



Immigration Law Advisor

January 2011 A Legal Publication of the Executive Office for Immigration Review Vol. 5 No. 1

In this issue...

Page 1: Feature Article:

*Location, Location, Location:
Venue for Immigration Appeals
in the U.S. Circuit Courts*

Page 6: Federal Court Activity

Page 7: *Speaking of Parole . . .*

Page 13: Regulatory Update

The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

Location, Location, Location: Venue for Immigration Appeals in the U.S. Circuit Courts

by Daniel L. Swanwick

"Where is a corporation?" Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809, 809 (1935).

"What is the location of a proceeding conducted in two places at once?" *Ramos v. Ashcroft*, 371 F.3d 948, 948 (7th Cir. 2004).

Introduction

As attorneys and adjudicators, our lives are full of legal fictions, convenient white lies we tell ourselves in order to bracket certain aspects of reality that we find distracting or irrelevant. One classic legal fiction concerns the location of a corporation. As Felix Cohen noted,

Clearly the question of *where a corporation is*, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. . . . It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, "How many angels can stand on the point of a needle?"

35 Colum. L. Rev. at 810.

This article addresses a different location-based legal fiction: where is an Immigration Court proceeding completed when the Immigration Judge, alien, and attorneys are in different places? Like the location of a corporation, the answer is not empirically discernible but depends, instead, on the context in which the question is being asked and on who has the authority to answer with finality.

Although there are several contexts in which the location of immigration proceedings comes up, this article is primarily concerned with which United States circuit court of appeals is the proper venue for an appeal of a final order of removal. This question is played out in two related inquiries. First, which circuit's case law should an Immigration Judge or the Board of Immigration Appeals apply in a given case? Second, when should a circuit court grant a motion to transfer venue to a sister circuit?

A legal fiction is most effective when it is clear and well understood and its effects are foreseeable. It is less so when it is confusing or its meaning is in dispute. As we will see, the location of an immigration proceeding conducted via telephone or video conferencing is a concept that is both misunderstood and contested. It is the goal of this article to clear up the confusion and highlight the principled disagreements.

Why Location Matters

Two factors interact to invest the location of an immigration proceeding with practical significance. First, the increased use of video conferencing in Immigration Court proceedings raises questions about the geographical location of any given hearing and resulting issues involving jurisdiction. Facing large caseloads and limited resources, the Office of the Chief Immigration Judge ("OCIJ"), as authorized by statute and regulations, has turned to video conferencing and telephonic hearings as important docket management tools. *See* section 240(b)(2) of the Act, 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c). As a substitute for in-person details to distant Immigration Courts, the use of video conferencing allows Immigration Judges to spend more time hearing cases and less time traveling. Because there are few technological or administrative limitations on the geographical location of the Immigration Judge and the parties, video conferencing and the telephone are inevitably used to conduct hearings where the parties and the Immigration Judge are in different

circuits. Perhaps the most salient example of this is the Headquarters Immigration Court. Its judges sit in Falls Church, Virginia, while conducting hearings exclusively via video conferencing at Immigration Courts throughout the country, and therefore only a small percentage of its caseload falls within the Fourth Circuit, where the court's facility is located. Many other Immigration Courts also regularly conduct hearings via video conferencing and telephone that cross circuit boundaries.

Second, the fact that differences exist in case law among the various circuit courts of appeals means that the location of an Immigration Court hearing may ultimately determine the substantive outcome of a case. Setting aside questions of ideology, the number of appeals taken from the Board presents the circuit courts with myriad opportunities to rule on issues of immigration law. Moreover, the two bodies with the power to resolve circuit splits—the Supreme Court and Congress—rarely do so in the immigration context.

With the increased use of telephone and videoconferencing, the location of an Immigration Court proceeding may continue to be a matter of dispute, the resolution of which in a given case could determine whether an alien is deported or allowed to remain in the country.

The State of the Law

Statute and Current Regulations

The Immigration and Nationality Act declares that the petition for review of an order of removal "shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." Section 242(b)(2) of the Act, 8 U.S.C. § 1252(b)(2). However, as noted above, with a significant number of hearings being conducted via telephone and video conferencing, where an Immigration Judge completed the proceedings is sometimes disputed as a matter of jurisdiction. For the purpose of appellate venue, this is not problematic, so long as the multiple possible locations are in the same judicial circuit. However, once the possible completion locations span circuit boundaries, the statute alone is no longer sufficient for determining appellate venue, and it becomes necessary to consider various other sources to fill the gap left by the ambiguous statutory language.

The regulations currently in force do not address where immigration proceedings are completed. However, certain regulatory provisions arguably shed some light on the question.

Ramos I and Georcelly

In *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004) (*Ramos I*), the Seventh Circuit held that an Immigration Judge completes proceedings where parties are required to file their motions and briefs and where orders are prepared and entered. Mr. Ramos's removal hearing was associated with the Immigration Court in Omaha, Nebraska, in the Eighth Circuit. The respondent's attorney and counsel for the Department of Homeland Security ("DHS") made their appearances in Council Bluffs, Iowa, also in the Eighth Circuit. They were connected via video conferencing to the Immigration Judge, who conducted the proceedings from his courtroom in Chicago, in the Seventh Circuit. All filings were required to be submitted to the Chicago Immigration Court, which at the time was the Administrative Control Immigration Court with responsibility over the Omaha Immigration Court and, by extension, the Council Bluffs hearing location. 8 C.F.R. § 1003.11.

After Mr. Ramos was unsuccessful before the Immigration Judge and the Board, he appealed to the Seventh Circuit. The Office of Immigration Litigation ("OIL")—the component of the Department of Justice responsible for litigating immigration matters before the Federal courts—moved to transfer venue to the Eighth Circuit, reportedly arguing that "a proceeding is 'completed' where the lawyers and witnesses appear for the hearing, rather than where the court is located and the order is issued." *Ramos I*, 371 F.3d at 949.

The court denied OIL's motion, finding that the Immigration Judge had completed the proceedings in Chicago, because that is where the parties were required to file their motions and briefs and where the orders were prepared and entered. It also noted that both the Immigration Judge and the Board captioned their formal orders with "Chicago" rather than "Omaha" or "Council Bluffs." In dicta, the court stated that the Immigration Judge would have completed his role in Chicago, even if the hearing had been conducted by three-way video conferencing, with the Immigration Judge participating from a vacation home in Michigan, in the Sixth Circuit.

Finding "enough ambiguity" in the statutory language, the court suggested that "immigration officials would be well advised to issue regulations specifying where they think immigration proceedings are 'completed.'" *Id.* However, the court went on to state that "all regulations could do, in the absence of statutory amendment, would be to offer the alien a choice; the statute itself ensures that the alien may petition for review in the circuit where the immigration court is located." *Id.*

In *Georcelly v. Ashcroft*, 375 F.3d 45 (1st Cir. 2004), the First Circuit did not reach the question of where an Immigration Judge completes proceedings, because it found that the parties had waived any objection to venue by their prior actions and inaction. *Id.* at 49 ("Venue requirements are normally for the convenience of the parties and, if the parties do not object, ordinarily there is no policy objection to proceeding in any court with jurisdiction."). However, in dicta, the *Georcelly* court, citing *Ramos I*, stated that the statutory language was "so far from conclusive" that legislative history and policy concerns might matter in future cases. *Id.* at 48. Anticipating that circuits would not necessarily agree on a single construction of the venue statute, the *Georcelly* court followed *Ramos I* in encouraging immigration officials and Congress to take action to promulgate uniform, binding rules in this area. *Id.* at 49.

