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In this issue -

Inspection, Admission, Parole, and Lawful Status in the Context of § 245(a) Adjustment of Status: Spotlight on TPS Holders

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Certain noncitizens who are present in the United States may be eligible to obtain lawful permanent residence within this country through adjustment of status under the core provisions of section 245 of the Immigration and Nationality Act ("INA").[1] Adjustment under section 245(a) is the most common adjustment path for individuals sponsored by a family member or employer as we get further from April 30, 2001, the sunset of section 245(i) of the INA.

This article will discuss the requirements for the "inspection" and "admission" or "parole" necessary to establish prima facie adjustment eligibility under section 245(a) of the INA. *See* 8 C.F.R. §§ 245.1(b)(3), 1245.1(b)(3). This article will also discuss the concept of continuous maintenance of lawful "status" after "entry" as required under section 245(c)(2) of the INA, along with key exemptions from the 245(c) restrictions. Finally, this article will discuss recent case law for those with Temporary Protected Status (TPS) seeking adjustment under section 245(a) to illustrate the key terms and concepts in this area, how they are related, and how each distinct requirement is tied to specific statutory language.

I. Defining the general principles of "inspection" and "admission or parole"

Under section 245(a) of the INA, applicants for adjustment of status must initially establish they last entered the United States (1) after being inspected at a port of entry (2) followed by being

admitted or paroled into the United States. *Matter of Quilantan*, 25 I&N Dec. 285, 287 (BIA 2010) (quoting section 101(a)(13)(A) of the INA).

Noncitizens who claim their last entry to the United States was after an admission will typically be able to obtain documentation of admission from Customs and Border Protection (CBP). Generally, the noncitizen will be admitted as an immigrant, nonimmigrant, or refugee.[2]

However, a noncitizen may be admitted to the United States without any underlying status. For example, an irregular admission - more colloquially known as a "wave-through" at the border - still satisfies the statutory requirements of section 245(a) of the INA because the applicant presented him/herself for inspection and went through a procedurally regular process after which admission was granted. *Matter of Quilantan*, 25 I&N Dec. at 290. Specifically, in *Matter of Quilantan*, the Board explained that a qualifying admission is one that meets the statutory definition of the term "admission" used at section 101(a)(13)(A) of the INA. 25 I&N Dec. at 290-92. Section 101(a)(13)(A) defines an admission as "the lawful entry of an alien into the United States after inspection and authorization by an immigration officer."[3]

Accordingly, sometimes a noncitizen who was not legally entitled to be admitted in any particular status can still satisfy the admission requirement for section 245(a) adjustment if he/she went to a port of entry for inspection and then was admitted as part of a procedurally regular process.[4] The noncitizen may not have any documentation from CBP confirming the admission but may be able to carry the burden of proof to establish the fact of admission through testimony or other corroborative evidence. However, an individual who made a knowing false claim to United States citizenship cannot establish a qualifying admission for section 245(a) purposes.[5]

Alternatively, an applicant for adjustment may be eligible under section 245(a) if, after coming to a port of entry, the applicant is paroled into the United States. Parole is generally defined as occurring where the noncitizen (1) seeks admission at a port of entry (2) after which the immigration officer determines that the applicant for admission is not a U.S. citizen or national and permits the applicant to physically enter the United States without admitting the applicant. *See* INA section 212(d)(5)(A).[6] Qualifying forms of parole for adjustment include parole for deferred inspection, humanitarian parole, and parole-in-place as granted by USCIS, but not "conditional parole" granted upon release from immigration custody.[7]

A respondent who claims eligibility for adjustment under section 245(a) of the INA based on a parole will also typically meet the definition of an arriving alien.[8] As a result, USCIS will generally have exclusive jurisdiction over any related adjustment application even where removal proceedings are ongoing or where a respondent has a final, unexecuted order of removal. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(ii); *see also Matter of Yauri*, 25 I&N Dec. 103 (BIA 2009); *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

However, an Immigration Judge may review USCIS's denial of an arriving alien's adjustment application filed under one set of narrow circumstances—where the applicant initially filed for adjustment with USCIS, then traveled on advance parole pursuant to the pending adjustment application, after which the applicant returned to the United States with the approved parole, and USCIS then denied the adjustment application. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(ii).

