U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Office of the Chief Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

March 26, 2010

Wayne Sachs, Esq.
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Office of the Chief Counsel/PHI
1600 Callowhill St. 4th Floor
Philadelphia, PA 19130

Re: ALYAZJI Alla Adel
A096 206 662

Dear Counsel:

The Board of Immigration Appeals requests supplemental briefing for the subject case. Both parties are granted until **April 21, 2010**, to submit a supplemental brief to the Board of Immigration Appeals. The Amicus Curiae is also permitted to submit a supplemental brief for the subject case. The briefs must be RECEIVED at the Board on or before this date. **Please note: The supplemental brief is limited to 25 double-spaced pages.** Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records. The Board will not accept any subsequent submissions filed after the deadline.

The Board requests supplemental briefing for the subject case on the issues delineated as follows, within the context of your brief:

> Does the Board's decision in *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), *vacated sub nom. Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006), remain viable given its reception in the courts to date? Specifically, if an alien is "admitted" to the United States after inspection and authorization by an immigration officer and continues to maintain a lawful presence in this country thereafter, does the alien's subsequent adjustment to lawful permanent resident status qualify as a potential "admission" for purposes of section 237(a)(2)(A)(i) of the Immigration and Nationality Act?
>
> If an alien has never been "admitted" to the United States after inspection and authorization by an immigration officer, does the alien's adjustment to lawful permanent resident status qualify as a potential "admission" for purposes of section 237(a)(2)(A)(i) of the Immigration and Nationality Act? *See Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999).
>
> If an alien is "admitted" to the United States after inspection and authorization by an immigration officer but subsequently fails to maintain a lawful presence in this country, does the alien's later adjustment to lawful permanent resident status qualify as a potential "admission" for purposes of section 237(a)(2)(A)(i) of the Immigration and Nationality Act?

If an alien is "admitted" to the United States on more than one occasion, which admission date qualifies as "the date of admission" for purposes of section 237(a)(2)(A)(i) of the Immigration and Nationality Act?

Please address whether, in light of the reasoning of *Clark v. Martinez*, 543 U.S. 371, 380-87 (2005), the statutory term "admission" can be construed to encompass adjustment of status in some cases but not in others.

The Board is in receipt of and grants the Department of Homeland Security's Motion for Extension of Time to Respond to Amicus Curiae Brief. The Department's response should be incorporated into the supplemental brief described above.

A fee is not required for the filing of a brief. Your brief must be RECEIVED at the Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual and Questions and Answers at www.usdoj.gov/eoir.

Also, the Board will hear Oral Argument in the above-referenced case on **May 20, 2010, at 11:00 a.m.** in Suite 2400, One Skyline Tower, 5107 Leesburg Pike, Falls Church, Virginia 22041. Oral Argument should not extend beyond 30 minutes for each party, which includes the time to present, for questions, and rebuttal, unless advance approval has been granted.

The record of proceedings may be examined in Suite 2000 prior to oral argument. Inquiries may be mailed to: Oral Argument Coordinator, Board of Immigration Appeals, Department of Justice, P.O. Box 8530 Falls Church, Virginia 22041. The Oral Argument coordinator's number is (703) 305-0161. You may also visit our web site at: www.usdoj.gov/eoir, where you will find our Practice Manual and Questions and Answers Regarding Oral Argument before the Board.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals–including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:

Board of Immigration Appeals,
Clerk's Office
5107 Leesburg Pike, Suite 2000,
Falls Church, VA 22041
Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

To mail by regular first class mail:

Board of Immigration Appeals,
Clerk's Office
P.O. Box 8530
Falls Church, VA 22041

Sincerely,

Paulomi M. Dhokai

Paulomi M. Dhokai
Oral Argument Coordinator
Board of Immigration Appeals

Enclosures: Oral Argument Waiver Form
✓Oral Argument Attendee List

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of: **Alla Adel ALYAZJI,** **a.k.a. Alaa Adel ALYAZJI Huda** **In removal proceedings**	**File No.: A096 206 662**

U.S. DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEFING

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. BRIEF ANSWERS..... 2

III. FACTUAL BACKGROUND..... 2

IV. ARGUMENT..... 6

A. In Order to Achieve National Uniformity, the Board Should Modify *Shanu* by Vacating the "Any Entry" Doctrine for Purposes of INA § 237(a)(2)(A)(i) 6

B. For Purposes of INA § 237(a)(2)(A)(i), Adjustment of Status Qualifies as an Admission if the Alien Did Not Make a Prior Admission under INA § 101(a)(13)(A)..... 9

C. The Board Should Not Address Whether "the Date of Admission" in INA § 237(a)(2)(A)(i) Relates to the Alien's Initial or Most Recent INA § 101(a)(13) Admission Because Respondent Only Accomplished One Admission..... 16

