COMMENT AND CASENOTE

BEYOND AGENCY AUTHORITY: ADMINISTRATIVE ELIMINATION OF STATUTORY ELIGIBILITY FOR LAWFUL PERMANENT RESIDENCE

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The U.S. Department of Justice and Department of Homeland Security has consistently attempted to make the process of becoming a lawful permanent resident of the United States difficult, at best. A 1997 Department of Justice regulation made this process impossible for a certain class of immigrants known as parolees, despite the fact that the Immigration and Nationality Act explicitly allowed these parolees the opportunity to become lawful permanent residents. The Department later withdrew this regulation because of the controversy it created in the federal circuit courts of appeal. However, new proposed regulations threaten to harm the position of immigrants in a similar impermissible fashion. This Comment explains how the actions of the Department of Justice and the Department of Homeland Security contravene Congress's explicit commands and are inherently unfair to a valuable class of immigrants.

INTRODUCTION

Delia Ramos Bona is a Filipino citizen whose husband served in the

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United States Navy for 19 years.[1] In 1991, when the military removed its personnel from the Philippine Islands due to the eruption of Mount Pinatubo, the Bonas were evacuated to the United States at the military's insistence.[2] The U.S. government paid for the Bonas' transportation.[3] When Delia and her family reached the United States, they were "paroled," meaning that even though they were not considered legally "admitted" to the country, they were allowed to go about their business in the United States.[4] Later that year, Delia's husband Rolando was naturalized and became a U.S. citizen.[5] At that time, Delia applied to adjust her immigration status to that of a lawful permanent resident ("LPR").[6] The Immigration and Naturalization Service ("INS") denied her application because of an allegation that Rolando's immigrant visa and subsequent citizenship had been fraudulent.[7] The fraud was never adjudicated, and the INS never attempted to revoke Rolando's citizenship,[8] nor did it attempt to revoke the visa given to Delia when the family arrived in the United States.[9] The INS then granted the Bonas' children permanent resident status, and they later became citizens.[10] Eight years later, in 1999, the INS decided to initiate removal proceedings against Delia.[11]

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1. Bona v. Gonzales, 425 F.3d 663, 664 (9th Cir. 2005).
2. *Id.* at 665.
3. *Id.*
4. "Parole" in the context of immigration law "has been described as a fiction involving an individual who happens to be at liberty within the territorial confines of the U.S. borders, but whose legal status is the same as that of an individual who is at the threshold of the U.S. border asking to come in." Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, 05—11 Immigr. Briefings (West) 1 (Nov. 2005). "The purpose of parole is to permit a non-citizen to enter the United States temporarily while investigation of eligibility for admission takes place." Succar v. Ashcroft, 394 F.3d 8, 15 (1st Cir. 2005). The Department of Homeland Security 2003 Yearbook of Immigration Statistics defines a parolee as "an alien, appearing to be inadmissible to the inspecting officer, allowed into the United States for urgent humanitarian reasons or when the alien's entry is determined to be for significant public benefit. Parole does not constitute a formal admission to the United States and confers temporary status only, requiring parolees to leave when the conditions supporting their parole cease to exist." DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 190 (2003), *available at* http://uscis.gov/graphics/shared/statitics/yearbook/2003/2003Yearbook.pdf. There are several types of parole, including deferred inspection parole, advance parole, port-of-entry parole, humanitarian parole, public interest parole, and overseas parole. *See id.* at 190–91.
5. *Bona*, 425 F.3d at 665.
6. *Id.*
7. *Id.*
8. The INS would not have been able to revoke Rolando's citizenship because of his long service in the United States military. *Id.* at 666.
9. *Id.*
10. *Id.*
11. *Id.*

Delia at this time was still considered a parolee.[12] An immigration judge determined that Delia, as a parolee, was also an "arriving alien" and thus was not eligible to apply for permanent residence.[13] As there was no remedy for Delia's situation other than adjustment, the immigration judge ordered that Delia be removed to the Philippines, away from her husband and three children.[14] In her appeal to the Ninth Circuit, Delia argued that she should have been allowed to apply for adjustment of status to lawful permanent resident.[15]

Why did the INS refuse to allow this woman to apply to become a permanent resident of the United States and thus avoid being removed, away from her family, back to the Philippines? The U.S. military had forced her to move to the United States, she was an eight-year resident of this country, the long-time wife of a devoted U.S. military serviceman, and the mother of three naturalized U.S. citizens. The INS barred Delia from applying to become a permanent resident because of 8 C.F.R. § 245.1(c)(8) ("the regulation," "the old regulation," or "the now-repealed regulation"), a regulation promulgated by the Department of Justice ("DOJ") in 1997. The regulation provided that certain categories of aliens were "ineligible to apply for adjustment of status to that of a lawful permanent resident under section 245 of the [Immigration and Nationality] Act."[16] Under the list of ineligible aliens, the regulation included "[a]ny arriving alien who is in removal proceedings pursuant to section 235(b)(1) [(expedited removal procedures)] or section 240 [(standard removal procedures)] of the Act."[17] The regulation has since been repealed,[18] but the issues surrounding its enforcement have not dis-

12. *See id.*

13. *See id.* An "arriving alien" is defined by the INS regulations in 8 C.F.R. § 1.1(q) (2005) as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled . . . ." "Arriving aliens" is a category which includes parolees. *See* Zheng v. Gonzales, 422 F.3d 98, 118 (3d Cir. 2005) ("Thus 'arriving aliens' appears to encompass most or all of those aliens who are paroled into the United States, as well as many of those aliens who are detained by DHS. Indeed, in its supplemental briefing, the government states that '[a] parolee is an 'arriving alien' who has been permitted temporary entry into the United States, as opposed to a non-parolee 'arriving alien' who has been detained for removal proceedings.'").

14. *Bona*, 425 F.3d at 666.

15. *See id.* at 666–67.

16. 8 C.F.R. § 245.1(c) (2005).

17. *Id.* § 245.1(c)(8) (repealed 2006).

18. Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585 (May 12, 2006) [hereinafter Eligibility of Arriving Aliens].

appeared. Newly proposed regulations threaten similar harm to other parolees attempting to become LPRs.[19]

In 1996, long after Delia Bona's original parole, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which requires all arriving aliens (including parolees) who are not "clearly entitled to be admitted" to be placed in removal proceedings.[20] Very few aliens are considered "clearly entitled to be admitted," and thus practically everyone paroled into the country is put into removal proceedings at the time they enter the United States.[21] The now-repealed regulation exacerbated the harshness of this statute by categorically excluding parolees, who had been in removal proceedings since they arrived, from ever applying for adjustment of status to lawful permanent residence. The regulation precluded even immigrants like Delia Bona, whose entire families lived, worked, and served in the United States, from eligibility for adjustment of status. These aliens could apply for adjustment of status after their removal proceedings ended; but given that the removal proceeding occurred for the purpose of "removing" them, many could be forced to leave the country before they ever had the chance to try for adjustment.

The circuit courts and interested parties disagreed on whether Congress delegated authority to the Attorney General, under the adjustment-of-status provision of the Immigration and Nationality Act ("INA"),[22] to categorically exclude all arriving aliens[23]—and thus most parolees[24]—from applying to adjust their status. This disagreement caused a split in the federal courts of appeal, which led to the agency's repeal of the regu-

19. *See id.* at 27,588–89 (interim rule effective May 12, 2006) (repealing 8 C.F.R. § 245.1(c)(8)).

20. *See* discussion *infra* Part I; 8 U.S.C. § 1225(b)(2)(A) (2000) (requiring that unless it is "clear[ ] and beyond a doubt" that an applicant for admission [a category which includes all parolees under 8 U.S.C. § 1225(a)(1)] is entitled to be admitted, that applicant for admission will be placed in a removal proceeding).

21. *See* discussion *infra* Part I. Some courts have disagreed and have said that there is not enough evidence to show that most parolees are in removal proceedings. *See* Momin v. Gonzales, 447 F.3d 447, 460 (5th Cir. 2006); Mouelle v. Gonzales, 416 F.3d 923, 930 n.9 (8th Cir. 2005).

22. 8 U.S.C. § 1255(a) ("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.").

23. *See supra* text accompanying note 13; *see infra* text accompanying note 33 (describing the definition of "arriving alien" and how this category includes parolees).

24. *See supra* text accompanying note 13; *see infra* text accompanying note 33 (describing the definition of "arriving alien" and how this category includes parolees).

lation.[25] This Comment argues that the repeal of 8 C.F.R. § 245.1(c)(8) did not solve the problems inherent in its previous operation. The interim rules, which replace the now-repealed regulation, carry a decidedly anti-adjustment tone: adjustment to lawful permanent residence appears nearly impossible for parolees.[26] Legislative history, regulatory history, canons of statutory construction in immigration law, and public policy suggest that the old regulation was invalid under the INA, and that the newly proposed regulations have similar flaws.

The purpose of this Comment is threefold: first, to illustrate the upsetting recent history of agency treatment of parolees and adjustment; second, to argue that the relevant government agencies[27] can and should change their course; and third, to guide practitioners through the ambiguity that exists while the interim rule is in effect. Part I discusses the history and demise of 8 C.F.R. § 245.1(c)(8) and lays out the major legal issues that arose when the circuit courts addressed adjustment of status by parolees. Part II describes the legislative history of INA § 245(a) and other provisions that affect parole and adjustment of status. It illustrates Congress's intent to allow parolees to adjust their status to lawful permanent residents and demonstrates how the now-repealed regulation and the new proposed regulations contravene that intent. Part III analyzes the history of the now-repealed regulation and illustrates that barring parolees from eligibility for adjustment was most likely a mistake or an unintended consequence on the part of the INS. Part III also addresses the

25. *See Momin*, 447 F.3d at 457, 460 (holding regulation valid); Scheerer v. U.S. Att'y Gen., 445 F.3d 1311, 1322 (11th Cir. 2006) (holding regulation invalid); Bona v. Gonzales, 425 F.3d 663, 664 (9th Cir. 2005) (holding regulation invalid); Zheng v. Gonzales, 422 F.3d 98, 116 (3d Cir. 2005) (holding regulation invalid); *Mouelle*, 416 F.3d at 929 (holding regulation valid); Succar v. Ashcroft, 394 F.3d 8, 9 (1st Cir. 2005) (holding regulation invalid); Eligibility of Arriving Aliens, *supra* note 18, at 27,587.

26. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27,589 ("[Arriving aliens such as parolees] generally could have and should have sought and obtained an immigrant visa from a consular officer abroad, rather than arriving at a port-of-entry as a putative nonimmigrant . . . . [T]he Secretary and the Attorney General may use rulemaking to limit the exercise of discretion to grant forms of relief to those aliens who have attempted to evade the consular visa process by seeking parole into the United States and then applying for adjustment of status.").

