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RECENT DEVELOPMENTS REGARDING THE VISA WAIVER PROGRAM: *BAYO V. CHERTOFF* AND THE ELECTRONIC SYSTEM FOR TRAVEL AUTHORIZATION (ESTA)

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By

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The Visa Waiver Program (VWP), established under Section 217 of the Immigration and Nationality Act (INA), allows nationals of certain countries to enter the United States without the necessity of obtaining a visa. Those who take advantage of this program are required to waive many of their rights to contest their removal from the United States. A recent Court of Appeals case, however, holds that some such waivers may not be effective and binding, meaning that some aliens who entered under the VWP retain the right to contest their removal. The recent implementation of the Electronic System for Travel Authorization (ESTA) in connection with the VWP could in some ways decrease the number of such ineffective waivers, but also has the potential to create new scenarios under which some of those who enter under the VWP may fail to validly waive their rights in a way that would not have been possible before.

Admission under the VWP is available only to an alien "applying for admission . . . as a nonimmigrant visitor (described in section 1101 (a)(15)(B) of) for a period not exceeding 90 days."[1] That is, it is available only to those who would otherwise qualify as tourists under a B-2 visa or business visitors under a B-1 visa. The alien also must be a member of a designated country. Thirty-five countries currently participate in the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France,

Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.[2] In order to be added to the list, a country must meet various criteria pertaining to the rate at which applications for visas from its nationals are refused.[3]

Admission under the VWP is subject to a number of additional conditions. An alien admitted under the VWP must have a machine-readable passport[4]; must in most cases arrive on a transportation line that has reached an agreement with U.S. authorities and do so with a round-trip ticket;[5] and must be "determined not to represent a threat to the welfare, health, safety, or security of the United States."[6] Aliens who have once failed to comply with the conditions of a VWP admission may not use the program again,[7] and aliens "who have been deported or removed from the United States, after having been determined deportable," and thus "require the consent of the Attorney General to apply for admission to the United States pursuant to section 212(a)(9)(A)(iii) of the Act," also may not use the VWP program even if their previous removal had nothing to do with the VWP and even if they have already received consent to reapply for admission.[8] Once an alien is admitted on the VWP, he or she may not change to another nonimmigrant status[9] (except for the U status available to certain crime victims[10]) and may not apply for adjustment of status to that of a permanent resident except as an immediate relative of a U.S. citizen or pursuant to INA § 245(i).[11]

Most relevantly for the purposes of this article, an alien applying for admission under the VWP is required to waive most rights to contest a determination that he or she should not be admitted, or should subsequently be removed. The statute provides:

An alien may not be provided a waiver under the program unless the alien has waived any right-

> (1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

> (2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

INA § 217(b), 8 U.S.C. § 1187(b). Language agreeing to this waiver of rights is included on the I-94W Nonimmigrant Visa Waiver Arrival/Departure Form signed by the alien upon arrival in the United States.

Refusal of admission under the VWP does not constitute removal for purposes of the INA,[12] meaning that an alien who is refused admission under the VWP and cannot contest this determination is at least not subject to the five-year bar on re-entry that would apply if the alien were removed upon arrival pursuant to an ordinary application for admission.[13] An alien who is admitted under the VWP, however, if subsequently "determined by the district director who has jurisdiction over the place where the alien is found" to be deportable, may be removed on the orders of the district director and will be considered as if he or she had been subject to ordinary removal proceedings.[14] This means that after such a VWP removal, the typical ten-year bar on seeking admission to the United States without advance permission will apply.[15]

An exception to the possibility of summary removal may be available when the alien has properly applied for adjustment of status to that of a permanent resident. In *Freeman v. Gonzales*,[16] the Court of Appeals for the Ninth Circuit held that such an alien is no longer subject to the no-contest clause of INA §217(b), because this clause is trumped by the adjustment of status statute's specific exemption of immediate relatives from the bar on adjustment. A similar argument could be made regarding aliens authorized to adjust status under INA § 245(i). The Ninth Circuit subsequently limited the benefit of the *Freeman* exception to those VWP entrants who apply for adjustment within the 90-day period of their admission,[17] although this author finds that limit questionable for reasons largely outside the scope of this article.[18]

Before one gets to the question of whether certain adjustment applicants are exempt from the VWP waiver of one's right to contest removal, however, one must determine whether a particular alien is subject to the VWP waiver at all. In *Bayo v. Chertoff*,[19] the Court of Appeals for the Seventh Circuit recognized that not all aliens who enter on the VWP program have necessarily waived their

right to contest removal, at least not in a knowing, voluntary and therefore valid fashion.

