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Darkside Discretion in Immigration Cases

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ARTICLE

DARKSIDE DISCRETION IN IMMIGRATION CASES

BY:

SHOBA SIVAPRASAD WADHIA *

ABSTRACT

“Darkside Discretion” refers to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for remedy but is denied by an adjudicator in the exercise of discretion. Imagine a woman who arrived in the United States six months ago who meets her burden of proving she is a refugee based on a fear of persecution by the government in her home country because of her religious beliefs, but who is denied asylum for discretionary reasons. This kind of decision exposes the “darkside” of discretion because it reflects how the government uses the tool of discretion negatively toward the asylum seeker. Like with asylum, Congress has crafted a range of remedies with hefty, medium, and broad statutory criteria as well as a discretionary component. Some of the remedies examined in this article include asylum, “adjustment of status,” “extreme hardship” waivers, and waiver under the “travel” ban. This article is the first to examine a cross section of discretionary decisions across federal agencies under a single normative framework.

This article argues that discretion in immigration cases should center on humanitarian concerns and be informed by compassion. How discretion is used matters, and functions best when exercised favorably toward the noncitizen. Further, in cases where Congress has already listed statutory requirements for immigration benefits or relief, it is generally unsuitable for agencies to issue a discretionary denial. This article is the first to consider broad solutions for responding to Darkside Discretion. One solution is to eliminate the discretionary component in statutory remedies that already include statutory requirements. A second solution is for Congress to create a rebuttable presumption in favor of noncitizens. A final but less optimal solution is for agencies to adopt a clearer standard for discretion. This article shows how eliminating or transforming the discretionary standard in immigration cases will lead to the reduction of arbitrary decisionmaking by federal agencies, adherence to administrative law values and greater opportunity for federal court review when cases are denied.

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I. INTRODUCTION

Prosecutorial discretion refers to the choice made by the Department of Homeland Security (DHS) about the scope of immigration enforcement against a person or group of persons. When DHS abstains from taking enforcement action against a person who is otherwise eligible for deportation, prosecutorial discretion is exercised favorably. The need for this discretion is inevitable because of limited resources and the humanitarian factors that drive DHS protect people from deportation.¹ Prosecutorial discretion represents one way the federal government makes immigration enforcement decisions.

Beyond prosecutorial discretion is the discretion used by executive branch agencies to sustain, change, or terminate existing immigration policies within their domain. Discretion also lies in the decisions by agencies like DHS, Department of Justice (DOJ), and Department of State (DOS). This article examines the use of discretion by federal agencies and serves as a natural extension of previous work on prosecutorial discretion, and the existing literature.² This article examines several remedies that involve Darkside Discretion in immigration cases. “Darkside Discretion” refers to a situation where the noncitizen satisfies the statutory criteria set by Congress to be eligible for a remedy, but is denied by an adjudicator in the exercise of discretion.³ This article questions whether this discretionary component is necessary, and highlights the historical problems associated with Darkside Discretion. This article proposes that Congress eliminate discretion or in the alternative, create a rebuttable presumption in favor of noncitizens in cases where they have met the statutory criteria.

¹ *Arizona v. United States*, 567 U.S. 387, 397, 132 S. Ct. 2492, 2499, 183 L. Ed. 2d 351 (2012).

² *Id.* See also Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS UNIV. L. REV. 2 (2018); Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*, 36 IMMIGR. & NAT'LITY L. REV. 94 (2015); Shoba Sivaprasad Wadhia, *Demystifying Work Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016).

³ See, e.g., Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 752 (1997) (“This form of discretion, which is prescribed expressly by statute and which appears as the end point of a complex, multilayered ‘administrative decision’, could be termed delegated discretion.”); See also Kate M. Manuel and Michael John Garcia, *Executive Discretion as to Immigration: Legal Overview*, CONG. RES. SERV. (Nov. 10, 2014), <https://fas.org/sgp/crs/homsec/R43782.pdf>. (“In several instances, the INA expressly grants immigration officials some degree of discretion over aliens’ eligibility for particular immigration benefits or relief, including adjustment to legal immigration status or authorization to work in the United States. These statutory delegations sometimes provide immigration officials with broad discretion to determine whether and when aliens may be eligible for particular immigration benefits. In other instances, such delegations may permit immigration officials to waive the application of a statutory requirement that would bar otherwise-qualifying aliens from obtaining particular immigration benefits or relief.”)

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Maurice Roberts provided some of the earliest thinking on the role of discretion in immigration adjudications, and to the field as a scholar, former chairman of the Board of Immigration Appeals and later Editor in Chief of *Interpreter Releases*, a widely circulated weekly periodical on immigration.⁴ He cautioned more than forty years ago “The importance of achieving a reasonably sound exercise of discretion at the administrative level is underscored by the fact that, in a realistic sense, there is no other place to turn.”⁵

The field of immigration scholars has since swelled and so too has the literature. Scholars have examined the role of discretion in administrative law,⁶ immigration prosecutorial discretion,⁷ and in specific sections of the immigration statute.⁸ Similarly, scholars have written about legislative immigration reform in connection with expanding or shrinking family based immigration, increasing the number of employment-based visas, modifying the rules for foreign students, and finding solutions for long term residents living in the United States without papers or with a temporary status, and those coming in the future.⁹ While the use of discretion in the immigration space has long been driven by humanitarian factors, macro and micro policy changes

⁴ Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV., 144, 144–48 (1975).

⁵ *Id.* at 148.

⁶ See, e.g., Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983); David Epstein and Sharyn O’Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POLITICAL SCIENCE 697 (1994); Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646 (1988).

⁷ See e.g., Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS UNIV. L. REV. 2 (2018); Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*, 36 IMMIGR. & NAT’LITY L. REV. 94 (2015); Shoba Sivaprasad Wadhia, *Demystifying Work Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016).

⁸ See, e.g., Maurice A. Roberts, *Relief from Deportation: Discretion and Waivers*, 1 IN DEFENSE OF THE ALIEN 29 (1978); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1301 (1972); Charles C. Foster, *Logic of Adjustment of Status to Permanent Residency*, 24 S. TEX. L.J. 37 (1983).

⁹ See, e.g., David B. Thronson, *You Can’t Get Here from Here: Toward a More Child Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58 (2006); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446 (2008); Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79 (2013); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Michael A. Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009). See also Hiroshi Motomura, *What is “Comprehensive Immigration Reform”?* - *Taking the Long View*, 63 ARK. L. REV. 225 (2010); Kevin R. Johnson and Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Integration*, 28 IMMIGR. & NAT’LITY L. REV. 575 (2007); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants’ Rights and the Rule of Law*, 38 U. MEM. L. REV. 853 (2008).

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in the Trump administration reveal how discretion can be used for broader purposes, and even misused. Against this backdrop, a close (re)examination discretion in immigration decisions is critical.

Part II of this article explores examples of Darkside Discretion from the Department of Homeland Security, Department of Justice, and Department of State. Specifically, Part II examines the discretionary component in asylum, cancellation of removal, adjustment of status, waivers of inadmissibility, and waivers under the travel ban. This section is organized so that remedies with heftier statutory requirements are distinguished from those with medium or broader ones. Apart from the travel ban waiver, every remedy examined in this article includes both statutory criteria and a largely undefined discretionary component. Part III examines why the need for a standard for discretion matters, the human costs of retaining discretion, and cautionary notes for how creating a standard may negatively affect agencies and people. Part IV considers solutions for limiting the dilemma of Darkside Discretion and favors a proposal to eliminate discretion altogether.

For this article, the author uses “Darkside Discretion,” “Delegated Discretion,” and “Discretionary decisions” interchangeably when discussing remedies processed by immigration officers at DHS, immigration judges at DOJ, or consulates at DOS. She uses the term “remedy” or “remedies” when discussing benefits, waivers or relief from removal. This article does not address uses of “prosecutorial discretion” except when identifying parallels or proposals relevant to Darkside Discretion. Also beyond the scope of this article is an analysis about the factors that drive officers or judges to determine if a person meets a statutory criterion, such as “bona fide marriage” or “extreme hardship” which “to the degree that it brings into play the adjudicator’s subjective notions, . . . has much in common with the application of discretion *qua* discretion.”¹⁰

II. DARKSIDE DISCRETION DEFINED

The Department of Homeland Security (DHS) is a cabinet level agency created by Congress in the wake of the September 11, 2001 terrorist attacks.¹¹ Congress delegated many of the immigration functions to DHS and split these functions into three main units: Customs and Border Protection (CBP); U.S. Citizenship and Immigration Services (USCIS); and Immigration and Customs Enforcement (ICE).¹² DHS has discretion to interpret many legal standards that have been left undefined by Congress. The Department of Justice (DOJ) houses the immigration court

¹⁰ Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 147 (1975).

¹¹ Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135.

¹² 8 U.S.C. § 211 (2016), Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135.

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system known as the Executive Office for Immigration Review (EOIR).¹³ Immigration judges in EOIR have jurisdiction to make many discretionary decisions when deciding whether a person qualifies for relief from removal. Similarly, the Board of Immigration Appeals (Board) is the appellate administrative body within EOIR responsible for hearing challenges to immigration judge decisions made by DHS or the affected noncitizen. Finally, Department of State (DOS) consulates around the world apply discretion every day. Consulates are guided by the immigration laws and the Foreign Affairs Manual (FAM)¹⁴ when deciding whether a visa should be issued and enjoy considerable discretion in deciding whether a noncitizen will be granted or refused a visa. The FAM does not have the force of a statute or regulation but is a daily guide for consulates and often defining as they are placed in the position of making discretionary decisions surrounding waivers. Relevant case law by the Board of Immigration Appeals is sometimes weaved into the FAM.

The choice by Congress to include a discretionary component in various immigration benefits and forms of relief is worthy to acknowledge. Congress could have made these statutory remedies mandatory. Possibly, one purpose Congress had in creating a discretionary component for many of the statutory remedies in the immigration statute was to provide enough flexibility to federal agencies during those instances which are unforeseeable to Congress at the time, or in cases where adverse factors raised by applicants outweigh the statutory elements or positive factors overall. One can imagine a situation where an applicant for a waiver or benefit has a significant history that clearly warrants a denial in the eyes of the adjudicator. The broader question is whether the discretionary component serves the purpose Congress intended or as a normative matter. This author believes that if a remedy or benefit under the statute must include a discretionary component, such discretion should generally favor the noncitizen and that compassion should generally inform discretionary decisions.

A. Hefty Statutory Requirements

1. Asylum

Asylum is available to people already in the United States who have suffered persecution or face similar harm in the future because of race, religion, nationality, political opinion, or membership in a particular social group.¹⁵ Congress not only included a specific definition for

¹³ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *About the Office*, U.S. DEPT. OF JUSTICE (Aug. 14, 2018), <https://www.justice.gov/eoir/about-office>.

¹⁴ *Foreign Affairs Manual and Handbook*, U.S. DEPT. OF STATE (accessed July 13, 2018), <https://fam.state.gov>.

¹⁵ I.N.A. § 208; 8 U.S.C. § 1158 (2016). While I analyze the discretionary component for asylum when a person is before an immigration judge, it is worth pointing out that people who are not in the jurisdiction of DOJ but who fear return will normally apply for asylum before DHS.

