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THE PREJUDICE CAUSED BY SUMMARY REMOVAL AFTER VISA WAIVER ADMISSION: WHAT THE THIRD CIRCUIT MISSED IN VERA AND BRADLEY

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In its decision earlier this month in the case of *Vera v. Attorney General of the U.S.*, the U.S. Court of Appeals for the Third Circuit held that a woman who had entered the United States at the age of 12 under the Visa Waiver Program (VWP) could be removed without a hearing before an immigration judge, even though the government could not produce proof that she had actually waived her right to such a hearing. The Third Circuit in Vera relied on a presumption that the waiver must have been properly executed since this was required by statute in order for Ms. Vera to be admitted under the VWP, and also on the argument, first accepted by the Third Circuit in the case of *Bradley v. Attorney General of the U.S.,* 603 F.3d 235 (3d Cir. 2010), that there was no prejudice to Ms. Vera from any lack of a knowing and voluntary waiver because the summary removal that she now faced was the same consequence that she would have faced if she had refused to sign the waiver. This second argument, similar to one made by the en banc Seventh Circuit in *Bayo v. Napolitano*, 593 F.3d 495 (7th Cir. 2010), appears to be based on a misunderstanding regarding the consequences of the different types of summary removals that can occur under the VWP.

Additional background details regarding the VWP, as well as regarding the original decision by the Seventh Circuit in Bayo (preceding the en banc decision relied upon by Bradley), are available in a March 23, 2009 article by this author on our firm's website. For present purposes, it suffices to note that VWP entrants are required by statute, as noted in Vera and its predecessors, to waive their rights to contest removal other than on the basis of an application for asylum, or similar relief from removal based on the threat of persecution or

torture. If a VWP entrant who has waived these rights is found inadmissible at the time of applying for admission, or is later found to be deportable, he or she may be summarily removed without a hearing, absent an application for asylum or related relief. There are, however, important differences between the consequences of summary removal upon initial application for admission under the VWP, and summary removal after admission under the VWP.

The procedures regarding determinations of inadmissibility and deportability under the VWP are set forth in the regulations at 8 C.F.R. § 217.4(a)-(b), available online from the Government Printing Office. The provision regarding "Determinations of inadmissibility" at 8 C.F.R. § 217.4(a) addresses the procedure by which "n alien who applies for admission under , who is determined . . . not to be eligible for admission under that section or to be inadmissible to the United States . . . will be refused admission into the United States and removed." 8 C.F.R. § 217.4(a)(1). Relevant here, 8 C.F.R. § 217.4(a)(3) provides that "Refusal of admission under paragraph (a)(1) of this section shall not constitute removal for purposes of the Act."

With regard to those admitted under the VWP, on the other hand, 8 C.F.R. § 217.4(b)(1) lays out the procedures for summary deportation of "n alien who has been admitted to the United States under who is determined by an immigration officer to be deportable from the United States under one or more of the grounds of deportability listed in section 237 of the Act." The immediately following paragraph, 8 C.F.R. § 217.4(b)(2), makes clear that "Removal by the district director under paragraph (b)(1) of this section is equivalent in all respects and has the same consequences as removal after proceedings conducted under section 240 of the Act."

The key distinction between an initial refusal of admission under 8 C.F.R. § 217.4(a) and a later summary deportation under 8 C.F.R. § 217.4(b), then, is that the former "shall not constitute removal for purposes of" the Immigration and Nationality Act (INA), but the latter has the same consequences as removal after full-fledged removal proceedings under INA section 240, 8 U.S.C. § 1229a. This distinction is important because removal under the INA has long-term consequences.

Most notably, one who has been removed is inadmissible under section 212(a)(9)(A) of the INA, 8 U.S.C. § 1182(a)(9)(A), for a period of time varying between five years and indefinitely, depending on the circumstances of

removal. In the ordinary course, when a removal order is issued after proceedings that were not initiated upon the arrival of the person removed, and there is no question of a second removal or an aggravated felony conviction, the period of inadmissibility is ten years pursuant to 8 U.S.C. § 1182(a)(9)(A)(ii)(I). One who wishes to seek readmission before this period has lapsed must obtain special consent to reapply for admission, pursuant to 8 U.S.C. § 1182(a)(9)(A)(iii). Such permission to reapply for admission can be sought from USCIS by filing an application on Form I-212, but will be granted only in the exercise of discretion and not automatically.

