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In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy

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IN COUNTRY, ON PAROLE, OUT OF LUCK—REGULATING AWAY ALIEN ELIGIBILITY FOR ADJUSTMENT OF STATUS CONTRARY TO CONGRESSIONAL INTENT AND SOUND IMMIGRATION POLICY

*Jeffrey A. Bekiares**

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* For all of my friends, family, and colleagues that have helped me along the way.

I. INTRODUCTION

Immigrants are a daily part of American life. They work in every sector of the economy and form strong social and familial bonds in the community. The legislative and cultural history of the United States has encouraged immigration as a constant source of vibrancy, dynamism, and renewal. One of the main mechanisms for becoming a United States citizen is through the process of adjusting status based on a strong relation to this country such as family or employment. Although Congress has set relatively broad criteria as to eligibility to adjust status,[1] the Attorney General has severely restricted this avenue through questionable regulation.

Title 8, § 245.1 of the Code of Federal Regulations governs adjustment of status for aliens[2] who wish to seek permanent residence in the United States.[3] The regulation, which is promulgated by the Attorney General, is a derivative of the power granted to him by Congress pursuant to § 245(a) of the Immigration and Nationality Act (INA).[4] This section of the INA grants the Attorney General the discretion to adjust status of a prescribed set of aliens to that of a "Lawful Permanent Resident" (LPR) when certain conditions are met.[5] The statute also contemplates that the Attorney General may issue regulations to guide the process of adjustment.[6]

Pursuant to this statute, the Attorney General has created a lengthy set of regulations dealing with the adjustment process.[7] The regulation codified at 8 C.F.R. § 245.1 creates a laundry list of specifics under the caption of "eligibility."[8] One subsection within this regulation in particular has created a nascent and growing controversy in immigration law.

Specifically, 8 § 245.1(c)(8) provides that any alien who is classed as an "arriving alien" and who is currently in removal proceedings is declared

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1. *See* 8 U.S.C.A. § 1255(a) (West 2006).

2. The term "alien" will be used in this Note for the sake of continuity with statutes and case-law. It is noted, however, that this term has been criticized as being a stigmatizing linguistic force, which has served to reinforce the self/other divide between natives and immigrants in the United States. *See, e.g.*, KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH 152-56 (2004) (examining the detrimental effects of such terminology). For the record, this Note makes no judgment about the propriety of such terminology.

3. 8 C.F.R. § 245.1 (2005). This regulation is virtually identical to 8 C.F.R. § 1245.1, and different courts often use these numbers interchangeably.

4. Immigration and Nationality Act of 1952 § 245(a), 8 U.S.C.A. § 1255(a) (West 2006). When referring to this statute, this Note will use United States Code designations.

5. *Id.* The section reads: "The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe . . . ." *Id.*

6. *Id.*

7. 8 C.F.R. §§ 245-247 (2005).

8. *See* 8 C.F.R. § 245.1.

per se ineligible to adjust status.[9] The controversy over this provision stems from the apparent conflict between the Attorney General's almost categorical exclusion of paroled aliens—a subset of arriving aliens—from relief, and the underlying enabling statute, which specifically mentions "paroled" aliens as a class eligible for discretionary relief.[10] Since, almost by definition, aliens who are paroled into the United States are placed into removal proceedings,[11] the Attorney General has essentially excised by regulation an entire class of aliens who otherwise might be afforded relief from removal as specified by Congress.

The Attorney General has defended the integrity of the regulation by principally relying on Congress's explicit commitment of the matter to his discretion.[12] This defense has taken on two forms. First, this argument took the form of a contention that Article III courts lacked the proper jurisdiction to invalidate the regulation[13] because matters committed solely to the discretion of the Attorney General by Congress in various areas of alien removal are beyond review.[14] As a second derivative argument, the Attorney General has contended that, even if the courts had the jurisdiction to review the regulation, the regulation itself represented a valid exercise of the discretion which was expressly granted.[15]

In the 2005 case of *Succar v. Ashcroft*,[16] however, the Court of Appeals for the First Circuit rejected both of the Attorney General's arguments and invalidated the regulation.[17] The main focus of the court's reasoning in that case was that the regulation was an impermissible alteration of the eligibility requirements for adjustment of status—a power Congress had

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9. *Id.* § 245.1(c)(8). "Any arriving alien who is in removal proceedings pursuant to section 235(b)(1) or section 240 of the Act [is ineligible to adjust]." *Id.*

10. *See* 8 U.S.C.A. § 1255(a) (West 2006). "The status of an alien who was inspected and admitted *or paroled* into the United States . . . may be adjusted . . . ." *Id.* (emphasis added). The concept of parole is critical in immigration law. It is a mechanism whereby aliens can be discharged into the United States at the discretion of an immigration officer upon physical entry, pending further review of admissibility at a later date. For further detailed discussion of parole, see *infra* Part II.C.

11. There are not immediately accessible statistics on this matter, but this is a logical result based on the statutes governing inspection and admissibility. If an officer inspects an "applicant for admission," and does not find him to be "clearly and beyond a doubt entitled to be admitted," then the officer shall place the alien into removal proceedings. 8 U.S.C.A. § 1225(b)(2)(A). For further discussion, see *infra* Part II.C and notes 54-55 and accompanying text.

12. *See* Succar v. Ashcroft, 394 F.3d 8, 19 (1st Cir. 2005).

13. *See id.*

14. *See* 8 U.S.C.A. § 1252(a)(2)(B)(I) (West 2006) (specifically forbidding judicial review of the discretionary denial of adjustment of status under 8 U.S.C.A. § 1255); *see generally* 8 U.S.C.A. § 1252 (outlining principles of judicial review of orders of removal).

15. *See Succar*, 394 F.3d at 21.

16. 394 F.3d 8 (1st Cir. 2005).

17. *Id.* at 36.

exclusively reserved unto itself.[18] This case marked the beginning in a series of rapid decisions that have split the circuits on the question of the continued validity of § 245.1(c)(8).[19]

When then Attorney General Janet Reno implemented the regulation in 1997, she justified it by stating that it was necessary in order to be consistent with Congress's intent in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),[20] which sought to expedite the removal of arriving aliens.[21] The soundness of this rationale, however, has been called sharply into question by the *Succar* case.[22] Specifically, that court noted that although Congress had amended the adjustment of status provisions in the INA several times since its original passage, including in the IIRIRA, it had not altered the eligibility of paroled aliens to adjust.[23] In addition, the court added that the new regulation indeed had the effect of counteracting many of the congressional fixes that had been instituted over the years to streamline the adjustment system.[24]

Denying paroled aliens the ability to lawfully adjust status because of a suspect regulation works mischief not only with congressional intent, but also with public policy, and even notions of fundamental fairness. The system of removal of aliens in the United States is a cumbersome process. Aliens often find themselves in administrative and legal adjudication for years on end.[25] In the meantime, however, these aliens continue to go on with their lives. Many work, pay taxes, marry, and start families, all while their ultimate domiciliary fate hangs in the balance. If paroled aliens in removal proceedings must return abroad before being allowed to adjust status, many will suffer a statutory penalty of at least a three-year ban on re-entry into the United States.[26] This places a significant hardship on

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18. *Id.* at 24.

19. *Compare* Ramos Bona v. Gonzales, 425 F.3d 663, 668 (9th Cir. 2005) (following the essential logic of *Succar* in invalidating 8 C.F.R. § 245.1(c)(8) in the Ninth Circuit), *and* Zheng v. Gonzales, 422 F.3d 98, 111-20 (3d Cir. 2005) (following *Succar*, but employing a different analysis), *with* Mouelle v. Gonzales, 416 F.3d 923, 928 (8th Cir. 2005) (upholding the regulation and rejecting the logic of *Succar*).

20. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1101 (2000)).

21. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 452 (Jan. 3, 1997); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10326-27 (Mar. 6, 1997).

22. Succar v. Ashcroft, 394 F.3d 8, 32-34 (1st Cir. 2005).

23. *Id.* at 35.

24. *Id.* at 33-34.

25. *See infra* Part V.B.

26. *See* 8 U.S.C.A. § 1182(a)(9)(B)(i) (West 2006) (barring non-citizens from reentry into the United States for three years if they were unlawfully present in the United States for more than 180 days, but less than one year, and for ten years if they were unlawfully present for more than

aliens and their families with legitimate adjustment of status claims.[27]

In light of the revitalized but never ending debate surrounding immigration, particularly illegal immigration in the United States, this Note analyzes why § 245.1(c)(8) was rightly invalidated by the First Circuit Court of Appeals,[28] both because it is contrary to congressional intent, and because it places a draconian burden on many arriving aliens. To this end, this Note will provide a brief overview of the INA and how it has controlled and shaped immigration since its passage, with a particular focus on understanding adjustment of status. It will also examine the jurisdictional challenges that reviewing courts face, particularly in the immigration context, and what tools may be used to divine congressional intent in this important area of the law. It will then apply these principles in the context of a burgeoning circuit split over § 245.1(c)(8), and explain the cases that have created the controversy. This Note will conclude with a brief look at the quantitative and qualitative effects of such a regulation on a population that Congress has sought to protect through consistent policy in adjustment of status eligibility. Finally, this Note will suggest why other federal circuits should follow the First Circuit's lead in striking down § 245.1(c)(8), and why, ultimately, the Supreme Court should do the same.

