HERE TODAY, GONE TOMORROW: "NULLIFYING" LAWFUL PERMANENT RESIDENT STATUS

Emily C. Arnold*

Lawful Permanent Resident (LPR) status is the status awarded to immigrants who have permission to reside permanently and work in the United States. For many, it is a stepping stone to U.S. citizenship. Section 101(a)(20) of the Immigration and *Nationality Act (INA) defines LPR status as "having been lawfully accorded the* privilege of residing permanently in the United States as an immigrant in accordance with the immig*ration laws, such status not having changed."*

In several instances, either through alleged fraud on the part of the immigrant or mistake on the part of the government, the government has granted an immigrant LPR status and then alleged years later that the individual, now residing in the United States under the belief that he or she is an LPR, was never in fact an LPR because of the original error. Thus, despite the fact that these individuals applied for and received LPR status through the proper channels, they have effectively had *their status "nullified."*

This result stems from the Board of Immigration Appeals's (BIA) interpretation of the word "lawfully." The BIA has held that the word "lawfully," as it appears in section 101(a)(20) of the INA, means in compliance with all procedural and substantive requirements of the INA. This interpretation has led the BIA to conclude that an immigrant who received LPR status through error or fraud was never an LPR and thus never possessed the special legal protections awarded to LPRs in this country.

It may seem to many that it is fair to revoke the LPR status of an individual who committed fraud to obtain that status. This Note does not disagree. The true *injustice of the BIA's interpretation is two*-fold. First, it is an extremely harsh action to take against those immigrants who obtained their LPR status through a government error. Often, these innocent individuals had no way of knowing that

---

* J.D. Candidate 2014, University of Arizona James E. Rogers College of Law. Many thanks to Dean Kirsten Engel, Professor Lynn Marcus, Eric J. Drootman, and the Arizona Law Review editorial staff for their assistance with this Note.

they were not in compliance with the law and relied on their lawful status for *years. Second, this interpretation allows the government to nullify an immigrant's* LPR status prior to any official hearing on the matter, merely by alleging that the initial application was based on fraud or mistake. This can impermissibly switch the burden of proof in removal proceedings from the government to the immigrant and deny the immigrant certain forms of relief for which he or she would otherwise be eligible.

Several circuit courts have upheld the BIA's interpretation of LPR. These decisions, however, have thus far ignored the effects such an interpretation has on *the burden of proof in removal proceedings. Additionally, the BIA's interpretation directly contradicts other provisions of the INA and is inconsistent with the BIA's* interpretation of *"lawfully" in other provisions. This Note argues that in examining the INA's removal procedures as a whole, it is clear that Congress* intended for anyone who has been granted LPR status to retain that status until its official termination in an immigration court proceeding, regardless of whether it was obtained in compliance with all substantive provisions of the law. The *remaining courts to examine this issue should reverse the BIA's interpretation of* LPR for the reasons advanced here.

TABLE OF CONTENTS

INTRODUCTION: WHEN IS AN LPR NOT AN LPR?

Imagine you buy an acre of land on which to build your family home. You lay the foundation, construct the frame, and hang the drywall. When the house is complete, your family moves in. Your children make friends and start school. But after you have lived there for several years, the government informs you that there has been a mistake—you should not have been allowed to buy that land. Suddenly, without any compensation, you have to move and abandon all that you have built.

This has been the reality for some immigrants residing in the United States,[1] except instead of the title to a plot of land, they have constructed their lives around the belief that they are Lawful Permanent Residents (LPRs), a status that confers the right to reside permanently, work, and build a life in the United States.[2] In some cases over a decade after granting the status, the government has said that the status was granted in error, and that the immigrant who has built a life here—started a career, raised children, bought property—must now abandon it.

For example, Karl Savoury, a citizen of Jamaica, married a U.S. citizen and applied to become an LPR in 1991.[3] Under the applicable law, Savoury was ineligible for LPR status because he had been convicted of a felony.[4] Although Savoury disclosed his conviction in his application, an Immigration and Naturalization Service (INS)[5] officer mistakenly granted Savoury LPR status.[6] It was not until 2002 that the INS charged Savoury, upon returning to the United States from a trip abroad, as being inadmissible based on that prior conviction.[7] In 2006, after Savoury had been living in the United States for 15 years, the Eleventh Circuit upheld the BIA's decision, holding that Savoury had never been an LPR because the INS had granted the status in contradiction of then-existing law.[8] Savoury was forced to leave behind his U.S. citizen son and abandon his job as a high school math teacher.[9]

This outcome, affecting a subset of LPRs charged with having procured their status irregularly, stems from the Board of Immigration Appeals's (BIA) current interpretation of the definition of an LPR under section 101(a)(20) of the

---

1. See, e.g., Savoury v. U.S. Att'y Gen., 449 F.3d 1307 (11th Cir. 2006).

2. See 8 U.S.C. § 1101(a)(20) (2012) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.").

3. Savoury, 449 F.3d at 1310. Because the status was granted based on Savoury's marriage, the LPR status was conditional. Id.; see also 8 U.S.C. § 1186a(a)(1). The conditional basis was removed two years later. Savoury, 449 F.3d at 1310.

4. Savoury, 449 F.3d at 1310–11; see also 8 U.S.C. § 1182(a)(2)(A)(i)(II) (1991). Savoury pled guilty to a charge of possession of cocaine with intent to distribute. Savoury, 449 F.3d at 1310–11. According to his Opening Brief to the Eleventh Circuit, however, he was merely in an apartment where cocaine had been present. Opening Brief for Petitioner at 10–11, Savoury v. U.S. Att'y Gen., 449 F.3d 1307 (11th Cir. 2006) (No. 05–10966–F). His record was otherwise clean. Id. at 11.

5. The Immigration and Naturalization Service, located within the Department of Justice, was the agency in charge of implementing U.S. immigration laws until it was dissolved in 2003. MICHAEL A. SCAPERLANDA, FED. JUDICIAL CTR., IMMIGRATION LAW: A PRIMER 5 (2009). The majority of immigration enforcement responsibilities were transferred to the newly created Department of Homeland Security. Id.

6. Savoury, 449 F.3d at 1311.

7. Id. INS was able to charge Savoury under the grounds of inadmissibility because he was returning from a brief trip abroad. See id.; infra notes 160–69 and accompanying text (discussing the implications for LPRs returning from abroad).

8. Savoury, 449 F.3d at 1313.

9. See Opening Brief for Petitioner, supra note 4, at 10.

Immigration and Nationality Act (INA).[10] The BIA has interpreted this section, and particularly the word "lawfully," to mean that a grant of LPR status to a noncitizen must be in compliance with all procedural and substantive requirements of the INA; if the grant was only procedurally valid (as was the case in Savoury), it is as if the noncitizen never possessed the status.[11]

To elaborate on the distinction, a grant of LPR status to a noncitizen is in compliance with all procedural requirements if she applied through the proper channels and the proper government officials approved her application;[12] but, the grant of LPR status is in compliance with the substantive portions of the law only if the noncitizen met all the underlying requirements for LPR status, such as being current on vaccinations, having the requisite family or employer sponsor, and demonstrating means of financial support in the United States.[13] To analogize the situation to a driver's license, applying for and receiving the license from the DMV would satisfy the procedural requirements, while receiving a 90% score on the written test would be a substantive requirement.

In Savoury's case, because he had a previous felony conviction, he did not meet all substantive requirements for LPR status at the time INS granted his application.[14] Thus, under the BIA's interpretation, he was never actually an LPR.[15] The status the government granted to him was essentially nullified. It did not matter to the BIA's analysis that Savoury had no notice that he did not meet all substantive requirements for LPR status at the time of his application, nor that the error in granting the status was entirely the government's.[16] It is as if, after he had been driving for fifteen years, the DMV discovered it had incorrectly scored his written test, that he only received an 89%, and thus, for all these years, he had been driving without a license. Even though he had a plastic card in his wallet that looked and felt like a license, in reality it was not.

The Second, Fifth, Eighth, Ninth, and Eleventh Circuits, extending Chevron deference to the BIA, have upheld this interpretation of "lawfully

---

10. The relevant portion of the INA, as codified, actually defines "lawfully admitted for permanent residence." 8 U.S.C. § 1101(a)(20) (2012). This Note will refer to the definition using both phrases. The INA is the primary statute regulating U.S. immigration and is codified under Title 8 of the United States Code. This Note refers to the relevant sections of the INA through its codified sections in the United States Code.

11. See, e.g., In re Koloamatangi, 23 I. & N. Dec. 548, 550 (BIA 2003); In re T–, 6 I. & N. Dec. 136, 137–38 (BIA 1954); see also infra Part II (surveying cases with this holding).

12. See Savoury, 449 F.3d at 1317 ("'[L]awfully admitted' means more than admitted in a procedurally regular fashion. It means more than that the right forms were stamped in the right places. It means that the alien's admission to the status was in compliance with the substantive requirements of the law.").

13. See 8 U.S.C. §§ 1154(a), 1182(a)(1)(A)(II), (a)(4). These are only a few of the many requirements that a noncitizen must meet in order to receive LPR status in the United States.

14. Savoury, 449 F.3d at 1310.

15. Id. at 1313 (citing In re Koloamatangi, 23 I. & N. Dec. 548 (BIA 2003)).

16. See id. at 1310, 1313.

admitted for permanent residence."[17] Under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., reviewing courts should uphold an administrative agency's interpretation of the statute it administers unless the interpretation directly contradicts the express intent of Congress or is unreasonable.[18] However, none of the reviewing courts have examined the BIA's interpretation of LPR with an eye to the effects it has on the INA, a complex and integrated statute, as the Supreme Court has determined they must.[19]

In examining the INA's removal procedures as a whole, it is clear that Congress intended that anyone who has been granted LPR status retain that status until its official termination at the conclusion of an immigration court hearing, regardless of whether it was obtained in compliance with all substantive provisions of the law. Interpreting the word "lawfully" in the definition of "lawfully admitted for permanent residence" to require only procedural regularity is consistent with the way courts have interpreted "lawful" in other portions of the INA. It is also the only interpretation that does not directly contradict other provisions of the INA. For these reasons, it is the only permissible interpretation.

