Orozco v. Mukasey: When an Entry May Not Be an "Admission" and the Fundamental Problems with the Ninth Circuit's Analysis

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CASE NOTE: OROZCO V. MUKASEY: WHEN AN ENTRY MAY NOT BE AN “ADMISSION” AND THE FUNDAMENTAL PROBLEMS WITH THE NINTH CIRCUIT’S ANALYSIS

Ilyce Shugall† and Rebecca Desnoyers††

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I. INTRODUCTION

Depriving a widespread group of hopeful future immigrants the opportunity to reside lawfully in the United States can destroy “the hopes and aspirations of a lifetime.” It can operate not only

against the individual immediately but also bear heavily upon his or her family both in and outside of the United States.² Recently, in *Orozco v. Mukasey*,³ the U.S. Court of Appeals for the Ninth Circuit issued a decision that closes off an important path to lawful permanent residency⁴ for numerous non-citizens.⁵ Although the court’s decision was vacated on October 20, 2008,⁶ the decision laid the groundwork for the Board of Immigration Appeals (“BIA” or the “Board”)⁷ now to issue a precedential decision having the same, if not even greater, impact on non-citizens seeking to gain legal status in the United States.⁸ Additionally, the Ninth Circuit set forth a detailed analysis for the U.S. Citizenship and Immigration Services (“CIS”)⁹ and circuit courts nationwide to follow, which will

Although the Board of Immigration Appeals (BIA) and the authors generally favor the “Matter of” citation format for decisions by the BIA, the authors use the “In re” format in this case note in order to conform to current Bluebook citation standards. See *Board of Immigration Appeals Practice Manual* § 4.6, at 62 (2004) [hereinafter BIA Practice Manual], http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap4.pdf (stating that “[a]ll precedent decisions should be cited as ‘Matter of.’ The use of ‘In re’ is not favored”); *The Bluebook: A Uniform System of Citation* R. 10.2.1(b), at 82 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

² See infra Part V.A. for a discussion of the procedural history and current posture of the case.

³ The Board of Immigration Appeals is the highest administrative tribunal on immigration and nationality matters in the United States. *BIA Practice Manual*, § 1.2(a), at 1 (2004), http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf. The BIA is a component of the Executive Office for Immigration Review, which is a component of the Department of Justice and operates under the authority and supervision of the Attorney General. *Id.* § 1.2(b) at 2.

⁴ BIA Practice Manual, Ch. 1.4(d)(i) (last rev. July 30, 2004) (stating that “[p]ublished decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS”).

⁵ CIS is a government agency within the U.S. Department of Homeland Security.
similarly limit the ability of non-citizens to adjust their status to lawful permanent residents and likely result in substantial hardships on both individuals and their families.

Historically, non-citizens who were residing in the United States were required to leave the country before they could obtain lawful permanent resident status in the United States. That changed, however, when Congress enacted section 245 of the Immigration and Nationality Act, which allowed non-citizens to remain in the United States as they adjusted status to that of lawful permanent residents if certain conditions were met. Today, section 245(a) sets forth the criteria for adjusting one’s status in the United States. One requirement is that the non-citizen be inspected and “admitted” into the United States. In 1996, Congress added a definition of the term “admitted,” which requires a “lawful entry” into the United States.

The issue in Orozco essentially boiled down to the court’s interpretation of this seemingly simple term: “admitted.” There, the petitioner, Brian Orozco (“Orozco”), who had no legal means by which to enter the country, appeared for inspection at a port-of-entry and presented someone else’s permanent resident card (“green card”) to an immigration officer. Upon inspection, the officer allowed Orozco to enter the United States. Orozco argued that despite his use of a false document, he was nevertheless...
“admitted” because he was inspected by an immigration officer at a port-of-entry and authorized to proceed. Thus, Orozco argued, he was eligible to adjust his status under section 245(a) with the appropriate waiver for his use of the false document. The Ninth Circuit disagreed. According to the court, the statutory language of section 245(a) and the “admission” definition is clear: a non-citizen who enters the country by fraudulent means cannot satisfy the “lawful entry” requirement of the “admission” definition and, thus, is statutorily ineligible to adjust status under section 245(a).

The court based its conclusion on the perceived unambiguous language of the statute and found support for its conclusion in an agency regulation, an earlier Ninth Circuit decision, and the “absurd results” that it said would follow if it adopted Orozco’s argument. The Ninth Circuit then dismissed Orozco’s appeal and upheld the decisions of the BIA and Immigration Judge ordering his removal from the United States to Mexico.

The court’s analysis in Orozco forecloses the opportunity to apply for adjustment of status to countless numbers of individuals who would otherwise have been eligible to apply for adjustment of status in conjunction with a waiver of inadmissibility for their fraud or misrepresentation. It also forces individuals to seek waivers (if eligible) under certain grounds in the INA that were previously unnecessary. Although the decision was limited to the Ninth Circuit and has now been vacated, there is substantial concern that the BIA will now issue a published decision in line with the Ninth Circuit or that other circuit courts will follow suit.

This case note asserts that the Ninth Circuit’s interpretation of the term “admitted” was incorrect and inconsistent with existing

18. Id.
19. Id.
20. Id.
21. Id. at 1069, 1073.
22. Id. at 1071–72. The court also rejected Orozco’s argument that the Board of Immigration Appeals and Immigration Judge erred in declining to follow the published agency decision, In re Arequillin, which interpreted the term “admission” within the context of section 245(a) of the Act. Id. at 1072–73.
23. Orozco, 521 F.3d at 1073.
25. The Board’s decision in Orozco was not published. Orozco, 521 F.3d at 1070.
BIA precedent and that someone who entered the United States under Orozco’s circumstances has indeed accomplished an “admission” within the meaning of section 245(a).

Part II provides basic background information about relevant immigration terms and concepts, including the immigration statute, the definition and parameters of adjustment of status under section 245(a), the term “admission,” and the waivers available under the Act for fraud or certain misrepresentations. Part III discusses the facts of the Orozco decision along with the court’s analysis of Orozco’s statutory eligibility for adjustment of status.

Part IV examines and dissects the court’s decision, beginning with its statutory construction of the term “admitted” and how the meaning of that term is not as clear as the court asserts. Through examples of BIA and circuit court decisions, the case note highlights the different meanings that courts have occasionally assigned the term “admission” despite the seemingly clear language in the statute.26 The case note then looks at the primary and longstanding BIA precedent decision analyzing the term “admission” in the context of adjustment of status and discusses whether it remains good law despite Congress’ creation of the “admission” definition in 1996.27 Because the Ninth Circuit in Orozco concluded that the 1996 statutory change did essentially overrule the BIA decision, this note asserts that the court should have at least remanded the case to the agency for a better explanation of its departure from existing precedent before rendering a decision on the case. The final sections of Part IV point to the practical and seemingly unintended effects of the Orozco analysis on other provisions in the INA. Part IV also speaks to the court’s concern over “absurd results” if it adopted Orozco’s argument,28 asserting that such concern is misplaced because numerous statutory provisions are already in place to penalize the fraudulent activity underlying Orozco’s entry into the United States.

Finally, Part V discusses the impact of the Orozco decision on the courts, the agency, and on immigrants. This note concludes that the Board, when reconsidering Orozco’s case, should follow its long-standing precedent in finding that a non-citizen who was

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27. Id. § 101(a) (13) (A), 8 U.S.C. § 1101(a) (13) (A).
28. Orozco, 521 F.3d at 1072.
inspected at a port-of-entry and allowed to enter the United States has been “admitted” for the purposes of INA sections 101(a)(13) and 245(a).

II. HISTORICAL BACKGROUND AND DEVELOPMENT

A. A Brief Overview of the Immigration and Nationality Act

“In its earliest days, the United States did not restrict immigration in any way.” 29 The first immigration laws unfolded during the so-called “open door” period from 1776 to 1875, 30 when Congress 31 passed the Naturalization Act of 1790. 32 In the mid-nineteenth and early-twentieth centuries, Congress passed other federal laws with the aim of controlling the admission of immigrants “in a more systematic way.” 33 At the beginning of the twentieth century, immigration policy turned to quotas. 34 Yet, it

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32. The 1790 Act established the process for becoming a naturalized citizen, limiting it to “free white persons.” BOSWELL, supra note 9, at 4.
33. See id. at 5; KURZBAN, supra note 30, at 1. These federal enactments include the 1875 statutes providing for the exclusion of convicts and prostitutes, the 1882 laws imposing a head tax of 50 cents on “aliens” and providing for the exclusions of “idiots, lunatics, convicts and persons likely to become public charges,” and the Chinese Exclusion Act of 1882, which provided for the exclusion of persons from China and was enforced for more than 60 years until its repeal in 1943. KURZBAN, supra note 30, at 1–2.
34. Jeffrey A. Bekiari, In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy, 58 FLA. L. REV. 713, 718 (2006). Following World War I, the popular fear that Southern and Eastern Europeans would inundate the United States resulted in Congress enacting a national origin quota system in 1921. KURZBAN, supra note 30, at 3. The quota limited the number of persons who could immigrate to three percent of that nationality group who were enumerated in the 1910 census. Id. The 1921 quota “did not include persons from the Western Hemisphere.” Id. In 1924, Congress passed the National Origin Quota Act (also called the Immigration Act of 1924), which, among other things, lowered the annual quota of immigrants allowed into the United States to 150,000 and restricted permissible immigration to two percent of the number of persons from
was not until 1952 that court established the core of contemporary immigration law.

Following extensive and controversial congressional hearings, Congress passed the McCarran-Walter Act of 1952, also known as the Immigration and Nationality Act of 1952. The Act, codified in Title 8 of the U.S. Code, brought U.S. immigration policy and laws “under the rubric of a single statute.” The Act passed over President Truman’s veto and reflected the restrictionist attitude of the country, which was in the aftermath of World War II and in the wake of the Korean War, McCarthyism, and the Cold War with Russia. Among other things, the 1952 Act enumerated exclusion and deportation grounds, established procedures for denaturalization, established a visa preference system based on family relationships and skills necessary to the economy, and established relief from deportation. Significantly, the Act also

that country enumerated in the 1890 census. Boswell, supra note 9, at 7; Kurzban, supra note 30, at 3.

35. Bekiares, supra note 34, at 718.
37. Boswell, supra note 9, at 8–9.
38. All statutory references in this case note will be made to the INA, and not to the U.S.C.
39. Bekiares, supra note 34, at 718.
40. President Truman vetoed the bill, saying:
This quota system—always based upon assumptions at variance with our American ideals—is long since out of date . . . . The greatest vice of the present quota system, however, is that it discriminates, deliberately and intentionally, against many of the peoples of the world . . . . The basis of this quota system was false and unworthy in 1924. It is even worse now. . . . It is incredible to me that, in this year of 1952, we should again be enacting into law such a slur on the patriotism, the capacity, and the decency of a large part of our citizenry.

Today, we are “protecting” ourselves as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe have fallen under the communist yoke . . . no one passes their borders. In no other realm of our national life are we so hampered and stultified by the dead hand of the past, as we are in this field of immigration.

Austin R. Fragomen, Jr. & Alfred J. Del Rey, Jr., The Immigration Selection System: A Proposal for Reform, 17 San Diego L. Rev. 1, 5 n.27 (1979) (quoting Truman, The President’s Veto Message (June 25, 1952), reprinted in President’s Commission on Immigration and Naturalization, Whom We Shall Welcome 277–79 (1953)).

41. Fragomen & Bell, supra note 5, at 5.
42. Generally speaking, denaturalization is the process whereby the order admitting a person for United States citizenship is revoked and the certificate of naturalization is cancelled. Boswell, supra note 9, at 182; INA § 340, 8 U.S.C. § 1451 (2006).
43. Kurzban, supra note 30, at 4; Boswell, supra note 9, at 8–9.
provided a way for non-citizens to adjust their status to that of lawful permanent residents without having to leave the United States. 44

Since 1952, the Act has been altered or amended dozens of times, sometimes significantly. 45 Some commentators have described it as among the country’s most controversial policies and, with the exception of the Internal Revenue Code, the longest, most complicated piece of legislation in modern U.S. history. 46 Yet, despite its numerous amendments and complex history, the 1952 Act still remains the basic framework for modern immigration and nationality law. 47


46. See Bekiares, supra note 34, at 718 (quoting ELIZABETH HULL, JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 20 (1985)).

47. Boswell, supra note 9, at 8; Reid v. Immigration & Naturalization Service, 420 U.S. 619, 621 (1975) (stating that "[a]lthough the McCarran-Walter Act has been repeatedly amended, it still is the basic structure dealing with immigration
B. Adjustment of Status Under INA section 245(a)

1. Background

“Adjustment of status” is a process by which someone becomes a lawful permanent resident of the United States without having to leave the country.\(^48\) Lawful permanent residence is “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws.”\(^49\) Adjusting one’s status to that of a lawful permanent resident is one of the main ways of eventually becoming a naturalized U.S. citizen.\(^50\)

For many years, a non-citizen otherwise eligible for lawful permanent residency could not become a permanent resident from inside the United States.\(^51\) Instead, the person had to first depart the United States, obtain an immigrant visa at an American consulate abroad (generally in his or her home country), and then return to the United States.\(^52\) In effect, the non-citizen was required to leave the country in order to come right back.\(^53\) This illogical requirement caused monetary and emotional hardship for the individual and his or her family.\(^54\) It also generated unnecessary paperwork and delays for the agencies involved.\(^55\) As a result, the Immigration and Naturalization Service\(^56\) devised the pre-examination program in 1935.\(^57\) This program allowed

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\(^{48}\) Charles Gordon et al., Immigration Law & Procedure § 51.01[1][a] (Matthew Bender, Rev. Ed. 2008).


\(^{50}\) Bekiares, supra note 34, at 714.


\(^{52}\) Foster, supra note 10, at 37.

\(^{53}\) See id. at 38.

\(^{54}\) Tucker, supra note 51, at 42.

\(^{55}\) Foster, supra note 10, at 38.


\(^{57}\) Tucker, supra note 51, at 43; Foster, supra note 10, at 37.
applicants to appear before an American consulate officer in Canada rather than having to travel to their countries of origin. Yet, this process still necessitated a pointless departure for applicants and an unnecessary paper shuffle for INS.  

In 1952, Congress eliminated pre-examination when it enacted section 245 of the Act, which provided that “aliens lawfully in the United States in a temporary status may, under prescribed conditions, have their status adjusted to that of permanent residency without the necessity of leaving the United States.” The ability to adjust one’s status in the United States saved considerable time and money for both the applicant and government and also avoided emotional hardship on families.  