27. The agencies referred to here are the Executive Office of Immigration Review in the DOJ and the United States Citizenship and Immigration Services ("USCIS") in the Department of Homeland Security (DHS). Both of these agencies have some amount of authority over immigration law: the immigration courts are housed in DOJ's Executive Office of Immigration Review, and this agency conducts removal proceedings. Several other immigration functions are housed in DHS's USCIS, which reviews applications for adjustment of status and processes visa applications. At one time all of the immigration functions were housed within INS (in DOJ), but many immigration functions were transferred to the DHS after that department was formed. The statute that allows parole, INA § 245(a), still designates the Attorney General as the one to make a parole decision, but the regulations pursuant to that statute refer to the Secretary of Homeland Security as the one who has the discretion to parole aliens.

agencies' new regulation proposals and shows how these proposals do not comport with the Administrative Procedure Act's ("APA") requirements. Part IV discusses traditions of statutory construction in immigration law and how those traditions favor interpreting the INA in such a way as to preclude the newly proposed restrictions on parolee adjustment. Part V discusses policy concerns of fairness and the hardship that both the now-repealed regulation and the newly proposed regulations cause parolees, a category of aliens who are statutorily eligible to become legal permanent residents of the United States. Part VI suggests that the relevant agencies, the DOJ's Executive Office of Immigration Review and the Department of Homeland Security's United States Citizenship and Immigration Services ("the agencies"), are in an excellent position to change the course of parolee adjustment and should do so. Part VI also addresses how parolees who want to become lawful permanent residents should proceed in the wake of the interim rule that replaced 8 C.F.R. § 245.1(c)(8).

I. THE LEGAL DEBATE SURROUNDING PAROLEE ADJUSTMENT

Congress provided for parolee adjustment of status at the discretion of the Attorney General in INA § 245(a).[28] Congress also required that most, if not all, parolees be in removal proceedings at any given time, as the following explanation demonstrates.

An alien who is currently paroled is not considered "admitted" to the United States.[29] INA § 235(a)(1)[30] provides that "[a]n alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission."[31] Thus, a parolee who is necessarily present in the United States but not considered admitted, is considered an "applicant for admission."[32] Parolees are also considered to be "arriving aliens," a term with a similar definition to that of

28. 8 U.S.C. § 1255 (2000) ("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.").

29. *Id.* § 1101(a)(13)(B) ("An alien who is paroled under section 1182(d)(5) [INA § 212(d)(5)] of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.").

30. *Id.* § 1225(a)(1).

31. *Id.*

32. *Id.*

"applicants for admission."[33] INA § 235 states that aliens who are applicants for admission are to be detained for an INA § 240[34] proceeding, which is a removal proceeding conducted for the purpose of "deciding the inadmissibility or deportability of an alien,"[35] if "the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted."[36] Unless it is "clear and beyond a doubt" that an applicant for admission (including all parolees) is entitled to be admitted, that applicant for admission will be placed in a removal proceeding.[37]

An alien could be determined inadmissible for a number of reasons, ranging from having a communicable disease of public health significance,[38] or being "likely at any time to become a public charge," to having been a stowaway,[39] or having evaded the draft.[40] Given the plethora of ways in which an alien can be considered "inadmissible," and given

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33. The regulatory term "arriving alien" is closely correlated to the statutory term "applicant for admission." "Arriving alien" is defined by the INS regulations in 8 C.F.R. § 1.1(q) as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled." 8 C.F.R. § 1.1(q) (2000). The term "arriving alien" appears to have the same meaning as the term "applicant for admission" used in 8 U.S.C. § 1225(a)(1) [INA § 235(a)(1)]: "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." Just as "parolee" is included in the definition of "applicant for admission," the term "arriving alien" also covers most parolees: a parolee is statutorily an "applicant for admission" and remains such "even if paroled." *See* 8 U.S.C. § 1101(a)(13)(B) (2000) ("An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted."); 8 U.S.C. § 1225(a)(1) (defining "applicants for admission"); Momin v. Gonzales, 447 F.3d 447, 452 (5th Cir. 2006) ("By regulation, the Attorney General created a sub-class of applicants for admission, the arriving alien .... For the purposes of our analysis, an arriving alien is the same as an applicant for admission."); Zheng v. Gonzales, 422 F.3d 98, 118 (3d Cir. 2005) ("Thus, 'arriving aliens' appears to encompass most or all of those aliens who are paroled into the United States, as well as many of those aliens who are detained by DHS. Indeed, in its supplemental briefing, the government states that '[a] parolee is an 'arriving alien' who has been permitted temporary entry into the United States, as opposed to a non-parolee 'arriving alien' who has been detained for removal proceedings.").

34. 8 U.S.C. § 1229a.

35. *Id.* § 1229a(a)(1).

36. *Id.* § 1225(b)(2)(A). This procedure of placing any alien who is not clearly and beyond a doubt entitled to be admitted into removal proceedings does not apply to aliens seeking asylum whose "credible fear of persecution" is being determined. *See Id.* § 1225(b)(1)(A)–(F); § 1225(b)(2)(B).

37. 8 U.S.C. § 1225(b)(2)(A).

38. *Id.* § 1182(a)(1)(A)(i).

39. *Id.* § 1182(a)(6)(D).

40. *Id.* § 1182(a)(8)(B).

the necessity of gathering evidence to determine whether or not an alien fits into any of the inadmissibility categories, it is unlikely that an immigration officer will be able to immediately determine, without further investigation, that an applicant for admission is "clearly and beyond a doubt" entitled to be admitted.[41] Thus, most applicants for admission, including parolees, are necessarily placed in removal proceedings.[42] The statutory scheme has the practical effect of ensuring that, at any given time, almost all parolees will be in the midst of removal proceedings.[43]

Thus, the INA contemplates both (a) parolees being able to adjust their status,[44] and (b) most parolees being in removal proceedings.[45] Any regulations put in place should be consistent with both of these statutory requirements. The repealed regulation did not comply with these requirements. Since parolees are "arriving aliens,"[46] and since most parolees are necessarily in removal proceedings,[47] the regulation had the effect of barring parolees from adjusting their status.[48]

Courts have addressed several different arguments regarding the meaning of INA § 245(a)[49] and the Attorney General's statutory authority to promulgate the now-repealed regulation, 8 C.F.R. § 245.1(c)(8). Interested parties argued over whether Congress gave the Attorney General authority to categorically exclude parolees from eligibility for adjustment of status, whether the regulation passed muster under *Chevron's* two-pronged analysis of agency interpretations of law, and whether, if the Attorney General had discretionary authority to promulgate the regulation, he abused that discretion.

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41. *Id.* § 1225(b)(2)(A).

42. *See Id.*; *see also* Zheng v. Gonzales, 422 F.3d 98, 117 (3d Cir. 2005) (citing 8 U.S.C. § 1225(b)(2)(A)) ("More compelling than any statistic, however, is the statutory structure that indicates that parolees will, by default, be in removal proceedings: any alien 'not clearly and beyond a doubt entitled to be admitted' will be placed in removal proceedings, so any parolee—that is, any alien who has been inspected but not admitted—will necessarily be in removal proceedings.").

43. *See Zheng*, 422 F.3d at 117 ("Thus, the statutory structure seems to indicate that virtually all parolees will be in removal proceedings. . . . It is clear from the statutory text that Congress intended for virtually all parolees to be in removal proceedings.").

44. 8 U.S.C. § 1255(a).

45. *Id.* § 1225(b)(2)(A); *see Zheng*, 422 F.3d at 117.

46. *See supra* text accompanying note 33.

47. *See supra* note 42 and accompanying text.

48. 8 C.F.R. § 245.1(c)(8).

49. 8 U.S.C. § 1225(a).

A. *Discretion to Determine Individual Relief versus Discretion to Determine Categorical Eligibility*

The primary legal issue surrounding the regulation was whether the Attorney General's statutory grant of authority to adjust the status of a parolee, "in his discretion and under such regulations as he may prescribe," to that of "an alien lawfully admitted for permanent residence" included the authority to categorically exclude arriving aliens, and thus parolees, from eligibility for adjustment.[50] If the statute did not give the Attorney General authority to define eligibility, then promulgating the regulation exceeded the Attorney General's power.

The First Circuit confronted this question in *Succar v. Ashcroft*.[51] In *Succar*, the court determined that the statute did not give the Attorney General authority to define eligibility: "[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief after application does not by itself give the Attorney General the discretion to define eligibility for such relief."[52] The court distinguished between discretion to grant relief and discretion to preclude an alien from even applying for relief: "the two questions of discretion as to the ultimate relief and discretion as to eligibility exclusions are distinct."[53] The First Circuit reasoned that INA § 245(a)[54] specifically mentioned aliens who were paroled as eligible for adjustment, and therefore the Attorney General could not exclude parolees from eligibility.[55]

The Ninth Circuit adopted the same rationale in *Bona v. Gonzales,* determining that Congress's delegation of discretionary authority to grant or deny an application for adjustment of status did not include a delegation of authority to choose who was eligible to apply for adjustment.[56] Because the regulation established categories of aliens who were not eli-

50. *Id.*

51. Succar v. Ashcroft, 394 F.3d 8, 9 (1st Cir. 2005).

52. *Id.* at 10 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 443 (1987)).

53. *Id.* at 23 (citing *Cardoza-Fonseca*, 480 U.S. at 443–44)).

54. 8 U.S.C. § 1255(a).

55. *See Id.* ("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 . . . ."); *Succar*, 394 F.3d at 24; *see also* Bona v. Gonzales, 425 F.3d 663, 670–71 (9th Cir. 2005) ("Thus, we agree with the First Circuit that Congress has spoken to the precise issue of who is eligible for adjustment of status and that 8 C.F.R. § 245.1(c)(8) is directly contrary to this Congressional determination.").

56. *Bona*, 425 F.3d at 670 ("Although Congress delegated to the Attorney General the discretionary authority to grant or deny an application for an adjustment of status, 8 U.S.C. § 1255(a), Congress did not delegate to the Attorney General the discretion to choose who was *eligible to apply* for such relief.").

gible to apply for adjustment, it was invalid under INA § 245(a).[57]

Other circuits disagreed with the First and Ninth Circuits' approach. The Third Circuit in *Zheng v. Gonzales* invalidated 8 C.F.R. § 1245.1(c)(8)[58] on other grounds, but before doing so, determined that the statute gave the Attorney General some power to regulate eligibility to apply for relief.[59] "[T]he statute grant[ed] the Attorney General broad discretion to issue regulations, and . . . this discretion may include some power to regulate eligibility to adjust status."[60] This power to regulate eligibility is "not unlimited, and must be exercised consistently with the intent of the statute."[61] The Eleventh Circuit agreed in *Scheerer v. U.S. Attorney General*,[62] stating that the statute was "at best ambiguous as to whether the Attorney General may regulate eligibility to apply for adjustment of status."[63]

Taking a wider view of the Attorney General's authority to regulate eligibility, the Eighth Circuit determined that categorical eligibility determinations through regulation were within the Attorney General's discretion under INA § 245(a).[64] The court held that the Attorney General should not be forced to "exercise his discretion through rules that speak only to the ultimate relief rather than eligibility," and it "makes little sense to invalidate this regulation simply because it speaks in terms of eligibility."[65] The Fifth Circuit agreed in *Momin v. Gonzales*.[66] Thus, opinions diverge on whether INA § 245(a) gives the Attorney General discretion only to grant or deny adjustment relief, or also to determine eligibility to apply for that relief.

