



AMERICAN IMMIGRATION LAW FOUNDATION

June 12, 2006

Director, Regulatory Management Division,
U.S. Citizenship and Immigration Services,
Department of Homeland Security,
111 Massachusetts Avenue, NW, 3rd Floor,
Washington, DC 20529

Re: DHS Docket No. USCIS–2006–0010

Dear Sir or Madam:

The American Immigration Law Foundation (AILF) and the American Immigration Lawyers Association (AILA) jointly submit the following comments on the interim rules with request for comments entitled “Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status,” 71 Fed. Reg. 27585 (May 12, 2006). We commend the U.S. Citizenship and Immigration Services (CIS), through the Department of Homeland Security (DHS), and the Executive Office of Immigration Review (EOIR), through the Department of Justice (DOJ), for deleting 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8) and acquiescing to the decisions of the majority of the Courts of Appeals that struck down these regulations. This interim rule represents an important step that has the potential of benefiting many deserving parolees and their U.S. citizen and lawful permanent resident family members. While we fully support the decision to make CIS available as a forum for the adjustment of parolees in removal proceedings – which we believe is the minimum required by law – we would encourage the agencies also to grant to immigration judges (IJs) jurisdiction over these adjustment applications.

We are very concerned by and strongly opposed to the suggestion of regulatory restrictions on the exercise of discretion by CIS adjudicators and IJs. Such restrictions are unnecessary; contradict the clear intent of Congress; violate the interpretation of INA § 245(a) as held by four Federal Courts of Appeals; and are entirely unsupported either legally or factually and thus also violate the Administrative Procedures Act (APA). As explained in detail below, we strongly urge CIS and EOIR to forgo regulatory restrictions on the exercise of discretion by

adjudicators. Instead, we urge the agencies to allow adjudicators full discretion in each particular case, guided by decades of precedential Board and federal court case law.

The American Immigration Law Foundation (AILF) is a non-profit organization founded in 1987 to increase public understanding of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law and administration. AILF has appeared as *amicus curiae* in four of the six cases that ruled on the validity of the regulations at issue here, and assisted in preparing arguments in the remaining two cases.

The American Immigration Lawyers Association (AILA) is a voluntary bar association of nearly 10,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. AILA's mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA's members are well acquainted with the adjustment of status process and the removal process, having significant experience representing and educating foreign nationals who are directly affected by the utilization of these processes.

AILF and AILA are thus exceptionally qualified to comment on the joint interim rule.

I. Comments On The Agencies' Amendment Of The Regulations

1. Removal Of The Bar To An "Arriving Alien" Adjusting In Proceedings Is An Appropriate And Timely Action.

CIS and EOIR are to be commended for deleting the bar, found in 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8), which prohibited an "arriving alien" in removal proceedings from adjusting status to lawful permanent residence. Removal of this bar will allow eligible, deserving individuals with close family ties and/or sponsoring employers to become lawful permanent residents as Congress intended. Moreover, both agencies are to be commended for wanting to "avoid the inconsistent application of the adjustment of status laws depending upon the geographic locations of the applicant." 71 Fed. Reg. at 27587. The agencies are also to be commended for not prolonging litigation when the majority of the Courts of Appeals to have addressed the issue have struck down the regulations, finding that they violated INA § 245(a).¹ The government's action in deleting the regulatory bar resolves the split in the Courts of Appeals in a way that will carry out Congress' intent.

¹ See *Scheerer v. Attorney General*, ___ F.3d ___, 2006 WL 947680 (11th Cir. April 13, 2006); *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005). Only two courts have upheld the regulation. *Momin v. Gonzales*, ___ F.3d ___, 2006 WL 1075235 (5th Cir. April 24, 2006) and *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir.), *petition for cert. filed* No. 05-1092 (February 23, 2006).

2. Jurisdiction Over The Adjustment Applications Of Parolees In Removal Proceedings Need Not And Should Not Be Limited To CIS.

While removal of the bar on adjustment is an important and commendable step, we believe that CIS and EOIR have gone too far by restricting jurisdiction over these applications to CIS only. We would encourage the agencies to grant IJs jurisdiction over the adjustment applications of parolees in removal proceedings. There are several reasons why such a step would make sense.

The prior system of allocating jurisdiction over adjustment applications depended entirely on the split between exclusion and deportation proceedings: if a person was in exclusion proceedings, the legacy INS had jurisdiction; if a person was in deportation proceedings, the IJ had jurisdiction. *See, e.g., Matter of Castro*, 21 I&N Dec. 379 (BIA 1996); *Matter of Manneh*, 16 I&N Dec. 272 (BIA 1977); *Matter of Wong*, 12 I&N Dec. 407, 408 (BIA 1967). Now that Congress has established a uniform removal proceeding, there no longer is a need to bifurcate jurisdiction between the two agencies, as there was when the proceedings themselves were bifurcated.

Consistent with the creation of a uniform removal proceeding, allowing parolees in proceedings to adjust before an IJ would make the adjustment process more uniform. The statute makes no distinction between those admitted and those paroled for purposes of adjustment eligibility. 8 U.S.C. § 1255(a); *Succar*, 394 F.3d at 16. All “admitted” adjustment applicants in proceedings are able to have their applications decided by an IJ. Were jurisdiction over the adjustment applications of parolees extended to IJs, then parolees and those who have been admitted would be treated alike.

Additionally, allowing parolees to adjust before an IJ would also promote agency efficiency. There would be no need for parolees to move for continuances or administrative closure of the removal proceedings so that they could file their adjustment applications with CIS. There also would be a reduced risk that a parolee would be precluded from having an adjustment application adjudicated due to the inability to get a continuance or stay of the removal proceedings. Since Congress intended that parolees have this right, and since the law of four circuits now is clear that all parolees – including those in proceedings – be afforded this opportunity, giving IJs jurisdiction would streamline the system while ensuring its efficacy.

3. The Agencies Should Clarify By Memo Or Instructions The Current EOIR Procedure For Pending Cases Until A Final Rule Is Adopted.

In the interim before a final regulation is issued, the agencies should adopt a uniform procedure to ensure that the applications of all parolees in removal proceedings who are eligible to apply for adjustment have the opportunity to do so. To fully comply with the federal court decisions in the First, Third, Ninth and Eleventh Circuits (*see n. 1, supra*), EOIR must adopt a

mechanism by which removal proceedings will be held in abeyance – either by administrative closure or a continuance – until CIS has the opportunity to adjudicate the parolee’s adjustment application. *See, e.g.*, 8 C.F.R. § 245a.12(b)(1) (authorizing removal proceedings to be administratively closed or indefinitely continued so that a LIFE legalization applicant can pursue an application with the Service).