II. A BRIEF HISTORY OF THE IMMIGRATION AND NATIONALITY ACT

A. *Modern Immigration Policy Takes Root*

The United States has long been thought of as the world's modern mecca of immigration. In many ways, the symbol of the Statue of Liberty embodies all that made America great in its earliest days and beyond.[29] In apparent accordance with these principles, the first hundred years of the Republic were characterized by a relatively liberal immigration system.[30]

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one year).

27. *See Succar*, 394 F.3d at 18-19 (briefly summarizing the statutory matrix that would place re-entry bans on paroled aliens in removal proceedings, creating a significant hardship on them and their families).

28. *See id.* at 36.

29. The oft quoted poem *The New Colossus* by Emma Lazarus is engraved at the base of the statue and reads in part, "Give me your tired, your poor, Your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" Emma Lazarus, *The New Colossus* (1883), *reprinted in* EMMA LAZARUS: SELECTIONS FROM HER POETRY AND PROSE 41 (Morris U. Schappes ed., rev. & enlarged ed. 1947).

30. *See generally* Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 82-86 (1998) (outlining early immigration policy).

As the twentieth century commenced, quotas began to dominate immigration policy.[31] The era of modern immigration policy, however, did not really begin until the McCarran-Walter Act of 1952.[32]

The McCarran-Walter Act brought United States immigration policy under the rubric of a single statute with three principle goals in mind. First, the Act sought to reunify families.[33] Second, the Act sought to protect the domestic labor force.[34] Third, the Act sought to promote the immigration of persons with needed skills.[35] Despite these laudable aspirations, the Act has subsequently been described by commentators as "among the country's most controversial policies, and with the exception of the Internal Revenue Code represent[ing] the longest, most complicated, and certainly the most arcane piece of legislation in modern United States history."[36] Since its introduction, the Act has been altered or amended dozens of times, in some cases with significant changes.[37] Throughout the history of Title 8, however, there has been a remarkable consistency in the status of paroled aliens as eligible for adjustment.

B. *Introducing Adjustment of Status*

Historically, obtaining an immigrant visa required an exit from the United States so that an alien could acquire the visa at a United States Consulate abroad.[38] With the passage of the 1952 Act, however, Congress allowed aliens who were physically present in the United States to adjust status to that of LPR without leaving the country.[39] The Act was then amended in 1960 to include paroled aliens in the list of those aliens eligible for the benefit.[40] The adjustment mechanism therefore allows

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31. *Id.* at 93-95 (exploring quota policies around the turn of the century).

32. Pub. L. No. 414, 66 Stat. 163 (1952). This Act established the basic structure of present immigration law, codified under Title 8 of the United States Code. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 1-20 (8th ed. 2002).

33. Curran, *supra* note 30, at 97.

34. *Id.*

35. *Id.*

36. *Id.* (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 20 (1985)).

37. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (including various new grounds of removability and redefining the concept of "entry" to that of lawful admission); Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986) (including provisions for establishing legal permanent resident status based on marriage); Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (including the establishment of various amnesty and legalization programs for certain groups of aliens).

38. *See* ROBERT C. DIVINE, IMMIGRATION PRACTICE § 8-7 (2005-2006 ed. 2005).

39. *See* McCarran-Walter Act, Pub. L. No. 414, 66 Stat. 163, 217 (1952).

40. *See* Pub. L. No. 86-648, 74 Stat. 504, 505 (1960).

aliens who are physically present in the United States, and who are otherwise eligible for an immigrant visa, to become LPRs.[41] The three principle requirements necessary to be considered for adjustment are: (1) the alien must make an adjustment application, (2) the alien must be eligible to receive an immigrant visa and be admissible to the United States for permanent residence, and (3) an immigrant visa must be immediately available when the application is filed.[42] If an alien meets these requirements he may be adjusted to LPR *at the discretion* of the Attorney General.[43] One of the most typical bases for a visa to be available for adjustment of an alien is on an immediate relative sponsorship petition, which often is made by a spouse who is a United States citizen or LPR.[44] Many of those aliens who may be able to utilize an immediate relative petition, however, are present in the United States on parole status only.

C. *The Arriving Alien and the Concept of "Parole"*

Prior to 1996, all aliens were classed into two categories: "(a) applicants for admission and (b) non-citizens present in the United States who had previously made an entry into the country either with, or without, an inspection."[45] Applicants for admission who were physically present in the United States were considered to be "arriving alien[s]."[46] This rather curious term referred to an individual who was physically present in the United States—having "entered" the country—and had been inspected, but who had not yet been cleared for admission.[47] Although this definition has remained essentially unchanged since its inception, the passage of IIRIRA in 1996 eliminated the concept of "entry" and replaced it with "admission."[48] Today, the term "arriving alien" is defined by the Attorney General's regulations broadly as "an applicant for admission coming or attempting to come into the United States."[49]

When an alien arrives in the United States and is not clearly admissible, the popular conception seems to be that he is detained until an

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41. *See* 8 U.S.C.A. § 1255(a) (West 2006).

42. *Id.* For a detailed listing of the intricacies of these requirements, see KURZBAN, *supra* note 32, at ch. 6, pt. I.

43. 8 U.S.C.A. § 1255(a) (West 2006).

44. This form is styled "Petition for Alien Relative" (Form I-130) by the United States Government and is available for download at http://uscis.gov/graphics/formsfee/forms/i-130.htm. After the approval of this petition, the alien must file another form to begin the actual adjustment process. This form is styled "Application to Register Permanent Residence or Adjust Status" (Form I-485) and is available for download at http://uscis.gov/graphics/formsfee/forms/i-485.htm.

45. Succar v. Ashcroft, 394 F.3d 8, 12 (1st Cir. 2005).

46. *Id.*

47. *Id.*

48. *See* Pub. L. No. 104-208, 110 Stat. 3009, 3009-3575 (1996).

49. 8 C.F.R. § 1.1(q) (2005).

administrative inquiry into his status can be held. This conception, however, broadly overestimates the number of aliens who are actually detained at points of entry. This is because the Attorney General has been granted discretion by Congress to "parole" aliens into the United States pending an investigation into the legitimacy of their presence.[50] Generally, this discretion may be exercised "temporarily under such conditions as [the Attorney General] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[51] Congress has defined the contours of parole in some detail by eliminating some aliens from eligibility for parole,[52] and prescribing the conditions of parole for others.[53] The parole mechanism is widely used by immigration officials, and nearly 265,000 aliens were paroled into the United States in 2003.[54] As a practical matter, it is likely that most of these aliens are almost immediately placed into removal proceedings because of the congressional direction that "if . . . an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding . . . ."[55] Since, almost by definition, most parolees will not be clearly and beyond a doubt admissible, they will find themselves placed into removal proceedings.[56] Understanding these classifications is a necessary foundation for understanding why § 245.1(c)(8) is an overreaching of the Attorney General's power. In order for a court to even consider such a question, however, it first must resolve its subject matter

50. *See* 8 U.S.C.A. § 1182(d)(5)(A) (West 2006).

51. *Id.*

52. *See id.* § 1225(c)(1) (eliminating some aliens from any admission or parole for security or on other grounds).

53. *Id.* § 1182(d)(5)(A). Parole is always intended to be temporary and administered on a case-by-case basis. *Id.* Once the purposes of the parole have been fulfilled, the alien must report back to custody and have his case further adjudicated as an arriving alien. *Id.*

54. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 83 (2004), http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf. For a concise discussion of the different parole mechanisms and collected statistics by such categories as year and port of entry, see *id.* at 81-84. Justice Clark described parole as "simply a device through which needless confinement is avoided while administrative proceedings are conducted." Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). He went on to note in his *Leng May Ma* opinion that "[p]hysical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond." *Id.*

55. 8 U.S.C.A. § 1225(b)(2)(A) (West 2006).

56. Parolees are not clearly entitled to admission, because if they were, their status would be normalized. Therefore, most parolees must be placed into removal proceedings. *See* Succar v. Ashcroft, 394 F.3d 8, 26-27 (1st Cir. 2005) (explaining the logic of assuming most parolees to be in removal proceedings); Ramos Bona v. Gonzales, 425 F.3d 663, 669-70 (9th Cir. 2005) (explaining further the logic enunciated in *Succar*). *But see* Mouelle v. Gonzales, 416 F.3d 923, 930 n.9 (8th Cir. 2005) (citing a lack of supporting statistics and rebuttal evidence by the Attorney General as reason to distrust the conclusion that most parolees are placed into removal proceedings).

jurisdiction in the traditionally closed-door field of immigration.