Summary refusal of admission to a VWP applicant, under 8 C.F.R. § 217.4(a), is not an order of removal for purposes of the INA according to 8 C.F.R. § 217.4(a)(3), and thus does not lead to a requirement that the refused applicant seek special permission to reapply for admission. Summary removal of a VWP applicant subsequent to admission under 8 C.F.R. § 217.4(b), on the other hand, has the same consequences as removal following ordinary removal proceedings according to 8 C.F.R. § 217.4(b)(2), which is to say that it will lead to at least a ten-year bar on readmission under 8 U.S.C. § 1182(a)(9)(A)(ii)(I) absent special, discretionary permission to reapply.

Thus, it was incorrect for the Third Circuit to say in Bradley and again in Vera that “Had Bradley known the contents of the waiver and refused to sign, he would be in the same position as he is now – subject to summary removal without a hearing” and thus unable to obtain status based on his marriage to a U.S. citizen. Bradley, 603 F.3d at 241; Vera, slip op. at 20. The summary removal without a hearing that Mr. Bradley and Ms. Vera would have faced at the time of their initial applications for admission, if they had refused to sign the VWP waiver based on a true understanding of what it meant, carried no collateral consequence of future inadmissibility to the United States. The summary removal that they faced after admission, on the other hand, carried a penalty of inadmissibility for 10 years.

Had Ms. Vera been refused admission when she came to the United States as a minor because she refused to sign the VWP waiver or was found unable to understand it, she would not have faced any bar on readmission to the United States. Now, however, she will, if removed under 8 C.F.R. § 217.4(b), be inadmissible under INA § 212(a)(9)(A) for a period of ten years. That alone would constitute the prejudice that the Third Circuit claimed was absent. Ms. Vera will also, if she is removed, likely be inadmissible for ten years under INA §

212(a)(9)(B), given her unlawful presence subsequent to admission, which she and Mr. Bradley would not have accrued if they had been refused admission because of refusal to sign a waiver—and which, even after they had accrued it, would not have precluded her or Mr. Bradley from adjusting status under INA § 245(a) based on a petition by a U.S. citizen immediate relative (such as a spouse) in the absence of the order of removal under 8 C.F.R. § 217.4(b) that is at issue here, so that there is indeed prejudice in this regard as well from subjecting Ms. Vera and Mr. Bradley to the strictures of the summary removal process despite the asserted lack of a knowing and voluntary waiver of rights by either of them. The Third Circuit's suggestion that there was no prejudice in Vera and Bradley appears to have been based on the assumption that refusal of VWP admission under 8 C.F.R. § 217.4(a) and subsequent summary deportation under 8 C.F.R. § 217.4(b) are legally identical procedures with identical consequences, but this is not the case.

With this erroneous argument out of the way, the Third Circuit's ruling in Vera appears to rest solely on the notion that a twelve-year-old girl must be presumed to have executed a knowing, voluntary, and meaningful waiver of her due process rights with regard to future removal from the United States simply because the governing statute and regulations indicate that the government ought to have required such a waiver prior to allowing her to enter the United States. That is a slender reed indeed, as discussed in a recent posting on the AILA Slip Opinion Blog. The Second Circuit's decision in *Galluzzo v. Holder*, which the Third Circuit in Vera declined to follow and which held that a VWP entrant's due process rights would have been violated (if prejudice were shown) when he was subjected to summary removal without any actual waiver, is significantly more convincing on that subject, and should be followed by other courts in the future. Indeed, it would make sense for even the Third Circuit, in the event of future panel or en banc reconsideration of Vera (or en banc reconsideration of its precedential value in a future case), to follow Galluzzo once the prejudice to someone in Ms. Vera's situation has been explained.