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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Amicus Invitation No. 16-09-19	Case No.: Redacted
In Removal Proceedings	

REQUEST TO APPEAR AS AMICUS CURIAE AND SUPPLEMENTAL BRIEF OF THE FEDERATION FOR AMERICAN IMMIGRATION REFORM

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I. INTEREST OF AMICUS CURIAE

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on September 9, 2016, for supplemental briefing in this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, stop illegal immigration, and promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996) (citing Timothy J. Cooney, Esquire, Washington, D.C., amicus curiae for FAIR and noting "The Board acknowledges with appreciation the brief submitted by amicus curiae.").

II. ISSUES PRESENTED

The *amicus* has provided supplemental briefing on the following issues for the Board's consideration in the instant case:

- Whether a "wave through" entry, like that at issue in *Matter of Quilantan*, 25 I. & N. Dec. 285 (B.I.A 2010), constitutes an admission in "any status" for the purposes of the 7 year continuous residence requirement under 8 U.S.C. § 1229b(a)(2); INA § 240A(a)(2).

III. SUMMARY OF THE ARGUMENT

A "wave through" cannot function as an admission in any status and therefore, cancellation of removal under Immigration and Nationality Act (INA) § 240A(a)(2) is inapplicable. First, an admission requires lawful entry and inspection by an immigration official,

both of which can only be fulfilled by substantive compliance with the language of the admission statute. Substantive compliance with the statute is supported by the legislative history of the admission doctrine as well as INA § 240A. Because substantive compliance with the admission definition is required, an alien cannot be "waved through" and be considered admitted.

Second, an alien can be eligible for relief only if admitted into a lawful immigration status. Otherwise, § 240A(a) would conflict with other sections of the INA as well as the primary objective of keeping illegal aliens out of the United States.

Finally, requiring substantive compliance does not nullify the waivers found in INA §§ 212(h) and 237(a)(1)(H). Section 237(a) and (a)(1)(H) survive using the doctrine of *nunc pro tunc* to allow retroactive admission. Additionally, if the waiver in § 212(h) were read to include misrepresentation, it would render § 212(i) completely superfluous. Therefore, the Board should find that an alien "waved through" at the border is not admitted in any status and therefore, cannot apply for cancellation of removal relief under INA § 240A(a)(2).

IV. ARGUMENT

The INA allows for cancellation of removal for a limited group of aliens. Under 8 U.S.C. § 1229b(a)(2) (INA § 240A(a)(2)), "an alien who is inadmissible or deportable from the United States [may be eligible for cancellation of removal] if the alien . . . has (1) resided in the United States continuously for 7 years; (2) after having been admitted; (3) in any status." The only element of cancellation of removal that has been otherwise defined by the INA is the term "admitted" which is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (INA § 101(a)(13)(A)). From these two definitions, the Board must determine if a "wave through"

fulfills the last two elements of § 1229b(a)(2) (INA § 240A(a)(2)), which require that the alien was admitted in any status.

The Board has previously considered a "wave through" admission when determining if it satisfies admission for adjustment of status. *Matter of Quilantan*, 25 I & N Dec. 285 (B.I.A. 2010). The Board found that the alien who was "waved through" at the border without being questioned by an immigration officer is admitted, for adjustment of status purposes because admission only requires procedural regularity, not substantive compliance. 25 I. & N. Dec. at 290. After reviewing the legislative history of the term "admitted" and determining that it requires only procedural regularity rather than substantive compliance, the Board then examined how the term "admission" interacts with two waiver provisions, the § 237(a)(1)(H)[1] and § 212(h)[2] waiver. Following *Matter of Quilantan*, the Fifth Circuit has determined that a "wave through" results in being "admitted in any status" under § 240A(a)(2). *See Tula Rubio v. Lynch*, 787 F.3d 288. The Fifth Circuit focused not on admission and procedural regularity, but on the "any status" language of INA § 240A(a)(2). *Id.* at 292-93. The Fifth Circuit found that any status includes when an alien is present in the country illegally. *Id.*

Amicus FAIR respectfully contends, as discussed below, that a "wave through" at the border cannot fulfill the admission and status requirements in § 1229b(a)(2) (INA § 240A(a)(2)) because a "wave through" does not satisfy the elements of an admission under INA §

[1] "*Waiver authorized for certain misrepresentations.* – The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission . . . whether or not innocent, . . . may be waived . . . ." 8 U.S.C. §1227(a)(1)(H) (INA § 237(a)(1)(H)).

