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The Continuing Struggle To Define "Admission" and "Admitted" in the Immigration and Nationality Act

by Daniel Cicchini and Joseph Hassell

Introduction

More than 15 years ago, Congress enacted a law making an alien's "admission," rather than his or her "entry," into the United States a central legal principle of the Immigration and Nationality Act. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). Indeed, under present law, an alien's "admission" into the United States, rather than his or her physical entry, triggers different grounds of removal and makes available different forms of relief. Sections 212(h), 237(a)(2), 240A(a) of the Act, 8 U.S.C. §§ 1182(h), 1227(a)(2), 1229b(a). Following this fundamental change to the Act, the Board of Immigration Appeals and the Federal circuit courts of appeals have struggled with interpreting the terms "admission" and "admitted" in various provisions throughout the Act. As previously noted in this publication in 2009:

> Despite the seemingly straightforward import of the terms, the meanings of "admission" and "admitted" have created perplexing interpretation challenges for the Immigration Courts and appellate bodies. The sweeping substitution of these terms throughout the Act unwittingly infused the statute with substantial ambiguities that the Executive Office for Immigration Review ("EOIR") is charged with resolving.

Sarah K. Barr, *The Meaning of "Admission" and "Admitted" in the Immigration and Nationality Act*, Immigration Law Advisor, Vol. 3, No. 10, at 1 (Oct. 2009).

In fact, Ms. Barr's article observes that the Board and the circuit courts have adopted various and conflicting definitions of the terms "admission" and

"admitted" in provisions throughout the Act, such as those relating to adjustment of status under section 245 of the Act, 8 U.S.C. § 1255; aggravated felonies under section 237(a)(2)(A)(iii); crimes involving moral turpitude under section 237(a)(2)(A)(i); and waivers of inadmissibility under section 212(h). *Id.* at 1-5, 16-21. The construction of "admission" and "admitted" in these provisions has far-ranging consequences, especially for those aliens who adjusted to lawful permanent resident ("LPR") status under section 245 and were later found deportable.

Since the publication of Ms. Barr's article, the Board and the circuit courts have continued to struggle with interpreting the terms "admission" and "admitted" under the Act. Accordingly, this article aims to provide adjudicators with an overview of the new issues and decisional law involving the construction and application of these terms. First, the article provides a brief overview of the relevance of the concept of admission to the Act's removal and relief provisions. Second, it discusses how the Board and the circuit courts have construed the term "admission" for purposes of determining whether an alien is properly charged with deportability under section 237(a) of the Act or inadmissibility under section 212(a). Next, it examines how the interpretation of the word "admission" affects whether a charge under section 237(a)(2)(A)(i) may be sustained. Finally, the article discusses relief from removal and provides an overview of how different interpretations of the term "admission" may affect an alien's eligibility for a waiver of inadmissibility under section 212(h).

An Overview of Admission, Removal, and Relief

Section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A), defines the terms "admission" and "admitted" as "the lawful *entry* of [an] alien into the United States *after inspection and authorization* by an immigration officer." (Emphases added.) Thus, an "admission" under the plain text of the statute has two basic requirements: (1) that there be a physical entry into the United States; and (2) that such physical entry take place *after* an immigration officer has inspected the alien and authorized his or her entry. *See*, *e.g.*, *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1366 (11th Cir. 2011).

If an alien has not been "admitted" to the United States, then he or she is subject to removal under section 212(a) of the Act, which lists certain grounds of inadmissibility. In contrast, if an alien has been admitted, he or she may only be charged with deportability under section 237(a) of the Act. This difference is not trivial because the grounds of inadmissibility and deportability differ and "[t]he application of each category is relevant to burdens of proof in removal proceedings and the availability of various forms of relief from removal." *Barr*, *supra*, at 2; *see also* 8 C.F.R. § 1240.8.

In certain instances, the crimes-based grounds of inadmissibility are broader than the grounds of deportability, thus rendering a greater range of aliens removable. For example, an alien is generally inadmissible for *merely committing* one "crime involving moral turpitude" *at any time*. Section 212(a)(2)(A)(i)(I) of the Act. On the other hand, an alien is generally deportable only if he or she has been *convicted* of such an offense committed within 5 years *after* being admitted to the United States, or of two or more turpitudinous crimes at any time after admission so long as they did not arise out of a single scheme of criminal misconduct. Sections 237(a)(2)(A)(i), (ii) of the Act. Likewise, an alien who admits possession of *any* amount of marijuana is inadmissible, whether convicted or not, while a similarly situated alien is *only* deportable if he or she was convicted, and even then not if the possession was "for one's own use of thirty grams or less of marijuana." Sections 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i) of the Act.[1]

It should be noted, however, that in some instances the crimes-based grounds of deportability are broader than the inadmissibility grounds. For example, an alien may be deportable for being convicted of an aggravated felony, a firearms offense, or a crime of domestic violence pursuant to sections 237(a)(2)(A)(iii), (C), and (E) of the Act. However similar grounds of inadmissibility do not exist under section 212 of the Act. *See Matter of Brieva*, 23 I&N Dec. 766, 771-73 (BIA 2005) (collecting cases where a conviction was found to be for an "aggravated felony" but not a "crime involving moral turpitude," the most similar ground of inadmissibility).

Furthermore, as noted previously, the burden of proof in removal proceedings is allocated differently depending on whether an alien has been "admitted" to the United States. 8 C.F.R. § 1240.8. For example, an alien subject to the grounds of inadmissibility—not lawfully in the United States pursuant to a prior admission—"must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged." 8 C.F.R. § 1240.8(b), (c);

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see also section 240(c)(2) of the Act. For an alien subject to the grounds of deportability, on the other hand, the Department of Homeland Security ("DHS"), not the alien, must prove "by clear and convincing evidence that the [alien] is deportable as charged." 8 C.F.R. § 1240.8(a); *see also* section 240(c)(3) of the Act. Regarding relief, an inadmissible alien may be eligible for a form of relief that is unavailable to a similarly situated LPR who is deportable. For example, no waiver of inadmissibility under section 212(h) of the Act may be available to an LPR who has been convicted of an "aggravated felony"—such as a fraud offense—after admission, while a waiver may be available to an inadmissible alien who has been convicted of the same offense.

As a consequence, because so much about an alien's removal is contingent upon a court's construction of the terms "admitted" or "admission" in the Act, this article will examine the most recent Board and circuit court precedents construing these terms in key provisions of the Act.

Determining the Applicable Grounds for Removal—Section 212 or 237 of the Act?

In any particular case, to determine whether an alien is properly charged under section 212 or 237 of the Act, an adjudicator must resolve three issues: (1) whether the alien physically entered the United States *after* inspection and authorization by an immigration officer; (2) whether applicable precedent defines the alien's adjustment of status, if any, as an admission; and (3) whether the alien is "seeking admission" within the meaning of section 101(a)(13)(C) of the Act.

Physical Entry After Inspection and "Admission" — Section 101(a)(13)(A)

The first issue an Immigration Judge is likely to encounter in determining whether an alien is properly charged under section 237 or section 212 of the Act is whether the alien physically entered the United States after inspection and authorization by an immigration officer. As previously noted, the Act defines the terms "admission" and "admitted" as the "*lawful entry* of the alien into the United States *after* inspection and authorization by an immigration officer." Section 101(a)(13)(A) of the Act (emphases added). This raises the question whether Congress' use of the word "lawful" requires that the alien be legally entitled to enter the United States.

In *Matter of Quilantan*, 25 I&N Dec. 285, 286 (BIA 2010), the Board held that an alien does not have to have a "lawful basis" to enter the country as evidenced by a valid immigration document to be "admitted" as that term is defined in section 101(a)(13)(A). In that case, the alien, a native and citizen of Mexico, was a passenger in a car, driven by a United States citizen, coming from Mexico to the United States. The alien did not have documents or a status that would have allowed her to enter the United States. However, at the border, an immigration official questioned the driver about his citizenship, but did not question the alien about her status; the officer then waved the car through the port of entry. In removal proceedings, the DHS argued that the alien was not "admitted" to the United States when she entered as a passenger in her friend's vehicle since she did not have a *lawful* basis to enter. The Board disagreed, holding that under section 101(a)(13)(A) an alien is "admitted" to the United States if his or her entry is *procedurally regular*—that is, the alien was inspected and authorized to enter—regardless of whether that alien is *substantively entitled* to be admitted to the United States under the Act. *Id.* at 293. Therefore, the Board concluded that although the alien was not substantively eligible to be admitted, she was nonetheless "admitted" because she presented herself for inspection at the border and was waved through.

Similarly, in *Hing Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010), the Ninth Circuit addressed the issue whether an alien who procured his initial "admission" by fraud and then later adjusted to LPR status was "previously admitted to the United States as an alien lawfully admitted for permanent residence" under section 212(h) of the Act. The circuit court held that the term "previously admitted" refers to the definition provided in section 101(a)(13)(A), which requires a "procedurally regular" admission and not a "substantively lawful admission." *Id.* at 1096. Accordingly, the court held that the alien was "admitted" when he initially entered, even though his entry was procured by fraud. *Id.*

Although it is not entirely clear, the Fourth Circuit appears to agree with this reasoning. *See Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012). *Bracamontes* dealt with an alien who had entered the United States illegally as a child; been granted temporary resident status ("TRS"); reentered the country with TRS in 1988 after being inspected; and adjusted status to that of an LPR in 1990. *Id.* at 382. In 1999, the alien committed an aggravated felony. *Id.* at 383.