The four Courts of Appeals determined that Congress intended that parolees have the same opportunity to apply for adjustment as those admitted, regardless of whether they were in removal proceedings. *Succar*, 394 F.3d at 25 (“Congress chose not to disqualify from eligibility all of those aliens ‘inspected and admitted or paroled’ in removal or other judicial proceedings”); *Bona*, 425 F.3d at 669; *Scheerer*, 445 F.3d at ___, 2006 U.S. App. LEXIS 9278 at *27 (“Congress did not intend the mere fact of removal proceedings would render an alien ineligible to apply for adjustment of status”); *Zheng*, 422 F.3d at 118 (same). Thus, only if the IJ holds the case in abeyance, will DOJ and DHS ensure that Congress intent is effectuated. Similarly, only in this way, can DOJ and DHS fully acquiesce to and comply with the majority rulings of the Courts of Appeals.

To ensure the fair and consistent handling of the adjustment applications of all parolees who are in proceedings, EOIR should clarify by memo or instruction how the Board and IJs are to handle pending cases so that every eligible parolee is afforded an opportunity to adjust before CIS. The commenters suggest that administrative closure of the removal proceeding pending adjudication of the adjustment application by CIS would be the most effective and consistent procedure. The commenters strongly urge DHS to adopt a policy agreeing to administrative closure of these cases pending the adjudication of the adjustment applications.²

Administrative closure will achieve several important goals with respect to the processing of these cases. First and foremost, it will ensure that the parolee has a full and fair opportunity to have the adjustment application adjudicated by CIS, as intended by Congress. It would also ensure that all parolees throughout the country have their cases dealt with in a consistent manner, regardless of their geographic location, a valid concern of both DHS and DOJ. *See* 71 Fed. Reg. at 27587.

Administrative closure would also benefit EOIR as it would allow these cases to be taken off the dockets, thereby reducing the workload of the immigration courts. Once the adjustment application is decided, the case could be reactivated. If the adjustment is approved, the removal proceedings could be terminated. If the adjustment application is denied, the removal proceedings could proceed.

² The Board has held that both parties must agree to an administrative closure before an IJ can order it, *see Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996). Until or unless this questionable policy is changed, the commenters suggest that DHS agree to administrative closure as a policy choice in these cases.

In the alternative, EOIR should issue instructions to IJs that they are to grant continuances in these cases for so long as necessary for CIS to adjudicate the adjustment application. Moreover, allowances may need to be made for these continuances with respect to case processing and closure statistics and deadlines.

4. The meaning of “filed” should be clarified.

The regulation under 8 C.F.R. § 1245.2(a)(1)(i) should clarify whether adjustment applications filed by aliens who are in removal proceedings must first be feed-in with USCIS at the Texas Service Center and then filed with the Immigration Judge, according to the instructions issued by DHS on April 1, 2005. DHS may wish to consider codifying these instructions in the regulations.

The regulation under 8 C.F.R. § 1245.2(a)(1)(ii) should clarify whether arriving aliens who are in proceedings should file with the Texas Service Center as do non-arriving aliens in proceedings or the lock-box as do aliens who are not in proceedings.

5. In First, Third, Ninth And Eleventh Circuits, The New Rule Should Not Require Re-adjudication By CIS Of IJ-Granted Cases Appealed By ICE.

In the Circuit decisions invalidating 8 C.F.R. 245.1(c)(8), the courts ultimately did not specify whether the Immigration Judge or CIS had jurisdiction over an application for adjustment of status filed by an arriving alien in removal proceedings. Therefore, many of the immigration judges in the jurisdictions covered by these decisions accepted applications for adjustment of status from arriving aliens and adjudicated their cases. In some of these cases, ICE attorneys appealed the judge’s decision.

The Department should make clear that the new rules do not apply retroactively to pending cases on appeal to the Board of Immigration Appeals. It would be fundamentally unfair to nullify the entire adjudication process and force applicants to start all over again and have their cases readjudicated by CIS. Once the case has been favorably adjudicated by an immigration judge, any administrative appeal decision should be based on the merits of the judge’s decision and not on jurisdictional grounds. A retroactive application of the new rules would run counter to the spirit under which the new regulation was created: to end litigation over conflicting interpretations of the adjustment of status laws. Given the ruling by several circuit courts allowing immigration judges to assume jurisdiction over adjustment of status applications, mandating readjudication by CIS of the applications granted by the immigration judge under the new rules would prolong the very litigation these rules were designed to end. With no limitations placed on jurisdiction over adjustment applications other than the provisions of 8 C.F.R. 245.2(a)(1) which limits consideration of applications for adjustment of status after an alien is in removal proceedings to those proceedings, the adjudication of adjustment applications by the judge was entirely proper and should not be tossed aside by a retroactive application of the new

rules. The integrity of the adjudication process should not be compromised by discarding the entire process. The rules should apply only to new, or at least unadjudicated, applications.

II. Comments On The Additional Rulemaking That EOIR And CIS Are Considering

1. The Agencies Have Failed To Provide A Reasoned Explanation For The Proposed Restrictions On The Exercise Of Discretion In Violation Of The APA.

Under the Administrative Procedures Act (APA), an agency's rulemaking will be found to be "arbitrary and capricious" where the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Under this "arbitrary and capricious" standard, the agency is prohibited from relying on factors that Congress has not intended it to consider or offering an explanation for its decision that runs counter to the evidence. *Motor Vehicle Manufacturers Assoc.*, 463 U.S. at 43. Moreover, a "reasoned explanation" requires more than the "minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause." *Id.*, at 44 n. 9; see also *Bowen v. American Hospital Assoc.*, 475 U.S. 610, 627 (1987) ("Thus, the mere fact that there is 'some rational basis within the knowledge and experience of the [regulators]' under which they 'might have concluded' that the regulation was necessary to discharge their statutorily authorized mission will not suffice to validate agency decisionmaking") (quotations omitted).

The Supreme Court has made clear that regulations can not stand where they are based upon flawed premises, unsupported by the record. See, e.g., *Bowen*, 475 U.S. at 636 (finding nothing in the administrative record to justify the Secretary's belief regarding discriminatory withholding of medical care). Moreover, the requirement that an agency explain the basis for a regulation applies equally to the agency's exercise of discretion by regulation, and an agency must "cogently explain" why it has exercised its discretion in a given manner. *Motor Vehicle Manufacturers Assoc.*, 463 U.S. at 48-49 (citations omitted).

As discussed below, the suggestions for limits on the exercise of discretion by CIS and/or IJs are arbitrary and capricious under the APA because they are: based upon flawed premises; unsupported legally or factually; and devoid of any reasoned explanation. For these reasons, the commenters strongly oppose the suggestion that either CIS or EOIR adopt any restriction on the exercise of discretion by agency adjudicators.

A. The Adjustment of Parolees in Removal Proceedings Will Not Harm the Integrity of the Visa Process

The basic premise underlying the suggestion for regulatory restrictions on CIS's exercise of discretion over the adjustment applications of parolees in proceedings is that these adjustments somehow "undermine the integrity of the visa issuance process." See 71 Fed. Reg.

at 27588 and 89 (“Further, rules concerning the manner in which discretion would be exercised would serve the same purpose of preserving the integrity of the nonimmigrant and immigrant visa issuance process”). EOIR and CIS present no argument or evidence to demonstrate that the adjustment of these parolees undermines the visa process. They also fail to provide research, investigative results, or other proof that these restrictions would indeed preserve the integrity of the visa process. The agencies have failed altogether to explain how the adjustment of this category of non-citizens affects the visa process – either positively or negatively – to any greater degree than the adjustment of any other eligible category of non-citizen.