D. Even An Alien "Admitted" under INA § 101(a)(13)(A) Who Fails to Maintain or Otherwise Violates His/Her Status Has Still Been "Admitted" for Purposes of INA § 237(a)(2)(A)(i)..... 17

E. *Martinez* Should Not Dissuade the Board from Interpreting "Admission" to Include Adjustment of Status Where an Alien Entered the United States with Parole or without Inspection..... 17

V. CONCLUSION..... 22

I. STATEMENT OF THE CASE

The Department of Homeland Security (Department or DHS) hereby files its supplemental brief in response to the request by the Board of Immigration Appeals (Board) for supplemental briefing on the following issues:

(1) Whether *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), *vacated sub nom. Aremu v. Dep't of Homeland Security*, 450 F.3d 578 (4th Cir. 2006), remains viable, given its reception in the courts to date. Specifically, if an alien is "admitted" to the United States after inspection and authorization by an immigration officer and continues to maintain a lawful presence in this country thereafter, does the alien's subsequent adjustment to lawful permanent resident status qualify as a potential "admission" for purposes of section 237(a)(2)(A)(i) of the Immigration and Nationality Act (INA or Act)?

(2) Whether in the case of an alien who has never been "admitted" to the United States after inspection and authorization by an immigration officer, does the alien's adjustment to lawful permanent resident status qualify as "the date of admission" for purposes of section 237(a)(2)(A)(i) of the Act? *See Matter of Rosas*, 22 I&N Dec. 616 (BIA 1999).

(3) In the case of an alien who has been "admitted" to the United States after inspection and authorization by an immigration officer, but who has subsequently failed to maintain a lawful presence, does the alien's adjustment to lawful permanent resident status qualify as "the date of admission" for purposes of section 237(a)(2)(A)(i) of the Act?

(4) If an alien has been "admitted" to the United States on more than one occasion, which admission date qualifies as "the date of admission" for purposes of section 237(a)(2)(A)(i) of the Act?

(5) Whether in light of the reasoning of *Clark v. Martinez*, 543 U.S. 371, 380-87 (2005), the statutory term "admission" can be construed to encompass adjustment of status in some cases but not in others?

II. BRIEF ANSWERS

> "[T]he date of admission" for purposes of determining whether an alien has been convicted of a crime involving moral turpitude within five years after the date of admission is the date the alien was "admitted" under INA § 101(a)(13), irrespective of whether the alien maintained lawful status after that admission. If no INA § 101(a)(13) admission occurred, the date of adjustment of status to that of a lawful permanent resident is "the date of admission" in INA § 237(a)(2)(A)(i)(I).
>
> An alien's adjustment of status to that of a lawful permanent resident qualifies as "the date of admission" under INA § 237(a)(2)(A)(i) where no INA § 101(a)(13) admission has occurred, as in the case of an alien who enters the United States without inspection or is paroled into the United States.
>
> "Admission" can encompass adjustment of status in some contexts or cases but not in others, because the same word may have different shades of meaning and may be variously construed when it occurs more than once in the same statute or even in the same section. *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); *see also Matter of Rosas*, 22 I&N Dec. 616, 623 n.5 (BIA 1999) (noting that the term "admission" may have different meanings in different contexts).

III. FACTUAL BACKGROUND

On June 22, 2009, DHS personally served respondent Alla Adel Alyazji with a Notice to Appear (NTA), charging him as an alien who has been admitted to the United States, but who is removable under section 237(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude (CIMT) committed within five years after the date of admission and for which a sentence of one year or longer may be imposed. Exh. 1 (NTA); Exh. 2 (Form I-213, Record of Deportable/Inadmissible Alien). The NTA alleges that respondent is not a citizen or national of the United States, but is a native and

citizen[1] of Palestine who was admitted to the United States on August 26, 2001, in B-2 status. Exh. 1. On February 25, 2002, respondent's B-2 nonimmigrant status expired, and he no longer remained in lawful status. *See* Exh. 2 (Form I-213, Record of Deportable/Inadmissible Alien, at 2); *but see* Amicus Br. at 16 (erroneously claiming that respondent remained lawfully in the United States for five years).

The NTA further alleges that on April 10, 2006, respondent's status was adjusted to that of a lawful permanent resident under section 201(b)[2] of the Act; that on January 25, 2008, respondent was convicted in the Northampton County Court of Common Pleas at Easton, Pennsylvania, for the offense of Indecent Assault Without Consent of Other, in violation of Pennsylvania Criminal Code 18.3126(A)(1); and that for this offense, a sentence of one year or longer may be imposed. Exh. 1. Respondent was a 46-year-old male, separated from his spouse, when he assaulted his victim, who was then 16 years old. Exh. 2 (Form I-213); Exh. 3 (Police Criminal Complaint, Affidavit of Probable Cause). Respondent was sentenced to 1 to 23 months of imprisonment; issued a $1,000 fine; and ordered to complete outpatient sex offender treatment, to undergo periodic clinical polygraphs, and not to have contact with the victim or any minors other than his own children. Exh. 3.