Yet, while adjusting status under section 245 obviated the need for a costly journey abroad, Congress attached such stringent conditions to the provision that few applicants could take advantage of the benefit. Among other things, Congress limited eligibility to persons who had entered the country as a bona fide nonimmigrant and continued to maintain that nonimmigrant status at the time of the adjustment-of-status application. The

58. Tucker, supra note 51, at 43; Foster, supra note 10, at 37.
59. Foster, supra note 10, at 38.
60. Foster, supra note 10, at 38 (citing H.R. REP. NO. 2096, 82d Cong., 2d Sess. 128 (1979)).
61. Foster, supra note 10, at 39; Tucker, supra note 51, at 42. A critical modern advantage of adjusting status (as opposed to leaving the United States for consular processing) is avoiding the ground of inadmissibility in section 212(a)(9)(B) of the Act. INA § 212(a)(9)(b), 8 U.S.C. § 1182 (2006). Under that section, if an individual is unlawfully present in the United States for more than 180 days but less than one year, voluntarily departs the United States before the commencement of proceedings, and attempts to return to the United States in less than three years, he or she is inadmissible. INA § 212(a)(9)(B)(i)(I), 8 U.S.C. §1182(a)(9)(B)(i)(I). Similarly, if an individual is unlawfully present in the United States for one year or more, voluntarily departs the United States, and attempts to return in less than 10 years, he or she is inadmissible. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II). But an applicant who can adjust status in the United States (and avoid a departure) is not subject to the unlawful presence bar. See Tucker, supra note 51, at 29.
63. The Act does not define the word “nonimmigrant” in the statute. It does, however, list classes of nonimmigrants in section 101(a)(15) in the context of defining the term "immigrant." INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (stating that "[t]he term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens . . .").
64. Tucker, supra note 51, at 43. Other limitations to adjusting status under section 245 of the 1952 Act included the following: the filing of an adjustment application terminated a person’s nonimmigrant status, the benefit was
result was that many people still had to leave the country in order to achieve permanent residency.\textsuperscript{65}

It became increasingly “obvious that the 1952 restrictions would have to be relaxed . . . in order for adjustment of status to work effectively.”\textsuperscript{66} Since then, numerous congressional amendments have been made to section 245, removing many of the restrictive provisions of the 1952 Act along with adding others.\textsuperscript{67}

unavailable to individuals from western hemisphere countries, and it excluded spouses or children of citizens unless they had been in the country for at least one year before acquiring eligibility. \textit{Id.}


66. Foster, \textit{supra} note 10, at 40.

67. See 8 U.S.C.A. § 1255 (West 2005 & Supp. 2008). Amendments to section 245 include the following: in 1957, Congress allowed adjustments to certain approved specialist personnel on oversubscribed quotas and to certain former diplomatic personnel; in 1958, Congress removed the requirement that non-citizens have maintained temporary status under which they were admitted, Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 699 (1958); the 1960 amendment eliminated the requirement of admission as a bona fide nonimmigrant, Joint Resolution of July 14, 1960, Pub. L. No. 86-648, § 10, 74 Stat. 504, 505 (1960); a 1965 amendment removed the language making the provisions inapplicable to natives of any contiguous country or adjacent island, instead making the provision inapplicable to natives of any country of the Western Hemisphere, as well as any adjacent island, Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (1965); a 1976 amendment ended the ban on Western Hemisphere non-citizens from adjusting status and inserted a new restriction barring adjustment for any non-citizen who thereafter remained in, or accepted employment without prior authorization from the INS before filing an adjustment application, Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 6, 90 Stat. 2703, 2705-06 (1976); a 1981 amendment provided that persons who accepted unauthorized employment may also apply for adjustment of status under § 245 if they are special immigrants as described in the Act, Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 5(d)(2), 95 Stat. 1611, 1614 (1981); in 1986, Congress passed the Immigration Reform and Control Act, which made adjustment unavailable to those, with certain exceptions, who are in unlawful status when filing or who have failed to maintain a lawful status since entry and barred entrants under the newly-enacted visa waiver pilot program, other than immediate relatives, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 117, 100 Stat. 3359, 3384; the Immigration Act of 1990 made additional changes with regard to the marriage fraud provisions, among other things; in 1994, Congress enacted a major change by permitting adjustment under a new § 245(i) to those ineligible under subsection (a) of § 245 for entering without inspection, and to those disqualified under subsection (c), Act of Aug. 26, 1994, Pub. L. No. 103-317, § 506(b), 108 Stat. 1724, 1765–66 (1994); the November 26, 1997, amendment established a new § 245(k) for the benefit of adjustment applicants who qualify for a visa number under the first three employment-based (EB) preferences or under EB-4 as a religious minister or worker, Act of Nov. 26, 1997, Pub. L. No. 105-119, § 111(c)(2), 111 Stat. 2440, 2458–59 (1997); and legislation enacted on December 21, 2000, facilitated the
For example, in 1960, the requirement of entry as a bona fide nonimmigrant was finally dropped from section 245. Instead, Congress added as a requirement that non-citizens be “inspected and admitted or paroled into the United States” in order to adjust their status to lawful permanent residents. “This change broadened the category of individuals eligible for adjustment of status relief.” Over time, adjustment of status gradually evolved into an effective tool for non-citizens in the United States to become lawful permanent residents.

2. Current Provision

Today, section 245(a) of the Act provides that:

The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

Thus, eligibility under section 245(a) depends in the first


68. Joint Resolution of July 14, 1960, § 10, 74 Stat. at 505; 4 Gordon et al., supra note 48, § 51.01[1][b].


71. Tucker, supra note 51, at 44.

72. There are three types of immigrant visas: (1) family-sponsored immigrant visas, (2) employment-based immigrant visas, and (3) diversity immigrant visas. Succar, 394 F.3d at 14 n.6 (citation omitted). Non-citizens seeking an immigrant visa must first receive approval of an immigrant visa petition, which is usually filed by a relative or employer. Id. at 14–15. The non-citizen must then wait for and receive an immigrant visa number, which means that a visa has been assigned. Id. For immediate relatives (spouses, parents, and children of United States citizens), an immigrant visa number is automatically available upon approval of the visa petition. Id. at n.6 (citation omitted).

instance upon the characterization of the individual’s arrival in the United States.\textsuperscript{74} Only a person who is “inspected and admitted” or paroled\textsuperscript{75} may qualify for adjustment of status under this section.\textsuperscript{76}

Notwithstanding what may seem like a straightforward term, there has been considerable discussion among commentators and the courts over the term “admission,” and most recently, about its meaning within the context of section 245(a).\textsuperscript{77}

C. The Term “Admission”

1. Entry vs. Admission

Admission is an important concept in immigration laws. Not only is it one of the statutory requirements for adjusting status under section 245(a),\textsuperscript{78} but it is the key factor in determining which of two grounds apply in the context of removing a non-citizen from the United States: “inadmissibility” or “deportability.”\textsuperscript{79} If the

\textsuperscript{74} 4 GORDON ET AL., supra note 48, § 51.06.

\textsuperscript{75} The term “parole” is not defined in the Act. 5 GORDON ET AL., supra note 48, § 62.01[1]. Parole may encompass a variety of situations in which temporary entry or stay in the United States is authorized. Id. This may include parole into the United States to receive medical treatment, prevent inhumane separation of families, or to enable entry as a witness or defendant in a criminal case. Id. See also Emokah v. Mukasey, 523 F.3d 110, 118 n.10 (2nd Cir. 2008) (defining parole as “an administrative practice whereby the government allows an arriving alien who has come to a port-of-entry without a valid entry document to be temporarily released from detention and to remain in the United States pending review of . . . his immigration status”) (quoting Ibragimov v. Gonzales, 476 F.3d 125, 131 (2d Cir. 2007)).

\textsuperscript{76} In certain situations, former INA § 245(i) permits some individuals to adjust their status to permanent residents even if they entered the United States without inspection. INA § 245(i), 8 U.S.C. § 1255(i). That section, however, is beyond the scope of this case note and expired on April 30, 2001. LIFE Act Amendments of 2000, § 1502(a)(1)(B), 114 Stat. at 2763A-324. Additionally, non-citizens who have an approved petition for classification as a VAWA [Violence Against Women Act] self-petitioner are eligible to adjust their status despite not having been “inspected and admitted” to the United States. See INA § 245(a), 8 U.S.C. § 1255(a) (“the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for permanent residence if . . .”).


\textsuperscript{78} INA § 245(a), 8 U.S.C. § 1255(a).

\textsuperscript{79} “Removal” is the ejection of the person from the United States. BOSWELL,
person has been “admitted” to the United States, the grounds of deportability apply; if he or she has not been admitted, the grounds of inadmissibility apply. An important distinction between the two grounds relates to burdens of proof. If a non-citizen is seeking admission (thus facing the grounds of inadmissibility), the individual has the burden of showing that he or she is either a U.S. citizen or not inadmissible under any provision of the Act. If the non-citizen has been admitted (thus facing the deportability grounds), the government has the burden of proving that the individual comes within one of the enumerated grounds of deportability in the Act. The inadmissibility grounds are set out in section 212(a) of the Act; the grounds of deportability are found in section 237(a).

The structure of the current removal proceedings began on April 1, 1997, when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Before this, the grounds of inadmissibility were referred to as “grounds of exclusion,” and there were two different types of hearings: exclusion hearings (in which the non-citizen had to prove that he or she was admissible to the United States) and deportation hearings (INS had the burden of proving the grounds by which it could force a person to leave the country).

Under this pre-IIRIRA system, the determining factor as to which of the two provisions applied depended upon whether the person had gained “entry” into the United States—not whether he or she was admitted. The BIA has interpreted the term “entry” to

supra note 9, at 24. Any person who is not a United States citizen or national can be removed. IMMIGRANT LEGAL RES. CTR., A GUIDE FOR IMMIGRATION ADVOCATES 3-2 (2001 ed. Supp. 2003) [hereinafter ILRC GUIDE]. A “removal proceeding” is the court process that determines whether someone will be removed from the United States. Id. at 10–11.

80. ILRC GUIDE, supra note 79, at 10-2.
81. INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2); Boswell, supra note 9, at 34–35;
82. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A); ILRC GUIDE, supra note 79, at 3-2.
84. ILRC GUIDE, supra note 79, at 3-3.
85. Entry was defined under former INA § 101(a)(13) as “any coming of an alien into the United States, from a foreign port or place or from an outlying possession . . . .” INA § 101(1)(13), 8 U.S.C. § 1101(a)(13) (1994); In re Connelly, 191 F.3d 155, 159 (BIA 1994).
86. FRAGOMEN & BELL, supra note 5, § 1:5.2, at 1–28; ILRC GUIDE, supra note
mean “(1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer; or (3) actual and intentional evasion of inspection at the nearest inspection point, coupled with (4) freedom from restraint.”

The former “entry” definition “generated much litigation and intellectual heartburn.” It meant that non-citizens who entered the United States without inspection still technically made an “entry” into the United States and, therefore, had the “advantage” of facing deportation grounds (instead of exclusion) in which the onus was on the government to prove that they were deportable. That all changed when Congress passed IIRIRA in 1996.

Among other things, IIRIRA combined the separate exclusion and deportation proceedings into a unified “removal” proceeding. Congress still retained two separate sets of grounds under which non-citizens may be charged but changed the name of the exclusion grounds to inadmissibility grounds (keeping the grounds of deportability). Importantly, with IIRIRA also came the shift in emphasis from the concept of “entry” to that of “admission.”

IIRIRA eliminated the definition of “entry” in former INA section 101(a)(13) and replaced it with the term “admission” under section 101(a)(13)(A), which means the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Congress also amended former INA

79, at 3-4.
88. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
94. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006). INA § 101(a)(13)(A) states in full: “The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” Note that Congress did not completely abandon the term “entry,” but rather incorporated it into the new definition. *See Rosas-Ramirez*, 22 I. & N. Dec. at 628. (Rosenberg, Board Member, concurring and dissenting) (stating that “[h]ere, Congress adopted and continued to use the term ‘entry,’ and only modified with it the word ‘lawful,’ so that for
section 212(a)(6)(A) to render inadmissible “an alien present in the United States without being admitted or paroled...”95 This ground is a parallel provision to the ground of removal, section 237(a)(1)(A), which renders removable non-citizens inadmissible “at the time of entry or adjustment of status.”96 These changes make it unmistakably clear that non-citizens who enter the United States without inspection are not “admitted” and cannot get the “benefit” of being subject to the grounds of deportability (versus the grounds of inadmissibility).97 Thus, “[i]n practical terms, the IIRIRA system changed what happens to people who entered [the United States] without inspection.”98 It did not, however, change any of the language in section 245(a) relating to adjusting one’s status to that of a lawful permanent resident.99

2. Multiple References in INA

“[T]he question of the point at which an ‘admission’ to the United States occurs and the form that it takes comes up in several contexts.”100 The “ultimate interpretation... can be critical” to an individual’s ability to avoid removal from the United States and/or purposes of an ‘admission,’ the entry had to follow inspection and authorization.”).

95. INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

96. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

97. Elwin Griffith, Admission and Cancellation of Removal Under the Immigration and Nationality Act, 2005 Mich. St. L. Rev. 979, 988 n.61 (2005) (citing H.R. Rep. No. 104-469, pt. 1, at 226 (1996) and quoting H.R. Rep. No. 104-828, at 208 (1996) (Conf. Rep.)) (stating “'[t]he current category of persons who are deportable because they have made an entry without inspection will, under the amendments made by section 301(c) of this bill, instead be considered inadmissible under revised paragraph (6)(A) of subsection 212(a).’”). See also Ortega-Cervantes v. Gonzales, 501 F.3d 1111, 1118 (9th Cir. 2007) (stating that “[p]rior to IIRIRA, aliens ‘who entered the United States without inspection or at any time or place other than as designated by the Attorney General’ would have been subject to deportation. Now, under IIRIRA, aliens ‘present in the United States who ha[ve] not been admitted... are... ‘applicant[s] for admission.’”(citations omitted)).

98. ILRC Guide, supra note 79, at 3-4.


obtain permanent residency.\textsuperscript{101}

In some provisions, the term serves mainly as a temporal one.\textsuperscript{102} For example, section 237(a)(2)(A)(i) refers to “a five-year period \textit{after the date of admission} during which a non-citizen committed” a crime involving moral turpitude,\textsuperscript{103} meaning that the admission date serves as the start of the five-year running period. In other provisions, the term is used in the context of an entry into the United States after inspection and authorization, for example INA sections:

- conviction of multiple criminal offenses \textit{after admission}. INA § 237(a)(2)(A)(ii),
- conviction of an aggravated felony at any time \textit{after admission}. INA § 237(a)(2)(A)(iii),
- conviction of a violation relating to a controlled substance \textit{after admission} (other than a single offense for less than 30 grams of marijuana). INA § 237(a)(2)(B)(i),
- being a drug abuser \textit{after admission}. INA § 237(a)(2)(B)(ii),
- conviction of various firearms offenses \textit{after admission}. INA § 237(a)(2)(C),
- conviction of a crime of domestic violence, stalking, child abuse, neglect or abandonment, or violation of a protection order \textit{after admission}. INA § 237(a)(2)(E)(i) and (ii),\textsuperscript{104} and
- 245(a) (status of alien who was \textit{inspected and admitted} or paroled may be adjusted).\textsuperscript{105}

“The reach of . . . these sections . . . turn, for the most part, on what constitutes an ‘\textit{admission[,]’}”\textsuperscript{106} and, as Part IV illustrates, interpretations of the term fluctuate depending on the particular context.

\textbf{D. Waivers Authorized for Fraud and Misrepresentation}

In addition to being inspected and admitted, a non-citizen applying for adjustment of status under section 245(a) must show

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{104} Rosenberg, \textit{supra} note 100, at 1–2.
\textsuperscript{105} INA § 245(a), 8 U.S.C. § 1255(a).
\textsuperscript{106} Rosenberg, \textit{supra} note 100, at 2.
that he or she is admissible to the United States. 107 There is a broad range of conduct that can render someone inadmissible. One of the more common grounds is section 212(a)(6)(C)(i), which relates to conduct involving fraud or misrepresentation. 108 Under that section, any non-citizen who fraudulently or willfully misrepresents a material fact in obtaining or seeking to obtain a visa, documentation, or admission to the United States is inadmissible. 109 Congress enacted section 212(a)(6)(C)(i) in order to prevent non-citizens from obtaining entry into the country by fraudulent means and then, once this is exposed, continuing with the immigration application process as if nothing happened. 110

Recognizing the harsh results of lifetime inadmissibility on non-citizens and their families, however, Congress enacted a waiver under section 212(i) for qualified individuals. 111 A waiver generally serves to temporarily or permanently remove, or “forgive,” a particular ground of inadmissibility or deportability. 112 A waiver


108. See KURZBAN, supra note 30, at 74.

109. Id.; INA § 212(a)(6)(C)(i) provides: “Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.” INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i). The fraud or misrepresentation under section 212(a)(6)(C)(i) is somewhat limited in scope. See Steven A. Morley, Fraud/Misrepresentation Bar and § 212(i) Waiver: Don’t Waive Goodbye, IMMIGRATION & NATIONALITY LAW HANDBOOK 426, 427 (Richard J. Link et al. eds., 2007-2008 ed.). To be inadmissible under § 212(a)(6)(C)(i), it must be determined that (1) a misrepresentation was made by the applicant, (2) the misrepresentation was willful, and (3) the fact misrepresented was material, or (4) the non-citizen used “fraud to procure a visa or other documentation to receive a benefit under the [Act].” 17-1 Foreign Affairs Manual – Visas, 22 C.F.R. § 40.63, N2 (2008).


111. See 5-63 Immigration Law and Procedure § 63.07(3)(f)(i) (stating that “[a]s originally enacted, the perpetual inadmissibility of a non-citizen who made misrepresentations, regardless of his or her qualifications and family attachments, produced many hardships.”); In re Lopez-Monzon, 17 I. & N. Dec. 280, 281 (Comm. 1979) (stating that “[t]he intent of Congress in adding this provision of law, which is evident from its language, was to provide for the unification of families, thereby avoiding the hardship of separation”).