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“refugee” that every asylum applicant should meet, but also expressed statutory limitations to asylum such as the requirement that a person apply within one year of their last arrival and not be convicted of a particularly serious crime.¹⁶ Nevertheless, asylum is a discretionary remedy so even if the asylum officer of immigration judge finds a person to qualify under the statute, they may still deny this life saving form of protection as a matter of discretion. The relevant statute reads:

IN GENERAL Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.¹⁷

Whether an asylum seeker applies for protection with an asylum officer in DHS or an immigration judge in DOJ depends on their posture. A person may apply for asylum “affirmatively” with USCIS if they are in the United States in a valid status or without status but not in the jurisdiction of the immigration court.¹⁸ If an asylum officer in USCIS does not find the person qualifies, they are “referred” to the immigration court and will apply for asylum as a “defense” to removal.¹⁹ Asylum seekers may also file applications for asylum as a defense to removal with the immigration court for the first time following their placement in removal proceedings.²⁰

Historically, discretion in asylum has been undefined by a clear guideline, but nevertheless guided by precedential decisions by the Board. One of the first cases to analyze the discretionary component was *Matter of Salim*. In that case, the Board agreed with the applicant that he would face persecution in his native Afghanistan based on his refusal to “join the Soviet controlled Afghan army in its war against Afghan rebels presently fighting against the Soviet invasion.”²¹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ I.N.A. §208; 8 C.F.R. § 208; USCIS, *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

¹⁹ I.N.A. § 208; 8 C.F.R. §1208; USCIS, *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

²⁰ I.N.A. §§ 208, 240; 8 C.F.R. §§ 1208, 1240; USCIS, *Obtaining Asylum in the United States*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Oct. 19, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states>.

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The Board gave significant weight to an advisory opinion by the Department of State that the applicant would face persecution.²² The Board then turned to the discretionary question, concluding the applicant's use of a fraudulently purchased passport bearing someone else's name to reach the United States was a strong negative discretionary factor and warranted a denial.²³ The Board made a distinction between a person being forced to use a fraudulent document as a means to escape harm, and the instant case, where the fraudulent document was obtained *after* the applicant escaped from Afghanistan and as characterized by the Board "with the sole purpose of reaching this country ahead of all the other refugees awaiting their turn abroad."²⁴ In the 1987 case known as *Matter of Pula*, the Board took a more generous approach when analyzing discretion:

Instead of focusing only on the circumvention of orderly refugee procedures, the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined in determining whether a favorable exercise of discretion is warranted. Among those factors which should be considered are whether the alien passed through any other countries or arrived in the United States directly from his country, whether orderly refugee procedures were in fact available to help him in any country he passed through, and whether he made any attempts to seek asylum before coming to the United States. In addition, the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there are also relevant.²⁵

When discussing the scenario of a person using a fraudulent document to enter the United States, the Board held: "The use of fraudulent documents to escape the country of persecution itself is not a significant adverse factor while, at the other . . . the danger of persecution should

²¹ *Matter of Salim*, Board of Immigration Appeals, Interim Decision 2922 (Sept. 29, 1982)
<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2922.pdf>.

²² *Matter of Salim*, Board of Immigration Appeals, Interim Decision 2922 (Sept. 29, 1982)
<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2922.pdf>

²³ *Matter of Salim*, Board of Immigration Appeals, Interim Decision 2922 (Sept. 29, 1982)
<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2922.pdf>.

²⁴ *Matter of Salim*, Board of Immigration Appeals, Interim Decision 2922, 316 (Sept. 29, 1982)
<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2922.pdf>.

²⁵ *Matter of Pula*, Board of Immigration Appeals Interim Decision 3033 (Sept. 22, 1987). *Matter of Pula* has been discussed by scholars. See, e.g., Deborah Anker and Carolyn Patty Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 67, 71 (1989); Kevin R. Johnson, A "Hard Look" at the Executive Branch's Asylum Decisions, 1991 UTAH L. REV. 279, 331–32 (1991); Kate Aschenbrenner, *Discretionary (in)justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 612–15 (2012); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 726 (1995).

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generally outweigh all but the most egregious of adverse factors.²⁶ In discussing *Matter of Salim*, the Board in *Matter of Pula* concluded “we agree with the applicant that *Matter of Salim*, supra, places too much emphasis on the circumvention of orderly refugee procedures. This circumvention can be a serious adverse factor, but it should not be considered in such a way that the practical effect is to deny relief in virtually all cases.”²⁷

Matter of Pula remains an influential case in asylum adjudications and is oft-times the guide used by lawyers and officers alike when deciding if discretion is warranted in cases where asylum applicants meet the statutory criteria. One unique feature of discretion in asylum law is the fact that *the danger of persecution should generally outweigh all but the most egregious of adverse factors*. This passage has long been understood to protect asylum seekers who have suffered persecution or fear similar harm in the future in most cases.

In the 1996 case of *Matter of Kasinga*, the Board applied discretion favorably towards a woman who entered the United States irregularly and faced persecution in the form of female genital mutilation:

The final issue is whether the applicant merits a favorable exercise of discretion. The danger of persecution will outweigh all but the most egregious adverse factors. [citations omitted] The type of persecution feared by the applicant is very severe. To the extent that the Immigration Judge suggested that the applicant had a legal obligation to seek refuge in Ghana or Germany, the record does not support such a conclusion. The applicant offered credible reasons for not seeking refuge in either of those countries in her circumstances. The applicant purchased someone else’s passport and used it to come to the United States. However, upon arrival, she did not attempt to use the false passport to enter. She told the immigration inspector the truth. . . . [citations omitted] We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant.²⁸

More recent case law reveals several reversals by the Board in discretionary denials made by immigration judges.²⁹ In one case, the Board was critical of the immigration judge’s

²⁶ *Id.*

²⁷ *Matter of Pula*, Board of Immigration Appeals Interim Decision 3033, 473 (Sept. 22, 1987).

²⁸ *Matter of Kasinga*, Board of Immigration Appeals, Interim Decision 3278, 368 (June 13, 1996), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf>.

²⁹ *See, e.g.*, J-M-B-, AXXX XXX 197 (BIA Feb. 28, 2019) (reverses discretionary denial of asylum upon finding that respondent’s extensive family ties in United States were not outweighed by years old convictions and unlawfully bringing wife to United States while 8 months pregnant) (Wendtland, Greer, Cole); C-S-N-, AXXX XXX 231 (BIA Feb. 12, 2019) (reverses discretionary denial of asylum for applicant who fraudulently attempted to obtain visa prior to fleeing native country and failed to seek asylum in twelve countries prior to entering United States) (Adkins-Blanch,

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discretionary denial for an asylum seeker stating,

The Immigration Judge found that the respondent's decades in the United States, his United States citizen father, and his eight United States citizen children were outweighed by years-old convictions for forgery for writing a "bad check" and false statement to an officer, and for unlawfully bringing his 8-month pregnant wife to join him in the United States []. While the respondent's criminal history is certainly relevant, we disagree that it outweighs the positives and will reverse the determination.³⁰

In another case, the sole question on appeal was “whether the respondent's use of a false Angolan passport in her unsuccessful effort to obtain a non-immigrant visa to escape persecution supports the discretionary denial of the respondent's request for asylum.”³¹ Relying in part on *Matter of Pula* and *Matter Kasinga*, the Board concluded that discretion should be exercised in favor of the asylum applicant.³²

Federal courts have also reviewed appeals of discretionary denials made by immigration judges and Board members in asylum cases.³³ The availability of federal court review over final asylum determinations by DOJ are unique to the extent that such review is unavailable for many other discretionary remedies in immigration law.³⁴

Kelly, Mann); S-A-N-, AXXX XXX 703 (BIA Feb. 1, 2019) (upholds discretionary grant of asylum to applicant with two convictions for possession of marijuana and two convictions for misdemeanor assault) (Grant); F-N-M-, AXXX XXX 389 (BIA Dec. 26, 2018) (IJ should not have denied asylum as a matter of discretion based solely on respondent's prior use of false passport in failed attempt to obtain nonimmigrant visa) (Kendall Clark, Guendelsberger, Grant); M-A-B-, AXXX XXX 333 (BIA June 30, 2017) (reverses discretionary denial of asylum based solely on respondent's five-year stay in Israel prior to arriving in the United States) (Pauley, Wendtland, Cole (dissenting)); Jean Pierre Batcha Samba, A088 046 199 (BIA Dec. 19, 2013) (making false statements to asylum officer or in removal proceeding not valid basis to deny asylum in exercise of discretion) (Pauley, Donovan, Wendtland).

³⁰ J-M-B-, AXXX XXX 197 (BIA Feb. 28, 2019).

³¹ F-N-M-, AXXX XXX 389 (BIA Dec. 26, 2018)

³² F-N-M-, AXXX XXX 389 (BIA Dec. 26, 2018)

³³ See, e.g., *Aden v. Ashcroft*, 112 F. App'x 852, 854 (3d Cir. 2004); *Aiqin Xue v. Holder*, 538 F. App'x 35, 37 (2d Cir. 2013); *Inyachkin v. Holder*, 334 F. App'x 418, 419–20 (2d Cir. 2009); *Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007); *Li Peng Wang v. Holder*, 346 F. App'x 615, 616 (2d Cir. 2009); For cases remanded or reversed, see *Andriasian v. I.N.S.*, 180 F.3d 1033, 1042 (9th Cir. 1999); *Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1314 (9th Cir. 1987); *Huang v. I.N.S.*, 436 F.3d 89, 99 (2d Cir. 2006); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1138-39 (9th Cir. 2004).

³⁴ See 8 U.S.C. §1252(a)(2)(B); I.N.A. § 242(a)(2)(B). “Denials of discretionary relief Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision,

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Based on the author’s review of a handful of federal court decisions, three observations can be made. First, combing through a decision that was denied in the exercise of discretion can be difficult when a judge has denied relief on other grounds. In other words, discretion is not always the sole basis for denying relief altogether.³⁵ Those cases are also less relevant to the solutions considered in this article, which presuppose that a person meets the statutory requirements, asylum or otherwise. Second, some of the discretionary denials tied to asylum are tied to the criminal history of the asylum seeker.³⁶ Importantly, Congress has already set limits on who may qualify for asylum, and has created statutory bars for those who have been convicted of “particularly serious crimes” or committed “serious nonpolitical crimes” outside the United States.³⁷ Consequently, discretionary denials that are triggered by the criminal history of an asylum seeker who otherwise qualifies as a refugee is unjustified, and ignores the framework Congress designed with regard to criminal bars.³⁸ Third, Congress has made amendments to the INA that expand the statutory bars for asylum to include factors what were once discretionary or irrelevant to the adjudication. For example, “firm resettlement” is a bar to asylum and refers to a person’s ability to live safely and permanently in a third country before arriving in the United States.³⁹ Similarly, Congress injected a one-year filing deadline for asylum applications, requiring asylum applicants to file within one year of their last arrival into the United States.⁴⁰ These changes illustrate that when Congress wishes to impose changes or restrictions to domestic asylum, it has and will do so.

and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.”

³⁵ See, e.g., *Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007); *Li Peng Wang v. Holder*, 346 F. App’x 615, 616 (2d Cir. 2009).

³⁶ See, e.g., *Inyachkin v. Holder*, 334 F. App’x 418, 419–20 (2d Cir. 2009); *Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007).

³⁷ I.N.A. § 208 (b)(2)(A) (ii)–(iii), 8 U.S.C. § 1158(b)(2)(A) (ii)–(iii) (2016). “(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

or

(iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United states prior to the arrival of the alien in the United States.”

³⁸ Beyond the scope of this article are the merits of each asylum bar crafted by Congress.

³⁹ I.N.A. § 208(b)(2)(A)(vi); 8 U.S.C. § 1158(b)(2)(A)(vi) (2016). “(vi) the alien was firmly resettled in another country prior to arriving in the United States.”

⁴⁰ I.N.A. § 208(a)(2)(B); 8 U.S.C. § 1158(a)(2)(B) (2016). “(B) *Time limit*. — Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien’s arrival in the United States.”