II. Defining "lawful status" after "entry" as used at section 245(c) of the INA

Establishing inspection followed by admission or parole is just the first requirement for section 245(a) adjustment. In addition, except for certain limited

groups (most commonly the immediate relatives of United States citizens), these applicants must also establish they have continuously maintained "lawful status" since their last "entry" to satisfy the requirements at section 245(c) of the INA.[9]

Violations of nonimmigrant status may include (1) staying longer than authorized; (2) working without authorization or outside of the scope of a specific nonimmigrant visa; (3) failing to maintain a full course of study as a student; (4) certain misrepresentations; and (5) certain criminal conduct. 8 C.F.R. §§ 214.1(a)(3), (e), (f), (g); 215.8. However, any technical failure to maintain status or a failure that arises through no fault of the nonimmigrant visa holder may excuse the period during which the adjustment applicant fell out of lawful status.[10] In addition, where an applicant falls out of lawful status after filing for adjustment, this failure to maintain lawful status does not trigger the bars at section 245(c).[11]

III. What is the difference between the fact of admission or parole and maintenance of lawful status?

An individual may satisfy the inspection and admission requirement with a "wave through" admission as described in *Matter of Quilantan*, without being able to maintain lawful status upon admission because the applicant was not admitted in any status. Typically, these individuals will not be eligible to adjust under section 245(a) of the INA unless they fall within one of the categories exempt from the restrictions at section 245(c) related to maintaining lawful status. The most common qualifying exemption arises where an adjustment applicant is the immediate relative (spouse, parent, or child under the age of 21) of a United States citizen.[12]

Similarly, a parolee may not be entitled to any particular status in the United States, as parole is typically considered physical permission to enter the country while the inspection process regarding the propriety of legal entitlement to admission is deferred.[13]

On the other hand, some noncitizens enter the United States without inspection but receive and maintain lawful status while in the United States. This most often occurs with nonimmigrant statuses granted under special circumstances, such as temporary protected status (TPS) under section 244 of the INA.[14] Therefore, although the applicant may be able to show maintenance of status, the applicant may not be able to clear the initial hurdle of an admission or parole as required by section 245(a) of the INA.

IV. Application to TPS recipients

Admission typically occurs in a status and section 245(c) of the INA also generally requires maintenance of lawful status. However, as discussed above, this is not always the case with special nonimmigrant statuses conferred from within the United States like TPS.[15] Between 2017 and 2021, a circuit split emerged involving TPS holders seeking adjustment, in which some courts concluded that the grant of TPS alone created a qualifying admission and other courts concluded that the grant of TPS did not alter the manner in which the applicant last entered.[16]

The circuit split was resolved in 2021 when the Supreme Court of the United States decided *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021). The Supreme Court concluded that the grant of TPS, alone, does not constitute an inspection followed by admission or parole for purposes of adjustment under section 245(a) of the INA. Instead, the Supreme Court reasoned that although an individual with TPS status is in and maintaining lawful status, the concept of lawful status is distinct from the fact of admission or parole under the relevant provision.[17]

Prior to the Supreme Court's decision in *Sanchez*, USCIS issued an Administrative Appeals Office adopted decision in *Matter of Z-R-Z-C-*, Adopted

Decision 2020-22 (Aug. 20, 2020), addressing a related question involving inspection and parole for TPS holders who travel abroad. Specifically, TPS holders have been authorized to apply for permission to travel abroad and return to the United States pursuant to their TPS by seeking advance parole under section 244(f)(3) of the INA and 8 C.F.R. § 244.15(a). In *Matter of Z-R-Z-C-*, USCIS formally addressed the question of whether, upon return to the United States under these provisions, the TPS holder had been paroled for purposes of 245(a) adjustment.[18]

In *Matter of Z-R-Z-C-*, USCIS departed from the agency's long-standing informal legal analysis that treated travel on advance parole related to TPS as a qualifying section 245(a) parole. Instead, in *Matter of Z-R-Z-C-*, USCIS looked for the first time at the specific language of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (the MTINA Amendments), discussing travel authorization for TPS holders. MTINA provides in relevant part that an individual with TPS returning on advance parole "shall" be deemed to have been "admitted in the same immigration status the alien had at the time of departure." USCIS reasoned that the "admitted in the same immigration status" language precluded the TPS holder from being "admitted" as a parolee because the TPS holder did not have parole status prior to departing for international travel. Moreover, USCIS held that an individual returning to the United States on advance parole with TPS could not be deemed admitted in any "status" as this would place an individual who initially entered without inspection, subsequently obtained TPS, and then engaged in authorized international travel in an improved status simply by virtue of traveling.