112. 14-1 INS Manuals 17.5(a); ILRC GUIDE, supra note 79, at 6-12. The INA permits waivers of inadmissibility and deportability in many circumstances. Examples of inadmissibility waivers include section 211(b) (waiver for returning resident immigrants); section 212(a)(3)(D)(ii), (iii), (waiver for immigrant membership in totalitarian party); section 212(a)(9)(B)(v) (waiver of unlawful presence); section 2 (waiver for nonimmigrants willing to provide government with information relating to a criminal enterprise); section 212(d)(4) (waiver of documentation requirements for nonimmigrants); section 212(d)(11) (waiver of
granted under section 212(i) essentially forgives a non-citizen’s inadmissibility under section 212(a)(6)(C)(i) due to fraud or misrepresentation.\footnote{Note that a section 212(i) waiver does not apply to false claims of United States citizenship under section 212(a)(6)(C)(ii)(I). Steven A. Morley, supra note 109, at 428. Under that section, “[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A of this title) or any other Federal or State law is inadmissible.” INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I).}

Previously, section 212(i) was expanded by the Immigration Act of 1990 (“IMMMACT90”)\footnote{Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).} to allow a waiver for fraud or misrepresentation under former INA section 212(i)(1) for the spouse, parent, son, or daughter of a U.S. citizen or lawful permanent resident.\footnote{HELEN A. SKLAR ET AL., NATIONAL IMMIGRATION PROJECT, IMMIGRATION ACT OF 1990 TODAY §9:73 (2008).} For non-citizens lacking the requisite family relationship, IMMMACT90 also permitted a waiver in circumstances

alien smuggling provision); section 212(d)(12) (waiver for non-citizen subject of a final order or violation of 274C for document fraud); section 212(e) (waiver from two-year foreign residence requirement for persons with J-1 visas); section 212(g)(1) (waiver of inadmissibility for communicable disease); section 212(g)(2) (waiver of failure to present proper vaccination documents); section 212(g)(3) (waiver for physical or mental disorder); section 212(h) (waiver of certain criminal grounds); section 212(i), (waiver of certain misrepresentations); section 212(k) (waiver to admit certain non-citizens who are inadmissible under particular provisions who are in possession of an immigrant visa); and section 210(c)(2)(B)(i) (except as otherwise provided, attorney general may waive any provision of section 212(a), for humanitarian purposes). See 14-1 INS Manuals 17.5(a).

Examples of deportability waivers include section 237(a)(1)(E)(iii) (waiver for alien smuggling); section 237(a)(1)(H) (waiver for certain misrepresentations); section 237(a)(2)(A)(v) (waiver for certain crimes upon grant of a pardon); section 237(a)(3)(C)(ii) (waiver for individual subject to final order for violation of section 274C relating to document fraud); and section 237(c) (waiver of certain grounds for “special immigrants” described in section 101(a)(27)(J).

This case note addresses only two waivers: section 212(i), and section 237(a)(1)(H).

Note that a section 212(i) waiver does not apply to false claims of United States citizenship under section 212(a)(6)(C)(ii)(I). Steven A. Morley, supra note 109, at 428. Under that section, “[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A of this title) or any other Federal or State law is inadmissible.” INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I). No waiver is available for inadmissibility under that section. Morley, supra note 109, at 428. However, a non-citizen is inadmissible under that section only for false citizenship claims made on or after the enactment of IIRIRA on September 30, 1996. Id. False claims made before this are treated as standard misrepresentations under section 212(a)(6)(C)(i). Id. See also State Dept. Instructs on Consequences of False Citizenship Claims, 74 INTERPRETER RELEASES (Fed. Publ’n, Inc., Wash., D.C.), Sept. 29, 1997, at 1483 (stating that “[f]alse claims to U.S. citizenship made prior to Sep. 30, 1996 should be examined under INA § 212(a)(6)(C)(i)”).
where ten years had passed since the date of the fraudulent act. 116 Yet, IIRIRA significantly curtailed section 212(i) relief. 117 First, a 212(i) waiver was no longer available to the parents of U.S. citizens or lawful permanent residents. 118 IIRIRA also removed the ten-year provision, restricting the benefits of the waiver only to those who have the stated family relationship. 119 Further, Congress raised the threshold for granting section 212(i) waivers, requiring a showing of “extreme hardship” to the non-citizen’s qualifying family member if the waiver is not approved. 120 Additionally, under IIRIRA, judicial review of a section 212(i) waiver is barred. 121

Thus, in its present form, section 212(i) waives inadmissibility for fraud or misrepresentation under 212(a)(6)(C)(i) only if the non-citizen can prove that his or her lawful permanent resident or U.S. citizen spouse or parent will suffer extreme hardship if the admission to the United States is refused. 122 Additionally, the

118. KURZBAN, supra note 30, at 76; SKLAR ET AL., supra note 115; compare INA § 212(i) (2006) (now called “inadmissible aliens”) with INA § 212(i) (1995) (then called “excludable aliens”). This means that the qualifying relative for purposes of section 212(i) is now limited to only a lawful permanent resident or United States citizen spouse or parent. Morley, supra note 109, at 429.
120. 5 GORDON ET AL., supra note 48, § 63.07[3][f][i]; Morley, supra note 109, at 426; SKLAR ET AL., supra note 115, § 9:73; see infra Part V.A (detailing the factors that the BIA outlined in In re Cervantes-Gonzalez, 22 I. & N. Dec. 560 (B.I.A. 1991) (determining whether extreme hardship has been established)).
121. INA § 212(i)(2), 8 U.S.C. § 1182 (2006) (stating “[n]o court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1)”); SKLAR ET AL., supra note 115 § 9:73.
122. INA § 212(i)(1) provides:

The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien . . . .

Id. It should be noted that even if someone meets the legal standard of a 212(i) waiver, it is still within the Attorney General’s discretion whether to ultimately approve the waiver. See INA § 212(i), 8 U.S.C. § 1182.
benefit of a 212(i) waiver is discretionary, meaning that the application may still be denied even if the non-citizen meets all of the statutory requirements.\footnote{123} If the non-citizen is outside the United States, a 212(i) waiver is submitted to a consular officer in connection with an immigrant visa application.\footnote{124} If the individual is inside the United States, the 212(i) waiver application is filed with the CIS field office director or with the Immigration Judge if the person is in removal proceedings.\footnote{125}

Unlike the grounds of inadmissibility, the grounds of deportability apply to non-citizens who have already been admitted to the United States.\footnote{126} There are several removal provisions unique to the deportability grounds.\footnote{127} One of those provisions is section 237(a)(1)(A), which provides that a person is removable if he or she was inadmissible at the time of entry or adjustment of status.\footnote{128} In effect, the provision is a delayed finding of inadmissibility, and reaches all those individuals who managed to enter the United States or adjust status in violation of a statute or regulation.\footnote{129} Thus, non-citizens inadmissible at the time of entry for having engaged in fraud or misrepresentation within the meaning of section 212(a)(6)(C)(i) are deportable under section 237(a)(1)(A).

Like the lifetime inadmissibility under section 212(a)(6)(C)(i), however, recurring hardships in the enforcement of 237(a)(1)(A) eventually led to a legislative determination that the provision was excessively severe.\footnote{120} A major concern was the

\footnotesize{
123. See INA § 212(i), 8 U.S.C. § 1182 (“The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) . . . .”); ILRC GUIDE, supra note 79, at 6-13.
124. ILRC GUIDE, supra note 79, at 6-29.
125. 8 C.F.R. § 212.7(a)(1)(ii) (2008).
126. INA § 237(a), 8 U.S.C. § 1227 (“Any alien . . . . in and admitted to the United States shall . . . . be removed if the alien is within one or more of the following classes of deportable aliens: . . . .”).
127. See Boswell, supra note 9, at 62 (providing examples of deportability grounds not found in the inadmissibility section, such as a non-citizen’s failure to maintain status under section 237(a)(1)(C) and failure to notify change of address under section 237(a)(3)(A)).
128. See id. See also INA § 237(a)(1)(A), 8 U.S.C. § 1227 (“Any alien who at the time of entry or adjustment of status was within one more of the classes of aliens inadmissible by the law existing at such time is deportable.”).
129. 6 GORDON ET AL., supra note 48, § 71.04[1].
130. See id. § 71.04[2][a][ii][i][A] (“Congress enacted this provision to prevent the break-up of families comprised in part of [United States] citizens or lawful permanent resident aliens.”).
}
impact of the provision on refugees who are often compelled to engage in fraud in order to escape persecution in their home countries and seek protection in the United States. As a result, legislation in 1957 and 1961 provided for a waiver of deportability, which was initially embodied in section 241(f). Following extensive amendments in 1981, section 241(f) was revised and replaced with section 241(a)(1)(H) in 1990 and then renamed under section 237 by IIRIRA in 1996.

Section 237(a)(1)(H) now contains the current version of the waiver and applies to a non-citizen who “is the spouse, parent, son, or daughter” of a U.S. citizen or lawful permanent resident and “was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission . . . .” A waiver granted under section

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131. See id. (citing *Petition of Iwanenko*, 145 F.Supp. 838, 843 (D.C. Ill. 1956) (“It is also the opinion of the Conferees that the section of the bill which provides for the exclusion of aliens who obtained travel documents by fraud or willfully misrepresenting a material fact should not serve to exclude or to deport certain bona fide refugees who in fear of being forcefully repatriated to their former homelands misrepresented their place of birth on applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence”) (quoting Congressman Walter)).


135. *Id.* (citing IIRIRA § 305(a)(2)).


The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens, described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(ii) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(iii) is a VAWA self-petitioner.
237(a)(1)(H) waives the non-citizen’s deportability and establishes his or her lawful admission for permanent residence in the United States.  

Relatively few cases discuss section 237(a)(1)(H) waivers. One example of a case in the Ninth Circuit involved a situation where a petitioner had misrepresented her marital status upon entering the United States and later sought a waiver of her deportation under what is now section 237(a)(1)(H). The petitioner, a citizen of the Philippines, had applied for an immigrant visa as a child (unmarried and under the age of twenty-one) of her lawful permanent resident father. Shortly thereafter, she discovered that she was pregnant and married the father of the unborn child. Six days later, the petitioner entered the United States with her immigrant visa still classified as an unmarried child of a lawful permanent resident. Later in deportation proceedings, the petitioner conceded her deportability under what is now section 237(a)(1)(A) by virtue of having obtained her visa by fraud or willful misrepresentation.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation. Note that the statute specifically excludes non-citizens subject to removal for having participated in Nazi persecutions or for having engaged in genocide. Eds.  

137. 6 GORDON ET AL., supra note 48, § 71.04[2][a][iii][C].  
138. Id. § 71.04[2][a][iii][A].  
139. Casem v. I.N.S., 8 F.3d 700 (9th Cir. 1993). At the time, the section of the Act under which the petitioner sought a waiver was section 1251(f) (now codified at section 237(a)(1)(H)). Id. at 701.  
140. The term “child” is defined in the Act as an “unmarried person under twenty-one years of age . . . .” INA § 101(b)(1), 8 U.S.C. § 1101(b)(1).  
141. Casem, 8 F.3d at 701. Under the family-based “preference” system, individuals in the category of petitioner are in the “second preference (2A)” category, which include spouses and children of lawful permanent residents of the United States. See supra note 66.  
142. Casem, 8 F.3d at 701.  
143. Id. After giving birth to her son in the United States, the petitioner in Casem returned to the Philippines and remarried her husband in a church ceremony. Id. She later returned to the United States and filed a petition on his behalf with the INS and mentioned only the second marriage. Id. At an interview in connection with the petition, she admitted to their first marriage and withdrew the petition. Id. INS then initiated deportation proceedings. Id.  
144. All proceedings initiated before the enactment of IIRIRA in 1996 pertaining to individuals who had made an “entry” into the United States were called “deportation proceedings.” See supra Part II.C.1. Following IIRIRA, the proceedings are now called “removal proceedings.” Id.  
145. The ground of deportability at the time was INA § 241(a)(1) (1982).
The sole issue before the Ninth Circuit was whether the petitioner was entitled to a waiver of her deportation under what is now section 237(a)(1)(H). The Ninth Circuit ultimately remanded the decision to the agency for failing to consider all relevant factors in its decision dismissing the petitioner’s appeal, namely the effect of petitioner’s deportation on her nine year-old U.S. citizen son.

According to the regulations, a request for a section 237(a)(1)(H) waiver may be made in removal proceedings before an Immigration Judge.

III. THE OROZCO DECISION

A. The Facts

On January 11, 1996, Orozco, a citizen of Mexico, presented himself for inspection at the San Ysidro, California port-of-entry. At the time, he did not have his own valid entry or travel document with which to enter the United States. Instead, Orozco presented a permanent resident alien registration card (“green card”) belonging to someone else. Upon inspection at the checkpoint, an immigration official allowed Orozco to enter the United States.

A number of years later, on April 23, 2001, Orozco married

146. Casem, 8 F.3d at 701.
147. Id. INA section 237(a)(1)(H) was initially embodied in § 241(f), which was later replaced with § 241(a)(1)(H).
148. Casem, 8 F.3d at 701, 703. Citing I.N.S. v. Errico., 385 U.S. 214, 225 (1966), the Ninth Circuit in Casem observed that while the waiver ground does not contain an “extreme hardship” clause, Congress enacted the provision to prevent the break-up of families comprised in part of United States citizens or lawful permanent residents and, thus, the BIA must consider hardship to the children of potential deportees along with all other relevant factors. Casem, 8 F.3d at 703.
149. 8 C.F.R. § 1240.11(d) (2006) (stating that “[t]he respondent may apply to the immigration judge for relief from removal under sections 237(a)(1)(H)”; See also 8 C.F.R. § 1240.11(e) (stating that “[a]n application under this section shall be made only during the hearing . . . “).
150. Brief for Petitioner at 7, Orozco v. Mukasey, 521 F.3d 1068 (9th Cir. 2008) (No. 06-75021) (stating that Orozco is a “native and citizen of Mexico”); Orozco v. Mukasey, 521 F.3d 1068, 1069 (9th Cir. 2008).
151. Orozco, 521 F.3d at 1069–70.
152. Id. at 1070.
153. See id. at 1070; Brief for Petitioner at 15, Orozco, 521 F.3d 1068 (No. 06-75021) (stating that it “has not been contested or challenged by the Service . . . [that] upon inspection by said officer, Orozco was authorized to enter the U.S.”).
Raquel Ontiveros ("Raquel"), a U.S. citizen. Together they had two U.S. citizen children. In June 2001, Raquel submitted a petition for alien relative on behalf of Orozco, who simultaneously filed an application for adjustment of status to become a lawful permanent resident. The INS approved Orozco’s petition for alien relative; the adjustment of status application was denied for failure to appear at an interview in connection with the application.

Immigration officials later apprehended Orozco and placed him in removal proceedings on April 13, 2005. The government charged Orozco with being removable from the United States under section 212(a)(6)(A)(i) for being present in the United States without having been admitted or paroled. Interestingly, the government then filed an amended charge of removability against Orozco under section 237(a)(1)(A), a ground of deportability, for being inadmissible at the time of entry for having presented a counterfeit document to gain admission into the United States.

At his hearing before the Immigration Judge, Orozco admitted the allegations about his entry into the United States and conceded

154. Orozco, 521 F.3d at 1070.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id. INA section 212(a)(6)(A)(i) (2006) states that “[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” See supra note 94.
160. INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (stating that “[a]ny alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable”) 161. Orozco, 521 F.3d at 1070. The government’s amended charge under INA § 237(a)(1)(A) is inconsistent with its argument that Orozco was never “admitted” to the United States. The grounds of deportability under section 237(a) only apply to non-citizens who have been “admitted” into the United States. See INA § 237(a), 8 U.S.C. § 1227(a) (stating that “[a]ny alien . . . in and admitted to the United States shall . . . be removed if the alien is within one or more of the following classes of deportable aliens . . . ”) (emphasis added).

Yet, at the same time, the government argued (and the court so found) that Orozco was ineligible for adjustment of status under INA § 245(a), because he was never admitted into the United States. See Brief for Respondent at 13, Orozco, 521 F.3d 1068 (No. 06-75021) (stating that “[t]he practical consequence is that Orozco cannot establish eligibility for adjustment of status under INA § 245(a) because he conceded that his entry was unlawful, and he is therefore precluded from showing he was ‘admitted’”).
removability under section 237(a)(1)(A). He then sought relief from removal in the form of adjustment of status under section 245(a) based on the approved visa petition previously filed by his wife, Raquel. Orozco also filed for a waiver of inadmissibility under section 212(i) for having entered the country with someone else’s green card.

The Immigration Judge determined that Orozco was statutorily ineligible for adjustment of status because he could not satisfy the “lawful entry” requirement of the “admission” definition under section 101(a)(13)(A). According to the judge, even if Orozco qualified for a waiver under section 212(i), he nevertheless remained statutorily ineligible to adjust under section 245(a).

