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USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Order of Removal

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USCIS ADJUSTMENT OF STATUS OF "ARRIVING ALIENS" WITH AN UNEXECUTED FINAL ORDER OF REMOVAL

By Mary Kenney

Practice Advisory[1]
Updated November 6, 2008

This practice advisory is one of three which discuss interim regulations that give USCIS jurisdiction over the adjustment application of an "arriving alien" [2] parolee who is in removal proceedings.[3] Additionally, USCIS has the authority to adjudicate an adjustment application by an "arriving alien" with an unexecuted final order of removal. USCIS instructed the field that an unexecuted final order of removal, in and of itself, is not a bar to admissibility and therefore not a bar to adjustment. *See* "Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate applications for Adjustment of Status" (Jan. 12, 2007), http://www.uscis.gov/files/pressrelease/AdjustStatus011207.pdf.

However, some local USCIS offices erroneously have refused to decide these applications, saying they have no jurisdiction because of the final removal order. Additionally, some local offices have denied these adjustment applications, erroneously finding that the individual is not eligible for adjustment because of the final order.

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[1] Readers are cautioned to check for additional or new cases and legal developments after the date of this advisory. This advisory is written and intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[2] An "arriving alien" is defined at 8 C.F.R. §§ 1.1(q) and 1001.1(q).

[3] The other two practice advisories are: "Arriving Aliens and Adjustment of Status: What Is the Impact of the Government's Interim Rule of May 12, 2006" and "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case." *See* http://www.ailf.org/lac/lac_pa_index.shtml.

Moreover, the BIA has a policy of refusing to reopen cases where the noncitizen is eligible to adjust under the interim regulations, on the basis that USCIS, not EOIR, has jurisdiction over the adjustment applications.[4] While reopening of removal proceedings is not required for USCIS to decide an adjustment application,[5] it can prevent a parolee under a final order of removal from being prematurely removed before USCIS has decided the adjustment application. This BIA policy combined with the erroneous denials by some local USCIS offices, has placed some arriving alien parolees with final orders in a "catch 22:" although they may be eligible under the interim regulations to adjust status, the local USCIS office may refuse to decide the adjustment application because of the final order, while the BIA will refuse to reopen the case – which would eliminate the final order – because only USCIS has jurisdiction over the adjustment application. As a result, the interim regulations have not been implemented in these cases and eligible parolees have been deprived of the opportunity to adjust.

This practice advisory explains why USCIS has jurisdiction over these adjustment applications notwithstanding the final unexecuted order of removal. The analysis here applies to a parolee who has not actually left the U.S. subsequent to the final removal order. The practice advisory also outlines the arguments why such a parolee remains eligible for adjustment notwithstanding an unexecuted final order of removal.

1. Practical considerations.

The intent of the interim regulations is to give "arriving alien" parolees an opportunity to apply for adjustment even if they are in removal proceedings. *See* 71 Fed. Reg. 27585 (May 12, 2006). This is also what four courts of appeals concluded was required under the statute, which in turn prompted the adoption of the interim regulations. *Scheerer v. U.S. Attorney General,* 445 F.3d 1311 (11th Cir. 2006) (*Scheerer I)*; *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Bona v. Gonzales,* 425 F.3d 663 (9th Cir. 2005); and *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005). The January 12, 2007 USCIS memo recognizes that parolees with a final removal order also should have this opportunity. Consequently, adjustment applications filed by arriving alien parolees with a final order should be decided by USCIS. USCIS should not simply call in ICE to enforce the removal order.

Of course, any noncitizen with a final removal order is always at risk of removal. As in all cases, the client and attorney can evaluate the risks before making strategy decisions,

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[4] *See, e.g.,* "Adjustment of Status of 'Arriving Aliens' Under the Interim Regulations: Challenging the BIAs Denial of a Motion to Reopen, Remand or Continue a Case," http://www.ailf.org/lac/lac_pa_index.shtml; *see also Ceta v. Mukasey,* 535 F.3d 639 (7th Cir. 2008) (remanding where BIA refused to reopen case); *Kalilu v. Mukasey,* 516 F.3d 777 (9th Cir. 2008) (same); *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008) (same); *but see Scheerer v. U.S. Attorney General*, 513 F.3d 1244 (11th Cir.), *cert. denied,* No. 07-1555 (2008) (*Scheerer II)* (affirming BIA denial of a motion).

[5] The one exception may be an in absentia removal order issued less than ten years prior to the adjustment application, because such an order – if issued with proper notice – carries a ten year bar to adjustment. 8 U.S.C. § 1229a(b)(7).

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