



AMERICAN IMMIGRATION LAW FOUNDATION

CASE UPDATE: NINTH CIRCUIT VACATES OROZCO

*On October 20, 2008, the Ninth Circuit Court of Appeals granted the parties' joint motion to dismiss *Orozco v. Mukasey* and vacate its published decision, 521 F.3d 1068 (9th Cir. 2008). The parties' motion came after the BIA granted a joint motion to reopen the case.*

PRACTICE ADVISORY¹

OROZCO v. MUKASEY: CURRENT STATUS OF THE CASE AND PRELIMINARY STRATEGIES

By Mary Kenney and Beth Werlin

May 19, 2008

This practice advisory discusses the holding in *Orozco v. Mukasey*, 521 F.3d 1068 (9th Cir. 2008), its current status, and preliminary strategies and arguments – both within and outside of the Ninth Circuit – to avoid its negative impact.

The information in this advisory is accurate as of the date of the advisory. Because the issue is developing, readers are cautioned to check for new cases and legal developments. AILF expects to provide more developed guidance on this issue over the next few months as the government's position and the ultimate resolution of *Orozco* become clearer. This practice advisory is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

The *Orozco* Holding

In *Orozco*, the Ninth Circuit held that a non-citizen who obtains entry into the U.S. by fraudulent means is statutorily ineligible for adjustment of status under INA § 245(a) because he or she has not been “admitted.” *Orozco* entered the U.S. at a checkpoint using someone else's “green card.” After inspection, he was permitted entry. Subsequently, he met and married a U.S. citizen, and the I-130 she filed on his behalf was approved. Later, he was placed in removal proceedings and charged under INA §

¹ Copyright(c) 2008, American Immigration Law Foundation. See www.aifl.org/copyright for information on reprinting this practice advisory.

237(a)(1)(A) (inadmissible at time of entry), as having presented counterfeit documents to gain admission to the U.S. He admitted the facts and conceded removability.

In proceedings, he applied for adjustment and an INA § 212(i) waiver. The IJ denied the adjustment, finding Orozco ineligible because he did not meet the statutory definition of “admitted” due to his fraudulent entry. The IJ found that this would remain so even if the § 212(i) waiver was granted. A single member of the BIA affirmed the decision.

The Ninth Circuit upheld the agency’s decision. The court noted that INA § 245(a) requires that Orozco have been “admitted.” It then applied the definition of “admitted” in INA § 101(a)(13)(A) (added to the INA by IIRIRA), which requires the “lawful entry of the alien into the U.S. after inspection and authorization ...” It found that that the term admitted as used in both §§ 245(a) and 101(a)(13)(A) was unambiguous and, by definition, requires something more than simply presenting oneself at the border. The court concluded that because Orozco’s entry was achieved with fraudulent documents, it was not a “lawful entry,” he had not been “admitted” within the definition of INA § 101(a)(13)(A), and therefore was not eligible for adjustment. The court found that *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), “is of no persuasive value” because this BIA case predated the current statutory definition of “admission.”

In addition, the court rejected the argument that Orozco was entitled to adjustment because he might be entitled to a § 212(i) waiver. The court found that eligibility for this inadmissibility waiver does not make his entry into the U.S. lawful, and thus he still would not meet the statutory requirement for admission under §245(a).

The Current Status of *Orozco*

Orozco currently is the binding law of the Ninth Circuit. That means that immigration judges in the Ninth Circuit are bound to follow the decision unless the decision is vacated or the court issues a subsequent favorable decision on rehearing in *Orozco* or *en banc* in another case.

On May 12, 2008, the court granted a sixty-day extension for the parties to file a petition for rehearing or rehearing *en banc* and stayed the issuance of the mandate. In response to a joint request from *both* parties, the court also referred the case to the circuit mediator. The parties’ joint motion indicates that they hope to resolve the case without further litigation. Both parties also agree that further administrative adjudication of Mr. Orozco’s removal case may be warranted, and they will explore, in mediation, ways to proceed before the BIA or the IJ.

The parties’ joint motion and the court’s order are posted at <http://www.aifl.org/lac/chdocs/OrozcoCtDocs.pdf>.

Cases Within the Ninth Circuit

If *Orozco* is raised in a case in the Ninth Circuit – whether before the IJ, the BIA, or the court – consider whether any of the following steps and/or arguments are possible:

- If the facts do not fall squarely within the facts of *Orozco*, you may be able to argue that *Orozco* is not binding on your client’s case. For example, in *Orozco*, the non-citizen affirmatively presented fraudulent documents to gain entry into the U.S. 521 F. 3d at ___, 2008 U.S. App. LEXIS 6142, *1-2. The court noted that this entry was not lawful, and cited criminal fraud provisions in support of this finding. *See id.* at *9-10. If you have a case in which your client was waved through the port of entry without showing any documents or making any misrepresentations, you could argue that *Orozco* is inapplicable, as the case does not involve fraud or willful misrepresentation by your client.
- Ask the IJ or the BIA to continue or otherwise hold the case in abeyance pending the outcome of the mediation in *Orozco*, and attach a copy of the parties’ joint motion for mediation and the court’s order. While AILF has no way of knowing the outcome of the mediation, it may be that this outcome or any further removal proceedings that occur could impact the *Orozco* decision. For example, it is possible that the parties could request that the Ninth Circuit decision be vacated or the BIA could issue a precedent decision on the issue.
- Argue that *Orozco* is wrong. It is possible that the Ninth Circuit could vacate or overturn *Orozco* or that the BIA could be persuaded to adopt a decision that differs from *Orozco*. In either event, it is possible *Orozco* might not be binding on IJs, even in the Ninth Circuit. Thus, it is important to preserve all arguments and appeals in your client’s case. See below for a summary of arguments.