In the aftermath of *Sanchez*, in March 2022, DHS entered into a stipulated settlement in a class action lawsuit challenging *Matter of Z-R-Z-C-*. *Central American Resource Center v. Jaddou*, Case 1:20-cv-02363-RBW (D.C. Cir. Mar. 21, 2022) (CARECEN Settlement). In the CARECEN settlement, ICE agreed to treat individuals in removal proceedings who have traveled on advance parole with TPS as inspected and admitted or paroled. *Id.* (ICE also agreed to jointly reopen and terminate removal proceedings for certain class members, thus allowing impacted TPS recipients who traveled on advance parole to pursue adjustment before USCIS under section 245(a) of the INA.)

Then, in July 2022, USCIS withdrew *Matter of Z-R-Z-C-*, acknowledging the tensions between the USCIS adopted decision and the subsequent Supreme Court decision. *See* USCIS PM-602-0188. However, in a departure from the pre-*Matter of Z-R-Z-C-* approach, the 2022 policy currently treats new travel on advance parole granted pursuant to TPS as an admission given the unique language of the MTINA Amendments, even if the TPS holder first entered the United States without inspection. *Id*.; *see also Hernandez v. Jaddou*, 65 F.4th 265 (5th Cir. 2023); *Duarte v. Mayorkas*, 27 F.4th 1044 (5th Cir. 2022).[19] Until there is binding precedent, adjudicators at EOIR will have to decide whether to accept DHS's approach. Thus, we may be asked to determine whether an individual with TPS who travels on advance parole and then is placed in removal proceedings is properly charged with deportability under section 237 of the INA and/or whether that individual would be eligible to adjust status under section 245(a) of the INA before the Immigration Court based on the DHS position that this constitutes an inspection and admission with TPS.[20]

Although, historically, most TPS holders traveling on TPS-related advance parole sought adjustment before USCIS as arriving aliens, EOIR will likely see more cases where an individual who held TPS at the time of their last return from international travel and had that status terminated is now seeking adjustment before the court, as TPS holders who travel pursuant to their TPS status will be treated by DHS as admitted. Additionally, some TPS and former TPS holders who previously were in removal proceedings, do not qualify for joint motions to reopen under CARECEN, and do not, in USCIS's opinion, qualify to adjust before the agency, may

seek reopening to adjust before the Immigration Court. Notably, should DHS admit TPS holders returning from international travel, consistent with the MTINA amendments, and then place such individuals in removal proceedings, the charge lodged will likely be under section 237 of the INA, requiring adjudicators to be mindful of the distinctions between 212 and 237 grounds and the differing burdens of proof.

In addition, if EOIR adjudicators elect to treat TPS holders as inspected and admitted (rather than paroled) following TPS-authorized international travel, questions may arise regarding any related adjustment applicant's admissibility for purposes of section 245(a) adjustment as the grounds of inadmissibility applicable to TPS holders at section 244 of the INA are narrower than those outlined at section 212 of the Act.[21] Similarly, for individuals with final orders of removal who applied for travel authorization as TPS holders, traveled, and returned to the United States prior to *Sanchez*, *Matter of Z-R-Z-C-*, the CARECEN Settlement, and the subsequent USCIS Policy Memo, questions regarding reliance and retroactive application of the admission analysis may arise.[22]

V. Conclusion

The litigation surrounding when and under what circumstances TPS holders are eligible for adjustment of status under section 245(a) of the INA illustrates the importance of treating inspection and admission or parole as distinct from the concept of being in and maintaining lawful status. In addition, evaluating adjustment eligibility for TPS holders makes clear that careful assessment of the legal provisions authorizing a noncitizen's ability to travel internationally and return to the United States may impact which agency has jurisdiction over any resulting adjustment application, along with any prima facie eligibility and admissibility assessment when addressing the merits of such an application. Finally, to the extent DHS will now treat TPS holders as having been inspected and admitted if they travel abroad pursuant to a valid grant of TPS, EOIR adjudicators will be tasked with assessing whether those who end up in removal proceedings are properly charged on the Notice to Appear in determining whether EOIR has jurisdiction over any resulting proceedings.

