National Immigration Litigation Alliance
Immigrant justice through the courts

Practice Advisory[1]

JUDICIAL REVIEW OF DISCRETIONARY RELIEF AFTER *PATEL v. GARLAND*

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On May 16, 2022, the Supreme Court in *Patel v. Garland*, 142 S. Ct. 1614 (2022) held that federal courts of appeals are barred from reviewing factual findings underlying the denial of the following forms of relief from removal: cancellation of removal, voluntary departure, adjustment of status, and waivers sought pursuant to 8 U.S.C. § 1182(h) and (i). In so holding, the Court interpreted the judicial review bar found at 8 U.S.C. § 1252(a)(2)(B)(i). This practice advisory summarizes the decision, explains its impact, and offers some paths forward for practitioners.

Notably, the case before the Court involved only the review of purely factual claims relating to the enumerated forms of relief, where the claims are raised to a court of appeals through a petition for review of an order of removal. Subsequently, however, lower courts have considered whether it applies to the jurisdiction of district courts to review affirmative denials of applications for adjustment of status outside of the context of removal.

1. What was the issue before the Supreme Court?

The specific issue identified by the Court was whether 8 U.S.C. § 1252(a)(2)(B)(i) "precludes judicial review of factual findings that underlie a denial of relief" from removal.[2]

The statute at 8 U.S.C. § 1252(a)(2)(B) provides:

> **(B) Denials of discretionary relief**
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> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
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> **(i)** any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

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[2] *Patel*, 142 S. Ct. at 1618.

> **(ii)** any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

Patel focuses entirely on subsection (a)(2)(B)(i), which precludes circuit courts from reviewing "any judgment regarding the granting of relief" under five provisions of the Immigration and Nationality Act (INA):

- 8 U.S.C. § 1182(h) (waiver of certain criminal offenses, known as a § 212(h) waiver)
- 8 U.S.C. § 1182(i) (waiver for fraud or willful misrepresentation of a material fact, known as a § 212(i) waiver)
- 8 U.S.C. § 1229b (cancellation of removal)
- 8 U.S.C. § 1229c (voluntary departure)
- 8 U.S.C. § 1255 (adjustment of status)

Notably excluded from this list are asylum, withholding of removal, and protection under the Convention Against Torture (CAT). Thus, *Patel* does not impact challenges to factual determinations relating to the denial of those forms of protection raised in a petition for review.[3]

2. What are the facts and procedural history of *Patel*?

Mr. Patel entered the United States without inspection in the 1990s.[4] Years later, the Department of Homeland Security (DHS) commenced removal proceedings by serving him with a Notice to Appear (NTA) charging him as being present in the United States without admission or parole under 8 U.S.C. § 1182(a)(6)(A)(i).[5] Mr. Patel admitted the charge and applied for adjustment of status as relief from removal. The Immigration Judge (IJ), in a decision affirmed by a panel majority of the Board of Immigration Appeals (BIA), denied the application, finding that he was inadmissible—and therefore ineligible for adjustment under 8 U.S.C. § 1255(a)—because he had misrepresented in a driver's license application that he was a U.S. citizen.[6] Notably, he was not charged in his NTA as having falsely claimed U.S. citizenship. The IJ's decision rested on a factual finding that Mr. Patel was not credible in asserting that he mistakenly checked the wrong box on the driver's license application and never intended to misrepresent his citizenship.

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[3] The plain language of both subsections of § 1252(a)(2)(B) clearly excludes asylum from their reach. *See also Nasrallah v. Barr*, 140 S. Ct. 1683, 1694 (2020) ("[8 U.S.C.] §§ 1252(a)(2)(C) and (D) do not preclude judicial review of a noncitizen's factual challenges to a CAT order."). Note, however, that *Nasrallah* does not address judicial review over factual challenges to *statutory* withholding of removal orders under 8 U.S.C. § 1231(b)(2)(A).

[4] *Patel*, 142 S. Ct. at 1619.

[5] *Id.* at 1620.