As the court explained, "Mohammed Bayo, a citizen of Guinea, used a stolen Belgian passport to enter the United States in 2002 under the VisaWaiver Program (VWP)."[20] Bayo signed a VWP waiver in English, which was not his native language.[21] (Nor is English an official language of Belgium, the country on whose passport Bayo had traveled.[22]) Tracking the language of INA § 217(b), "he waiver stated in English that Bayo waived the right 'to review or appeal of an immigration officer's determination as to admissibility, or to contest, other than on the basis of an application for asylum, any action in deportation.'"[23] The VWP waiver form that Bayo signed "also contained a clause, again in English, providing that Bayo had read and understood the form and that he had answered its questions truthfully."[24]

Bayo stayed in the United States beyond the 90-day period allowed under the VWP, and eventually married a U.S. citizen and in 2006 applied to adjust his status to permanent resident based on that marriage. Instead of being granted permanent residence, however, he was subjected to the VWP summary removal process, as the Court of Appeals explained:

> Shortly thereafter, Immigration and Customs Enforcement investigators learned that Bayo had entered the country using a stolen Belgian passport. Department of Homeland Security officers consequently arrested Bayo, who admitted that he was in the country illegally and handed over the Belgian passport. DHS concluded that Bayo had overstayed his 90-day admission under the VWP, and in light of his signed waiver, ordered his removal. The order stated that Bayo was entitled to remain in the United States only until October 11, 2002, and that he had "remained in the United States longer than authorized." Bayo received no removal hearing. Consequently, he was not permitted to contest removal based on his petition to adjust his status or his claim that he did not knowingly sign the hearing waiver.[25]

Bayo petitioned for review of the order of removal, arguing, "first, that as a matter of due process, the waiver s unenforceable because he did not knowingly consent to it, and second, that even if the waiver is enforceable he

not be removed while his adjustment-of-status application s pending."[26]

Although the Seventh Circuit rejected the second argument, which was based on *Freeman*, it found that the argument based on lack of knowing consent could have merit. There was no administrative record of fact-finding regarding whether Bayo's waiver was voluntary, because no hearing on the subject had been held.[27] However, Bayo maintained that a number of facts supported his contention that the waiver had not been knowing a voluntary:

> In his brief, Bayo claims that he could not understand the waiver because it was in English and he speaks only French, the primary language spoken in Guinea. Bayo also says that he has not completed high school, had not traveled internationally before he arrived in Belgium, and did not consult with an attorney before signing the waiver. Because of his limited education and travel experience, and because the waiver was not translated into his spoken language, Bayo argues that he did not knowingly waive his right to a hearing.[28]

The Court of Appeals held that "waivers of rights under the VWP must be knowing and voluntary" pursuant to "the longstanding general principle that waivers of constitutional rights must be knowing and voluntary."[29] Thus, if Bayo was correct, he was entitled to be excused from his waiver. The Court of Appeals therefore remanded the case to DHS "for a fact-finding hearing on the issue of whether knowingly and voluntarily waived his due process rights."[30]

The Seventh Circuit indicated in *Bayo* that it was insufficient for the government not to have "set out to confuse or coerce" a VWP applicant into signing a waiver.[31] Rather,

> due process would . . . require that the government take steps reasonably designed to assure that the waiver is knowing and voluntary. Indeed, in those cases where VWP waivers have been found knowing and voluntary, the government has taken precisely such steps: it has provided the petitioner a waiver in his or her spoken language, and from this a fact-finder could infer that the petitioner understood the waiver.[32]

That is, a key factor in determining whether VWP waivers are knowing,

voluntary, and therefore valid is whether the alien entering under the VWP is provided a waiver in his or her spoken language. VWP entrants not provided a waiver in their spoken language would appear to have a strong claim under *Bayo* that their waiver of rights was not knowing and voluntary.