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Scholars have also analyzed the discretionary component in asylum cases.⁴¹ In his work, *The Proper Role of Discretion in Political Asylum Determinations*, Arthur C. Helton analyzes some early cases involving discretion and limiting principles that can be derived from administrative law, statutes, the U.S. constitution, and international law. His analysis of *Matter of Salim* and its progeny is particularly rich, as are his cautionary notes about how discretion is applied. In his analysis, Helton found that asylum seekers were denied protection in the exercise of discretion based on refugees having found a “safe haven” in a third country before coming to the United States, criminal activities in the United States, terrorist activities abroad, and fraud in connection with manner of entry or attempted manner of entry.⁴² Ultimately, Helton was concerned about how discretion “threatens to swallow the right to apply for asylum in the United States” and how discretionary denials can leave genuine refugees in limbo.⁴³ Helton discusses one regulatory reference in *Matter of Salim*:

For example, 8 C.F.R. 208.8(f)(1) precludes the District Director from granting asylum relief to specific classes of applicants, and 8 C.F.R. 208.8(f)(2) states that the District Director shall consider- all relevant factors such as whether an outstanding offer of resettlement is available to the applicant in a third country and the public interest involved in the specific case. The regulations, in essence, summarize the specific preclusion in the Act against aliens who persecuted others abroad with this Board's and the judicially developed principles for the exercise of discretionary relief from deportation.⁴⁴

In her piece, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, Kate Aschenbrenner uses profiles drawn from actual cases to express the detrimental effects a discretionary denial can have on asylum seekers who otherwise meet the refugee definition.⁴⁵ In

⁴¹ See, e.g., Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PENN. L. REV. 1247 (1990); Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595 (2012); David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 331–32 (1991).

⁴² Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1004–8 (1985).

⁴³ Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1019 (1985).

⁴⁴ *Matter of Salim*, Board of Immigration Appeals, Interim Decision 2922, 315 (Sept. 29, 1982). <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/2922.pdf>; See *Rosenberg v. Woo*, 402 U.S. 49 (1971).

⁴⁵ See generally, Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595 (2012).

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one case she profiles, an immigration judge concluded that a woman from Rwanda had established her credibility and burden of proving that she faces a well-founded fear of persecution in the future, but denied her asylum as a matter of discretion because they speculated that “she had not told the truth in obtaining the visa she used to come to the United States.”⁴⁶ This applicant was ultimately successful in challenging her discretionary denial, but the entire process took more than two years to be resolved, causing both great human consequences of delay and costs to the government. Aschenbrenner discusses how Celine's appeal was ultimately successful, but how during the two-plus year time period during which Celine awaited a final decision, she was separated from her family and financially challenged because she lacked work authorization. Soon after the appeal was granted, Celine passed away. Said Aschenbrenner, “Because of the delay caused by the immigration judge's discretionary denial of her claim to asylum, she was never able to bring her family to the United States.”⁴⁷

Aschenbrenner discusses the limitations that arise when a person is denied asylum and in the alternative, given a lesser form of relief known as “withholding of removal” to argue that discretion should be eliminated.⁴⁸ Withholding of removal is a “cousin” to asylum but the differences are significant because of the standard a person must prove and the fact that qualifying individuals cannot petition to bring their family members who are currently outside the United States, or include them as “derivatives” on an application.⁴⁹ Indeed, there are dramatic differences between asylum and withholding and removal, which, as shared in more detail below, support the solution by this author to eliminate discretion in asylum altogether.

The politics of discretion in asylum cases have been central in the Trump administration and showcased in highly controversial policy published by the former Attorney General encouraging his employees to expand discretionary denials.⁵⁰ In the decision *Matter of A-B-* the former Attorney General cautioned adjudicators about the importance of discretion: “. . . I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA.”⁵¹ Furthermore, controversial guidance from USCIS on how to implement discretion in asylum cases echoed the language from the footnote in *Matter of A-B-*, quoted portions of *Matter of Pula*, and inserted new language that may influence and increase the number of discretionary denials in the future:

⁴⁶ *See id.* at 600–1.

⁴⁷ *See id.*

⁴⁸ *See id.* at 625–28.

⁴⁹ *See id.* at 607–8.

⁵⁰ *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

⁵¹ *Id.*

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... USCIS personnel may find an applicant's illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion. In particular, 'the circumvention of orderly refugee procedures' factor may take into account whether the alien entered the United States without inspection and, if not, whether the applicant had other ways to lawfully enter this country. For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE. An officer should consider whether the applicant demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim that the applicant wished to present to U.S. authorities.⁵²

The foregoing language is controversial because it attempts to normalize denials for asylum seekers who arrive at a place other than a port of entry. Practice advisories in the wake of *Matter of A-B-* were critical of the narrative around discretion which in asylum cases historically, is understood as favorable to the asylum seeker except in the most egregious circumstances.⁵³ One advisory by the American Immigration Lawyers Association reminds practitioners that *Matter Pula* remains good law and that caselaw from the federal circuit courts of appeals may be helpful.⁵⁴ These documents advise immigration practitioners to explain any discretionary factors in a particular case and to be prepared to explain how and why a client entered the United States.

2. *Cancellation of Removal*

"Cancellation of Removal" is another remedy in the immigration statute available only to noncitizens in removal proceedings before the immigration judge. For example, a single undocumented mother who has lived in the United States for more than two decades and is caring

⁵² Policy Memorandum, U.S. Citizenship and Immigration Servs. (July 11, 2018) (on file with USCIS).

⁵³ See e.g., *Practice Advisory: Applying for Asylum After Matter of A-B*, NAT'L IMMIGRANT JUSTICE CENTER (Jan. 2019), <https://immigrantjustice.org/sites/default/files/content-type/page/documents/2019-01/Matter%20of%20A-B-%20Practice%20Advisory%20-%201.2019%20Update%20-%20Final.pdf>; AILA, *Practice Pointer: Matter of A-B and Discretion*, AM. IMMIGRATION LAW. ASSN. (Oct. 15, 2018), <https://www.aila.org/infonet/practice-pointer-matter-of-a-b-and-discretion>.

⁵⁴ The practice pointer provides an excerpt from one 2018 case from the Sixth Circuit Court of Appeals, *Hussam F. v. Sessions*, where the asylum seeker entered the United States with a fraudulent passport: "Here, Petitioner certainly should have been more forthcoming with immigration officials. But under *Pula*, the Board's analysis may not begin and end with his failure to follow proper immigration procedures. See *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (citing *Pula* and noting that "the presence of immigration law violations" is a relevant factor, but "the BIA has cautioned against affording it too much weight.')." AILA, *Practice Pointer: Matter of A-B- and Discretion*, AM. IMMIGRATION LAW. ASSN. (Oct. 15, 2018), <https://www.aila.org/infonet/practice-pointer-matter-of-a-b-and-discretion>.

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for children who were born in the United States, and a parent who is a green card holder, may seek “cancellation of removal.”⁵⁵ Specifically, for nonpermanent residents seeking relief under cancellation, the statute provides that a noncitizen who is inadmissible or deportable from the United States may be granted relief if they have been physically present in the United States for at least ten years; can show good moral character during that time; can show they have not been convicted of specific offenses listed in immigration statute; and can establish that their removal would result in “exceptional and extremely unusual hardship” to their U.S. citizen or lawful permanent resident spouse, parent, or child.”⁵⁶ For green card holders facing removal, cancellation of removal can serve as a remedy if they can show five years in lawful permanent resident (LPR) status, continuous presence for seven years, and have not been convicted of an “aggravated felony.”⁵⁷

Discretionary denials of cancellation of removal can have lasting effects on the immigrant’s family and community. These effects are illustrated by the kinds of equities a person must or may show to qualify for cancellation. For example, if non-resident cancellation requires a significant level of hardship to a family member(s) then deporting the immigrant and separating them from a family can have a devastating impact on those left behind. For many applicants seeking cancellation of removal, a discretionary denial can mean a lifetime separation from family members who in turn suffer emotionally, financially, or medically. This author once represented an adult daughter whose elderly mother, a green card holder, was widowed and suffered from a life-threatening disease. As the only daughter in a Muslim family and her primary caregiver, she argued that if she was deported, her mother would suffer “exceptional and extremely unusual hardship.” The immigration judge found that the statutory requirements for cancellation of removal had been met, and that she qualified in the exercise of discretion. Had the immigration judge denied this case in the exercise of discretion, the mother and daughter would have been permanently separated, and the mother would have lost her only family caregiver.

Cancellation of removal is a robust statute with strict requirements for qualification as well as a discretionary component. It seems redundant at best and potentially abusive at worst to inject a separate discretionary piece, given these statutory requirements that depending on the version, already requires continuous physical presence for ten years, “good moral character,” “exceptional and unusual hardship” to a qualifying relative and continuous or physical residence in the United States.⁵⁸ Noncitizens who can show long time residence in the United States or strong humanitarian

⁵⁵ I.N.A. § 240A, 8 U.S.C. § 1229b (2016).

⁵⁶ I.N.A. § 240A, 8 U.S.C. § 1229b (2016).

⁵⁷ I.N.A. § 240A, 8 U.S.C. § 1229b (2016).

⁵⁸ I.N.A. § 240A; 8 U.S.C. § 1229b (2016). Beyond the scope of this article but worthy of a note is the literature and critique surrounding cancellation of removal for nonpermanent residents. See e.g., Molly Hazel Sutter, *Mixed-Status Families and Broken Homes: The Clash between the U.S. Hardship Standard in Cancellation of Removal Proceedings and International Law*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 783 (2006); Margaret H. Taylor, *What Happened to*

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factors to a relative should presumably qualify in the exercise of discretion, a term that remains undefined. Any eligible candidate for cancellation for removal has also lived in the United States for at least seven to ten years, which in the author’s view is independently a compelling positive factor.⁵⁹ Given the rigorous requirements and statutory caps already in place for cancellation of removal, there is little purpose in preserving a discretionary feature to this remedy.

Cancellation of removal is not the only remedy reviewed by immigration judges that include a discretionary element. Other examples of discretionary remedies that are brought before immigration court include waivers of inadmissibility, adjustment of status; asylum; and suspension of deportation to name a few, and reach at least one dozen.⁶⁰ Individuals who go before the immigration court with an application for relief for removal have typically conceded removability and moved to the “relief” stage of their removal or court proceedings. At the same time, this should not be overstated, as most people who are removed or deported from the United States do not have a formal court proceeding before the immigration judge.⁶¹

B. *Medium Statutory Requirements*

1. *Adjustment of Status*

In “adjustment of Status” or “adjustment” cases, DHS uses discretion when a person applies to “adjust” to a green card status while physically present in the United States. In 1952, Congress created section 245 so that immigrants physically present in the United States could

Non-LPR Cancellation - Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal, 30 J. OF L. & POLITICS 527 (2015); Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL’Y & L. 87 (2006).

⁵⁹ Political scientist Elizabeth Cohen has examined the role of time as a tool for measuring citizenship. ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018). As described in this article, many formal immigration benefits and remedies also hinge on the length of residence or physical presence of a noncitizen in the United States; Finally, I have discussed in previous work the value of using time as a measure of exercising discretion. *See e.g.*, Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. REV. 1 (2012); *See also* HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006).

⁶⁰ I.N.A. §212, 8 U.S.C. § 1182 (2016); I.N.A. §245, 8 U.S.C. § 1255 (2016); I.N.A. § 224, 8 U.S.C. § 1254 (2016).

⁶¹ *See* Bryan Baker, U.S. DEP’T. OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *Annual Report: Immigration Enforcement Actions: 2016*, at 8 tbl.6 (2017), https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf [<https://perma.cc/RJ3N-ZTVW>]; *See also* Shoba Sivaprasad Wadhia, *Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017); <https://www.latimes.com/opinion/op-ed/la-oe-koh-wadhia-deportations-20180630-story.html>.

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“adjust” their status to that of a permanent resident as opposed to having to go abroad for a process known as “consular processing.”⁶² Section 245(a) of the Immigration Nationality Act provides:

The status of an alien who was inspected and admitted or paroled into the United States . . . *may [emphasis added]* be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.”⁶³ The standard for adjustment is stringent and requires that a person be inspected and admitted or paroled in the United States, be “admissible”, that a person be present in the United States, and that a person have an immigrant visa “available” at the time of application.⁶⁴

The statutory requirements alone bar a person who entered without inspection but is married to a U.S. citizen from qualifying for adjustment. Furthermore, those in family or employment relationship such as a spouse to a green card holder or an employee from India with an advanced degree sponsored by a U.S. employer may not meet the requirement that a visa is “immediately available” due to the backlogs.⁶⁵

Adjustment also includes a discretionary component, which means that a person can meet the statutory criteria outlined above but still be denied. Historically, adjudicators in INS relied on guidelines by known as the “Operation Instructions” and precedential decisions by the Board to decide whether a person was eligible for adjustment.⁶⁶ The structure was largely decentralized. Immigration officers made the initial decisions and their superiors reviewed “discretionary denials

⁶² See also Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. OF LEGAL STUDIES 349, 351 (1972).