Although certain legal questions are yet to be resolved in this context, the recent challenges and the analysis by the Supreme Court, the Circuit Courts, and DHS reinforce the need for using precision when applying the concepts of admission, parole, and lawful status, and avoiding conflation of these concepts. This is particularly so in making threshold determinations regarding removability and, if jurisdiction attaches, in determining when and under what circumstances respondents may be eligible to adjust their statuses. Clarity in these concepts will also be helpful, absent other binding authority, in adjudicating motion to reopen that present issues of the applicant's admissibility, the related 212(a)(9) travel bars, and possible retroactivity analysis. These motions may be more prevalent where DHS takes the position that EOIR, not USCIS, has original jurisdiction over the applicant's adjustment application. As a result, developing a working knowledge of these terms and an adjudication strategy for tackling these issues may be helpful in addressing these cases as they arise, unless and until binding precedents are developed.

(cont'd on p. 8 (endnotes))

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BIA Precedent Decisions – Second Quarter 2023

In ***Matter of Cancinos-Mancio***, 28 I&N Dec. 708 (BIA 2023), the Board held an **Immigration Judge may consider the transcript of a plea colloquy when applying the modified categorical approach** to determine which subsection of a divisible statute a respondent was convicted of violating. In this case, the Immigration Judge properly examined the transcript of a change of plea hearing.

In ***Matter of Morales-Morales***, 28 I&N Dec. 714 (BIA 2023), the Board held that 8 C.F.R. § 1003.38(b) is a claim-processing rule, not a jurisdictional provision, and therefore **the Board has authority to accept untimely appeals** and consider them timely in certain situations. The Board specified that it will accept a late-filed appeal if the filing party can establish equitable tolling applies, which requires both diligence in the filing of the appeal and an extraordinary circumstance that prevented timely filing.

The Board addressed New York's second-degree burglary statute in ***Matter of Pougatchev***, 28 I&N Dec. 719 (BIA 2023). First, the Board held that a conviction for **burglary of a building while displaying what appears to be a firearm, in violation of NYPL § 140.25(1)(d), is not categorically an aggravated felony burglary offense** because the statute is overbroad and indivisible with respect to the definition of "building." Second, the Board held **such a conviction is an aggravated felony crime of violence** because it necessarily involves the use, attempted use, or threatened use of physical force against a person or property.

Supreme Court Action

Decisions Impacting Immigration Law – Second Quarter 2023

In ***Santos-Zacaria v. Garland***, 143 S. Ct. 1103 (2023), the Court held INA § 242(d)(1), which requires a noncitizen to exhaust all administrative remedies available as of right prior to seeking judicial review, is not jurisdictional, and a respondent need not seek reconsideration by the BIA in order to file a petition for review of the BIA's decision in federal court.

In ***Pugin v. Garland***, 143 S. Ct. 1833 (2023), the Court held that an offense can be an obstruction of justice aggravated felony under INA § 101(a)(43)(S) even if the offense does not require an investigation or proceeding to be pending. The offenses found to be aggravated felonies in this case were dissuading a witness from reporting a crime and being an accessory after the fact to a felony.

Of note, **the Court granted certiorari** in *Loper Bright Enterprises v. Raimondo* (No. 22-451), to consider the question "[w]hether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

A Circuit Court Sampling – Second Quarter 2023

Decisions that Shaped the Field of Immigration Law, One from Each Numbered Circuit

First Circuit – *Andrade-Prado v. Garland*, 64 F.4th 386 (1st Cir. 2023). The court held that a Brazilian conviction was valid for immigration purposes because the respondent did not show that it was politically motivated and he was able to meaningfully participate in the criminal proceedings.

Second Circuit – *Malets v. Garland*, 66 F.4th 49 (2d Cir. 2023). The court vacated *Matter of Y-I-M-*, 27 I&N Dec. 724 (BIA 2019), concluding significant parts of the Immigration Judge's adverse credibility finding were based on factual errors.

Third Circuit – *Doyduk v. U.S. Att'y Gen.*, 66 F.4th 132 (3d Cir. 2023). Upholding a discretionary denial of adjustment of status, the court held that the facts underlying expunged criminal charges can be considered when exercising discretion.

Fourth Circuit – *Kerr v. Garland*, 66 F.th 462 (4th Cir 2023). The court held that, when determining the cumulative probability of torture from all sources and for all reasons in a CAT claim, no specific methodology is required as long as a reviewing court can discern that all sources of and reasons for torture were aggregated.