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In consideration of these facts, the Fourth Circuit found that the alien was eligible for a section 212(h) waiver because, inter alia, he had "*entered the United States legally* [in 1988], following inspection by an immigration officer." *Id.* at 386 (emphasis added). Whether the Fourth Circuit used the term "legal entry" to mean a "substantively legal" or "procedurally regular" entry is not entirely clear. However, the court favorably cites *Hing Sum* for the proposition that "[p]rocedure, *and not substance*, is determinative of an 'admission' into the United States." *Id.* at 387 (emphasis added) (quoting *Hing Sum*, 602 F.3d at 1101) (internal quotation mark omitted). In addition, the court's holding ultimately rests on a *factual* determination that an alien's entry into the United States in 1988 as a temporary resident, "following inspection by an immigration officer," constituted an "admission" under section 101(a)(13)(A). *Id.* at 388 ("Here . . . [the alien] does have a prior *lawful entry* into the United States, which *according to the definition provided by Congress in* [*section*] *101(a)(13)(A)*, constitutes an 'admission.'") (emphases added).

It should be noted, moreover, that unlike the alien in *Hing Sum*, the aliens in *Bracamontes* and *Quilantan* did not procure their admissions through "fraud." Rather, the alien in *Bracamontes* entered the United States "legally" with TRS, following inspection by an immigration officer. *Id.* And the alien in *Quilantan* remained silent when immigration officials questioned the driver of the car. *Matter of Quilantan*, 25 I&N Dec. at 286. Therefore, it remains uncertain whether the Fourth Circuit or the Board would consider the alien's admission in *Hing Sum*, which was procured by affirmative fraud, to be "procedurally regular" or a "lawful entry." However, the more significant point is that whether an alien has been "admitted" under the definition set forth in section 101(a)(13)(A) appears to be a factual determination, which does not turn on whether the alien is legally entitled to any immigration status.[2] Thus, for an adjudicator, determining whether an alien has been "admitted" within the meaning of section 101(a)(13)(A) of the Act should be a relatively straightforward factual finding.

Adjustment of Status: Is It an Admission?

Determining if and when an alien has been "admitted" is more complex, however, if an alien becomes an LPR through adjustment of status under section 245 of the Act. Indeed, in such a case, an adjudicator may have to determine whether applicable precedent defines an alien's adjustment of status as an "admission" within the meaning of the Act, because the Board and the circuit courts appear to be split on the issue.

Under section 245 of the Act, the Attorney General may adjust the status of any alien who has previously been inspected, admitted, or paroled. More specifically, adjustment of status is a process that permits aliens already present in the United States to become LPRs without having to depart and procure an immigrant visa from an American consulate, most often in the alien's country of origin. USCIS, DHS, Adjustment of Status, (Mar. 30, 2011), http://www.uscis.gov/greencard (follow "Green Card Processes and Procedures" hyperlink; then follow "Adjustment of Status" hyperlink); *Barr* at 3.

Because aliens who adjust status are already physically present inside the United States, this process does not involve physical entry into the country after inspection and authorization at a port of entry. Thus, under the plain language of section 101(a)(13)(A) of the Act, it is not an "admission." As a consequence, an alien who has adjusted status to that of an LPR after entering the country *without inspection* has not been "admitted" within the meaning of section 101(a)(13)(A) and would therefore be subject to the grounds of inadmissibility under section 212(a) of the Act.

To avoid this result, in *Matter of Rosas*, 22 I&N Dec. 616, 621-23 (BIA 1999), the Board held that an alien who was either authorized to enter after inspection or who has "adjusted status" after an unlawful entry was "admitted" for purposes of determining whether the inadmissibility or deportability grounds should apply. *See also Matter of E.W. Rodriguez*, 25 I&N Dec. 784, 789 (BIA 2012) (holding that the Board is "constrained to treat adjustment as an admission in order to preserve the coherence of the statutory scheme and avoid absurdities"); *Matter of Espinosa Guillot*, 25 I&N Dec. 653, 655-56 (BIA 2011) (holding that an alien who adjusted to LPR status under the Cuban Refugee Adjustment Act was admitted and therefore subject to charges of removability under section 237(a)); *Matter of Alyazji*, 25 I&N Dec. 397, 399-401 (BIA 2011) (citing Board cases where "adjustment of status" is an admission, as well as circuit decisions concluding otherwise); *Matter of Koljenovic*, 25 I&N Dec. 219, 225 (BIA 2010) (holding that, for purposes of a section 212(h) waiver of inadmissibility, an alien whose status is adjusted to that of an LPR has been "admitted" on the

date he or she adjusted status). Other provisions of the Act additionally suggest that an adjustment of status means that an alien is "in and admitted to the United States," making him or her deportable. *See* section 237(a)(1)(A) of the Act (entitled "Inadmissible aliens" and providing, in pertinent part, that "[a]ny alien who at the time of entry *or adjustment of status* was within one or more classes of aliens [who were] inadmissible . . . is deportable") (emphasis added).

Unlike the Board, the circuit courts' treatment of the "adjustment-as-admission" issue is mixed. The Ninth Circuit has held that an adjustment of status can be considered an "admission," albeit in a limited context, but most other circuits disagree. In *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001), the Ninth Circuit held that adjustment of status was an "admission" within the context of section 237(a)(2)(A)(iii) of the Act, which authorizes removal of any alien convicted "at any time after admission" of an aggravated felony. In that case, an LPR, who had entered without inspection, had never been "admitted" within the meaning of section 101(a)(13)(A) of the Act. Nevertheless, the court found the alien removable because he later adjusted status and then was convicted of an aggravated felony. *Id.* (quoting section 101(a)(20) of the Act in defining the term "lawfully admitted for permanent residence").

However, in the context of section 237(a)(2)(A)(i)(I) of the Act, which provides, inter alia, that an alien is deportable if he or she is convicted of an offense committed within 5 years "after the date of admission," the circuit courts have consistently held that an alien's adjustment of status does not constitute an "admission." More specifically, the Fourth, Sixth, and Seventh Circuits have all held that the term "admission" in the phrase "date of admission" is governed by the plain, "unambiguous" meaning of "admission" in section 101(a)(13)(A), which requires physical entry after inspection. *Zhang v. Mukasey*, 509 F.3d 313, 316 (6th Cir. 2007) (holding "that there is only one 'first lawful admission,' and it is based on physical, legal entry into the United States, not on the attainment of a particular legal status"); *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578, 581 (4th Cir. 2006) ("Because the statutory definition of 'admission' does not include adjustment of status, it appears that a straightforward application of *Chevron* requires us to conclude that the BIA's determination that 'the date of admission' under [section 237(a)(2)(A)(i)] includes the date of an adjustment of status fails step one of the *Chevron* analysis."); *Abdelqadar v. Gonzales*, 413 F.3d 668, 673 (7th Cir. 2005) ("[The alien] accuses the agency of engaging in word play by equating 'admitted for permanent residence' with 'the date of admission.' The former is a legal status, the latter an entry into the United States. Section [101(a)(13)(A)] defines admission as a lawful entry, not as a particular legal status afterward.") Additionally, in *Shivaraman v. Ashcroft*, 360 F.3d 1142, 1147-48 (9th Cir. 2004), the Ninth Circuit distinguished its prior reasoning in *Ocampo-Duran*, 254 F.3d 1133, holding that the date of an alien's adjustment of status is not "the date of admission" under section 237(a)(2)(A)(i) if, at the time of the alien's adjustment, he or she was already lawfully present in the United States pursuant to an earlier nonimmigrant admission.

It should be noted, however, that none of the circuit court cases interpreting the term "admission" within the context of section 237(a)(2)(A)(i)(I) concerned an alien who had previously entered without inspection and then adjusted status to that of an LPR. *Zhang*, 509 F.3d at 314 (alien "admitted . . . as an F-2 nonimmigrant student"); *Aremu*, 450 F.3d at 579 (alien "admitted as a nonimmigrant visitor for pleasure"); *Abdelqadar*, 413 F.3d at 672 (alien lawfully admitted after inspection); *Shivaraman*, 360 F.3d at 1143 (alien "lawfully entered . . . as an F-1 nonimmigrant student"). It is difficult to predict how the circuits would decide a case under section 237(a)(2)(A)(i)(I) concerning an LPR who adjusted status after entering without inspection. However, if the circuits maintain that an adjustment of status is not an "admission" under section 237(a)(2)(A)(i)(I), such an interpretation would effectively immunize such an alien from deportability under this provision and may subject them to the grounds of inadmissibility under section 212 of the Act.