[6] *Id.*

On petition for review to the Eleventh Circuit, Mr. Patel argued that "any reasonable judge would have been 'compelled to conclude' that his testimony was credible and that he had made an honest mistake on the form."[7] Mr. Patel and the government agreed that 8 U.S.C. § 1252(a)(2)(B)(i) did not bar review of this factual determination, though they disagreed as to the scope of § 1252(a)(2)(B)(i) in other contexts.[8] But the Eleventh Circuit, sitting *en banc*, held 9-5 that it did *not* have jurisdiction to review any factual findings underlying the agency's denial of adjustment of status. The court held that § 1252(a)(2)(B)(i) stripped it of jurisdiction to review *all* agency determinations related to adjustment of status, as this was one of the enumerated categories of discretionary relief listed in § 1252(a)(2)(B)(i). Moreover, the court concluded that 8 U.S.C. § 1252(a)(2)(D), which restores jurisdiction over legal and constitutional claims raised in a petition for review,[9] was inapplicable because it did not specify review of factual issues.[10] In so holding, the court significantly curtailed the scope of judicial review and broke from published decisions issued by a majority of other circuits.[11] The Supreme Court subsequently granted certiorari to resolve the jurisdictional question.

3. What did the parties argue before the Supreme Court?

Mr. Patel argued that the adjudication of adjustment of status applications contained two distinct steps.[12] First, the agency would determine if a noncitizen is statutorily eligible for relief. Second, the agency would determine if an eligible noncitizen should be granted the relief as a matter of discretion. Mr. Patel argued that the bar to review in § 1252(a)(2)(B)(i) applied only to the second step of the adjudication, and thus, courts had jurisdiction to review all claims—whether factual, legal, or constitutional—arising from step one of the inquiry. The government made a similar, but analytically distinct, argument that courts could review step one of the inquiry *unless*

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7 *Id*.

8 *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1272 (11th Cir. 2020) (en banc).

9 8 U.S.C. § 1252(a)(2)(D) states:

> **(D) Judicial review of certain legal claims**
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> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

10 *Patel*, 971 F.3d at 1275.

11 *Id*. at 1277 n.22; *see also Patel*, 142 S. Ct. at 1621 n.1. Note that the Supreme Court stated that the Seventh Circuit "appear[s] to interpret" the statute similarly to the Eleventh Circuit in *Cevilla v. Gonzales*, 446 F.3d 658, 660-61 (7th Cir. 2006). *Id*. However, the Seventh Circuit appears to have reached a different conclusion in, inter alia, *Iddir v. INS*, 301 F.3d 492, 497 (7th Cir. 2002) ("[W]e find section 1252(a)(2)(B)(i), by its use of the terms 'judgment' and 'decision or action', only bars review of actual discretionary decisions to grant or deny relief under the enumerated sections, including section 1255.").

12 Brief for Petitioners at 18, *Patel*, 2022 WL 1528346 (No. 20-979).

the eligibility determination had been made discretionary by statute.[13] Mr. Patel and the government agreed that his case raised a nondiscretionary factual question as to statutory eligibility and, therefore, that federal courts had jurisdiction to consider the claim.

Because Mr. Patel and the government agreed that there was jurisdiction, the Supreme Court appointed an amicus curiae[14] to brief and argue in support of the Eleventh Circuit's decision. Amicus contended that 8 U.S.C. § 1252(a)(2)(B)(i) precluded judicial review of all issues related to adjustment of status applications (i.e., steps one *and* two), including nondiscretionary eligibility issues such as the factual one in Mr. Patel's case. Amicus further argued that 8 U.S.C. § 1252(a)(2)(D) did not restore review of factual issues—only legal and constitutional issues.[15] Because Mr. Patel's only claim was factual, amicus argued that the Eleventh Circuit properly held that it lacked jurisdiction to review the petition.

4. What did the Supreme Court hold in *Patel*?

The Supreme Court agreed with the position of amicus and affirmed the Eleventh Circuit's holding that federal courts lack jurisdiction to review factual determinations arising from applications for relief enumerated in 8 U.S.C. § 1252(a)(2)(B)(i).

Importantly, the Court's holding only applies to the five enumerated forms of discretionary relief when denied *in removal proceedings*. The Court specifically declined to address the issue of § 1252(a)(2)(B)(i)'s impact on jurisdiction in *district court* actions challenging U.S. Citizenship and Immigration Services (USCIS) denials of affirmative applications or petitions for an immigration benefit.

