



Practice Advisory¹

ARRIVING NONCITIZENS AND ADJUSTMENT OF STATUS

April 25, 2022

I. Introduction

Prior to 2006, regulations barred a noncitizen from adjusting to permanent resident status if he or she was (1) an “arriving [noncitizen]”²; and (2) in removal proceedings. 8 C.F.R. §§ 245.1(c)(8), 1245.1(c)(8) (2005). Four courts of appeals struck down this regulatory bar, holding that it violated the adjustment of status statute, 8 U.S.C. § 1255(a), reasoning that arriving noncitizens in removal proceedings had to be afforded a forum within which to apply for adjustment.³ In response to these decisions, in 2006, United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR) rescinded the regulatory bar on adjustment and replaced it with interim regulations which, seventeen years later, remain in effect without ever being finalized.⁴ With one limited exception, these regulations give USCIS sole jurisdiction over the adjustment applications of arriving noncitizens in removal proceedings.

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² The statute and regulations use the term “arriving alien.” Because “using the term ‘alien’ to refer to other human beings is offensive and demeaning,” *Flores v. USCIS*, 718 F.3d 548, 551 n.1 (6th Cir. 2013), this advisory replaces this term with the term “arriving noncitizen.” Thus, all references to “arriving noncitizens” are references to the statutory and regulatory term “arriving aliens.”

³ See *Scheerer v. Attorney General*, 445 F.3d 1311, 1318-22 (11th Cir. 2006); *Bona v. Gonzales*, 425 F.3d 663, 667-70 (9th Cir. 2005); *Zheng v. Gonzales*, 422 F.3d 98, 111-20 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8, 20-36 (1st Cir. 2005); but see *Momin v. Gonzales*, 447 F.3d 447, 452-61 (5th Cir. 2006), *vacated and remanded*, 462 F.3d 497 (5th Cir. 2006); *Mouelle v. Gonzales*, 416 F.3d 923, 926-30 (8th Cir. 2006), *vacated and remanded*, 548 U.S. 901 (2006).

⁴ 8 C.F.R. §§ 245.2(a)(1) (USCIS) and 1245.2(a)(1) (EOIR); see also *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, 27587 (May 12, 2006).

The regulations provide an avenue for arriving noncitizens who (1) have been granted parole, (2) are in removal proceedings, and (3) are otherwise eligible, to adjust their status to that of a lawful permanent resident before USCIS.⁵ However, because the regulations do not require an immigration judge to dismiss, continue, or administratively close removal proceedings while the adjustment application is pending, these applicants will be at risk of deportation if they receive a final removal order before USCIS adjudicates their adjustment application. Similarly, arriving noncitizens who are under an old, unexecuted final order of removal are at risk of deportation notwithstanding USCIS' authority to decide their adjustment applications—and, if they are eligible, approve them. This practice advisory identifies who falls under the classification of “arriving noncitizens,” discusses the regulations delineating USCIS vs. EOIR jurisdiction over adjustment applications of arriving noncitizens in removal proceedings and suggests strategies to facilitate the adjustment of status of eligible parolees in removal proceedings before they are removed.

II. Arriving Noncitizens

Who is an arriving noncitizen?

The regulations define an “arriving [noncitizen]” as:

[A]n applicant for admission coming or attempting to come into the United States at a port-of-entry, or [a noncitizen] seeking transit through the United States at a port-of-entry, or [a noncitizen] interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving [noncitizen] remains an arriving [noncitizen] even if paroled pursuant to section 212(d)(5) of the Act [8 U.S.C. § 1182], and even after such parole is terminated or revoked.⁶

Most commonly, arriving noncitizens are those who seek admission at a port-of-entry and whom immigration officials allow to enter by means of parole but do not “admit.” As used here, the term “admission” is the “lawful entry of [a noncitizen] into the United States after inspection and authorization by an immigration officer.”⁷

Noncitizens granted parole at a port-of-entry under 8 U.S.C. § 1182(d)(5) fall within the definition of an “arriving [noncitizen]” because immigration officials permit them to enter the country but do not admit them.⁸ Moreover, a grant of parole under § 1182(d)(5) satisfies the

⁵ For adjustment of status eligibility requirements and bars, *see generally* 8 U.S.C. § 1255(a) *et seq.*; 8 C.F.R. § 245.1.

⁶ 8 C.F.R. §§ 1.2, 1001.1(q).

⁷ 8 U.S.C. § 1101(a)(13)(A).

