Published on *The National Law Review* https://natlawreview.com

Not All “Entries” Are Equal – The Law of “Entry” and “Admission” for Purposes of the Immigration and Nationality Act

Article By:

Laura B. Homan

I. Introduction

The timing of an alien’s admission to the United States is an important one under the **Immigration and Nationality Act (“Act” or “INA”)**.[1] Since the enactment of **Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)**[2] the Board of Immigration Appeals (BIA or Board) and the federal circuit courts have faced a recurring question as to the proper interpretation of the Act’s removability statutes. The knot in this interpretation question comes from Congress’ implementation of the term “admission” as a substitution for the previously used language of “entry”.[3] The pre-IIRIRA term of “entry” was defined as any unrestrained crossing of the United States border.4 While IIRIRA substitution language defines “admission” and admitted to mean the lawful entry of the alien to the United States after inspection and authorization by an Immigration Officer.[5]

In light of the developing precedent and changing interpretations of the term “admission” the purpose of this article is to analyze and to determine an alien’s removability under the INA.

II. Current Statutory Framework

IIRIRA became law on September 30, 1996.[6] Among the many dramatic changes IIRIRA delivered, IIRIRA consolidated deportation and exclusion proceedings into one removal proceeding.[7] Before IIRIRA, aliens who entered the United States, even without inspection, were subject to deportation proceedings; however, aliens who had never entered the United States or were paroled into the United States were subject to exclusion proceedings.[8] Under IIRIRA the grounds for inadmissibility grew to include unlawful presence.[9] Among those aliens who are unlawfully present are aliens who entered the United States without inspection and aliens who overstay their nonimmigrant visas.[10] All aliens who are not both inspected and admitted to the United States are inadmissible and subject to grounds for inadmissibility; therefore they are removable aliens.[11] IIRIRA also added to the categories of deportable aliens under INA section 237.[12]

Most significantly, IIRIRA created the new term “admission” and displaced the former terminology of

"entry".[13] Admission requires that an immigration officer inspect and admit an alien.[14] Pre-IIRIRA, the term "entry" was defined as the physical act of crossing into the borders of the United States and included aliens who evaded the inspection process.[15] When IIRIRA replaced the definition of "entry" with new language and a different definition -"admission"- Congress did not reconcile all of the provisions in the INA to reflect this change in language.[16] Because the definition of "admission" or "admitted" requires inspection and authorization by an immigration officer under definition INA section 101(a)(13) it begs the question whether "admission" or "admitted" maintains the same meaning throughout the INA.[17] Specifically, entry and admission make a difference when considering the procedure for removal because removability may depend on the timing of the alien's admission or entry. [18]

Under the INA an alien can be removed for acts that rendered him inadmissible at the time of admission and an alien can be removed for committing prohibited acts after his admission to the United States.[19] In some of these removability provisions IIRIRA used "after admission" or "admitted" and replaced the concept of previously used "entry".[20] This distinction is critical. Some of these grounds of deportation contain wording which requires an admission following the alleged deportable conduct.[21]

When an alien gains admission into the United States in the expected way of first time entry from abroad on an immigrant visa and is inspected by an immigration officer at a port of entry IIRIRA's adoption of "admission" causes no issue. However, IIRIRA's adoption of the term causes wrinkles when an alien enters the United States on a nonimmigrant visa and subsequently adjusts his status to that of a lawful permanent resident. Congress did not specify if this alien's adjustment of status is considered an "admission". Another issue created by IIRIRA "admission" language occurs if an alien has been admitted or has entered the United States more than once - the question becomes which admission or entry is controlling for grounds of deportation under INA section 237(a).[22] Further issues arise when an alien enters without inspection, adjusts his status to that of a lawful permanent resident, and then commits a crime. Congress failed to explicitly cover this situation when it enacted IIRIRA or in any subsequent amendments, and the Ninth Circuit has been left to resolve this issue.