All applicants for adjustment – whether initially admitted on a temporary or non-immigrant basis or paroled in – would have to consular process if Congress had not specifically exempted them from this process. Thus, the very existence of the adjustment process – and its expansion over the years – indicates Congress intended that those eligible to adjust be exempted from visa processing. Because Congress made parolees eligible for adjustment, Congress exempted them from consular processing. EOIR and CIS should not use the very fact of their eligibility as justification for restricting the favorable exercise of discretion.

Moreover, the adjustment of parolees currently in removal proceedings has no greater impact on the integrity of the visa process than the adjustment of parolees who were in exclusion proceedings had on the visa process prior to 1997. From 1960 to 1997, when 8 C.F.R. §245.1(c)(8) was promulgated, immigrants in exclusion proceedings were allowed to apply for adjustment of status before the District Director. This procedure is the same process that DOJ and DHS have proposed in the present regulations. For these nearly forty years, these agencies were never compelled to add restrictions, and Congress never passed a law to solve any reported problems with the integrity of the visa process. The agencies’ blanket statement that the visa process needs further protections now, without any basis or proof for this necessity, fails to provide even minimal justification for these serious restrictions on arriving aliens.

If anything, further restrictions on arriving aliens will place added burdens on the visa process. Consulates will be forced to deal with increased numbers of cases seeking to consular process, resulting in delays and pressure to quickly process cases. Additionally, many arriving aliens are asylum applicants who had no way to consular process in their home country anyway. Placing restrictions on them in the name of preserving the visa processing is likely to have no effect at all on the integrity of the system.

Moreover, for the agency now to limit this minimal procedure by adopting restrictions on the exercise of discretion, would be a change in course that requires a “reasoned analysis.” *Motor Vehicle Manufacturers Assoc.*, 463 U.S. at 57. The rule does not provide a “reasoned analysis” for departing from the longstanding, pre-1997 practice in which there were no regulatory restrictions on the exercise of discretion.

Congress created the adjustment of status process as an exception to visa processing through a U.S. Consulate abroad. In doing so, Congress specifically anticipated that individuals

eligible to adjust status would be by-passing the traditional visa process. *See* full discussion of legislative history, *supra*. Congress specifically *intended* this result to remedy burdens imposed by the consular process on the U.S. citizens involved, the non-citizen applicants, and the government. In *Succar*, the court rejected the government’s rationale for the regulation, and instead found that it was the regulation barring the adjustment of this category of non-citizens – and not the actual adjustment of these individuals – that undermined congressional intent. *Succar*, 394 F.3d at 10 (“The effect of the regulation is to reinstitute the problems Congress wished to solve”); *accord Scheerer*, 445 F.3d at ___, 2006 U.S. App. LEXIS 9278 at *28 (finding that the government’s regulation “essentially reverses the eligibility structure set out by Congress”).

It is disingenuous for the agencies to claim to be resolving the Circuit split by acquiescing to the courts’ rejection of the regulation – which was premised on clear findings of the statutory intent behind INA § 245(a) – but at the same time continuing to posit that the adjustment of parolees in proceedings undermines the integrity of the visa process. *See* 71 Fed. Reg. at 27587 (Section III A. Acquiescence and Regulatory Amendment) and 27588, 89 (inferring that adjustment of paroled aliens in removal proceedings undermines the integrity of the visa process). CIS and EOIR cannot reject by rule the statutory interpretation in *Succar* and other cases that the adjustment of parolees in removal proceedings furthers the intent of Congress.

Because the underlying premise is faulty – and the adjustment of parolees in proceedings will not adversely impact the integrity of the visa process – there is no justification for regulatory restrictions on the exercise of discretion over these adjustment applications.

B. The Cases Of Parolees in Removal Who Are Seeking to Adjust Cannot Be Generalized And Thus General Restrictions On the Exercise of Discretion Are Inappropriate.

The suggestion for regulatory restrictions on the exercise of discretion is also premised on certain generalized assumptions about the cases of parolees in removal proceedings who are seeking adjustment. Without these assumptions as a foundation, there would be no justification for even discussing regulatory restrictions on the exercise of discretion. The commenters do not believe that these assumptions have a basis in fact or law. Moreover, the agencies have failed to support the assumptions – or the conclusions drawn from these assumptions – and therefore the proposed regulatory changes are not based on reasoned decisionmaking as required by the APA.

As discussed above, see section A, there is an unsupported premise underlying the alleged need for restrictions on discretion that the adjustment of parolees in proceedings undermines the visa process. Additionally, in the discussion of further rulemaking provisions being considered, CIS and EOIR make the unsupported assumption that most or all parolees in proceedings are now and will continue to be attempting to circumvent the visa process. Similarly, the agencies conclude without evidence or support that “generally,” these parolees

“could have and should have sought and obtained an immigrant visa from a consulate abroad;” and that these parolees, “generally,” will have “arrive[ed] at a port-of-entry as a putative nonimmigrant, or with otherwise invalid or fraudulent documents.” 71 Fed. Reg. at 27589.

First, these factors are not relevant considerations and therefore are improper for inclusion in across-the-board regulatory restrictions on the exercise of discretion. That parolees “should” have sought and obtained a visa from a consulate abroad is, as a matter of law, an erroneous statement. Where and how a non-citizen “should” apply for permanent resident status is entirely governed by statute. As four Courts of Appeals have held, INA § 245(a) gives eligible parolees the same right to apply for adjustment from within the United States as it gives eligible non-citizens who have been admitted. Thus, under the statute, all parolees who are eligible to apply to adjust status within the United States “can and should” seek permanent residence in this way. Congress has already determined that neither the fact that they are parolees nor the fact that they are in proceedings has any bearing on adjustment being the proper route to permanent residence for them. To the contrary, in the First, Third, Ninth and Eleventh Circuits, the courts agree that the statutory structure requires that virtually all parolees be in removal proceedings; despite this, Congress clear intent was that parolees as a class be eligible to apply for adjustment. *See, e.g., Bona*, 425 F.3d at 669-670 (*quoting Succar*, 394 F.3d at 27); *Scheerer*, 445 F.3d at ___, 2006 U.S. App. LEXIS 9278 at *26-27; *Zheng*, 422 F.3d at 118.

Thus, whether or not a parolee could also consular process (and whether or not the parolee wishes to avoid this lengthy process) is simply not a factor that Congress intended the government to consider in exercising discretion in these cases.

