



AMERICAN IMMIGRATION LAW FOUNDATION

“ARRIVING ALIENS” AND ADJUSTMENT OF STATUS: WHAT IS THE IMPACT OF THE GOVERNMENT’S INTERIM RULE OF MAY 12, 2006?

Practice Advisory¹

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On May 12, 2006, the Attorney General (through the Executive Office for Immigration Review (EOIR)) and the Secretary of the Department of Homeland Security (through DHS) jointly issued an interim rule that repealed 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). *See* 71 Fed. Reg. 27585 (2006). These two former regulations barred all “arriving aliens” – including parolees – from adjusting to permanent resident status if they were in removal proceedings.² These regulations were challenged in litigation throughout the country, including by AILF. Four federal courts of appeals struck down the regulations after finding that they violated INA § 245(a), while two other courts of appeals upheld the regulations.³

The repeal of these regulations provides a window of opportunity for parolees in proceedings who are eligible to apply for adjustment of status. This practice advisory will discuss the impact of the interim rule and suggest steps that a parolee can take to benefit from the interim rule.

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² 8 C.F.R. § 245.1(c)(8) applied to CIS while § 1245.1(c)(8) applied to immigration judges.

³ The courts that struck down the regulations were: *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 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). The courts that upheld the regulations were: *Momin v. Gonzales*, ___ F.3d ___, 2006 U. App. LEXIS 15164 (5th Cir. 2006) (*petition for reh. pending*) and *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir.), *vacated and remanded*, ___ U.S. ___, 2006 U.S. LEXIS 4899 (June 26, 2006). AILF appeared as *amicus curiae* or otherwise assisted with the briefing in each of these cases. For more information on this litigation, see http://www.aifl.org/lac/lac_arrivingalien.shtml.

The interim rule consists of two parts. First, it includes changes to the regulations that are effective immediately. These changes are discussed in this advisory. Second, the rule suggests additional proposed changes to the regulations that may be made in the future. Without exception, the suggested future changes would limit the favorable exercise of discretion in the adjustment applications and removal proceedings of “arriving aliens” covered by the rule. The rule sought public comment on the suggested changes by June 12, 2006.⁴ Because the suggested changes are suggestions only – and have not been, and may never be, adopted – they are not discussed here.

What does the interim rule do?

The interim rule makes the following changes to the regulations:

- The interim rule repeals 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8). These former regulations barred an “arriving alien,” including a parolee, who was in removal proceedings from being eligible to file an adjustment of status application before either an immigration judge (IJ) or U.S. Citizenship and Immigration Services (CIS). Several courts found that the majority of parolees were in removal proceedings and that these regulations thus barred most parolees from being able to adjust in proceedings. The courts found that this result violated the adjustment statute, which specifically states that parolees are eligible to adjust status. 8 U.S.C. § 1255(a); *Bona*, 425 F.3d at 669-670 (*quoting Succar*, 394 F.3d at 27); *Scheerer*, 445 F.3d at 1321-22; *Zheng*, 422 F.3d at 118.

DHS and EOIR repealed these regulations to resolve the split in the courts over the validity of the regulations. DHS and EOIR explained that they decided to repeal the regulations because “having rules that apply nationwide is preferable to continuing to litigate the validity of the [regulations].” 71 Fed. Reg. 27587.

- The interim rule generally gives CIS jurisdiction over the adjustment of status applications of parolees in removal proceedings. 8 C.F.R. § 245.2(a)(1). Thus, the fact that a parolee is in removal proceedings is no longer a bar to his or her filing an application for adjustment of status with CIS.
- The interim rule provides one exception for IJ jurisdiction over adjustment applications of certain “arriving aliens” who have been granted advance parole. This exception arguably is more expansive than the comparable exception that existed prior to the interim regulations. 8 C.F.R. § 1245.2(a)(1)(ii).

What is the effective date of the interim rule and how long will it remain effective?

The interim rule was effective on May 12, 2006, the date that it was published. This means that as of that date, 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8) were repealed and no

⁴ AILF and AILA submitted comments strongly opposing the suggested future changes to the regulations. See http://www.ailf.org/lac/reg_comment.pdf.

longer in effect. As of that date, there no longer were any regulations that barred an arriving alien from adjusting status if he or she was in removal proceedings. Moreover, as of that date, CIS generally was granted jurisdiction to decide adjustment applications filed by parolees who were in removal proceedings. IJs were granted jurisdiction in the cases of certain advance parolees.

The interim rule will continue in effect until a final regulation is published, at which time the final regulation will take effect. The comment period on the interim and proposed changes to the regulations closed on June 12, 2006. CIS and EOIR must review the comments that were submitted and respond to these comments in the final regulations. This process always takes at least several months and has been known to take a year or more. Thus, there is no way to predict when a final regulation will be published. Of course, there is also no way to predict what, if any, changes will be included in a final regulation.

