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JUDICIAL REVIEW OF DENIED ARRIVING-ALIEN ADJUSTMENTS

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by

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Under current regulations, "arriving aliens" who are paroled into the United States without officially being admitted, and who later seek adjustment of status, face an unusual set of procedural circumstances. They can apply for adjustment with USCIS even if there is a final order of removal against them, but in most cases they lack the ability to apply for adjustment of status in removal proceedings even before a final order has been issued, and as a result, it can be difficult to obtain judicial review of any legal errors made by USCIS in adjudicating the adjustment application. However, an analogy to another unusual set of procedural circumstances, those facing asylum applicants who sought admission into the United States under the Visa Waiver Program, suggests an approach under which arriving aliens denied adjustment of status can in some cases seek review in the Court of Appeals.

Most aliens who seek adjustment of status will apply with USCIS unless they are in removal proceedings, in which case they will apply before the Immigration Judge.[1] If adjustment of status applications by aliens other than arriving aliens are denied by USCIS, they can renew the applications in removal proceedings before an Immigration Judge.[2] If the application is denied by the Immigration Judge, the alien can appeal this denial to the Board of Immigration Appeals, and then seek review of adverse BIA action by petition for review in the Court of Appeals for the circuit in which the Immigration Judge completed proceedings.[3] Although discretionary decisions in connection with an application for adjustment of status are barred from judicial review, constitutional issues and

questions of law can be addressed by the Court of Appeals.[4]

Arriving aliens, however, cannot seek adjustment of status before an Immigration Judge unless they were granted advance parole based on an adjustment application before USCIS, departed from and returned to the US based on that grant of parole, and were placed in removal proceedings either upon or after their return because USCIS had denied their adjustment application.[5] That is, under most circumstances, an adjustment application can only be renewed by an arriving alien if it is advance parole based on that very application which has made the alien into an arriving alien.[6] Otherwise, the adjustment application of an arriving alien can only be pursued with USCIS, independently of any removal proceeding: the Immigration Judge, and for that matter the Executive Office of Immigration Review (Immigration Courts plus the BIA) as a whole, lacks any jurisdiction over it. In the remainder of this article, references to an "arriving alien" refer to an arriving alien who is in this latter situation, rather than one who falls within the limited exception allowing renewal of an adjustment application following re-entry on advance parole that was based upon that same application.

The one advantage of this lack of EOIR jurisdiction over arriving-alien adjustments is that an arriving alien, like an alien in exclusion proceedings as those proceedings under pre-IIRIRA law, can adjust status administratively even if there is a final order of removal against him or her.[7] Other aliens with final removal orders, whose adjustment applications fall under EOIR jurisdiction, would need to reopen their removal proceedings in order to pursue adjustment applications, which is generally not possible without DHS consent once the removal order has been final for more than 90 days.[8]

Lack of EOIR jurisdiction carries two major disadvantages, however. First, it is possible for an arriving alien to be ordered removed in EOIR removal proceedings while his or her adjustment application is still pending before USCIS, although several Courts of Appeals adjudicating petitions for review of removal orders against such aliens have indicated that under such circumstances the BIA should issue a stay of the removal order pending USCIS adjudication of the adjustment application, or at least provide a better explanation that any offered to date of why it is unwilling to do so.[9] Second, there is no obvious way to obtain judicial review of the USCIS denial of such an

adjustment application, even if an error of law is involved. Because the denial will be by a separate agency from that involved in issuing any removal order, a petition for review of that order will not straightforwardly encompass the denial of adjustment.

There are, however, some potential options available to obtain judicial review of a USCIS denial of an arriving alien's application for adjustment of status. First, particularly if there are no removal proceedings against an arriving alien whose application for adjustment of status is denied, one potential way to obtain judicial review of a denial of adjustment of status by USCIS is to file a lawsuit in an appropriate U.S. District Court under the Administrative Procedure Act. The Court of Appeals for the Third Circuit, in *Pinho v. Gonzales*, 492 F.3d 193 (3d Cir. 2005), held that APA jurisdiction exists over a USCIS ruling that an applicant is ineligible as a matter of law for adjustment of status,[10] because "Determination of *eligibility* for adjustment of status – unlike the *granting* of adjustment itself – is a purely legal question and does not implicate agency discretion." *Pinho*, 492 F.3d at 204.