Additionally, the BIA's current interpretation of "lawfully admitted for permanent residence" erodes certain procedural protections provided to noncitizens in the INA. Among other things, it enables the government to nullify a noncitizen's LPR status at any time in a proceeding, which can shift the burden of proof to the immigrant as well as deny her the opportunity to apply for critical waivers that might allow her to remain in the United States. Thus, from the standpoint of justice and from a statutory perspective, the BIA's current interpretation is unjust.[20]

---

17. See De La Rosa v. U.S. Dep't of Homeland Sec., 489 F.3d 551, 554–55 (2d Cir. 2007); Savoury, 449 F.3d at 1313; Arellano-Garcia v. Gonzales, 429 F.3d 1183, 1186 (8th Cir. 2005); Monet v. INS, 791 F.2d 752, 753 (9th Cir. 1986); In re Longstaff, 716 F.2d 1439, 1441 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984). In re Longstaff was decided one year before the Supreme Court decided Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The Fifth Circuit, however, has not reconsidered its decision.

18. See Chevron, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.") (citations and footnote omitted); see also infra Part III (discussing Chevron in greater depth).

19. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) (citing Brown v. Gardner, 513 U.S. 115, 118 (1994)) ("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); see also infra note 98.

20. See Chevron, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

This Note argues that because the intent of Congress is clear, the remaining circuit courts should reverse, under Chevron, the BIA precedent, and interpret the definition of "lawfully admitted for permanent residence" provided in section 101(a)(20) of the INA to require only procedural regularity. Even if the courts find that Congress's intent was ambiguous with respect to the requirements that "lawful" implies, the BIA's interpretation cannot be reasonable if applied in such a way as to strip noncitizens of the procedural protections Congress intended to provide to them.

The aim of this Note is primarily to provide a framework for a Chevron challenge that a noncitizen respondent could bring before a reviewing court by highlighting the statutory inconsistencies and procedural errors the BIA's interpretation creates. Several of the points this Note raises do not appear to have been argued before any of the reviewing circuit courts, and, as previously stated, courts have thus far ignored the far-reaching effects the BIA's interpretation has upon the INA as a whole.

This Note will proceed in six parts. Part I will provide some basic background on the ways noncitizens typically obtain LPR status and how LPR status can be lost. Part II will provide an overview of the pre-Chevron case law interpreting the INA's definition of LPR (also referred to here as section 101(a)(20) of the INA). Part III will examine the reasons that reviewing circuit courts have upheld the definition post-Chevron and point out the flaws in those analyses. Part IV looks at evidence in the INA that demonstrates that Congress intended the definition of LPR to require only procedural regularity. Part V demonstrates the way the BIA's current definition strips noncitizens of important procedural protections. Finally, Part VI will show the positive effects that an alternate interpretation of section 101(a)(20) would have on individuals, immigration courts, and the INA a whole. The Note concludes that the circuit courts should reverse the current interpretation of section 101(a)(20), allowing LPRs to retain their status unless a court officially terminates it after a hearing on the matter, regardless of the way in which a noncitizen obtained the status.

I. LAWFUL PERMANENT RESIDENT STATUS: WITH ONE HAND HE GIVETH

United States Citizenship and Immigration Services (USCIS), the agency in the Department of Homeland Security (DHS) responsible for providing immigration benefits,[21] admits two classes of noncitizens into the country: immigrants and nonimmigrants.[22] These are terms of art in immigration law. A nonimmigrant is a foreign citizen who is admitted into the country only temporarily for a specific purpose.[23] Immigrants are admitted permanently based on a close familial relationship, an employer sponsor, refugee status, or winning

21. SCAPERLANDA, supra note 5, at 5; About Us, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/aboutus (last updated Sept. 12, 2009).

22. SCAPERLANDA, supra note 5, at 39.

23. See 8 U.S.C. § 1101(a)(15) (2012); SCAPERLANDA, supra note 5, at 39.

the diversity lottery.[24] The vast majority of immigrants are admitted under the first category because they are the child, parent, or spouse of a U.S. citizen or LPR.[25] After DHS admits an immigrant, she possesses LPR status and typically becomes eligible to apply for U.S. citizenship within five years.[26]

An LPR can only be removed[27] if he commits an act that falls into one of the six major categories of grounds for deportation.[28] Those categories are immigration status violations, criminal offenses, failure to register and document falsification, security and related grounds, public charge grounds, and unlawful voting.[29] The category of "immigration status violations" includes any noncitizen who was inadmissible "at the time of entry or adjustment of status."[30] Thus, all grounds of inadmissibility in the INA are also encompassed in the grounds of deportation.[31]

DHS is the entity that brings charges of deportability against an LPR. An immigration judge (IJ) then conducts a hearing as to the charges and makes a determination on whether the LPR can remain in the United States.[32] Even if the LPR is found to be removable, there are waivers available that will permit the LPR to maintain her immigration status and continue to reside in the United States.[33] If an LPR or other noncitizen is eligible for a waiver, it is up to the IJ's discretion whether or not to grant it.[34]

---

24. See SCAPERLANDA, supra note 5, at 42; RUTH ELLEN WASEM, CONGRESSIONAL RESEARCH SERV., U.S. IMMIGRATION POLICY ON PERMANENT ADMISSIONS: SUMMARY 2 (Mar. 13, 2012).

25. See WASEM, supra note 24, at 9.

26. NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2011 at 2 (2012).

27. Removal proceedings encompass determinations on both the inadmissibility and deportability of noncitizens. SCAPERLANDA, supra note 5, at 69–70.

28. Id. at 73.

29. Id.; see also 8 U.S.C. § 1227(a)(1)–(6) (2012).

30. 8 U.S.C. § 1227(a)(1)(A) ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.").

31. See id.

32. Immigration Judges are part of the Executive Office for Immigration Review, which is housed in the Department of Justice. EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUSTICE, EOIR at a Glance (Sept. 9, 2010), http://www.justice.gov/eoir/press/2010/EOIRataGlance09092010.htm.

33. See, e.g., 8 U.S.C. § 1182(h) (waiving inadmissibility for certain criminal offenses).

34. See, e.g., id. ("The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .") (emphasis added).

Both DHS and the LPR can appeal an IJ's decision on removability to the BIA,[35] the highest administrative immigration tribunal in the United States.[36] Generally, the BIA conducts a "paper review" of the IJ's decision, but on rare occasions it will hear oral arguments as well.[37] BIA decisions are binding on immigration courts.[38]

The majority of BIA decisions are, in turn, reviewable by the federal courts of appeals.[39] While federal appellate courts do not have jurisdiction to review findings of fact or discretionary decisions, they can review any "constitutional claims or questions of law" that arose in the earlier proceedings.[40]

II. PRE-CHEVRON CASE LAW: INTERPRETING THE DEFINITION OF "LAWFUL PERMANENT RESIDENT"

The INA defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."[41] Title 8, Part 1.2 of the Code of Federal Regulations mirrors this definition, but the sentence, "[s]uch status terminates upon entry of a final administrative order of exclusion, deportation, or removal," was added in 1996.[42]

Cases involving accusations that a noncitizen achieved his LPR status through fraud or government error often turn on the meaning of this definition.[43] Specifically, courts have had to decide whether the word "lawfully" requires compliance with only the procedural requirements of the INA or with both the procedural and substantive requirements.[44] As outlined in the Introduction, this distinction can have significant consequences for certain noncitizens.[45]

---

35. DAVID L. NEAL ET AL., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 1.4: Jurisdiction and Authority (Oct. 1, 2013 ed.).

36. Id. § 1.2(a).

37. U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS, http://www.justice.gov/eoir/biainfo.htm (last updated November 2011).

38. Id.

39. See SCAPERLANDA, supra note 5, at 12. Although the district courts were once able to review BIA decisions on habeas grounds, the REAL ID Act of 2005 changed this as part of Congress's efforts to streamline the immigration appeals process. Id. at 10–12; see also 8 U.S.C. § 1252 (2012).

40. 8 U.S.C. § 1252(a)(2)(D); SCAPERLANDA, supra note 5, at 13–14.

41. 8 U.S.C. § 1101(a)(20).

42. See Executive Office for Immigration Review, Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,904 (Apr. 29, 1996) (originally codified at 8 C.F.R. § 1.2 (1997)).

43. See, e.g., Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1313 (11th Cir. 2006); In re Longstaff, 716 F.2d 1439, 1440 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984); In re Koloamatangi, 23 I. & N. Dec. 548, 551 (BIA 2003).

44. See Introduction for further explanation of this distinction.

45. Some LPRs charged with using fraud or misrepresentation to procure their status will be eligible for a waiver under section 237(a)(1)(H) of the INA if they were

The first published BIA case on this issue appears to be Matter of T–, which was decided in 1954.[46] There, the Board held that, because the respondent, a native and citizen of Italy, procured his immigrant visa only by failing to disclose that he had been previously deported, his entry was unlawful and he was ineligible for relief under section 212(c) of the INA.[47] From there, it took decades before the issue appeared in another published case.

The issue next appeared, as a matter of first impression before the Ninth Circuit, in 1973, in Lai Haw Wong v. Immigration & Naturalization Service.[48] There, the court affirmed a BIA ruling that a mother and three sons from Hong Kong were deportable under INA section 241(a)(1),[49] the provision of the INA that at the time made deportable any noncitizen who was inadmissible at the time of admission.[50] The mother and sons were admitted on derivative visas, which were based on the visa issued to Wong Kam Chow, the husband and father.[51] Prior to coming to the United States, Wong Kam Chow was convicted of a narcotics charge and thus was never admitted, invalidating the visas of his family members.[52] Nevertheless, the mother and sons were mistakenly admitted as LPRs.[53]

The mother and sons appealed the BIA ruling on the grounds that they were entitled to a waiver under INA section 241(f), a provision waiving deportability on the basis of fraud or misrepresentation for noncitizens in possession of an immigrant visa who also have the requisite relationship with a U.S. citizen or LPR.[54] The mother and sons each claimed that the other created the requisite familial relationship.[55] The Ninth Circuit upheld the BIA's denial of the waiver on the grounds that none of the family members were actually LPRs due to their mistaken admission.[56] The court's rationale for this determination was that because the waiver's purpose was family reunification, Congress's intent would be ill served by providing the waiver to the wife and sons when the husband remained in Hong Kong.[57]

---

otherwise admissible at the time of admission and meet certain other requirements. See 8 U.S.C. § 1127(a)(1)(H)(i).

