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Waiver Relief for Refugees Who Have Engaged in Criminal Activity

by Pedro Pavón

Introduction

Section 209(c) of the Immigration Naturalization Act, 8 U.S.C. § 1159(c), confers discretionary authority on the Attorney General and the Secretary of Homeland Security to waive certain grounds of criminal inadmissibility "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." This article will examine and discuss section 209(c) and the very limited case law that analyzes and interprets this section of the Act.

Section 209(c) and *Matter of H-N-*

Aliens who have been admitted into the United States as refugees can only seek adjustment of status under section 209 of the Act. One year after entering as a refugee, an alien must report to the Department of Homeland Security ("DHS") "for inspection and examination for admission to the United States as an immigrant." Section 209(a)(1)(C) of the Act. Unless "the examining immigration officer determines that [the] alien seeking admission is . . . clearly and beyond a doubt entitled to be admitted," the alien must be detained and placed in removal proceedings.¹ Section 235(b)(2)(A) of the Act, 8 U.S.C. § 1225(b)(2)(A).

Under section 212 of the Act, 8 U.S.C. § 1182, there are several grounds on which a refugee may be inadmissible. Among them are convictions for crimes involving moral turpitude or offenses relating to controlled substances; suspected or known terrorist activity; and multiple convictions where the aggregate sentences were 5 years or more.² Section 209(c) of the Act, however, gives the Attorney General and the Secretary of Homeland Security authority to waive most past criminal activity with respect to a refugee for the reasons noted above.³

The Attorney General has delegated the authority to adjudicate matters pertaining to section 209(c) waivers to Immigration Judges.

See *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004); see also 8 C.F.R. § 1240.11(a). Until relatively recently, Immigration Judges and the Board of Immigration Appeals had significant latitude to grant section 209(c) waivers for criminal inadmissibility. In some cases, refugees who had committed severe crimes were granted section 209(c) waivers and thereby received permanent residence. In general, however, even though section 209(c) waivers were included in the Act in 1980, there are relatively few published decisions discussing the factors considered in adjudicating this waiver.

An example of such a case is *Matter of H-N-*, 22 I&N Dec. 1039 (BIA 1999), which involved second-degree robbery. In *Matter of H-N-*, the Board upheld an Immigration Judge's decision to adjust the status of a refugee who had been convicted of second-degree robbery to that of a permanent resident by granting a section 209(c) waiver. The respondent in that case was a 37-year-old citizen of Cambodia who arrived in the United States as a refugee in 1984. Thereafter in 1996, she was convicted of second-degree robbery and was sentenced to 3 to 6 years in prison. During the commission of the robbery, the respondent's co-conspirator fatally shot a woman in front of her children.

In its analysis in *Matter of H-N-*, the Board concluded that the equities in the respondent's favor outweighed her previous robbery conviction. The Board cited her "four United States citizen children, a husband who legally resides [in the United States], and over 15 years of residence in the United States" as factors in her favor. *Id.* at 1045. The Board also mentioned letters from her friends and prison case worker and concluded that the record "indicat[ed] that the respondent's conviction [was] not indicative of her overall character." *Id.* The Board even stated that the respondent was "a person who would be an asset to our society." *Id.* As a result, the Board upheld the Immigration Judge's decision to grant the respondent a section 209(c) waiver.

***Matter of Jean* and Subsequent Case Law**

In a 2002 decision, the Attorney General placed significant restrictions on the types of crimes that can be waived under section 209(c) of the Act. *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The respondent in this case was a 45-year-old Haitian refugee. Along with her husband and five children, she was admitted into the United States as a refugee in 1994. On March 30, 1995,

the respondent was baby sitting a 19-month-old child. While in her care, the child fell off of a couch and began to cry. In an attempt to quiet the child, the respondent spanked him two or three times on the buttocks. When the child continued to cry, the respondent picked up the child by the armpits and shook him. Then she hit him on his head with her fist two or three times. When nothing worked, the respondent picked up the child again and shook him until he finally lost consciousness. An hour later, when the child's mother returned, the respondent told her that the child had simply passed out while the mother was gone.

The medical examiner's report detailed the abuse, describing bruises to the child's head, chest, and back. There were also internal hemorrhages of the lungs, pancreas, and diaphragm, and acute subdural and spinal hemorrhaging. It was determined that the cause of the child's death was bleeding and swelling inside his skull. His death was ruled a homicide.

The respondent never called 911 or any emergency services. Afterward, during criminal proceedings, she told the court that she did not dial 911 because she had been preoccupied with a long-distance phone call. She also added that a call to emergency services would have been useless because she did not speak English well and would have had trouble communicating with authorities. A month after pleading guilty to manslaughter, the respondent was sentenced to 2 to 6 years in prison.

Following her prison term, the respondent requested adjustment of status under section 209(a) of the Act from that of refugee to that of a lawful permanent resident. The Immigration and Naturalization Service denied her application, and she was placed in removal proceedings as an alien convicted of a crime involving moral turpitude. The respondent did not contest her inadmissibility; instead she sought a waiver under section 209(c).⁴

At the merits hearing, an Immigration Judge ruled that the respondent's second-degree manslaughter conviction was for an aggravated felony and, as a result, found her ineligible for any relief from removal.⁵ On appeal, the Board reversed the Immigration Judge's decision. In its decision, the Board concluded that the respondent's offense was not a crime of violence, and remanded the case to the Immigration Judge.

On remand, the Immigration Judge once again denied all relief. The respondent appealed and the Board reversed the Immigration Judge again. In its opinion, the Board “concluded . . . that ‘the equities,’ when weighed against the respondent’s criminal conviction, warranted the grant of [a waiver of inadmissibility and adjustment of status].”⁶ *Matter of Jean*, 23 I&N Dec. at 378 (quoting the Board’s decision).

The Attorney General almost immediately directed the Board to refer the case to him for review, and he subsequently reversed the Board’s decision. He categorized the Board’s analysis as “grossly deficient” and “difficult to accept.” *Id.* at 382-83. The Attorney General argued that the Board “marginalize[d] the depravity of [the respondent’s] crime” and gave “[l]ittle or no significance” to the severity of the crime involved. *Id.* at 383.