The Supreme Court has not dealt directly with the scope of discre-

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57. *Id.* at 670–71.

58. 8 C.F.R. § 1245.1(c)(8) and 8 C.F.R. § 245.1(c)(8)—the regulation at issue here—are identical. The latter section pertains to the U.S. Citizenship and Immigration Services of the Department of Homeland Security, while the former pertains to the immigration courts (the Executive Office of Immigration Review) and the Board of Immigration Appeals, which are within the Department of Justice. Both of these regulations were repealed simultaneously. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27,585, 27,591.

59. *See* Zheng v. Gonzales, 422 F.3d 98, 103, 116, 120 (3d Cir. 2005).

60. *Id.* at 103.

61. *Id.*

62. Scheerer v. U.S. Att'y Gen., 445 F.3d 1311, 1321 (11th Cir. 2006).

63. *Id.*

64. 8 U.S.C. § 1255(a) (2000); Mouelle v. Gonzales, 416 F.3d 923, 929 (8th Cir. 2005), *cert. granted*, 126 S.Ct. 2694 (2006), *vacated and remanded in light of* 71 Fed. Reg. 27,585, 126 S.Ct. 2964 (2006).

65. *Mouelle*, 416 F.3d at 929 (citing Lopez v. Davis, 531 U.S. 230, 243–44 (2001)).

66. Momin v. Gonzales, 447 F.3d 447, 458 (5th Cir. 2006) ("[T]he fact that Congress chose to exclude certain classes of aliens from eligibility does not mean that, where complete discretion to grant relief is vested in the Attorney General, the Attorney General cannot opt to exercise the discretion and exclude other classes by regulation."), *vacated*, 426 F.3d 497 (5th Cir. 2006).

tion allowed by INA § 245(a). In *INS v. Cardoza-Fonseca*,[67] however, the Court considered the general question of whether a statute that gives an agency discretion to grant relief allows discretion to regulate who is eligible to apply for that relief. Interpreting INA § 208(a),[68] which is part of the same statutory immigration framework as INA § 245(a), the Court held that a provision allowing the Attorney General discretion in granting individual relief did not grant authority to make categorical eligibility determinations.[69] This provision authorized the Attorney General, in his discretion, "to grant asylum to an alien who is unable or unwilling to return to his home country 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'"[70] The INS argued that an alien had to show he was "more likely than not to be subject to persecution" in his home country before he would be eligible for asylum under this provision.[71] Thus, the INS had essentially created an eligibility requirement prior to consideration for asylum relief.[72] The Court held this eligibility requirement invalid.[73] Whether or not to grant asylum was "a matter which Congress ha[d] left for the Attorney General to decide," but it was "clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported."[74] In this way, the Court distinguished between statutorily granted discretion as to ultimate relief, and statutorily impermissible determination of eligibility for that relief.

Outside of the immigration law context, however, the Supreme Court sent a different message regarding agency discretion to grant relief as compared to discretion to determine eligibility for relief.[75] *Lopez v. Davis* dealt with early release of prisoners who had completed drug and

67. 480 U.S. 421 (1987).

68. 8 U.S.C. § 1158(a) (1987); *see Cardoza-Fonseca*, 480 U.S. at 423.

69. *See Cardoza-Fonseca*, 480 U.S. at 449–50.

70. *Cardoza-Fonseca*, 480 U.S. at 423 (quoting 8 U.S.C. § 1101(a)(42) (2000) and citing 8 U.S.C. § 1158(a); 8 U.S.C. § 1158(a) (2000)).

71. *Id.* Another statute, section 243(h) of the INA, 8 U.S.C.A. § 1253(h), required the Attorney General (and did not allow any discretion on his part) to withhold deportation of an alien who could show that his "life or freedom would be threatened" on account of several factors if he was deported. *Id.* The court had held this standard to require that an alien be more likely than not to be subject to persecution in the country to which he would be returned. *Id.* Here, the INS attempted to apply the standard for section 243(h) as an eligibility requirement for section 208(a). *Id.* However, section 243(h) was substantially different from section 208(a) because it required nondiscretionary withholding of deportation, whereas section 208(a) merely allowed the Attorney General discretion to grant asylum if he so chose.

72. *Cardoza-Fonseca*, 480 U.S. at 423.

73. *Id.* at 450.

74. *Id.*

75. *See* Lopez v. Davis, 531 U.S. 230 (2001).

alcohol treatment programs.[76] The statute at issue[77] provided that "[t]he period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons."[78] The statute thus granted the Bureau of Prisons discretion in reducing sentences. The Bureau of Prisons then published a rule establishing eligibility requirements for consideration for early release.[79] The Court determined that the Bureau's discretion to grant relief of early prison release included discretion to determine eligibility for consideration for that relief.[80] The Court stressed the value of eligibility determinations to administrative efficiency.[81] The Bureau could "categorically exclude prisoners [from eligibility for relief] based on their preconviction conduct."[82]

In this way the Supreme Court sent mixed messages on the permissibility of agency promulgation of categorical eligibility requirements under statutes that delegate discretionary authority to grant or deny relief. The more applicable decision, however, is the Supreme Court's decision in *INS v. Cardoza-Fonseca*. That decision indicated that, in the immigration context, discretion to determine ultimate relief was not equal to discretion to categorically determine eligibility for that relief.[83]

B. Is the Statute Unambiguous Regarding Parolees' Eligibility to Adjust Status?

Beneath the overarching issue of whether discretion to grant relief encompasses discretion to determine eligibility to apply for that relief is the issue of whether the statute unambiguously states that parolees are eligible for adjustment of status. If so, any agency regulation effectively barring parolees from adjustment is invalid under the first prong of the Supreme Court's analysis of agency interpretations of law, as established in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*[84]

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76. *Id.* at 233.
77. 18 U.S.C. § 3621(e)(2)(B) (2000).
78. *Lopez*, 531 U.S. at 233 (quoting 18 U.S.C. § 3621(e)(2)(B)).
79. *Id.* at 233–34 (quoting 28 C.F.R. § 550.58 (1995)).
80. *Id.* at 244.
81. *Id.* (citing Heckler v. Campbell, 461 U.S. 458, 467 (1983)).
82. *Id.*
83. INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987).
84. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). *Chevron* analysis of agency interpretations of law contains two prongs:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give ef-

The First Circuit in *Succar* invalidated the now-repealed regulation on the basis of the first prong of *Chevron*.[85] The court reasoned that the regulation's effect—barring most parolees from applying for adjustment—was contrary to the unambiguous requirements of INA § 245(a). According to the First Circuit, "[t]he statute . . . is unambiguous on this issue and . . . congressional clarity works against the Attorney General."[86] After a lengthy examination of the statutory scheme of the INA, the court determined that this was "a *Chevron* step one case because Congress has clearly spoken on the issue of eligibility. We find the Attorney General's regulation to be inconsistent with that congressional determination."[87]

Similarly, the Ninth Circuit in *Bona* invalidated the regulation on the first prong of *Chevron*.[88] The court determined that the statute clearly established the eligibility of parolees for adjustment, and that the regulation, which in effect removed this eligibility, was invalid as contrary to INA § 245(a).[89] By this reasoning, any regulation that removes parolees' eligibility for adjustment is invalid.

C. Is the Regulation Reasonable?

The third area of debate involved the second prong of *Chevron*. The second prong asks whether, if the statute *was* ambiguous as to whether parolees would be eligible for adjustment of status, the regulation restricting parolee adjustment was reasonable.[90]

The Third Circuit in *Zheng* dealt specifically with this argument, determining that INA § 245(a) was ambiguous as to whether the Attorney General could regulate eligibility for adjustment of status.[91] The court

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> fect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

85. *See* Succar v. Ashcroft, 394 F.3d 8, 29 (1st Cir. 2005).

86. *Id.* at 24.

87. *Id.* at 29.

88. Bona v. Gonzales, 425 F.3d at 663, 670–71 (9th Cir. 2005).

89. *Id.* ("Thus, we agree with the First Circuit that Congress has spoken to the precise issue of who is eligible to apply for adjustment of status and that 8 C.F.R. § 245.1(c)(8) is directly contrary to this Congressional determination. Therefore, the inquiry is at an end . . . and section 245.1(c)(8) is invalid. The petitioner is eligible for adjustment of status.") (quoting *Succar*, 394 F.3d at 29); Morales-Izquierdo v. Ashcroft, 388 F.3d 1299, 1303 (9th Cir. 2004).

90. *Chevron*, 467 U.S. at 842–43.

91. Zheng v. Gonzales, 422 F.3d 98, 116 (3d Cir. 2005).

went on to ask whether the now-repealed regulation was "based on a permissible construction of the statute."[92] The court held the regulation invalid based on the second prong of *Chevron*, stating that "[g]iven Congress's intent as expressed in the language, structure, and legislative history of INA section 245, the regulation's effect of precluding almost all paroled aliens from applying to adjust their status . . . is not based on a permissible reading of INA section 245(a), 8 U.S.C. § 1255(a)."[93] Similarly, the Eleventh Circuit in *Scheerer* held that the regulation was "not based on a permissible construction" of the statute.[94] There was an "intractable conflict" between the statute, which contemplated that parolees would be able to apply for adjustment, and the regulation, which excluded parolees from eligibility to apply for adjustment.[95] Under this reasoning, any agency action precluding most parolees from adjustment would be invalid under INA § 245(a).