[2] Provides a waiver to certain "classes of aliens considered ineligible for visas or admission." The relevant text provides:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings . . . ."

8 U.S.C. 1182(h) (INA § 212(h)).

101(a)(13)(A) and an alien "waved through" does not thereby attain any type of status contemplated under the INA. The Board should find that procedural regularity will not suffice as a legal benchmark for admitting aliens into the United States, when applied to cancellation of removal for aliens admitted in any status. Second, the cancellation of removal statute does not recognize unlawful presence in the United States as a status. Finally, the waivers found in section 212(h) and 237(a)(1)(H) can still be used by applying the *nunc pro tunc* doctrine to remedy incomplete admissions due to a mistake by the immigration official.

A. The Definition of Admission Requires Substantive Compliance Rather Than Merely Procedural Regularity.

To understand the legislative history of cancellation of removal under § 240A(a)(2), which requires an alien to reside in the United States for 7 years after being admitted, the Board must first understand the INA's statutory shift from "entry" to "admission." The law of admission and removal was fundamentally changed in 1996 by the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat 3009 (IIRIRA).

The most significant IIRIRA reform to the body of immigration law governing the lawful entry and presence of aliens into the United States was the replacement of physical entry as the threshold criteria for lawful presence with "admission."[3] Before IIRIRA, entry was statutorily defined as the "coming of an alien into the United States, from a foreign port or place or from an outlying possession." *Matter of Agour,* 26 I. & N. Dec. 566, 571 (B.I.A. 2015) (citation

[3] Previously under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) § 414 and § 422 (1996), an alien "found" in the United States but not inspected and admitted was subject to examination and summary exclusion (that is, expedited removal) proceedings, and lost eligibility for Suspension of Deportation. IIRIRA repealed AEDPA § 414 and § 422. IIRIRA § 301 then replaced the definition of entry in INA § 101 with the new definition of admission, § 101(a)(13), that treats persons present in the United States without authorization as not admitted.

omitted). Post-IIRIRA, it is longer sufficient for an alien to merely physically enter the United States; the alien must now be admitted by making a lawful entry after inspection.

Today, admission is still the threshold requirement for lawful immigration, both temporary and permanent, under most INA provisions. Congress has defined the term admission as "the lawful entry of the alien into the United States after being inspected and authorized by an immigration officer." INA § 101(a)(13)(A). This definition is comprised of three statutory elements that *must* be fulfilled in order for an alien to be "admitted" to the United States: (1) lawful entry into the United States; (2) inspection; and (3) authorization by an immigration officer. However, the BIA's interpretation of admission as applied in *Matter of Quilantan* has not complied with the first two elements of the admission definition. Therefore, the Board should not extend *Matter of Quilantan* to cancellation of removal under § 240A(a)(2), and should require substantive compliance with the definition of admission to be eligible.

1. A "wave through" does not result in a lawful entry into the United States.

Requiring only procedural regularity rather than substantive compliance with the language of the admission definition sacrifices the means of analysis to get the desired result. Allowing a "wave through" to imitate a "lawful entry" produces a definition of admission that is not consistent with itself and cannot be applied consistently. It would require that some status categories undergo a substantive review to allow admission while other status categories would only require procedural regularity with the elements of admission. Depending upon the status, admission may or may not be conferred upon an alien. This approach has created inconsistent and confusing results which are difficult to apply to cases *ex ante*.

For example, entry under the Family Unit Program (FUP) does not result in an admission because the alien does not physically enter the United States. *Matter of Reza-Murillo*, 25 I. & N.

Dec. 296, 297 (B.I.A. 2010) (finding that admission requires actual entry into the United States). Asylum status may or may not confer admission depending upon the process by which the alien was granted asylum. *Compare Matter of V-X-*, 26 I. & N. Dec. 147 (B.I.A. 2013) (adjusting to asylee status from parolee status was not an admission) *with Matter of D-K-*, 25 I. & N. Dec. 761, 769 (B.I.A. 2012) ("[A]n alien admitted to the United States as a refugee has been 'admitted' for purposes of section 101(a)(13)(A) of the Act."). Finally, while adjustment of status to an asylee will not confer admission, adjustment to legal permanent resident status does. *See Matter of Agour*, 26 I. & N. Dec. at 567-69. Congress intentionally enacted a single unitary definition of admission. *See* INA § 101(a)(13)(b); IIRIRA, Pub. L. No. 104-208; Sept. 30, 1996, 110 Stat 3009 (1996). Because the definition of "admission" has not been applied in the unitary manner intended by Congress, the Board now must contend with seemingly inconsistent results in practice.