More broadly, the Attorney General criticized the Board’s approach to section 209(c) waivers in both that case and *Matter of H-N*. He characterized the Board’s decision in *Matter of H-N* as “wholly unconvincing” and stated that “the seriousness of the underlying offense was all but lost on the Board.”⁷ *Matter of Jean*, 23 I&N Dec. at 382. In particular, he stated that the Board treated the murder in that case as an “afterthought,” and he deemed the Board’s review of the facts in *Matter of Jean* to be a “scant summary.” *Id.*

In his decision in *Matter of Jean*, the Attorney General laid out new guidelines to use when determining section 209(c) waiver eligibility. He made clear that “violent or dangerous individuals” should never be granted waivers “except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship.” *Id.* at 383. The Attorney General followed up by stating that “depending on the gravity of the alien’s underlying criminal offense, such a showing might still be insufficient.”⁸ *Id.*

However, even though the Attorney General attempted to make a clear rule for addressing waivers under section 209(c), additional questions remain. For example, it is not clear what the threshold is for “extraordinary circumstances” under the rule in *Matter of Jean*. The Attorney General laid out two examples of “extraordinary circumstances”—cases involving national

security or foreign policy matters, or exceptional and extremely unusual hardship—but he did not limit the availability of relief to just these cases. Immigration Judges and the Board will have to determine what the parameters of “extraordinary circumstances” will be.

Additionally, the Attorney General placed the burden of proof on the respondent to “clearly demonstrate[]” that a denial of adjustment of status would result in “exceptional and extremely unusual hardship.” *Id.* However, the Attorney General did not explain what he meant by “clearly demonstrate[]” and, more importantly, to whom the “exceptional and extremely unusual hardship” standard applies—whether he was referring to hardship to a family member (or any other person), the respondent, or both.

There has been one subsequent Board case addressing the merits of a waiver under section 209(c). *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004). That case involved a Nigerian respondent who was convicted of second-degree criminal possession of a forged instrument under New York law. One of her two United States citizen children was afflicted with cerebral palsy. In affirming the Immigration Judge’s grant of a section 209(c) waiver, the Board reemphasized and elaborated on the Attorney General’s guidance in *Matter of Jean*. Specifically, the Board stated:

The Attorney General has communicated in unequivocal terms that he is not inclined to exercise his discretion favorably with respect to aliens who have been convicted of dangerous or violent crimes except in the most exceptional circumstances. Indeed, even nonviolent aggravated felonies will generally constitute significant negative factors militating strongly against a favorable exercise of discretion.

Thus, an alien convicted of an aggravated felony will become the beneficiary of the Attorney General’s discretion under sections 209(b) and (c) only in those rare situations where he or she successfully demonstrates the existence of truly compelling countervailing equities, such as those present in the instant case.

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR DECEMBER 2009

by John Guendelsberger

The United States courts of appeals issued 538 decisions in December 2009 in cases appealed from the Board. These numbers include 87 Ninth Circuit decisions with November dates that were not available in time to be included in last month's report. The courts affirmed the Board in 478 cases and reversed or remanded in 60, for an overall reversal rate of 11.2% compared to last month's 7.1%. There were no reversals from the Fourth, Sixth, Eighth, and Tenth Circuits.

The chart below provides the results from each circuit for November 2009 based on electronic database reports of published and unpublished decisions.

Circuit	Total cases	Affirmed	Reversed	% reversed
First	4	3	1	25.0
Second	59	54	5	8.5
Third	45	40	5	11.1
Fourth	16	16	0	0.0
Fifth	19	18	1	5.3
Sixth	12	12	0	0.0
Seventh	5	4	1	20.0
Eighth	10	10	0	0.0
Ninth	346	300	46	13.3
Tenth	4	4	0	0.0
Eleventh	18	17	1	5.6
All circuits:	538	478	60	11.2

The 46 Ninth Circuit reversals included 8 cases finding fault with an adverse credibility determination as the basis for denying asylum, and 9 others that disagreed with the determination of past persecution, nexus, or a finding of ineligibility based on failure to file within 1 year of last arrival. Three cases involved failure to allow a continuance to meet fingerprinting requirements; another three reversed for failure to allow a continuance to await the outcome of a pending labor certification. Nine reversals involved the denial of late motions to reopen. Eight reversals involved criminal grounds for removal.

The Second Circuit reversed in five cases, including one adverse credibility finding, a changed

conditions exception to the 1-year time bar for filing for asylum, and a claim based on "other resistance" to coerced family planning. The other two reversals involved the definition of a "conviction" and charges under paragraph 101(a)(43)(U) of the Act for "attempt or conspiracy" to commit an aggravated felony.

The five reversals from the Third Circuit included two adverse credibility determinations and a remand to further consider country conditions, the aggravated felony crime of violence ground for removal, and a motion to reopen for adjustment of status.

The chart below shows the total numbers for calendar year 2009 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total cases	Affirmed	Reversed	% reversed
Ninth	1956	1619	337	17.2
Third	329	275	54	16.4
Seventh	77	66	11	14.3

Sixth	162	148	14	8.6
Eighth	78	72	6	7.7
Eleventh	281	261	20	7.1
First	71	67	4	5.6
Second	1394	1317	77	5.5
Fifth	252	242	10	4.0
Fourth	180	174	6	3.3
Tenth	55	54	1	1.8
All circuits:	4829	4289	540	11.2

During calendar year 2009, the Ninth Circuit issued the most reversals (337), about 62% of all reversals. The Second Circuit issued 77 reversals to account for 14%. Together, these two circuits issued 69% of the total decisions and 76% of all the reversals.

The following chart shows the reversal rate by circuit for the last 4 calendar years.