III. JUDICIAL REVIEW OF AGENCY DECISIONS IN IMMIGRATION

A. *The Jurisdictional Problem & "Pure" Questions of Law*

The critical threshold question for any court reviewing an administrative regulation is whether it has inherent or granted jurisdiction to do so. In the field of immigration, the Supreme Court historically has given Congress almost unreviewable deference.[57] In fact, in the area of exclusion, the Supreme Court has said that the power of Congress to order exclusion of aliens on any bases that it chooses is "plenary."[58] The Court further articulated its position in this area by stating that the exercise of discretion by Congress's delegate will not be disturbed so long as the executive discloses a "facially legitimate and bona fide reason" for the decision.[59] The reasons for this extraordinary deference are indeed complex, but it would seem that they are bound up in the notion that the judiciary does not belong in areas of foreign policy which may implicate political questions.[60]

In accordance with this great deference, Congress has crafted its immigration statutes to narrowly tailor jurisdiction for Article III courts to review decisions of the Attorney General. For example, Congress has circumscribed any judicial review in a number of matters where the Attorney General has discretionary power—including matters of adjustment of status under 8 U.S.C.A. § 1255(a).[61] This statutory prohibition combined with the courts' general reticence to interfere in immigration matters would seem to preclude judicial review of regulations promulgated pursuant to a grant of discretionary power. The courts, however, have nevertheless retained jurisdiction over the review of such

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57. For a good discussion of the early development of immigration policy and the decisions of the courts, see Curran, *supra* note 30, at 82-100.

58. Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972); Boutilier v. INS, 387 U.S. 118, 123 (1967); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 343 (1909).

59. *Mandel*, 408 U.S. at 769-70.

60. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305-06 (1993) (stating that there is no subject over which legislative power is more complete than the relationship between the United States and alien visitors); Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) (stating that political question reasoning also governs deference to Congress and the President in the area of immigration and naturalization); *cf.* Wong Wing v. United States, 163 U.S. 228, 233-34 (1896) (noting that although Congress has great power in the area of exclusion, it still must be exercised within constitutional boundaries).

61. *See generally* 8 U.S.C.A. § 1252 (West 2006) (containing all matters relating to judicial review); *see specifically* 8 U.S.C.A. § 1252(a)(2)(B)(i) (West 2006) (containing the prohibition on judicial review of discretionary denials of adjustment of status).

regulations in certain cases.[62]

Specifically, the courts have never accepted the notion that pure questions of law can be excised from judicial review, even where "plenary power" in a field is accepted.[63] As such, Article III courts have routinely reviewed agency interpretations of statutes which often take the form of regulations.[64] The main goal of such a review is to determine if the agency has overstepped its authority in promulgating a regulation beyond the scope of the agency's statutory mandate.[65] In 1984, the Supreme Court attempted to define the parameters of this review when it decided *Chevron v. Natural Resources Defense Council*.[66] *Chevron* provided reviewing courts with a framework for analyzing questions of statutory interpretation by agencies.[67] Such analysis is critical to understanding techniques which are available to reviewing courts when ruling on the validity of regulations such as § 245.1(c)(8).

B. *The* Chevron *Analysis and the Appropriate Measure of Deference*

Since *Chevron* was decided in 1984, it has produced as much controversy as clarity.[68] The Supreme Court in *Chevron* established a two-step framework for reviewing courts to analyze agency construction of

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62. For a discussion about the wisdom of such judicial review in the immigration context, see Melissa A. Flynn, Comment, *Separation of Powers: Permissive Judicial Review or Invasion of Congressional Power?*, 54 FLA. L. REV. 989, 996-99 (2002).

63. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the principle that it is the province of the courts "to say what the law is"), *with* Zadvydas v. Davis, 533 U.S. 678, 687-88 (2001) (holding that a statutory jurisdictional bar to review of a discretionary decision in the immigration context did not preclude judicial review of the extent of authority granted to the Attorney General by the statute—essentially, a question of law), *and* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940) (stating that the interpretation of statutes in justiciable controversies is the prerogative of the courts). *See also* Administrative Procedure Act, 5 U.S.C. § 706 (2000) (recognizing the authority of the courts to settle questions of law in review of administrative proceedings).

64. *See, e.g.*, Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9 (1984) (reviewing an EPA regulation and noting that the courts are the final word on statutory construction).

65. *See id.* at 843.

66. 467 U.S. 837 (1984).

67. For a discussion and defense of the *Chevron* framework, see Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

68. *Compare* Pierce, *supra* note 67, at 307-08, *and* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514-15 (1989) (defending deference to agency interpretation of law as a validation of congressional intent), *with* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487-88 (1989) (questioning the compatibility of *Chevron* with the non-delegation doctrine), *and* Cass R. Sunstein, *Deregulation and the Courts*, 5 J. POL'Y ANALYSIS & MGMT. 517 (1986) (arguing that the risk of special interest groups is too great to abrogate independent judicial review of agency decisions).

statutes.[69] The first step in the process is for courts to determine if Congress has spoken to the particular issue at hand.[70] Unfortunately, there has never been full agreement as to what sources reviewing courts may use to determine whether the issue has been resolved by Congress.[71] The first and foremost method for determining if Congress has resolved a particular issue in a statute is for courts to look at the plain meaning and text of the statute itself and the statutory scheme as a whole.[72] If the statute on its face is unambiguous, then the inquiry is at an end, and the regulation may stand or fall based on the court's level of satisfaction that the agency's interpretation comports with the plain meaning of the statute. If, however, the statute is not clear on its face, then some courts choose to use legislative history to resolve step-one questions.[73] This analysis often involves looking at whether Congress has considered the issue in previous iterations of the statute, and what debate has surrounded the issue.[74] If congressional intent can be divined from such an analysis, then, once again, the inquiry need not proceed past step-one.

When it cannot be determined if Congress has resolved the issue in the text of the statute, reviewing courts must proceed to step-two of the analysis.[75] Step-two involves a judicial determination of whether Congress has committed a particular issue to agency discretion, or whether it simply

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69. *Chevron*, 467 U.S. at 842-43.

70. *Id.* at 842.

71. The confusion over which sources may be used to determine congressional intent can probably be blamed on the *Chevron* decision itself. The decision never clearly enumerates which sources may be used in a step-one analysis. It seems clear, however, that, at the very least, a plain reading of the statute and an application of simple principles of statutory construction are in order. *See id.* at 859-62. It is also likely that *Chevron* authorizes reviewing courts to look at legislative history in their analyses. *See id.* at 862-64. *But see* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 293 n.4 (1988) (calling any reference to legislative history in *Chevron* step-one analysis "irrelevant"). Conversely, the *Chevron* Court seemed to frown upon considerations of policy, which it perceived as better left to the legislative process. *See Chevron*, 467 U.S. at 864-66.

72. For an enunciation of this principle and citations to cases which reaffirm it, see *K Mart Corp.*, 486 U.S. at 291 (citing *Chevron*'s direction to look at the text of the statute to determine any clearly expressed intent of Congress); Bethesda Hosp. Ass'n. v. Bowen, 485 U.S. 399, 405 (1988) (endorsing the technique of looking at the language and design of a statute as a whole in *Chevron* step-one analysis).

73. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137-38 (2000) (effectively using legislative history to demonstrate how Congress has foreclosed regulation in a particular industry).

74. This is a traditional technique of statutory interpretation and was relied upon heavily by the First Circuit in *Succar*, where that court noted that Congress's language in its adjustment of status statute had not significantly changed—at least with respect to eligibility standards—since its first introduction. *See* Succar v. Ashcroft, 394 F.3d 8, 16 (1st Cir. 2005) (noting that Congress had more than a dozen opportunities to excise parolees, as a group, from the class of aliens eligible to adjust and chose not to do so).

75. *Chevron*, 467 U.S. at 843-44.

has been overlooked or omitted by the statute.[76] If the court determines that an issue has been committed to agency discretion, then the court will only overturn the interpretation if it is "arbitrary, capricious, or manifestly contrary to the statute."[77] If, however, the court determines that the issue was simply omitted from the statute's scope, and therefore the responsibility has fallen to the agency to fill the gap, then the only determination to be made is whether the agency's interpretation is a reasonable one.[78] Step-two analysis has not been as widely used by the lower courts as step-one, but it involves many of the same techniques for trying to discern congressional intent, such as resorting to legislative history and deciphering the statutory scheme.[79] In the absence of discernable congressional intent, an alternative approach to resolving ambiguities may be a resort to old methods of statutory construction.

