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THROUGH THE LOOKING GLASS: ADVENTURES WITH ARRABALLY AND YERRABELLY IN IMMIGRATION LAND

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"Why, sometimes I've believed as many as six impossible things before breakfast."

— Lewis Carroll, Alice in Wonderland

Arrabally and Yerrabelly are not characters in a children's fantasy story book. They were the respondents in a decision of the Board of Immigration Appeals styled *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), which to immigration attorneys is like a fairy tale story come true. The decision is magical, and truly benefits foreign nationals who are subject to the 3 and 10 year bars even if they travel abroad.

Indeed, Arrabally and Yerrabelly, husband and wife respectively, were unlawfully present for more than 1 year. A departure after being unlawfully present from the US for one year renders the individual inadmissible for a period of 10 years. Specifically, § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA) provides:

Any alien (other than an alien lawfully admitted for permanent residence) who –

(II) has been unlawfully present in the United States for one year or more , and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible

A companion provision, INA § 212(a)(9)(B)(i)(I) triggers a 3 year bar if the non-citizen is unlawfully present for more than 180 days and less than one year, and leaves the US prior to the commencement of removal proceedings.

The 3 and 10 year bars create a federal Catch-22. An individual who is unlawfully present cannot generally apply for lawful permanent residence in the US through adjustment of status unless he or she falls under limited exceptions. Such an individual who is ineligible to apply for a green card in the US must leave the US to process for an immigrant visa at an overseas consular post. But here's the catch: If this person leaves the US he or she will trigger the bar and cannot return for 10 years. Thus, this person, even though approved for a green card, remains in immigration limbo.

Arrabally and Yerrabelly were unlawfully present too for more than 1 year, and would have triggered the 10 year bar had they "departed" the US. Fortunately, they were able to file Form I-485 applications for adjustment of status under an exception, INA § 245(i), after the employer's I-140 petition got approved. § 245(i), which expired on April 30, 2001 but which could still grandfather someone if an immigrant petition or labor certification was filed on or before that date, allows those who are out of status to be able adjust status to permanent residence in the US. Due to a family emergency in India, they left the US under advance parole, which is a special travel dispensation one can obtain when one is a pending applicant for adjustment of status. At issue is their case was whether they effectuated a "departure" under advance parole and thus triggered the 10 year bar.

The DHS has always taken the position that leaving the United States under advance parole effectuates a departure and thus triggers the 10 year bar under § 212(a)(9)(B)(i)(II) if the individual is unlawfully present for one year.

The adjustment of status applications of Arrabally and Yerrabelly were denied on the basis that they were inadmissible for 10 years, and were subsequently placed in removal proceedings. The Immigration Judge affirmed the DHS's finding, but the BIA like magic reversed on the ground that their leaving the US under advance parole did not result in a departure pursuant to § 212(a)(9)(B)(i)(II) thus rendering them inadmissible under the 10 year bar. The BIA reasoned that travel under a grant of advance parole is different from a regular departure from the US, since the individual is given the assurance that he or she will be paroled back in the US to continue to seek the benefit of adjustment of status. Thus, traveling outside the US under advance parole does not trigger the 10 year bar. Although *Matter of Arrabally and Yerrabelly* interpreted the 10 year bar provision under § 212(a)(9)(B)(i)(I), its logic can apply equally to the 3 year bar under § 212(a)(9)(B)(i)(I).

The decision now allows foreign nationals like Arrabally and Yerabelly, who may have been unlawfully present to travel outside the US on advance parole while their adjustment of status applications are pending without fearing the 10 year bar. But the decision opens up other amazing possibilities too. If a person is unable to adjust status by virtue of being out of status, and cannot do so under the § 245(i) exception, another exception is by adjusting status as an immediate relative of a US citizen. The spouse, minor child or parent of a US citizen can adjust status in the US even if they have violated their status. However, this individual must still be able to demonstrate that he or she was "inspected and admitted or paroled" in the United States under INA § 245(a) as a pre-condition to file an adjustment of status application in the US. Thus, a person who enters the US surreptitiously without inspection is ineligible to adjust status to permanent residence in the US despite being married to a US citizen. Such a person may still have to proceed overseas at a US consulate for immigrant visa processing, and will need to overcome the 10 year bar through a waiver. This would not be necessary if such immediate relative could be granted "parole-in-place" which at this point of time is only granted to spouses of military personnel in active duty. In the leaked July 2010 memorandum to USCIS Director Mayorkas, the suggestion is made that the USCIS "reexamine past interpretations of terms such as 'departure' and 'seeking admission again' within the context of unlawful presence and adjustment of status."