Circuit/Year	2009	2008	2007	2006
First	5.6%	4.2%	3.8%	7.1%
Second	5.5%	11.8%	18.0%	22.6%
Third	16.4%	9.0%	10.0%	15.8%
Fourth	3.3%	2.8%	7.2%	5.2%
Fifth	4.0%	3.1%	8.7%	5.9%
Sixth	8.6%	12.0%	13.6%	13.0%
Seventh	14.3%	17.1%	29.2%	24.8%
Eighth	7.7%	8.2%	15.9%	11.3%
Ninth	17.2%	16.2%	16.4%	18.1%
Tenth	1.8%	5.5%	7.0%	18.0%
Eleventh	7.1%	8.9%	10.9%	8.6%
All Circuits:	11.12%	12.6%	15.3%	17.5%

As the chart indicates, the annual reversal rate for all circuits taken together fell over each of the last 3 calendar years. In 2006, there were 944 reversals or remands out of 5398 total decisions (17.5%). In 2007, there were 753 reversals out of 4932 total decisions (15.3%). In 2008, there were 568 reversals out of 4510 total decisions (12.6%). In 2009, the reversal rate fell to 11.2%.

In 2006 and 2007, seven of the eleven circuits reversed in over 10% of decisions. In 2008, seven circuits reversed below 10%. In 2009, eight circuits reversed below the 10% rate.

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The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?

by Edward R. Grant

In 1996, the Attorney General for the first time placed regulatory limits on the filing of motions to reopen and reconsider before Immigration Judges and the Board of Immigration Appeals. Congress followed suit several months later, codifying as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) the now-familiar 30-day and 90-day time deadlines, as well as the “one motion” numerical limit. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546. Virtually all concerned at the time saw these events as *limitations* on the filing of motions.

On a single recent day, however, the Supreme Court and the United States Court of Appeals for the Ninth Circuit both ruled that IIRIRA created a *right* to file a motion to reopen. That right, in turn, now requires judicial review of a motion denied in the exercise of discretion, *Kucana v. Holder*, ___ U.S. ___, 2010 WL 173368 (Jan. 20, 2010), and administrative adjudication of a motion even after the alien has been physically removed from the United States, *Martinez Coyt v. Holder*, ___ F.3d ___, 2010 WL 174254 (9th Cir. Jan. 20, 2010).

While neither result, particularly in *Kucana*, was surprising, the breadth of the “right” to file a motion to reopen pronounced in both cases portends both significant change in motions practice before the Immigration Courts and the Board and potential challenges to other limitations and requirements on motion imposed since 1996. We will briefly discuss both decisions and outline some of these potential challenges.

Kucana: Preserving Judicial Review of Motion Denials—And More

The issues in *Kucana* are familiar to readers of these pages. See Edward R. Grant, *Immigration in the Supreme Court: The October 2009 Term*, Immigration Law Advisor, Vol. 3, No. 10, at 7, 9 (Oct. 2009). Predictably, the Court unanimously agreed with the position of *both* parties (amicus counsel was appointed to defend the decision under review) that the Immigration and Nationality Act’s bar to judicial review of discretionary determinations of the Attorney General does not extend to decisions to deny a motion to reopen. See section 242(a)(2)(B)(ii) of the Act; *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008).

Clause (ii) of section 242(a)(2)(B) precludes from judicial review “any other decision or action of the Attorney General . . . the authority for which is specified under this title to be in the discretion of the Attorney General” (other than the granting of asylum relief). The Court, affirming the view taken by all circuits other than the Seventh, determined that since the discretionary character of a ruling on a motion to reopen is conferred by regulation, and not specifically by the Act, clause (ii) does not apply. Focusing on the phrase “any other decision or action” in clause (ii), the Court turned its attention to clause (i) of section 242(a)(2)(B), which precludes from review “any judgment” on some waivers of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status. Those forms of relief, the Court noted, are

discretionary in character and are so defined in the Act. See sections 212(h), 212(i), 240A(a), 240A(b), 240B(a), 245(a) of the Act. Clause (ii), therefore, is best viewed as a “catchall” provision to cover other discretionary decisions of the Attorney General “of the same genre, *i.e.*, those made discretionary by legislation.” *Kucana*, 2010 WL 173368, at *8. Such decisions are substantive ones, made as a “matter of grace,” determining whether an alien may or may not remain in the United States. *Id.* at *9 (quoting the oral argument transcript).

Decisions on reopening motions made discretionary by regulation, in contrast, are adjunct rulings: The motion to reopen is a procedural device serving to ensure “that aliens [a]re getting a fair chance to have their claims heard.” A court decision reversing the denial of a motion to reopen does not direct the Executive to afford the alien substantive relief; ordinarily, it touches and concerns only the question whether the alien’s claims have been accorded a reasonable hearing.

Id. (quoting the oral argument transcript) (citation omitted).

In light of its distinction between “substantive” waivers and “procedural” motions—a distinction sufficient to resolve the question before it—the Court then took a curious turn. Echoing *Dada v. Mukasey*, 128 S. Ct. 2307 (2008), the Court described IIRIRA as having “transform[ed] the motion to reopen from a regulatory procedure to a *statutory form of relief* available to the alien.” *Kucana*, 2010 WL 173368, at *9, (quoting *Dada*, 128 S. Ct. at 2316) (emphasis added). The highlighted words raise as many questions now as they did when first enunciated in *Dada*.

First, if the propriety of a motions ruling is limited to whether an alien has received a “reasonable hearing,” is it truly accurate to refer to the motion as a form of “relief”? Second, while it is true that IIRIRA gave a statutory basis to what previously had been guided purely by regulation, it is highly doubtful that Congress intended to “transform” motions practice, other than to impose defined limits of time and number. In fact, 6 years earlier, Congress had instigated the regulatory process, mandating that, within 6 months, the Attorney General issue regulations limiting the number of motions that an alien could file and placing a time limit on such motions. Immigration Act

of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5066 (“IMMACT”). (The deadline, it appears, slipped to 6 *years*.) There is scant evidence that the motivation of Congress, in either IMMACT or IIRIRA, was anything other than to *curb* the filing of motions. As the Court itself recognized in 1995, a “principal purpose” of section 545(d) of IMMACT and its related provisions was to expedite petitions for review and “to redress the related problem of successive and frivolous administrative appeals and motions.” *Stone v. INS*, 514 U.S. 386, 400 (1995).