In a one-member, unpublished decision, the BIA affirmed the Immigration Judge’s decision in full, noting that Orozco was indeed ineligible for adjustment of status because he did not establish a lawful entry and admission under section 101(a)(13)(A). Orozco appealed the decision to the Ninth Circuit Court of Appeals.

B. The Court’s Analysis

The question of Orozco’s statutory eligibility for adjustment of status under section 245(a) was an issue of first impression for the Ninth Circuit. The court began its analysis by looking at the language of the statute itself. Looking first at section 245(a), which requires that a non-citizen be “inspected and admitted . . . into the United States,” the court noted that the term “admitted” is

162. See Orozco, 521 F.3d at 1070.
163. Id.
164. Id.
165. Id. The Immigration Judge apparently stated on the record that he would have granted Orozco’s adjustment application in the exercise of discretion, along with Orozco’s accompanying INA section 212(i) waiver, if Orozco were found to be statutorily eligible under section 245(a). See Brief for Petitioner at 8, Orozco, 521 F.3d 1068 (No. 06-75021).
166. See Orozco, 521 F.3d at 1070.
167. Id.
168. Id. at 1073. The Ninth Circuit found that it had jurisdiction over Orozco’s Petition for Review under INA section 242(a)(2)(D) to decide, as a matter of law, whether he is statutorily eligible for adjustment of status. Id. at 1071.
169. Id.
170. Id.
not defined in section 245(a).\textsuperscript{171} The court, however, looked to the definition of “admission” set forth in section 101(a)(13)(A), which applies to the entire Act and includes a “lawful entry” into the United States as part of the definition.\textsuperscript{172}

According to the court, the statutory language of sections 245(a) and 101(a)(13)(A) unambiguously requires that a non-citizen’s entry into the United States be lawful in order to qualify for adjustment of status under section 245(a).\textsuperscript{173}

Orozco argued that he satisfied the admission requirement in section 245(a) when he presented himself for questioning before the immigration official at the San Ysidro port-of-entry and was thereafter granted permission to enter the country.\textsuperscript{174} The court rejected this argument. Although it did not explain what actually constitutes a “lawful entry,” the court said that “it requires something more than simply presenting oneself for inspection and being allowed to enter the United States.”\textsuperscript{175}

The court then gave several reasons in support of its conclusion that lawful entry is a statutory prerequisite to adjustment under section 245(a). First, it noted that its holding is “in accord” with 8 Code of Federal Regulation section 101.2,\textsuperscript{176} which clarifies that the agency may create a record of a previous admission where none exists or correct an erroneous record of an admission, provided the error was not a result of deliberate deception or fraud on the part of the non-citizen.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id. See also INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006) (stating that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, lawful entry of the alien into the United States after inspection and authorization by an immigration officer.”).
\item \textsuperscript{173} Orozco, 521 F.3d at 1072.
\item \textsuperscript{174} Id. at 1070.
\item \textsuperscript{175} Id. at 1072.
\item \textsuperscript{176} A regulation is a rule promulgated by the agency pursuant to the requirements of the Administrative Procedures Act (APA). The definition of a “rule” is “an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy . . . .” APA § 551(4), 5 U.S.C. § 551(4) (2008).
\item \textsuperscript{177} 8 CFR § 101.2 (2008). The regulation provides:
\begin{verbatim}
An alien who entered the United States as either an immigrant or nonimmigrant under any of the following circumstances shall be regarded as having been lawfully admitted in such status, except as otherwise provided in this part: An alien otherwise admissible whose entry was made and recorded under other than his full true and correct name or whose entry record contains errors in recording sex, names of relatives, or names of foreign places of birth or residence, provided that he establishes by clear, unequivocal, and convincing evidence that the
\end{verbatim}
\end{itemize}
Without discussing how the regulation is in accord with Orozco’s situation, the court moved on to the next reason in support of its holding. The court explained that it applied section 101(a)(13)(A) in an earlier case that involved a different ground of removability, *Shivaramen v. Ashcroft*. In that case, it found that the Board of Immigration Appeals (BIA) had unreasonably interpreted the person’s “date of admission” in section 237(a)(2)(A)(i) (related to a crime involving moral turpitude) to mean the date he adjusted status instead of the date he lawfully entered the United States. The court said that in reaching that conclusion, it observed that INA section 101(a)(13)(A) leaves no room for doubt, “unambiguously defining admission as the lawful entry of the alien into the United States.”

Citing two criminal fraud statutes, the court then observed that Orozco’s entry into the United States was not lawful and that “absurd results” would follow if his entry, while criminal, was deemed lawful for purposes of section 245(a).

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178. *Orozco*, 521 F.3d at 1072 (citing *Shivaramen v. Ashcroft*, 360 F.3d 1142, 1147 (9th Cir. 2004)).
179. *Shivaramen*, 360 F.3d at 1143.
180. Id. at 1146.
181. Id. (citing two criminal fraud statutes, 18 U.S.C. §§ 1001(a) (2006) and 1028(a)(7) (2006)). 18 U.S.C. § 1001(a) (2006) provides for a fine and/or imprisonment for an individual who knowingly and willfully “makes any materially false, fictitious, or fraudulent statement or representation” or “makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . .” 18 U.S.C. § 1028(a)(7) (2006) prohibits an individuals from using “a means of identification of another person with the intent to commit . . . . any unlawful activity that constitutes a violation of Federal law.”
182. *Shivaramen*, 360 F.3d at 1146 (citing *Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (relating to avoiding absurd results, if possible, when interpreting a statute)). The court said, “Orozco asks us to turn a blind eye to criminal and fraudulent acts underlying his entry, because he arrived at an authorized border crossing station and presented himself for inspection.” *Orozco*, 521 F.3d at 1072.
Next, the court rejected several arguments that Orozco raised in his appeal. 183 It first rejected his argument that the Immigration Judge erred in declining to follow the BIA’s published decision in *In re Areguillin.* 184 The court found *Areguillin* “of no persuasive value” in light of IIRIRA, which, it said, altered the statutory framework upon which the decision rested. 185 The court explained that prior to IIRIRA, the term “admission” was not defined and that in light of the amendment, now requiring a lawful entry, Congress “unambiguously required lawful entry into the United States as a statutory prerequisite to adjustment of status under 8 U.S.C. section 1255(a).” 186

Finally, the court rejected Orozco’s argument that his waiver under section 212(i) renders him eligible to adjust his status. 187 According to the court, “eligibility for a waiver of inadmissibility does not make Orozco’s underlying entry into the United States lawful.” 188 The court then concluded that the Immigration Judge and BIA correctly found Orozco statutorily ineligible for adjustment of status under section 245(a) of the Act.

On March 25, 2008, the Ninth Circuit filed its decision dismissing Orozco’s petition for review. 190

IV. ANALYSIS OF THE *OROZCO* DECISION

In reaching its decision in *Orozco,* the Ninth Circuit seemed to construe the term “admission” in somewhat of a vacuum. While the definition of “admitted” in section 101(a)(13)(A) seems clear at first glance, the meaning is not so plain and should be considered in the larger context of the Act. As the First Circuit once said, “[t]he immigration laws about adjustment of status are

183. *Id.* at 1072–73.
184. *Id.* at 1072. In *Areguillin,* the BIA found that “‘admission’ occurs when the inspection officer communicates to the applicant that he has determined that the applicant is not inadmissible, [and] [t]hat communication has taken place when the inspector permits the applicant to pass through the port of entry.” *Orozco,* 521 F.3d at 1073; *In re Areguillin,* 17 I & N. Dec. 308, 310 (B.I.A. 1980). See supra Part II.C.3.a.i for more information on *In re Areguillin.*
185. *Orozco,* 521 F.3d at 1073.
186. *Id.* 8 U.S.C. § 1255(a) is the codified version of INA § 245(a).
187. *Orozco,* 521 F.3d at 1073.
188. *Id.*
189. *Id.*
190. *Id.* at 1068. See supra Part V for a discussion about the current status of the case and its current and potential impact on immigrants, the courts, and the agency.
not a haphazard compilation of provisions; [t]he terms and provisions of 8 U.S.C. § 1255(a) must be understood in the larger context of the statutory scheme."

Orozco’s argument that his inspection and authorization constituted an “admission” within section 245(a) is consistent with current case law and interpretations by the BIA and the courts. Moreover, the Ninth Circuit’s analysis leads to unintended results and overlooks the numerous provisions and safeguards already in place that address the type of fraudulent behavior with which the court was concerned.

A. The Court’s Interpretation of “Admission” is Overly Narrow

1. The Term “Admitted” is Not so Clearly Defined in the Statute

As support for its conclusion that a non-citizen who obtains entry by fraudulent means is not “admitted” within the meaning of section 245(a), the Orozco court quoted a statement that it had made in its decision in Shivaraman four years earlier: “8 U.S.C. section 1101(a)(13)(A) leaves no room for doubt, unambiguously defining admission as the lawful entry of the alien into the United States.” It is true, as the court states, that the definition of “admission” clearly and unambiguously says this; however, what that definition means, particularly as it is applied to a completely different provision of the INA within an entirely

191. See Succar v. Ashcroft, 394 F.3d 8, 26 (1st Cir. 2005).
192. See, e.g., In re Areguillin, 17 I. & N. Dec. 308, 310 n.6 (B.I.A. 1980) (stating that an “admission” occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible. That communication takes place when the inspector permits the applicant to pass through a port of entry”); In re Orellana de Barden, No. A95-672-921, 2007 WL 4699871, at *1 (BIA Nov. 13, 2007) (stating that “In re Areguillin, supra, was not superseded by the 1996 amendments to the Act.”); Succar v. Ashcroft, 394 F.3d 8, 14 (1st Cir. 2005) (stating that “ ‘[a]dmitted aliens’ means individuals who have presented themselves for inspection by an immigration officer and who have been allowed to enter the country.”); Emokah v. Mukasey, 523 F.3d 110, 118 (2d Cir. 2008) (finding that the petitioner, a citizen of Nigeria, was “admitted” to the United States even though she was inadmissible at the time of her entry for fraud).
195. Orozco, 521 F.3d at 1072 n.3 (quoting Shivaraman, 360 F.3d at 1146). See infra Part IV.A.2.b for a more detailed discussion of Shivaraman.
different context, is another matter.

Despite the seemingly straightforward words in section 101(a)(13)(A), the meaning of the term “admission” is actually not so clear. Indeed, the Orozco court stopped short of fully explaining what the definition meant, saying instead that lawful entry requires something “more than simply presenting oneself for inspection and being allowed to enter the United States.” In actuality, the term “admission,” or some form thereof, is found in a myriad of sections scattered throughout the INA. In some instances, it is utilized several times in different forms within the same provision. While the Act mostly refers to “admission” in the sense of a non-citizen coming to the United States and crossing over the border (or entering at an airport), courts have also construed it to mean something different: the attainment of legal status. The range of contexts in which the term appears along with the occasional variations as to its meaning reveals that a single, inflexible definition of the term does not always make sense. Indeed, in discussing “admission” in the context of INA section 237(a)(2)(A)(i), the same removal provision discussed in Shivaraman, the Seventh Circuit has remarked that definitions

196. Orozco, 521 F.3d at 1072.
197. See, e.g., INA §§ 101(a)(4), (a)(6), (a)(13)(A)–(C), (a)(15)(L), (a)(15)(O), (a)(20), (a)(27)(A), (a)(48)(i); 209(a)(1); 210(a)(1); 211(a); 212(a)(1)(A)(ii), (a)(2)(D)(iv), (a)(4)(A), (a)(4)(C)–(D), (a)(5)(A)(i), (a)(5)(D), (a)(6)(A)–(C), (a)(6)(E)(ii), (a)(7)(A), (a)(7)(B), (a)(9)(A), (a)(9)(B)(i), (g)(1), (h)–(l), (n)(1), (t)(1); 213; 214(a)(1), (b), (d), (e), (g)(7), (n)(2)(C), (o); 216(b)(1); 216A(a)(1); 217(a)(1); 221(f)–(h); 222(g); 223(a), (b); 233(a); 235(a)(1)–(5); 237(a)(1)(C)(i), (a)(1)(G)(i), (a)(1)(H), (a)(2)(A)(i)–(iii), (a)(2)(B)(i), (ii), (a)(2)(C), (a)(2)(E), (a)(4)(A), 240(a)(3), (c)(2)(A), (c)(3), (e)(2)(A); 240A(a)(2), (b)(3), (c)(2); 240B(a)(1)(B)(i), (a)(4); 240C; 241(c)(3)(B); 242(b)(4)(C); 245(a); 245A(a); 246(a), (b); 247(a); 248(a)(4); 249; 250; 272(a); 273(b); 274B(a)(3)(B); 276(a)(1); 287(d); 290(a); 291; 316(a); 317; 318; 319(a); 320(a)(3); 322(a)(5); 331(a); 334(b); 336(c); 337(a); 338; 344(d); 360(b), (c).
198. See, e.g., INA § 212(a)(2)(D)(iv), 8 U.S.C. § 1182(i)(1) (stating that the "Attorney General may . . . waive the application of clause (i) . . . in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established . . . that the refusal of admission . . . of such an immigrant alien would . . . .") (emphasis added); INA § 212(a)(9)(B)(i), 8 U.S.C. § 1182(a)(9)(B)(i) (stating "[a]ny alien (other than an alien lawfully admitted for permanent residence) who was unlawfully present in the United States . . . and again seeks admission within 3 years . . . is inadmissible.") (emphasis added); INA § 212(h), 8 U.S.C. § 1182(h) ("[n]o waiver shall be granted . . . in the case of an alien who has previously been admitted . . . as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has . . .") (emphasis added).
rarely work universally since one word can have different connotations in different constructions.\textsuperscript{199} According to the court, “[t]he whole point of contextual reading is that context matters.”\textsuperscript{200}

2. Numerous Interpretations of “Admission” are Found Within the Larger Statutory Scheme

A look at case law in the larger scheme of the Act highlights the important role that context sometimes plays in analyzing the term “admission” and the occasional problems that courts have experienced in trying to affix a single, inflexible definition to the term.\textsuperscript{201}

a. BIA Decisions

In 1998, in \textit{In re Ayala-Arevalo}, the Board discussed several terms, including “lawfully” and “admission,” in the context of INA section 212(h), a provision that waives inadmissibility for certain criminal activity.\textsuperscript{202} In so doing, the Board discussed “admission” in the sense of attaining a legal status, and essentially concluded that an admission for permanent residence within the meaning of...
section 212(h) is “lawful” even if the person was admitted in violation of the law. In Ayala-Arevalo, the respondent entered the United States in January 1989, and then again on July 3, 1991, as a lawful permanent resident. About five years later, he was convicted of conspiring to defraud the United States. The Immigration Judge found the respondent deportable for having committed a crime involving moral turpitude and for being excludable at the time of his last entry into the United States.

If available, a waiver granted under section 212(h) could have potentially overcome the grounds under which the respondent was found deportable. However, the waiver is unavailable to someone who has “previously been admitted to the United States as an alien lawfully admitted for permanent residence” unless the person has lived in the United States for seven years before the start of deportation or removal proceedings. The respondent in Ayala-Arevalo was admitted as a permanent resident in July 1991, and his deportation proceedings began about five years later, on May 20, 1996. Thus, if the Board found that he was indeed “lawfully admitted for permanent residence” within the meaning of section 212(h), he would not have the necessary seven years of residence and would thus be ineligible for a waiver.

The respondent testified that he had engaged in fraudulent activity before leaving the United States and continued this activity upon his return in 1991. Therefore, according to the respondent, he was never “lawfully admitted” for permanent residence because he was actually inadmissible at the time he was admitted for permanent residence in 1991.

204. Id. at 399.
205. Id.
206. Id. at 398, 400. The Immigration Judge found the respondent deportable under former “sections 241(a)(1)(A) and (2)(A)(i) of the . . . Act, 8 U.S.C. §§ 1251(a)(1)(A) and (2)(A)(i)(Supp. II 1996).” Id. at 398.
207. Former INA § 212(h), 8 U.S.C. § 1182(h) (1996); In re Ayala-Arevalo, 22 I. & N. Dec. at 403 (Rosenberg, dissenting) (“If available, a waiver granted under section 212(h) of the Act could overcome several grounds of inadmissibility, including . . . a conviction for . . . a single crime of moral turpitude.”).
210. Id. at 402 (citing former INA § 212(h) (Supp. II 1996), 18 U.S.C. 1182 (h) (Supp. II 1996)).
211. Id. at 399.
212. Id. at 400. Lory Diana Rosenberg, Separate Opinion – The Cost of Admission: Adjusting the Before and After of “Inspection and Authorization” Under § 101(a)(13)(A),
The Board rejected this argument. Notwithstanding the word “lawful” in section 212(h), the Board stated that “the statute does not . . . distinguish between those whose admission was lawful and those who were [later found] to have been admitted in violation of the law.” The Board concluded that the Immigration Judge properly found the respondent ineligible for a 212(h) waiver.

