How VAWA Special Rule Admissibility and an I-212 Application Can Overcome Reinstatement of Removal and the Permanent Bar

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I. Introduction

It's surprising what one can learn by reading statutes carefully instead of relying solely upon governmental interpretations of their meaning. Here, a later statute enabled a previously removed alien to avoid reinstatement of removal and the permanent bar to admission as a lawful resident. These statutory insights arose through defending a young woman who had previously been expeditiously removed on reentry following more than one year of unlawful presence in the United States, had reentered without inspection, had married a U.S. citizen, had been physically and emotionally abused by him during their relationship, had divorced, and found herself facing removal for having entered without inspection in violation of Immigration and Nationality Act (INA) §212(a)(6)(A)(i).[1] At the Master Hearing, the respondent indicated her intent to file for cancellation of removal under Violence Against Women Act (VAWA) Special Rule procedures.[2] Following the Master Hearing, the government reviewed the file and, following normal procedures, moved to terminate jurisdiction for the purpose of reinstating the respondent's previous expedited removal order. The reinstatement-of-removal statute, INA §241(a)(5),[3] has become a favorite governmental tool to dispatch repeat uninspected entrants with minimal fuss: No judge, no attorney, no collateral attack, minimal procedure, and the alien is sent packing.[4] Since the

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[1] 8 U.S.C. §1182(a)(6)(A)(i). References throughout will be to the INA. U.S.C. cites are to the 2010 edition.

[2] INA §240A(b)(2), 8 U.S.C. §1229b(b)(2), which provides, in relevant part (emphasis added):

> (A) Authority.--The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is *inadmissible* or *deportable* from the United States if the alien demonstrates that--
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> (i) (I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is or was a United States citizen (or is the parent of a child of a United States citizen and the child has been battered or subjected to extreme cruelty by such citizen parent);
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> . . . .
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> (ii) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application, and the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States;
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> (iii) the alien has been a person of good moral character during such period, subject to the provisions of subparagraph (C);
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> (iv) the alien is not inadmissible under paragraph (2) or (3) of section 212(a), is not deportable under paragraphs (1)(G) or (2) through (4) of section 237(a), subject to paragraph (5), and has not been convicted of an aggravated felony; and
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> (v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.

[3] 8 U.S.C. §1231(a)(5). It provides as follows:

> Reinstatement of removal orders against aliens illegally reentering.--If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

[4] The procedure appears at 8 C.F.R. §1241.8(a):

> An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:
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> (1) Whether the alien has been subject to a prior order of removal. The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.

reinstatement statute purports to forbid all "relief," few means exist to avoid its reach. That's where studying the statutes came in. The following arguments successfully resisted the motion to terminate and identified a sound statutory basis for the client's eventual application for cancellation of removal and adjustment of status.

II. Immigration Judges Continue to Have Discretion to Consent to a Reapplication for Admission for VAWA Special Rule Cancellation of Removal and Other Respondents

In its termination motion, the government raised its standard argument that the court has no jurisdiction based on the opening language of the reinstatement regulation.[5]

In response, we pointed out that under the Violence Against Women Reauthorization Act of 2005 (VAWRA), "The Secretary of Homeland Security, the Attorney General, and the Secretary of State shall continue to have discretion to consent to an alien's reapplication for admission after a previous order of removal, deportation, or exclusion."[6] Moreover, the statute codified the "sense of Congress": "that the officials described in paragraph (1) should particularly consider exercising this authority in cases under the Violence Against Women Act of 1994 . . . and relief under section 240A(b)(2) . . . of [the Immigration and Nationality] Act (as in effect on March 31, 1997) pursuant to regulations under section 212.2 of title 8, Code of Federal Regulations."[7]

This statute postdates both the reinstatement of removal statute, INA §241(a)(5), and the above-cited reinstatement regulation the government always relies on to terminate Immigration Court jurisdiction. While it may be technically true, as the government argues in such instances, that "no right to a hearing before an immigration judge" exists when there has been a prior removal, it is also clear from this more recent statute that the Immigration Court, under the Attorney General, "continue[s] to have discretion to consent to an alien's reapplication for admission *after a previous order of removal*, deportation, or exclusion."[8] Moreover, by referring specifically to 8 C.F.R. §212.2 in the reapplication context, the statute reaffirms the continuing validity of this regulation, which includes *nunc pro tunc* procedures that permit an I-212 application to be filed "in conjunction with" an application for adjustment of status.[9] Although the

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(2) The identity of the alien, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.