When does CIS have jurisdiction over an adjustment application of an “arriving alien” in removal proceedings?

CIS now has jurisdiction over the adjustment application of “arriving aliens,” including parolees, who are in removal proceedings. 8 C.F.R. § 245.2(a)(1) (granting jurisdiction over all adjustment applications except those over which an IJ has jurisdiction). The fact that the individual is in removal proceedings is no longer a bar to the jurisdiction of CIS over the adjustment application. Similarly, a final order of removal should arguably not be a bar to CIS’ ability to adjudicate an adjustment application. *See, e.g., Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (legacy 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”).

The interim regulations also do not place any limits on the exercise of discretion over the adjustment application by CIS decision-makers. While the rule *suggests* possible future limits on the exercise of CIS discretion over these adjustment applications, the agency did not adopt any of these limits in these interim regulations. Thus, unless and until final regulations are issued that contain restrictions, CIS decision-makers must apply the same standards to these adjustment applications as they would to any other adjustment application. The standards to be applied are those that have been developed by Board and federal court case law. *See* 71 Fed. Reg. at 27590.

When does an IJ have jurisdiction over the adjustment application of an “arriving alien” in removal proceedings?

In general, the interim regulations do not give jurisdiction over an adjustment application of an “arriving alien” to an immigration judge (IJ). 8 C.F.R. § 1245.2(a)(1)(ii). Thus, with one exception discussed below, an IJ generally will not be able to decide an adjustment application of a parolee in proceedings. However, an IJ can continue a removal case or otherwise hold it in abeyance so that a parolee can file an adjustment

application with CIS. The regulations do not limit the exercise of discretion by IJs over requests for continuances or administrative stays. While the rule *suggests* possible future limits on the exercise of an IJ's discretion over this type of request, these limits were not included in the interim regulation. Thus, unless and until final regulations are issued that contain restrictions, IJs must apply the same standards to these requests as they would to any other request for a continuance. The standards to be applied are those that have been developed by Board and federal court case law. *See* 71 Fed. Reg. at 27590.

The interim regulations provide an exception allowing an IJ to exercise jurisdiction over the adjustment applications of certain advance parolees. The exception under the interim regulations is arguably broader than that contained in the former regulations.

The interim regulation, at 8 C.F.R. § 1245.2(a)(1)(ii), states that an IJ does have jurisdiction over an adjustment application of an "arriving alien" in removal proceedings if:

- the individual properly filed the adjustment application with CIS while in the U.S.;
- the individual departed from and returned to the U.S. pursuant to a grant of advance parole to pursue the previously filed adjustment application;
- the application for adjustment of status was denied by CIS; and
- DHS placed the parolee in proceedings either upon the individual's return to the U.S. pursuant to the advance parole or after CIS denied the adjustment application.

Prior to the adoption of this interim regulation, the former version of 8 C.F.R. § 1245.2(a)(1) stated that an advance parolee could "renew" an adjustment application before an IJ after it had been denied by CIS if the parolee met the exception. There is an argument that, because the interim regulation deleted the word "renew," it is broader than the former regulations. Arguably, the interim regulation will not be limited to only the "renewal" of the denied adjustment application, but will also cover new adjustment applications filed by the advance parolee. Of course, the other prerequisites of the interim rule must still be met for this exception to apply.

What steps can a practitioner take on behalf of a parolee in proceedings who seeks to adjust?

The following are initial suggestions about steps to take to assist your parolee client who is in proceedings with an adjustment application. Neither CIS nor EOIR have issued any instructions or memoranda on how to handle these cases, and thus there are a number of unanswered questions. We will be seeking answers through AILA liaison. As information becomes available about the process, we will post it to the AILF website and to InfoNet.

Perhaps the biggest unanswered question is how the Board will handle requests for reopening or for remands to allow a parolee to seek a continuance or other stay of

removal proceedings while he or she applies for adjustment with CIS. Since the interim rule was issued, the government already has indicated in several cases that there is no basis for a Board remand or reopening, because EOIR does not have jurisdiction under the interim regulations over the adjustment application. This misses the point of the remand/reopening request, however. Such a request is not for the purpose of asking an IJ to adjudicate the adjustment application; rather, the request is to seek a continuance or administrative stay from the Board or IJ so that CIS will have time to adjudicate the adjustment application before removal proceedings are completed.⁵

In all cases, adjustment-eligible people should apply for adjustment with CIS as soon as possible. No matter the stage of the removal proceeding (e.g., whether before the IJ, the Board, or on appeal at federal court) your client can immediately file an adjustment application with CIS.⁶ CIS has not indicated that there will be different filing procedures for parolees in removal proceedings who are applying for adjustment under this interim rule. Thus, unless CIS instructs differently, we suggest that you follow the instructions on the Form I-485 as to where to file. This will vary depending on the type of adjustment application being filed.