In her dissenting opinion in Ayala-Arevalo, Board Member Rosenberg commented that although the majority’s approach “may be a way to preclude the respondent’s application for a discretionary waiver under section 212(h) of the Act . . . it strikes me as result-oriented.” In short, the Ayala-Arevalo decision shows how the BIA interpreted “admission” and how it seemed to stray from a strict interpretation of the term “lawfully” as it applies to admission for permanent residence in section 212(h).

Less than a year later, in April 1999, the Board looked at the term “admission” in a different context. In In re Rosas-Ramirez the respondent entered the United States without inspection, adjusted her status to a lawful permanent resident under section 245(a), and was later convicted of an aggravated felony. The issue before the Board was whether someone in this situation has accomplished an “admission” to the United States as that term is used in section 237(a)(2)(A)(iii). Under that provision, “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.

The Board was in somewhat of a predicament. An individual is

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214. Id. The Board refused to separate the term “lawfully admitted” in the statute from the phrase “previously been admitted,” because it found that the latter phrase supplied the context for the former. Id. According to the Board, the main issue in the case is whether the respondent “has previously been admitted” for permanent residence to the United States. Id. at 402. “Inasmuch as the respondent was admitted to the United States in lawful permanent resident status [whether or not attained in violation of the law] and has failed to accrue 7 years of lawful residence since the date of his admission, he is ineligible for a waiver under section 212(h).” Id.
215. Id. at 403.
216. Id. at 406–07 (Rosenberg, dissenting).
218. Id. at 616–17.
removable under this section only if he or she was convicted after admission. As noted, the term “admission” is defined as a “lawful entry of the alien into the United States after inspection and authorization by an officer.” The respondent in Rosas-Ramirez, however, did not make a lawful entry into the United States; nor was she inspected and authorized by an immigration officer to enter the country at the border. Yet, her later attainment of lawful permanent resident status did not fall within the literal language of the “admission” definition either because a person does not make an “entry” upon adjusting his or her status, as the person is already in the country.

However, a finding to the contrary—and in accord with the respondent’s argument that her adjustment of status was not an admission—would have an undesirable effect. Specifically, it would allow non-citizens who originally entered the country without inspection, subsequently adjusted status, and then committed a crime, to avoid removal under the aggravated felony provision. At the same time, non-citizens who entered lawfully under the same circumstances could be found removable under the same statutory section. According to the Seventh Circuit, “[t]he Board found that too much to swallow.”

In resolving the case, the BIA noted that the definition of “admission” in section 101(a)(13)(A) “does not set forth the sole and exclusive means by which admission to the United States may occur under the Act.” The Board ultimately concluded that the reference to “admission” in section 237(a)(2)(A)(iii) includes both those persons who are admitted at the time of entry under section 101(a)(13)(A) and those who are lawfully admitted for permanent

221. Id. (emphasis added).
224. Griffith, supra note 97, at 986. In Rosas-Ramirez, the Board noted that “[a]lthough adjustment to permanent resident status under section 245A requires that an alien demonstrate admissibility as an immigrant, and is arguably the equivalent of inspection and authorization by an immigration officer, it is less clear that such a change in status can be characterized as an ‘entry’ into the United States.” In re Rosas-Ramirez, 22 I. & N. Dec. at 617–18.
225. See Abdelqadar v. Gonzales, 413 F.3d 668, 673 (7th Cir. 2005) (stating “why should illegal entrants enjoy rights superior to those of lawful immigrants?”).
226. In re Rosas-Ramirez, 22 I. & N. Dec. at 623 (emphasis added). Similarly, the Immigration and Naturalization Service argued on appeal that the Immigration Judge erred in finding that the term “admission,” as used in section 237(a)(2)(A)(iii), encompasses only the process described in section 101(a)(13)(A). Id. at 617.
residence some time after entry. Concluding that the respondent’s adjustment of status was an “admission,” the Board found that she was deportable for having been convicted of an aggravated felony at any time after admission. Thus, in reaching its conclusion, the Board construed the term “admission” to mean something other than a “lawful entry” within the meaning of section 101(a)(13)(A).

A similar question concerning the definition of “admission” in the context of the same aggravated felony provision at issue in Rosas-Ramirez arose in Ocampo-Duran v. Ashcroft. Like the respondent in Rosas-Ramirez, the petitioner in Ocampo-Duran entered the country without inspection, adjusted his status, and was later convicted of an aggravated felony. Following its analysis in Rosas-Ramirez, the Board similarly construed the petitioner’s attainment of lawful permanent residence through adjustment of status as an “admission” and therefore found him deportable under section 237(a)(2)(A)(iii). The petitioner appealed the Board’s decision to the Ninth Circuit Court of Appeals.


228. See In re Rosas-Ramirez, 22 I. & N. Dec. at 623–24 (citing INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii)). Board Member Lory Diana Rosenberg concurred in part and dissented in part. Id. at 624–31. Although Member Rosenberg agreed that it is possible that Congress may have intended for § 237(a)(2)(A)(iii) to apply to an individual who adjusted her status, like the respondent, Rosenberg pointed out that there is nothing in the statute that says so. Id. at 625. Several years later, in a 2005 decision, In re Shanu, the Board clarified that its decision in Rosas-Ramirez was not a result-oriented approach, stating, “the potential for unreasonable results was merely a fact marshaled to support our interpretation of the aforementioned statutory language.” See In re Shanu, 23 I. & N. Dec. 754, 758 (B.I.A. 2005), vacated, Aremu v. Dep’t of Homeland Sec., 450 F.3d 578 (4th Cir. 2006). According to the Board, “[i]t is that language, and not the possibility of unreasonable results, that drove our analysis in Rosas-Ramirez and continues to drive it today.” Id.


231. Ocampo-Duran, 254 F.3d at 1134.

232. See id. at 1134–35.

233. Id. at 1134.
b. Ninth Circuit decisions

In *Ocampo-Duran*, the court was tasked with determining whether the Board correctly concluded that the petitioner’s adjustment of status date constituted an “admission” under INA section 237(a)(2)(A)(iii), such that the petitioner could be deportable for an aggravated felony.\(^\text{234}\) Like the respondent in *Rosas-Ramirez*, the petitioner in *Ocampo-Duran* argued that he was not removable under that section because he entered the country without inspection and was, thus, never technically “admitted” for purposes of the statute.\(^\text{235}\) In dicta, the Ninth Circuit rejected the petitioner’s argument as an “overly-narrow interpretation of section 237(a)(2)(A)(iii).”\(^\text{236}\) According to the court, the petitioner’s adjustment of status was an “admission” because he had been “lawfully admitted” as defined in section 101(a)(20).\(^\text{237}\) The court further found that the petitioner failed to explain “why Congress would create a loophole in the removal laws for aliens who enter the country without inspection, adjust their status, and then commit aggravated felonies.”\(^\text{238}\) Ultimately, however, the court dismissed the appeal for lack of jurisdiction.

Three years later, in *Shivaraman v. Ashcroft*, the Ninth Circuit further explained and defended its decision in *Ocampo-Duran* when yet another “admission” question was raised.\(^\text{240}\) This time, however, the facts were different and the relevant removal ground was section 237(a)(2)(A)(i), which relates to removability for having been convicted of a crime involving moral turpitude committed within five years after the date of admission.\(^\text{241}\)

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\(^{234}\) *Id.* at 1133. See also INA § 237(a)(2)(A)(iii), 8 U.S.C.

\(^{235}\) Id. at 1134.

\(^{236}\) *Ocampo-Duran*, 254 F.3d at 1134.

\(^{237}\) *Id.* at 1135.

\(^{238}\) *Ocampo-Duran*, 254 F.3d at 1135.

\(^{239}\) *Id.* (stating that “[b]ecause Ocampo-Duran is an alien who is removable because of a conviction for an offense enumerated in INA § 242(a)(2)(C), we do not have jurisdiction over his petition for review”). As a result, the court’s finding in *Ocampo-Duran* is dicta and therefore not controlling.

\(^{240}\) Shivaraman v. Ashcroft, 360 F.3d 1142 (9th Cir. 2004).

\(^{241}\) INA § 237(a)(2)(A)(i) states:

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five
unlike the individuals in *Rosas-Ramirez* and *Ocampo-Duran*, the petitioner entered the United States in *valid* nonimmigrant status, later adjusted status, and subsequently committed a crime. Thus, the court was not faced with the same “loophole” problem as in the other cases. It did, however, face the task of having to determine from which date the five-year period began to run: the date the petitioner initially entered the United States in nonimmigrant status following his inspection and authorization or the date he was “admitted” as a lawful permanent resident.

“Having treated [the petitioner’s] adjustment in *Rosas-Ramirez* as an ‘admission’ to the United States, the BIA wanted to maintain an air of consistency in *Shivaraman* by taking the same approach.”

In its decision, the Board explained that the language of section 237(a)(2)(A)(i) (at issue in *Shivaraman*) is almost identical to the language of section 237(a)(2)(A)(iii) (at issue in *Rosas-Ramirez* and *Ocampo-Duran*) and found no basis for distinguishing between the two provisions. Under its analysis, “any event that qualifies as an ‘admission’ under this definition can serve as the date of admission

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242. *Shivaraman*, 360 F.3d at 1143. More specifically, the petitioner in *Shivaraman* entered the United States on an F-1 student visa on September 2, 1989. *Id.* On January 1, 1997, he adjusted his status to that of a lawful permanent resident. *Id.* Petitioner was later convicted of first-degree theft “on the basis of acts he committed between January 27, 1998, and October 10, 1998.” *Id.* In March 2001, the INS served respondent with a Notice to Appear charging him with removability under § 237(a)(2)(A)(i) of the Act for having been “convicted of a crime, involving moral turpitude for which a sentence of one year or longer may be imposed, that is committed ‘within five years . . . after the date of admission.’” *Id.* The petitioner appeared before the Immigration Judge and filed a motion to terminate his removal proceedings, arguing that his “date of admission” for purposes of § 237(a)(2)(A)(i) was in 1989, when he first lawfully entered the United States after inspection and authorization by an immigration officer, not his later adjustment of status date. *Id.* at 1143–44. Relying primarily on *Rosas-Ramirez*, the immigration judge found that the controlling “date of admission” was when respondent’s adjustment of status was granted (not the date of his entry into the United States). *Id.* at 1144. Accordingly, since the respondent committed his crimes within five years of that date, the Immigration Judge found the petitioner removable as charged, denied his request to terminate removal proceedings, and ordered him removed to India. *See id.* at 1144–45. The BIA dismissed the appeal. *Id.* at 1145.

244. *Id.* at 989.
245. *Shivaraman*, 360 F.3d at 1145.
for the purposes of section 237(a)(2)(A)(i)." On that basis, the BIA found that the later date of respondent’s adjustment of status was the proper date to start the running of the five-year period.

The Ninth Circuit gave no deference to the BIA’s conclusion, noting that section 101(a)(13)(A) unambiguously defines the term “admission” as the lawful entry into the United States after inspection and admission. It then pointed out that section 237(a)(2)(A)(i) says “the date of admission” and found that there can only be one “the date.” Considering the two statutory sections as they related to one another, the court found that the language of the statute was clear and that the “admission” date was the date that the non-citizen effectuated a lawful entry into the United States, and it is that date from which the five-year period begins to run. For the petitioner, that was the date when he entered as a nonimmigrant in 1989.

The court wanted to avoid the subjective, malleable construction of the admission date construed by the BIA. Indeed, it criticized the BIA for “establishing a regime whereby an IJ [Immigration Judge] may pick and choose . . . at his apparent whim, among several dates of ‘admission’ for purposes of determining removability under INA [section] 237(a)(2)(A)(i).” The court also criticized the Board for relying on Rosas-Ramirez and Ocampo-Duran as support for its decision. The Ninth Circuit did not find that those cases were wrongly decided; on the contrary, it said that the Board and court had to embrace an alternative construction of the term “admission” in those cases in order to avoid the “absurd” results that would have followed with respect to

246. Id.
247. Id. at 1147.
248. Immigration & Nationality Act (INA) § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13) (2006); Shivaramen, 360 F.3d at 1146. See also Aremu v. Dep’t of Homeland Security, 450 F.3d 578, 579 (4th Cir. 2006) (finding that the date of adjustment of status does not constitute an “admission” for the purposes of INA § 237(a)(2)(A)(i)); Zhang v. Mukasey, 509 F.3d 313, 316 (6th Cir. 2007) (holding that admission is based on actual physical, legal entry and not the attainment of a designated legal status); Abdelqadar v. Gonzalez, 415 F.3d 668, 673 (7th Cir. 2005) (referring to the term “admission” in aggravated felony deportation proceedings).
249. Shivaramen, 360 F.3d at 1148.
250. Id. at 1146.
251. Id. at 1144.
252. Id. at 1147; Griffith, supra note 96, at 991.
253. Shivaramen, 360 F.3d at 1147.
254. Id.
non-citizens who enter the country unlawfully.\(^{255}\)

Interestingly, the Ninth Circuit in *Shivaraman* further noted that even though it did not apply the statutory definition of “admission” in section 101(a)(13)(A) in *Ocampo-Duran*, its decision in that case “both in its language and its logic, recognized section 101(a)(13)(A) as the primary, controlling definition of the statutory term.”\(^{256}\) The Ninth Circuit in *Ocampo-Duran*, however, did not make any reference to section 101(a)(13)(A) in its decision.\(^{257}\)

Regardless of whether the court had in fact previously recognized section 101(a)(13)(A) as the primary, controlling authority of the “admission” definition, the fact remains that the court and Board departed from the plain words of the definition in the aggravated felony context.\(^{258}\) In fact, the Board went further and stated on more than one occasion that section 101(a)(13)(A) does not set forth the sole and exclusive means by which admission to the United States may occur.\(^{259}\) Likewise, in *Orozco*, just because the Ninth Circuit applied one meaning to the term “admission” in *Shivaraman* does not automatically mean that it must apply the same meaning within the context of section 245(a), a completely different provision of the INA.

### B. The Interpretation of “Admission” Set Forth by the Petitioner in *Orozco* is Consistent with Current Case Law and Secondary Sources

Although *Orozco* entered the United States using someone...
else’s green card, he argued that he was nevertheless “admitted” for purposes of section 245(a) because he presented himself for inspection before an immigration officer and was allowed to proceed into the United States. The Ninth Circuit characterized Orozco’s argument as one relating to the location of his entry into the United States, which the court found as only one step in the admission process. This characterization, however, misses a key aspect of his argument. Orozco did not argue that his admission was accomplished solely by appearing at a designated port-of-entry for inspection. Rather, he argued that an admission occurred when he appeared at the port-of-entry for inspection and an immigration officer allowed him to enter the United States following inspection.

Orozco cited the published BIA decision Areguillin as support for the argument that he was admitted. In order to defeat Orozco’s argument, the Ninth Circuit found Areguillin to be of no persuasive value in light of IIRIRA, which defined “admission” to require a lawful entry into the United States. Despite many opportunities post-IIRIRA, however, the BIA has never overruled its decision in Areguillin. In fact, in one post-IIRIRA unpublished decision, the BIA specifically stated that Areguillin “was not superseded by the 1996 amendments to the Act.” Additionally, many secondary sources continue to cite Areguillin (or its interpretation) as the standard for whether someone has been “admitted” within the meaning of sections 245(a) and 101(a)(13)(A).