At a subsequent removal hearing in York, Pennsylvania, on July 16, 2009, respondent appeared *pro se* and admitted the allegations lodged against him, and the Immigration Judge (IJ) found him removable as charged. Hearing Transcript (Tr.) at 5-6.

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[1] The Department erroneously alleged respondent to be a citizen of Palestine. The U.S. Government does not recognize Palestine as a country or view Palestinian passports to confer Palestinian citizenship. Therefore, the Department hereby withdraws the allegation that respondent is a citizen of Palestine.

[2] Section 201(b) of the Act, and more specifically section 201(b)(2)(A)(i), pertains to the basis of the visa petition under which respondent adjusted; respondent's adjustment actually occurred pursuant to section 245 of the Act.

At another removal hearing on July 29, 2009, respondent's counsel appeared and asked the IJ to revisit the charge of removability because *Shanu* "is on life support." *Id.* at 15. The IJ found respondent removable as charged because his offense occurred on March 24, 2007, within five years of April 10, 2006, the date that respondent adjusted status to that of a lawful permanent resident. *Id.* at 20; *see also* Exh. 3 (Police Criminal Complaint, Affidavit of Probable Cause). The IJ granted respondent a continuance to consider any available relief. Tr. at 28, 30.

At a removal hearing on September 1, 2009, respondent conceded that he had no relief, *id.* at 32, and the IJ set a briefing schedule for respondent to file a motion to terminate. On September 21, 2009, respondent filed a motion to terminate removal proceedings, arguing that his date of admission for purposes of the Act is August 26, 2001, when respondent entered the United States on a B-2 nonimmigrant visa. Resp. Br. at 11. The Department opposed the motion on September 23, 2009, arguing that *Shanu* is controlling because respondent's case falls within the jurisdiction of the Third Circuit Court of Appeals, which has not addressed *Shanu*. DHS Br. at 4.

On November 3, 2009, the IJ issued a written Decision and Order denying respondent's motion to terminate, finding respondent removable as charged, and ordering his removal to Palestine based on the charge set forth in the NTA. I.J. at 5. The IJ found that he was bound by *Shanu* because the Third Circuit Court of Appeals had not issued a precedent overruling it. *Id.* at 4-5. On November 10, 2009, respondent filed a Notice of Appeal of the IJ's decision to the Board, arguing that the phrase "the date of admission," as employed in section 237(a)(2)(A)(i) of the Act, includes adjustment of status only if the alien has not previously been admitted under section 101(a)(13)(A). On December

30, 2009, respondent filed a brief with the Board. In it, respondent argues that pursuant to *Rosas*, "the date of admission" may refer to the adjustment-of-status date if an alien has not previously been "admitted" under section 101(a)(13)(A), and maintains that *Shanu* no longer retains viability given its reception in the circuit courts of appeals. Resp. Br. at 3, 6-8. On December 15, 2009, DHS filed a motion for summary affirmance of the IJ's decision. On March 26, 2010, the Board issued a supplemental briefing schedule, seeking to address the meaning of "the date of admission" in section 237(a)(2)(A)(i) of the Act.

IV. ARGUMENT[3]

A. In Order to Achieve National Uniformity, the Board Should Modify *Shanu* by Vacating the "Any Entry" Doctrine for Purposes of INA § 237(a)(2)(A)(i).

In *Shanu*, the Board found that both adjustment of status and a section 101(a)(13)(A) admission always qualify as "admissions" for purposes of section 237(a)(2)(A)(i), and that "any admission," whether the first or any subsequent admission, may be considered. *Shanu*, 23 I&N Dec. at 757, 759. In the five years since the Board decided *Shanu*, four circuit courts of appeals have issued decisions that disagree with the "any entry" doctrine discussed in *Shanu*. *See Zhang v. Mukasey*, 509 F.3d 313 (6th Cir. 2007); *Aremu v. Dep't of Homeland Sec.*, 450 F.3d 578 (4th Cir. 2006); *Abdelqadar v.*

[3] On April 21, 2010, the Board issued a decision, *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), and posted it on its Virtual Law Library. The Department has not had sufficient time to consider its applicability, if any, to the questions presented by the Board in its Notice of Oral Argument. The Department requests the right, for both parties, to file a limited further pleading to address *Matter of Koljenovic*, within a time period specified by the Board.

Gonzales, 413 F.3d 668 (7th Cir. 2005); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004); *see generally Shanu*, 23 I&N Dec. at 763.

