Nos. 03-71596
03-72488

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Delia RAMOS BONA,
Petitioner,

v.

John ASHCROFT, Attorney General of the United States
Respondent.

ON REVIEW FROM A DECISION OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF THE AMERICAN IMMIGRATION LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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I. INTRODUCTION

Amicus Curiae American Immigration Law Foundation (AILF) submits this brief to expand upon Petitioner's argument that the immigration regulation at issue in this case – 8 C.F.R. § 245.1(c)(8)[1] – violates the statute and is *ultra vires*. Amicus recently briefed and argued this precise issue to the First Circuit Court of Appeals in the case *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), where the Court struck down the regulation after finding that it violated § 245 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1255. To the best of Amicus' knowledge, the First Circuit is the only court to have ruled on the validity of this regulation.

INA § 245(a) expressly provides that parolees – without restriction – are eligible to adjust their status to that of lawful permanent residents within the United States if they meet the general statutory requirements for adjustment. Consistent with this language, the agency's longstanding practice from 1960 until 1997 was to allow *all* parolees an opportunity to apply for adjustment of status. In 1997, the Attorney General reversed this

[1] 8 C.F.R. §§ 245.1(c)(8) and 1245.1(c)(8) are identical. The former section pertains to the U.S. Citizenship and Immigration Services of the Department of Homeland Security, while the latter section pertains to the immigration courts and the Board of Immigration Appeals, which remain within the Department of Justice. Amicus will refer to 8 C.F.R. § 245.1(c)(8) for convenience. Because the regulations are identical, however, both are challenged in this case.

long-standing interpretation by adopting a regulation that stripped the vast majority of parolees – those in removal proceedings – from any avenue for adjusting their status. *See* 8 C.F.R. § 245.1(c)(8). There were no statutory changes to support this reversal in position. To the contrary, the 1996 comprehensive overhaul of the immigration statute in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) specifically left this provision unchanged. Pub. L. No. 104-208.

In *Succar*, the First Circuit invalidated this regulation as being in violation of INA § 245(a). After thoroughly considering the plain language of § 245(a), the larger statutory structure, and the legislative history of the provision, the Court rejected the Respondent's claim that the regulation was consistent with congressional intent. Instead, the Court found that the regulation conflicted with both the plain language of the statute and clear congressional intent. The regulation "reinstituted" the very problems that Congress sought to resolve through the adjustment of status process. 394 F.3d at 10. Additionally, the regulation upset "Congress's careful balancing of the country's security needs against the national interests Congress wished to advance through adjustment of status proceedings." *Id.*

While this Court will not lightly overturn a regulation, it has been compelled to do so when the regulation conflicts with clear congressional

intent. *See, e.g., Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (overturning Attorney General's regulation that conflicted with statutory mandate that an immigration judge determine removability); *Akhtar v. Burzynski*, 384 F.3d 1193 (9th Cir. 2004) (holding that regulatory "age-out" provisions for "V" visas frustrate congressional policy); *Romero v. INS*, 39 F.3d 977 (9th Cir. 1994) (Attorney General's immigration regulation exceeded his authority because it conflicted with congressional intent); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) (invalidating regulation that fundamentally altered statutory cause of action); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 126 (1985) (federal regulation in conflict with a federal statute is invalid as a matter of law). Amicus urges the Court to find that the regulatory bar on adjustment of status of arriving aliens in removal proceedings violates the statute and is *ultra vires*.

II. STATUTORY AND REGULATORY OVERVIEW

INA § 245(a) allows a non-citizen to apply for adjustment of status to that of a lawful permanent resident if he 1) has been inspected and either admitted or paroled into the United States; 2) is the beneficiary of an approved petition that makes an immigrant visa immediately available to him; and 3) is otherwise eligible for permanent residence. 8 U.S.C. §

1255(a). A non-citizen "adjusts status" by applying for permanent residence while in the United States.

