describing it accurately," the agency would again conclude that the petitioner failed to establish exceptional and extremely unusual hardship. *Id.* Therefore, the court remanded the case to the BIA for a new determination on the question of hardship.

Aburto-Rocha v. Mukasey

In *Aburto-Rocha v. Mukasey*, 535 F.3d 500 (6th Cir. 2008), the Sixth Circuit held that it had jurisdiction to review whether the BIA had incorrectly applied its own precedent regarding exceptional and extremely unusual hardship to the petitioner's case. In taking jurisdiction, the court stated that "the choice by the BIA to disregard its own binding precedent—even when deciding an issue that *is* within its discretion—is *not itself* a discretionary decision Congress has excluded BIA "reasonably construed and applied its own precedents." *Id.*

In its analysis, the court first acknowledged that in the decision denying the petitioner's application for non-LPR cancellation, the BIA had relied on its previous decisions in *Monreal* and *Andazola*. Then the court went on to review those decisions in order to determine whether the BIA "fairly applied its precedent." *Id.* at 503-04. After reviewing *Monreal* and *Andazola*, the court compared the cases to the facts of the petitioner's case. The court noted that in this case, the BIA had outlined the potential future hardships faced by the petitioner's qualifying relatives, namely that his U.S. citizen children would face "'emotional hardship,'" "'difficulty adjusting to life in Mexico,'" and "'reduced educational and economic opportunities in Mexico.'" *Id.* at 504 (quoting the BIA's decision). The court also mentioned the potential hardship faced by the petitioner's daughter as a result of her health problems, noting that this was the one difficulty "*not* common" in most cancellation cases. *Id.* at 504-05. The court agreed that this was insufficient to demonstrate the requisite hardship because the petitioner was unable to show that "adequate medical treatment" would not be available to her in Mexico. *Id.* at 505. The court concluded that in determining that the petitioner failed to demonstrate exceptional and extremely unusual hardship, the BIA "accurately distilled the standard" in *Monreal* and *Andazola* and did not misapply its own precedent. *Id.* at 504.

Although the BIA did not mention *Recinas* in its decision, the court found that this omission was "not unreasonable." *Id.* at 505. The court distinguished this case from *Recinas* on the grounds that, unlike the respondent in *Recinas* who had no family in Mexico, the petitioner's parents and two brothers live in Mexco, and "his common-law wife and mother of his six children" will likely return to Mexico with him. *Id.*

Conclusion

In non-LPR cancellation cases, every circuit court has held that in many instances, the question whether a petitioner has shown his qualifying relatives will suffer exceptional and extremely unusual hardship is a discretionary determination outside of the court's jurisdiction to review. However, petitioners have had some success in attaining circuit court review of hardship determinations by arguing that the agency has either applied an incorrect legal standard or misapplied its precedent decisions to the facts of a particular case.

In taking jurisdiction over these claims, circuit courts have undertaken varying degrees of review. For example, in *Mireles*, the Seventh Circuit took jurisdiction but, in denying the petition for review, simply stated that "the IJ used the right legal standard" in her decision. *Mireles*, 433 F.3d at 969. On the other hand, in *Aburto-Rocha* the Sixth Circuit reviewed *Monreal* and *Andazola* in depth and compared these precedent decisions with the specific facts of the petitioner's case in concluding that the BIA did not err. Looking at all these decisions together, the circuit courts seem to be attempting to strike a balance in non-LPR cancellation cases between granting deference to discretionary determinations and reviewing matters of law. The most appropriate way to strike this balance is not always obvious. Circuit courts clearly do have jurisdiction to review matters of law in these cases. However, when a circuit court reviews the underlying facts of a petitioner's claim, even if the court is reviewing a legal issue over which it has jurisdiction, the court may at times come close to reweighing the evidence and reviewing the agency's discretionary determination, over which it does not have jurisdiction. While the circuit courts continue to strike this balance, EOIR adjudicators in these cases should take care to apply as carefully as possible the statutory standard of "exceptional and extremely unusual hardship" in section 240A(a)(1)(B) of the Act in accordance with the BIA's precedent decisions in *Monreal*, *Andazola*, and *Recinas*. ◆

Nina Elliot is an attorney advisor to the chief immigration judge. Greta Hendricks is an attorney advisor to the Board of Immigration Appeals. *This article was originally published in the Immigration Law Advisor, February 2010, Vol. 4 No. 2. The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.*

Why It's So Hard to Obtain Legal Status, Even Through Marriage and Family

Leslie Berestein Rojas

A recent series of posts explored the immigration limbo lived by families of mixed status, families in which some members are U.S. citizens and/or legal residents while others remain undocumented, unable to adjust their immigration status in spite of family and marriage ties to the United States.

Mixed-status families are surprisingly common. In 2009, the Pew Hispanic Center estimated there were 8.8 million people living in families of mixed immigration status in the United States. This makes for a conservative estimate, as Pew's definition was limited to families with unauthorized immigrants and their U.S. citizen children. Even more common are mixed-status extended families, one example being the Kenyan-born family of President Obama, whose undocumented half-uncle was arrested in August, and whose aunt was up for deportation until being granted asylum.