The recent introduction of ESTA may increase the chances that future VWP entrants will submit knowing and voluntary waivers-although some aspects of ESTA could potentially push in the other direction. ESTA, which is authorized by 8 C.F.R. §217.5, requires that VWP travelers submit an electronic application for travel authorization via a DHS website, and "receive a travel authorization prior to embarking on a carrier for travel to the United States."[33] This authorization will generally be valid for two years or until the expiration of the VWP applicant's passport,[34] but will need to be renewed if the applicant's name, passport, gender, or country of citizenship changes, or if the applicant's answer to any of the questions on the ESTA application changes.[35] The online ESTA application includes a waiver of rights similar to that on the I-94W form signed by the alien, and provides that submission of one's biometrics at the border will constitute reaffirmation of this waiver.

The ESTA website provides applications in twenty-one difference languages, and leaves the choice of language to the applying alien. [36] While there are currently thirty-five countries participating in the Visa Waiver Program, the shortfall may be illusory, because many VWP countries share a language: citizens of Germany, Austria and Liechtenstein will generally be able to communicate in German (and citizens of Switzerland in German or French or Italian, also already on the list), citizens of the United Kingdom, Ireland, Australia and New Zealand in English, and so on. At a first glance, it appears that no national of a VWP country will be unable to access ESTA materials in at least one of the country's national languages. Thus, the *Bayo* problem of aliens who have not been provided waivers in their spoken language appears to have lessened, at least so long as DHS does in fact offer ESTA applications in the languages of all VWP participant countries.

If the existence of ESTA causes DHS to be less diligent about providing written waivers at the border in the alien's language and making sure that those waivers are signed, however, it could actually increase the number of aliens who fail to execute a waiver valid under the standard of *Bayo.* There is nothing

to stop an ESTA application from being completed by a travel agent or other third party, and indeed websites have already emerged that offer assistance with the ESTA process for a fee.[37] An unknowing waiver by proxy would hardly meet the standards of *Bayo*. Therefore, even under the ESTA regime, any alien who did not complete the online application him- or herself may have a valid *Bayo* claim if he or she does not sign a waiver in the appropriate language at the border.

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[1] INA § 217(a)(1), 8 U.S.C. § 1187(a)(1). The omitted language refers to an alien applying for admission "during the program," which appears to be a leftover from the time that visa waivers were allowed for a limited period of time under what was then known as the Visa Waiver Pilot Program.

[2] *See* http://travel.state.gov/visa/temp/without/without_1990.html#countries.

[3] Ordinarily, pursuant to INA § 217(c)(2)(A), a qualifying VWP country must meet the following criteria:
Either-
(i) the average number of refusals of nonimmigrant visitor visas for nationals of

that country during-
(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and
(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or
(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.
8 U.S.C. § 1187(c)(2)(A). A country with a refusal rate between 2 and 3.5 percent may be placed on probationary status pursuant to INA § 217(f)(1)(B), 8 U.S.C. § 1187(f)(1)(B).

[4] INA § 217(a)(3), 8 U.S.C. § 1187(a)(3).

[5] INA § 217(a)(5), (a)(8), 8 U.S.C. § 1187(a)(5), (a)(8). Both of these requirements are subject to limited exceptions.

[6] INA § 217(a)(6), 8 U.S.C.§ 1187(a)(6).

[7] INA § 217(a)(7), 8 U.S.C. § 1187(a)(7). If an emergency prevents an alien's timely departure after a VWP admission, however, "the district director having jurisdiction over the place of the alien's temporary stay may, in his or her discretion, grant a period of satisfactory departure not to exceed 30 days. If departure is accomplished during that period, the alien is to be regarded as having satisfactorily accomplished the visit without overstaying the allotted time." 8 C.F.R. § 217.3(a).

[8] 8 C.F.R. § 217.1(b)(2).