(3) Whether the alien unlawfully reentered the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

[5] *Id.*, first two sentences.

[6] Pub. L. No. 109-162, §813(b)(1), 119 Stat. 2960 (Jan. 5, 2006). (Originally VAWDOJRA, the name of the statute was shortened by removing reference to the Department of Justice (DOJ) from Titles I-IX of the Act. VAWA & DOJ Reauthorization Act Technical Amendments, Pub. L. No. 109-271, §1(a), 120 Stat. 750 (Aug. 12, 2006).)

[7] Pub. L. No. 109-162, §813(b)(2), 119 Stat. 2960 (Jan. 5, 2006). Both (b)(1) & (2) are included in an editorial note to INA §240A(b)(2), 8 U.S.C. §1229b(b)(2).

[8] *Id.* §813(b)(1) (emphasis added).

[9] 8 C.F.R. §212.2(a), (c), & (i) (emphasis added):

(a) Evidence. Any alien who has been deported or removed from the United States is inadmissible to the United States unless the alien has remained outside of the United States for five consecutive years since the date of deportation or removal. If the alien has been convicted of an aggravated felony, he or she must remain outside of the United States for twenty consecutive years from the deportation date before he or she is eligible to re-enter the United States. Any alien who has been deported or removed from the United States and is applying for a visa, admission to the United States, or adjustment of status, must present proof that he or she has remained outside of the United States for the time period required for re-entry after deportation or removal. The examining consular or immigration officer must be satisfied that since the alien's deportation or removal, the alien has remained outside the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act. Any alien who does not satisfactorily present proof of absence from the United States for more than five consecutive years, or twenty consecutive years in the case of an alien convicted of an aggravated felony, to the consular or immigration officer, and any alien who is seeking to enter the United States prior to the completion of the requisite five- or twenty-year

> absence, must apply for permission to reapply for admission to the United States as provided under this part. A temporary stay in the United States under section 212(d)(3) of the Act does not interrupt the five or twenty consecutive year absence requirement.
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> . . . .
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> (e) Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act and Part 245 of this chapter must request permission to reapply for entry *in conjunction with* his or her application for adjustment of status. This request is made by filing Form I-212, Application for Permission to Reapply. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.
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> . . . .
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> (i) Retroactive approval.
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> (1) If the alien filed Form I-212 when seeking admission at a port of entry, the approval of the Form I-212 shall be retroactive to either:
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> (i) The date on which the alien embarked or reembarked at a place outside the United States; or
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> (ii) The date on which the alien attempted to be admitted from foreign contiguous territory.
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> (2) If the alien filed Form I-212 *in conjunction with* an application for adjustment of status under section 245 of the Act, the approval of Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States.