D. Did the Attorney General Abuse His Discretion?

A fourth possibility confronting courts considering the validity of a regulation restricting parolee adjustment is that the *Chevron* analysis does not apply, and that the Attorney General's discretion in promulgating the regulation should be reviewed only for whether it is reasonably related to the statute.[96] This approach emphasizes the wide discretion given by statute to the Attorney General, rather than addressing ambiguity in the statutory language, as is done in a *Chevron* analysis. While the Eighth Circuit did not characterize this approach as a *Chevron* analysis, it seems closely related to the second prong of *Chevron*.[97]

In *Mouelle v. Gonzales*,[98] the Eighth Circuit determined that the now-repealed regulation could not properly be evaluated under the first step of *Chevron*, "given the discretionary nature of the relief available under 8 U.S.C. 1255(a) [INA § 245(a)]."[99] The court emphasized that INA § 245(a) "clearly and unambiguously states that adjustment of status is a discretionary decision."[100] This case was not appropriate for *Chevron* analysis because "the regulation at issue [did] not purport to interpret

92. *Id.* (quoting *Chevron*, 467 U.S. at 843).
93. *Id.* at 120.
94. Scheerer v. U.S. Attorney Gen., 445 F.3d 1311, 1322 (11th Cir. 2006).
95. *Id.*
96. Mouelle v. Gonzales, 416 F.3d 923, 930 (8th Cir. 2005) (quoting Lopez v. Davis, 531 U.S. 230, 242 (2001); Fook Hong Mak v. INS, 435 F.2d 728, 731 (2d Cir. 1970)).
97. *Mouelle*, 416 F.3d at 930.
98. *Id.* at 929.
99. *Id.* at 928.
100. *Id.* at 928–29.

statutory eligibility standards, but rather rest[ed] on the discretionary authority that Congress explicitly gave the Attorney General to grant adjustment-of-status relief."[101] The Eighth Circuit determined that the regulation was valid "[a]s a rule-based exercise of the Attorney General's discretion to allow status adjustments."[102]

After determining that the regulation was not contrary to the statute, the Eighth Circuit assessed the reasonableness of the regulation.[103] Because allowing applications for adjustment of status during removal proceedings would "necessarily lengthen removal proceedings," and because "expediency was one of the goals of the 1996 amendments to the Immigration and Nationality Act," the court concluded that the Attorney General's reasons for promulgating the regulation were valid in light of the legislature's intent.[104]

The Fifth Circuit agreed that the regulation was "a valid exercise of the discretion granted by Congress to the Attorney General" and that the regulation was not contrary to the INA.[105] Much of the Fifth Circuit's decision hinged on its conclusion that inadequate evidence existed to show that most parolees were subject to removal proceedings. [106] This factual conclusion undergirded the *Succar* and *Zheng* lines of cases.[107]

As demonstrated by the divergence in judicial approaches, it is debatable whether the language of INA § 245(a) permits restrictions on parolee eligibility for adjustment. This Comment engages in that debate and argues that such restrictions are inappropriate under the INA.

E. The Repeal of 8 C.F.R. § 245.1(c)(8) and Newly Proposed Restrictions

On May 12, 2006, the agencies jointly repealed 8 C.F.R. § 245.1(c)(8) and 8 C.F.R. § 1245.1(c)(8),[108] instituted interim regulations in their place, and solicited comment on proposed new rules dealing with parolees and adjustment.[109] Confusion regarding this repeal existed for several months after it was released, evidenced by the fact that parties and courts continued to discuss and argue the validity of the now-

101. *Id.* at 930.
102. *Id.*
103. *Id.*
104. *Id.*
105. Momin v. Gonzales, 447 F.3d 447, 457, 460 (5th Cir. 2006).
106. *See id.*
107. *See id.*
108. *See supra* note 58 and accompanying text (explaining the connection between 8 C.F.R. 245.1(c)(8) (repealed May 12, 2006) and 8 C.F.R. § 1245.1(c)(8) (2006)).
109. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27,585.

repealed regulation as late as three months after the repeal.[110] In July of 2006, two months after the regulation had been repealed, the U.S. Attorney General argued to the U.S. Supreme Court that 8 C.F.R. § 245.1(c)(8) was still valid.[111] Despite the regulation's repeal, the situation for parolees attempting to adjust their status remains murky in the wake of the interim rule and proposed regulations that replaced 8 C.F.R. § 245.1(c)(8).[112]

When promulgating the interim rule, the agencies acknowledged that the old regulation had resulted in a circuit split as to its validity, and this split would cause inconsistent application of adjustment of status law, since the regulation would be applied in some circuits and not in others.[113] In order to avoid this inconsistent application, the agencies decided to repeal the regulation altogether.[114] The agencies did not concede that the regulation was invalid under the INA, but rather withdrew the regulation as a matter of practicality.[115]

The interim rule established that adjustment applications by parolees who are in removal proceedings can be adjudicated only by the DHS's U.S. Citizenship and Immigration Services ("USCIS"), not by the DOJ's Immigration Judges ("IJs").[116] The IJs oversee the parolee's removal proceedings, and thus this rule separated agency jurisdiction over adjustment of status from jurisdiction over removal proceedings.[117] Ju-

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110. *See* Shah v. U.S. Attorney Gen., No. 05-10587, 2006 WL 2356060, at *2 (11th Cir. Aug. 15, 2006) (noting that petitioner had raised for the first time on appeal an argument that 8 C.F.R. § 245.1(c)(8) was invalid as inconsistent with 8 U.S.C. § 1255(a)); Akhtar v. Gonzales, 450 F.3d 587, 594–95 (5th Cir. 2006) (holding 8 C.F.R. § 245.1(c)(8) valid, even though at that time the regulation had already been repealed); *Supreme Court Vacates Eighth Circuit's* Mouelle *Decision, Which Upheld Bar to AOS for Arriving Aliens*, 83 No. 26 INTERPRETER RELEASES 1379, 1379–80 (July 10, 2006) [hereinafter *Supreme Court Vacates*] (characterizing Attorney General's reply brief in Mouelle v. Gonzales petition for writ of certiorari to the U.S. Supreme Court, stating that "[i]n his reply brief, the Attorney General (AG), while recognizing that the regulations at issue had been removed on May 12, 2006, nevertheless continued to argue that the regulations were valid.").

111. *See Supreme Court Vacates*, *supra* note 110, at 1379.

112. *See id.* at 1379–80 (noting that the repeal of the regulations did not mean that the agencies had agreed that arriving aliens should be able to adjust their status; on the contrary, the agencies continued in the interim rule to express their concern that adjustment of status not be used to circumvent consular processing).

113. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27587.

114. *See id.*

115. *See id.*

116. *Id.*

117. *Id.* Note that there is an exception for jurisdiction over adjustment by an IJ, instead of USCIS, in cases of advance parole that meets certain conditions. *See id.* at 27,588 ("[T]hese rules retain the narrow existing exception for an alien who leaves the United States while an adjustment application is pending with USCIS, and then returns under a grant of advance parole; if DHS places such an alien in removal proceedings, the immigration judge would have jurisdiction to adjudicate the alien's renewed adjustment application if that application has

risdiction was previously unknown because parolees who were in removal had not been allowed to apply for adjustment at all under 8 C.F.R. § 245.1(c)(8).[118] Parolees who challenged the validity of the old regulation typically did so when appealing an IJ's removal decision.[119]

The repeal of 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8), while commendable, does not solve many of the issues surrounding the regulation's previous enforcement.[120] The interim rule's tone is decidedly anti-adjustment.[121] The agencies did not agree that parolees should now be able to adjust their status.[122] Rather, the agencies specifically stated that the immigrant visa process and regular consular processing[123] are the "proper means" for an alien to become a lawful permanent resident.[124] The agencies indicated that "a strong showing of favorable equities" is required before granting adjustment to a parolee in removal, particularly if there are any factors in the case that "weigh against allowing adjustment," such as a "preconceived intent to evade the consular process."[125] The agencies indicated that "arriving aliens" such as parolees "could have and should have sought and obtained an immigrant visa from a consular officer abroad" instead of coming to the United States, being paroled, and then applying for adjustment to lawful permanent residence.[126]

The agencies solicited comments on a proposed rule that would make an adjustment applicant's status as an arriving alien, including pa-

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been denied by USCIS.").

118. *See supra* Introduction (discussing how 8 C.F.R. 245.1(c)(8) precluded parolees from applying for adjustment).

119. *See* Bona v. Gonzales, 425 F.3d 663, 665 (9th Cir. 2005); Zheng v. Gonzales, 422 F.3d 98, 102 (3d Cir. 2005); Mouelle v. Gonzales, 416 F.3d 923, 925 (8th Cir. 2005); Succar v. Ashcroft, 394 F.3d 8, 9–10 (1st Cir. 2005) (all providing examples of aliens who challenged the validity of the regulation when appealing a removal order); *see also* Toussaint, File No. A96 001 425–Miami, 2006 WL 211046, (B.I.A. Jan. 10, 2006) (moving to reopen removal proceedings in order to pursue adjustment of status pursuant to Succar court's invalidation of the regulation).

120. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27,585; *Supreme Court Vacates*, *supra* note 110, at 1380.

121. *See* Eligibility of Arriving Aliens, *supra* note 18, at 25,589 (preserving the integrity of the visa issuance process); *id.* at 25,588–89 ("proper means," strong showing of adverse factors, etc.)

122. *Supreme Court Vacates*, *supra* note 110, at 1380.

123. Standard consular processing involves applying for an immigrant visa from one's home country and being regularly admitted to the United States as a lawful permanent resident upon entry, rather than applying for adjustment once one is paroled into the country. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY ch. 4 (5th ed. 2003) (discussing the traditional admissions process for lawful permanent residents).

124. Eligibility of Arriving Aliens, *supra* note 18, at 27,588.

125. *Id.*

126. *See id.* at 27,589.

rolee status, a "significant adverse factor" that would warrant denial of an adjustment application unless the situation presented "unusual and outstanding countervailing equities."[127] The agencies also sought comment on a proposed rule that would establish a presumption against granting adjustment to certain classes of aliens, which could include parolees.[128] Under another proposed rule, the agencies simply would not exercise their discretion to grant adjustment of status to certain classes of aliens.[129] This proposal is essentially the same as 8 C.F.R. § 245.1(c), which stated that the Attorney General would not favorably exercise his discretion to grant adjustment to certain classes of aliens.[130]

Because the interim rule established adjustment jurisdiction solely in USCIS, the agencies solicited comment on whether the IJ conducting an arriving alien's removal proceeding should grant a continuance while the alien pursues his or her adjustment application with USCIS.[131] The agencies suggested regulations that would limit the IJ's discretion to grant such a continuance.[132] Under these suggested regulations, the IJ's discretion would be limited by either a presumption against granting continuances or by a regulation allowing continuances only in limited circumstances.[133]

If these proposals are implemented as regulations, it may be practically impossible for a parolee to adjust status to lawful permanent residence. Requiring "unusual and outstanding countervailing equities" before considering a parolee's adjustment application would seem to place a sizeable burden on the parolee applicant.[134] Also, if permanent regulations establish a presumption against granting continuances of removal proceedings while adjustment applications are reviewed, parolees could be removed before they even know if their adjustment applications have been granted. In this situation, adjustment of status would become completely meaningless.

The practical effect of the agencies' proposals would be almost the same as the now-repealed regulation: in practice, it would be nearly impossible for a parolee to successfully adjust status to lawful permanent residence. By making a successful adjustment application improbable, these proposals regulate away the opportunity Congress created in INA § 245(a) for parolees to apply for and receive a discretionary adjustment of

127. *Id.* .
128. *See id.*
129. *See id.*
130. *See* 8 C.F.R. § 245.1(c)(8) (2000) (repealed May 12, 2006).
131. *See* Eligibility of Arriving Aliens, *supra* note 18, at 27,589.
132. *Id.*
133. *See id.*
134. *Id.*

status.

II. CONGRESSIONAL INTENT THAT PAROLEES BE ELIGIBLE TO ADJUST STATUS

The legislative history of INA provisions authorizing parole and adjustment of status indicates that Congress intended parolees to be eligible for successful adjustment of status. The now-repealed regulation, 8 C.F.R. § 245.1(c)(8), prohibited most parolees' eligibility for adjustment, and thus was inconsistent with congressional intent. The new regulation proposals are similarly problematic. If implemented, the proposals would not categorically bar parolees from eligibility to apply for adjustment, as the old regulation did, but they could make parolee adjustment applications so unlikely to succeed that eligibility to apply for adjustment would be essentially meaningless.