Three years earlier, in *INS v. Doherty*, 502 U.S. 314 (1992), the Court was even more explicit. Surveying its own recent decisions that upheld decisions of the Board to deny motions, the Court concluded that the granting of a motion to reopen is discretionary and that the Board has “broad discretion” to deny such motions. Moreover, such motions “are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.” *Id.* at 323. This is “especially true” in immigration proceedings, where every delay works to the benefit of the alien. *Id.*; see also *INS v. Abudu*, 485 U.S. 94, 104-05 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 446 (1985); *INS v. Phinpathya*, 464 U.S. 183, 188 (1984) (all reversing circuit court decisions overturning the Board’s denials of motions).

Finally, the ability, or, if you will, “right” of an alien to file a motion is not in doubt; allowing such motions was a long-standing practice before the Board even prior to establishment of the Executive Office for Immigration Review. Motions practice served many useful administrative purposes, including prevention of error and, not least, obviating the need for aggrieved aliens to seek relief in Federal court on matters that could be resolved before the agency. See generally Gerald S. Hurwitz, *Motions Practice Before the Board of Immigration Appeals*, 20 San Diego L. Rev. 79 (1982).

In light of this history, it is arguable the Court has misread, both in *Dada* and *Kucana*, the intent behind Congress’s codification of motion practice—and needlessly so. Reliance on a “right” to file a motion to reopen was no more essential to resolving *Kucana* than it was to resolving *Dada*. See Edward R. Grant, *Dadaism Reborn: Immigration Law in the October 2007 Term of the Supreme Court*, Immigration Law Advisor, Vol. 2, No. 6 (June 2008). *Kucana* is clearly correct that motions decisions have been reviewed under the abuse of discretion standard for many years and that Congress in IIRIRA could have, but did not, specifically insulate motions decisions from

judicial review. That would have been sufficient to decide the matter. *Kucana*, 2010 WL 173368, at *12.

The immediate impact of *Kucana* will be limited, perhaps even for the petitioner. The Seventh Circuit, like its sister circuits, will now review motion denials under an abuse of discretion standard. That court had already adopted a unique hybrid standard allowing it to address certain motion denials, and *Kucana* will bring its standard of review in line with that prevailing elsewhere. The Seventh Circuit indicated that *Kucana*'s motion would have been denied under that very standard, which is not surprising given the underlying facts. (Press reports that Mr. Kucana lost his case because he "overslept his hearing" were technically accurate, but misleading. Kucana did fail to appear at his initial 1997 hearing, suffering an in absentia order. An Immigration Judge denied his motion to rescind the in absentia order, a decision the Board affirmed in 2002. Only in 2006 did Kucana file the motion at issue before the Supreme Court, claiming that conditions had worsened in Albania since Kucana's scheduled hearing in 1997.)

Yet, the Court's repeated invocation of a substantive right to file a motion to reopen may invite further litigation. The Court explicitly left for another day two questions, one very much in play in the circuits, and the other, at least for now, quite settled.

The first is whether judicial review of denial of a motion to reopen should be precluded where the Federal courts lack jurisdiction over the underlying claim for relief. *Kucana*, 2010 WL 173368, at *10 n.17; *see also Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004). It may seem logical that if the underlying relief (such as cancellation of removal) is not subject to judicial review, nor should a motion to reopen for further adjudication on such relief be subject to that review. However, if the Court is correct that review of a motion decision "concerns only . . . whether the alien's claims have been accorded a reasonable hearing," then the logic fails, because the issues of fair hearing and substantive merit for relief are of different character. *Kucana*, 2010 WL 173368, at *9.

Kucana poses an even more intriguing possibility with regard to the second, and seemingly settled, question: whether Federal courts may review the Board's decision not to reopen a case sua sponte, thus waiving the time and/or number limitations. The Court notes that the circuits are now unanimous in declining such jurisdiction. *Id.* at *10 n.18. If so, then why raise the issue? The answer

may lie in the simple recognition that of all discretionary determinations made in the course of deciding a motion to reopen, the option to grant sua sponte reopening leaves room for the widest consideration of discretionary factors. The Act makes no mention of sua sponte authority, and there are no regulations or Board precedents guiding its exercise beyond the admonition that the sua sponte authority be used only in exceptional circumstances. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that sua sponte authority is not to be used to cure filing defects or waive time and number limitations in order to alleviate hardship). Circuit courts have declined jurisdiction to review the Board's sua sponte authority precisely because there are no articulated standards by which the courts can determine whether the Board has abused its discretion in denying a request for sua sponte relief. *See, e.g., Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002). By stating that "[w]e express no opinion" on the issue, the Court may be saying merely that the issue was not before it. *Kucana*, 2010 WL 173368, at *10 n.18. A later decision may even clarify that the "right" to file a motion to reopen expires at the end of the 90-day motions period (with the exception of motions filed by asylum applicants claiming changed conditions), and thus there is no right to have the Board even consider a sua sponte request. However, by defining the motion to reopen as a "statutory form of relief," the Court in *Dada* and *Kucana* has opened the door to further refinement of previously settled rules of motions practice. Our next case aptly illustrates the point.

Martinez Coyt v. Holder: Prosecuting Motions To Reopen From Abroad?

The "departure rule," first promulgated by regulation in 1952, states that departure from the United States bars an alien who is "the subject of" exclusion, deportation, or removal proceedings from filing a motion to reopen or reconsider and, further, that departure of the alien constitutes a withdrawal of any motion then pending. *See Matter of Armendarez*, 24 I&N Dec. 646, 648 (BIA 2008); 8 C.F.R. § 1003.2(d); *see also* 8 C.F.R. § 1003.23(b)(1).