Not only has the critical unitary function of admission been conflated, but the Board has hesitated even to acknowledge a uniform definition for the term "lawful." The term "lawful" has been assigned different meanings depending upon the context. The Board has required substantive compliance when an alien is "lawfully admitted for permanent residence" because the term demands it. *In re Koloamatangi*, 23 I. & N. Dec. 548, 550 (B.I.A. 2003) (explaining the statutory construction of INA § 101(a)(20) and that the use of the word "lawfully" in § 101(a)(20) requires substantive compliance with the elements of admission). "'Lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity." *Id.* "[T]he term 'lawful,' in relation to defining 'admitted,' goes further than to merely denote compliance with form or technical requirements and refers to actual content. *In re Ayala-Arevalo*, 22 I. & N. Dec. 396, 404 (B.I.A. 1998) (Rosenberg, dissenting) (citation omitted).

Conversely, *Matter of Quilantan* attempted to distinguish the use of "lawful" for "lawfully admitted for permanent residence" from its use in the admission definition. 25 I. & N. Dec. at 290 n.3.

As a consequence, not only is the core definition of "admission" not uniformly applied, but the term "lawful" has been given different definitions based upon context. Instead of providing clarity to the elements of the admission definition, the case law muddies the water by requiring adherence to the substantive requirements in some cases, but only procedural compliance in others. The result is arbitrary exceptions where none exist in the statutory text or legislative history. "As a rule a single statutory term should be interpreted consistently." *Matter of Alyazji*, 25 I. & N. Dec. 397, 404 (B.I.A. 2011). Overall, the lack of uniformity in the term "admission" leaves parties confused as to when and how an alien has been lawfully admitted into the United States. Requiring substantive compliance for admission to the United States would produce important consistency as to what must be accomplished to be admitted, and support the plain language meaning of the statute.

The term "lawful" or "lawfully" has fallen victim to the same fate as "admission," with two different meanings in use depending upon context. The Board's duality in the use of "lawful" creates uncertainty as to how it should be applied during the admission process. As a result, in *Matter of Quilatan*, the Board ignored any substantive requirements that entry into the United States must be lawful to be an admission. Lawful entry requires that the entry be "permitted or recognized by law." Black's Law Dictionary (10th ed. 2014). Without a recognized immigration status, entry into the country cannot be lawful even if the alien was waved through. A "wave through" admission cannot confirm that an entry into the United States is lawful. Allowing a "wave through" to suffice as a lawful entry ignores that an entry into the

United States must be lawful, and in effect impermissible reverts Department of Homeland Security (DHS) practice to the pre-IIRIRA standard of entry rather than admission. Without requiring lawful entry, entry without a proper immigration status becomes acceptable. This reasoning is the only way an alien, with no immigration status, could come into the United States and be considered by the agency to be admitted at the time of entry.

2. Waiving an alien through at a port of entry does not constitute an inspection.

An alien who enters the country by being "waved through" has not been inspected as required in INA § 101(a)(13)(A). IIRIRA imposed on both DHS and all aliens a nondiscretionary duty to ensure the alien appear in person before an immigration officer, who *must* conduct an inspection and find the alien to be "clearly and beyond a doubt entitled to be admitted." *Clark v. Martinez*, 543 U.S. 371, 373 (2005). Comparison with the pre-IIRIRA statute shows that this language creates a substantive requirement that an actual inspection must be conducted to fulfill the admission definition. Prior to 1996, the INA required inspection only for "aliens arriving at ports . . . at the discretion of the Attorney General." 8 U.S.C. § 1225(a) (1995). In 1996, Congress amended the INA to mandate that DHS inspect *every* alien applicant for admission to ensure their eligibility for admission to the United States: "All aliens . . . who are applicants for admission . . . *shall be inspected* by an immigration officer." INA § 235(a)(3) (added by IIRIRA § 302). Today, neither DHS nor the Department of Justice (DOJ) possess the legal authority to waive or decline to comply with this congressional mandate. *Clark*, 543 U.S. at 373 ("An alien arriving in the United States *must* be inspected by an immigration official[.]") (emphasis added). The inspection process requires:

> Individuals seeking entry into the United States are inspected at Ports of Entry (POEs) by CBP officers who determine their admissibility. The inspection process includes all work performed in connection with the entry of aliens and

> United States citizens into the United States, including preinspection performed by the Immigration Inspectors outside the United States.[4]

In *Matter of Quilantan*, the Board determined that inspection occurs even where no information is volunteered by the alien and no questions are asked by an immigration officer. 25 I. & N. Dec. at 293. But procedural regularity and a "wave through" do not without more comply with the statute, and cannot be the appropriate standard for admitting aliens into the United States.

Even if the Board were to determine that only procedural regularity was required, a "wave through" does not comply with the procedures put into place by Customs and Border Protection (CBP). The statutory language of the INA *requires* a substantive inspection. *See* INA § 235(a)(3). By using the word "shall" in INA § 235(a), Congress mandated that immigration officials at the border have a non-discretionary duty to inspect all applicants for admission. *See U.S. v. Monsanto*, 491 U.S. 600, 607 (1989) (when a statute "uses the word 'shall', Congress has imposed a mandatory duty upon the subject of the command."); Black's Law Dictionary (10th ed. 2014) (citing the legal definition of "shall"). The existence of an unrealized opportunity to inspect is not the standard for the definition of admission or the inspection requirements under statute. Using the word "shall" within the statute requires immigration officials to substantively inspect each applicant for admission. An immigration official may use discretion when conducting the inspection to determine if the alien is permitted in the United States, but the officer cannot unilaterally determine that an inspection is not required. A "wave through" is the decision not to conduct an inspection. A "wave through" is an improper use of discretion not to inspect which is not tolerated under the statutory definition of admission.

[4] USCIS, *Immigration Inspection Program*, http://www.cbp.gov/border-security/ports-entry/overview (last visited April 12, 2016); *see also* INA § 235.

Were the Board to allow for procedural regularity, a "wave through" does not conform to the procedure outlined by CBP. A primary goal of the inspection process is to "examine[] individuals and their related documents." *Supra* note 4. Allowing "wave through" to act as an inspection does not conform procedurally with those actions an immigration official is supposed to take as outlined by their objectives. The inspection procedure includes an array of questions, searches, etc. that in the discretion of the immigration officer may be necessary to deduce whether an alien is admissible to the United States.

At the discretion of an experienced officer, a cursory questioning or a brief glance at a relevant document may be all that is necessary for an individual inspection. But waving an alien through the border does not examine an alien's admissibility or assess their immigration documents. *See id.* A "wave through" requires no assessment at all of the admissibility at the border of the alien. Waving an alien through does not fulfill any element of the statutory inspection and therefore cannot function procedurally or substantively as admission.

B. The Legislative History Of INA § 240A Does Not Support Requiring Only Procedural Regularity During Admission.

The cancellation of removal provision was added to the INA by IIRIRA. Pub.L. No. 104-208, 110 Stat. 309 (Sept. 30, 1996). Section 240A(a)(2) replaced § 212(c).[5] *See INS v. St. Cyr*, 533 U.S. 289, 297 (2001) (providing the justification for why Congress replaced § 212(c) with § 240A). Section 212(c) had been widely used by aliens seeking relief. In the six years prior to IIRIRA, § 212(c) had been granted to over 10,000 aliens. *INS v. St. Cyr*, 533 U.S. at 296.

[5] "Aliens lawfully admitted for permanent residence . . . and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General . . . ." Former 8 U.S.C. § 1182(c); INA 212(c) (repealed 1996).

Repeal and replacement of § 212(c) served a dual purpose. First, replacement narrowed the class of alien who are eligible for relief. *Id.* at 297. Second, it legislatively resolved a longstanding split between circuits and the Board regarding what was required to obtain relief under § 212(c).