This is very important because the legacy Immigration and Naturalization Service (INS) and the U.S. Citizenship and Immigration Services (USCIS) have steadfastly maintained that the procedures for granting *nunc pro tunc* permission to reapply for admission described in these portions of the regulation were no longer valid. *See, e.g.,* Memorandum of Michael Aytes, Acting Deputy Director, USCIS, *Adjudicating Forms 1-212 for Aliens Inadmissible Under Section 212(a)(9)(C) or Subject to Reinstatement Under Section 241(a)(5) of the Immigration and Nationality Act in light of* Gonzalez v. DHS, *508 F.3d. 1227 (9th Cir. 2007)* (May 19, 2009), *reprinted at* 15 Bender's Immigr. Bull. 282, 289 (App. B) (Feb. 15, 2010) (following BIA precedents, the Service treats 8 C.F.R. §212.2 as effectively superseded by the later-enacted INA §212(a)(9), prescribes multiple ways to deny I-212 applications, and quotes BIA dicta that "'nunc pro tunc' (retroactive) and advance (prospective) approval provisions formerly contained in 8 CFR 212.2 do not apply to consent requests under section 212(a)(9)(C)(ii) of the INA" (nn. 1&4, citations omitted, emphasis in original)); Memorandum of Michael Aytes, Acting Associate Director for Operations, USCIS, and Dea Carpenter, Acting Chief Counsel, USCIS, HQOCC 70/21.1.16-P, 70/21.1.17-P, *Effect of* Perez-Gonzalez v. Ashcroft *on adjudication of Form 1-212 applications filed by aliens who are subject to reinstated removal orders under INA §241(a)(5)* (Mar. 31, 2006), *reprinted at* 11 Bender's Immigr. Bull. 1043, 1079 (App. I) (Sept. 1, 2006) (which sought to restrict the use of I-212 applications despite Court of Appeals precedent to the contrary) (rescinded by the May 19, 2009. memorandum).

wording of the regulation addresses only applications under section 245 of the INA, it is clear from this statute that Congress intends this regulatory relief *to* apply also to applications under "section 240A(b)(2)," that is, under the VAWA Special Rule.

This 2006 enactment restates a pre-emptive, discretionary, regulatory exception to the reinstatement procedure—one that the government has actively ignored.[10] Indeed, this respondent fit the

[10] *See, e.g.,* Delgado v. Mukasey, 516 F.3d 65, 72-74 (2d Cir. 2008) (relied on *Torres-Garcia;* rejected applicability of I-212 procedure; discussed VAWRA, erroneously concluding that the operative language of §813 quoted above had been deleted by a subsequent enactment); Matter of Briones, 24 I. & N. Dec. 355, 358-59 (BIA Nov 29, 2007) (echoed *Torres-Garcia* on inapplicability of I-212 for alien subject to permanent bar, then focused on interplay of INA §§212(a)(9)(C)(i) and 245(i)); Matter of Torres-Garcia, 23 I. & N. Dec. 866, 873-76 (BIA Jan 26, 2006) (decided three weeks after passage of VAWRA, but neither followed nor discussed the statute; rather, held that an approved I-212 did not overcome the permanent bar of INA §212(a)(9)(C)(i)(II): "the very concept of *retroactive* permission to reapply for admission . . . contradicts the 'clear language' of section 212(a)(9)(C)"); *see also* Gonzalez-Balderas v. Holder, 597 F.3d 869 (7th Cir. 2010) (following *Torres-Garcia* and joining *Delgado* in deferring to the agency's interpretation of the statute).

The rationale of these cases, which ignored VAWRA to reach erroneous conclusions, forms the bedrock of Mr. Aytes's memoranda, *supra* note 9. VAWRA has broad application to both INA §245(a) and Special Rule adjustments of status, unmistakably instructing the Executive Branch that 8 C.F.R. §212.2 is still alive *in its entirety*. This means that the BIA, the Court of Appeals for the Second Circuit, other courts relying on *Torres-Garcia*, and Mr. Aytes are all wrong. For, *contrary to statute*, they all deny the possibility of filing an I-212 Application for Permission to Reapply for Admission "in conjunction with" an adjustment of status application. Such an application, if granted, gives the adjustment applicant retroactive permission for the last unlawful entry and thereby negates inadmissibility under INA §212(a)(9)(C)(i)(II) (contrary to the conclusion of Mr. Aytes and the BIA). Moreover, this retroactive finding under 8 C.F.R. §212.2(a), (e), & (i) undercuts the triggering event for reinstatement of removal. Thus, an I-212 filed "in conjunction with" (often in advance of) an adjustment application, *if approvable*, should establish admissibility for the previously removed undocumented

precise situation that Congress strongly encouraged the named officials to "particularly consider" in exercising this discretion. Following the statute's wording, we also provided an I-212 Application for Permission to Reapply for Admission with the opposing brief. This application provided the basis for exercising discretion under the above statute. It was filed prospectively "in conjunction with" the cancellation of removal and adjustment of status application yet to be filed under §240A(b)(2).