⁸ 8 U.S.C. § 1182(d)(A) permits DHS officers to parole “into the United States” for urgent humanitarian reasons or where there is a significant public benefit any noncitizen who is seeking admission. The provision specifies that the “parole of such [noncitizen] shall not be regarded as an admission.” *Id.*; *see also* 8 U.S.C. § 1101(a)(13)(B) (specifying that a noncitizen who is paroled is not considered “admitted”).

requirement in 8 U.S.C. § 1255(a) that an adjustment applicant have been “inspected and admitted or paroled.” Generally, returning lawful permanent residents (LPR) are not considered to be seeking admission and thus are not classified as arriving noncitizens, unless they meet one of six statutory exceptions in 8 U.S.C. § 1101(a)(13)(C).⁹

Are the terms “arriving [noncitizens]” and “applicants for admission” the same?

While the term “applicant for admission” is not defined in the Immigration and Nationality Act (INA), the statute broadly identifies those who fall within the term’s parameters as any noncitizen who:

is present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including a[] [noncitizen] who is brought to the United States after having been interdicted in international or United States waters).¹⁰

As such, someone classified as an “arriving [noncitizen]” also is an applicant for admission. However, the latter category is broader than the former so not all applicants for admission are arriving noncitizens. That is, while individuals who enter the United States without inspection are considered applicants for admission, they are not arriving noncitizens as they did not seek admission at a port-of-entry. A noncitizen who was admitted after inspection is neither an applicant for admission nor an arriving noncitizen, even if that person subsequently falls out of status.

How can a practitioner determine if a client is an arriving noncitizen?

Whether a noncitizen is classified as arriving affects whether DHS can charge the individual as inadmissible under 8 U.S.C. § 1182 or deportable under 8 U.S.C. § 1227, which agency has

⁹ That statute specifies that a returning LPR “shall not be regarded as seeking admission” unless the individual has: abandoned or relinquished their status; been outside the United States for a continuous period in excess of 180 days; engaged in illegal activity after departure; departed the country while under certain legal processes; committed an offense under 8 U.S.C. § 1182(a)(2) for which certain relief has not been granted; or attempts to enter the country not at a port-of-entry or without inspection. *See also Matter of Pena*, 26 I&N Dec. 613 (BIA 2015) (holding that a returning LPR cannot be charged as arriving on the basis that LPR status was obtained unlawfully as that is not one of the six statutory exceptions); *but see Kim v. Holder*, 560 F.3d 833, 838 (8th Cir. 2009) (finding that a noncitizen who obtained LPR status fraudulently was properly treated as an arriving noncitizen charged with inadmissibility).

¹⁰ 8 U.S.C. § 1225(a)(1); *see also* 8 C.F.R. § 235.1(f)(2) (discussing noncitizens present without admission or parole and those who enter without inspection), (f)(3) (explaining that noncitizens interdicted at sea are applicants for admission); *but see* 8 C.F.R. § 235.1(f)(4) (clarifying that a stowaway is not an applicant for admission).

jurisdiction over any adjustment application, and the person’s options for release from immigration custody.¹¹

For clients in removal proceedings, DHS may allege that a noncitizen is an arriving noncitizen by including that allegation on the Notice to Appear (NTA). Specifically, the top of the NTA contains a section in which the DHS officer must elect whether the person is: alleged to be an “arriving [noncitizen],” present in the United States without being admitted or paroled, or someone who previously was admitted.

A practitioner can have a client provide written or oral evidence about to the manner of their entry to the United States and, thus, can confirm or refute an arriving noncitizen allegation. If the client’s entry was not through a port-of-entry, then an arriving noncitizen allegation on the NTA is incorrect. In a case in which a client relates facts indicating that the allegation is incorrect, a practitioner can contest the allegation just as they would contest a factual allegation or charge of inadmissibility or deportability. If the immigration judge determines that the individual is not an arriving noncitizen, the judge will have jurisdiction over any adjustment application filed in removal proceedings.¹²

III. Agency Jurisdiction over Adjustment Applications

How do the regulations assign jurisdiction between USCIS and EOIR over the adjustment applications of arriving noncitizens in removal proceedings?

The regulations detail which agency (USCIS or EOIR) has jurisdiction over an adjustment application filed by an arriving noncitizen who is in removal proceedings. With respect to USCIS, 8 C.F.R. § 245.2(a)(1) specifies that it has jurisdiction over the adjustment application of any noncitizen “unless the immigration judge has jurisdiction to adjudicate the application under 8 C.F.R. § 1245.2(a)(1).” Thus, USCIS has jurisdiction over *all* adjustment applications *except* those over which an immigration judge has jurisdiction.