As this Board recognized in *Rosas* and again in *Shanu*, adjustment of status does not conform to the "literal" language of the statutory definition in section 101(a)(13)(A). *Rosas*, 22 I&N Dec. at 617; *Shanu*, 23 I&N Dec. at 756. Accordingly, the Board looked to the overall statutory scheme. *Rosas*, 22 I&N Dec. at 617-23; *Shanu*, 23 I&N Dec. at 756-58. In essence, the Board interpreted the term "admission" as having different connotations depending upon context. *See Abdelqadar*, 413 F.3d at 673 (citing *Rosas*).[4] In so doing, the Board followed the "fundamental canon of statutory construction" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Because "the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context," the Board properly looked beyond "'definitional possibilities'" to "'statutory context.'" *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Where, as here, an agency is exercising its authority to interpret and administer a statute, "'[the] initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.'" *Nat'l Cable and Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984)); *see, e.g., Matter of Marcal Neto*, 25

[4] The circuit courts considering the validity of *Shanu* have split over whether an agency may properly read a context clause into a definition. *Compare Abdelqadar*, 413 F.3d at 673 (indicating such action is within an agency's latitude), *with Aremu*, 450 F.3d at 581 (finding such action "impermissible").

I&N Dec. 169, 173-74 (BIA 2010) (holding that under *Chevron* step 2, and in light of DHS's interpretation of its role in the section 204(j) process, the Board would agree with recent circuit court decisions and overrule *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005)). An overarching goal of the Board is to achieve national uniformity in the enforcement, interpretation, and application of federal immigration laws. *See* 8 C.F.R. § 1003.1(d)(1) (providing that one of the Board's chief powers is the dispensation of "uniform guidance" on the proper interpretation of the Act); *Matter of Cerna*, 20 I&N Dec. 399, 408 (BIA 1991). Given that all of the circuit courts of appeals to have published cases examining *Shanu* have disagreed with *Shanu*'s application of the "any entry" doctrine, the Board should overrule this aspect of *Shanu* in order to accomplish its mission of promoting national uniformity. Importantly, the Fourth, Sixth, Seventh, and Ninth Circuits have held or left open the possibility that adjustment of status may sometimes qualify as an "admission" for purposes of section 237(a)(2)(A)(i); it simply depends on context.[5] *See, e.g., Zhang*, 509 F.3d at 316 (distinguishing *Rosas*, which involved an alien who first entered the United States illegally); *Aremu*, 450 F.3d at 583 ("[W]e express no opinion on whether adjustment of status may properly be considered 'the date of admission' where the alien sought to be removed has never been admitted within the meaning of § 1101(a)(13)(A)."") (citations omitted); *Abdelqadar*, 413 F.3d at 674 ("Maybe there is a good reason why § 1227(a)(2)(A)(i) should work differently, but silence by an administrative agency does not carry the day."); *Shivaraman*, 360 F.3d at

[5] While these courts have generally held that the plain language of the statute controls the question of "the date of admission" for purposes of section 237(a)(2)(A)(i) of the Act, *see Zhang*, 509 F.3d at 315-16 (following prior court decisions); *Aremu*, 450 F.3d at 582; *Shivaraman*, 360 F.3d at 1149, whether a case is properly resolved at *Chevron* step 1 or step 2 becomes immaterial where the agency and the courts reach the same interpretation.

1148 (distinguishing *Rosas*, which involved an alien who first entered the United States illegally). The Board should accordingly modify its holding, as set forth below.

B. For Purposes of INA § 237(a)(2)(A)(i), Adjustment of Status Qualifies as an "Admission" if the Alien Did Not Make a Prior "Admission" under INA § 101(a)(13)(A).

1. Adjustment of status qualifies as "the date of admission" under section 237(a)(2)(A)(i) only if there has not previously been an "admission" under section 101(a)(13)(A), such as for aliens who were parolees or present without having been admitted or paroled. For purposes of section 237(a)(2)(A)(i) of the Act, adjustment of status will not ordinarily qualify as an admission if the alien has previously made a section 101(a)(13)(A) admission. The term "admission" or "admitted" supplanted "entry" after the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Div C. of Pub. L. No. 104-208, 110 Stat. 3009-546. *Compare* INA § 101(a)(13) (1995) *with* INA § 101(a)(13)(A) (2010). Before IIRIRA, an adjustment of status to that of a lawful permanent resident did not qualify as an "entry." *Matter of Adetiba*, 20 I&N Dec. 506, 508 (1992); *Matter of Connelly*, 19 I&N Dec. 156, 158 (BIA 1984). Congress made no clear changes to the Act to signal that in section 237(a)(2)(A)(i), adjustment of status should qualify as an "admission" where previously adjustment of status did not constitute an "entry." On the contrary, as argued below, changes to the Act suggest the opposite.