C. *Application of the Immigration Rule of Lenity*

One technique that has been proposed for resolving statutory ambiguities in the immigration context is use of the traditional immigration rule of lenity as a canon of statutory construction.[80] This rule suggests that ambiguities in immigration statutes should be resolved in favor of the alien.[81] There would seem to be good language in Supreme Court decisions to support such a position.[82] The Court has often equated removal of aliens with the idea of "banishment" and "exile."[83] Such

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76. *Id.* In step-two, a reviewing court must determine if there has been an "explicit" delegation to the agency or an "implicit" one. *Id.* at 844.

77. *Id.* at 843-44. This would be an "explicit" delegation situation. *Id.*

78. *Id.* at 844. This would be an "implicit" delegation situation. *Id.*

79. *See, e.g.*, Taylor v. Progress Energy, Inc., 415 F.3d 364, 369, 373-75 (4th Cir. 2005) (applying *Chevron* step-two analysis to a regulation promulgated pursuant to the Family and Medical Leave Act); Wells Fargo Bank N.A. v. Boutris, 419 F.3d 949, 959 (9th Cir. 2005) (applying a *Chevron* step-two analysis to a provision of the Bank Act).

80. *See generally* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003) (proposing the revival and use of the immigration rule of lenity as being consistent with *Chevron* and good public policy).

81. *Id.* at 516.

82. Consider, for example, the Supreme Court's statement in a case involving potential deportation that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . . . It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment." Bonetti v. Rogers, 356 U.S. 691, 699 (1958) (quoting Bell v. United States, 349 U.S. 81, 83 (1955)). The *Bonetti Court* went on to say, "we cannot 'assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" *Bonetti*, 356 U.S. at 699 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (alteration in original)).

83. *See* Kungys v. United States, 485 U.S. 759, 791 (1988) (Stevens, J., concurring in the judgment) (likening the punishment of denaturalization for making false statements to "exile" and

emphasis would seem to support the notion that immigration statutes should be construed by courts in the light most favorable to the alien. If this were accepted, courts should invalidate any regulations which do not resolve ambiguities in such a light.

It is unclear, however, that such a technique would be consistent with the dictates of *Chevron*. If there is a step-one analysis taking place, then the immigration rule of lenity would seem to be an unnecessary consideration. If Congress has spoken to the issue, then the matter is ended, no matter how favorable or unfavorable the statute is to the alien. This is especially true in the field of immigration—more particularly exclusion—where the Supreme Court has declared Congress's power to be plenary.[84] In a step-two analysis, however, the rule may well prove very useful. If a reviewing court determines that there has been either an express or implied delegation of authority by Congress in the statute, it may still apply the immigration rule of lenity to determine if the agency action was either arbitrary and capricious or unreasonable. For example, in the case of § 245.1(c)(8), a reviewing court may choose to use a step-two analysis and apply the immigration rule of lenity in determining that the regulation is unreasonable as being too unfavorable to aliens in the face of ambiguity.[85] Such an analysis, however, surely would not be without its own controversy, as it is exactly this kind of use of canons of construction that the Supreme Court was trying to limit in its decision in *Chevron*.[86]

D. *Due Process Concerns—Are Aliens Owed Any Rights at All?*

A final important consideration when examining judicial review of agency decisions in immigration law is the level of constitutional concern which must be given to such matters. A plain reading of the Constitution would suggest that aliens should be owed the same due process rights under the Fifth[87] and Fourteenth[88] Amendments as citizens of the United States. This is because the Due Process Clause of each of these amendments declares that the federal and state governments may not

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"banishment"); *Fong Haw Tan*, 333 U.S. at 10 (calling deportation a drastic measure which is sometimes the equivalent of "banishment" or "exile").

84. *See* Boutillier v. INS, 387 U.S. 118, 123 (1967); Cha Chan Ping v. United States, 130 U.S. 581, 608 (1889) (declaring the power of excluding foreigners to be "an incident of sovereignty belonging to the government of the United States").

85. For such an example, see *infra* Part IV.C of this Note and the discussion of *Zheng v. Gonzales*, 422 F.3d 98 (3d Cir. 2005).

86. For a warning about how a resort to such canons of statutory construction might well constitute an "evisceration" of *Chevron*, see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment).

87. U.S. CONST. amend. V.

88. U.S. CONST. amend. XIV, § 1.

deprive *any person* of life, liberty, or property without due process of law.[89] The juxtaposition of this language with the reference to *any citizen* in the Privileges and Immunities Clause of the Fourteenth Amendment[90] would seem to bolster the point of view that the framers intended the Due Process Clause to apply to *anyone* physically within the jurisdiction of the United States.

Nevertheless, the Supreme Court has pointed out that aliens who are subject to exclusion from the country correspondingly may be subject to abridged due process rights.[91] The logic of this seems to be that aliens who have not yet been found to be admissible to the country are constructively considered to be still outside of its borders, and thus they are treated as if they were still at the border seeking entry.[92] Therefore, since Congress already has plenary powers over aliens, it can dictate whatever process it feels is due to such aliens.[93] Such logic would, of course, cover the entire category of arriving aliens and the subset of parolees with which § 245.1(c)(8) deals.

This discussion of due process rights for arriving aliens may logically seem to end when one considers the Supreme Court's pronouncements to date on the matter.[94] This inquiry, however, would seem to be altered in the special circumstances that applications for adjustment of status often entail. This is because, not only are the due process rights of the individual alien at stake, but if the adjustment application is based on a marriage or other familial relation to a United States citizen or LPR, the unquestioned due process rights of that individual are also at stake.[95] Since the Court

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89. U.S. CONST amend. V; U.S. CONST. amend. XIV, § 1. For a discussion of cases which have found process due to immigrants in various situations and an argument for their extension, see Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 486 (2005).

90. U.S. CONST. amend. XIV, § 1.

91. The Supreme Court could not have been clearer with its language in this regard when it said, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (citation omitted).

92. The Court elucidated this position three years after the *Knauff* case when it stated, "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.... But an alien on the threshold of initial *entry* stands on a different footing . . . ." Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (emphasis added) (citations omitted).

93. *See id.*

94. Such as, for example, the cited decisions in *Knauff* and *Shaughnessy*. *But see* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing the ability to invoke due process rights in the exclusion context where a former resident alien was seeking to reenter the United States).

95. For an excellent discussion of the due process rights which might attach in this circumstance, see David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1761 (1986). *But see* Shaneela Khan,

repeatedly has extolled the virtues of marriage as a bedrock in our society,[96] one would think that considerations of due process would have extra significance in cases of adjustment of status based on marriage.[97] With these established and theoretical sources of statutory interpretation available, a challenge to the validity of § 245.1(c)(8) might have seemed inevitable. In 2005, the Courts of Appeals began to hear a multitude of just such petitions.

IV. *SUCCAR V. ASHCROFT* ANALYZED: SECTION 245.1(C)(8), THE DEATH OF A BAD REGULATION?

A. *The Facts of the Case*

Wissam Succar is a native and citizen of Lebanon.[98] He first arrived in the United States in October 1998, and immediately began the process of applying for asylum.[99] He was then placed into removal proceedings and was paroled into the United States pending a full hearing on his asylum application.[100] His parole status had not changed through the date of his hearing.[101] Succar's application for asylum was denied by the immigration judge, and Succar appealed the decision to the Board of Immigration Appeals (BIA).[102] During the pendancy of his appeal, Succar married a United States citizen.[103] Succar's wife then filed an I-130 visa petition for Succar which was approved in April 2001.[104] Succar subsequently proceeded to file an I-485 petition for adjustment of status based on the approval of the I-130, and the case was remanded to the immigration judge

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Alienating our Nation's Legal Permanent Residents: An Analysis of Denmore v. Kim *and its Impact on America's Immigration System*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 113 (2004) (suggesting that the Supreme Court's decision to deny traditional notions of due process to LPRs in the context of bail hearings evinces a willingness to deny due process for LPRs).

96. This language can be seen in almost every facet of society including government and popular parlance. The Supreme Court made such an announcement when it stated that marriage created "the most important relation in life" and in civilized society. Maynard v. Hill, 125 U.S. 190, 205 (1888).

97. *See* Moyce, *supra* note 95, at 1771.

98. Succar v. Ashcroft, 394 F.3d 8, 11 (1st Cir. 2005).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* The BIA functions as the appellate court for decisions of the country's immigration judges. 8 C.F.R. § 1003.1(b) (West 2005). It is part of the Executive Office for Immigration Review (EOIR), *id.* § 1003.1(a)(1), which in turn is organized under the Department of Justice.