The *Patel* dissent disagreed with the majority, stating that "[s]ubparagraph (B)(i) only deprives courts of jurisdiction to review the Attorney General's step-two discretionary decision to grant or deny relief, not the BIA's step-one judgments regarding whether an individual is eligible to be considered for such relief."[16] Significantly, the dissent questioned the majority's conclusory determination that Mr. Patel's petition concerned a *factual*, rather than legal, question.[17]

5. What was the Court's rationale?

The decision interpreted 8 U.S.C. § 1252(a)(2)(B)(i), surrounding statutory language, and precedent. First, the Court read the phrase "any judgment regarding the granting of relief" in

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13 Brief for the Respondent Supporting Petitioners at 15, *Patel*, 2022 WL 1528346 (No. 20-979); *see also* Transcript of Oral Argument at 55, *Patel*, 2022 WL 1528346 (No. 20-979).

14 While a number of amicus briefs were submitted in the case, including one by NILA, "amicus" herein refers to Court-appointed counsel arguing in defense of the Eleventh Circuit's decision.

15 Brief for Court-Appointed Amicus Curiae in Support of the Judgment Below at 20-21, *Patel*, 2022 WL 1528346 (No. 20-979).

16 *Patel*, 142 S. Ct. at 1631 (Gorsuch, J., dissenting).

17 *Id*. at 1635 n.3.

§ 1252(a)(2)(B)(i) broadly, reasoning that "judgment" extends beyond those decisions that are discretionary, and that the words "any" and "regarding" expanded "judgment's" reach.[18]

Second, the Court found that Congress's enactment of § 1252(a)(2)(D) to preserve judicial review of *only* legal and constitutional claims is consistent with a reading of § 1252(a)(2)(B)(i) that precludes review of factual questions.[19] The Court reasoned that Congress could have included judicial review of factual determinations when it enacted § 1252(a)(2)(D) but did not.

Third, the Court determined that its decision was consistent with its prior holdings in *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020), and *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020). Specifically, in *Guerrero-Lasprilla*, the Court held that § 1252(a)(2)(D)'s restoration of judicial review over legal questions included review of mixed questions of law and fact. The *Patel* Court reasoned that, had it interpreted § 1252(a)(2)(D) as including pure questions of fact, it would have so held in *Guerrero-Lasprilla*.[20] The Court also pointed out that it had stated in *Nasrallah* that "a noncitizen 'may not bring a factual challenge to orders denying discretionary relief, including . . . adjustment of status.'"[21]

The Court rejected other arguments raised by Mr. Patel and the government. First, both parties argued that the Eleventh Circuit's decision erroneously foreclosed judicial review of the denial of Mr. Patel's adjustment application based on a false claim to U.S. citizenship, but that, *if DHS had charged him as being removable for having made a false claim*, that *removability* question would have been reviewable. The majority found this argument unconvincing, noting that the granting of relief is a "matter of grace" not a "matter of right," and thus review of a denial of relief could reasonably be restricted even where the same factual challenge to removability would have remained reviewable.[22]

Second, the Court rejected the argument that, under the Eleventh Circuit's decision, federal courts would not have jurisdiction to review denials of discretionary relief that occurred *outside* removal proceedings, i.e., denials of affirmative applications for § 212(i) and § 212(h) waivers and adjustment of status.[23] The majority concluded that "foreclosing judicial review unless and until removal proceedings are initiated would be consistent with Congress' choice to reduce procedural protections in the context of discretionary relief."[24] In any event, the majority reasoned, "policy concerns cannot trump the best interpretations of the statutory text."[25]

Finally, the Court found that the text and context of § 1252(a)(2)(B)(i) clearly precluded judicial review of factual determinations in the discretionary relief context. Thus, the Court concluded that it did not need to resort to the presumption of judicial reviewability, as argued by Mr. Patel

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18 *Patel*, 142 S. Ct. at 1622.
19 *Id*. at 1623.
20 *Id*.
21 *Id.* (quoting *Nasrallah*, 140 S. Ct. at 1694).
22 *Id.* at 1626 (quoting *INS v. St. Cyr*, 553 U.S. 289, 308 (2001)).
23 *See infra* Question 7.
24 *Patel*, 142 S. Ct. at 1626-27.
25 *Id*. at 1627.

and the government.[26] This conclusion, based on the statute's purportedly unambiguous meaning, is remarkable in that it implicitly deems unreasonable the contrary interpretation by 4 dissenting judges at the Supreme Court and 5 at the Eleventh Circuit.