When Congress substituted the term "admission" for "entry", Congress did not express Congressional intent or purpose for this substitution of language.[23] Therefore the ambiguous definition of "admission" under IIRIRA presents a question of statutory construction and speculation. For example, although the statute is silent on this possibility, Congress may have intended to include the ground of deportability codified as INA section 237(a)(2)(A)(iii) to apply to an individual who adjusted his status. However, it is unclear whether the process known as "adjustment of status"[24] can constitute "inspection and authorization by an immigration officer"[25] and therefore be considered an "admission" as defined in section 101(a)(13)(A) of the Act. The plain language of the Act permits an alien who entered without inspection to adjust status and be lawfully admitted for permanent residence.[26] Because the plain language of the Act does not resolve whether this alien who entered without inspection and subsequently adjusted status was "admitted" as defined by section 101(a)(13)(A), can this alien be removed based on behavior after admission? Even when this question is resolved, further statutory ambiguity remains. If the alien who entered without inspection is considered "admitted" when he adjusts status, the statutory language is unclear how to interpret that alien's date of admission-
was the alien admitted when the alien crossed the border into the United States or was the alien admitted when he subsequently adjusted status?

This article will discuss the development of case law surrounding removability provisions in INA section 237(a)(2)(A)(i), section 237(a)(2)(A)(iii), and section 212(a)(9)(B)(i)(II) in light of IIRIRA use of

"admission" in the Act.[27]

III. Historical Perspective of Removal Proceedings and Alien Entries

Pre-IIRIRA aliens who entered the U.S. by evading inspection were entitled to deportation proceedings and the benefit of cancellation of removal.[28] Under IIRIRA, aliens who enter by evading inspection have not been "admitted" into the United States.[29] Since the enactment of IIRIRA, aliens who entered without inspection do not have the same procedural and substantive benefits in removal proceedings as an alien who has been admitted to the United States.

In Matter of Pierre,[30] Haitian refugees awaited inspection on their boat outside the port of West Palm Beach, Florida; they were never admitted into the United States by any immigration officer and subsequently detained. Pre-IIRIRA case law in Matter of Pierre defined an "entry" in the United States involved "(1) a crossing into the territorial limits of the United States, i.e. physical presence; plus (2) inspection and admission by an immigration officer or (3) actual and intentional evasion of inspection at the nearest inspection point, coupled with (4) freedom from restraint."[31] Therefore without effecting an "entry" the aliens' proceedings were properly held to be exclusion proceedings as determined under INA section 291 which provided that any person who applies for admission to the United States must establish that he is not subject to exclusion.

Current IIRIRA statutory framework merged the previously separated deportation proceedings and exclusion proceedings (as described in Matter of Pierre) into one. The IIRIRA merger of proceedings resulted in the birth of "removal" proceedings and the requirement of lawful admission for many immigration benefits, including the eligibility for adjustment of status under INA section 245. [32]

IV. Understanding the Date of Admission Precedent

A. BIA's First Interpretation of "Admission" Under IIRIRA

The BIA first considered whether an adjustment of status constituted an "admission" for the purposes of removability under INA section 237 (a)(2)(A)(iii) in Matter of Rosas.[33] The alien in Matter of Rosas entered the United States without inspection in 1979.[34] In December of 1989 she adjusted her status pursuant to INA section 245A and thereafter considered "an alien lawfully admitted for permanent residence." [35] After Rosas' conviction of illicit transportation of a controlled substance (an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. section 1101(a)(43)(B) (1994)) on March 14, 1997, Legacy Immigration and Naturalization Service (INS) placed the alien in removal proceedings.[36] The BIA discussed that an alien who adjusted status to that of permanent resident under INA section 245A requires the alien to demonstrate admissibility as an immigrant; however the BIA acknowledged the adjustment of status could not be characterized as an "entry" into the United States under INA section 101(a) (13)(A).[37] The BIA noted that INA section 101(a)(13)(A) does not set forth the exclusive definition of the term "admitted".[38]