⁶³ I.N.A. §245; 8 U.S.C. § 1255 (2016).

⁶⁴ *Id.*

⁶⁵ See e.g., I.N.A § 201(d)(1)(A); 8 U.S.C. § 1151 (d)(1)(A); I.N.A. § 201(c)(1); 8 U.S.C. §1151(c)(1) (2016); Kyle A. Knapp, *The Green Card Backlog – Take a Number and Wait . . . A Long Time*, 16 No. 11 OHIO EMP. L. LETTER 4.

⁶⁶ See e.g., INS Operation Instructions § 245.5(d)(3) (“Every denial of a section 245 application solely as a matter of discretion, shall be reviewed by a district officer no lower than Assistant District Director, Travel Control before the decision is served.”), (4) (“If an adjudicator determines that a section 245 application should be granted in the exercise of discretion, despite the existence of an adverse supervisory officer before the applicant is notified of the decision. If a formal written decision is not prepared in such a case, the adjudicator shall note Form I-468 to show “Approval warranted despite (specify adverse factor or factors) for following reason: (specify).”).

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and any discretionary approvals involving adverse factors.”⁶⁷ If a noncitizen was denied 245 adjustment, they were able to reapply for adjustment of statute before a Special Inquiry Officer⁶⁸ and if denied, appeal to the Board.⁶⁹ While the Operations Instructions included a framework for adjudicators to follow when exercising discretion in adjustment cases, the standard was ambiguous and at best instructed officers to consider substantial equities and adverse factors as well as published precedential decisions.⁷⁰

Early cases by the Board show how both the absence of equities or a preconceived intent to remain in the United States permanently after entering on a temporary visa resulted in discretionary denials.⁷¹ In one case called *In re Leger*, the Board stated “there must be outstanding equities in a generally meritorious case, to warrant the grant of adjustment.”⁷² In another case *In re Ortiz-Prieto* a Chilean native who was in deportation proceedings because of a visa overstay and eligible for adjustment of status. The sole question in this case was whether discretion was properly exercised. The Board affirmed the discretionary denial from the special inquiry officer, noting that the Chilean native had no close family members or dependents in the United States, immediate family members living in Chile, and therefore no outstanding equities.⁷³

Eventually, the Board loosened the standard for discretion in adjustment cases, holding in the case of *In re Arai*: “Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion. In the absence of adverse factors, adjustment will ordinarily

⁶⁷ *Id.*; See also Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. OF LEGAL STUDIES 349, 355 (1972); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications* (Dec. 6, 1971), <https://www.acus.gov/recommendation/procedures-immigration-and-naturalization-service-respect-change-status-applications>; Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1305-06 (1986).

⁶⁸ Special Inquiry Officers (SIOs) functioned as “immigration judges” historically. In 1973, INS published a rule defining SIOs as immigration judges. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *Rules and Regulations*, U.S. DEPT. OF JUSTICE (Mar. 30, 1973), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/10/02/38%20Fed%20Reg%208590%2004041920.pdf>.

⁶⁹ See Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. OF LEGAL STUDIES 349, 354 (1972).

⁷⁰ See INS Operation Instructions § 245.5(d).

⁷¹ For a greater dissection into the role of “preconceived intent” as a factor in denying adjustment applications on a discretionary basis see Charles C. Foster, *Logic of Adjustment of Status to Permanent Residency*, 24 S. TEX. L.J. 37 (1983).

⁷² Roberts, *supra* note 10, at 161 (citing to *In re Leger*).

⁷³ Matter of Ortiz Prieto, Board of Immigration Appeals Interim Decision 1508 (Jul. 16, 1965).

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be granted, still as a matter of discretion.”⁷⁴

Under the current framework, whether a noncitizen applies for adjustment as a benefit with DHS or as a “defense” to removal before an immigration judge in DOJ depends on their posture. A person who is not currently in removal proceedings would apply for adjustment “affirmatively” with USCIS. A person in removal proceedings would apply for adjustment as a “defense” to removal. This paragraph summarizes some cases involving the latter.⁷⁵ Many of the decisions reviewed for this article involved cases where the Board reversed an immigration judge’s discretionary denial, and often included equities such as long time residence and strong family ties in the United States.⁷⁶ In one case *Jorge Adalberto Sanchez*, the applicant was found by the

⁷⁴ Matter of Arai, Board of Immigration Appeals Interim Decision 2027 (March 4, 1970); *see also* Roberts, *supra* note 10, at 162–3.

⁷⁵ The author thanks Ben Winograd from the Immigrant & Refugee Appellate Center (Center) for collecting and making available unpublished decisions by the Board of Immigration Appeals. The decisions summarized in the next session are drawn from cases provided by the Center.

⁷⁶ *See, e.g.*, N-M-, AXXX XXX 196 (BIA Dec. 1, 2017) (reverses discretionary denial where IJ found equities outweighed by actions of respondent’s prior husband who was indicted for war crimes by International Criminal Tribunal for the Former Yugoslavia (ICTY)) (*Pauley*, Greer, Wendtland); Roderico Geronimo Tzum-Sum, A071 575 904 (BIA Aug. 18, 2017) (reverses discretionary denial upon finding conviction for misdemeanor sexual battery under Cal. Penal Code 243.4(d)(1) not a “violent or dangerous” crime and respondent resided in U.S. for more than 25 years, was married to U.S. citizen, and had a U.S.-citizen child with cognitive disabilities) (*Wendtland*, Greer, Pauley); Teresa Moreno-Gonzalez, A200 946 740 (BIA June 29, 2017) (reverses discretionary denial of adjustment application upon finding respondent’s three U.S. citizen children, long marriage to naturalized U.S. citizen, and other positive equities outweigh five arrests that did not result in conviction) (*Wendtland*, Cole, O’Connor); Jorge Albeto Rodriguez Vazquez, A205 292 786 (BIA June 15, 2017) (reverses discretionary denial of adjustment application where respondent had close ties to five U.S. citizen children, was active in church, seemed genuinely rehabilitated, and last DUI was more than eight years prior) (*Pauley*, O’Connor, Wendtland); Zulfiqar Ali Mirza, A099 395 768 (BIA Feb. 19, 2016) (reverses discretionary denial of adjustment application upon finding respondent’s positive equities outweighed alleged involvement in fraudulent petition for religious visa) (*Pauley*, Greer, Wendtland); Jose Alfredo Quijada, A092 041 082 (BIA Feb. 4, 2016) (reverses discretionary denial of adjustment application upon finding respondent’s positive equities were not outweighed by his unlawful entry and a 1989 criminal conviction for which he was placed on probation for two years) (*Greer*, O’Herron, Pauley (dissenting)); Mario Melgar, A200 550 222 (BIA Oct. 14, 2015) (finds respondent merits favorable exercise of discretion despite recent DUI conviction and lack of tax compliance) (*Grant*, Holmes, O’Leary); Ernest Antwi Asamoah, A087 310 643 (BIA Sept. 11, 2015) (failure to disclose DWI conviction on adjustment application was a factor to be considered in the exercise of discretion but did not render respondent ineligible to adjust status) (*Mullane*, Creppy, Malphrus); Gustavo Soto Enriquez, A087 274 650 (BIA Aug. 5, 2015) (reverses discretionary denial of adjustment where IJ improperly relied on purported discrepancies between the respondent’s testimony and a pre-sentence investigation regarding an alleged offense for which the respondent was not prosecuted) (*Pauley*, Greer, Cole); David Aguinaga-Melendez, A200 759 135 (BIA May 19, 2015) (reverses discretionary denial of adjustment where no evidence existed that respondent was responsible for crime leading to prior arrest for attempted murder or that he benefitted from filing of tax return that inaccurately listed him as married) (*Grant*, Guendelsberger, Adkins-Blanch); Andrew Aburu Misumi, A094 075 414 (BIA Dec. 22, 2014) (reverses discretionary denial of adjustment because conviction for driving with open container of alcohol outweighed by marriage to U.S. citizen, present employment, and prior care for two U.S. citizen stepchildren) (*Pauley*, Cole, Donovan); Elena Hernandez-Hernandez, A074 571 777 (BIA Mar. 31, 2014) (IJ should have accepted partially

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immigration judge to be eligible for adjustment under the statute but was denied in the exercise of discretion based on his criminal history. Sanchez challenged this decision because the immigration judge did not consider positive factors in his case. The Board agreed and remanded the case for additional factfinding.⁷⁷ In the case of *Manuel Velasquez Chavez*, DHS challenged the immigration judge's grant of adjustment under the statute and in the exercise of discretion. The Board upheld the grant, noting:

The respondent⁷⁸ has presented positive factors which generally weigh in favor of granting his application. He has resided in the United States for over 20 years (IJ at 3; Exh. I). The respondent has been gainfully employed, and his employer stated the respondent is an excellent employee (IJ at 2). His employer indicated they wish to retain the respondent as part of their business (IJ at 2). The respondent earns a good salary (IJ at 2). More than 7 years have passed since the respondent's last offense.⁷⁹

The *Chavez* case serves as a reminder that even where an immigration judge grants adjustment in the exercise of discretion, DHS has the authority to appeal.

In the case of *Jesus Ramirez-Ortega*, the respondent argued that the immigration judge failed to consider his equities when denying adjustment in the exercise of discretion. The Board agreed, noting his equities:

complete evidence regarding the respondent's efforts to pay delinquent taxes and failed to analyze her positive and negative equities) (*Grant*, Guendelsberger, Hoffman); R-P-, AXXX XXX 024 (BIA Feb. 19, 2014) (respondent merits favorable exercise of discretion in light of lengthy residency, immediate relatives who are U.S. citizens/LPRs, acknowledgment of criminal history, past victim of domestic violence, and lack of support network in home country) (Pauley); Joao Coutinho, A098 236 413 (BIA Feb. 11, 2014) (remands record where IJ declined to favorably exercise discretion because respondent and his wife's account of alleged physical altercation contradicted statements in police report but failed to make any findings of fact regarding whether the incident resulted in conviction or to consider respondent's positive equities) (Creppy); Enrique Manuel Vasquez-Perez, A095 802 066 (BIA Nov. 14, 2013) (reverses discretionary denial of adjustment upon finding positive equities not outweighed by single conviction for driving under the influence) (Miller); Fernando Linares-Isidoro, A095 729 470 (BIA Nov. 30, 2012) (sustains DHS appeal, denies adjustment of status as matter of discretion in light of respondent's criminal history) (*Donovan*, Greer, Pauley); Hicham Sadik, A096 680 844 (BIA June 8, 2012) (upholds prior denial of adjustment application due to respondent's failure to register with NSEERS program and to submit evidence demonstrating payment of back taxes) (Kendall-Clark)).

⁷⁷ Jorge Adalberto Sanchez, A076 561 900 (BIA Mar. 25, 2019).

⁷⁸ In immigration cases, "respondent" refers to the noncitizen who is normally responding to charges by the government alleging a violation(s) of immigration law. This same person would be called an "applicant" if applying for a benefit or a waiver affirmatively with DHS or a "petitioner" if filing a petition for review in federal court challenging a final removal order.

⁷⁹ Manuel Velasquez Chavez, A094 903 327 (BIA Dec. 10, 2018).