In turn, 8 C.F.R. § 1245.2(a)(1) states that an immigration judge does not have jurisdiction over an adjustment application of an “arriving [noncitizen]” in removal proceedings, with one exception. Under this exception, an immigration judge has jurisdiction over the adjustment application of an arriving noncitizen in removal proceedings if:

- the individual properly filed an adjustment application with USCIS while in the United States;

¹¹ Immigration judges lack authority to conduct bond hearings for arriving noncitizens in removal proceedings. *See* 8 C.F.R. §§ 236.1(c)(11)(i); 1003.19(h)(2)(i)(B). Thus, individuals who are properly classified as arriving only are eligible only for parole. *See generally* 8 C.F.R. § 212.5. There is ongoing litigation on the related issue concerning whether individuals who enter without inspection and subsequently demonstrate a credible fear of persecution are entitled to a bond hearing, see [Padilla v. ICE](#). The custody issue is beyond the scope of this advisory.

¹² 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

- the individual “departed from and returned to the United States pursuant to a grant of advance parole to pursue the previously filed” adjustment application;
- the adjustment application “was denied by USCIS;” and
- DHS placed the parolee in proceedings “either upon the [individual’s] return to the United States pursuant to the advance parole or after USCIS denied the [adjustment] application.”¹³

The regulations address only the procedural question of the jurisdiction of the two agencies over adjustment applications; they do not impact any substantive eligibility issue. Consequently, USCIS adjudicators must apply the same standards to the adjustment applications of paroled arriving noncitizens as they would to the adjustment application of anyone else.¹⁴

These regulations were adopted in response to decisions of several courts of appeals which held that, consistent with the statutory scheme, an arriving noncitizen in removal proceedings must be afforded some forum in which to apply for adjustment of status.¹⁵ In deciding upon this forum, USCIS and EOIR adopted the structure that existed prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. 104–208, 110 Stat. 3009-546. At that time, there were two major types of proceedings to remove a noncitizen from the United States: exclusion proceedings, which were brought against individuals who had never made an entry into the United States; and deportation proceedings, brought against individuals who had entered the United States. Under this former model, arriving noncitizens were subject to exclusion proceedings. A noncitizen in exclusion proceedings was not barred from applying for adjustment of status. Generally, however, only the former INS had jurisdiction over the adjustment applications of individuals in exclusion proceedings; immigration judges did not have jurisdiction over these applications, with one limited exception.¹⁶ Moreover, an individual remained eligible to adjust even when he or she had a final order of exclusion, provided the order had not been executed.¹⁷ The current regulations have been upheld by several courts.¹⁸

¹³ 8 C.F.R. § 1245.2(a)(1)(ii).

¹⁴ See *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, 27590 (May 12, 2006).

¹⁵ See note 3, *supra*, for citations to these cases.

¹⁶ *Matter of Castro*, 21 I&N Dec. 379, 380 (BIA 1996). The current exception allowing for immigration judge jurisdiction parallels the exception that existed in exclusion proceedings.

¹⁷ See *Matter of C-H-*, 9 I&N Dec. 265, 266 (Reg. Comm’r 1961) (holding that a noncitizen is eligible to adjust notwithstanding an exclusion order where she has been inspected and paroled and is otherwise eligible); see also *Matter of Garcia*, 16 I&N Dec. 653, 655 (BIA 1978) (noting that INS had a policy of “refraining from either deporting or instituting proceedings against the beneficiary of a prima facie approvable visa petition if approval of the visa petition would make the beneficiary immediately eligible for adjustment of status”)

¹⁸ See, e.g., *Gazeli v. Sessions*, 856 F.3d 1101, 1108-09 (6th Cir. 2017); *Scheerer v. U.S. Att’y Gen.*, 513 F.3d 1244, 1249-52 (11th Cir. 2008); *Cardella v. Sessions*, 700 F. App’x. 712, 712-13 (9th Cir. 2017); *Osazee v. Holder*, 324 F. App’x. 338, 340 (5th Cir. 2009).

Does USCIS have jurisdiction to decide an adjustment application if the arriving noncitizen is under a final order of removal?