In addition to filing the adjustment application with CIS, a parolee can also pursue one of the following steps, depending on the stage of the removal proceedings:

- **If your client’s case is on appeal at the federal court level:** You may wish to move for a remand of the case so that your client can apply for adjustment before CIS. If possible, you should ask the attorney for the government to agree to the remand. Be as specific as possible in the remand request with respect to what you are seeking. In addition to the remand, the relief you might seek could include a request for the case to be remanded to an IJ, where you could seek an administrative stay, an adjournment, a continuance or that the case otherwise be held in abeyance while the parolee’s adjustment application is being adjudicated

⁵ Note, however, that even if a final order of removal is issued, CIS arguably should still be able to adjudicate the adjustment application. *See, e.g., Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978) (legacy 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”).

⁶ In briefing before the Supreme Court, the petitioners in *Mouelle v. Gonzales* (S.Ct. Docket No. 05-1092) briefly raised the argument that an IJ might retain jurisdiction. AILF is not aware of anyone having developed this argument. A practitioner who wishes to preserve this argument can raise the claim before the IJ and/or Board on the record. Be aware, however, that this is not a substitute for having your client file an adjustment application with CIS. Aside from the exception for certain advance parolees, CIS is the only forum that currently will adjudicate an adjustment application of a parolee in proceedings. For that reason, the only immediately viable option for your client is to file an adjustment application with CIS.

by CIS. You could also seek to have the government agree to a stay of removal while the parolee's adjustment application is adjudicated.

- **If your client's case is on appeal at the Board:** You can move for a remand to an IJ where you could seek an administrative stay,⁷ an adjournment,⁸ a continuance or that the case otherwise be held in abeyance while the parolee's adjustment application is being adjudicated by CIS. You could also seek to have the government agree to a stay of removal while the parolee's adjustment application is adjudicated by CIS. In the alternative, you can ask the Board to continue the case pending CIS' adjudication.
- **If a decision has been made by the Board and no Petition for Review filed with the circuit court:** If the removal case is closed, a motion to reopen may be filed with the immigration court or the BIA, whichever last had jurisdiction. If possible, the applicant should file the motion within 90 days of the final decision in the removal case. If more than 90 days has passed, the individual can still attempt to file a motion to reopen and ask the BIA or the IJ to exercise sua sponte authority to reopen on the basis of a major change in the law. *See* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1); *see also Matter of Muniz*, 23 I&N Dec. 2207, 208 (BIA 2002) (although motion was filed late, Board decided to reconsider the case on its own motion). A copy of the adjustment application that has been filed with CIS, along with the filing receipt, should be attached to the motion as required by the regulations. The filing of the motion will not automatically stay removal, but your client may file a motion for stay of removal. In most cases, if the Board refuses to reopen, the denial can be challenged in a petition for review.
- **If your client's case is before an IJ:** You can seek an adjournment or continuance of the removal proceedings while the adjustment application is adjudicated by CIS (*see* footnote 8). If the trial attorney will agree, you can alternatively seek administrative closure of the proceedings pending CIS' decision on the adjustment application. *See Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996) (indicating that that both parties must agree to an administrative closure before an IJ can order it) (*see* footnote 7).

⁷ Under current Board practice, you must get the trial attorney to agree administrative closure of the removal proceedings pending adjudication of the adjustment application. *See Matter of Gutierrez*, 21 I&N Dec. 479, 480 (BIA 1996) (indicating that that both parties must agree to an administrative closure before an IJ can order it). AILF disagrees with the holding of *Gutierrez* requiring both parties to consent before an IJ can administratively stay a case. A practitioner could consider seeking administrative closure even if the government does not agree, and could subsequently challenge *Gutierrez* should an appeal to federal court be necessary.

⁸ Unlike administrative closure, for which there is no regulatory guidance, there is a regulation authorizing an IJ to adjourn a case at the request of either party. 8 C.F.R. § 1240.6. This regulation does not require the consent of both parties. Thus, it may be beneficial to cite this regulation in support of your request for an adjournment.

AILF is interested in hearing of any problems that practitioners may have with either CIS or EOIR in getting adjustment applications adjudicated for parolees under the interim rule. If you run into problems, please contact Mary Kenney at mkenney@ailf.org.

What remedy is there if CIS denies the adjustment application?

The statute and regulations do not provide for an administrative appeal of a denial of an adjustment application by CIS. Moreover, with the limited exception of certain advance parolees, *see* 8 C.F.R. §§ 1245.2(a)(1)(ii), under the new interim regulation an IJ does not have jurisdiction over the adjustment application of a parolee in removal proceedings. If an adjustment application can not be filed with the IJ, the denial of adjustment can not be appealed to the BIA and also can not be included as an issue in a Petition for Review of a final order of removal before a court of appeals.

The judicial review that generally would be available over CIS's denial of an adjustment application is an action in federal district court under the Administrative Procedures Act. If you have questions about bringing such an action, contact Mary Kenney at mkenney@ailf.org.