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The record reflects that the respondent does have significant equities, including that he has lived in the United States for 24 years. He has significant family ties in the United States, including his United States citizen wife, four United States citizen children, his lawful permanent resident parents, and two siblings, one who is a United States citizen and one who is a lawful permanent resident (IJ at 9). The respondent has a consistent employment history and strong connections to the community (IJ at 9). Moreover, the respondent's wife suffers from serious mental and physical health issues, which make it difficult for her to earn enough money to support her family without the respondent's help (IJ at 9; Respondent's Br. at 8-9). In addition, the respondent's son is in special education classes and has a history of behavioral problems (IJ at 9; Respondent's Br. at 9-10).⁸⁰

This author has also worked on or examined cases involving male spouses from predominantly Muslim countries who lived in the United States during the post 9/11 era, eventually married a U.S. citizen but were denied adjustment in the exercise of discretion because they did not comply with a Muslim registry program crafted by former Attorney General John Ashcroft and known as “NSEERS” or the National Security Entry-Exit Registration System. The NSEERS program affected thousands of people in the United States who complied with the program but were issued deportation papers based on an immigration status violation. Importantly, an unknown number of people who did not know about the registration requirements (which were published in the Federal Register, a document not always consulted by men of the age bracket to whom the program applied), or were too afraid to apply because of the negative consequences they witnessed or experienced as a result of executive branch policies in the wake of 9/11, discovered they had not registered years later during the course of the immigration journey, such an adjustment of status interview.⁸¹ The NSEERS program remained on the books through most of the Obama administration, but was eventually rescinded years later through a “final rule” days before the inauguration of President Trump.⁸² The impact of NSEERS on those applying for adjustment illustrates how historical policy or political changes can influence future discretionary decisions in ways this author finds problematic. If the principle is for discretionary decisions to generally favor the noncitizen, denials of adjustment as a result of a discredited program like NSEERS undermines this principle.

The former Operations Instructions and case law are not dissimilar from more recent guidelines published by USCIS on how the discretionary component for adjustment of status

⁸⁰ Jesus Ramirez-Ortega, A070 827 672 (BIA May 21, 2018).

⁸¹ See, e.g., *NSEERS: The Consequences of America's Efforts to Secure Its Borders*, Penn State Law Center for Immigrants' Rights Clinic for the American-Arab Anti-Discrimination Committee (2009); *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy*, Penn State Law Center for Immigrants' Rights Clinic and the Rights Working Group (2012).

⁸² *Understanding the Final Rule Ending NSEERS*, 36 YALE J. ON REG.: NOTICE & COMMENT (Dec. 23, 2016), <https://yalejreg.com/nc/understanding-the-final-rule-ending-nseers-by-shoba-sivaprasad-wadhia/>.

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should be considered. The current guidance cites to many of the cases identified above, and states in part “Absent compelling negative factors, an officer should exercise favorable discretion and approve the application. If the officer finds negative factors, the officer must weigh all of the positive and negative factors. The list of issues and factors may include, but is not limited to:

- Eligibility;
- Immigration status and history;
- Family unity;
- Length of residence in the United States;
- Business and employment; and
- Community standing and moral character.”⁸³

The USCIS guidance also cautions officers to “[a]void[] the use of numbers, points, or any other analytical tool that suggest quantifying the exercise of favorable or unfavorable discretion.”⁸⁴

Despite the existing case law from the Board and guidelines by USCIS regarding the exercise of discretion in adjustment cases, they are broad enough to result in discretionary denials by the stroke of a pen if an adjudicator decides the positive factors are outweighed by negative ones. In a meaningful number of cases, it is a single negative factor or mark that results in a denial in the exercise of discretion.⁸⁵

Survivors of Crime

While section 245(a) of the immigration statute is the primary way a person applies for adjustment of status, some classes apply for adjustment under different statutory provisions. For instance, a survivor of crime who has been granted U nonimmigrant status in the United States is eligible for adjustment of status under 245(m) which in turn requires the victim to show that they are in a U-1 nonimmigrant statute, physically present in the United States for a continuous period of at least three years, did not “unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity,” not inadmissible under INA section 212(a)(3)(E); that presence is justified on “humanitarian grounds, to ensure family unity, or is in the public interest;” and that they qualify for adjustment as a matter of discretion.⁸⁶ U adjustment cases are

⁸³ Policy Manual, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 6, 2019).

⁸⁴ *Id.*

⁸⁵ *See, e.g.*, *Britkovyy v. Nielsen*, No. 18-CV-718, 2019 WL 1473094, at *3 (E.D. Wis. Apr. 3, 2019); *Yu Mei Chen v. Nielsen*, 363 F. Supp. 3d 333, 337 (E.D.N.Y. 2019); *Siddiqui v. Cissna*, 356 F. Supp. 3d 772, 776 (S.D. Ind. 2018).

⁸⁶ I.N.A. § 245(m); *See also* U.S. Citizenship and Immigration Servs., *Green Card for a Victim of a Crime (U Nonimmigrants)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (May 23, 2018), <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-a-victim-a-crime-u-nonimmigrant>.

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unique because the applicant's immigration status is tied to their helpfulness to law enforcement and experience as a survivor of crime or family member of such survivor.⁸⁷ As a normative matter, one might argue that all survivors of crime who are helpful in the investigation or prosecution of the crime should qualify for adjustment in the exercise of discretion. Having worked with survivors of crime who qualify for U nonimmigrant status, the author has seen first-hand the courage it takes for a survivor to come forward and report a crime to the police or cooperate in the investigation of a crime. The equities or circumstances in these cases often include the presence of family in the United States, employment, and trauma.

The regulations that govern U adjustment detail factors that should be considered when exercising discretion, and state in part "Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient."⁸⁸ Practically speaking, USCIS has exercised its discretion to deny adjustment application for U nonimmigrants. One attorney shared with the author a denial she received on a U adjustment case involving a man with ten years residence and close family relationships in the United States, participation in a youth delinquency program, steady employment, and a 2015 arrest for sexual battery, sexual assault. The juvenile probation program was a special diversion program created for low level offenses. Despite the fact that the noncitizen was fourteen years old at the time of the incident and no charges were filed, USCIS found the noncitizen was a risk to public safety and failed to satisfy his burden of proving eligibility for adjustment of status in the exercise of discretion.⁸⁹

If an attorney or noncitizen is denied adjustment, they may file a motion or appeal to USCIS.⁹⁰ In one case reviewed known as *Matter of R-M-G*, the applicant was a native and citizen

⁸⁷ *Id.*

⁸⁸ The full regulation at 8 C.F.R. § 245.23(d)(11) states, "*Evidence relating to discretion.* An applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible, USCIS may consider all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns."

⁸⁹ Email from Attorney A to author (May 30, 2019, 7:04 PM).

⁹⁰ 8 U.S.C. § 1255 (2016), Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 73 (2016).

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of Mexico who entered the United States at the age of twenty-two and was a “victim of a felonious assault, whereby he was threatened at gunpoint and his friend was shot in the abdomen and arm.”⁹¹ He received U nonimmigrant status based on his helpfulness with the investigation of the crime. He was denied adjustment by USCIS. The AAO summarized the equities in the case as told by the lower agency decision:

The Director acknowledged the positive and mitigating equities present in the Applicant's case: his lengthy residence and employment in the United States; his LPR spouse, U.S. citizen son, and step-son with work authorization; the financial and emotional support he provided for his mother in Mexico prior to her death; and the numerous letters of support from the Applicant's friends, coworkers, religious leaders, and acquaintances that described him as a hard-working, responsible, honest, and kind human being. However, the Director highlighted the Applicant's 1999 conviction for driving under the influence of alcohol (DUI) and his 1996 arrest on charges of aggravated assault and possession of a weapon during the commission of a crime. The Applicant's criminal history occurred twenty years ago and pre-dated his grant of a U nonimmigrant status. The AAO remanded the case back to the Director after concluding that they failed to consider all of the mitigating factors in the case.⁹²

The outcome in *Matter of R-M-G* favored the applicant, but it raises broader questions and concerns about the ability for agencies to focus on some factors and ignore others when deciding if adjustment should be granted in the exercise of discretion. Little purpose is served when agencies issue discretionary denials in cases that have already overcome several statutory requirements or where several equities are present.

How discretion is exercised in adjustment cases is not just normatively important to the discussion but also practically relevant. A significant number of noncitizens apply for adjustment through family, employment, or humanitarian grounds annually. To provide a snapshot, in the third quarter of Fiscal Year 2019, USCIS received 137,299 adjustment applications, approved 153,071 of pending applications, and denied 20,220 applications.⁹³ The public data does not detail whether an application was denied in the exercise of discretion or because of failure to meet a statutory

⁹¹ *Matter of R-M-G*, Administrative Appeals Office Decision, (May 21, 2019).

⁹² *Id.*

⁹³ U.S. Citizenship and Immigration Servs., *Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Apr.1 – June 30, 2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I485_performancedata_fy2019_qtr3.pdf. The number of applications “received” include new applications and entered into the system during the quarter. “Denied” applications include applications that were denied, terminated, or withdrawn during the quarter.

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criterion. The author’s experience in seeking data on prosecutorial discretion in immigration cases is that filing a Freedom of Information Act (FOIA) request is necessary to yield such information and even then, the data itself is often incomplete.⁹⁴

2. *Extreme Hardship Waivers*

“Extreme Hardship” waivers represent another area where the government uses discretion. Like with adjustment, a person will seek a waiver before DHS or DOJ depending on their procedural posture. For certain noncitizens seeking admission as an immigrant but otherwise ineligible because of an immigration violation, agencies have discretion to grant a “waiver” if they can meet certain requirements. One criterion an applicant must show is that a relative who is a U.S. citizen or green card holder will suffer “extreme hardship” if the applicant were to be removed.⁹⁵ The immigration statute contains three kinds of waivers that include “extreme hardship” as an element: 1) 212(h) waiver of inadmissibility for certain criminal grounds,⁹⁶ 212(i) waiver of inadmissibility for certain misrepresentations or fraud,⁹⁷ and 3) 212(a)(9) waiver of inadmissibility for unlawful presence.⁹⁸ For each of these waivers, applicants have the burden to prove eligibility for relief and if successful will receive a permanent status or “green card.”⁹⁹

Importantly, every immigrant seeking a waiver under one of these categories must have a basis for receiving permanent status in the first place. For example, the author once represented a man married to a U.S. citizen wife and with a U.S. citizen child. He qualified for permanent status based on his marriage to a U.S. citizen but also sought a 212(h) waiver because his criminal history triggered a ground of inadmissibility. In preparing his case, the author had to show that her client met the requirements for a 212(h):

⁹⁴ SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* ch. 7 (2017); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H.L. REV. 1, 4 (2012); Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013).

⁹⁵ I.N.A. §§ 212(h), 212(i), 8 U.S.C. §§ 1182(h), 1182(i) (2016).

⁹⁶ I.N.A. § 212(h), 8 U.S.C. § 1182(h) (2016).

⁹⁷ I.N.A. §212(i), 8 U.S.C. §1182(i) (2016).

⁹⁸ I.N.A. § 212(a)(9), 8 U.S.C. § 1182 (a)(9) (2016).

⁹⁹ Some scholars and practitioners have discussed waivers of inadmissibility in other contexts. *See, e.g.*, Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997); Katherine Brady, *Update: The LPR Bars to § 212(h) – To Whom Do They Apply?*, IMMIGRANT LEGAL RESOURCE CENTER (2014); https://www.ilrc.org/sites/default/files/resources/212h_matter_of_rodriguez_update_2014.pdf; Julianne Lee, *Tortured Language: Lawful Permanent Residents and the 212(h) Waiver*, 84 FORDHAM L. REV. 1201 (2015); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345, 353–54 (2007).

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The Attorney General *may [emphasis added]*, in his discretion, waive the application of [certain criminal grounds of inadmissibility] ...in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.”¹⁰⁰ The term “extreme hardship” is not defined in the statute or federal court decisions. Rather, the definition has been historically guided by agency interpretations of this standard in individual cases.¹⁰¹

In addition to meeting the “extreme hardship” standard and other statutory requirements, applicants must also show that a waiver is warranted as a matter of discretion. Said the Board in one case *In re Jose Mendez-Morales* in 1996:

We emphasize that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create any entitlement to that relief. Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. We would note, however, that an application for discretionary relief, including a waiver under section 212(h), may be denied in the exercise of discretion without express rulings on the question of statutory eligibility.¹⁰²

The case involved a 42- year old native of Mexico who entered the United States on a green card but was later convicted of first-degree sexual assault in violation of Nevada law. He was married to a U.S. citizen and (re)applied for adjustment of status based on his marriage in conjunction with a 212(h) waiver of inadmissibility based on his criminal conviction. Drawing from an earlier but well known case called *Matter of Marin* the Board identified lengthy residence, hardship to the applicant and his family, service in the Armed Services, steady employment, business ties, and community service as among the favorable factors to consider when deciding whether discretion is warranted.¹⁰³

When applying these and other factors, the Board in *Mendez-Morales* held that discretion was not warranted. The Board recognized the strong equities in the case including his role as a

¹⁰⁰ I.N.A. § 212(h), 8 U.S.C. § 1182(h) (2016).