Former section 241(a)(1) provided that "any alien in the United States . . . shall, upon the order of the Attorney General, be deported who – *at the time of entry* was within one or more of the classes of aliens excludable by the law existing at the time of such entry." INA § 241(a)(1) (1990) (emphasis added). Former section 241(a)(4) provided

for the deportation of an alien convicted of certain offenses "within five years *after entry*." INA § 241(a)(4) (1990) (emphasis added). When Congress passed the Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978, it revised the deportation grounds and amended former section 241(a)(1) to read as follows:

> Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is deportable as being within one or more of the following classes of aliens:
>
> (1) Excludable *at time of entry or of adjustment of status* or violates status
>
> (A) Excludable aliens
>
> Any alien who *at the time of entry or adjustment of status* was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

INA § 241(a)(1)(A) (1991) (emphasis added). While Congress added adjustment of status to former section 241(a)(1), the IMMACT90 did not make a corresponding change to former section 241(a)(4), which was renumbered to former section 241(a)(2)(A)(i) and read as follows:

> (2) Criminal offenses
> (A) General crimes
> (i) Crimes of moral turpitude
> Any alien who—
> (I) is convicted of a crime involving moral turpitude committed *within five years after the date of entry*, and
> (II) either is sentenced to confinement or is confined therefore in a prison or correctional institution for one year or longer, is deportable.

INA § 241(a)(2)(A)(i) (emphasis added). The changes that Congress made to section 241(a)(1) in 1990 remained after the passage of IIRIRA in 1996 and remain in the current version of the Act.[6]

[6] Section 237(a)(1)(A) is the successor statute to former section 241(a)(1), and section 237(a)(2)(A)(i) is the successor statute to former section 241(a)(4) and former section 241(a)(2)(A)(i).

Congress's addition of the term "adjustment of status" next to the term "entry" in former section 241(a)(1) and later section 237(a)(1)(A) reflects its understanding that the two terms are distinct. As a general rule of statutory construction, a statute should be construed so that none of its language is superfluous. *See Matter of Nwozuzu*, 24 I&N Dec. 609, 614 (BIA 2008) (citing 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 104 (4th ed. 1984)); *but see Matter of Armendarez*, 24 I&N Dec. 646, 659-60 n.11 (BIA 2008) (noting that the Supreme Court has held "the rule against superfluities inapplicable where Congress may have enacted technically redundant or unnecessary language as a point of special emphasis in order 'to remove any doubt' on the point in question") (citing *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008)). That Congress did not add "adjustment of status" to the term "entry" (and later "admission") in former section 241(a)(2)(A)(i), but did so in former section 241(a)(1), suggests that Congress did not consider adjustment of status to be the legal equivalent of an "entry" or an "admission" for purposes of section 237(a)(2)(A)(i). Had Congress meant for an alien to be deportable within 5 years after the date of an adjustment of status, it could have easily added "adjustment of status" to former section 241(a)(4) and later former section 241(a)(2)(A)(i) and section 237(a)(2)(A)(i). The absence of "adjustment of status" in section 237(a)(2)(A)(i) reflects Congress's general intention not to equate it with "admission" for purposes of section 237(a)(2)(A)(i). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) (citations omitted).

Further, in 1994 Congress again amended former section 241(a)(2)(A)(i) of the Act by inserting the parenthetical "(or 10 years in the case of an alien provided lawful permanent resident status under section 245(i) of this title)." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130003(d), 108 Stat 1796, 2025-2026 (effective Sept. 13, 1994). The statute read, in relevant part:

> Any alien who—
> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(i) of this title) *after the date of entry*. . . is deportable.

INA § 241(a)(2)(A)(i)(I) (1995) (emphasis added). The 10-year time period applied only to aliens adjusting under former section 245(i) and not to all aliens.[7] Rather than insert the all-inclusive phrase "adjustment of status," as it did in former section 241(a)(1)(A), Congress provided a deportable offense only for those who committed a CIMT within 10 years of adjusting their status under former section 245(i) of the Act. *But see Shanu*, 23 I&N Dec. at 760 ("We find no indication . . . that Congress or the Attorney General intended that the phrase 'date of admission' should have one meaning for aliens granted lawful permanent resident status under section 245(j) and a different, narrower meaning for all other aliens.").

2. It may be observed that Congress modified the phrase in former section 241(a)(4) which previously read "within five years after entry" to read "within five years after *the date of* entry," as it later existed in former section 241(a)(2)(A)(i). The Board

[7] Former section "245(i)" was redesignated "245(j)." *See* IIRIRA § 671(a)(4)(B). In *Shanu*, the Board relied on this parenthetical to support its conclusion that Congress had intended to include "adjustment of status" in the meaning of "the date of admission" in section 237(a)(2)(A)(i) of the Act. *Shanu*, 23 I&N Dec. at 758. It may be observed, however, that Congress specified adjustment of status only under section 245(j), rather than the all-inclusive "adjustment of status" referenced in former section 241(a)(1)(A) of the Act.

did not attach significance to the addition of the words "the date" because under the "any entry" doctrine, any entry could be used to calculate the starting point of the five-year period during which the alien must have committed a CIMT. *See Shanu*, 23 I&N Dec. at 763 n.6. Notwithstanding its earlier interpretation, the Board should now attach greater meaning to those words. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Matter of Cardenas*, 24 I&N Dec. 795, 807 (BIA 2009) ("A regulation is to be construed like a statute, and it is a basic rule of construction, albeit not woodenly applied, not to deem language therein to be superfluous.").