The *Georcelly* court also noted that although it was not deciding the issue, the "most straightforward reading" of the statute would probably have led to a conclusion that the proceedings were completed in Puerto Rico, in the First Circuit, where there was a "reasonable likelihood" that the final removal order was officially filed and docketed, rather than in the U.S. Virgin Islands, in the Third Circuit, where the in absentia ruling was made in person by the Immigration Judge. *Id.* at 48. The court hedged this tentative finding in two ways. First, it noted that while "a judicial order is normally effective when filed and docketed," exceptions to this rule do exist. *Id.* Second, the court stated that "[f]urther facts might affect the outcome (e.g., perhaps the removal order for some reason was effective when announced)." *Id.*

OPPM 04-06, Ramos II, and Poroj-Mejia

On August 18, 2004, shortly after *Ramos I* and *Georcelly* were decided, and proximate to the opening of the video conferencing Headquarters Immigration

Court, the Office of the Chief Immigration Judge issued Interim Operating Policies and Procedures Memorandum (“OPPM”) 04-06, *Hearings Conducted through Telephone and Video Conference*, <http://www.justice.gov/eoir/efoia/ocij/oppm04/04-06.pdf>. The OPPM first articulates OCIJ’s policy position that the “hearing location”—where a case is “docketed for hearing” and where immigration proceedings are deemed to take place—is not necessarily the same as the Administrative Control Immigration Court, where the parties are required to file all documents. The OPPM then instructs Immigration Judges to create a clear record of the hearing location by stating it on the record and placing it in the caption of any ruling or order, and to apply the circuit law of the hearing location, not of the Administrative Control Immigration Court.

This last instruction, concerning the circuit law to be applied, places the OPPM in conflict with the Seventh Circuit’s holding in *Ramos I* and the First Circuit’s tentative dicta in *Georcely*. Because OPPM 04-06 is a memorandum setting out internal agency guidance, rather than a regulation carrying the force of law, it does not receive formal deference from the Federal courts. See *Poroj-Mejia v. Holder*, No. 10-1425, 2010 WL 4102295, at *2 (7th Cir. Oct. 18, 2010); see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). Rather, it is “entitled to respect” only to the extent that it has the “power to persuade.” *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1949)).

Very soon after OCIJ issued OPPM 04-06, OIL asked the Seventh Circuit to reconsider its earlier ruling on venue. In *Ramos v. Gonzales*, 414 F.3d 800, 803 (7th Cir. 2005) (*Ramos II*), the court paraphrased the OPPM as stating that “hearings will be presumed to be where the parties and lawyers are located, not where the IJ is.” However, invoking “law of the case” doctrine, the Seventh Circuit “decline[d] the invitation” to reconsider its earlier venue decision in light of this subsequent agency guidance. *Id.*

Then, in October of 2010, the Seventh Circuit addressed the OPPM’s applicability on the merits for the first time, albeit in a nonprecedential disposition. *Poroj-Mejia*, 2010 WL 4102295 at *2. It found that the Board erred by applying Eighth Circuit law in a case where the Immigration Judge was “located in Chicago when conducting the proceeding via teleconference with

Poroj-Mejia in Kansas City.” *Id.* Although the OPPM required the application of Eighth Circuit law, the Seventh Circuit found that an “internal memorandum” like the OPPM does not “override the statute.” *Id.*

Proposed Regulation

EOIR has taken steps to comply with the circuits’ recommendations that it promulgate a regulation to clarify where an immigration proceeding is completed. In 2007, the Department of Justice published a proposed rule establishing that removal proceedings shall be deemed to be completed at the location of the final hearing, defined as “the place of the hearing identified on the notice for the final hearing,” regardless of whether all parties are physically present at that location. *Jurisdiction and Venue in Removal Proceedings*, 72 Fed. Reg. 14,494, 14,497 (proposed Mar. 28, 2007) (to be codified at 8 C.F.R. § 1003.20(a)(4)).

However, even if it were to be promulgated as a final rule, it is unclear that this regulation would be afforded deference by the Seventh Circuit. Deference is due under *Chevron* when (1) the statutory provision a regulation interprets is within the promulgating agency’s jurisdiction to administer; (2) the statute is ambiguous on the point at issue; and (3) the agency’s construction is reasonable. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 980 (2005) (*Brand X*) (citing *Chevron*, 467 U.S. at 843-44 & n.11, 865-66). The problem facing the regulation is that the *Ramos I* court, in stating that “the statute itself ensures that the alien may petition for review in the circuit where the immigration court is located,” could be read to have found that section 242(b)(2) of the Act is not ambiguous on this point and that any contrary interpretation would be unreasonable. *Ramos I*, 371 F.3d at 949.

Furthermore, under *Brand X*, a court’s prior judicial construction of a statute trumps the agency’s construction, even if the agency’s construction is due deference under *Chevron*, if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. *Brand X*, 545 U.S. at 982. Again, it is unclear whether the *Ramos I* court held that its construction followed from the unambiguous terms of section 242(b)(2). In successive paragraphs, the opinion states that “[t]here is enough ambiguity in the phrase . . . that immigration officials would be well advised to issue regulations

specifying where they think immigration proceedings are ‘completed,’” and that “all regulations could do, in the absence of statutory amendment, would be to offer the alien a choice [of appellate venue]; the statute itself ensures that the alien may petition for review in the circuit where the immigration court is located.” *Ramos I*, 371 F.3d at 949. Ultimately, this issue is beyond the scope of this article, and it must be resolved, if at all, by the Seventh Circuit.

Subsequent Case Law—Chicago

The Seventh Circuit—and appellate litigants, when they are in agreement with one another—consistently cite to *Ramos I* for the proposition that an immigration proceeding is completed where the Immigration Court is located. For example, in *Escobar Barraza v. Mukasey*, 519 F.3d 388 (7th Cir. 2008), a Chicago-based Immigration Judge had applied Eighth Circuit law to a case docketed in Omaha. In its decision, the Seventh Circuit did not reach the issue of venue because the litigants, citing the statute and *Ramos I*, agreed that Seventh Circuit law should apply. Similarly, in *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115 (7th Cir. 2008), the parties agreed on appeal that venue was proper in the Seventh Circuit for a case that was docketed in Kansas City and heard by a Chicago Immigration Judge. In a footnote, the Seventh Circuit cited *Ramos I* in confirming proper venue. *Id.* at 1118 n.1.