The applicant for adjustment in *Pinho* does not appear to have been an arriving alien, or at any rate the issue did not arise, because no removal proceedings had been instituted and there was no immediate prospect that any would be. *Pinho*, 492 F.3d at 200-201. In finding jurisdiction to exist under the APA, the Third Circuit relied in significant part upon the fact that in that "there are no deportation proceedings pending in which the decision might be reopened or challenged." *Pinho*, 492 F.3d at 202. Where an arriving alien is in removal proceedings at the time an adjustment application is denied by USCIS, or where a final order of removal against such an alien already exists when USCIS denies an adjustment application, the courts may be less likely to accept APA jurisdiction over the denial, although one could certainly argue that the logic of *Pinho* still applies, because the removal proceedings are not ones "in which the decision might be reopened or challenged" given the lack of EOIR jurisdiction over an arriving alien's application for adjustment. Furthermore, even if one does obtain APA jurisdiction over the denial of an adjustment application filed with USCIS by an arriving alien with a final order of removal outstanding against him, the district court hearing the suit may be unwilling to interfere with DHS's execution of the order of removal.

Where a removal order against an arriving alien already exists, however, there

is another possible mechanism for obtaining judicial review of a USCIS denial of adjustment of status which may be preferable to an APA action under *Pinho*. To see why, it is necessary to look at another procedural context in which adjudication of an alien's application for relief from removal proceeds separately from the actual entry of an order of removal against the alien. Although unusual in this respect, arriving-alien adjustment applications are not unique.

In order to enter the United States without a visa under the Visa Waiver Program (VWP), applicants with passports from VWP-participating countries must have
waived any right-

> (1) to review or appeal . . . 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). Recent developments in this area of the law, regarding the ESTA electronic system and the possibility of judicial review where a waiver is ineffective, were explored in a previous article by this author on this website (http://cyrusmehta.com/perseus/News.aspx?SubIdx=ocyrus20093232256). The relevant point here is that aliens subject to a VWP waiver who apply for asylum are referred to Immigration Court not for a hearing regarding their removability – for they have waived the right to such a hearing – but instead for "asylum-only proceedings" in which the only issues up for determination are the alien's eligibility for asylum, withholding of removal, or relief under the Convention Against Torture.[11] Removability itself, in the context of an effective VWP waiver, can be determined by DHS administrative fiat.[12]
In *Kanacevic v. INS*, 448 F.3d 129 (2d Cir. 2006), the Court of Appeals for the Second Circuit confronted the question of whether, and on what ground, it had jurisdiction to review the denial of relief in such "asylum-only proceedings". As the Court of Appeals explained in *Kanacevic*:

> Under 8 U.S.C. § 1252(a)(1) (2000) we have jurisdiction to review a "final order of removal." The government contends that because of the truncated rights available to a Visa Waiver Applicant, the denial of the

> asylum application is in effect a final order of removal because Kanacevic can be removed without further proceedings.

Kanacevic, 448 F.3d at 133. The Court of Appeals concluded that this government contention was correct, and that a VWP applicant for asylum can seek review of that application's denial through a petition for review:

> Although the denial of asylum in a Visa Waiver Program case does not occur in the context of removal proceedings, denial of the asylum application is the functional equivalent of a removal order under the provisions of the Visa Waiver program. Were we to elevate form over substance by holding that the disposition of asylum-only proceedings does not function as a final order of removal to confer jurisdiction, we would create uncertainty over exactly what procedure a Visa Waiver applicant could pursue in order to obtain review of his or her asylum proceedings in the Courts of Appeals.

Kanacevic, 448 F.3d at 134-135.

Under the logic of *Kanacevic*, an arriving alien with a final order of removal whose application for adjustment is denied by USCIS should be able to petition for review of this denial. Like a VWP alien in asylum-only proceedings, an arriving alien with a final order of removal can be removed without further proceedings if the application is denied. Thus, the denial of such an arriving alien's adjustment application, like the denial of a VWP alien's asylum application, is the functional equivalent of an order of removal. And were the Courts of Appeals "to elevate form over substance by holding that does not function as a final order of removal to confer jurisdiction, would create uncertainty over exactly what procedure a could pursue in order to obtain review of his or her proceedings." *Kanacevic*, 448 F.3d at 134-135. Therefore, just as in *Kanacevic*, the Courts of Appeals should find jurisdiction to exist over a USCIS denial of adjustment for an arriving alien with a final order of removal.