Although an alien may have accomplished multiple entries or admissions, Congress chose to use the term "the date" rather than "a date." The use of the definite article "the" signifies that the "any entry" doctrine does not apply to section 237(a)(2)(A)(i). The "any entry" doctrine may still apply in other contexts, such as sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), 237(a)(2)(B), 237(a)(2)(C), or 237(a)(2)(E). Unlike these other statutory provisions, section 237(a)(2)(A)(i) is the only section 237(a)(2) ground of removability which uses the phrase "the date of admission" rather than "admission." The phrase should be interpreted to allow less discretion in selecting which date may be used. The parties in this case are largely in agreement as to how the Board should choose the appropriate date of admission.

3. "Admission" is defined in section 101(a)(13)(A) as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." INA § 101(a)(13)(A). Acquiring lawful permanent resident status by coming to a port of

entry with an immigrant visa qualifies as an "admission" under section 101(a)(13)(A) because the alien is inspected and authorized to make an "entry" when s/he leaves the inspections facility. In contrast, an adjustment-of-status applicant is *assimilated* to the position of an alien making an entry, while not actually making the entry. *See Connelly*, 19 I&N Dec. at 159. "Entry" is an essential element of the definition of "admission" and was a well-defined term, in the immigration context, when Congress amended section 101(a)(13) in 1996. It meant that an alien, while free from actual or constructive restraint, has crossed into the territorial limits of the United States and has been inspected and admitted by an immigration officer or has actually and intentionally evaded inspection at the nearest inspection point. *See Matter of Pierre et al.*, 14 I&N Dec. 467, 468 (BIA 1973). Congress substituted "admission" for "entry," but did not change the meaning of "entry." Thus, "entry" as used in section 101(a)(13)(A) must be taken to mean what it has always meant. *See, e.g., United States v. Merriam*, 263 U.S. 179, 187 (1923) (stating that where Congress uses in a statute a word with a judicially settled meaning, Congress is presumed to intend that meaning).

It follows, accordingly, that since "entry" is an essential element of "admission," "admission" requires a coming to the United States from a foreign port or place. *See* INA § 101(a)(13) (1995). Thus, for aliens already admitted within the meaning of section 101(a)(13)(A), adjustment of status does not involve "any coming of an alien into the United States, from a foreign port or place . . . ." *Id.* The alien is already here. The statute and its history, therefore, do not support a finding that adjustment of status is always an "admission." If someone is admitted at a port of entry as a nonimmigrant and later adjusts status (whether before or after losing nonimmigrant status), it is still the case

that the alien's "coming . . . into the United States" took place at the port of entry, not during the later adjustment of status within the United States.

4. For the following reasons, adjustment of status of a parolee qualifies as an "admission." By definition, parole is not an admission. INA § 212(d)(5)(A). Section 101(a)(13)(B) of the Act explicitly provides, "An alien who is paroled under section 212(d)(5) of this title . . . shall not be considered to have been admitted." A parolee is considered to be at a port of entry seeking admission. *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Before adjustment of status, the paroled alien is an applicant for admission. INA § 235(a)(1); 8 C.F.R. § 1.1(q). After the alien adjusts status to that of a lawful permanent resident, the alien is no longer paroled and becomes "an alien lawfully admitted for permanent residence," INA §§ 101(a)(20), 245(a). Accordingly, adjustment of status must qualify as the alien's admission. *Cf. Bamba v. Riley*, 366 F.3d 195, 204 (3d Cir. 2004) (finding expedited removal provision is applicable to all aliens convicted of an aggravated felony who are not lawfully admitted for permanent residence, including parolees.)