Ultimately, the Board concluded aliens "lawfully admitted for permanent residence" through the adjustment process are considered to have accomplished an "admission" to the United States under INA section 101(a)(20). [39] The BIA therefore concluded the term "admission" in INA section 237(a)(2)(A)(iii) includes an adjustment of status.[40] Rosas was found removable because she was convicted of an aggravated felony after her adjustment of status from within the United States.[41] Under section 101(a)(20) of the Act, the Board determined that this section encompassed both admissions as an Legal Permanent Resident (LPR) at the border and admissions to LPR status through the adjustment of status within the United States.[42] They found their determination supported

by the language of the adjustment provisions themselves: under the general provision for adjustment of status, the Attorney General is to "record the alien's lawful admission for permanent residence".[43] Other provisions for adjustment of status to permanent residence also confer upon the applicant a status "lawfully admitted". [44]

The definition of the term "removable" added by the IIRIRA assigns INA section 237 grounds to aliens who are "admitted to the United States." [45] INA section 237(a) finds aliens removable who "at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible".[46] It is from INA section 237(a)(1)(A) of the Act that the BIA found its statutory support for its holding.[47] The BIA concluded that INA section 237 recognizes that aliens who have adjusted to permanent resident status have been "admitted" to the United States.[48]

Furthermore, the Board found support for their holding in the avoidance of absurd results.[49] Concluding that if the terms "admission" and "admitted" did not include adjustment of status, aliens who acquire their LPR status through adjustment of status would be inadmissible under INA section 212(a)(6)(A)(i) and in the same position as aliens who entered without inspection. [50] While the Board found such a "drastic shift in the treatment of a significant number of permanent resident aliens" was not the intention of IIRIRA, other provisions in IIRIRA were specifically added to disincentive unlawful entries and give harsh penalties to aliens who entered without inspection.[51]

However, the Board's rationale to avoid absurd results may be questionable. When considered in its entirety, IIRIRA's shift from "entry" to "admission" most obviously affects the category of aliens who entered without inspection; therefore, Congress may have looked to impact aliens who entered without inspection who later adjusted status under INA section 245A. Congress's intention to significantly impact aliens who entered without inspection through IIRIRA perhaps does not make this statue yield an absurd result, but rather the intended one. Most convincingly this argument highlights the fact that INA section 237(a)(2)(A)(iii) refers to convictions occurring "after admission," and the adjustment of status process does not involve or constitute an "admission" as defined in the statute.

B. Circuit Court's First Interpretation of "Admission" under IIRIRA

Shortly after Matter of Rosas, the federal circuit court had an opportunity to weigh in. The Ninth Circuit approach was consistent with the Board's following their decision in *Ocampo-Duran v. Ashcroft*.[52] Under a similar fact pattern as Matter of Rosas, an alien entered the United States without inspection to later adjust his status under 245A when after he adjusted status he committed an aggravated felony and was convicted.[53] The Ninth Circuit faced with a similar question as Matter of Rosas, whether the phrase "lawfully admitted for permanent residence," INA section 101(a)(20), could constitute an "admission" for purposes of removal under section 237(a)(2)(A)(iii).[54] The court held an adjustment of status is an "admission" for purposes of determining removability under section 237(a)(2)(A)(iii).[55] The court found the alien removable because he was convicted of an aggravated felony after his adjustment of status.[56]

Like the BIA, the Ninth Circuit found support in the canon to interpret statutes so as to avoid absurd results.[57] The Ninth Circuit refused to find the exclusive definition under all circumstances of "admission" as contained in INA section 101(a)(20) because it would have meant that aliens who entered the United States without inspection and authorization and subsequently adjusted status could not be removed under INA section 237(a)(2)(A)(iii) (because they had never been "admitted") even though aliens who had been lawfully admitted could be removed under this section of the Act.[58]