"*Seeking Admission*"—*Section 101(a)(13)(C) of the Act*

Finally, perhaps the most vexing issue for an adjudicator in determining whether an alien is deportable or inadmissible arises under section 101(a)(13)(C)(v) of the Act. That section provides that an "alien lawfully admitted for permanent residence in the United States shall not be regarded as *seeking admission*" unless, inter alia, "[the alien] has *committed* an offense identified in section 212(a)(2),

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CIRCUIT COURT DECISIONS FOR MAY 2012

by John Guendelsberger

The United States courts of appeals issued 233 decisions in May 2012 in cases appealed from the Board. The courts affirmed the Board in 219 cases and reversed or remanded in 14, for an overall reversal rate of 6.0%, compared to last month's 10.4%. There were no reversals from the Fourth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	74	70	4	5.4
Third	23	23	0	0.0
Fourth	11	11	0	0.0
Fifth	9	9	0	0.0
Sixth	7	7	0	0.0
Seventh	3	3	0	0.0
Eighth	8	7	1	12.5
Ninth	81	74	7	8.6
Tenth	4	4	0	0.0
Eleventh	10	8	2	20.0
All	233	219	14	6.0

The 233 decisions included 112 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 38 direct appeals from denials of other forms of relief from removal or from findings of removal; and 83 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	112	105	7	6.3
Other Relief	38	34	4	10.5
Motions	83	80	3	3.6

The seven reversals or remands in asylum cases involved credibility (two cases), nexus (three cases), the 1-year bar, and whether the Government was unable or unwilling to prevent persecution.

Three of the four reversals in the "other relief" category involved application of the modified categorical approach to aggravated felonies or crimes involving moral turpitude. The fourth involved a section 209(c) refugee adjustment.

Two of the three motions cases involved the departure bar. In the third case, the court remanded for the Board to consider an issue that was raised on appeal but not addressed.

The chart below shows the combined numbers for January through May 2012 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	430	361	69	16.0
First	21	18	3	14.3
Fifth	41	36	5	12.2
Sixth	43	39	4	9.3
Eighth	22	20	2	9.1
Tenth	13	12	1	7.7
Third	108	100	8	7.4
Fourth	57	53	4	7.0
Seventh	15	14	1	6.7
Eleventh	66	62	4	6.1
Second	362	345	17	4.7
All	1178	1060	118	10.0

Last year's reversal rate at this point (January through May 2011) was 12.4%, with 1592 total decisions and 198 reversals.

The numbers by type of case on appeal for the first 5 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	623	563	60	9.6
Other Relief	203	166	37	18.2
Motions	352	331	21	6.0

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RECENT COURT OPINIONS

Second Circuit:

Caraballo-Tavera v. Holder, No. 11-2517-ag, 2012 WL 2213662 (2d Cir. June 18, 2012): The Second Circuit denied the petition for review of a decision by the Board affirming an Immigration Judge's denial of the petitioner's application for adjustment of status. The petitioner entered the U.S. on a K-1 fiancé visa, married within the prescribed 90-day period, and was granted conditional residence. Fifteen months later, the petitioner and his U.S. citizen wife divorced. The petitioner filed to remove the condition on his residence on the ground that his marriage was entered into in good faith. His petition was denied by the Department of Homeland Security, his conditional residence status was terminated, and removal proceedings were commenced. The petitioner argued before the Immigration Judge that he was eligible to adjust his status based on an approved immigrant visa petition filed by his U.S. citizen daughter. The Immigration Judge ruled that the petitioner, as a K-1 entrant, was ineligible to adjust through any means other than his marriage to the K-1 visa sponsor. On appeal, the court first noted that the Board and three other circuits had interpreted section 245(d) of the Act consistently with the Immigration Judge's holding. The court next addressed the petitioner's argument that he was not barred from adjustment because, in essence, he ceased to be a K-1 entrant upon obtaining conditional resident status. Comparing the facts to those in *Kalal v. Gonzales*, 402 F.3d 948 (9th Cir. 2005), in which the Ninth Circuit found removable an alien who had been erroneously granted conditional resident status without ever marrying the K-1 visa sponsor, the Second Circuit concluded that Congress had constructed a "specific restrictive process" for K-1 visa entrants. Therefore, the court held that the statute barred any alien *originally admitted* to the U.S. as a K-1 nonimmigrant from adjusting status except conditionally based on the marriage to the K-1 sponsor.

Sixth Circuit:

Ruiz-Lopez v. Holder, No. 11-3730, 2012 WL 2291132 (6th Cir. June 19, 2012): The Sixth Circuit upheld the Board's conclusion that the petitioner had been convicted of a crime involving moral turpitude ("CIMT"). The petitioner pled guilty in 1997 to one count of felony flight under section 46.61.024 of the Washington Revised Code. In a published decision, the Board found that a violation of the statute, which required the driving of a vehicle "in a manner indicating a wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle," was categorically a CIMT. The court did not rule on whether *Chevron* deference was owed, because its own independent analysis agreed with that of the Board. After reviewing how the Board had defined a CIMT in its precedent case law, the court noted that prior to this case, the Board had no published decision addressing whether a comparable crime met that definition. The court therefore looked for guidance to decisions of the Fifth and Seventh Circuits, in which similar convictions for fleeing police officers were found to involve moral turpitude. The court noted that the Washington statute required both scienter and reprehensible conduct and therefore satisfied both prongs of the CIMT definition set out in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

Eighth Circuit:

Bobadilla v. Holder, No. 11-1590, 2012 WL 1914068 (8th Cir. May 29, 2012): The Eighth Circuit granted a petition for review of a decision of the Board affirming an Immigration Judge's order of removal. The Immigration Judge had held that the petitioner's Minnesota conviction for providing a false name to a peace officer was for a crime involving moral turpitude. The court discussed the case law history leading to the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), and determined that the decision should be accorded *Chevron* deference. The court noted that the Immigration Judge's decision did not reference *Silva-Trevino*. The Board, citing *Silva-Trevino*, concluded that the crime was categorically a CIMT because the intentional attempt to evade responsibility required by the statute was inherently base, vile, and reprehensible. The court found this reasoning consistent with pre-*Silva-Trevino* case law holding that crimes in which fraud was an element were categorical CIMTs. However, the court noted that these earlier cases lacked the "realistic probability" inquiry that *Silva-Trevino* added to the CIMT determination process. According to the court, in this case the petitioner provided a false name during a traffic stop, which the court categorized as "a time when many citizens who are not 'base, vile, or depraved' may be less than fully truthful or cooperative." The court further observed that the Minnesota statute did not require proof that the false statement was successful in misleading the officer or obstructing justice. The court thus found a remand appropriate to allow the Board to apply the more flexible analysis afforded under *Silva-Trevino*'s "realistic probability" test.

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Ninth Circuit:

Vilchez v. Holder, No. 09-71070, 2012 WL 2306975 (9th Cir. June 19, 2012): The Ninth Circuit denied a petition for review challenging the denial of an application for cancellation of removal. The petitioner, a lawful permanent resident since 1995, was placed in removal proceedings in 2008 and charged with removability based on his conviction for a crime involving domestic violence. In a hearing conducted by video-conference, the Immigration Judge denied the petitioner's application for cancellation of removal based on numerous adverse discretionary factors, including the petitioner's domestic violence conviction, his multiple drug convictions and parole violations, and continued drug abuse, for which he had not demonstrated rehabilitation. The Board affirmed and further found that the video-conference hearing did not violate the petitioner's due process because such hearings are expressly allowed by statute and the petitioner neither objected to the hearing nor demonstrated prejudice. On appeal, the petitioner argued that the Board erred in both affirming the denial of relief and failing to find a due process violation. The circuit court held that it did not have jurisdiction to review the discretionary denial of the cancellation application. It further held that due process determinations arising from video-conferencing must be made on a case-by-case basis. The court cited examples in which due process may be violated, such as where the video-conferencing prevents a petitioner from reviewing documents or hinders the Immigration Judge's ability to gauge demeanor and thus assess credibility. However, the court noted that in this case, the Immigration Judge made no adverse credibility finding. The court further observed that the petitioner was represented by counsel, testified at length, presented three witnesses, and failed to establish how the outcome might have been affected by the use of video-conferencing. The court therefore concluded that no due process violation occurred in this hearing.

BIA PRECEDENT DECISIONS

In *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), the Board identified the framework for an Immigration Judge to determine whether or not to grant a continuance for the adjudication of an alien's pending U nonimmigrant visa petition. The case was before the Board on remand from the Ninth Circuit for further consideration of a motion for continuance to await resolution of the lead respondent's U visa petition. Reviewing the statutory scheme, the Board observed that the U visa was created to assist law enforcement agencies in detecting, investigating, and prosecuting crimes and to encourage alien victims to report criminal activity to authorities and participate in the investigation and prosecution of the offenders. Setting forth the requirements for establishing prima facie eligibility for a U visa under section 101(a)(15)(U)(i) of the Act, the Board noted that an alien may be eligible for a visa if the Secretary of Homeland Security determines that: (1) the alien suffered substantial physical or mental abuse as the victim of a crime in violation of United States laws; (2) the alien has information concerning the crime; and (3) the alien has been, is being, or is likely to be helpful to a Federal, State, or local law enforcement official, prosecutor, judge, or other authorities prosecuting the criminal activity. The Board also outlined the evidentiary requirements for obtaining a U visa and noted that an alien must be admissible to the United States or have obtained a waiver of inadmissibility from the U.S. Citizenship and Immigration Service ("USCIS").