6. What circuit decisions did *Patel* overturn?

The Supreme Court's decision overrules the jurisdictional holdings finding review of factual determinations related to the enumerated forms of discretionary relief in at least the following cases:

- *Castro v. Holder*, 727 F.3d 125 (1st Cir. 2013)
- *Rosario v. Holder*, 627 F.3d 58 (2d Cir. 2010)
- *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176 (3d Cir. 2003)
- *Garcia-Melendez v. Ashcroft*, 351 F.3d 657 (5th Cir. 2003)
- *Santana-Albarran v. Ashcroft*, 393 F.3d 699 (6th Cir. 2005)
- *Ortiz-Cornejo v. Gonzales*, 400 F.3d 610 (8th Cir. 2005)
- *Mamigonian v. Biggs*, 710 F.3d 936 (9th Cir. 2013)
- *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009).[27]

In addition, while the Supreme Court characterized the Seventh Circuit's holding in *Cevilla v. Gonzales*[28] as being consistent with the Eleventh Circuit's holding in *Patel*,[29] other Seventh Circuit decisions conflict with *Cevilla*, and these have now been overruled by *Patel*.[30]

7. What impact could *Patel* have on the jurisdiction of Courts of Appeals over immigration petitions for review?

Patel does not affect jurisdiction over factual challenges related to asylum, withholding, or CAT raised in petitions for review.[31] Pursuant to 8 U.S.C. § 1252(a)(2)(D) (*see supra* n.9), it also does not affect circuit court jurisdiction over legal and constitutional claims, including mixed question of law and fact, raised in petitions for review.[32] Rather, the decision strips jurisdiction over all purely *factual* questions in challenges to denials of the forms of relief enumerated in § 1252(a)(2)(B)(i) raised in a petition for review.
Such purely factual questions might include, for example:

- When a noncitizen was admitted to the United States;
- Whether a noncitizen actually has a qualifying relative for the relevant form of relief;

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26 *Id*.
27 *Id*. at 1621 n.1.
28 446 F.3d 658 (7th Cir. 2006).
29 *Patel*, 142 S. Ct. at 1621 n.1
30 *See, e.g., Iddir v. INS*, 301 F.3d 492, 496-498 (7th Cir. 2002); *see also*, *Patel*, 971 F.3d at 1289 (Martin, J., dissenting) (citing additional cases which now may be overruled by *Patel*).
31 *See supra* Question 1.
32 Indeed, the majority opinion reaffirms that such legal and constitutional claims *are* subject to review. *Patel*, 142 S. Ct. at 1619, 1623.

- Whether an applicant for non-LPR cancellation has acquired the requisite continuous physical presence; and
- Whether an applicant has in fact sustained a disqualifying conviction.

As noted above in Question 3, the dissent calls into question whether Mr. Patel's petition for review in fact raised a *factual* question.[33] Thus, practitioners are advised to review footnote 3 of the dissent when contemplating how to frame questions related to the substantial evidence standard.

Post-*Patel*, the courts of appeals are split over whether they retain jurisdiction to review the BIA's denial of a motion to reopen or remand a removal case where such motions involve eligibility for a form of relief itemized in 8 U.S.C. § 1255(a)(2)(B)(i). The Eighth and First Circuits have found jurisdiction over such motions.[34] In contrast, several courts have applied § 1252(a)(2)(B)(i) and found no jurisdiction.[35]

8. What impact may *Patel* have on district courts' jurisdiction over the denial of adjustment of status applications?

Affirmative adjustment applications, including those filed by "arriving [noncitizens],"[36] are adjudicated by USCIS.[37] If USCIS denies an affirmative adjustment application, the applicant

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[33] *Patel*, 142 S. Ct. at 1635 n.3 (Gorsuch, J., dissenting) (noting that "whether there is substantial evidence to support a finding is a question of law") (quoting *Colo. Nat'l Bank v. Comm'r*, 305 U.S. 23, 25 (1938)).