The Ninth Circuit seems to do linguistic acrobatics to avoid absurdity and embraced an alternative

construction of the term “admission” because an overly narrow interpretation of the term of “admission” would have created an undesirable loophole.[59] The Ninth Circuit’s linguistic maneuvers seem to conflict with following rational Congressional intent. The IIRIRA amendment created ambiguities that perhaps neither the circuit court nor the BIA is prepared to interpret. The Ninth Circuit’s decision to adopt a broad interpretation of “after admission” to include both aliens who are “admitted” at the time of entry pursuant to section 101(a)(13)(A) and to aliens who are “lawfully admitted for permanent residence,” as defined in section 101(a)(20) is at best a guess of Congressional intent because Congress was otherwise silent when it enacted the substitution of the term “after admission” for “after entry”. Legislative history does not indicate Congress intended to render “inadmissible” the group of aliens who have adjusted status, so this lack of intent may not be the most credible support for the Ninth Circuit’s broad interpretation.[60]

C. Lingering Questions of Interpretation

Following Matter of Rosas and Ocampo-Duran the “admission” interpretation question was far from settled, and arose with new questions for removal considerations under a different fact pattern in Matter of Shanu.[61] The alien, Shanu, was admitted as a nonimmigrant in 1989. Shanu later adjusted his status to that of LPR in 1996.[62] In 1997 Shanu convicted of a crime involving moral turpitude (“CIMT”).[63] The Board held an alien who adjusts to LPR status from within the United States has been admitted as of the date of his adjustment.[64] The BIA concluded that Congressional intended “with respect to aliens who have been admitted to the United States more than once- that each and every date of admission qualifies as a potentially “relevant” date of admission under section 237(a)(2)(A)(i)”.[65] Therefore, under this BIA holding, an alien with multiple admissions who is convicted of a CIMT committed within 5 years after the date of any admission the alien is removable.[66] Shanu was removable because he was convicted of a CIMT within 5 years of his adjustment of status.[67]

Shivaraman v. Ashcroft[68] presented the Ninth Circuit the opportunity to consider the same fact pattern and issue as Matter of Shanu. The Ninth Circuit considered whether an alien’s date of adjustment of status can constitute the alien’s “date of admission” for purposes of INA section 237(a)(2)(A)(i) if the alien previously made a lawful entry into the United States and continuously maintained lawful presence.[69] However, unlike the Board’s holding in Shanu, the Ninth Circuit considered the “date of admission” for removal purposes as the date the alien first made “lawful entry” into the United States.[70]

Shivaraman was admitted as a nonimmigrant in 1989 and later adjusted his status to that of LPR in 1997.[71] The state of Hawaii convicted Shivaraman of theft (a CIMT) in 1998 for acts he committed between January 27, 1998 and October 10, 1998 that was punishable up to 10 years.[72] In March 2001, INS charged Shivaraman with removability on the basis of a CIMT under INA section 237(a)(2)(A)(i).[73]

In addition to determining that an alien’s adjustment of status is considered an admission under the relevant removal statute,[74] the Ninth Circuit then discussed which date of admission was proper for aliens, like Shivaraman, who had multiple “admissions” for purposes of removal when the alien made a lawful entry to the United States prior to his adjustment of status.[75] In this discussion the Ninth Circuit commented on BIA precedent from Matter of Rosas and Ocampo-Duran and asserted the inapplicability of Matter of Rosas and Ocampo-Duran in this case because in both of those cases the alien first entered the United States without inspection and subsequently adjusted status.[76] The Ninth Circuit found the applied BIA precedent arbitrary with “unbounded discretion with disparate effects and drastic immigration consequences”[77] While the Ninth Circuit did not find the alien’s

adjustment of status to meet the literal terms of the definition of “admission” or admitted” as contained in section 101(a) (13)(A) it held that in order to avoid absurd results, adjustment of status should permit an alien to be considered “admitted” from the language contained in section 101(a)(20).[78] The Ninth Circuit held when an alien is “admitted” under INA section 101(a)(13)(A) and maintains a continuous lawful presence thereafter, “the date of admission” is the date of the alien’s lawful entry and not the date of adjustment of status.[79] The Fourth and Sixth Circuit Courts subsequent considerations of similar fact patterns and the same issues in Shirvaman yielded similar holdings in Aremu v. DHS[80] and Zhang v. Mukasey.[81]

