CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

MARTINEZ V. MUKASEY: NEW HOPE FOR CERTAIN LEGAL PERMANENT RESIDENTS WITH CRIMINAL CONVICTIONS

Posted on August 18, 2008 by Cyrus Mehta

By

David A. Isaacson[*]

Earlier this year, the United States Court of Appeals for the Fifth Circuit issued a decision that could make relief from removal available to many Legal Permanent Residents with criminal convictions who had previously been thought ineligible to receive such relief. *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008), holds that a statutory prohibition against waivers of inadmissibility under INA § 212(h) for certain LPRs who have committed "aggravated felonies", or have resided in the U.S. for less than 7 years, does not apply to LPRs who obtained their green card through adjustment of status in the United States rather than by arriving on an immigrant visa.

To understand the significance of this, it is necessary to understand the preconditions for a 212(h) waiver. Section 212(h) of the Immigration and Nationality Act (INA) provides:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
>
> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred

more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection 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. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

8 U.S.C. § 1182(h). This waiver is available for a crime involving moral turpitude[1]; multiple crimes even if not involving moral turpitude that lead to a sentence of imprisonment of 5 years or more[2]; prostitution-related offenses[3]; and drug crimes involving 30 grams or less of marijuana,[4] although not other

drug crimes.[5]

Although an INA § 212(h) waiver by its terms applies to grounds of *inadmissibility* to the United States, not deportability once one is already in the United States, it can be used under certain circumstances by aliens who have already been in the United States, whether as LPRs or in another status. First, it can be used by an LPR or other alien who travels outside the United States after committing a crime and, upon his or her return, is put into removal proceedings as an applicant for admission under INA § 101(a)(13)(C)(v).[6] (The possibility of inadmissibility charges upon return is why it is **crucial** that any LPR with a criminal record consult a competent immigration attorney before traveling: a single crime which could not support a charge of deportability may support a charge of inadmissibility if one travels.[7]) Second, it can be used by an alien charged with deportability if the convicted alien has a basis to apply for adjustment of status—essentially, to seek permanent residence from scratch, for example through a U.S. citizen spouse, even though one may already have it.[8]

A § 212(h) waiver is available as a general matter even to an alien who is subject to deportation for what immigration law terms an "aggravated felony"[9]—a list of crimes laid out in INA § 101(a)(43)(a)(A)-(U) which has expanded to include such things as "an offense described in . . . section . . . 1955 of (relating to gambling offenses) for which a sentence of 1 year imprisonment or more may be imposed,"[10] and any "theft offense" for which a sentence of one year or more of imprisonment is imposed even if that sentence is suspended.[11] (Note that an "aggravated felony" need not be an actual felony; some misdemeanors qualify.[12]) However, the final paragraph of section 212(h) states in part that "o waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony."

The conventional wisdom prior to *Martinez* was that this prohibition applied to all LPRs, whether they had gained their permanent residency through admission on an immigrant visa or adjustment of status. On this interpretation, an LPR convicted of an aggravated felony was actually in a worse position that

someone who had never had a green card: an aggravated-felon alien who had never been an LPR was eligible for adjustment with a 212(h) waiver if, for example, he or she had a U.S. citizen spouse and could prove that extreme hardship would befall that spouse if the alien was deported, while an LPR with a similar U.S. citizen spouse was thought not to have that option.[13] And while an LPR would under some circumstances be eligible for a form of relief from the immigration consequences of criminal convictions that is not available to non-LPRs, namely, cancellation of removal for permanent residents under INA § 240A(a), that relief is also unavailable in the event of an "aggravated felony" conviction.[14]

The Fifth Circuit in *Martinez* observed, however, that the final paragraph of section 212(h) does not actually say that a § 212(h) waiver is unavailable to any LPR who has been convicted of an aggravated felony. Rather, the prohibition on a § 212(h) waiver for one who has committed an aggravated felony applies "in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence"—language which, when examined carefully, does not refer to all LPRs. In particular, it does not refer to aliens who have adjusted their status to that of permanent resident under INA § 245 or 245A while in the United States, rather than entering as an immigrant on an immigrant visa.

As the Fifth Circuit noted, both "admitted" and "lawfully admitted for permanent residence" are defined terms in the INA. Pursuant to INA § 101(a)(13)(A), "The terms ‘admission' and ‘admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." And pursuant to INA § 101(a)(20), "The term ‘lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

The BIA had relied in Martinez's case on *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999), for the proposition that an adjustment of status qualified as an "admission", and held that Martinez therefore had "previously been admitted to the United States as an alien lawfully admitted for permanent residence."[15] The Fifth Circuit concluded, however, that the statutory definition of "admitted" does not by its terms include adjustment of status to permanent residence.