Cases Outside the Ninth Circuit

Orozco is not binding on cases outside the Ninth Circuit, and at this time, it is unclear whether IJs and the BIA are inclined to follow the Ninth Circuit. In at least one post-*Orozco* case with facts substantially similar to those in *Orozco*, a DHS trial attorney took the position that the individual was admitted for purposes of INA § 245(a). AILF would like to find out if this is an anomaly or whether DHS is regularly taking this position. Please let us know how DHS is handling these cases by emailing AILF at clearinghouse@ailf.org. In addition, we would like to know:

- Have any IJs/BIA addressed *Orozco*? If so, what is their position?
- Is DHS charging individuals as inadmissible (under INA § 212) as opposed to removable (under INA § 237)?

If you find it necessary to address *Orozco* in a non-Ninth Circuit case, keep in mind the following:

- *Orozco* is not binding outside the Ninth Circuit. In fact, the Second Circuit has held that a non-citizen who enters after “inspection and authorization” has been “admitted” even if he was inadmissible at the time of entry. *Emokah v. Mukasey*, No. 07-3115, ___ F.3d ___, 2008 U.S. App. LEXIS 8651 (2d Cir. Apr. 22, 2008).
- *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), is binding BIA precedent. In *Matter of Areguillin*, the BIA found the respondent eligible for adjustment of status even though she was subsequently found deportable under former INA § 241(a)(1) for having been excludable at time of entry.
- To the extent that *Orozco* is persuasive authority, it may be distinguished based on the facts in an individual case. In *Orozco*, the petitioner affirmatively misrepresented himself at the time of entry by presenting counterfeit documents. As noted above, if you have a case in which your client simply was waved through the port of entry, you could distinguish *Orozco* and argue that there was no fraud or willful misrepresentation by your client and thus no unlawful entry.
- Argue that the Ninth Circuit’s decision in *Orozco* is wrong. It is possible that the BIA could be persuaded to adopt a decision that differs from *Orozco*. See below for a summary of these arguments.

Arguments to Challenge *Orozco*

The following is a brief summary of arguments as to why *Orozco* was incorrectly decided. They are not fully developed in this practice advisory. Instead, they are summarized so that practitioners are aware of them and can raise and preserve them in their clients’ cases.

- The Ninth Circuit Erred By Finding that *Orozco* Was Not Admitted.

The Ninth Circuit should read “admitted” in INA § 245 in the context of the entire INA and as consistent with references to admission and admitted contained in other sections of the INA.

- *Orozco* is internally inconsistent. On the one hand, Mr. Orozco was found removable under INA § 237(a)(1)(A), a statutory provision which specifically requires that the non-citizen be “in and admitted” to the U.S. See INA § 237(a). On the other hand, with respect to relief from this removal order, Orozco was found to not have been “admitted” to the U.S. and thus to be ineligible for adjustment. Mr. Orozco cannot be both “admitted” and “not admitted” based upon the same facts. See *Kalubi. Ashcroft*, 364 F.3d 1134, 1138 (9th Cir. 2004) (“x may not become not-x just because the process has progressed [to a new stage]”).
- *Orozco* conflicts with INA § 237(a)(1)(H) which provides a waiver for one who is “inadmissible at the time of admission” as an alien who by fraud or

misrepresentation seeks to procure admission to the U.S. or other immigration benefit. The plain language of this waiver provision necessarily requires an admission. Yet, under the *Orozco* analysis, a non-citizen could not be inadmissible for fraud at the time of admission because if fraud existed, no admission would have taken place. Thus, *Orozco* renders § 237(a)(1)(H) meaningless, a result not countenanced by basic rules of statutory construction.

A waiver under INA § 212(i) cures an unlawful entry.

- The Ninth Circuit erroneously found that a waiver of inadmissibility does not make *Orozco*'s underlying entry into the United States lawful. This conclusion conflicts with binding BIA and Ninth Circuit precedent holding that fraud waivers waive not only the ground of inadmissibility, but also cure the initial unlawfulness of the entry. *See Matter of Sosa-Hernandez*, 20 I&N Dec. 758 (BIA 1993) (waiver under former INA § 241(f) waives not only ground of excludability, but also underlying fraud and renders entry lawful); *Matter of Manchisi*, 12 I&N Dec. 132 (BIA 1967) (holding that a waiver under former INA § 241(f) excuses the fraud at time of entry and “that entry has been cleared of illegality...”); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (same, relying on *Matter of Sosa-Hernandez* and *Matter of Manchisi*); *see also Rodriguez v. Ashcroft*, No. 01-1855, 2002 U.S. Dist. LEXIS 3018, *6-7 (N.D. Tex. Feb. 22, 2002) (analogizing current INA § 212(i)(1) and former INA § 241(f) and, citing *Matter of Sosa-Hernandez*, noting that § 212(i) waives not only deportability, but also the underlying fraud or misrepresentation).
- The Court Should Have Remanded *Orozco* to the BIA.

The BIA should have the first opportunity to interpret the meaning of admitted in this context under the current statutory definition. *See, e.g., Zheng v. Mukasey*, 514 F.3d 176, 184 (2d Cir. 2008) (finding that a remand is appropriate when, inter alia, the following reasons exist: insufficient attention by the IJ and the BIA to the questions identified; the desirability of national uniformity given the grave consequences of an issue; a dearth of law in the circuit on the issue; a high volume of cases that this issue implicates; and a severe impact on an alien's immigration prospects).

Please keep AILF informed of any case you have raising the *Orozco* issue, in or out of Ninth Circuit, by contacting AILF at clearinghouse@ailf.org.