Until 1996, non-citizens were roughly divided into two major categories for immigration law purposes: "arriving aliens" who were seeking admission and had not yet entered the United States, and non-citizens who had made an entry into the United States. Parolees fell within the former category – although they were physically present in the United States, they were treated as if they were at the border seeking admission. *See e.g., Leng May Ma v. Barber*, 357 U.S. 185 (1958). In contrast, non-citizens who entered the country without any inspection were treated as being present in the United States pursuant to an entry. *Matter of Z*, 20 I. & N. Dec. 707 (BIA 1993). Individuals who made an entry into the United States were subject to deportation proceedings, while those who were seeking admission were subject to exclusion proceedings. *See* 8 U.S.C. § 1251(a) (1995); 8 U.S.C. § 1226 (1995).

Exclusion proceedings were to determine whether an individual who had not yet made an entry but who was seeking admission was admissible. 8 U.S.C. § 1226 (1995). Thus, exclusion proceedings pertained to "arriving aliens." *Id.*. While in exclusion proceedings, a paroled "arriving alien" always retained the right to apply for adjustment of status before the

Immigration and Naturalization Service (INS). The INS retained the authority to adjudicate the adjustment application independent of the exclusion proceedings. *See e.g., Matter of Castro,* 21 I. & N. Dec. 379 (BIA 1996); *see also Succar*, 394 F.3d at 16-17.[2]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). Relevant here, Congress eliminated the definition of the term "entry" and replaced it with a definition of the terms "admission" and "admitted." 8 U.S.C. § 1101(a)(13) (2004). Congress also eliminated "deportation" and "exclusion" proceedings and replaced them with "removal" proceedings – applicable both to those seeking admission and those admitted. Finally, Congress made changes to the adjustment eligibility of certain non-citizens, *but not parolees. See* 8 U.S.C. §§ 1255(c)(7) and (8).

In 1997 the Attorney General issued proposed regulations intended to "implement the IIRIRA." 62 Fed. Reg. 444 (Jan. 3, 1997). Two months

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[2] In *Succar*, the Court asked the parties to clarify the procedure as it existed prior to the adoption of the challenged regulation. In response, "the Attorney General joined in a letter with the petitioner which confirmed that prior to 1997, arriving aliens in exclusion proceedings who were statutorily eligible for adjustment of status could apply to the district director for this relief." *Id.*, 394 F.3d at 16 n. 11.

later, the proposed rules were adopted as interim rules that remain in place at this time. 62 Fed. Reg. 10312 (March 6, 1997).

The new regulations, *inter alia*, created a definition for the pre-existing term "arriving alien." This definition currently reads:

> The term *arriving alien* means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. part 235, at a port-of-entry, or an alien who is 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 pursuant to section 212(d)(5) of the Act, except an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

8 C.F.R. § 1.1(q) (2004). In the supplemental information on the regulation, the DOJ explained that it was adopting the definition for "clarity." *See* 62 Fed. Reg. at 445.

The new regulations also made one substantive change to the pre-existing adjustment of status regulations. Specifically, they added a bar to the adjustment of "[a]ny arriving alien who is in removal proceedings pursuant to section 235(b)(1) [expedited removal] or section 240 [regular removal] of the Act." 8 C.F.R. § 245.1(c)(8). In the prefatory remarks, the

Attorney General did not claim that this change was required by IIRIRA. Rather, the Attorney General contended only that this addition was consistent with the new expedited removal proceeding adopted in IIRIRA. 62 Fed. Reg. at 452. Under § 235(b)(1), however, expedited removal is applicable to only a specifically defined group of applicants for admission, not including parolees and thus not including Petitioner. 8 U.S.C. § 1225(b)(1).

In *Succar*, the Attorney General did not dispute that the "'majority of the intended beneficiaries of parolee adjustment of status are in removal proceedings.'" 394 F.3d at 21. Consequently, and as a direct result of this regulation, for the first time since parolees were added to INA § 245(a) in 1960, the vast majority of parolees have been stripped entirely of the opportunity to apply for adjustment of status.