> Courts had differed on whether an alien's 'seven consecutive years' of domicile under § 212(c) had all to post-date the alien's obtaining LRP status. Congress addressed that split by creating two distinct durational conditions: the 5-year status requirement of subsection(a)(1), which runs from the time an alien becomes an LPR, and the 7-year continuous residency requirement of subsection(a)(2), which can include years preceding the acquisition of LPR status.

Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2018 (2012) (discussing whether a child may use the parent's period of domicile in the computation of the 7-year residency requirement).

The legislative history of § 240A(a)(2) is inapposite to that of § 245(a) (adjustment of status). In *Matter of Quilantan*, the Board extensively analyzed the legislative history of § 245(a) to support its finding that admission need only be procedurally regular to fulfill the requirements of adjustment of status. The Board found that Congress had continuously expanded the language of the statute to make more aliens eligible for adjustment of status. 25 I & N Dec. at 291-92. It concluded that procedural regularity rather than substantive compliance better aligned with Congress's goal to expand the number of aliens eligible for adjustment of status under § 245(a). *See id.*

In *Matter of Quilantan*, the Board tracked the broadening language of the statute over time to find that procedural regularity was consistent with the legislative intent and history of the language. *See* 25 I. & N. Dec. at 191-92. Unlike *Matter of Quilantan*, the legislative history of § 240A(a)(2) does not focus on expanding the applicability of relief

to aliens and instead focused on the vast number of aliens using the statute for relief as well as the need for clarification to ensure it is applied properly, as Congress intended.

The history and interpretation of § 240A(a)(2) neither require nor suggest that an expanded administrative application of the statute which requires only procedural regularity would be appropriate. Section 240A was not added to the INA to broaden the language but rather clarify how § 212(c) *should* have been applied. If applied properly, the changes were never intended to make it easier for aliens to use cancellation of removal but allow cancellation of removal for a narrow class of aliens. *See St. Cyr*, 533 U.S. at 297 (emphasis added). Requiring only procedural regularity would be inconsistent with the legislative history and how the Supreme Court has interpreted the statute's history, because it broadens the applicability of cancellation of removal instead of allowing for only a narrow application of the provision. *Id.*

C. An Alien "Waved Through" An Entry Point Remains Inadmissible.

Before admission to the United States can occur, an alien must be admissible. INA § 212(a). The INA provides various grounds of inadmissibility that render an alien ineligible for admission. At the time of admission, an alien must *inter alia* have the required documentation to enter the country in a lawful immigration status. INA § 211(a). If an alien is applying for admission and does not have the documentation necessary to be in a valid lawful status, the alien is inadmissible to the United States. INA § 212(a)(7)(A) and (B).

When the alien is an applicant for admission, the alien must present the proper documentation for inspection by an immigration officer to be admitted. Requiring proper documentation for admission in the United States aligns with the CBP's inspection goal of

examining documentation to ensure an alien is properly admitted into the United States. *Supra* note 4. If an alien lacks the proper documentation, the alien is inadmissible.

In *Matter of Quilantan*, the alien was not in possession of valid documentation when she was waved through the border. 25 I. & N. Dec. at 286. When she presented herself at the border, she was an applicant for admission. Under § 211(a) and § 212(a)(7)(A) and (B), she was inadmissible and therefore, could not be admitted even if waved through the border entry point. Substantive compliance with the INA should have been required; otherwise the required verification that an alien is in possession of the required documentation could not occur. If an alien is waved through the border, the verification of valid documentation does not occur and the alien is inadmissible.

D. "Any Status" Cannot Include Individuals Who Are Not In A Lawful Immigration Status.

In *Matter of Quilatan*, the Board did not require the alien to be in any particular status category after entry into the United States in order to be admitted. 25 I. & N. Dec. at 293. Indeed, the Fifth Circuit has already taken advantage in the ambiguity left by the Board to determine that an alien may be admitted while in an unlawful status, and that such unlawful status is eligible for an application of INA § 240A(a)(2). *See Tula Rubio v. Lynch*, 787 F.3d 288 (5th Cir.) (finding that a "wave through" suffices as an admission in any status).

When IIRIRA was passed in 1996, Congress replaced physical entry in the United States with lawful entry as an element of the admission definition. *Supra* note 3. Adopting the admission definition tightened control over who was allowed within the country. As *Matter of Quilantan* notes, Congress eliminated the entry doctrine and replaced it with admission to ensure that aliens who enter illegally do not have the same or greater rights in removal proceedings. 25 I. & N. Dec. at 291.