103. *Succar*, 394 F.3d at 11. The marriage took place in February, 2001, nearly two and a half years after his initial entry into the United States. *Id.*

104. *Id.*

for consideration of the petition.[105]

On remand, the Immigration and Naturalization Service (INS)[106] took the position that Succar was not eligible to adjust status because he was a paroled alien in removal proceedings, and thus was barred by 8 C.F.R. § 245.1(c)(8) from applying for this benefit.[107] The immigration judge found this argument to be persuasive and denied the adjustment application as a matter of law.[108] Succar timely appealed on the denial of the application, and the BIA affirmed the immigration judge's opinion in all respects.[109] Succar then appealed the decision to the First Circuit Court of Appeals.[110] He asserted that the regulation was invalid as being contrary to the clearly expressed intent of Congress, and that the Attorney General acted beyond the scope of his power in promulgating it.[111]

B. *Asserting Jurisdiction and Applying* Chevron *Step-One*

The Attorney General immediately challenged Succar's appeal on the grounds that the First Circuit lacked the necessary jurisdiction to hear the challenge to the regulation.[112] The Attorney General supported this position by positing that 8 U.S.C.A. § 1252(a)(2)(B) precludes judicial review of discretionary agency determinations on adjustment of status.[113] The First Circuit, however, rejected this argument and exercised review.[114]

The First Circuit found its jurisdictional base in *Succar* by determining that the issue in the case was a pure question of law, which by definition does not fall outside of Article III jurisdiction.[115] The court was quick to point out that this case presented a question not of discretion, but rather of statutory interpretation, which is always within the province of the federal courts.[116] As such, review of the regulation was proper because it was an exercise in whether the Attorney General had acted within the scope of his

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105. *Id.* Succar filed the motion with the BIA to remand the proceedings. *Id.*

106. The INS was reorganized in 2003 under the Department of Homeland Security, and its functions were transferred to the Bureau of Immigration and Customs Enforcement (ICE). *See* 6 U.S.C.A. § 542 (West 2006). For purposes of this Note, the service will be referred to as the INS.

107. *Succar*, 394 F.3d at 11.

108. *Id.* at 12. Specifically, the immigration judge stated that "I am confident that I don't have the authority to adjust status to someone who's an arriving alien." *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 21.

112. *Id.* at 19.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 19 n.15. *See also* Zadvydas v. Davis, 533 U.S. 678, 688 (2001) (exercising judicial review over a challenge to the extent of the Attorney General's post-removal detention powers, because his ability to act was "not a matter of discretion").

authority in promulgating § 245.1(c)(8), which the court described as "a classic issue for the court to decide."[117]

After the court had decided that an exercise of review was proper, it moved on to determining the validity of the regulation vis-à-vis that statute.[118] In order to do this, the court utilized the *Chevron* framework to analyze whether the regulation was a valid use of the Attorney General's power.[119] As such, the inquiry began with a determination of whether Congress had specifically addressed in the statute the issue of parolees' eligibility to adjust status.[120] This step-one analysis led the court to conclude that the statute was unambiguous on the issue of whether parolees should be eligible and that the clarity of the statute worked against the Attorney General's interpretation.[121] The court in *Succar* thus declined even to reach step-two of the *Chevron* analysis, as the clear congressional intent was discernable from the face of the statute.[122]

In reaching its decision, the *Succar* court relied heavily both on plain text analysis and legislative history to provide the justification for why it believed that Congress had spoken to the issue of parolees' eligibility. First, the court explained that the face of the enabling statute clearly states that adjustment of status is available to those aliens who have been "inspected and admitted or *paroled* into the United States."[123] This plain language clearly shows congressional intent that aliens who have been paroled should be eligible for adjustment. However, § 245.1(c)(8) completely eliminates a huge class of aliens who otherwise would be eligible to be considered for adjustment.[124] The court also pointed out that

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117. *Succar*, 394 F.3d at 19.

118. *Id.* at 20.

119. *Id.* at 22.

120. *Id.* The *Succar* court began its analysis here by relying on the seminal immigration case of *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1987) (quoting Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9 (1984)) (holding that the judiciary has final authority on issues of statutory construction and if a clear congressional intent is present, then that is the law which must be given effect). *Succar*, 394 F.3d at 22.

121. *Id.* at 24.

122. *Id.* at 35-36.

123. *Id.* at 24 (quoting 8 U.S.C.A. § 1255(a)) (emphasis added).

124. The Attorney General disputes this claim in *Succar* as well as in the subsequent Eighth Circuit case of *Mouelle v. Gonzales*, 416 F.3d 923, 930 n.9 (8th Cir. 2005), in which he argued that the number of paroled aliens placed in removal proceedings was not so great as to effectively eliminate this class. This claim seems statistically dubious, however, in light of other available figures relating to parole and adjustment of status. Given that the adjustment mechanism is so heavily used as a means of attaining legal permanent residence, it seems incongruous that only 1,957 paroled persons in fiscal year 1999 adjusted status out of a total 263,755 persons who were paroled that year. *See* DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, USE OF THE ATTORNEY GENERAL'S PAROLE AUTHORITY UNDER THE IMMIGRATION AND NATIONALITY ACT: FISCAL YEARS 1998-1999 (2003), http://uscis.gov/graphics/aboutus/

the enabling statute contains a long list of exceptions in which certain aliens who might otherwise be eligible for adjustment cannot be considered.[125] Thus, the text of the statute evinces a congressional plan which has been well thought out in terms of eligibility requirements, but which the regulation has all but totally eviscerated.

Second, the court used legislative history to demonstrate why it believed that Congress must have intended to reserve the power to define eligibility for adjustment unto itself, and not to confer it away to the Attorney General.[126] The main support for the court's position came from the reasons expressed by Congress for the original passage of the amendments to the adjustment provisions in 1960.[127] Congress evidently became concerned both with the needless trips out of the country (most typically to Canada) that aliens eligible to become LPRs had to undertake in order to obtain a visa and also the hardship which these trips placed on them and their families.[128] Congress was equally concerned about the number of private relief bills that were spawned because of the arcane process in place.[129] In order to mitigate these problems, Congress crafted its amendments to the adjustment provisions to streamline the process for eligible aliens.[130]

The court further supported this position through a recollection of the relatively high level of stability that the adjustment provisions have enjoyed in the INA since they were amended in 1960, even after the passage of the landmark IIRIRA.[131] The Attorney General made the point that one of the central purposes in the passage of IIRIRA was to make the process of removal of aliens more efficient and effective, and that § 245.1(c)(8) works toward achieving that goal.[132] The court responded, however, that the fact that the statutory eligibility of parolees to adjust status had not changed since 1960—not even after the passage of IIRIRA—was clear proof that Congress still intended for these aliens to be eligible for consideration.[133]

The Attorney General, however, did not end his defense of the regulation with a mere challenge to jurisdiction and reliance on traditional

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repsstudies/parolerpt9899.pdf.

125. *Succar*, 394 F.3d at 29 (referring to the 8 U.S.C.A. § 1255 list of adjustment exceptions).

126. *Id.* at 30-34.

127. *Id.* at 32-33.

128. *Id.* (citing S. Rep. No. 86-1651 (1960), *as reprinted in* 1960 U.S.C.C.A.N. 3124, 3136).

129. *Id.* at 33.

130. *See id.* at 33-34 (providing a more detailed analysis of the three main problems that Congress wished to address including hardship to aliens and their families).

131. *Id.* at 34-35.

132. *See* Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444, 452 (Jan. 3, 1997).

133. *Succar*, 394 F.3d at 35.

notions of deference to agency interpretation. Rather, he continued his argument by claiming that the regulation itself was nothing more than the manifestation of the discretion that the statute had granted him.[134] In other words, the choice not to consider an adjustment application from paroled aliens in removal proceedings was simply a quasi-preemptive exercise of discretion. The court rejected this argument on the grounds that, while the Attorney General is authorized to exercise his discretion in granting or denying adjustment applications, he is not authorized to rewrite the categories of eligibility for the benefit.[135] In making this point, the court distinguished the case of *Lopez v. Davis*,[136] in which the Supreme Court upheld the Bureau of Prisons' (BOP) use of discretion in categorically excluding a group of prisoners from a benefit as an exercise of discretion.[137] The *Succar* court felt that the statute at issue in *Lopez* did not give the agency any inherent guidance in distinguishing between groups of prisoners who should receive the benefit, and those who should not.[138] In 8 U.S.C.A. § 1255, however, Congress had indeed provided the Attorney General with a clear indication of which aliens would be inherently eligible for the benefit—namely, those who have been inspected and admitted, and those who have been paroled.[139] As such, the Attorney General was not free in his discretion to dictate out of hand which aliens would be excluded from even being considered for adjustment. Rather, the Attorney General is only free to exercise his discretion negatively against aliens after they have been given a fair chance to be heard on the merits of their claim *if they are statutorily eligible*.