Armendarez, responding to a remand directive from the Fifth Circuit, endeavored to shore up the departure rule against inroads made by several circuit court decisions. *See William v. Gonzales*, 499 F.3d 329, 332-33 (4th Cir. 2007) (invalidating 8 C.F.R. § 1003.2(d) in its entirety, relying on a statutory "right" created by IIRIRA to file one motion to reopen and on the "negative inference"

from the failure of IIRIRA to codify the departure bar); *Lin v. Gonzalez*, 473 F.3d 979 (9th Cir. 2007) (holding that the departure rule does not bar the filing of a motion to reopen by an alien who departed and then returned to the United States because he was not “subject” to removal proceedings once the removal order was executed); see also *Reynoso-Cisneros v. Gonzales*, 491 F.3d 1001 (9th Cir. 2007) (same for an alien with an exclusion order who returned to the United States). The Board rejected each of these interpretations, concluding that none warranted application outside the Fourth and Ninth Circuit. *But see Matter of Bulnes*, 25 I&N Dec. 57 (BIA 2009) (holding that an alien’s departure while under an in absentia order does not bar filing of a motion to reopen premised on lack of notice because an order issued without notice is not a valid “order of deportation”).

Martinez Coyt v. Holder now invalidates the departure rule as applied to one circumstance: forced departure of an alien while a timely motion to reopen is pending. The court agreed with the petitioner that enforcement of the departure rule in such circumstances is ultra vires to the statute. It also rejected the Government’s argument that IIRIRA’s requirement for expedited enforcement of removal orders permits it to compel removal during the motions period, thus stripping the Board of jurisdiction.

It would completely eviscerate the statutory right to reopen provided by Congress if the agency deems a motion to reopen constructively withdrawn whenever the government physically removes the petitioner while his motion is pending before the BIA. The only manner in which we can harmonize the provisions simultaneously affording the petitioner a ninety day right to file a motion to reopen and requiring the alien’s removal within ninety days is to hold, consistent with the other provisions of IIRIRA, that the physical removal of a petitioner . . . does not preclude the petitioner from pursuing a motion to reopen.

Martinez Coyt, 2010 WL 174254, at *4. While the issue was not before it, the court’s language here indicates that it might extend the same reading to an alien who is removed and, still within the 90-day period, seeks to file a timely motion.

Martinez Coyt leaves a split in the circuits on this question. The Ninth Circuit relied on the Sixth Circuit’s recent decision holding that forced removal during the pendency of an appeal to the Board from a denied motion to reopen could not constitute withdrawal of the appeal. *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009); see also *Rosillo-Puga v. Mukasey*, 580 F.3d 1147, 1157 (10th Cir. 2009) (affirming the validity of the departure bar regulations, finding it “inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the Attorney General incorporating such a bar in his regulations”); *Ovalles v. Holder*, 577 F.3d 288, 295-96, 298 (5th Cir. 2009) (affirming the post-departure bar, distinguishing *William* because the petitioner’s motion was not timely, and rejecting the analysis in *Lin*); *Shah v. Mukasey*, 533 F.3d 25, 27 (1st Cir. 2008) (holding that an alien cannot file a motion to reopen after his departure); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672, 676 (5th Cir. 2003) (holding that the Board lacks jurisdiction to reopen after an alien’s departure, even under its sua sponte authority). *But see Mansour v. Gonzales*, 470 F.3d 1194, 1200 (6th Cir. 2006) (holding that the departure bar applies to an alien who voluntarily left the United States, even briefly, after a final order of deportation).

To summarize the current state of play, the departure rule has no effect in the Fourth Circuit, because of the decision in *William* that IIRIRA implicitly repealed the regulation. In the Ninth Circuit, it would appear that a timely filed motion to reopen—including a motion that claims to be timely under the theory of equitable tolling—will not be deemed withdrawn if, while the motion is pending, the alien is forcibly removed from the United States. Nor under the Ninth Circuit’s decision in *Lin* does the departure bar apply at all if an alien departs the United States, reenters, and then files the motion. In the First and Tenth Circuits, the departure bar appears valid in all circumstances. Finally, in the Fifth Circuit, the Ninth Circuit’s interpretation in *Lin* is out, but the question whether a *timely* motion to reopen prevents enforcement of the departure rule may still be open.

One may safely conclude this is not the last we have heard on this particular issue.

Edward R. Grant was appointed to the Board of Immigration Appeals in January 1998.

RECENT COURT OPINIONS

Supreme Court:

Kucana v. Holder, __S. Ct.__, 2010 WL 173368 (Jan. 20, 2010): The Supreme Court reversed and remanded the decision of the United States Court of Appeals for the Seventh Circuit, which had ruled that it lacked jurisdiction to review the Board's denial of a motion to reopen based on a claim of changed country conditions in Albania. The Court held that the provisions of section 242(a)(2)(B) of the Act prohibit judicial review of matters in which the Attorney General is given discretion by statute, but not to matters in which the Attorney General grants discretion to the Board by regulation.

Second Circuit:

Huang v. Holder, __F.3d__, 2010 WL 90777 (2d Cir. Jan. 12, 2010): The Second Circuit denied the petition for review of an asylum seeker from the People's Republic of China. In denying the petition, the court granted deference to the Board's precedent decision in *Matter of M-F-W- & L-G-*, 24 I&N Dec. 633 (BIA 2008), holding that the forced insertion of an IUD does not constitute per se persecution under the coercive population control provisions of section 101(a)(42) of the Act. Noting that the statute was ambiguous regarding IUD insertions, the court found the Board's determination reasonable and thus entitled to *Chevron* deference. The court found it did not need to consider the petitioner's "other resistance" argument where she did not challenge the Immigration Judge's determination that the IUD insertion was not "on account of" her resistance to China's family planning policy.

Fifth Circuit:

Hernandez v. Holder, __F.3d__, 2009 WL 5125456 (5th Cir. Dec. 30, 2009): The Fifth Circuit denied the petition for review of an Immigration Judge's decision (affirmed by the Board) that the petitioner was ineligible for cancellation of removal for certain lawful permanent residents as one who was convicted of an aggravated felony. The court concurred with the Board's precedent decision in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), holding that an offense defined by State law may qualify as an aggravated felony as described in a Federal statute enumerated in section 101(a)(43) of the Act, even if it lacks the jurisdictional element of the Federal offense. The respondent was convicted under Texas law of felony possession of marijuana and possession of a firearm. The question presented was whether the firearm conviction

conformed with the applicable Federal statute cited under section 101(a)(43)(E)(ii) of the Act, which requires a firearm conviction to interfere with interstate commerce (an element missing from the Texas statute).