46. 6 I. & N. Dec. 136 (BIA 1954).

47. Id. at 137–38.

48. 474 F.2d 739 (9th Cir. 1973).

49. 8 U.S.C. § 1251(a)(1) (1970). A version of this waiver is now available under 8 U.S.C. § 1227(a)(1)(A) (2012).

50. Lai Haw Wong, 474 F.2d at 741.

51. Id. A derivative visa allows certain relatives to "accompany the primary visa holder." SCAPERLANDA, supra note 5, at 39.

52. Lai Haw Wong, 474 F.2d at 741.

53. Id.

54. 8 U.S.C. § 1251(f) (1970) (now repealed, but the precursor to 8 U.S.C. § 1127(a)(1)(H)(i) (2012)).

55. Lai Haw Wong, 474 F.2d at 741.

56. Id. at 741–42.

57. Id. at 742.

The court may have felt that its determination as to the respondents' LPR statuses was necessary because the waiver was not discretionary at the time.[58] To prevent the respondents from gaining LPR status, the court had to find that the respondents were statutorily ineligible for the waiver, and the only way to do so was to find that none of the family members were ever LPRs. Had the court instead allowed Congress to resolve the loophole the respondents were attempting to exploit through legislation—which it did in 1981[59]—unintended consequences of this holding could have been avoided. Although perhaps the results were just in this particular instance, many of the decisions that have followed Lai Haw Wong's precedent have achieved bitterly unjust results.[60] This is despite the fact that the court's rationale in Lai Haw Wong is no longer applicable: Congress's 1981 amendment to section 241(f) made the waiver discretionary, meaning that if the same case were decided today, the IJ could prevent the respondents from maintaining their LPR statuses while still recognizing that they briefly possessed them.[61]

The Fifth Circuit also ruled on the matter in 1983, in In re Longstaff.[62] There, the court, citing no authority, determined that Richard Longstaff, a citizen of the United Kingdom who had resided in the United States as an LPR for 18 years, was not in fact an LPR.[63] Longstaff was a homosexual and, as such, was inadmissible to the United States under 1965 law because he was an alien "afflicted with psychopathic personality."[64] When asked whether he was so afflicted in his entry application, he wrote "no," never having been told that the legal definition of the term included homosexuality.[65] Longstaff was admitted and eventually owned two shops in Texas, where he sold clothing and provided hairdressing services.[66] By all accounts he was an upstanding resident.[67] It was only after he applied to become a U.S. citizen that immigration officials were alerted to Longstaff's sexual orientation, which began an investigation into his initial visa application.[68] Ultimately, the Fifth Circuit held that "[t]he term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity."[69] Therefore, the court held that because Longstaff had been

---

58. See 8 U.S.C. § 1251(f) (1970). This not true of the modern version of this waiver. See 8 U.S.C. § 1127(a)(1)(H)(i) (2012).

59. See Immigration and Nationality Act Amendments of 1981, sec. 8, § 241(f), Pub. L. No. 97–116, 95 Stat. 1611, 1616 (1981) (codified at 8 U.S.C. § 1182) [herinafter INA].

60. See, e.g., In re Longstaff, 716 F.2d 1439 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984).

61. See INA § 8, 95 Stat. at 1616.

62. 716 F.2d. at 1440.

63. Id. at 1440, 1442.

64. Id. at 1442 (quoting 8 U.S.C. § 1182(a)(4) (1976)).

65. Id. at 1440.

66. Id. at 1441.

67. See id.

68. Id.

69. Id.

inadmissible at the time of entry, he was not lawfully admitted and was thus not an LPR.[70] Not only was he ineligible for citizenship, he was "excludable."[71]

Ironically, the court based its holding—that noncitizens who were excludable at the time of entry were not "lawfully admitted" —on the existence of a provision of the INA that makes deportable any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry."[72] The court stated that "[b]y providing for the deportation of excludable aliens, the Act implies that such persons, though present in the United States, were not 'lawfully admitted.'"[73] In reality, however, the court's holding negated the need for such a provision. If Congress intended for courts to interpret "lawfully admitted" the way the Fifth Circuit did in Longstaff, it would not have felt compelled to include a provision providing for the deportation of lawfully admitted aliens who were excludable at the time of entry.[74]

Despite these problems, both BIA and circuit court decisions have adopted the courts' reasoning in In re T–, Lai Haw Wong, and In re Longstaff and cite these cases as precedent.[75] Though it is not necessary to recount the factual circumstances of each case, some courts have expanded on the sparse body of statutory reasoning contained in these early decisions.

Notably, the BIA decided In re Koloamatangi[76] after a 1996 amendment to the regulatory definition of LPR.[77] The amendment added the final sentence to the current definition, which reads: "[T]he status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status

---

70. Id. at 1441–42.

71. Id. at 1451. The government did not seek to deport Longstaff, and the court restricted its holding to applications for citizenship only. Id. at 1451 n.58. As the dissent feared, however, this decision was then cited to justify deportations of noncitizens in Longstaff's situation in the future. See id. at 1453 (Tate, C.J., dissenting) ("Of far greater importance than Longstaff's unfortunate individual plight . . . is the subjection to deportation of all other persons against whom a governmental agency may assert . . . a reason for deportation—perhaps (as in the case of Longstaff) many years after presumably lawful entry into the United States . . . .").

72. 8 U.S.C. § 1251(a)(1) (1976). This provision mirrors the language of the modern statute. See 8 U.S.C. § 1227(a)(1) (2012).

73. In re Longstaff, 716 F.2d at 1442.

74. See infra Part V for additional arguments that this interpretation undermines congressional intent.

75. See, e.g., Mejia-Orellana v. Gonzales, 502 F.3d 13, 16 (1st Cir. 2007) (citing In re Longstaff, 716 F.2d at 1441–42); Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1316–17 (11th Cir. 2006) (citing In re Longstaff, 716 F.2d at 1440–41); Monet v. INS, 791 F.2d 752, 753 (9th Cir. 1986) (citing In re Longstaff, 716 F.2d at 1441; Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir.1973)); In re Koloamatangi, 23 I. & N. Dec. 548, 549–50 (BIA 2003) (citing In re Longstaff, 716 F.2d at 1441–42; In re T–, 6 I. & N. Dec. 136 (BIA 1954)).

76. 23 I. & N. Dec. 548.

77. See 8 C.F.R. § 1.2 (2012); Executive Office for Immigration Review, Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,904 (Apr. 29, 1996) (originally codified at 8 C.F.R. § 1.1(p) (1997)).

terminates upon entry of a final administrative order of exclusion or deportation."[78]

The government accused the respondent, a Tongan citizen, of entering the United States on an immigrant visa by virtue of a bigamous, and thus unrecognized, marriage.[79] Though the respondent had resided in the United States, supposedly as an LPR, for the requisite five years, the IJ held that he was not eligible for cancellation of removal under section 240A(a) of the INA because he was not considered lawfully admitted.[80] On appeal, the respondent argued that the final sentence of the above definition meant that because no final administrative order had been entered against him, he retained his LPR status.[81] The BIA, however, disagreed, stating that the amendment was merely meant to clarify at what point a deportable resident, who had legally obtained LPR status, lost such status: at the time an order of deportation was entered or after physical departure from the United States.[82]

Critically, In re Koloamatangi was the first decision to clarify that noncitizens "who had obtained their permanent resident status by fraud, or had otherwise not been entitled to it" were never LPRs.[83] Courts later interpreted this statement to mean that even noncitizens who were accidentally admitted due to government error through no fault of their own were also not considered LPRs.[84]

To summarize, the primary arguments put forth by the BIA and the pre-Chevron circuit court decisions consist of the following: In In re of T–, the BIA reasoned that it traditionally held entry gained through fraud or misrepresentation to be "unlawful."[85] In Lai Haw Wong, the Ninth Circuit reasoned that permitting the respondents to be considered LPRs for the purposes of eligibility for relief would undermine Congress's goal of family reunification because the husband remained in Hong Kong.[86] In In re Longstaff, the Fifth Circuit cited the portion of the INA that allows for deportation of noncitizens who were inadmissible at the time of admission as evidence that Congress did not intend for noncitizens who gained their status by fraud or misrepresentation to be considered LPRs.[87] As previously shown, however, the Fifth Circuit's reasoning is problematic.[88] Finally, the BIA in In re Koloamatangi determined that the 1996 amendment to the regulatory definition of LPR was not meant to allow noncitizens whose LPR status

78. Id. § 1.2 (emphasis added). The INA definition consists of the first sentence but not the second. See 8 U.S.C. § 1101(a)(20) (2012).

79. In re Koloamatangi, 23 I. & N. Dec. at 549.

80. Id.

81. Id.

82. Id. at 550.

83. Id. (emphasis added).

84. See, e.g., Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1313 (11th Cir. 2006).

85. In re T–, 6 I. & N. Dec. 136, 137–38 (BIA 1954).

86. Lai Haw Wong v. INS, 474 F.2d 739, 742 (9th Cir. 1973).

87. See In re Longstaff, 716 F.2d 1439, 1442 (5th Cir. 1983), cert. denied 467 U.S. 1219 (1984).

88. See supra notes 72–74 and accompanying text.

is questioned to retain their status until a final administrative order was entered against them.[89]

What is striking about these cases is that, with the exception of Longstaff (where citizenship was at stake), the respondent was merely challenging his or her statutory ineligibility for discretionary relief from removal. All forms of relief in the INA available exclusively to LPRs require both statutory eligibility and an IJ's favorable exercise of discretion.[90] Thus, in each case, had the court decided that the respondents were in fact LPRs because of their compliance with the procedures set forth in the INA, they still could have suffered the same adverse outcome; it would have merely been left to the IJ to weigh the equities and come up with a just result for the particular noncitizen respondent.[91] Leaving this decision to the IJ has a number of policy advantages discussed more fully in Part VI.