The court's analysis in *Succar* is complex, but fundamentally sound. The court chose to use the full breadth of a *Chevron* step-one analysis to reach the conclusion that § 245.1(c)(8) not only is an overestimation of what the statutory term "discretion" implies in such a context, but also that it is contrary to a public policy that Congress had carefully crafted, considered, and reconsidered over a long period of time. Although the *Succar* court chose to effectuate the invalidation of § 245.1(c)(8) by

134. *See id.* at 26-30.

135. *Id.* at 29.

136. 531 U.S. 230 (2001).

137. *Id.* at 233. Specifically, the Court held that it was permissible for the Bureau of Prisons to categorically deny a class of prisoners who might be eligible for a sentencing reduction benefit under the enabling statute, because of the nature of their offense. *Id.* at 232-33.

138. *Succar*, 394 F.3d at 28-29. The enabling statute in *Lopez* read, "The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve." *Lopez*, 531 U.S. at 233. The Bureau of Prisons sought to categorically deny the benefit to any "prisoners whose current offense is a felony attended by 'the carrying, possession, or use of a firearm.'" *Id.* at 232-33 (citation omitted).

139. *See Succar*, 394 F.3d at 29.

utilizing a *Chevron* step-one analysis, subsequent cases have shown that the logic of a step-two analysis likewise can be used for the same purpose.

C. *An Alternate Method of Invalidation—Reaching* Chevron *Step-Two*

Shortly after *Succar* was decided, the Third Circuit heard *Zheng v. Gonzales*.[140] In *Zheng*, the court was called upon to consider a question very similar to that presented in *Succar*. Specifically, the court was asked to pass on the validity of § 245.1(c)(8),[141] in the case of a Chinese national who sought to adjust status and was denied any review by the Attorney General based on his classification as a paroled alien in removal proceedings.[142]

Zheng first arrived in the United States in or after 1990, and entered the country without inspection.[143] Zheng returned to China briefly in 1993, and was readmitted to the United States on a grant of advance parole.[144] He initially filed his application for adjustment of status in 1993 based on protections under the Chinese Student Protection Act.[145] The application was not ruled on until six years later in 1999 when the Attorney General denied it.[146] The INS then immediately initiated removal proceedings against Zheng, who attempted to renew his application for adjustment before an immigration judge at a hearing in 2001 for an asylum application filed by Zheng's attorney.[147] The attempted renewal was denied by the immigration judge, however, citing § 245.1(c)(8) (*citation altered*).[148]

Although the BIA affirmed the ruling of the immigration judge, the Third Circuit Court of Appeals reversed, and invalidated the regulation.[149] After a brief jurisdictional statement which adopted the logic of *Succar*,[150]

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140. 422 F.3d 98 (3d Cir. 2005).

141. The court in *Zheng* referred to the regulation by its alternate designation of § 1245.1(c)(8). This author has chosen to continue to refer to the regulation as § 245.1(c)(8) throughout for the sake of clarity, but this alteration will be noted parenthetically where necessary.

142. *Zheng*, 422 F.3d at 102-03.

143. *Id.* at 103.

144. *Id.* Advance parole is a process whereby aliens may be granted permission to travel abroad with the express understanding that they will be readmitted to the United States upon their return, and will thereby be in parole status. For an official definition of advance parole, see OFFICE OF IMMIGRATION STATISTICS, *supra* note 54, at 190.

145. *Zheng*, 422 F.3d at 103-04. The Chinese Student Protection Act of 1992 was an act to suspend deportation of Chinese Nationals present in the United States and grant permanent residency under certain conditions, and was considered to be a response to the Tiananmen Square incident. Pub. L. No. 404, 106 Stat. 1969 (1992).

146. *Zheng*, 422 F.3d at 104.

147. *Id.*

148. *Id.*

149. *Id.* at 124.

150. *Id.* at 111. Interestingly, the *Zheng* court stated that the government, presumably after the adverse ruling in *Succar*, no longer disputed the jurisdiction that the courts of appeals have to

the court moved on to a *Chevron* analysis of the regulation's validity.[151] Unlike the First Circuit, however, the Third Circuit found that a step-one analysis of § 245.1(c)(8) (*citation altered*) was inadequate to dispose of the regulation.[152] This is because the court considered the statute to be ambiguous enough to warrant a further exploration of the matter under step-two. In making this determination, the court noted that the logic of *Lopez v. Davis*[153] dictated that ambiguity in eligibility requirements under similar situations did not foreclose an agency from placing regulatory restrictions on such eligibility.[154]

In its step-two analysis, the court found that the regulation was still an invalid exercise of the Attorney General's discretion.[155] Although it did not specifically say so, the court appears to have approached the issue as an implicit grant of power to the Attorney General by the statute as opposed to an explicit one. This appears so since the language that the court uses is couched in terms of reasonableness of the regulation as opposed to an arbitrary and capricious review.[156] Such a standard would appear to contain a much higher level of inherent deference to the agency's decision making, but the court found nevertheless that the regulation was unreasonable in light of the clear intent of Congress to structure carefully the statutory eligibility scheme.[157] This holding further exposes § 245.1(c)(8) for the poorly crafted regulation that it is. The court's adoption and further elaboration of the *Succar* findings as they related to congressional history and intent highlight the overreaching quality of the regulation and deservingly brand it as decidedly unreasonable.

There is an initial temptation to question whether there is really any legitimacy to the two-step *Chevron* analysis at all after a comparison of *Succar* and *Zheng*. Afterall, both courts ultimately invalidated § 245.1(c)(8), and both appeared to rely on legislative intent in crafting the eligibility requirements for adjustment of status as their primary justification for the invalidation, despite the fact that they used different steps in the analysis.[158] Such a reading, however, would overlook an important distinction. The First Circuit in *Succar* held the regulation

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review the regulation. *Id.*

151. *Id.* at 112-13.

152. *Id.* at 116.

153. 531 U.S. 230 (2001).

154. *Zheng*, 422 F.3d at 116 n.14.

155. *Id.* at 120.

156. *See id.* at 116.

157. *Id.* at 118-20.

158. *Compare* Succar v. Ashcroft, 394 F.3d 8, 24 (1st Cir. 2005) (finding against the regulation under a step-one analysis because Congress had spoken to the issue), *with Zheng*, 422 F.3d at 116, 119-20 (finding against the regulation under a step-two analysis, because ambiguity in the statute required moving past step-one).

invalid as plainly contrary to the text of 8 U.S.C.A. § 1255(a), and in so doing, rejected the logic of *Lopez*. Presumably, this would mean that the Attorney General could not subsequently craft *any* regulation altering eligibility requirements for paroled aliens which would satisfy that court. By contrast, the Third Circuit in *Zheng* held that the regulation was invalid as merely being unreasonable in light of 8 U.S.C.A. § 1255(a), and in so doing, upheld the logic of *Lopez*. Presumably, this in turn would mean that the Attorney General might yet craft a regulation affecting eligibility for paroled aliens as long as it could be found to be reasonable.[159] Thus, although the *Zheng* holding appears to move § 245.1(c)(8) closer to the regulatory graveyard, it may not signal an end to pre-emptive disqualification of at least some paroled aliens for purposes of adjusting status.

D. *A Continuation of Validity?*

The *Succar* reasoning has not met with universal acceptance in the short time since the case was decided. In the case of *Mouelle v. Gonzales*,[160] the Eighth Circuit Court of Appeals heard a challenge to § 245.1(c)(8) and rejected the logic of *Succar*.[161] In so doing, the Eighth Circuit has provided an alternative course for other circuits to follow in reviewing the regulation.[162]

In *Mouelle*, Petitioner was a native and citizen of the Republic of Congo, who first entered the United States as a student in 1989.[163] He became a paroled alien after a brief visit to Canada and a subsequent return to the United States in 1997.[164] In 1998, removal proceedings were commenced against him.[165] In 2003, Petitioner and his wife filed

159. It is difficult to know what the form of such a regulation might look like, but certainly not impossible to conceive. Given the fact that there are multiple categories of paroled aliens, and aliens who are paroled on many different grounds or justifications, it is possible to picture a regulation which more narrowly restricts eligibility and would no longer offend a reasonableness inquiry such as that which the Third Circuit applied.

160. 416 F.3d 923 (8th Cir. 2005).

161. *Id.* at 927-28.

162. The Fifth Circuit Court of Appeals also has heard a case in which § 245.1(c)(8) was challenged, but it did not reach the question of the provision's validity because the court considered the alien's argument on this issue to be waived because it was untimely brought to the court's attention. Diarra v. Gonzales, No. 04-60097, 137 F. App'x 627, 631-32 (5th Cir. 2005). The Eleventh Circuit dismissed a similar case without considering the validity of § 245.1(c)(8) because of an untimely challenge. Shah v. U.S. Att'y Gen., No. 05-10587, 151 F. App'x 748, 751 6-7 (11th Cir. 2005). Consequently the question of validity presumably is still an open one in these circuits.