III. ARGUMENT

A. CONGRESS INTENDED THAT PAROLEES BE ABLE TO ADJUST THEIR STATUS WITHIN THE UNITED STATES.

1. The INA authorizes the adjustment of parolees under § 245(a) in plain and unambiguous terms.

Regulations that are "manifestly contrary to the statute" are invalid, because the court and the agency must give effect to the "unambiguously

expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). In assessing the intent of Congress, a court is to look first at the plain meaning of the statute. Where there is ambiguity, a court may discern Congressional intent from legislative history, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 n. 12 (1987), and from the language and design of the entire statute. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). However, where no ambiguity exists, the plain language of the statute must control. *Morales-Izquierdo*, 388 F.3d at 1303.

INA § 245(a) clearly sets forth the two categories of individuals eligible to adjust to permanent resident status under that provision: those who have been "inspected and *admitted or paroled* into the United States." 8 U.S.C. § 1255(a) (emphasis added). The plain meaning of the statute thus makes parolees eligible for adjustment. The statute makes no distinction between individuals who are admitted and those who are paroled. It also makes no distinction between individuals in removal proceedings and those not in proceedings. *Id.; see also Succar,* 394 F.3d at 16. Under the plain meaning of the statute, individuals who have been inspected and paroled into

the United States are eligible to adjust to the same extent as individuals who have been inspected and admitted. [3]

Because the statutory language is unambiguous, there is no need for agency interpretation and no deference is to be accorded an agency interpretation, such as the regulation at issue here, that conflicts with the plain meaning of the statute. *See Succar*, 394 F.3d at 24; *see also Lagandaon v. Ashcroft*, 383 F.3d 983, 987 (9th Cir. 2004) (holding that where agency misreads plain statutory language, no deference is due); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) ("After employing the "traditional tools of statutory construction," . . ., we conclude that [the intent of] Congress [is clear]. . . Therefore, we may not defer to the BIA's interpretation that the filing period is not subject to equitable tolling.").

2. Congress' clear intent is reinforced by the design of the statute as a whole.

In "ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and

[3] It is not disputed that Ms. Bona was inspected and paroled into the United States, and thus she is eligible for adjustment under the plain language of INA § 245(a) regardless of whether she currently is in parole status. *Accord Tibke v. INS*, 335 F.2d 42, 45 (2d Cir. 1964) (noting that the amended § 245 deleted an eligibility requirement that the individual's original status be maintained).

design of the statute as a whole," *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. at 291, for Congress is presumed to "create a 'symmetrical and coherent regulatory scheme.'" *Morales-Izquierdo,* 388 F.3d at 1303 (citation omitted). Here, the structure of the immigration statute demonstrates Congress' intent that parolees were not to be excluded from eligibility for adjustment. The statutory

> context shows that Congress purposefully classified paroled individuals as "inadmissible," and it also determined that they should generally be placed in removal proceedings. But Congress also explicitly allowed paroled individuals to adjust status if they meet the other statutory requirements.

Succar, 394 F.3d at 27. If, as Respondent has claimed, Congress' intent was that parolees in proceedings would not be eligible to adjust, the statutory structure makes no sense: on the one hand, it provides that the majority of paroled individuals are to be placed in proceedings, but on the other hand, it specifically makes these same parolees eligible for adjustment without limitation.

The contradiction in Respondent's interpretation is particularly evident from the fact that Congress specified precisely the categories of individuals whom it intended to disqualify from adjustment under INA § 245. *See e.g.,* INA § 245(c), 8 U.S.C. § 1255(c) (listing 8 categories of non-citizens for whom § 245(a) is inapplicable). Parolees are not among any of

the excluded categories of ineligible non-citizens. As the First Circuit explained:

> Th[e] lack of a carve out for parolees in removal proceedings is itself significant, given that the statute contains a number of carve outs as to eligibility for adjustment of status. Some carve outs exclude persons from eligibility to apply who would otherwise meet more general eligibility requirements. Further, other carve outs create eligibility in persons otherwise ineligible. Congress thus has created a comprehensive scheme.