The USCIS has exclusive jurisdiction over U visa petitions and applications for adjustment of status under section 245(m) of the Act. Although neither a U visa application nor an adjustment application based on an approved U visa may be renewed before an Immigration Judge during removal proceedings, Immigration Judges have discretion to grant a continuance to allow an alien to pursue such a visa or await adjudication of a pending petition by the USCIS.

Observing that the standard for a discretionary grant of a continuance is a showing of good cause, the Board noted that certain factors in the good-cause determination framework set out in *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009), were applicable in the context of a U visa. Those factors include (1) the Department of Homeland Security's ("DHS") response to the motion for a continuance; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance and other procedural factors. The Board instructed that an Immigration Judge should first consider the DHS's position: if the DHS is not opposed, the proceedings should be continued in the absence of unusual, clearly identified, and supported reasons for not doing so.

If DHS opposes the continuance on a reasonable basis, the inquiry turns to the alien's likelihood of success, which relates to prima facie eligibility for the U visa. First, the Immigration Judge should consider whether

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the respondent will likely be able to show that he or she suffered "substantial physical or mental abuse" as the victim of a qualifying crime. The relevant factors are the nature of the injury inflicted, the duration of the harm, and the severity of the perpetrator's conduct, as evidenced by medical reports or psychological evaluations. A prima facie eligibility showing also requires establishing that the underlying criminal activity is a crime enumerated in section 101(a)(15)(U) of the Act or "similar activity" in violation of the laws of the United States, for which the respondent is not culpable. If those requirements are not satisfied, the Immigration Judge's inquiry ends.

When a respondent makes a prima facie showing of abuse as a victim of a qualifying crime, the Immigration Judge should next evaluate whether the respondent has relevant information and has been, is being, or will be helpful to authorities investigating or prosecuting the crime. A law enforcement certification ("LEC") may satisfy this requirement, while conversely, an alien lacking an approved LEC generally would not be able to show good cause without DHS support or other compelling circumstances.

If the respondent is inadmissible, the Immigration Judge must assess the likelihood that the USCIS will grant a waiver of inadmissibility. When the respondent has submitted proof that the requisite U visa application forms have been filed, including the LEC and waiver of inadmissibility, if applicable, and the petition appears to meet the criteria to be granted, any delay in the USCIS's adjudication of the petition not attributable to the respondent augurs in favor of granting a continuance. Additionally, the Immigration Judge should consider the length of the time the U visa application has been pending, the number of prior continuances the court has provided, and any additional relevant factors to determine whether good cause has been shown to warrant a further continuance. The Board explained that as a general rule, a prima facie approvable U visa application creates a rebuttable presumption that the respondent warrants a continuance for a reasonable time period.

In light of the newly articulated framework, the Board remanded the case to the Immigration Judge for consideration of the respondents' request to continue the proceedings while the lead respondent's U visa application is pending.

In *Matter of O. Vazquez*, 25 I&N Dec. 817 (BIA 2012), the Board considered how an alien can maintain the status of a "child" under the Act when an application for adjustment of status was filed while the alien was under the age of 21 but was not adjudicated before his or her 21st birthday. The respondent was the beneficiary of an approved I-130 visa petition. His immigrant visa number became available when he was 20 years old, but he did not file an application for adjustment of status until more than a year later, when he was 21 years and 9 months of age.

Under section 203(h)(1)(A) of the Act, an applicant for adjustment of status can avoid "aging out" if the alien has "sought to acquire" the status of a lawful permanent resident within a year of an immigrant visa number becoming available. After determining that the phrase "sought to acquire" was not plain and unambiguous, the Board examined section 203(h)(1)(A) in its entirety and reasoned that since an alien has a full year from the date of visa availability to qualify for "age-out" protection, it was reasonable to expect the proper filing of an application as a way to satisfy the "sought to acquire" element of the statute.

Alternatively, the Board found that the "sought to acquire" element could be satisfied by presenting persuasive evidence that the alien submitted an application for adjustment of status but it was rejected for procedural or technical reasons, such as a missing signature. As with asylum applications, if the deficiency is promptly corrected and the application resubmitted within a reasonable time, an adjustment of status application should also be considered timely filed for purposes of section 203(h)(1)(A).

In addition, the Board found that the "sought to acquire" standard could be satisfied by showing that there are extraordinary circumstances beyond the applicant's control that prevented a timely filing. For example, an alien could show that he or she paid an attorney to assist in timely filing an adjustment application, the application was completed and executed with the attorney's assistance, but the attorney failed to timely file the application. In contrast, merely contacting an attorney about initiating the process for obtaining an available visa or contacting an organization or an attorney for legal advice is insufficient to meet the "sought to acquire" requirement.

Summarizing its conclusions, the Board stated that an alien may satisfy the "sought to acquire" element of section 203(h)(1)(A) of the Act by properly filing an adjustment of status application with the DHS; by establishing with persuasive evidence that a properly

submitted application was rejected for a procedural or technical reason; or by showing that other extraordinary circumstances beyond the alien's control prevented a timely filing. Since the respondent only sought legal advice and did not file his adjustment application within 1 year of visa availability, the Board concluded that he did not satisfy the "sought to acquire" requirement of section 203(h)(1)(A) of the Act and dismissed the appeal.

In *Matter of C. Valdez*, 25 I&N Dec. 824 (BIA 2012), the Board addressed whether the respondent's pre-November 28, 2009, admission to the Commonwealth of the Northern Mariana Islands ("CNMI") by the CNMI Immigration Service constitutes an admission to the United States for purposes of adjustment of status eligibility. Concluding that it does not qualify as an admission, the Board dismissed the appeal.

The respondent, who had been convicted of attempted rape, was last admitted to the CNMI by its Immigration Service in October 2007. He conceded removability and sought to apply for adjustment of status based on an approved visa petition filed by his United States citizen wife and for a waiver of inadmissibility under section 212(h) of the Act. The Immigration Judge denied the adjustment application in part because he found that the respondent had not been inspected and admitted or paroled into the United States. He also found the respondent ineligible for a "stand-alone" section 212(h) waiver.

Initially the Board explained that the CNMI was created through a covenant between the Northern Mariana Islands and the United States in 1975, establishing a self-governing commonwealth in political union with and under the sovereignty of the United States. In 2008, most provisions of United States immigration laws were extended to the CNMI by statute, with a transition period beginning November 28, 2009, and ending on December 31, 2014. Notably, the statute provided for the inclusion of the CNMI within the definition of "United States" under section 101(a)(38)(A) of the Act.

The respondent sought section 245(a) adjustment of status, which requires inspection and admission or parole into the United States by a United States immigration officer. When he was last admitted to the CNMI in October 2007, the commonwealth was not included in the definition of the United States under the Act, so he was not admitted or paroled into the United States. Further, he was admitted by the CNMI Immigration Service, not by a United States immigration officer. Thus, the Board concurred with the Immigration Judge that the respondent was ineligible for adjustment of status and a section 212(h) waiver.

In *Matter of Isidro*, 25 I&N Dec. 829 (BIA 2012), the Board considered whether an applicant for cancellation of removal under section 240A(b) of the Act had a qualifying relative in his United States citizen son, who was under 21 years of age when the application was filed but turned 21 before it was adjudicated. Concluding that the son was no longer a "child" as contemplated by the Act, the Board found that the respondent did not have a qualifying relative.

The Ninth Circuit had remanded the case for the Board to determine whether *Matter of Bautista Gomez*, 23 I&N Dec. 893 (BIA 2006), should be extended to the circumstances present here. That case involved an alien who had previously been denied section 240A(b) relief because she lacked a qualifying relative and who sought reopening to reapply after her parents became qualifying relatives through a grant of cancellation of removal. In analyzing the alien's eligibility, the Board examined 8 C.F.R. § 1003.23(b)(3), which governs motions to reopen to apply for cancellation of removal and provides that pursuant to section 240A(d)(1) of the Act, such motions will be granted only if the applicant establishes that he or she was eligible for cancellation of removal prior to the service of the notice to Appear. The Board reasoned that since the regulation only referenced section 240A(d)(1), the provision defining the termination of continuous physical presence, the restriction applied only to the continuous physical presence requirement and not to the other requirements for section 240A(b) eligibility, including good moral character and qualifying relatives. Thus, an alien who could demonstrate 10 years of continuous physical presence as of the date of service of a notice to appear could establish eligibility for cancellation of removal by later acquiring qualifying relatives, since the issues of good moral character and qualifying relatives are properly considered at the time the cancellation of removal application is adjudicated.

Observing that an application for relief from removal is a "continuing" application, the Board noted that when the respondent's cancellation application was filed, his son was a "child" as contemplated by the Act, but his son had turned 21 before the application was adjudicated. Consistent with the principle articulated in *Matter of*

Bautista Gomez, the Board reasoned that the respondent lacked a qualifying relative when the Immigration Judge adjudicated his cancellation of removal application and thus he could not establish eligibility for relief.