Additionally, there is absolutely no factual or legal support in the federal register announcement for any of these generalized assumptions. By statute, parolees can only be admitted to the United States if – on an individual case basis – they satisfy the stringent discretionary standard “that ‘urgent humanitarian reasons’ justify the parole or that paroling the individual will yield a ‘significant public benefit.’” 71 Fed. Reg. at 27586 (*citing* 8 U.S.C. § 1182(d)(5)(A)). The very fact that the individual was granted parole in the discretion of the government indicates that the individual had a legitimate humanitarian or public interest reason for seeking entry into the United States and that the government recognized this legitimate humanitarian or public interest reason. Thus, the very fact that the individual was granted parole demonstrates that the purpose of the individual’s coming to the U.S. was not – as asserted in the preamble to the regulations – to circumvent the visa process. Instead the purpose of the individual’s coming here was the purpose for which he or she was granted parole.

Similarly, the very fact that the individual was eligible for and found deserving of a grant of parole indicates that visa processing abroad likely was not an option at the time – or at least not the most viable one, considering the individual’s humanitarian or public interest need for parole. Again, the fact that these individuals were granted parole belies the agencies’ assertion that these paroles “could have [] gotten visas abroad.”

A sampling of cases demonstrates the myriad circumstances which lead to a parolee in proceedings becoming eligible to apply for adjustment. These cases illustrate that generalizations about this group are inappropriate, and that instead, discretion must continue to be exercised on a wholly case-by-case basis with no regulatory restrictions based on unsupported assumptions.

Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005): Petitioner, the Filipina wife of a U.S. serviceman, was paroled into the U.S. upon the orders of the U.S. government when families of servicemen were evacuated from the Philippines due to an impending volcano eruption. Her parole into the U.S. – which was not even at her own instigation – was not an attempt on her part to circumvent the visa process.

Garcia v. Gonzales, 2006 U.S. App. LEXIS 11668 (11th Cir. 2006)³: Petitioner was paroled under NACARA § 202 as the minor daughter of Nicaraguan parents. See Brief of Respondent-Appellee Attorney General Gonzales, at 2. Her intent at the time of the parole was to adjust status under NACARA, as she was statutorily eligible to do. She was not attempting to circumvent the visa process but to take advantage of the special NACARA legislation. Due to agency delay beyond her control, her NACARA application was not adjudicated prior to her aging out, and thus, after living here for several years, she instead sought to adjust through her U.S. citizen husband.

Succar v. Gonzales, 394 F.3d 8, 11 (1st Cir. 2005): Petitioner approached an official at the airport when his plane stopped in New York en route from Lebanon to Panama, and explained that he wished to apply for asylum. He was taken into custody and found to have a credible fear. He was then released on parole to pursue his asylum claim. During the several years that his asylum claim was pending, he married a U.S. citizen, and sought adjustment on that basis. He did not use false documents and did not file a frivolous claim for asylum. He was not attempting to circumvent the visa process.

Momin v. Gonzales, ___ F.3d ___, 2006 WL 1075235 at *1 (5th Cir. 2006): Petitioner originally entered the U.S. on a non-immigrant visa as a student. Four years later, he left temporarily on advance parole and returned to pursue a visa petition filed by his U.S. citizen wife and an adjustment application. He abandoned this application when the marriage ended in divorce. He then sought to adjust status based upon his employment. His original entry to the U.S. was not an attempt to circumvent the visa process. In fact, had he not temporarily left

³ The unpublished cases are not being cited for precedential value but rather as illustrations of various factual settings.

the U.S. while his initial application was pending, he would not be considered an arriving alien.

Rodriguez de Rivera v. Ashcroft, 394 F. 3d 37, 38 (1st Cir. 2005): Petitioner entered the U.S. without inspection and subsequently married a U.S. citizen. She applied for adjustment of status under INA § 245(i). After a trip outside the country, she was paroled back into the U.S. Petitioner was not eligible to consular process when she first entered the U.S. and thus was not attempting to circumvent the visa process. Moreover, based on her initial entry without inspection and undocumented stay in the U.S., she fell within the exception to the visa consular process specifically created by Congress under INA § 245(i).

Shah v. Gonzales, 2005 U.S. App. LEXIS 19777 (11th Cir. 2005): Petitioner arrived at an airport without documents and immediately sought asylum. He was placed in proceedings and paroled into the U.S. to apply for asylum after he was found to have a credible fear of persecution. While his asylum application was pending, he met and married his U.S. citizen wife. He then sought to pursue an adjustment application. He did not use fraudulent documents. He also did not attempt to circumvent the visa process; at the time that he arrived he was not in a position to consular process but did have a credible fear of persecution.

Isla v. Gonzales, 2005 U.S. App. LEXIS 3686 (9th Cir. 2005): Petitioner was present in the U.S. for a number of years pursuing an asylum application. She received advance parole to visit her ailing father. Only after her return, and after she had been placed in removal, did she become eligible for adjustment. At that time, however, she was considered an “arriving alien” due to her departure and return on advance parole. At no time did this Petitioner intend to circumvent the visa process. Instead, her intent – both on initial entry and when she sought advance parole – was to pursue an asylum claim.

2. The imposition of discretionary regulatory barriers to parolees’ ability to adjust status will harm those with a serious need to avoid departure from the U.S.

All of the regulatory proposals published in the Federal Register on May 12, 2006 are restrictive in nature – i.e., they would apply discretion *against* the adjustment of status of arriving aliens rather than in favor of the exercise of discretion. This would be achieved by using discretionary rules that deny these aliens continuances needed to permit timely USCIS adjudications; elevating the adverse weight of discretionary factors that are presumed to typify the circumstances of arriving aliens (failure to consular process, preconceived intent); and subjecting these aliens to a heightened discretionary standard or presumption against adjustment of status.

The effect of denying the affected aliens adjustment of status is that they would be required to leave the country to process immigrant visa applications abroad, if eligible. This would cause the greatest harm to those with the greatest need to process in the U.S.: aliens from war-torn countries or countries with other harmful conditions, aliens with medical issues, aliens who have minor children or parents dependent on them in the U.S., aliens with limited economic resources for costly overseas travel; and others for whom return will impose unnecessary hardship.

Among those who would be most harmed are aliens paroled into the U.S. based on a credible fear of persecution. 8 C.F.R. 235.6. Such aliens may not prevail in obtaining asylum ultimately because so many kinds of significant, even life-threatening, violence have been held not to constitute “persecution.” See, e.g., *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985) (tragic and widespread savage violence affecting entire population). Denying them adjustment of status would unnecessarily subject them to harmful conditions in their home country.

Aliens from countries recovering from natural disasters or other harsh conditions would also be harmed by being forced to return if denied adjustment of status. For example, in *Bono v Gonzales*, 425 F.3d 663 (9th Cir. 2005), the arriving alien was the spouse of an American Navy man who had served for 19 years; she was paroled in from the Philippines due to the eruption of Mount Pinatubo. See also, conditions described in USCIS’ designations of TPS countries such as Honduras and Nicaragua (post-hurricane recovery); Somalia (ongoing political strife, drought, malnutrition and cholera); Liberia (post-war conditions preventing safe return).