Yes, USCIS has jurisdiction over the adjustment application of an arriving noncitizen even when a removal order has become administratively final, as long as the order has not been executed—that is, as long as the individual has not departed, whether voluntarily or not, after the removal order was issued.¹⁹

Under 8 U.S.C. § 1255(a), a noncitizen must be admissible to the United States to adjust status. Significantly, as explained in a USCIS memorandum, “[t]he removal order, itself, does not make the [noncitizen] inadmissible until it is executed.”²⁰ Thus the removal order is not a bar to adjustment. However, practitioners still must consider whether the underlying ground upon which the removal order is based renders the noncitizen inadmissible and therefore ineligible for adjustment and, if it does, whether a waiver is available. For example, where the removal order is based on 8 U.S.C. § 1182(a)(7)—the inadmissibility ground for individuals who did not have a valid visa or other entry document at the time of admission—the adjustment itself will cure this inadmissibility. In *Matter of C-H-*, 9 I&N Dec. 265 (Reg. Comm’r 1961), the noncitizen was found inadmissible and ordered excluded because she was not in possession of a valid immigrant visa. Before the exclusion order was executed, she applied for adjustment of status with the former INS. In a precedent decision, the Regional Commissioner held that the exclusion order did not render her ineligible for adjustment. *Id.* at 266. Although she was inadmissible for lack of a valid visa at the time the exclusion order was issued, she subsequently became eligible for a visa (the basis for her adjustment application) and thus was no longer inadmissible on this ground. The reasoning of *Matter of C-H-* is equally applicable to a case involving a final order of removal rather than exclusion.

In contrast, a removal order issued in absentia will render the noncitizen ineligible for adjustment, unless the order was issued more than ten years ago. An in absentia order—if issued with proper notice—carries a ten-year bar to adjustment.²¹

¹⁹ See 8 U.S.C. § 1101(g) (specifying that a noncitizen who departs the United States while under an order of removal “shall be considered to have been deported or removed”).

²⁰ See USCIS Memorandum, “Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status” (Jan. 12, 2007), <https://www.aila.org/infonet/uscis-adjustment-by-arriving-aliens-in-removal> (“The removal order, itself, does not make the alien inadmissible until it is executed.”); *Matter of C-H-*, 9 I&N Dec. at 265; see also *Matter of Yauri*, 25 I&N Dec. 103, 106-107 (BIA 2009) (relying on statements by counsel for DHS and concluding that USCIS retains jurisdiction over the adjustment application of an arriving noncitizen even when there is a final order of removal).

²¹ 8 U.S.C. § 1229a(b)(7). In limited circumstances, an in absentia order of removal may be rescinded and opened. 8 U.S.C. § 1229a(b)(5)(C).

Finally, it is important to keep in mind that any noncitizen with a final order of removal is always at risk of being removed. As in all cases, the client and the attorney must evaluate this risk before the client decides whether to apply for adjustment.

IV. Advocacy Strategies

What strategies are there to prevent a removal order from being issued—and executed—before USCIS decides the adjustment application?

Under the regulations, the removal hearing and the adjustment application proceed on two independent tracks—the first under the jurisdiction of EOIR and the second, of USCIS. As a result, there is always the risk that a removal order will be issued and executed before USCIS decides the adjustment application. If the noncitizen is removed before the adjustment application is decided, he or she will have lost the opportunity to adjust.

Where an individual is currently in removal proceedings, he or she can ask the U.S. Immigration and Customs Enforcement (ICE) attorney to exercise prosecutorial discretion by joining a motion to dismiss or administratively close proceedings. The fact that the noncitizen may be eligible for adjustment of status is a factor that the ICE attorney should consider under DHS's most recent (as of April 2022) guidelines for the exercise of prosecutorial discretion.²²

Where the noncitizen is under a final order of removal, he or she can move to reopen the removal case, which, if granted, will eliminate the removal order. If reopening is granted, the noncitizen then should move to dismiss or administratively close the proceedings, to allow USCIS time to adjudicate the adjustment application. The time and number limits on a motion to reopen do not apply if all parties agree to the motion and file it jointly.²³

Consequently, as a practical matter, the most straightforward way to ensure that a client with a final order of removal remains within the United States until USCIS decides the adjustment application is to obtain the cooperation of DHS, if possible. This may involve asking DHS to join a motion to reopen or asking it to stay removal until after the adjustment application is decided.²⁴

Although the Board of Immigration Appeals (BIA) stated in *Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009), that reopening would generally not be granted to allow a noncitizen to pursue relief over which an immigration judge or the Board does not have jurisdiction, it may still be possible to convince either an immigration judge or the Board to grant this relief even in the absence of a joint motion.²⁵

²² See, e.g., Kerry E. Doyle, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (April 3, 2022), AILA Doc. No. 22040500, https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

²³ 8 C.F.R. §§ 1003.2(c)(3)(ii), 1003.23(b)(4)(iv).

²⁴ See *id.*; 8 C.F.R. §§ 241.6, 1241.6.