Seventh Circuit:

Milanovic v. Holder, __F.3d__, 2010 WL 22371 (7th Cir. Jan. 6, 2010): The Seventh Circuit affirmed the denial of the Serbian petitioner's applications for withholding of removal and protection under the Convention Against Torture. (The petitioner's asylum application was dismissed as untimely.) The Immigration Judge found that the petitioner was persecuted when he was beaten by supporters of Slobodan Milosevic. However, relying on the State Department Country Report, the Immigration Judge ruled that DHS rebutted the presumption of future persecution, given that Milosevic is no longer in power. With respect to the petitioner's argument "that his claim of persecution was based on the actions of a purely local official and thus the ouster of Milosevic could not constitute a change in country conditions sufficient to rebut the presumption of future persecution," the court ruled this argument was waived because the petitioner did not present it to the Immigration Judge or Board. The court further ruled that, even if the petitioner's argument was not waived, "there is adequate evidence to support the Immigration Judge's determination that the removal of Milosevic constituted a change in country conditions sufficient to rebut the presumption of future persecution."

Haile v. Holder, __F.3d__, 2010 WL 22372 (7th Cir. Jan. 6, 2010): The Seventh Circuit remanded following the denial of the petitioner's application for asylum. The petitioner was born in Ethiopia to parents of Eritrean ethnicity. When Eritrea and Ethiopia separated in 1993, the petitioner's parents renounced their Ethiopian citizenship and became Eritrean citizens, but the petitioner remained in Ethiopia and kept his Ethiopian citizenship. In 1998, when war began between Ethiopia and Eritrea, Ethiopia expelled 75,000 Ethiopian citizens of Eritrean ethnicity. Before he could be expelled from Ethiopia, the petitioner went to the United States and applied for asylum, arguing that Ethiopia's stripping him of citizenship constituted persecution. The Immigration Judge initially denied the application on the grounds that stripping a person of citizenship, without anything more, is not persecution. The Seventh Circuit remanded in *Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005), but the Board subsequently denied the application again. In remanding

for a second time with its present decision, the court first agreed with the Board “that not all denationalizations are instances of persecution.” However, the court disagreed with the Board’s “conclusion that even if a person loses his citizenship because of a ‘protected ground’ . . . such a loss of citizenship does not, without more, amount to persecution.” In this respect, the court stated that “[i]f Ethiopia denationalized the petitioner because of his Eritrean ethnicity, it did so because of hostility to Eritreans . . . and [this] suggest[s] that his denationalization was persecution and created a presumption that he has a wellfounded [sic] fear of being persecuted should he be returned to Ethiopia.”

Bayo v. Napolitano, __F.3d__, 2010 WL 174231 (7th Cir. Jan. 20, 2010): The Seventh Circuit denied the petition for review of a citizen of Guinea from the DHS’s summary order of removal. The petitioner, who entered the United States under the Visa Waiver Program (“VWP”) using a stolen Belgian passport, had been ordered removed by DHS without being placed in removal proceedings. The court rejected the petitioner’s argument that the VWP provisions could not apply to him as a citizen of Guinea (a non-VWP country) and further found no due process violation based on the petitioner’s claim that his signing of the waiver of his right to a hearing was not “knowing and voluntary” where he failed to establish that he was prejudiced as a result. The court finally found that the petitioner was precluded from pursuing his adjustment of status application (based on his marriage to a United States citizen) where such petition was filed beyond the 90-day limit for visits allowed under the VWP provisions.

Eighth Circuit:

Shanchez-Velasco v. Holder, __F.3d__, 2010 WL 173810 (8th Cir. Jan. 20, 2010): The Eighth Circuit affirmed the denial of the petitioner’s application for cancellation of removal for nonpermanent residents. The petitioner testified that he lived in the United States for more than 10 years, and that his parents could corroborate this, but that they did not want to testify because they were afraid of being placed in removal proceedings. The Immigration Judge ruled that the petitioner did not establish the requisite 10 years’ continuous physical presence, but he did not make an adverse credibility determination. In affirming the ruling, the court stated that the Immigration Judge had the discretion to require the petitioner “to corroborate any ‘otherwise credible testimony’ with reasonably available evidence,” and that “[t]he IJ did

that and concluded that corroborative testimony from [the petitioner’s] parents was reasonably available but unused despite their fear of being subjected to removal proceedings.” Concerning the petitioner’s argument that the Immigration Judge violated his due process rights by excluding two of his witnesses, the court stated that “aliens have no right to due process in the purely discretionary remedy of cancellation of removal.”

Ninth Circuit:

Taslimi v. Holder, __F.3d__, 2010 WL 6389 (9th Cir. Jan. 4, 2010): The Ninth Circuit reversed an Immigration Judge’s determination (affirmed by the Board) that the petitioner’s asylum application was time barred. The petitioner, a citizen of Iran, filed for asylum more than 10 years after entry. However, she claimed her late filing was excused by changed conditions arising from her conversion to Christianity. The Immigration Judge found the nearly 7-month delay between her conversion and her filing to exceed a reasonable period. The court concluded otherwise, finding the petitioner’s religious conversion to be a process that began on the date of her conversion ceremony but took subsequent time to incorporate into her life. The court credited the petitioner’s claim that she waited to make sure that her conversion was permanent before applying for asylum, and it further noted that a filing immediately after converting “might have cast doubt upon the sincerity of her faith.” The matter was remanded to the Board to consider the petitioner’s discretionary eligibility for asylum.