Addressing the respondent's argument that the Child Status Protection Act was intended to allow an alien whose qualifying relative had turned 21 to retain eligibility for cancellation of removal, the Board pointed out that the statute only preserves "child status" for persons who qualified as a "child" at the time a visa petition or application for permanent resident or derivative asylum status was filed on their behalf and who turned 21 before a final adjudication was reached. Noting that the statute expressly references certain forms of relief and particular sections of the Act but omits any reference to cancellation of removal, the Board concluded that Congress intended it to apply only to specifically enumerated sections of the Act. After rejecting the respondent's remaining appellate arguments, the Board dismissed the appeal.

In *Matter of Fernandez Taveras*, 25 I&N Dec. 834 (BIA 2012), the Board held that section 101(a)(13)(C)(v) of the Act, which relates to lawful permanent residents seeking admission at a United States port of entry, is inapplicable to an alien in the United States applying to adjust status under section 245(a) of the Act. Additionally, the Board explained that a lawful permanent resident who was granted section 240A(a) cancellation of removal in a prior removal proceeding initiated based on a drug conviction bears the burden of proving that the conviction does not render him inadmissible when he applies for adjustment of status in a subsequent removal proceeding.

The respondent had been granted section 240A(a) cancellation of removal in removal proceedings initiated because of his conviction for possession of crack cocaine. Following two subsequent convictions for petit theft, new removal proceedings were initiated, during which the respondent sought section 245(a) adjustment of status and a waiver under section 212(h) of the Act. The Immigration Judge found the respondent eligible for relief, reasoning that he was not inadmissible based on the drug offense because he had been granted cancellation of removal in proceedings triggered by that conviction. Relying on section 101(a)(13)(C)(v) of the Act, which provides that a returning lawful permanent resident shall not be regarded as seeking admission to the United States except under limited conditions, the Immigration Judge granted the respondent's waiver and adjustment of status applications.

Examining section 101(a)(13)(C)(v) of the Act, the Board observed that its purpose was to regulate the circumstances under which a returning lawful permanent resident may reenter the United States, following inspection, without being classified as an applicant for admission. Under that statute, a lawful permanent resident who had committed an offense identified in section 212(a)(2) of the Act would be deemed an applicant for admission unless he or she had been granted a waiver under section 212(h) or cancellation of removal under section 240A(a) after the offense was committed. The Board pointed out that the Department of Homeland Security ("DHS") bears the burden of proving that a returning lawful permanent resident is an alien seeking admission.

The Board observed that because the respondent was seeking adjustment of status, he has the burden of establishing eligibility for relief, including demonstrating that he is admissible. Noting that an alien seeking adjustment of status is considered to be an applicant for admission, the Board reasoned that section 101(a)(13)(C)(v) of the Act applies only to lawful permanent residents returning from a trip abroad and not to previously admitted aliens who seek discretionary relief in removal proceedings, so it has no impact on the burden of proving eligibility for adjustment of status. While the respondent would not be considered an applicant for admission because he was granted cancellation of removal with respect to his drug conviction, section 101(a)(13)(C)(v) does not prevent that conviction from rendering him inadmissible in the context of adjustment of status.

The Board also pointed out that section 101(a)(13)(C)(v) does not alter the well-established principle that a waiver of inadmissibility or deportability waives only the ground charged, not the underlying basis for removability. Thus, the respondent's drug conviction retains immigration consequences despite his having been granted cancellation of removal in prior proceedings premised on that conviction.

After concluding that section 101(a)(13)(C)(v) of the Act does not relieve the respondent of his burden

to establish admissibility to be eligible for section 245(a) adjustment of status, the Board determined that his drug conviction rendered him inadmissible and statutorily barred from adjusting his status. The Board also found that the respondent was ineligible for a section 212(h) waiver because the conviction related to possession of crack cocaine. The Immigration Judge's decision was vacated and the respondent was ordered removed.

REGULATORY UPDATE

77 Fed. Reg. 38,126-27 (June 26, 2012)
DEPARTMENT OF STATE

Public Notice 7930

In the Matter of the Designation of Aitzol Iriondo Yarza, also known as Gurbitz, also known as Gurbita, also known as Barbas, also known as Balak as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Public Notice 7931

The Designation of Abubakar Shekau, Also Known as Abu Mohammed Abubakar bin Mohammed, Also Known as Shekau, Also Known as Abu Muhammed Abubakar Bi Muhammed, Also Known as Shehu, Also Known as Shayku, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Public Notice 7932

The Designation of Khalid al-Barnawi, Also Known as Khalid Barnawi, Also Known as Khaled al-Barnawi, Also Known as Khaled el-Barnaoui, Also Known as Mohammed Usman, Also Known as Abu Hafsat, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Public Notice 7933

In the Matter of the Designation of Abubakar Adam Kambar, Also Known as Abu Yasir, Also Known as Abubakar Kambar, Also Known as Abu Yasir Kambar, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Abubakar Adam Kambar, also known as Abu Yasir, also known as Abubakar Kambar, also known as Abu Yasir Kambar, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in Section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the Federal Register.

Dated: June 18, 2012.

Hillary Rodham Clinton, Secretary of State.

[FR Doc. 2012–15577 Filed 6–25–12; 8:45 am]

The Continuing Struggle *continued*

unless since such offense the alien has been granted relief under section 212(h) or 240A(a)." Section 101(a)(13)(C)(v) of the Act (emphases added). This provision only applies to an alien who: (1) has previously been admitted as an LPR either through adjustment of status *or* after "admission" at the port of entry; (2) commits a turpitudinous offense at any time; and (3) leaves the United States as an LPR and attempts to reenter the country. *See* sections 101(a)(13)(C), (20) of the Act. Under these circumstances, the differences between the crimes-based inadmissibility and deportability grounds are thrown into stark contrast, particularly for an LPR who has been convicted of one crime involving moral turpitude more than 5 years after his or her admission to the United States. Section 237(a)(2)(A)(i) of the Act.

More specifically, such an alien would be deemed inadmissible rather than deportable if he or she *committed* a turpitudinous offense *at any time*, regardless of when the alien adjusted status or initially entered after inspection. Section

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212(a)(2)(A)(i)(I) of the Act. As noted previously, section 237(a)(2)(A)(i) makes an alien deportable only if he or she has been *convicted* of a "crime involving moral turpitude" committed within 5 years *after* admission. Recently, the circuit courts have issued inconsistent decisions interpreting the application of section 101(a)(13)(C) of the Act to LPRs seeking to reenter the United States after being convicted of a turpitudinous offense. The United States Supreme Court sought to reconcile some of these inconsistencies in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012). *See infra* at 14-15.

For instance, the Board and the Third Circuit recently came to different conclusions regarding the Government's particular burden of proof as to whether a reentering LPR is an applicant for admission, pursuant to section 101(a)(13)(C) of the Act, and is thus subject to the inadmissibility grounds, rather than the deportability grounds. *Doe v. Att'y Gen. of U.S.*, 659 F.3d 266 (3d Cir. 2011); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011).

In *Matter of Rivens*, the Board held that the DHS bears the burden of proving by "clear and convincing evidence" that one of the exceptions under section 101(a)(13)(C) applies. 25 I&N Dec. at 625. In that case, an LPR committed two crimes involving moral turpitude prior to seeking reentry into the United States. *Id.* at 624. The Board suggested that if the DHS showed by "clear and convincing evidence" that the LPR was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude, then it additionally proved ipso facto that the alien was in fact "seeking admission" under section 101(a)(13)(C)(v) of the Act. *See id.* at 627.

However, in *Doe*, the Third Circuit held that the appropriate standard to determine whether an LPR is "seeking admission" under section 101(a)(13)(C)(v) of the Act is whether immigration officials have "probable cause to believe that the alien has committed one of the crimes identified" in section 212(a)(2) of the Act. 659 F.3d at 272. There, the alien was an LPR; however, after returning to the United States from a trip abroad, the DHS refused to "admit" the alien and placed him in proceedings under section 212 of the Act because immigration officials discovered that he was subject to an arrest warrant arising out of his association with a wire fraud scheme. *Id.* at 268-70 (noting that had the alien not left the country he could not have been placed into proceedings based on his criminal offense until he was convicted). The Third Circuit held that because an arrest warrant had been issued, immigration officials necessarily had "probable cause" to believe that the alien had committed this offense, thus rendering him an alien "seeking admission" under section 101(a)(13)(C)(v) and subject to removal under section 212 of the Act. *Id.* at 273.

The Third Circuit decided *Doe* less than a month before the Board's decision in *Matter of Rivens*. Therefore, in light of *Rivens*, the Third Circuit may now defer to the Board's interpretation of section 101(a)(13)(C)(v), especially because the court acknowledged that the Act was "ambiguous." *Id.* at 271-72 (stating that there is "a hole in the Immigration and Nationality Act: it requires an immigration officer to determine whether an arriving lawful permanent resident has committed a crime, but omits mention of how the officer is to do so").