260. Orozco v. Mukasey, 521 F.3d 1068, 1070 (9th Cir. 2008).
261. Id. at 1072 (stating “Orozco argues that the ‘lawful entry’ requirement imposed by 8 U.S.C. § 1101(a)(13)(A) relates to the location of the alien’s entry into the United States”).
262. See Brief for Petitioner at 15, Orozco, 521 F.3d 1068 (No. 06-75021).
263. See id. (stating that it “has not been contested or challenged by the Service [government] . . . [that] upon inspection by said officer, Orozco was authorized to enter the U.S.”).
265. Brief for Petitioner at 4, Orozco, 521 F.3d 1068 (No. 06-75021).
266. Orozco, 521 F.3d 1068, at 1073.
268. See, e.g., 15-1 EXAMINATIONS HANDBOOK SCOPE (2008) (citing In re Areguillin under “Precedent Decisions” heading); 4 GORDON ET AL., supra note 48, § 51.03[2] (discussing eligibility under section 245(a) and stating that “the admission itself need not have been regular or lawful, or even as a nonimmigrant”).
1. In re Areguillin and Post-IIRIRA BIA Decisions

In In re Areguillin, the respondent, a citizen of Mexico, appealed a decision of the Immigration Judge denying her application for adjustment of status under section 245(a) because she was not “inspected and admitted” into the United States as the statute required. In her hearing before the judge, respondent testified that she crossed the “border in a car with two couples and another woman.” She had no travel or entry documents in her possession at the time. According to respondent, at the port-of-entry, an immigration officer looked inside the car, asked the driver a question, and then permitted the car and its occupants to proceed into the United States. The Immigration Judge concluded that the respondent was not inspected and admitted for purposes of section 245 because she was in fact inadmissible for entering the country without proper documentation.

Sustaining respondent’s appeal, the BIA stated that it could find no basis for the Immigration Judge’s construction of the term “admission,” that only a non-citizen who has been “lawfully or legally” admitted to the United States may qualify for adjustment of status. According to the Board, this interpretation is contrary to the legislature’s action of eliminating the restrictive 1952 Act requirement that only bona fide nonimmigrants may adjust status in the United States. An “admission,” the Board said, occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible, and that communication takes place when the inspector permits the applicant to pass through the port-of-entry. The Board further stated that the rule that a non-citizen has not entered without inspection when he presented himself for inspection and made no knowing false claim to U.S. citizenship applies in determining

270. Id. at 309.
271. Id.
272. Id.
273. Id.
274. Id. at 310.
275. See id. at 310 n.5.
276. Id. at 310 n.6 (citing In re V—Q—, 9 I. & N. Dec. 78 (B.I.A. 1960)).
277. Id. at 310. The BIA treats individuals who made a false claim to United States differently because an immigration officer is not empowered to inspect a citizen in the same manner as a non-citizen. 6 GORDON ET AL., supra note 48, § 71.04[3][c][iii]. As such, non-citizens who entered the United States pursuant a
whether an alien has satisfied the inspection and admission requirement.\textsuperscript{278}

Since the Immigration Judge failed to make a finding about Areguillin’s credibility as to her means of entering the country, the BIA remanded the case for further proceedings.\textsuperscript{279} According to the Board, if the respondent’s account about her entry is indeed true, she was “inspected and admitted” within the meaning of section 245(a) despite the fact that she entered the country without any valid entry documents.\textsuperscript{280}

In reaching its decision, the Board cited several other Board decisions that looked at a non-citizen’s entry and inspection into the United States.\textsuperscript{281} All of these cases, however, predate the
passage of IIRIRA, which amended INA section 101(a)(13) to its current definition, requiring a “lawful” entry into the United States. The question then becomes whether the Board’s interpretation of “admission” in Areguillin remains good law after IIRIRA. The Ninth Circuit did not think so.

A look at post-IIRIRA case law, however, shows that the BIA has never overruled Areguillin in a published decision. In fact, the Board has not issued any published decisions after IIRIRA specifically analyzing the terms “inspected” and “admitted” within the meaning of 245(a). The Board has, however, issued several unpublished decisions that shed light on its view of the continuing validity of Areguillin.

In 2004, in In re Parra-Parra, the Board looked at whether the respondent who had left the country during the pendency of his adjustment of status application was “inspected and admitted” upon his return to the country even though he failed to have his advance parole form stamped by the immigration official and, thus, was deemed to have abandoned his adjustment application after his departure from the United States. This meant that the respondent technically had no valid basis for returning to the United States when he presented himself for inspection. The respondent stated that he did not have the advance parole form stamped because the immigration officer did not ask him any questions. Citing Areguillin, the Board found that the respondent “was, in fact, inspected and admitted when he was allowed to enter ask him relevant information about his admission. The non-citizen is not required to volunteer information); In re F—, 1 I. & N. Dec. 90, 91 (B.I.A. 1941) (finding that, contrary to the government’s contentions, the non-citizen did not enter the United States without inspection because he physically presented himself for questioning and the officer chose not to ask him any questions).

283. “Advance parole” is often granted to non-citizens residing in the United States who have a need to travel abroad, but whose immigration status would not afford them a right to legal admission upon their return. Ibrahim v. Gonzales, 476 F.3d 125, 132 (2nd Cir. 2007). The government decides in advance of a non-citizen’s arrival that he or she will be paroled into the United States upon arriving at a port-of-entry. Id.; Succar v. Ashcroft, 394 F.3d 8, 15 n.7 (1st Cir. 2005). Advance parole is not explicitly contemplated by the statute governing parole, but is permitted by 8 C.F.R. § 212.5(f). Ibrahim, 476 F.3d at 132. See also 8 C.F.R. § 212.5(f) (stating that ”[w]hen parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued form I-512").
285. Id.
the United States by an immigration inspector.”

In two later decisions, in 2006 and 2007, the Board declined to reach the question of whether the IIRIRA amendments to section 101(a)(13) overruled *Areguillin*. In another 2007 unpublished case, the Board distinguished *Areguillin* and attempted to limit the scope of the decision by noting that the respondent there was considered “on those facts” to have been inspected and admitted. Later that same year, however, the Board expressly said that “[*In re*] *Areguillin* . . . was not superseded by the 1996 amendments to the Act.” In that case, the respondent testified that she presented herself with others in a car for inspection at a port-of-entry and was allowed to proceed into the United States. According to the Board, the respondent sufficiently established that she was inspected and admitted, and eligible to adjust her status.

Just recently, in May 2008, the Board found that no admission was established where the respondent was asleep in the back of a car and was waived through the border without ever speaking to the immigration officer or knowing the details of what happened at the checkpoint. Citing *Orozco v. Mukasey*, the Board found that *Areguillin* was not controlling “in the current case.” According to the Board, the respondent had no documentation to prove his claim that he entered the United States in March 2002, and thus could not meet his burden of proving that “he made a lawful entry or admission into the United States.” Although the Immigration Judge in *Osovskiy* concluded that *Areguillin* was statutorily overruled


287. *See In re Raza*, A95 136 705, 2006 WL 2803312 (B.I.A. July 28, 2006) (declining to address whether the standard for “inspection and admission” articulated in *Areguillin* is applicable here). *See also In re Arreola-Amezquita*, A95 489 549, 2007 WL 275728 (B.I.A. Jan. 11, 2007) (stating “[w]e need not reach the question whether the amended section 101(a)(13)(A) of the Act, defining the term ‘admission,’ overruled [*In re*] *Areguillin*”).


293. *Id.*

294. *See id.* Interestingly, the Board in *In re Osovskiy* used the terms “lawful entry” and “admission” in the disjunctive.
by IIRIRA, the Board failed to discuss the continuing validity of \textit{Areguillin} in its analysis; nor did it go so far as to conclude that \textit{Areguillin} was no longer good law.\textsuperscript{295}

Additionally, in her concurring and dissenting opinion in \textit{Rosas-Ramirez}, former Board Member Rosenberg discussed the term “admitted” in section 101(a)(13)(A) consistently with the \textit{Areguillin} standard.\textsuperscript{296} According to Rosenberg, “the new terms ‘admission’ and ‘admitted’ require that the entry must be lawful. That is, the individual must be inspected by an immigration official at a port-of-entry and authorized to enter the country.”\textsuperscript{297}

Finally, in two unpublished post-IIRIRA decisions, the Board recognized the non-citizens’ eligibility to adjust their status under section 245(a) with a 212(i) waiver notwithstanding the fact that the individuals gained entry into the United States by fraudulent means.\textsuperscript{298}

2. Circuit Court Decisions

Aside from \textit{Orozco}, a search of federal circuit court cases has not revealed any published decisions in which the meaning of “admission” for purposes of section 245(a) was the principal issue where fraud was involved. This is likely due to the fact that appellate courts do not have jurisdiction over discretionary denials of applications for relief in removal proceedings, including adjustment of status applications.\textsuperscript{299} Therefore, the issue has not had the opportunity to present itself to the circuit courts. Courts may, however, still review constitutional claims and questions of

\textsuperscript{295} See \textit{id.}
\textsuperscript{298} \textit{See In re Martin, No. A29714117, 2008 WL 4335829} (B.I.A. Sept. 2, 2008) (remanding proceedings to afford non-citizen the opportunity to seek adjustment of status in conjunction with a waiver even though the non-citizen had entered the United States using a fraudulent passport). \textit{See also In re Krakmalov, No. A40418326, 2004 WL 880323} (B.I.A. Mar. 3, 2004) (declining to disturb the Immigration Judge’s decision to grant the non-citizen’s application for adjustment of status and waiver under INA § 212(i), 8 U.S.C. § 1182(i), even though the respondent had committed marriage fraud in order to initially enter the United States).
\textsuperscript{299} \textit{See INA § 242(a)(2)(B)(i)} 8 U.S.C. § 1252(a)(2)(B)(ii) (stating that “[n]otwithstanding any other provision of law . . . no court shall have jurisdiction to review any judgment regarding the granting of relief under (section 1255) . . .”).
law, which include determining, as a matter of law, a non-citizen’s statutory eligibility for adjustment of status under section 245(a). 300

While the meaning of “admitted” under section 245(a) may not have been a central issue, several circuit court decisions have nevertheless discussed or conveyed their interpretations of the term in various post-IIRIRA decisions. An example is Succar v. Ashcroft in which the First Circuit cited section 1101(a)(13)(A) and stated that “'[a]dmitted aliens’ means individuals who have presented themselves for inspection by an immigration officer and who have been allowed to enter the country.” 301 The court did not distinguish between non-citizens who entered the country with proper travel documents and those who did not.

Along the same lines, the Second Circuit found that the petitioner, a citizen of Nigeria, was “admitted” to the United States even though she was inadmissible at the time of her entry for fraud. 302 There, the petitioner entered the United States on a tourist visa that she had obtained by falsely using a surname of a wealthy local businessman, with whom she was romantically involved, after a prior application in her own surname had been rejected. 303 The court expressly disagreed with the contention that the petitioner’s fraud must necessarily mean that she entered the United States without admission. 304 On the contrary, the court said that while the manner in which petitioner procured admission rendered her inadmissible, that “does not change the fact that she was, indeed, admitted.” 305

Still other decisions reflect the courts’ interpretations of the term “admitted,” in a more indirect way, in that several decisions have found that non-citizens who had gained entry by fraud or

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300. See INA § 242(a)(2)(D)) (stating “[n]othing in subparagraph (B) or (C) . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section”). See also Orozco v. Mukasey, 521 F.3d 1068, 1071 (9th Cir. 2008) (stating “we retain jurisdiction to decide, as a matter of law, whether an alien is statutorily eligible for adjustment of status”) (internal quotations omitted).
301. Succar v. Ashcroft, 394 F.3d 8, 14 (1st Cir. 2005). The Succar court considered the validity of a regulation promulgated by the Attorney General, 8 C.F.R. § 245.1(c)(8) in the context of adjustment of status under section 245(a). Id. at 9.
302. Emokah v. Mukasey, 523 F.3d 110, 118 (2d Cir. 2008).
303. Id. at 114.
304. Id. at 118.
305. Id.
misrepresentation were ineligible for adjustment of status on the basis of either discretion or inadmissibility, but not for lack of an admission.306

3. Secondary Sources

Despite the lack of federal circuit court case law specifically on point with the issue in Orozco, many secondary sources continue to cite AreguinIIin (or its interpretation) as the standard for whether someone has been “admitted” within the meaning of sections 245(a) and 101(a)(13)(A). For example, under the heading “Precedent Decisions” the INS Examinations Handbook cites Areguillin and states its proposition as follows: “[p]hysically presenting oneself for questioning and making no knowing false claim to U.S. citizenship constitutes being ‘inspected and admitted’ for section 245 purposes.”307 According to another 2008 source, in order to be “admitted,” non-citizens must present themselves to an immigration officer at the border, who questions them about their basis for entering the United States and approves that entry.”308

306. See, e.g., Falae v. Gonzales, 411 F.3d 11, 15 (1st Cir. 2005) (assuming that petitioner showed prima facie eligibility for adjustment of status notwithstanding the fact that he had entered the United States with a passport belonging to someone else); Balbuena v. United States Attorney General, 277 Fed. App’x. 136 at 139 n.2 (3d Cir. 2008) (noting in dicta that it appears that petitioner, who entered the United States without a valid entry document, is ineligible for adjustment of status due to his inadmissibility for fraud relating to his marriage to a United States citizen) [i.e., not statutory ineligibility due to his lack of admission]; Pjetrushi v. Ashcroft, 108 Fed. App’x. 65, 68 (3d Cir. 2004) (noting that petitioners’ ineligibility for adjustment of status is due to their inadmissibility for having fraudulently entered the United States using passports that were not their own) [i.e., not statutory ineligibility due to his lack of admission].

307. 15 CHARLES GORDON, ET AL., 1 IMMIGRATION AND NATURALIZATION SERVICE L. & PROC. IMMIGR. & NATURALIZATION SERVICE EXAMINATIONS HANDBOOK Part III at 287 (Matthew Bender, rev. ed., 2008). See also 16 CHARLES GORDON, ET AL., OPERATIONS INSTRUCTIONS OF THE IMMIGRATION AND NATURALIZATION SERVICE 245.3b (Matthew Bender, rev. ed., 2008) (instructing immigration officers conducting interviews in connection with adjustment application under § 245(a) to deny an application if the person’s nonimmigrant visa was obtained by fraud or misrepresentation, unless the applicant qualifies for a waiver under § 212(i), insinuating applicant is statutorily eligible to adjust status with a waiver).

308. AUSTIN T. FRAGOMEN, JR. ET AL., IMMIGRATION PROCEDURES HANDBOOK § 20:5 (Sept. 2008). See also RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 7:2 (2d ed. 2008) (stating that “[o]ne of the affirmative requirements for adjustment of status is that the person entered the United States lawfully, not evading inspection. Therefore, it must be shown that the person was inspected by an Immigration Officer and admitted into the United States in nonimmigrant status, or inspected and paroled into the United States. A person who entered the United
Still another source states “any person not refused entry, or placed in deferred inspection or removal proceedings, is considered to have been inspected and admitted.” Along the same lines, in discussing eligibility for section 245(a), one treatise expressly states that “[t]he admission itself need not have been regular or lawful, or even as a nonimmigrant.” The treatise also provides that even an “entry on a document falsely procured counts as admission if the holder was inspected and admitted as an alien[,]” rendering the individual (if otherwise statutorily eligible and deserving as a matter of discretion) eligible to adjust status to a permanent resident.

States without inspection is not eligible to apply for permanent resident status. This would include persons who illegally entered through a land border other than a border crossing post, stowaways, and persons who entered the United States claiming to be United States citizens, or NATO personnel who are not inspected.” (emphasis added).

309. Sarah Ignatius & Elisabeth S. Stickney, NAT’L IMMIGR. PROJECT OF NAT’L LAWS. GUILD, IMMIGRATION LAW & FAMILY § 8:19 (2008). Note, however, that, citing In re Robles, authors Ignatius and Stickney further state that “[a] person who intentionally evades DHS inspection when entering the United States has not been inspected and admitted.” Id. (citing In re Robles, 15 I. & N. Dec. 734 (B.I.A. 1976)). In Robles, the Board found that the non-citizen entered the country without inspection where he was told by an immigration officer at a port-of-entry to stay and wait in the inspection area. In re Robles, 15 I. & N. Dec. 734, Interim Decision 2514, (B.I.A. Aug. 9, 1976). Instead of waiting, the non-citizen fled and entered the United States. Id. at 735.

310. 4 GORDON ET AL., supra note 48, § 51.03[2] n.2 (stating that “[t]he need to be admitted as a bona fide nonimmigrant was eliminated by the 1960 amendments[,]” but that “[a] bad faith entry may however affect eligibility on other grounds”). See also id. § 51.01 (stating that “[t]he test [of section 245 eligibility] is also met by the alien who is admitted, regardless of whether the admission is proper”) (emphasis added). See also NAT’L IMMIGR. PROJECT OF NAT’L LAWS. GUILD, 1 IMMIGRATION LAW AND DEFENSE § 8:9 (3d ed. 2008) (stating “the Operations Instructions of INS specify that it is not necessary for the applicant to have entered as a bona fide nonimmigrant, although the manner of entry may be considered in a discretionary denial of relief”).