The BIA had opportunity to reconsider its interpretation of “after admission” in Matter of Alyazji.[82] It affirmed that an adjustment of status constitutes an “admission”.[83] It specified the language, structure and purpose of the Act, taken as a whole has led to the conclusion that the class of aliens “in and admitted to the United States consists of (1) those who entered the United states with the permission of an immigration officer after being inspected at a port of entry; and (2) those who entered the United States without permission or were paroled, but who subsequently became lawful permanent residents.”[84] Further, in an effort to settle the query about which date of admission applies when the alien has been admitted more than once, the BIA concluded that the date of admission was the date “by virtue of which the alien was present in the United States when he committed his crime.”[85] Therefore, the alien is removable if the alien was present in the United States as a result of an admission that took place within the five-year period of the date that he committed his crime.[86] However, the alien would not be deportable if he committed his crime more than five years after the current admission to the United States.[87] The BIA clarified that the five-year period does not begin anew every time the alien is admitted.[88] It considered the adjustment of status an admission it specified that the alien’s 5 year period did not restart with his adjustment of status – it merely extends the alien’s period of presence without affecting the determination of the date of admission as required by statute.[89]

V. Conclusion

Congress should look to remedy its gap in its definition of “admission”, especially as it applies to grounds of deportability. By now Congress should recognize that its definition of “admission” in section 101(a)(13)(A) cannot be universally applied throughout the INA. Without Congress adding language to indicate a permissive contextual application, it begs the question whether the term “admitted” has the same meaning in INA section 101(a)(20) that it has in INA section 101(a)(13)(A).

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i Immigration Nationality Act (“INA” or “Act”) (McCarran Act) (McCarran-Walter Act), 8 U.S.C. §§ 1101-1537 (2006).

ii Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) Pub. L. No. 104-208, 110 Stat. 3009-546.

iii 8 U.S.C. § 1101(a)(13)(2006)

iv Pub. L. No. 82-414, 66 Stat. 163 (1952) (Pre-IIRIRA, the term “entry” in former INA section 101(a)(13) meant “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise…”)

v 8 U.S.C. § 1101(a)(13) (2006).

vi Pub. L. No. 104-208, 110 Stat. 3009-546.

vii 8 U.S.C. § 1229 (2006).

viii Pub. L. No. 82-414, 66 Stat. 163 (1952).

ix 8 U.S.C. § 1182 (2006).

x Id.

xi Aliens who are inadmissible under INA section 212(a) are “ineligible to receive visas and ineligible to be admitted to the United States.” Id.

xii 8 U.S.C. § 1227 (2006).

xiii 8 U.S.C. § 1101(a)(13) (2006).

xiv Id.

xv Pub. L. No. 82-414, 66 Stat. 163 (1952).

xvi Some of the inadmissibility grounds under the INA maintained the language of “entry” under IIRAIRA: INA section 212(a)(3)(C)(I) and 212(a)(5)(A)(I). Removal grounds that use the term “entry”: INA § 237(a)(1)(A) “inadmissibility at entry” and “smuggling aliens within five years of

entry”.

xvii 8 U.S.C. § 1101(a)(13)(2006).

xviii 8 U.S.C. §§ 1227, 1182.

xix 8 U.S.C. § 1182 (2006).

xx 8 U.S.C. § 1101(a)(13) (2006).

xxi 8 U.S.C. § 1227(a) (2006).

xxii Id.

xxiii House Report No. 104-469 (1) at 158-59 (1996).

xxiv 8 U.S.C. § 1101(a)(13) (2006) defines the term “lawfully admitted for permanent residence” means the “status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.”

xxv Id.

xxvi 8 U.S.C. § 1101(a)(13) (2006).