Rather, "nder this statutory definition, ‘admission' is the lawful *entry* of an alien after inspection, something quite different, obviously, from post-entry adjustment of status, as done by Martinez."[16] Thus, "for the § 212(h) bar to apply: when the applicant is granted permission, after inspection, to enter the United States, he must then be admitted as an LPR."[17] The Fifth Circuit held that the statutory language of § 101(a)(13)(A) was unambiguous, so that *Chevron* deference[18] did not enter the picture.[19]

The government attempted to argue that the presence of the language "lawfully admitted for permanent residence" in INA sections 245 and 245A as a description of the status to which an alien granted adjustment is adjusted, as well as in § 212(h), supported the universal application of the LPR aggravated-felon § 212(h) bar, but the Fifth Circuit rejected this contention. Because "lawfully admitted for permanent residence" is "an entirely separate term of art defined at § 101(a)(20),"[20] its presence in the § 212(h) bar language did not help the government's position. Breaking down the statutory language into its component parts, "§ 212(h) only denies waivers of eligibility to those aliens who have ‘previously been *admitted* to the United States as an *alien lawfully admitted for permanent residence* ."[21]

This may seem somewhat formalist at first glance, but formalism cuts both ways, and there are a great many instances in immigration law where a literalist interpretation of the INA is followed to the detriment of the alien. Indeed, the definition of "aggravated felony" itself falls into this category: upon holding that misdemeanor petty larceny qualified as an aggravated felony under the literal meaning of INA § 101(a)(43)(G), the Court of Appeals for the Third Circuit described the relevant provision as "a carelessly drafted piece of legislation has improvidently, if not inadvertently, broken the historic line of division between felonies and misdemeanors" and suggested that Congress "might wish to revisit the issue or at least obviate the difficult question posed by this case with more careful drafting."[22] In a legal regime where an LPR convicted of misdemeanor shoplifting can be deemed guilty of an "aggravated felony" because of the literal meaning of the statutory text, and therefore deportable, it is only fair that such a "felon" be allowed to seek relief to which he or she is entitled on a literal reading of the statutory text. Had Congress wanted to, it could simply have barred waivers to any alien who was or had ever been "an

alien lawfully admitted for permanent residence", but that is simply not what the statutory language says.

Two further points that the Fifth Circuit did not reach suggest that *Martinez*, especially if its logic is accepted by other circuits, should benefit an even larger class of LPRs than appears at first glance. First, and most simply, the logic of *Martinez* would apply equally to an LPR who has no aggravated-felony conviction but "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," the other prong of the LPR § 212(h) bar. Thus, such shorter-term LPRs can also seek § 212(h) relief. As with the *Martinez* exception to the aggravated-felony bar, this is particularly significant because many such LPRs will be precluded from obtaining cancellation of removal under § 240A(a).[23]

Second, it appears that even an LPR by adjustment of status who travels outside the United States for short periods of time and then returns would have a strong argument for § 212(h) eligibility under *Martinez*, so long as he or she is not successfully readmitted *after* committing the crime in question. Pursuant to INA § 101(a)(13)(C), "n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless" one of six conditions is met. One of those conditions is "ha been absent from the United States for a continuous period in excess of 180 days"[24] and another is "ha committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a)."[25] Logically, it seems that an alien who "shall not be regarded as seeking an admission into the United States" has not been "admitted" when he or she is allowed in—for otherwise the alien would have been granted something he or she had not sought, an awkward usage at best. Thus, unless an LPR who gained that status via adjustment has previously been readmitted after satisfying one of the INA § 101(a)(13)(C) conditions, he or she has not "been admitted to the United States as an alien lawfully admitted for permanent residence" for § 212(h) purposes. And even though an LPR-by-adjustment returning from a trip after committing "an offense identified in section 212(a)(2)" is seeking admission at that point, on that first return the LPR has never "*previously* been admitted to the United States as an alien lawfully admitted for permanent residence"; rather, he or she

is seeking admission as an LPR for the first time and will want a § 212(h) waiver in order to accomplish that admission.

Of course, it is important to keep in mind that a § 212(h) waiver is not automatic. To even be eligible, the applicant for a waiver must either have a qualifying relative who would suffer extreme hardship if the applicant were removed,[26] be applying for the waiver more than 15 years after commission of the crime (or at any time in the event of a prostitution offense) and demonstrate rehabilitation,[27] or be entitled to relief under the Violence Against Women Act.[28] Even if the applicant *is* eligible, whether a waiver is actually granted is a matter of the Attorney General's discretion (exercised in most cases by an immigration judge and the Board of Immigration Appeals); the waiver is not automatic.

Nonetheless, *Martinez*'s impact on the number of people able to seek such a waiver is significant. If widely followed, it will help ameliorate some of the worst excesses of mandatory deportation of permanent residents that have otherwise occurred.

---

[*] **David A. Isaacson is an Associate at Cyrus D. Mehta & Associates, P.L.L.C., where he practices primarily in the area of immigration and nationality law. He is a graduate of Yale Law School, where he served as a Senior Editor of the Yale Law Journal. Following law school, David clerked for the Honorable Leonard B. Sand of the United States District Court for the Southern District of New York, and then worked in the Litigation Department at the law firm of Davis Polk & Wardwell, where he devoted a significant amount of time to *pro bono* immigration matters involving asylum, the Child Status Protection Act, INA section 245(i), and the immigration treatment of adopted children. David is the author of *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 Ariz. L. Rev. 313 (2005), *reprinted in* 26 Immigr. & Nat'lity L. Rev. 515 (2006). He is admitted to practice in New York, in the Courts of Appeals for the Second and Third Circuits, and in the Southern and Eastern Districts of New York, and is a member of the American Immigration Lawyers Association.**

[1] INA § 212(a)(2)(A)(i)(I).