In sum, the reasoning behind these early decisions left much to be desired in terms of policy considerations and statutory interpretation. Nevertheless, it was this rationale to which the later reviewing circuit courts looked when determining whether the BIA's interpretation of "lawfully admitted for permanent residence" was statutorily permissible and reasonable in light of the Supreme Court's Chevron holding.

III. CHEVRON DEFERENCE TO THE BIA'S INTERPRETATION OF SECTION 101(a)(20) OF THE INA: DID THE CIRCUIT COURTS GET IT WRONG?

The Supreme Court held in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. that reviewing courts must defer to an agency's

---

89. In re Koloamatangi, 23 I. & N. Dec. 548, 550–51 (BIA 2003).

90. See 8 U.S.C. § 1182(c) (1994) (repealed 1996) (allowing an IJ to waive inadmissibility for LPRs who committed certain criminal offenses prior to 1996); 8 U.S.C. § 1229b(a) (2006) (permitting an IJ to cancel an order of removal for LPRs who meet certain eligibility criteria); 8 U.S.C. § 1227(a)(1)(E)(iii) (2006) (allowing an IJ to waive certain alien smuggling offenses committed by LPRs).

91. Equitable factors that IJs take into consideration when making a determination on whether a noncitizen respondent should be granted relief from removal include:

> family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, . . . circumstances of the grounds of [removal] that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

In re C–V–T–, 22 I. & N. Dec. 7, 11 (BIA 1998) (citing In re Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978)).

interpretation of its administrative statute if two conditions are met: (1) the statute is ambiguous or silent on the matter; and (2) the agency interpretation is reasonable.[92] A statute is ambiguous if the intent of Congress cannot be determined through the traditional tools of statutory construction.[93] This includes examining "the provisions of the whole law" as well as "its object and policy."[94] Whether an agency interpretation is reasonable turns on whether it is a policy choice "that Congress would have sanctioned."[95] An agency interpretation is not reasonable if it is in conflict with expressed congressional intent.[96]

Because precedential BIA decisions give "ambiguous statutory terms concrete meaning through a process of case-by-case adjudication," reviewing courts grant them Chevron deference when the meaning of the INA is at issue.[97] Arellano-Garcia v. Gonzales, decided in 2005, was the first circuit court decision to directly cite and apply Chevron in examining the BIA's interpretation of "lawfully admitted for permanent residence."[98] There, the Eighth Circuit found that because the INA's definition was "somewhat circuitous," defining the phrase as "the status of having been lawfully accorded the privilege of residing

---

92. 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

93. Id. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

94. Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)) (internal quotation marks omitted).

95. Chevron, 467 U.S. at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)). This sometimes can include examining legislative history, depending on the perspective of the interpreting court. See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 233 (1986) ("[O]ur longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer,' unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress.") (quoting Chevron, 467 U.S. at 844) (internal citations omitted).

96. See United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999) ("If . . . the agency's statutory interpretation fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [the Court] gives [that] judgment controlling weight.") (quoting Nationsbank of N.C., N.A. v. Variable Annuity Ins. Co., 513 U.S. 251, 257 (1995) (brackets in original) (internal quotation marks omitted).

97. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987)) (internal quotation marks omitted). Chevron deference is extended only to precedential BIA decisions. Camins v. Gonzales, 500 F.3d 872, 879 (9th Cir. 2007) ("When the BIA explicitly adopts in a published opinion a particular interpretation of an ambiguous provision of the INA, we apply Chevron deference to its interpretation . . . .").

98. 429 F.3d 1183, 1186 (8th Cir. 2005). Although the Fifth Circuit's decision, Monet v. INS, addressed this issue in 1986 after the Supreme Court decided Chevron, Monet does not cite Chevron or complete a traditional Chevron analysis in upholding the BIA's interpretation. See Monet v. INS, 791 F.2d 752, 753 (9th Cir. 1986) ("The issue presented here . . . is a question of law. Our review is de novo.") (citations omitted).

permanently in the United States,"[99] the statute was ambiguous, and thus the court should resolve the issue based on whether the BIA's interpretation was reasonable.[100]

The court then found that the BIA's holding in Matter of Koloamatangi was reasonable based solely on the fact that the BIA decision followed Fifth Circuit and Ninth Circuit precedent.[101] This reasoning misconstrues Chevron, which requires that courts look to the intent of Congress in determining whether an agency interpretation is reasonable.[102] Merely citing the fact that other courts have followed suit without more is not the type of analysis the Supreme Court envisioned.[103]

Mejia-Orellana v. Gonzales, decided in 2007, also examined the BIA's interpretation of the definition of "lawfully admitted for permanent residence" through the Chevron lens.[104] Although the First Circuit limited its decision to the context of cancellation of removal under INA § 240A(a),[105] it found that the BIA's interpretation was reasonable for two reasons. First, the court stated that "any other reading" would encourage applicants for lawful permanent residence to commit fraud during the visa application process.[106] Second, the court reasoned that other courts had interpreted the phrase "lawfully admitted for permanent residence" to denote substantive compliance with the law in multiple sections of the INA.[107] For instance, other courts had interpreted "lawfully admitted for permanent residence" the same way under section 212(c) of the INA,[108] which requires LPR status as a prerequisite for discretionary relief from removal for noncitizens convicted of

---

99. 8 U.S.C. § 1101(a)(20) (2012).

100. Arellano-Garcia, 429 F.3d at1186.

101. Id. at 1187. In re Koloamatangi, 23 I. & N. Dec. 548 (BIA 2003) is discussed supra in notes 76–84 and the accompanying text. The Ninth and Fifth Circuit cases the court cited were Monet, 791 F.2d 752, and In re Longstaff, 716 F.2d 1439 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984).

102. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

103. The fact that an agency interpretation is old or well established does not mean that it is consistent with the intent of Congress. See Brown v. Gardner, 513 U.S. 115, 122 (1994) ("A regulation's age is no antidote to clear inconsistency with a statute . . . ."); Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 171 (1989), superseded by statute on other grounds, Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978, as recognized in Meacham v. KALP, Inc., 554 U.S. 84, 94 (2008) ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

104. 502 F.3d 13, 16 (1st Cir. 2007).

105. Id. A noncitizen in removal proceedings is only eligibility for cancellation of removal if he or she has been a lawful permanent resident "for not less than 5 years." 8 U.S.C. § 1229b(a)(1) (2012).

106. See Mejia-Orellana, 502 F.3d at 16.

107. Id.

108. 8 U.S.C. § 1182(c) (1994) (repealed 1996). See Mejia-Orellana, 502 F.3d at 16 (citing De La Rosa v. U.S. Dep't of Homeland Sec., 489 F.3d 551, 554 (2d Cir. 2007)).

certain crimes before 1997,[109] and section 318 of the INA,[110] which requires LPR status as a threshold for naturalization.[111]

Addressing the court's first argument that "any other reading" would encourage fraud, it is highly unlikely that such fraud would occur. First, fraud or misrepresentation is a deportable offense itself.[112] Additionally, as previously discussed, the INA contains a provision making removable any noncitizen who was inadmissible "at the time of entry or adjustment of status."[113] Thus, any noncitizen who procures an immigrant visa by means of fraud or misrepresentation or who was permitted to enter through government error would still be removable. The only difference would be that, in cases where a discretionary waiver is available, the IJ would be able to consider the noncitizen's application for the waiver and then weigh the equities to determine whether the noncitizen should remain in the country.[114] The resulting change in removal procedures could hardly be considered sufficient incentive to commit visa application fraud.

The First Circuit's second justification, that "lawfully admitted for permanent residence" has been consistently interpreted to require substantive compliance in various sections of the INA, rests on the court's unique holding that its interpretation of LPR applies only in the context of the waiver at issue and not to the INA's general definition of LPR. Because the INA provides a definition of LPR in the definitional section, that definition must be applied consistently throughout the statute.[115] Viewed in this light, the fact that the courts have interpreted "lawfully admitted for permanent residence" the same way under multiple waiver provisions carries little weight in regard to whether the interpretation is reasonable. In fact, the word "lawful," on which the BIA's holding ultimately turns, has been interpreted inconsistently throughout the INA.[116]

Although the Eleventh Circuit decision in Savoury did not directly cite Chevron, it did discuss whether the BIA's interpretation was "reasonable."[117] In

---

109. The statute was repealed in 1996, but still applies in this particular circumstance. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, Title III, § 304(b), 110 Stat. 3009–597 (1996) (repealing 8 U.S.C. § 1182(c)).

110. 8 U.S.C. § 1429 (2012).

111. See Mejia-Orellana, 502 F.3d at 16 (citing In re Longstaff, 716 F.2d 1439, 1441–42 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984)).

112. See 8 U.S.C. § 1182(a)(6)(C)(i).

113. Id. § 1227(a)(1)(A).

114. See supra note 91 and accompanying text (factors the IJ considers in granting a discretionary waiver); infra Part IV (discussion of the policy benefits of allowing IJs to exercise discretion in this area).

115. See 8 U.S.C. § 1101(a) (stating that the definitions provided apply "[a]s used in this chapter," meaning throughout the statute); see also Hing Sum v. Holder, 602 F.3d 1092, 1098 (9th Cir. 2010) (stating that 8 U.S.C. § 1101(a) is intended to apply "across the INA").

116. See infra notes 148–59.

117. Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1313 (11th Cir. 2006). For the factual circumstances of the case, see Introduction.

support of its argument that it was, the court cited the *Black's Law Dictionary* definition of "lawful": "[n]ot contrary to law; permitted by law";[118] however, this does little to resolve the ambiguity. The court also stated that the phrase, "in accordance with the immigration laws," contained in the INA's definition of LPR, implicitly required "consistency with all applicable law," both substantive and procedural.[119] Like the dictionary definition, however, this sheds no more light than does the word "lawful" itself on what exactly is required.