[34] *Llanas-Trejo v. Garland*, 53 F.4th 458, 462 (8th Cir. 2022) (indicating that *Patel* was inapplicable to a motion to reopen); *Moreno v. Garland*, 51 F.4th 40, 46 (1st Cir. 2022) ("This court has jurisdiction to review denials of motions to reopen, even where the petitioner's ultimate goal before the agency was to garner some form of discretionary relief as to which this court's jurisdiction has been substantially curtailed by statute.").

[35] *See, e.g.*, *Ochoa v. Garland*, 71 F.4th 717, 722-23 (9th Cir. 2023) (rejecting both parties' claim of jurisdiction and, relying on *Patel*, finding no review available for denials of motions for a continuance and for remand where resolution of both motions hinged on agency factual findings regarding eligibility for adjustment of status and cancellation of removal); *Perez v. Garland*, 67 F.4th 254, 257-58 (5th Cir. 2023) (relying on *Patel* and holding that the court lacked jurisdiction over the BIA's denial of a motion to remand to consider new evidence related to cancellation of removal); *Ponce Flores v. U.S. Att'y Gen.*, 64 F.4th 1208, 1223 (11th Cir. 2023) ("[W]hen direct review of the underlying order is barred by one of the INA's jurisdiction-stripping provisions, we also lack jurisdiction to entertain an attack on that order mounted through a motion to reopen.") (internal quotations omitted).

[36] The statute and regulations use the term "arriving alien." Because "using the term 'alien' to refer to other human beings is offensive and demeaning," *Flores v. USCIS*, 718 F.3d 548, 551 n.1 (6th Cir. 2013) (abrogated on other grounds by *Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021)), this advisory replaces this term with "arriving noncitizen." Thus, all references to "arriving noncitizens" are references to the statutory and regulatory term "arriving aliens."

[37] 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1).

does not have the right to an administrative appeal.[38] Individuals who are not arriving noncitizens may renew the application before an IJ if DHS files an NTA placing them in removal proceedings.[39]

Prior to *Patel*, district courts in most circuits reviewed the denial of adjustment applications filed by arriving noncitizens and applicants not placed in removal proceedings when such denials were based on nondiscretionary statutory eligibility. District courts review denied adjustment applications under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq*., and/or the Declaratory Judgment Act (DJA), 28 U.S.C. § 2201.[40]

In briefing and argument to the Court, Mr. Patel, the government, and non-Court appointed amici (including NILA) raised the concern that a broad interpretation of § 1252(a)(2)(B)(i)—if found applicable to district courts—may be interpreted to foreclose district court review. Notably, some courts have found that the plain language of § 1252(a)(2)(D), which restores judicial review over "constitutional claims and questions of law" is limited to claims "raised upon a petition for review filed with the appropriate court of appeals."[41]

The Supreme Court expressly declined to decide the impact of § 1252(a)(2)(B)(i) on district court jurisdiction.[42] Relying on the reasoning of *Patel*, however, at least two Courts of Appeals have held that this section bars district court review.[43] In these circuits, noncitizens may be able to get federal court review of legal and constitutional questions raised in a denied adjustment application only if they are placed in removal proceedings, renew their application before the IJ, and are again denied by the IJ and the BIA—at which point, they can file a petition for review

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38 8 C.F.R. § 245.2(a)(5)(ii).

39 *Id*.

40 District court review is not available for cancellation of removal and voluntary departure—two other forms of relief enumerated in 8 U.S.C. § 1252(a)(2)(B)(i)—because this relief is available only in removal proceedings and thus judicial review occurs through a petition for review of a final order of removal. *See* 8 U.S.C. § 1252(a)(1). District court review of USCIS denials of § 212(h) and § 212(i) waivers is more complicated because of purported bars on review found in 8 U.S.C. §§ 1182(h)(2) and 1182(i)(2). The extent to which district court review exists over such affirmative waiver denials is beyond the scope of this advisory.

41 8 U.S.C. § 1252(a)(2)(D). *See*, *e.g.*, *Shabaj v. Holder*, 718 F.3d 48, 51 (2d Cir. 2013) (finding that § 1252(a)(2)(D) did not apply to a challenge to USCIS' denial of a § 212(i) waiver).