[2] INA § 212(a)(2)(B).

[3] INA § 212(a)(2)(D).

[4] INA § 212(a)(2)(A)(i)(II).

[5] INA § 212(a)(2)(E) relates to aliens who have asserted immunity from prosecution, and is unlikely to apply in cases involving a Legal Permanent Resident.

[6] Regarding such "stand-alone" 212(h) waivers, *see Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).
and http://www.ailf.org/lac/pa/212elig.pdf.

[7] An alien who has committed a single crime of moral turpitude more than five years after admission to the United States, for example, will not be deportable but will be inadmissible following foreign travel. *Compare* INA § 237(a)(2)(A)(i)(I) (rendering an alien deportable in the case of a crime involving moral turpitude committed within 5 years of entry, or 10 years in the case of an informant adjusted under INA § 245(j)) and § 237(a)(2)(A)(i)(II) (rendering an alien deportable if "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct"), *with* INA § 212(a)(2)(A)(i)(I) (rendering an alien inadmissible if convicted of a single crime involving moral turpitude).

[8] It is also possible that a § 212(h) waiver could be used by an LPR charged with deportability and ineligible to seek adjustment of status, based on a constitutional equal-protection argument similar to that accepted with regard to relief under former section 212(c) of the INA (also by its terms only a waiver of inadmissibility, but extended to cover deportability) in *Francis v. INS*, 532 F.3d 268 (2d Cir. 1976). . Such an argument is outside the scope of this article and does not in any event appear to have ever yet been successful in the 212(h) context.

[9] INA §§ 101(a)(43), 237(a)(2)(iii).

[10] INA § 101(a)(43)(J).

[11] INA § 101(a)(43)(G); 101(a)(48)(B) (defining sentence of imprisonment to

include suspended sentences). Thus, even misdemeanor shoplifting resulting in a suspended sentence of one year can qualify. *See*, *e.g.*, *United States v. Pacheco*, 225 F.3d 148, 254 (2nd Cir. 2000).

[12] *See*, *e.g.*, *United States v. Pacheco*, 225 F.3d 148, 254 (2nd Cir. 2000)*; Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000); *United States v. Graham*, 169 F.3d 787, 792 (3rd Cir. 1999).

[13] This disparity has been subject to challenge on equal-protection grounds, but has been upheld by a number of Circuit Courts of Appeals. *See*, *e.g.*, *Taniguchi v. Schultz*, 303 F.3d 950, 957-58 (9th Cir. 2002); *Moore v. Ashcroft,* 251 F.3d 919, 925-26 (11th Cir.2001); *Lara-Ruiz v. INS,* 241 F.3d 934, 947-48 (7th Cir.2001).

[14] INA § 240A(a)(3).

[15] *Martinez v. Mukasey*, 519 F.3d 532, 542 (5th Cir. 2008). *Rosas-Ramirez* had addressed not the availability of a § 212(h) waiver, but the applicability of INA § 237(a)(2)(A)(iii), the basic aggravated-felony deportability provision, which refers to crimes committed "at any time after admission."

[16] *Martinez*, 519 F.3d at 544 (5th Cir. 2008).

[17] *Id.*

[18] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[19] *Martinez*, 519 U.S. at 544.

[20] *Id.*at 546.

[21] *Id.* (brackets and emphasis in original).

[22] *Graham*, 169 F.3d at 788, 793.

[23] Some LPRs who fail to meet the 7-year requirement for § 212(h) as interpreted by the BIA may still meet the § 240A(a) requirement, because the former requires 7 continuous years of lawful residence, *see* Matter of Rotimi*,* 24 I&N Dec. 567 (BIA 2008),whereas the latter only requires that the alien have been an LPR for 5 years, INA § 240A(a)(1), and have "resided in the United

States continuously for 7 years after having been admitted in any status," INA § 240A(a)(2), whether or not all of that residence was lawful. Thus, an alien who overstays a nonimmigrant visa for several years and then adjusts to LPR status and is put into removal proceedings six years after adjustment shortly after committing a crime, for example, would be ineligible for a § 212(h) waiver under the BIA's interpretation of the 7-year bar, but would be eligible for cancellation under § 240A(a). Conversely, an alien who commits a crime shortly before reaching 7 years of continuous residence may be eligible for a § 212(h) waiver but not for § 240A(a) cancellation, because the 7-year period for cancellation stops at the time of the crime but the 7-year period for § 212(h) only stops when proceedings are initiated.

[24] INA § 101(a)(13)(C)(ii).

[25] INA § 101(a)(13)(C)(v).

[26] INA § 212(h)(1)(B).

[27] INA § 212(h)(1)(A).

[28] INA § 212(h)(1)(C).