The parole regulations set forth additional examples of aliens who would be harmed if forced to return because of denial of the opportunity to adjust status here. 8 C.F.R. 212.5(b). These include aliens who were paroled because of “serious medical conditions” or pregnancy and are now under a physician’s care in this country; juveniles who were paroled while unaccompanied and have achieved some stability with a U.S. relative or U.S. guardian; or others who were paroled in the public interest and whose departure would now work a hardship. See also, *In Re Guerrero-Arambula* (A 20 914 485 Chicago, July 7, 2004) (unpublished), treating dependence of elderly parent as an equity which should have been considered in exercising discretion for adjustment purposes.

3. The Regulatory Proposal To Treat An Applicant’s Status As An Arriving Alien As A Significant Adverse Factor That May Warrant Denial Of Adjustment Conflicts With Congressional Intent And The Legislative History Of INA §245(a).

Adjustment of status by an arriving alien should not be considered a “significant adverse factor” because Congress specifically sought to discourage consular processing by passing INA §245(a) in 1960. It would directly contradict Congress’ intent to now treat the failure to consular process as a significant adverse factor.

The current language of INA §245(a), which allows those “inspected and admitted or paroled” to adjust their status, came into effect as the result of statutory amendments in 1958 and 1960. These amendments were the result of efforts by President Eisenhower, Congressman Walter of Pennsylvania, and others in Congress who wanted to reduce restrictions on immigration. *See, e.g.*, Special Message to Congress on Immigration, H.Doc. 360 (March 7, 1960) (a letter from Eisenhower urging the “liberalization of some of our existing restrictions upon immigration” through the doubling of quotas and heightened admission of refugees).

Specifically, Congress sought to rectify the preexamination process that was in effect from 1952 until 1958. Through this process, any immigrant present in the U.S. who was eligible for adjustment of status, but who was no longer in valid immigration status, had to obtain an immigrant visa at a U.S. post abroad to obtain permanent residence. At that time, INA §245(a) allowed adjustment of status only to aliens who possessed valid nonimmigrant status at the time of their application. In order to process the immigrant visa application at a consular post, an immigrant residing in the U.S. would have to apply to the INS for preexamination and voluntary departure in order to insure that he would be admitted to the U.S. once he obtained an immigrant visa. Then he would have to leave the U.S. and consular process, usually in Canada. The only way to avoid this costly bureaucratic process was through a private Congressional bill, which was disfavored in Congress due to the number of such bills introduced and the burden it placed on Congress. *See, generally*, H.R. Jud. Comm., Rpt. 85-2133 (Aug. 21, 1958) (reprinted in 1960 U.S.C.C.A.N. 3135).

This process was burdensome on the U.S. Embassies, as the majority of all immigrants were forced to consular process in order to obtain permanent residence. It was also burdensome on Congress, as it was forced to process all the private bills from immigrants who were unable or unwilling to consular process.

The first change to this process was in 1958, when Congress deleted language in §245(a) that required nonimmigrants to be in lawful status when applying for adjustment of status. Pub.L.No. 85-700, 72 Stat. 699 (Aug. 21, 1958). However, in late 1959, the Attorney General indicated a desire to revert to the old preexamination procedure in spite of the 1958 amendment. 41 Op.Atty.Gen. No. 77 (Nov. 20, 1959). Subsequently, Congress decided to express even more clearly its intent to allow parolees and other inspected immigrants to adjust their status and not have to undergo the preexamination process. Sen. Rpt. 86-1651 (June 22, 1960) (reprinted in 1960 U.S.C.C.A.N. 3124, 3137).

In 1960, Congress expanded §245(a) through a joint resolution. Pub.L.No. 86-648, 74 Stat. 505 (July 14, 1960). This new amendment allowed adjustment of status for not just those admitted in nonimmigrant status, but also those who were paroled into the U.S. Congress clearly expressed its purpose for allowing parolees to adjust status in Senate Report 86-1651, in which it stated that the purpose of this joint resolution was to broaden the existing procedure for the adjustment of the status of a nonimmigrant to that of the status of an alien lawfully admitted for

permanent residence to include all aliens (other than crewman) who have been inspected at the time of their entry into the United States or who have been paroled into the United States. Sen. Rpt. 86-1651 (reprinted in 1960 U.S.C.C.A.N. at 3124-3125). In the same amendment, Congress explicitly barred alien crewmen from adjustment of status, establishing that when it intended to restrict adjustment of status, it did so explicitly. Pub.L.No. 86-648.

The circuit court decisions cited in these interim regulations acknowledged this legislative history in overturning 8 C.F.R. §245.1(c)(8). For example, in *Succar v. Ashcroft*, the First Circuit observed:

In changing the system, Congress sought to ... eliminate the burden on inspected and admitted or paroled aliens and their American relatives of having to leave the United States and apply from a consular office abroad ... There is some evidence in the legislative history that Congress wished also to alleviate the burden imposed on consular offices to process applications for adjustment of status.

394 F.3d 8, 33-34 (1st Cir. 2005). *See also Bona v. Gonzales*, 425 F.3d 663, 669 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 119 (3d Cir. 2005).

When Congress passed the current language of INA §245(a) into law, it clearly sought to encourage immigrants to adjust their status in the U.S. and decrease the large numbers of immigrants forced to consular process. The cases cited by DHS and DOJ in the proposed regulation confirm this reading of the statute. Elevating the failure to consular process to a “significant adverse factor” in the exercise of discretion contradicts the clear intent of Congress to relieve the burden on the consulates, the immigrant, and the immigrant’s family caused by consular processing. As the First Circuit noted, “Congress clearly evaluated the administrative inconvenience to the INS of the expanded category of those eligible to apply for adjustment of status and nonetheless altered the prior procedure [of preexamination and consular processing].” *Succar*, 394 F.3d at 34. DOJ and DHS must follow the will of Congress and not make the failure to consular process a significant adverse factor.

4. Creating A Presumption Against Adjustment Of Status Or Elevating Failure To Consular Process To A Significant Adverse Factor Results In A Failure To Exercise Discretion In Violation Of INA § 245(a).

DHS and DOJ suggest that the failure to consular process, or alleged preconceived intent, should be elevated to a significant adverse factor in the exercise of discretion. It also suggests imposing a presumption against arriving aliens who seek to adjust status. 71 Fed. Reg. at 27588-89. Both of these suggestions would result in a failure to exercise discretion, in violation of INA §245(a).

It is elementary that adjustment of status under INA §245(a) is based on discretion. *Matter of Arai*, 13 I&N Dec. 494, 495-496 (BIA 1970). *See also* INA §245(a) (“the status of an

alien who was inspected and admitted or paroled into the U.S. ... may be adjusted by the Attorney General, *in his discretion* and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence”). In exercising discretion, DHS or DOJ is required to balance equities, such as family ties, length of residence in the U.S., and hardship with any adverse factors, such as criminal history or preconceived intent. *Id.* See also *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) (exercising discretion in the context of a waiver of excludability under INA §212(c)). The agencies have competently undertaken its balancing duties for many years. In cases in which they have found that preconceived intent outweighed equities in a given case, they have denied adjustment of status. See, e.g., *Jain v. INS*, 612 F.2d 683, 688 (2d Cir. 1979). In other cases, they have determined that equities overcome the existence of preconceived intent, and have granted discretionary relief. *Matter of Battista*, 19 I&N Dec. 484, 486 (1987).