¹⁰¹ See e.g., *Hassan v. I.N.S.*, 927 F.2d 465, 468 (9th Cir. 1991); *Palmer v. I.N.S.*, 4 F.3d 482, 487 (7th Cir. 1993); *Osuchukwu v. I.N.S.*, 744 F.2d 1136, 1142 (5th Cir. 1984).

¹⁰² *In re Jose Mendez-Morales*, Board of Immigration Appeals Interim Decision 3272 (Apr. 12, 1996).

¹⁰³ *Id.* at 301.

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financial provider, father to three U.S. citizen children, husband to a U.S. citizen wife and a consistent history of employment.¹⁰⁴ The Board also noted the wife’s medical condition and previous suicide attempt at the time her husband was charged criminally.¹⁰⁵ Nevertheless, given the serious nature of the factual events surround the criminal charge and conviction itself, as well as the absence of any “persuasive evidence of rehabilitation,” the Board dismissed the case and agreed with the lower immigration court that discretion was not warranted.¹⁰⁶

Then Board Member Lory Rosenberg issued a powerful dissent, critiquing the majority for elevating “rehabilitation” as a determinative factor in discretion and weighing it more heavily than the elements of “close family ties” and “extreme hardship.”¹⁰⁷ She found the decision to be an “abuse of discretion” and also one that “does violence to the statutory language.”¹⁰⁸

Years later, well after the demise of the former Immigration and Naturalization Service and creation of DHS, USCIS published guidance of its officers on the application of the discretionary component in waivers. USCIS cites to *Mendez-Morales*:

A finding of extreme hardship permits but never compels a favorable exercise of discretion. If the officer finds the requisite extreme hardship, the officer must then determine whether USCIS should grant the waiver as a matter of discretion based on an assessment of the positive and negative factors relevant to the exercise of discretion. The family relationships to U.S. citizens or lawful permanent residents and a finding of extreme hardship to one or more of those family members are significant positive factors to consider.¹⁰⁹

The USCIS guidance also points out how a criminal ground of inadmissibility on which a waiver is based may itself be a negative factor that yields a discretionary denial.¹¹⁰ While the case law and USCIS guidance underscore how a finding of extreme hardship does not necessarily result in a favorable exercise of discretion, they do not articulate a clear guideline for how this discretion will be considered.

¹⁰⁴ *Id.* at 314.

¹⁰⁵ *Id.* at 303.

¹⁰⁶ *Id.* at 305.

¹⁰⁷ *Id.* at 307–15.

¹⁰⁸ *Id.*

¹⁰⁹ Policy Manual, U.S. CITIZENSHIP AND IMMIGR. SERVS. (June 6, 2019).

¹¹⁰ *Id.*

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Waivers of inadmissibility illustrate just one category of remedies that include a discretionary component that remain undefined. Despite the presence of a body of case law and guidance by USCIS, one is nevertheless left with a discretionary waiver that lacks a sufficiently clear definition to avoid or challenge abuses. Furthermore, and regarding criminal waivers of inadmissibility, the irony of exercising discretion negatively for a criminal charge that is itself the basis for the waiver is not lost upon the author.

Like with asylum, cancellation of removal, and adjustment of status, the statutory requirements for waivers of inadmissibility are rigorous enough that noncitizens who meet these requirements should qualify. Similarly, the choice by Congress to include only a specified list of criminal grounds that can even be waived or list requirements like “extreme hardship” to an anchor relative, underscores their ability to express limits and rules in connection with waivers. Finally, the number of noncitizens seeking waivers is far from trivial. To illustrate, in the third quarter of 2019, considering all waivers (including waivers of inadmissibility under which some of the waivers covered this section encompasses) USCIS received 18,904 applications, approved 12,713 applications, and denied 3,608.¹¹¹ The public data does not break down waivers by category, nor does it explain how many were denied a waiver in the exercise of discretion. Nevertheless, the numbers show that many applications for waivers of inadmissibility involving a discretionary component are filed with USCIS each quarter and annually.

C. Broad Waivers

1. 212(d)(3) Waivers

Consular officers in Department of State use discretion in assessing waiver eligibility like (but not the same) as the discretion exercised by DHS in the consideration of waivers. To illustrate, when a “nonimmigrant” or one seeking admission temporarily through a category, such as students, scholars, or tourists is also a candidate for “inadmissibility” under immigration laws, they must prove eligibility for a waiver or otherwise exempt from the proclamation altogether. One common waiver known as the “212(d)(3)” waiver is guided by case law and the FAM. In the BIA case of *Matter of Hranka*, the Board held:

An application under section 212(d)(3) requires a weighing of at least three factors: (1) the risk of harm to society if the applicant is admitted; (2) the seriousness of the applicant's immigration law, or criminal law violation, if any; and (3) the nature of the applicant's reasons for wishing to enter the United States.¹¹²

¹¹¹ U.S. Citizenship and Immigration Servs., *Number of Service-wide Forms by Fiscal Year To- Date, Quarter, and Form Status 2019*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY19Q1.pdf.

¹¹² *Matter of Hranka*, 16 I. & N. Dec. 491, 491 (BIA 1978).

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The literature analyzing 212(d)(3) waivers is arguably more expansive than the case law.¹¹³ The FAM also lists the following factors consulates should consider in deciding whether a waiver is warranted: 1) recency and seriousness of activity or condition; 2) reasons for proposed travel to the United States; 3) positive or negative effect, if any, of proposed travel on U.S. public interests; 4) whether a single, isolated incident or a pattern of misconduct; and evidence of reformation or rehabilitation.¹¹⁴

The 212(d)(3) waiver is available to those with equities but unlike many other waivers, is not contingent on the applicant meeting a qualifying family relationship or some compelling or exceptional case. The lack of exceptionalism in the 212(d)(3) waiver case is in fact “exceptional” as compared to other waivers and remedies in the immigration statute but most relevant here is the fact that DOS officers have the discretion to recommend (or not to recommend) a waiver for nonimmigrants seeking a waiver in this category. The opportunity to qualify for a 212(d)(3) waiver is important to a student admitted to a U.S. university but inadmissible for reasons because of a previous immigration violation or nonviolent criminal history, or a scholar accepted as a Fulbright at a health institute but inadmissible for the same. The list of reasons a person can be labeled as “inadmissible” under the immigration statute is broad and makes remedies like the 212(d)(3) waiver ever important. Further, this waiver reflects a judgment by Congress that qualifying applicants should not necessarily have to prove a compelling case like a family relationship or serious medical condition. Like with the remedies discussed in the previous section with DHS, the discretionary component of the 212(d)(3) waiver has not been clearly defined.

2. *Travel Ban Waivers*

Consulates are also responsible for considering if nationals subject to the presidential proclamation or “travel ban” are eligible for a waiver. The travel ban has undergone many versions but the latest one was issued as a Presidential proclamation and upheld by the U.S. Supreme Court on June 26, 2018 as lawful under the immigration statute and U.S. Constitution.¹¹⁵ The travel ban affects all immigrants (or those seeking admission to the United States on a permanent basis) from Iran, Libya, North Korea, Somalia, Syria, Yemen; some nonimmigrants (or visitors from these

¹¹³ See e.g., Jared Hatch, *Requiring a Nexus to National Security: Immigration, Terrorist Activities, and Statutory Reform*, 2014 BYU L. REV. 697 (2014); Edward J. Lynch, *Medical Exclusion and Admissions Policy: Statutes and Strictures*, 23 N.Y.U. J. INT’L L. & POL. 1001 (1991).

¹¹⁴ 9 FAM 305.4. PROCESSING WAIVERS, 7 Immigration Law Service 2d PSD Foreign Affairs Manual 305.4.

¹¹⁵ *Trump v. Hawaii*, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). See also Shoba Sivaprasad Wadhia, *Symposium: Reflections on the travel ban decision*, SCOTUSBLOG (June 26, 2018, 5:02 PM), <https://www.scotusblog.com/2018/06/symposium-reflections-on-the-travel-ban-decision/>; Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018); SHOBA SIVAPRASAD WADHIA, *BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP* ch. 3 (2019).

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same countries); and certain “B” visitors from Venezuela.¹¹⁶ On January 31, 2020, the travel ban was expanded to include most immigrants from Nigeria, Eritrea, Myanmar, Kyrgyzstan; and nationals from Tanzania and Sudan seeking admission as diversity lottery program.¹¹⁷ For those covered by the ban, the only way to gain admission to the United States is to prove eligibility for a waiver before a U.S. consulate. The criteria for the waiver includes a showing that denying entry would cause “undue hardship,” that entry is in the “national interest” of the United States and that the person poses no threat to national security.¹¹⁸ The waivers are discretionary, but there is good reason to believe that waivers are not being considered as described in the proclamation. Quarterly statistics from DOS show that only 5.1 percent of applicants subject to the proclamation received a waiver as of March 31, 2019.¹¹⁹ Whether the exceedingly low rate of waiver grants or predetermination of the outcome violates administrative law because of its arbitrariness or the U.S. Constitution based on racial animus, a violation of due process, or both is unknown and is currently the subject of litigation.¹²⁰

Beyond the legal challenges surrounding the waiver process of travel ban is the ordinary discretion held by consulates to decide whether a waiver is warranted. This kind of discretion resembles how waivers and discretion function in DHS and DOJ. There exists no specific definition or principle for the discretionary component, a challenge that is only compounded by the absence of a formal definition for the threshold criteria needed to qualify, such as hardship and national interest.

¹¹⁶ Proclamation No. 9822, 83 Fed. Reg. 45,161 (Sept. 24, 2017).

¹¹⁷ Proclamation No. 9983, 85 Fed. Reg. 6699 (2020); Press Release, Am. Immigration Law. Assn., AILA Condemns Trump Administration’s Expansion of Discriminatory Travel Ban (Jan. 31, 2020) (on file with AILA); Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to the Travel Ban*, N.Y. TIMES (Jan. 31, 2020), <https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html>.

¹¹⁸ Proclamation No. 9822, 83 FR 45,161 (Sept. 24, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (2020).

¹¹⁹ Implementation of Presidential Proclamation 9645, U.S. DEPT. OF STATE (Dec. 8, 2017–Mar. 31, 2019), <https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20-%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%20to%20March%2031%202019.pdf>.

¹²⁰ See, e.g., *Emami v. Nielsen*, 365 F. Supp. 3d 1009 (N.D. Cal. 2019). See also Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump* 53 UC DAVIS ONLINE (Nov. 2019), available at: <https://lawreview.law.ucdavis.edu/online/53-online-Wadhia.pdf>.

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III. WHY ELIMINATING OR CLARIFYING DISCRETION MATTERS

A. *Limits on Discretion by the Attorney General*

One benefit of eliminating delegated discretion altogether or building a clear standard is that it provides a built-in check in balances for the system. During his tenure as Attorney General, Jefferson Sessions used a tool in the immigration law known as “certification” to reclaim cases decided by the Board of Immigration Appeals and re-issue new decisions unilaterally, often shrinking relief or protection for the respondent and future cases.¹²¹ The nearly one dozen cases certified during the first two years of the Trump administration has been striking.¹²² To illustrate, and as introduced in section II of this article, the Board issued a formative decision for asylum cases in 2014 recognizing explicitly that domestic violence can be a basis for asylum.¹²³ Specifically, the Board held: “Depending on the facts and evidence in an individual case, “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal.”¹²⁴ The case, *Matter of A-R-C-G* was not the first time the Board recognized gender or sexual violence as a social group in asylum cases, but it was nonetheless significant and a foundation for future asylum claims. Following the shift in administrations, the Attorney General certified *Matter of A-B-* and issued a decision that undermines these asylum claims and overrules *Matter of A-R-C-G*.¹²⁵ Authored by the Attorney General, the case leads with “*Matter of A-R-C-G*, 26 I&N Dec. 338 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.”¹²⁶

¹²¹ See 8 C.F.R. 1003.1(h)(1)(i).