163. *Mouelle*, 416 F.3d at 924.

164. *Id.* at 925.

165. *Id.*

applications to adjust status based on her employment.[166] The BIA denied their petition to have their applications considered before an immigration judge, however, because it found them ineligible as being "arriving aliens" in removal proceedings.[167]

On appeal, the Mouelles challenged the validity of § 245.1(c)(8) based on the logic of *Succar*.[168] The Eighth Circuit, however, stated its disagreement with that decision.[169] Significantly, the majority immediately noted in its discussion of the regulation's validity that it did not believe that a *Chevron* step-one analysis was appropriate in such a case.[170] It centered its support for this argument on the discretionary nature of the statute itself.[171] Specifically, the court believed that the discretion granted to the Attorney General by 8 U.S.C.A. § 1255(a) represented a firm expression of congressional intent to grant wide latitude, not only in processing adjustment claims, but also in defining eligibility for them.[172]

Although the *Mouelle* court engaged in very little discussion of *Chevron*, and specifically stated that it believed the case to be inappropriately evaluated under step-one, the terms that the majority used in its opinion were right in line with such analysis. The court's focus on the requirements for eligibility were consistent with either a *Chevron* step-one or step-two analysis. Since the court believed that eligibility could be defined as a matter of discretion, it clearly believed that congressional intent dictates such a result.[173] Furthermore, the court goes on to use the language of reasonableness when describing the classification in relation to the expressed congressional desire to expedite removal of arriving aliens.[174] Such language is a classic sign of a gap-filling step-two analysis.[175] Unlike the *Zheng* court, however, the *Mouelle* majority found

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166. *Id.* at 925-26.

167. *Id.*

168. *Id.* at 927-28. Like the later *Zheng* court, the *Mouelle* court referred to 8 C.F.R. § 1245.1(c)(8), but this note will continue to refer to it as 8 C.F.R. § 245.1(c)(8) for the sake of continuity.

169. *Id.* at 928.

170. *Id.*

171. *Id.*

172. *Id.* at 928-29.

173. *See id.* at 929. In reaching this conclusion, the court—much like the Third Circuit in the later *Zheng* case—cited agreement with the *Lopez* decision in such contexts. *Id.* The court used the logic of *Lopez* to ask, "[W]hy should the Attorney General be forced to exercise his discretion through rules that speak only to the ultimate relief rather than eligibility? . . . [I]t makes little sense to invalidate this regulation simply because it speaks in terms of eligibility." *Id.* (citation omitted).

174. *Id.* at 930.

175. As a conclusion to its analysis, the court referred to the reformation goals of IIRIRA and the stated intent of the Attorney General to promulgate regulations which would effectuate the congressional desire to shorten removal proceedings. *Id.* Interestingly, however, the court did not at all address the point made in *Succar* that continuity of baseline eligibility for adjustment in the

the Attorney General's interpretation of the statute to be perfectly reasonable, and thus upheld the regulation.[176]

The decision in *Mouelle* does indeed represent a defense for § 245.1(c)(8), and could provide the Supreme Court, if it chose to hear such a case, with a possible blueprint for its continued validity. A focus on reasonableness always provides an avenue for legitimate debate. In the wider context of immigration law, however, the decision does not make sense. The face of 8 U.S.C.A. § 1255(a) appears clear with regard to Congress's intent for paroled aliens to be eligible, and any interpretation to the contrary would seem to contravene notions of congressional intent, public policy, and even due process. By placing these concerns in a real-world context, the final substantive section of this Note demonstrates why traditional canons of statutory construction—in this case the immigration rule of lenity—still should be relied upon to settle close questions such as those presented by the validity of harsh regulations like § 245.1(c)(8).

V. THE FIGURES AND THE FACES BEHIND THEM—TOWARD UNDERSTANDING THE IMPACT

A. *Empirical Data*

It would be easy to synthasize the cases which have invalidated § 245.1(c)(8) as simply holding that the regulation is contrary to congressional intent, and therefore an unauthorized exercise of agency interpretation. This alone would be enough to recommend to those federal circuits that have not yet considered cases dealing with the validity of § 245.1(c)(8) to strike down the regulation. A purely academic analysis may end just there. It would be a mistake, however, to overlook the human impact of regulations such as this—which, of course, is often the very impetus for good law and policy, particularly in the area of immigration. Such a component deserves at least a brief overview, to create a kind of 'z-axis' of depth to these issues, for future courts to examine when considering such cases.

The sheer size of immigration numbers in the United States is impressive. Between the years of 1991 and 2000, over 9,000,000 people immigrated to the United States.[177] Significantly, although the numbers have fluctuated from year to year since the passage of the INA, total immigration has not appreciably dropped off since the passage of the

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INA, even in the face of such sweeping reforms as IIRIRA, seems to be strong evidence of congressional intent for such eligibility to remain open. *See* Succar v. Ashcroft, 394 F.3d 8, 24 (1st Cir. 2005).

176. The panel in *Mouelle* split with Circuit Judge Bye, filing a lone short dissent in favor of the logic of *Succar*. *Id.* at 931.

177. Office of Immigration Statistics, *supra* note 54, at 11.

IIRIRA in 1996.[178] Additionally, between the years of 2000 and 2003 there were over 1,000,000 persons paroled into the United States.[179] In 2001 and 2002, over 60% of all persons who immigrated to the United States did so through the adjustment of status mechanism.[180]

Looking at such figures is not only helpful in understanding the size of the immigrant class in the United States, but also in examining its qualities in order to better understand the sometimes draconian effects that § 245.1(c)(8) can have. In 2004, almost 66% of all persons who became LPRs of the United States did so on a family-sponsored basis.[181] Of those who adjusted on this basis, 60.1% were married.[182] Moreover, one study published in 1999 by the Urban Institute found that 85% of immigrant families (those families with at least one non-citizen parent) in the United States are "mixed-status" families—meaning that they are a mix between United States citizens and aliens.[183] Such figures indicate strong family ties between the United States and aliens present in this country. Breaking apart such families by disallowing parolees to adjust can have serious consequences for the long term stability of these unions. Consider an immigrant in Succar's position: If such an immigrant's adjustment claim is not granted, for example, he likely would be removed from the United States and would be barred from re-entry for a period of ten years.[184]

These figures remind us why dialogue about immigration in the United States is of such central importance. Immigration is a vital part of the

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178. *See id.* (providing statistics for total immigration from 1820 to 2003).

179. *See id.* at 81.

180. *Id.* at 7. For a snapshot of delays in the front end processing of adjustment of status claims, including national statistics, see Victor Manuel Ramos, *Orlando Delays Keep Immigrants in Limbo*, ORLANDO SENTINEL, Oct. 23, 2005, at A1. For an editorial view of how immigration-case backlogs harm the United States' interest in family unity and economic productivity, see AMERICAN IMMIGRATION LAW FOUNDATION, IMMIGRATION POLICY BRIEF, THE ENDLESS WAIT: WILL RESOURCES MATCH THE RESOLVE TO REDUCE THE IMMIGRATION CASE BACKLOG? (2004), http://www.ailf.org/ipc/endlesswaitprint.asp.

181. *See* OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., CHARACTERISTICS OF FAMILY SPONSORED LEGAL PERMANENT RESIDENTS: 2004 1-2 (2005), http://uscis.gov/graphics/shared/statistics/publications/FSFamSponsoredLPR2004.pdf. This number was calculated using the numbers in Table 1 where 620,429 of the total 946,142 LPRs were family sponsored. *Id.* at 2.

182. *Id.*

183. MICHAEL E. FIX & WENDY ZIMMERMANN, URBAN INST., ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 2 (1999), http://www.urban.org/UploadedPDF/409100.pdf.

184. *See* Succar v. Ashcroft, 394 F.3d 8, 18-19 & n.14 (1st Cir. 2005) (discussing Succar's likely ineligibility to return to the United States for ten years due to his illegal presence in the country exceeding one year). At a minimum, since parolees are statutorily ineligible for voluntary departure due to 8 U.S.C.A. § 1229(c)(a)(4) (West 2006), most parolees will find themselves barred from return for five years due to an involuntary removal in the case of an adverse judgment, where no waiver is granted due to 8 U.S.C.A. § 1182(a)(9)(A)(i), (iii) (West 2006). *Id.* at 18-19.