²⁵ See, e.g., *Dirav Dolatbhai Patel*, AXXX XX3 819, 2017 WL 4946915 (BIA Sept. 15, 2017) (distinguishing *Matter of Yauri* and finding that the case presented compelling reason to grant reopening).

In *Matter of Yauri*, the BIA emphasized its lack of jurisdiction over the adjustment application and framed the motion to reopen as an effort to “stay” execution of the final order.²⁶ Several courts have rejected this reasoning. For example, the Ninth Circuit refused to defer to *Matter of Yauri*, finding that it conflicted with the motion to reopen regulation.²⁷ Specifically, the court found that the stay regulation the BIA relied upon, which grants the BIA the authority to stay the execution of a removal order while a motion to reopen is pending, in no way restricts the BIA’s authority to reopen a case. Thus, the court rejected the conclusion that the BIA had no authority under the regulations to reopen a case of an “arriving [noncitizen]” in order to provide the noncitizen the opportunity to adjust before USCIS.²⁸ The Eighth Circuit similarly rejected the BIA’s reasoning, explaining that once a case is reopened there no longer is a final order to “stay” while USCIS decides the adjustment application.²⁹

Where an arriving noncitizen under a final, unexecuted order of removal is adjusted by USCIS, are there any further steps that should be taken?

Upon adjustment, the applicant becomes a legal permanent resident (LPR). The grant of LPR status supersedes any removal order that previously had been issued. Unfortunately, however, DHS officials, and particularly officers at ports of entry, may not understand this if they see that a final order of removal remains in the noncitizen’s record. Consequently, an arriving noncitizen under a final order of removal who successfully adjusts his or her status before USCIS should move to reopen and terminate the removal proceedings. If the case is reopened and terminated, there will no longer be an administratively final order on record. In turn, this could make return to the United States after a trip abroad less risky for the individual.

In *Matter of Yauri*, the BIA ultimately granted exactly this relief, finding that once the adjustment application had been granted, reopening solely for the purpose of terminating the removal proceedings was “warranted.”³⁰

²⁶ 25 I&N Dec. at 108-109.

²⁷ *Singh v. Holder*, 771 F.3d 647, 652 (9th Cir. 2014).

²⁸ *Id.*

²⁹ *Clifton v. Holder*, 598 F.3d 486, 493-94 (8th Cir. 2010); *see also Freire v. Holder*, 647 F.3d 67, 70 (2d Cir. 2011) (reversing decision denying a continuance to allow USCIS the opportunity to decide the adjustment application of the respondent, who was an “arriving [noncitizen]”); *Ceta v. Mukasey*, 535 F.3d 639, 646-47 (7th Cir. 2008) (explaining that successful implementation of the regulations required at least “minimal coordination” between EOIR and USCIS or the “statutory opportunity to seek adjustment will be a mere illusion”); *Kalilu v. Mukasey*, 548 F.3d 1215, 1218 (9th Cir. 2008) (stressing that the opportunity the regulations provide for an “arriving [noncitizen]” to demonstrate eligibility for adjustment is “rendered worthless where the BIA ... denies a motion to reopen ... that is sought in order to provide time for USCIS to adjudicate a pending application”).

³⁰ 25 I&N Dec. at 112. The BIA addressed two pending motions to reopen in *Matter of Yauri*. The first was the respondent’s motion, filed while her adjustment application was pending with USCIS and seeking reopening and a continuance until USCIS decided the adjustment application. DHS opposed this motion. Before the BIA issued its decision, however, Ms. Yauri’s

What remedy is there if USCIS denies the adjustment application?

The adjustment regulations do not provide for an administrative appeal of a denial of an adjustment application by USCIS.³¹ Moreover, because an immigration judge does not have jurisdiction over the adjustment applications of most arriving noncitizens, *see* 8 C.F.R. § 8 C.F.R. § 1245.2(a)(1), these individuals cannot renew their adjustment applications in proceedings. Therefore, the only available administrative relief is a motion to USCIS to reopen or reconsider the denial.

Alternatively, it may be possible to challenge the denial of an adjustment application in a federal district court under the Administrative Procedure Act (APA). As of the date of writing this Practice Advisory, a case is currently pending before the Supreme Court which will decide whether a district court has jurisdiction to consider such a challenge. *Patel v. Garland*, No. 20-979 (S. Ct. argued Dec. 6, 2021).

adjustment application was granted. DHS then filed its own motion to reopen for the purpose of terminating proceedings. The Board addressed both motions, denying the respondent's (even though, by the time, the Board ruled, it had become moot), and granting the one filed by DHS.

³¹ *See* 8 C.F.R. § 245.2(a)(5)(ii).