The court gave the government a further opportunity to support its motion to terminate jurisdiction. The government predictably premised its arguments upon *Torres-Garcia* and the assumption that no relief or waiver exists for a previously removed alien who reenters without inspection until at least ten years have passed, by virtue of INA §§212(a)(9)(C)(i)(II)[11] and 241(a)(5). The government also argued (erroneously) that §813(b)(1) and (b)(2) of VAWRA had been deleted by a later enactment.[12]

Owing to the statute's reaffirming the Attorney General's discretion and to the existence of a waiver of the permanent bar of §212(a)(9)(C)(i)(II) available for VAWA *self-petitioners*, the court denied the motion to terminate. But before deciding whether or not to grant permission for the respondent to reapply for admission retroactively to her last entry, the court requested a further brief on the respondent's eligibility for the waiver at §212(a)(9)(C)(iii) as a "VAWA self-petitioner."

In response, we specifically showed that the respondent fell within the group of eligible VAWA Special Rule and/or VAWA self-petitioner beneficiaries of the 2005 VAWRA "Sense of Congress" provision and the waiver provision of §212(a)(9)(C)(iii). Prior to establishing her qualification as a VAWA self-petitioner, however, we demonstrated that §240A(b)(2) afforded the respondent much broader protection, *including from all the inadmissibility provisions of INA §212(a)(9)*, without the need of a waiver.

III. The Permanent Inadmissibility Bar of INA §212(a)(9)(C)(i)(II) Does Not Apply to VAWA Special Rule Applicants

Under INA §240A(b)(2), the VAWA Special Rule statute, "The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is *inadmissible* or *deportable* from the United States . . . ."[13] The statute goes on to list specific inadmissibility and deportability exceptions under §§212(a) and 237(a), including for criminal, security, and aggravated felony grounds.[14] However, the statute exempts subsection (b)(2) beneficiaries from its additional list of those "ineligible" for relief.[15] The scope of this adjustment of status authority far exceeds that of §245, whose beneficiaries must be "admissible" and "inspected and admitted or paroled." By contrast, the cancellation of removal and adjustment of status for a VAWA Special Rule applicant "who is inadmissible or deportable" effectively supersedes *all* grounds of inadmissibility and deportability except aggravated felonies and the specifically mentioned paragraphs of §§212(a) and 237(a).

Here, Congress could have subjected the Special Rule to other inadmissibility or ineligibility provisions, but it chose not to. Notably, the inadmissibility provisions of INA §212(a)(9) do not appear in the short list of restrictions on this broad authority for relief. Nor does §241(a)(5). Taken at face value, this means that undocumented entry, unlawful presence, prior deportation or removal, three-year bar, ten-year bar, permanent bar—indeed, all forms of inadmissibility save those specifically described in this section—do not apply in the case of Special Rule VAWA applicants under §240A(b)(2).[16]

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entrant and should protect the applicant from reinstatement so as to enable a decision to be made on the merits of the associated adjustment application under §245(a), §245(i), or §240A(b)(2). Therefore, these decisions all appear to be clearly erroneous in view of VAWRA's affirmation of the I-212 application procedures, including their retroactive effect, by specific reference to 8 C.F.R. §212.2, which post-dates §212(a)(9)(C).

[11] 8 U.S.C. §1182(a)(9)(C)(i)(II).

[12] This argument appears also to have been made—and accepted—in *Delgado v. Mukasey*, 516 F.3d at 73. Contrary to the government's argument, VAWA & DOJ Reauthorization Act Technical Amendments, Pub. L. No. 109-271, §1(a), 120 Stat. 750 (Aug. 12, 2006), did *not* affect §813(b) of VAWRA.

[13] Emphasis added.