Succar, 394 F.3d at 10.

By specifically listing in subparagraphs (c)-(f) those who are ineligible for adjustment of status under subparagraph (a) of § 245, Congress manifested its intent to preserve the opportunity for non-citizens not so barred to seek adjustment of status.

3. Legislative history supports interpretation of the statute consistent with its plain meaning.

Where, as here, the statute is clear and unambiguous, there is no need for the Court to consider legislative history. Nonetheless, a review of the legislative history here adds further support that Congress expressed its intent through the plain language of the statute. This is particularly true considering that, for more than 35 years, the Attorney General had interpreted INA § 245(a) consistent with this legislative history. *Succar*, 394 F.3d at 10.

Congress' purpose in establishing the adjustment of status provision was "so that aliens lawfully in the United States in a temporary status may, under prescribed conditions, have their status adjusted to that of permanent residents without the necessity of leaving the United States." H.R. Conf. Rep. 82-2096 at 1755 (1952). *See also*, H.R. Rep. 82-1365 at 1719 (1952) ("This procedure was specifically devised to obviate the need for departure and reentry in the cases of aliens temporarily in the United States...") and 4 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 51.01[1][b] at 51-6 through 51-13 (rev. ed. 2004) (discussing travel hardship problems which gave rise to both the former "preexamination" procedure and adjustment of status which replaced it.)

Adjustment of status, originally available only to an alien who was lawfully admitted to the United States, was explicitly expanded by Congress in 1960 to the present requirement of "an alien who was inspected and admitted or paroled." Pub. L. 86-648, § 10, 74 Stat. 504 (1960). The purpose of the amendment was to "broaden the existing procedure … to include *all aliens* … who have been inspected … *or who have been paroled* into the United States." Senate Report No. 1651, June 22, 1960, 3125 (emphasis added). Congress reiterated its interest in benefiting relatives of U.S. citizens, among others. *See* S. Rep. 86-1651, 1960 U.S.C.C.A.N. 3124 (June

22, 1960) at 3136-3137; *see also Succar,* 394 F.3d at 32-34 (discussing legislative history of INA § 245(a)).

Since expanding § 245 relief to parolees, Congress has never retreated from its intent to keep such relief available to them. Yet Congress has had more than a dozen opportunities to do so. *Succar,* 394 F.3d at 16. Since 1960, Congress has repeatedly amended INA § 245(a), restricting the class of non-citizens eligible to adjust in the United States. Nonetheless, every time Congress restricted the class of people who could apply for adjustment of status, it retained parolees within that class without limitation. It must be presumed that Congress' action in this regard was a deliberate intent to preserve this existing right. *Cardoza-Fonseca*, 480 U.S. at 432; *accord Akhtar*, 384 F.3d at 1199 (noting the presumption that "'when a statute designates certain … manners of operation, all omissions should be understood as exclusions'") (citation omitted); *see also Tibke*, 335 F.2d at 45 ("In view of the repeated attention given Section 245 by Congress, we can only conclude that it was fully aware of the significance of the language that it selected").

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4. Any lingering ambiguities must be resolved in favor of the Petitioner.

Because INA 245(a) is an ameliorative statute, it should be interpreted and applied in an ameliorative fashion. *Akhtar*, 384 F.3d at 1200. In fact, this rule "applies with additional force in the immigration context, 'where doubts are to be resolved in favor of the alien.'" *Padash v. INS*, 358 F.3d 1161, 1173 (9th Cir. 2004)(quotations and citations omitted); *see also INS v. St. Cyr,* 533 U.S. 289, 320 (2001) (quoting *Cardoza-Fonseca*, 480 U.S. at 449 (emphasizing that there is a "long-standing principle construing any lingering ambiguities in deportation statutes in favor of the alien").