42 *Patel*, 142 S. Ct. at 1626. In a footnote, the Court also cited the "independent question" of whether USCIS' denial of an adjustment application prior to initiation of removal proceedings would satisfy the threshold requirements of finality and exhaustion of administrative remedies, noting disagreement among the courts of appeals on this issue. *Id*. at 1626 n.3. Note, however, that, by regulation, arriving noncitizens are unable to renew their adjustment applications in removal proceedings. Consequently, there are arguments in their cases that USCIS' denial should be administratively final and that there are no further administrative remedies to exhaust.

43 *See Abuzeid v. Mayorkas*, 62 F.4th 578 (D.C. Cir. 2023), *Britkovvy v. Mayorkas*, 60 F.4th 1024 (7th Cir. 2023); *see also Doe v. Sec'y, DHS,* No. 22-11818, 2023 WL 2564856 (11th Cir. Mar. 20, 2023) (unpublished). Numerous district courts have reached the same conclusion and the issue likely will be resolved by other courts of appeals in the coming months.

with a court of appeals. A regulation forecloses this path to judicial review for arriving noncitizens, however, since it strips IJs of all jurisdiction over their adjustment applications. *See* 8 C.F.R. § 1245.2(a). The Seventh Circuit addressed this issue in *Britkovvy v. Mayorkas*, suggesting that Mr. Britkovvy—who was an arriving noncitizen for whom an IJ found no jurisdiction to decide his adjustment application—could challenge the validity of the regulation in a petition for review in the court of appeals if the immigration court issued a final order of removal against him. 60 F.4th 1024, 1031-32 (7th Cir. 2023).

9. Does *Patel* impact 8 U.S.C. § 1252(a)(2)(B)(ii)?

Patel was limited to addressing the scope of subsection (i) of § 1252(a)(2)(B) and thus does not impact the application of subsection (ii). Subsection (ii) purports to bar review of "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum]." The referenced "subchapter" is 8 U.S.C. Subchapter 2, which includes, inter alia, provisions related to immigrant and nonimmigrant visas and visa petitions, inadmissibility and deportability grounds, and waivers other than those referenced in § 1252(a)(2)(B)(i). For cases in which this provision may be implicated, practitioners should research decisions of the courts of appeals in the relevant circuit to determine its applicability. While the government may argue that the reasoning of *Patel* applies to § 1252(a)(2)(B)(ii), there are statutory construction arguments based on the different language of the two provisions that can be raised in response.

10. What steps can attorneys consider when representing clients seeking relief enumerated in 8 U.S.C. § 1252(a)(2)(B)(i)?

Relief Denied in Removal Proceedings

- **In petitions for review, frame claims as legal or constitutional, rather than factual, whenever possible and underscore the reviewability of mixed questions of law and fact.**

Because *Patel* does not affect circuit court jurisdiction over petitions for review that raise legal and constitutional claims or mixed questions of law and fact, practitioners should frame issues as such. Practitioners also should not assume that a particular issue is purely factual in nature. As indicated in the dissent in *Patel*, whether a question is truly factual is nuanced and "whether there is substantial evidence to support a finding is a question of law."[44] Thus, an assumption that an issue is purely factual can have serious ramifications and foreclose federal court review.

Whether the agency applied the correct legal standard or standard of review is always a legal question subject to de novo review. For example, while credibility may be a factual issue, whether the BIA correctly applied the clear error standard in reviewing an adverse credibility

[44] *Patel*, 142 S. Ct. at 1635 n.3 (Gorsuch, J., dissenting) (quoting *Colo. Nat'l Bank v. Comm'r*, 305 U.S. 23, 25 (1938)).

determination is always a question of law.[45] Similarly, what actions a person took is a question of fact, but whether those actions constitute due diligence for purposes of equitable tolling is a mixed question of law and fact.[46]

Whether a particular issue is legal, factual, or mixed can be difficult to determine. The Supreme Court has granted certiorari in a case which will resolve a circuit split over whether an agency's determination that a set of established facts do not establish "exceptional and extremely unusual hardship" for cancellation of removal is a mixed question of law and fact. *Wilkinson v. Garland*, No. 22-666, 2023 WL 4278442 (June 30, 2023).[47]