[14] Sections 212(a)(2) or (3), 8 U.S.C. §1182(a)(2) or (3), 237(a)(1)(G) or (2)-(4), 8 U.S.C. §1227(a)(1)(G) or (2)-(4), provided the person has not been convicted of an aggravated felony. Section 240A(b)(2)(A)(iv), 8 U.S.C. §1229b(b)(2)(A)(iv).

[15] *Compare* §240A(b)(2)(A)(iv), 8 U.S.C. §1229b(b)(2)(A)(iv), *and* §240A(c), 8 U.S.C. §1229b(c).

[16] Owing to the statutes' parallel structure based on *inadmissibility* or *deportability*, beneficiaries of cancellation of removal for permanent residents (§240A(a), 8 U.S.C. §1229b(a)) and nonpermanent residents (§240A(b)(1), 8

Both §240A(b)(2) and §212(a)(9)(C) entered the immigration law via the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),[17] as part of a unified legislative scheme. The comprehensive IIRAIRA scheme subjected otherwise inadmissible VAWA Special Rule applicants to only two grounds of inadmissibility under §212(a): criminal (§212(a)(2)) and security (§212(a)(3)). It omitted all other grounds—including §212(a)(9) pertaining to "Aliens Previously Removed"—as exceptions to the Special Rule.[18] This means that the Immigration Court has the authority to grant such a respondent cancellation of removal and adjustment of status *despite* her prior removal and undocumented entry. Therefore, by its unambiguous terms the VAWA Special Rule exempts her from the disability of §212(a)(9)(C)(i)(II).

IV. Congress Restated the Attorney General's Discretion to Grant Relief from Prior Removal, Particularly for VAWA Applicants, Thereby Linking Special Rule Adjustment Under INA §240A(b)(2) and Permission to Reapply for Admission Under 8 C.F.R. §212.2

Under §813(b) of VAWRA, quoted above, the references to both INA §240A(b)(2) and 8 C.F.R. §212.2 unmistakably signal that Congress intended this provision to encompass VAWA Special Rule applicants *who had previously been removed* from the United States and to emphasize the availability to them of the I-212 application under the regulation. Otherwise, the statutory reference to 8 C.F.R. §212.2, the regulation that governs "[c]onsent to reapply for admission after deportation, removal or departure," would be meaningless. Rather, this reference directly implicates INA §212(a)(9)(C)(i)(II), the permanent bar for reentry without being admitted after a prior removal: Congress emphasized that the described officials "should particularly consider" exercising discretion in such cases involving VAWA Special Rule applicants who had previously been removed and had reentered the United States. Moreover, Congress declared, for the benefit of those who doubted it, that the listed officials "shall continue to have" this discretion, and, by reference to the regulation, that such discretion can still be exercised *retroactively* in favor of aliens who are physically present in the United States in association with Special Rule cancellation of removal and adjustment of status.[19]

Here, to emphasize its sense that INA §240A(b)(2) and 8 C.F.R. §212.2 were being misinterpreted and misapplied, Congress took the extraordinary measure of statutorily instructing the Executive Branch concerning them. Although under the plain meaning of the Special Rule explained above such further instruction should have been unnecessary, Congress deliberately resuscitated a regulation that the USCIS and some courts had treated as superseded by INA §212(a)(9), and portions of which the government had refused to follow.[20] Moreover, Congress broadened the application of the retroactive provisions of the regulation beyond §245(a) adjustment by linking it with other procedures, including Special Rule adjustment of status. The government's initial alternative positions in this case, that the reinstatement statute bars jurisdiction and that INA §212(a)(9)(C)(i)(II) bars cancellation of removal, show that despite the efforts of Congress, five years later the government has still not gotten the message.

The permanent inadmissibility bars of §212(a)(9)(C)(i)(I) and (II) (for reentering or attempting to reenter the United States without admission after a year or more of unlawful presence or after having been previously removed or deported) had been in effect for more than eight years at the time Congress enacted this provision. If Congress had intended to limit this strong statement of support for VAWA applicants by subjecting it to §212(a)(9)(C)(i)(II) with respect to the "previous order of removal," it could certainly have qualified its broad discretionary language. It did not. Therefore, the clear language of §813(b) permitted the immigration judge to exercise discretion to consider the reapplication for admission following removal without regard to INA §212(a)(9)(C)(i)(II).[21]

U.S.C. §1229b(b)(1)) may partake of similar legal arguments, but with different lists of restrictions.