Under certain circumstances, however, even if an LPR is properly classified as an alien "seeking admission" under section 101(a)(13)(C) of the Act, he or she *may not* be charged under the grounds of inadmissibility. *See Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007). That case involved an LPR who was convicted of sexual assault in 1996 prior the enactment of IIRIRA, and who was placed in "inadmissibility" proceedings under section 212 following his return from a trip abroad in 2001. *Id.* at 875 (citing section 101(a)(13)(C)(v) of the Act). The Ninth Circuit noted that previously, under the so-called *Fleuti* doctrine, "an LPR who [returned from an] 'innocent, casual, and brief' trip across [the] international border" was not deemed to be "seeking admission" because he or she "did not 'intend[]' a 'departure' within the meaning of INA § 101(a)(13)." *Camins*, 500 F.3d at 876 (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 461 (1963)). The Ninth Circuit, however, declined to apply the *Fleuti* doctrine, deferring to the Board's decision in *Matter of Collado*, 21 I&N Dec. 1061, 1064-65 (BIA 1998), which held that the *Fleuti* doctrine had not survived the enactment of the current version of section 101(a)(13) of the Act. *Camins*, 500 F.3d at 879-80; *see also Vartelas v. Holder*, 620 F.3d 108, 117 (2d Cir. 2010), *rev'd*, 132 S. Ct. 1479 (2012); *De Vega v. Gonzales*, 503 F.3d 45, 48 (1st Cir. 2007); *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 501-02 (5th Cir. 2006); *Tineo v. Ashcroft*, 350 F.3d 382, 395-96 (3d Cir. 2003).

In spite of its deference to *Collado*, the Ninth Circuit nevertheless declined to retroactively apply section

101(a)(13)(C) to the LPR in that case, holding that the retroactive application of this section would impermissibly violate notions of fundamental fairness because current section 101(a)(13)(C)(v) attaches "new legal consequences to events completed before its enactment," which may interfere with the alien's expectations. *Camins*, 500 F.3d at 882 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (internal quotation marks omitted)). In reaching this conclusion, the circuit court relied on the Supreme Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the Supreme Court held that IIRIRA's repeal of former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), which allowed the Attorney General to waive deportation, did not apply retroactively to aliens who pleaded guilty, prior to IIRIRA's effective date, to criminal offenses making them eligible for deportation. In consideration of *St. Cyr*, the Ninth Circuit similarly concluded that application of current section 101(a)(13)(C) would be impermissibly retroactive because many LPRs expect that: (1) they may "travel abroad" as a result of their lawful status; and (2) they would remain subject to former section 101(a)(13), as interpreted by *Fleuti*, if they pleaded guilty to an offense prior to the IIRIRA. *Camins*, 500 F.3d at 884-85. More precisely, the circuit court found current section 101(a)(13)(C) impermissibly retroactive because it attached a "new legal consequence to the convictions of LPRs who pled guilty to [] crimes prior to its enactment," and these consequences interfered with "'familiar considerations of fair notice, reasonable reliance, and settled expectations'" regarding an alien's ability to "travel outside the country—even for innocent, casual, and brief trips previously allowed—without facing charges of inadmissibility upon their return." *Id.* at 884-85 (quoting *Landgraf*, 511 U.S. at 270). For similar reasons, the Fourth Circuit found section 101(a)(13)(C) "impermissibly retroactive because it indisputably attached new legal consequences to [an alien's prior conviction(s)]." *Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004).

However, the Second Circuit in *Vartelas*, 620 F.3d at 121, disagreed, holding that the current version section 101(a)(13)(C) of the Act abrogated the *Fleuti* doctrine *and* may permissibly be applied retroactively. *Vartelas* involved an LPR who in 1994, prior to the enactment of the IIRIRA, pleaded guilty to a crime involving moral turpitude. In 2003, post-IIRIRA, the alien traveled abroad to visit his aging parents in Greece. And, upon his return, an immigration officer classified him as "seeking admission" based on his 1994 conviction.

The Second Circuit reasoned, contrary to the Fourth and Ninth Circuits, that the central inquiry in the case was the alien's reliance on prior law and that the application of section 101(a)(13)(v) did not depend on the alien's decision to plead guilty; it depended on whether he "committed" a proscribed offense. *Id.* at 118 (quoting section 101(a)(13)(v) of the Act). Thus, the court observed that an alien may not reasonably rely "on provisions of the immigration laws in 'committ[ing]' his crimes" because it

> border[ed] on the absurd to argue that . . . aliens might have decided not to commit [their] crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

Id. at 120 (quoting *St. Cyr v. INS*, 229 F.3d 406, 409 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001)). Similarly, given that section 101(a)(13)(C)(v) governs the entry status of an LPR who has *committed* a crime involving moral turpitude, the Second Circuit concluded that the application of that section with respect to an LPR attempting to reenter the United States following a trip abroad was not impermissibly retroactive, "for here too it would border on the absurd to suggest that [the alien] committed his . . . crime in reliance on the immigration laws." *Id.*

The Supreme reversed the Second Circuit's decision in *Vartelas*, holding, inter alia, that the circuit court's reasoning overemphasized an LPRs "reliance" on prior law, which was not dispositive. *Vartelas*, 132 S. Ct. at 1490-91. According to the majority, "[t]he essential inquiry . . . is 'whether the new provision attaches new legal consequences to events completed before its enactment,'" not necessarily whether the alien relied on prior law. *Id.* at 1491 (quoting *Landgraf*, 511 U.S. at 269-70). Thus, if the new provision attaches "new legal consequences" to pre-enactment convictions, the law may not be retroactively applied. *Id.* Under the facts of the case, the Court reasoned that current section 101(a)(13)(C)(v) attached new legal consequences (or a "new disability") to the alien's "past wrongful conduct" which occurred prior to the enactment of the IIRIRA; that consequence was the "[l]oss of the ability to travel abroad." *Id.* at 1488.

The dissent, in contrast, argued that no retroactive effect was involved in the case, because the "*regulated activity* is reentry into the United States"—not the alien's pre-IIRIRA conviction—and the alien "returned to the United States after the statute's effective date." *Id.* at 1493 (Scalia, J., dissenting). The majority countered that although it was the alien's "return to the United States [that] occasioned his treatment as a new entrant . . . *the reason* for the 'new disability' imposed on him was not his lawful foreign travel. It was, indeed, his *conviction*, *pre-IIRIRA*, of an offense qualifying as one of moral turpitude." *Id.* at 1488-89 (emphases added). The majority, moreover, found the dissent's argument less than "plausible that Congress' solution to the problem of dangerous lawful permanent residents would be to pass a law that would deter such persons from ever leaving the United States." *Id.* at 1489 n.7. Consequently, the Court held that the current version of section 101(a)(13)(C)(v) could not be retroactively applied to an LPR whose only convictions occurred pre-IIRIRA. *Id.* at 1490.

Date of Admission—Section 237(a)(2)(A)(i)(I) of the Act

Unlike an alien who is inadmissible for committing a crime involving moral turpitude, a deportable alien is only removable under section 237(a)(2)(A)(i) if he or she is "convicted of a crime involving moral turpitude [punishable by imprisonment of a year or more that was] *committed within five years . . . after the date of admission*." Section 237(a)(2)(A)(i) of the Act (emphasis added). Thus, section 237(a)(2)(A)(i)(I) sets the temporal trigger for deportability *as the date* of admission rather than *any time after* admission under section 212(a)(2)(A)(i)(I). *See, e.g.*, *Shivaraman*, 360 F.3d at 1147-48 (concluding that "[t]here can be only one 'the' date" of admission and declining to adopt an interpretation of the statute "whereby an [Immigration Judge] may pick and choose . . . at his apparent whim, among several dates of admission for purposes of determining removability [under section 237(a)(2)(A)(i)(I)]").

On this issue, the circuit courts and the Board appear in close, albeit not perfect, agreement. Specifically, the Board held in *Matter of Alyazji* that an "alien is deportable under section 237(a)(2)(A)(i) of the Act if he (1) is convicted of a crime involving moral turpitude that was punishable by a term of imprisonment of at least 1 year *and* (2) *was*, *on the date of the commission of that crime*, *present in the United States pursuant to an admission that occurred not more than 5 years earlier*." 25 I&N Dec. at 408 (emphasis added). In that case, the Board overruled its previous holding in *Matter of Shanu*, 23 I&N Dec. 754, 759-64 (BIA 2005), which held, as a matter of historical practice, that any admission, including an adjustment of status, constituted an "admission" under section 237(a)(2)(A)(i). In overruling *Shanu*, the Board found that the reasoning in that case placed "too much focus on historical practice and too little on the actual language of the current statute." *Matter of Alyazji*, 25 I&N Dec. at 404. Accordingly, the Board in *Alyazji* looked to the language of the Act itself in puzzling out the meaning of "the date of admission" within section 237(a)(2)(A)(i).