It is also elementary that the exercise of discretion requires an individualized analysis of a given case. As the Supreme Court held in *Hintopolous v. Shaughnessy*, “the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case.” 353 U.S. 72, 75-76 (1957). (Upholding denial of suspension of deportation). The Court also noted in that case, “discretion must be exercised even though statutory prerequisites have been met.” *Id.* at 77. See also *Marin*, 16 I&N Dec. at 584 (“Each case must be judged on its own merits”).

Finally, an agency must look at the individual merits of a case and make a reasoned decision that demonstrates that it has balanced equities and adverse factors. As the Supreme Court held in *Chenery v. Heckler*, the basis for an administrative decision “must be set forth with such clarity as to be understandable.” 332 U.S. 194, 196 (1947). Clarity is necessary for a reviewing court to determine whether discretion was exercised. See also *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962) (overturning discretionary decision due to a lack of a reasoned analysis).

The present regulation proposes creating a presumption against adjustment of status for arriving aliens, or elevating the failure to consular process to a “significant adverse factor.” 71 Fed. Reg. at 27588-89. It reasons that preconceived intent is already an adverse factor that is considered in the exercise of discretion. *Id.* at 27588. It also suggests – although without any foundation or evidence – that by failing to consular process, arriving aliens display a preconceived immigrant intent when they later apply for adjustment of status. *Id.* at 27589.

By creating a negative presumption, or creating a “significant adverse factor,” the agencies would remove from consideration the individual circumstances of a given case, thereby depriving arriving aliens of a discretionary decision. Instead of balancing all factors, as required by case law, they essentially make the failure to consular process the only issue to consider. As a result, the agencies fail to exercise their discretion. Simply, if a person is an arriving alien, he would be automatically subject to a negative presumption or heightened burden of proof without consideration of his individual circumstances, and the agencies would not be free to conduct an individualized analysis of the case, as they are required to do in exercising discretion. As such,

the present regulation's proposed scheme would prevent the balancing inherent in the exercise of discretion.

Moreover, *Lopez v. Davis*, 531 U.S. 230 (2001), does not authorize this broad exercise of regulatory discretion. The Courts of Appeals that considered *Lopez* in this context explicitly made clear that *Lopez* does not authorize a regulatory exercise of discretion that conflicts with Congress' clear intent. See, e.g., *Zheng*, 422 F.3d at 113 (Noting that "*Lopez* is a double-edged sword, for it does *not* stand for the proposition that the statutory grant of discretion to the Attorney General renders his exercise of that discretion functionally unreviewable"); *Succar*, 394 F.3d at 29 (*Lopez* is inapplicable where, as here in the adjustment context, "Congress made numerous and explicit policy choices"). Whether ruling at step one or two of *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), these courts found that a categorical restriction on adjustment eligibility violated Congress' clear intent. As *Succar* explained:

because eligibility is explicit in this statute, the Attorney General cannot categorically refuse to exercise discretion favorably for classes deemed eligible by the statute. The agency cannot get in through the back door of the relief stage what it cannot do at the eligibility stage.

Succar, 394 F.3d at 29 n. 28. The proposed restrictions on the exercise of discretion contained in this rule are an attempt to repackage the categorical restriction on eligibility represented by 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). As such, these restrictions will run afoul of *Succar*, *Zheng*, *Bona* and *Scheerer*. Instituting such restrictions will lead to more litigation, in direct contradiction of the stated goal of this rule.

DHS and DOJ also fail to submit any evidence that arriving aliens as a group deliberately flaunt the U.S. immigration laws by avoiding consular processing, so as to necessitate added restrictions on their adjustment of status. Many arriving aliens enter the U.S. to seek asylum, and later become eligible for adjustment of status. Returning to their home country to consular process would place their lives in danger. They also may be subject to a three- or ten-year bar to reentry under INA §212(a)(9)(B), eliminating their ability to consular process. Consular processing is simply not an option for many arriving aliens. They should not be penalized for failing to exercise an impossible option.

Additionally, Congress has already spoken on the issue of preconceived intent. In 1960, it removed the language from the statute that prohibited those with preconceived intent from adjusting status in the U.S. See, e.g., *Jain*, 612 F.2d at 688, *Choe v. INS*, 11 F.3d 925, 929 (9th Cir. 1993). It also made misrepresentation a ground of inadmissibility. INA §212(a)(6)(C). This ground of inadmissibility can be waived in the exercise of discretion if an immigrant can prove that a qualifying family member would suffer extreme hardship if his admission were refused. INA §212(i).

Congress has explicitly told DHS and DOJ how it wishes to deal with immigrants who enter the U.S. with the wrong intent. The agencies can consider preconceived intent in their exercise of discretion, and they can also find that an immigrant is inadmissible, if that preconceived intent rises to the level of misrepresentation. But they cannot turn preconceived intent into a basis for a blanket bar to adjustment of status, as Congress already explicitly abolished that practice in 1960 when it amended the statute. An agency may not do by rule or policy what Congress explicitly said it could not do in the statute. *Choe*, 11 F.3d at 929.

Additionally, by creating further restrictions on arriving aliens, DHS and DOJ seek to impermissibly count twice an immigrant's preconceived intent. This practice promises absurd results. For example, the agencies could find an immigrant inadmissible for misrepresentation under INA §212(a)(6)(C), grant a waiver under INA §212(i), but then find them ineligible for adjustment of status due to preconceived intent, even though it had already been waived. This practice would disregard Congress' careful evaluation of the policy issues surrounding preconceived intent, and violate its resulting statutory structure.

In conclusion, the proposals set out in the Federal Register seek to eliminate the balancing duties inherent in the exercise of discretion. This violates INA §245(a) as well as case law from the Supreme Court, Circuit Courts, and Board of Immigration Appeals. We urge DHS and DOJ to decline to implement any further restrictions on arriving aliens.

5. It Is Unnecessary To Extend By Regulation The Standard Of “Unusual And Outstanding Countervailing Equities” To Adjustment For Arriving Aliens.

DHS and DOJ do not need to promulgate additional rules for arriving aliens who seek adjustment of status. There is a well-settled body of case law that applies to all adjustment applicants. This precedent case law allows an adjudicator to deny applications as a matter of discretion based upon adverse factors which are not offset by significant equities. The lead case that elucidates this standard is *Matter of Arai*, 13 I&N 494 (BIA 1970).

The additional rulemaking provisions being considered in the interim regulation suggest (erroneously) implicitly that all “arriving aliens” intend to circumvent the normal visa process at U.S. Consulates abroad. In an obvious effort to punish such entries, the proposed regulation seeks to formalize non-statutory presumptions and to impose the higher standard of “unusual and outstanding countervailing equities” to adjustment applicants placed in removal proceedings. To justify the proposed amendments, the additional rulemaking provisions cite various Circuit Court, District Court and BIA decisions where adverse factors were present. The justification for the unnecessary provisions is entirely misplaced.