In the unpublished decision appealed in *Poroj-Mejia*, 2010 WL 4102295, the Board explicitly stated its disagreement with the Seventh Circuit’s approach to venue and applied Eighth Circuit law to a Kansas City hearing conducted by a Chicago Immigration Judge. In supporting this result, the Board set out its understanding of the *Ramos* line of cases:

At the time of the Seventh Circuit’s decision in [*Ramos I*], [OPPM 04-06] had not yet been issued, and the Court indeed noted the absence of any governing regulations. After the policy’s issuance, the Government asked the Seventh Circuit to reconsider its venue holding in [*Ramos I*]. The court denied that request, but its only stated reason was that the prior decision had “established the law of the case with respect to venue for *this* proceeding” [*Ramos II*, 414 F.3d at 803] (emphasis added). Subsequently, in

[*Chavez-Vasquez*], the Seventh Circuit stated in a footnote that, “[v]enue is determined by the location of the immigration court rather than by the location from which witnesses appear via teleconference,” but the court supported that proposition only by a citation to the first decision in *Ramos*. [*Chavez-Vasquez*, 548 F.3d at 1118 n. 1.] In [*Nzeve*], the court again cited to the first *Ramos* decision, without mention of the subsequent OCIJ policy. Thus, the Seventh Circuit has still not considered the effect of the OCIJ policy, but, in our view, has left open the question whether the policy’s issuance subsequent to the first decision in *Ramos* would warrant a result different from the one reached in that case.

As discussed above, the Seventh Circuit recently overturned the Board’s application of Eighth Circuit law in a nonprecedential disposition in this case, finding that “[b]ecause an IJ in Chicago conducted Poroj-Mejia’s removal proceeding, venue lies in this circuit.” *Poroj-Mejia*, 2010 WL 4102295, at *2. Although the Seventh Circuit explicitly dismissed the OPPM by characterizing it as an internal memorandum that does not override the statute, the fact that it did so in a nonprecedential disposition means that this outcome is not binding on EOIR adjudicators. See Fed. R. App. P. 32.1; 7th Cir. R. 32.1(b).

Subsequent Case Law—El Paso

Disputes over venue have also come up in cases where the hearing notice specifies a hearing in Chaparral, New Mexico, in the Tenth Circuit, but the proceedings are conducted by Immigration Judges in El Paso, Texas, in the Fifth Circuit. In these cases, which have not produced rulings from the relevant circuits, the Board has consistently applied the guidance contained in OPPM 04-06 and makes no reference to *Ramos I*.

In another unpublished case, the Board held that Tenth Circuit law applied, even though the Immigration Judge—and possibly the respondent—was in El Paso, within the Fifth Circuit. Citing the OPPM, the Board found that this was the correct result, because the case was “docketed for hearing” in Chaparral and “the policy

continued on page 14

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR DECEMBER 2010 AND CALENDER YEAR 2010 TOTALS

by John Guendelsberger

The United States courts of appeals issued 166 decisions in December 2010 in cases appealed from the Board. This is fewer than half the average number of decisions we see each month. The courts affirmed the Board in 141 cases and reversed or remanded in 25, for an overall reversal rate of 15.1% compared to last months 14.5%. There were no reversals from the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for December 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	1	1	50.0
Second	27	27	0	0.0
Third	16	15	1	6.3
Fourth	6	6	0	0.0
Fifth	18	14	4	22.2
Sixth	6	5	1	16.7
Seventh	3	3	0	0.0
Eighth	3	3	0	0.0
Ninth	59	41	18	30.5
Tenth	7	7	0	0.0
Eleventh	19	19	0	0.0
All	166	141	25	15.1

The 166 decisions included 92 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 33 direct appeals from denials of other forms of relief from removal or from findings of removal; and 41 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	92	77	15	16.3
Other Relief	33	29	4	12.1
Motions	41	35	6	14.6

Of the 15 reversals or remands in asylum cases, 14 were from the Ninth Circuit. These cases involved the credibility determination (five cases); nexus (three cases); assessment of changed country conditions after a finding of past persecution (two cases); level of harm for past persecution; the 1-year bar; firm resettlement; and ineffective assistance of counsel. The Fifth Circuit remanded a Convention Against Torture case in which it found that the Board should have applied a “willful blindness” standard.

The four reversals in the “other relief” category included two *Carachuri-Rosendo* remands from the Fifth Circuit; a *Cui* remand to provide more time for fingerprinting from the Ninth Circuit; and a remand from the Third Circuit to further address whether an offense was a crime involving moral turpitude. The six reversals involving motions to reopen addressed proper service of the notice to appear; ineffective assistance of counsel; changed country conditions; and the scope of the Immigration Judge’s jurisdiction upon reopening and remand by the Board.

The chart below shows the combined numbers from January through December 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	62	49	13	21.0
Ninth	1890	1590	300	15.9
Fifth	171	148	23	13.5
Third	419	374	45	10.7
Sixth	104	95	9	8.7
First	35	32	3	8.6
Eighth	62	57	5	8.1
Eleventh	217	203	14	6.5
Fourth	135	128	7	5.2
Second	914	869	45	4.9
Tenth	41	39	2	4.9
All	4050	3584	466	11.5

The numbers by type of case on appeal for all of 2010 are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1996	1754	242	12.1
Other Relief	878	750	128	14.6
Motions	1176	1080	96	8.2

A few points concerning this year's numbers are worth noting. The unusually high rate of reversal in the Fifth Circuit was due, in large part, to *Carachuri-Rosendo* remands, which accounted for 13 of the 23 reversals in that circuit. Notably, the Board was required to defer to Fifth Circuit law in these cases until the Supreme Court essentially approved the Board's approach to recidivist possession convictions in its June 2010 decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). Without these remands, the reversal rate in the Fifth Circuit would be 5.8%, rather than 13.5%.

The Seventh Circuit had the highest reversal rate this year, as it did in 4 of the last 5 years. The reversal rate in the Second Circuit has declined in each of the last 5 years. The Ninth Circuit reversal rate this year, while relatively high, was lower than in the previous 4 years.

As the chart below indicates, over the last 5 calendar years we have seen a significant downward trend in both the number of overall decisions issued each year and in the number of reversals or remands. The annual reversal rate is up slightly this year after falling for 3 years in a row. Notably, if the *Carachuri-Rosendo* remands from the Fifth Circuit (13 cases) and Seventh Circuit (1 case) are put aside, the overall reversal rate for 2010 drops from 11.5% to 11.2%, the same rate as in 2009.

	2006	2007	2008	2009	2010
Total Decisions	5398	4932	4510	4829	4050
Reversals	944	753	568	540	466
% Reversed	17.5	15.3	12.6	11.2	11.5

The reversal rates by circuit for the last 5 calendar years are shown in the following chart by the percentage reversed.

