Adjustment of Status Following an Admission Does Not "Re-Start" the Five-Year Clock for Purposes of the Moral Turpitude Deportation Ground

Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011), overruling in part
Matter of Shanu, 23 I&N Dec. 754 (BIA 2005)

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A noncitizen is deportable based upon conviction of a single crime involving moral turpitude, if the conviction has a potential sentence of at least a year and if the person committed the offense within five years "after the date of admission."[1] For some years the Board of Immigration Appeals (BIA) has disagreed with federal courts on the definition of "date of admission."[2] Now the BIA has changed its rule to one that is similar to the federal cases and that benefits immigrants. Consider the following example:

> Stella is admitted at the border as a tourist in 2002, overstays the visa, and adjusts status to lawful permanent resident in 2006. In 2009 she commits and is convicted of a crime involving moral turpitude; the conviction carries a potential sentence of a year.
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> Whether Stella is deportable for a single conviction of a crime involving moral turpitude depends upon when her "date of admission" occurred. She is not deportable if the "date of admission" is the 2002 admission at the border, because she committed the offense more than five years after that date, in 2009. She is deportable if the 2006 adjustment of status is the "date of admission," because she did not accrue five years before committing the offense.

Under *Matter of Shanu*, 23 I&N Dec. 754 (BIA 2005), the BIA held that a person in Stella's position would be deportable. In *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011) the BIA partially overturned *Matter of Shanu*, and held that a person in this position is *not* deportable under the moral turpitude ground. The BIA held that the "date of admission" for this purpose is the admission *pursuant to which the person is in the United States*. The Board stated:

> Thus, to ascertain an alien's deportability under section 237(a)(2)(A)(i) of the Act, we look first to the date when his crime was committed. If, on that date, the alien was in the United States pursuant to an admission that occurred within the prior 5-year period, then he is deportable. Conversely, the alien is not deportable if he committed his offense more

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[1] INA § 237(a)(2)(A)(i), 8 USC § 1227(a)(2)(A)(i).

[2] Compare *Matter of Shanu*, 23 I&N Dec. 754, 759 (BIA 2005) (adjustment following an admission and overstay re-starts the five-year clock) with *Aremu v. Department of Homeland Security*, 450 F.3d 578 (4th Cir. 2006) (overruling *Shanu* to hold that adjustment did not re-start the five year clock); *Abdelqadar v. Gonzales*, 413 F.3d 668 (7th Cir. 2005)(same outcome); *Shivaraman v. Ashcroft*, 360 F.3d 1142 (9th Cir. 2004) (adjustment did not re-start the five-year clock where the person remained in lawful status until adjustment); *Zhang v. Mukasey*, 509 F.3d 315 (6th Cir. 2007) (similar).

> than 5 years after the date of the admission pursuant to which he was then in the United States. Moreover, under this understanding of the phrase "the date of admission," the 5-year clock is not reset by a new admission from within the United States (through adjustment of status). Rather, such a new admission merely extends an existing period of presence that was sufficient in and of itself to support the alien's susceptibility to the grounds of deportability. *Id*. at pp. 406-407.

In *Alyazji* the Board described how it will apply this rule in different scenarios:

> A is admitted to the U.S. on a temporary visa in 2001, overstays, adjusts status to lawful permanent residence in 2006, and commits the moral turpitude offense in 2007. The "date of admission" for purposes of the five years is the date of admission as a tourist in 2001, and he is not deportable. See *Id.* at 408; this is the fact situation in *Alyazji*. The same would hold true if A had not fallen out of status, for example had been admitted on a student visa and remained in status until adjustment.
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> B enters the U.S. without inspection and later adjusts status to lawful permanent residence (for example, pursuant to INA § 245(i) or as an asylee). The "date of admission" for purposes of the five years is the date of adjustment of status. See discussion at *Id.* p. 401.
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> C is admitted to the U.S. as a tourist in 1990 and then leaves the U.S. for several years. He enters the U.S. without inspection in 1998, adjusts status in 2002, and commits a crime involving moral turpitude offense in 2004. The date of the 2002 adjustment of status is the "date of admission" for purposes of the five years. *Id*. at 407-408.
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> D is admitted to the U.S. as a permanent resident in 2002. After remaining here lawfully, he leaves the U.S. for three weeks to visit his mother in 2008. Upon his return he does not make a new "admission," pursuant to INA § 101(a)(13)(C).[3] In 2009 he commits and is convicted of a crime involving moral turpitude. What is the "date of admission" for purposes of the moral turpitude deportation ground?
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> While *Alyazji* does not address this situation, counsel should argue that under the *Alyazji* test the date of admission is 2002, not 2008. The person is subject to the grounds of deportability pursuant to his admission as a permanent resident in 2002, not pursuant to his processing as a returning LPR in 2008, which was neither an admission nor an adjustment of status. Therefore he is not deportable because he did not commit the offense within five years after his "date of admission."

[3] A lawful permanent resident who travels outside the United States is not considered to be seeking a new admission upon her return, unless she comes within one or more enumerated categories set out in INA § 101(a)(13)(C), 8 USC § 1101(a)(13)(C), such as being inadmissible under the crimes ground, or remaining outside the United States for more than six months.