A. Legislative History of Parole and Adjustment of Status

Parole has been an important concept in immigration law since the enactment of the INA in 1952.[135] The original INA provided for parole in section 212(d)(5),[136] and that section continues to allow parole today.[137] In the House Judiciary Committee's Report on the original INA,[138] the Committee explained that it had granted the Attorney General discretion to parole aliens in emergency cases and in the public interest.[139] The Committee believed that allowing the Attorney General discretion to grant parole was necessary.[140] Parole has been part of immigration law ever since.

As for adjustment of status, when enacted in 1952, the original text of INA § 245(a)[141] did not allow parolees to adjust their immigration

135. *See* H.R. REP. No. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1706.

136. *See* Immigration and Nationality Act, H.R. 5678, 82d Cong. § 212(d)(5) (1952) (enacted), *reprinted in* 1952 U.S.S.C.A.N. 166, 189. ("The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.").

137. *See* 8 U.S.C. § 1182(d)(5)(A) (2000).

138. *See* H.R. REP. No. 82-1365.

139. *See id.*

140. *See id.*

141. *See* 8 U.S.C. § 1255(a) (2000).

status.[142] Rather, it only allowed adjustment by aliens who had already been legally admitted.[143] However, recognizing the hardship this provision placed on parolees, Congress amended the section in 1960 by adding "paroled" to the language describing aliens who were eligible to adjust status.[144] Since that time, INA § 245(a) has allowed the Attorney General to adjust the status of parolees to lawful permanent residents.[145]

The Senate Judiciary Committee, as stated in its report on the 1960 amending legislation, wanted to abolish difficult, costly, and unnecessary measures that developed in the absence of parolees' being able to adjust status.[146] For example, the Committee sought to eliminate a practice that required parolees to leave the United States and go to a U.S. consular office in another country to receive an immigrant visa to the U.S., and then return to the U.S. as an admitted alien on that immigrant visa before being able to adjust status.[147] The Committee did not intend for paroled aliens to have to undertake the difficult and costly return to their home country to go through traditional consular processing before being able to become lawful permanent residents.[148]

The Judiciary Committee also hoped to curtail the large number of private relief immigration bills[149] in Congress that sought adjustment of

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142. *See* Immigration and Nationality Act, H.R. 5678, 82d Cong. § 245(a) (1952) (enacted), *reprinted in* 1952 U.S.C.C.A.N. 166, 216 ("(a)The status of an alien who was lawfully admitted to the United States as a bona fide nonimmigrant and who is continuing to maintain that status may be adjusted by the Attorney General in his discretion (under such regulations as he may prescribe to insure the application of this paragraph solely to the cases of aliens who entered the United States in good faith as nonimmigrants) to that of an alien lawfully admitted for permanent residence as a quota immigrant or as a nonquota immigrant under section 101(a)(27)(A), if (1) the alien makes application for adjustment, (2) the alien is admissible to the United States for permanent residence under this Act, (3) a quota or nonquota immigrant visa was immediately available to him at the time of his application for adjustment, (4) a quota or nonquota immigrant visa is immediately available to him at the time his application is approved, and (5) if claiming a nonquota status under section 101(a)(27)(A) he has been in the United States for at least one year prior to acquiring that status.").

143. *See id.*

144. H.R.J. Res. 397, 86th Cong. § 10 (1960) (enacted), *reprinted in* 1960 U.S.C.C.A.N. 574, 575 ("Section 245(a) of the Immigration and Nationality Act, as amended (66 Stat. 217, 72 Stat. 699, 8 U.S.C. 1255(a)), is further amended to read as follows: '(a) The status of an alien, other than an alien crewman, 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 approved.'").

145. *See* 8 U.S.C. § 1255(a) (2000).

146. *See* S. REP. No. 86-1651 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3124, 3136–3137.

147. *See id.*

148. *See id.*

149. Private relief immigration bills are bills that come before Congress which, after being

status without the immigrant having to leave the country.[150] To the Judiciary Committee, the existence and prevalence of these private bills made clear the desirability of allowing more aliens to adjust status without having to leave the country or individually petition Congress.[151]

When enacting the amending legislation, Congress recognized the importance of adjustment of status and specifically included parolees among those aliens who were eligible to adjust.[152] The legislative history demonstrates that Congress intended parolees to be eligible for adjustment of status, and that Congress did not intend parolees to have to undertake difficult and costly procedures, such as returning to their countries of origin to go through the traditional consular visa process, before being able to become lawful permanent residents.[153]

Given the clear legislative intent to allow parolees to adjust status, the now-repealed regulation was fatally flawed under the first prong of *Chevron* analysis of agency interpretations of law.[154] The first prong of *Chevron* analysis asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress."[155] Here, as shown by the legislative history and the INA provisions that simultaneously make parolees eligible for adjustment and require parolees to be in removal proceedings, the clear intent of Congress was that parolees be eligible to adjust their status.[156] The old regulation effectively barred parolees from

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voted into law, allow a certain named individual to adjust his status to permanent resident.

150. *See id.*

151. *See id.*

152. *See* H.R.J. Res. 397, 86th Cong. § 10 (1960) (enacted), *reprinted in* 1960 U.S.C.C.A.N. 574, 575.

153. *See* S. REP. No. 86-1651.

154. Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). *Chevron* analysis of agency interpretations of law contains two prongs:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Id.

155. *Chevron*, 467 U.S. at 842–43.

156. *See supra* Part I (discussing how INA requires both that parolees be eligible to adjust and that parolees be in removal proceedings).

this eligibility, and thus the Attorney General's promulgation of the regulation exceeded the authority Congress gave him. The regulation was invalid on that ground.[157]

Fortunately, the regulation has since been repealed.[158] Unfortunately, the new regulation proposals may similarly contravene congressional intent. The agencies have specifically proposed adverse presumptions and multiple-agency jurisdiction that will make successful parolee adjustment of status extremely difficult, if not impossible.[159] This result contradicts Congress's stated intent of avoiding difficult measures for parolees trying to adjust.[160] When discussing the justification for their proposals, the agencies stated that "[t]he immigrant visa process remains the proper means for an alien to seek . . . [to become] a lawful permanent resident,"[161] and that an arriving alien "generally could have and should have sought and obtained an immigrant visa from a consular officer abroad, rather than arriving at a port-of-entry."[162] These explanatory statements imply that parolees should have gone through consular processing in their home country and because they did not do so, adjustment should be granted only in the most compelling of cases that demonstrate "unusual and outstanding countervailing equities."[163] This view runs directly counter to the Senate Judiciary Committee's hope of avoiding a requirement that parolees return to their home countries to go through consular processing before becoming lawful permanent residents.[164]

In order to avoid acting contrary to Congress's intent, the agencies should not implement proposals that make adjustment more difficult for parolees. The agencies now stand at a crossroads as to whether the new proposals will be implemented, and they should choose the outcome that conforms to the will of Congress.[165]

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157. *See* Succar v. Ashcroft, 394 F.3d 8, 29 (1st Cir. 2005) (invalidating the regulation based on the first prong of *Chevron*).

158. Eligibility of Arriving Aliens, *supra* note 18, at 27,587.

159. *See* discussion *supra* Part I.E.

160. *See* S. REP. No. 86–1651 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3124, 3136–37.

161. Eligibility of Arriving Aliens, *supra* note 18, at 27,588.

162. *Id.* at 27,589.

163. *Id.* It is important to note that these proposals are not yet regulations, but they are still important both because they can become regulations and because they evidence the very low regard the agencies seem to have for parolees.

164. *See* S. REP. No. 86–1651.

165. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (explaining that if Congress has addressed the question at issue and congressional intent is clear, the agency must give effect to Congress's expressed intent); Mary A. Kenney, Senior Attorney, American Immigration Law Foundation, Comments Submitted in Response to Eligibility of Arriving Aliens, *supra* note 18, at 27,585, (June 12, 2006), at 12–17, http://www.ailf.org/lac/reg_comment.pdf (arguing that the agency's new proposals contravene congressional intent).

III. REGULATORY HISTORY AND AGENCY MISTAKE

The history of the now-repealed regulation suggests that its impact barring parolees from applying for adjustment of status may have been an unintended consequence or even a mistake on the part of the Department of Justice. The agency itself did not appear to recognize or intend the impact that the regulation had on parolees. Because of this, the regulation could reasonably have been held invalid as arbitrary and capricious under the Administrative Procedure Act ("APA") due to the INS's failure to consider the impact on parolees when promulgating the regulation.[166] Similarly, the newly proposed regulations and the assumptions that underlie them may violate the APA.[167]

A. Parolees Were Not the Intended Targets of the Statute that the Regulation Purported to Implement

The original purpose of the now-repealed regulation was to implement the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[168] which revised the INA in several important ways.[169] The INS's justification for the regulation was based on Congress's intent to remove aliens in an expedited manner,[170] as evidenced in INA § 235(b)(1).[171] This INA section is not specifically aimed at parolees.[172] It provides that immigration officers should remove in an expedited fashion those aliens who seek to procure a visa or admission to the United States by fraud or by willfully misrepresenting a material fact or those aliens who are not in possession of valid documentation.[173] Later in the section, the Attorney General is authorized to apply expedited removal to aliens "who ha[ve] not been admitted or paroled into the United States, and who ha[ve] not affirmatively shown, to the satisfaction of an immigration officer, that [they have] been physically present in the United States for the two year period immediately prior to the date of

166. 5 U.S.C. § 706(2)(A) (2000).
167. *See* Kenney, *supra* note 165, at 6.
168. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 444, 444 (proposed Jan. 3, 1997) (codified at 8 C.F.R. pt. 245) [hereinafter Inspection and Expidited Removal]; 8 C.F.R. § 245.1(c)(8) (2006)). Among the changes wrought to the INA by IIRIRA were insistence on expedited removal proceedings for aliens attempting to enter the U.S. through fraud or misrepresentation or without proper documents, and consolidation of exclusion and deportation proceedings into one, unified, same-procedure removal proceeding.
169. *See Id.* at 444.
170. *Id.* at 452.
171. 8 U.S.C. § 1225(b)(1) (2000).
172. *Id.*
173. *Id.* § 1225(b)(1)(A)(i).

the determination of inadmissibility."[174]

The expedited removal procedures contemplated in INA § 235(b)(1) are aimed at aliens who sought admission to the United States by fraud,[175] those who came to the country without any valid documentation,[176] and those who have not been paroled.[177] The statute is *not* aimed at expedited removal proceedings for aliens who have already been paroled. The regulation barred paroled aliens in removal proceedings from applying for adjustment of status because of expediency concerns, but paroled aliens were not a target of the INA provision that the regulation purported to implement. Thus, it was possible that the regulation's effect on parolees was an unintended consequence or a mistake on the part of the INS.