The INA does not define the term "status" in the immigration context; it is a term of art. *In Re Blancas-Laras*, 23 I. & N. Dec. 458, 480 (B.I.A. 2002) (determining that both immigrants and nonimmigrant admissions qualify as "admission in any status"). Determining that immigrants as well as nonimmigrants are aliens eligible for cancellation of removal is also supported by the legislative history of IIRIRA, which clarified the requirements of cancellation of removal for LPRs as well as other immigration statuses. *See Martinez Gutierrez*, 132 S. Ct. at 2018 (clarifying that § 240A(a)(1) applied to LPRs while § 240A(a)(2) applied to admitted status other than LPR status).

The holding of *In Re Blancas* has not been extended in subsequent cases or even *dicta* allowing aliens that enter the United States without a legal status to qualify for cancellation of removal. That position would result in absurdity.

> "[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). Where the literal reading of a statutory term would "compel an odd result," we must search for other evidence of congressional intent to lend the term its proper scope. *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (citing *Green v. Bock Laundry Machine Co*., 490 U.S. 504, 509 (1989)) (finding that the Federal Advisory Committee Act did not apply to the American Bar Association's Standing Committee because it was not an "advisory committee"). Reading INA § 240A(a)(2) to only include lawful immigration statuses would keep the statute consistent with how unlawful status is treated elsewhere in the INA, and avoid the absurd result of granting

privileges to an alien who has never been in a lawful status merely because the alien was able to evade deportation for 7 years.

If the Board allows for aliens to be admitted by wave through, even when they have no legal immigration status, it would make the need for statutory inspection or the requirement of valid immigration status upon entering the United States surplusage. IIRIRA as well as the legislative history of § 240A focused on stopping illegal immigration and narrowing how § 240A could be used. *See e.g.*, Pub. L. 104-208; 110 Stat. 3009 (expanding inadmissibility grounds, increasing bars, enhancing enforcement, and replacing entry with admission); *INS v. St. Cyr*, 533 U.S. at 297. Allowing aliens who enter the country without legal status to receive cancellation of removal because the alien was able to evade immigration officials for 7 years is not consistent with the aims of the current immigration laws, specifically § 240A(a)(2).

Reading INA § 240A(a)(2) to include unlawful status would also bring the section into direct conflict with other provisions of the INA that impose disincentives on aliens who would otherwise choose to remain in the United States after expiration of their lawful status or enter without admission and stay. An alien who is unlawfully present for more than 180 days but less than one year can seek admission within three years of their departure date. INA § 212(a)(9)(b)(i)(I). If the alien has been unlawfully present for more than one year, he or she cannot seek admission within ten years. INA § 212(a)(9)(b)(i)(I). These statutory provisions ensure that aliens do not overstay their visas or enter and stay within the country illegally. The longer the unlawful stay, the longer the term of ineligibility for subsequent admission.

However, interpreting the term "status" to include unlawful presence as a status contemplated under § 240A(a)(2) creates an impermissible conflict between sections 240A and

212. Under § 212, an alien is prohibited from being admitted in the future if they are here unlawfully, while § 240A(a)(2) would cancel removal if the alien was here for multiple years.

E. Required Substantive Compliance With The Elements Of The Admission Definition Does Not Nullify The Waivers Found In § 212(h) and § 327(a)(1)(H).

In *Matter of Quilantan*, the Board determined that only procedural regularity was required for the admission definition, reasoning that to find otherwise would nullify the § 212(h) and § 327(a)(1)(H) waivers. 25 I. & N. Dec. at 291-92. However, even if the Board requires substantive compliance with the admission, both waivers would continue to operate as intended.

Section 237 and the waiver under § 237(a)(1)(H) provide a relief to aliens who were inadmissible at the time of admission. *Matter of Quilantan* stated "this provision of the Act would be internally inconsistent, because an alien could not be both 'admitted' and 'inadmissible' at the time of entry." *Id.* (addressing the introductory language of § 237(a)). Substantive compliance would "render null section 237(a)(1)(H) of the Act, which provides a waiver of deportability that is expressly available to aliens who obtained admission by fraud or misrepresentation." *Id.* Additionally, *Matter of Quilantan* found that if substantive compliance was required during entry, "the waiver of inadmissibility [under INA § 212(h)] . . . would potentially become available to aliens who had procured lawful permanent residence by fraud and misrepresentation . . . ." *Matter of Quilantan*, 25 I. & N. Dec. at 292.