[17] Pub. L. No.104-208, §§301, 304, 110 Stat. 587 (1996).

[18] A parallel argument exists concerning deportability grounds, to the extent they may be relevant. Nor does another contemporaneous statute, INA §241(a)(5), the reinstatement-of-removal statute, appear in the exception or ineligibility lists. This is understandable. Since the Special Rule accepts as beneficiaries aliens who are otherwise *inadmissible* because of *inter alia* undocumented entry or prior removal, nothing remains to trigger the reinstatement statute. The Special Rule provides protection from the outset, a pre-emptive "safe haven" from reinstatement, as it were, thereby avoiding the argument that it offers impermissible "relief" under the reinstatement statute.

[19] 8 C.F.R. §212.2(i)(2).

[20] Specifically, the government has rejected the retroactive use of the I-212 filed in conjunction with an I-485 adjustment of status application. See *supra* notes 9-10 and accompanying text.

[21] As an alternative to straight INA §240A(b)(2) eligibility without the I-212.

V. The Respondent Qualified as a VAWA Self-Petitioner

Under INA §101(a)(51), a "VAWA self-petitioner" means:

> an alien . . . who qualifies for relief under–
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> (A) clause (iii) ... of section 204(a)(1)(A);
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> . . . ; or
>
> (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104-208).

The first option, §204(a)(1)(A)(iii)(II)(CC)(ccc), permits a battered spouse to file a petition for immediate relative status where she "was a bona fide spouse of a United States citizen within the past 2 years and . . . demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse . . . ." The second relevant option, Section 309 of IIRAIRA, the effective-date provision, incorporates by reference §304, which established the new §240A, including the Special Rule. Therefore, it would appear that subparagraph (G) in the definition could be interpreted to include all aliens under §240A(b)(2) as VAWA self-petitioners, too.

Here, the respondent met both listed conditions. Her abusive marriage had terminated less than two years earlier. And she was qualified to apply for relief under §240A(b)(2). Therefore, she qualified as a "VAWA self-petitioner" under the statutory definition.

VI. Unlike VAWA Self-Petitioners, VAWA Special Rule Cancellation of Removal Beneficiaries Do Not Require a Waiver of §212(a)(9)(C)(i) Inadmissibility

Under INA §212(a)(9)(C)(iii),

> The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA *self-petitioner* if there is a connection between—
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> (I) the alien's battering or subjection to extreme cruelty; and
> (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.[22]

Similar waiver authority exists for VAWA *self-petitioners* regarding other forms of inadmissibility, notably INA §212(a)(6)(A)(ii) (aliens present without admission or parole)[23] and §212(a)(9)(B)(iii)(IV) (aliens unlawfully present). These specific waiver authorities for VAWA self-petitioners are necessary because self-petitioners adjust their status under §245(a) and must therefore be otherwise "admissible . . . for permanent residence."[24] Such is not the case with VAWA Special Rule beneficiaries: They are specifically identified as "inadmissible or deportable." They do not need a specific waiver of individual inadmissibility provisions, because they are adjustable *despite* their inadmissibility or deportability. The provisions of §212(a)(6) and §212(a)(9) simply do not apply to them as they do to VAWA self-petitioners.