The 1996 and 1997 amendments to the INA did not include any change to the statutory requirements for adjustment of status under section 245(a). Specifically, Congress did not impose a heightened standard of scrutiny on adjustment applicants nor did Congress seek to impose arbitrary requirements for approval of discretionary relief in cases where adverse factors

may exist. In contrast, Congress did amend the statutory requirement for some forms of relief from removal by heightening the standard of review, narrowing the category of eligibility, and broadening the burden of proof.⁴ The amendments to section 240A for cancellation applicants is a clear example of Congressional intent to heighten the burden of proof required for an alien to prevail in such cases. However, imposing a heightened standard of scrutiny by regulation on arriving aliens in removal proceedings is a radical departure from case law, was not intended by Congress, and will constitute unwarranted *ultra vires* action by the Secretary and the Attorney General.

Existing case law does not support the proposition that a showing of “unusual or outstanding equities” is *required* for discretionary approval of an adjustment application where adverse factors exist. Rather, the heightened standard of “unusual and outstanding equities” has been applied in cases that involve aliens with criminal convictions. *See U.S. v. Interian-Mata*, 363 F.Supp.2d 1246, 1248 (S.D. CA 2005) (“It is well settled that an applicant for section 212(c) relief who has a serious criminal history must demonstrate unusual or outstanding equities in order to receive relief.” (citing *Gonzalez-Valerio*, 342 F.3d 1051, 1056-1057 (9th Cir. 2003))). *See also Akinyemi v. INS*, 969 F.2d 285 (7th Cir. 1992); *Ayala-Chavez v. INS*, 944 F.2d 638 (9th Cir. 1991); *Matter of Edwards*, 20 I&N Dec. 191 (BIA 1990); *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). Extension of this standard to arriving aliens is unwarranted and unsupported by case law and statutory history.

In *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970), a case cited in the rulemaking provisions, the BIA found no adverse factors that required denial of the Respondent’s adjustment application. In fact, the BIA specifically stated, “[I]t is difficult and probably inadvisable to set up restrictive guide lines for the exercise of discretion. Problems which may arise in applications for adjustment must of necessity be resolved on an individual basis.” *Id.* at 495. Although the BIA mentioned that it may be necessary in some cases for an adjustment applicant to show unusual or outstanding equities to overcome adverse factors, the Board did not hold that such equities are required to be shown nor did the Board set up any such standard of review for future cases.

Additional cases cited by the Secretary and Attorney General do indicate that a preconceived intent to circumvent the immigrant visa process can be an adverse factor in adjustment cases. *See Jain v. INS*, 612 F.2d 683 (2nd Cir. 1979); *Von Pervieux v. INS*, 572 F.2d 114 (3rd Cir. 1978); *Ameeriar v. INS*, 438 F.2d 1028 (3rd Cir. 1971); *Matter of Ibrahim*, 18 I&N

⁴ *See H.R. Conf. Rep. No. 104-828, 104th Congress, 2nd Sess. (1996)*. “Section 240A(b)(1) replaces the relief now available under INA section 244(a) (“suspension of deportation”), but limits the categories of illegal aliens eligible for such relief and the circumstances under which it may be granted. The managers have deliberately changed the required showing of hardship from ‘extreme hardship’ to ‘exceptional and extremely unusual hardship’ to emphasize that the alien must provide evidence of harm to his spouse, parent, or child substantially beyond that which ordinarily would be expected to result from the alien’s deportation.”

Dec. 55 (BIA 1981). However, those cases do not support the proposition that the legal standard for relief should be heightened beyond any statutory requirement in the INA.

While discretionary decisions must be made with consideration of all factors in the case, the standard of unusual and outstanding equities has only been required as a matter of law in criminal alien cases. Rather than deviate from case law and impose standards not existent in the relevant statute, the Secretary and Attorney General should allow Immigration Judges to continue to balance the equities in cases where discretion must be exercised. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

6. The Termination And/Or Revocation Of Parole Status Is Not An Adverse Factor To Be Considered In An Adjustment Application.

The fact that an applicant's parole has been terminated or revoked should not be formalized in the regulation or otherwise considered as an adverse factor. First, INA § 245(a) is clearly written in the past tense. An individual is eligible for adjustment if he "was inspected and admitted or paroled." 8 U.S.C. § 1255(a). There is absolutely no requirement in the statute that the individual maintain the status of a parolee up until the time of adjustment. *Bona*, 425 F.3d at 668 n.5 ("under the plain terms of section 1255(a), [Bona] would be eligible for adjustment of status regardless of whether her parole status ended or was revoked at a later time); *see also Zheng v. Gonzales*, 422 F.3d at 121 (noting "some force" to this argument).

Similarly, because Congress required only that an individual be admitted, there is no requirement in § 245(a) that the individual maintain the original admission status at the time of adjustment. *See Tibke v. INS*, 335 F.2d 42, 45 (2d Cir. 1964) (noting that the adjustment of status statute as amended eliminated the requirement that the non-citizen's original status be maintained in order to be eligible for relief).

Congress intended that an individual who had been paroled at entry remain eligible for adjustment even if that person had lost parole status, so long as none of the statutory bars to adjustment applied. The loss of parole, in and of itself, is not an adverse factor that should weigh against a favorable exercise of discretion. This is particularly true since, under the regulations, parole is automatically terminated when a charging document is served on the parolee. 8 C.F.R. § 212.5(e)(2)(i). As several courts have now held, Congress did not intend removal proceedings to be a basis for ineligibility for adjustment for parolees. *See, e.g., Succar*, 394 F.3d at 25; *Bona*, 425 F.3d at 670; *Scheerer*, 445 F.3d at ___, 2006 U.S. App. LEXIS 9278 at *27); *Zheng*, 422 F.3d at 118. Since these courts have held that the majority of parolees are in proceedings, then, under this regulation, the majority of parolees will have had their parole terminated when proceedings were initiated. As such, the automatic termination of parole due to the initiation of removal proceedings is not an adverse event that should weigh against the non-citizen. Any such rule would violate INA § 245(a).

Treating parole revocation/termination as a “significant adverse factor” incorrectly focuses the discretionary decision on the agency’s action rather than the underlying facts that gave rise to the revocation/termination – facts that may or may not make the non-citizen any less deserving of discretion. A generalized rule treating the revocation or termination of parole as an adverse factor for the exercise of discretion in adjustment applications is inappropriate and unnecessary.

7. Regulatory Standards For Granting Continuances Should *Not* Be Amended To Deprive Parolees Of A Meaningful Adjustment Of Status Application Procedure.

The Secretary of Homeland Security and the Attorney General seek comments on whether the regulations should be amended to mandate, presume, or encourage the denial of continuances for arriving aliens in removal proceedings – in order for them to obtain consideration of an adjustment of status application filed with USCIS pursuant to new interim regulation 8 C.F.R. § 245.2 (a)(1) (May 12, 2006). In particular, comments are sought on further regulations providing that continuance of removal proceedings for such aliens:

- a) will not be required;
- b) will be presumptively denied unless the alien rebuts the presumption; or
- c) will be granted in limited circumstances.

