Update: The LPR Bars to § 212(h) – To Whom Do They Apply?

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Section 212(h) of the INA is an important waiver of inadmissibility based on certain crimes. Since 1997, §212(h) has provided that at least some lawful permanent residents (LPRs) cannot apply for the waiver if they (a) have been convicted of an aggravated felony since a certain type of admission or (b) have failed to accrue seven years of lawful continuous residence before removal proceedings are initiated. Not all LPRs are subject to these bars, however. In six circuits, courts have held that the bars are triggered only when a person is admitted at a U.S. port of entry as an LPR, but are *not* triggered when a person adjusts status to LPR. The BIA disagrees, and one federal court has agreed to defer to the BIA's reading. This section will give an update on defense strategy and current litigation.

A. Summary

Currently there is a conflict in the law as to which permanent residents are subject to the LPR bars to eligibility to apply for § 212(h).

In cases arising within the **Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits,** federal courts have held that the bars apply only to persons who have been admitted to the U.S. as permanent residents *at a border or border equivalent.* Merely adjusting status to lawful permanent residency does not trigger the bars.[2] An person who has not been admitted at the border as an LPR may be able to apply for a §212(h) waiver despite conviction of an aggravated felony or lack of the seven years. The BIA will follow this rule, which we will call the *Martinez* rule,[3] in cases arising within the jurisdiction of these courts. The same logic should require that even where an LPR is subject to the bars, an aggravated felony conviction will disqualify her from §212(h) eligibility only if the conviction occurred after she was admitted as a permanent resident at a border or border equivalent, as opposed to after adjustment or some other admission.

Outside of the above jurisdictions (i.e., in cases arising within the **First, Second, Sixth, Eighth, and Tenth Circuits**), the BIA will impose its own rule and find that *all* permanent residents are subject to the LPR bars, regardless of whether they adjusted status or were admitted

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[2] *Hanif v. Holder, 694 F.3d 497 (3rd Cir. 2012); Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008); *Papazoglou v. Holder*, 725 F.3d 790 (7th Cir. 2013); *Negrete-Ramirez v. Holder*, -F.3d- (9th Cir. 2014); *Sum v. Holder*, 602 F.3d 1092 (9th Cir. 2010); *Lanier v. United States AG*, 631 F.3d 1361 (11th Cir. 2011).

[3] The rule was first set out in *Martinez v. Mukasey, supra.*

at a port of entry as LPRs.[4] The First, Second, Sixth, and Tenth Circuits have not yet addressed the issue. Counsel in those jurisdictions should consider appealing the case to the Circuit Court of Appeals, to seek a ruling that the plain language of § 212(h) limits application of the bars to a person admitted as an LPR at a port of entry. The Eighth Circuit held that it must defer to the BIA's interpretation under *Chevron.*[5] A petition for rehearing *en banc* will be filed.

B. How the Rules Apply: Examples

The following fact situations demonstrate how the BIA on the one hand, and federal courts following the *Martinez* rule on the other, apply the LPR bars.

> **Example:** Mr. Martinez was admitted as a tourist, fell out of status, and then adjusted status to LPR. Subsequently he was convicted of a fraud offense that was both an aggravated felony and an inadmissible crime involving moral turpitude (CIMT). Charged with being removable under the aggravated felony deportation ground, Mr. Martinez asks to apply for adjustment of status as a defense to removal. Because he is inadmissible under the CIMT ground, he also needs to apply for a § 212(h) waiver.
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> Is Mr. Martinez subject to the LPR bars to § 212(h)? If he is, does his aggravated felony conviction mean that he cannot apply for § 212(h)?

The BIA would find that Mr. Martinez is subject to the LPR bars, because all permanent resident are. It would find that he is disqualified under the bars, because he was convicted of an aggravated felony since becoming a permanent resident. This will be the rule applied in the First, Second, Sixth, Eighth, and Tenth Circuits, absent federal court rulings to the contrary.

The Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals apply the rule first set out in *Martinez v. Mukasey.* They would find that Mr. Martinez is not subject to the LPR bars, because he never has been *admitted at the border as an LPR.* Because he is not subject to the bars, the fact that he has an aggravated felony conviction does not disqualify him from applying for § 212(h).

> **Example:** What if Mr. Martinez had traveled outside the U.S. after being convicted of the offense, and upon his return was stopped at the border and charged in removal proceedings with being inadmissible?

Under the BIA rule, all permanent residents are subject to the LPR bars, and an aggravated felony conviction after admission or adjustment disqualifies the person from §212(h). Mr. Martinez could not apply for § 212(h).