Fifth Circuit – *Reese v. Garland*, 66 F.4th 530 (5th Cir. 2023). Joining several other circuits, the court held that a section 237(a)(1)(H) fraud waiver does not waive removability under INA § 237(a)(3)(B)(iii) for a conviction relating to entry-document fraud.

Sixth Circuit – *Turcios-Flores v. Garland*, 67 F.4th 347 (6th Cir. 2023). Highlighting that a particular social group requires a characteristic that is either immutable *or* fundamental to the applicant's identity, the court held the evidence presented showed land ownership in Honduras was a fundamental characteristic the applicant should not be required to change.

Seventh Circuit – *Arias v. Garland*, 69 F.4th 454 (7th Cir. 2023). The court held harm on account of perceived wealth lacks a nexus to a protected ground. To show a nexus to small business ownership, an applicant must show animus toward small business owners as a group rather than indiscriminate targeting of anyone with perceived wealth.

Eighth Circuit – *Barbosa v. Garland*, 70 F.4th 1080 (8th Cir. 2023). Examining a conviction for possession of methamphetamine in violation of Kan. Stat. Ann. § 21-5706(a), which prohibits the possession of "any opiates, opium or narcotic drugs, or any [designated] stimulant," the court held the identity of the drug is an element of the offense and therefore the statute is divisible based on the drug involved.

Ninth Circuit – *Arizmendi-Medina v. Garland*, 69 F.4th 1043 (9th Cir. 2023). Concluding the respondent was denied due process when the Immigration Judge deemed his opportunity to file an asylum application abandoned and denied a continuance, the court emphasized the need to clearly state any filing deadline imposed and unambiguously communicate that failure to comply with the filing deadline will result in the claim being deemed abandoned.

Tenth Circuit – *Farnum v. Garland*, 71 F.4th 790 (10th Cir. 2023). The court held that when an Immigration Judge finds an applicant filed a frivolous asylum claim, the frivolous bar applies immediately in the same proceedings in which it was made.

Eleventh Circuit – *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023). After certifying a question to the Florida Supreme Court, the court held that aggravated assault with a deadly weapon under Florida law requires a knowing mens rea and thus has as an element the use, attempted use, or threatened use of force.

(cont'd from p. 5)

[1] Although beyond the scope of this article, a noncitizen who has never been to the United States (or who departs the United States to become a lawful permanent resident) "consular processes" before the U.S. Department of State as governed by the applicable regulations at Title 22. The concept of becoming a lawful permanent resident while in the United States did not exist until 1935, when the U.S. government began "pre-examination" of noncitizens who would then travel abroad to be issued an immigrant visa. *See USCIS Policy Manual*, Volume 7, Part B, Chapter I, section B. The Immigration and Nationality Act of 1952 introduced the concept of adjustment from within the United States without travel abroad. *See* Immigration and Nationality Act of 1952, ch. 477, section 245(a), 66 Stat. 163, 217. Since 1952, several statutory changes have been enacted, creating a patchwork of terms used to describe the requirements imposed on individuals seeking adjustment of status. For an overview of several relevant historical developments, *see Matter of Quilantan*, 25 I&N Dec. 285, 288-92 (BIA 2010). The evolving statutory provisions and use of interrelated terms have contributed to confusion about what qualifies as an admission or parole, who is an arriving alien, and how this relates (or does not) to lawful status for those seeking permanent residency.

[2] Citizens are not inspected when entering the United States. *See, e.g.*, *Matter of Wong*, 11 I&N Dec. 712, 713 (BIA 1966); *Matter of Bufalino*, 11 I&N Dec. 351, 351 (BIA 1965); *Matter of M-*, 5 I&N Dec. 642, 645 (BIA 1954). Likewise, generally, lawful permanent residents are not subject to inspection when they travel through a port of entry. *See* section 101(a)(13)(C) of the Act (outlining when a lawful permanent resident is considered an applicant for admission). As a result, United States Citizenship and Immigration Services (USCIS) will generally not treat an individual claiming to have last entered using a valid lawful permanent resident card as having been admitted for adjustment purposes. *See USCIS Policy Manual*, Volume 7, Part B, Chapter II, fns. 26, 28. However, the first time a noncitizen enters the United States with an immigrant visa issued abroad, the applicant would be inspected and admitted.