311. 4 GORDON ET AL., supra note 48, § 51.03[2] (citing In re Ghazal, 10 I. & N. Dec. 344 (B.I.A. 1963); In re Loo Bing Sun, 15 I. & N. Dec. 307, 308 (B.I.A. 1975); In re K—B—N—, 9 I. & N. Dec. 50, 52 (Ass’t Comm’r 1960)). See also 6 GORDON ET AL., supra note 48, § 71.04[3][c][ii] (stating “[m]anifestly, not every falsification and misstatement inhibits inspection. Thus, if a person presented himself or herself to an immigration officer as an alien, but made a misrepresentation that might have affected his or her entry, inspection may still have occurred.”). See also AUSTIN T. FRAGOMEN, JR. ET AL., 1 IMMIGR. LAW & BUSINESS § 3:86. Statutory Requirements (July 2006) (stating that “[i]n order to be eligible for adjustment of status the alien must, as a first requirement, have been inspected, admitted, or paroled into the United States. Aliens who entered the United States illegally, without inspection or as stowaways, are not eligible to adjust status.”). This seems to insinuate that an entry that was made with inspection and not as a stowaway is legal and qualifies the individual for adjustment of status. Id.
Several other sources provide a meaning of “admission” under 101(a)(13)(a) in the general context of non-citizens seeking entry into the United States at a port-of-entry or border. All of the sources cite Areguillin as authority for the standard for determining a non-citizen’s “admission” into the United States.

Thus, in light of the unclear definition of “admission,” the different constructions of the term in the larger statutory scheme, the published Board decision providing an interpretation of the term specifically pertaining to the provision at issue in Orozco, and interpretations by the circuit courts and secondary sources that either continue to cite Areguillin or interpret the term consistent with that in the decision, it appears as if the Ninth Circuit in Orozco incorrectly found that Areguillin was of no persuasive value. Consequently, the court should have reversed the Board’s decision finding Orozco statutorily ineligible for adjustment of status and remanded the case in order to allow Orozco to apply for adjustment of status in conjunction with a waiver under INA section 212(i). Alternatively, the court should have, at the very least, remanded the case to the agency with instructions to explain its departure from its published decision in Areguillin and the numerous unpublished decisions that have followed the same analysis.

4. The Court Should Have Remanded the Case to the Agency Instead of Deciding the Case

In an unpublished decision, the Board adopted and affirmed the decision of the Immigration Judge finding Orozco statutorily ineligible for adjustment of status notwithstanding his eligibility for a waiver. In so doing, a single member of the Board departed

312. See, e.g., Anna Marie Gallagher, 1 Immigration Law Service 2d § 2:27 (2008) (defining admission as occurring “when the inspecting officer communicates to the alien applicant” that “applicant is not inadmissible, and such communication has taken place when the inspector permits the applicant to pass through the port of entry”); Dag Ytreberg, 3 C.J.S. Aliens § 631 (2008); Laura Hunter Dietz et al., 3B Am. Jur. 2D Aliens and Citizens § 1311 (2008).
313. In re Areguillin, 17 I. & N. Dec. 308, 310 n.6 (B.I.A. 1980) (citing In re V—Q—, 9 I. & N. Dec. 78, 79 (B.I.A.1960)) (defining “admission” as, or similar to, occurring when the inspecting officer communicates to the non-citizen at a port-of-entry that the officer has determined that he or she is not inadmissible, and such communication takes place when the inspector permits the non-citizen to pass through the port-of-entry).
314. See Orozco v. Mukasey, 521 F.3d 1068, 1073 (9th Cir. 2008).
315. Id. at 1070.
from the agency’s own standard that had been in place for over twenty-five years.\textsuperscript{316} Virtually no explanation was given as to why an “admission” for purposes of section 245(a) now suddenly requires something more than the standard it had articulated earlier in \textit{Areguillin}.\textsuperscript{317} Indeed, only six months before the \textit{Orozco} decision, the Board expressly said that “\textit{Areguillin} . . . was not superseded by the 1996 amendments to the Act.”\textsuperscript{318}

The Ninth Circuit has previously acknowledged that “[w]hile agencies must have significant flexibility to adapt their practices to meet changed circumstances or the facts of a particular case,” they may not simply disregard their own established standards and policies without giving a reason for doing so.\textsuperscript{319} Here, the agency simply adopted and affirmed the Immigration Judge’s decision without an adequate explanation of its departure from precedent and its long-standing practice of finding that an individual in Orozco’s situation was admitted.

In fact, the Immigration Judge erred in the first instance by not following the precedent decision of the Board in \textit{Areguillin}, which is required by agency regulations.\textsuperscript{320} Regardless, the agency should have the first opportunity to interpret the meaning of “admitted” under the current statutory framework before a precedent decision is set by the reviewing court.\textsuperscript{321}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{316} \textit{In re Areguillin} was decided in 1980. \textit{In re Areguillin}, 17 I. & N. Dec. 308 (B.I.A. 1980).
\item \textsuperscript{318} \textit{In re Orellana de Barden}, No. A95 672 921, 2007 WL 4699871, at *1 (B.I.A. Nov. 13, 2007).
\item \textsuperscript{319} Yepes-Prado v. I.N.S., 10 F.3d 1363, 1370 (9th Cir. 1993). \textit{See also} Braun v. I.N.S., 992 F.2d 1016, 1019 (9th Cir. 1993); Israel v. I.N.S., 785 F.2d 738, 740 (9th Cir. 1986).
\item \textsuperscript{320} 8 C.F.R. § 1003.1(g) (2008) (“decisions of the Board . . . shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States”).
\item \textsuperscript{321} \textit{See} I.N.S. v. Orlando Ventura, 537 U.S. 12, 16 (2002) (holding that a court of appeals, except in rare circumstances, should remand a case to an agency for decision of a matter that statutes place primarily in agency hands). \textit{See also} Zheng v. Mukasey, 514 F.3d 176, 184 (2nd Cir. 2008) (stating that remand is appropriate in the following circumstances: (1) insufficient attention by the IJ and the BIA to the questions identified; (2) the desirability of national uniformity given the grave consequences of a frivolousness finding; (3) the ambiguity of the statute and corresponding regulations; (4) the dearth of law in this circuit related to these
\end{itemize}
\end{footnotesize}
Since the agency did not give the issue the attention that it requires, the Ninth Circuit should have remanded the case to the BIA for a better explanation about its departure from existing precedent before rendering a decision on the case.

C. The Court’s Analysis Produces Unintended and Unjust Results

The error of the court’s conclusion that someone in Orozco’s situation is not “admitted” into the United States can be seen by looking at some of its logical implications within the larger statutory scheme. The court’s conclusion renders several provisions of the Act inapplicable or meaningless, beginning with the removal provision under which the government charged Orozco: section 237(a)(1)(A).

According to that provision, only non-citizens “in and admitted to the United States” may be found deportable for being inadmissible at the time of entry. However, under the Ninth Circuit’s analysis, Orozco was never technically “admitted” because he could not satisfy the “lawful entry” requirement under section 101(a)(13)(A). Thus, in effect, the Ninth Circuit determined that Orozco was admitted for removability purposes, but not admitted for purposes of adjustment of status. This inconsistency contradicts the court’s emphasis on the need for a consistent interpretation of the meaning of section 101(a)(13)(A) and its statement that a singular definition applies to all of the references

questions; (5) the high volume of cases that this issue implicates; and (6) the severe impact of a frivolousness finding on an alien’s immigration prospects); AILF PRACTICE ADVISORY, supra note 77.

322. Orozco, 521 F.3d at 1070 (stating that “[t]he government subsequently filed an amended charge of removability against Orozco, pursuant to 8 U.S.C. § 1227(a)(1)(A), charging him with presenting a counterfeit document to gain admission to the United States”).

325. INA § 237(a), 8 U.S.C. § 1227(a) (2006) (emphasis added), which provides:

Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: . . . (A) Inadmissible aliens. Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

INA § 237(a)(1)(A).

324. Orozco, 521 F.3d at 1072–73.

325. See Kalubi v. Ashcroft, 364 F.3d 1134, 1138 (9th Cir. 2004) (stating that “we are not persuaded that x may become not-x because the process has progressed to step two”). See also AILF PRACTICE ADVISORY, supra note 77.
to “admission” in the Act.  

Similarly, the court’s conclusion that someone who entered the country by fraud is not “admitted” also renders the waiver at section 237(a)(1)(H) meaningless. Under that provision, the removal of a non-citizen under section 237(a)(1)(A) (for having been inadmissible at the time of “admission” for fraud or misrepresentation under section 212(a)(6)(C)) may be waived, assuming all other statutory requirements are met.  

Notably, the statute does not apply to individuals who are inadmissible under any other category at the time of admission; it only applies to inadmissibility at the time of entry under sections 237(a)(1)(A) and 212(a)(6)(C) where there was a misrepresentation at the time of admission.  

Under the court’s analysis in Orozco, however, someone who was inadmissible at the time of admission as a result of fraud can no longer seek a waiver under 237(a)(1)(H) because, technically, no “admission” ever took place.

It is a fundamental cannon of statutory construction that courts should not interpret one provision of a statute in a way that renders another part of the same statute superfluous. It is presumed that Congress was aware of section 237(a)(1)(H) when it passed IIRIRA in 1996 and it likely did not intend for the definition of section 101(a)(13)(A) to render that section of the Act

326. Orozco, 521 F.3d at 1071–72 (stating that “[t]he definitions found in 8 U.S.C. § 1101(a)(13)(A) apply to terms ‘used in [the] chapter’ containing 8 U.S.C. § 1255(a).”).


328. INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H); In re Guang Li Fu, 23 I. & N. Dec. 985, 988 (B.I.A. 2006) (concluding that “section 237(a)(1)(H) of the Act is best interpreted as authorizing a waiver of removability under section 237(a)(1)(A) based on charges of inadmissibility at the time of entry under section 212(a)(7)(A)(i)(I) of the Act, as well as under section 212(a)(6)(C)(i), where there was a misrepresentation made at the time of admission”).

329. See Orozco, 521 F.3d at 1071–72.

330. United States v. Beltran-Munguia, 489 F.3d 1042, 1054 (9th Cir. 2007) (citing United States v. Fish, 368 F.3d 1200, 1205 (9th Cir. 2004)); Schneider v. Chertoff, 450 F.3d 944, 954 (9th Cir. 2006) (“We strive to avoid constructions that render words meaningless.”) (quoting United States v. LSL Biotechnologies, 379 F.3d 672, 679 (9th Cir. 2004); Williamson v. C.I.R., 974 F.2d 1525, 1531 (9th Cir. 1992) (“We are not at liberty to impose upon a statute a construction that renders parts of its language nugatory.”). See also Ansari v. Qwest Commc’ns Corp., 414 F.3d 1214, 1218 (10th Cir. 2005) (“[i]t is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)); In re Artigas, 23 I. & N. Dec. 99, 100–01 (B.I.A. 2001).
meaningless. 331

Also, under the Orozco analysis, even people who did not engage in intentionally fraudulent activity, but whose entries were somehow invalid, may be forever barred from adjusting status under section 245(a). 332 For example, assume that a young man was granted a second preference category immigrant visa petition as the unmarried son of a lawful permanent resident while he was still unmarried. Then, after the man was granted the immigrant visa but before he entered the United States as a lawful permanent resident, the man marries, believing that such a marriage would have no effect on his status. The man then enters the United States without disclosing his marriage, as he thinks it is irrelevant and is not asked about his marital status. Even if the young man is later found to have been inadmissible at the time of entry for not having had a valid immigrant visa, he historically could have been eligible for adjustment of status with a waiver under INA section 237(a)(1)(H). Now, however, that individual is statutorily barred from adjusting, despite an innocent misrepresentation (or failure to disclose information). 333

Finally, the court’s analysis in Orozco leads to a peculiar discrepancy. Under its analysis, individuals who misrepresented material facts on their adjustment of status applications or lied to an immigration officer about a material fact in an adjustment interview may still adjust their status if they obtain a 212(i) waiver and are otherwise eligible to adjust. 334 An individual like Orozco, however, who committed fraud upon entry, is forever barred as a matter of law.

One of Congress’s many amendments to section 245(a) was to remove the overly restrictive requirement of allowing only bona fide nonimmigrants to adjust their status to lawful permanent residents. 335 Aside from a few limited exceptions, the Orozco court’s overly-narrow interpretation of “admitted” takes us several steps back to a point where non-citizens who are otherwise eligible

331. Doe v. Kamehameha Sch., 470 F.3d 827, 847 (9th Cir. 2006) (“we assume that Congress is aware of existing law when it passes legislation”) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).
332. See INA § 245(a), 8 U.S.C. § 1225(a).
333. Id.
334. See Orozco, 521 F.3d at 1071–73.
335. See id.
337. See, e.g., INA §§ 245(i), 8 U.S.C. § 1255(i) and 212(k), 8 U.S.C. § 1182(k).
to adjust status must, once again, leave their families and go abroad to secure immigrant visas. This seems contrary to Congressional intent, as the waiver under INA section 212(i) was created to forgive certain misrepresentations and promote family unity (as was INA section 237(a)(1)(H)).

Moreover, requiring such individuals to travel abroad in order to secure immigrant visas creates a whole host of additional problems for the intending immigrant, as set forth in Part V(B) below.

Furthermore, had the court determined that a 212(i) waiver was available to Orozco and others in his situation, it could have determined that it had the authority to apply the waiver nunc pro tunc to Orozco’s entry. Had it done so, it would have then remanded the case to the agency to adjudicate the 212(i) waiver. If the 212(i) waiver were then granted nunc pro tunc, Orozco would have unquestionably made a lawful admission, would be admissible, and could be granted adjustment of status.

D. The Court’s Concerns Over “Absurd Results” Are Already Addressed by the Statute

The Ninth Circuit cited two criminal fraud statutes in support of its finding that Orozco’s entry into the United States was unlawful. The court then concluded that it would be an “absurd result” to find Orozco’s entry, while criminal, is lawful for purposes of section 245(a).

The court further said that Orozco was
essentially asking it to “turn a blind eye to criminal and fraudulent acts underlying his entry . . . .” The court certainly has a right to be concerned about criminal and fraudulent acts. However, Congress has already provided ample means by which to address this behavior in the form of discretionary bars, strict waiver standards, and inadmissibility and removal provisions. These provisions do not permit non-citizens like Orozco who engage in fraud to be simply let off the hook, as the court seems to intimate.

First, if Orozco is found to have been “inspected and admitted” under section 245(a), he still has the burden of proving his admissibility to the United States. Orozco, however, is not admissible because he engaged in fraud when he entered the United States with a false alien registration card, thereby falling within INA section 212(a)(6)(C)(i). As previously discussed, one of the main reasons Congress enacted this section of inadmissibility was to “prevent non-citizens from securing entry into the country by fraudulent means and then, when the fraud is discovered, proceeding with an immigration application as if nothing happened.” Because Orozco is inadmissible, in order to overcome the admissibility requirement in INA section 245(a), he must seek a waiver under the narrow standards set forth in section 212(i), which requires establishing extreme hardship to either a U.S. citizen or lawful permanent resident spouse or parent.

Assuming, then, that Orozco is statutorily eligible for adjustment of status pursuant to section 245(a) and meets the discretionary and statutory requirements of section 212(i), his adjustment application may still be denied as a matter of discretion under sections 245(a) and 212(i).
Additionally, individuals who gain entry into the United States by fraud within the meaning of section 212(a)(6)(i) are subject to removal from the country under section 237(a)(1)(A). Indeed, the Board recently pointed this out in In re Orellana de Barden, noting that while the respondent could not be charged under the grounds of inadmissibility for having entered without inspection (because she was indeed “admitted”), there is a ground of removability for someone who was inadmissible at the time of entry.

Finally, section 274(C) of the Act specifically imposes penalties in the form of a fine on a non-citizen who uses a document belonging to someone else for purposes of obtaining an immigration benefit under the Act. Moreover, as the Ninth Circuit pointed out, other criminal statutes exist to potentially punish someone for using counterfeit documents to enter the United States.