B. The INS Assumed When Promulgating the Regulation that it Would Not Affect Parolees

The INS's justification for the old regulation revealed a fundamental mistake in its understanding of the regulation and the underlying statute.[178] Justifying the regulation, the INS stated that "[i]f the Service decides as a matter of prosecutorial discretion, not to initiate removal proceedings but to parole the arriving alien, the alien will be able to apply for adjustment of status before the district director."[179] This statement assumed that parole and removal proceedings were alternatives to one another, rather than coexisting situations.[180] The statement contemplated that the INS could decide to parole an alien *instead of* initiating removal proceedings. It did not contemplate that, in practice, parole and

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174. 8 U.S.C. § 1225(b)(1)(A)(iii)(I)–(II).

175. *See Id.* § 1225(b)(1)(A); *see also Id.* § 1182(a)(6)(C).

176. *See* 8 U.S.C. § 1225(b)(1)(A); 8 U.S.C. § 1182(a)(7). Note that not every parolee arrives in the United States without valid documentation. Take, for example, Delia Bona, who came into the United States legally at the insistence of the U.S. military and with valid paperwork, but who was paroled and was not officially considered "admitted." *See* Bona v. Gonzales, 425 F.3d 663, 665 (9th Cir. 2005).

177. *See* 8 U.S.C. § 1225(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

178. For the INS's justification for 8 C.F.R. § 245.1(c)(8), see Inspection and Expedited Removal, 62 Fed. Reg. 444, 452 (proposed Jan. 3, 1997).

179. Inspection and Expedited Removal, *supra* note 168, at 452.

180. As has been discussed throughout this note, this is an erroneous assumption because parolees, as arriving aliens, are statutorily in removal proceedings at any given time. Being a parolee and being in removal proceedings are simultaneous states, and the INA presumes this simultaneous occurrence. This justification by the INS seems to assume that if one is paroled, then one is not in removal proceedings, and vice versa; but this is not the case. *See* discussion *supra* Part I (stating that parolees are simultaneously in removal and eligible for adjustment); *see also* sources cited *supra* note 42.

removal proceedings simultaneously coexist for most parolees.[181] As discussed previously in this Comment, parolees, as arriving aliens, are statutorily required to be in removal proceedings.[182] It is not possible to be a parolee *or* to be in removal proceedings. Rather, one is necessarily both a parolee *and* in removal proceedings.

The INS's justification specified that an arriving alien who is paroled "will be able to apply for adjustment of status."[183] The INS thus assumed when promulgating the regulation that the bar on adjusting status during removal proceedings would not affect paroled aliens. We now know, however, that the regulation greatly affected parolees because of the fact that many parolees are, as required by statute, in removal proceedings.[184]

C. *The Proposed Regulations Reflect Similarly Flawed Assumptions*

The new regulation proposals reflect similarly flawed or factually incorrect assumptions. The agencies seek, through the proposed regulations, to "limit the exercise of discretion to grant forms of relief to those aliens who have attempted to evade the consular visa process by seeking parole into the United States."[185] They justify the proposed rules on the ground that such rules would "preserv[e] the integrity of the nonimmigrant and immigrant visa issuance processes."[186] These statements are based on assumptions that parolees are aliens who "have attempted to evade the consular visa process" and that allowing parolees to adjust status somehow harms "the integrity of the . . . visa issuance process."[187] Both of these assumptions are incorrect.

1. Parolees Have Not "Attempted to Evade the Consular Visa Process"

The agencies should not assume that parolees "have attempted to evade the consular visa process" or have been in a position in which they "could have and should have sought and obtained an immigrant visa

181. *See* discussion *supra* Part I (explaining why parolees are constantly in removal proceedings).
182. *See Id.*; *see also* sources cited *supra* note 42.
183. Inspection and Expedited Removal, *supra* note 168 at 452.
184. *See* discussion *supra* Part I; *see* also sources cited *supra* note 42.
185. Eligibility of Arriving Aliens, *supra* note 168, at 27,589.
186. *Id.*
187. *Id.*

from a consular officer abroad, rather than arriving at a port-of-entry."[188] On the contrary, parole is only granted by the favorable discretion of the Secretary of DHS "for urgent humanitarian reasons or significant public benefit."[189] Thus, as the American Immigration Law Foundation ("AILF")[190] pointed out in comments it submitted to the agencies on the proposed regulations, "[t]he very fact that the individual was granted parole in the discretion of the government indicates that the individual had a legitimate humanitarian or public interest reason for seeking entry into the United States" and, thus, that the purpose of the individual's coming to the U.S. was this recognized humanitarian or public interest, *not* any attempt to circumvent the visa process.[191]

One need only look to the factual circumstances surrounding situations of parolees to see that this group of aliens did not enter the United States attempting to evade the consular visa process. "Parole has most often been granted to aliens fleeing unsettled conditions in their own country, when refugee status has not been granted for whatever reason."[192] Parole is also granted in a number of other circumstances that have nothing to do with an alien's attempt to evade the traditional consular visa process, such as when Delia Bona was granted parole after being evacuated to the United States at the military's insistence.[193] Thus, the assertion that parolees are typically aliens who attempted to circumvent the traditional immigration process is incorrect.

2. Parolee Adjustment Does Not Harm the Integrity of the Visa Issuance Process

The agencies' second major assertion underlying their justification for the proposed rules, that allowing parolees to adjust status would somehow harm the integrity of the visa issuance process, is not true. The agencies provided no proof for this assertion and "have failed altogether to explain how the adjustment of this category of non-citizens affects the visa process—either positively or negatively—to any greater degree than the adjustment of any other eligible category of non-citizen."[194] By ex-

188. *Id.*

189. 8 U.S.C. § 1182(d)(5)(A) (2000); *see* discussion *infra*, Part V.B.

190. The American Immigration Law Foundation is a non-profit group devoted to promoting excellence in the practice of immigration law and fairness under the law for immigrants.

191. *See* Kenney, *supra* note 165, at 9.

192. AUSTIN T. FRAGOMEN, JR., ALFRED J. DEL REY, JR., AND STEVEN C. BELL, IMMIGRATION PROCEDURES HANDBOOK, § 20:5 (2005), *available at* WL IMPH 20:5.

193. Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005); *see also* Kenney, *supra* note 165, at 10–11 (describing similar parolee circumstances).

194. Kenney, *supra* note 165, at 7.

empting parolees from consular processing, Congress did not intend to limit their access to adjustment.[195] Moreover, until 1997, when 8 C.F.R. § 245.1(c)(8) was promulgated, the agencies never claimed that restrictions on parolee adjustment were needed to maintain the integrity of the visa process.[196] "The agencies' blanket statement that the visa process needs further protections now, without any basis or proof for this necessity, fails to provide even minimal justification for these serious restrictions on arriving aliens."[197]

> If anything, further restrictions on arriving aliens will place added burdens on the visa process. Consulates will be forced to deal with increased numbers of cases seeking to consular process, resulting in delays and pressure to quickly process cases. Additionally, many arriving aliens are asylum applicants who had no way to obtain consular process in their home country. Placing restrictions on them in the name of preserving the visa process is likely to have no effect at all on the integrity of the system.[198]

Thus, the proposed regulations are based upon factually incorrect assumptions, just as the now-repealed regulation was based on the incorrect belief that parolees were not in removal proceedings.[199]

D. The Agencies' Restrictions on Parolee Adjustment Are Inappropriate

The agencies' efforts to restrict parolee adjustments, previously through 8 C.F.R. § 245.1(c)(8) and, now, through the new regulation proposals, are based on factually incorrect premises or mistakes. If the premises underlying the reasons for the regulations are incorrect, the agencies should not seek to implement or enforce them.

The old regulation as it applied to parolees may have been invalid as arbitrary and capricious under the Administrative Procedure Act ("APA")[200] due to the INS's failure to consider its impact on parolees when promulgating the regulation.[201] If put in place, the proposed regulations may be similarly invalid under the APA. The agencies should not

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195. *See id.*
196. *See id.*
197. *Id.*
198. *Id.*
199. *See* discussion *supra* Part III.B.
200. None of the circuit courts that invalidated the regulation used this rationale, preferring instead to rely on a *Chevron* analysis of agency interpretations of law. However, this section argues that an APA "arbitrary and capricious" interpretation would have been plausible.
201. *See* 5 U.S.C. § 706(2)(A) (2000).

implement regulations that are "arbitrary and capricious" in violation of the APA.

Courts review agency rulemaking decisions to determine if they are arbitrary and capricious under the APA.[202] The leading case interpreting the APA in the context of agency rulemaking is *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* ("*State Farm*").[203] *State Farm* established a searching version of arbitrary and capricious review of agency rulemaking, often referred to as "hard look review:"

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[204]

The regulatory history examined here reveals a fatal flaw in the now-repealed regulation under a *State Farm* analysis: the INS "entirely failed to consider an important aspect of the problem"[205] by not realizing, and thus not considering the regulation's impact on parolees.[206] Congress specifically made parolees statutorily eligible to apply for adjustment of status.[207] It follows that a proposed regulation's effect of taking away this congressionally-bestowed eligibility is "an important aspect"[208] to be considered in an agency's rulemaking decision. The INS appears not to have realized that the regulation would affect parolees,[209] much less to have considered the impact on parolees in its rulemaking. Because the INS "entirely failed to consider" the "important aspect" of the regulation's effect on parolees in its decision, the promulgation of the regulation as it applied to parolees was arbitrary and capricious under a *State Farm* analysis, and likely would have been set aside insofar as it applied to parolees if a court had addressed this is-

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202. *Id.*
203. 463 U.S. 29 (1983).
204. *Id.* at 43.
205. *Id.*
206. *See* discussion *supra* Part III.B (explaining how the INS did not contemplate that the regulation would bar parolees from applying for adjustment).
207. 8 U.S.C. § 1255(a) (2000); *see* discussion *supra* Part II (explaining congressional intent that parolees be eligible to adjust status).
208. *State Farm*, 463 U.S. at 43.
209. *See* discussion *supra* Part III.B.

sue.[210]

The new proposed regulations are also suspect under a *State Farm* analysis because no "satisfactory explanation" has been provided for them.[211] Unlike when the agencies promulgated 8 C.F.R. § 245.1(c)(8) under the auspice of implementing IIRIRA,[212] the agencies have not cited any statute as the guiding force behind their new proposed rules.[213] Instead, the interim rule refers to a vague desire to "preserve the integrity" of the consular visa process and to "codify . . . limitations on the exercise of discretion" toward parolee adjustment.[214] The agencies referred to adjustment case law, but pointed to nothing suggesting that parolees should be less eligible to adjust than any other applicant.[215]

The factual assumptions on which the agencies base their justifications for the proposed regulations are incorrect.[216] The agencies' explanation for their proposed rules thus "runs counter to the evidence before the agency."[217] It would also seem that incorrect factual assumptions fail to constitute the "satisfactory explanation" that *State Farm* requires.[218]

Both the old regulation and the new regulation proposals fail to meet the requirements for agency regulations set out in the APA and interpreted in *State Farm*. The agencies should not, therefore, implement the new proposals. If the agencies implement the proposals as permanent regulations, courts should construe the new regulations as "arbitrary and capricious," and thus invalid under the APA.