[3] *Matter of Quilantan* reaffirms the Board's earlier holding in *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), notwithstanding the fact that our earlier precedent examined the use of the term "admission" in the 1980 version of the Act which was substantially amended in 1996. *Matter of Quilantan*, 25 I&N Dec. at 290. The Board's analysis in *Matter of Quilantan* has been accepted in the circuits where challenges have been raised. *See, e.g.*, *Acosta v. Lynch*, 819 F.3d 519 (1st Cir. 2016); *Ottey v. Barr*, 965 F.3d 84 (2d Cir. 2020); *Singh v. U.S. Att'y Gen.*, 12 F.4th 262, 277 n.14 (3d Cir. 2021); *Mauricio-Vasquez v. Whitaker*, 910 F.3d 134 (4th Cir. 2018); *Rendon v. Barr*, 952 F.3d 963 (8th Cir. 2020); *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017).

[4] Although the *Quilantan* framework has been accepted by the circuit courts, decisions issued by EOIR have been reviewed by the circuit courts for clear error in factfinding or credibility determinations, the noncitizen's ability to meet the burden of proof as to the fact of admission, and other statutory eligibility considerations. *See, e.g.*, *Acosta*, 819 F.3d 519 (concluding an applicant who entered with fraudulent nonimmigrant documents may adjust under 245(a) but only if he can establish the fact of admission through credible evidence); *Ottey*, 965 F.3d 84 (concluding an applicant can adjust under section 245(a) if admitted with another's lawful permanent resident credentials but concluding there that the applicant did not establish the fact of admission because the applicant was a toddler at the time with limited knowledge about the entry and his parents, who provided affidavits, were not present during his travel); *Singh*, 12 F.4th at 277 n.14 (explaining an applicant for admission who remained longer than authorized still entered through a procedurally regular admission consistent with *Quilantan*); *Mauricio-Vasquez*, 910 F.3d 134 (concluding the Department of Homeland Security (DHS) did not carry its burden of proof to establish the noncitizen in that case, a lawful permanent resident, was deportable as charged where the DHS did not establish the noncitizen entered without inspection and subsequently adjusted his status as the noncitizen presented rebuttal evidence documenting a procedurally regular admission without a departure prior to his adjustment). However, where noncitizens have sought to expand the holding in *Quilantan* to assert that a procedurally regular admission is not an "illegal entry" for purposes of criminal illegal reentry provisions or as it relates to the grounds of inadmissibility at section 212(a)(9) of the INA, the circuit courts have generally rejected this expansion, noting admission and entry are distinct legal concepts that should not be conflated. *See, e.g.*, *Terrazas-Hernandez v. Barr*, 924 F.3d 768 (5th Cir. 2019); *Mendoza v. Sessions*, 891 F.3d 672 (7th Cir. 2018); *Gutierrez-Gutierrez v. Garland*, 991 F.3d 990 (8th Cir. 2021); *Cordova-Soto v. Holder*, 659 F.3d 1029 (9th Cir. 2011). Notwithstanding the foregoing, because a grant of adjustment is ultimately a discretionary determination, after *Patel v. Garland*, 142 S. Ct. 1614 (2022), some circuit courts may decline to review EOIR's final administrative decisions going forward.

[5] An individual making a knowing false claim to United States citizenship evades inspection and thus is not admitted. *Matter of Pinzon*, 26 I&N Dec. 189, 191 (BIA 2013). However, an applicant for admission who commits fraud in successfully entering as a noncitizen often has subjected him/herself to a procedurally regular, although substantively invalid, inspection and admission. This individual, in applying for adjustment of status, will likely have to address the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the INA involving fraud or a material misrepresentation in seeking or obtaining an immigration benefit and will likely need to qualify for a waiver of inadmissibility under section 212(i) of the INA to successfully adjust status.

[6] *See also* section 101(a)(13)(B) of the INA confirming parole is *not* an admission.