Circuit	2006	2007	2008	2009	2010
First	7.1	3.8	4.2	5.6	8.6
Second	22.6	18.0	11.8	5.5	4.9
Third	15.8	10.0	9.0	16.4	10.7
Fourth	5.2	7.2	2.8	3.3	5.2
Fifth	5.9	8.7	3.1	4.0	13.5
Sixth	13.0	13.6	12.0	8.6	8.7
Seventh	24.8	29.2	17.1	14.3	21.0
Eighth	11.3	15.9	8.2	7.7	8.1
Ninth	18.1	16.4	16.2	17.2	15.9
Tenth	18.0	7.0	5.5	1.8	4.9
Eleventh	8.6	10.9	8.9	7.1	6.5
All Circuits	17.5	15.3	12.6	11.2	11.5

John Guendelsberger is a Member of the Board of Immigration Appeals.

Speaking of Parole: Who's in, and Who's Out

Edward R. Grant and Patricia M. Allen

Francophiles will note the pun in our title: our term “parole,” with its multiple legal uses ranging from the parole evidence rule in contracts to the contested issue of parole for prisoners, comes from the French for speech or words—as in *paroles d’une chanson* (as sung by Edith Piaf). The derivation is simple: prisoners (or immigrants) will “speak” their “word” of honor to abide by certain conditions in exchange for their liberty. However, in immigration law, an alien’s “parole” can affect his eligibility for “downstream” benefits, such as adjustment of status, or determine whether he is considered illegally in the United States for criminal conviction purposes. Several recent decisions explicate how various forms of “parole” affect such eligibility.

Drawing the Distinction Between “Entry” and “Release”

The law allows certain aliens who were “inspected and admitted *or paroled into* the United States” to adjust their status to that of lawful permanent residents. Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) (emphasis added). The Act contains two separate provisions authorizing the parole of aliens: sections 212(d)(5)(A) and 236(a) of the Act, 8 U.S.C. §§ 1182(d)(5)(A) and 1226(a).

While section 212(d)(5)(A) specifically authorizes “parole into the United States,” section 236(a)(2)(B) authorizes “conditional parole.” The former relates to the parole of aliens for “urgent humanitarian reasons or significant public benefit,” as determined by the Attorney General on a case-by-case basis. Section 212(d)(5)(A) of the Act. The latter relates to Attorney General custody determinations regarding aliens arrested on a warrant and detained “pending a decision on whether the alien is to be removed from the United States.” Section 236(a) of the Act.

In November 2010, the United States Court of Appeals for the Third Circuit addressed, on first impression, the issue whether conditional parole under section 236 of the Act constitutes parole into the United States for purposes of adjustment of status under section 245 of the Act. *Delgado-Sobalvarro v. Att’y Gen. of U.S.*, 625 F.3d 782 (3d Cir. 2010). Our survey reveals that this issue has been addressed in published cases only by the Board of Immigration Appeals and the Third and Ninth Circuits.

The petitioners in *Delgado-Sobalvarro*, a mother and daughter, entered the United States without inspection and were later detained by immigration authorities and charged with being present in the United States without having been admitted or paroled. The petitioners were then released on conditional parole on their own recognizance under section 236 of the Act. Almost 2 years later, the mother married a United States citizen, who subsequently filed an immediate relative visa petition (Form I-130) for each petitioner. At their removal hearing, the Immigration Judge found that the petitioners were ineligible to adjust their status because they were neither admitted nor paroled into the United States, as required under section 245 of the Act. After their motion to reconsider was denied, the petitioners appealed to the Board. Among other arguments, the petitioners contended that conditional parole is, in effect, “parole” as contemplated by section 245 of the Act. The Board disagreed and the petitioners appealed.

The Third Circuit concluded that “conditional parole” is distinct from the term “parole,” as it is used in section 245 of the Act. In coming to this conclusion, the court accorded the Board *Chevron* deference for its distinction between a grant of parole under section 212(d)(5)(A) of the Act and conditional parole under section 236 of the Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The court relied on the Board’s previous holding in *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010), issued only 5 months earlier. The Third Circuit, recognizing the factual similarities present in both cases, relied on some of the Board’s analysis and identified two rationales in support of its determination. First, it found that the term parole is used in a “nearly identical” manner in sections 245 and 212 of the Act, but not in section 236 of the Act, which adds the word “conditional.” *Delgado-Sobalvarro*, 625 F.3d at 786. Second, the court investigated the legislative history of section 245 and found that the authorization of parole was initially added to this section to “provide refugees an opportunity to become lawful permanent residents” and “not to grant eligibility for adjustment of status . . . to aliens who entered the United States surreptitiously.” *Id.* at 786-87 (citing S. Rep. No. 86-1651 (1960), *as reprinted in* 1960 U.S.C.A.N. 3124, 3137) (internal quotation marks omitted). Looking at section 236 of the Act, the court found that it related to purposes not contemplated by section 245, in that it “merely provides a mechanism whereby an alien may be released pending the determination of removal,” so long as he or she is not a danger to society or a likely absconder. *Id.* at 787. The court found, therefore, that to allow aliens on conditional parole to adjust status under section 245 of the Act “would frustrate Congress’s intention to limit eligibility to refugees whose admission provides a public benefit or serves an urgent humanitarian purpose.” *Id.*

The Board in *Castillo-Padilla* investigated the effects the respondent’s interpretation would have on the statutory and regulatory scheme, a rationale not later addressed in *Delgado-Sobalvarro*. First, the Board reasoned that the respondent’s interpretation would conflict with the purpose behind section 245(i) of the Act, which provides relief to certain individuals who enter the United States without inspection. Under the respondent’s interpretation, an individual detained and released after entering without inspection could seek adjustment of status under section 245(a) without having to meet the restrictive eligibility requirements of section 245(i). Second, the Board recognized that this interpretation would also affect the application of the unlawful presence requirement of section 212(a)(9)(B)(i) of the Act, because its definition includes being “present . . . without being admitted or *paroled*.” Section 212(a)(9)(B)(ii) of the Act (emphasis added). The Board also found that the difference between parole under sections 212(a) and 236 of the Act is made even more distinct where the authority to make determinations under either section does not

entirely rest with the same entity. That is, while both the Secretary of the Department of Homeland Security (“DHS”) and the Attorney General have the authority to make parole determinations under section 236(a) of the Act, only the Secretary of the DHS may do so under section 212(a). *Compare* 8 C.F.R. § 1003.19, *and* 8 C.F.R. § 1236.1(d), *with* 8 C.F.R. § 212.5. Moreover, the Board also stressed that the regulations relating to the parole provisions of sections 236(a) and 212(a) present different eligibility standards and procedures for termination of parole. *See Castillo-Padilla*, 25 I&N Dec. at 261; *see also* 8 C.F.R. §§ 212.5(b), 236.1(c)(8).

The only circuit besides the Third that has published on this issue is the Ninth, in *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111 (9th Cir. 2007). This case relates to circumstances slightly different from those in *Castillo-Padilla* and *Delgado-Sobalvarro*. The petitioner in *Ortega-Cervantes* was granted conditional parole under section 236 of the Act in return for his witness testimony against his smuggler in criminal court. Among other arguments advanced by the petitioner was the assertion that although he was granted conditional parole under section 236, his agreement to assist in a criminal prosecution shared the purpose behind one of the regulations implementing section 212 of the Act, which provides that parole may be granted to “[a]liens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States.” 8 C.F.R. § 212.5(b)(4). Although creative, this argument was rejected by the court, which determined that the regulation did not apply to the petitioner. The court found that 8 C.F.R. § 212.5(b)(4) only applies to certain arriving aliens and those charged with particular grounds of inadmissibility. Unfortunately for the petitioner, he was neither an arriving alien nor charged with inadmissibility, because he was already present in the United States when he was apprehended.