The Board should interpret statutes in a manner that avoids an absurd result. *See, e.g., Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1135 (9th Cir. 2001) (finding that adjustment of status qualifies as an admission under section 237(a)(2)(A)(iii) because to hold otherwise would create a loophole for aliens present without having been admitted or paroled, one that Congress would not have intended). Like the alien paroled into the United States under section 212(d)(5)(A), an alien present with having been admitted or paroled, *see* INA § 212(a)(6)(A)(i), accomplishes an "admission" when s/he adjusts status to that of a lawful permanent resident. *See* INA § 245(i) (permitting certain aliens

present without having been admitted or paroled to adjust status to that of aliens lawfully admitted for permanent residence). Under section 235(a) of the Act, the alien present without having been admitted or paroled is, like a parolee, deemed an applicant for admission. Once adjusted to lawful permanent resident status, the alien is no longer an applicant for admission, so the adjustment of status must qualify as the admission. *See Deus v. Holder*, 591 F.3d 807, 810-11 (5th Cir. 2009) (stating that because alien first entered the United States without inspection, she was not "admitted" until her adjustment of status to that of a lawful permanent resident); *see also Rosas,* 22 I&N Dec. at 623 (noting that unless an alien who adjusted status to that of a lawful permanent resident were deemed to have been admitted, the alien could not obtain relief under sections 240A(a) or 212(c)).[8]

C. The Board Should Not Address Whether "the Date of Admission" in INA § 237(a)(2)(A)(i) Relates to the Alien's Initial or Most Recent INA § 101(a)(13) Admission Because Respondent Only Accomplished One Admission.

The Department respectfully declines to address issues that are not currently before the Board in this case. Respondent only made one section 101(a)(13) admission to the United States, so the Board need not consider whether it is his first, last, or other entry that qualifies as "the date of admission" for purposes of section 237(a)(2)(A)(i). *See, e.g., Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464, 465 (BIA 2008) (declining to address an issue not material to the outcome of the case); *cf. Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (adopting "only that definition of social group necessary to decide this individual case"); *id.* at 368-69 (Filppu, Board Member, concurring) (noting that the

[8] Notably, respondent agrees with the Department that adjustment of status qualifies as an "admission" if an alien did not previously accomplish a section 101(a)(13) admission. Resp. Br. at 6-8.

Board properly declined to address issues that went beyond those essential to the disposition of the appeal before it).

D. Even An Alien "Admitted" Under INA § 101(a)(13)(A) Who Fails to Maintain or Otherwise Violates His/Her Status Has Still Been "Admitted" for Purposes of INA § 237(a)(2)(A)(i).

The Ninth Circuit Court of Appeals in *Shivaraman* found that for an alien who accomplishes a section 101(a)(13) admission and maintains lawful status, "the date of admission" for purposes of section 237(a)(2)(A)(i) is the alien's section 101(a)(13) admission date and not a later adjustment-of-status date. *Shivaraman*, 360 F.3d at 1148. Implicitly, if the alien were not to maintain lawful status, s/he would not have accomplished an "admission," and a subsequent adjustment-of-status date would then count as "the date of admission." The Ninth Circuit does not explain the genesis of this rule, and the Board should not adopt it.

Once an alien has been "admitted," his or her "admission" is not erased because s/he violates his or her immigration status. For purposes of the Act, to be "admitted" is an action that is completed after an alien enters on an immigrant or nonimmigrant visa. The alien's status may change from lawful to unlawful, but the historical fact of having been admitted does not change. The Fourth, Sixth, and Seventh Circuit Courts of Appeals do not follow the *Shivaraman* rule requiring that an alien have maintained lawful status in order to have accomplished a section 101(a)(13) admission. The Department favors the Fourth, Sixth, and Seventh Circuits' approach over the Ninth Circuit's.

E. *Martinez* Should Not Dissuade the Board from Interpreting "Admission" to Include Adjustment of Status Where an Alien Entered the United States with Parole or without Inspection.

1. "Statutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 129 S.Ct. 1749, 1756 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). In reviewing the permissibility of an agency's construction of statutory provisions, courts follow the two-step process established by the Supreme Court in *Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984). "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." *Id.* at 842-43.

As noted, *infra*, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132-33. "'Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.'" *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atlantic Cleaners & Dyers, Inc., v. United States*, 286 U.S. 427 (1932)); *see also Abdelqadar*, 413 F.3d at 673 ("Context clauses reflect the fact that definitions rarely work universally, and that one word can have different connotations in different constructions.").

As the Supreme Court has made clear, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to

their place in the overall statutory scheme." *Brown & Williamson*, 529 U.S. at 133. That a term "may have a plain meaning in the context of a particular section [of a statute] . . . does not mean that the term has the same meaning in all other section and in all other contexts." *Robinson*, 519 U.S. at 343. Once it is established that a term takes on one meaning in some sections of a statute, but not others, "the term standing alone is necessarily ambiguous and each section must be analyzed" in context. *Id.* at 343-44. This point remains applicable "even when the term[]" has a "statutory definition." *See Duke Energy Corp.*, 549 U.S. at 574 (citing *Robinson*). Under the second step of the *Chevron* analysis, "if the statute is . . . 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." *Chevron*, 467 U.S. at 843.