B. NOTHING IN IIRIRA PROVIDES LEGISLATIVE JUSTIFICATION FOR THE CHALLENGED REGULATION.

In the prefatory background material explaining the 1997 regulation, the Attorney General asserted that the denial of all relief to "arriving aliens" in 8 C.F.R. § 245.1(c) was "consistent with the intent of Congress when it passed IIRIRA." 62 Fed. Reg. 10326-27 (May 6, 1997). In fact, the opposite is true. An examination of the 1996 statutory changes demonstrates that IIRIRA "strengthen[s], not weaken[s], Petitioner's claim that the regulation is invalid." *Succar*, 394 F.3d at 11.

First, none of the statutory changes made by IIRIRA even addresses adjustment of status for parolees. Thus, unlike the remainder of the

comprehensive regulatory changes adopted in the wake of IIRIRA, there is no statutory support for this new regulation. Second, Congress went to great effort in IIRIRA to identify specifically the categories of individuals whom it intended to be ineligible for relief and the types of proceedings in which the opportunity to seek relief would be barred. Thus, Congress' intent that no change occur with respect to parolees in proceedings and adjustment is demonstrated by the absence of any language limiting the preexisting right of parolees – including those in proceedings – to adjust status.

1. Congress included in IIRIRRA two specific new grounds of ineligibility for adjustment under § 245(a) applicable to nonimmigrant visa violators. *See* 8 U.S.C. §§ 1255(c)(7) and (8), In creating these new categorical grounds of ineligibility, Congress gave no indication that it intended any additional categorical bars to adjustment.

Prior to 1997, the Attorney General interpreted the statute as not precluding a parolee in removal proceedings from adjusting before the Service. Former 8 C.F.R. § 242.2(a)(2). This regulation only affected which forum had jurisdiction over the application; it did not affect eligibility for the relief itself. Given the Attorney General's long-standing interpretation of the statute as allowing adjustment of status by parolees in removal proceedings, the fact that Congress chose *not* to categorically

restrict parolee's right to adjust under INA § 245(a) when it amended the statute in IIRIRA demonstrates that it intended to preserve that right.

2. IIRIRA's new definitions for the terms "admitted" and "admission" provide no justification for restricting the pre-existing right of arriving aliens to adjust. Rather, Congress' intent was to reclassify the status of non-citizens present in the United States without inspection. Thus, Congress defined the terms "admission" and "admitted" such that an applicant for admission would include not only an "arriving alien" but also an individual present in the United States who had never been admitted or paroled, that is, who entered without inspection. 8 U.S.C. § 1101(a)(13); *see also Succar*, 394 F.3d at 13 (noting that the main impact of this change was to "re-characterize aliens who are present in the United States, but who have not been inspected or admitted"). In doing so, Congress did not change the status of an "arriving alien" nor express any intent to modify the general treatment historically provided "arriving aliens."

Congress had long used the specific term "arriving alien," most notably in specifying who would be placed in exclusion proceedings. *See* former 8 U.S.C. § 1226 (1995) (providing that exclusion proceedings shall be used "to determine whether an *arriving alien* who has been detained for further inquiry … shall be allowed to enter or shall be excluded and

deported.") (emphasis added). As long ago as 1956, the Board of Immigration Appeals (BIA) noted that the term "excludable" technically relates to an "arriving alien" seeking admission. *Matter of M --,* 7 I. & N. Dec. 147 (BIA 1956). Similarly, in a provision that still exists, pre-IIRIRA law stated that "the physical and mental examinations of *arriving aliens* [ ] shall be made by medical officers of the United States Public Health Service…" *See* former 8 U.S.C. § 1224(a) (1995) (emphasis added); current 8 U.S.C. § 1224(b) (2004).

Consistent with the statutory use of the term, the regulations have also long recognized "arriving aliens." *See, e.g.,* 8 C.F.R. § 212.5(b) (1996) (discussing "all other arriving aliens"); 8 C.F.R. § 234 (1996) ("Physical and Mental Examination of Arriving Aliens"); 8 C.F.R. § 211.1 (1996) ("arriving immigrant aliens"); 8 C.F.R. § 212.1 (1996) ("arriving nonimmigrant aliens").