Should I Stay or Should I Go? (Darling, You Got To Let Me Know)¹

The petitioner in our next case was not seeking relief from removal, but rather relief from criminal prosecution. Javier Anaya-Acosta was convicted in district court for being an individual “illegally or unlawfully in the United States” in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(5)(A). *See United States v. Anaya-Acosta*, 2011 WL 6185, at *1 (9th Cir. Jan. 3, 2011). Anaya-Acosta appealed his conviction to the Ninth Circuit, arguing that he was not “illegally or

unlawfully in the United States” at the time of his arrest because he was under a departure control order issued by Immigration and Customs Enforcement (“ICE”). ICE had served Anaya-Acosta with this order at the request of the Los Angeles Police Department to secure his participation as a material witness in a State murder trial. More than 2 months prior to receiving this order from ICE requiring him to remain in the United States, Anaya-Acosta had been denied relief from removal in immigration proceedings and had been granted voluntary departure, which he overstayed.

Among other arguments advanced by Anaya-Acosta, the most relevant was his assertion that his presence in the United States pursuant to a departure control order was equivalent to having been “paroled” into the United States pursuant to section 212(d)(5)(A) of the Act. This is an interesting argument, because the regulations implementing § 922(g)(5)(A) exclude from the meaning of “illegally or unlawfully in the United States” those who have been paroled into the United States under section 212(d)(5)(A) of the Act. *See* 27 C.F.R. § 478.11.

The Ninth Circuit disagreed and swiftly disposed of this argument. Unlike the analysis applied in *Ortega-Cervantes v. Gonzales*, the court did not investigate the regulations implementing section 212(d)(5)(A) relating to witnesses in judicial proceedings. Instead, the court applied an analysis similar to that of the Third Circuit in *Delgado-Sobalvarro*. The court found that parole under section 212(d)(5)(A) is granted for “urgent humanitarian reasons or significant public benefit” and held that Anaya-Acosta had not established that a departure control order serves as an equivalent. *Anaya-Acosta*, 2011 WL 6185, at *2 (internal quotation marks omitted).

The court also found that “parole is granted only to aliens who have not yet entered the United States and who must be inspected by immigration officers before entering.” *Id.* at *2. The court reached this conclusion by seeking the elusive definition of an “alien applying for admission,” as used in section 212(d)(5)(A) of the Act to describe those eligible for parole, and by piecing together section 235(a)(3), which requires that applicants for admission be inspected by immigration officers, and 8 C.F.R. § 1.1(q), which defines the term “arriving alien.” *Id.* This finding conflicts again with *Ortega-Cervantes v. Gonzales*, where the court explicitly noted that “[n]ow, under IIRIRA, aliens present in the United States who ha[ve] not been admitted” are also considered as “applicant[s] for admission.” *Ortega-Cervantes*, 501 F.3d at 1118 (internal

quotation marks omitted). Notwithstanding, the court found that because of Anaya-Acosta's illegal entry into the United States without inspection and his removal order, he was within the meaning of "illegally or unlawfully in the United States" pursuant to section 922(g)(5)(A), and it sustained his conviction.

What Happens if I Go? And They Don't Let Me Back in?

A final twist of the parole pretzel—what happens when advance parole is revoked while a parolee is overseas—led to a significant Seventh Circuit decision in December. *Samirah v. Holder*, 627 F.3d 652 (7th Cir. 2010). The Jordanian plaintiff sought a writ of mandamus, challenging the decision of the former Immigration and Naturalization Service ("INS") to revoke the advance parole it granted to him in December 2002 to visit his ill mother. Ironically, he was stopped from "entering" the United States while on a layover in Shannon, Ireland—Shannon being one of the few preinspection checkpoints operated by INS/DHS at foreign airports. The gist of Samirah's action was that upon revocation of his parole, he should (by regulation) be returned to his prior immigration status, that of a previously admitted alien (on a student visa) with a pending application for adjustment of status—in the United States. The district court and a divided Seventh Circuit agreed.

Writing for the majority, Judge Posner rejected Government arguments that once his parole was revoked, Samirah was inadmissible because he lacked a lawful entry document.

The government is wrong. Form I-512L [advance parole document] is a travel document, a substitute for a visa (it *says* so), the purpose of which is to tell immigration officers that the bearer is entitled to enter the United States. The government argues that the alien needs a fresh grant of parole, after his advance parole terminates, to be readmitted. To require the alien to obtain a fresh grant of parole would contradict both the regulation and the form—the form because it is the equivalent of a visa, and the regulation because it requires that the bearer's status as of when advance parole was granted be restored when the parole ends. That status includes being present in the United States. One of the

statutory qualifications for an adjustment of status that is applicable to the class of aliens to which the plaintiff belongs is, as we said, that the alien be in the United States. The status the plaintiff enjoyed before he received advance parole, and hence the status he reacquired by virtue of the regulation upon the termination of his advance parole, was that of an alien eligible for an adjustment of status and therefore, among other things, physically present in the United States. Restoration of his status thus requires his return to this country. So if the revocation of advance parole canceled the plaintiff's Form I-512L travel document, the government was required—subject to exceptions discussed later in this opinion—to issue him another one, or admit him without documentation, in order to honor the promise in the parole regulation to restore an alien whose parole is canceled to his prior status.

Samirah, 627 F.3d at 655-56.

The court was no less dismissive of the Government's argument that physical presence in the United States and seeking adjustment under section 245 of the Act do not constitute a "status." Section 245 "sets forth in detail who may seek to adjust his status to that of an alien lawfully admitted for permanent residence. It defines, in other words, the status seeker's status." *Id.* at 657. Judge Posner also asserted—but this seems unclear—that Samirah could have retained this "status" had he, instead of submitting to preinspection in Shannon, flown directly to the United States from Jordan, flown to Canada or Mexico, and entered illegally, or if he was smuggled into the United States, "even if it was in a coffin in the cargo hold of an airliner, disguised as Count Dracula (cf. *Love at First Bite*)." *Id.* at 656. Flourishes aside, while Samirah may have had the *status* of being an applicant for adjustment of status in the latter circumstances, he may well not have been *eligible* for such relief, which, with the exception of those eligible under section 245(i) of the Act, is not available to those whose presence in the United States is not pursuant to "admission" or "parole." This calls into question Judge Posner's assertion that the eligibility criteria in section 245 *define* a "status," rather than declaring the status that must exist before an alien may be granted relief.

Next, Judge Posner elaborated on the taxonomy of “parole:”

Don’t be fooled by the word “parole.” In normal usage it means you’re tentatively free but if you violate the conditions of your freedom you’ll be sent back to prison. When “advance parole” in the immigration setting is revoked, your status is restored and you’re just sent back to the United States, which we prefer to think of as the land of liberty rather than as a prison. Advance parole is the right to leave the United States without (in a case such as this) abandoning your right to seek adjustment of status upon your return. Revocation of advance parole terminates your “liberty” to be footloose abroad and requires you to rush back here to preserve your application.