Martinez Coyt v. Holder, __F.3d__, 2010 WL 174254 (9th Cir. Jan. 20, 2010): The court sustained the appeal of a petitioner whose motion to reopen was deemed under 8 C.F.R. § 1003.2(d) to have been withdrawn due to the petitioner’s removal to Mexico. The court considered that IIRIRA both grants an alien 90 days to file a motion to reopen and also requires an alien to be removed within 90 days of a final order of removal. The court concluded that to deem the removal of an alien to constitute a withdrawal of a pending motion to reopen under such statutory framework would “completely eviscerate” the statutory right to reopen. The court thus found that the only way to reconcile the above provisions was to find that a motion to reopen is not precluded in the case of the alien’s involuntary removal. The court therefore concluded that the regulation was invalid as applied to the petitioner and remanded to the Board for further consideration.

BIA PRECEDENT DECISIONS

In *Matter of Kronegold*, 25 I&N Dec. 157 (BIA 2010), the Board reviewed a decision suspending the respondent from practicing before the Executive Office for Immigration Review (“EOIR”) and the Department of Homeland Security (“DHS”) for 7 years pursuant to reciprocal attorney discipline proceedings. The respondent in this case was disbarred in New York, and the New Jersey Disciplinary Review Board suspended him from practice there for 1 year in reciprocal proceedings. The EOIR Disciplinary Counsel brought disciplinary proceedings based on the disbarment, which created a rebuttable presumption that reciprocal disciplinary sanctions should follow. This presumption can be rebutted only if the attorney demonstrates by clear and convincing evidence that the underlying disciplinary proceedings resulted in a deprivation of due process, that there was an infirmity of proof establishing the misconduct, or that discipline would result in a grave injustice. The Board’s review of the proceedings is the same that Federal courts use in the courts’ disbarment proceedings, which is a deferential review. In this case, the Board rejected the respondent’s argument that there was an infirmity of proof in the New York proceeding where he had admitted he could not successfully defend himself and resigned. The Board found that it was not appropriate to relitigate issues relating to the merits of the State disciplinary proceedings. The Board also rejected the argument that it would be a grave injustice to impose discipline reciprocal to New York because New Jersey imposed a shorter disciplinary period, finding that there may be valid reasons why New Jersey would impose a different disciplinary period.

In *Matter of Gamero*, 25 I&N Dec. 164 (BIA 2010), the Board considered the new voluntary departure regulations that require aliens to provide proof to the Board that a voluntary departure bond has been paid. 8 C.F.R. § 1240.26(c). If the proof is not provided, the Board cannot reinstate voluntary departure. 8 C.F.R. § 1240.26(c)(3)(ii). The regulations also require the Immigration Judge to advise the respondent of the proof requirement. In this case, the respondent did not submit the required proof, but the Immigration Judge did not provide the mandatory advisal. The Board found that the mandatory advisals appear to have been intended to serve as a critical complement to, and a prerequisite for, the requirement to submit proof of posting. Given the adverse consequences to the alien arising from the

failure to submit the requirement proof, the importance of the advisal is apparent. The Board found that when the advisals have not been provided, a remand is an appropriate remedy to permit the Immigration Judge to provide the required advisals and to grant a new period of voluntary departure.

In *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010), the Board found that Immigration Judges have authority to make a determination under section 204(j) of the Act regarding the portability of an approved employment-based visa petition for purposes of allowing an alien to adjust his status when he has changed jobs or employers. Taking note that the parties were in agreement about the outcome, the Board overruled *Matter of Perez Vargas*, 23 I&N Dec. 829 (BIA 2005), *vacated*, *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007)).

The Board disagreed with the parties’ argument that the plain language of section 204(j) requires that Immigration Judges have jurisdiction over portability determinations, finding that this interpretation was not unreasonable. The Board acknowledged that the result of its prior decision was to essentially prevent aliens in removal proceedings from pursuing their adjustment applications. In its brief, the DHS indicated that it refuses to make the determination under section 204(j) when an alien is in removal proceedings. Therefore, Immigration Judges must do so to avoid unfairness.

The Board also reasoned that while Immigration Judges have no authority to decide whether a visa petition should be granted or revoked, there are many examples in case law indicating that Immigration Judges do have a role in assessing whether an alien is admissible. The situations in those cases are similar to an Immigration Judge making a section 204(j) determination in that they all involve assessing the underlying factual basis for granting a visa petition and other requirements for establishing eligibility for adjustment of status. The Board recognized that assessing whether a new job or employer is sufficiently similar to the prior job for which a visa petition was granted may be difficult. The determination will hinge on the evidence presented by the parties, however, and is therefore similar to other factual determinations that all trial judges are expected to make, regardless of their expertise on the matter. Finally, the Board noted that this decision is in line with legislative intent in enacting the American Competitiveness in the Twenty-First Century Act, which appears to be intended to free aliens from the

need to file new employment-based visa petitions, or to obtain formal reapproval of prior decisions, when they change jobs after a significant delay in the adjudication process.

In *Matter of Rose*, 25 I&N Dec. 181 (BIA 2010), the Board clarified that the death of a petitioning spouse during the 2-year conditional period for an alien seeking permanent resident status excuses the general requirement that a petition to remove the conditional basis of an alien spouse's status must be jointly filed. Consequently, the conditional permanent resident does not need a separate waiver under section 216(c)(4) of the Act. The Board noted that sections 216(c)(1)(A) and (B) provide two requirements for removing the conditional basis of an alien spouse's status: a petition and an interview. Both of these statutory provisions include a parenthetical regarding deceased spouses, which the Board interpreted to exempt alien spouses whose petitioning spouses are deceased from the "joint" filing and interview requirements. Because the respondent could meet these requirements, a waiver was not required. Section 216(d)(1)(A)(i)(II) of the Act supports this reading, making clear that if the reason for the termination of a marriage is the death of the petitioning spouse, that is not, in itself, a basis for denying the petition to remove the conditions on the alien's status.

In this case, the respondent's husband died a month after she was granted conditional permanent resident status. The respondent timely filed a Petition to Remove Conditions on Residence (Form I-751) and appeared for an interview. The former Immigration and Naturalization Service issued a Notice of Intent to Deny based on questions relating to the bona fides of the marriage and ultimately terminated the respondent's status. The respondent was placed in proceedings and requested review of the petition. The Immigration Judge denied the petition because it was not jointly filed and the respondent did not establish eligibility for a section 216(c)(4) waiver. The Board remanded the case for review of the petition on its merits.