Notwithstanding the lack of "parole in place" for all applicants, in yet another ground breaking case, *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010), the BIA held that someone who presents herself at the border, but is waived through, is still inspected for purposes of adjustment eligibility. For example, a person who is a passenger in a car, and is waived through a border post at the Mexico-US border can still establish a lawful entry into the US. *Matter of Quilantan* can be further extended to someone who enters the US with a photo-switched fraudulent non-US passport. Such a person has also been inspected, albeit through a fraudulent identity. Foreign nationals in such situations, if they can prove that they were inspected, can qualify to apply for their green cards in the US through adjustment of status if they marry a US citizen or are the minor children or parents of US citizens. They may however be subject to other grounds of inadmissibility, such as fraud or misrepresentation, but they can at least file those waivers with an I-485 application in the US. While it is true that in another feat of administrative innovation, the DHS has proposed that some can

apply for the waiver of the 3 and 10 year bars in the US prior to their departure, this rule may not extend to applicants who are applying for an additional waiver, such as to overcome the fraud ground of inadmissibility.

Despite *Matter of Quilantan*, USCIS examiners during an adjustment of status interview require corroborating evidence of this admission, and may not accept only the sworn statement of the applicant regarding the manner of his or her entry into the US. They may want to actually see the photo-switched passport, which may no longer in the possession of the applicant. Such a person may still be found ineligible to adjust status despite being inspected and admitted in the above manner under *Matter of Quilantan*. But if this person, after filing an adjustment of status application, left the US under advance parole and returned to the US, he or she would be considered "paroled" into the US and qualify for a new adjustment of status application as an immediate relative of a US citizen. If the first I-485 application is denied, he or she could file this second application where the "parole" would be a clearer basis for adjustment eligibility than the initial "waived through" or fraudulent admission. Moreover, under *Matter of Arrabally and Yerabelly*, this individual would not have triggered the 10 year bar during travel under advance parole during the pendency of the first adjustment application. Travelling abroad under advance parole during the first adjustment application without triggering the 10 year bar could give an applicant a second bite at the apple in filing another adjustment application if the first one gets denied for lack of evidence of an admission. There is one caveat though. This is still an untested theory but the authors do not see why it could not be argued in the event of a denial of the first adjustment application, assuming it was filed in good faith and denied only because of lack of corroboration of the admission. Using *Matter of Arrabally and Yerrabelly* in the manner we propose seeks to do just that. Once again, as with the concept of parole, we seek to build on past innovation to achieve future gain.

Matter of Arrabally and Yerrabelly can come to the rescue of DREAMers too. In our recent blog, *DEFERRED ACTION: THE NEXT GENERATION*, June 19, 2012, we proposed extending the holding of *Matter of Arrabally and Yerrabelly* to beneficiaries of deferred action. There are bound to be many who will be granted deferred action who will also be on the pathway to permanent residence by being beneficiaries of approved I-130 or I-140 petitions. As already explained, unless one is being sponsored as an immediate relative, i.e. as a spouse, child or parent of a US citizen, and has also been admitted and

inspected, filing an application for adjustment of status to permanent residence will generally not be possible for an individual who has failed to maintain a lawful status under INA § 245(a). Such individuals will have to depart the US to process their immigrant visas at a US consulate in their home countries. Although the grant of deferred action will stop unlawful presence from accruing, it does not erase any past unlawful presence. Thus, one who has accrued over one year of unlawful presence and departs the US in order to process for an immigrant visa will most likely face the 10 year bar under INA § 212(a)(9)(B)(i)(II). While some may be able to take advantage of the proposed provisional waiver rule, where one can apply in the US for a waiver before leaving the US, not all will be eligible under this new rule. A case in point is someone who is sponsored by an employer under the employment-based second preference, and who may not even have a qualifying relative to apply for the waiver of the 10 year bar.