United States economy as well as its social policy, which is so centrally based on family maintenance and stability.[185] Regulations such as § 245.1(c)(8) not only make legitimate immigration much more difficult for a class of potentially deserving aliens, but also disrupt their family structures and their ability to earn money, pay taxes, and support the economy at large. There undoubtedly are those who would balk at such concerns in the cases of aliens who arrive illegally, are immediately placed into parole, and then are subject to a speedy removal proceeding. Such a position would likely find great support in both the academic community and the general populace. Unfortunately, the wheels of immigrant justice do not turn with such mercurial efficiency.

B. *The Long Wait for Resolution*

Perhaps the most significant systemic problem facing the immigration adjudication system in the United States today is the incredible caseloads which inundate the administrative agencies responsible for them. Between fiscal years 2000 and 2004, immigration courts in the United States received over 1,400,000 cases.[186] At the end of fiscal year 2004, the BIA alone had 33,544 cases pending.[187]

These heavy caseloads are certainly not unfamiliar to other areas of the justice system.[188] What makes them so significant in the immigration context, however, is that the ultimate resolution of a case could well mean permanent removal from the country. For a person who has spent an appreciable amount of time—in some cases years—building a life in the United States, this sentence may be even worse than death.[189]

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185. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888) (extolling the virtues of the family to American society).

186. *See* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEP'T OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK B2 (2005), http://www.usdoj.gov/eoir/statspub/fy04syb.pdf. This number was calculated by adding together the receipts of all immigration court matters from FY 2000 through FY 2004. *See id.* These statistics include proceedings such as deportation, exclusion, removal, credible fear, reasonable fear, claimed status, asylum only, rescission, continued detention review, NACARA, and withholding only, as well as bond determinations, and motions. *Id.* at B1. These cases fall annually to just over 200 immigration judges which are spread throughout the country. *See* Executive Office for Immigration Review, Dep't of Justice, Office of the Chief Immigration Judge website, http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Feb. 12, 2006) (breaking down the immigration courts and judges by state and city).

187. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 186, at U2. The number of judges on the BIA was also substantially reduced in 2002 from 21 to 11. *Id.* at U1.

188. For a snapshot of increasing caseloads since 1995 in the federal district and appellate courts, as well as the bankruptcy courts, see OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 2004 JUDICIAL CASELOAD INDICATORS 6 (2004), http://www.uscourts.gov/caseload2004/front/judbus03.pdf.

189. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (discussing the negative consequences of deportation).

Take for example a male alien aged thirty who comes to the United States from Columbia.[190] Assume that he has no legal basis for being in the United States, but wishes to claim asylum.[191] The reviewing officer at the port of entry may determine that his claim of fear of persecution merits a further hearing, but that the alien is not clearly admissible.[192] If the reviewing officer determines that the alien is not a threat, he will likely parole the alien into the country pending a removal proceeding and hearing on his asylum claim. Assuming that the alien's claim of asylum takes four years to resolve—from trial before the immigration judge to appeal before the BIA[193]—he will be thirty-four years old before any resolution can be reached on his case. During that time, assume that he has found stable employment, paid taxes, attended church and community activities, married a United States citizen, and had two children. Section 245.1(c)(8) would operate to deny this alien from adjustment based on his marriage (or his employment), simply because he had been paroled and placed in removal proceedings four years ago. If he is ultimately denied his claim of asylum, he may be removed and potentially prohibited from returning to the United States for ten years.[194] This may place his family in the difficult position of being separated from one parent, and having to raise children on a single-parent income. It may also place the alien in the perhaps impossible situation of having to remake a life in a country where he may no longer have any family or community ties, prospective employment, and in which he potentially left in fear for his life in the first place. As mentioned before, such a result may seem palatable in cases of speedy removal of undeserving aliens; but when the process takes four years to complete, the fundamental fairness of asking aliens to put their lives completely on hold seems very questionable indeed.

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190. Columbia is a good example because it is a major point of departure to the United States, comprising roughly 3.6% of all cases filed in fiscal year 2004. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 186 at E1.

191. Asylum is the mechanism whereby an alien can be granted permission to remain in the United States if he can demonstrate a credible fear of returning to his country of origin based on one of the following five statutorily protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1158(b)(1)(B) (2000).

192. Such a case would be a typical example of how an alien might end up on parole while awaiting a hearing on his claim for asylum. This was the case in *Succar*. Succar v. Ashcroft, 394 F.3d 8, 11 (1st Cir. 2005).

193. This timeframe was arbitrarily selected, but is certainly not unreasonable. Consider that in the three principle cases discussed in this Note the initial dates of entry for the immigrants were 1998, 1990 (approx.), and 1989 respectively. Each of these cases was still in adjudication in 2005. *Id.*; Zheng v. Gonzales, 422 F.3d 98, 103 (3d Cir. 2005); Mouelle v. Gonzales, 416 F.3d 923, 924 (8th Cir. 2005).

194. *See supra* note 26 and accompanying text (sketching the statutory scheme that places many arriving aliens who are removed in a position of being unable to return to the United States legitimately for many years).

VI. CONCLUSION

Any conclusion to such a discussion should necessarily begin with a reiteration of Congress's stated intent in passing the INA in 1952. Its passage was intended to vindicate the three central policies of (1) reunifying families, (2) protecting the domestic labor force, and (3) promoting the immigration of persons with useful skills.[195] These goals have guided not only the broader immigration framework in this country at least since 1952, but also the continuation and refinement of the adjustment of status mechanism. Adjustment of status features centrally in the first and third goals of the INA framework. Streamlined facilitation of adjustment of status allows for those aliens who have a statutory right to become legal permanent residents to do so in a fashion that is the least disruptive to them and their families, and is the most expeditious to the United States labor force. Congress's clear intent in passing and substantially maintaining 8 U.S.C.A. § 1255(a) was to include paroled aliens in the class of adjustment eligible aliens to fulfill its stated public policy goals.

Section 245.1(c)(8) not only obstructs the fundamental public policy goals of the INA, but it also plays havoc with traditional notions of due process and fairness. Although it is conceded that arriving aliens do not have the same due process rights as citizens or other immigrants,[196] it also is true that immigration proceedings often involve not just the alien in question, but also his family.[197] If an immigrant's family members are United States citizens or legal permanent residents, then the question of the process which is due to such aliens becomes much trickier.[198] Section 245.1(c)(8) results in a denial of process which would otherwise be due to an alien who has specifically been enumerated by Congress as statutorily eligible for adjustment of status.

Finally, even if arguments of public policy and constitutional mandate are not considered persuasive, the regulation must fail on simple precepts of administrative law and statutory construction. Although judicial review in immigration is quite limited,[199] this does not mean that reviewing courts cannot examine pure questions of law and statutory interpretation.[200] In a

195. *See* Curran, *supra* note 30, at 97 (citation omitted).

196. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

197. *See generally* Moyce, *supra* note 95 (discussing what process should be due not only to aliens, but also to their petitioning spouses in adjustment proceedings).

198. *See id.*

199. *See* 8 U.S.C.A. § 1252(a)(2)(B) (West 2006).

200. *See* INS v. St. Cyr, 533 U.S. 289, 298, 314 n.38 (2001) (calling the question of whether the Attorney General had the power to exclude an alien from eligibility for relief from deportation

typical case, an agency is granted deference to its decision making if it is within the clear mandate of the enabling statute or is otherwise reasonable.[201] The courts that have reviewed § 245.1(c)(8), however, have shown on either *Chevron* step-one or step-two analyses that the regulation is an impermissible usurpation of Congress's power to define eligibility for adjustment of status.[202]

Admittedly, the question will be considered close by many observers. In such situations, however, the most prudent course of action should be to follow the immigration rule of lenity and interpret the statute in the light most favorable to the paroled alien. If Congress's authority to control immigration is to appear legitimate to the citizens of the United States, its immigrants and aliens, and indeed, to the world at large, it must not allow the almost wholly unaccountable fourth branch of government[203] to usurp all power to define eligibility for a crucial benefit such as adjustment of status. To do so would be a betrayal, not only of the Constitutional tripartite system of government, but also of those famous words which appear at the base of Lady Liberty[204]—assuring for all the continuing role of the United States as the fairest country in the world to the worthy immigrant.

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in the criminal context a pure question of law); INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (calling the divining of congressional intent with respect to standards of judicial determination in asylum cases to be "a pure question of statutory construction for the courts to decide").

201. *See* Chevron v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984).

202. *Compare* Succar v. Ashcroft, 394 F.3d 8, 35-36 (1st Cir. 2005) (utilizing step-one analysis to invalidate), *and* Bona v. Gonzales, 425 F.3d 663, 668-72 (9th Cir. 2005) (same), *with* Zheng v. Gonzales, 422 F.3d 98, 116-20 (3d Cir. 2005) (utilizing step-two analysis to invalidate).

203. This language has been used to describe agencies in court opinions and scholarly writings for many years. *See* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578, 582 (1984).

204. *See* Lazarus, *supra* note 29, at 41.