The Multi-American series on mixed-status families featured the first-person stories of U.S. citizens and legal residents who are the spouses, children and siblings of undocumented immigrants. Many had tried to adjust their status and failed. One U.S. citizen woman whose husband had been unable to adjust, and now faces deportation, wrote: "People who don't have undocumented family members don't believe me when I tell them he can't get papers."

It's commonly believed that marriage to a U.S. citizen is an immigration cure-all, as is having U.S.-born children. Not so. In fact, for people who entered illegally, current laws make it next to impossible to obtain legal status. Legal expert David Wolfe Leopold, an immigration attorney and former president of the American Immigration Lawyers Association, explains why.

M-A: Why is it so difficult to adjust immigration status for those who lack legal status, even through family or marriage?

Leopold: The law limits adjustment to non-immigrants who have maintained status, not worked without authorization, etc. There are few exceptions to this general rule.

In the family based context, a person may adjust if they were lawfully admitted or paroled into the United States, and they are married to a U.S. citizen or the parent of a U.S. citizen who has reached the age of 21. In the employer sponsorship context, a person may adjust if they were lawfully admitted (not paroled) into the United States and their failure to maintain status has been for no longer than six months. Asylees and refugees may adjust regardless of lawful admission.

M-A: What if someone entered illegally without a visa, as opposed to someone who entered lawfully and overstayed? Is it possible to obtain legal status?

Leopold: For most people, no. There are two exceptions to this, commonly known as 245(i): 1) if the person could have adjusted by an immigration process started before Jan. 18, 1998, or; 2) if the person could have adjusted based on an immigration process started before April 30, 2001 and they can prove they were present in the U.S on Dec. 21, 2000.

Practically speaking, this means that some petition or labor certification process must have been filed on their behalf or on behalf of their parent or spouse before these dates. The rules are pretty liberal as to who can benefit. But, as you might imagine, the pool of people who qualify diminishes as the years and days go by.

M-A: Is there a way for people who entered without a visa to adjust status through marriage?

Leopold: No. The law does not permit adjustment even if the green card is based on marriage to a U.S. citizen and there is extreme hardship to the family. If a person entered without an inspection and doesn't qualify for 245(i) exceptions, they must leave the United States in order to apply for their immigrant visa.

M-A: What happens when people are told to go back to their native country, such as to Ciudad Juarez in Mexico to process paperwork at the consulate there? What are the penalties?

Leopold: Anyone who has been in the United States for more than six months after entering illegally, or overstaying their authorized period of stay, faces a three or 10 year bar to readmission once they leave. If a person overstays for six months, they will be barred for three years; if they overstay for one year or more, they will be barred for 10 years.

If they reenter illegally after having been removed or after having been in the United States unlawfully for more than a year, they will be barred permanently.

However, there are hardship waivers if the immigrant can show that refusal of admission would cause extreme hardship to his/her U.S. citizen or lawful permanent resident parent or spouse. (Note: Hardship to U.S. citizen/lawful permanent resident children doesn't matter.)

So if the immigrant is married to an undocumented spouse, and they have U.S. citizen or mixed children, the immigrant has no waiver available even if he/she is eligible for an immigrant visa based on employer sponsorship.

There was a case in Ohio years ago where a South Korean boy's parents were both deported. He was a U.S. citizen, they were not. No waiver available to the parents,

despite the obvious hardship to the boy who was left behind without support. Under these circumstances, the government expects the U.S. citizen child to return with the parents or go into foster care.

M-A: So what typically happens in these cases?

Leopold: If there is a waiver available, the immigrant must apply for it abroad. Practically speaking, that means a wait of a year or more for the waiver. And there is no guarantee of approval. The government expects a showing of hardship to the U.S. citizen spouse.

Hardship is more than mere separation; it is a combination of economic, psychological etc. And again, hardship to the children, who may be traumatized by the absence of the parent, just doesn't matter.

M-A: The families of these people who can't adjust immigration status—including their U.S. citizen spouses, children—live in a sort of mixed-status limbo. Is there anything that families like these can do to change their situation?

Leopold: Not under the current structure of the law. It effectively bars anyone who has been here unlawfully for more than 6 months. By requiring the person to leave the United States to get the immigrant visa, and then barring them for years once they leave, the law includes an ugly Catch-22. You need to leave to get the visa, but once you leave you're ineligible for the visa for 10 years.

This provision, known as the 212(a)(9)(B) 3/10, and permanent bars, was put into the law in 1997 (under President Bill Clinton) as an incentive for people to depart once their period of stay expired. It was also included as an incentive for people not to enter illegally. But it has done the opposite. Rather than abandon their mixed-status families, immigrants tend to hunker down and hope the law changes. Many of them don't even know the bar exists, until they seek advice from a lawyer.

M-A: What part in this phenomenon does the family-based immigrant visa system play?

Leopold: The family based system, which allows for the immigration of immediate relatives and other family members, is limited by the adjustment provisions which deny adjustment to most people who have violated or failed to maintain their immigration status.

If an eligible immigrant can't adjust internally, they must depart to apply for an immigrant visa at a U.S. consulate abroad. Once they depart to apply for the immigrant visa, they can be barred for as much as 10 years based on previous unlawful present.◆

This article originally appeared in the online publication Multi-American *published by Southern California Public Radio at multiamerican.scpr.org/2011/11/why-its-so-difficult-to-obtain-legal-status-even-though-marriage-and-family/.*