The effect of such amendments could be to deny paroled aliens the opportunity to have their USCIS adjustment applications actually considered by any authority, because the interim regulations strip the immigration courts of jurisdiction to consider their applications (8 C.F.R. 1245.2(a)(1)) and the USCIS adjudication of their applications cannot be completed within the removal time frame. *See* processing times charts indicating I-485 adjudications in some cities are at least six months (<https://egov.immigration.gov>); and the growing number of mandamus cases filed because of significantly longer delays, e.g. *Kim v. Ashcroft*, 340 F.Supp.2d 384 (S.D.N.Y. 2004) (42 months); *Castillo v. Ridge*, 445 F.3d 1057 (8th Cir. 2006) (eight years).

Once removed, an alien cannot adjust status, because such relief by its nature exists only within the U.S.⁵ Thus, the “application” procedure offered to parolees is reduced to a mere right to submit an application *form*, without any concurrent opportunity to have the claim actually adjudicated in a manner that might result in relief. This is tantamount to providing no application at all.

A. Denying any forum for paroled aliens to adjust status violates INA § 245(a), which makes paroled aliens eligible for such relief and therefore

⁵ Of course, a final order of removal will not preclude CIS from adjudicating the adjustment application, so long as the individual has not physically been removed.

conflicts with the rulings of the federal courts that struck down the prior regulation.

Categorical denial by regulation of continuances to parolees, directly or by presumption or inflated standards, when the regulations provide no other forum for parolees to pursue an adjustment of status application, effectively strips parolees of their adjustment of status eligibility as surely as the invalidated regulation that made arriving aliens “ineligible to apply.” See former 8 C.F.R. 245.1(c)(8) and 1245.1(c)(8). This would contravene the explicit holdings of the four courts that struck down the prior regulation because it conflicted with the INA:

- In *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), the court found that although Congress gave the Attorney General discretion to grant or deny adjustment of status, it did not give him discretion to determine who is eligible to apply, *id.* At 26; excluding a statutorily protected class from eligibility amounts to a failure to exercise discretion. *Id.* at note 23 (“the Attorney General must actually exercise his discretion to determine whether *the paroled individuals* that Congress had deemed eligible should be granted this relief”) (emphasis supplied).
- In *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), the court ruled that the fact that the statute gave the Attorney General authority to regulate eligibility, that fact “does not give him free rein to issue any eligibility regulations that he chooses” *id.* at 116. That court found that denying “any forum” for most paroled aliens to apply for adjustment of status conflicted with the language, origin and purpose of the statute. *Id.* at 30, note 16 (emphasis in original).
- In *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005), the court held that excluding a category of statutorily eligible aliens from the ability to apply “in any forum” goes beyond simply regulating the manner in which such applications are made or the discretionary decision to grant such relief. *Id.* at 670. The denial of any opportunity to apply, in contrast to denial of a second bite at the apple (i.e., an opportunity to *renew* a previously adjudicated application) invalidated the former arriving alien regulation. *Id.* at note 8.
- In *Scheerer v. U.S. Atty. Gen.*, 445 F.3d 1311 (11th Cir. 2006), the court followed the Third Circuit’s ruling in *Zheng*, *supra*, and determined that even though the statute may allow for “some regulatory eligibility standards”, this authority does not extend to a regulation that “essentially” reverses the eligibility structure set by Congress.

B. A bar, a presumption or imposition of restrictive standards against continuances of removal hearings for paroled aliens who must apply for adjustment before USCIS denies parolees a meaningful adjustment of status application procedure.

Because the interim regulation precludes immigration court jurisdiction over an adjustment of status application, and the USCIS adjudication process cannot be assured within the removal hearing time frame, the conversion of parolees' statutory right to apply for adjustment of status into a right to apply for adjustment before the USCIS, without a concurrent right to a continuance of the removal proceeding, renders the "application" process offered to parolees by the interim regulation ineffective to actually obtain any relief.

Rules that render procedural rights ineffective or meaningless violate Fifth Amendment due process. *Windsor v. McVeigh*, 93 U.S. 274 (1876) (addressing the "sham" of providing a party with formal notice of a proceeding, so as to suggest that he had an opportunity to be heard but then refusing him further participation); *Gebremichael v. INS*, 10 F.3d 28, 39 (1st Cir., 1993) (the Board violated due process when it precluded consideration of refutation of judicially noticed facts by relying on more noticed facts); *Elchediak v. Heckler*, 750 F.2d 892 (11th Cir. 1985) (similar preclusive effect of *res judicata* rule). Since due process may attach to the statutory and regulatory right to file an application, see *HRC v. Smith*, 676 F.2d 1038 (11th Cir. 1982), a sham adjustment of status application process that permits the technical filing of a form but precludes bona fide consideration and adjudication of the claim would violate due process. Courts frown upon such preclusive procedural rules even where constitutional due process is not required. *Degan v. United States*, 517 U.S. 820 (1996). See also *Goncalves v. INS*, 6 F.3d 830, 835 (1st Cir. 1993) (Board could not by regulation provide a procedure (reopening) that "its cases then deny" based on illogical premises).

The "application" provided for under INA §245 must mean not just the right to file a form but the right to have the predicate adjustment claim considered. See *U.S. ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). And it must mean the same for parolees as for admitted aliens. As the Supreme Court has made clear, a statute may not mean different things depending on whom it is applied to. *Clark v. Martinez*, 543 U.S. 371 (2005). Subjecting parolees to sham application procedures, when other statutorily eligible groups are provided a meaningful one, would be arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law. See *Davila-Bardales v. INS*, 27 F.3d 1 (1st Cir. 1994); *Shin v. INS*, 750 F.2d 122 (D.C. Cir. 1984); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986); *Contractor's Transp. Corp. V U.S.*, 537 F.2d 1160 (4th Cir. 1976); *Bracco Diagnostics v. Shalala*, 963 F.Supp. 20 (D.D.C. 1997).

C. Continuances are a poor administrative mechanism to permit the processing of USCIS adjustment applications for parolees.

Whether continuances are made available to parolees on a discretionary or mandatory basis, the continuance process does not promote judicial economy because it requires the continued removal cases to be periodically re-calendared, keeping these cases active on EOIR dockets and taking court time away from EOIR matters that actually require a hearing. An administrative closure procedure, such as that employed for ABC class members in the NACARA context, see 8 C.F.R. 240.62(b), would better serve administrative economy and

efficiency, while providing a meaningful way for parolees to have their applications considered by USCIS.

Moreover, given that sole jurisdiction over parolees' adjustment applications under the interim regulation is vested with USCIS, the interests of uniformity dictate that USCIS adjudicate all the applications – applying discretion on the merits – rather than only those applications which pass an EOIR discretionary continuance process. Using its expertise gained from dealing comprehensively with all the cases, USCIS might well grant a parolee's adjustment of status application on the same facts on which EOIR closes the continuance gate.

Respectfully submitted,

AMERICAN IMMIGRATION LAW FOUNDATION

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

By: Mary A. Kenney
Senior Attorney, AILF