The fact that an arriving alien may already have an order of removal outstanding against him should not prevent the denial of an adjustment application from being viewed as itself a final order of removal for purposes of judicial review. Dating back many years, "there is a "long line of Supreme Court and appellate court decisions interpreting 'order of deportation' to include orders denying motions to reconsider and reopen." *Chow v. INS*, 113 F.3d 659

(7th Cir. 1997). This line of authority was extended to orders of removal after IIRIRA, and Courts of Appeals routinely review denials of motions to reopen and reconsider orders of removal. At the very least, the denial of an adjustment application by an arriving alien with a final order of removal is the functional equivalent of the denial of a motion to reopen that final order, and thus reviewable under the combination of the logic of *Kanacevic* and the logic of the motion-to-reopen cases.

Thus, it should be possible to obtain effective judicial review of denial of an adjustment application by an arriving alien regardless of the situation with respect to removal proceedings against that alien. If there are no removal proceedings and no prospect of proceedings in the immediate future, an APA action along the lines of *Pinho* is appropriate. If there is a final order, one can petition for review of the USCIS denial under *Kanacevic*, on the theory that the denial of the application is a functional equivalent of a final order of removal, and may also be able to bring a *Pinho* action. If removal proceedings are pending, a *Pinho* action is still arguably possible given the lack of EOIR jurisdiction over the adjustment application; there is also the option of seeking a stay of the removal proceedings pending USCIS action on the adjustment, and then, if the adjustment application is denied by USCIS and the removal order becomes final, filing a *Kanacevic* petition for review of the denial of the adjustment and related final order of removal. In all three scenarios, errors of law by USCIS in the adjudication of an arriving alien's adjustment application need not go unchallenged.

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[1] 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

[2] 8 C.F.R. § 245.2(a)(5)(ii).

[3] *See* 8 U.S.C. § 1252.

[4] 8 U.S.C. § 1252(b)(1)(B), (b)(1)(D).

[5] 8 C.F.R. § 1245.2(a)(1)(ii).

[6] It is theoretically possible that an arriving alien, having been paroled in based on a first application, could file a second application and utilize an advance parole from that second application before being placed in any removal proceedings. Then, it would appear that the second application could be renewed in proceedings even though the alien was already an arriving alien when it was filed with USCIS.

[7] *See Matter of Castro*, 21 I&N Dec. 379, 380 (BIA 1996); *Matter of C-H-*, 9 I&N Dec. 265 (R.C. 1961); Mary Kenney, American Immigration Law Foundation, USCIS Adjustment of Status of "Arriving Aliens" with an Unexecuted Final Order of Removal, updated Nov. 5, 2008, Practice Advisory available at http://www.ailf.org/lac/pa/lac_pa_060308_arraliens.pdf.

[8] *See* INA § 240(c)(6)(C). There are some exceptions, such as for asylum applicants who can demonstrate changed country conditions.

[9] *See Ceta v. Mukasey,* 535 F.3d 639 (7th Cir. 2008); *Kalilu v. Mukasey,* 516 F.3d 777 (9th Cir. 2008); *Ni v. BIA*, 520 F.3d 125 (2d Cir. 2008); *but see Scheerer v. U.S. Attorney General*, 513 F.3d 1244 (11th Cir.), *cert. denied,* No. 07-1555 (2008). For an overview of this case law, *see* Mary Kenney, American Immigration Law

Foundation, Adjustment of Status of "Arriving Aliens" Under the Interim Regulations: Challenging the BIA's Denial of a Motion to Reopen, Remand, or Continue a Case, updated Nov. 5, 2008, Practice Advisory available at http://www.ailf.org/lac/pa/lac_pa_070416_biaarraliens.pdf.

[10] The applicant in *Pinho* had appealed the denial of an I-601 waiver of inadmissibility to the Administrative Appeals Office of USCIS, and had thereby obtained review of the underlying question whether he was inadmissible. The logic of *Pinho*, however, appears equally applicable to cases in which there is no I-601 denial to appeal to the AAO, which lacks jurisdiction over an I-485 adjustment application on its own, and where the final USCIS decision thus comes from a USCIS Field Office or Service Center.

[11] *See* 8 C.F.R. § 1208.2(c)(1), (3).

[12] *See* 8 C.F.R. § 217.4.