¹²² See, e.g., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Agency Decisions, Vol. 27, U.S. DEPT. OF JUSTICE (Sept. 25, 2019), <https://www.justice.gov/eoir/volume-27>; See also Dara Lind, *Jeff Sessions is exerting unprecedented control over immigration courts — by ruling on cases himself*, VOX (May 21, 2018), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>; See also Jeffrey S. Chase, *The AG's Certifying of BIA Decisions*, JEFFREY CHASE BLOG (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions>; Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129 (2017).

¹²³ *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/26/3811.pdf>.

¹²⁴ *Id.*

¹²⁵ *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018), <https://www.justice.gov/eoir/page/file/1070866/download>.

¹²⁶ *Id.* *Matter of A-B-* has been criticized by a number of advocates and scholars. See, e.g., Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343 (2019); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 752 (2019).

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On July 2, 2019, the Trump administration went one step further by publishing a “final rule” that expands the ability for the Attorney General to review cases issued by the Board and to designate decisions of their choosing as precedent.¹²⁷ According to one attorney, this new regulation, which became effective in September 2019, allows the Attorney General to sidestep any process at all before making a final decision or change to immigration law.¹²⁸

While the solutions proposed in this article for discretion do not prevent the power held or soon to be held by the Attorney General, it does set limits. Decisions by the Attorney General issued through certification or designation may not violate statutes or regulations. Beyond the scope of this article but a worthy policy question for a future one is whether the certification rule in title 8 of the code of the regulations should be rescinded altogether, or whether the immigration courts themselves should be removed from the Department of Justice.¹²⁹

B. Reduction of Arbitrary Discretionary Decisions

Eliminating discretion or establishing a clear standard can help reduce arbitrary and capricious discretionary decisions. For example, the arbitrariness of the discretionary component in adjustment cases was analyzed by Abraham D. Sofaer in his study, “Judicial Control of Informal Discretionary Adjudication and Enforcement.”¹³⁰ While the agency structure and main players were different from today’s design, Sofaer’s work remains relevant today. In his study, he found:

Examiners applied different standards in exercising discretion on the merits; that the Service’s view of discretion has changed periodically; that extensive and political intervention on the merits strongly correlates with the presence of discretionary power that official Service policy on the meaning of discretion permits inconsistent results; and there are striking variations among INS districts in their rates of denial of section 245 cases that do not appear explainable in terms of the character of the districts involved.¹³¹

¹²⁷ Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 Fed. Reg. 127 (July 2, 2019).

¹²⁸ Law360, *Revived Rule Ups Barr’s Power To Shape Immigration Law*, Law360 (July 1, 2019, 10:21 PM), <https://www.law360.com/articles/1174543/revived-rule-ups-barr-s-power-to-shape-immigration-law>.

¹²⁹ See, e.g., *Immigration Judges Seek Independence from Department of Justice*, 16 GEO. IMMIGR. L.J. 733 (2002); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678 (2010); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386–87 (2007).

¹³⁰ Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1300–4 (1972).

¹³¹ *Id.* at 1301.

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Professor Sofaer’s study also reveals the significant role of political intervention in 245 cases, concluding “Examiner reversals of discretionary decisions on the same record were overwhelmingly due to political intervention.”¹³²

Reflecting on the dissent by Board member Lory Rosenberg in *Mendez-Moralez*, perhaps the Board would have benefited from a guideline on discretion and reduced the dissonance around the weight accorded to the negative and positive factors in his case. Roberts also stated, “In view of the broad range of discretionary authority thus confided to the Attorney General and his delegates, some standards are clearly needed to preclude arbitrary and capricious decision-making by the many delegates of the Attorney General exercising discretion.”¹³³

A second lens through which to discuss arbitrary decisionmaking is the extent to which adjudicators use the discretionary component in a statutory benefit or waiver to deny relief and foreclose the option for judicial or federal court review. Under the immigration statute, most discretionary decisions cannot be reviewed by a federal court.¹³⁴ But what to call “discretion” versus statutory remains elusive. Says Daniel Kanstroom: “Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion.”¹³⁵ In examining the relevant statute at section 242(a)(2)(C) of the Immigration Nationality Act, one source states: “[A] court cannot review the denial of most types of relief from removal that are granted at the discretion of the immigration officer or immigration judge, including a waiver of inadmissibility, cancellation of removal, voluntary departure, and adjustment of status to lawful permanent resident.”¹³⁶ The statute contains some exceptions to the bar on judicial review for discretionary decisions and specifically in cases involving “questions of law” or “constitutional claims” and in asylum cases.¹³⁷

In his empirical piece reviewing 276 immigration cases involving jurisdiction and discretion, Kanstroom found that the majority of cases (179 of 276) were dismissed for lack of jurisdiction, with nearly half involving an interpretation of “extreme hardship.”¹³⁸ Casting

¹³² *Id.*

¹³³ Roberts, *supra* note 10, at 158.

¹³⁴ 8 U.S.C. § 1252(a)(2) (2016). See also Daniel Kanstroom, *The Better Part of Valor: the REAL ID Act, Discretion, and the Rule of Immigration Law*, 51 N. Y. L. SCH. L. REV. 161 (2006); Nancy Morawetz, *Back to the Future? Lessons Learned from Litigation Over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113 (2006).

¹³⁵ Kanstroom, *supra* note 134.

¹³⁶ Margaret Mikyung Lee, *An Overview of Judicial Review of Immigration Matters*, CONG. RES. SERV. (Sept. 11, 2013), <https://fas.org/sgp/crs/homesecc/R43226.pdf>.

¹³⁷ *Id.* I.N.A. §§§ 208, 242(a)(2)(D), 101(a)(42); 8 U.S.C. §§§1252(a)(2)(D), 1101(a)(42), 1158.

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“extreme hardship” as a discretionary decision is problematic to this author, who understands discretion more narrowly and treats the element of “extreme hardship” as a statutory requirement as opposed to an ultimately discretionary decision. Kanstroom’s work shows that in many cases involving discretionary determinations, such cases are dismissed. Immigration scholar Lenni Benson has explored the degree to which an attorney may recast a case as involving a constitutional or statutory issue in litigation. She remarks “Knowing there is no judicial review of the discretionary decision, an attorney may now recharacterize litigation to raise constitutional or statutory issues. Barring review of the act of discretion has frequently only shifted the litigation strategy not eliminated litigation.”¹³⁹

Possibly, the degree to which discretionary decisions are denied vary from one circuit court to the next and hinge on the level to which a challenge is characterized as “discretion” or based on an issue that is in fact reviewable. In the second circuit, judiciary review is precluded even when a decision is based on the statute so long as there is any kind of discretionary decision and even where there is no reasoned explanation for the discretionary denial.¹⁴⁰ In the case of *Ling Yang v. Mukasey*, the second circuit found that because the immigration judge provided reasons for denying adjustment in the exercise of discretion independent of the grounds to determine statutory eligibility, and the Board affirmed this denial, the court lacked jurisdiction to review this discretionary decision.¹⁴¹ Such a broad approach is problematic because it could influence adjudicators to insert a discretionary reason into a decision they would have ordinarily retained as a statutory reason because of pressure from the agency to create an outcome that eliminates the opportunity for future review in a federal court. This scenario is not unlike the pressure placed by the Attorney General on immigration judges to complete a certain number of cases or follow a particular directive that disfavors the grant of relief.¹⁴² Beyond the scope of the article but worthy of discussion is the undue pressure placed on DHS and DOJ employees to craft a particular outcome in discretionary cases.¹⁴³

¹³⁸ Kanstroom, *supra* note 134. The dismissed cases included extreme hardship, cancellation of removal, adjustment of status, and voluntary departure.

¹³⁹ Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N. Y. L. SCH. L. REV. 37 (2006).

¹⁴⁰ See, e.g., *Ling Yang v. Mukasey*, 514 F.3d 278 (2d Cir. 2008); *Lin v. U.S. Dep't of Homeland Security.*, 699 Fed. Appx. 44 (2d Cir. 2017); *Marrakchi v. Napolitano*, 494 F. App'x 877 (10th Cir. 2012).

¹⁴¹ *Ling Yang v. Mukasey*, 514 F.3d 278 (2d Cir. 2008).

¹⁴² See, e.g., Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 600 (2009).

¹⁴³ Several scholars have discussed solutions that include but are not limited to removing the immigration court out of the Department of Justice. See, e.g., *Immigration Judges Seek Independence from Department of Justice*, 16 GEO. IMMIGR. L.J. 733 (2002); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678

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Courts continue to grapple with the scope of judicial review in immigration cases. Despite the strong statutory language detailing the scenarios where federal court review is unavailable, the scope has long been governed by a presumption in favor of judicial review over agency actions.¹⁴⁴ One statutory provision known as 1252(a)(2)(D) was codified in 2005 and preserves review for “constitutional claims” or “questions of law” for certain noncitizens with final orders of removal.¹⁴⁵ The scope of this provision was the subject of oral arguments before the U.S. Supreme Court on December 9, 2019. In consolidated cases of *Guerrero-Lasprilla v. Barr* and *Ovalles v. Barr.*, the Assistant Solicitor General representing the government argued that when Congress used the words “questions of law” in the immigration statute, judicial review was reserved only for “pure” questions of law, and not mixed questions of law and fact.¹⁴⁶ The lawyer for the respondents argued that “...when Congress created Section 2(d), it must have meant for more than just whether or not the Board used the right statement of the standard. It must include whether or not that standards used.”¹⁴⁷ Beyond the statutory question, the Court also raised the presumption in favor of federal court review. Justice Neil Gorsuch asked, “Isn’t the presumption pretty ancient really? I mean, it goes back to the common law that the king can’t act arbitrarily without some check, some review, some opportunity by citizens.”¹⁴⁸

The principle in favor of judicial review was recently showcased in the Third Circuit Court of Appeals in a case involving a father and child from Guatemala seeking asylum in the United States, forced to wait in Mexico under a controversial asylum policy known as “Migrant Protection Protocols,” (MPP) and detained for a prolonged period at the Berks County Residential Center in Leesport, PA.¹⁴⁹ One section of the immigration statute examined by the court was 1252(b)(9), a provision that limits judicial review in immigration cases “arising from any action or proceeding

(2010); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386–87 (2007).

¹⁴⁴ *INS v. St. Cyr*, 533 U.S. 289 (2001) (“To prevail on its claim that AEDPA and IIRIRA stripped federal courts of jurisdiction to decide a pure question of law, as in this case, petitioner Immigration and Naturalization Service (INS) must overcome both the strong presumption in favor of judicial review of administrative action.”)

¹⁴⁵ INA 242(a)(2)(D)

¹⁴⁶ Transcript of Oral Argument at 32, *Guerrero-Lasprilla v. Barr* and *Ovalles v. Barr*, No. 18-776, 18-1015 (argued Dec. 9, 2019).

¹⁴⁷ *Id.* at 63.