Samirah, 627 F.3d at 658. Having dismissed the Government’s arguments, Judge Posner trained his sharpest fire on the assertion that “advance parole” is not equivalent to “parole” for purposes of section 245. “If it is not parole, what is it?” *Id.* at 660; *see also Matter of G-A-C-*, 22 I&N Dec. 83, 88 (BIA 1998) (en banc) (stating that “advance parole” is equivalent to “advance authorization of parole”). Thus, if advance parole is not a form of parole, “it is a promise of parole—that is, a promise of permission to reenter the United States so that the parolee can press his application for adjustment of status.” *Samirah*, 627 F.3d at 660.

As is frequently the case, the narrative here tells the tale. *Samirah*’s parole was revoked, and he was placed on a “no-fly” list on account of his suspected ties to terrorism. This decision was not reviewable and thus technically not the subject of the majority’s decision. But the majority was clearly concerned that by refusing to admit *Samirah* on his now-revoked advance parole document, the Government was denying him an opportunity to contest that assertion.

“He did nothing wrong by going to visit his sick mother in Jordan—the government said he could do so and return. If he is a threat to U.S. security, he can be returned under guard and kept under guard until the application is disposed of or removal or

criminal proceedings brought to successful completion against him. The government has not suggested that he is too dangerous to be allowed on an airplane—in fact it has not suggested that he is dangerous at all. One can be a “security risk” without creating a risk of committing a violent act.”

Samirah, 627 F.3d at 661-62. The majority characterized the Government’s assertion regarding *Samirah* as “redolent of guilt by association.” *Id.* at 662.

Judge Manion, in dissent, asserted that the issues presented in this case were no different in substance from those addressed in *Samirah*’s first visit to the Seventh Circuit. *Samirah v. O’Connell*, 335 F.3d 545 (7th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). Then, the Seventh Circuit rejected a district court decision ordering reinstatement of *Samirah*’s advance parole, concluding that there was not jurisdiction to do so. Countering the majority, Judge Manion pointed out that in *Matter of G-A-C-*, 22 I&N Dec. 83 n.3, the Board explicitly stated that at the point an alien’s request for advance parole is granted, the alien is not “paroled”—that occurs only when the alien returns to the United States and is allowed to enter. *Samirah*, 627 F.3d at 666; *see also Barney v. Rogers*, 83 F.3d 318 (9th Cir. 1996). The majority’s decision effectively holds that the “promise” extended by advance parole cannot be withdrawn, save by allowing an otherwise admissible alien (despite his lack of valid entry document) to enter the United States—which has the same effect as reversing or suspending the INS’s revocation of advance parole. *Samirah*, 627 F.3d at 667-68.

Conclusion

The rulings in *Castillo-Padilla*, *Delgado-Sobalvarro*, *Ortega-Cervantes*, and *Anaya-Acosta*, while not momentous, clarify critical questions concerning the effect parole may have on relief from removal or criminal conviction. Those released on conditional parole may “give their word” as earnestly as those allowed to enter the United States on humanitarian parole, and they may be no less scrupulous in keeping it. So also may an individual who agrees, or is ordered, to serve as a witness in a judicial proceeding benefiting our judicature. But in the end, it is the manner of entry—authorized or unauthorized—that tips the scales on eligibility for relief.

This point was not lost on the Seventh Circuit in *Samirah*. Abandoning at least the outcome of its prior ruling in the same case, the court established that an alien without a current and valid grant of parole can nevertheless be granted the right to enter the United States to pursue a form of relief for which “admission” or “parole” is a prerequisite. The impact of this decision is potentially far-reaching; the “promise,” in this case, is made by the Government, not by the parolee, and *Samirah* appears to teach that it is a promise that may not easily be broken.

Edward R. Grant has been a Board Member of the Board of Immigration Appeals since January 1998. Patricia M. Allen is an Attorney-Advisor to the Board.

¹Our apologies to The Clash.

RECENT COURT OPINIONS

First Circuit:

Telyatitskiy v. Holder, __F.3d__, 2011 WL 117257 (1st Cir. Jan. 14, 2011): The First Circuit dismissed a petition for review of the Board’s denial of a motion to reconsider its earlier decision affirming an Immigration Judge’s removal order. The Immigration Judge had found the petitioner, a lawful permanent resident (“LPR”) who had entered the U.S. as a refugee in 1995, ineligible for asylum and withholding of removal based on his aggravated felony conviction and denied his application for protection under the Convention Against Torture (“CAT”) on the merits. The court noted that because the appeal was not from the Board’s review of the Immigration Judge’s decision, but rather from its decision on the motion to reconsider, the court’s review was limited to the issues raised in the latter, which addressed only the CAT claim. Furthermore, since the alien was convicted of an aggravated felony, the court’s jurisdiction was statutorily limited to constitutional issues or questions of law. The court therefore lacked jurisdiction to consider the petitioner’s arguments concerning his withholding claim or his “thinly disguised claim concerning evidentiary weight.”

Second Circuit:

Baraket v. Holder, __F.3d__, 2011 WL 135760 (2d Cir. Jan. 18, 2011): The Second Circuit denied a petition for review of the Board’s decision preterminating an LPR’s application for cancellation of removal. The Board held that the alien’s commission of a crime terminated his

period of continuous U.S. residence short of the required 7 years. The alien argued that the “stop-time rule” relating to continuous residence should be triggered not by the date of the commission of the crime, but rather by the date of conviction. The court disagreed, rejecting the argument that statements made in its earlier cases finding the crime’s commission date to be determinative were merely dicta. The court nevertheless took the opportunity to reiterate its earlier holdings, which are consistent with the Board’s decision in *Matter of Perez*, 22 I&N Dec. 689 (BIA 1999).

Ninth Circuit:

Viridiana v. Holder, __F.3d__, 2011 WL 149339 (9th Cir. Jan. 19, 2011): The Ninth Circuit granted the petition for review of an Indonesian alien whose asylum application had been deemed untimely by the Immigration Judge. The Immigration Judge had ruled that the alien failed to establish extraordinary circumstances to excuse her late filing based on delays caused by the fraudulent inaction and misrepresentations of a nonattorney consultant. The court agreed with the alien’s assertion that the Immigration Judge misconstrued the claim to be one of ineffective assistance of counsel, which the Immigration Judge denied because (1) the consultant never held himself out as counsel; and (2) the requirements of *Matter of Lozada* were not met. The court held that the Immigration Judge erred as to the first reason by applying inappropriate case law involving requests for rescission of an in absentia removal order. The court further found that the Immigration Judge’s second reason mischaracterized the claim as one involving ineffective assistance of counsel, which resulted in the Immigration Judge’s attempt to apply the “ill-fitting standards” of *Lozada*.