Here, since the respondent qualified as both a VAWA Special Rule applicant and as a VAWA self-petitioner, she was able to assert the status that would serve her best. She was charged with being present without admission or parole in violation of §212(a)(6)(A)(i). Both VAWA Special Rule and self-petitioners are now exempt from this ground of inadmissibility. The Aytes memo[25] explains that a change of law in 2000 removed the requirement of "inspection and admission or parole" for VAWA self-petitioners. As a result, USCIS determined that this change also had the effect of "waiving inadmissibility under §212(a)(6)(A)(i) . . . for any alien who is the beneficiary of an approved VAWA self-petition." "Effective immediately," the memo further explained, "The VAWA self-petitioner is *not* required to show a 'substantial connection' between the qualifying battery or extreme cruelty and the VAWA self-petitioner's unlawful entry."[26]

When inadmissibility still existed for the self-petitioner under this statute, the self-petitioner had to prove the connection. Once the self-petitioner was no longer inadmissible under the statute, showing the "substantial connection" became unnecessary. This

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[22] 8 U.S.C. §1182(a)(9)(C)(iii) (emphasis added).

[23] This waiver has been superseded by the memorandum of Michael L. Aytes, Associate Director, Domestic Operations, USCIS, HQDOMO 70/23.1, *AFM* Update AD08-16, *Adjustment of status for VAWA self-petitioner who is present without inspection* (Apr. 11, 2008), *reprinted at* 13 Bender's Immigr. Bull. 641, 644 (App. B) (May 15, 2008).

[24] INA §245(a)(2), 8 U.S.C. §1255(a)(2).

[25] Aytes, *supra* note 23, at 2.

[26] *Id.*

principle applies by analogy to the waiver provision of §212(a)(9)(C)(iii). For the VAWA self-petitioner, who is otherwise inadmissible under §212(a)(9)(C), fulfillment of the "connection" requirement is essential to establish admissibility under §245(a). By contrast, the VAWA Special Rule applicant does not have to prove admissibility. By definition, he or she is *inadmissible*. Under these circumstances, the Special Rule affords complete protection. Therefore, Special Rule applicants do not require separate waivers of §212(a)(9)(C)(i) inadmissibility.[27]

VII. Conclusion

The permanent inadmissibility bar of INA §212(a)(9)(C)(i)(II) does not apply to VAWA Special Rule applicants. Congress linked the Special Rule to the regulation governing consent to reapply for admission after removal, showing that the Special Rule covers the same subject matter as §212(a)(9)(C)(i)(II) and affirming the continued viability of 8 C.F.R. §212.2, including *nunc pro tunc* validity in conjunction with adjustment of status applications, without exceptions. Although the respondent in our case qualified alternatively as a VAWA self-petitioner, the Special Rule provided her a broader scope of protection. Under the Special Rule, she did not need a separate waiver of inadmissibility regarding §212(a)(9)(C)(i)(II).[28] She remained eligible for discretionary cancellation of removal and adjustment of status without regard to her prior removal and subsequent reentry. Although the procedure was clearly available to her, she did not have to file an I-212 application to qualify for cancellation and adjustment under the Special Rule.[29] Moreover, reinstatement of removal did not apply because the Special Rule[30] "safe haven" accommodates the inadmissibilities that would otherwise have triggered reinstatement. This shows that the Respondent's status as a battered spouse placed her in a special class under §240A(b)(2) that allowed her to avoid the permanent bar, termination of proceedings, and reinstatement of removal.[31]

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[27] By analogy, viewed through the lens of the Aytes Memo, the respondent could also be considered a VAWA self-petitioner who, because of the effect of the Special Rule, does not need to show the connection between the battering and the proscribed behavior. Thus, the respondent also qualified for the §212(a)(9)(C)(iii) waiver, to the extent that it applied.

[28] Alternatively, as a VAWA self-petitioner, she qualified for the waiver provision, §212(a)(9)(C)(iii), without having to show the "connection" owing to her underlying VAWA Special Rule status.

[29] In this instance, however, defensive use of the I-212 at the outset defeated the government's attempt to terminate the case in order to reinstate the earlier removal and paved the way for the respondent to present her case for special-rule cancellation. Although disagreeing with the court's ruling on the I-212, government counsel concurred that under the Special Rule the I-212 had become irrelevant.

[30] Either separately, alternatively, or in combination with: §813(b) of VAWRA, an application for consent to reapply for admission, or VAWA self-petitioner status.

[31] On October 22, 2010, the immigration judge granted the respondent's application for cancellation and adjustment.