IV. TRADITIONAL STATUTORY CONSTRUCTION IN IMMIGRATION LAW

Canons of statutory construction in immigration law caution against interpreting the INA to allow the Attorney General to bar parolees from adjusting their status, either explicitly through a categorical bar (as in the now-repealed regulation) or practically through adverse presumptions, adverse factors, and difficult procedural and jurisdictional situations (as in the proposed regulations). These canons should be considered when

210. *See State Farm*, 463 U.S. at 43; *see also supra* text accompanying note 200 (explaining that the courts did not address this rationale).
211. *State Farm*, 463 U.S. at 43.
212. *See supra* text accompanying notes 199–208.
213. *See* Eligibility of Arriving Aliens, *supra* note 18 at 27,585.
214. *Id.* at 27,588.
215. *See id.* at 2,588–89 (no such explanation).
216. *See* discussion *supra* Part III.C.1 (regarding factual inaccuracy of agencies' underlying rationale).
217. *State Farm*, 463 U.S. at 43.
218. *Id.*

drafting any new regulatory proposal.

A. Canon I: Construing Deportation Statutes in Favor of the Alien

In *Cardoza-Fonseca*, Justice Stevens acknowledged the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[219] Additionally, in *Fong Haw Tan v. Phelan*, Justice Douglas resolved doubts on the meaning of a deportation statute in favor of a narrow construction: "since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used [in the statute]."[220]

In *Delgadillo v. Carmichael*, the Supreme Court insisted on an alien-friendly interpretation of a deportation statute because of the harsh consequences of deportation: "Deportation can be the equivalent of banishment or exile. The stakes are indeed high and momentous for the alien who has acquired his residence here."[221] Similarly, the Court recognized in *Costello v. INS* that "accepted principles of statutory construction in this area of the law" require courts to resolve doubt regarding the interpretation of deportation statutes in favor of the alien.[222]

The rationale for construing ambiguity in deportation statutes in favor of the alien should apply with equal force to statutes dealing with removal for inadmissibility, particularly in cases involving parolees.[223]

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219. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); *see also* Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1029 (9th Cir. 2005) ("[O]ur interpretation adheres to the general canon of construction that resolves ambiguities in favor of the alien."); Comment, *The Futile Forgiveness: Basing Deportation on an Expunged Narcotics Conviction*, 114 U. PA. L. REV. 372, 372 (1966) ("Deportation may work severe hardship, causing a complete break of established social and economic ties. This fact has led to a doctrine of judicial leniency toward aliens ordered to be deported; the deportation statutes are to be strictly construed and all doubts as to their construction are to be resolved in favor of the alien.").

220. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

221. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (citing Bridges v. Wixon, 326 U.S. 135, 147 (1945)).

222. Costello v. INS, 376 U.S. 120, 128 (1964); *see also* INS v. Errico, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed: 'We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile.'" (quoting *Delgadillo*, 332 U.S. at 391)).

223. There is a difference between deportation and removal for inadmissibility. Deportation is for aliens who have already been admitted and are subsequently being removed. There are specific statutory grounds for deportation. *See* 8 U.S.C. § 1227 (2000) (grounds of deportability). Removal for inadmissibility also removes an alien from the country, but there are different statutory grounds for inadmissibility. Removal for inadmissibility only applies to those aliens who are not yet considered "admitted," such as parolees, illegal aliens, and aliens at the

Just as with deportation, the stakes here are very high. Parolees are aliens who are in the United States and, like Delia Bona, may have extensive social, familial, and economic ties to this country. For parolees like Delia Bona, removal for inadmissibility would cause hardships similar to those experienced in deportation—including having to leave an established home, family, and all one has worked for behind. The proceedings for deportation and removal for inadmissibility are very similar.[224] A decision adverse to the alien in a removal proceeding has the same result regardless of whether the alien is being determined inadmissible or is being deported: either way, the alien will be "removed," and thus forced to leave the country.[225] The principle calling for reading deportation statutes in favor of the alien thus logically applies to statutory construction regarding parolees' removal for inadmissibility.

The statute at issue here, section 245(a) of the INA,[226] should be read using this canon, requiring construction in favor of the alien when the statute results in removal. Section 245(a), which allows the Attorney General to adjust the status of parolees, does not explicitly deal with removal (for deportation or for inadmissibility),[227] but the canon of construction is still relevant here because section 245(a) adjustment of status is the main remedy available to parolees attempting to avoid being removed. In this sense, section 245(a) has a great deal to do with removal. In *Succar*,[228] *Mouelle*,[229] *Zheng*,[230] and *Bona*,[231] the petitioners all appealed from Board of Immigration Appeals ("BIA") orders of removal or refusals to reopen removal proceedings after removal had been ordered. Had these parolees been given a chance to apply to adjust their status un-

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border and at ports of entry. *See* 8 U.S.C. § 1182 (grounds for inadmissibility, for which an alien who has not yet been admitted but who is in the United States can be removed). *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY chs. 4–6 (5th ed. 2003) (providing general information on the distinction between removal for deportability and removal for inadmissibility).

224. 8 U.S.C. § 1229a(a)(1) (providing procedures for conducting removal proceedings, which determine both inadmissibility and deportability). Removal proceedings are conducted both when inadmissibility and deportability are being determined; however, different grounds exist for charging an alien with inadmissibility. *See* 8 U.S.C. § 1182(a) (providing grounds of inadmissibility); 8 U.S.C. § 1227(a) (providing grounds of deportability).

225. 8 U.S.C. § 1231(a)(1)(A) ("[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . . ."). Also, note that the Attorney General may sometimes allow aliens to voluntarily depart instead of being removed. *See* 8 U.S.C. § 1229c(a)(1).

226. 8 U.S.C. § 1255(a).

227. *Id.*

228. Succar v. Ashcroft, 394 F.3d 8, 9–10 (1st Cir. 2005).

229. Mouelle v. Gonzales, 416 F.3d 923, 925 (8th Cir. 2005).

230. Zheng v. Gonzales, 422 F.3d 98, 103 (3d Cir. 2005).

231. Bona v. Gonzales, 425 F.3d 663, 665 (9th Cir. 2005).

der section 245(a), and had they been successful in adjusting that status to that of permanent residents, they would not have been ordered removed from the United States.[232] In this way, section 245(a) is a removal statute to which the logic of the canon should apply.

Using this "in-favor-of-the-alien" canon, any ambiguity in section 245(a) of the INA[233] should be resolved in favor of the alien. Thus, section 245(a) of the INA [234] should be read to establish that parolees may apply for adjustment of status and that the DOJ and DHS may not take away that eligibility, either through a categorical bar (as seen in the old regulation), or in practical effect through the onerous restrictions proposed in the interim rule. The parolee is statutorily given a chance to be considered for adjustment of status, which would give him a remedy from being removed from the country.[235] The statute should not be construed to allow the Attorney General to take this remedy away, either categorically or in practical effect.

B. Canon II: Inclusio Unius, Exclusio Alterius

Another canon of statutory construction, *inclusio unius, exclusio alterius*, mandates construing section 245(a) of the INA[236] not to allow the Attorney General authority to hinder parolees' applications for adjustment of status. This canon means that "inclusion of one thing indicates exclusion of the other."[237] The idea of the canon is that "the enumeration of certain things in a statute suggests that the legislature had no in-

232. "'[L]awfully admitted for permanent residence' means 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 . . . ." 8 U.S.C. § 1101(a)(20). Once an alien receives this status, they are allowed to stay permanently in the United States, instead of being removed, as long as they comply with immigration laws. *See id.* Also, since parolees are not considered "admitted," 8 U.S.C. § 1101(a)(13)(B), they have removal proceedings that are concerned with admissibility or inadmissibility (not with deportation). Once a parolee's status is adjusted to that of a lawful permanent resident, he or she is considered to have been admitted. 8 U.S.C. § 1101(a)(13)(C) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws" except under certain circumstances, such as having relinquished permanent resident status, having left the United States, having committed a crime, etc.). After a parolee adjusts his status and is admitted, removal proceedings dealing with his inadmissibility are no longer necessary, and it would make little sense to remove him for inadmissibility. Thus, once a parolee adjusts status to that of lawful permanent resident, he or she may remain in the United States and will not be removed.

233. 8 U.S.C. § 1255(a).

234. *Id.*

235. *Id.*

236. *Id.*

237. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 824 (3d ed. 2001).

tent of including things not listed or embraced."[238]

Here, Congress can and has excluded groups of aliens from eligibility for adjustment, and it has done so explicitly in the INA.[239] For example, section 245(c) of the INA[240] specifically excludes from eligibility for adjustment of status alien crewmen; aliens who have not maintained continuously lawful status; aliens admitted in transit (while passing through the country); aliens who have already been admitted, but as nonimmigrant visitors; aliens who are deportable; aliens who have violated the terms of their nonimmigrant visas; and aliens seeking visas on the basis of marriage entered into during pending removal proceedings.[241] The *inclusio* canon tells us that Congress, by specifying those groups that are ineligible for adjustment, did not intend for any additional unlisted groups to be excluded from adjustment eligibility. Congress did not list parolees as ineligible, despite so listing several other alien groups, and thus it must have intended that parolees be eligible for adjustment.[242] If Congress intended that parolees be ineligible for adjustment, it could have added them to the categories of aliens not eligible for adjustment. It never did so. Adherence to the *inclusio* canon mandates an interpretation of the statute that enables parolees, whom Congress never excluded from eligibility for adjustment, to adjust status.

The old regulation entirely precluded parolee adjustment. The new regulations, if put in place, could in effect obliterate parolee eligibility by making successful parolee adjustment applications highly uncommon or even nonexistent. In accordance with traditional canons of constructions in immigration law, the INA should be interpreted to disallow this result.

V. A POLICY OF FAIRNESS

DOJ and DHS policy regarding parolees, as evidenced by both the now-repealed regulation and the newly proposed regulations, does not comport with notions of fairness. This section will demonstrate how the agencies' approach to parolee adjustment causes unfairness and hardship in many cases.

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238. *Id.*

239. Succar v. Ashcroft, 394 F.3d 8, 16 (1st Cir. 2005) ("Since the 1960 enactment of section 1255(a), Congress has on several occasions amended other provisions of 8 U.S.C. § 1255 [INA § 245] to restrict the class of people who are eligible to receive adjustment of status. . . . Significantly, Congress has never taken parolees, as a group, out of the class of eligible aliens, despite over a dozen opportunities . . . to do so.").

240. 8 U.S.C. § 1255(a).

241. *Id.* § 1255(c)(1)–(8), (e)(1).

242. *Id.*

A. The Hardship Caused by the Regulation's Prohibition of Adjustment of Status for Parolees

If a parolee in removal proceedings is barred from or restricted when adjusting his status from within the United States, his only other option for becoming a legal permanent resident is to "leave the United States and go through consular processing [from another country] in order to adjust status."[243] This option, however, is not possible without great difficulty and hardship. It involves the expense of traveling to another country and remaining there until consular processing grants an immigrant visa (if it does so at all). Worse yet, for parolees like Delia Bona who have developed ties in the United States and whose families live and work here as citizens, it involves leaving behind one's family and home.