Since the publication of our blog, the USCIS has issued extensive guidelines for consideration of Deferred Action for Childhood Arrival (DACA) in the form of Frequently Asked Questions (FAQ), which will take effect on August 15, 2012. We were pleasantly surprised to find in the FAQ that those granted deferred action beneficiaries can apply for advance parole. It is yet unclear whether one who has been granted deferred action and who has accrued unlawful presence and travels under advance parole can take advantage of *Arrabally and Yerrabelly* and the current FAQ does not suggest it. At this point, a DACA applicant should assume that *Arrabally and Yerrabelly* will not apply, and an individual who has accrued over one-year of unlawful presence and leaves even under advance parole could face the 10-year bar. Still, there is no reason for *Arrabally and Yerabelly's* magic to not apply in this case too. Here too, the individual will be leaving the US under advance parole, which under *Matter of Arrabally and Yerabelly*, did not effectuate the departure under INA § 212(a)(9)(B)(i)(II). This is something worth advocating for with the USCIS as the DACA program unfolds. Obviously, USCIS will tread carefully as it is already facing criticism from opponents of the program, including members of Congress. Yet, applying *Matter of Arrabally and Yerrabelly* to young people who have been granted a fresh lease of life would be a logical extension. The FAQ also indicates that the USCIS will only grant advance parole if one is travelling for humanitarian purposes, education purposes or employment purposes. Again, the FAQ does not expand on what humanitarian, education or employment purposes mean.

A deferred action beneficiary with an approved I-130 or I-140, which has become current for green card processing, can conceivably apply for advance parole based on humanitarian purposes to apply for immigrant visa at the consular post overseas. His or her departure under advance parole, if *Matter of Arrabally and Yerrabelly* applies, will not trigger the 10 year bar. If this person successfully comes back on an immigrant visa to be granted permanent residence upon admission, query whether the holding will still apply. After all, the BIA in *Arrabally and Yerrabelly* contemplated a return as a parolee and not as a permanent resident. Yet, again, just as the BIA performed magic when interpreting "departure" to not apply to those leaving the US under advadnce parole, there is no reason for the USCIS to not stretch it to a scenario where the deferred action beneficiary will leave on advance parole, thus not triggering the 10 year bar, in order to return to the US as an immigrant. This is clearly not the current position of the USCIS as articulated in its FAQ. The purpose of our blog is to advance interpretations that would be favorable for DREAMers down the road.

On the other hand, *Matter of Arrabally and Yerrabelly* can be more readily applied to those who otherwise would not be able to adjust status if they made an entry without inspection but were immediate relatives of US citizens. Such people would not need to process an immigrant visa at a US consulate overseas if they could adjust status. Unlike an adjustment of status applicant, a DACA applicant can file an application for deferred action even if he or she entered without inspection. If later, this applicant, now granted deferred action, married a US citizen, he or she could leave under advance parole and not trigger the 10 year bar. At the same time, he or she would have also been paroled back into the US, making him or her eligible to adjust status, which prior to the parole would not have been possible. This fact pattern clearly falls under the four corners of *Matter of Arrabally and Yerrabelly* as opposed to someone proceeding overseas under advance parole and returning as a permanent resident. Yet, we reiterate, at this point, it is not at all clear whether *Matter of Arrabally and Yerrabelly* will apply to deferred action beneficiaries who travel abroad, and they should seek the advice of competent legal counsel before they wish to apply for advance parole in order to travel.

While DACA is clearly not designed to create a pathway to permanent residence, *Matter of Arrabally and Yerrabelly* can facilitate this indirectly through independent I-130 or I-140 petitions that were filed on behalf of the deferred

action beneficiary. Although only Congress can change the law, the President can find new ways to expand the relief available under current law. Our proposal would relieve the Administration from the burdens of extending deferred action every two years (assuming the program lasts for that long) once the beneficiary is granted permanent residence. After all, until Congress acts to reform our broken immigration system, it behooves us to be wildly creative, even to the extent of imagining that fairy tales might become reality, like what the BIA achieved in *Matter of Arrabelly and Yerrabelly.* Indeed, precisely because DACA is a remedial initiative, it deserves and should be granted the most generous administration infused with the central goal of remaining true to the reasons that inspired its creation. For this to happen, we turn to the wisdom of Albert Einstein:

When I examine myself and my methods of thought, I come to the conclusion that the gift of fantasy has meant more to me than any talent for abstract, positive thinking
All we have to do is dream!