Thus, because the term "arriving aliens" had long been used in both the statute and the regulations, the simple fact that the Attorney General defined the term in 1997 is not justification for imposing a bar on adjustment of parolees in proceedings.

3. Congress' complete restructuring of deportation proceedings did not authorize any change in the pre-existing right of parolees in proceedings

to adjust status. Rather, Congress in IIRIRA identified specifically which categories of individuals would be ineligible to seek relief in which type of proceeding. Significantly, in contrast to all other forms of proceedings, Congress placed no general restrictions on the ability of an individual in removal proceedings under 8 U.S.C. § 1229a to apply for relief.[4] Thus, the fact that an individual is in removal proceedings is not a basis for denying that individual the opportunity to apply for adjustment.

In place of exclusion and deportation proceedings, Congress created four types of proceedings: 1) "expedited removal" for non-citizens arriving at ports of entry and charged as inadmissible due to lack of proper documents or material misrepresentations at entry, 8 U.S.C. § 1225(b)(1); 2) special removal procedures for individuals arriving in the U.S. who are suspected of being a terrorist or security threat, 8 U.S.C. § 1225(c); 3) special removal proceedings for stowaways, 8 U.S.C. § 1225(a)(2); and 4) removal proceedings for persons present in the United States, regardless of whether they are applicants for admission. 8 U.S.C. § 1229a.[5]

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[4] The one limited exception, not relevant here, is a bar on relief for individuals ordered removed *in absentia.* 8 U.S.C. § 1229a (b)(7).

[5] Congress also retained an expedited removal procedure for certain non-citizens convicted of an aggravated felony, in which the individual is barred from seeking any discretionary relief. 8 U.S.C. § 1228(b).

In each of these proceedings, Congress was explicit as to when it intended to deny individuals the opportunity to apply for relief from removal. Thus, in three of the four proceedings, Congress expressly eliminated the right of an individual subject to the proceedings to apply for any relief – including adjustment of status – other than asylum.[6] The lack of any comparable restrictions for those in regular removal proceedings under 8 U.S.C. § 1229a thus indicates a deliberate choice on Congress' part.

Had Congress intended that all "arriving aliens," as broadly defined by the Attorney General's subsequently adopted regulation, be subject to expedited removal under INA § 235(b)(1), it would have so legislated. Instead, Congress explicitly limited the expedited removal procedure to two discrete sets of applicants for admission, neither of which includes parolees. 8 U.S.C. § 1225(b)(1).

The fact that an arriving alien is not placed in expedited removal, but instead paroled in for regular removal proceedings, indicates that an immigration officer determined that the individual was not subject to

[6] *See* 8 U.S.C. § 1225(a)(2) (stowaways have no right to a hearing and are ineligible for relief other than asylum); § 1225(b) (in expedited removal, no right to a hearing other than to apply for asylum); and § 1225(c) (aliens removable on security grounds not entitled to a hearing other than limited review by the Attorney General). IRRIRA also amended the procedure for reinstating prior removal orders against individuals who had illegally reentered, barring applications for relief in reinstatement proceedings. 8 U.S.C. § 1231(a)(5).

expedited removal. *See, e.g.,* 8 C.F.R. § 235.2. In fact, some groups of arriving aliens – including individuals who apply for asylum and demonstrate a credible fear of persecution – can not be placed in expedited removal. Thus, Respondent's reliance on congressional intent behind the expedited removal procedures is misplaced.

C. CONGRESS DID NOT AUTHORIZE THE ATTORNEY GENERAL TO CATEGORICALLY DISQUALIFY PAROLED RELATIVES OF U.S. CITIZENS FROM ELIGIBILITY FOR ADJUSTMENT OF STATUS.