- **Consider seeking prosecutorial discretion.**

DHS may exercise prosecutorial discretion at various stages of proceedings, including at the time of NTA filing, during removal proceedings, before the BIA, and even while a case is pending on a petition for review before the court of appeals. Under DHS's April 3, 2022, prosecutorial discretion memorandum, "[a]ppellate advocacy should focus on priority cases," and "DOJ's Office of Immigration Litigation (OIL) will continue to assess whether cases at the petition for review (PFR) stage of appellate litigation are DHS enforcement priorities."[48] In non-priority cases where the noncitizen is not detained, "OIL generally will work with the noncitizen to make the appropriate motion to the circuit court to close the case."[49]

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45 Whether the Board applied the wrong standard of review is a legal question, regardless of whether the underlying issue is factual or legal in nature. *See, e.g.*, *Rosales Justo v. Sessions*, 895 F.3d 154, 161 (9th Cir. 2018) (stating that the BIA's determination that the IJ clearly erred "is not . . . an 'administrative finding of fact' subject to the substantial evidence standard . . . but a legal determination" subject to de novo review).

46 *See Guerrero-Lasprilla*, 140 S. Ct. 1062.

47 The question presented in *Wilkinson* is:

> whether an agency determination that a given set of established facts does not rise to the statutory standard of "exceptional and extremely unusual hardship" is a mixed question of law and fact reviewable under § 1252(a)(2)(D), as three circuits have held, or whether this determination is a discretionary judgment call unreviewable under § 1252(a)(2)(B)(i), as the court below and two other circuits have concluded.

Petition for Writ of Certiorari at *1, *Wilkinson*, 2023 WL 4278442 (Jan. 17, 2023); *see also Wilkinson*, No. 22-666 (June 30, 2023) (question presented), https://www.supremecourt.gov/qp/22-00666qp.pdf.

48 U.S. Immigration and Customs Enforcement, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion, 14 & n.32 (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf.

49 *Id.* at 14 n.32.

- **Consider administrative remedies, such as motions to reopen, remand, or reconsider.**

If a case is on appeal before the BIA or on petition for review with a circuit court, practitioners may consider whether it is appropriate to file motions to reopen, remand, or reconsider and request that DHS join in the motion.[50]

Applications Denied by USCIS

- **Consider seeking administrative remedies, such as motions to reopen or reconsider, and review by the Administrative Appeals Office (AAO).**

An applicant can obtain three of the forms of relief enumerated in § 1252(a)(2)(B)(i)—§ 212(h) and § 212(i) and adjustment of status—from USCIS outside of removal proceedings. Given the open question of whether district courts will have jurisdiction to review these decisions, practitioners should consider all possible administrative options prior to filing a district court case. Such relief includes filing a motion to reopen to supplement the record with additional evidence or a motion to reconsider demonstrating a legal error in the underlying decision.[51]

Additionally, a denial of a waiver under either § 1182(h) or § 1182(i) can be appealed to the Administrative Appeals Office.[52] There is no administrative appeal of a denial of adjustment of status.[53] However, a USCIS officer may certify an adjustment decision to the AAO for further review.[54] Generally, this happens in cases in which "an unusually complex or novel issue of law or fact" is raised.[55] While the regulations permit only a USCIS officer, and not the applicant, to certify a decision, practitioners may be able to advocate for the director of the USCIS field office which issued the denial to certify the decision to the AAO.

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50 *Id*. at 14-15. For more information on the filing of motions to reopen, practitioners should consult National Immigration Litigation Alliance and American Immigration Council, The Basics of Motions to Reopen EOIR-Issued Removal Orders (Apr. 25, 2022), https://immigrationlitigation.org/wp-content/uploads/2022/04/MTR-Updated-FINAL.pdf.

51 *See* 8 C.F.R. § 103.5(a)(2), (3).

52 Both waivers are filed on Form I-601, instructions for which are available at https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf. The AAO has jurisdiction over denials of waiver requests filed on Form I-601. *See* https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aao; see also 8 C.F.R. § 103.3.

53 8 C.F.R. § 245.2(a)(5)(ii).

54 8 C.F.R. § 103.4(a).

55 8 C.F.R. § 103.4(a)(1).