2. In *Clark v. Martinez*, 543 U.S. 371 (2005), the Supreme Court found that section 241(a)(6) applies to both inadmissible aliens (subject to INA § 212) and certain admitted aliens (subject to INA § 237). The statute provides:

> (6) Inadmissible or criminal aliens.
> An alien ordered removed who is inadmissible under section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

INA § 241(a)(6). Noting that the statutory text provides for no distinction between admitted and non-admitted aliens, the Supreme Court held that the same detention provision cannot have a different meaning depending on the alien involved. *Martinez*, 543 U.S. at 379. *Martinez*, which considered the meaning of a full statutory paragraph, simply does not address whether an individual word or statutory term can have different

meanings in different contexts. Even within section 241(a)(6), the specific paragraph considered in *Martinez*, the statutory term "removal period" continues to have different meanings for different aliens, depending on whether they seek judicial review of a final removal order and whether they are in criminal (or other non-immigration) custody. *See* INA § 241(a)(1)(B). As described above, the Supreme Court, and lower courts as well, have held post-*Martinez* that the same term can have more than one meaning depending on the context in which the word appears. *Duke Energy Corp.*, 549 U.S. at 574; *see also Abdelqadar*, 314 F.3d at 673 ("To accept the way *Rosas[]* read 'admission' in § 1227(a)(2)(A)(iii) is not, however, to imply that the word must have the same meaning in § 1227(a)(2)(A)(i).").

The terms "admission" and "admitted," while defined in section 101(a)(13)(A), appear hundreds of times throughout the Act. It would be futile to restrict the meaning of these terms to the definition provided in section 101(a)(13)(A) in all circumstances. To do so would yield absurd results. For example, to qualify for cancellation of removal under section 240A(a) of the Act, an alien must have resided in the United States continuously for seven years "after having been *admitted* in any status." INA § 240A(a)(2) (emphasis added). If an adjustment of status were not recognized as an "admission" for purposes of section 240A(a)(2), an alien who never made a section 101(a)(13) admission and later adjusted status to that of a lawful permanent resident could never qualify for this form of relief. *See Rosas*, 22 I&N Dec. at 623. It is unlikely that Congress would have intended this unusual result.

Further, section 318 of the Act requires that an alien must have been "admitted to the United States as a permanent resident" in order to naturalize. INA § 318. A lawful

permanent resident who adjusted status and never made a section 101(a)(13) admission would be deemed to have never been "admitted to the United States as a permanent resident" and thus could never naturalize. This absurd result would preclude naturalization to aliens who were previously admitted on nonimmigrant visas pursuant to section 101(a)(13), but who were not admitted as immigrants, including Shanu/Aremu, Abdelqadar, Shivaraman, and Zhang. Notably, Congress included in section 318 the prepositional phrase "to the United States" and did not simply use the term of art "lawfully admitted for permanent residence," which the Act defines in section 101(a)(20). The statute should be interpreted to apply to all aliens who have become lawful permanent residents so as to avoid absurd results.

3. The Board should not endeavor to harmonize its interpretation of the term "admission" in section 237(a)(2)(A)(i) with the several hundred other examples of "admission" or "admitted" appearing in the Act. *See Rosas*, 22 I&N Dec. 623 n.5. Such a herculean undertaking would prove unproductive, and it certainly cannot be accomplished with the confines of a 25-page brief. For example, the terms "admitted" and "admission" appear multiple times in sections 212(a)(9), 237(a)(2), 212(h), 212(i), 316, and 318, among various other sections of the Act. *See, e.g.,* IIRIRA § 308(f) (striking "entry" and inserting "admission" in certain provisions of sections 101, 212, 214, 216, 240, 241, 245 and 247 of the Act). The Board should reserve for another day how to interpret "admission" in these other contexts, rather than attempt to craft one definition that applies to all sections of the Act and in all scenarios. The American Immigration Council appears to be in accord with this view. *See, e.g.*, Amicus Br. at 10

("While there may be other instances in which Congress's use of 'admission' cannot be reconciled with the statutory definition, this is not such an instance.").

V. CONCLUSION

The Board should find that adjustment of status qualifies as an "admission" for purposes of section 237(a)(2)(A)(i) only when the alien has not accomplished an "admission" within the meaning of section 101(a)(13)(A). Since the former Immigration and Naturalization Service admitted respondent to the United States as a nonimmigrant visitor on August 26, 2001, respondent's adjustment of status would not qualify as "the date of admission." The applicable date of admission should be the date of respondent's admission as a nonimmigrant visitor on August 26, 2001. As such, respondent's commission of a CIMT would not fall within five years after the date of admission. Accordingly, the Department does not oppose termination of removal proceedings.

Respectfully submitted,

Dated: April 21, 2010

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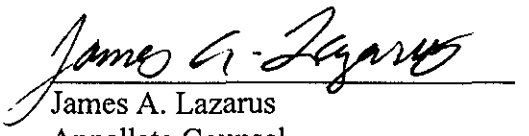

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