REGULATORY UPDATE

75 Fed. Reg. 3476

DEPARTMENT OF HOMELAND SECURITY

Designation of Haiti for Temporary Protected Status

SUMMARY: The Department of Homeland Security announces that the Secretary of Homeland Security

(Secretary) has designated Haiti for temporary protected status (TPS) for a period of 18 months. Under section 244(b)(1) of the Immigration and Nationality Act, the Secretary is authorized to designate a foreign state for TPS or parts of such state upon finding that such state is experiencing ongoing armed conflict, an environmental disaster, or "extraordinary and temporary conditions." The Secretary may grant TPS to individual nationals of the designated foreign state (or to eligible aliens having no nationality who last habitually resided in such state) who have been both continuously physically present in the United States since the effective date of the designation and continually residing in the United States since a date determined by the Secretary, and who meet other eligibility criteria. TPS is available only to persons who were continuously physically present in the United States as of the effective date of the designation. Under this designation, Haitian nationals (and aliens having no nationality who last habitually resided in Haiti) who have continuously resided in the United States since January 12, 2010, and who remain in continual physical presence in the United States from the effective date of the notice, may apply for TPS within the 180-day registration period that begins on the date of publication of the notice. These nationals also may apply for employment authorization documents and for permission to depart from and return to the United States.

DATES: This designation of Haiti for TPS is effective on January 21, 2010, and will remain in effect through July 22, 2011. The 180-day registration period for eligible individuals to submit their TPS applications begins January 21, 2010, and will remain in effect until July 20, 2010.

75 Fed. Reg. 2879

DEPARTMENT OF HOMELAND SECURITY

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

SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may only approve petitions for H-2A and H-2B nonimmigrant status 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 39 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, 2010, and shall be without effect at the end of one year after January 18, 2010.

Waiver Relief for Refugees *continued*

Id. at 666. Therefore, in *Matter of K-A-*, the Board limited the Attorney General's heightened standard to aliens convicted of "dangerous or violent crimes." However, the Board did not elaborate on what the requirements are for a crime to be "dangerous" or "violent."

Finally, the United States Court of Appeals for the Fifth Circuit, on appeal of the Attorney General's decision in *Matter of Jean*, upheld the Attorney General's heightened standard for granting section 209(c) waivers. *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006). The Fifth Circuit interpreted the Attorney General's heightened standard to apply only to aliens "who 'engage in violent criminal acts.'" *Id.* at 397 (quoting *Rivas-Gomez v. Gonzales*, 411 F.3d 1072, 1079 (9th Cir. 2006), *superseded by* 225 Fed. Appx. 680 (9th Cir. Mar. 22, 2007)). This interpretation seems to leave the door open for aliens with aggravated felony convictions to still be eligible for relief under section 209(c) as long as their criminal acts were not violent in nature.⁹ Moreover, the Ninth Circuit has noted in an unpublished decision that the Attorney General's determination in *Matter of Jean* "was fact-based, not categorical." *Rivas-Gomez v. Gonzales*, 225 Fed. Appx. 680, 683 (9th Cir. Mar. 22, 2007). A fact-based approach will likely lead to debate regarding what constitutes a crime that is dangerous or violent in nature.

Conclusion

In *Matter of Jean*, the Attorney General articulated a new rule significantly limiting the parameters of section 209(c) waivers. However, there remain some open legal issues in section 209(c) cases. These issues include how to define phrases such as "exceptional and extremely unusual hardship," and to whom the hardship requirement applies. Another issue involves determining what are "dangerous or violent crimes." In deciding these questions, adjudicators may find themselves having to make split-hair factual determinations on a regular basis. Decisions involving these issues may well lead to appeals and, perhaps, additional case law on the subject of section 209(c) waivers.

Pedro Pavón is a Judicial Law Clerk at the Miami Immigration Court.

¹ For additional background, see *Comments of Washington Legal Foundation to the U.S. Department of Justice Immigration and Naturalization Service Concerning Waiver of Criminal Grounds of Admissibility* (Sept. 9, 2002), <http://www.wlf.org/Upload/litigation/INSREFUG.pdf>.

² See sections 212(a)(2)(A)(i)(I)-(II), (2)(B), (3)(B)(i)(I)-(II) of the Act.

³ Drug trafficking offenses cannot be waived. Terrorism and suspected terrorist activity also cannot be waived. Section 209(c) of the Act (stating that the Attorney General or the Secretary of Homeland Security "may waive any other provision of [section 212(a)] (other than paragraph (2)(C) or subparagraph (A),(B),(C), or (E) of paragraph (3))").

⁴ The respondent also applied for asylum, withholding of removal, and relief under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵ Although the Immigration Judge found the respondent ineligible for all relief from removal based on an aggravated felony conviction, there is no prohibition against aliens with aggravated felonies being granted adjustment of status under section 209 of the Act.

⁶ The respondent's "husband and children testified as to the difficulties they experienced during her nearly six years of incarceration." *Matter of Jean*, 23 I&N Dec. at 383.

⁷ For a good discussion of the Attorney General's comments on the Board's analysis in both *Matter of Jean* and *Matter of H-N-*, see *Attorney General Ashcroft, Acting Sua Sponte, Reverses Board in Haitian Removal Case*, 79 Interpreter Releases, No. 27, at 1007 (July 8, 2002).

⁸ In his decision, he Attorney General recognized the hardship the respondent's removal would cause her family. However, he stated that evaluations of requests for waivers under 209(c) "cannot . . . focus solely on the family hardships, but must consider the nature of the criminal offense that rendered an alien inadmissible in the first place." *Matter of Jean*, 23 I&N Dec. at 383.

⁹ As noted in footnote 5, there is no prohibition against aliens with aggravated felony convictions being granted adjustment of status under section 209 of the Act.

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