[7] *See* 8 C.F.R. § 235.2 (deferred inspection); section 212(d)(5)(A) of the INA (humanitarian parole); and *USCIS Policy Manual*, Volume 7, Part B, Chapter 2, section A.3 (parole-in-place). Unlike the foregoing paroles, conditional parole is typically granted by DHS to track the release of a detainee from Immigration and Customs Enforcement (ICE) custody and does not meet the definition of a parole under section 212(d)(5) of the INA, as authority to grant "conditional parole" is grounded in section 236(a)(2)(B) of the INA without reference to the 212(d)(5) language and definitions. However, this concept is the subject of ongoing litigation, and adjudicators should double check for any relevant litigation updates where this issue is presented. For authority finding conditional parole is not a qualifying 245(a) parole, see, e.g., *Matter of Castillo Padilla*, 25 I&N Dec. 257 (BIA 2010). *See also Cruz-Miguel v. Holder*, 650 F.3d 189 (2d Cir. 2011); *Delgado-Sobalvarro v. U.S. Att'y Gen.*, 625 F.3d 782 (3d Cir. 2010); *Garcia v. Holder*, 659 F.3d 1261, 1268 (9th Cir. 2011). In addition, it is good to be mindful that certain applicants for adjustment are deemed paroled or are treated as applicants for admission eligible for parole based on their unique circumstances. For instance, although beyond the scope of this article, applicants for special immigrant juvenile (SIJ) adjustment under section 245(h) of the INA will be considered paroled for purposes of the section 245(a) requirements if they were not previously inspected and admitted or paroled. *See* INA § 245(h)(1). The fact of parole, however, does not confer a lawful status on the SIJ adjustment applicant. *See Garcia*, 659 F.3d at 1268. Similarly, adjustment applicants present in the Commonwealth of the Northern Marianas Islands are paroled by USCIS if they are otherwise adjustment-eligible in meeting the 245(a) requirements. *See* USCIS Policy Manual, Volume 7, Part B, Chapter 2, section A.4. Finally, although beyond the scope of this article, USCIS periodically supports unique parole initiatives for specific countries. For current information on country-specific parole programs, see the USCIS website at www.uscis.gov/humanitarian/humanitarian_parole, www.uscis.gov/ukrainian, www.uscis.gov/CHNV, and www.uscis.gov/humanitarian/information-for-afghan-nationals.

[8] 8 C.F.R. §§ 1.2, 1001.1(q) (defining an arriving alien as an "applicant for admission coming or attempting to come to the United States at a port of entry."). The term continues to apply if the applicant for admission is paroled but the parole is subsequently revoked. 8 C.F.R. § 1001.1(q).

[9] The restrictions at section 245(c) of the INA are also inapplicable to applicants for adjustment under the Violence Against Women Act (VAWA), certain physicians and their accompanying spouses and children, certain employees of NATO and other international organizations along with their spouses and children, SIJ applicants, and certain members of the U.S. armed forces and their spouses and children. INA § 245(c) (explicitly listing the VAWA exemption and identifying special immigrants under sections 101(a)(27)(H) (for physicians), (I) (for NATO and other international organization employees), (J) (for juveniles), and (K) (for members of the military)). In addition, there is a limited exception for certain employment-based applicants who have failed to maintain status for no more than 180 days in the aggregate since their last admission. *See* INA § 245(k).

[10] INA § 245(c)(2), (8). For examples of technical violations beyond the control of the applicant see USCIS Policy Manual, Volume 7, Part B, Chapter 4, section E.2.

[11] An applicant may fall out of status after filing for adjustment and still satisfy the requirements for maintenance of status set forth at section 245(c) of the INA. However, if that adjustment application is denied, the applicant cannot then file a successive adjustment application more than 180 days after last being in lawful status and "bootstrap" the second application to the initial one in meeting the 245(c) requirements. *See, e.g.*, *Dhuka v. Holder*, 716 F.3d 149 (5th Cir. 2013). In addition, continued unauthorized employment after filing for adjustment and prior to obtaining an employment authorization document through the adjustment application can create a section 245(c) bar.

[12] *See* INA § 245(a) for the immediate relative exemption and INA § 201(b)(2) for the definition of an immediate relative.

[13] *See, e.g.*, *Iredia v. U.S. Att'y Gen.*, 25 F.4th 193, 196 (3d Cir. 2022) (explaining that entry on parole does not come with any underlying status).

[14] 8 C.F.R. § 244.10(f)(2)(iv); *see also Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020) (explaining that individuals with terminated TPS are no longer maintaining lawful status and, if they last entered without inspection, finding them removable under section 212(a)(6)(A)(i) of the INA). Other special statuses may confer status from within the United States without an admission, including U visa nonimmigrant status for certain victims of violent crimes conferred under section 101(a)(15)(U) of the INA, or individuals granted asylee status under section 208(c) of the INA. Because U visa holders and asylees may adjust through their respective programs, under sections 245(m) and 209 of the INA, without invoking section 245(a), the issues regarding admission and maintenance of status only come up with these individuals if they are also the beneficiaries of an approved employment- or family-based visa petition and they wish to use these visa petitions to adjust under section 245(a) of the INA.