349. INA § 274C(a)(3), 8 U.S.C. § 1324c(a)(3) (stating “[i]t is unlawful for any person or entity knowingly to use . . . any document lawfully issued to . . . a person other than the possessor . . . for the purpose of . . . obtaining a benefit under this chapter . . .”).
350. See, e.g., 18 U.S.C. §§ 1001(a)(1)–(3) (2006) (making it a federal crime to knowingly and willfully make a false or fraudulent statement or make use of a false writing or document knowing the same to contain false or fraudulent statement or entry). See also id. § 1028(a)(7) (prohibiting an individual from using a means of identification of another person with the intent to commit an unlawful activity that constitutes a violation of federal law); Orozco v. Mukasey, 521 F.3d 1068, 1072 (9th Cir. 2008).
Therefore, finding Orozco to have been “admitted” into the United States does not lead to an “absurd” contradiction because numerous measures already exist for addressing the fraudulent nature of his entry into the United States. Going beyond these measures and adopting such an overly-restrictive interpretation, which overlooks years of precedent decisions by the agency and the courts, that renders other provisions of the statute meaningless, and forever bar individuals otherwise eligible from adjusting status, seems inequitable, incorrect, and unnecessary.

V. OROZCO: WHAT DOES IT MEAN AND WHAT LIES AHEAD

A. Impact of the Orozco Decision on the Courts and on the Agency

Despite its Recent Vacature

Orozco v. Mukasey was a published decision, which meant that it was binding law in the Ninth Circuit until its vacature in October 2008. On May 8, 2008, Orozco and respondent Michael Mukasey, Attorney General, filed a joint motion with the Ninth Circuit to refer the matter to mediation and stay the issuance of the court’s mandate. The basis for the motion was that ICE charged Orozco with being removable under INA section 237 in the Notice to Appear, the charging document in removal proceedings. As previously discussed, however, such a charge only applies if a non-citizen has been admitted into the country. INA section 212, in contrast, applies to non-citizens who have not been admitted into the United States. The Ninth Circuit granted the joint motion on May 12, 2008, and referred the case to the court’s mediation

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351. See Ninth Circuit, Cir. Rule 36-1 (stating “[a]s used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited”) and Cir. Rule 36-3 (stating that “[t]he published dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”), available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/9254af0b51940d288257316006b45-id/$FILE/FRAP_0707.pdf. See infra Part V for information about the authority of the decision on Immigration Judges and the BIA.

352. Orozco v. Mukasey, 521 F.3d 1068 (9th Cir. 2008), appeal docketed, No. 06-70521 (9th Cir. Oct. 24, 2008) [hereinafter Orozco Appeal]. See also AILF PRACTICE ADVISORY, supra note 77.

353. Co-author’s conversation with counsel for Brian Orozco.

354. See supra Part II.C.1.

355. See generally INA §§ 212 and 237.
In the meantime, Orozco also filed a petition for rehearing with the Ninth Circuit on May 9, 2008. Additionally, the parties filed a joint motion to reopen proceedings with the BIA. The BIA granted the parties’ motion, reopened the case, and remanded it back to the Immigration Judge for further proceedings. Counsel for Orozco then filed a Motion to Reconsider the Remand to the Immigration Judge and requested additional briefing at the Board. Following the Board’s decision granting the motion to reopen, the parties filed a joint Motion to Vacate Published Decision and Voluntary Dismissal of Petition For Review on October 7, 2008, with the Ninth Circuit. The decision was vacated on October 20, 2008. Additionally, the Board granted the request for additional briefing. Assuming extension requests are granted, the brief for the petitioner Orozco is due at the Board on December 8, 2008.

Although the decision has been vacated, there is concern within the immigrant advocate community that the Ninth Circuit has now provided the tools for other circuit courts and the BIA to issue similar published opinions that will affect immigrants throughout the country. Likewise, advocates are also concerned that the CIS and immigration judges nationwide will apply the reasoning in Orozco as a means to limit the scope of non-citizens who can adjust their status in the United States. Moreover, the case of Orozco is not over. Counsel for Orozco and a team of immigration attorneys around the country are preparing to brief the case before the BIA once again and urge a different outcome.
If the outcome does not change and if other circuits follow the lead of the Ninth Circuit in *Orozco*, however, any individual who entered the United States without valid documentation who seeks to apply for adjustment of status in any of the states that fall within that particular circuit would be denied such opportunity.

Moreover, once the BIA has the opportunity to hear the issues in *Orozco* for a second time, it could choose to publish the decision using the detailed reasoning that has been gift wrapped for the Board in the Ninth Circuit’s now vacated decision, thereby making the decision binding on cases throughout the country (except for those that arise out of circuits where the appellate court has rendered decisions contrary to the Ninth Circuit’s). \(^{367}\) Similarly, should Orozco’s case get resolved without the BIA needing to reach the issues addressed by the Ninth Circuit, the BIA could just as easily issue a similar precedent decision on the issue having the same, if not greater, effect on non-citizens seeking to gain legal status in the United States.

B. Anticipated Impact on Immigrants and Their Families

Although it is difficult to gauge the full effect of *Orozco* up until this point, the impact of the decision on immigrants and their families is likely to be immense. Previously, individuals who entered without proper documentation were allowed the opportunity to apply for adjustment of status. \(^{368}\) Now, they could be statutorily barred from adjusting their status and are being cautioned by practitioners, including the author, against applying for the benefit altogether. \(^{369}\)

\(^{367}\) BIA Practice Manual, § 1.4(d)(i) (rev. July 30, 2004), http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm (stating that “[p]ublished decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS”); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1013 (9th Cir. 2006) (noting that only “selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents”) (citing 8 C.F.R. § 1003.1(g) (2006)).


\(^{369}\) Though *Orozco* is no longer the law of the Ninth Circuit, immigration practitioners are reluctant to affirmatively apply for adjustment of status for individuals in a similar situation to Orozco. Eds. For example, it is the practice of this co-author at this time to advise her clients to not apply for adjustment of status if they have an entry similar to that of Orozco’s because she believes that the alternative would be putting her clients at risk of being denied residency and
Because of this major change in analysis, many non-citizens will potentially face a situation similar to that in 1952 by having to undertake a trip abroad to secure their immigrant visas. The consequences of departing the United States, however, are much greater today than they were in 1952. Of those individuals who may need to travel abroad, countless will now require unlawful presence waivers under INA section 212(a)(9)(B)(v) for having been in the United States without legal status for a period of over 180 days. For those who require such a waiver, the disadvantages are much more than the cost of traveling abroad. First, not all non-citizens are eligible for an unlawful presence waiver. In order to be eligible for a waiver, one must have the necessary qualifying relative relationship, including a U.S. citizen or lawful permanent resident parent or spouse. Similar to the waiver under INA section 212(i), U.S. citizens and lawful permanent resident children of the non-citizen do not count as qualifying relatives.

placed in removal proceedings.

370. See 22 C.F.R. Part 42 (regarding immigrant visa processing from abroad). See also former INA § 245(i), which was repealed by legislation (allowing non-citizens who were not inspected to nevertheless adjust their status under section 245(a), but only if they are beneficiaries of a visa petition or labor certification filed on or before April 30, 2001, and can prove their physical presence in the United States on a particular date); INA § 245(c), 8 U.S.C. § 1255(c) (2006) (permitting, generally speaking, adjustment of status under INA section 245(a) for certain individuals who accept unauthorized employment, who are in unlawful immigration status, or who fail to continuously maintain lawful status since entry into the United States, but not allowing the same for individual who were not “inspected and admitted” within the meaning of section 245(a). See also Tamara K. Fogg, supra note 65, at 39, 40 (stating “[a]lthough [section 245] eliminated pre-examination with passage of the 1952 Act, Congress did not replace the procedure with a satisfactory substitute . . . . Therefore, under the 1952 Act, most aliens then residing in the United States who would be qualified for permanent residency had no real option but to travel to their homeland . . . .”).


372. INA § 212(a)(9)(B)(v) sets forth the requirements for the waiver: The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.


374. Id.
Furthermore, the mere existence of qualifying relatives is insufficient to meet the requirements of the unlawful presence waiver. The non-citizen must prove that the relative would suffer “extreme hardship” if the non-citizen were unable to return to the United States. The Board has interpreted the “extreme hardship” requirement and has found that such hardship must go beyond that which a family member would normally suffer if he or she were removed from the United States. Specifically, the Board has determined that the “extreme hardship” inquiry with respect to a waiver of inadmissibility is essentially the same as that to be made when reviewing an application for suspension of deportation under former INA section 244. The Board has set forth various factors to be considered in making an extreme hardship determination. These factors are:

[T]he presence of lawful permanent resident or United States citizen family ties to this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties to such countries; the financial impact of departure from this country; and, finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

Thus, one can see that not all applicants will be able to meet the high extreme hardship standard. If a non-citizen is denied the

375. Id.
376. See United States v. Becerril-Lopez, 541 F.3d 881, 886 (9th Cir. 2008) (stating that “[t]o demonstrate the ‘extreme hardship’ required by the statute, the defendant must show that the consequences of his being removed would go beyond the common results of deportation, such as a loss of financial support for relatives in the United States”) (internal quotations omitted) (citing United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1998)). See also Shooshtary v. I.N.S., 39 F.3d 1049, 1051 (9th Cir. 1994) (stating “[a]s we have stated before, the common results of deportation or exclusion are insufficient to prove extreme hardship”) (internal quotations omitted) (citing Hassan v. I.N.S., 927 F.2d 465, 468 (9th Cir. 1991)).
377. See In re Cervantes-Gonzalez, 22 I. & N. Dec. 560, 565 (B.I.A. 1991) (“[W]e find the factors articulated in cases involving suspension of deportation and other waivers of inadmissibility to be helpful, given that both forms of relief require extreme hardship and the exercise of discretion.”). See also In re Kao and Lin, 23 I. & N. Dec. 45, 49 n.3 (B.I.A. 2001) (“The standard for ‘extreme hardship’ that we apply in the present [suspension of deportation] case is the same as that applied in cases . . . involving waivers of inadmissibility under section 212(i) of the Act.”).
waiver, then he or she must wait outside the United States for a period of three or ten years, depending on the length of unlawful presence. Thus, all individuals affected by Orozco who attempt to obtain lawful permanent residency risk being stuck outside of the country for many years and separated from family and friends in the United States in the interim.

Similarly, but even more significantly, if the courts and the government interpret “admission” as the Ninth Circuit did in Orozco, a great deal of individuals will now be subject to the “permanent bar” under section 212(a)(9)(C) and ineligible for any waivers. Under that section, any non-citizen who was previously deported or removed from the United States or who accrued over one year of unlawful presence and who then “enters or attempts to enter the United States without being admitted” is inadmissible. Thus, once again, the term “admission” becomes critical to the equation. Individuals in the above situation who were “admitted” are not subject to the permanent bar; individuals not “admitted” are permanently inadmissible.

Prior to the Orozco decision, many non-citizens who had previously received orders of removal or had accrued over one year of unlawful presence, departed the country, and subsequently reentered without proper documentation were nevertheless eligible to apply for adjustment of status in conjunction with the appropriate waivers. This is because their subsequent reentry


380. INA § 212(a)(9)(C)(i) provides "[a]ny alien who (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible." INA § 212(a)(9)(C)(i). Inadmissibility under this section is commonly referred to as the “permanent bar” within the immigration community. Id.


382. INA § 212(a)(9)(C)(iii) contains a limited exception to the permanent bar. Under this section, an individual subject to the permanent bar may seek advance permission to reapply for admission once he or she has remained outside of the United States for a period of ten years. INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182 (a)(9)(C)(iii).

383. Individuals who previously received orders of removal were eligible to apply for adjustment of status in conjunction with waiver under INA
into the United States was still considered an “admission.” Now, under the *Orozco* analysis, such individuals would be subject to the permanent bar because their subsequent entry without proper documentation is not considered an “admission.”

Thus, if the BIA and other circuit courts follow the *Orozco* analysis, it is quite likely that the expected increase in the need for waivers and rise in individuals subject to the permanent bar will have significant and devastating effects on immigrants and their families as they cope with the resulting temporary and permanent separations from one another.

VI. CONCLUSION

Someone like Brian Orozco who gained entry into the United States by presenting a false document to an immigration officer is subject to serious immigration and criminal consequences under the Act and other federal statutes. But it is contrary to BIA precedent, the canons of statutory construction, and is wholly inequitable to determine, as the court in *Orozco* originally did, that one of those consequences is a permanent statutory bar to

§ 212(a)(9)(A)(iii); this provision allows an individual to seek permission to reapply for admission after having been ordered deported or removed. INA § 212(a)(9)(A)(iii), 8 U.S.C. § 1182(a)(9)(A)(iii). Similarly, individuals who had accrued an aggregate period of more than one year of unlawful presence in the United States, left the country, and later entered the United States without proper documentation could apply for adjustment of status with an unlawful presence waiver under INA § 212(a)(9)(B)(v). INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v).

384. Additionally, individuals who were previously ordered removed may also be subject to reinstatement of the old removal order under section 241(a)(5), which states:

> [if] the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.


385. See *Orozco*, 521 F. 3d at 1071–72 (stating “[t]he term ‘admitted’ is . . . defined in 8 U.S.C. § 1101(a)(13)(A) [INA § 101(a)(13)(A)]. According to the statutory definition . . . ‘admission’ mean[s], with respect to an alien, the lawful entry of the alien into the United States . . . . The definitions found in 8 U.S.C. § 1101(a)(13)(A) [INA § 101(a)(13)(A)] apply to terms ‘used in [the] chapter . . . . We further conclude that lawful entry requires more than simply presenting oneself for inspection and being allowed to enter the United States.”).
adjusting status under section 245(a). Contrary to the court’s finding, the precedent and the overall statutory language support a finding that someone in Orozco’s situation has been “admitted” to the United States for purposes of section 245(a) and should have the opportunity to seek adjustment of status along with the necessary waiver(s) of inadmissibility.

In its original Orozco decision, however, the Ninth Circuit reached a different conclusion. According to the Ninth Circuit, the language of the relevant statutory provisions requires a lawful entry into the United States, which means something more than just presenting oneself for inspection and being allowed to proceed into the country. Yet, as previously discussed, the definition of the term “admission” does not unambiguously lead to the court’s conclusion. Rather, courts have previously interpreted the term “admission” to mean something other than the “lawful entry” definition now set forth in the Act. Given the imprecise nature of the meaning of the term, and the occasional disparate treatment of its meaning, the Ninth Circuit should have given weight to Areguillin, the BIA precedent decision that addresses the term specifically within the context of the provision at issue in Orozco: section 245(a). Yet, the court determined that Areguillin was of no persuasive value in light of IIRIRA. As discussed, however, the BIA has never overruled Areguillin in a published decision and numerous sources continue to cite the decision as the standard for determining whether a non-citizen has been “admitted” within the meaning of 245(a). If the court understood Areguillin to be overruled by the change in the statute, it should have at least given the agency the first opportunity to fully address the issue in light of IIRIRA and provide a more thorough explanation before deciding the matter itself.

Additionally, absurd results follow from, and are not avoided by, the Ninth Circuit’s overly-narrow interpretation of “admission” because it produces inconsistent results within section 237(a)(1)(A) and renders section 237(a)(1)(H) meaningless.

Numerous measures already exist in the statute to address the court’s concern about absurd results if it followed Orozco’s argument. Orozco is in fact penalized by provisions such as sections 212(a)(6)(C)(i) and 237(a)(1)(A), the narrow standards of the corresponding waiver provisions, and criminal fraud statutes for his fraudulent manner of entry. Congress did not turn a “blind
eye” to fraudulent or criminal behavior when it enacted these provisions. In subjecting himself to such provisions, by applying for an immigration benefit under section 245(a), Orozco is not asking the court to do so either.

Although the vacature of the published decision has, for now, been beneficial to Brian Orozco and all of those individuals in his situation sitting in the Ninth Circuit, immigration practitioners throughout the country are prepared for its analysis to live on and be applied by the CIS, immigration courts, BIA, and circuit courts. Thus, despite the vacature of the decision, the Orozco issue is likely to surface again in the future. Accordingly, the Board, when reconsidering Orozco’s case, should issue a published decision clarifying once and for all the meaning of “admitted” in the context of INA section 245(a) in light of the statutory definition added by IIRIRA. Such a definition should remain consistent with the long-standing definition set forth by the Board’s decision in In re Areguillin. In a new decision, the Board should follow its precedent and find that an individual who was inspected at a port-of-entry and allowed to enter the United States has been “admitted” for purposes of INA sections 101(a)(13) and 245(a).

386. See Orozco, 521 F.3d at 1072 (stating that “[i]n essence, Orozco asks us to turn a blind eye to criminal and fraudulent acts underlying his entry . . . ”).