The Second Circuit was the most recent court to address the reasonableness of the BIA's interpretation.[120] The court again appeared to resolve the issue at step two of Chevron,[121] but did not look beyond the arguments offered by the other circuits. In holding that the BIA's interpretation was reasonable, the court again cited the *Black's Law Dictionary* definition of "lawful" and stated that its holding was consistent with those of the other circuits.[122]

In examining whether the BIA's interpretation of "lawfully admitted for permanent residence" is reasonable under Chevron, no court has looked further than the plain meaning of the INA's definition itself, a decidedly circuitous subsection.[123] Though some courts have also looked to other BIA and circuit precedent to support their findings of reasonableness, this is not a permitted Chevron analysis inquiry. Considering that the BIA's interpretation creates procedural violations in adjudications, leads to unjust outcomes for individuals, weakens the role of the IJ, and undermines general U.S. immigration policy goals, an inquiry into whether the BIA's interpretation is reasonable in light of the INA's overarching statutory scheme is not only permissible under Chevron, but necessary.[124]

IV. WHY THE BIA'S INTERPRETATION UNDERMINES THE INTENT OF CONGRESS

No circuit court, in applying the Chevron doctrine to the BIA's interpretation of "lawfully admitted for permanent residence,"[125] has examined the far-reaching, adverse effects that the interpretation has on the INA as a complex statutory scheme or on the general immigration policy goals of Congress.[126] Instead, the courts have limited their inquiries to the definition itself and the meaning of the word "lawfully" contained within it. This is contrary to many

---

118. Id. (quoting BLACK'S LAW DICTIONARY 902 (8th ed. 2004)).

119. Id.

120. De La Rosa v. U.S. Dep't of Homeland Sec., 489 F.3d 551, 554–55 (2d Cir. 2007).

121. Id. at 554 ("We need not concern ourselves with the first step of the Chevron analysis as the BIA has offered a permissible interpretation of the statute to which we would defer if we were to find that the language at issue was ambiguous.").

122. Id. at 554–55.

123. See Arellano-Garcia v. Gonzales, 429 F.3d 1183, 1186 (8th Cir. 2005) (stating that the definition is "somewhat circuitous").

124. See infra Parts V–VI.

125. 8 U.S.C. § 1101(a)(20) (2003).

126. See supra Part III.

Supreme Court holdings, which state that "[i]n reading a statute we must not look merely to a particular clause but consider in connection with it the whole statute."[127] This is particularly critical here, where the interpreted clause is a definition, the meaning of which must be used consistently throughout the INA.[128] Examining the statute in its entirely reveals that Congress could not have intended for the BIA's current interpretation and that reviewing courts should interpret section 101(a)(20) of the INA to mean that LPR status is valid unless and until revoked through a hearing.

To be clear, this Note does not argue that Congress intended for noncitizens who obtain permanent resident status through fraud or misrepresentation to be permitted to remain in the United States. This Note merely argues that noncitizens who achieve LPR status through such wrongdoing or through government mistake should retain LPR status until a final order of removal or rescission is entered against them.[129] Such a reading of section 101(a)(20) of the INA would not bar DHS from initiating deportation proceedings. Specifically, two sections of the INA would still allow for the deportation of noncitizens who obtained their LPR status through fraud or misrepresentation: section 212(a)(6)(C) and section 237(a)(1)(A).

Section 212(a)(6)(C) of the INA provides that any noncitizen who achieved her status through fraud or willful misrepresentation is inadmissible.[130] While only applicants for admission can be charged under this section,[131] section

---

127. Dada v. Mukasey, 554 U.S. 1, 16 (2008) (quoting Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (internal quotation marks omitted)); see also Negusie v. Holder, 555 U.S. 511, 519 (2009) ("[W]e look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") (quoting Dada v. Mukasey, 554 U.S. at 16) (internal quotation marks omitted); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987) ("On numerous occasions we have noted that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (quoting Kelly v. Robinson, 479 U.S. 36, 43 (1986)) (internal quotation marks omitted).

128. See supra note 121 and accompanying text.

129. The plain language of the regulatory definition appears to validate this reading. See 8 C.F.R. § 1.2 (2012) ("Such status terminates upon entry of a final administrative order of exclusion, deportation, or removal."). Several respondents have made an argument for this reading of the regulations, but courts have thus far rejected it, relying on legislative history. See Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1314 (11th Cir. 2006); In re Koloamatangi, 23 I. & N. Dec. 548, 549 (BIA 2003); supra notes 77–83 and accompanying text.

130. 8 U.S.C. § 1182(a)(6)(C) (2012) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.").

131. Section 212 of the INA applies only to arriving noncitizens—those who have not been admitted. See 8 U.S.C. § 1182(a) ("[A]liens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . . ."). LPRs are considered to be already "admitted" except for under a select set of circumstances. See infra note 174 and accompanying text.

237(a)(1)(A)[132] makes deportable any noncitizen who was inadmissible "at the time of entry or adjustment of status," making all grounds of inadmissibility, including section 212(a)(6)(C) of the INA, grounds for deportation as well.[133]

Because of its breadth, section 237(a)(1)(A) would also make deportable any alien who was in violation of any other subsection of section 212 of the INA at the time of admission. For example, noncitizens that had certain prior criminal convictions at the time of admission but were admitted though government error would still be deportable.[134] Thus, under this subsection, a noncitizen like Savoury,[135] who was inadmissible when he was granted LPR status but admitted through no fault of his own,[136] would still be deportable. The main difference, in effect, would be that he and other individuals in his situation would be statutorily eligible for waivers available only to LPRs. For instance, had the court held that Savoury retained his LPR status throughout his deportation proceedings, he would have been eligible for a waiver under section 212(c) of the INA.[137]

Prior to its repeal, section 212(c) of the INA provided that "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General."[138] It is important to note again that such relief, like all relief available specifically for LPRs in deportation proceedings, is discretionary.[139] Just because a noncitizen is eligible for relief does not mean he will receive it. It would merely be in the hands of an immigration judge to weigh the equities and make a fair decision.[140] Thus, section 237(a)(1)(A) of the INA allows for the deportation of noncitizens who were inadmissible at the time they were granted LPR status but received it anyway because of fraud or government error, making it unnecessary to hold their status void ab initio, as the BIA would do.[141]

In fact, the BIA's interpretation of "lawfully admitted for permanent residence" comes into direct conflict with the INA's rescission of adjustment of

---

132. 8 U.S.C. § 1227(a)(1)(A).

133. See id. ("Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.").

134. Id. § 1182(a)(2)(A)(i)(I).

135. See Introduction for the factual circumstances of this case.

136. Savoury disclosed his prior conviction during his application for adjustment of status. See Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1310 (11th Cir. 2006).

137. Savoury did in fact apply for this waiver. Id. at 1312.

138. 8 U.S.C. § 1182(c) (1994) (emphasis added) (repealed in 1996); see also supra note 109.

139. See supra note 95.

140. See supra note 91 and accompanying text (factors considered by the IJ in granting a discretionary waiver); infra notes 159–62 and accompanying text (discussion of the policy benefits of allowing IJs to exercise discretion in this area).

141. See, e.g., In re Koloamatangi, 23 I. & N. Dec. 548, 551 (BIA 2003).

status proceedings.[142] Section 246(a) of the INA enables the Attorney General (or the IJ, for practical purposes) to rescind the LPR status of a noncitizen if he was ineligible for it at the time it was granted, returning the LPR to his former nonimmigrant status.[143] It provides:

> If, at any time within five years after the status of a person has been otherwise adjusted . . . to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person . . . ."

If, as the statute provides, an LPR was "not in fact eligible" for LPR status at the time his status was adjusted, under the BIA's interpretation, he would never have had LPR status.[144] Under that interpretation, rescission of that status would not only be unnecessary but impossible, as it is impossible to revoke something that does not exist.

Additionally, the five-year limitation provision implies that after five years, the noncitizen would be allowed to maintain LPR status regardless of whether he was entitled to it, as long as deportation proceedings were not initiated against him.[145] Again, this would be impossible if the noncitizen did not, in fact, possess the status to begin with. Thus, the language of section 246 of the INA clearly implies Congress anticipated that LPRs who adjusted status by means of fraud or error would maintain their status until the termination of a proceeding against them.[146] There is no reason that this should only be true for LPRs who

---

142. See 8 U.S.C. § 1256(a) (2012).

143. See Oloteo v. INS, 643 F.2d 679, 681 (9th Cir. 1981) ("What Congress plainly intended by § 246 of the Act was a procedure whereby the Attorney General may, in his discretion, 'bust the rank' of the adjusted permanent resident alien and restore him to his original temporary status as an alien 'admitted or paroled' into the United States . . . .").

144. See, e.g., In re Koloamatangi, 23 I. & N. Dec. at 551 ("[W]e hold that the correct interpretation of the term 'lawfully admitted for permanent residence' is that an alien is deemed, ab initio, never to have obtained lawful permanent resident status once his original ineligibility therefor is determined in proceedings.") (emphasis added).

145. The rescission of status provision does not require that an IJ rescind a noncitizen's status prior to placing him or her in removal proceedings. See 8 U.S.C. § 1256(a). Most courts have interpreted this to mean that the five-year bar does not apply to deportation proceedings under most circumstances. See, e.g., In re Belenzo, 17 I. & N. Dec. 374, 384 (BIA 1981). However, the Third Circuit has gone so far as to hold that section 246(a) serves as a statute of limitations, barring DHS from rescinding a noncitizen's LPR status or commencing removal proceedings even if the noncitizen achieved his LPR status achieved through fraud or misrepresentation. Garcia v. U.S. Att'y Gen., 553 F.3d 724, 728 (3d Cir. 2009). This clearly conflicts with the BIA's interpretation of LPR. See Belenzo, 17 I. & N. Dec. at 384.

146. Several respondents who adjusted status have challenged the court's decision that their LPR status was void ab initio on the basis of section 246(a) of the INA. For example, respondent Arellano-Garcia argued that he retained his LPR status because his status had not been rescinded and the five-year statute of limitations had passed. See Arellano-Garcia v. Gonzales, 429 F.3d 1183, 1185 (8th Cir. 2005). The court rejected this

adjusted status, given that the INA's definition of the term "lawfully admitted for permanent residence" should apply equally to all provisions of the INA that contain it.