Compounding this difficult situation, a parolee in removal proceedings may not even be allowed to leave the country to go through consular processing elsewhere in order to return as a legal permanent resident. The statutory provision that allows the Attorney General to let an alien in removal proceedings voluntarily depart the United States instead of being removed doesn't apply to parolees.[244] "[N]on-citizens who have not been admitted into the United States" (including all parolees) who are also in removal proceedings are effectively "ineligible for voluntary departure."[245] The option of going back to one's home country to wait for consular processing in order to secure legal permanent residence is effectively not an option because the parolee in removal proceedings is not legally eligible to leave the United States voluntarily.[246]

If parolees are unable to apply to adjust status or are hindered in doing so by a judge's refusal to grant a removal continuance during the pendency of the adjustment application and are subsequently determined to be removable, the ensuing consequence of removal is severe. When an alien is ordered removed, "the Attorney General shall remove the alien from the United States within a period of 90 days . . . ."[247] Then, after being forced to leave the country, an alien who has been ordered removed pursuant to an inadmissibility removal proceeding is ineligible for readmission for five years.[248] Thus, a parolee who is hindered in applying for adjustment of status and is consequently removed cannot be

243. *Succar*, 394 F.3d at 18.
244. 8 U.S.C. § 1229c(a)(1), (4).
245. *Succar*, 394 F.3d at 18–19 (citing 8 U.S.C. § 1229c(a)(4)).
246. *Id.*
247. 8 U.S.C. § 1231(a)(1)(A).
248. *Id.* § 1182(a)(9)(A)(i).

legally admitted to the United States again for five years.[249] As the First Circuit stated in *Succar*, "[d]enying paroled aliens in removal proceedings the ability to adjust status within the United States thus creates a significant hardship on these individuals and their families."[250]

B. *Why Parolees' Hardships Should Matter to Us: Parolees as a Deserving Class of Aliens*

Parolees are often aliens who we see as deserving of a chance to stay in the United States. The Attorney General[251] is authorized to parole aliens into the United States temporarily "for urgent humanitarian reasons or significant public benefit."[252] According to DHS regulations, aliens can only be paroled when "the aliens present neither a security risk nor a risk of absconding."[253] The regulations provide that aliens who can be paroled include those who have serious medical conditions,[254] women who are pregnant,[255] aliens who are witnesses in judicial, administrative, or legislative hearings,[256] and other aliens "whose continued detention is not in the public interest."[257] An immigration official acting for the Attorney General also has discretion to temporarily parole an alien whom he or she deems appropriate,[258] which includes aliens who arrive at ports of entry seeking admission but about whom some questions still remain as to admissibility.[259] In making the decision of whom to parole, immigration officials consider the likelihood that the alien will appear at subsequent hearings and look to such factors as community ties, the alien's close relatives with known addresses, and agreement to

249. *See id.*
250. 394 F.3d at 19.
251. Note that section 212(d)(5)(A) of the INA (8 U.S.C. § 212(d)(5)(A)) provides for the Attorney General to parole aliens into the United States because the INS was formerly a Department of Justice Agency. However, most immigration functions were transferred to the Department of Homeland Security after that department was formed, thus, while the statute still designates the Attorney General as the one to make a parole decision, the DHS's USCIS is now the agency that houses the immigration services and adjudications functions and that therefore has discretion to parole aliens. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 238—46 (5th ed. 2003) (discussing the recent changes in agency jurisdiction and the duties of each immigration agency).
252. 8 U.S.C. § 1182(d)(5)(A).
253. Aliens and Nationality, 8 C.F.R. § 212.5(b) (2006).
254. 8 C.F.R. § 212.5(b)(1).
255. *Id.* § 212.5(b)(2).
256. *Id.* § 212.5(b)(4).
257. *Id.* § 212.5(b)(5).
258. *Id.* § 212.5(c).
259. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 190–91 (2003), *available at* http://uscis.gov/grapics/shared/statistics/yearbook/2003/2003Yearbook.pdf.

cooperate with the immigration process.[260]

The statute authorizing parole[261] and the regulations that are used in granting parole[262] both work to ensure that only those aliens who have a valid humanitarian or public interest reason to be in the country and who are not risks to the security of U.S. residents are paroled. The regulations also contemplate that parolees will often be aliens who have community ties to the United States and family in this country, and who are willing to cooperate with the U.S. legal system.[263] In this way, the only aliens who are paroled are ones who have great need to stay and who have family and community ties here, and who are willing to abide by the law.[264] Thus, any regulations that categorically or effectively bar parolees from being able to adjust their status impose tremendous hardship on a class of aliens who have many positive characteristics and are likely deserving of being able to stay in the United States.

As demonstrated by the story of Delia Bona, parolees are often valuable members of the U.S. community. The current DOJ and DHS policy on parolee adjustment results in severe consequences to parolees by hampering or barring their ability to become legal permanent residents. Because 8 C.F.R. § 245.1(c)(8), as it applied to parolees, forced a valuable class of law-abiding people to leave the United States by denying them eligibility to adjust to legal permanent resident status, and thereby denying them relief from removal, the regulation did not comport with notions of fairness. These considerations should inform the agencies' decision on whether to implement the proposed regulations, as well as inform any subsequent court's review of the proposed regulations.

VI. STANDING AT A CROSSROADS

The previous sections have demonstrated that the agencies' recent approach to parolee adjustment, evidenced by both the now-repealed regulation and the newly proposed adjustment restrictions, contravenes congressional intent,[265] constitutes improper agency action,[266] contravenes the INA as interpreted through traditional canons of statutory construction in immigration law,[267] and is fundamentally unfair.[268] Fortu-

260. 8 C.F.R. § 212.5(d)(2)–(3).
261. 8 U.S.C. § 1182(d)(5)(A) (2000).
262. 8 C.F.R. § 212.5.
263. *Id.* § 212.5(b), (d)(2)–(3).
264. *Accord* Kenney, *supra* note 165.
265. *See supra* Part II.
266. *See supra* Part III.
267. *See supra* Part IV.

nately, however, the agencies are in an excellent position to change this course because 8 C.F.R. § 245.1(c)(8) has been repealed.[269] Impermissible restrictions on parolee adjustment have been proposed, but have not yet been put into operation.[270] The agencies can choose to implement the existing interim rule[271] on a permanent basis without adding any of the additional restrictions that have been proposed. This would leave parolees in the position of being able to apply for adjustment of status with as good a chance at success as all other adjustment applicants. Agencies should listen to the myriad legal and policy arguments in favor of this choice. The agencies cannot continue to act in contravention of statutory authority and congressional intent regarding parolee adjustment, and they should not continue attempting to make parolee adjustment difficult, if not impossible. The agencies should not impose additional restrictions, but should simply adopt the interim rule as permanent.

If the agencies choose to adopt the interim rule as permanent, one procedural difficulty remains. The interim rule establishes that USCIS will have exclusive jurisdiction over adjustment applications from parolees in removal,[272] but it does not establish any uniform procedure ensuring that removal proceedings, which are conducted by an IJ, will be stayed or otherwise deferred while the adjustment application is adjudicated.[273] The absence of such a procedure is of great consequence: if removal proceedings are not stayed, a parolee could be removed from the country, and thus burdened with all of the onerous penalties of removal,[274] before USCIS finishes reviewing the parolee's application for adjustment to lawful permanent residence. This would drain all meaning from the parolee's application to become an LPR. The agencies have proposed limiting when an IJ may grant such a deferment,[275] a proposal which would exacerbate the situation by forbidding individual IJs from exercising discretion to defer removal.

On this issue, the agencies are standing at a crossroads. They have three options: 1) they can leave the interim regulation in place permanently, without adding any uniform procedure for removal deferment; 2) they can implement limitations on when an IJ may defer removal for purposes of allowing a parolee to apply to USCIS for adjustment; or 3)

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268. *See supra* Part V.
269. Eligibility of Arriving Aliens, *supra* note 18, at 27,591.
270. *Id.* at 27,588–90.
271. *Id.* at 27,591–92.
272. *Id.* at 27,587–88.
273. *Id.* at 27,585–92; *see also* Kenney, *supra* note 165, at 4.
274. *See supra* Part V.B (discussing negative consequences of removal, including five year bar to re-entry).
275. Eligibility of Arriving Aliens, *supra* note 18, at 27,589.

they can leave the interim regulation in place, but clarify a uniform procedure, such as administrative closure of the removal proceeding or instructions to IJs to grant continuances, for deferring removal while parolees' adjustment applications are reviewed by USCIS. The latter option is the only one that ensures parolees the full and fair opportunity to apply for adjustment and to have that application reviewed before they are removed. In light of Congress's stated intent of allowing parolees eligibility to adjust, the agencies should choose the latter option.

In the meantime, the interim rule itself is all that governs parolee adjustment. Parolees who wish to become LPRs are in a much better position under the interim rule than under 8 C.F.R. § 245.1(c)(8), which banned them from applying for adjustment. They may now apply to USCIS for adjustment of status, and that application will be reviewed.[276] However, parolees still face a difficult situation in which the IJ, who is overseeing removal proceedings, is not required or guided to defer or stay removal proceedings while an adjustment application is pending with USCIS.[277] The parolee could be removed before his adjustment application is ever reviewed. Unless and until the agencies put a uniform removal deferment procedure in place, this overlapping agency jurisdiction could present a significant logistical difficulty for parolees.

The best route for a parolee who seeks to adjust his or her status is to apply to USCIS for that adjustment. Then, if it appears that removal proceedings are progressing more quickly than the adjustment of status application review by USCIS, the parolee should implore his or her assigned IJ to defer the removal proceedings until the adjustment application has been adjudicated. While the situation may sound grim, it is actually much improved from previous years when parolees could not apply for adjustment at all under 8 C.F.R. § 245.1(c)(8).

CONCLUSION

The promulgation of 8 C.F.R. § 245.1(c)(8) constituted an inappropriate use of agency regulatory power. The anti-parolee adjustment policy behind the regulation continues to have negative effects, as the anti-parolee sentiment is also evident in the new regulation proposals. Both the now-repealed regulation and its newly proposed replacements are inconsistent with the intent of Congress. Their impact on parolees was not planned or well-reasoned by the INS and its successors. Canons of statutory construction in immigration law dictate interpreting the statute in fa-

276. *Id.* at 27,587–88.
277. *Id.*; *see also* Kenney, *supra* note 165, at 3–5.

vor of the parolee. As a policy, the new regulation proposals are fundamentally unfair and cause immense hardship that was not contemplated by the INA. The promulgation of 8 C.F.R. § 245.1(c)(8) exceeded the Attorney General's authority, and the agencies' new proposals to make parolee adjustment excessively difficult are inconsistent with the INA and with sound public policy. The immigration agencies and courts that accept these new proposals as an appropriate exercise of the agencies' discretion are sorely misguided.