In particular, the Board reasoned that a plain reading of section 237(a), which makes an alien "deportable" if he or she is "in and admitted to the United States," ordinarily means that the alien is deportable if he or she is "present in the United States *pursuant* to an admission." *Id.* at 408. The Board additionally found that the plain language of section 237(a)(2)(A)(i) specifies a singular date—"*the* date"—of admission in relation to the pertinent offense. *Id.* (emphasis added). Thus, the Board concluded that "the date of admission" in section 237(a)(2)(A)(i) of the Act "refers to the date of the admission by virtue of which the alien was present in the United States when he committed his crime." *Id.* at 407. Consequently, turning to the facts before it, the Board found that when the alien *committed* a "crime involving moral turpitude" in 2007, he was physically present in the United States pursuant to a lawful admission in 2001. *Id.* at 408. As a result, the alien's admission in 2001, not his adjustment of status in 2006, was "the date of admission" for purposes of section 237(a)(2)(A)(i). *Id.*

The Third Circuit is the only circuit that purports[3] to apply *Alyazji*'s interpretation of "the date of admission" in section 237(a)(2)(A)(i). *Totimeh v. Att'y Gen. of U.S.*, 666 F.3d 109, 117-18 (3d Cir. 2012). That case involved an alien who was initially admitted to the United States as a nonimmigrant in 1980. The alien subsequently fell "out of status" and then adjusted status to that of an LPR in 1983. Following his adjustment of status, the alien was convicted of a turpitudinous offense in 1988 and charged with removability under section 237(a)(2)(A)(i). In consideration of *Alyazji*, the court found that "regardless [of] whether [the alien] was 'out

of status,' his 1980 admission was valid, and he remained in the United States through his adjustment of status in May 1983." *Id.* at 118. Consequently, the court reasoned that when he was "*convicted*" of the offense in 1988, the alien was present by virtue of his initial nonimmigrant admission in 1980. *Id.* (emphasis added). Thus, purportedly in accordance with *Alyazji*, the Third Circuit held that the alien in that case had not been convicted of a "crime involving moral turpitude" within 5 years of his "date of admission." *Id.*

As noted above, most other circuits adhere to a strict application of section 101(a)(13)(A)'s "unambiguous" definition of "admission" in this context, holding that "the date of admission" under section 237(a)(2)(A)(i)(I) means an alien's authorized physical entry into the United States after inspection by an immigration officer. *Shivaraman*, 360 F.3d at 1149 (holding that "where an alien is 'admitted' to the United States in accordance with the unambiguous definition of that statutory term as set forth in § 101(a)(13)(A), and where he maintains continuous lawful presence in this country thereafter, the date of his lawful entry constitutes the triggering date for purposes of the five-year removal provision, INA § 237(a)(2)(A)(i)"); *see also Zhang*, 509 F.3d 313 (same); *Aremu*, 450 F.3d 578 (same); *Abdelqadar*, 413 F.3d 668 (same).

Similar to the circuit courts, the Board in *Alyazji* discounted the date of an alien's section 245 adjustment of status as the triggering "date of admission" under section 237(a)(2)(A)(i)(I). However, even though the Board and circuit courts appear consistent on this point, *Alyazji*'s holding suggests otherwise. Unlike the Sixth, Seventh, Ninth, and Eleventh Circuits, the Board's holding in *Alyazji* does not discount the possibility that the date of an alien's adjustment of status *may* serve as "the date of admission" under certain circumstances. Indeed, suppose an alien entered the country without inspection, later adjusted status, and was present in the United States pursuant to that adjustment of status when she committed a turpitudinous offense. In such a case, a plain reading of the holding in *Alyazji* indicates that the date the alien adjusted status should be construed as that alien's "date of admission." 25 I&N Dec. at 408-09.

Waiver Under Section 212(h) of the Act

If an alien is found removable on the basis of a criminal offense, he or she may be eligible for relief in lieu of removal. Specifically, an alien who has been found removable under the inadmissibility grounds for having committed a crime involving moral turpitude can seek a discretionary waiver of inadmissibility under section 212(h) of the Act. A section 212(h) waiver "is typically referred to as the 'waiver of inadmissibility,' as INA § 212 sets forth grounds upon which an alien can be denied admission to the United States, as well as conditions under which certain of those grounds can be waived. However, the waiver is also available in removal proceedings." *Lanier*, 631 F.3d at 1364 n.1.

Despite the availability of the waiver to inadmissible aliens, it may remain unavailable to certain LPRs. In relevant part, section 212(h) provides that no waiver may be granted

> in the case of an alien who has previously *been admitted* to the United States *as an alien lawfully admitted for permanent residence* if either since the date of such admission the alien *has been convicted of an aggravated felony* or the alien has not lawfully resided *continuously* in the United States for a period of *not less than 7 years* immediately preceding the date of initiation of proceedings to remove the alien from the United States.

(Emphases added.)

Thus, the statutory text suggests that no waiver of inadmissibility exists for LPRs who: (1) have "been convicted of an aggravated felony"; or (2) have *not* continuously resided in the United States for at least 7 years prior to the initiation of removal proceedings. This rule is strictly enforced in the Board's recent decision in *Matter of Koljenovic*, 25 I&N Dec. at 225. Subsequent developments in the circuit courts, however, indicate that a section 212(h) waiver *may* be available to many LPRs who are otherwise ineligible for other forms of relief—because of an aggravated felony conviction—if those LPRs adjusted their status while in the country and have not since reentered. *See* section 237(a)(2)(A)(iii) of the Act. Whether an LPR is statutorily eligible for section 212(h) relief depends on an adjudicator's construction of the terms "admission" and "admitted." As a result, in determining an LPR's substantive eligibility for a section 212(h) waiver, the adjudicator should be mindful of the relevant precedent that interprets these terms.

In *Matter of Koljenovic*, 25 I&N Dec. at 219, the alien initially entered the United States without inspection but later adjusted status to that of an LPR in 2001. In 2004, he was convicted of a turpitudinous offense, and in 2008 he was placed in removal proceedings under section 212(a)(2) of the Act, following his return from a trip abroad. The alien then sought a waiver of inadmissibility under section 212(h) in conjunction with an application to readjust status, which the Immigration Judge denied, "finding that the [alien] was ineligible because he was lawfully admitted for permanent residence when he adjusted his status and he did not have the requisite 7 years of lawful continuous residence since the date of his adjustment of status." *Id.* at 219-20. On appeal, the alien argued that this bar did not apply to him because he was not "admitted" as an LPR when he adjusted his status.

More precisely, the alien argued that adjustment of status is not an "admission" within the meaning of section 212(h) because it is not an "admission" under section 101(a)(13)(A), which requires physical entry into the United States after inspection and authorization. *Id.* at 220. The Board disagreed, holding that an "adjustment of status constitutes an admission" under section 212(h). *Id.* at 225. In fact, the Board added, it was his "only possible date of admission, given that he entered without inspection." *Id.* Thus, according to the Board, any alien who "adjusts status" pursuant to section 245 *or* physically enters the United States as an LPR after inspection and authorization may be subject to the bar in section 212(h) if he or she is convicted of an aggravated felony *or* has not continuously resided in the United States for at least 7 years. *Id.*

However, the Fourth, Fifth, Ninth, and Eleventh Circuits disagree with this reasoning. Instead the circuit courts focus on the "unambiguous" nature of the definition of "admitted" in section 101(a)(13)(A), concluding that this definition must necessarily define the term "admitted" within section 212(h); thus the bar only applies to aliens who have physically entered the United States as LPRs after inspection and authorization at a port of entry. *Bracamontes*, 675 F.3d at 389 ("[T]he language is plain and unambiguous . . . : section 212(h) bars only those aliens who have committed aggravated felonies and who have previously been admitted to the United States *with lawful permanent resident status* from seeking a waiver of inadmissibility."); *Lanier*, 631 F.3d at 1366-67 ("[T]he plain language of § 212(h) provides that a person must have physically entered the United States, after inspection, as a lawful permanent resident in order to have 'previously been admitted to the United States as an alien lawfully admitted for permanent residence.' Based on this unambiguous text, we find that the statutory bar to relief does not apply to those persons who, like [the alien], adjusted to lawful permanent resident status while already living in the United States."); *Hing Sum*, 602 F.3d at 1101 ("The text, structure, and history of the statute confirm that the terms 'admission' and 'admitted' as used in [sections 101(a)(13)(A)] and 212(h) refer to inspection and authorization by an immigration officer at the port of entry."); *Martinez*, 519 F.3d at 544 (holding that the statutory bar to section 212(h) applies "when the alien is granted permission, after inspection, to enter the United States . . . as an LPR").

Although it is unclear whether the Fourth, Fifth, and Ninth Circuits would apply the same reasoning to an alien who entered without inspection and later adjusted status, the Eleventh Circuit's holding in *Lanier* directly repudiates *Koljenovic* by exempting just such an alien from the aggravated felony bar under section 212(h). *Lanier*, 631 F.3d at 1366. As previously noted, the Board in *Koljenovic* did not literally apply the definition of section 101(a)(13)(A) to an alien who unlawfully entered and then adjusted status because the alien "would [then] have no admission date at all." 25 I&N Dec. at 223. The Board further observed that the Fourth Circuit "explicitly noted that finding adjustment of status to be an admission might be justified because of the possible absurdities that would result from a contrary holding in cases such as this, where the alien has never been admitted within the meaning of section 101(a)(13)(A) of the Act." *Id.* (citing *Aremu*, 450 F.3d 578). The Fourth Circuit cited this reasoning favorably in *Bracamontes*, stating that in *Koljenovic*, "the BIA arguably needed to fill in a 'gap' in the language of section 212(h) because it was entirely silent concerning how to treat an alien with *no* lawful entry at all." 675 F.3d at 388.