In fact, courts have held that the word "lawful" requires only procedural compliance within the context of the definition of "admission."[147] Section 101(a)(13)(A) of the INA states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[148] In In re Quilantan, the BIA addressed, for the first time since the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amendments, whether "admission," as defined in section 101(a)(13)(A) of the INA, requires compliance with all substantive immigration laws or merely with procedural regularity.[149] The court held that despite the amendments, an admission is valid and thus a lawful entry if it is merely procedurally regular,[150] affirming its pre-IIRIRA holding on the issue in In re Areguillin.[151] The same year the BIA decided In re Quilantan, the Ninth Circuit in Yin Hing Sum v. Holder also had occasion to address this issue and came to the same conclusion.[152]

---

argument on the grounds that Arellano-Garcia was deportable anyway based on his prior conviction. Id. at 1186. The court did not attempt to reconcile the implications of the rescission of status provision with the BIA's interpretation of LPR. See id. at 1187.

147. See Yin Hing Sum v. Holder, 602 F.3d 1092, 1096 (9th Cir. 2010); In re Quilantan, 25 I. & N. Dec. 285, 293 (BIA 2010). These cases were primarily concerned with the entire definition of "admission" and only In re Quilantan specifically addressed the word "lawful" contained in that definition. 25 I. & N. Dec. at 290 n.3 ("[W]e must now address the ambiguity created by Congress's use of the term 'lawful' to modify the term 'entry' in section 101(a)(13)(A) of the Act."). Because admission is defined as "lawful entry" however, it follows that both of these holdings also indirectly addressed the meaning of "lawful" within this subsection. See 8 U.S.C. § 1101(a)(13)(A) (2012).

148. 8 U.S.C. § 1101(a)(13)(A) (emphasis added).

149. 25 I. & N. Dec. at 290. In this case, the respondent entered the United States without valid documents through a U.S.–Mexico border-crossing checkpoint. In re Quilantan, 25 I. & N. Dec. at 286. The respondent was in the passenger seat of a U.S. citizen friend's car. Id. The inspector asked only the driver if she was a U.S. citizen and then waived them through without questioning the respondent. Id. The BIA determined that, because the respondent presented herself for questioning at an appropriate place of entry and did not make any false claims of citizenship, she had met the qualifications for admission. Id. at 293.

150. Id. at 288.

151. 17 I. & N. Dec. 308, 310 n.6 (BIA 1980). ("'Admission' occurs when the inspecting officer communicates to the applicant that he has determined that the applicant is not inadmissible. That communication has taken place when the inspector permits the applicant to pass through the port of entry.") (internal citation omitted).

152. See Ying Hing Sum, 602 F.3d at 1093 ("'[A]dmission' to LPR status in § 212(h) does not refer to an admission in substantive compliance with the immigration laws, but rather an admission that is procedurally regular in nature."). In that case, the respondent, Ying Hing Sum, argued that a provision of 8 U.S.C. § 1182(h)(2), which bars a noncitizen "previously . . . admitted to the United States as an alien lawfully admitted for permanent residence" from receiving a specific criminal waiver, did not apply to him

The result of these holdings is that, even if a noncitizen were "inadmissible" at the time of admission, as long as the admission was approved through the proper immigration channels (i.e., the noncitizen was "inspected and authorized at the port of entry"[153]), it would still be considered a valid admission under the INA. This is the same interpretation of "lawful" for which this Note argues in the context of the definition of "lawfully admitted for permanent residence."

Both the BIA and the Ninth Circuit support their interpretation of the definition of "admission" by looking to its effects on all portions of the INA, not by merely examining the words of the definition in a vacuum, as courts have done for "lawfully admitted for permanent residence."[154] Most persuasively, both the BIA and the Ninth Circuit noted that section 237(a)(1)(A) of the INA makes "admitted" noncitizens who were inadmissible at the time of entry removable.[155] Thus, the statute implies that a noncitizen is still considered to be "admitted" even if the noncitizen was not in compliance with all substantive requirements of "admission"[156] at the time of entry. To interpret "admission" to require compliance with all substantive provisions of the INA would make it impossible for a noncitizen to be both "admitted" and "inadmissible" as the statute provides.[157] This is exactly the kind of analysis that the courts have failed to do in examining what it means to be a lawful permanent resident.[158]

In terms of policy, the BIA's reading of section 101(a)(20) of the INA also undermines the power Congress entrusted to the IJ as factfinder.[159] The BIA's precedent—holding that a permanent resident who is improperly granted status is never an LPR—impermissibly prevents the IJ from considering a noncitizen's application for relief from removal in certain circumstances and from determining whether relief is warranted as a matter of discretion.[160]

---

because he had achieved his LPR status through fraud or misrepresentation and was thus not technically admitted as an LPR. See id. The court's holding was therefore the only way to avoid the absurd result of Yin Hing Sum obtaining eligibility for the waiver because he had committed fraud. See id. at 1097 ("There is no reason why Congress would give a pass to non-citizens who had fraudulently obtained LPR status while barring from relief non-citizens who had legitimately obtained LPR status.").

153. Id. at 1093.

154. See supra Parts II–III.

155. 8 U.S.C. § 1227(a)(1)(A); Yin Hing Sum, 602 F.3d at 1098.

156. See supra note 133 and accompanying text.

157. See Yin Hing Sum, 602 F.3d at 1098.

158. See supra Parts II–III.

159. All waivers contained in the INA require the IJ's favorable exercise of discretion. See supra note 91 for factors that IJs may consider. Additionally, Congress has made the IJ's discretionary decisions unreviewable by the circuit courts. See supra note 39 and accompanying text.

160. For example, in De La Rosa v. U.S. Dep't of Homeland Sec., the Second Circuit determined that the BIA's interpretation of LPR statutorily barred De La Rosa from eligibility for a waiver of inadmissibility under 8 U.S.C. § 1182(c) (1994) (repealed in 1996). 489 F.3d 551, 553–54 (2d Cir. 2007). This was also true in Savoury v. U.S. Att'y

Allowing the final decision on deportation to remain in the IJ's hands has a number of advantages. For one, the IJ is the person with the most knowledge of the case's particular circumstances.[161] Most importantly, however, taking the decision out of the IJ's hands is a disservice to the general goals of U.S. immigration policy as identified by Congress.[162] This is because the IJ cannot consider whether allowing a particular noncitizen to remain in the country would further these broader immigration goals once the noncitizen is deemed statutorily ineligible for relief. For instance, whether the noncitizen has strong community ties or immediate relatives living in the United States are no longer factors in the decision. Thus, removing the IJ's ability to weigh the equities can force the IJ to issue an order of removal even when the IJ believes U.S. immigration policy and individual justice would be better served by granting a particular removable noncitizen a waiver.

V. WHY THE BIA'S INTERPRETATION IS UNREASONABLE: REMOVAL PROCEEDINGS WITH NO BURDEN OF PROOF

In addition to being statutorily impermissible, the BIA's interpretation of "lawfully admitted for permanent residence" also creates a host of procedural problems during immigration hearings. Some of these problems go so far as to strip noncitizens of procedural rights guaranteed to them in the INA. Because this is not an outcome "that Congress would have sanctioned," the BIA's interpretation is unreasonable under step two of the Chevron analysis.[163]

These procedural problems arise when DHS charges a noncitizen in possession of LPR status as having wrongfully received that status—either through fraud or government error—as the noncitizen is arriving at the U.S. border[164] after a trip abroad.[165] Any time removal charges are brought against a noncitizen while

---

Gen., 449 F.3d 1307, 1317 (11th Cir. 2006). In Mejia-Orellana v. Gonzales, the First Circuit also used the BIA's interpretation to hold that Mejia-Orellana was barred from eligibility for cancellation of removal under 8 U.S.C. § 1229b(a)(1). 502 F.3d 13, 14 (1st Cir. 2007).

161. See 8 U.S.C. § 1229a(b)(1) (2012) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.").

162. These goals are family reunification, recruitment of skilled workers, protection of refugees, and diversity. See supra note 24 and accompanying text.

163. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)); see also supra notes 93–97 and accompanying text (further discussion of Chevron).

164. The "border" includes not only the physical land and sea boundaries of the United States, but also international airports. See Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (explaining that "a search of the passengers and cargo of an airplane" arriving at a U.S. airport after a nonstop flight from abroad "would clearly be the functional equivalent of a border search").

165. Savoury is an excellent example of this, because he was charged as being inadmissible upon entering the United States after a trip abroad to visit family. See Introduction; Opening Brief of the Petitioner, supra note 4, at 11. For a full discussion of the impact a noncitizen's trip abroad can have on subsequent immigration proceedings, see

he is entering the country, the burden of proof in the subsequent proceeding is dependent upon the noncitizen's immigration status.[166] If the noncitizen is an LPR, unless she falls into one of six specified exceptions, the burden is on DHS to show, by clear and convincing evidence, that she is removable regardless of whether or not she left the country.[167] This is not true for a noncitizen who goes abroad if she is merely in possession of a nonimmigrant visa. Even if previously admitted, a nonimmigrant's arrival at the border is always considered an application for admission,[168] and the burden is thus on her to show that she is "clearly and beyond doubt entitled to be admitted."[169]

Because the burden of proof is dependent upon whether the arriving noncitizen is or is not an LPR, it would seem imperative for all parties involved to know at the beginning of the proceeding which status the noncitizen possesses. The BIA's current interpretation of "lawfully admitted for permanent residence," however, makes this impossible to discern until the IJ has made a finding on the charges at the end of the proceeding.[170] This is because, if the IJ affirms the charges—finding, for example, that the noncitizen had a previous felony conviction at the time she was granted LPR status—her LPR status is considered void ab initio, meaning that she never had it.[171] Thus, she was not an LPR at the start of the proceeding,[172] and the burden was on her to disprove the charges "clearly and beyond doubt." If the IJ finds the charges were false, however, the noncitizen retains her LPR status and it is thus revealed that the burden was on DHS all along. In essence, the IJ is forced to hold a hearing that does not have an identifiable burden of proof until its termination.[173]

Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, 05–11 IMMIGR. BRIEFINGS 1 (2005).

166. See 8 U.S.C. § 1229a(c)(2)–(3) (2012).

167. See Id. § 1101(a)(13)(C) (stating that generally, "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States"); Id. § 1229a(c)(3) ("[T]he Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."); see also Bradley J. Wyatt, Even Aliens Are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reforms, 12 WM. & MARY BILL RTS. J. 605, 615–16 (2004).