Rosas-Castaneda v. Holder, __F.3d__, 2011 WL 9504 (9th Cir. Jan. 4, 2011): The court granted a petition for review of an Immigration Judge’s order of removal, which was affirmed by the Board. The alien, an LPR, pled guilty to one felony count of attempted transportation for sale of more than 2 pounds of marijuana. The Immigration Judge found him removable as a controlled substance violator under section 237(a)(2)(B)(i) of the Act but concluded that the record was insufficient to sustain an aggravated felony charge because the statute was divisible. However, the Immigration Judge denied cancellation of removal because the alien failed to produce a transcript of his criminal proceeding to conclusively prove he had

not been convicted of an aggravated felony. The alien argued that under the 9th Circuit's decision in *Sandoval-Lua v. Gonzales*, the aggravated felony charge could not be sustained in light of the insufficient record, but the Immigration Judge concluded that the holding in that case was superseded by the corroboration requirements of the subsequently enacted REAL ID Act. The 9th Circuit disagreed, holding that *Sandoval-Lua* remains good law, because the REAL ID Act amendments only authorize Immigration Judges to request additional evidence to corroborate *testimonial* evidence, but not other evidence of record. Finding the record of conviction to be inconclusive, the court remanded for the order denying cancellation of removal to be vacated.

Rizk v. Holder, ___F.3d___, 2011 WL 6182 (9th Cir. Jan. 3, 2011): The court denied the petition for review of a male asylum seeker from Egypt but granted the petition of his wife and children, whose appeal from the Immigration Judge's decision was not addressed by the Board. The aliens were a husband and wife, who each filed separate applications for asylum, and their two children, who were derivative applicants. While the court held that the husband, wife, and children adequately appealed to the Board from the Immigration Judge's decision denying them relief, the Board's decision addressed only the husband's appeal. The case of the wife and children was accordingly remanded to the Board to address their appeal. However, the court was unpersuaded by the husband's challenge to the Immigration Judge's adverse credibility finding in his case. The court found that the Immigration Judge, in a detailed decision, properly relied on numerous discrepancies supported by the record, for which the husband provided no adequate explanation, despite being given ample opportunity to do so.

Eleventh Circuit:

Mejia Rodriguez v. U.S. Dep't of Homeland Security, ___F.3d___, 2011 WL 9573 (11th Cir. Jan. 4, 2011): The Eleventh Circuit affirmed a district court's ruling that the DHS properly denied an application for Temporary Protected Status based on the applicant's two misdemeanor convictions. The applicant challenged the DHS's finding that his guilty plea in State court to possession of marijuana and driving with a suspended sentence (for which he was sentenced to time served) qualified as a conviction under section 101(a)(48)(A) of the Act. Citing the Federal Rules of Criminal Procedure,

the court concluded that section 101(a)(48)(A) requires a "formal judgment of guilt," consisting of "the plea, the jury verdict or the court's findings, the adjudication, and the sentence." In the instant case, the applicant pled guilty and the State court made a finding of guilt and imposed a sentence of time served. The Eleventh Circuit determined that the finding of guilt, coupled with the imposition of time served, which qualified as a sentence, constituted an adjudication that satisfied the "formal judgment of guilt" definition in section 101(a)(48)(A).

REGULATORY UPDATE

76 Fed. Reg. 2915

DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H-2A and H-2B Nonimmigrant Worker Programs

SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may approve petitions for H-2A and H-2B nonimmigrant status only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the Federal Register. That notice must be renewed each year. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 53 countries whose nationals are eligible to participate in the H-2A and H-2B programs for the coming year.

DATES: Effective Date: This notice is effective January 18, 2011, and shall be without effect at the end of one year after January 18, 2011.

SUPPLEMENTARY INFORMATION:

Background: USCIS generally may approve H-2A and H-2B petitions only for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as participating countries. Such designation must be published as a notice in the Federal Register and expires after one year. USCIS may, however, allow a national from a country not on the list to be named as a beneficiary of an H-2A or H-2B petition based on a determination that such participation is in the U.S. interest. See 8 CFR 214.2(h)(5)(i)(F) and 8 CFR 214.2(h)(6)(i)(E).

Location, Location, Location *continued*

of the Office of the Chief Immigration Judge is that venue lies where the case is docketed for hearing, even if that location is different from where the Immigration Judge or other parties are located.”

Following this decision, the DHS moved the Board to reconsider, arguing that the designation of Chaparral on the hearing notice had been an administrative mistake and that all parties had, in fact, appeared in person before the Immigration Judge in El Paso. The Board granted the motion to reconsider and, agreeing with the DHS, vacated its earlier decision, finding that “[w]hile the hearing notice generally controls the hearing location, when the notice reflects an address for the scheduled hearing that was entered as the result of an administrative error, it does not trump all evidence to the contrary showing that the proper hearing location was El Paso, Texas.” Although this reconsideration changed the outcome in the case, it did not indicate any disagreement with EOIR’s general approach to the issue, as set out in OPPM 04-06 and the proposed regulations.

In a more recent unpublished case, the Board again cited OPPM 04-06 in holding that the El Paso-based Immigration Judge had erred in applying Fifth Circuit law to a case that was “docketed for hearing” in Chaparral, where the respondent and his attorney had appeared, connected via video conferencing to El Paso.

Misunderstandings

Most of the confusion concerning circuit court venue over immigration appeals stems from imprecision in terminology and definitions and the “overloading” of common terms.

Regulatory Ambiguity

Some confusion arises through regulatory ambiguities. For example, based on current regulatory definitions, it is unclear what is meant by an Immigration Court that is not an Administrative Control Immigration Court. The regulations define an Immigration Court as a “local sit[e] of the OCIJ where proceedings are held before immigration judges and where the records of those proceedings are created and maintained,” and an Administrative Control Immigration Court as “one that creates and maintains Records of Proceedings [“ROPs”]

for Immigration Courts within an assigned geographical area.” 8 C.F.R. §§ 1003.9(d), 1003.11. However, an Immigration Court, which is defined in part by its creation and maintenance of ROPs, should not, according to this definition, have an ROP created and maintained for it by an Administrative Control Immigration Court.

The current regulations also conflate the concepts of jurisdiction and venue by establishing that jurisdiction vests in the specific Immigration Court where the charging document is filed, but then allowing other Immigration Courts to conduct proceedings in that case following changes of venue. See 8 C.F.R. §§ 1003.14(a), 1003.20. However, jurisdiction is the *power* to adjudicate and may not be waived if absent, whereas venue, the *place* where judicial authority can be exercised, is normally for the convenience of the parties and may be waived if not objected to timely. See Charles Alan Wright, *The Law of Federal Courts* § 42, at 257 (5th ed. 1994); *Georceley*, 375 F.3d at 49; Fed. R. Civ. P. 12(h)(1). The proposed regulation attempts to remedy this confusion by providing that jurisdiction lies with OCIJ, rather than with a specific Immigration Court. 72 Fed. Reg. at 14,496-97 (Supplementary Information and text of the proposed regulation).