[15] USCIS generally has original jurisdiction over the conferral of TPS, and Immigration Judges only have limited jurisdiction to conduct TPS de novo review. For a further discussion of the procedures for seeking TPS, see generally *Matter of Barientos*, 24 I&N Dec. 100 (BIA 2007). This is distinct from the concept of TPS applicants applying for adjustment before USCIS or, where appropriate, before the Immigration Court.

[16] The Sixth, Eighth, and Ninth Circuits concluded that the grant of TPS alone constituted an admission, while the Third Circuit disagreed. *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Velasquez v. Barr*, 979 F.3d 572 (8th Cir. 2020); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *but see Sanchez v. DHS*, 967 F.3d 242 (3d Cir. 2020).

[17] The Supreme Court's decision in *Sanchez v. Mayorkas* is consistent with the Board's earlier precedent in *Matter of Padilla Rodriguez* (*supra* n.14). *Sanchez v. Mayorkas* builds on the Board's interpretation of TPS status as a nonimmigrant status that is unrelated to the manner in which the noncitizen last entered the United States. *See also Matter of Sosa Ventura*, 25 I&N Dec. 391 (BIA 2010) (explaining that any waivers granted for purposes of conferring TPS status are limited to the statutory context in which the benefit is granted and clarifying that the grant of TPS does not alter the noncitizen's removability).

[18] For a complete discussion of the related legal developments, *see* USCIS Policy Memorandum PM-602-0188, *Recission of* Matter of Z-R-Z-C- *as an Adopted Decision; interpretation of authorized travel by TPS beneficiaries*, July 1, 2022 ("PM-602-0188").

[19] Although TPS was created in 1990, the MTINA Amendments modified the way in which TPS holders returning from authorized international travel would be treated. For more than 30 years, TPS holders continued to travel on advance parole, notwithstanding the tension between the initially promulgated TPS travel regulations and the MTINA Amendments discussing admission. USCIS announced a plan to revise the regulations and modify what travel documents TPS holders are issued in light of recent legal developments highlighting the tension. *See* USCIS Office of General Counsel Memorandum, *Immigration Consequences of Authorized Travel and Return to the United States for Individuals Holding Temporary Protected Status*, Apr. 6, 2022; *see also* USCIS PM-602-0188 at p. 1, n. 18.

[20] *See also*, *Michel v. Mayorkas*, 68 F.4th 74, 79-80 (1st Cir. 2023) (concluding DHS was substantially justified in concluding individuals returning from international travel as TPS holders were not arriving aliens). Although beyond the scope of this article, in *Matter of Arrabally & Yerabelly*, 25 I&N Dec. 771 (BIA 2012), the Board discussed the role of travel on advance parole conferred as a result of a pending adjustment application as not qualifying as "seeking admission" for purposes of the unlawful presence bars at section 212(a)(9) of the INA.

[21] For instance, if the noncitizen initially entered without inspection or as a nonimmigrant and then fell out of status prior to obtaining TPS, this may give rise to questions about the applicability of the unlawful presence grounds at section 212(a)(9)(B) of the INA, although USCIS has suggested that it will apply certain retroactivity and reliance principals in evaluating whether, depending on the timing of the travel, the noncitizen reasonably expected to be treated as a parolee who would *not* trigger the unlawful presence bars. *See* PM-602-0188 at p. 13; *see also Matter of Arrabally & Yerabelly*.

[22] *See* PM-602-0188 at p. 2-3, 14-15. This question is foreclosed in the Fifth Circuit under *Duarte*, as the Fifth Circuit has explicitly said it will apply the admission analysis retroactively. 27 F.4th at 1061. If such individuals were deemed admitted without first obtaining the advanced permission of the Secretary of Homeland Security to apply for readmission, bars under section 212(a)(9)(A) of the INA may render the applicant inadmissible and statutorily ineligible for adjustment of status. However, if such applicants were deemed to have relied on USCIS's prior interpretation of the law in qualifying for retroactive application of the old approach, they would be deemed arriving aliens who legally departed. *Compare Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), *with Matter of Arrabally & Yerabelly*, 25 I&N Dec. at 771.