168. See 8 U.S.C. § 1101(a)(13)(A), (C).

169. Id. § 1229a(c)(2).

170. Id. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.").

171. See, e.g., Kyong Ho Shin v. Holder, 607 F.3d 1213, 1217 (9th Cir. 2010) (holding "all grants of LPR status that were not in substantive compliance with the immigration laws to be void ab initio"); see also supra Parts II–III.

172. See 8 U.S.C. § 1101(a)(13)(A). Cf. Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1311 (11th Cir. 2006) (respondent in possession of LPR status was charged as being inadmissible after a trip abroad).

173. Some may argue that 8 U.S.C. § 1101(a)(13)(C) makes this situation commonplace in immigration proceedings where the LPR respondent is charged with falling under one of the § 1101(a)(13)(C) exceptions while returning from abroad. This is because under 8 U.S.C § 1101(a)(13)(C), it is also sometimes impossible to know whether the LPR

If this seems confusing, it should. To find out the appropriate burden of proof for the charge, the judge must first decide whether or not the charge was actually committed. Scarier still, most noncitizens in this situation, and even many immigration lawyers representing them, will assume that the burden of proof is on DHS, as it would typically be for a noncitizen in possession of LPR status returning from abroad who does not satisfy an applicable exception.[174] Making this assumption, a lawyer might advise a client not to testify until DHS has presented evidence to meet the "clear and convincing evidence" burden, an error that could cost the noncitizen her right to remain in the United States should the IJ determine that the burden was in fact on the noncitizen.

While the most fair and logical solution to this predicament would be to place the burden on DHS to show by "clear and convincing evidence" that the noncitizen is not an LPR, there is no statute requiring this allocation, and often this does not occur in practice. For example, Olga Sergueeva, a native and citizen of Russia in possession of LPR status, found herself in exactly this situation upon returning to the United States from a trip to Russia.[175] DHS alleged that because Sergueeva attained her LPR status through fraud or misrepresentation, she should be treated as an arriving alien, and, thus, the burden was on Sergueeva to disprove the fraud charge.[176] Sergueeva's attorney eloquently described the procedural problems with this analysis in Sergueeva's Brief to the Second Circuit:

---

is an "arriving alien" until the IJ makes a finding on the charges. The critical distinction here, however, is that the BIA has held that the exceptions found in § 1101(a)(13)(C) come with their own burden of proof. See In re Rivens, 25 I. & N. Dec. 623, 625–26 (BIA 2011) ("[W]ith respect to the application of section 101(a)(13)(C) of the Act, we find no reason to depart from our longstanding case law holding that the DHS bears the burden of proving by clear and convincing evidence that a returning lawful permanent resident is to be regarded as seeking an admission."). Therefore, even though it may be unclear until the termination of the proceeding whether the LPR is considered an arriving alien or not, the burden of proof for the charges is still known to all parties throughout the proceeding.

174. 8 U.S.C. § 1101(a)(13)(C). Even in the situation where a returning LPR is charged with falling under one of the listed exceptions, she is still protected by the fact that DHS must show by clear and convincing evidence that the noncitizen does in fact fall under the exception. See In re Rivens, 25 I. & N. Dec. at 625–26; see also supra note 172. Thus, the situation presented here, where a noncitizen is charged with a ground that could potentially nullify his or her LPR status, is unique in lacking a clear burden of proof.

175. See Reply Brief for Petitioner at 2–12, Sergueeva v. Holder, 324 F. App'x 76 (2d Cir. 2009) (No. 07–2238–ag).

176. Sergueeva stated DHS's position this way before the Second Circuit:

> [DHS] contends that, because, at some point after [Sergueeva] returned to the U.S., the IJ found that [Sergueeva's] LPR status had been obtained through fraud or misrepresentation, [Sergueeva's] LPR status was void ab initio, and as a result [Sergueeva] was not an alien lawfully admitted for permanent residence in accordance with INA § 101(a)(20), and thus, at the time she returned to the U.S., [Sergueeva] was not a LPR and not entitled to the protections of § 101(a)(13)(C).

See id. at 5–6.

> It would be wholly improper to shift the burden [of proof] based on mere allegations by the government that [Sergueeva's] status was not lawfully obtained. . . . [T]he government, by indicating little more than a vague suspicion that the alien's LPR status was not lawfully obtained, could require all returning LPR's to demonstrate . . . that their admission as a permanent resident was lawful. . . . Clearly, such a result was not contemplated by the statute and would render § 101(a)(13)(C) a mere suggestion by Congress rather than a proscription.[177]

Unfortunately, the Second Circuit denied her petition in 2009 and largely failed to consider this argument. The panel cited Matter of Koloamatangi[178] for the proposition that Sergueeva was not an LPR, without further analysis.[179]

In light of this decision, imagine this nightmare scenario: You are a noncitizen in possession of LPR status who has been living in the United States for ten years. Your wife and children came to the United States with you and were also granted LPR status as derivative beneficiaries. You and your family take a brief, two-week trip abroad to visit relatives. Upon arriving at the airport on your trip home, Customs and Border Patrol informs you that your visa has been flagged, alleging that you committed a felony prior to coming to the United States and did not disclose it in your application. You and your family are charged with visa application fraud and inadmissibility on account of the felony, and you are all placed in removal proceedings.

In accordance with the BIA and circuit court decisions on what constitutes lawful admission for permanent residence,[180] these allegations may mean that your LPR status, and that of your wife and children,[181] never existed.[182] Because you were charged at the border, if you are not currently considered an LPR, the burden is on you to show that you did not commit fraud and are thus entitled to admission.[183] But whether you are an LPR depends on the truth of the allegations against you. The IJ cannot determine the burden of proof for the fraud charge without first making a determination of whether you in fact had a felony

---

177. Id. at 8–9.

178. 23 I. & N. Dec. 548 (BIA 2003).

179. See Sergueeva v. Holder, 324 F. App'x 76 (2d Cir. 2009), at *79 (2d Cir. 2009).

180. See supra Parts II–III.

181. See Kyong Ho Shin v. Holder, 607 F.3d 1213, 1217 (9th Cir. 2010) (finding that the respondents were not LPRs because they were derivative beneficiaries of their mother's fraudulently procured LPR visa, even though the respondents themselves did not commit fraud and did not know their mother had).

182. See, e.g., In re Koloamatangi, 23 I. & N. Dec. at 551; see also supra note 75 and accompanying text.

183. See Burdens of Proof in Removal Proceedings, 8 CFR § 1240.8(b) ("In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.").

conviction, the very thing the hearing is meant to determine. The high burden of proof in place to protect you in this situation[184] crumbles away.

This circular and nonsensical situation could easily be avoided if courts were to interpret LPR status in such a way that those noncitizens in possession of the status retain it until an IJ issues an order of removal or rescission, regardless of how the LPR obtained it. It seems impossible that Congress could have intended the ludicrous effects the current interpretation can have on removal procedures.

It would also seem that a removal proceeding with an unknown burden of proof would violate due process.[185] Indeed, a handful of respondents affected by this interpretation have attempted to argue just that; but, none have been successful.[186] There are several barriers to a noncitizen bringing such a claim. Critically, most courts do not view LPR status as fulfilling the requisite property or liberty interest when what is ultimately at stake is eligibility for certain

---

184. See Reply Brief for Petitioner, supra note 175, at 4–5. The Brief argues that in establishing limited circumstances in 8 U.S.C. § 1101(a)(13)(A) under which a returning LPR can be treated as an arriving alien, Congress intended to "protect aliens who have been accorded LPR status from having to prove their right to admission clearly and beyond doubt every time they leave the U.S. and return." See also Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly . . . .").

185. Courts have long protected LPRs' right to a fair hearing before they may be removed from the United States. See Landon, 459 U.S. at 32 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation.") (citations omitted). To prevail on a due process claim, a noncitizen claimant must demonstrate: (1) that she has a legitimate property or liberty interest at stake; (2) that a procedural error was made in her removal proceeding; and (3) that the violation prejudiced her interests. See Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); see also Jupiter v. Ashcroft, 396 F.3d 487, 492 (1st Cir. 2005); Lata v. INS, 204 F.3d 1241, 1246 (9th Cir. 2000).

186. See, e.g., Mejia-Orellana v. Gonzales, 502 F.3d 13, 17 (1st Cir. 2007); Savoury v. U.S. Att'y Gen., 449 F.3d 1307, 1320 (11th Cir. 2006). Several respondents have also argued unsuccessfully for equitable or collateral estoppel. See, e.g., Opening Brief for Petitioner, supra note 4, at 20–21. Both of these arguments, however, are fairly weak. Equitable estoppel against the government requires a showing of affirmative misconduct, not mere negligence or inaction, as is the case when the government accidentally overlooks a prior conviction. See Savoury, 449 F.3d at 1319 (citing United States v. McCorkle, 321 F.3d 1292, 1297 (11th Cir. 2003)). Collateral estoppel, though perhaps a stronger argument, also has some weak points. For one, it is questionable whether an administrative decision such as the approval of a visa application would cause it to attach, particularly because visas are approved by USCIS while the EOIR, housed in the Department of Justice, is in charge of removal decisions. See CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8255 (1st ed. 2013). Additionally, the issue must have been actually litigated in a prior proceeding. If the government mistakenly neglected to address an issue, such as a prior conviction, it is questionable whether that would constitute a full and fair opportunity to litigate it. Though possibly worth looking into further, this is beyond the scope of this Note.

discretionary waivers.[187] This has been an insurmountable hurdle for most noncitizens attempting to bring a due process claim based on the procedural violations that result from the BIA's current interpretation of LPR.

Additionally, a noncitizen bringing a due process claim must show that the procedural error resulted in "substantial prejudice,"[188] meaning that the error potentially altered the outcome of the hearing.[189] If DHS is able to present clear and convincing evidence that the noncitizen respondent was not initially entitled to LPR status, the fact that the noncitizen was unaware of the burden of proof might not impact the outcome. Of course, this inquiry is factually intensive and difficult to discuss in hypotheticals. Accordingly, although there may be ways that a noncitizen could successfully bring a due process claim based on the BIA's interpretation and its consequences, that is largely beyond the scope of this Note.