xxvii 8 U.S.C. § 1227 (2006) which (in pertinent part) authorizes the removal of any alien who “is convicted of a crime involving moral turpitude committed within five years … after the date of admission,” provided the crime is punishable by a sentence of imprisonment of 1 year or longer and

section 237(a)(2)(A)(iii) of the Act provides “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” Similar

confusion occurs in section 212(a)(9)(B)(i)(II) of the Act “[A]liens who are inadmissible … are ineligible to receive visas and ineligible to be admitted to

the United States.”

xxviii Pub. L. No. 82-414, 66 Stat. 163 (1952).

xxix 8 U.S.C. § 1227 (2006) (Aliens who entered without inspection are classified as inadmissible, shall be removable, and are not entitled to the benefit of cancellation of removal unless they qualify for the narrow exceptions permitted by 240(b) of the Act).

xxx 14 I. & N. Dec. 467, 468 (BIA 1973).

xxxi Id.

xxxii 8 U.S.C §§ 1229, 1255 (2006).

xxxiii Matter of Rosas, 22 I. & N. Dec. 616 (BIA 1999).

xxxiv Id. at 616.

xxxv Id; 8 U.S.C. § 1255(a) (1988).

xxxvi Matter of Rosas, 22 I.& N. Dec. at 616-17.

xxxvii Id. at 623.

xxxviii Id.

xxxix Id. at 618.

xl Id. at 623.

xli Id.

xlii Id.

xliii Id. at 619; 8 U.S.C. § 1255 (2006).

xliv Id.; “an alien lawfully admitted for permanent residence” See INA sections 209(b) (refugees), 210(a)(2) (special agricultural workers), 244(a) of the Act (suspension of deportation), 8 U.S.C. §§ 1159(b), 1160(a)(2), 1254(a) (2006).

xlv 8 U.S.C. § 1227(a) (2006).

xlvi Id.

xlvii Matter of Rosas, 22 I.& N. Dec at 619.

xlviii Id.

xlix Id. at 621.

l Id.

li Id.

lii Ocampo-Duran v. Ashcroft, 254 F.3d 1133 (9th Cir. 2001).

liii Id. at 1134.

liv Id.

lv Id.

lvi Id. at 1135.

lvii Id.

lviii Id.

lix Id.

lx Matter of Rosas, 22 I.& N. Dec at 619 n.4

lxi Matter of Shanu, 23 I&N Dec. 754 (BIA 2005)

lxii Id. at 754

lxiii Id. at 755

lxiv Id. at 759

lxv Id. at 759.

lxvi Id.

lxvii Id. at 764.

lxviii Shirvaman v. Ashcroft, 360 F. 3d 1142 (9th Cir. 2004).

lxix Id. at 1143.

lxx Id.

lxxi Id.

lxxii Id.

lxxiii Id.

lxxiv The INA provides that an alien is removable if he is convicted of a CIMT for which a sentence of one year or longer may be imposed, that is committed “within five years… after the date of [his] admission.” Section 237(a)(2)(A)(i). 8 U.S.C. § 1227(a) (2006).

lxxv 360 F. 3d at 1146-47.

lxxvi Id.

lxxvii Id. at 1147.

lxxviii Id. at 1147-48.

lxxix Id. at 1149.

lxxx 450 F.3d 578 (4th Cir. 2006) (held the date on which an alien, who was previously admitted as a nonimmigrant adjusts his status to that of a lawful permanent resident is not the “date of admission” for removal purposes).

lxxxi 509 F. 3d 313 (6th Cir. 2007) (held an alien's physical, legal entry into the U.S. was his nonimmigrant admission for purposes of removal under INA section 237(a)(2)(A)(i)).

lxxxii 25 I & N Dec. 397 (BIA 2011).

lxxxiii Id.

lxxxiv Id. at 399.

lxxxv Id. at 406.

lxxxvi Id. at 406.

lxxxvii Id.

lxxxviii Id. at 406-7.

lxxxix Id. 407.

National Law Review, Volume II, Number 303

Source URL:https://natlawreview.com/article/not-all-entries-are-equal-law-entry-and-admission-purposes-immigration-and-nationali