¹⁴⁸ *Id.* at 55. For a good overview of oral arguments in this case, see Kit Johnson, *Argument preview: Justices to consider limits on appeals courts’ authority to review decisions of the Board of Immigration Appeals*, SCOTUSBLOG (Dec. 2, 2019, 10:33 AM), <https://www.scotusblog.com/2019/12/argument-preview-justices-to-consider-limits-on-appeals-courts-authority-to-review-decisions-of-the-board-of-immigration-appeals/>

¹⁴⁹ *E.O.H.C. v. Secretary United States Department of Homeland Security* (3d. Cir. 2020) <https://www2.ca3.uscourts.gov/opinarch/192927p.pdf>

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brought to remove an alien” to only those with a final order of removal.¹⁵⁰ The appellants argued that 1252(b)(9) does not apply to them because their case is *not* “arising from any action or proceeding brought to remove” but rather is a challenge to the government’s authority to deport father and child to Mexico under MPP.¹⁵¹ Drawing from judicial outcomes by the Supreme Court in *St. Cyr*, *Jennings*, and *Preap*, the “now or never” principle, and the presumption in favor of judicial review, the Third Circuit allowed most of the claims brought by the appellants to proceed. In reading the statute, the Third Circuit held “We are simply applying the usual presumptions favoring judicial review in reading the law that Congress has passed. . . . now-or-never challenges like most of the ones here do not ‘aris[e] from’ that action or proceeding. Following *Jennings* and *Preap*, we will not read §1252(b)(9) so broadly as to bar all review of those claims.”¹⁵²

Adherence to Administrative Law Values

A third benefit of eliminating discretion or creating a guideline is that it would promote positive administrative law values. Administrative law values have been analyzed by plenty of immigration scholars.¹⁵³ In her scholarship on prosecutorial discretion in immigration cases, the author has drawn from administrative law literature and examined how accuracy, consistency, efficiency, and acceptability as values emerging from codifying deferred action as a regulation.¹⁵⁴ Eliminating discretion altogether, or crafting a clear standard for discretion in formal immigration adjudications would yield similar but not identical values. Without a well-defined benchmark for discretion, noncitizens and lawyers who represent them, accuracy, consistency among like cases, and transparency are compromised.

In his study, *The Change-Of-Status Adjudications: A Case Study of Informal Agency Process*, Abraham D. Sofaer examined 245 applications – “summary, disposition, representation, and bias in the decision of applications- that seem most pertinent to an interest in the consequences of delegating broad discretionary power.”¹⁵⁵ Sofaer found that discretionary denials made by

¹⁵⁰ Section 1252(b)(9)

¹⁵¹ *E.O.H.C. v. Secretary United States Department of Homeland Security* 17 (3d. Cir. 2020)
<https://www2.ca3.uscourts.gov/opinarch/192927p.pdf>

¹⁵² *Id.*

¹⁵³ *See, e.g.,* Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215 (2014).

¹⁵⁴ Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 51–65 (2012); Shoba Sivaprasad Wadhia, *Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas*, 36 IMMIGR. & NAT'LITY L. REV. 94 (2015).

¹⁵⁵ *See* Abraham D. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. OF LEGAL STUDIES 349, 356 (1972).

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immigration adjudicators were regularly reversed by SIOs without any change in the facts.¹⁵⁶

A similar pattern emerged in the roughly twenty unpublished decisions reviewed by the author and discussed earlier in this article- a high rate of reversals by the Board in cases where the facts remain largely the same. Treating similarly relevant facts consistently is itself a value and something the author has also discussed when analyzing immigration prosecutorial discretion cases. The importance of consistency is magnified when applied to discretion because of the effect across agencies.

The current system lacks efficiency. The statutory criteria crafted by Congress already reflect a policy judgment that in many cases are more stringent than the “ordinary” balancing test behind discretion. That DHS, DOJ, and DOS officers are required to make decisions about whether a person meets the statutory requirements and thereafter engage in an analysis about discretion is time consuming, superfluous at best, or inhumane at worst. By eliminating discretion or setting a clearer standard, fewer applicants may need to file an administrative appeal because the decisions is arbitrary, leading to greater efficiency in the agency. The solution is not to reduce the opportunities for an individual to file an appeal but rather to reduce the number of times an appeal is filed because a discretionary denial lacked a sound reason. To echo immigration scholar Lenni Benson “By accepting efficiency as a primary goal, I do not mean to imply that it is the only goal of the adjudication system. The ideal system would also guarantee fair and individualized procedures and that people are not illegally removed.”¹⁵⁷

C. *Cautionary Notes*

One tradeoff with creating standard for discretion is the pushback by government and the potential for greater litigation. Expanded litigation may undermine or at least diminish the value of efficiency, one value that informs creating a rule in the first place. The fear of litigation is not merely a theory but was a reality when the Immigration and Naturalization Service proposed a rule on June 21, 1979, “[I]nsure that all applications and petitions submitted to this Service receive consideration under appropriate discretionary criteria and are adjudicated in a fair and uniform manner throughout the United States.”¹⁵⁸ The proposed rule premised the need for a discretionary rule on the ability for noncitizens to receive “fair and equal treatment before the Service.”¹⁵⁹ The proposed rules contained discretionary criteria for a number of waivers and benefits in the immigration context, some of which are detailed in the previous section. Regarding applications for adjustment under section 245 of the INA, the proposed rule included a paragraph about the exercise of discretion:

¹⁵⁶ *See id.* at 391.

¹⁵⁷ *See Benson, supra* note 139.

¹⁵⁸ Federal Register, Vo. 44 No. 121, June 21, 1979, Proposed Rules.

¹⁵⁹ *Id.*

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In making a decision on an application for adjustment of status, consideration shall be given to all the pertinent factors, favorable and unfavorable. ... The following factors shall be considered among those which adversely affect the exercise of discretion: preconceived intent to remain permanently in the United States at the time of entry as a nonimmigrant; violations of immigration laws; lack of respect for laws of U.S.; adverse foreign relations impact; no viable family ties in United States; abandonment or desertion of spouse and/or dependent children in the United States or in a foreign country. The following factors shall be considered as among those which favorably affect the exercise of discretion: advanced or tender age; poor health; lawful permanent resident or U.S. citizen family members dependent on the alien for support; lengthy residence in the United States; need for services in the United States.¹⁶⁰

The proposed rules also included changes to the 212(d)(3) waiver of inadmissibility and the following specific language:

Discretion under sections 212(d)(3)(A) [.] shall be favorably exercised unless there are adverse factors which are not outweighed by favorable factors. The following factors shall be considered among those which adversely affect the application: the activity giving rise to the ground of excludability is recent; the alien has a prior history of immigration violations; the ground of excludability is serious. The following factors shall be considered among those which favorably affect the application: there is evidence of recent good conduct and rehabilitation; the ground of excludability is relatively minor or based on circumstances remote in time; the need to enter the United States is great.¹⁶¹

The proposed regulations were robust and covered several immigration adjudications involving discretion, but they were ultimately cancelled by INS in 1981.¹⁶² The cancellation was striking in contrast to the length of the proposed regulations. INS reasoned, “The proposed rule is cancelled because it is impossible to foresee and enumerate all of the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion. Listing some factors, even with the caveat that such a list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion.”¹⁶³ INS highlighted one particular

¹⁶⁰ Fed. Reg. Rule 36191.

¹⁶¹ 46 Fed Reg. 9119.

¹⁶² *Id.*

¹⁶³ *Id.*

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commentator who stated “You must make every effort to not eliminate discretionary powers by converting discretionary powers into a body of law.”¹⁶⁴ Thus, INS chose to cancel the rule “to avoid the possibility of hampering the free exercise of discretionary authority. . . .”¹⁶⁵

In reacting to the choice by INS to cancel the rule, Colin Diver opined “At least the Service is consistent: its explanations are no more transparent than its rules.”¹⁶⁶ Nevertheless, the lesson here is that proposing clear rules can sometimes result in pushback both during by commentators from the public and ultimately by the agency suggesting the rules in the first place. If the counterpoint to publishing rules or standards is to ensure the exercise of discretionary powers, what is the balance? Is there a balance? This author continues to believe that an undefined standard for discretion in formal decisions like those described in this article are more vulnerable to abuses of discretion. If the tradeoff is that agencies have less discretionary power in the presence of a clear standard, the author finds the tradeoff is worthwhile for the values discussed in this article. Professor Sofaer also shows how such rulemaking may increase efficiency by lessening the number of appeals made and reversed when initially denied, especially in the case of adjustment applications.¹⁶⁷ Professor Diver also challenged the efficiency in avoiding rulemaking, noting “Greater clarity would, of course, entail additional ex ante rulemaking costs. But that investment would undoubtedly be repaid by the reduced explanatory burden on individual adjudicators.”¹⁶⁸ Finally, creating a clearer standard would increase the humanitarian and administrative law values that guide its solution.

IV. FINDING SOLUTIONS

One option is for Congress to eliminate discretion in cases where the statutory criteria are already rigorous and reflective of policy goals of Congress. There is a strong argument for removing discretion for remedies with hefty statutory requirements. In the case of cancellation of removal, Congress requires similar standards and specifically non-green card holder, an even higher showing of hardship to an anchor relative. In the case of asylum, Congress has created a definition that requires a person to show past harm or future harm that rises to the level of “persecution” and harm that is tied to specific reason like race or religion. Removing discretion for waivers with medium statutory requirements is also appropriate to consider. In the case of waivers, Congress has set strict requirements surrounding residence, family relationships, and “hardship.” Finally, for those waivers written most broadly, Congress intended for the nonimmigrant waiver under 212(d)(3) waiver to be broad; revealed by their choice and ability to

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 95 (citing Sofaer, *supra* note 62, at 396–97, 421).

¹⁶⁶ Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 94 (1983).

¹⁶⁷ *Id.* at 95.

¹⁶⁸ *Id.*

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impose more requirements for other waiver schemes in the statute. The intentions of Congress are more elusive regarding the waiver under the travel ban because the ban itself was a creature of the White House.

In every example covered by this article, a statutory grant without discretion would still require adjudicators to refer to statutes, regulations, and case law to determine if a person qualifies. Some of these decisions would still be subjective or quasi-discretionary because of the inherent nature of certain choices such as whether an applicant's relative would suffer the requisite "hardship" or whether an asylum applicant would face "persecution." In other words, many of the statutory criteria remain undefined and inevitably require adjudicators to rely on case law and individual circumstances. Nevertheless, eliminating discretion would increase efficiency by removing the layer of discretion altogether.

A second option is for Congress or the executive branch to craft a regulation that creates a rebuttable presumption of discretion in favor of the noncitizen. The regulation could be housed jointly by the Department of Homeland Security, Department of Justice and Department of State. The idea of housing a standard in more than one agency is not new.¹⁶⁹ How to craft a rule is no less challenging than understanding the tradeoffs of developing one in the first place. In his work, Diver talks about the "tradeoffs" when considering different formulations of language and about the importance of having a guiding principle.¹⁷⁰

The executive branches may also explore a final solution of providing more clarity for discretion in waivers and remedies that include this component. This third option may work better for the broad waivers, namely, the 212(d)(3) and travel ban waivers, as they lack the same rigor or language in the statute. The third option comes with challenges, many of which were described by Diver.¹⁷¹ Another concern with creating a new standard for adjudicators to apply is that it could make the process less efficient by adding prescribed factors for they would have to weigh and apply in making every discretionary decision. Further, officers and judges who do not favor a new standard for political or personal reasons may shift their focus on interpreting other quasi-discretionary factors like "exceptional and extremely hardship" more strictly though the precise culture and trigger for such decisions (or what one scholar refers to as bureaucratic buy in¹⁷²) are beyond the scope of this article.

¹⁶⁹ See, e.g., Authority of the Secretary of Homeland Security; Delegations of Authority; Immigration Laws, 68 Fed. Reg. 10921 (Mar. 6, 2003).

¹⁷⁰ Diver, *supra* note 166, at 70–1.

¹⁷¹ Diver, *supra* note 166, at 106–9.

¹⁷² Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1225, 1233–5.

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This article reveals the important role of discretion in immigration law. It showcases several statutory remedies that involve a discretionary component and argues that if discretion is applied, it should generally favor the noncitizen. By contrast, discretionary denials by the agency cause a Darkside Discretion that undermines the humanitarian role of discretion and calls for greater exploration into the solutions. This article proposed three different possible solutions for solving the dilemma of Darkside Discretion and contributes to the literature on immigration law in a meaningful and forward-looking manner.