Regardless, it is not necessary for a noncitizen to successfully bring a due process claim in order for the circuit courts to find that the BIA's interpretation of section 101(a)(20) of the INA is impermissible.[190] Even assuming that the INA's definition of LPR is sufficiently ambiguous to accommodate the BIA's interpretation,[191] such an interpretation should be considered unreasonable in light of the fact that it diminishes or renders meaningless statutory protections provided to noncitizens in the INA.[192]

---

187. See, e.g., Mejia-Orellana, 502 F.3d at 17 (holding that there was no colorable due process claim because the interest at stake was eligibility for a discretionary waiver). This is, however, an issue on which the circuits are split. See United States v. Copeland, 376 F.3d 61, 70–71 (2d Cir. 2004) (providing an overview of different circuit courts' holdings on this issue); see also United States v. De Horta Garcia, 519 F.3d 658, 661 (7th Cir. 2008) (stating that the Seventh Circuit follows the majority of circuits on this issue). Both the Ninth and Second Circuits have held that due process attaches if an error causes a respondent to forgo applying for a form of relief for which he is likely eligible. See United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1049 (9th Cir. 2004); Copeland, 376 F.3d at 71. In these circuits, while an IJ's discretionary denial of relief is not a property interest, the right to a hearing on the respondent's eligibility for the form of relief is. See Copeland, 376 F.3d at 72 (stating that there is a "distinction between a right to seek relief and the right to that relief itself"). Circuits claiming that eligibility for discretionary waivers is not a property interest rely on a line of § 1983 cases holding that predeprivation hearings are not a property right when a government benefit or employment is discretionary. See id. at 71–72. The Second Circuit stated that this analogy is faulty in that a right to a hearing on certain waivers "is well established and mandatory, whether or not the ultimate granting of relief is discretionary." Id. at 72. This is supported by the fact that eligibility for relief is "governed by specific statutory standards." Id. (quoting INS v. St. Cyr, 533 U.S. 289, 307–08 (2001)).

188. Savoury, 449 F.3d at 1320.

189. See Shin v. Mukasey, 547 F.3d 1019, 1024 (9th Cir. 2008).

190. Such a decision would, however, be clear evidence that the BIA's interpretation should be overruled. See Fox v. Washington, 236 U.S. 273, 277 (1915) (citations omitted) ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed").

191. This Note argues it is not. See supra Part IV.

192. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent

As previously stated, in this situation—where the noncitizen, believing she possesses LPR status, briefly leaves the country, attempts to return, and is charged as being inadmissible due to an error in her initial LPR application—the noncitizen is often assumed to be an arriving alien unless she can prove otherwise, contrary to the more obvious reading of the INA that places the burden on DHS.[193] Implicit in this burden-shifting is the fact that the IJ has made a determination on the charges—whether they are application fraud or another ground of inadmissibility—prior to the termination of the proceeding.[194] This is in clear violation of section 240(c) of the INA, which states that "[a]t the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States."[195]

Additionally, this appears to violate the noncitizen's right to present evidence on her behalf as is required by INA section 240(b)(4).[196] This statute provides that "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government."[197] Even if a noncitizen is given the opportunity to present evidence after the IJ has made a preliminary determination on the charges, this seems a hollow version of the provided right. An analogous situation would be a case where the government, upon finding illicit items in someone's home, claims that the burden of proof is on the homeowner to show he is innocent because he is a criminal.[198] This is not the system of law under which we live.

While the government could argue that it is not necessary for the IJ to determine the burden of proof until the termination of the hearing, this too would create injustice for a noncitizen respondent. The noncitizen would be at a complete loss for how to strategize for the proceeding, not knowing whether she or DHS had the burden of proof until the final decision was issued. Neither statutes nor case law could inform her decision because the burden of proof determination would depend entirely on whether the judge found the allegations true in the first place.

---

regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted).

193. See supra notes 173–76 and accompanying text.

194. If the IJ had not made such a determination, it is clear that the noncitizen respondent would remain an LPR until the hearing's termination; but, this is not how such hearings are often conducted. See supra notes 182–83 and accompanying text.

195 8. U.S.C. § 1229a(c)(1)(a) (2012) (emphasis added).

196. Id. § 1229a(b)(4)(B).

197. Id.

198. Olga Sergueeva put it another way in her Reply Brief to the Second Circuit:

> [DHS] contends that, . . . at the time [Sergueeva] returned to the U.S., [Sergueeva] was not an LPR and not entitled to the protections of § 101(a)(13)(C) . . . [DHS's] argument puts the cart before the horse. It is akin to saying now that a jury has found the defendant guilty of murder, there was no need to give that defendant a trial by jury, because he was, at all times, guilty of murder.

Reply Brief for Petitioner, supra note 175, at 5–6.

In sum, the BIA's interpretation of the definition of "lawfully admitted for permanent residence" diminishes procedural rights provided to noncitizens in the INA. Even though this situation is specific and affects only a small minority of noncitizens, this should be sufficient evidence for the circuit courts to find that the interpretation is unreasonable under Chevron.

VI. THROUGH THE LOOKING GLASS: CONSEQUENCES OF AN ALTERNATIVE INTERPRETATION OF "LAWFULLY" IN SECTION 101(a)(20) OF THE INA

Some courts would have us believe that interpreting "lawfully admitted for permanent residence" to require only procedural regularity, as "admission" is interpreted,[199] would provide immunity to noncitizens who acquired their LPR status unlawfully or would incentivize fraud.[200] Both of these fears are flatly unfounded. Regarding the first, section 237(a)(1)(A), which makes deportable any noncitizen who was inadmissible at the time of entry, would prevent this from occurring. This would include anyone who procured a visa through fraud or misrepresentation.[201] It would also include those noncitizens like Karl Savoury[202] and Richard Longstaff,[203] who were admitted through government error despite being inadmissible at the time of entry or adjustment of status. For example, Karl Savoury would still be deportable under section 237(a)(1)(A) as a noncitizen who was inadmissible at the time of adjustment of status due to his previous drug conviction.

While some would perhaps desire more protections for noncitizens in Savoury's position—those who relied on previous government decisions that stated that they were in fact LPRs—an alternative interpretation of section 101(a)(20) would only provide them with eligibility for certain waivers that are solely available to LPRs.[204] Because all such forms of relief require the IJ's favorable exercise of discretion, in reality, this alternate interpretation would only give more power to the IJs to weigh the equities and determine if the noncitizen respondent should be granted a waiver.[205] It might, for instance, enable the IJ to

---

199. See supra notes 148–59 and accompanying text.

200. See Mejia-Orellana v. Gonzales, 502 F.3d 13, 16 (1st Cir. 2007) (stating that any other interpretation of LPR would encourage applicants for lawful permanent residence to commit fraud).

201. See 8 U.S.C. 1182(a)(6)(C)(i) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.") (emphasis added).

202. See Introduction.

203. See supra Part II.

204. Relief available exclusively for LPRs consists primarily of 8 U.S.C. § 212(c) (which was repealed but is still available to certain noncitizens) and cancellation of removal under 8 U.S.C. § 240A(a). 8 U.S.C. § 237(a)(1)(E)(iii), which waives certain alien smuggling offenses, also applies exclusively to LPRs. See supra note 90 and accompanying text.

205. See supra note 90 and accompanying text.

consider that Savoury earned a degree in Civil Engineering, taught high school math, and volunteered in an adult literacy program.[206] Or that Longstaff was a small business owner whose only offense was being homosexual, a law that was no longer even in effect at the time of his appeal.[207] Or that neither respondent at any time committed fraud or misrepresentation. Do we, as a country, really want to force IJs to ignore the positive contributions these noncitizens have made to society, their family and community ties to the United States, and the overall sense of injustice that comes with deporting someone who does not merit such treatment?

Aside from promoting justice for the individuals involved, there are additional policy considerations that favor the more lenient interpretation of LPR for which this Note argues. For one, it would end the "mystery burden of proof" problem that arises in some fraud and misrepresentation cases, which requires an IJ to make a finding on the merits of the charges before determining the burden of proof. Regardless of one's guilt or innocence, it seems completely contrary to American ideals to make such a determination before both sides have had an opportunity to present their evidence; or worse, to withhold the determination of the burden of proof until a removal order is issued.

Finally, an alternate interpretation of section 101(a)(20) would promote consistency within the INA. "Lawfully" would no longer be interpreted differently under the definitions of LPR and "admission," and the contradictions that now exist between rescission of status provisions and the BIA's current interpretation would disappear. Reviewing courts should begin taking these realities into account.

CONCLUSION

The BIA's current interpretation of the INA's definition of "lawfully admitted for permanent residency" creates a variety of problems for both noncitizens and the immigration courts alike. Under the current interpretation, a noncitizen could potentially live in the United States for decades, believing that his LPR status gives him the right to do so permanently, only to find out that he never in fact possessed this status. Such a reading cannot be what Congress intended in saying that "lawfully admitted for permanent residency" is "the status of having been lawfully accorded the privilege of residing permanently in the United States."[208]

While the circuit courts have thus far upheld the BIA's interpretation under Chevron, none have looked closely at the intent of Congress in enacting this section. In particular, no court has looked into the way the definition interacts with other portions of the statute. Inconsistencies that develop under the current reading reveal that Congress could not have intended that a noncitizen's LPR status should be nullified if the government at any later time discovers an irregularity in that

206. Opening Brief of the Petitioner, supra note 4, at 10.
207. See supra notes 62–69 and accompanying text.
208. 8 U.S.C. § 1101(a)(20).

noncitizen's application. Such inconsistencies have forced the BIA to interpret "admission" as requiring only procedural regularity under other sections of the INA, and it should do the same for LPR status. The intent of Congress in this respect is unambiguous.

Even if reviewing courts find that Congress's intent is unclear with regard to what "lawfully" requires in the definition of LPR, the procedural violations that can arise under the BIA's current interpretation should be enough to demonstrate that the BIA's interpretation is unreasonable. Viewed under Chevron, the current interpretation cannot stand. Noncitizen respondents facing this issue in the future should bring these arguments to light.