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[4] *Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012), *Matter of Koljenovic*, 25 I&N Dec. 218 (BIA 2010).

[5] *Roberts v. Holder*, --F.3d-- (8th Cir. March 28, 2014), deferring *under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In contrast, under the federal rule in *Martinez*, Mr. Martinez would not be subject to the LPR bars, because he does not have a *previous* admission at the border as an LPR. This is his first such admission. He can apply for §212(h) and if it is granted, he can be admitted and continue as a permanent resident.

> **Example:** What if Mr. Martinez had traveled outside the U.S. after he was convicted, but upon his return he was not stopped but was (mistakenly) permitted to return to the U.S. despite being inadmissible. Later he was charged in removal proceedings with being deportable for conviction of an aggravated felony and/or for being inadmissible at last admission.

Under the BIA rule, because Mr. Martinez was convicted of an aggravated felony while a permanent resident, he remains barred from applying for §212(h).

ICE is likely to assert that Mr. Martinez is *subject* to the LPR bars even under the *Martinez* federal court rule. While usually an LPR returning from a trip abroad is presumed not to be seeking a new "admission," this is not true if the person comes within certain exceptions. One of these exceptions is if the person is inadmissible under the crimes grounds. See INA §101(a)(13)(C). Because Mr. Martinez' conviction causes inadmissibility under the moral turpitude ground, ICE would likely charge that he came within an exception to §101(a)(13)(C), and therefore he was "admitted" at the border as an LPR, and the LPR bars now apply.

There may be arguments against an assertion that the Mr. Martinez is subject to the LPR bars based upon this return to the U.S. In this case, however, even if Mr. Martinez were held to be subject to the LPR bars, his aggravated felony conviction should not disqualify him from applying for §212(h) under the *Martinez* analysis. Section 212(h) provides that conviction of an aggravated felony is a bar if it occurs *after* admission at the border as an LPR. Mr. Martinez was convicted of the CIMT/aggravated felony offense *before* his trip and re-admission. Thus even if the bars potentially apply to Mr. Martinez, his conviction does not come within them, and should be able to apply to re-adjust status and waive inadmissibility under §212(h) as a defense to removal.

C. Case Discussion

For a more in-depth discussion of the BIA cases and §212(h) strategies, see Brady, "Update on § 212(h) Defense Strategies" at www.ilrc.org/crimes.

The last paragraph of INA §212(h), 8 USC §1182(h) provides that the waiver is not available to certain permanent residents:

> No waiver shall be granted under this subsection in the case of an alien who has ***previously been admitted to the United States*** as an ***alien lawfully admitted for permanent residence*** if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in

the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States.

Some lawful permanent residents (LPRs) are not subject to this statutory bar, meaning that they can apply for § 212(h) even if they were convicted of an aggravated felony or failed to accrue the seven years. Currently the BIA applies a different legal standard than federal courts do, so that the outcome of the case may depend upon the jurisdiction in which the case arises.

The *Martinez* rule in cases under the jurisdiction of the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals. These courts held that the §212(h) bars apply only to a person who was admitted to the United States as a lawful permanent resident *at a port of entry (i.e. the border or its equivalent such as an airport).* They found that the § 212(h) phrase "previously been admitted to the United States" incorporates the statutory definition of "admission" at INA § 101(a)(13)(A), 8 USC § 1101(a)(13)(A), which is "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Therefore merely adjusting status to permanent residency does not trigger the bars.[6]

The courts all based this holding on the plain language of the statute, which means they determined that they need not give *Chevron* deference to the BIA's contrary interpretation on this point.[7] (In contrast, the Eighth Circuit held that it must grant *Chevron* deference to the BIA's interpretation; see *Roberts, supra.)* Also, while these cases concerned the LPR bar based on conviction of an aggravated felony, the same standard would apply to the LPR bar based on lack of seven years lawful continuous residence. In *Matter of Rodriguez* the BIA agreed that it must follow the above rule in removal cases arising within these jurisdictions.

The Board's Decision in *Matter of Rodriguez*. In cases arising outside the jurisdiction of the above circuit courts of appeals, the BIA will hold that *all* LPRs are subject to the LPR § 212(h) bars, including LPRs who adjusted status following a prior admission or a prior entry without inspection. *Matter of Rodriguez,* 25 I&N Dec. 784 (BIA 2012). Where possible counsel should appeal an adverse IJ and BIA decision to the federal appellate level, to seek a ruling in line with that of the *Martinez* federal court rule.