In the prefatory comments to the regulation, the Attorney General defends the adoption of the bar on arriving aliens and parolees adjusting while in proceedings by stating only that "adjustment of status is a discretionary decision." 62 Fed. Reg. 10326. However, the Attorney General may not use his discretionary authority to create new categorical bars that are not authorized. As the First Circuit explained:

> Congress has spoken clearly on the issue of eligibility to adjustment of status and has reserved for itself the determination of whether a non-citizen should be able to apply for this relief. The Attorney General cannot promulgate a regulation that categorically excludes from application for adjustment of status a category of otherwise eligible aliens; this is contrary to congressional intent in *section 1255.*

Succar, 394 F.3d at 24.

Congress limited the Attorney General's exercise of discretion to the individualized determinations of specific adjustment applications. *See* 8 U.S.C. § 1255(a). A parolee's statutory eligibility for adjustment "triggers the exercise of discretion" even if it does not compel the granting of the requested relief. *Asimakopoulos v. INS*, 445 F.2d 1362, 1365 (9th Cir. 1971). By categorically barring an entire class of parolees from eligibility, however, the regulation "effectively precludes the exercise of discretion in many cases in which the applicant would otherwise qualify for relief." *Id.* The agency's failure to exercise the discretion delegated to it is reversible error. *Id.*; *see also Succar*, 394 F.3d at 26, n. 23 ("Here, the Attorney General must actually exercise his discretion to determine whether the paroled individuals that Congress has deemed eligible for adjustment of status should be granted this relief").

Moreover, the exercise of discretion with respect to the ultimate outcome of an individual case is distinct from the discretion to determine categorical eligibility requirements. *Succar,* 394 F.3d at 23. Congress has been explicit when it intended to delegate to the Attorney General the authority to create new categorical bars or conditions above and beyond those found in the statute. For example, INA § 240B specifically lists non-citizens ineligible for voluntary departure relief, *see* 8 U.S.C. § 1229c(a)(4),

(c) & (d), and also expressly delegates discretionary authority to further limit categorical eligibility by regulation "for any class or classes of aliens." 8 U.S.C. 1229c(e). *See also* 8 U.S.C. §§ 1158(b)(2)(C) and (d)(5) (authorizing the Attorney General to establish "additional limitations and conditions" on asylum eligibility and consideration). As a matter of statutory construction, when Congress includes language elsewhere omitted, "...it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

The agency had no authority to promulgate a regulation that categorically barred an entire group of applicants from eligibility for adjustment of status.

CONCLUSION

For the reasons expressed above, Amicus urge this Court to find that the challenged regulation violates INA § 245(a) and to hold that Petitioner, as a parolee, remains eligible to apply for adjustment of status and to have his application decided on the merits.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App. 32(a)(7), I hereby certify, according to computerized count, that this brief contains 4,772 words. This brief was prepared in Microsoft Word 2000.

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Mary Kenney

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Delia RAMOS BONA,	)	
	)	
Petitioner	)	
v.	)	Civ. Act. Nos. 03-71596
	)	03-72488
JOHN ASHCROFT, Attorney General of the United States,	)	
	)	
Respondent	)	

LIST OF RELATED CASES

The undersigned counsel for Amicus submits that, to the best of her knowledge, the following cases pending before this Court all raise the issue presented here, and addressed by the Court of Appeals for the First Circuit in *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005): whether 8 C.F.R. § 245.1(c)(8) conflicts with the statute and is *ultra vires*?

Jiang v. Ashcroft, No. 03-71837

Bona v. Ashcroft, No. 03-71596

Roozeky v. Ashcroft, No. 04-71540

Hong v. Ashcroft, No. 04-74034

Kosonsuphakit v. Ashcroft, No. 04-71962

Respectfully submitted,

_____
Mary Kenney

Date: February 24, 2005

CERTIFICATE OF SERVICE

On February 24, 2005, I, Kerry Foley, served two copies of this Brief of Amicus Curiae on each of the following counsel of record by regular mail:

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