The Board additionally explained in *Koljenovic* that a strict application of the section 101(a)(13)(A) definition of "admitted" to section 212(h) would allow aliens who became LPRs through adjustment of status, "who currently comprise a substantial majority of all those admitted to lawful permanent resident status, to forever avoid the effect of the aggravated felony bar." 25 I&N Dec. at 224 & n.3 (citing statistics from 2007 to 2009 that close to 60 percent of those who obtain LPR status did so through adjustment of status). More recent data

confirms that more than half of LPRs obtain such status through adjustment under section 245. Randall Monger & James Yankay, DHS, *Annual Flow Report—U.S. Legal Permanent Residents: 2011* 2, Table 1 (Apr. 2012), http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf. Thus, the Board reasoned, "There is no indication that Congress intended the limitations it built into section 212(h) to apply to those aliens whose previous admission to lawful permanent resident status occurred through the overseas consular process, but not to the majority of aliens whose admission occurred through adjustment of status." *Koljenovic*, 25 I&N Dec. at 224.

The Fourth, Fifth, and Eleventh Circuits disagree with the Board on this point, noting that plausible reasons exist for why Congress chose to distinguish between aliens who entered the country as LPRs and those who adjusted to LPR status post-entry, including: (1) Congress was taking a rational first step towards addressing its ultimate goal of removing criminal aliens; and (2) Congress determined that aliens who adjusted their status are more deserving of access to the waiver. *Bracamontes*, 675 F.3d at 389 (citing *Martinez*, 519 F.3d at 545); *Lanier*, 631 F.3d at 1367 n.4 (citing same). In light of these rational explanations for distinguishing between these two types of LPRs, the Fourth, Fifth, and Eleventh Circuits held that they were "not at liberty to override the plain, unambiguous text of § 212(h)." *Lanier*, 631 F.3d at 1367 n.4 (citing *Martinez*, 519 F.3d at 545); *see also Bracamontes*, 675 F.3d at 389 (holding that "regardless of whether some might deem such a distinction 'absurd' . . . these are rational explanations and, as such, they must be upheld") (citing same). Finally, the Fifth and Eleventh Circuits concluded that "defining 'admitted' to exclude post-entry adjustment to LPR status is bolstered by the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Lanier*, 631 F.3d at 1367 n.4 (quoting *Martinez*, 519 F.3d at 544).

In *Matter of E.W. Rodriguez*, the Board noted that it would defer to the Fourth, Fifth, and Eleventh Circuits' decisions in *Bracamontes*, *Martinez*, and *Lanier*, respectively, in removal proceedings arising in those circuits. 25 I&N Dec. at 788-89. Although the Board in *E.W. Rodriguez* acknowledged its disagreement with these decisions and reaffirmed its holding in *Koljenovic*, it recognized that it was "not free to construe the [Act] differently [from the Fourth, Fifth, and Eleventh Circuits] because [those courts have] found the language of section 212(h) to be *unambiguous*." *Id.* at 788 (emphasis added) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (holding that a court's prior judicial construction of a statute trumps a subsequent agency construction that is otherwise entitled to deference under *Chevron* where the prior court decision held that its construction followed from the *unambiguous terms* of the statue and thus left no room for agency discretion)). As a consequence, because the removal proceedings in *E.W. Rodriguez* arose within the Fifth Circuit, and since the alien in that case had not physically entered the United States as an LPR following inspection, the Board held that the Fifth Circuit's interpretation of "admitted" in section 212(h) dictated that the aggravated felony bar did not impede the alien's eligibility for section 212(h) relief. *Id.* The Board noted that it would similarly defer to the Fourth and Eleventh Circuits' constructions of section 212(h) in removal proceedings arising in those circuits. *Id.* at 788-89.

Nevertheless, the Board in *E.W. Rodriguez* maintained that "[i]n jurisidictions where controlling circuit law does not forbid us from doing so . . . we will continue to hold—in accordance with the reasoning underlying our own precedent in *Matter of Koljenovic* that section 212(h) relief is unavailable to any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status." *Id.* at 789 (citation omitted). Interestingly, the Board's decision in *Matter of E.W. Rodriguez* did not cite or mention the Ninth Circuit's holding in *Hing Sum*, which observed that the "*the statute is not ambiguous*" and held that the "text, structure, and history of the statute confirm that the terms 'admission' and 'admitted' as used in [sections 101](a)(13)(A) and 212(h) of the Act] refer to inspection and authorization by an immigration officer at the port of entry." *Hing Sum*, 602 F.3d at 1099, 1101 (emphasis added). Nor did the Board indicate why *Hing Sum*—as opposed to the decisions in *Bracamontes*, *Lanier*, and *Martinez*—is not "controlling circuit law" in the Ninth Circuit interpreting the term "admitted" in section 212(h) as unambiguously referring to a physical entry following inspection and authorization in accordance with section 101(a)(13)(A) of the Act.

Regardless, based on the reasoning outlined in *Koljenovic*, the Board in *E.W. Rodriguez* continued to maintain that

> the language of section 212(h) *is ambiguous when understood in the context of the statute taken as a whole* [and] that the proper resolution of that ambiguity [outside the Fourth, Fifth, and Eleventh Circuits] is to interpret the statute as barring relief for any alien who has been convicted of an aggravated felony after acquiring lawful permanent resident status, *without regard to the manner in which such status was acquired*.

Matter of E.W. Rodriguez, 25 I&N Dec. at 789 (emphases added).

Conclusion

Two general, competing approaches emerge from the above analysis: one appears particularly mindful of immigration consequences and context, while the other seems to emphasize consistency. The first approach recognizes the implications that a particular construction of "admission" or "admitted" may have on the accurate interpretation and application of the Act, and it emphasizes the need to "preserve the coherence of the statutory scheme and avoid absurdities." *See Matter of E.W. Rodriguez*, 25 I&N Dec. at 789. This approach considers the possibility that an adjustment of status may constitute an "admission" under certain circumstances because a strict application of section 101(a)(13)(A) may immunize certain aliens from deportability or may even make otherwise nondeportable aliens inadmissible. The second approach, adopted in many circuits, looks for a uniform interpretation of "admission" and "admitted," applying section 101(a)(13)(A)'s "unambiguous" definition of these terms to specific provisions in the Act. As noted above, this approach limits the definition of "admission" and "admitted" to an authorized physical entry after inspection, which does not encompass a post-entry adjustment of status.

Whether these two approaches can be reconciled remains to be seen. Until that time, adjudicators will continue to wrestle with the meaning of the terms "admission" and "admitted," depending on their particular statutory context within the Act.

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1. An inadmissible alien who was convicted of possession of 30 grams or less of marijuana for his or her personal use may apply for a discretionary waiver of inadmissibility under section 212(h) of the Act. Nevertheless, such a waiver is only applicable if an Immigration Judge has previously found the alien removable under section 212(a)(2)(A)(i)(II) of the Act.

2. This issue should be distinguished from the question that arises when an alien reenters the United States unlawfully after a prior removal order. In that case, under section 241(a)(5) of the Act, the DHS can "reinstate" the prior removal order without seeking a new order before an Immigration Judge. Most circuits have held that, under section 241(a)(5) of the Act, an alien who was previously removed but then reentered after being inspected by an immigration officer can still be removed under section 241(a)(5) if he or she had no lawful status to reenter. *See Cordova-Soto v. Holder*, 659 F.3d 1029, 1033-35 (10th Cir. 2011) (rejecting the rule in *Quilantan* as applied to section 241(a)(5) and citing other circuit courts holding the same). Those cases do not address the issue whether an alien was admitted for purposes of determining whether that alien should be charged under section 212 or 237 of the Act.

3. We use the terms "purports" and "purportedly" above to underline the fact that although the Third Circuit in *Totimeh* "based" its holding on the Board's "unambiguous precedent" in *Alyazji*, the court's application of *Alyazji* was incomplete. 666 F.3d at 118. Indeed, as noted above, the Third Circuit's finding of nondeportability in *Totimeh* depends on the fact that Totimeh was not *convicted* of a turpitudinous offense within 5 years after the date of admission. The statutory text and the Board's decision in *Alyazji*, on the other hand, make an alien deportable if he or she "is convicted of a crime involving moral turpitude *committed* within five years . . . after the date of admission." Section 237(a)(2)(A)(i)(I) of the Act (emphasis added); *see also Alyazji*, 25 I&N Dec. 397. In its opinion, the Third Circuit does not note when Totimeh actually *committed* the criminal conduct of which he was later convicted in 1988; it may have been the case that the alien had committed the crime within 5 years of his "admission" in 1980, making him deportable and completely changing the case's outcome. Regardless, the Third Circuit in *Totimeh* purports to have adopted *Alyazji*'s reasoning, even if the application of that reasoning was incomplete.

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