Section 212(h) applies certain bars to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence." As discussed above, all federal courts of appeal that have considered the matter have held that the plain meaning of this language is that a person must have been admitted as an LPR at a port of entry to the U.S. in order to be subject to the bars, because it incorporates the definition of admission at INA § 101(a)(13)(A).

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[6] See cases in n. 2, *supra.*

[7] Under *Chevron, supra,* if statutory language is ambiguous, a federal court must defer to a "reasonable" on-point, precedent interpretation of the statute by the administrative agency that has jurisdiction to implement the statute. The courts found that the applicable language in INA §212(h) is not ambiguous.

In *Matter of Rodriguez* the BIA states that it disagrees with these courts' interpretation, but declines to state a basis for its opinion. It restates its reliance on a prior decision, *Matter of Koljenovic,* 25 I&N Dec. 218 (BIA 2010). In a section entitled "Continued Adherence to *Koljenovic*" the *Rodriguez* panel states only that "[o]ur prior decisions have explained at some length that refusal to treat adjustment of status as an admission can result in serious incongruities, and it is unnecessary to repeat that discussion here." *Rodriguez,* 25 I&N Dec. 784, 789 (BIA 2012).

The Board should discuss these issues, however. The Board's position is causing permanent residents to be needlessly deported with no opportunity to have their "day in court" to present evidence of the extreme hardship that U.S. citizen or permanent resident family would suffer upon their deportation. It is a position that six of the seven federal appeals courts that have considered the issue have found to be in error. Yet in *Matter of Rodriguez* the Board merely refers to prior precedent that is not on point, and in fact is either superseded by or contrary to the holding in *Rodriguez.*

While the Board relies entirely on *Matter of Koljenovic,* in fact *Koljenovic* addressed only the special case of whether the § 212(h) bar shall apply where an adjustment of status was preceded by an entry without inspection. The rationale of *Koljenovic* was that if an adjustment did not meet the definition of "admitted to the United States as an alien lawfully admitted for permanent residence" for purposes of the bar to § 212(h), then adjustment also could not meet the definition of "admission" for purposes of deportability, and an LPR who entered without inspection and then adjusted status would not be subject to deportation grounds. *Koljenovic* is a flawed decision,[8] but even if it were not, *Matter of Rodriguez* has eliminated the rationale for the decision by treating all adjusted permanent residents alike for § 212(h) purposes, regardless of whether the adjustment was preceded by admission or by entry without inspection. Even assuming *arguendo* that *Koljenovic* was correctly decided, it does not provide much guidance under *Matter of Rodriguez* – or at least not to cases where adjustment was preceded by an admission.

In *Rodriguez* the Board also cited to *Matter of Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999). A careful reading of this case shows that it contradicts the Board's position. It is true that *Rosas-Ramirez* employed the definition of "admitted as a lawful permanent resident" at INA § 101(a)(20) to find that an adjustment of status may be deemed an "admission" for purposes of applying the deportation grounds to an adjusted permanent resident. However, *Rosas-Ramirez* stated that in contrast, "this change of status does *not* meet the definition of an 'admission' in section 101(a)(13)(A)…" *Rosas-Ramirez* at 623 (emphasis supplied). The § 101(a)(13)(A)

[8] The *Koljenovic* panel did not acknowledge a distinction between the term "admission" (for purposes of deportability) and the phrase "previously been admitted to the United States as an alien lawfully admitted for permanent residence" (the bar to §212(h) relief). The panel in *Koljenovic* did not analyze the §212(h) statutory language, nor discuss the separate definitions of "admission" that it incorporated, at INA §§101(a)(13) and (a)(20). In contrast, the federal courts based their holdings on a careful reading of the §212(h) language, and unanimously have come to the opposite conclusion as the Board. See further discussion in Brady, "Update on §212(h) Defense Strategies," *supra.*

definition, entry into the U.S. following inspection and admission, is the one at issue in the § 212(h) bar.

In *Rodriguez* the Board cited to *Matter of Alyazji*, 25 I&N Dec. 397, 399, 403 (BIA 2011), which also does not necessarily support or explain its holding. In *Alyazjii* the BIA considered the deportation ground based on committing a crime involving moral turpitude within five years of "admission." There the Board held that while an adjustment of status is an admission for some purposes, if a noncitizen is in the U.S. pursuant to an admission a port of entry then a subsequent adjustment of status is not the "admission" referred to in the deportation ground. *Id*. at 404-408. Here the Board is able to distinguish between the term "admitted" as it is used in two parts of the deportation grounds at INA § 237(a). It likewise should distinguish between the term "admitted" in the deportation grounds and the phrase "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" in INA § 212(h).