Neither waiver is voided by requiring substantive compliance with the definition of admission. The "in and admitted" language of § 237(a) and (a)(1)(H) survives requiring substantive compliance because admission can be granted *nunc pro tunc* in this circumstance. *Nunc pro tunc* retroactively permits an alien to be admitted into the United States when appropriate and necessary. Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 1535 (15th ed. 2016) (citing *Matter of Sosa-Hernandez*, 20 I. & N. Dec. 758 (B.I.A 1993)). *Nunc pro tunc*

motions have been used to cure problems of inadmissibility issues for a waiver under § 237(a)(1)(H). *See Sergueeva v. Holder*, 324 Fed. App'x 76 (2d. Cir. 2009) (recognizing the use for § 237(a)(1)(H)). While it is recognized that a *nunc pro tunc* motion is limited in its scope, where an alien is not at fault for their inadmissibility due to an oversight by the immigration officer who did not properly inspect and authorize admission, an application of *nunc pro tunc* may be appropriate. *See* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 1535 (15th ed. 2016) (citing *Lovan v. Holder*, 574 F.3d 990, 993-96 (8th Cir. 2009) (recognizing *nunc pro tunc* as an equitable remedy due to error by the Board or an immigration judge)).

In the context of a "wave through" at the border, a *nunc pro tunc* motion could be used to cure the inadmissibility due to failure of CBP to conduct an inspection of an alien who applied for admission as part of entry. If an alien presents themselves at the border with the necessary documentation to lawfully enter the United States in a recognized immigrant or nonimmigrant status, but an inspection does not occur due to government inaction, *nunc pro tunc* can be exercised to retroactively approve admission so that an alien is "in and admitted" for the purposes of § 237(a) generally, as well as for the waiver under § 237(a)(1)(H). The doctrine could not be used, however to cure an unlawful entry into the United States where the alien lacked proper documentation or lawful status upon entry.

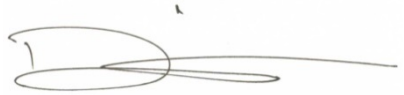
The § 212(h) waiver also survives any "fraud or misrepresentation" on the part of the alien at the time of admission. *Matter of Quilantan* stated that a substantive compliance requirement would permit aliens who had engaged in fraudulent activity to utilize the § 212(h) waiver in contradiction to *In re Ayala-Arevalo,* 22 I. & N. Dec. 398 (B.I.A. 1998) (stating that an alien who commits fraud at entry cannot use the § 212(h)). This construction is flawed. The § 212(h) waiver is discretionary in nature. Nothing requires the Attorney General or those who

have been delegated his authority in this context to grant an application for waiver from an alien who engaged in fraud at the time of entry which rendered them inadmissible. Second, Congress provided a waiver specifically for fraud or willful misrepresentation of material fact. *See* INA § 212(i). The Board "must not read any word or phrase so broadly that it would render other parts of the statute superfluous." *Matter of Dejesus*, 26 I. & N. Dec. 171, 173 (B.I A. 2013) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Allowing waivers for fraud under § 212(h) as well as § 212(i) would render § 212(i) superfluous and unnecessary. Allowing § 212(h) to apply to misrepresentation would arbitrarily duplicate the applicability of § 212(i) and render the provision unnecessary and superfluous. Each waiver can survive interpreting admission as requiring substantive compliance. The Board may thus find that a "wave through" at the border is not an admission and does not warrant relief under § 240A(a)(2).

V. CONCLUSION

The Board should find that a "wave through" at the border is not consistent with admission to the United States. The term "admission" requires substantive compliance to ensure uniformity of the use and application of the term. To interpret it otherwise would conflict with the legislative shift from entry to admission. Additional, the "any status" language of § 240A(a)(2) only confers cancellation of removal upon those in lawful immigration statuses. To interpret it to apply to illegal aliens would create conflict with other sections of the INA and cause absurd results by incentivizing aliens who are in the United States illegally to remain for as long as possible while attempting to access this form of relief.

Respectfully submitted,



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