Although the current regulations provide that the location where parties are required to file all documents is the Administrative Control Immigration Court that has administrative control over the ROP, 8 C.F.R. §§ 1003.11, 1003.31, documents are also accepted as filed when presented to an Immigration Judge during an in-person hearing, and by fax when proceedings are conducted via video conferencing or telephone. See Immigration Court Practice Manual §§ 3.1(a), 4.7(d), http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

Imprecision in Case Law

A related issue concerns the circuit courts’ introduction of additional and ambiguous terminology. For example, in stating that the Immigration Judge would have “completed *his* role in Chicago,” even if he had physically been presiding via a three-cornered teleconference from a vacation home in Michigan, the *Ramos I* court invoked the notion of “the immigration court’s home office,” a concept that appears nowhere else in the materials related to Immigration Court venue. *Ramos I*, 371 F.3d at 949. The court did not attempt to

define this term with any rigor but, instead, summarily stated that the court's "home office" in this case was where there parties were required to file their documents (i.e., the Administrative Control Immigration Court), where orders are prepared and entered, and where Mr. Ramos preferred to litigate his appeal. *Id.* Given that, in practice, these three factors may, and often do, center on different geographical locations, the *Ramos I* court's holding is arguably limited to situations where all three coincide. Moreover, in the decision's next paragraph, where the *Ramos I* court sets out its putative statutory interpretation of section 242(b)(2) of the Act, it silently replaces the ad hoc "immigration court's home office" with the shorter, and even more ambiguous, "immigration court."

Adding to the confusion, the Seventh Circuit found in its decision in *Poroj-Mejia* that it had proper venue based on the Immigration Judge's location in Chicago. *Poroj-Mejia*, 2010 WL 4102295, at *2. However, *Ramos I* explicitly held that the location of the Immigration Court, not the Immigration Judge, was the crucial issue, stating that a Chicago-based Immigration Judge participating from Michigan would still have completed the proceedings in Chicago. *Ramos I*, 371 F.3d at 949. This "Michigan vacation home" scenario from *Ramos I*—wherein an Immigration Judge is in a physical location other than the Immigration Court—is not just a hypothetical. In fact, this is the case with all hearings conducted by Immigration Judges at the Headquarters Immigration Court in Falls Church, Virginia, which does not create or maintain ROPs or accept filings from parties. It is also now true for Chicago Immigration Judges hearing cases out of Kansas City. Approximately 2 weeks after Mr. Poroj-Mejia's final hearing, Chicago ceased to be the Administrative Control Immigration Court for Kansas City, and now all documents for these cases are filed in Kansas City, even if they are ultimately heard via video conferencing by an Immigration Judge in Chicago.

Another example of ambiguous language by the circuit courts concerns the terms used to describe the location of an Immigration Judge's final order. The *Ramos I* court seems to imply that an order is necessarily "prepared and entered" at the Administrative Control Immigration Court, even if the Immigration Judge is located elsewhere. *Ramos I*, 371 F.3d at 949. The *Georcely* court takes a more nuanced approach, citing circuit law and a legal treatise for the proposition that, although exceptions exist, judicial orders are normally effective when "officially filed

and docketed." *Georcely*, 375 F.3d at 48. *Georcely* leaves the door open to other possibilities, such as a removal order being "effective when announced." *Id.* These terms all lack definitions in the context of the Immigration Courts. However, the regulations do provide that an oral decision shall be stated by the Immigration Judge in the presence of the parties, with a summary memorandum to be served on the parties, while a written decision shall be served on the parties by mail or personal service. 8 C.F.R. § 1003.37(a). Arguably, once an oral decision, together with its written summary, is delivered to the assembled parties, it has been entered and made effective. Of course, the location of the entry of such a decision is problematic in video conferencing and telephonic hearings.

Principled Disagreement

Cutting through all of the misunderstandings, and construing all positions in the manner most favorable to their proponents, one core disagreement remains: is a proceeding completed at the Administrative Control Immigration Court, where documents are filed and orders officially docketed, or is it completed at the hearing location, where parties are instructed to appear? Both alternatives would allow video conferencing to continue to be used in the most flexible manner deemed necessary by EOIR, including across circuit lines, and would allow the parties and adjudicators, after consulting a single source of information, to know for certain which circuit law to apply and where to appeal.

In the absence of a uniform rule, Immigration Judges and the Board must apply the correct circuit law in light of uncertain circuit court guidance. Currently, this results in unnecessary case-by-case litigation and remands. If what emerges from the case law is not a clear rule, but rather a balancing test—which is one possible reading of *Ramos I*—then much time and many resources will be wasted gathering and weighing otherwise insignificant facts in order to decide this threshold matter. *See, e.g., Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." (citation omitted)).

Going Forward

It is not likely that a one-size-fits-all solution to the terminological and principled disagreements outlined above will be forthcoming, primarily because there is no single definitive authority or reference. However, in the face of ongoing uncertainty, there are a number of practical steps that EOIR adjudicators may take to move us toward a legal fiction of “immigration proceeding completion location” that everyone can share and agree upon.

First, Immigration Judges conducting hearings via video conferencing or telephone should refer to OPPM 04-06 and follow its guidance. Although the Seventh Circuit appears inclined to apply its law in all cases heard by Chicago Immigration Judges, it has yet to dispose of the OPPM in a precedential order. Moreover, the OPPM’s recommendations concerning captioning and making a clear record of all participants’ locations remain sound, regardless of the circuit law being applied. Additionally, aside from the First Circuit’s tentative dicta in *Georceley*, no circuit other than the Seventh has addressed this issue, so the OPPM in its entirety is presumptively applicable everywhere else.

Board Members and staff attorneys should be vigilant regarding any potential circuit court venue issues and strive for consistency by applying the OPPM’s guidance to the extent appropriate. In addition, the Board may also include a footnote explicitly setting out the location where the proceedings were completed, such as the following: “The proceedings before the Immigration Judge in this matter were completed in [hearing location] through video conference pursuant to section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).”

Conclusion

Much like the location of a corporation, the location of an immigration hearing is a complicated concept with many competing practical and doctrinal considerations and no empirically discoverable answer. However, unlike the former, I would hope that the latter legal fiction is not still being litigated 200 years hence. Compare *Bank of United States v. Devaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (finding that for purposes of diversity jurisdiction, the location of a corporation is the

location of all of its shareholders), *with Hertz Corp. v. Friend*, 130 S. Ct. at 1192 (concluding that for purposes of diversity jurisdiction, a corporation is located at its “nerve center”).

Daniel L. Swanwick is an Attorney Advisor with the Board of Immigration Appeals.

EOIR Immigration Law Advisor

David L. Neal, Acting Chairman
Board of Immigration Appeals

Brian M. O’Leary, Chief Immigration Judge
Office of the Chief Immigration Judge

Jack H. Weil, Assistant Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Librarian
EOIR Law Library and Immigration Research Center

Carolyn A. Elliot, Senior Legal Advisor
Board of Immigration Appeals

Nina M. Elliot, Attorney Advisor
Office of the Chief Immigration Judge

Micah N. Bump, Attorney Advisor
Office of the Chief Immigration Judge

Layout: EOIR Law Library