[9] 8 C.F.R. § 248.2(a)(6). This prohibition still refers to the Visa Waiver Pilot Program, which is no longer in existence, but would likely be interpreted to apply to the VWP as well.

[10] 8 C.F.R. § 248.2(b); *see* INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). .

[11] INA § 245(c)(4), 8 U.S.C. § 1255(c)(4); 8 C.F.R. § 245.1(b)(8). Like 8 C.F.R. § 248.2(a)(6), this prohibition still refers to the Visa Waiver Pilot Program, which is no longer in existence, but would likely be interpreted to apply to the VWP as

well. Immediate relatives are defined in INA § 201(b) and include the spouses, parents, and unmarried children of U.S. citizens. INA § 245(i) applies to certain aliens who had an application for labor certification or a visa petition filed on their behalf before April 30, 2001. For more details, see, e.g., http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus2007914223330 and http://cyrusmehta.com/perseus/News.aspx?MainIdx=ocyrus200591724845&Month=&Source=Zoom&Page=1&Year=All&From=Menu&SubIdx=1290 .

[12] 8 C.F.R. § 217.4(a)(3) states: "Refusal of admission under paragraph (a)(1) of this section shall not constitute removal for purposes of the Act."

[13] *See* INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i).

[14] 8 C.F.R. § 217.4(b)(1), (2).

[15] INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii). The bar is 20 years in the case of a second or subsequent removal, and perpetual in the case of an alien convicted of an aggravated felony. Permission to reapply for admission before the bar has lapsed, available under INA § 212(a)(9)(A)(iii), is sought by filing Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal.

[16] 444 F.3d 1031 (9th Cir. 2006).

[17] *Momeni v. Chertoff*, 521 F.3d 1094 (9th Cir. 2008). *See also*, *e.g.*, *Lacey v. Gonzales,* 499 F.3d 514, 518 (6th Cir.2007); *Ferry v. Gonzales*, 457 F.3d 1117 (10th Cir. 2006).

[18] To summarize, the sources of law upon which the Ninth Circuit relied in *Freeman* do not distinguish between a timely application for adjustment and an untimely one; under the law governing immediate relatives who apply for adjustment (or applicants under § 245(i)), there is ordinarily no such thing as an application that must be denied solely on grounds of untimeliness. Importing the concept of maintenance of status into an immediate-relative context, where it does not ordinarily belong, is problematic.

[19] 535 F.3d 749 (7th Cir. 2008).

[20] *Id.* at 750. The government did not make, and therefore waived, any

argument to the effect that "by presenting a fraudulent passport, Bayo disqualified himself from challenging the validity of the waiver," *id.* at 751 n.1.

[21] *Id.*

[22] The official languages of Belgium, according to the CIA's *World Factbook*, are French, Dutch and German. https://www.cia.gov/library/publications/the-world-factbook/geos/be.html.

[23] *Bayo*, 535 F.3d at 751.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 753.

[28] *Id.* at 752.

[29] *Id.* at 756-757.

[30] *Id.* at 757.

[31] *Id.* at 755.

[32] *Id.* at 756.

[33] 8 C.F.R. § 217.5(b).

[34] 8 C.F.R. § 217.5(d).

[35] 8 C.F.R. § 217.5(e).

[36] The ESTA website, available at https://esta.cbp.dhs.gov/ or by hyperlink from http://www.cbp.gov/xp/cgov/travel/id_visa/esta/ , offers online forms in English, Čeština (Czech), Dansk (Danish),Deutsch (German), Eesti (Estonian), Español (Spanish), Français (French), Íslenska (Icelandic), Italiano (Italian), Japanese, Korean, Latviešu (Latvian), Lietuvių (Lithuanian), Magyar (Hungarian), Nederlands (Dutch), Norsk (Norwegian), Português (Portuguese), Slovenčina

(Slovak), Slovenščina (Slovenian),Suomi (Finnish), and Svenska (Swedish).

[37] The author does not wish to link to, and possibly provide additional traffic to, such websites, but notes that one private entity has already commandeered the namesake ESTA domain with the ".us" suffix to offer such services.