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US IMMIGRATION & NATIONALITY LAW

STATE DEPARTMENT'S INTERPRETATION OF MATTER OF ARRABALLY AND YERRABELLY AT ODDS WITH BIA'S

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In a previous blog, we analyzed *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), a seminal Board of Immigration Appeals case which held that a departure under advance parole does not trigger the 10 year bar provision under § 212(a)(9)(B)(i)(I). 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 they 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 rationale has also applied equally to the 3 year bar under § 212(a)(9)(B)(i)(I), but had never been officially confirmed.

On September 5, 2024, USCIS updated guidance on its website to state the following:

Furthermore, under *Matter of Arrabally and Yerrabelly*, 25 I&N Dec 771 (BIA 2012), a noncitizen who accrued more than 180 days of unlawful presence during a single stay and left is not inadmissible under INA 212(a)(9)(B)(i)(II) when they again seek admission, if they left the United States after first obtaining an advance parole document. While the Board of Immigration Appeals, in *Matter of Arrabally and Yerrabelly,* stated that its decision was limited to INA 212(a)(9)(B)(i)(II), the board's reasoning in *Matter of Arrabally* applies equally to INA 212(a)(9)(B)(i)(I). For this reason, we apply the decision to both INA 212(a)(9)(B)(i)(I) and (II).

This language makes clear that USCIS will apply *Matter of Arrabally and Yerrabelly* when making determinations of inadmissibility under INA 212(a)(9)(B)(i)(I) relating to the 3 year bar and INA 212(a)(9)(B)(i)(II) relating to the 10 year bar. The guidance also emphasizes that *Matter of Arrabally and Yerrabelly* applies equally to INA 212(a)(9)(B)(i)(I), although the BIA decision itself dealt only with INA 212(a)(9)(B)(i)(II). The corresponding section of the USCIS Policy Manual (Volume 8, Part O) has yet to be updated to reflect this guidance.

Matter of Arrabally and Yerabelly enables individuals to escape the 3 and 10 year bar when they depart the US under advance parole in various contexts. For instance, an applicant for adjustment of status can request advance parole, and a departure under such advance parole does not trigger the 3 and 10 year bar. Similarly, a DACA recipient who obtains advance parole and travels pursuant to this grant of advance parole also does not trigger the 3 and 10 year bar. The USCIS has also applied *Matter of Arrabally and Yerrabelly* to one who leaves the US pursuant to travel authorization under Temporary Protected Status.

The U.S. Department of State (DOS) policy surrounding INA 212(a)(9)(B)(i)(I) and INA 212(a)(9)(B)(i)(II) is highly inconsistent with this USCIS guidance, however. In meeting with DOS on October 10, 2024 the American Immigration Lawyers Association (AILA)'s DOS liaison committee posed the following question:

> *"Members report instances where DACA recipients who have received Advance Parole have been determined to be inadmissible under the three- and/or 10-year bars. This is contrary to the Board of Immigration Appeals decision in Matter of Yarrabelly and Arrabelly…Can DOS confirm that consular officers are instructed to apply the Yerrabelly/Arrabelly holding and that, as such, any visa applicant who is traveling pursuant to the approval of Advance Parole would not require a waiver under INA§212(d)(3) for a violation of 212(a)(9)(B)? This would be consistent with USCIS's recent update…"*

DOS responded by stating:

> *In Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771(BIA 2012), the Board of Immigration Appeals held "that an alien who has left and returned to the United States under a grant of advance parole has not*

> *made a 'departure . . . from the United States' within the meaning of section 212(a)(9)(B)(i)(II) of the Act." The holding and discussion throughout Arrabally makes clear that advance parole allows a noncitizen who needs to leave and return to the United States to do so with the expectation that the noncitizen "will be presenting himself for inspection without a valid visa in the future" so that "he will, upon return, continue to pursue the adjustment of status application he filed before departing." Arrabally in no way holds that advance parole can be used as a way to leave the United States and to obtain a visa (as opposed to pursuing an adjustment of status) without application of the congressionally mandated visa ineligibility for accrual of unlawful presence in excess of 180 days.*

This Q&A is available online.

DOS' policy will not recognize *Matter of Arrabally and Yerrabelly* if a noncitizen, for example, obtains DACA after age 18.5, leaves the U.S. on advance parole, and applies for an H-1B visa at a US consulate. Although this applicant departed the U.S. on advance parole, DOS would nonetheless consider them to have triggered the inadmissibility bar at INA 212(a)(9)(B)(i). In order to obtain an H-1B visa, the applicant would need a 212(d)(3) waiver of unlawful presence. Similarly, DOS is unlikely to apply *Matter of Arrabally and Yerrabelly* to one who left the U.S. under advance parole and seeks to be readmitted to the U.S. with an immigrant visa.

There is no reason for DOS to restrict the interpretation in *Matter of Arrabally and Yerrabelly* to one who departed the US under advance parole and will be returning to the US on advance parole rather than on a newly obtained visa at the US consulate. The BIA in *Matter of Arrabally and Yerrabelly* correctly interpreted that one who leaves under advance parole does not effectuate a departure for purposes of triggering the 10 year bar under INA 212(a)(9)(B)(i)(II). If the individual chooses to return on a visa rather than advance parole, it should not change the fact that there was no departure under advance parole at the point in time when they left the US. Thus far, the USCIS has not restricted its interpretation in the same manner as DOS.

The DOS's interpretation has also been inconsistent with the USCIS's interpretation in other instances. For example, the DOS has not recognized the

Dates for Filing to protected the age of a child under the Child Status Protection Act as the USCIS has prudently done. Now the DOS's interpretation of *Matter of Arrabally and Yerrabelly* is also at odds with USCIS's. Such inconsistent interpretations between the USCIS and DOS only create further hardship and difficulties for noncitizens who are already struggling to navigate a complex and byzantine immigration system.

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